

**MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING**THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION8787 Georgia Avenue
Silver Spring, Maryland 20910-3760
301-495-4500, www.mncppc.orgOFFICE OF
THE GENERAL COUNSELAgenda Date: November 5, 2009
Item Nos. 13 and 14
Reconsideration Requests(301) 495-4646
FAX (301) 495-2173**REQUEST FOR RECONSIDERATION****MEMORANDUM**

TO: Montgomery County Planning Board

FROM: David B. Lieb, Associate General Counsel *DL*
301.495.4646

DATE: October 30, 2009

RE: Reconsideration Requests for Studio Plaza, Project Plan No. 920070010

With this memorandum we forward for the Board's review two reconsideration requests of the Board's resolution approving the Studio Plaza project plan, one filed by 8204 Associates, LLC on September 22, 2009 and the other filed by Athena and Dimitra Kalivas on September 24, 2009.

I. BACKGROUND

At its May 28, 2009 meeting, the Board approved the Studio Plaza project plan by a 4-0 vote, with Commissioners Hanson, Robinson, Cryor, and Alfandre voting in favor, and Commissioner Presley absent. The resolution memorializing the Board's decision was mailed on September 15, 2009.

The approved project plan provides for the construction of a multi-building mixed-use development, including residential, retail, office, and/or hotel uses, with a maximum density – exclusive of any density bonuses for MPDUs or workforce housing – of 626,781 gross square feet on 5.11 acres of CBD-1 and Fenton Village Overlay-zoned land, located on the block bound by Thayer Avenue, Fenton Street, Silver Spring Avenue, and Mayor Lane in the Fenton Village area of the Silver Spring CBD.

II. APPLICABLE RULES

A reconsideration request must "specify any alleged errors of fact or law and state fully all grounds for reconsideration because of mistake, inadvertence, surprise,

fraud, or other good cause.” The Board is responsible for determining if the grounds stated in support of the reconsideration request are sufficient to merit reconsideration.

Only a Board member who voted in the majority of the decision that is the subject of the request for reconsideration may move to reconsider the decision. In this case, Commissioners Hanson, Cryor, and Alfandre are eligible to move for reconsideration. If there is no motion for reconsideration, the request for reconsideration is denied. Any motion to reconsider must be supported by a majority of the Board members present who either participated in the previous decision or read the record on which it was based.

III. RECONSIDERATION REQUESTS

The 8204 Associates and Kalivas reconsideration requests both seek to modify the conditions of approval of the Studio Plaza project plan. Neither request seeks to have the Board reverse its decision to approve the project plan.

A. 8204 Associates’s Reconsideration Request

8204 Associates’s reconsideration request contains a primary request and several secondary requests to modify Condition 2.d, which addresses the impact of the proposed development on the 8204 Associates property, primarily in terms of access. Each of the conditions that 8204 Associates seeks to modify was considered and adopted by the Board based on the recommendations of the staff report and after receiving extensive testimony on these issues.

The staff report for the Studio Plaza project plan contained a detailed discussion of how the proposed development would impact 8204 Associates’s access to its property, and recommended conditions designed to ensure that access would be maintained. Following a lengthy discussion of these issues at the public hearing, the Board adopted the staff-recommended conditions with slight modification.

Condition 2.d provides two alternatives for maintaining 8204 Associates’s access. The first (and preferred) alternative is for the Applicant and 8204 Associates to agree to certain modifications to the 8204 Associates building that will facilitate 8204 Associates’s continued access to its property. Because this alternative requires modifications to the 8204 Associates building, to which 8204 Associates would have to consent, the resolution provides an alternative. If 8204 Associates and the Applicant fail to agree to the modifications outlined in conditions 2.d.i-vi by the time of site plan approval, under Condition 2.d.vii the Applicant will be required to construct either an exterior elevator or stairway to provide 8204 Associates access to the second floor of its building, which would also ensure 8204 Associates continued access to its property. The fallback option requires minimal or no physical modifications to the 8204 Associates building. Notwithstanding the provision of these two alternatives, the resolution provides further flexibility for the parties to explore other alternatives. Condition 2.g provides that the Board will consider any such alternative proposals at site plan.

Condition 2.d. provides:

For the Gerecht Property,¹ the Applicant shall:

- i. install a commercial elevator inside the building convenient to the Fenton Street entrance;
- ii. enclose the alcove at the parking lot entry as conditioned space;
- iii. make modifications to the building interior to accommodate the addition of the elevator
- iv. remove the pedestrian bridge;
- v. replace signage on the Fenton Street façade;
- vi. set back the proposed building to the north to allow a reasonable measure of light and air for the existing windows on the north elevation of 8204 Fenton Street as determined by the Planning Board at site plan;
- vii. if the owners of the Applicant and the owners of the Gerecht Property cannot agree to changes inside their building, the Applicant must provide one of two exterior options:
 1. an exterior elevator, as illustrated in the Project Plan staff report as "Exterior Elevator Option"; or
 2. an exterior stair connecting the pedestrian bridge to the Fenton Street right-of-way, referred to in the Project Plan staff report as "Exterior Stair Option."

In its reconsideration request, 8204 Associates seeks to modify Condition 2.d in several respects. Primarily, it requests to modify Condition 2.d to avoid a situation that 8204 Associates claims will result in the Applicant choosing which of the alternative access means outlined in Condition 2.d.vii – an exterior elevator or stairway – will ultimately be constructed. We do not share 8204 Associates's reading of these conditions as allowing the Applicant to dictate the construction of an exterior stairway or elevator. In the event the Applicant and 8204 Associates do not agree to the modifications outlined in conditions 2.d.i-vi, the Applicant will not simply get to choose whether to build an external elevator or stairway. The Applicant may propose one solution or another as part of its site plan application. It will ultimately be up to the Board, however, to determine which of these is adequate to meet the requirements of the project plan approval conditions and the site plan approval standards.

8204 Associates also requests that the Board consider appointing a neutral decision maker to resolve any impasse that the parties might reach as they seek to reach a mutual agreement about how to fulfill Conditions 2.d.i-vi. The request to appoint a neutral party under these circumstances appears to be based on a misunderstanding of how Condition 2.d will be implemented. As an initial matter, we expect planning staff

¹ The resolution refers to the 8204 Associates property as the "Gerecht property."

to continue to work to facilitate an agreement between 8204 Associates and the Applicant about how to implement Conditions 2.d.i-vi Under Condition 2.h, the details of any such agreement must be approved in writing and approved by the Board at site plan. If no agreement is reached, Condition 2.d contains a built-in means for resolving the impasse. Of course, there is no guarantee that the parties will reach an agreement. In that case, as explained above, the Board will determine whether access to the second floor of 8204 Associates's building should be provided via an exterior elevator or stairway.

8204 Associates further requests certain clarifications to Condition 2.d, but asks that the Board entertain these changes only if it grants reconsideration on the basis of the issues already discussed above. 8204 Associates briefly describes the requested clarifications at page 3 of its reconsideration request. Because these clarifications are not a basis on which 8204 Associates seeks reconsideration, we will not repeat them here and the Board should not consider them as separate grounds for reconsideration.

B. The Kalivases' Reconsideration Request

In their reconsideration request, the Kalivases seek modifications to Condition 2.c, which addresses the impact of the proposed development on the Kalivas property both in terms of access and parking. Each of the conditions that the Kalivases seek to modify was considered and adopted by the Board based on the recommendations of the staff report and after receiving extensive testimony on these issues.

Like Condition 2.d, Condition 2.c provides alternative conditions. Conditions 2.d.i.-iv contemplate the Applicant working with the Kalivases to reach agreement about the details of relocating the Kalivases loading entrance, providing replacement parking, providing a secondary access, and coordinating construction phasing so as to maintain the Kalivases' loading access. Condition 2.c.v provides a fallback condition to be implemented at the time of site plan if the Kalivases do not agree to Conditions 2.c.i-iv. Notwithstanding the provision of these two alternatives, the resolution provides further flexibility for the parties to explore alternative arrangements altogether; Condition 2.g provides that the Board will consider any such alternative proposals at site plan.

Condition 2.c provides:

For the Kalivas Property, the Applicant shall:

- i. relocate the loading entrance to the west side of the building to facilitate loading from the alley behind the GranDesign building;
- ii. replace, in close proximity to the rear of their building, the parking spaces currently accessible from the 16-foot alley located at the southeast corner of the Kalivas property;
- iii. provide a secondary entrance to the building that would be more directly accessible to Studio Plaza patrons; and

- iv. coordinate construction phasing to maintain the loading function of Kalivas tenants; or
- v. if the owners of the Kalivas property are not amenable to the above conditions, construct the alley configuration referred to in the Project Plan staff report as “Revised Option 2”.

Condition 2.c.i calls for relocating the Kalivases’ loading entrance necessary to ensure continued access after the Studio Plaza development is built. The Kalivases note that Condition 2.c.i does not describe all of the details that will be necessary to accomplish the relocation, including modifications internal to the Kalivas building, and seek to modify the condition to clarify that the Applicant will bear the cost of all such modifications. As drafted, Condition 2.c.i in combination with Condition 2.i contemplates the Applicant performing and paying at its sole expense for all of the work necessary to relocate the Kalivases’ loading entrance. The Board’s resolution does not specify the precise details of the work to be performed, because the details will depend on the precise configuration of the Studio Plaza site plan.

Condition 2.c.ii requires the Applicant to replace parking spaces that are located in the alley behind the Kalivas building. The Kalivases request that the condition be modified to specify that the Applicant must provide three spaces, which, the Kalivases claim, is fewer than the number of spaces that will be lost as a result of the Studio Plaza development. As drafted, we read Condition 2.c.ii to require the spaces to be replaced space for space. Thus, if the Kalivases are correct that the number of spaces being lost is greater than three, Condition 2.c.ii will require the Applicant to provide at least three spaces.

Condition 2.c.iii addresses the provision of a new entrance for the Kalivas property to facilitate access from the Studio Plaza development. The Kalivases assert that Condition 2.c.iii, like Condition 2.c.i, requires clarification with respect to the need to perform work inside of the Kalivas building to facilitate the access. As drafted, Condition 2.c.iii, combined with Condition 2.i, contemplates the Applicant performing and paying at its sole expense for all of the work necessary to construct this new entrance. The Board’s resolution does not specify the precise details of the work to be performed, because the details will depend on the precise configuration of the Studio Plaza site plan.

Condition 2.c.iv calls for Studio Plaza’s construction to be phased in a manner that will maintain the loading function for the Kalivas building. The Kalivases request there not be any interruption in their “current off-street loading capability until the replacement loading area is completed and available.” As drafted, Condition 2.c.iv appears to capture the spirit of this request, but leaves the precise details of phasing to be determined at site plan when the details of the Studio Plaza development, and its impact on the Kalivases’ loading function, can be better understood.

Condition 2.c.v contains a fallback alternative to be implemented at the time of site plan if the Kalivases do not agree to Conditions 2.c.i-iv. This fallback is referred to

as "Revised Option 2." Revised Option 2 is detailed at page 18 of the staff report, which is Attachment 4 to this memo. The Kalivases state that they have not agreed to Revised Option 2, and request that Condition 2.c.v be amended to change the focus on this "unacceptable alternative." It is unclear what it would mean to change the focus on this alternative, but it would presumably mean to eliminate this alternative condition altogether. Because Condition 2.c.v is an alternative condition to be implemented only in the event that the Kalivases do not agree to Conditions 2.c.i-iv, it is fair to say that Condition 2.c in no way focuses on Revised Option 2, but rather that Condition 2.c.v is a secondary alternative. As part of the public hearing in this matter, the Board considered whether Revised Option 2 was an appropriate alternative solution, including any comments by the Kalivases on the matter, and the only basis on which the Kalivases seek to modify this condition is that they have not agreed to it. Revised Option 2 is designed to provide a solution that does not require any modification to the Kalivases' property.

With respect to Condition 2.c.v, the Kalivases echo 8204 Associates's request for the Board to require the appointment of a neutral party at the Applicant's expense to resolve disputes between the Kalivases and the Applicant regarding the implementation of Conditions 2.c.i-iv. As discussed above, we expect planning staff to work actively to facilitate the implementation of these conditions during the site plan review stage. If an agreement is not reached, the Board's resolution calls for the issues to be resolved through the implementation of Revised Option 2.

Finally, the Kalivases seek to modify Condition 2.i, which provides that "[n]one of the development, permitting, and construction of the [accommodations for adjacent properties described in Condition 2] shall be at the expense of the owners of the Kalivas property, 8204 Fenton Street, or 911 Silver Spring Avenue." The Kalivases seek to expand the coverage of this condition to make the Applicant responsible for "all expenses existing adjacent businesses incur that are necessitated by steps taken to implement the requirements of Condition 2." As an example, the Kalivases note that they "may need to hire design or construction professionals to assist them in ensuring that the changes to the Kalivas Building mandated in Condition 2.c are conceived and implemented to the best possible advantage of ongoing tenant operations." Without opining on the appropriateness of such a condition generally, we note that such a condition would be difficult for the Board to enforce. As expressed in the Kalivases' reconsideration request, the Applicant's responsibility for costs incurred by the Kalivases could be very far-reaching and could extend to all manner of fees, including legal fees, regardless of their reasonableness. Separately, we note that the need to hire professionals to ensure that the modifications to the Kalivases' building are "conceived and implemented to the best possible advantage of ongoing tenant operations" exceeds the applicable Project Plan approval standard, which is for the proposed development to be "compatible with, and not detrimental to, existing [] development in the general neighborhood," not to ensure that it is to the best possible advantage of surrounding development.

IV. RECOMMENDATION

We do not believe there is any legal deficiency in the Planning Board's action approving the Studio Plaza project plan that requires reconsideration. The Board thoroughly reviewed the plan at its May 28, 2009 hearing, and adopted conditions sufficient to address the issues raised at the hearing. However, if the Board determines that either the 8204 Associates or Kalivas reconsideration request demonstrates that there was a mistake, inadvertence, surprise, fraud in its earlier decision, or that either 8204 Associates or the Kalivases have shown other good cause for reconsideration, the Board may grant the request. The Board should consider whether to grant each reconsideration request separately.

IV. ATTACHMENTS

Attachment 1 – 8204 Associates reconsideration request

Attachment 2 – Kalivas reconsideration request

Attachment 3 – Project plan resolution

Attachment 4 – Staff Report

Attachment 5 – Applicant's Response in opposition to reconsideration requests

ATTACHMENT 1

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DAVID W. BROWN

September 22, 2009

Via Email and Regular Mail
Rollin.Stanley@mncppc-mc.org

Rollin Stanley, Planning Director
Maryland-National Capital Park
and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: **Petition for Reconsideration**
Planning Board Resolution on Studio Plaza,
Project Plan No. 920070010 (Sept. 15, 2009)

Dear Director Stanley:

Pursuant to Rule 4.12 of the Board's Rules of Procedure, 8204 Associates, LLC, through undersigned counsel, petitions for reconsideration of the above-referenced Resolution. 8204 Associates, LLC, a party of record in this matter, is the owner of what the Resolution refers to as the Gerecht Property, which is correctly described as an adjacent property to the Studio Plaza property, and is the subject of Condition 2.d. of the Resolution.

The principal basis for the request is that Condition 2.d. mistakenly and inadvertently is worded to as to provide for an unintended consequence: freely allowing the Applicant, Michael, LLC, to refuse to agree to the implementation of Conditions 2.d. i through vi, in order to force 8204 Associates, LLC to accept the Applicant's choice of either Condition 2.d.vii.1 or 2.d.vii.2. This is plainly contrary to what the Board intended, and it can be readily corrected, as suggested below. If reconsideration is granted, we also request some minor changes in the wording of certain other parts of Condition 2 to more accurately reflect the 8204 Associates, LLC proposal.

Discussion

Condition 2, entitled "Accommodation of Adjacent Properties," responds to concerns raised at the May 28, 2009 hearing about impairment of the easements that my

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clients, including 8204 Associates, LLC, have over a portion of the property within the Studio Plaza Project, and continued access by these adjacent property owners to their properties by customers and delivery vehicles, both during and after construction of the Studio Plaza Project. Condition 2.d. is intended to address concerns raised by 8204 Associates. In particular, Conditions 2.d. i. through vi. are a distillation by the Board of the conditions identified by my client as potentially workable for access purposes in the event of approval of the Project. Those client-drafted conditions were included as an exhibit to a letter I wrote to Planner Elza Hisel-McCoy on May 12, 2009.

My written hearing testimony on behalf of 8204 Associates, LLC on May 28, 2009 reflected the position of my client: that the Board take no action on the Project Plan until its express easement rights in Project property have been fully resolved. The Board elected instead to go forward with Project Plan approval, and to condition its approval on compliance with Condition 2. In this reconsideration request, 8204 Associates, LLC is not asking the Board to reconsider that basic decision. Except for minor wording changes to more accurately and completely encompass what we sought and we believe the Board decided, there is no fundamental objection to Condition 2. See point 2. below. Our principal concern is with Condition 2.d.vii., as explained immediately below.

1. **Condition 2.d.vii.** 8204 Associates, LLC, objects to Condition 2.d.vii. in its present form. It states, in effect, that if there is disagreement between my client and the Applicant over implementation of Conditions 2.d.i. through vi., then the Applicant has the option of imposing on 8204 Associates, LLC either the "Exterior Elevator Option," Condition 2.d.vii.1., or the "Exterior Stair Option," Condition 2.d.vii.2. In fact, neither such of these options is acceptable to 8204 Associates, LLC, as was made clear in my May 12, 2009 letter to Mr. Hilsel-McCoy. Hence, as Condition 2.d. is currently worded, all the Applicant has to do to impose his choice of one of these two unacceptable options is to refuse agreement to 8204 Associates, LLC's preferred solution, as expressed in Conditions 2.d.i. through vi.

Having been in attendance at the entire May 28th hearing, I am confident that this result was not the Board's intention in imposing Condition 2.d., and that Condition 2.d.vii., as currently worded, is nothing more than an inadvertent mistake. The Board's Condition 2.d.vii., however, does contain the germ of an important consideration: how are Conditions 2.d.i. through vi. going to be implemented if the parties are unable to agree on the details of implementation? The answer is not to force on 8204 Associates, LLC, an unacceptable alternative option, but rather to provide some mechanism for resolution of the disagreement. For example, if the Board were not inclined to resolve any impasse itself, it could assign the task to a hearing examiner or outside arbitrator. Such a provision is agreeable to 8204 Associates, provided it is clear that the cost of dispute resolution is within the contemplation of Condition 2.i., which assigns all costs to the Applicant, and provided further that the Board ensures that

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whoever is charged with resolving any disagreement over implementation of Conditions 2.d.i. through vi. be both a true neutral and a person competent to resolve disputes of this type. We leave the exact wording of the needed revision to Condition 2.d.vii. to the sound discretion of the Board.

