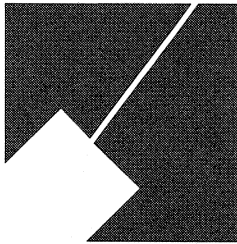


M-NCPPC



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>

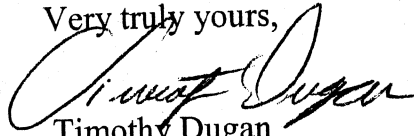
No.	Page	Para.	Discussion
			<p>Trail). The Applicant has studied the terrain running along the edge of the paved surface and has identified a precipitous fall away from the paved surface. Installing a shared-use pathway next to the existing paved surfaces would require retaining walls that could be 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. Saeyin 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 #: 213245
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

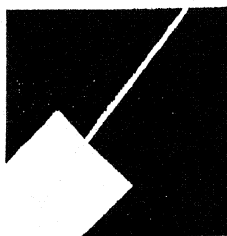
RRB:dm CN213245

cc: R. Weaver
S. Federline
SM File # 213245

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

EXHIBIT 3

M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

8787 Georgia Avenue
Silver Spring, Maryland 20910-3760
301-495-4500, www.mncppc.org

Board Approval Date: July 28, 2005

Date Mailed:

Action: DEC 19 2005
Approved Staff Recommendation
Motion of Commissioner Bryant,
seconded by Commissioner Perdue,
with a vote of 4-0.
Chairman Berlage and Commissioners
Perdue, Bryant and Wellington voting in
favor. Commissioner Robinson was
absent.

MONTGOMERY COUNTY PLANNING BOARD

OPINION

Preliminary Plan 1-04109
NAME OF PLAN: Burtonsville Shopping Center

I. **Introduction**

The date of this written opinion is DEC 19 2005 (which is the date that this opinion is mailed to all parties of record). Any party authorized by law to take an administrative appeal must initiate such an appeal within thirty days of the date of this written opinion, consistent with the procedural rules for the judicial review of administrative agency decisions in Circuit Court (Rule 7-203, Maryland Rules of Court - State).

On 6/30/04, BMC Property Group ("Applicant") submitted an application for the approval of a preliminary plan of subdivision of property in the C-2 zone. The application proposed 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. The application was designated Preliminary Plan 1-04109. On 7/28/05, Preliminary Plan 1-04109 was brought before the Montgomery County Planning Board for a public hearing. At the public hearing, the

Montgomery County Planning Board heard testimony and received evidence submitted in the record on the application.

The record for this application ("Record") closed at the conclusion of the public hearing, upon the taking of an action by the Planning Board. The Record includes: the information on the Preliminary Plan Application Form; the Planning Board staff-generated minutes of the Subdivision Review Committee meeting(s) on the application; all correspondence and any other written or graphic information concerning the application received by the Planning Board or its staff following submission of the application and prior to the Board's action at the conclusion of the public hearing, from the Applicant, public agencies, and private individuals or entities; all correspondence and any other written or graphic information issued by Planning Board staff concerning the application, prior to the Board's action following the public hearing; all evidence, including written and oral testimony and any graphic exhibits, presented to the Planning Board at the public hearing.

II. Site and Project Descriptions

The 27.15-acre property is located in the northwest quadrant of the intersection of Columbia Pike (US 29) and Spencerville Road (MD 198). The majority of the site is unrecorded; the portion in the immediate corner of the 29/198 intersection is recorded by plat. It is within the Patuxent River watershed (Use I waters). The eastern portion of the site is an existing shopping center. About 14.37 acres of the property is in forest cover. A small stream traverses the northwestern portion of the property. A severely eroded gully lies along part of the property line that is adjacent to the elementary school. The gully connects into the stream immediately offsite. The gully was most likely created from uncontrolled stormwater runoff from the existing shopping center and the adjacent elementary school site.

This application is a request to redevelop the existing Burtonsville Shopping Center. The property is zoned C-2 and under the proposed development scenario, will not be required to undergo Site Plan review. The Fairland Master Plan makes specific recommendations regarding the redevelopment of the site as detailed in the Community Based Planning memorandum. One overriding theme of the master plan guidance is the need for a pedestrian friendly design. While recognizing that the project will not be subject to Site Plan review, staff did request and receive an Illustrative Circulation Plan to show the general concepts of internal street cross-sections, sidewalk widths, setbacks, amenities and crosswalks. Sidewalks with associated lead walks along the U.S. 29 and MD 198 frontages are also provided.

Access to the property is to be accommodated at two locations: one on U.S. 29 and the other on MD 198 (loop road). The layout of the buildings on the property is conceptual and is shown as a number of building pads within the parking lots to provide flexibility for future tenants. The plan proposes 809 underground parking spaces and 521 surface parking spaces. The Montgomery County Department of Permitting

Services will need to review and approve a Parking Facilities Plan as part of the building permit review for this site. The plan as shown will require a waiver of the required setback for parking facilities from the adjacent residential (RC) zone. The decision on the waiver will be made by DPS. Staff's recommended conditions require the Applicant to:

- 1) Obtain approval of a waiver from the Director of MCDPS prior to issuance of building permits and as part of the Parking Facilities Plan review, or
- 2) Meet the minimum setback requirements as required under 59-E-2.81.

III. FAIRLAND MASTER PLAN - Conformance

Staff concluded that the proposed plan complies with the recommendations of the Fairland Master Plan, as discussed in detail in the staff report prepared by the Community Based Planning Staff Report.

IV. TRANSPORTATION

The site is located within the northwest quadrant of the local lanes of Columbia Pike U.S. 29 (Burtonsville Boulevard)/MD 198 intersection (just west of the new U.S. 29 Relocated/MD 198 interchange currently under construction). Access to the site is proposed from both Burtonsville Boulevard and MD 198 (through the future Burtonsville Access Road). Currently, several bus routes (Metrobus routes Z3, Z5, Z8, Z9, Z29, and MTA Routes 915 and 929) provide service along US 29 and MD 198 in the area. The Burtonsville Park and Ride Lot is located within the northeast quadrant of US 29 (Burtonsville Boulevard)/MD 198 intersection next to the Burtonsville Crossing Shopping Center.

The Approved and Adopted 1997 *Fairland/Cloverly Master Plans* include the following nearby master-planned roadway, bikeway, pedestrian, and trail facilities:

1. US 29 local lanes or Burtonsville Boulevard, to the east of the property, as a six-lane divided Major Highway (M-10a) from south of MD 198 to Dustin Road (to the north). A minimum right-of-way width of 100 to 200 feet is recommended for this section of the roadway. A Class I bikeway is also recommended in the master plan for this section of local US 29.
2. Sandy Spring Road/Spencerville Road (MD 198), as a four-lane divided major highway (M-76) with a minimum right-of-way width of 120 feet, and with a Class I bikeway (PB-34) to the south side of the roadway between Old Columbia Pike/US 29 and the Prince George's County line. The 2005 Countywide Bikeways Functional Master Plan recommends a Shared-Use Path for MD 198 between Layhill Road to the west in Cloverly and the Prince George's County line to the east (SP-20 and SP-21).

3. Old Columbia Pike, as a two-lane Primary Road (P-25c) with a minimum right-of-way width of 70 feet between MD 198 to the north and Briggs Chaney Road to the south, and with sidewalks. As recommended in the Master Plan, four-foot wide sidewalks are provided along both sides of Old Columbia Pike. The roadway is also a Class II bikeway facility (EB-13; BL-12 in the 2005 Countywide Bikeways Functional Master Plan).
4. Burtonsville Access Road, to the north of MD 198 between MD 198 and the access road to Burtonsville Elementary School, as a two-lane Business District Street (B-7), with a minimum right-of-way of 60 feet.
5. Riding Stable Road, as a two-lane Primary Road (P-47) with a minimum right-of-way width of 70 feet, and with a rural open-section to the north of MD 198 and a Class III bikeway (PB-61) between MD 198 to the south to the Prince George's County line/Brooklyn Bridge Road to the north.
6. McKnew Road, as a two-lane primary road (P-26) with a minimum right-of-way width of 70 feet, and with sidewalks between MD 198 and Sugar Pine Court on both sides. The portion of McKnew Road to the south of Sugar Pine Court is currently built to master plan recommendations with sidewalks on both sides.
7. Cedar Tree Drive, as a two-lane primary road (P-45) with a minimum right-of-way width of 70 feet, and with a Class III/I bikeway (PB-46) between MD 198 and the Fairland Recreational Park/Prince George's County Line. A Class I bikeway (PB-47 - Cedar Tree Drive Connector) that connects Cedar Tree Drive through Fairland Recreational Park with Robey Road is also recommended in the master plan. The existing portion of Cedar Tree Drive (between MD 198 and Islewood Terrace) is built as a two-lane Primary Road to master plan recommendations with sidewalks on both sides and a Class III bikeway.
8. Blackburn Road to the east of US 29, as a two-lane Primary Road (P-44) with a minimum right-of-way 70 feet, and with sidewalks.
9. Greencastle Road, between US 29 to the northwest and Prince George's County Line to the southeast, as a four-lane Arterial (A-110) with a minimum right-of-way width of 80 feet. The master plan also recommends sidewalks and a Class I bikeway (PB-52) along Greencastle Road between Old Columbia Pike (to the west of US 29) and Prince George's County Line. The 2005 Countywide Bikeways Functional Master Plan recommends a Dual Bikeway for the section of Greencastle Road between US 29 and Robey Road (DB-11), and a Shared-Use Path for the section of Greencastle Road between Robey Road and Prince George's County line (SP-23).

10. Peach Orchard Road (to the west of the site in Cloverly) as a two-lane Primary (P-10) between MD 198 to the north and Briggs Chaney Road to the south with a minimum right-of-way width of 70 feet, and with a Class III bikeway (PB-37).
11. Patuxent Trail, as an unpaved trail (PB-41) within the PEPCO right-of-way to the north of the site.

On-going Transportation Projects

The SHA Consolidated Transportation Program, and the DPWT Capital Improvement Program includes the following nearby projects:

1. The US 29/MD 198-interchange project, from north of Dustin Road to south of MD 198. Construction of this project started in June 2002 and is near completion and open to traffic. The project is scheduled for completion in Fall 2005.
2. The MD 28/MD 198 Corridor Improvement Planning Study is ongoing. SHA anticipates release of the draft environmental document for the project in Fall 2005. The study is funded for project planning only.
3. The Burtonsville Access Road project, to the north of MD 198 between MD 198 and the access road to the Burtonsville Elementary School is fully funded, and is scheduled to start construction in Spring 2007.

Local Area Transportation Review

Peak-hour trips associated with the proposed new shopping center consisting of 250,000 square feet of retail uses and 10,000 square feet of commercial office space were estimated for the weekday morning peak-period (6:30 a.m. to 9:30 a.m.) and the evening peak-period (4:00 p.m. to 7:00 p.m.), and (summarized in Table 1 of the Transportation Division's staff report). The net increase in trips generated by the proposed development reflect trip credits for the existing shopping center on the property that include a 50,000 square-foot retail center and a 6,000 square-foot nursery retail/outdoor furniture sales center.

Transportation Division staff concluded that the proposed retail/office density on the property was estimated to generate a total of 285 and 1,168 peak hour trips during the respective weekday morning and evening peak periods. With applicable credit for retail uses currently on the property, the proposed uses on the property were estimated to generate a total of 154 and 683 net new-peak hour trips during the respective weekday morning and evening peak periods.

- Congestion Levels at Nearby Intersections

A summary of the Critical Lane Volume (CLV) analysis results for the study intersections for the weekday morning and evening peak hours during the respective peak periods based on the analysis presented in the traffic study is provided in Table 2 of the Transportation Unit Staff analysis ("Table 2").

As shown in Table 2, the weekday morning and evening peak-hour capacity analysis presented in the traffic study indicated that under Total traffic conditions (with Applicant funded intersection operational/physical improvements [potential installation of signal/turn lanes at the MD 198/Burtonsville Access Road and US 29/Site Driveway intersections] subsequent to further SHA/DPWT review), CLV at the study intersections were below the FY 2004 congestion standard for the respective policy areas. Therefore the application satisfies the LATR requirements of the APF test.

Rural policy areas such as the Patuxent Policy Area are not assigned any transportation staging ceilings. Therefore, the proposed development is not required to meet the PATR test.

V. ENVIRONMENTAL

A. Patuxent Primary Management Area

The Patuxent River Primary Management Area (PMA) is a water quality protection area defined in the Environmental Guidelines for land in the Patuxent River watershed. It is a set area adjacent to any stream within the Patuxent River watershed where the Guidelines recommend certain land use activities and measures as part of a development project to protect and enhance water quality conditions of the stream system. One of these measures is a 10 percent imperviousness guideline limit for lower-density land development projects within the part of the PMA that is outside any environmental buffer. Development in zones that create high impervious uses, such as commercial zones, are considered to be in "nonconformance". There is no imperviousness guideline limit in the Environmental Guidelines for development in high-density zones. However, best management practices to reduce and minimize water quality impacts are recommended.

Approximately 11.1 acres of the subject site lies within the PMA. Most (8.8 acres) of the PMA is zoned RC. About 2.3 acres of the PMA is zoned C-2. The C-2 portion of the PMA is not subject to the 10 percent imperviousness guideline limit because it is considered to be a non-conforming zone.

The RC portion of the PMA is subject to the 10% imperviousness guideline limit. This part of the PMA meets that guideline limit because no impervious surfaces are proposed, except for possibly a small SWM facility access path. The path

(approximately 5720 square feet) would create about 1 percent imperviousness within the PMA.

The proposed SWM concept includes a wet pond that would provide quantity and quality controls not only for the shopping center development, but for a large portion of the adjacent elementary school (including most of the school building). The concept also includes eliminating the severely eroded channel and several dry wells located throughout the commercial part of the site. Staff believes this SWM concept meets the Environmental Guidelines recommendation for using best management practices for a commercial use (*i.e.*, high-impervious use) that lies partly within the PMA.

B. Forest Conservation

The Applicant proposes to retain about 4.58 acres of the 14.4 acres of forest. The retention area includes the environmental buffer and lies entirely within the PMA. The reforestation requirement is 4.80 acres, of which 1.97 acres will be located onsite. The remaining 2.83 acres of reforestation will be met offsite or with credits from a forest bank. The forest retention area and forest planting area on the site will be placed in a Category I conservation easement. Staff believes the proposed preliminary forest conservation plan meets the Forest Conservation Law requirements and recommends conditional approval of the plan.

VI. SCHOOLS

By letter dated January 24, 2005, Montgomery County Public Schools (MCPS) requested that the Applicant provide a vegetated buffer and construct a fence along the perimeter of the school site. The Applicant has been in contact with the school system and has advised that the area around the school will be, for the most part, afforested and protected with a forest conservation easement. Landscaping, to meet the concerns of MCPS, can be accommodated within the area identified "Proposed Landscape Buffer" adjacent to the eastern border of the school property and as shown on the preliminary plan. The Applicant has acknowledged that there will be continued discussion regarding the placement of a fence and any gates requested by MCPS.

As demonstrated in the staff report this plan complies with the recommendations of the Fairland Master Plan. Further staff believes that it complies with all applicable sections of Chapter 50, the Subdivision Regulations. The plan provides safe and adequate access, and can be served by adequate public facilities. With the waiver of setbacks that will be reviewed by MCDPS, the plan will comply with Chapter 59, the Zoning Ordinance. Staff recommends approval of the plan subject to the conditions cited above.

VII. Public Hearing

Staff summarized its findings and recommendations in the staff report, and recommended approval of the project with conditions as revised at the time of the hearing. The Applicant appeared, represented by legal counsel, and agreed to the recommendations of staff and the proposed conditions of approval. Stuart Rochester, speaking on behalf of the Fairland Master Plan Committee, testified that there is a "wide gap" between what the Master Plan Committee envisioned for this project and what has been proposed. Mr. Rochester testified that this subject property was envisioned as part of the Fairland town center. He said that the Committee tentatively supported the waiver of the setback required for the adjoining property, zoned RC. He also said that the extension of water and sewer to the site should be granted only for the commercial portion of the site, and he supported the relocation of the stormwater management pond to allow for preservation of additional forest.

Mr. Rochester's primary concern was about the size of the proposed new buildings, and even greater concern about the possibility that the several buildings on the site could be consolidated into one, "big box" building. On the other hand, however, he noted that under the layout as proposed, the Applicant largely achieved master plan goals of a pedestrian friendly site and adequate landscaping.

Mr. Charles Peters, representing Santini Grove Property Owners Association, an adjoining residential community, testified in "vehement" opposition to the setback waiver, stating that it would allow parking on residentially zoned property. Commissioner Bryant noted on the record that commercial parking is not allowed on residentially zoned property, and this was confirmed by staff. 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). Staff noted that where the Subject Property adjoins property not owned by the Applicant, the proposed project meets all setback requirements. Mr. Rochester confirmed that he supports the waiver only where the Subject Property adjoins land owned by the Applicant.

Cleve Brown, President of the Patuxent Watershed Protective Association, testified in opposition to the parking setback waiver. He testified that it has the effect of increasing the amount of parking, thus in effect enlarges the buildable area on the site. He said that there is an existing stormwater management problem on the site, and questioned why in the face of that fact the Board would approve additional imperviousness that would offset improvements that might be achieved with the new stormwater management facilities.

Lynn Martins, President of Seibel's Restaurant, a nearby restaurant, testified in support of the project, expressing her views that the redevelopment of this site can provide a potential boost to the business district.

During rebuttal, the Applicant noted that the Master Plan required a loop road on the adjoining property (zoned RC - Rural Cluster). By instead locating the master-planned recommended road within the Subject Property the Applicant has preserved additional green space on the adjoining property (much of which is located in a Category I conservation easement). The Applicant also noted that even with the proposed setback waiver, setbacks from the adjoining properties not owned by the Applicant are significant, being 60 feet at their narrowest and several hundred feet from existing residential properties. The Applicant also testified, in response to Planning Board questions, that if it did not get the waiver from DPS that it likely would lose density.

Commissioner Bryant asked for clarification as to whether the waiver request is typical, given the fact that the loop road is located adjacent to property under common ownership. Legal counsel testified in response to the question that it is relatively unique to have property under common ownership when this type of waiver is requested. Technical staff further advised that staff did not make an affirmative recommendation on the waiver because the Board will not grant the waiver, but instead will be reviewed by the Department of Permitting Services as part of a parking facilities plan. Technical staff also noted that the property adjoining the Subject Property never would be developed, in that it would be placed in a perpetual conservation easement. Staff further said that if the waiver is not granted by DPS, then the setback requirements must be met.

VIII. FINDINGS

Having given full consideration to the recommendations of its Staff; the recommendations of the applicable public agencies¹; the Applicant's position; and other evidence contained in the Record, which is hereby incorporated in its entirety into this Opinion, the Montgomery County Planning Board finds that:

- a) The Preliminary Plan No. 1-04109 substantially conforms to the Fairland master plan. The Board finds persuasive the analysis presented by staff that the density, vehicular and circulation patterns, and landscaping requirements as conditioned below, conform to the general recommendations of the Master Plan.
- b) The uncontested evidence of record demonstrates that public facilities will be adequate to support and service the area of the proposed subdivision, and the record confirms that the water/sewer category change is limited to the commercial portion of the site only.

¹ The application was referred to outside agencies for comment and review, including the Washington Suburban Sanitary Commission, the Department of Public Works and Transportation, the Department of Permitting Services and the various public utilities. All of these agencies recommended approval of the application.

- c) The uncontested evidence of record demonstrates that the size, width, shape, and orientation of the proposed lot are appropriate for the location of the subdivision.
- d) The uncontested evidence of record demonstrates that 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.
- e) The uncontested evidence of record demonstrates that 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") that the Stormwater Management Concept Plan meets MCDPS' standards.
- f) Aside from the issue of the waiver (over which the Board has no jurisdiction) and conformance to the master plan, the Record of this application does not contain any contested issues; and, therefore, the Planning Board finds that any future objection, which may be raised concerning additional substantive issue in this application, is waived.

IX. **CONDITIONS OF APPROVAL**

Finding Preliminary Plan No. 1-04109 in accordance with the purposes and all applicable regulations of Montgomery County Code Chapter 50, the Planning Board approves Preliminary Plan No. 1-04109, subject to the following conditions:

- 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 *width at the subject property's frontage along*:
 - a. US 29 (Burtonsville Boulevard) to provide a minimum of 100 feet from the roadway centerline or a *minimum* 200 feet from the *established* opposite right-of-way line, as *determined by M-NCPPC and SHA*,
 - 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*.
 - e. Burtonsville Access Road to provide up to 60 feet of right-of-way width as *determined by DPWT*.

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:
 - b. 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.
 - c. 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 *and to locate a pathway from school site to shopping center access road in coordination with MCPS*. If additional forest retention is not feasible, provide documentation to demonstrate why the additional retention is not feasible.
 - d. 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 plat to reflect a Category I conservation easement on all stream valley buffers and areas of forest conservation and afforestation.

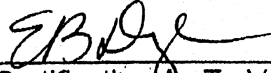
This Preliminary Plan will remain valid for 36 months from its Initiation Date (as defined in Montgomery County Code Section 50-35(h), as amended). Prior to the expiration of this validity period, a final record plat for all property delineated on the approved preliminary plan must be recorded among the Montgomery County Land Records or a request for an extension must be filed.

* * * * *
[CERTIFICATION OF BOARD VOTE ADOPTING OPINION ON FOLLOWING PAGE]

MR 12/8/05
Approved for legal sufficiency
M-NCPPC Office of General Counsel

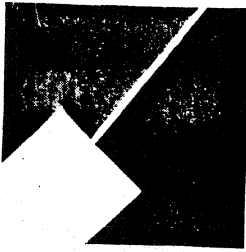
CERTIFICATION OF BOARD VOTE ADOPTING OPINION

At its regular meeting, held on Thursday, December 15, 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 Burtonsville Shopping Center, Preliminary Plan No. 1-04109. Commissioner Robinson abstained and Commissioner Bryant was absent.



Certification As To Vote of Adoption
Technical Writer

M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

8787 Georgia Avenue
Silver Spring, Maryland 20910-3760
301-495-4500, www.mncppc.org

Board Approval Date: July 28, 2005

Date Mailed: MAR 21 2006

Action:

Approved Staff Recommendation
Motion of Commissioner Bryant,
seconded by Commissioner Perdue,
with a vote of 4-0.
Chairman Berlage and Commissioners
Perdue, Bryant and Wellington voting in
favor. Commissioner Robinson was
absent.

MONTGOMERY COUNTY PLANNING BOARD
CORRECTED
OPINION

Preliminary Plan 1-04109
NAME OF PLAN: Burtonsville Shopping Center

I. **Introduction**

The date of this written opinion is MAR 21 2006 (which is the date that this opinion is mailed to all parties of record). Any party authorized by law to take an administrative appeal must initiate such an appeal within thirty days of the date of this written opinion, consistent with the procedural rules for the judicial review of administrative agency decisions in Circuit Court (Rule 7-203, Maryland Rules of Court - State).

On 6/30/04, BMC Property Group ("Applicant") submitted an application for the approval of a preliminary plan of subdivision of property in the C-2 zone. The application proposed 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. The application was designated Preliminary Plan 1-04109. On 7/28/05, Preliminary Plan 1-04109 was brought before the Montgomery County Planning Board for a public hearing. At the public hearing, the

ATTACHMENT TWO

Montgomery County Planning Board heard testimony and received evidence submitted in the record on the application.

The record for this application ("Record") closed at the conclusion of the public hearing, upon the taking of an action by the Planning Board. The Record includes: the information on the Preliminary Plan Application Form; the Planning Board staff-generated minutes of the Subdivision Review Committee meeting(s) on the application; all correspondence and any other written or graphic information concerning the application received by the Planning Board or its staff following submission of the application and prior to the Board's action at the conclusion of the public hearing, from the Applicant, public agencies, and private individuals or entities; all correspondence and any other written or graphic information issued by Planning Board staff concerning the application, prior to the Board's action following the public hearing; all evidence, including written and oral testimony and any graphic exhibits, presented to the Planning Board at the public hearing.

