



**MONTGOMERY COUNTY PLANNING BOARD**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB No. 08-150  
Site Plan No. 82003025B  
Project Name: Lofts 24 – Silver Spring Park  
Hearing Date: November 20, 2008

**MONTGOMERY COUNTY PLANNING BOARD**

**RESOLUTION**

WHEREAS, pursuant to Montgomery County Code Division 59-D-3, the Montgomery County Planning Board ("Planning Board") is required to review amendments to approved site plans; and

WHEREAS, on May 22, 2008, MAB LLC ("Applicant"), filed a site plan amendment application designated 82003025B, Lofts 24 – Silver Spring Park (the "Amendment") for approval of the certain modifications to the approved site plan.

WHEREAS, following review and analysis of the Amendment by Staff and the staffs of other applicable governmental agencies, Staff issued a memorandum to the Planning Board dated November 6, 2008, setting forth its analysis and recommendation for approval of the Amendment in part ("Staff Report"); and

WHEREAS, on November 20, 2008, Staff presented the Amendment to the Planning Board at a public hearing, where the Planning Board heard testimony and received evidence submitted for the record on the Amendment; and

WHEREAS, the Applicant seeks through the Amendment approval to:

1. Replace previously approved fiberglass benches with (4) small round concrete benches in the locations shown on the approved site plan. The concrete benches will be mounted to the ground.
2. Modify the bollard light fixture to a similar model by a different manufacturer. The proposed bollard is also black and is similar in shape and dimensions to the one previously approved.
3. Change the pole mounted and wall mounted light fixtures to a similar model by a different manufacturer. The design and photometric output is equivalent.
4. Eliminate one wall mounted face plate light fixture on the wall at the rear of the property, and increase the wattage of the remaining light fixtures to 200

Approved as to  
Legal Sufficiency:

8787 Georgia Avenue, N.C.P.P.C. Legal Department 20910 Chairman's Office: 301.495.4605 Fax: 301.495.1320

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- watts on the type A (S-twin) lights and to 175 watts on the type B-2 lights. Update photometric plan.
5. Adjust location of honey locust to account for the larger PEPCO transformer pad.
  6. Eliminate (1) yew shrub from the planting area adjacent to the dumpster area due to the reduced size of the planting area.
  7. Remove (1) magnolia tree on the west side of the building to avoid obstructing the electrical meters.
  8. Remove skylights from plans as consistent with M-NCPPC administrative approval dated of April 5, 2005. Skylights were not installed due to DPS measuring standards for building height, an issue raised during the building permit approval process.
  9. Show dual railing on the sidewalk off Bonifant Street as required by DPS.
  10. Revise location of PEPCO blast wall to be a 3-foot distance from the transformer pad as indicated in the PEPCO standards.
  11. Revise the concrete pad of the PEPCO transformer to reflect the larger PEPCO transformer that was installed per PEPCO requirements.
  12. Add 6-inch step and depressed curb at the northwest end of the parking lot;

WHEREAS, as described in the Staff Report, the Amendment proposed two additional changes to the approved site plan. Namely, the Applicant proposed to:

13. Install the brick area of approximately 60 square feet as shown on the approved landscape plan and proffered in exchange for the loss of public use space that resulted from the shifting of the building.
14. Revise thickness of granite pavers to two centimeters rather than two-inch thickness as previously approved.

WHEREAS, at the public hearing, the Applicant made clear that it did not wish to have the Planning Board approve elements 13 and 14 of the Amendment as described in the Staff Report, but instead wished to have the Planning Board amend the requirements of the approved site plan to ratify certain as-built paving conditions. Specifically, the Applicant seeks after-the-fact approval of (1) the use of concrete instead of brick paving at the Fenton Street driveway entrance, and (2) the use of concrete instead of granite pavers at the pedestrian entrances to the building located along Fenton and Bonifant Streets and in the public use space located at the corner of Fenton and Bonifant Streets.

WHEREAS, on November 20, 2008, the Planning Board voted to approve the Amendment in part, subject to conditions, and deny the Amendment in part, on the motion of Commissioner Robinson, seconded by Commissioner Presley, with a vote of 5-0, Commissioners Alfandre, Cryor, Hanson, Presley, and Robinson voting in favor.