2. Other Condition 2 Issues/Clarifications. If reconsideration is granted as to Condition 2.d.vii., 8204 Associates, LLC also requests that the Board revisit the wording of other parts of Condition 2 to more accurately reflect their proposal and what the Board decided at the hearing. We understand that Condition 2.h. specifies that the details can be worked out at the site plan stage, but 8204 Associates would prefer certain clarifications now, or at least be on record as to what will be sought at the site plan stage.

Condition 2.d.i. We request that this Condition be reworded as follows: "Install a commercial elevator inside the building in the second floor entranceway, with the elevator exit facing down the building hallway." Any other location is at the expense of rentable space and would make it very difficult to revert areas served by the elevator to individually rented offices.

Condition 2.d.vi. As requested in our May 12th letter, we request that this Condition be expanded, or a new subparagraph be added to Condition 2.d., to reflect that Studio Plaza be set back from Fenton Street at least as far as the current setback of the Gerecht Building. This would at least slightly reduce the tendency of the large Studio Plaza Project to obscure and dominate the Gerecht Building.

Condition 2.d.vi. We further request as to Condition 2.d.vi. that it be revised slightly to provide, as was specified by Chairman Hanson in comments near the close of the hearing, that the window-to-building setback between all windows on the Gerecht Building and Studio Plaza be a minimum of 16 feet (or, preferably to 8204 Associates, LLC, 20 feet). The current provision provides for a setback of an indeterminate amount and the provision is limited to the north side of the Building, whereas there are windows on the west side as well.

Condition 2.i. We request that this Condition be revised to add the following language at the end of the Condition: "and shall specify that all accommodations required under Condition 2 be completed before commencing construction of the Studio Plaza project." We believe that this or a similar deadline would provide the proper incentive for the Applicant to promptly implement the necessary accommodations to protect the viability of 8204 Associates LLC's ongoing CD Publications business in the Gerecht Building.

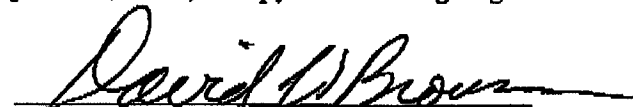
Rollin Stanley, Planning Director
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Please advise the Board that 8204 Associates, LLC is very appreciative of whatever consideration can be given to our request.

Sincerely yours,


David W. Brown

I CERTIFY that this 22nd day of September, 2009, a copy of the foregoing was sent to all parties of record.


David W. Brown

ATTACHMENT 2

DAVID W. BROWN

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September 24, 2009

Via Email and Regular Mail
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Rollin Stanley, Planning Director
Maryland-National Capital Park
and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: **Petition for Reconsideration**
Planning Board Resolution on Studio Plaza,
Project Plan No. 920070010 (Sept. 15, 2009)

Dear Director Stanley:

Pursuant to Rule 4.12 of the Board's Rules of Procedure, Athena C. and Dimitra Kalivas ("the Kalivases"), through undersigned counsel, petition for reconsideration of the above-referenced Resolution. The Kalivases, parties of record in this matter, are the owners of what the Resolution refers to as the Kalivas Property, which is correctly described as an adjacent property to the Studio Plaza property, and is the subject of Condition 2.c. of the Resolution.

By separate letter, I have submitted a petition for reconsideration of the referenced Resolution on behalf of 8204 Associates, LLC. At the same time, I am also requesting some minor changes in the wording of portions of Condition 2. to more accurately reflect the needs and wishes of the Kalivases, as previously expressed in this matter.

Discussion

Condition 2, entitled "Accommodation of Adjacent Properties," responds to concerns raised at the May 28, 2009 hearing about impairment of the easements that my clients, including the Kalivases, have over portions of the property within the Studio Plaza Project, and continued access by these adjacent property owners to their properties by customers and delivery vehicles, both during and after construction of the Studio Plaza

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Project. Condition 2.c. is intended to address concerns raised by the Kalivases. In particular, Conditions 2.c. i. through v. are a distillation by the Board of the conditions identified by my client as potentially workable for access purposes in the event of approval of the Project. Those client-drafted conditions were included as an exhibit to a letter I wrote to Planner Elza Hisel-McCoy on May 12, 2009. Condition 2.i. addresses financial responsibility for effectuating access-protection measures specified in Condition 2, and Condition 2.j. addresses what is to be shown on the Project Plan in relation to Condition 2.

My written hearing testimony on behalf of the Kalivases on May 28, 2009 reflected the position of my clients: that the Board take no action on the Project Plan until their express easement rights in Project property have been fully resolved. The Board elected instead to go forward with Project Plan approval, and to condition its approval on compliance with Condition 2. In this reconsideration petition, the Kalivases are not asking the Board to reconsider that basic decision. Except for minor wording changes to more accurately and completely encompass what we sought or what we believe the Board decided, discussed below, there is no fundamental objection to Condition 2. We understand that Condition 2.h. specifies that the details can be worked out at the site plan stage, but the Kalivases would prefer certain clarifications now, or at least be on record as to what will be sought at the site plan stage.

1. **Condition 2.c.i.** The requirement to relocate the Kalivases' loading entrance to the west side of the Kalivas Building fails to specify what is entailed in completing such relocation. The Kalivases, in their proposed Condition 1 of May 12th, sought a commitment from the Applicant that the relocated loading dock would be finished both inside and outside the Kalivas Building. Such a relocation necessarily entails minor adjustments to the location of an internal loading ramp, as well as the location of fixtures on the inside of the Building, such as moving equipment currently blocking the new receiving area to the old receiving area. Condition 2.c.i., perhaps in conjunction with Condition 2.i., addressing financial responsibility, discussed below, should be amended to clarify that the Applicant is responsible for these relocation costs and the full and final finish to the loading dock relocation, inside and outside the Kalivas Building. This would be in keeping with the views expressed by Board members at the hearing, to the effect that the financial burden any and all disruption of existing businesses attributable to the Studio Plaza Project should be borne by the Applicant, not the adjacent affected businesses. See also our comment below on Condition 2.i.

2. **Condition 2.c.ii.** The requirement to replace the Kalivases' current parking spaces at the end of the 16-foot alley fails to specify how many parking spaces are to be provided in close proximity to the rear of the Kalivas Building. In their proposed Condition 5, the Kalivases requested three (3) such spaces. In fact, the Kalivases will be losing even more parking spaces than that, but felt that requesting more

than three spaces would be difficult for the Applicant to implement. Accordingly, the current ambiguity in Condition 2.c.ii. should be removed by specifying that the Applicant is to provide three (3) spaces in close proximity to the Kalivas Building.

3. **Condition 2.c.iii.** The same comments about full and final finishing of the relocated loading dock, see comment on Condition 2.c.i., are likewise applicable to the requirement to provide a secondary entrance to the Building, including the need for clarity that the Applicant is financially responsible for all costs. See comment on Condition 2.i., below.

4. **Condition 2.c.iv.** We interpret this Condition to be functionally equivalent to the Kalivases' proposed Condition 6, which requested that the Applicant be required to coordinate all work on Building 3 such that there would be no interruption in the Kalivas Building's current off-street loading capability until the replacement loading area is completed and available. We leave for the Board to decide whether any clarification in the wording of this Condition is necessary in light of this understanding and expectation.

5. **Condition 2.c.v.** The Kalivases have at no point agreed that the Applicants' "Revised Option 2" is acceptable. Because Conditions 2.c. i. through iv., especially if amended as recommended above, encompass what would be acceptable to the Kalivases, this Condition should be amended to focus not on an unacceptable alternative, but rather on a process for resolving any lingering implementation dispute. To this end, the Kalivases concur with the suggestions of 8204 Associates, LLC, in their petition for reconsideration, that the Board amend Condition 2 to provide a mechanism for dispute resolution.

6. **Condition 2.i.** This Condition properly imposes on the Applicant all of the "development, permitting and construction" expenses of effectuating the access-preservation requirements elsewhere in Condition 2. It recognizes the severe economic disparity between the Applicant and the long-established surrounding businesses, as well as the hardship those businesses will have to endure as the Studio Plaza Project is brought to fruition, but does not go far enough in protecting those businesses from the costs that will be imposed on them by the Project. Condition 2.i. should be amended to make the Applicant responsible for all expenses existing adjacent businesses incur that are necessitated by steps taken to implement the requirements of Condition 2. For example, and without limitation, the Kalivases may need to hire design or construction professionals to assist them in ensuring that the changes to the Kalivas Building mandated in Condition 2.c. are conceived and implemented to the best possible advantage of ongoing tenant operations.

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7. **Condition 2.j.** We join with the request of 8204 Associates, LLC that this Condition be revised to add the following language at the end of the Condition: "and shall specify that all accommodations required under Condition 2 be completed before commencing construction of the Studio Plaza project." We believe that this or a similar deadline would provide the proper incentive for the Applicant to promptly implement the necessary accommodations to protect the viability of tenant operations in the Kalivas Building.

Please advise the Board that the Kalivases are very appreciative of whatever consideration can be given to this petition for reconsideration.

Sincerely yours,


David W. Brown

I CERTIFY that this 24th day of September, 2009, a copy of the foregoing was sent to all parties of record.


David W. Brown

ATTACHMENT 3



SEP 15 2009

MONTGOMERY COUNTY PLANNING BOARD

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB No. 09-104
Project Plan No. 920070010
Project Name: Studio Plaza
Date of Hearing: May 28, 2009

MONTGOMERY COUNTY PLANNING BOARD

RESOLUTION

WHEREAS, under Montgomery County Code Division 59-D-2, the Montgomery County Planning Board ("Planning Board") is vested with the authority to review project plan applications; and

WHEREAS, on July 25, 2006, Michael, LLC, ("Applicant") filed, and on March 12, 2007, staff accepted, an application for approval of a project plan for a multi-building mixed-use development, including, but not limited to, residential, retail, office, and/or hotel uses, with a maximum density – exclusive of any density bonuses for MPDUs or workforce housing – of 626,781 gross square feet ("Project Plan"), on 5.11 acres of CBD-1 and Fenton Village Overlay-zoned land, located on the block bound by Thayer Avenue, Fenton Street, Silver Spring Avenue, and Mayor Lane in the Fenton Village area of the Silver Spring CBD ("Property" or "Subject Property"); and

WHEREAS, Applicant's project plan application was designated Project Plan No. 920070010, Studio Plaza, (the "Application"); and

WHEREAS, Planning Board Staff ("Staff") issued a memorandum to the Planning Board, dated May 15, 2009, setting forth its analysis of, and recommendation for approval of the Application subject to certain conditions ("Staff Report"); and

WHEREAS, on May 28, 2009, following review and analysis of the Application by Staff and the staffs of other governmental agencies, the Planning Board held a public hearing on the Application concurrently with a *pro forma* Mandatory Referral (MR 09-713) and a Petition to Abandon Public Alleys (AB-719) (the "Hearing"); and

WHEREAS, at the Hearing, the Planning Board heard testimony and received evidence submitted for the record on the Application; and

Approved as to
Legal Sufficiency:

M-NCPPC Legal Department

8787 Georgia Avenue, Silver Spring, Maryland 20910 Chairman's Office: 301.495.4605 Fax: 301.495.1320

www.MCParkandPlanning.org E-Mail: mcp-chairman@mncppc.org

WHEREAS, on May 28, 2009, the Planning Board voted to approve the Application subject to conditions, on motion of Commissioner Alfandre; seconded by Commissioner Robinson; with a vote of 4-0, Commissioners Alfandre, Cryor, Hanson, and Robinson voting in favor, and Commissioner Presley absent.

NOW, THEREFORE, BE IT RESOLVED that, pursuant to the relevant provisions of Montgomery County Code Chapter 59, the Montgomery County Planning Board APPROVES Project Plan No. 920070010 for a multi-building mixed-use development, including, but not limited to, residential, retail, office, and/or hotel uses, with a maximum optional method base density – exclusive of any density bonuses for MPDUs or workforce housing – of 626,781 gross square feet, on 5.11 gross acres in the CBD-1 and Fenton Village Overlay zones, subject to the following conditions:

1. Development Ceiling

- a. The maximum density of the proposed development, excluding any residential density bonuses for MPDUs or workforce housing, is limited to 626,781 square feet of gross floor area. The final total development ceiling, including all density bonuses, dwelling unit counts, and distribution of land uses will be determined at Site Plan.
- b. If, by time of Preliminary Plan review, the County Council approves a Zoning Text Amendment revising Section 59-C-6.2351 to allow the transfer of optional method density within CBD zones from lots smaller than 22,000 square feet, at Preliminary Plan the Applicant may propose to revise the maximum density established above without amending this Project Plan.

2. Accommodation of Adjacent Properties

- a. In general, at Preliminary Plan and Site Plan, the Applicant must show adequate access for customers and deliveries for adjacent properties currently enjoying such access;
- b. The final design of the buildings included in this Project Plan, including but not limited to setbacks, vertical stepping, and other design measures, must afford the existing, immediately-adjacent buildings sufficient access to light and air. The Planning Board will approve the final design at Site Plan;
- c. For the Kalivas Property, the Applicant shall:
 - i. relocate the loading entrance to the west side of the building to facilitate loading from the alley behind the GranDesign building;
 - ii. replace, in close proximity to the rear of their building, the parking spaces currently accessible from the 16-foot alley located at the southeast corner of the Kalivas property;
 - iii. provide a secondary entrance to the building that would be more directly accessible to Studio Plaza patrons; and

- iv. coordinate construction phasing to maintain the loading function of Kalivas tenants; or
 - v. if the owners of the Kalivas property are not amenable to the above conditions, construct the alley configuration referred to in the Project Plan staff report as "Revised Option 2".
- d. For the Gerecht Property, the Applicant shall:
 - i. install a commercial elevator inside the building convenient to the Fenton Street entrance;
 - ii. enclose the alcove at the parking lot entry as conditioned space;
 - iii. make modifications to the building interior to accommodate the addition of the elevator
 - iv. remove the pedestrian bridge;
 - v. replace signage on the Fenton Street façade;
 - vi. set back the proposed building to the north to allow a reasonable measure of light and air for the existing windows on the north elevation of 8204 Fenton Street as determined by the Planning Board at site plan;
 - vii. if the owners of the Applicant and the owners of the Gerecht Property cannot agree to changes inside their building, the Applicant must provide one of two exterior options:
 - 1. an exterior elevator, as illustrated in the Project Plan staff report as "Exterior Elevator Option"; or
 - 2. an exterior stair connecting the pedestrian bridge to the Fenton Street right-of-way, referred to in the Project Plan staff report as "Exterior Stair Option."
- e. For 911 Silver Spring Avenue (the "Katz Property"), no Site Plan associated with this Project Plan may inhibit direct vehicular access to the 16-foot public alley behind 911 Silver Spring Avenue from the proposed adjacent private street.
- f. The Preliminary Plan must include a public access easement over the proposed private street connecting Thayer Avenue and Silver Spring Avenue.
- g. If the Applicant and adjacent property owners come to mutually agreeable accommodations other than those described in conditions 2.c., 2.d., and 2.e., the Planning Board will consider conformance with condition 2.a. above at Site Plan.

- h. The details of the accommodations required under this Condition No. 2 shall be in writing and determined at Site Plan.
- i. None of the development, permitting, and construction of the above items shall be at the expense of the owners of the Kalivas property, 8204 Fenton Street, or 911 Silver Spring Avenue.
- j. The final approved Project Plan shall illustrate each of the options described within this condition.

3. Public Use Space and Amenities

- a. The Applicant must provide a minimum of 23 percent of the net lot area for on-site public use space and a minimum of 22 percent of the net lot area for on and off-site public amenity space. The final design and details will be determined during Site Plan review.
- b. The proposed public use space must be easily and readily accessible to the general public and available for public enjoyment.
- c. The Applicant must provide a public art installation that announces the central public space and connects it in a meaningful, attractive, and enticing fashion to the surrounding streets and the larger community. This artwork should be integrated into the overall environmental design of the project, including the architecture, landscape, and hardscape features.
- d. The Applicant must present the public artwork to the art review panel for comment prior to approval of the Site Plan.
- e. The Applicant must provide a through-block pedestrian promenade from the intersection of Mayor Lane and Mayor's Promenade east to Fenton Street. The paving on the existing section of Mayor's Promenade must match that of the proposed promenade extension to Fenton Street.
- f. The Applicant must install the Silver Spring Streetscape standard, including paving, street lights, street trees, and undergrounding of utilities, along site frontage on public streets.
- g. The Applicant must underground all utilities along Mayor Lane between Silver Spring and Thayer Avenues.

4. Housing

- a. The proposed development must provide a minimum of 15 percent of the final number of all dwelling units as MPDUs, exclusive of Workforce Housing.
- b. Comply with the Workforce Housing provisions of the General Development Agreement (GDA) for Parking Lot #3, Silver Spring, MD, between Michael, LLC, and Montgomery County, MD, executed on October

24, 2008, by providing 15 percent of the residential density attributable to County Land, per the equation included in the GDA.

- c. The Applicant must provide a minimum of 10 percent workforce housing for residential density attributable to the all portions of the site not included in the original July 25, 2006, Project Plan application, which are grandfathered as exempt, or addressed in the GDA for Parking Lot 3.

5. Sustainability

- a. The development as a whole must achieve at a minimum a Certified rating in the LEED-ND (Neighborhood Development) standard established by the US Green Building Council, provided such Certification is available. The final certification level and timing will be determined at Site Plan.
 - b. Each building included in this Project Plan and subsequent Site Plans must achieve at a minimum a Certified rating in LEED-NC (New Construction), or other building-specific LEED rating system, established by the US Green Building Council.
6. The final design of the underground parking garage to be constructed by the Applicant for eventual transfer to Montgomery County under the terms of the General Development Agreement must be approved as part of Site Plan review. The Mandatory Referral heard by the Board at the May 28, 2009, public hearing was *pro forma* only and does not limit or conclude the Board's review of any portion of the site included in the Project Plan.

7. Issues to be Addressed at Site Plan

Among the issues to be addressed at Site Plan are:

- a. The design of the central open space must demonstrate a significant relationship and connection to the adjacent public streets.
- b. Staged interim or alternative public parking accommodation for retailers on Fenton Street, possibly to include shorter-term parking meters on Fenton Street or shared parking arrangements within nearby private parking garages.
- c. Safety review of the project by a Montgomery County Police Department CPTED (Crime Prevention Through Environmental Design) Officer.
- d. A site phasing plan that minimizes negative impacts on the adjacent buildings and surrounding community.

BE IT FURTHER RESOLVED that, having given full consideration to the recommendations and findings of its Staff, which the Planning Board hereby adopts and incorporates by reference (except as modified by herein), and upon consideration of the entire record and all applicable elements of § 59-D-2.43, the Montgomery County Planning Board, with the conditions of approval, FINDS:(a)

As conditioned, the proposal complies with all of the intents and requirements of the zone.