II. Site and Project Descriptions

The 27.15-acre property is located in the northwest quadrant of the intersection of Columbia Pike (US 29) and Spencerville Road (MD 198). The majority of the site is unrecorded; the portion in the immediate corner of the 29/198 intersection is recorded by plat. It is within the Patuxent River watershed (Use I waters). The eastern portion of the site is an existing shopping center. About 14.37 acres of the property is in forest cover. A small stream traverses the northwestern portion of the property. A severely eroded gully lies along part of the property line that is adjacent to the elementary school. The gully connects into the stream immediately offsite. The gully was most likely created from uncontrolled stormwater runoff from the existing shopping center and the adjacent elementary school site.

This application is a request to redevelop the existing Burtonsville Shopping Center. The property is zoned C-2 and under the proposed development scenario, will not be required to undergo Site Plan review. The Fairland Master Plan makes specific recommendations regarding the redevelopment of the site as detailed in the Community Based Planning memorandum. One overriding theme of the master plan guidance is the need for a pedestrian friendly design. While recognizing that the project will not be subject to Site Plan review, staff did request and receive an Illustrative Circulation Plan to show the general concepts of internal street cross-sections, sidewalk widths, setbacks, amenities and crosswalks. Sidewalks with associated lead walks along the U.S. 29 and MD 198 frontages are also provided.

Access to the property is to be accommodated at two locations: one on U.S. 29 and the other on MD 198 (loop road). The layout of the buildings on the property is conceptual and is shown as a number of building pads within the parking lots to provide flexibility for future tenants. The plan proposes 809 underground parking spaces and 521 surface parking spaces. The Montgomery County Department of Permitting

Services will need to review and approve a Parking Facilities Plan as part of the building permit review for this site. The plan as shown will require a waiver of the required setback for parking facilities from the adjacent residential (RC) zone. The decision on the waiver will be made by DPS. Staff's recommended conditions require the Applicant to:

- 1) Obtain approval of a waiver from the Director of MCDPS prior to issuance of building permits and as part of the Parking Facilities Plan review, or
- 2) Meet the minimum setback requirements as required under 59-E-2.81.

III. FAIRLAND MASTER PLAN - Conformance

Staff concluded that the proposed plan complies with the recommendations of the Fairland Master Plan, as discussed in detail in the staff report prepared by the Community Based Planning Staff Report.

IV. TRANSPORTATION

The site is located within the northwest quadrant of the local lanes of Columbia Pike U.S. 29 (Burtonsville Boulevard)/MD 198 intersection (just west of the new U.S. 29 Relocated/MD 198 interchange currently under construction). Access to the site is proposed from both Burtonsville Boulevard and MD 198 (through the future Burtonsville Access Road). Currently, several bus routes (Metrobus routes Z3, Z5, Z8, Z9, Z29, and MTA Routes 915 and 929) provide service along US 29 and MD 198 in the area. The Burtonsville Park and Ride Lot is located within the northeast quadrant of US 29 (Burtonsville Boulevard)/MD 198 intersection next to the Burtonsville Crossing Shopping Center.

The Approved and Adopted 1997 *Fairland/Cloverly Master Plans* include the following nearby master-planned roadway, bikeway, pedestrian, and trail facilities:

1. US 29 local lanes or Burtonsville Boulevard, to the east of the property, as a six-lane divided Major Highway (M-10a) from south of MD 198 to Dustin Road (to the north). A minimum right-of-way width of 100 to 200 feet is recommended for this section of the roadway. A Class I bikeway is also recommended in the master plan for this section of local US 29.
2. Sandy Spring Road/Spencerville Road (MD 198), as a four-lane divided major highway (M-76) with a minimum right-of-way width of 120 feet, and with a Class I bikeway (PB-34) to the south side of the roadway between Old Columbia Pike/US 29 and the Prince George's County line. The 2005 Countywide Bikeways Functional Master Plan recommends a Shared-Use Path for MD 198 between Layhill Road to the west in Cloverly and the Prince George's County line to the east (SP-20 and SP-21).

3. Old Columbia Pike, as a two-lane Primary Road (P-25c) with a minimum right-of-way width of 70 feet between MD 198 to the north and Briggs Chaney Road to the south, and with sidewalks. As recommended in the Master Plan, four-foot wide sidewalks are provided along both sides of Old Columbia Pike. The roadway is also a Class II bikeway facility (EB-13; BL-12 in the 2005 Countywide Bikeways Functional Master Plan).
4. Burtonsville Access Road, to the north of MD 198 between MD 198 and the access road to Burtonsville Elementary School, as a two-lane Business District Street (B-7), with a minimum right-of-way of 60 feet.
5. Riding Stable Road, as a two-lane Primary Road (P-47) with a minimum right-of-way width of 70 feet, and with a rural open-section to the north of MD 198 and a Class III bikeway (PB-61) between MD 198 to the south to the Prince George's County line/Brooklyn Bridge Road to the north.
6. McKnew Road, as a two-lane primary road (P-26) with a minimum right-of-way width of 70 feet, and with sidewalks between MD 198 and Sugar Pine Court on both sides. The portion of McKnew Road to the south of Sugar Pine Court is currently built to master plan recommendations with sidewalks on both sides.
7. Cedar Tree Drive, as a two-lane primary road (P-45) with a minimum right-of-way width of 70 feet, and with a Class III/I bikeway (PB-46) between MD 198 and the Fairland Recreational Park/Prince George's County Line. A Class I bikeway (PB-47 - Cedar Tree Drive Connector) that connects Cedar Tree Drive through Fairland Recreational Park with Robey Road is also recommended in the master plan. The existing portion of Cedar Tree Drive (between MD 198 and Islewood Terrace) is built as a two-lane Primary Road to master plan recommendations with sidewalks on both sides and a Class III bikeway.
8. Blackburn Road to the east of US 29, as a two-lane Primary Road (P-44) with a minimum right-of-way 70 feet, and with sidewalks.
9. Greencastle Road, between US 29 to the northwest and Prince George's County Line to the southeast, as a four-lane Arterial (A-110) with a minimum right-of-way width of 80 feet. The master plan also recommends sidewalks and a Class I bikeway (PB-52) along Greencastle Road between Old Columbia Pike (to the west of US 29) and Prince George's County Line. The 2005 Countywide Bikeways Functional Master Plan recommends a Dual Bikeway for the section of Greencastle Road between US 29 and Robey Road (DB-11), and a Shared-Use Path for the section of Greencastle Road between Robey Road and Prince George's County line (SP-23).

10. Peach Orchard Road (to the west of the site in Cloverly) as a two-lane Primary (P-10) between MD 198 to the north and Briggs Chaney Road to the south with a minimum right-of-way width of 70 feet, and with a Class III bikeway (PB-37).
11. Patuxent Trail, as an unpaved trail (PB-41) within the PEPCO right-of-way to the north of the site.

On-going Transportation Projects

The SHA Consolidated Transportation Program, and the DPWT Capital Improvement Program includes the following nearby projects:

1. The US 29/MD 198-interchange project, from north of Dustin Road to south of MD 198. Construction of this project started in June 2002 and is near completion and open to traffic. The project is scheduled for completion in Fall 2005.
2. The MD 28/MD 198 Corridor Improvement Planning Study is ongoing. SHA anticipates release of the draft environmental document for the project in Fall 2005. The study is funded for project planning only.
3. The Burtonsville Access Road project, to the north of MD 198 between MD 198 and the access road to the Burtonsville Elementary School is fully funded, and is scheduled to start construction in Spring 2007.

Local Area Transportation Review

Peak-hour trips associated with the proposed new shopping center consisting of 250,000 square feet of retail uses and 10,000 square feet of commercial office space were estimated for the weekday morning peak-period (6:30 a.m. to 9:30 a.m.) and the evening peak-period (4:00 p.m. to 7:00 p.m.), and (summarized in Table 1 of the Transportation Division's staff report). The net increase in trips generated by the proposed development reflect trip credits for the existing shopping center on the property that include a 50,000 square-foot retail center and a 6,000 square-foot nursery retail/outdoor furniture sales center.

Transportation Division staff concluded that the proposed retail/office density on the property was estimated to generate a total of 285 and 1,168 peak hour trips during the respective weekday morning and evening peak periods. With applicable credit for retail uses currently on the property, the proposed uses on the property were estimated to generate a total of 154 and 683 net new-peak hour trips during the respective weekday morning and evening peak periods.

- Congestion Levels at Nearby Intersections

A summary of the Critical Lane Volume (CLV) analysis results for the study intersections for the weekday morning and evening peak hours during the respective peak periods based on the analysis presented in the traffic study is provided in Table 2 of the Transportation Unit Staff analysis ("Table 2").

As shown in Table 2, the weekday morning and evening peak-hour capacity analysis presented in the traffic study indicated that under Total traffic conditions (with Applicant funded intersection operational/physical improvements [potential installation of signal/turn lanes at the MD 198/Burtonsville Access Road and US 29/Site Driveway intersections] subsequent to further SHA/DPWT review), CLV at the study intersections were below the FY 2004 congestion standard for the respective policy areas. Therefore the application satisfies the LATR requirements of the APF test.

Rural policy areas such as the Patuxent Policy Area are not assigned any transportation staging ceilings. Therefore, the proposed development is not required to meet the PATR test.

V. ENVIRONMENTAL

A. Patuxent Primary Management Area

The Patuxent River Primary Management Area (PMA) is a water quality protection area defined in the Environmental Guidelines for land in the Patuxent River watershed. It is a set area adjacent to any stream within the Patuxent River watershed where the Guidelines recommend certain land use activities and measures as part of a development project to protect and enhance water quality conditions of the stream system. One of these measures is a 10 percent imperviousness guideline limit for lower-density land development projects within the part of the PMA that is outside any environmental buffer. Development in zones that create high impervious uses, such as commercial zones, are considered to be in "nonconformance". There is no imperviousness guideline limit in the Environmental Guidelines for development in high-density zones. However, best management practices to reduce and minimize water quality impacts are recommended

Approximately 11.1 acres of the subject site lies within the PMA. Most (8.8 acres) of the PMA is zoned RC. About 2.3 acres of the PMA is zoned C-2. The C-2 portion of the PMA is not subject to the 10 percent imperviousness guideline limit because it is considered to be a non-conforming zone.

The RC portion of the PMA is subject to the 10% imperviousness guideline limit. This part of the PMA meets that guideline limit because no impervious surfaces are proposed, except for possibly a small SWM facility access path. The path

(approximately 5720 square feet) would create about 1 percent imperviousness within the PMA.

The proposed SWM concept includes a wet pond that would provide quantity and quality controls not only for the shopping center development, but for a large portion of the adjacent elementary school (including most of the school building). The concept also includes eliminating the severely eroded channel and several dry wells located throughout the commercial part of the site. Staff believes this SWM concept meets the Environmental Guidelines recommendation for using best management practices for a commercial use (*i.e.*, high-impervious use) that lies partly within the PMA.

B. Forest Conservation

The Applicant proposes to retain about 4.58 acres of the 14.4 acres of forest. The retention area includes the environmental buffer and lies entirely within the PMA. The reforestation requirement is 4.80 acres, of which 1.97 acres will be located onsite. The remaining 2.83 acres of reforestation will be met offsite or with credits from a forest bank. The forest retention area and forest planting area on the site will be placed in a Category I conservation easement. Staff believes the proposed preliminary forest conservation plan meets the Forest Conservation Law requirements and recommends conditional approval of the plan.

VI. SCHOOLS

By letter dated January 24, 2005, Montgomery County Public Schools (MCPS) requested that the Applicant provide a vegetated buffer and construct a fence along the perimeter of the school site. The Applicant has been in contact with the school system and has advised that the area around the school will be, for the most part, afforested and protected with a forest conservation easement. Landscaping, to meet the concerns of MCPS, can be accommodated within the area identified "Proposed Landscape Buffer" adjacent to the eastern border of the school property and as shown on the preliminary plan. The Applicant has acknowledged that there will be continued discussion regarding the placement of a fence and any gates requested by MCPS.

As demonstrated in the staff report this plan complies with the recommendations of the Fairland Master Plan. Further staff believes that it complies with all applicable sections of Chapter 50, the Subdivision Regulations. The plan provides safe and adequate access, and can be served by adequate public facilities. With the waiver of setbacks that will be reviewed by MCDPS, the plan will comply with Chapter 59, the Zoning Ordinance. Staff recommends approval of the plan subject to the conditions cited above.

VII. Public Hearing

Staff summarized its findings and recommendations in the staff report, and recommended approval of the project with conditions as revised at the time of the hearing. The Applicant appeared, represented by legal counsel, and agreed to the recommendations of staff and the proposed conditions of approval. Stuart Rochester, speaking on behalf of the Fairland Master Plan Committee, testified that there is a "wide gap" between what the Master Plan Committee envisioned for this project and what has been proposed. Mr. Rochester testified that this subject property was envisioned as part of the Fairland town center. He said that the Committee tentatively supported the waiver of the setback required for the adjoining property, zoned RC. He also said that the extension of water and sewer to the site should be granted only for the commercial portion of the site, and he supported the relocation of the stormwater management pond to allow for preservation of additional forest.

Mr. Rochester's primary concern was about the size of the proposed new buildings, and even greater concern about the possibility that the several buildings on the site could be consolidated into one, "big box" building. On the other hand, however, he noted that under the layout as proposed, the Applicant largely achieved master plan goals of a pedestrian friendly site and adequate landscaping.

Mr. Charles Peters, representing Santini Grove Property Owners Association, an adjoining residential community, testified in "vehement" opposition to the setback waiver, stating that it would allow parking on residentially zoned property. Commissioner Bryant noted on the record that commercial parking is not allowed on residentially zoned property, and this was confirmed by staff. 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). Staff noted that where the Subject Property adjoins property not owned by the Applicant, the proposed project meets all setback requirements. Mr. Rochester confirmed that he supports the waiver only where the Subject Property adjoins land owned by the Applicant.

Cleve Brown, President of the Patuxent Watershed Protective Association, testified in opposition to the parking setback waiver. He testified that it has the effect of increasing the amount of parking, thus in effect enlarges the buildable area on the site. He said that there is an existing stormwater management problem on the site, and questioned why in the face of that fact the Board would approve additional imperviousness that would offset improvements that might be achieved with the new stormwater management facilities.

Lynn Martins, President of Seibel's Restaurant, a nearby restaurant, testified in support of the project, expressing her views that the redevelopment of this site can provide a potential boost to the business district.

During rebuttal, the Applicant noted that the Master Plan required a loop road on the adjoining property (zoned RC - Rural Cluster). By instead locating the master-planned recommended road within the Subject Property the Applicant has preserved additional green space on the adjoining property (much of which is located in a Category I conservation easement). The Applicant also noted that even with the proposed setback waiver, setbacks from the adjoining properties not owned by the Applicant are significant, being 60 feet at their narrowest and several hundred feet from existing residential properties. The Applicant also testified, in response to Planning Board questions, that if it did not get the waiver from DPS that it likely would lose density.

Commissioner Bryant asked for clarification as to whether the waiver request is typical, given the fact that the loop road is located adjacent to property under common ownership. Legal counsel testified in response to the question that it is relatively unique to have property under common ownership when this type of waiver is requested. Technical staff further advised that staff did not make an affirmative recommendation on the waiver because the Board will not grant the waiver, but instead will be reviewed by the Department of Permitting Services as part of a parking facilities plan. Technical staff also noted that the property adjoining the Subject Property never would be developed, in that it would be placed in a perpetual conservation easement. Staff further said that if the waiver is not granted by DPS, then the setback requirements must be met.

VIII. FINDINGS

Having given full consideration to the recommendations of its Staff; the recommendations of the applicable public agencies¹; the Applicant's position; and other evidence contained in the Record, which is hereby incorporated in its entirety into this Opinion, the Montgomery County Planning Board finds that:

- a) The Preliminary Plan No. 1-04109 substantially conforms to the Fairland master plan. The Board finds persuasive the analysis presented by staff that the density, vehicular and circulation patterns, and landscaping requirements as conditioned below, conform to the general recommendations of the Master Plan.
- b) The uncontested evidence of record demonstrates that public facilities will be adequate to support and service the area of the proposed subdivision, and the record confirms that the water/sewer category change is limited to the commercial portion of the site only.

¹ The application was referred to outside agencies for comment and review, including the Washington Suburban Sanitary Commission, the Department of Public Works and Transportation, the Department of Permitting Services and the various public utilities. All of these agencies recommended approval of the application.

- c) The uncontested evidence of record demonstrates that the size, width, shape, and orientation of the proposed lot are appropriate for the location of the subdivision.
- d) The uncontested evidence of record demonstrates that 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.
- e) The uncontested evidence of record demonstrates that 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") that the Stormwater Management Concept Plan meets MCDPS' standards.
- f) Aside from the issue of the waiver (over which the Board has no jurisdiction) and conformance to the master plan, the Record of this application does not contain any contested issues; and, therefore, the Planning Board finds that any future objection, which may be raised concerning additional substantive issue in this application, is waived.

IX. CONDITIONS OF APPROVAL

Finding Preliminary Plan No. 1-04109 in accordance with the purposes and all applicable regulations of Montgomery County Code Chapter 50, the Planning Board approves Preliminary Plan No. 1-04109, subject to the following conditions:

- 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 width at the subject property's frontage along:~~
 - a. US 29 (Burtonsville Boulevard) to provide a minimum of ~~50-100~~100 feet from the roadway centerline or a minimum of 100-200 feet from the established opposite right-of-way line, as determined by M-NCPPC and SHA.
 - b. Spencerville Road to provide a minimum of 60 feet from the roadway centerline or a minimum of 120 feet from the established opposite right-of-way line, as determined by M-NCPPC and SHA.
 - c. Burtonsville Access Road to provide up to 60 feet of right-of-way width as determined by MNCPPC and DPWT.

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:
 - b. 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.
 - c. 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 and to locate a pathway from school site to shopping center access road in coordination with MCPS*. If additional forest retention is not feasible, provide documentation to demonstrate why the additional retention is not feasible.
 - d. 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~~ June 2, 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 plat to reflect a Category I conservation easement on all stream valley buffers and areas of forest conservation and afforestation.

This Preliminary Plan will remain valid for 36 months from its Initiation Date (as defined in Montgomery County Code Section 50-35(h), as amended). Prior to the expiration of this validity period, a final record plat for all property delineated on the approved preliminary plan must be recorded among the Montgomery County Land Records or a request for an extension must be filed.

* * * * *
[CERTIFICATION OF BOARD VOTE ADOPTING OPINION ON FOLLOWING PAGE]

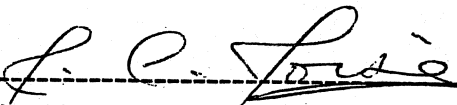
Approved
M-NCPPC

MF 3/13/06

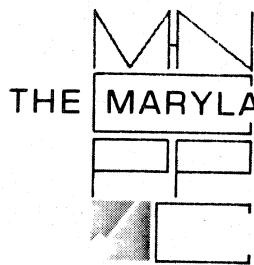
Sufficiency
General Counsel

CERTIFICATION OF BOARD VOTE ADOPTING OPINION

At its regular meeting, held on **Thursday, March 16, 2006**, 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. 1-04109, Burtonsville Shopping Center.**



Certification As To Vote of Adoption
M. Clara Moise, Technical Writer



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
8787 Georgia Avenue • Silver Spring, Maryland 20910-3760

OFFICE OF
THE GENERAL COUNSEL

(301) 495-4646
FAX (301) 495-2173

March 27, 2006

Timothy Dugan, Esquire
Attorney at Law
Shulman Rogers Gandal Pordy & Ecker, P.A.
11921 Rockville Pike
Rockville, Maryland 20852-2743

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

Dear Mr. Dugan:

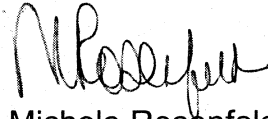
I am responding to your letter of December 29, 2005 ("Letter"), seeking modification of certain text within the body of the opinion for the above-referenced project, and modification or deletion of certain conditions of approval. Enclosed please find a copy of the corrected opinion, as approved by the Planning Board on March 16, 2006. It corrects condition number 2 (which did not include the specific language before the Board at the time it reviewed the plan), and condition number 16, which inadvertently referenced the wrong date for the stormwater management approval letter from the Department of Permitting Services (DPS).

The remaining changes that you requested in your Letter either proposed to delete conditions that were expressly approved by the Board, or proposed to modify text that explains the Board's decision. If you wish to pursue further changes to the opinion language, you must either file a request for reconsideration within 10 days of the mailing of the corrected opinion, or seek an amendment to the approved plan.

ATTACHMENT THREE

Should you have any questions, or require additional information, please call me at 301-495-4646.

Sincerely,

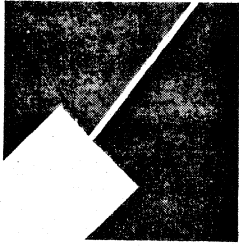


Michele Rosenfeld
Associate General Counsel

MMR:cmd

cc: Faroll Hamer, Acting Director, Montgomery County Planning Department
Stuart Rochester, Chair, Fairland Master Plan CAC
A. C. Brown, President, Patuxent Watershed Protection Association, Inc.
Jim J. Hughes, Vice President, Patuxent Master Plan CAC

M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

8787 Georgia Avenue
Silver Spring, Maryland 20910-3760
301-495-4500, www.mncppc.org

Board Approval Date: July 28, 2005

Date Mailed: MAR 21 2006

Action:

Approved Staff Recommendation
Motion of Commissioner Bryant,
seconded by Commissioner Perdue,
with a vote of 4-0.
Chairman Berlage and Commissioners
Perdue, Bryant and Wellington voting in
favor. Commissioner Robinson was
absent.

MONTGOMERY COUNTY PLANNING BOARD
CORRECTED
OPINION

Preliminary Plan 1-04109
NAME OF PLAN: Burtonsville Shopping Center

I. **Introduction**

The date of this written opinion is MAR 21 2006 (which is the date that this opinion is mailed to all parties of record). Any party authorized by law to take an administrative appeal must initiate such an appeal within thirty days of the date of this written opinion, consistent with the procedural rules for the judicial review of administrative agency decisions in Circuit Court (Rule 7-203, Maryland Rules of Court - State).

On 6/30/04, BMC Property Group ("Applicant") submitted an application for the approval of a preliminary plan of subdivision of property in the C-2 zone. The application proposed 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. The application was designated Preliminary Plan 1-04109. On 7/28/05, Preliminary Plan 1-04109 was brought before the Montgomery County Planning Board for a public hearing. At the public hearing, the

Montgomery County Planning Board heard testimony and received evidence submitted in the record on the application.

The record for this application ("Record") closed at the conclusion of the public hearing, upon the taking of an action by the Planning Board. The Record includes: the information on the Preliminary Plan Application Form; the Planning Board staff-generated minutes of the Subdivision Review Committee meeting(s) on the application; all correspondence and any other written or graphic information concerning the application received by the Planning Board or its staff following submission of the application and prior to the Board's action at the conclusion of the public hearing, from the Applicant, public agencies, and private individuals or entities; all correspondence and any other written or graphic information issued by Planning Board staff concerning the application, prior to the Board's action following the public hearing; all evidence, including written and oral testimony and any graphic exhibits, presented to the Planning Board at the public hearing.

II. Site and Project Descriptions

The 27.15-acre property is located in the northwest quadrant of the intersection of Columbia Pike (US 29) and Spencerville Road (MD 198). The majority of the site is unrecorded; the portion in the immediate corner of the 29/198 intersection is recorded by plat. It is within the Patuxent River watershed (Use I waters). The eastern portion of the site is an existing shopping center. About 14.37 acres of the property is in forest cover. A small stream traverses the northwestern portion of the property. A severely eroded gully lies along part of the property line that is adjacent to the elementary school. The gully connects into the stream immediately offsite. The gully was most likely created from uncontrolled stormwater runoff from the existing shopping center and the adjacent elementary school site.