NOW, THEREFORE, BE IT RESOLVED that, pursuant to the relevant provisions of Montgomery County Code Chapter 59, the Montgomery County Planning Board hereby APPROVES the Amendment in part, subject to conditions, and DENIES it in part. Specifically, the Commission approves elements 1-12 of the Amendment, but does not approve the proposed paving changes. The Commission's approval of elements 1-12 of the Amendment is subject to the following conditions:

1. The final Certified Site Plan must be consistent with all as-built conditions or as modified by this Amendment.
2. Redirect bollard lighting once seating is installed.
3. Prior to approval of the amended Certified Site Plan, the plans must be revised to reflect the original conditions of approval as follows, subject to Staff review and approval:
  - a) Provide black granite pavers with a 2-inch thickness, mortared in place at the three entryways to the building and public use space at the corner of Bonifant and Fenton Streets. The individual pavers must be 2" x 24" x 24" with a 2" x 12" x 12" matching border as originally approved.
  - b) Add note on plans stating "Remove existing tile pavers at entryways and public use space, and excavate the concrete slab to the necessary depth to accommodate the 2-inch thick granite pavers mortared in place." The granite pavers must be installed so that the surface is flush with the surface of the existing surrounding pavement.
  - c) Document and add a note on plans relative to the 1-year warranty on landscaping from date of planting and based on proper maintenance.
  - d) Provide a brick crossing on the driveway off Fenton Street in alignment with the adjacent sidewalks and handicap ramps and as shown on the site plan sheet of 82003025A.
4. No later than two weeks after the mailing of this resolution, the Applicant must submit to Staff a plan of compliance proposing a schedule to fulfill all requirements of the approved site plan, as amended by subsequent approvals by Site Plan staff and the Planning Board.

BE IT FURTHER RESOLVED, that the Planning Board adopts the Staff's recommendation and analysis set forth in the Staff Report and FINDS:

Elements 1-12 of the Amendment are consistent with the provisions of § 59-D-3.7 of the Zoning Ordinance. These elements of the Amendment do not materially alter the intent, objectives, or requirements of the original site plan approval.

Those changes were either caused by requirements that are beyond the Applicant's control, are *de minimis*, or are deletions for which the Applicant is proposing an adequate substitute.

The same cannot be said of the proposed paving changes. The Applicant proposes to amend the originally approved site plan to eliminate the requirement to provide brick paving across the Fenton Street driveway entrance as an extension of the adjacent sidewalks, and to provide only approximately 60 square feet of brick paving above this area, which was previously proffered in exchange for the loss of public use space that resulted from the shifting of the building. The Applicant further proposes to eliminate the requirement to pave two building entrances on Fenton Street, one entrance on Bonifant Street, and the public use space located at the corner of Bonifant and Fenton Streets with two-inch thick granite pavers of specified widths. The effect of approving these proposed paving changes would be to ratify the as-built conditions, which currently fail to comply with the requirements of the approved site plan.

The Applicant makes several arguments in support of the proposed paving changes. It argues that the benefit provided by the brick and granite paving requirements is purely aesthetic. The Applicant further argues that the cost of tearing out the existing paving and replacing it with the materials required by the approved site plan will exceed the economic benefit. Specifically, the Applicant asserts that the cost of complying with the paving requirements of the approved site plan will be approximately \$150,000, and that complying would yield no economic benefit to the Lofts 24 unit owners. The Applicant argues that this would violate the "economic waste doctrine." The Applicant also argues that due to the proximity of the paving to the building, replacing the paving could damage the building. With respect to the paving at the Fenton Street driveway entrance, the Applicant further argues that the use of concrete instead of brick is consistent with what is shown on one sheet of the certified site plan (although the brick paving is shown on several other sheets of the certified site plan), and that transitioning from brick sidewalks to a concrete driveway will enhance pedestrian safety by providing a visual cue to pedestrians that they are stepping into an area that is open to vehicular traffic. Finally, the Applicant requests that the risk of liability associated with the performance of the work necessary to bring Lofts 24 into compliance with the requirements of the approved site plan be shifted to either the Planning Board or the Lofts 24 homeowners association.

At the public hearing, the Planning Board heard testimony from representatives of the Lofts 24 condominium association, who emphasized the importance of the Planning Board requiring the Applicant to comply with the requirements of the approved site plan. In addition to discussing the Amendment, the representatives of the condominium association testified about previously approved changes to the approved site plan, namely the elimination of sky lights, which resulted from a post-approval determination that the sky lights did not comply with the building code. While the testimony concerning the sky lights was beyond the scope of this proceeding, it

underscored the reliance of building residents on the plans approved by the Planning Board.

Based on all of the evidence and arguments presented, the Planning Board does not find any justification for approving the proposed paving changes. The Applicant's attempt to dismiss the paving, which the Applicant itself proposed initially and which formed the basis of the Planning Board's approval of the original site plan, as a purely aesthetic issue is both incorrect and ignores that aesthetic improvements play an important role in promoting a number of planning goals that the Planning Board and Montgomery County are seeking to achieve in this area, including promoting economic revitalization and promoting pedestrian activity. The quality paving elements required as part of the approved site plan will be enjoyed by residents and neighbors of the building, as well as by pedestrians as they pass by the building or as they stop to enjoy the public use at the corner of Fenton and Bonifant, and, finally, to a lesser extent by drivers. By enhancing the quality of the paved areas, the requirements of the approved site plan will help to highlight the building entrances and public use space from the sidewalk area, create visual interest, and enhance the pedestrian realm in a manner that will encourage pedestrian activity, and, in turn, promote safety. These improvements will also contribute to enhancing an area, where there has been a lack of private investment in the past and where, due to its proximity to metro and other public infrastructure, the County and Planning Board are interested in promoting investment and development.