Intents and Purposes Of The CBD Zones

The Montgomery County Zoning Ordinance states the purposes which the CBD zones are designed to accomplish. The following statements analyze how the proposed Project Plan conforms to these purposes:

- (1) *"To encourage development in accordance with an adopted and approved master or sector plan, or an urban renewal plan approved under Chapter 56 by permitting an increase in density, height, and intensity where the increase conforms to the master or sector plan or urban renewal plan and the Site Plan or combined urban renewal Project Plan is approved on review by the Planning Board."*

As recommended in the Sector Plan, this proposed Project Plan promotes mixed-use higher-density urban infill redevelopment. The project benefits from increased density and building height recommended by the Sector Plan and realized in the zoning. The proposed additional residential units and office space, combined with street-activating ground-floor retail and restaurants, will enliven and reinvigorate Fenton Village.

- (2) *"To permit a flexible response of development to the market as well as to provide incentives for the development of a variety of land uses and activities in central business districts to meet the needs and requirements of workers, shoppers and residents."*

The Project Plan proposes a variety of land uses, including residential, office, retail and restaurant, and potentially hotel. Residences will include market-rate units, MPDUs, and Workforce Housing. The central public use space and extensive pedestrian network will provide opportunity for a diversity of recreational activities, active and passive, for residents of both the project and the larger community as well as visitors.

- (3) *"To encourage designs which produce a desirable relationship between the individual buildings in the central business district, between the buildings and the circulation system and between the central business district and adjacent areas."*

This project will make a significant contribution to the rebuilding of Fenton Village, replacing one- and two-story commercial buildings with mixed-use residential and office buildings with ground-floor retail and restaurant uses. These buildings will line the street edge, creating vibrant, attractive streetscapes. The smaller retail and restaurant spaces envisioned for this project are intended to retain and reinforce the neighborhood-serving character of the larger Fenton Village. Further, the addition of through-block connections – a new north-south private street and an east-west pedestrian promenade – will expand upon the existing sidewalk network in the CBD and create more opportunities for small retailers. In terms of building height, the taller buildings on the project will be located closest to Georgia Avenue, with height decreasing approaching Fenton Street and the single-family neighborhoods to the east, in conformance with the Sector Plan and the Fenton Village Overlay Zone. As conditioned, the project will also provide a reasonable alternative accommodation to adjacent buildings whose current service operations will be impacted.

- (4) *"To promote the effective use of transit facilities in the central business district and pedestrian access thereto."*

This project is located approximately one-quarter mile from the Silver Spring Transit Center, which includes local and regional rail service as well as numerous metropolitan bus lines. A commercial interstate bus depot is just one block south of the site. The proposed pedestrian-oriented improvements will augment and upgrade the existing sidewalk system and will provide residents and tenants of the project, as well as the larger community, greater access to transit.

- (5) *"To improve pedestrian and vehicular circulation."*

The addition of two through-block pedestrian connections and streetscape upgrades will significantly improve already reasonably high-quality pedestrian circulation. Street-activating ground-floor retail and restaurant uses, as well as residential and office building entrances, will further improve circulation and increase pedestrian safety by placing more eyes on the street and encouraging foot traffic. The new mid-block private street will provide additional connectivity for vehicles within Fenton Village.

- (6) *"To assist in the development of adequate residential areas for people with a range of different incomes."*

Though the final unit mix will be determined during Preliminary and Site Plan review, the project will contain a significant number of residential units that will include substantial proportions of MPDUs and Workforce Housing, providing housing opportunities for people with a range of different incomes.

- (7) *"To encourage land assembly and most desirable use of land in accordance with a sector plan."*

This project assembles a large number of properties, with a gross tract area of about five acres, currently occupied by small-scale commercial buildings and surface parking lots, which do not take full advantage of proximity to metro and other benefits of a redeveloping CBD. In proposing development in accordance with the goals of the Sector Plan, this project will provide highly desirable land uses and public spaces and amenities for Fenton Village.

Further Intents of the CBD-1 Zone

Section 59-C-6.213(a) indicates other objectives of the CBD-1 Zone:

- (1) *"To foster and promote the orderly development of the fringes of the Central Business Districts of the county so that these areas will provide land uses at a density and intensity which will encourage small business enterprises and diverse living accommodations, while complementing the uses in the interior portions of these districts; and"*

This development will provide an array of land uses – multi-family residential, office, retail, restaurant, and possibly hotel – that readily complements nearby uses. These include single- and multi-family housing, small office buildings, a supermarket, small-scale retail, and restaurants. The density and height of the development provides a transition between the Georgia Avenue corridor, the Silver Spring Transit Center, and Downtown Silver Spring, and the lower-density development of Fenton Street and East Silver Spring. During Site Plan review, staff will undertake to help ensure the small, diverse, neighborhood-scale of the retail enterprises. At that time, staff will also endeavor to increase the diversity of unit types, sizes, and bedroom counts to maximize the range of living accommodations.

- (2) *"To provide a density and intensity of development which will be compatible with adjacent land uses outside the Central Business Districts."*

Adjacent land uses located outside the CBD and Fenton Village consist primarily of single-family houses, with the buildings along both sides of Fenton Street defining the transition. In accordance with the Sector Plan and the Overlay Zone, the building heights within this project will step down to their lowest point along the west side of Fenton Street. This project will further reinforce Fenton Street as a neighborhood shopping street, providing small-scale retail and restaurant uses and building entrances, helping to activate this street.

Purpose of the Fenton Village Overlay Zone

Section 59-C-18.191 describes the purpose of the Fenton Village Overlay Zone:

- (1) *"facilitate the implementation of an organized and cohesive development pattern that is appropriate for an urban environment;"*

The scale of this Project Plan enables the organized and cohesive development of the large majority of a single block in this revitalizing urban environment. The buildings are located directly on sidewalks and public open spaces, delineating these public streets and open places as the public realm.

- (2) *"encourage attractive design and ensure compatibility with existing buildings and uses within and adjacent to the overlay zone;"*

This Project Plan features an attractive design that fits well between the higher densities along Georgia Avenue and Downtown Silver Spring and the lower-density development east of Fenton Village. The proposed buildings will achieve a minimum LEED-NC Certification and, if the standard is out of pilot phase, the development as a whole will achieve a minimum LEED-ND Certification. As conditioned, the proposed uses, as described above, are compatible with and complimentary to surrounding uses.

- (3) *"provide flexibility of development standards to encourage innovative design solutions;"*

This project benefits significantly from the flexible development standards, balancing private economic benefit with improved public benefit, consistent with the sector plan.

- (4) *"allow for the transfer of the public use space requirement to other properties within the Overlay District; and"*

The proposed development will transfer a total of 74,979 gross square feet of base density from three sending lots located across public rights-of-way, including Mayor Lane, Fenton Street, and Silver Spring Avenue, to the receiving portion of the site.

- (5) *"allow new uses."*

The three new uses enumerated in the Overlay Zone – catering facilities, small bakeries, and computer component assembly firms – could each be well accommodated within the proposed development.

Requirements of the CBD-1 & Fenton Village Overlay zones

The Staff Report contains a data table that lists the Zoning Ordinance-required development standards and the development standards proposed for approval. The Board finds, based on this data table, and other evidence and testimony of record, that the Application meets all of the applicable requirements of the CBD-1 and Fenton Village Overlay zones. The following data table sets forth the development standards approved by the Planning Board and binding on the Applicant.

DATA TABLE

Development Standards
 Approved by the Board and
 Binding on the Applicant

Max. Building Height (feet)	
Building, if project min. 33 % residential; along the west side of Fenton Street	60
Building, if project min. 33 % residential – to accommodate Workforce Housing	90 110
Min. Setbacks (feet)	
East Property Line	0
North Property Line	0
West Property Line	0
South Property Line	0
Min. Site Area (square feet)	
Gross Tract Area	222,592
Prior Dedication	41,971
Proposed Dedication	8,283
Net Tract Area	172,338
Max. Base Density (exclusive of residential density bonuses)	
Gross Area	626,781
Floor Area Ratio	2.82
Public Use Space (percent of net lot)	
On-Site Public Use Space	23.2
Off-Site Amenity Space	22.6
Total Public Use & Amenity Space	45.9

(b) The proposed development conforms to the Silver Spring CBD Sector Plan approved under Chapter 56.

By providing a mixed-use urban-infill development, this project fulfills each of the goals identified in the Silver Spring CBD Sector Plan regarding downtown development: Transit-Oriented; Commercial; Residential; Civic; Green; Pedestrian-Friendly. The site is located approximately one-quarter mile from the Silver Spring Transit Center, including local and regional rail and numerous bus lines. The project proposes a vertical mix of uses, with office, multi-family residential, and possibly hotel uses, all above retail, restaurant, and potentially other street-activating ground floor uses. Central to the design is a large public civic green space, and each street, public or private, contained within or adjacent

to the site will have street trees, upgraded street lights, and other features of the Silver Spring streetscape standard. Highlighting the civic nature of the central green will be a significant public art project, to be integrated with the design and configuration of the surrounding buildings so as to boldly empower the space to reach out of the center of the block to the adjacent streets and the neighborhoods beyond. Finally, this urban infill project will expand and improve the street and pedestrian network and experience in Fenton Village, with through-block connections, attractive streets, and exciting recreation, retail, and entertainment opportunities.

- (c) *Because of its location size, intensity, design, operational characteristics and staging, the proposed development is compatible with and not detrimental to existing or potential development in the general neighborhood.*

As conditioned, the project's size, intensity of development, design, operational characteristics, and staging are compatible with the existing adjacent development as well as the planned redevelopment of Fenton Village. The Planning Board has carefully considered, and is sensitive to, the impact of the design of this project on the surrounding neighbors. Thus, the approval of this plan is conditioned upon the Applicant taking steps to ensure that the neighboring businesses' access needs are met. It is also conditioned to ensure that this project will not unduly deny light and air to the surrounding properties. As the planning of this project moves forward to site plan, the Planning Board will continue to look carefully at these issues, and ensure this project is compatible with surrounding development. The Planning Board notes that the types of compatibility concerns that have been raised about this project are likely to become more frequent as other CBD properties are redeveloped. While the close proximity of new and existing development in these areas may pose compatibility challenges, it also has the potential to create a distinctive sense of place, which is an important goal in creating transit-oriented, pedestrian-friendly environments. Creative design will be key to meeting these compatibility challenges, and it is what the Planning Board will expect as this project moves forward.

- (d) *The proposed development does not overburden existing public services nor those programmed for availability concurrently with each stage of construction and, if located within a transportation management district designated under Chapter 42A, article II, is subject to a traffic mitigation agreement that meets the requirements of that article.*

Other public facilities exist on or near the site and no expansion or renovation of these services will be required by the County. Initial review of this project by Transportation Planning staff and County agencies did not reveal significant issues. The project design and operational details must be approved by the

respective agencies prior to preliminary plan approval. Further, the Applicant is replacing in kind the number of public surface parking spaces with public underground parking spaces, and will provide interim accommodations during construction. Final details of the ultimate design of the underground garage and interim parking arrangements will be determined at site plan.

- (e) The proposed development is more efficient and desirable than could be accomplished by the use of the standard method of development.*

A standard method project would only allow a density of 2.0 FAR on this site. Further, the requirement for public amenities would be removed and the public use space requirement would be reduced by one-half. Because infill development and density at transit hubs is a core value of smart growth and given the number and quality of public amenities being proffered, the optional method of development is much more desirable and more efficient for this particular site.

- (f) The proposed development includes moderately priced dwelling units in accordance with Chapter 25A of this Code.*

The proposed development will provide 15 percent MPDUs as required by Chapter 25A, based on the final number of dwelling units to be determined at Site Plan. A final agreement between the Applicant and the Department of Housing and Community Affairs will be required at the time of Site Plan review.

- (g) When a Project Plan includes more than one lot under common ownership, or is a single lot containing two or more CBD zones, and is shown to transfer public open space or development density from on lot to another or transfer densities, within a lot with two or more CBD zones, pursuant to the special standards of either section 59-C 6.2351 or 59-C 6.2352 (whichever is applicable), the Project Plan may be approved by the Planning Board based on the following findings:*

- (1) The project will preserve an historic site, building, structure or area as shown on the Locational Atlas and Index of Historic Sites or the Master Plan for Historic Preservation; and/or*
- (2) The project will implement an urban renewal plan adopted pursuant to Chapter 56 of the Montgomery County Code; and/or*
- (3) The project will result in an overall land use configuration that is significantly superior in meeting the goals of the applicable master or sector plan and the zone than what could be achieved without the proposed transfer.*

The project will neither preserve a historic site nor implement an urban renewal plan. The proposed development will transfer to the receiving portion of the site

a total of 74,979 gross square feet of base density from three sending lots located across public rights of way: Mayor Lane; Fenton Street; and Silver Spring Avenue. The additional density will contribute towards the compact redevelopment of this site and produce a more viable project than would be allowed without the proposed transfer.

- (h) *The proposed development satisfies any applicable requirements for forest conservation under Chapter 22A.*

The site is subject to Chapter 22A Montgomery County Forest Conservation Law. A Preliminary Forest Conservation Plan was stamped as received by the Environmental Planning Division on March 13, 2009. There is no forest on-site. Two specimen trees on-site will be removed and one specimen tree off-site on an adjacent property will be preserved. The site's entire requirement will be met with a fee-in-lieu payment.

- (i) *The proposed development satisfies any applicable requirements for water quality resources protection under Chapter 19.*

The site's stormwater management concept plan was conditionally approved on January 21, 2009 by the Department of Permitting Services. The conditional approval notes that proposed stormwater management structures are shown differently on the project plan than on the concept plan. The proposed method includes two underground vaults and filters. A revised concept plan was recently submitted to DPS to reduce stormwater runoff quantities to be captured by a series of proposed green roof tops. Any outstanding issues will be resolved at Site Plan review.

BE IT FURTHER RESOLVED that all elements of the plans for Project Plan No. 920070010 stamped received by M-NCPPC on March 16, 2009, are required except as modified by the above conditions of approval; and

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

BE IT FURTHER RESOLVED, that neither the Board's deliberation nor this Resolution should be construed to constitute an opinion of the Board as to the existence or validity of any private easement that may or may not be attributable to the property underlying this Project Plan; and

BE IT FURTHER RESOLVED that this Project Plan shall remain valid as provided in Montgomery County Code § 59-D-2.7; and

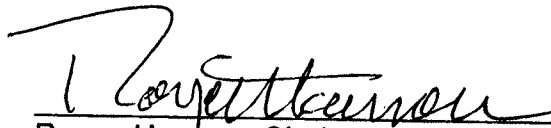
BE IT FURTHER RESOLVED that the date of this Resolution is SEP 15 2009
(which is the date that this Resolution is mailed to all parties of record); and

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 Resolution, consistent with the procedural rules for the judicial review of administrative agency decisions in Circuit Court (Rule 7-203, Maryland Rules).

* * * * *

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 Wells-Harley, seconded by Commissioner Presley, with Commissioners Hanson, Alfandre, Presley, and Wells-Harley voting in favor of the motion, and with Commissioner Cryor absent, at its regular meeting held on Thursday, September 10, 2009, in Silver Spring, Maryland.



Royce Hanson, Chairman
Montgomery County Planning Board

ATTACHMENT 4



MONTGOMERY COUNTY PLANNING DEPARTMENT
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Staff Report: Project Plan 920070010, Studio Plaza

ITEM #: _____

MCPB HEARING DATE:

May 28, 2009

REPORT DATE:

May 15, 2009

TO: Montgomery County Planning Board

VIA:

Rose Krasnow, Chief *RK*
Robert Kronenberg, Supervisor *RK*
Development Review Division

FROM:

Elza Hisel-McCoy, Assoc. AIA, LEED-AP *CH*
Coordinator
Development Review Division
301.495.2115
Elza.Hisel-McCoy@mncppc-mc.org

**APPLICATION
DESCRIPTION:**

Multi-building mixed-use development, including, but not limited to, residential, retail, office, and/or hotel uses, with a maximum base density – exclusive of any density bonuses – of 626,781 gross square feet, on 5.11 acres of CBD-1- and CBD-2-zoned land in the Fenton Village Overlay Zone of the Silver Spring CBD Sector Plan.

APPLICANT:

Michael, LLC

FILING DATE:

Original filing date: July 25, 2006
Original acceptance date: March 12, 2007
Revised application filing date: January 16, 2009

RECOMMENDATION:

Approval with conditions

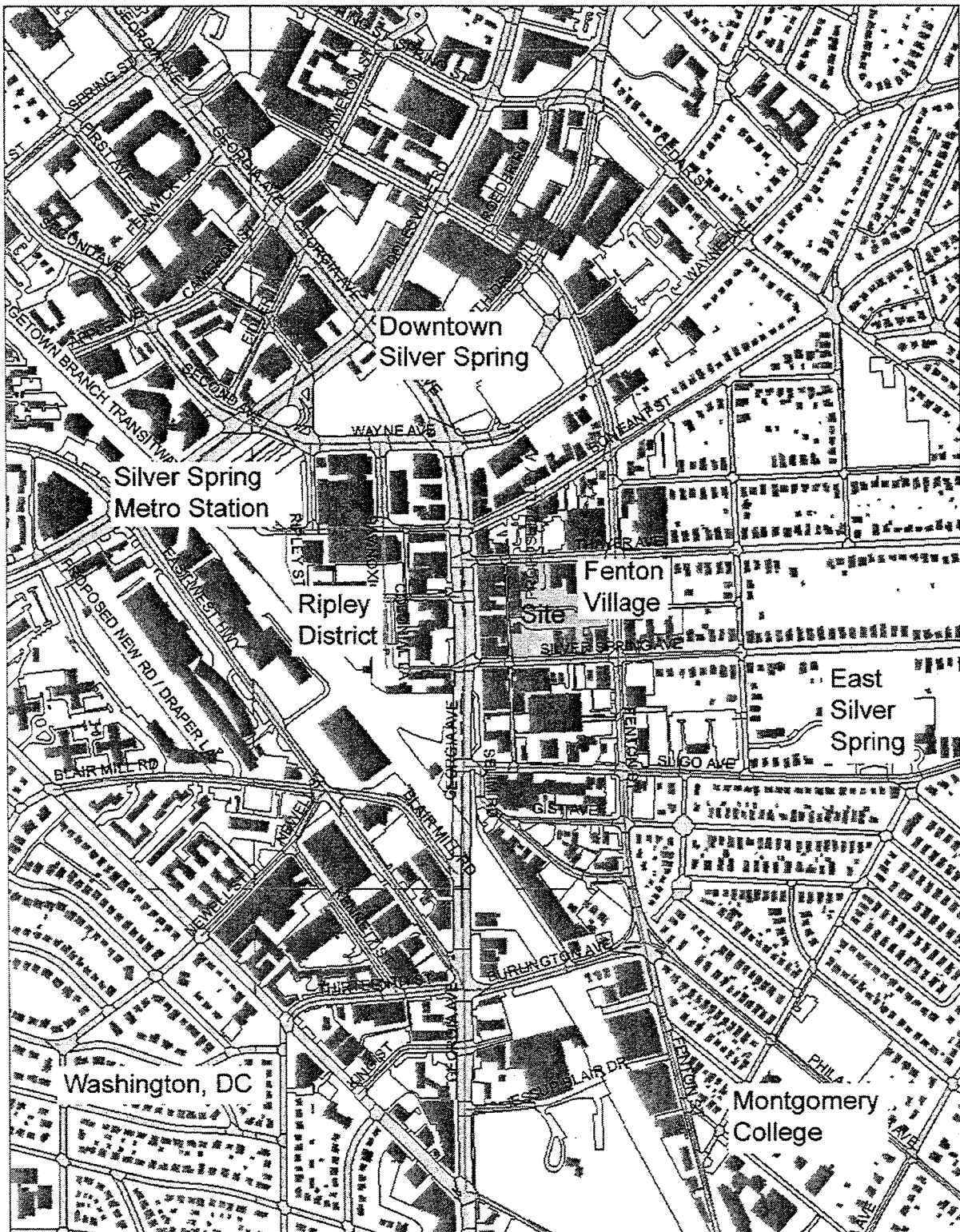
**EXECUTIVE
SUMMARY:**

The proposed project is a public-private partnership that would redevelop the majority of a city block in the Fenton Village area of the Silver Spring CBD, including County Parking Lot 3 located at the center of the block. The multi-building development would mix housing, office, retail, and restaurant uses, and possibly a hotel. It would create a new mid-block private street, a significant central public green space, and a through-block pedestrian system. Given the complexity of the program, the staff review of this Project Plan has remained general, focusing on maximum base density and the minimum public use and amenity package. Final arrangement, design, and disposition of the various project elements, including the mix of uses, density allocation, number of dwelling units, and the quality and quantity of public space, will be determined subsequently during the Preliminary and Site Plan reviews.