This application is a request to redevelop the existing Burtonsville Shopping Center. The property is zoned C-2 and under the proposed development scenario, will not be required to undergo Site Plan review. The Fairland Master Plan makes specific recommendations regarding the redevelopment of the site as detailed in the Community Based Planning memorandum. One overriding theme of the master plan guidance is the need for a pedestrian friendly design. While recognizing that the project will not be subject to Site Plan review, staff did request and receive an Illustrative Circulation Plan to show the general concepts of internal street cross-sections, sidewalk widths, setbacks, amenities and crosswalks. Sidewalks with associated lead walks along the U.S. 29 and MD 198 frontages are also provided.

Access to the property is to be accommodated at two locations: one on U.S. 29 and the other on MD 198 (loop road). The layout of the buildings on the property is conceptual and is shown as a number of building pads within the parking lots to provide flexibility for future tenants. The plan proposes 809 underground parking spaces and 521 surface parking spaces. The Montgomery County Department of Permitting

Services will need to review and approve a Parking Facilities Plan as part of the building permit review for this site. The plan as shown will require a waiver of the required setback for parking facilities from the adjacent residential (RC) zone. The decision on the waiver will be made by DPS. Staff's recommended conditions require the Applicant to:

- 1) Obtain approval of a waiver from the Director of MCDPS prior to issuance of building permits and as part of the Parking Facilities Plan review, or
- 2) Meet the minimum setback requirements as required under 59-E-2.81.

III. FAIRLAND MASTER PLAN - Conformance

Staff concluded that the proposed plan complies with the recommendations of the Fairland Master Plan, as discussed in detail in the staff report prepared by the Community Based Planning Staff Report.

IV. TRANSPORTATION

The site is located within the northwest quadrant of the local lanes of Columbia Pike U.S. 29 (Burtonsville Boulevard)/MD 198 intersection (just west of the new U.S. 29 Relocated/MD 198 interchange currently under construction). Access to the site is proposed from both Burtonsville Boulevard and MD 198 (through the future Burtonsville Access Road). Currently, several bus routes (Metrobus routes Z3, Z5, Z8, Z9, Z29, and MTA Routes 915 and 929) provide service along US 29 and MD 198 in the area. The Burtonsville Park and Ride Lot is located within the northeast quadrant of US 29 (Burtonsville Boulevard)/MD 198 intersection next to the Burtonsville Crossing Shopping Center.

The Approved and Adopted 1997 *Fairland/Cloverly Master Plans* include the following nearby master-planned roadway, bikeway, pedestrian, and trail facilities:

1. US 29 local lanes or Burtonsville Boulevard, to the east of the property, as a six-lane divided Major Highway (M-10a) from south of MD 198 to Dustin Road (to the north). A minimum right-of-way width of 100 to 200 feet is recommended for this section of the roadway. A Class I bikeway is also recommended in the master plan for this section of local US 29.
2. Sandy Spring Road/Spencerville Road (MD 198), as a four-lane divided major highway (M-76) with a minimum right-of-way width of 120 feet, and with a Class I bikeway (PB-34) to the south side of the roadway between Old Columbia Pike/US 29 and the Prince George's County line. The 2005 Countywide Bikeways Functional Master Plan recommends a Shared-Use Path for MD 198 between Layhill Road to the west in Cloverly and the Prince George's County line to the east (SP-20 and SP-21).

3. Old Columbia Pike, as a two-lane Primary Road (P-25c) with a minimum right-of-way width of 70 feet between MD 198 to the north and Briggs Chaney Road to the south, and with sidewalks. As recommended in the Master Plan, four-foot wide sidewalks are provided along both sides of Old Columbia Pike. The roadway is also a Class II bikeway facility (EB-13; BL-12 in the 2005 Countywide Bikeways Functional Master Plan).
4. Burtonsville Access Road, to the north of MD 198 between MD 198 and the access road to Burtonsville Elementary School, as a two-lane Business District Street (B-7), with a minimum right-of-way of 60 feet.
5. Riding Stable Road, as a two-lane Primary Road (P-47) with a minimum right-of-way width of 70 feet, and with a rural open-section to the north of MD 198 and a Class III bikeway (PB-61) between MD 198 to the south to the Prince George's County line/Brooklyn Bridge Road to the north.
6. McKnew Road, as a two-lane primary road (P-26) with a minimum right-of-way width of 70 feet, and with sidewalks between MD 198 and Sugar Pine Court on both sides. The portion of McKnew Road to the south of Sugar Pine Court is currently built to master plan recommendations with sidewalks on both sides.
7. Cedar Tree Drive, as a two-lane primary road (P-45) with a minimum right-of-way width of 70 feet, and with a Class III/I bikeway (PB-46) between MD 198 and the Fairland Recreational Park/Prince George's County Line. A Class I bikeway (PB-47 - Cedar Tree Drive Connector) that connects Cedar Tree Drive through Fairland Recreational Park with Robey Road is also recommended in the master plan. The existing portion of Cedar Tree Drive (between MD 198 and Islewood Terrace) is built as a two-lane Primary Road to master plan recommendations with sidewalks on both sides and a Class III bikeway.
8. Blackburn Road to the east of US 29, as a two-lane Primary Road (P-44) with a minimum right-of-way 70 feet, and with sidewalks.
9. Greencastle Road, between US 29 to the northwest and Prince George's County Line to the southeast, as a four-lane Arterial (A-110) with a minimum right-of-way width of 80 feet. The master plan also recommends sidewalks and a Class I bikeway (PB-52) along Greencastle Road between Old Columbia Pike (to the west of US 29) and Prince George's County Line. The 2005 Countywide Bikeways Functional Master Plan recommends a Dual Bikeway for the section of Greencastle Road between US 29 and Robey Road (DB-11), and a Shared-Use Path for the section of Greencastle Road between Robey Road and Prince George's County line (SP-23).

10. Peach Orchard Road (to the west of the site in Cloverly) as a two-lane Primary (P-10) between MD 198 to the north and Briggs Chaney Road to the south with a minimum right-of-way width of 70 feet, and with a Class III bikeway (PB-37).
11. Patuxent Trail, as an unpaved trail (PB-41) within the PEPCO right-of-way to the north of the site.

On-going Transportation Projects

The SHA Consolidated Transportation Program, and the DPWT Capital Improvement Program includes the following nearby projects:

1. The US 29/MD 198-interchange project, from north of Dustin Road to south of MD 198. Construction of this project started in June 2002 and is near completion and open to traffic. The project is scheduled for completion in Fall 2005.
2. The MD 28/MD 198 Corridor Improvement Planning Study is ongoing. SHA anticipates release of the draft environmental document for the project in Fall 2005. The study is funded for project planning only.
3. The Burtonsville Access Road project, to the north of MD 198 between MD 198 and the access road to the Burtonsville Elementary School is fully funded, and is scheduled to start construction in Spring 2007.

Local Area Transportation Review

Peak-hour trips associated with the proposed new shopping center consisting of 250,000 square feet of retail uses and 10,000 square feet of commercial office space were estimated for the weekday morning peak-period (6:30 a.m. to 9:30 a.m.) and the evening peak-period (4:00 p.m. to 7:00 p.m.), and (summarized in Table 1 of the Transportation Division's staff report). The net increase in trips generated by the proposed development reflect trip credits for the existing shopping center on the property that include a 50,000 square-foot retail center and a 6,000 square-foot nursery retail/outdoor furniture sales center.

Transportation Division staff concluded that the proposed retail/office density on the property was estimated to generate a total of 285 and 1,168 peak hour trips during the respective weekday morning and evening peak periods. With applicable credit for retail uses currently on the property, the proposed uses on the property were estimated to generate a total of 154 and 683 net new-peak hour trips during the respective weekday morning and evening peak periods.

- Congestion Levels at Nearby Intersections

A summary of the Critical Lane Volume (CLV) analysis results for the study intersections for the weekday morning and evening peak hours during the respective peak periods based on the analysis presented in the traffic study is provided in Table 2 of the Transportation Unit Staff analysis ("Table 2").

As shown in Table 2, the weekday morning and evening peak-hour capacity analysis presented in the traffic study indicated that under Total traffic conditions (with Applicant funded intersection operational/physical improvements [potential installation of signal/turn lanes at the MD 198/Burtonsville Access Road and US 29/Site Driveway intersections] subsequent to further SHA/DPWT review), CLV at the study intersections were below the FY 2004 congestion standard for the respective policy areas. Therefore the application satisfies the LATR requirements of the APF test.

Rural policy areas such as the Patuxent Policy Area are not assigned any transportation staging ceilings. Therefore, the proposed development is not required to meet the PATR test.

V. ENVIRONMENTAL

A. Patuxent Primary Management Area

The Patuxent River Primary Management Area (PMA) is a water quality protection area defined in the Environmental Guidelines for land in the Patuxent River watershed. It is a set area adjacent to any stream within the Patuxent River watershed where the Guidelines recommend certain land use activities and measures as part of a development project to protect and enhance water quality conditions of the stream system. One of these measures is a 10 percent imperviousness guideline limit for lower-density land development projects within the part of the PMA that is outside any environmental buffer. Development in zones that create high impervious uses, such as commercial zones, are considered to be in "nonconformance". There is no imperviousness guideline limit in the Environmental Guidelines for development in high-density zones. However, best management practices to reduce and minimize water quality impacts are recommended

Approximately 11.1 acres of the subject site lies within the PMA. Most (8.8 acres) of the PMA is zoned RC. About 2.3 acres of the PMA is zoned C-2. The C-2 portion of the PMA is not subject to the 10 percent imperviousness guideline limit because it is considered to be a non-conforming zone.

The RC portion of the PMA is subject to the 10% imperviousness guideline limit. This part of the PMA meets that guideline limit because no impervious surfaces are proposed, except for possibly a small SWM facility access path. The path

(approximately 5720 square feet) would create about 1 percent imperviousness within the PMA.

The proposed SWM concept includes a wet pond that would provide quantity and quality controls not only for the shopping center development, but for a large portion of the adjacent elementary school (including most of the school building). The concept also includes eliminating the severely eroded channel and several dry wells located throughout the commercial part of the site. Staff believes this SWM concept meets the Environmental Guidelines recommendation for using best management practices for a commercial use (*i.e.*, high-impervious use) that lies partly within the PMA.

B. Forest Conservation

The Applicant proposes to retain about 4.58 acres of the 14.4 acres of forest. The retention area includes the environmental buffer and lies entirely within the PMA. The reforestation requirement is 4.80 acres, of which 1.97 acres will be located onsite. The remaining 2.83 acres of reforestation will be met offsite or with credits from a forest bank. The forest retention area and forest planting area on the site will be placed in a Category I conservation easement. Staff believes the proposed preliminary forest conservation plan meets the Forest Conservation Law requirements and recommends conditional approval of the plan.

VI. SCHOOLS

By letter dated January 24, 2005, Montgomery County Public Schools (MCPS) requested that the Applicant provide a vegetated buffer and construct a fence along the perimeter of the school site. The Applicant has been in contact with the school system and has advised that the area around the school will be, for the most part, afforested and protected with a forest conservation easement. Landscaping, to meet the concerns of MCPS, can be accommodated within the area identified "Proposed Landscape Buffer" adjacent to the eastern border of the school property and as shown on the preliminary plan. The Applicant has acknowledged that there will be continued discussion regarding the placement of a fence and any gates requested by MCPS.

As demonstrated in the staff report this plan complies with the recommendations of the Fairland Master Plan. Further staff believes that it complies with all applicable sections of Chapter 50, the Subdivision Regulations. The plan provides safe and adequate access, and can be served by adequate public facilities. With the waiver of setbacks that will be reviewed by MCDPS, the plan will comply with Chapter 59, the Zoning Ordinance. Staff recommends approval of the plan subject to the conditions cited above.

VII. Public Hearing

Staff summarized its findings and recommendations in the staff report, and recommended approval of the project with conditions as revised at the time of the hearing. The Applicant appeared, represented by legal counsel, and agreed to the recommendations of staff and the proposed conditions of approval. Stuart Rochester, speaking on behalf of the Fairland Master Plan Committee, testified that there is a "wide gap" between what the Master Plan Committee envisioned for this project and what has been proposed. Mr. Rochester testified that this subject property was envisioned as part of the Fairland town center. He said that the Committee tentatively supported the waiver of the setback required for the adjoining property, zoned RC. He also said that the extension of water and sewer to the site should be granted only for the commercial portion of the site, and he supported the relocation of the stormwater management pond to allow for preservation of additional forest.

Mr. Rochester's primary concern was about the size of the proposed new buildings, and even greater concern about the possibility that the several buildings on the site could be consolidated into one, "big box" building. On the other hand, however, he noted that under the layout as proposed, the Applicant largely achieved master plan goals of a pedestrian friendly site and adequate landscaping.

Mr. Charles Peters, representing Santini Grove Property Owners Association, an adjoining residential community, testified in "vehement" opposition to the setback waiver, stating that it would allow parking on residentially zoned property. Commissioner Bryant noted on the record that commercial parking is not allowed on residentially zoned property, and this was confirmed by staff. 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). Staff noted that where the Subject Property adjoins property not owned by the Applicant, the proposed project meets all setback requirements. Mr. Rochester confirmed that he supports the waiver only where the Subject Property adjoins land owned by the Applicant.

Cleve Brown, President of the Patuxent Watershed Protective Association, testified in opposition to the parking setback waiver. He testified that it has the effect of increasing the amount of parking, thus in effect enlarges the buildable area on the site. He said that there is an existing stormwater management problem on the site, and questioned why in the face of that fact the Board would approve additional imperviousness that would offset improvements that might be achieved with the new stormwater management facilities.

Lynn Martins, President of Seibel's Restaurant, a nearby restaurant, testified in support of the project, expressing her views that the redevelopment of this site can provide a potential boost to the business district.

During rebuttal, the Applicant noted that the Master Plan required a loop road on the adjoining property (zoned RC - Rural Cluster). By instead locating the master-planned recommended road within the Subject Property the Applicant has preserved additional green space on the adjoining property (much of which is located in a Category I conservation easement). The Applicant also noted that even with the proposed setback waiver, setbacks from the adjoining properties not owned by the Applicant are significant, being 60 feet at their narrowest and several hundred feet from existing residential properties. The Applicant also testified, in response to Planning Board questions, that if it did not get the waiver from DPS that it likely would lose density.

Commissioner Bryant asked for clarification as to whether the waiver request is typical, given the fact that the loop road is located adjacent to property under common ownership. Legal counsel testified in response to the question that it is relatively unique to have property under common ownership when this type of waiver is requested. Technical staff further advised that staff did not make an affirmative recommendation on the waiver because the Board will not grant the waiver, but instead will be reviewed by the Department of Permitting Services as part of a parking facilities plan. Technical staff also noted that the property adjoining the Subject Property never would be developed, in that it would be placed in a perpetual conservation easement. Staff further said that if the waiver is not granted by DPS, then the setback requirements must be met.

VIII. FINDINGS

Having given full consideration to the recommendations of its Staff; the recommendations of the applicable public agencies¹; the Applicant's position; and other evidence contained in the Record, which is hereby incorporated in its entirety into this Opinion, the Montgomery County Planning Board finds that:

- a) The Preliminary Plan No. 1-04109 substantially conforms to the Fairland master plan. The Board finds persuasive the analysis presented by staff that the density, vehicular and circulation patterns, and landscaping requirements as conditioned below, conform to the general recommendations of the Master Plan.
- b) The uncontested evidence of record demonstrates that public facilities will be adequate to support and service the area of the proposed subdivision, and the record confirms that the water/sewer category change is limited to the commercial portion of the site only.

¹ The application was referred to outside agencies for comment and review, including the Washington Suburban Sanitary Commission, the Department of Public Works and Transportation, the Department of Permitting Services and the various public utilities. All of these agencies recommended approval of the application.

- c) The uncontested evidence of record demonstrates that the size, width, shape, and orientation of the proposed lot are appropriate for the location of the subdivision.
- d) The uncontested evidence of record demonstrates that 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.
- e) The uncontested evidence of record demonstrates that 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") that the Stormwater Management Concept Plan meets MCDPS' standards.
- f) Aside from the issue of the waiver (over which the Board has no jurisdiction) and conformance to the master plan, the Record of this application does not contain any contested issues; and, therefore, the Planning Board finds that any future objection, which may be raised concerning additional substantive issue in this application, is waived.

IX. CONDITIONS OF APPROVAL

Finding Preliminary Plan No. 1-04109 in accordance with the purposes and all applicable regulations of Montgomery County Code Chapter 50, the Planning Board approves Preliminary Plan No. 1-04109, subject to the following conditions:

- 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 width at the subject property's frontage along:~~
 - a. US 29 (Burtonsville Boulevard) to provide a minimum of ~~50-100~~100 feet from the roadway centerline or a minimum of 100-200 feet from the established opposite right-of-way line, as determined by M-NCPPC and SHA.
 - b. b. Spencerville Road to provide a minimum of 60 feet from the roadway centerline or a minimum of 120 feet from the established opposite right-of-way line, as determined by M-NCPPC and SHA.
 - e. c. Burtonsville Access Road to provide up to 60 feet of right-of-way width as determined by MNCPPC and DPWT.

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:
 - b. 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.
 - c. 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 *and to locate a pathway from school site to shopping center access road in coordination with MCPS*. If additional forest retention is not feasible, provide documentation to demonstrate why the additional retention is not feasible.
 - d. 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~~ June 2, 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 plat to reflect a Category I conservation easement on all stream valley buffers and areas of forest conservation and afforestation.

This Preliminary Plan will remain valid for 36 months from its Initiation Date (as defined in Montgomery County Code Section 50-35(h), as amended). Prior to the expiration of this validity period, a final record plat for all property delineated on the approved preliminary plan must be recorded among the Montgomery County Land Records or a request for an extension must be filed.

* * * * *
[CERTIFICATION OF BOARD VOTE ADOPTING OPINION ON FOLLOWING PAGE]

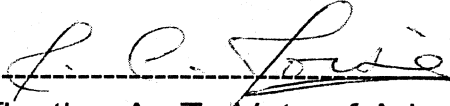
Approve
M-NCPPC

MF 3/13/06

Efficiency
Counsel

CERTIFICATION OF BOARD VOTE ADOPTING OPINION

At its regular meeting, held on **Thursday, March 16, 2006**, 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. 1-04109, Burtonsville Shopping Center.**



Certification As To Vote of Adoption
M. Clara Moise, Technical Writer



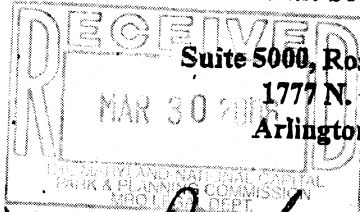
FAX COVER SHEET

RECEIVED
MAR 28 2006

Historical Office
Office of the Secretary of Defense

Suite 5000, Rosslyn Plaza North
1777 N. Kent Street
Arlington, VA 22209-2165

OFFICE OF THE CHAIRMAN
THE MARYLAND NATIONAL CAPITAL
PARK AND PLANNING COMMISSION



TO: Chairman Derek Berlyne (10) pages

FAX NUMBER: _____

PHONE NUMBER: _____

MESSAGE: Derek

CAC request for re-review of the
Burtonsville Slippy Ctr. Preliminary Plan record of
action is attached.

Stuart

FROM: Stuart I. Rochester

DATE: 3/27/06

PHONE: 703-588-7876

PAGES: 10
(including cover sheet)

FAX: 703-588-7572

E-MAIL: stuart.rochester@osd.mil

FAIRLAND MASTER PLAN CITIZENS ADVISORY COMMITTEE
2901 Greencastle Road Burtonsville MD 20866

March 24, 2006

Mr. Derick Berlage, Chairman
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring MD 20910

RE: Request for Planning Board Review of Matters Relating to Corrected Opinion and Preliminary Plan 1-04109 (Burtonsville Shopping Center)

Dear Chairman Berlage:

Thank you for receipt of the March 21 "corrected" opinion in the case of Preliminary Plan 1-04109 (Burtonsville Shopping Center). The Fairland Master Plan Citizens Advisory Committee, on behalf of other parties of record as well, including the Patuxent Watershed Protective Association and the Santini Road Property Owners Association (incorrectly identified as Santini Grove even in the corrected opinion), is exercising its right to request a new hearing or at least a review of several points either incorrectly or inadequately represented in the opinion record besides the two technical changes made on pages 10 and 13. Finding (f) on page 10 provides grounds for such a review based on the two issues (waiver and master plan conformance) cited as contested issues on which substantive questions may be raised subsequent to the original opinion.

Some further technical corrections need to be made for simple accuracy sake: the proper identification of the name of the Santini Road residents cited above, and on page 8, where the record reads "Mr. Rochester testified that this subject property was envisioned as part of the Fairland town center," in fact the reference should be to a Burtonsville town center. There are also misspellings, e.g., "pursuasive" on page 9.

However, the purpose of this appeal bears on the two substantive issues in question:

1) Master Plan Conformance

The page 9, VIII(a) finding of master plan conformance depends to a significant degree on the language of Conditions 12 and 14, which in the aftermath of the Board's decision has the applicants, staff, and even the Planning Board Chair making different statements and representations as to how prescriptive and enforceable those conditions are and even what they mean. Indeed, the applicant, 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—see attached page 2 of Dugan Feb. 7 letter to DPS and Fairland CAC Mar. 23 letter to DPS Director Robert Hubbard. That Planning Staff and Board seem unable or unwilling to address the applicant's ability to literally disregard the existing language in the record of opinion indicates plainly a need to incorporate some additional qualifying or clarifying language

Attachment A

to prevent an egregious loophole or circumvention of the Board's intent and to elucidate what evidently is not common enough understanding of the English-language usage of the words "bound" and "substantial conformance."

If "substantial master plan conformance" is not spelled out, the result is not just semantic confusion and ambiguity but the potential for serious unintended consequences, where requirements in the report presume different conditions (based on master plan expectations) than those that may subsequently apply. To cite but one example, Condition 13c. contains a requirement "to locate a pathway from school site to shopping center access road," a peculiar stipulation that may have presumed the benefit of connecting the elementary school to a neighborhood center. While some might question the wisdom of that idea under any circumstances, such a requirement becomes absolutely perverse, and downright dangerous, from a child safety and vulnerability standpoint, if instead of the neighborhood center concept in the master plan of which the school was construed as an integral part, the elementary school instead finds itself next door to a regional, transient, auto-dependent big box store.

The simple remedy is to add language to Condition 12, line 3, to state "Fairland Master Plan guidelines *that call for a neighborhood retail center . . .*" If there is any doubt what the Master Plan explicitly says on the subject, see attached pp. xiv-xvi of the — Attachment B — 1997 Fairland Master Plan document that specify **repeatedly neighborhood** retail on the Burtonsville site, as contrasted with bullet 7 on p. xiv that identifies where *regional* retail is supposed to occur in the planning area.

2) Waiver

This issue alone renders the hearing record fundamentally flawed. The record is replete with references to a waiver request that was a key point of discussion and indeed a condition of approval but that proved to be a presumptive error. That the mistaken assumption remains sprinkled throughout a "corrected" opinion is inexcusable and speaks volumes about the greater interest in expediency than in the integrity and accuracy of an official document of record.

More significant yet, the applicant's proposal and staff's embrace of the waiver mechanism to address setbacks (and the Board's decision based on the misinformation to simply hand off the matter to the Department of Permitting Services, which has jurisdiction over such waivers) effectively prevented further consideration by the Board of important setback concerns relative to the elementary school and watershed—which, as it turns out, may not get discussed at DPS either because it has said the Zoning Ordinance cited in the Planning Board opinion is silent on the issue and the supposed compliance requirement does not exist!