The Applicant's argument that requiring conformance with the approved site plan would violate the economic waste doctrine is similarly flawed. As an initial matter, the economic waste doctrine applies in the context of construction contract disputes, and has been cited by courts rejecting claims for specific performance of a construction contract where a building has already been built and the cost of specific performance would exceed the benefit. Therefore, the economic waste doctrine cases cited by the Applicant are inapposite. Moreover, accepting the Applicant's economic waste argument would fundamentally undermine the site plan review and enforcement process. A site plan is approved as a package. At the time of site plan review, the removal of one element might have resulted in other elements being added. If an applicant who has received site plan approval can pick and choose which elements to follow, and then demand approval for variations from elements of the approved plan that it argues do not add sufficient value to the development, the overall package of improvements may be substantially diminished and there would be little point in having a site plan in the first place. Further, the Applicant's argument that the cost of performing the work necessary to bring Lofts 24 into conformance with the approved site plan would exceed the value that the work would add to the Lofts 24 unit owners, which is central to its economic waste argument, ignores both that the Lofts 24 condominium association sees a substantial value in the approved site plan being followed and that the elements of the approved site plan are intended to benefit not only the unit owners but also the larger public, who, as described above, will experience and

benefit from the required paving. Finally, requiring conformance with approved site plans is important to deter site plan violations.

The Applicant's argument that the proximity of the required paving changes to the existing building will make it difficult to perform is also not a reason to amend the paving requirements of the approved site plan. It was completely within the Applicant's control and capability to perform the work required by the approved site plan in the first place, and, based on the testimony of the Applicant, it appears that the primary reason that it did not do so was convenience. At the public hearing, the Applicant explained that the decision to install concrete paving instead of the required granite was made in an attempt to keep the project on schedule, a situation that could have presumably been avoided by ordering the granite sooner.

The Applicant disagreed with Staff about whether brick paving was required at the Fenton Street driveway. The Board disagrees with the Applicant's assertion that the brick paving at the Fenton Street driveway entrance was not required. The Applicant correctly points out a discrepancy in the certified site plan, namely that sheet L-1 of the landscape plan does not show the brick paving. But this argument ignores that the certified site plan contains multiple other sheets, including the site plan, lighting plan, storm water management plan, and erosion and sediment control, that show the brick paving being required on the apron.

The Planning Board is not convinced by the Applicant's argument that using concrete in the pedestrian portion of the Fenton Street driveway apron will be safer than brick paving. There are other precedents for continuing brick paving from the sidewalk across driveways and streets, and the Board is not aware that they have posed any safety issues.

The Planning Board does not accept any potential liability associated with the work that the Applicant must perform to conform to the approved plans, nor is it appropriate to shift such liability to the Lofts 24 homeowners association. Complying with the approved site plan is the responsibility of the Applicant, not any other party.

Finally, as explained at the public hearing, the Planning Board expects the Applicant to promptly take the steps necessary to comply with the approved site plan, as amended by approved changes. Thus, the Board is requiring the Applicant to submit a compliance plan explaining the timeline by which it will perform the work necessary to come into compliance. The Planning Board expects site plan staff to review the compliance plan and report to the Board on what it provides. As discussed at the hearing, the Planning Board views the Applicant's failure to install the paving required by the approved site plan as raising significant enforcement issues, which site plan staff should consider in connection with the compliance plan.

BE IT FURTHER RESOLVED that all site development elements as shown on Lofts 24 – Silver Spring Park drawings stamped by the M-NCPPC on August 15, 2008, shall be required, except as modified by the above conditions of approval; and

BE IT FURTHER RESOLVED, that this Resolution incorporates by reference all evidence of record, including maps, drawings, memoranda, correspondence, and other information; and

BE IT FURTHER RESOLVED, that this Amendment shall remain valid as provided in Montgomery County Code § 59-D-3.8; and

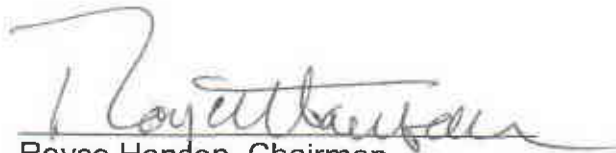
BE IT FURTHER RESOLVED, that the date of this written resolution is MAR 27 2009 (which is the date that this resolution is mailed to all parties of record); and

BE IT FURTHER RESOLVED, that 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).

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**CERTIFICATION**

This is to certify that the foregoing is a true and correct copy of a resolution adopted by The Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission on motion of Commissioner Alfandre seconded by Commissioner Presley, with Commissioners Hanson, Robinson, Cryor, Alfandre, and Presley present and voting in favor of the motion, at its regular meeting held on Thursday March 19, 2009, in Silver Spring, Maryland.



Royce Hanson, Chairman  
Montgomery County Planning Board