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Vicinity Map

SITE DESCRIPTION

Vicinity

The subject property is located in the Fenton Village area of the Silver Spring CBD and is bound by Thayer Avenue to the north, Silver Spring Avenue to the south, Fenton Street to the east, and Georgia Avenue and Mayor Lane to the West.

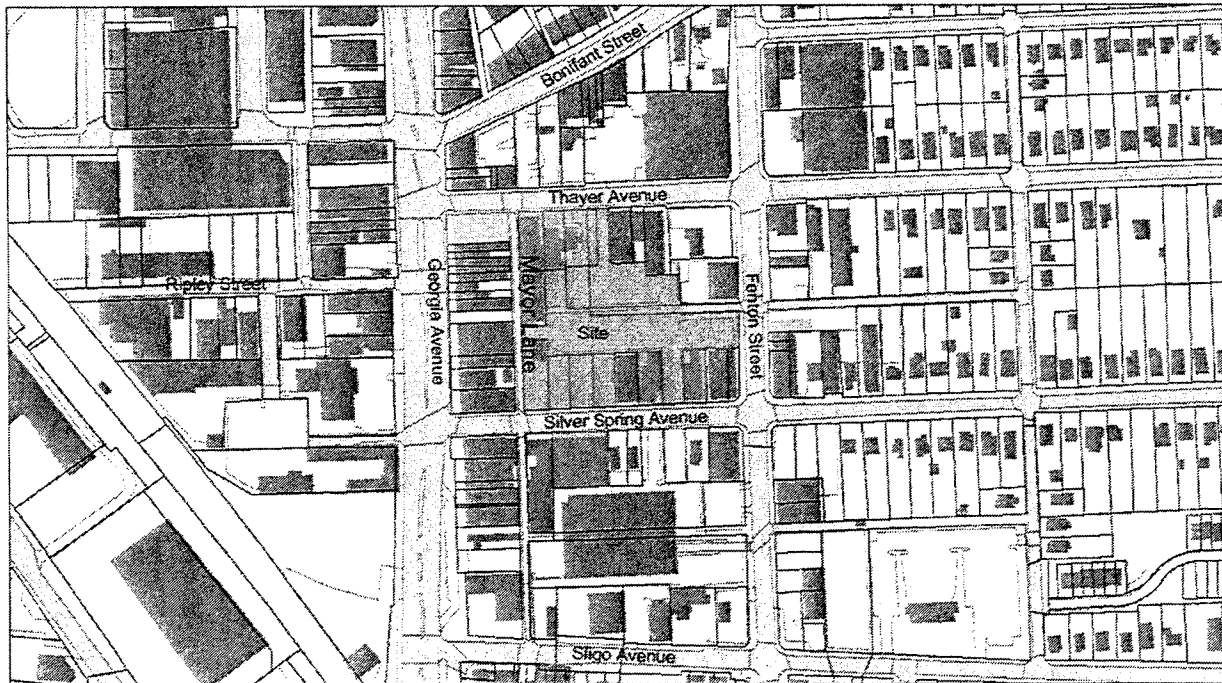
The site is currently surrounded by small commercial and retail buildings of up to four stories, including a Safeway supermarket at the intersection of Thayer Avenue and Fenton Street, and the structured County Parking Garage 4 one block south. The buildings are populated by a diversity of restaurants, ethnic grocers, convenience and specialty retail, and small commercial enterprises.

A five-minute walk from the site will bring you to the Silver Spring Metro Station, the Ripley District and the master-planned Metropolitan Branch Trail, Downtown Silver Spring, the Takoma Park Campus of Montgomery College, and the shops of South Silver Spring.

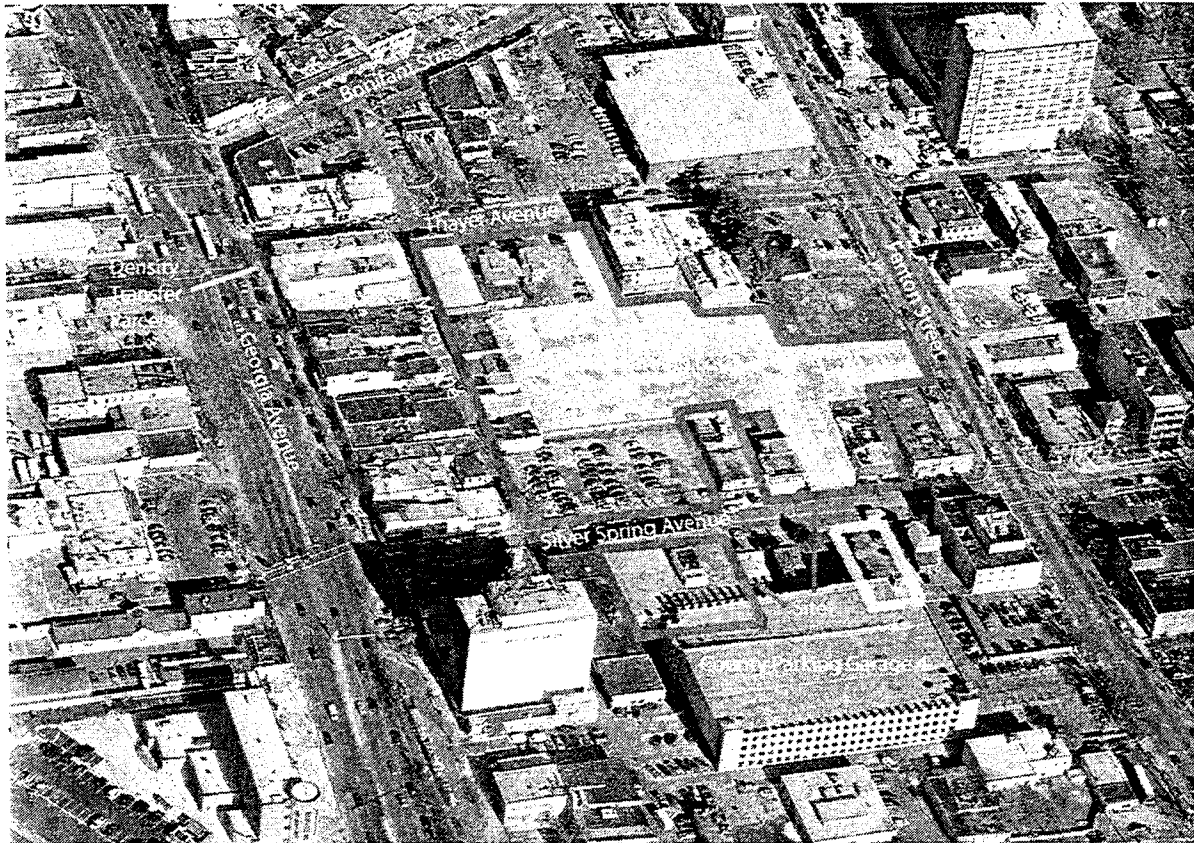
North and west of the site the density of development increases along the metro and rail tracks and into the core of the CBD. South and east of the site, low-rise commercial development gives way to the single-family neighborhoods of Takoma Park and East Silver Spring.

Site Analysis (See Appendix B for photos)

The site is currently occupied by a mix of one- and two-story office and retail buildings backing onto a surface parking lot, County Parking Lot 3. The parking lot is currently accessible from each of the surrounding streets, with the exception of Georgia Avenue. Access to the western edge of Parking Lot 3 is from Mayor Lane, a 20-foot-wide public alley that runs behind the retail buildings lining Georgia Avenue. The proposed Project Plan also includes properties immediately adjacent to the block: three density transfer sending sites – on the south side of Silver Spring Avenue and the east side of Fenton Street – and a proposed building site on the south side of Silver Spring Avenue.



Site Map



Aerial Photo Looking North

PROJECT DESCRIPTION

Proposal

Preface

It is not uncommon for Project Plan proposals to contain a high degree of specificity, fixing the number of dwelling units, distributing the total allocation of density among various uses, and presenting public space and building designs demonstrating advanced development. However, given the complexity and presently fluid nature of the program, the Applicant has requested, and staff has agreed, that this proposal be reviewed in broader terms, a rough framework upon which more detailed designs may be fleshed out during Site Plan review.

This staff recommendation will identify only the preliminary maximum base density and not the final mix of uses and associated total density including bonuses and other accommodation for providing MPDUs and Workforce Housing. It will set the minimum quantity of the Public Use and Amenity package. It will also include high expectations of design quality, enumerating specific concerns about the site, spaces, landscape, and buildings that must be addressed at Site Plan.

Staff acknowledges that deferring significant sections of the review involves a certain amount of uncertainty as to the overall quality of the design – and therefore its overall impact on the surrounding community – but believes this to be an appropriate path. Project Plan approval confers

upon the Applicant only the ability to continue to develop the design as necessary to apply for Preliminary Plan of Subdivision and Site Plan, the latter of which may be multiple for a site with as many as four multi-story multi-use buildings. At those reviews, staff will hold the Applicant to a much more detailed standard.

Background

This Project Plan was first submitted on July 25, 2006, and formally accepted on March 12, 2007. As originally submitted, the proposal included three buildings: an office building at the corner of Thayer Avenue and Mayor Lane and two multi-family residential buildings located on opposite sides of Silver Spring Avenue near Mayor Lane, each with ground-floor retail (labeled as Buildings 1, 2, and 4 on the illustrative site plan below). Because the application was submitted before the December 1, 2006, effective date of the Workforce Housing law, these portions of the proposal were, and remain, “grandfathered” as exempt from that requirement. The original proposal did not include any portion of County Parking Lot 3.

On June 7, 2007, the Planning Board approved a one-year extension to the review period for the project to allow the Applicant to complete negotiations with the County for the redevelopment of Public Parking Lot 3, negotiations which had been suspended pending the study of potential Purple Line alignments through the site.

On April 3, 2008, the Planning Board approved a further one-year extension of the review period, to June 7, 2009, to allow the Applicant to finalize with Montgomery County a General Development Agreement (GDA) for the redevelopment of Public Parking Lot 3 and to complete preparation of the revised Project Plan drawings to incorporate the County property into the proposal. At that hearing, staff recommended extending the review period by only 6 months.

On July 29, 2008, the County Council approved ZTA 08-08 which amended the Fenton Village Overlay Zone (59-C-18.192(b)(1)(C)) to increase the allowable building height between Georgia Avenue and Fenton Street from 90 feet to 110 feet to accommodate workforce housing (provided at least 33 percent of the building is residential).

General Development Agreement

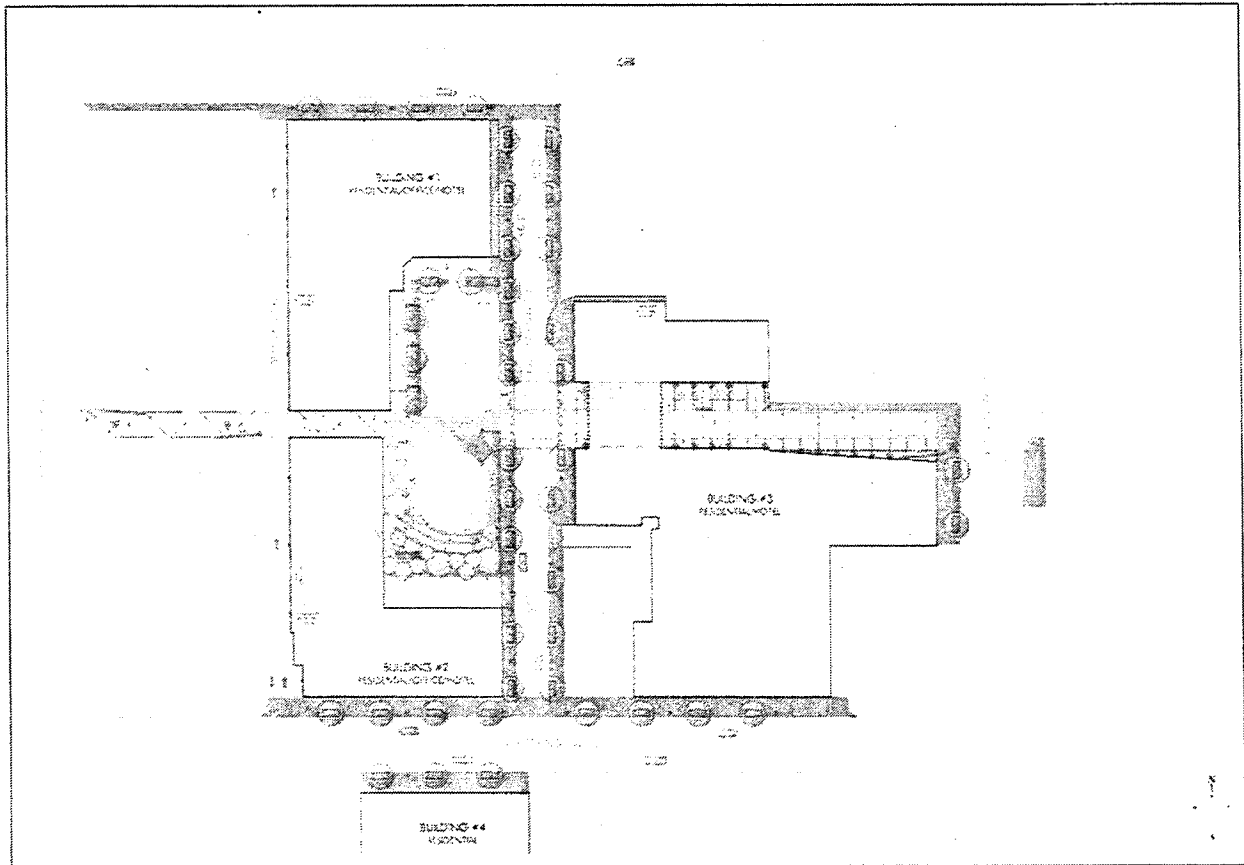
The GDA between Michael, LLC, and Montgomery County, Maryland, for the redevelopment of Public Parking Lot 3 (see Appendix C) was executed October 24, 2008, and sets the terms and conditions for the inclusion of County Parking Lot 3 into the proposed Studio Plaza development. Key features of the GDA include (N.B.: the following is staff’s summary, see GDA text for precise language):

- County will transfer ownership of Public Parking Lot 3 to the Applicant for a mixed-use redevelopment
- Applicant will construct on site an underground public parking garage containing 152 replacement parking spaces from the surface lot
- The Applicant will transfer ownership of the public parking garage to the County on a condominium basis
- The Applicant will contribute \$50,000 toward the cost of a “Revenue Collection System”
- The County will own, operate, and maintain the public parking garage

- The public parking garage must be built in the first phase of development and within 24 months of Land Settlement
- The minimum amount of residential development attributable to the County Land shall be 50 percent of the maximum achievable density of that land
- The Applicant will provide a minimum of 15 percent of the units attributable to County Land as Workforce Housing
- The Applicant will provide a minimum of 15 percent of the units attributable to County Land as MPDUs
- The Applicant must provide at least 50 percent of the private parking required by the Zoning Code, unless the Planning Board approves a smaller amount.

Land Use

The proposed mixed-use development would provide a base density, exclusive of any residential density bonuses, of 626,781 gross square feet. Staff expects the final mix of uses to include both commercial and multi-family residential, all with ground-floor retail, and may also include a hotel.



Illustrative Landscape Plan

All residential development will include 15 percent MPDUs. As stated above, any residential uses provided in Buildings 1, 2, and 4 are exempt from providing Workforce Housing. However, the residential density derived from land not included in the original submission, including both the County land and the adjacent property for which the Applicant is contract purchaser, will include Workforce Housing. Per the GDA, the Applicant will be providing Workforce Housing equivalent

to 15 percent of the density related to the County lot, and for the adjacent property the Applicant will provide a minimum of 10 percent as Workforce Housing. The Applicant estimates upwards of about 600 dwelling units, approximately 70 percent of the potential project density. The final number, distribution, and location of market rate units, MPDUs, and Workforce Housing will be determined at Site Plan.

The project will include a number of buildings that define, activate, and improve the connectivity of both the surrounding streets as well a central public space. The current proposal shows three buildings on the main block and a fourth across Silver Spring Avenue. The maximum building height for each building will be limited by the Fenton Village Overlay Zone (59-C-18.192(b)(1)). Along the west side of Fenton Street, the maximum height for the proposed residential building will be 60 feet. Between Fenton Street and Mayor Lane to the west, the maximum building height is 60 feet, unless the building is 33 percent residential, when the maximum increases to 90 feet. But if a building with 33 percent residential uses is providing Workforce Housing, the zone allows additional height as necessary to accommodate that Workforce Housing, up to a maximum building height of 110 feet.

The central plaza will be a minimum of 40,000 square feet, and will be visually and spatially connected to the surrounding streets. The final design and character of this space will be determined at Site Plan, when staff will work with the Applicant's design team to address issues raised by the proposed Silver Spring Green Space Plan and any community comments raised during that review.



Schematic View of Central Green

The design also features a central private street parallel to Georgia Avenue that connects Thayer and Silver Spring Avenues. This new street currently is designed to feature one lane of traffic in each direction, with no on-street parking. The final design will feature the full standard Silver Spring streetscape, including lighting, trees, and brick paving.



New Private Street, From Thayer Avenue

Further, as this project as a whole is expected to achieve LEED-ND (Neighborhood Development) certification, and will include buildings that will be required under Montgomery County's Green Building Law to also achieve LEED-NC (new construction) certification, additional facilities to accommodate and encourage pedestrian circulation and cycling will be provided.