Given the absence of a site plan requirement in the C-2 zone, it is all the more imperative that maximum care, clarity, and accuracy be achieved in the record of opinion of a preliminary plan for this zone. In my testimony before the Board during the preliminary plan hearing on July 28, 2005, you may remember (or you may check the hearing record) I said: "Insofar as this proposal evidently will not go to site plan, and given the extraordinary importance of the site, with far-ranging impacts on the elementary

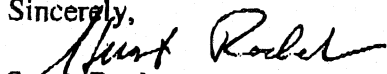
school, the Patuxent Watershed, and other retail in the area, as well as the surrounding residential community, it is all the more imperative that the Board give the plan careful scrutiny at this point in the process, which may be the only occasion to review it." Like Katrina, this was a disaster that was not only predictable, but predicted.

Where do we go from here? You have indicated to Delegate Karen Montgomery and others that you are relying on passage of ZTA 6-05 to address the problems of the C-2 zone, including concerns that citizens have raised about this case. And to the Planning Board's credit, it has firmly supported the proposal of a site plan requirement in the C-2 zone. We all hope that Councilmember Praisner will be successful in her effort to secure County Council approval of this much needed zoning text amendment. **However, if it does not pass, and its prospects for now appear uncertain, or for that matter if the subject property is grandfathered in any new legislation, the Board will have the burden of maintaining the integrity of the planning process in this instance within the existing procedures and regulations.**

We believe the Board has the opportunity, and indeed the responsibility, given the errors, discrepancies, and deficiencies that inhere in the opinion and that are cited above, to address and fix the problem(s) NOW in a timely and appropriate review of the original record. But in any event, even if the case gets bumped along to DPS and to building permit review, the Planning Board and Staff will inevitably have an ongoing role and key input in interpreting and conveying just what your opinion and conditions mean and require. In that event, the Master Plan committee, and the several impacted parties of record, and citizens everywhere concerned about the integrity of process, particularly in the wake of Clarksburg and the Board's expressed commitment to greater scrutiny and rigor, will be looking for assurance that plans proffered the community and Planning Department in order to secure approval—whether in a C-2 zone or in a residential zone, whether in the case of a site plan requirement or conditions of approval in a sole preliminary plan requirement—can not be transparently flouted if citizens are to have any confidence in your or any other County planning administration. Fix it now or fix it later. But at the end of the day this episode will be a notable success, or a shameful embarrassment as well as a planning disaster for the East County.

Please share this letter with your colleagues and please let the CAC know the Board's decision.

Sincerely,



Stuart Rochester

Chairman, Fairland Master Plan CAC

cc. Councilmember Marilyn Praisner
Michelle Rosenfeld, M-NCPPC

1) Waiver Request

The Petitioner requests a complete waiver from the parking, driveway, landscaping and screening setback requirements (i.e., a zero setback) along the entire interior split zoning line as depicted in red and described in the Notes on the Illustrative Plan (the "Plan") which is submitted as part of this Petition. The waiver would exempt the areas shown in red from all of the referenced setback requirements, regardless of whether such areas are or may become front, side or rear yards. No waiver from any common property line with adjoining properties is being sought. As explained at Section 4), the C-2 zone, rather than the RC zone, setback standards apply. Nonetheless, regardless which zone's standards apply, the Petitioner's request for a zero setback is the same.

The Petitioner requests the waiver to: (1) best address the practical circumstances underlying the use of the property as a retail center in the Burtonsville area; and (2) to best utilize the C-2 zoned land's shape.

In the Burtonsville area, multi-story retail buildings and structured parking are not possible. In all likelihood, the stores will be one (or at most two) story structures. The businesses and the shoppers will depend upon surface parking so that coming and going is perceived to be safe and convenient. Thus, the center will be predominantly horizontal. Using the surface area of the C-2 zoned land most efficiently will be critical.

Avoiding unnecessary and wasteful use of the horizontal plane is the purpose of the waiver application. Setbacks are unnecessary, and should be avoided, in areas between the zoning line and the property line, where: (1) significant distances exist between the adjoining uses and the C-2 zoned land; and/or (2) the areas between the zoning line and the property line are already wooded and will be subject to permanent conservation easements. (In the one area not as wooded, but wooded nonetheless along its perimeter -- the northeasterly corner of the property zoned RC -- the waiver is proper because it is so wooded, and it will not be used for residential purposes, in the long term.²) Further if setbacks were also imposed along the irregularly curved RC/C-2 zoning line³ in the rear, the arching shape, plus setbacks, would cause a ripple

² An existing residence is being rented by a couple who sold the property to the Petitioner. They have plans to leave in the near future. The property is not intended to be used for residential purposes in the long term.

³ The split zoning line shows one of the Master Plan's alternative alignments for the loop road. The chosen loop road will be located elsewhere. It is now referred to as the "Burtonsville Access Road." It is planned to run generally between the stores fronting on Rte. 198 and the Burtonsville Elementary School, and to cut across a portion of the Petitioner's property near Rte. 198. The zoning line around the rear of the center is curved, because such loop road alternative would have had to accommodate the curve of a vehicle's turn, at a certain speed. If the loop road had run behind the center, it would have been a public right of way. Also, it would have been constructed on the RC zoned land, just outside of the C-2 zoned land. The Master Plan recommended that it be located there: "Add a loop road adjacent to the outer perimeter of the new C-2 zoned land in the rear of the center generally running from the southwestern corner of the site and exiting at US 29." (Please the Fairland Master Plan at page 72.) Accordingly, the Petitioner would have then used the loop road for its rear access. Consequently, the lack (cont'd)

FAIRLAND MASTER PLAN CITIZENS ADVISORY COMMITTEE
2901 Greencastle Road Burtonsville MD 20866

March 23, 2006

Mr. Robert C. Hubbard
Director, Department of Permitting Services
255 Rockville Pike, 2nd Floor
Rockville MD 20850-4166

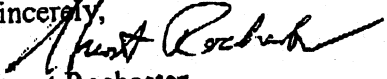
Dear Mr. Hubbard:

Thank you for your letter of March 3 updating the Fairland Master Plan Committee on the Burtonsville Shopping Center Petition for a Setback Waiver. The Master Plan Committee, and the many interests—including the Burtonsville Elementary School adjacent to the shopping center and the Patuxent Watershed Protective Association—impacted by and closely following this case greatly appreciate the care and scrutiny thus far exhibited by the Department of Permitting Services in the handling of the several issues relating to this problematic site.

This letter is to remind DPS of the importance of the **parking facility** matter in particular, whether a setback waiver is involved or not (as you know, there has been considerable misinformation and confusion regarding the latter). The shopping center owner has received preliminary plan approval with density (capacity) based on his showing **structured parking** in his plan. Without that structured parking, especially with the larger box he has in mind, upwards of 1,000 or more parking spaces would spill onto the site, thus dramatically reducing and perhaps rendering physically impossible the other elements shown in his plan that enable him to fulfill the condition of “substantial master plan conformance” and that contributed to approval of the plan by the Planning Board (and indeed its support by the Master Plan Committee). Incredibly, in Mr. Jones’s attorney’s February 7, 2006 request to your office for a parking facility setback waiver, on page 2 (see attachment) he incidentally states “*in the Burtonsville area, multi-story buildings and structured parking are not possible.*” The letter thus directly contradicts a key element that he showed in his plan before the Planning Board to support his density and ability to meet the conditions of approval, including a pedestrian-friendly center and substantial conformance to master plan guidelines. We find this deeply troubling.

Having jurisdiction over the parking facility review as well as any waiver petition, your Department, we trust, will hold the applicant to the plan upon which his approval was based. We wish to receive timely notification by DPS of its review of the developer’s parking facility plan, which we understand occurs prior to building permit. We and our residents, who are concerned about so many aspects of what appears to be a classic “bait and switch” attempt, will look to DPS to enforce the plan proffered the community and the Planning Board and to not allow a transparent flouting of the integrity of the planning and permitting processes.

Sincerely,


Stuart Rochester
Chairman, Fairland Master Plan CAC

cc. Councilmember Marilyn Praisner
Councilmember Steve Silverman
Councilmember Nancy Floreen
Derick Berlage, Chairman, Montgomery County Planning Board
Richard Weaver, M-NCPPC
Michelle Rosenfeld, M-NCPPC

PLAN HIGHLIGHTS

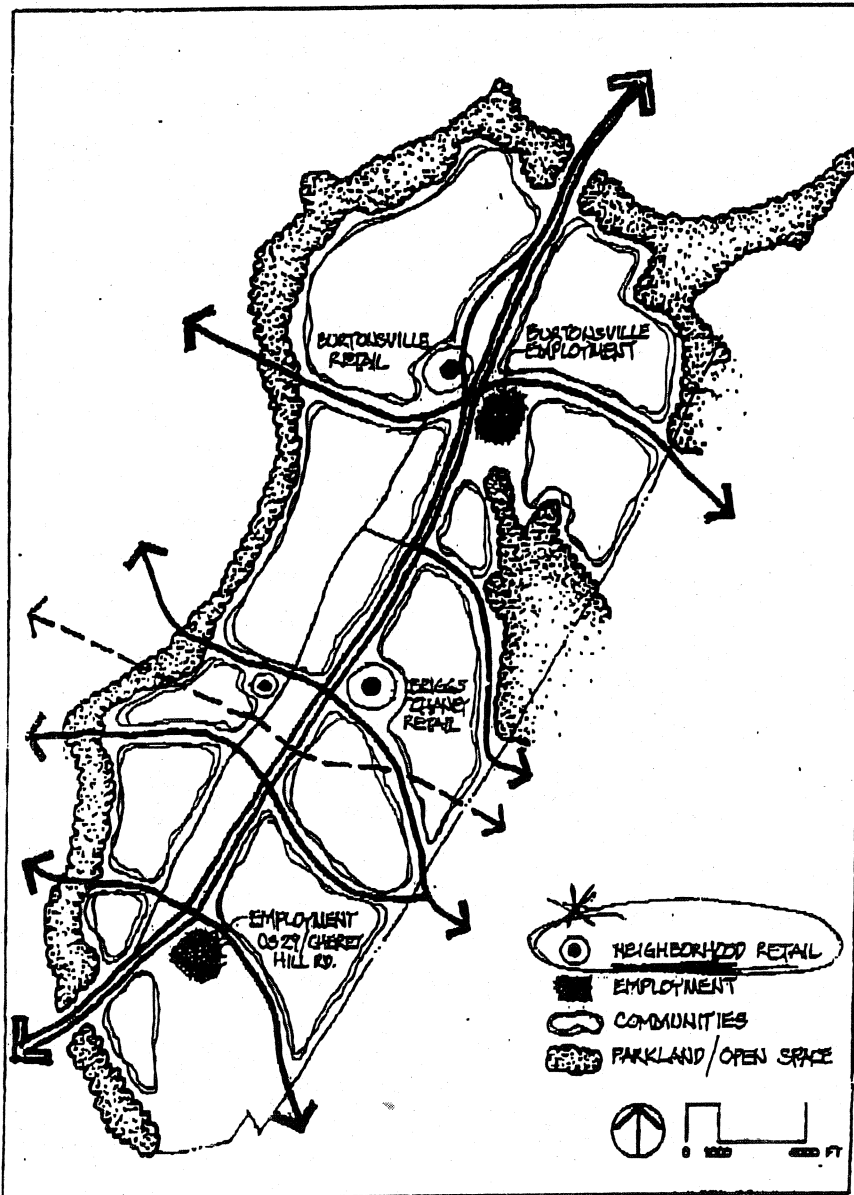
COMMUNITIES AND CENTERS

This Master Plan reinforces the existing development patterns in the Fairland Master Plan area with appropriate adjustments based on the 1993 General Plan Refinement and the goal of balancing land use against available facilities and infrastructure.

The Fairland Master Plan has community building as one of its key components; recognizing and reinforcing each community's unique character and identity and ensuring that local centers serving the communities are attractive, functional, safe, and accessible. The communities of Fairland are composed of new neighborhoods adjacent to mature neighborhoods, served by local shopping, schools, public services, and parks. The Fairland Master Plan implements the policies of the General Plan Refinement, which identified the Fairland Master Plan area as primarily residential in nature and within the Suburban Communities and the Residential Wedge.

This Plan:

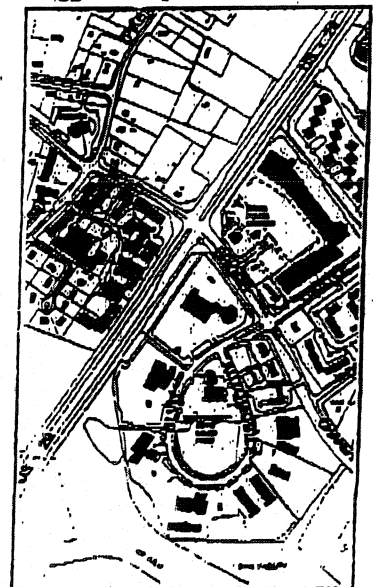
- Increases the potential for a greater percentage of single-family detached homes in undeveloped or underdeveloped areas within Fairland while maintaining a mix of housing types.
- Recommends a golf course community that straddles the Montgomery and Prince George's Counties' boundary and incorporates the revitalization of the public Gunpowder Golf Course, located off Gunpowder Road.
- Recommends redevelopment of the Great Oaks site with an institutional use or as a residential subdivision by using Transfer of Development Rights (TDRs).
- Removes TDR development options wherever environmental and access constraints limit using increased densities.
- Recommends streetscaping and sidewalk improvements in the Briggs Chaney Road and Burtonsville neighborhood retail areas.
- Recommends overlay districts to encourage diversification of uses in the US 29/Cherry Hill Road Employment Area and to provide opportunities for redevelopment in the Burtonsville Industrial Area.
- Recommends a new low-intensity regional shopping center in a 42-acre portion of the West*Farm Technology Park.
- Recommends sidewalk, trail, and roadway connections between new and existing communities.



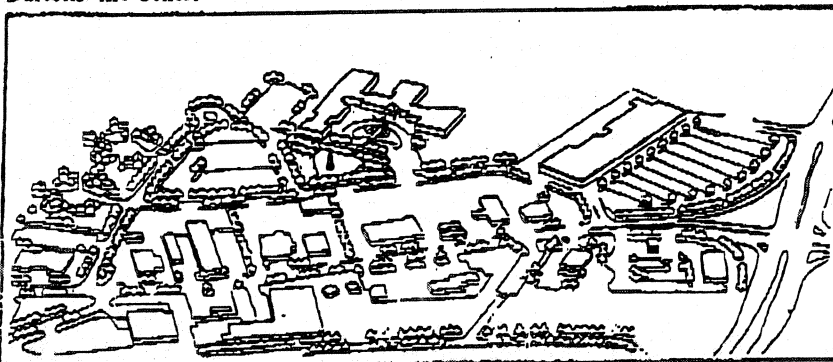
Golf Course Community



Briggs Chaney Center



Burtonsville Center



The Fairland Master Plan recommends enhancing mobility by transportation system with a wide range of alternatives.

The Plan identifies right-of-way for grade-separated interchange improvements on US 29 and gives priority to east-west travel. The Plan underscores the need for pedestrian safety and access to local facilities and recommends a number of sidewalk improvements in commercial centers, in the residential communities, and along the major roads. Emphasis is placed on safe and attractive transportation improvements that enhance local circulation while improving all modes of travel within and through the communities and centers of Fairland.

This Plan:

- Recommends grade-separated interchanges for all east-west crossings of US 29 and the need to reserve right-of-way for all improvements.
- Provides improved traffic circulation for through and local traffic.
- Recommends a rear access road in the Burtonsville neighborhood retail area to improve circulation along MD 198.
- Recommends improved access to the Burtonsville Elementary School.
- Recommends streetseaping, sidewalks, and pedestrian crossings in the Briggs Chaney Road and Burtonsville neighborhood retail areas.
- Recommends extension of existing local and regional bus service.
- Recommends a Transportation Demand Management Program to encourage transportation alternatives to the single-occupancy automobile, including car pooling and mass transit.
- Provides a safe and convenient bikeway network that connects to local community centers, services, and recreational facilities and expands commuting opportunities for biking.
- Expands the system of sidewalks and walkways to improve access to public transit, commercial centers, schools, parks, and places of employment.

March 30, 2006

Mr. Derrick Berlage
Chairman, Montgomery County Planning Board
M.N.C.P.P.C.
8787 Georgia Avenue
Silver Spring, MD 20910-3760

Dear Mr. Berlage,

I write on behalf of the Patuxent Watershed Protective Association, Inc., a party of record in the case of Preliminary Plan 1-04109 (Burtonsville Shopping Center).

The petitioner's application included a request for a "waiver" of the setback requirement. The Board must have agreed with the need for a waiver because much of the testimony and discussion centered on that issue. It was my main concern. I am now told there is uncertainty about the requirement. Enclosed for quick reference is a copy of a March 17 letter to Ms. Michelle Rosenfeld (cc: Mr. Derrick Berlage) outlining my futile attempt to get answers to a couple of seemingly simple questions. Now I face the deadline for response to the "corrected" Opinion in this case and still have no confidence that the setback question has been adequately addressed.

Therefore, I respectfully request a rehearing of this matter if that is what it takes to inform concerned citizens of what to expect and to create a record that is factual and unambiguous.

Thank you for your consideration.

Sincerely,

A. Cleveland Brown, V.M.D.
President, Patuxent
Watershed Protective
Association, Inc.

Enclosure

ATTACHMENT FIVE

March 17, 2006

Ms. Michelle Rosenfeld
Legal Counsel
Montgomery County Planning Board
M.N.C.P.P.C
8787 Georgia Avenue
Silver Spring, MD 20910-3760

Dear Ms. Rosenfeld,

On February 14, at 1:30 PM, I met with you and others at the Planning Board offices as a person of record in the matter of the Burtonsville Shopping Center Case. At that time, you agreed to send me copies of law defining the difference between a "waiver" and a "variance." To date, I have not received same. Oversights happen and I assume that to be the case.

Additionally, I ask that you also inform me of the "setback" requirements in the above cited case and the law pertinent to those setback requirements.

If there are problems responding to my requests, please advise me.

Thanks for your consideration.

Sincerely,

A. Cleveland Brown, V.M.D.

cc: Mr. Derrick Berlage
Chairman, Montgomery County Planning Board
M.N.C.P.P.C.
8787 Georgia Avenue
Silver Spring, MD 20910-3760

**SHULMAN
ROGERS
GANDAL
PORDY &
ECKER, P.A.**

Lawrence A. Shulman
Donald R. Rogers
Karl L. Ecker†
David A. Pordy +
David D. Freishtat
Martin P. Schaffer
Christopher C. Roberts
Edward M. Hanson, Jr.
James M. Kochanski
James M. Kefauver †
Robert B. Canter
Daniel S. Krakower
Kevin P. Kennedy
Nancy P. Regelin
Samuel M. Spiritos +
Martin Levine
Worthington H. Talcott, Jr. +
Fred S. Sommer
Morton A. Fallor

Alan S. Tilles
James M. Hoffman
Michael V. Nakamura
Jay M. Eisenberg +
Douglas K. Hirsch
Ross D. Cooper
Glenn C. Etelson
Karl J. Protol, Jr. +
Timothy Dugan +
Kim Viti Fiorentino
Sean P. Sherman +
Gregory D. Grant +
Jacob S. Frenkel*
William C. Davis, III
Rebecca Oshway
Alan B. Sternstein
Michael J. Froehlich
Sandy David Baron
Christine M. Sorge

Michael L. Kabik
Jeffrey W. Rubin
Simon M. Nadler
Scott D. Muscles
Karl W. Means
Michelle R. Curtis*
Mimi L. Magyar
Glenn W.D. Golding +
Michael J. Lichtenstein
Bruce A. Henoch
Jeremy W. Schulman
William F. Askinazi
Matthew M. Moore +
Jeannie Eun Cho
Debra S. Friedman*
Eric J. von Vorys
Gary I. Horowitz
Heather L. Howard +
Stephen A. Metz

Hong Suk "Paul" Chung
Patrick J. Howley
Carmen J. Morgan*
Kristin E. Draper*
Heather L. Spurrier*
André L. Brady
Melissa G. Bernstein
Patricia Teck
Jacob A. Ginsberg
John D. Sadler
Marc E. Pasekoff
Erin J. Ashbarry
Alexis H. Peters*
Meredith S. Abrams
John D. Adams
Kristen Munger*
Michael T. Ebaugh
David B. Kramer
Lauren J. Pair

Anne Marie Vassallo*
Matthew D. Alegi*
Joann J. Wang* +
Christopher W. Poverman
Of Counsel
Larry N. Gandal
Jeffrey A. Shane
Leonard R. Goldstein
Richard P. Meyer*
Larry A. Gordon*
David E. Weisman
Lawrence Eisenberg
Deborah L. Moran
Scott D. Field
Special Counsel
Philip R. Hochberg*
Maryland and D.C. except as noted:
* Virginia also ° D.C. only
• Maryland only † Retired

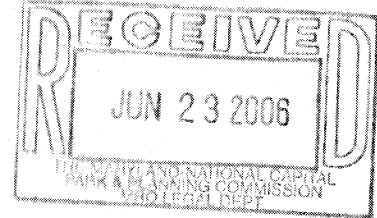
Writer's Direct Dial Number:

(301) 230-5228
tdugan@srgpe.com
(301) 230-6576
lgordon@srgpe.com

June 23, 2006

Hand Delivered

The Honorable Derick P. Berlage, Chairman
Members of the Planning Board
The Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910



Re: Preliminary Plan 1-04109
(Burtonsville Shopping Center)
Opposition to Requests for Review

Dear Chairman Berlage and Members of the Board:

On behalf of our client BMC Property Group ("BMC"), we oppose the March 24, 2006 request of Mr. Stuart Rochester¹ and the March 30, 2006 request of Mr. A. Cleveland Brown² for further review of Preliminary Plan 1-04109. By Corrected Opinion, mailed March 21, 2006, the Planning Board corrected its December 19, 2005 final Preliminary Plan Opinion to address two minor technical items – right of way dimensions and the date of a referenced letter. Neither correction is raised as grounds for reconsideration in either letter. Rather, Mr. Rochester and Mr. Brown appear to be using the corrections as a pretext for reopening the entire application to re-argue issues that are not new.

¹ Mr. Rochester's letter is captioned as "Request for Planning Board Review of Matters Relating to Corrected Opinion and Preliminary Plan 1-04109." Mr. Rochester is Chairman of the Fairland Master Plan Citizens Advisory Committee.

² Mr. Brown's letter has no caption or letterhead, but states that it is submitted "on behalf of the Patuxent Watershed Protective Association, Inc."

Both Mr. Rochester and Mr. Brown failed to file a request for reconsideration of the Planning Board's Opinion that was mailed on December 19, 2005. At most, through their recent letters, they could have asked the Planning Board to reconsider its two technical corrections, but they did not. The time has long since passed to request reconsideration of the Opinion. Accordingly, we respectfully recommend that their requests be rejected. A fuller discussion of our position follows.

As addressed in detail in Section 4 of this letter, even if their complaints were not time-barred, they have failed to show any good cause or to explain how their assertions are somehow materially different from the evidence provided during the proceedings. (See, Planning Board Rules of Procedure, p. 5, Sec. 11-A(2)). Further, even if they had provided such information in their letters, "the fact that a party raises an issue worthy of reconsideration does not itself require the Board to reconsider a prior action." (See, Planning Board Rules of Procedure, p. 5, Sec 11-A).

Finally, based on the Record in the instant case, the Board itself should not find any reason, on its own accord, to reopen its decision. Section VIII, f), p. 10, of both the final Opinion and the Corrected Opinion should not be upended. Both of these provisions read as follows:

Aside from the issue of the [parking and driveway setback] waiver (over which the Board has no jurisdiction) and conformance to the master plan, the Record of this application does not contain any contested issues; and, therefore, the Planning Board finds that any future objection, which may be raised concerning additional substantive issue in this application, is waived. (Emphasis added.)

1) Background

A chronology of relevant dates and actions relating to the approval of Preliminary Plan No. 1-04109 ("Preliminary Plan") is as follows:

1. 7/22/2005 - Planning Board Staff Report.
2. 7/28/2005 - Public hearing and Planning Board's unanimous approval.
3. 12/19/2005 - Planning Board Opinion mailing date.
4. 3/16/2006 - Planning Board unanimously adopts the Corrected Opinion.
5. 3/21/2006 - Planning Board Corrected Opinion mailing date (the "Corrected Opinion").
6. 3/24/2006 - "Request for Review" letter by Mr. Rochester, stamped received by the Planning Board on 3/28/2006.

7. 3/30/2006 - Letter by Mr. Brown representing the Patuxent Watershed Protective Association, Inc. (We do not know the date of receipt by the Planning Board).

The Corrected Opinion contained two changes to its Conditions of Approval:

- (a) Condition No. 2 (Op., p. 10); and (b) Condition No. 16 (Op., p.13). The corrections were as follows:

First correction:

- 2) 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:

- a. US 29 (Burtonsville Boulevard) to provide a minimum of ~~50-100~~100 feet from the roadway centerline or a minimum of 100-200 feet from the established opposite right-of-way line, as determined by M-NCPPC and SHA;⁵
- b. b. Spencerville Road to provide a minimum of 60 feet from the roadway centerline or a minimum of 120 feet from the established opposite right-of-way line, as determined by M-NCPPC and SHA.
- e. c. Burtonsville Access Road to provide up to 60 feet of right-of-way width as determined by M-NCPPC and DPWT.

Second correction:

- 16) Compliance with the conditions of the MCDPS stormwater management approval dated ~~July 13~~ June 2, 2005.

2) The Approved Preliminary Plan Is Beyond The Time Limitation For Reconsideration Based on the Record

The alleged rights of Mr. Rochester and Mr. Brown to request, in essence, the Board's full re-review of its final decision have long since expired. The Opinion was mailed on December 19, 2005. It was the Planning Board's final decision. It was subject to a request for reconsideration for a period of 10 days after its mailing.³ Additionally, "A request for reconsideration shall not operate to extend any appeals times provided by applicable law."⁴ The two (2) minor technical changes reflected in the Board's Corrected Opinion have not been challenged and would not merit Board reconsideration. Thus, the reconsideration requests of Messrs. Rochester and Brown are time-barred.

³ See, Board's Rules of Procedure (Revised January 13, 2005), p. 5, Sec. 11-A "Reconsideration."

⁴ See, Planning Board's Rules of Procedure (Revised January 13, 2005, p. 5, Sec. 11-D).

3) If Any Review Is Allowed, It Is Limited To The Two Minor Modifications Made In The Corrected Opinion

Assuming, for the sake of argument, that the Planning Board chooses to accept either reconsideration request under the current circumstances, for the reasons discussed above, the reconsideration would be limited to the two technical corrections. (Yet, in Mr. Rochester's own letter, he concedes that the changes were mere "technical changes.") Neither Mr. Rochester nor Mr. Brown raised any objection to the two corrections. Consequently, they have raised no issues that are still subject to Board reconsideration.

This interpretation was affirmed in Nutter v. City of Baltimore, 230 Md. 6, 185 A. 2d 360 (1962) wherein, the Court of Appeals stated:

... an appeal or attempted appeal from subsequent action of the Board, even though related to the original action sought to be reviewed, will lie only as to the validity of the subsequent action and not relate or reach back to the original action.
(Emphasis added.)

Id. at 364, citing Maryland Clothing Manufacturing v. Baltimore, 207 Md. 165, 113 A. 2d 743; Fleischer v. Murdock Sup., 62 N.Y.S. 2d 417; Hempstead v. Board of Zoning Appeals of Town of Hempstead, 245. App. Div. 750, 280 N.Y.S. 448.

To allow the Board's final findings, conclusions and conditions to be resurrected for scrutiny some six (6) months after their finality would make a mockery of the Planning Board's Rules and Maryland Rules for concluding an administrative preliminary plan of subdivision proceeding. In essence, it would undermine the ability to make timely technical corrections to a Board Opinion for fear of reopening an entire matter to review.

Thus, from the standpoint of Maryland jurisprudence, due process, and simple fairness, the Planning Board must find the requests for reconsideration untenable.

4) All Issues Raised By Mr. Rochester and Mr. Brown Have Been Fully and Fairly Vetted

Section 11-A of the Planning Board's Rules of Procedure (as Revised January 13, 2005) provides,

A request to reconsider may only be made by a party of record, must be in writing, and unless waived by the Board for just cause must be received by the Planning Board within 10 days of the date of final decision. The Board may review a request to reconsider, provided sufficient grounds are demonstrated...

* * *

The fact that a party raises an issue worthy of reconsideration does not itself require the Board to reconsider a prior action.

Neither gentleman contests what Mr. Rochester expressly refers to as the "technical changes," that were made to Conditions No. 2 and No. 16 in the Corrected Opinion. Rather, they seek to have the Board revisit its unchanged and final (and thus beyond reconsideration) determinations on other matters. In effect, they are seeking another bite at the subdivision apple to which they are not entitled.

Mr. Rochester asks the Board to review two (2) issues: (1) Master Plan Conformance; and (2) Setback waiver as being contrary to finding VIII (f) in the Opinion (and as unchanged in the Corrected Opinion). Specifically, he cites concerns with language contained in the Board's Finding VIII(a) as it may relate to Conditions No. 12, 13(c) and No. 14. The relief he seeks is to change the language of Condition No. 12, line 3 to state, "which will be in substantial conformance with the Fairland Master Plan guidelines that call for a neighborhood retail center..." as a way of clarifying, after the fact, what he posits to be the proper interpretation of the Fairland Master Plan and what the Board meant in its findings and conditions when referring to "substantial conformance" to the Fairland Master Plan. Clearly, such further action by the Board is no longer permissible.

As noted, Mr. Brown states that there is uncertainty about the need for a setback waiver and concludes by requesting a "rehearing of this matter." Once again, the request for rehearing of the Preliminary Plan is now well beyond the Board's jurisdiction, even assuming that the setback waiver was within the Board's jurisdiction, which it is not.

a) Master Plan Conformance.

Mr. Rochester wants the Board's Condition No. 12 to be changed to state "Fairland Master Plan guidelines that call for a neighborhood retail center." However, in accordance with the recommendations of the Master Plan, the Shopping Center zoning was reaffirmed and the C-2 zoned area was expanded. The C-2 zone is the "General Commercial" zone classification. It is not the neighborhood retail zoning classification. Despite the C-2 zoning designation, Mr. Rochester would have redevelopment of the property, through interpretation of the interrelationship between the Master Plan and the Zoning Ordinance, restricted to the "Convenience Commercial" uses of the C-1 zone.

The Purpose Clause of the C-2 zone expressly permits, "general commercial uses representing various types of retail trades, businesses and services for a regional or local area." (See, Sec. 59-C-4.350), (Emphasis added). In contrast, the Purpose Clause of the C-1 zone states that it is "to provide locations for convenience shopping facilities in which are found retail commercial uses which have a neighborhood orientation and which supply necessities usually requiring frequent purchasing with a minimum of consumer travel." (See, Sec. 59-C-4.340), (Emphasis added.)

Having legislatively zoned the property C-2, the use cannot be administratively restricted to preclude development and uses expressly allowed in that zone. As held in Board of County Commissioners of Washington County v. H. Manny Holtz, 65 Md. App. 574, 501 A. 2d 489 at 493 (1985), even where conditional zoning is allowed by statute (which is not the case in Montgomery County), limitation or restriction of the uses permitted on a tract of land within a given zone violates uniformity requirements and is "a usurpation of the legislative function." (See also, Mayor and Council of Rockville v. Rylyns Enterprises, 372 Md. 514, 814 A. 2d 469 (2002)).

b) Clear Representation that Building Footprints Were Illustrative

That the building layout is conceptual is consistent with Section 50-34(e)(1) of the Subdivision Ordinance which expressly provides that shopping centers and other enumerated uses "...shall be indicated for such use on the preliminary plan, together with scaled dimensions and approximate area of each site. Nothing herein shall be construed to limit actual development to such uses." (Emphasis added.)

Consistent with Sec. 50-34(e)(1), the July 22, 2005 Staff Report states, "staff did request and receive an Illustrative Circulation Plan . . ." and "the layout of the buildings on the property is conceptual and is shown as a number of building pads within the parking lots to provide flexibility for future tenants." (Emphasis added), (Staff Report, p. 4.) Attachment "C" to the Staff Report (the Community-based Planning Report from Ms. Piera Weiss) states at p. 2 thereof that, "the applicant has stated during various meetings with staff and the public that the layout is conceptual and may not be built exactly as shown." (Emphasis added.)

Further, as gleaned from the audio tape of the Board's July 28, 2005 preliminary plan public hearing and the unofficial written transcript of the proceedings dated April 5, 2006 prepared by Deposition Services, Inc. of Rockville, Maryland, (attached as Exhibit 1), there were at least seven (7) separate confirmations by Staff, Board members and the Applicant that the proposed preliminary plan concept for the arrangement of the buildings was conceptual and subject to change, including the supporting parking. These statements are quoted below.

- a) TR., p. 4 – Mr. Weaver (Staff): “This is a Preliminary Plan Review. This is the only review that the Board will have. This will not proceed to the Site Plan stage. And as you may know, we do what we can at Preliminary Plan. We’re really looking at setting the APF review, transportation review, we’re looking at the access points, we’re looking at setting the square footage, and we’ve done what we can with this Preliminary Plan.... Given our limited review, what we managed to do was have the applicant come up with this illustrative circulation plan.”
- b) TR., p. 7 – Mr. Weaver (Staff): “And again, we are at Preliminary Plan. The layout of this site could change...”
- c) TR., p. 31 – Commissioner Bryant: “Also, would you [Staff] respond to the point of clarification that in light of the fact that this is illustrative, and that also is under the control of the applicant, that those buildings can be re-sited, they can be reduced in size, or they can be reconfigured so that you still get the same total square footage...”
- d) TR., p. 33 – Ms. Weiss (Staff): “I believe that any configuration, since we know that this is conceptual, any change in it would have a whole host of changes. And this is a maximum, what they are showing here.”
- e) TR., p. 39 – Mr. Jones (Applicant): “Will it [the design] change? Yes, there will be changes here as we identify particular tenants for the site.”
- f) TR., p. 42 – Mr. Jones (Applicant): “If, in fact, I reduce the density to the degree that some of the community members ultimately are looking for, and that is very possible, then I’m going to be more dependent on surface parking.”
- g) TR., p. 43 – Commissioner Perdue: “How about, given that this is a Preliminary Plan, can they just mush all those boxes together and make one really big box?”

- Mr. Dugan (Applicant’s Attorney): “They have flexibility here to do that.”

Despite these multiple confirmations, Mr. Rochester now asserts that the conceptual layout was never discussed. Not only were they discussed at length, but the very essence of an illustrative plan is that it is subject to change. (Again, a preliminary plan application does not establish building configurations.) As confirmed above, it is beyond question that the internal layout provided for subdivision review were always intended to be illustrative. Given that both Messrs. Rochester and Brown attended and actively participated in the public hearing, their comments are surprising.

c) Setback Waivers Were Already Considered

Regarding the issue of parking and driveway setback waivers, Mr. Rochester expressly acknowledges at p. 2, of his letter that it is the Department of Permitting Services "which has jurisdiction over such waivers," (a fact made clear to all parties at the Board's July 28, 2005 public hearing, and reiterated at Condition No. 15 of both the Opinion and Corrected Opinion). Indeed, as stated by Mr. Weaver (Staff) at the hearing, "Since we [the Staff and Board] do not look at a Parking Facilities Plan as part of our Preliminary Plan, the waiver will be resolved by the Director of DPS as part of the Parking Facilities Plan, which the applicant will be required to prepare as part of the building permits." (TR., p. 7). Regardless, Mr. Rochester now wants the Board to revisit the issue to once again address concerns he raises about the Burtonsville Elementary School, the Patuxent Watershed, other retail in the area, and the surrounding residential community. Mr. Brown seeks reconsideration of the same issue based solely upon his vague assertion that, "I am told that there is uncertainty about the requirement." In effect, they both want a new hearing and, apparently, want to impose site plan – type review on a preliminary plan of subdivision.

As Mr. Weaver clearly stated at the outset of the public hearing, review in a subdivision case is limited to addressing adequacy of public facilities, transportation, access and square footage. (TR., p. 4). Further, as a C-2 zoned property, no site plan review or approval is applicable to the shopping center. Should the Board acquiesce to the requests of Mr. Rochester and Mr. Brown, it would set a precedent whereby it would never reach finality in a preliminary plan case simply because all issues would be subject to continuing, unlimited review.

In sum, the requests for reconsideration of Mr. Rochester and Mr. Brown are time-barred as to the Preliminary Plan Opinion mailed December 19, 2005. Further, even if they were not, they have raised no new issues. They do not request reconsideration of the two minor technical changes made in the Corrected Opinion. The requests must be denied.

5) No Basis Exists for the Planning Board to Revisit its July 28, 2005 Decision

Apart from the late and unfounded assertions made by Messrs. Rochester and Brown, the Planning Board has no grounds in the instant case for reopening the preliminary plan approval on its own. First, the Board's Rules of Procedure regarding reconsideration only allow for a party of record to request such action and do not allow

the Board to act sua sponte. Additionally, as previously recited at the outset of this letter, Section VIII, f), p. 10 of both the Board's final Opinion and Corrected Opinion state,

Aside from the issue of the [parking and driveway setback] waiver (over which the Board has no jurisdiction) and conformance to the master plan, the Record of this application does not contain any contested issues; and, therefore, the Planning Board finds that any future objection, which may be raised concerning additional substantive issue in this application, is waived." (Emphasis added.)

Assuming, arguendo, that the Board's own Rules and/or express conditions of approval are not dispositive of this issue, there are no judicial grounds for reopening the matter. There has been no prerequisite fraud, irregularity or mistake (See, Miles v. McKinney, 174 Md. 551, 564, 199 A. 540, 546 (1938); Schultze v. Montgomery County Planning Board, 230 Md. 76, 80-81, 185 A.2d 502, 504-05 (1962)). Maryland case law makes clear that the power of a board to revise its judgments "is not one which may be exercised arbitrarily, but only where there is justification and good cause." Id. at 82.

Further, "Maryland courts have narrowly defined and strictly applied the terms fraud, mistake and irregularity, in order to ensure finality of judgments." Thacker v. Hale, 146 Md. App. 203, 217, 806 A.2d 751, 759 (2002). The term "irregularity" relates to process or procedure, rather than error in truth or accuracy. Weitz v. McKenzie, 273 Md. 628, 631, 331 A.2d 291, 293 (1975). "Mistake" is limited to those relating to jurisdictional power in the context of revising judgments. Thacker at 225. "Fraud" in this context requires an action based on mistaken belief induced by an applicant's misrepresentations. Calvert County Planning Commission v. Howlin Realty Management, Inc., 364 Md. 301, 325, 772 A.2d 1209, 1223 (2001).

None of the aforementioned factors are present or alleged in Preliminary Plan Case No. 1-04109. That the Preliminary Plan building layout was conceptual and illustrative was made clear in: (i) the Staff report; (ii) meetings between the Applicant and neighbors and (iii) numerous statements made by Staff, the Board and the Applicant at the Planning Board public hearing attended and participated in by both Messrs. Rochester and Brown. There was no intent to mislead or defraud and no deception occurred. To the contrary, the Applicant and Staff went out of their way to make the conceptual nature of the application crystal clear to all parties. No mistakes were made and no irregularity arose. As Mr. Weaver clearly enunciated, the scope of Planning Board review of a preliminary plan is limited and the extent of that scope of review was followed by the Board. It does not include the size of building footprints.

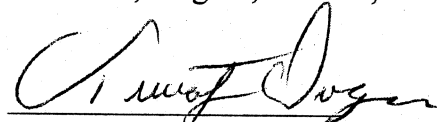
In sum, the Planning Board may not revisit its prior opinions which were valid when issued. As enunciated in McKinney at 566,

otherwise there would be no finality to the proceeding; the result would be subject to change at the whim of members or due to the effect of influence exerted upon them, or other undesirable elements tending to uncertainty and impermanence.

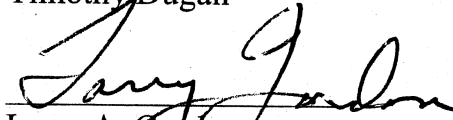
6) Conclusion

As fully supported by the facts, the law, and the Board's own Rules of Procedure, we respectfully request that the Planning Board deny any and all requests for reconsideration.

Respectfully submitted
Shulman, Rogers, Gandal, Pordy & Ecker, P.A.,



Timothy Dugan



Larry A. Gordon

Attorneys for BMC Property Group

cc: Debra Daniel, Esq.
Ms. Faroll Hamer
Ms. Rose G. Krasnow
Mr. Richard Weaver
Ms. Piera M. Weiss
The Honorable Steven Silverman
The Honorable Nancy Floreen
The Honorable Marilyn J. Praisner
Mr. Christopher T. Jones
Mr. Stephen P. Tawes
Mr. Stuart Rochester
Mr. A. Cleveland Brown

EXHIBIT 1

Unofficial Typed Transcript of Planning
Board Proceeding
Preliminary Plan 1-04109

July 28, 2005

Burtonsville Shopping Center

1 THE MONTGOMERY COUNTY PLANNING BOARD OF
2 THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

3
4 Burtonsville Shopping Center #10

5 Preliminary Plan 1-04109

6
7 T R A N S C R I P T
8 O F
9 P R O C E E D I N G S
10

11
12
13 July 28, 2005

14 VOLUME 1 of 1
15

16 BEFORE:

17 COMMISSIONER ALLISON BRYANT

18 COMMISSIONER JOHN ROBINSON

19 VICE-CHAIRMAN WENDY PERDUE

20 CHAIRMAN DERICK BERLAGE

21 COMMISSIONER MEREDITH WELLINGTON
22
23
24
25

EXHIBIT 1

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, MD 20852
Tel: (301) 881-3344 Fax: (301) 881-3338
info@DepositionServices.com www.DepositionServices.com

COPY

OTHERS PRESENT:

RICH WEAVER, Development Reviews
PIERA WEISS, Community Based Planning
TIM DUGAN, BMC Property Group
SEAN ROGERS, ESQ., Representing Applicant
CHRIS JONES, Burtonsville Shopping Center
ED PAPAZI, Kinley-Horne Associates
STEVE TAWES, Lordiff and Saltez
JOHN DEESH MONDAVIA
KEN BROWN
STEWART ROCHESTER, Fairland Master Plan
CHARLES PETERS, Santini Road Property Owners Association
LYNN MARTINS, President, Seibel's Restaurant
CLEVE BROWN, President, Patuxent Watershed Protective Assoc.

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Lynn Martins	21
Cleve Brown	22

P R O C E E D I N G S

1
2 MR. WEAVER: For the record, Item No. 10 is
3 Preliminary Plan 104 -- 109, Burtonsville Shopping Center.
4 My name is Rich Weaver with Development Review. Joining me
5 is Piera Weiss with Community Based Planning. This is a
6 request for 250,000 square feet of retail uses and 10,000
7 square feet of office uses in the C-2 zone, located in the
8 intersection of Old -- we'll call it now Old U.S. 29, now
9 known as Burtonsville Boulevard, at the intersection of
10 Spencerville Road. This is the existing Burtonsville
11 Shopping Center.

12 And through some work with the Master Plan, we, in
13 recognizing the fact that this shopping center needed some
14 renovation, there was a rezoning, which took a portion of
15 some RC zoned property and rezoned it to the C-2 zone,
16 expanding this envelope, and that was worked through as part
17 of the Master Plan and Piera is here to give her expertise on
18 the Master Plan.

19 I'll go through the elements of this plan. As you
20 can see on this rendered drawing, the envision for this
21 particular shopping center right now is some building pads
22 located throughout the parking facility, totaling 250,000
23 square feet - a 5,000 square foot restaurant and
24 approximately 10,000 square feet of office use conceptually
25 shown in this area. This is in the C-2 zone, and I'll

db

1 emphasize this now.

2 This is a Preliminary Plan Review. This is the
3 only review that the Board will have. This will not proceed
4 to the Site Plan stage. And as you may know, we do what we
5 can at Preliminary Plan. We're really looking at setting the
6 APF review, transportation review, we're looking at the
7 access points, we're looking at setting the square footage,
8 and we've done what we can with this Preliminary Plan. There
9 is specific guidance in the Master Plan. And one of the
10 overriding themes in the Master Plan was pedestrian
11 circulation and pedestrian friendly design.

12 Given our limited review, what we managed to do was
13 have the applicant come up with this illustrative circulation
14 plan. And I think what this shows is the general ideas of
15 the road cross sections throughout the site. They are listed
16 on this exhibit, the Illustrative Circulation Plan. There
17 are a number of cross sections shown here. We have looked at
18 those for their pedestrian friendliness, the width of the
19 sidewalks, the setbacks from the curblines, the street
20 treatment as it pertains to the landscaping. We've also
21 asked for lead walks out to the new sidewalk system, which
22 will encircle the site. And, generally, we are happy with
23 what this conceptual plan shows and we've attempted to bind
24 the applicant to that in one of the conditions here. There
25 are a number of conditions.

1 UNIDENTIFIED SPEAKER: 12 and 14.

2 MR. WEAVER: Condition 14?

3 UNIDENTIFIED SPEAKER: And 12.

4 MR. WEAVER: 12 and 14, bind them to the elements
5 of this Circulation Plan. There are a number of road
6 improvements, as the Board may know, for 198 and U.S. 29,
7 including this loop road. Now, 198 kind of tends to tail off
8 to the bottom of this plan and, as you may know, there are a
9 number of businesses along 198. And the existing traffic
10 circulation pattern through Burtonsville is somewhat
11 constrained.

12 The Master Plan envisioned a loop road, although it
13 was not specific in the design and location of that. What
14 has resulted from DPWT's review and Park and Planning's
15 review is somewhat modify loop road, which essentially starts
16 at this location near the intersection of 29. It loops down
17 in front of the existing elementary school next to the site
18 and hooks up down I think at Old Columbia Pike, where it
19 terminates into Route 198.

20 I mentioned elementary school. Note that there is
21 a fairly extensive buffer between the elementary school and
22 the, we'll call it the access road to the rear of the site.
23 There is a zoning line split that I will refer to, which
24 essentially runs down the back of the rear access road. The
25 bulk of the RC zone will be kept as conversation area, mostly

db

1 in reforestation or existing forest or at forestation. We'll
2 also house the stormwater management pond. The stormwater
3 management pond has gone through a significant review because
4 there were identified in the Master Plan some existing
5 severely eroded gullies and channels, and this being in the
6 Patuxent River. And it was created by the existing shopping
7 center and the school site. It is our hope, and we are
8 pretty confident, that this stormwater pond will remediate
9 some of those existing erosion problems and tend to control
10 some of that uncontrolled runoff.

11 We have looked at the access points for this
12 property. There will be a right in and right out onto U.S.
13 29, and there will also be two access points onto the new
14 loop road. The loop road is the subject of a county project.
15 A portion of the loop road will be built commensurate with
16 the construction of this project. The remainder of the loop
17 road, it needs further dedications, as it goes offsite onto
18 neighboring properties, and that will kind of be the second
19 phase of this loop road. I believe the applicant will build
20 the first segment down to 198 and initial access point, it
21 will have two initial access points - one on 29 and on this
22 portion of loop road, with the third access to the loop road
23 coming at a later date.