Public Use Space & Amenities

The proposed development would provide a minimum of 40,000 square feet of on-site public use space and 39,000 square feet of off-site public amenities. The on-site space is primarily composed of a central public open space with pedestrian links to each of the surrounding streets. The amenity package also includes a public art scheme that will dramatically and invitingly connect the central open space to the surrounding streets. Final details of the proposed open space and public amenities will be determined during the review of the site plan. The off-site amenity package features public right-of-way streetscape improvements along all site frontages and the undergrounding of all utilities in Mayor Lane.

Vehicular and Pedestrian Circulation

The site is bound on three sides by public streets, including Fenton Street, Thayer Avenue, and Silver Spring Avenue, and a public alley, Mayor Lane. The proposal includes the creation of a new cross-block private street, connecting Thayer Avenue and Silver Spring Avenue. Vehicular access to parking, loading, and pedestrian drop-off areas will come from these streets and alleys. Final traffic design will be determined by the preliminary and site plans.

As proposed, the project will feature street-activating uses along each street and the central public space. In addition to the new and existing streets, the development will also feature a pedestrian way connecting Georgia Avenue through "Mayor's Promenade" east to Fenton Street. This pedestrian path will be generously proportioned and lined with restaurants, retail, and other activating uses.



Pedestrian Promenade, from Georgia Avenue



Pedestrian Promenade, from Fenton Street

The project is replacing the 152 surface public parking spaces in an underground parking garage located beneath the central green and private street. The site will also provide private underground parking for the proposed residential and commercial buildings.

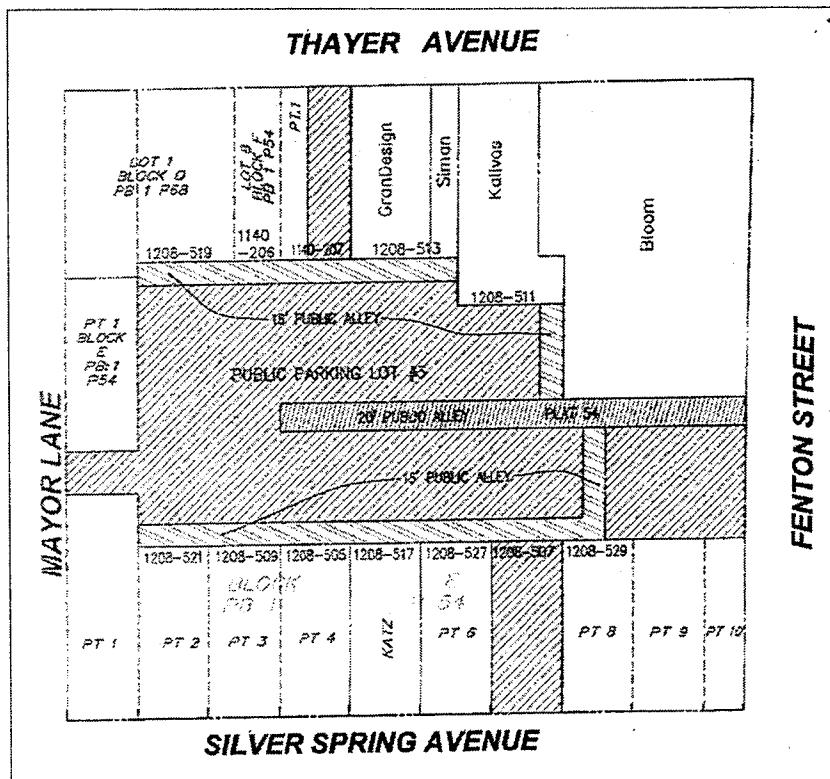
The site is conveniently located one block from the master-planned Metropolitan Branch Trail. Cyclists, whether visiting, commuting to, or living on the site will have ample facilities for storage of their bicycles.

ISSUES

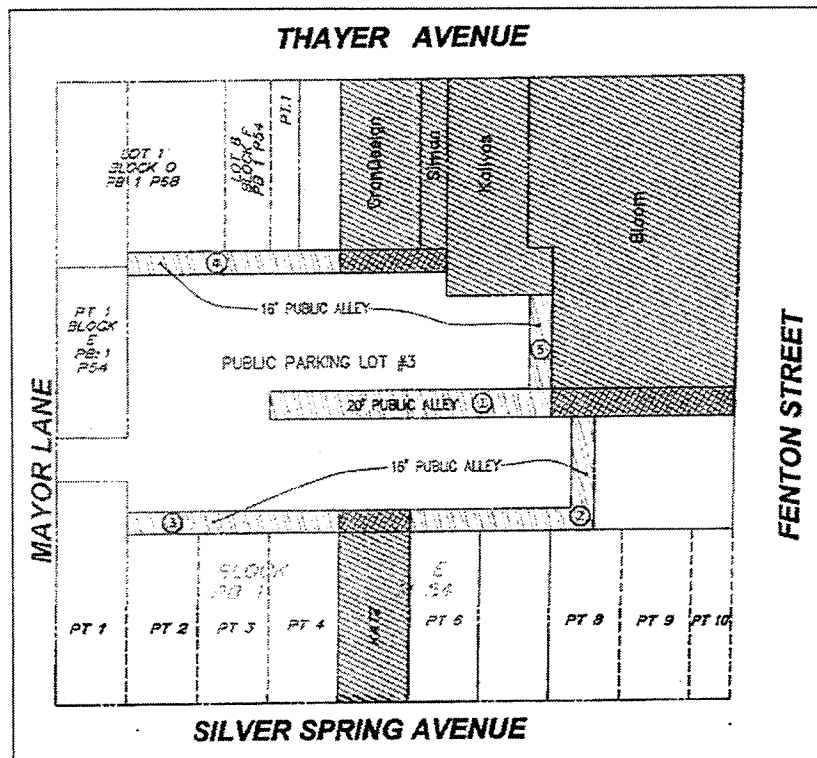
Proposed Abandonment of public alleys associated with Parking Lot 3

In the course of this Project Plan review, the Applicant determined that several 16-foot alleys, created by deed, lie within County Parking Lot 3. Staff understands these alleys to have been created to provide service access to several properties through the public parking lot from adjacent public rights-of-way, and that these alleys were deeded when the County acquired from the properties on this block land for the creation of Parking Lot 3. There further exists a platted 20-foot public alley connecting Fenton Street to Parking Lot 3.

In order to take full advantage of the redevelopment of the Parking Lot, the Applicant has proposed to abandon several sections of both the 16-foot alleys and the 20-foot platted alley.



Parking Lot 3, Current Condition



Parking Lot 3, Applicant's Proposal
(alleys retained in blue, those abandoned in red)

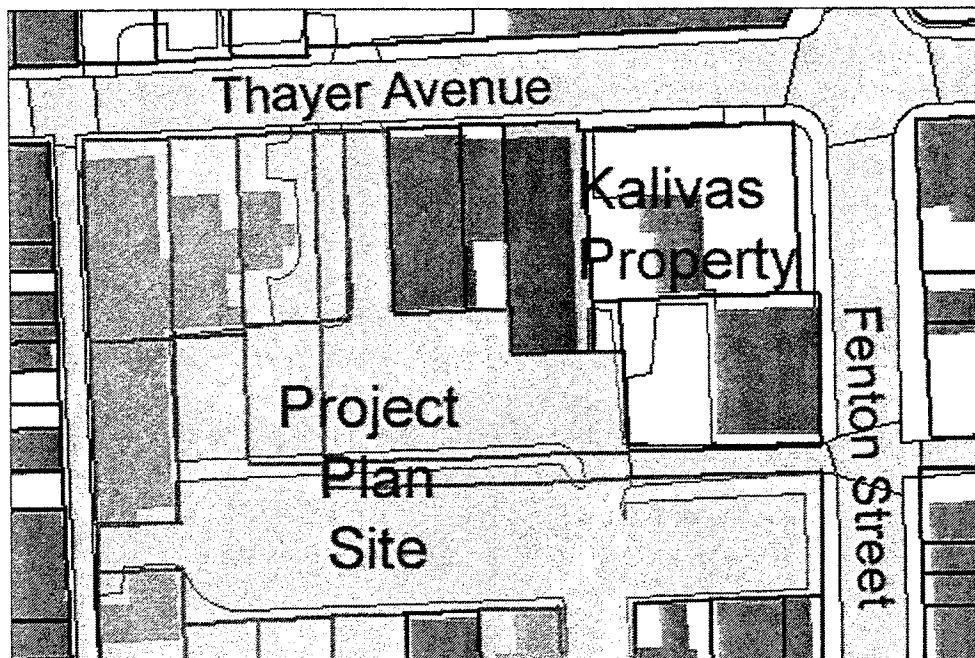
The abandoned sections, enumerated in the diagram above as sections 1-5, primarily impact the properties controlled by the Applicant. Alley sections servicing properties not controlled by the Applicant, indicated in blue on the above diagram, would remain at the rear or side of the GranDesign, Siman, Kalivas, Bloom, and Katz properties. A proposed new private street, running through the site along the western edge of the GranDesign and Katz properties, will provide public access to those alleys.

On February 12, 2009, the Board heard the Petition to Abandon the alley sections, where staff recommended approval of the abandonments. At that hearing, the Kalivas family and the owner of the building at 8204 Fenton Street (shown above as PT 9 and PT 10 at the corner of Silver Spring Avenue and Fenton Street) recommended denying the petition to abandon, citing undue impingement upon loading access to their properties. The Planning Board voted to withhold their recommendation to the County on the petition, pending a hearing of the Project Plan proposal, at which time the Board expected these issues to be resolved.

Since that hearing, staff has undertaken to coordinate an accommodation mutually agreeable to the Applicant and these property owners.

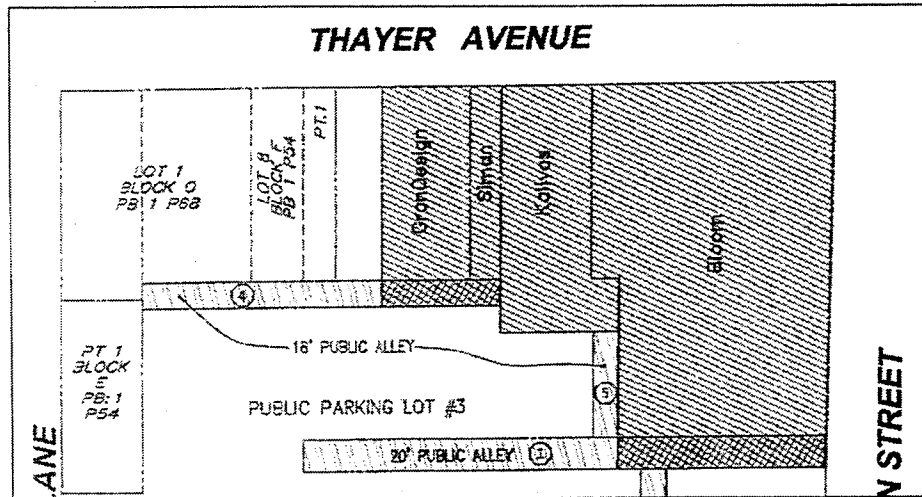
Kalivas Property

The Kalivas property is located on Thayer Avenue and is currently occupied by a one-story building housing a Thai market. Pedestrian access is from Thayer Avenue, with service access from the rear of the building on Parking Lot 3. The rear of the Thai market building comes within a few feet of the property boundary with the County Parking Lot. As shown in the photos in Appendix B, the area between the back of the building and the parking lot is taken up with a concrete walk about 3 feet deep and approximately one foot of pavement.

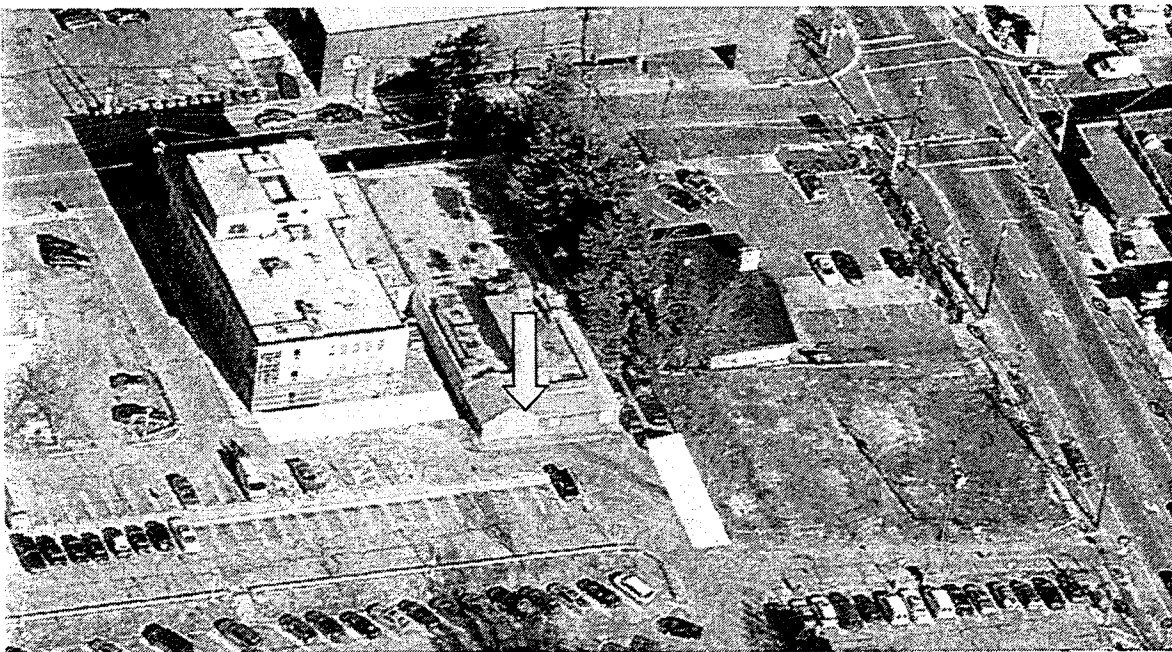


Kalivas Property

Two 16-foot alleys abut the Kalivas property. The alley proposed for abandonment extends to the southeast corner of the site from the 20-foot alley currently serving as an entrance ramp to Parking Lot 3 from Fenton Street. The second, proposed to remain, runs behind the GranDesign and Siman properties and terminates at the side of the Kalivas property.



Proposed Alley Disposition, Parking Lot 3



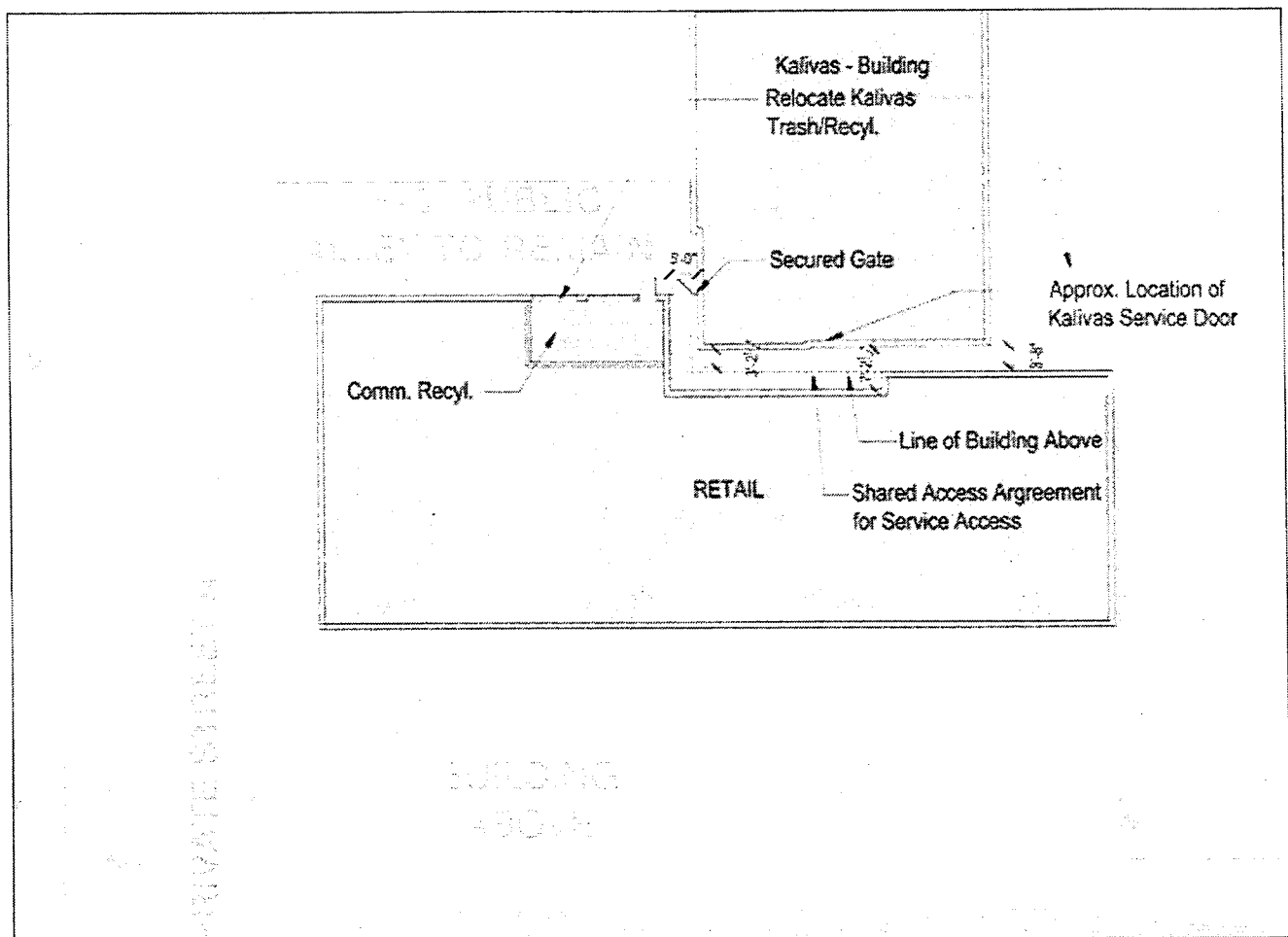
Aerial view of the Kalivas building

The alley to the southeast is currently used by the building tenants to access parking and trash storage. Neither this alley nor the one to the west is used by the property for loading access. Loading is instead achieved directly from Parking Lot 3, by backing a truck, typically an 18-wheeler, to a door in the middle of the rear façade (indicated with an arrow above). The tenants of the Kalivas property have been operating this way for a considerable period of time, to staff's knowledge, seemingly without challenge.