24 This project has recently received a category
25 change approval for sewer for the C-2 portion of the property

1 only - the rural cluster zone - shown here essentially in
2 green, will remain in W-6 and S-6, it's not slated for water
3 or sewer service. I will note for the record that there is
4 the need for a waiver of a setback from the C-2 zone to the
5 applicant's controlled portion of the rural cluster zone.
6 Typically, we would expect to see a setback consistent with
7 the rural cluster zone. In other words, this driveway aisle
8 here would need to be set back approximately 20 feet. This
9 being a side-yard setback from the rural cluster zone.

10 Since we do not look at a Parking Facilities Plan
11 as part of our Preliminary Plan, that waiver issue will be
12 resolved by the director of DPS as part of the Parking
13 Facilities Plan, which the applicant will be required to
14 prepare as part of the building permits. So we are
15 suggesting that it's more -- it is appropriate at this time
16 to have this pass on to the director and to look at when we
17 have a better idea of the potential tenants of this structure
18 and how this will actually lay out. And, again, we are at
19 Preliminary Plan. The layout of this site could change, but,
20 again, we were very interested in looking at the pedestrian
21 circulation through the site as far as the sidewalks go.

22 And with that, I'll segue into Piera, who may have
23 a few words about the history of the Master Plan and how this
24 layout complies with the Master Plan.

25 MS. WEISS: I only have -- wish to answer questions

db

1 that you might have, if you have any.

2 CHAIR: There may be one or two questions after we
3 hear from the speakers.

4 MR. WEAVER: May I add one extra condition to the
5 list of the revised conditions? I do need to add a condition
6 that reflects the record plat. Must show Category 1
7 easements on stream valley buffers and forest conservation
8 areas. That is a standard condition that I was remiss in
9 putting on the revised conditions.

10 CHAIR: Great. Applicants?

11 MR. DUGAN: Good evening. For the record, my name
12 is Tim Dugan. Sean Rogers [PHONETIC SP.], representing the
13 applicant. With me this evening is Chris Jones of the
14 Burtonsville Shopping Center, the owners; Ed Papazi [PHONETIC
15 SP.] of Kinley-Horne, our traffic engineer; and then from
16 Lordiff and Saltez [PHONETIC SP.], we have Steve Tawes
17 [PHONETIC SP.], John Deesh Mondavia [PHONETIC SP.], and Ken
18 Brown, in order to answer questions here for you.

19 Certainly we'd like to take a moment to thank the
20 staff for their assistance, especially Piera Weiss and Rich
21 Weaver have been a big help. Sharon and Ethan have been
22 great. Sherry Armiri [PHONETIC SP.] and Candy Benott
23 [PHONETIC SP.] have worked a long time, shoulder to shoulder
24 with us, and we appreciate their help.

25 We'd also like to acknowledge some of the

1 representatives of the Fairland Master Plan Citizens Advisory
2 Committee, who have also worked hard on this project with us.
3 And they will continue to be involved, I hope, with the
4 project. Namely, Stewart Rochester has been very active with
5 us. Patrick Ziliacus [PHONETIC SP.] is also one person I
6 wanted to name and we've also been speaking with Mr. Charlie
7 Peters. Some of the individuals are here this evening.

8 Finally, thanks to Mary Pat Wilson from the
9 Montgomery County Public Schools for their help with respect
10 to the Burtonsville Elementary School. We agreed with the
11 Planning Staff recommendations, in addition to the one that
12 Mr. Weaver just mentioned. That's a standard requirement on
13 record plats.

14 We would like to highlight the following things for
15 you and not just in terms of complimenting Rich's
16 presentation, and that is the Burtonsville Shopping Center is
17 part of the components that are to accomplish the objectives
18 of the Fairland Master Plan and we're very much involved with
19 that and we support that. One of the most important ones is
20 obviously to encourage redevelopment. And this is certainly
21 -- will do that. This will foster the redevelopment of the
22 Burtonsville Shopping Center, which is a main center for
23 retail there.

24 We are redeveloping the center. We will be
25 installing shared use pathways and the like on the perimeter

db

1 so that the pedestrian access that's noted in the Master Plan
2 will be there. We're building a portion of the Burtonsville
3 Access Road. If permitted, if the signal warrants are there,
4 we'll be installing traffic lights both at the Route 29 point
5 and also on the Burtonsville Access Road. And that
6 Burtonsville Access Road, of course, will also assist in
7 tying in the retail area there. That we want to address the
8 Master Plan's goal of strengthening Burtonsville as a local
9 center through the reconstruction of the roads are noted in
10 the Master Plan with respect to 198. You know, that's an
11 ongoing state highway analysis that's going on right now.
12 The Burtonsville Access Road, the construction that's in the
13 CIP, it's when the next four years of the CIP it will be
14 constructed. Reconfigure this landscaping, like I mentioned
15 already.

16 With respect to the stormwater Management
17 facilities, we mentioned that before. The gully that we'll
18 be resolving you could drive a cart -- like a horse and buggy
19 through it right now. It's pretty big. So that will be
20 alleviated and that will help things out a lot. Onsite
21 pedestrian friendly landscaping and the like, that's part of
22 the Master Plan objectives. We wanted to let the Board know
23 that we were serious about doing so. And so we do accept
24 staff's recommendation to be bound by the illustratives that
25 are on the Illustrative Circulation Plan. There will be

1 variations on this site. It will not be just a uniformly
2 boring all the way through the project. You'll have
3 modulations in the widths of the sidewalks and the like, as
4 you would in many centers. And the areas that are not
5 heavily trafficked by patrons and the like, you may have
6 slightly narrower sidewalks and the like. This is the
7 standard illustrative hierarchy of sidewalks that we did
8 agree to and we'll be happy to do that. But you will be
9 seeing tree grades, tree plantings, benches, receptacles and
10 the like, things that are more akin to a Site Plan
11 application.

12 The other points that we wanted to make were with
13 respect to the Stormwater Management Concept Plan, this
14 design accommodates the Burtonsville Elementary School. We
15 think that's good for the area there. We will look to, and
16 we anticipate, sharing in some of the costs with the public
17 school system in providing that stormwater management
18 facility. And we have continued to work with them and we
19 look forward to continuing to work with them on alleviating
20 that situation there.

21 And so with all that having been said, we have high
22 hopes for this redevelopment of this center and we're more
23 than happy to answer questions of the Board. Thank you very
24 much.

25 CHAIR: Thank you. We have a number of speakers.

db

1 Steward Rochester and Charles Peters. Gentlemen, you can
2 step back. I'll start with them.

3 MR. ROCHESTER: Good evening. I almost said
4 afternoon, but it is evening now. I'm Stewart Rochester with
5 the Fairland Master Plan Committee. I also want to
6 acknowledge Sammy Young, who I see here who was a key member
7 of our committee and who worked on the Fairland Plan,
8 including this portion of the plan that involved
9 Burtonsville.

10 I've been struggling to come up with a metaphor to
11 convey the wide gap between what the CAC and the community
12 envisioned here and where the developer has gone with his
13 plan. Someone said that what's left of Marxism looks more
14 like Groucho than Karl. For what was to have been the
15 Burtonsville Town Center, things like "Honey, I Blew Up the
16 Kids" or "Extreme Makeover."

17 We, and I, personally, when I say we, the CAC,
18 members of the community, and I, personally, have worked long
19 and hard to find some common ground with the applicant,
20 trying to understand and appreciate each other's objectives
21 and concerns. Although there has been much frustration and
22 little consensus, I do want to emphasize the high regard we
23 have for the property owner, Chris Jones, for his ability,
24 his enterprise, and his intelligence, which in some ways
25 makes this plan a little more disappointing compared with

1 what I think we might have been able to achieve here if we
2 had worked a little harder at it and had been more creative
3 and come to some consensus as to dimensions and scale and
4 concept.

5 But this is a developer that we've come to like and
6 respect, even as we disagree. And I do want to emphasize
7 that. There are a number of specific points I want to
8 address and then I'll offer a couple of general observations.
9 One, I have been asked and will tentatively support the
10 request of a waiver of the RC setbacks, so long as restricted
11 to the RCPs to the west, where the environmental piece of it
12 will protect the school. We are concerned that such a waiver
13 enables a property owner to overextend the development of the
14 loop, in order to enhance the use and value of this property
15 beyond its Master Plan limits and intent. But we will rely
16 in the Board's discretion that such a waiver would not
17 compromise the essential integrity of the RC zone here or
18 elsewhere.

19 Secondly, I want to be sure the record is clear,
20 and I'm confident, I know it is, that any water and sewer
21 reclassification should be limited to the C-2 zone and not
22 extended the RC portion of the property.

23 Thirdly, we applaud what appears to be a sensible
24 decision to relocate the stormwater pond, in order to better
25 protect contiguous forests and catch runoff from the

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1 elementary school. We realize this will depend on
2 consultations between a developer and Montgomery County
3 Public Schools over cost sharing, adequate fencing, and
4 screening of the facility, and other issues that need to be
5 addressed early on if this is to be a feasible solution.

6 Our main issue, as has always been, is the size of
7 Jonestown. This year, bulk and scale, what the applicant has
8 proposed, which it seems to us does diminish and may
9 overwhelm, if not negate, the main street village concept
10 that the Master Plan contemplated. To be fair, communities
11 often have unrealistic expectations. Our hope was for an
12 inviting sense of place where there would be a more integral
13 tie-in with public spaces around the school, outdoor
14 restaurants, seating and the like, and other amenities. But
15 we recognize the many constraints to achieving this, a
16 business district that is so fractured and where few of the
17 property owners, in truth, are as engaged as Mr. Jones. And
18 to his credit, the applicant has made a good faith effort to
19 meet the pedestrian-friendly guidelines in the plan with
20 regard to sidewalks and streetscaping.

21 Having said that, we still worry about the impact
22 of the proposal on one other small local retail in the area
23 that the Master Plan encourages and the community values.
24 Two, the character and scale of the surrounding low-density
25 residential wedge; three, the adjacent Patuxent watershed;

1 and four, the future of the Burtonsville Business District
2 and Town Center itself, which seems destined to remain
3 somewhat in limbo and lacking any coherent theme or special
4 distinction.

5 If this is not the nightmare Wal-Mart scenario,
6 it's disturbingly close to what I've called Son of Sam. And
7 we would urge the Board to attach any conditions to ensure
8 that once approved this Preliminary Plan can't morph or be
9 reassembled into a Wal-Mart-type big box. That would truly
10 make a travesty of the Master Plan goal intent.

11 We take comfort in the applicant telling us that
12 this is a theoretical maximum size and layout, but we, and
13 you, have to guard against the theoretical mischief or
14 potential for arm here as well.

15 As we stated at the conclusion of our letter that
16 appears in the stamped packet, insofar as this proposal
17 evidently will not go to Site Plan, and given the
18 extraordinary importance of the site, with far-ranging
19 impacts on the elementary school, the Patuxent watershed, and
20 other retail in the area, as well as the surrounding
21 residential community, it's all the more imperative that the
22 Board give the plan careful scrutiny at this point in the
23 process, which maybe the only occasion to review it. Thank
24 you.

25 CHAIR: Thank you. Mr. Peters?

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1 MR. PETERS: My names is Charles Peters,
2 representing Santini Road Property Owners Association. We,
3 as residential property owners adjacent to the Burtonsville
4 Shopping Center, Jones RC tract had been watching this piece
5 of property. This property was adjacent to two other large
6 tracts, 48 and 80 acres, bordering our area that are being
7 considered for cluster development. The other properties
8 appear to be going to subdivision by the book.

9 We are vehemently opposed to this Board granting
10 Mr. Jones the setback waiver to allow commercial parking on
11 land zoned residential. Both for the principle it would
12 violate and the precedent it would set. The property owner
13 himself has created this very problem by overdeveloping his
14 site. Since when do we reward, with a waiver, the build out
15 of a property to enhance its value beyond what the Master
16 Plan capacity allows? Thank you.

17 CHAIR: Thank you.

18 UNIDENTIFIED SPEAKER: Can I just ask a couple of
19 quick -- now, you are opposed to the waiver of the setback
20 for the parking facilities?

21 MR. PETERS: Regarding the parking, yes.

22 UNIDENTIFIED SPEAKER: Do you want to just --

23 MR. PETERS: Why?

24 UNIDENTIFIED SPEAKER: Yeah, because you are saying
25 it will impinge on the residential?

1 MR. PETERS: Well, I'm just concerned that once we
2 let the camel's nose under the tent where do we go from
3 there? What other waiver are we going to go to. The site is
4 jammed full and it appears to me that if possibly we can, you
5 know, reduce some of the size of the buildings that are
6 there.

7 UNIDENTIFIED SPEAKER: May I ask you --

8 MR. PETERS: Certainly.

9 UNIDENTIFIED SPEAKER: -- listen to her question a
10 little differently, because I thought she said something that
11 was a little inconsistent with what your concern is.

12 MR. PETERS: Okay.

13 UNIDENTIFIED SPEAKER: Because it suggested that
14 you were opposed to it from the residential standpoint. I
15 think what you said is that you are opposed to the idea of a
16 waiver allowing parking on the residential portion.

17 MR. PETERS: That's correct.

18 UNIDENTIFIED SPEAKER: But the parking is for
19 commercial activity on the residential portion. And I think
20 that's what you're saying you're opposed to.

21 UNIDENTIFIED SPEAKER: So you just don't want it to
22 be larger. This would mean --

23 UNIDENTIFIED SPEAKER: No.

24 MR. PETERS: No. I'm concerned that we're going to
25 -- we're going to get some form of commercial creep.

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1 UNIDENTIFIED SPEAKER: It's against regulations to
2 allow commercial parking to occur on a residential lot. And
3 I think --

4 UNIDENTIFIED SPEAKER: Okay.

5 UNIDENTIFIED SPEAKER: -- and by allowing this to
6 go forward that means that we have --

7 UNIDENTIFIED SPEAKER: Started the --

8 UNIDENTIFIED SPEAKER: Started the --

9 UNIDENTIFIED SPEAKER: [VOICES OVERLAP] commercial
10 on residential.

11 UNIDENTIFIED SPEAKER: Yes.

12 UNIDENTIFIED SPEAKER: But now, excuse me, I was
13 going to ask you, Mr. Rochester, you seem to take a different
14 view on the waiver issue.

15 MR. ROCHESTER: Well --

16 UNIDENTIFIED SPEAKER: Or were you asking that it
17 be waived in some part and not waived in the rest. I
18 couldn't quite understand that.

19 MR. ROCHESTER: First of all, just to be a little
20 clearer, and I understand Mr. Peters' concern, the parking
21 itself would not take place on the RC. But you would not
22 have what would have been normal setback between the R -- if
23 that was parking, we'd go right up to the RC. And then
24 that's --

25 UNIDENTIFIED SPEAKER: So you lose the setback?

1 MR. ROCHESTER: You'd lose the setback and I am
2 concerned that you may compromise, therefore, the integrity
3 of the RC.

4 UNIDENTIFIED SPEAKER: So where are you [VOICES
5 OVERLAP]? Can you point that out?

6 MR. ROCHESTER: Which is the purpose of the
7 setback.

8 UNIDENTIFIED SPEAKER: That's what they're
9 [INDISCERNIBLE]?

10 UNIDENTIFIED SPEAKER: Yeah. Point that out right
11 there.

12 MR. ROCHESTER: The waiver is to this portion of
13 the RC zone, which the applicant controls, from approximately
14 this point to this point.

15 UNIDENTIFIED SPEAKER: Well, wait, if we drew a
16 line, what areas are being allowed to be built on that
17 wouldn't have been built on without the waiver?

18 MR. ROCHESTER: This road, in grey, would have to
19 have been set back 20 feet approximately from the zoning
20 line, which runs right to the edge of the road.

21 UNIDENTIFIED SPEAKER: The road would have to have
22 been set back?

23 MR. ROCHESTER: The road would have to have been
24 set back.

25 UNIDENTIFIED SPEAKER: So it all goes back 20 feet

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1 you said.

2 MR. ROCHESTER: Twenty feet. May I add for the
3 record that where the applicant does not open the adjacent
4 property, they meet all the established setbacks on the other
5 perimeters of the site.

6 UNIDENTIFIED SPEAKER: Okay.

7 MR. PETERS: You know, there is a concern when we
8 do all of these drawings that Santini Road kind of in the
9 aerial shots gets kind of blurred out of the picture and our
10 residences are not really given the credit that they're due.
11 And at the backside of where the stormwater management pond
12 is, is the beginning of that 48 acres, and there will be
13 houses that are, from what I understand, already permitted,
14 but they've been held up because the state roads purchased
15 that property for the ICC. And so those houses that are
16 planned to be built there are on hold now and then the other
17 property would be north of that, which is the large open
18 space above that green space. So we're talking about future
19 development is going to be done right in that --

20 UNIDENTIFIED SPEAKER: Right, I understand.

21 MR. PETERS: -- direct area.

22 UNIDENTIFIED SPEAKER: I understand what you're
23 saying.

24 MR. ROCHESTER: May I make just one more point?

25 CHAIR: Well, I think we're really --

1 MR. ROCHESTER: Well, it's important.

2 CHAIR: Really quick.

3 MR. ROCHESTER: All right. Really quick.

4 CHAIR: You've got to take the questions and turn
5 it into --

6 MR. ROCHESTER: No, no, no. It's to be fair to the
7 applicant because I've had long discussions with him on the
8 waiver. And we gave a nod to the waiver on the piece of the
9 property adjacent to the RC that he owns, but not to the
10 north, the area that he doesn't own. At the same time, I
11 have to respect Mr. Peters' position as well. We were trying
12 to be an honest broker in this, as the National Planning
13 Committee. And there is the principle that we are concerned
14 about where a developer, again, could really develop beyond
15 what is the zone capacity, based on the setbacks and the
16 configuration of the property.

17 CHAIR: Okay. We understand. Thank you very much.

18 UNIDENTIFIED SPEAKER: Okay.

19 CHAIR: The next two speakers are Cleve Brown and
20 Lynn Martins.

21 MR. BROWN: Defer to the lady.

22 CHAIR: Mr. Brown? Ms. Martins?

23 MS. MARTINS: Hi. Thank you. I'm Lynn Martins. I
24 am the president of Seibel's Restaurant, which neighbors the
25 Burtonsville Shopping Center. We were established in 1939

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1 and we're a family operation. I am part of that family. And
2 we are excited about this project. We look really forward,
3 as was referred, Burtonsville's kind of business district is
4 definitely in limbo. The new development with the 29 and 198
5 and future 198 prospects, I think that this is something that
6 could really encourage the other property owners within the
7 business district. I think everybody is kind of waiting for
8 someone to step forward and do something. And I think this
9 is something that we need.

10 There has been some great development going on in
11 the area, some wonderful housing has been built, but we need
12 to keep these people within our business district. We need
13 not to be chasing them away. And I think that this is an
14 offer that will help keep all of these people in our
15 neighborhood. And like I said, we've been there since 1939.
16 It won't be myself, but my children are involved in the
17 business and we'd like to stay there. And as a neighbor, Mr.
18 Jones has been there. We've had -- you know, had very many
19 conversations on what has been going on and we encourage it.
20 We definitely look forward to it.

21 CHAIR: Thank you. Mr. Brown?

22 MR. BROWN: Thank you, Mr. Chairman, Members of the
23 Board. I'm Cleve Brown. I'm president of the Patuxent
24 Watershed Protective Association, and the name itself tells
25 you what we're about.

1 We are concerned about the parking setback waiver.
2 It has the effect of increasing the parking, which has the
3 effect of increasing the other activity on the total site.
4 We heard that there has been a serious runoff problem up to
5 this point, contributed by the school, as well as the
6 existing shopping center. And we've heard about the
7 Stormwater Management Plan, which will quote unquote should
8 help a lot, and that's great. That's great. But my question
9 would be why at this point, before anything is built, why
10 issue a waiver that is going to create more of a problem that
11 needs a remedy? More impervious surface and more commercial
12 activity on the site?

13 We have no problem with the gentleman using the
14 property as it was intended, but to change the regulations to
15 increase the capacity, and that's exactly what it's doing,
16 whether -- I think one speaker incorrectly referred to using
17 the residential property for parking. No, I never understood
18 that, but it does give up the setback, which has the same
19 effect, it increases the parking on the area and in effect
20 enlarges the site.

21 The fact that the owner owns the adjoining
22 residential property is fine. It lessens objections, but
23 changing in zoning and waivers go with the land and not the
24 owner. And when that's passed on, then you have a commercial
25 site that is in violation of what the present setbacks would

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1 require. And for the Patuxent Watershed Protective
2 Association, those are my comments. Thank you.

3 CHAIR: Thank you. Any questions? I do want to
4 say to Ms. Martins, first of all, love your restaurant.

5 MS. MARTINS: Thank you.

6 CHAIR: Been there many times. And I was just
7 curious, now that the new Route 29 is open, has there been an
8 impact on your business that you've seen?

9 MS. MARTINS: There was definitely an impact with
10 the 29 and the signage. The state very poorly handled
11 directing the traffic because it, you know, used to be an
12 actual stop. You came to Burtonsville, you had a left-hand
13 turn, right-hand turn to go to Laurel. That was a great
14 disruption. I mean, if you call my voice it says, "Please
15 press 3 for the update waive of Seidel's," because it
16 constantly changes. And they've tried to fix that.
17 Unfortunately, it was a little late.

18 CHAIR: So you did lose business during the
19 construction?

20 MS. MARTINS: I think we've lost business, and it's
21 really mainly due to the construction, not due to the actual
22 road reconfiguration.

23 CHAIR: Yeah.

24 MS. MARTINS: It's, you know, holds up traffic.

25 CHAIR: Just curious because of all those

1 discussions we had over the years.

2 UNIDENTIFIED SPEAKER: Mr. Chairman, could I make
3 one additional comment?

4 CHAIR: No, thank you, sir. Thank you very much.
5 Any rebuttal from the applicant? Any other questions?

6 UNIDENTIFIED SPEAKER: I have a question, primarily
7 of the applicant.

8 CHAIR: All right. Thank you very much. You are
9 excused. Mr. Dugan, do you have a [INDISCERNIBLE]?

10 MR. DUGAN: Yes, thank you.

11 CHAIR: Okay, go ahead.

12 MR. DUGAN: If I can borrow your microphone for a
13 second. Okay, thank you. What I was going to talk about
14 was, and we'll be happy to answer any questions, but with
15 respect to the driveway, the parking setback waiver, and why
16 we're going to ask for that with DPWT but also why we brought
17 it to your attention. And that was in the Master Plan, under
18 -- for this particular property, the various recommendations
19 that were included in the staff report. One of them had to
20 do with rezoning, an amount not to exceed three acres of the
21 eastern portion of the RC parcel, to enable the center to
22 redevelop. And then there was language that said add a loop
23 road, adjacent to the outer perimeter of the new C-2 zoned
24 land in the rear of the center, generally running from the
25 southwestern corner of the site and existing at U.S. 29.

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1 I had two points. One was that our proposal here
2 will provide more green space in those areas than would have
3 been available there if the loop road had been built along
4 the rear of the property there. Because the loop road would
5 have been in the RC zone plan. Just for dimension purposes,
6 at the southwesterly corner, that distance is 100 feet
7 setback from the property line, where we've committed to
8 build a fence along the perimeter of the Burtonsville
9 Elementary School, and where we've agreed to have a forest
10 conversation easement area. So you have 100 feet at that
11 point. The narrowest point that it gets to is 60 feet there,
12 as you can see there, as it necks down.

13 So although it's not always the case, certainly in
14 many instances, zoning lines follow property lines as well.
15 There is some analogous situation to setbacks from property
16 lines and setbacks from zoning lines, and I'll admit that
17 it's not exactly, but it is to avoid having incompatible uses
18 too close to one another, and that's certainly an element of
19 why you would have a setback.

20 So my point is, with respect to distances for
21 setbacks, there is 60 feet at a minimum right here. As they
22 mentioned before, a setback for parking a driveway is only 20
23 feet or so. This is quite a bit more than that, even at its
24 narrowest point. I'd also point out that the distance from
25 the other areas further back were significantly more than

1 that. They are 300 to 400 feet back from the property line
2 and in terms of distances from the residential properties,
3 that's obviously a very significant distance.