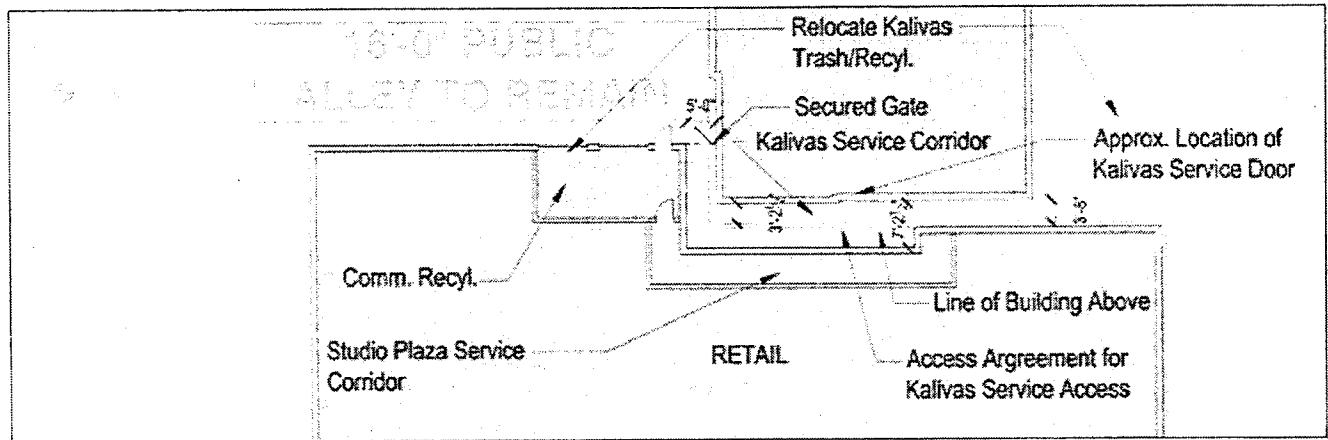
The Applicant and the Kalivas family had held discussions to find a mutually agreeable accommodation, but were unable to achieve a compromise by the February 12 hearing. With the intent to mediate between these parties, staff met alone on site with the Kalivas family on February 19, 2009, to discuss design alternatives that could be explored by the Applicant's design team. Staff then relayed these alternatives to the Applicant, who began schematic development.

On Tuesday, March 17, 2009, Development Review, Urban Design, and Community Planning staff met with the Kalivas family and the Applicant's design team to discuss alternatives. These options fell into two general categories: relocate loading access to the alley behind GranDesign or maintain the service access status quo.

Under this proposed relocation scenario, the Kalivas tenants would back their truck into the alley behind GranDesign and use handcarts to transfer deliveries through a secured exterior passageway to the existing loading door. In one option, the retail tenants of both Studio Plaza and Kalivas would share the serviceway, in another they have separate access.

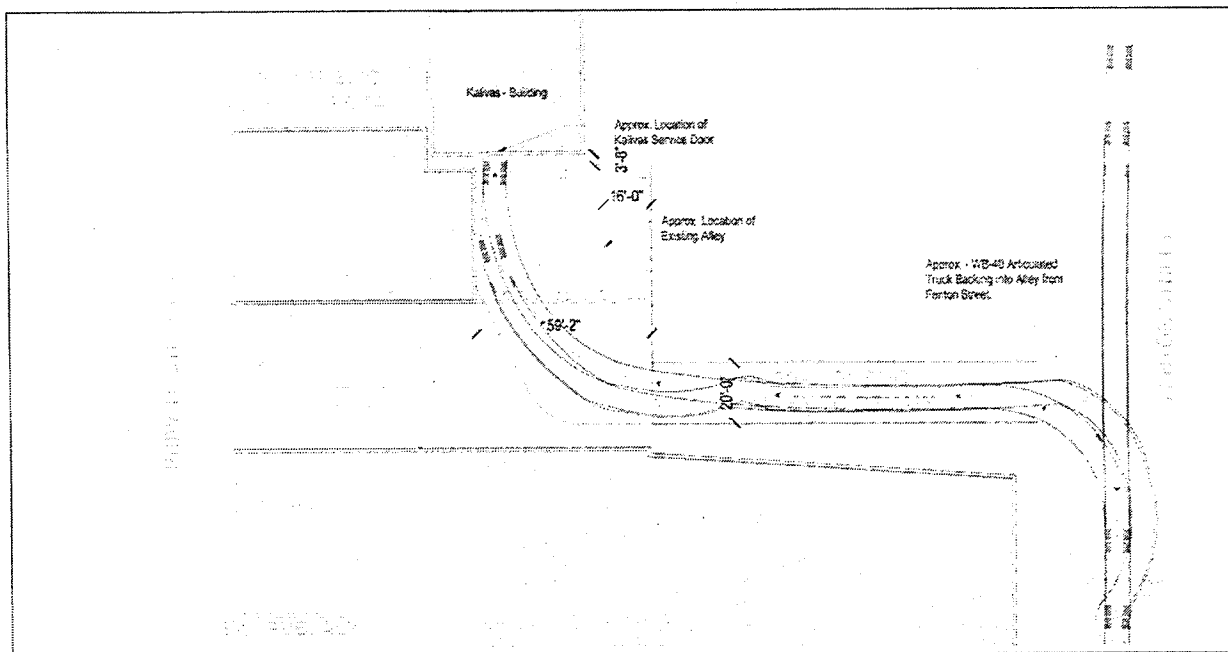


*Option 1A (Relocation):
Handcart Access to Exterior Loading Door w/ Shared Service Walkway*



*Option 1B (Relocation):
Handcart Access to Exterior Loading Door w/ Separated Service Walkway*

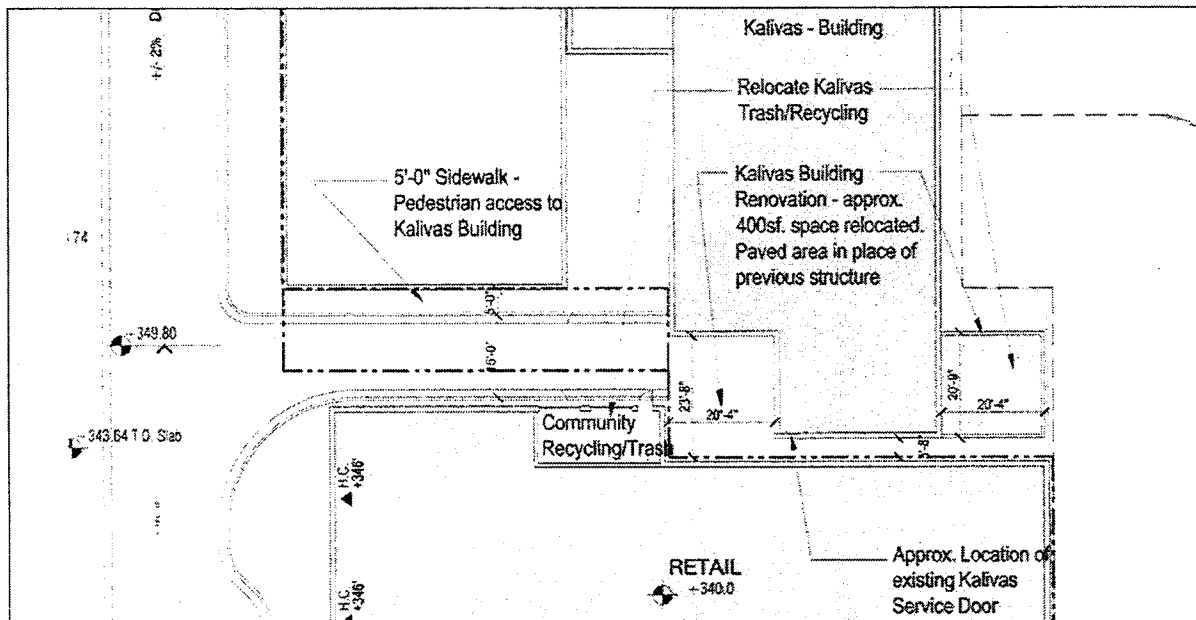
The second scenario envisioned what would be required to retain the loading access status quo. Though technically possible, this would require removing a significant portion of proposed residential units, retail area, and public use and amenity space, and would expose the loading dock of the Kalivas building.



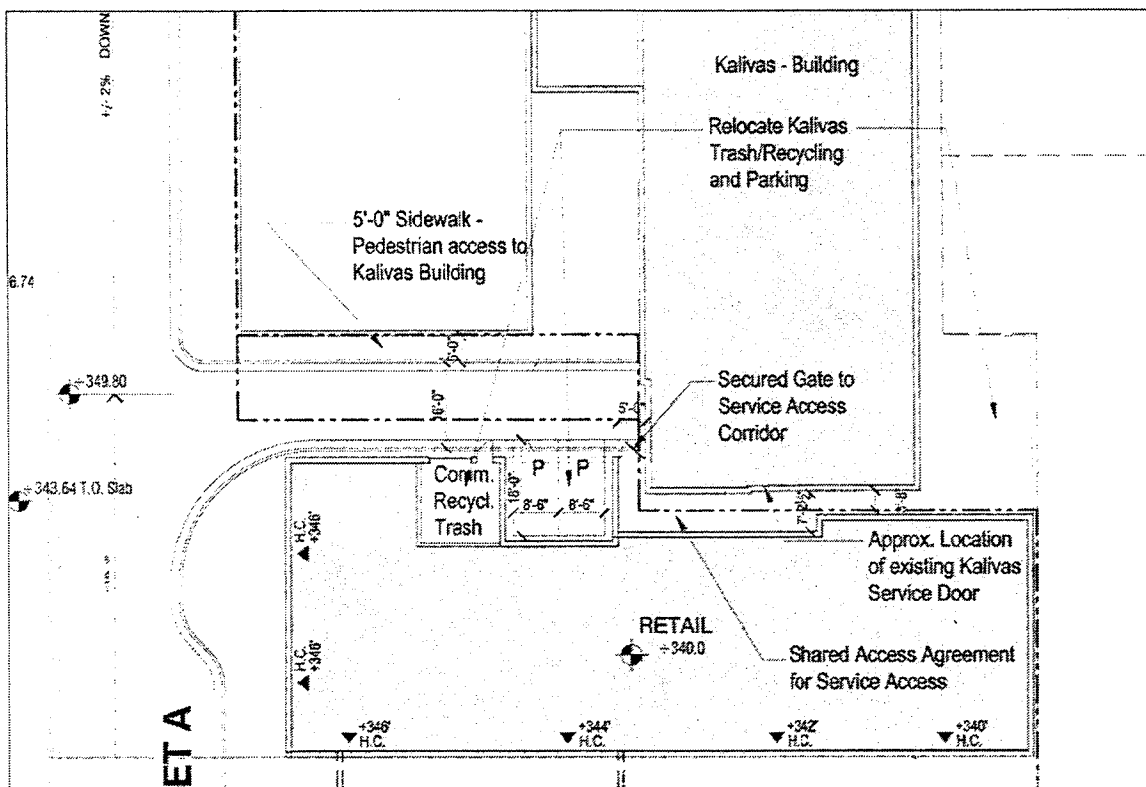
*Option 2 (Maintain Status Quo):
Truck (18-wheeler) Backing from Fenton Street*

At the conclusion of the March 17 meeting, the Kalivas family seemed to express interest in some version of the relocation option and were going to discuss it after the meeting and follow up with the Applicant and staff. On March 27, 2009, David Brown of the law offices of Knopf & Brown notified the Applicant and staff that the Kalivas family had retained the firm to represent them.

On April 7, 2009, the Applicant provided an updated pair of proposals for review. These revisions were more developed versions of the relocation schemes illustrated above, and included parking.



Revised Proposed Option 1



Revised Proposed Option 2

On April 28, 2009, Mr. Brown provided the Applicant and staff with draft conditions of approval approved by the Kalivas family (Appendix D). The conditions include, but are not limited to, requiring that the Applicant, at no expense to the Kalivas family:

- relocate the loading entrance to the west side of the building to facilitate loading from the alley behind the GranDesign building;
- replace, in close proximity to the rear of their building, the parking spaces currently accessible from the 16-foot alley located at the southeast corner of the Kalivas property;
- provide a secondary entrance to the building that would be more directly accessible to Studio Plaza patrons;
- coordinate construction phasing to maintain the loading function of Kalivas tenants.

Staff met with Mr. Brown and the Applicant and his attorney to review and discuss these conditions. Although Mr. Brown indicated that his clients continue to oppose the project, they nevertheless considered the conditions to be the minimum acceptable accommodation by the Applicant. Staff is prepared to recommend these selected conditions as conditions of approval before the Board, with the understanding that the final details of these accommodations will be determined at Site Plan. However, if the the owners of the Kalivas property are not amenable to the above conditions, staff recommends the Applicant construct, entirely on Applicant-controlled land, the alley configuration referred to above as "Revised Option 2".

Gerecht Property/8204 Fenton Street

The Gerecht Property/8204 Fenton Street is located at the intersection of Silver Spring Avenue and Fenton Street, at the southeast corner of the proposed Project Plan. The site is currently occupied by a two-story office building, currently housing a publication company on the second floor and retail on the first floor: a café opening to Fenton Street and a market and hair salon on Silver Spring Avenue. The building shares a zero-lot line with Parking Lot 3 to the north.



Gerecht Property/8204 Fenton Street



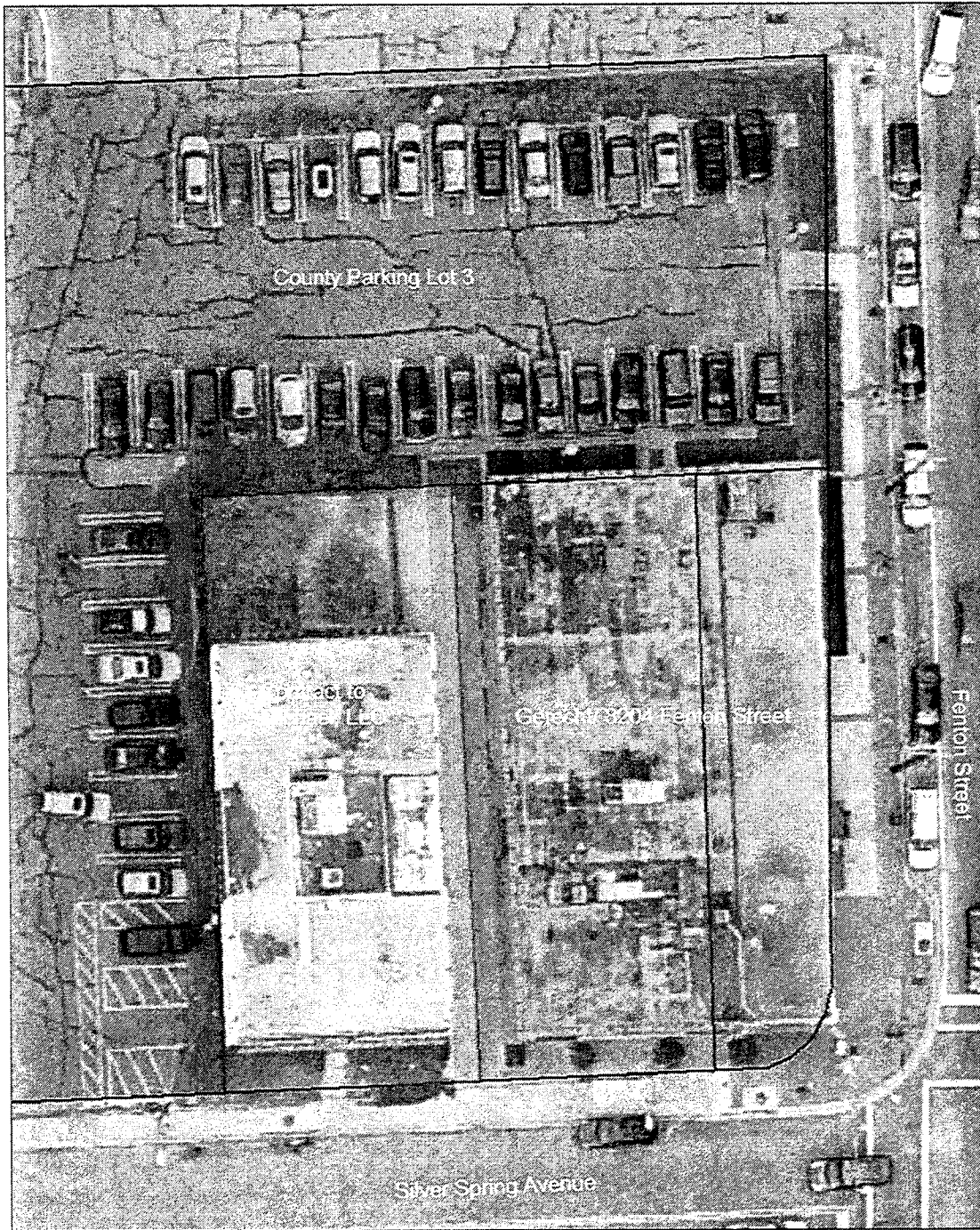
Gerecht Property Fenton Street Elevation

The building was built in at least two stages, but the interior functions – with minor adaptations – as one building. The retail spaces are accessed directly from the street. The remaining areas on the first floor and the entirety of the second floor may be accessed at street level from a door on Fenton Street or from two doors on the shared private alley on the west side of the building. The building has no elevator; interior access to the second floor is provided by stairs. The building also has an entrance onto the adjacent portion of Public Parking Lot 3. The publishing company has been using this as its main entry for employees and loading. These doors access a landing from which one may ascend a few feet to the publishing offices or descend to the Fenton Street entry hall.