4 The stormwater management facility is going to
5 alleviate much of the erosion today that is at issue with
6 respect to trying to preserve the Patuxent and set it up for
7 a better situation.

8 For those reasons, we think it makes sense. We are
9 using the C-2 zone area that we thought we would be able to
10 use, assuming that the loop road went behind the center. We
11 would have used the loop road for that access. We now have
12 that roadway on our property so that we can have similar
13 access, so we're using less land there theoretically than we
14 would have otherwise. That's why we think it's justified.

15 The other thing is we certainly have no parking in
16 the RC zoned land. Let me just check one other thing here.
17 I think that's it. We'd be happy to answer questions.

18 CHAIR: All right. Discussion?

19 UNIDENTIFIED SPEAKER: I have a question. I want
20 to ask the staff, do we have in the record the letter from
21 Mr. Dugan concerning the applicant's intentions with the
22 sewer request? I don't see it in my packet.

23 UNIDENTIFIED SPEAKER: Mr. Dugan's letter?

24 UNIDENTIFIED SPEAKER: Well, there is a reference
25 in Mr. Rochester's testimony, or maybe, Mr. Dugan, you can

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1 just answer it yourself. I mean, there was a letter of July
2 21st.

3 MR. DUGAN: There was a concern that we were asking
4 for a sewer and water category change for any of the area
5 other than the C-2 zoned area. I submitted a letter that
6 said that we had no intention to have the sewer and water
7 category change for anything other than the C-2. In other
8 words, we were simply asking for sewer and water category
9 change for the C-2 zoned land.

10 UNIDENTIFIED SPEAKER: You submitted it to us?

11 MR. DUGAN: Yes. We also conveyed a copy to Mr.
12 Rochester as well.

13 UNIDENTIFIED SPEAKER: And that is still your
14 intention?

15 MR. DUGAN: And indeed --

16 UNIDENTIFIED SPEAKER: And you are still abiding by
17 that letter?

18 MR. DUGAN: Absolutely.

19 UNIDENTIFIED SPEAKER: And we do have a copy of it?

20 MR. DUGAN: I have a copy of that. I also have a
21 copy of the approved category change from the director of
22 DEP, and it is for the C-2 portion zoned -- portion of the
23 property only. The actual category change --

24 UNIDENTIFIED SPEAKER: So, perhaps, we should just
25 incorporate that in part of the record.

1 MR. DUGAN: Sure. It's into the record.

2 UNIDENTIFIED SPEAKER: So it's clear.

3 MR. DUGAN: Sure.

4 UNIDENTIFIED SPEAKER: Other than that, I guess we
5 need to discuss the waiver, and what other issues do we have?

6 UNIDENTIFIED SPEAKER: I have other questions
7 before we get to the waiver.

8 UNIDENTIFIED SPEAKER: Okay.

9 UNIDENTIFIED SPEAKER: The principal from the
10 elementary school was here, but she left. Would you show
11 where the driveway that leads up to the elementary school is
12 and the relationship of that to this center -- this site?

13 MR. DUGAN: Okay. Well, it shows on this aerial
14 and it also shows on this. The access point to the loop road
15 for the elementary school is located here.

16 UNIDENTIFIED SPEAKER: Oh, okay.

17 MR. DUGAN: And it goes offsite and will eventually
18 loop around back down to the loop road.

19 UNIDENTIFIED SPEAKER: All right. And if I
20 understand correctly from what's been presented, there is at
21 least probably 60 to 80 feet now, 60 feet at the closest
22 point. Where the loop road is that looks like it might be as
23 much as 80 to 100 feet.

24 MR. DUGAN: Well, it's --

25 UNIDENTIFIED SPEAKER: The end there to where you

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1 said the loop road -- to the school site is?

2 MR. DUGAN: Yes.

3 UNIDENTIFIED SPEAKER: Okay. I just wanted to get
4 some sense about that. Now, I just need to understand one
5 other thing, and I'm particularly interested in legal
6 counsel's guidance on this. While I was pleased to hear that
7 there is no parking on the residentially zoned lane, because
8 under no circumstances do I believe we could support that,
9 because that's, obviously, a violation. What I wanted to
10 know though is in light of the fact that this applicant has
11 control of the RC land and they're asking for a waiver in
12 light of the fact that they have put the road up to the RC
13 land, as opposed to measuring it from the end of the RC
14 parcel further east so that there would be no need for a
15 waiver. Whether that's consistent with the kind of typical
16 request and whether or not, in fact, that's something that we
17 regularly grant based upon such a request. And that's gets
18 into the question about the waiver request that Ms.
19 Wellington was asking about also.

20 UNIDENTIFIED SPEAKER: I think typically when you
21 have waiver requests like this, they do not involve property
22 under common ownership. So I think that's a relatively
23 unique factor. If the waiver is granted, then my expectation
24 would be that it would impact how the -- any potential
25 development on the adjoining site would be presented and

1 approved because it will raise compatibility issues and may
2 limit amount of density or how close they could build to that
3 existing roadway based on compatibility issues. With respect
4 to the merits of the waiver itself, I would defer to
5 technical staff on this project.

6 UNIDENTIFIED SPEAKER: Okay. Technical staff,
7 would you please respond to that? Also, would you respond to
8 the point of clarification that in light of the fact that
9 this is illustrative, and that also is under the control of
10 the applicant, that those buildings can be re-sited, they can
11 be reduced in size, or they can be reconfigured so that you
12 still get the same total square footage, I'm assuming, and
13 still not -- and there won't be anything that's a detriment
14 to the applicant, I believe. So I just want you to speak to
15 that. Why must it be that representation versus some other
16 representation?

17 UNIDENTIFIED SPEAKER: You ask two points. First,
18 the staff report was deliberately a little mum on the parking
19 setback because we were assuming that DPS, the director of
20 DPS, would issue a parking waiver as part of the review of
21 the Parking Facilities Plan that will be required of the
22 applicant to prepare at the time of building permit. So we
23 did not provide a lot of guidance on that.

24 I think the fact that the applicants owns the rural
25 cluster zoned portion is pertinent to the review of the

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1 waiver, because I'm sure compatibility is one of the issues
2 that we would look at in the review of the waiver. I do
3 believe that if the waiver were not granted, and as it stated
4 in the Staff Report, they would have to respect that required
5 setback, which we believe is 20 feet. And I further would
6 believe with some creative redesign, this being illustrative
7 and a conceptual layout, that they could achieve, if not this
8 square footage, something very close to it.

9 UNIDENTIFIED SPEAKER: So just to make sure I
10 understand what you're saying, there is no apparent
11 impediment to the applicant if they met the setback
12 requirement; is that correct?

13 UNIDENTIFIED SPEAKER: I think it could be dealt
14 with, I do.

15 UNIDENTIFIED SPEAKER: All right. Second question.
16 In terms of square footage that's being proposed, especially
17 in light of the fact that this is our one short, there will
18 be little or if any loss of total square footage if there was
19 a reconfiguration of space; is that correct?

20 UNIDENTIFIED SPEAKER: You're getting into some
21 design elements. I'm a little uncomfortable making a
22 statement on the record. Would they lose square footage?

23 UNIDENTIFIED SPEAKER: You can't say that they will
24 lose square footage; is that correct?

25 UNIDENTIFIED SPEAKER: I can't say they will, no.

1 UNIDENTIFIED SPEAKER: You can't say that they
2 will? All right. And you are going to get your chance.

3 UNIDENTIFIED SPEAKER: Okay.

4 UNIDENTIFIED SPEAKER: Thirdly, is there anything -
5 - Piera, you wanted to say?

6 MS. WEISS: Yes, I just wanted to say, if they do
7 set back the required amount it is conceivable that they
8 might lose some square footage, whether it's 1,000 square
9 feet, whatever. But if you do change the setback, you do,
10 accordingly, lose something, whatever it is.

11 UNIDENTIFIED SPEAKER: Whatever it is.

12 MS. WEISS: Whatever it is.

13 UNIDENTIFIED SPEAKER: From an economic standpoint,
14 which is not your area, I understand, but based upon your
15 history, would they lose significant value on this parcel as
16 a result of meeting the required setbacks?

17 MS. WEISS: Would you like my opinion on that?

18 UNIDENTIFIED SPEAKER: I want your opinion.

19 MS. WEISS: Okay. In my memorandum I did make my
20 opinion and I believe that there is no preexisting condition
21 here which warrants a waiver.

22 UNIDENTIFIED SPEAKER: Well, that was going to be
23 the next question. So thank you for answering two questions.

24 MS. WEISS: I believe that any configuration, since
25 we know that this is conceptual, any change in it would have

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1 a whole host of changes. And this is a maximum, what they
2 are showing here.

3 UNIDENTIFIED SPEAKER: Yes.

4 MS. WEISS: So --

5 UNIDENTIFIED SPEAKER: Okay. That's -- those are
6 my questions. Thank you.

7 UNIDENTIFIED SPEAKER: Those were good questions.
8 It helped develop the issue I think. It was helpful to me.

9 UNIDENTIFIED SPEAKER: Okay.

10 CHAIR: You were going to give him a chance to
11 explain --

12 UNIDENTIFIED SPEAKER: Yes, please, to respond.

13 CHAIR: -- loss of --

14 MR. DUGAN: Thank you. Mr. Allison -- Mr. Bryant,
15 I wanted to just remind the Board that at the time of the
16 Master Plan, when we were working on the size of the area
17 that we were asking to have rezoned, we thought the loop road
18 was likely to be built back there and that we would use the
19 loop road in order to access the site. If that's the case,
20 then we would have -- we would be using essentially the area
21 that we have indicated now that we are using. We don't have
22 that loop road on the RC zoned land. We've got to provide
23 something on our own land, and so we're trying to maintain
24 the same basic area that we were going to develop that we
25 would have had on our [line], if the loop road had been built

1 where it was. So there were certain expectations that are
2 now pulled off the table that we don't have anymore. And so
3 it's not --

4 CHAIR: And you are saying those were Master Plan
5 expectations?

6 MR. DUGAN: Yes, they were in the Master Plan.
7 That one recommendation I read to you. I think it was on
8 page 72 or --

9 CHAIR: You had expectations, that's one issue;
10 that you're saying the Master Plan confirmed your
11 expectation, that's a different issue.

12 MR. DUGAN: I wouldn't want to overstate any
13 expectation, except that it said "outer loop road adjacent to
14 the outer perimeter of the new C-2 zoned land." So we were
15 assuming that when we figured out what area we were going to
16 use for C-2 zoned land, and we asked for three acres
17 approximately, the notion was that we would connect from that
18 loop road. And so that was the land area that we were zoned,
19 but now we don't have that loop road. So now we have a loop
20 road on the back of the property, which let me add one thing.
21 It makes it a lot easier to segregate truck traffic at the
22 light to use the back property to bring the truck traffic
23 around that way. It better segregates it from the
24 pedestrians and from the normal customer driving in and out
25 as well. And so, as you can imagine, if we --

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1 CHAIR: My question is what do you lose if you --

2 MR. DUGAN: Well, you have -- there's a ripple
3 effect. There is a ripple effect there into the rest of the
4 area there. There is less land that we can use. And so how
5 it shakes through, one would be in this area, we'd lose
6 certainly surface parking. We'd have to put more underground
7 parking, which here it would be difficult and expensive. If
8 it works in Burtonsville in the first place, we wanted to
9 make sure we sized the thing so that we design the roadway
10 improvements that we would make there. That we wouldn't
11 undersize them, so we'd have in terms of APFO and the like,
12 we would have the traffic that we felt it would generate.
13 That, of course, translates to the traffic lights that we
14 expect we'll probably install on 29 and 198 as well.

15 And so -- but, fundamentally, we thought that there
16 is an abundance of setback there, given the fence and given -
17 - and the forest conservation areas in that we're certainly
18 not going to use that RC zoned land. And we've got a very
19 robust best management practices. The Environmental Planning
20 staff said that with respect to the Stormwater Management
21 Facility. So I think they have -- they've accommodated many,
22 many, and embraced many, many of the goals in the Master
23 Plan.

24 UNIDENTIFIED SPEAKER: Let me make sure I
25 understood you correctly, and please, staff, you are going to

1 listen to this, Mr. Dugan just represented that they are not
2 going to use the RC land. What that means to me is that that
3 land is not going to be developed ever. Is that what that
4 means to you?

5 MR. DUGAN: That land will have a category one
6 forest conservation easement on it. Because the bulk of it
7 is in reforestation or forestation where stream buffered.

8 UNIDENTIFIED SPEAKER: Okay.

9 CHAIR: So the suggestion that it might someday
10 develop in residential and there might be a compatibility
11 concern is really not --

12 [END OF SIDE ONE.]

13 UNIDENTIFIED SPEAKER: -- because Mr. Dugan did
14 speak about the Master Plan and the fact that the language in
15 the Master Plan says put the public loop road, this is a
16 distinction I feel was made, it's a public loop road in the
17 RC area and the zoning land would follow the inside of this
18 public loop road. The reason why we did that was that he
19 didn't lose density if we put the public road on his
20 property. He still has to have a setback from the public
21 road and the public road would be zoned rural cluster.

22 UNIDENTIFIED SPEAKER: Okay.

23 UNIDENTIFIED SPEAKER: So it would have to be a
24 setback.

25 CHAIR: Okay.

db

1 UNIDENTIFIED SPEAKER: But we don't need a
2 circulation drive though.

3 UNIDENTIFIED SPEAKER: My point was the Master Plan
4 was recommending a public road that went all the way back
5 through there for his particular property. That public road
6 is not going to be built.

7 UNIDENTIFIED SPEAKER: Right.

8 CHAIR: Now, what exactly are you building here?
9 Because I have to say, as a retail center, this is a -- I've
10 never seen a design like this before. What exactly is this
11 going to be?

12 MR. DUGAN: I'll let Chris Jones tell you what he
13 expects and what he knows today.

14 CHAIR: Okay.

15 MR. JONES: Right now, I mean, again, part of my
16 concern here and part of my mandate to move my engineers and
17 so forth was to make sure that we did not under-design our
18 infrastructure, that we did not under-design our road
19 capacity and our entrances. That we created a theoretical
20 maximum for the site with retail, not going into the office
21 densities that you could put on a C-2 or something like that
22 but in a retail context. That we created a theory maximum so
23 that when we designed our infrastructure, when we designed
24 our stormwater management, when we presented this plan, that
25 everybody, staff as well as I could be confident that the

1 infrastructure and the public facilities were adequate to
2 handle any development we might do.

3 At this stage, we have not approached any
4 retailers. We do not have any tenants lined up for this. I
5 have met many, many times with the community about this
6 project and I've been very careful not to make undue
7 representations because I don't know. Will it change? Yeah,
8 there will be changes here, as we identify particular tenants
9 for the site. And can I say definitively? We are trying to
10 establish some characteristics of streetscaping, the elements
11 of the Master Plan that were there, that we will, in fact,
12 have appropriate streetscaping, that we will have these
13 pedestrian-friendly elements. But it is going to get
14 configured -- that the tenants we ultimately get will kind of
15 dictate the shifts and shakes of it.

16 One of the things we're trying to show is sort of a
17 street pattern. There has been sort of talk of, well, this
18 isn't the town center we were looking for. One of the
19 layouts that we were trying to establish here is more of a
20 street grid kind of pattern than a straight strip shopping
21 center that you're used to seeing with just the stores strung
22 out in a row. But the final, final configuration of it will
23 depend very much on the specific tenants we get.

24 UNIDENTIFIED SPEAKER: So what you're saying is --
25 I'm sorry.

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1 UNIDENTIFIED SPEAKER: No, no.

2 UNIDENTIFIED SPEAKER: You're saying that this
3 concept --

4 UNIDENTIFIED SPEAKER: Site Plan.

5 MR. JONES: It's a Preliminary Plan. I don't have
6 tenants yet. And is sort of have a chicken and the egg. I
7 can't get tenants when they have no certainty that I can do
8 something because they won't --

9 UNIDENTIFIED SPEAKER: Yeah. No, I understand.

10 MR. JONES: -- talk to me. So I'm kind of --

11 UNIDENTIFIED SPEAKER: I understand. I'm just
12 saying --

13 MR. JONES: But I'm trying to bring in elements of
14 free-standing buildings developed with finished lines --

15 CHAIR: Yeah. Actually, the reason for my question
16 was you're arguing one of the reasons we should grant you the
17 waiver is so that you have more square footage. If I knew
18 what you wanted more square footage for, I'd feel more
19 comfortable.

20 MR. JONES: I think it's more an issue of
21 functionality, if I could speak to that. Because Piera is
22 making the distinction of public versus private road. But
23 from a functional point of view, and if you look at the
24 illustrations in the Master Plan that show the public access
25 road on the RC land, it is essentially functioned as a rear

1 service road.

2 CHAIR: Right. But you could still have a rear
3 service road that's 20 feet further east.

4 MR. JONES: Bear with me. Let's --

5 CHAIR: It's just further east.

6 MR. JONES: Bear with me please. I mean, I've got
7 a really -- one of my problems is in any configuration, we
8 could play with this all day long. But I have an amoeba of a
9 site. If you think of the typical retail site, it is
10 rectangular and it has corners and nice 90-degree angles. I
11 have no straight lines. If you look at my zoning
12 [INDISCERNIBLE] up there, I have no straight lines. And I
13 pinch down in certain areas.

14 If you go to where that loop road, the zoning line
15 was established, in talking to the staff, they told us what
16 the turning radius at speed was going to be for a road. So
17 that whole rear line was, basically, this is the speed
18 traffic will be going, you can't have a radius more than
19 this, you can't have a 90-degree angle, and so forth.

20 It becomes very problematic to lay out any shopping
21 center there. And rear service drives are critical. In the
22 Master Plan, the public road essentially served the function
23 of that rear service drive. You could access the property.
24 And even though we then had a setback to parking, still our
25 rear service drive was, in essence, off of the commercial

1 area. Now, if we have to bring that rear service drive in
2 and then pull the parking in, it has this ripple effect and
3 you get to a point that even if I were to cut the density of
4 this project, here I'm showing a great deal of structured
5 parking. I have 800 structured parking spaces on this plan.
6 It is not certain that the economics ultimately will justify
7 that. And then I may have to move to surface parking. If,
8 in fact, I reduce the density to the degree that some of the
9 community members ultimately are looking for, and that is
10 very possible, then I'm going to become much more dependent
11 on surface parking.

12 CHAIR: I understand. Okay. I get your point.

13 UNIDENTIFIED SPEAKER: I have two questions. First
14 question, with respect to the waiver, I'm a little confused
15 about whether we grant the waiver -- so that's not our issue?

16 MR. JONES: No, we just thought that you should be
17 aware that we were going to ask for the waiver.

18 UNIDENTIFIED SPEAKER: Okay, but even if we thought
19 that was awful, what's our role? Is there anything we could
20 do about it? I'm not saying I think that -- I understand
21 what the scope of my authority is. I love talking about
22 issues I have nothing to do with and we could go another
23 couple of hours on it, but I just sort of would like to
24 understand what the range of authority is?

25 MR. JONES: The authority is with the director of

1 DPS in this case and you could be advisory.

2 UNIDENTIFIED SPEAKER: Okay. The other issue is,
3 I, too, share the Chairman's [INDISCERNIBLE]. This is an
4 unusual configuration and I was having a little trouble
5 imagining a corollary on the grounds on somebody whose
6 already got one of these that looks like that. So that then
7 raises a question in my mind, we had Stewart's testimony,
8 worried about Son of Sam. How about, given that this is a
9 Preliminary Plan, can they just mush all those boxes together
10 and make one really big box?

11 MR. DUGAN: They have flexibility here to do that.

12 UNIDENTIFIED SPEAKER: Okay.

13 MR. DUGAN: We refer to the big box size limit.
14 That's essentially 120,000 square feet with a pharmacy and a
15 full-line grocery store. You get to that size and we start
16 talking about special exceptions and at that point we can get
17 the Site Plan type review.

18 UNIDENTIFIED SPEAKER: All right.

19 MR. DUGAN: If you were special exception, we are
20 in here with architecture, building materials, you know,
21 everything.

22 UNIDENTIFIED SPEAKER: I'm willing to proceed,
23 based upon the understanding of Condition 15. In Condition
24 15, you state that, and what was really -- 14 concerned me
25 because by voting for the conditions, you essentially are

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1 buying into the conceptual plan that's there. But 15 does,
2 in fact, make provisions for the agency that makes the
3 decision to make the decision, but if the agent says we are
4 not going to give it to you then they have to go to where I
5 was going to have them go at this point anyway, which is to
6 make sure that the parking facilities comply with the
7 setbacks. So I'm okay now based up on that. But let me also
8 say that from the -- in terms of advantages, I remember, by
9 the way, when you came to speak to us when HSA was going to
10 do that road and how you talked in terms of what they did to
11 that road, how it would affect you, and we worked very hard
12 to make sure that you got the entranceway. So I just want t
13 let you --

14 UNIDENTIFIED SPEAKER: I appreciate it.

15 UNIDENTIFIED SPEAKER: Okay. I just wanted to let
16 you know that we remember that too.

17 UNIDENTIFIED SPEAKER: And I do as well and I
18 appreciate it.

19 UNIDENTIFIED SPEAKER: Okay. All right.

20 UNIDENTIFIED SPEAKER: Well, your Condition 15 does
21 highlight for me then -- I'm back to trying to understand
22 what our range of authority is. It says "obtain a waiver of
23 the setbacks." That implies we think they -- by golly, they
24 should do that.

25 UNIDENTIFIED SPEAKER: The second sentence I think

C E R T I F I C A T E

DEPOSITION SERVICES, INC., hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings before the Montgomery County Planning Board in the matter of:

Burtonsville Shopping Center #10

1-04109

By: D. Blum

Date: 4-5-06

Debra L. Blum, Transcriber

4/5/06

FAIRLAND MASTER PLAN CITIZENS ADVISORY COMMITTEE

June 27, 2006

HAND DELIVERED

Mr. Derick Berlage, Chairman
And Montgomery County Planning Board Commissioners, M-NCPPC
8787 Georgia Avenue
Silver Spring MD 20910

RE: Preliminary Plan 1-04109 (Burtonsville Shopping Center)
Response to Applicant Attorneys' Letter of June 23, 2006

Dear Chairman Berlage and Commissioners:

Having neither the time nor pockets to hire an attorney to rebut Mr. Dugan's and Mr. Gordon's letter of June 23 challenging our request for reconsideration of the Corrected Opinion of March 21, 2006, in the matter of Preliminary Plan 1-04109 (Burtonsville Shopping Center), the Fairland Master Plan Citizens Advisory Committee (CAC) will reply herein as forcefully and directly as it can, while standing by our reconsideration request of March 24 and countering the applicant's assertions at greater length during our testimony at the upcoming reconsideration hearing. As always, we will rely on the facts (some of which Messrs. Dugan and Gordon have correct and others they have stretched or concocted) and common understanding of the English-language usage of the words "conditions," "binding," and the like rather than selectively-cited legal precedent that has only passing relevance for resolving what is at issue in this case.

Regarding the attorneys' point that the reconsideration request itself should be dismissed because it was filed too late and there are no judicial grounds for reopening the matter, the CAC, as advised by General Counsel and as required, submitted its request within 10 days of issuance of the Corrected Opinion and precisely and pointedly based the request on the two conditions that the Opinion (and the attorneys themselves) cite as having been contested (waiver and master plan conformance)—see Finding (f), page 10, of the Opinion—and therefore the only issues upon which substantive questions may be raised subsequent to the original opinion assuming the revelation of pertinent new information or facts. That a party to the record may request reconsideration of substantive issues within 10 days of the issuance of a Corrected Opinion is well-known to the attorneys through their own request for changes in the original opinion, when they were advised by the Planning Board's General Counsel that the proper remedy was to "file a request for reconsideration within 10 days of the mailing of the corrected opinion" (see attachment and reference to Counsel's March 27, 2006, letter in para 5 below).

As for the waiver issue, Dr. Brown and the Patuxent Watershed Protective Association have spoken to that point. The CAC would add simply that the "waiver" discussion throughout the record is based on what was subsequently determined to be a presumptive error, a mistaken assumption, and therefore needs to be corrected (and we believe reheard) if the Board is concerned about the accuracy of the record and the correct characterization of the issue.

ATTACHMENT SEVEN

The CAC's primary concern relates to "master plan conformance" and indeed the requirement in Condition 12 (and related Condition 14) for "**substantial**" master plan conformance. The CAC does not want to "re-argue issues that are not new," which is the attorneys' contention, or even necessarily to revise or alter the language of the conditions of approval, but rather 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—and that was the basis for his density calculation and a circulation plan that enabled him to comply with even a semblance of conformance to master plan guidelines. (See attached page 2 of Dugan Feb. 7 letter to DPS, and Fairland CAC Mar. 23 letter to DPS Director Robert Hubbard.) **The facts are that the Board approved a plan that cannot be done, with conditions that cannot be met, except by the applicant parsing semantics and relying on the vagaries of the C-2 zone to achieve an outcome that neither the master plan nor the Board intended.**

Messrs. Dugan and Gordon go to great length to argue that the applicant was straightforward with the community, the planning staff, and the Board as to what could result on this site and, more importantly, that staff and Board acquiesced in the notion that a "big box" store and a sea of surface parking on this site was somehow consistent with the conditions of approval and substantial conformance to master plan guidelines. In their letter of June 23, they quote Mr. Weaver and Ms. Weiss as conceding the "layout will change" (p. 7) and that the project may not be built "exactly as shown" (p. 6); of course this was understood, but the expectation, and the requirement (according to the adopted conditions of approval, which after all are the last word on the subject), was that the applicant, even given wide latitude, nonetheless had to conform substantially to master plan guidelines and was "bound to" at least the "elements of the Illustrative Circulation Plan." Indeed, so concerned were the applicant and his attorney by those express conditions that subsequent to the Board's decision of December 19, 2005, on December 29, 2005, they wrote planning staff, ala Clarksburg, asking staff to sign off on an 11-page menu of "interpretations" and "modifications" of the Opinion. **SIGNIFICANTLY, in a letter of March 27, 2006 (see attachment), the Planning Department's General Counsel informed Mr. Dugan that to get the latitude he was seeking would require a reconsideration filing or an AMENDMENT to the plan!!**

Attorneys and client have since decided to ignore the stated conditions, and General Counsel's letter reaffirming them, by either emphasizing the vagueness of the single word "illustrative" (choosing to disregard the semantic clarity of "substantial conformance," "pedestrian-friendly internal street network," "bound to the elements of," "conditions" of approval, etc.) or parroting a single brief sidebar exchange as if it were some kind of smoking gun. In the latter instance, Commissioner Perdue asked if they believed they had the ability to combine all the square footage into a single big box and Mr. Dugan answered affirmatively with all the conviction of a suspected offender coming clean after being found with his hand in the cookie jar. And that hiccup in the record is the best they can muster to support their case. You will note that Commissioner Perdue did not say, "Great. Go for it." Although one might have wished the commissioner would have explored further with the applicant the implications—i.e., what is left of the town center concept when you assemble all or almost all of the capacity into a single 140,000 square foot box (the size of two Best Buy stores back to back) and eliminate the parking garage so that 1,000 parking spaces spill over onto the site—what

is significant is that the Board did not mitigate or modify the conditions to clarify that the applicant could go there as a matter of right or compliance. Moreover, if there is any question, it is not for the applicant, but for the planning body, to construe whether the final plan they show the County meets the threshold of “substantial conformance to master plan.”

With regard to the attorneys’ references on pages 5-6 of their June 23 letter to the C-2 clause expressly permitting a wide range of uses “for a regional or local area,” the attorneys disingenuously underline regional whereas the Fairland Master Plan prominently and repeatedly specifies in three distinct places at the very front of the plan that the appropriate use on the site is to serve a local neighborhood need and purpose (see attached pages xiv, xv, and xvi from the 1997 Fairland Master Plan). **So, yes, the C-2 zone “permits” a wide range of uses—they have created a straw man here, as no one is contesting that—but it does not *preclude* the requirement that the scale and character of development on a C-2 site be appropriate to and compatible with adjacent uses (in this instance, an elementary school and the Patuxent Watershed) and consistent with master plan intent and vision.**


Finally, the attorneys argue that “mistake” or “fraud” must be found in order to reverse a decision, though in fact Maryland case law makes clear a board may revise its judgment “when there is justification and good cause.” We are not seeking to indict the applicant for “fraud,” nor do we believe he made any “mistake” that was not calculated. Mockery, travesty, Trojan horse, bait and switch—any of those will suffice. Even a preliminary plan in this county, one hopes, has to pass a laugh test; the pedestrian-friendly stipulation alone presumably rules out a single big box and a sea of parking islands on a site (perhaps Mr. Dugan can tell us of anyone he knows who walks to a Costco). This is about not merely whether the “conditions of a preliminary plan” have any meaning at all, but whether the English language has any meaning in our planning process.

In closing, the master plan committee would submit that the record of a preliminary plan is singularly, especially, important in the case of a C-2 zone. As we state in our reconsideration request, precisely because the Planning Board in the C-2 zone gets only one opportunity for comprehensive review in the absence of a site plan requirement, it is all the more imperative that maximum care, clarity, and accuracy be achieved in the record of opinion for development in this zone. We prefer you address the discrepancies and deficiencies or any ambiguities in the record through the reconsideration process. But we would at least expect the Board to hold the applicant accountable to the conditions of approval during the parking facility review and building permit review—whatever compliance mechanism you will be involved in either yourselves or through input to the Department of Permitting Services. Should it turn out that the conditions of approval in a C-2 preliminary plan are not “conditions” at all, or are so hollow and so worthless they amount to a charade, then please in the future do not again put citizens, or yourselves or staff, through a phony exercise; just state that there is no purposeful review in the C-2 zone, dispense with the pretense of a preliminary plan, and hand the developer a blank slate on which to work his will.

Allow me a personal observation. We believe this plan has never received the scrutiny it deserves or that the community from early on asked for as a matter of high urgency. To some participants it

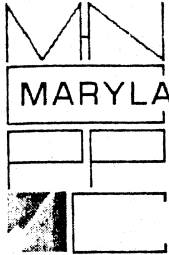
seems that both the County Council, with its keeping the C-2 ZTA on hold, and the Planning Board are satisfied to kick the can down the road. At stake is not merely the credibility of the post-Clarksburg commitment to rigor and integrity but possibly the fate of a planning area that, not unlike the subject site, is at a key crossroads. Burtonsville is a wonderful diversified group of neighborhoods—you saw it by the faces that came to testify on the Blackburn Road development last month—but it is fragile. You make a planning mistake of this magnitude here and you don't get to make others—because the hope and trust that residents place in their being able to shape one of the most visible and defining elements of their community will have been erased along with the possibility for a town center of any character or promise. I'm reminded of what Dr. Nelson had to say about the big box at your last Shady Grove forum, that it had the least useful life of any land use, commercial or residential, that the initial developer typically gets out at the 7-year mark and turns the property over to a stupid investor, leaving the fool and the community holding the bag. I will not impute that motive to Mr. Jones but I will do my utmost, and in the end I feel certain this Planning Board will also, to make sure that doesn't happen.

Sincerely,


Stuart Rochester
Chair, Fairland Master Plan CAC

Attachments

cc. Debra Daniel ✓
Faroll Hamer
Rose Krasnow
Richard Weaver
Piera Weiss
Councilman Steven Silverman
Councilmember Marilyn Praisner
Councilmember Nancy Floreen
Dr. Cleve Brown
Christopher Jones
Timothy Dugan
Larry Gordon



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
8787 Georgia Avenue • Silver Spring, Maryland 20910-3760

OFFICE OF
THE GENERAL COUNSEL

(301) 495-4646
FAX (301) 495-2173

March 27, 2006

Timothy Dugan, Esquire
Attorney at Law
Shulman Rogers Gandal Pordy & Ecker, P.A.
11921 Rockville Pike
Rockville, Maryland 20852-2743

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

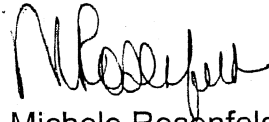
Dear Mr. Dugan:

I am responding to your letter of December 29, 2005 ("Letter"), seeking modification of certain text within the body of the opinion for the above-referenced project, and modification or deletion of certain conditions of approval. Enclosed please find a copy of the corrected opinion, as approved by the Planning Board on March 16, 2006. It corrects condition number 2 (which did not include the specific language before the Board at the time it reviewed the plan), and condition number 16, which inadvertently referenced the wrong date for the stormwater management approval letter from the Department of Permitting Services (DPS).

The remaining changes that you requested in your Letter either proposed to delete conditions that were expressly approved by the Board, or proposed to modify text that explains the Board's decision. If you wish to pursue further changes to the opinion language, you must either file a request for reconsideration within 10 days of the mailing of the corrected opinion, or seek an amendment to the approved plan.

Should you have any questions, or require additional information, please call me at 301-495-4646.

Sincerely,



Michele Rosenfeld
Associate General Counsel

MMR:cmd

cc: Faroll Hamer, Acting Director, Montgomery County Planning Department
Stuart Rochester, Chair, Fairland Master Plan CAC
A. C. Brown, President, Patuxent Watershed Protection Association, Inc.
Jim J. Hughes, Vice President, Patuxent Master Plan CAC

FAIRLAND MASTER PLAN CITIZENS ADVISORY COMMITTEE
2901 Greencastle Road Burtonsville MD 20866

March 23, 2006

Mr. Robert C. Hubbard
Director, Department of Permitting Services
255 Rockville Pike, 2nd Floor
Rockville MD 20850-4166

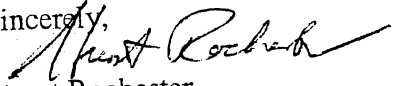
Dear Mr. Hubbard:

Thank you for your letter of March 3 updating the Fairland Master Plan Committee on the Burtonsville Shopping Center Petition for a Setback Waiver. The Master Plan Committee, and the many interests—including the Burtonsville Elementary School adjacent to the shopping center and the Patuxent Watershed Protective Association—impacted by and closely following this case greatly appreciate the care and scrutiny thus far exhibited by the Department of Permitting Services in the handling of the several issues relating to this problematic site.

This letter is to remind DPS of the importance of the **parking facility** matter in particular, whether a setback waiver is involved or not (as you know, there has been considerable misinformation and confusion regarding the latter). The shopping center owner has received preliminary plan approval with density (capacity) based on his showing **structured parking** in his plan. Without that structured parking, especially with the larger box he has in mind, upwards of 1,000 or more parking spaces would spill onto the site, thus dramatically reducing and perhaps rendering physically impossible the other elements shown in his plan that enable him to fulfill the condition of “substantial master plan conformance” and that contributed to approval of the plan by the Planning Board (and indeed its support by the Master Plan Committee). Incredibly, in Mr. Jones’s attorney’s February 7, 2006 request to your office for a parking facility setback waiver, on page 2 (see attachment) he incidentally states “*in the Burtonsville area, multi-story buildings and structured parking are not possible.*” The letter thus directly contradicts a key element that he showed in his plan before the Planning Board to support his density and ability to meet the conditions of approval, including a pedestrian-friendly center and substantial conformance to master plan guidelines. We find this deeply troubling.

Having jurisdiction over the parking facility review as well as any waiver petition, your Department, we trust, will hold the applicant to the plan upon which his approval was based. We wish to receive timely notification by DPS of its review of the developer’s parking facility plan, which we understand occurs prior to building permit. We and our residents, who are concerned about so many aspects of what appears to be a classic “bait and switch” attempt, will look to DPS to enforce the plan proffered the community and the Planning Board and to not allow a transparent flouting of the integrity of the planning and permitting processes.

Sincerely,



Stuart Rochester

Chairman, Fairland Master Plan CAC

- cc. Councilmember Marilyn Praisner
- Councilmember Steve Silverman
- Councilmember Nancy Floreen
- Derick Berlage, Chairman, Montgomery County Planning Board
- Richard Weaver, M-NCPPC
- Michelle Rosenfeld, M-NCPPC

1) Waiver Request

The Petitioner requests a complete waiver from the parking, driveway, landscaping and screening setback requirements (i.e., a zero setback) along the entire interior split zoning line as depicted in red and described in the Notes on the Illustrative Plan (the "Plan") which is submitted as part of this Petition. The waiver would exempt the areas shown in red from all of the referenced setback requirements, regardless of whether such areas are or may become front, side or rear yards. No waiver from any common property line with adjoining properties is being sought. As explained at Section 4), the C-2 zone, rather than the RC zone, setback standards apply. Nonetheless, regardless which zone's standards apply, the Petitioner's request for a zero setback is the same.

The Petitioner requests the waiver to: (1) best address the practical circumstances underlying the use of the property as a retail center in the Burtonsville area; and (2) to best utilize the C-2 zoned land's shape.

In the Burtonsville area, multi-story retail buildings and structured parking are not possible. In all likelihood, the stores will be one (or at most two) story structures. The businesses and the shoppers will depend upon surface parking so that coming and going is perceived to be safe and convenient. Thus, the center will be predominantly horizontal. Using the surface area of the C-2 zoned land most efficiently will be critical.

Avoiding unnecessary and wasteful use of the horizontal plane is the purpose of the waiver application. Setbacks are unnecessary, and should be avoided, in areas between the zoning line and the property line, where: (1) significant distances exist between the adjoining uses and the C-2 zoned land; and/or (2) the areas between the zoning line and the property line are already wooded and will be subject to permanent conservation easements. (In the one area not as wooded, but wooded nonetheless along its perimeter -- the northeasterly corner of the property zoned RC -- the waiver is proper because it is so wooded, and it will not be used for residential purposes, in the long term.²) Further if setbacks were also imposed along the irregularly curved RC/C-2 zoning line³ in the rear, the arching shape, plus setbacks, would cause a ripple

² An existing residence is being rented by a couple who sold the property to the Petitioner. They have plans to leave in the near future. The property is not intended to be used for residential purposes in the long term.

³ The split zoning line shows one of the Master Plan's alternative alignments for the loop road. The chosen loop road will be located elsewhere. It is now referred to as the "Burtonsville Access Road." It is planned to run generally between the stores fronting on Rte. 198 and the Burtonsville Elementary School, and to cut across a portion of the Petitioner's property near Rte. 198. The zoning line around the rear of the center is curved, because such loop road alternative would have had to accommodate the curve of a vehicle's turn, at a certain speed. If the loop road had run behind the center, it would have been a public right of way. Also, it would have been constructed on the RC zoned land, just outside of the C-2 zoned land. The Master Plan recommended that it be located there: "Add a loop road adjacent to the outer perimeter of the new C-2 zoned land in the rear of the center generally running from the southwestern corner of the site and exiting at US 29." (Please the Fairland Master Plan at page 72.) Accordingly, the Petitioner would have then used the loop road for its rear access. Consequently, the lack (cont'd)

PLAN HIGHLIGHTS

COMMUNITIES AND CENTERS

This Master Plan reinforces the existing development patterns in the Fairland Master Plan area with appropriate adjustments based on the 1993 General Plan Refinement and the goal of balancing land use against available facilities and infrastructure.

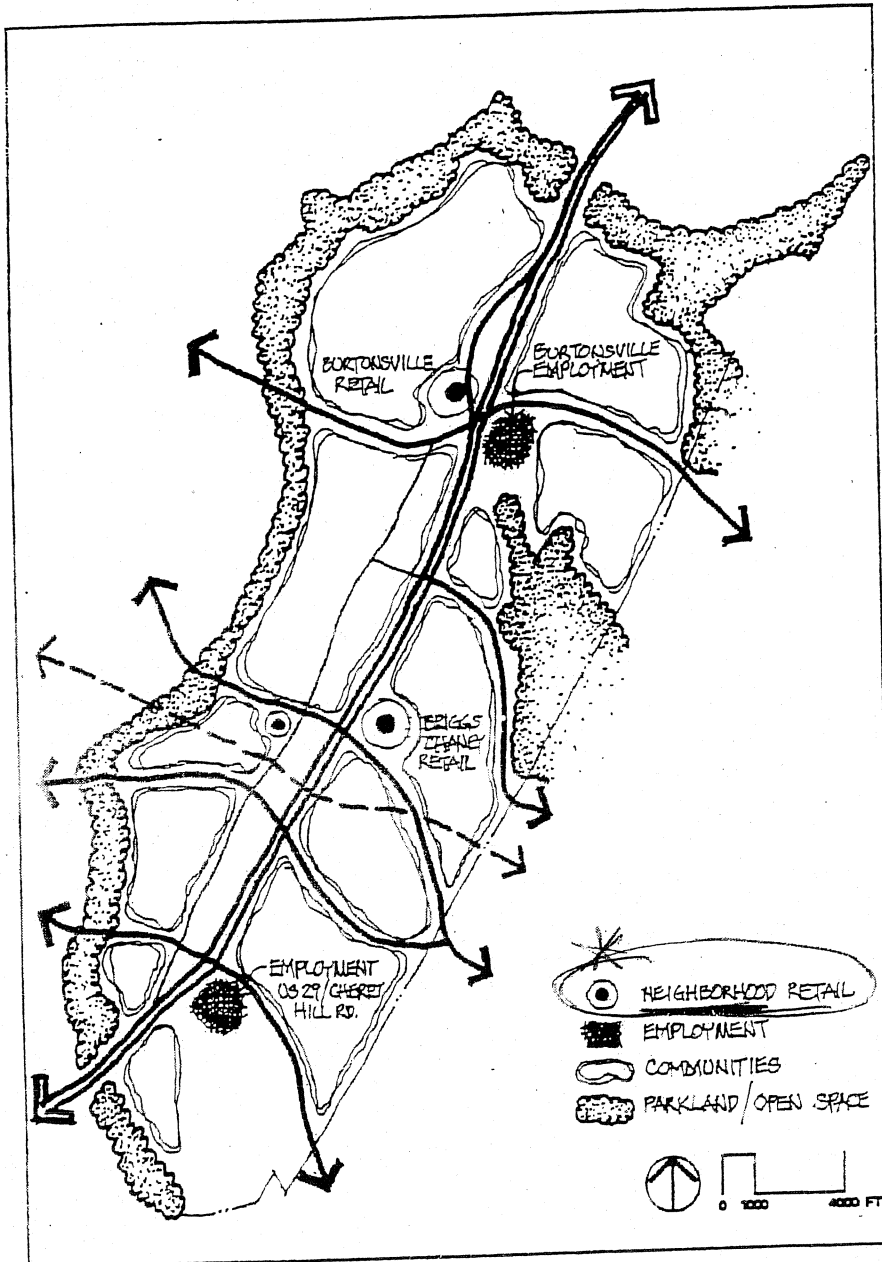
The Fairland Master Plan has community building as one of its key components; recognizing and reinforcing each community's unique character and identity and ensuring that local centers serving the communities are attractive, functional, safe, and accessible. The communities of Fairland are composed of new neighborhoods adjacent to mature neighborhoods, served by local shopping, schools, public services, and parks. The Fairland Master Plan implements the policies of the General Plan Refinement, which identified the Fairland Master Plan area as primarily residential in nature and within the Suburban Communities and the Residential Wedge.

This Plan:

- Increases the potential for a greater percentage of single-family detached homes in undeveloped or underdeveloped areas within Fairland while maintaining a mix of housing types.
- Recommends a golf course community that straddles the Montgomery and Prince George's Counties' boundary and incorporates the revitalization of the public Gunpowder Golf Course, located off Gunpowder Road.
- Recommends redevelopment of the Great Oaks site with an institutional use or as a residential subdivision by using Transfer of Development Rights (TDRs).
- Removes TDR development options wherever environmental and access constraints limit using increased densities.
- Recommends streetscaping and sidewalk improvements in the Briggs Chaney Road and Burtonsville neighborhood retail areas.
- Recommends overlay districts to encourage diversification of uses in the US 29/Cherry Hill Road Employment Area and to provide opportunities for redevelopment in the Burtonsville Industrial Area.
- Recommends a new low-intensity regional shopping center in a 42-acre portion of the West*Farm Technology Park.
- Recommends sidewalk, trail, and roadway connections between new and existing communities.

COMMUNITIES AND CENTERS

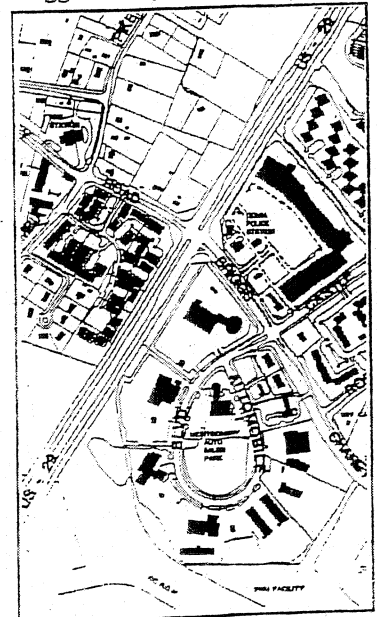
FIGURE 1



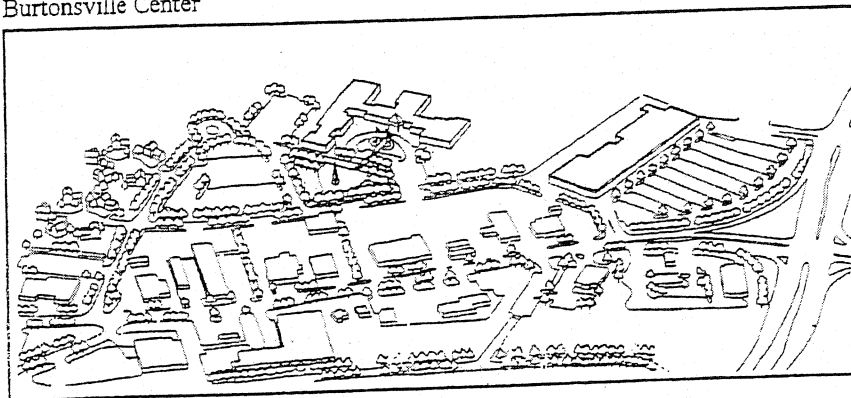
Golf Course Community



Briggs Chaney Center



Burtonsville Center



The Fairland Master Plan recommends enhancing mobility by providing a safe and efficient transportation system with a wide range of alternatives.

The Plan identifies right-of-way for grade-separated interchange improvements on US 29 and gives priority to east-west travel. The Plan underscores the need for pedestrian safety and access to local facilities and recommends a number of sidewalk improvements in commercial centers, in the residential communities, and along the major roads. Emphasis is placed on safe and attractive transportation improvements that enhance local circulation while improving all modes of travel within and through the communities and centers of Fairland.

This Plan:

- Recommends grade-separated interchanges for all east-west crossings of US 29 and the need to reserve right-of-way for all improvements.
- Provides improved traffic circulation for through and local traffic.
- Recommends a rear access road in the Burtonsville neighborhood retail area to improve circulation along MD 198.
- Recommends improved access to the Burtonsville Elementary School.
- Recommends streetscaping, sidewalks, and pedestrian crossings in the Briggs Chaney Road and Burtonsville neighborhood retail areas.
- Recommends extension of existing local and regional bus service.
- Recommends a Transportation Demand Management Program to encourage transportation alternatives to the single-occupancy automobile, including car pooling and mass transit.
- Provides a safe and convenient bikeway network that connects to local community centers, services, and recreational facilities and expands commuting opportunities for biking.
- Expands the system of sidewalks and walkways to improve access to public transit, commercial centers, schools, parks, and places of employment.