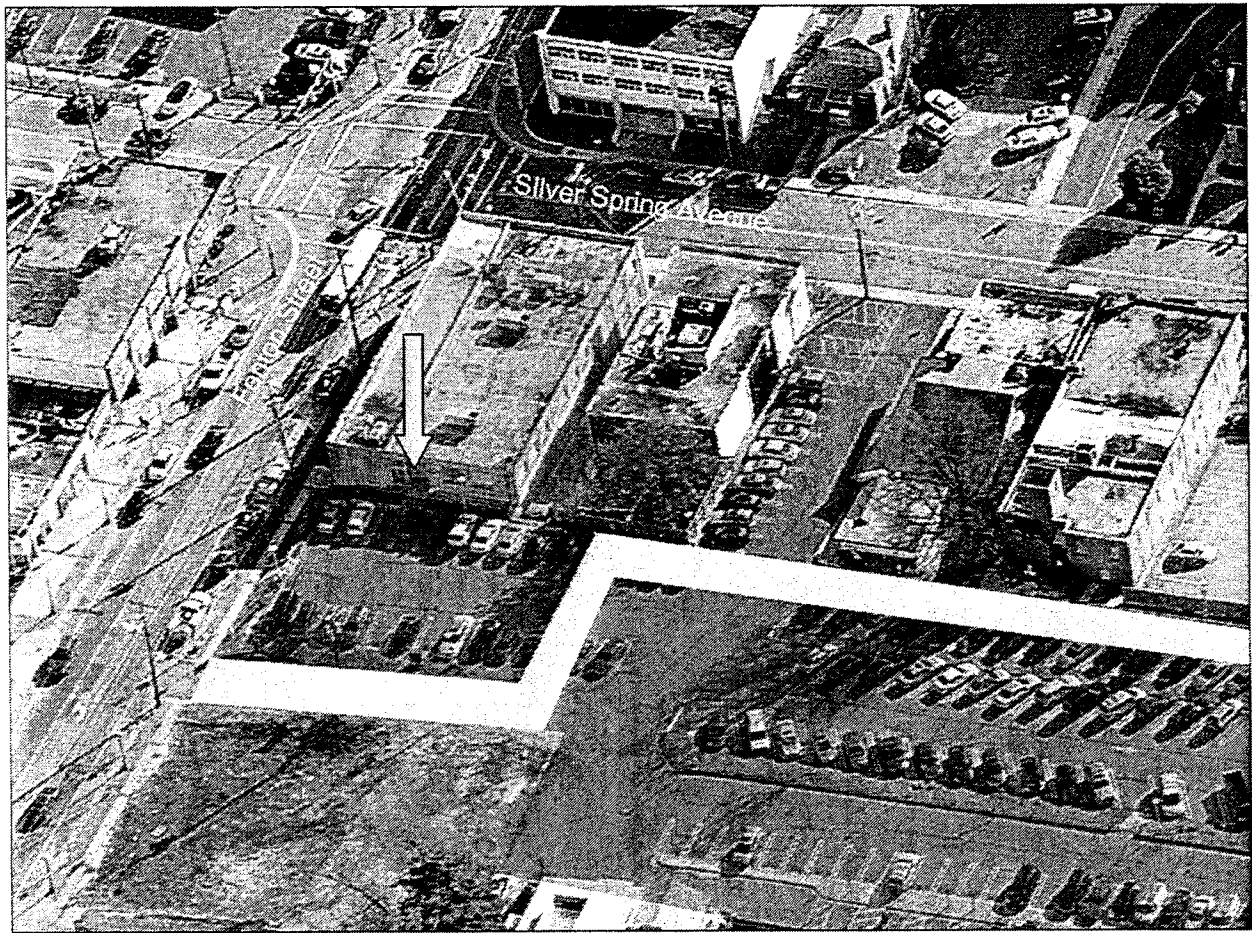
Gerecht Property Parking Lot Elevation

The Gerecht property enjoys easements on two adjoining properties. One easement covers a shared private alley, accessed from Silver Spring Avenue, between the Gerecht property and the Applicant's contract property to the west. A second easement, for a garbage dumpster area cut into the hill on the County Parking Lot, is at the northwest corner of the Gerecht property, accessed from the shared private alley. A third easement covers a concrete pedestrian bridge extending from the building to Parking Lot 3.



Approximate Location of Current Easements (in green) for 8204 Fenton Street

The Gerecht property does not load directly from the platted or deeded alleys contained within Parking Lot 3, loading instead directly from the Parking Lot itself. Access to this portion of Parking Lot 3 is gained from the 20-foot platted alley off Fenton Street.

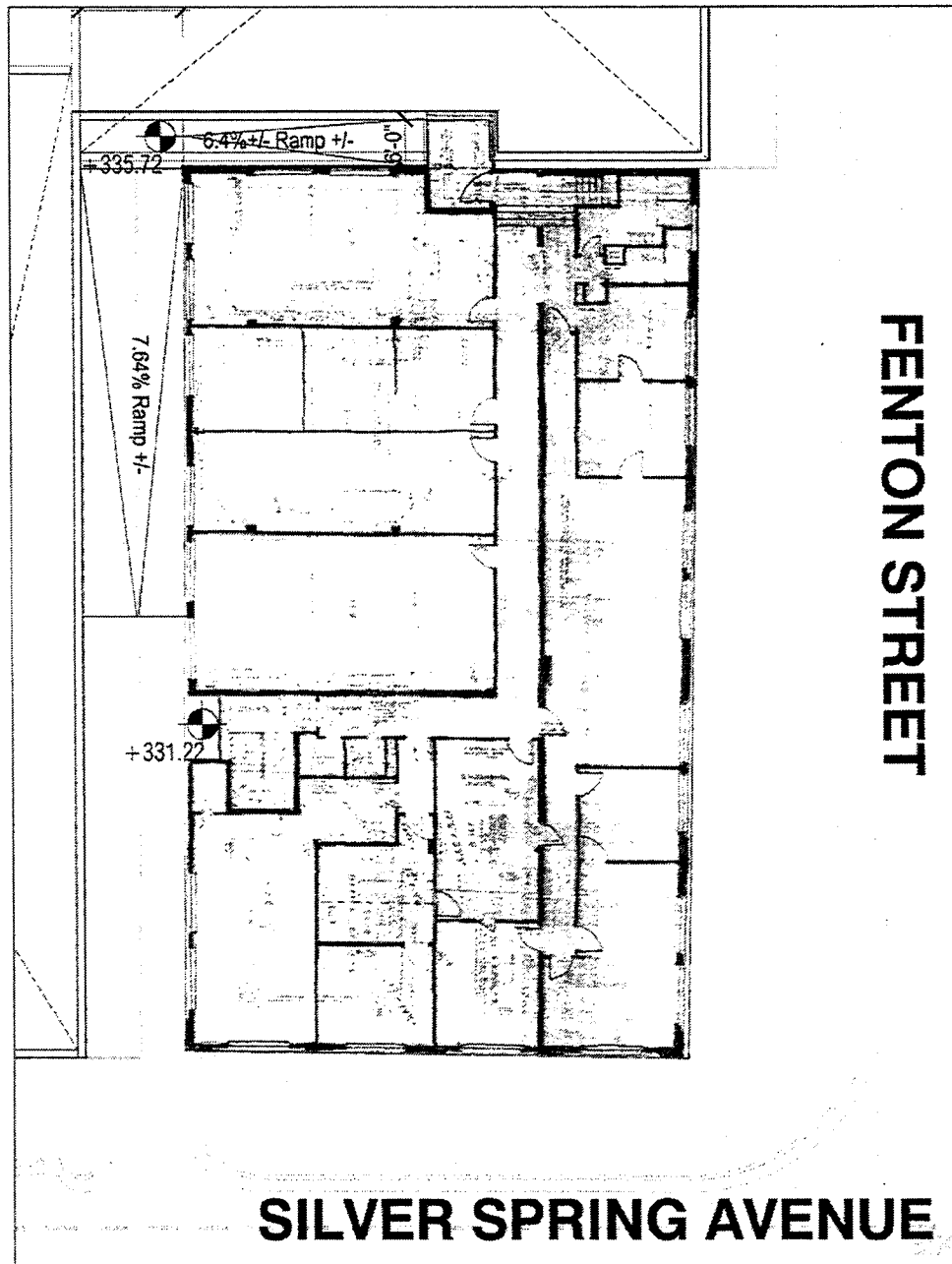


Approximate Location of Existing Public Alleys near 8204 Fenton Street

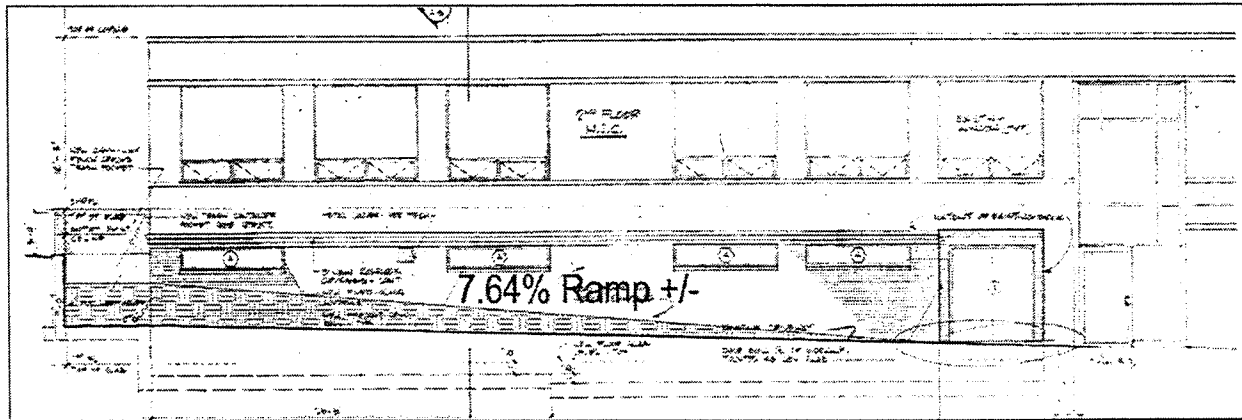
On December 16, 2008, staff received two letters, from Mr. Gerecht and his attorney Mr. Joseph Lynott, expressing concerns about the relationship between 8204 Fenton Street and the proposed development (see Appendix E). In response, staff met with Mr. Gerecht at M-NCPPC on January 15, 2009, to discuss his concerns. Staff encouraged Mr. Gerecht to negotiate a reasonable accommodation from the Applicant, possibly to include revisions to the building interior (at the Applicant's expense). The Applicant and Mr. Gerecht held discussions to find a mutually agreeable accommodation, but were unable to achieve a compromise by the February 12 hearing.

Again with the intent to mediate between the parties, staff met alone on site with Mr. Gerecht on February 19, 2009, to discuss design alternatives that could be explored by the Applicant's design team. Proposals developed by the Applicant and shared with Mr. Gerecht before the February 12 meeting included the installation of a service elevator within 8204 Fenton Street. Mr. Gerecht declined these interior proposals as unworkable, so staff focused discussion on exterior alternatives. Staff relayed these alternatives to the Applicant for development.

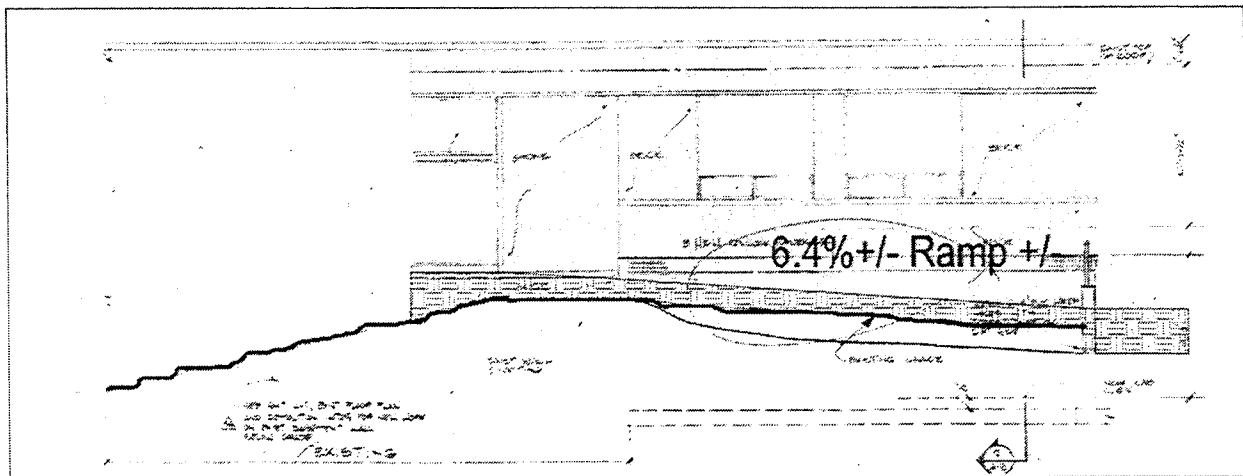
On Tuesday, March 17, 2009, Development Review, Urban Design, and Community Planning staff met with Mr. Gerecht and the Applicant's design team to discuss alternatives. The first option created a ramp in the joint alley that would allow a box-type truck to back up to the corner of the building and unload to the concrete pedestrian bridge via handcart.



Ramp Option Plan

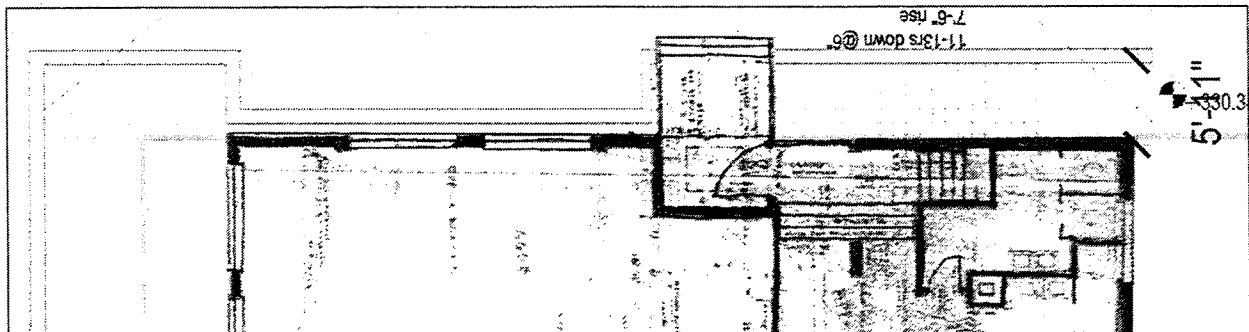


Ramp Option Alley Elevation

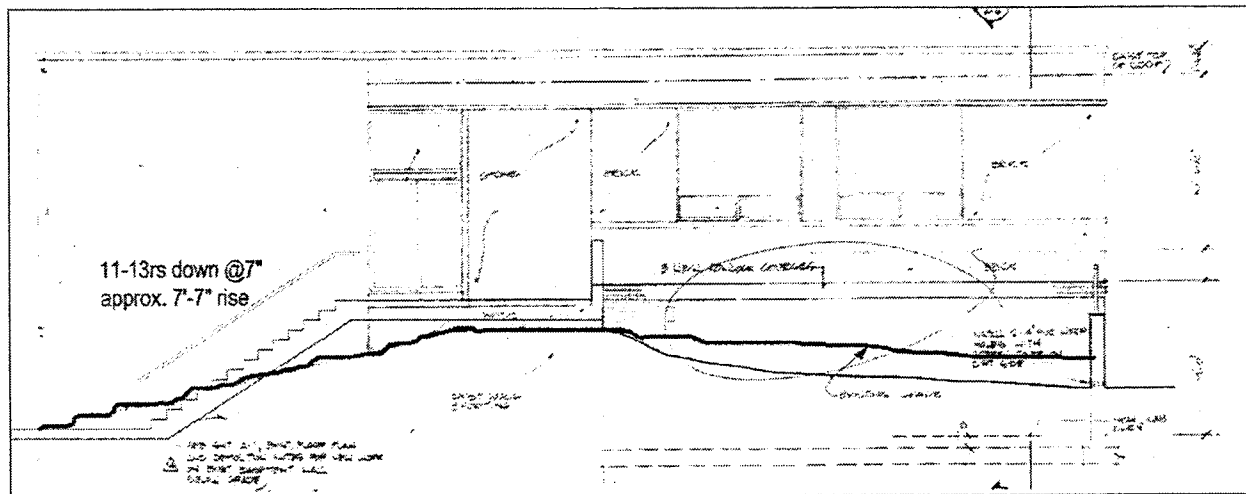


Ramp Option Parking Lot Elevation

The second option intended to meet the spirit of the pedestrian bridge easement by constructing, entirely on the proposed development, a concrete stair connecting the pedestrian bridge to the Fenton Street sidewalk. Loading in this case would be from the shared alley and up the internal stairs.

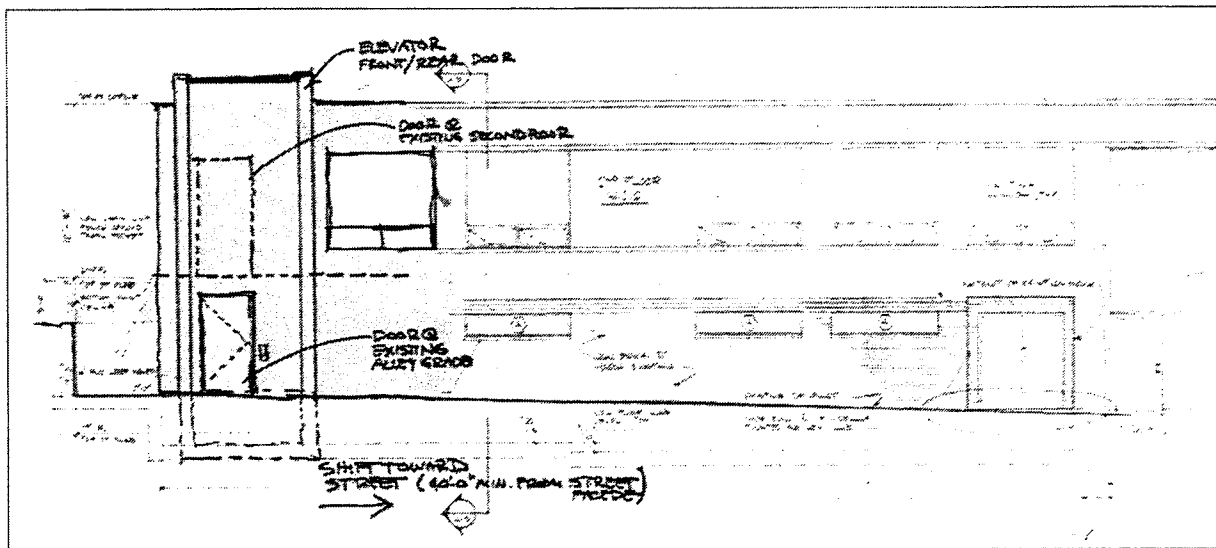


Exterior Stair Option Plan

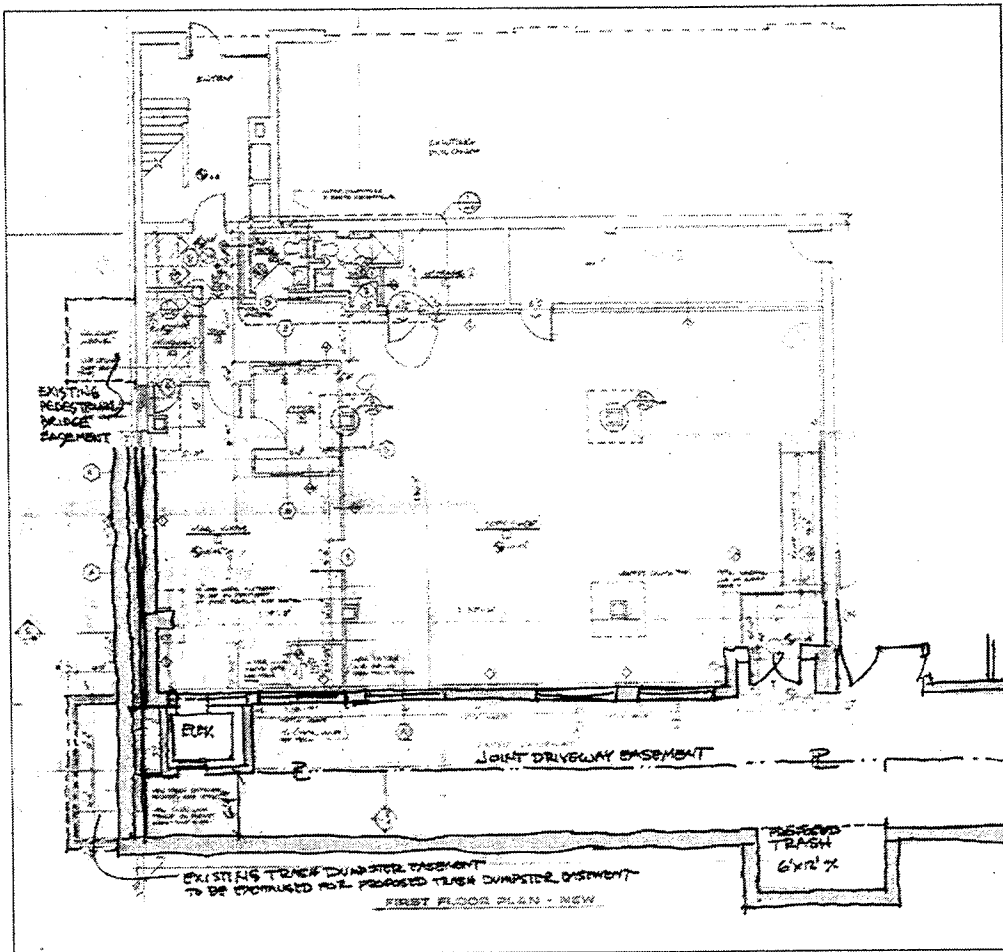


Stair Option Parking Lot Elevation

In a final attempt to get the parties together to achieve a mutually agreeable accommodation, staff set up a meeting on April 17, 2009, at M-NCPPC. Attending the meeting were representatives from 8204 Associates, CD Publications, Development Review, Urban Design, and Community Planning, MC DOT, the County Executive, Councilmember Ervin's office, and the Applicant (see Appendix F for the attendance list). At this meeting, Mr. Gerecht formally declined the exterior ramp and stair options and reiterated a reluctance to accede to the installation of an interior elevator due to concerns about disruption of business operations on the second floor. Another alternative was, however, suggested that involved the construction of a service elevator outside the building in the shared alley, an elevator which could then be connected to the building at the last stages to minimize interruption. Mr. Gerecht and his colleagues agreed to consider the design and the Applicant set about preparing the drawings.



Exterior Elevator Scheme Alley Elevation



Exterior Elevator Option Plan

In addition to providing an exterior service elevator in the shared alley to service 8204 Fenton Street, the scheme also proposes to exchange the easement for the garbage bins currently located at the end of the shared alley with another on the proposed development that would be more conveniently located to the building's alley service entrance. As of this writing, staff has not received a formal response to this latest proposal.

Staff did receive on May 1, 2009, from Mr. Gerecht's attorney, David Brown, a series of conditions for accommodation between Mr. Gerecht and the Applicant (see Appendix E). While maintaining opposition to the project, the general terms of the conditions include, but are not limited to, requiring that the Applicant to, at no expense to 8204 Associates:

- install a commercial elevator inside the building convenient to the Fenton Street entrance
- enclose the alcove at the parking lot entry as conditioned space
- make modifications to the building interior to accommodate the addition of the elevator
- remove the pedestrian bridge
- replace signage on the Fenton Street façade
- set back the proposed building to the north to allow a measure of light and air to the existing windows on the north elevation.

Staff is prepared to recommend these selected conditions as conditions of approval before the Board, with the understanding that the final details of these accommodations will be determined at Site Plan. Mr. Gerecht's conditions also included requests that various financial considerations be paid to him by the Applicant. Staff is not prepared to recommend these as conditions of approval. Staff is further recommending that, if the parties cannot agree to changes inside their building, the Applicant accommodate that property by the installation either of an exterior elevator, as illustrated in the "Exterior Elevator Option," or an exterior stair connecting the pedestrian bridge to the Fenton Street right-of-way, as illustrated in the "Exterior Stair Option."

Loading/Unloading from County Parking Lot

In a letter dated March 9, 2009, staff requested clarification from MC DOT regarding several issues related to the Kalivas and Gerecht properties, particularly with regard to their use of Public Parking Lot 3 for loading purposes. Their response, dated April 3, 2009, (see Appendix G for both letters) states:

It is our opinion that neither Kalivas, nor Gerecht have an express right to perform "loading" from Lot 3. By deed and plat (though the latter appears to be unrecorded), Kalivas is allowed access to the rear of her property via a 16-foot "public alleyway" that crosses Lot 3. Access could include loading and unloading of vehicles, though Kalivas would have to confine those activities within the easement area.

The County has granted an easement for the benefit of the Gerecht property. The County granted to 8204 Associates Limited Partnership "an easement and right-of-way" for a "pedestrian bridge" that connects Gerecht's building to Lot 3 (*Liber 9322, Folio 513*). Other than provisions that allow 8204 Associates, and the County, access to the bridge for the purposes of reconstruction, repair, maintenance and the like, the easement implies pedestrian access only and would not allow loading from Lot 3.

In addition, Sec. 31-29(10) of the County Code specifically prohibits the loading or unloading of commercial vehicles on a County parking lot.

Parking

Parking, particularly short-term parking for the businesses along the east side of Fenton Street, is an issue that will need to be given significant attention and coordination at Site Plan. Although the surface spaces of Parking Lot 3 will be relocated to an underground structure just half a block away and the on-street parking along Fenton Street and adjacent streets will not be reduced by this development, the removal of the small parking lot immediately adjacent to Fenton Street will need to be ameliorated. Possible solutions could include additional interim short-term parking facilities along Fenton Street, shorter-term parking meters, and strategic project phasing.

Phasing

For an infill project of this stature, phasing of the various buildings and other components will be an essential tool for its successful integration into the existing community fabric. Issues of parking,

development of community amenities, and minimizing disruption, among others, will be addressed at Site Plan.

Safety

Several community members have cited safety and security concerns on this project, particularly with the underground public parking garage. Staff generally shares these concerns and will be working with the Applicant, MCDOT, and CPTED (Crime Prevention Through Environmental Design) experts in the Montgomery County Police Department to produce a design that will help ensure a safe and secure environment. Many existing area retail and mixed-use developments in downtown areas with more urban densities, including Mazza Galerie in Friendship Heights, downtown Washington, DC, and Arlington, VA, feature viable underground parking. There are safe and secure ways to design and operate underground garages and staff will acquire the necessary input to make sure these best practices are identified and implemented. While the street-oriented buildings and public spaces and street-activating ground-floor retail spaces will provide additional pedestrians on the sidewalks and eyes on the street, significantly improving security over what is now a largely unsupervised area, staff will coordinate with both safety experts and the future operators of the underground public garage to produce an optimal design.

Public Green Space design

The central public space will be the largest of its kind in Fenton Village (and for the foreseeable future the Ripley District as well) and will have to serve many functions. The final design, to be determined at Site Plan, will address the frequently noted need for a large communal green space in Fenton Village. The draft Silver Spring Green Space Plan, prepared in response to the loss of “green” space in downtown Silver Spring, specifically identified this location as a unique and prime opportunity to secure a much-needed and –desired public space in this area. The final design will feature strong spatial, visual, and kinetic connections to the surrounding streets, inviting the larger community into the public green space.

Small businesses

The commercial character of Fenton Village is defined by small businesses: convenience retail, cafes and eateries, and specialty shops. The proposed mixed-use development will introduce new office tenants and residents into the neighborhood, providing an expanded customer base seven days a week, morning, noon, and night. It will also bring more retail space and likely increase property values, increasing retail competition and potentially rents to rise for existing businesses. With the assumption that Fenton Village will eventually redevelop, more densely than it is currently, these opportunities and challenges sooner or later will come to the small businesses of Fenton Village.

It is a goal of the Master Plan to maintain the “Village” character of Fenton Street. During Site Plan review, staff will engage with the Applicant, the County Office of Economic Development, local business owners, and others to explore options for retaining, promoting, and improving upon that character.

Other easements

The attorney representing the Kalivas property and 8204 Fenton Street, and now 911 Silver Spring Avenue (the office building located immediately adjacent to the intersection of Silver Spring Avenue and the proposed new private street, the alley behind whose building is proposed to remain), has submitted for the record a legal argument regarding private easements he asserts that his clients have over the subject property. Staff is consulting with the Legal Department and is providing the documents for reference (Appendix L).

CORRESPONDENCE

Staff received 27 letters and e-mails in support of the proposed development (Appendix H). Commenters cited the many benefits of redevelopment, particularly in Fenton Village. Some identified minor issues to be addressed at Site Plan. Supporters include many small businesses, retailers, and restaurants in the immediate vicinity, as well as citizens and the Greater Silver Spring Chamber of Commerce.

In opposition, staff received letters from 2 Silver Spring residents and a third from the East Silver Spring Citizens Association (ESSCA) (Appendix I), the latter of which very helpfully and constructively recommended solutions to address their concerns.

From Mr. Gerecht, staff has also received a petition raising concerns about the impacts of the proposed Project Plan on Fenton Village (for a sample page, see Appendix J; the entire petition may be found in the project file). Staff analysis of petition (Appendix XX) counted 695 signatures, mostly from residents of greater Silver Spring (65 percent), but also from Washington, DC, (10 percent) Takoma Park (6 percent), and other areas within Montgomery, Prince George's, Baltimore, Howard, and other Maryland counties, as well as Virginia, Pennsylvania, Tennessee, and Texas. The primary issues identified by respondents included the loss of the amount, location, and convenience of the current parking arrangement (51 percent), the safety of the proposed replacement underground parking garage (25 percent), and concern for the survival of the small business in Fenton Village (12 percent). Other concerns included the adjacent property owners' loss of their current loading arrangement (5 percent), increased traffic congestion (3 percent), and a perceived lack of public input in the awarding of the redevelopment for Parking Lot 3 (2 percent).

These data suggest a great many of the retailers in Fenton Village are patronized by people who drive (sometimes apparently from great distances) to the area. The addition of several hundred new residences within one block's walk will have a significant impact. About 60 of the respondents identified themselves as "businesses". Though the petition was received too late for inclusion in this report, at the hearing staff will provide a visual analysis of the location of the Silver Spring businesses in support of, and those having concerns with, this project.

Staff agrees with the main issues and concerns raised by the respondents and has conditioned its recommendation of approval on the resolution of such issues at the time of Site Plan.

PROJECT ANALYSIS

Sector Plan

The Silver Spring CBD Sector Plan sets forth a vision for the redevelopment of downtown Silver Spring based on six themes:

- Transit-oriented downtown
- Commercial downtown
- Residential downtown
- Civic downtown
- Green downtown
- Pedestrian-friendly downtown.

This proposal meets the goals of each of these themes. The site is located approximately one-quarter mile from the Silver Spring Transit Center, which contains local and regional rail and numerous bus lines. The project proposes a vertical mix of uses, with office, multi-family residential, and possibly hotel uses, all above retail, restaurant, and potentially other street-activating ground floor uses. Central to the design is a large public civic green space, and each street, public or private, contained within or adjacent to the site will provide street trees, upgraded street lights, and other improvements required as part of the Silver Spring streetscape standard. Highlighting the civic nature of the central green will be a significant public art component, to be integrated with the design and configuration of the surrounding buildings so as to boldly empower the space to reach out of the center of the block to the adjacent streets and the neighborhoods beyond. Finally, this urban infill project will expand and improve the street and pedestrian network and experience in Fenton Village, with through-block connections, attractive streets, and exciting recreation, retail, and entertainment opportunities.

The Silver Spring CBD Sector Plan further identifies five “Revitalization Areas”, including Fenton Village, of which it said:

Pedestrian traffic in Fenton Village has declined due to a variety of real and perceived problems including lack of demand for the goods and services offered in Fenton Village, inadequate pedestrian circulation, concerns about security, the ability to attract office workers from the nearby Core, and the area’s deteriorating visual image.

The area is also physically disjointed, due to a lack of significant renovation or infill development in recent years. In more unified shopping districts, retailers benefit from the combined drawing power of the individual stores. In Fenton Village, the disjointed patterns of commercial activity and the lack of a resident population dilutes pedestrian traffic – a key component to retail vitality.¹

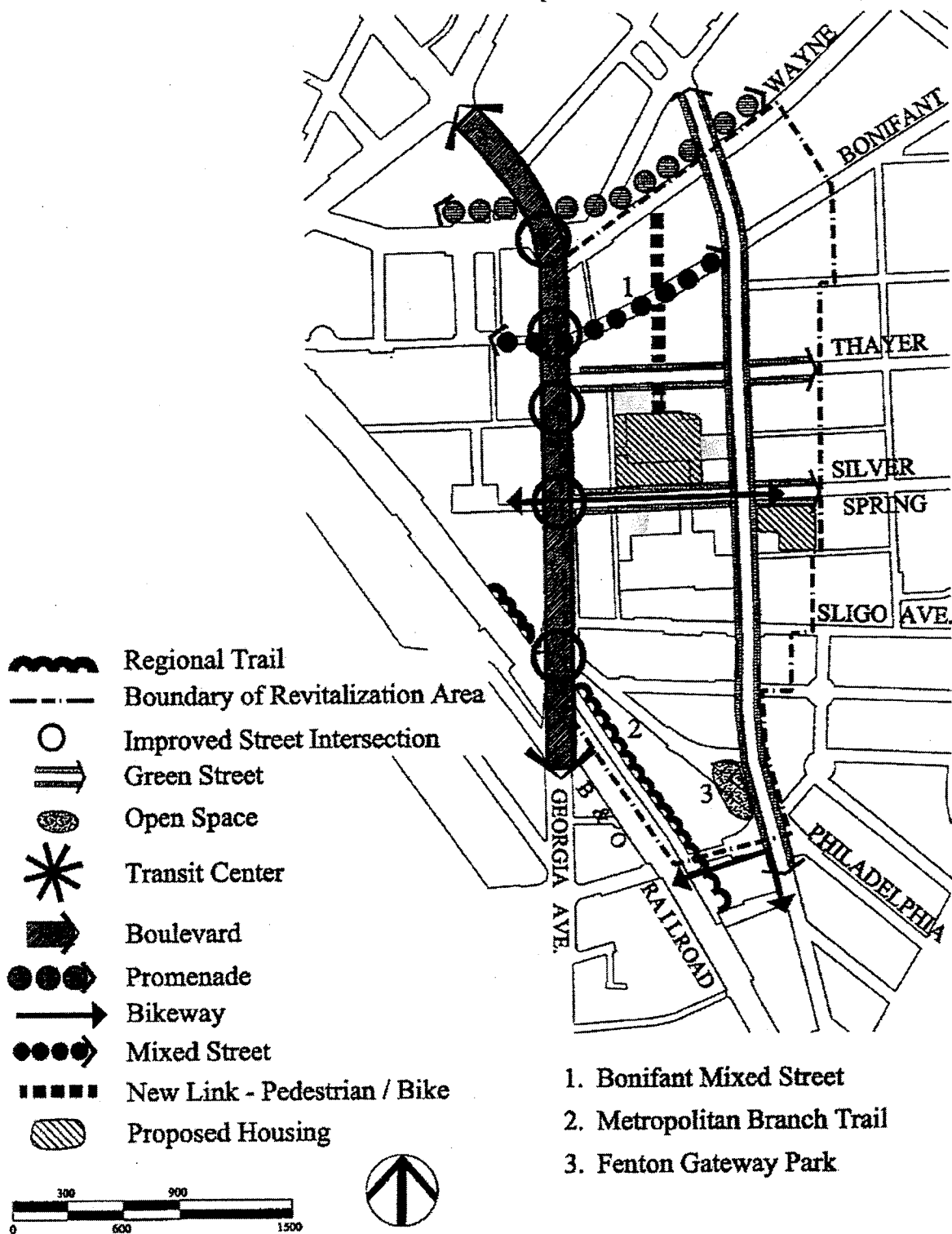
This project specifically addresses those issues.

With the objective to “Revitalize Fenton Village by positioning it to benefit from redevelopment on the Urban Renewal site, facilitate housing that will upgrade the physical environment and bring in new residents, and provide a pedestrian-friendly environment that encourages people to stroll and stay”², the Sector Plan also made recommendations specific to Fenton Village.

The Plan increased the zoning in Fenton Village from CBD-0.5 to CBD-1, doubling the maximum density from FAR 1.5 to 3.0, identified locations for new housing (including this proposed site) and open space, and established an overlay zone to help ensure compatibility. This plan proposes boldly to fulfill the vision and goals of the Sector Plan.

¹ Silver Spring CBD Sector Plan, 61

² *ibid.*



Fenton Village Concept Plan

Transportation

During Preliminary Plan review, Transportation Planning staff will ensure the Applicant addresses all requirements of both Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR).

Environment

The entire proposed development would be built on compacted, urban soils occupied currently by buildings or surface paved parking lots; there are no existing environmental features on site.

Development Standards

The subject Project Plan comprises land in the CBD-1, CBD-2, Fenton Village Overlay (FVO) Zones, which are governed by the development standards in Section 59-C-6 and 59-C-18 of the Montgomery County Zoning Ordinance. The CBD-2 portion of the site is an already improved site included solely for the transfer of unused density remaining on the site.

As the data table shows, all of the requirements of the CBD-1 and FVO are met by the subject Project Plan. The CBD-2 properties within this development do not contain proposed improvements. For a detailed calculation of the proposed base density, see Appendix K. Because this project is within a Parking Lot District, parking spaces are not required to be provided.

Project Data Table for the CBD-1/FVO Zones

Development Standard	Permitted/ Required	Proposed for Approval
Max. Building Height (feet)		
Building w/ min. 33 percent residential GFA; along the west side of Fenton Street	60	60
Building w/ min. 33 percent residential GFA	90	90
– to accommodate Workforce Housing	110	110
Min. Setbacks (feet)		
East Property Line	n/a	0
North Property Line	n/a	0
West Property Line	n/a	0
South Property Line	n/a	0
Min. Site Area (square feet)		
Gross Tract Area	18,000	222,592
Prior Dedication	n/a	41,971
Proposed Dedication	n/a	8,283
Net Tract Area	n/a	172,338
Max. Base Density (exclusive of residential density bonuses)		
Gross Area	626,781	626,781
Floor Area Ratio	2.82	2.82
Public Use Space (percent of net lot)		
On-Site Public Use Space	20	23.2
Off-Site Amenity Space	n/a	22.6
Total Public Use & Amenity Space	20	45.9

FINDINGS

According to Section 59-D-2.43 of the Montgomery County Zoning Ordinance, in reaching its determination on a Project Plan the Planning Board must consider the following:

- (a) The nature of the proposed site and development, including its size and shape, and the proposed size, shape, height, arrangement and design of structures, and its consistency with an urban renewal plan approved under chapter 56.
- (b) Whether the open spaces, including developed open space, would serve as convenient areas for recreation, relaxation and social activities for the residents and patrons of the development and are planned, designed and situated to function as necessary physical and aesthetic open areas among and between individuals structures and groups of structures, and whether the setbacks, yards and related walkways are located and of sufficient dimensions to provide for adequate light, air, pedestrian circulation and necessary vehicular access.
- (c) Whether the vehicular circulation system, including access and off-street parking and loading, is designed to provide an efficient, safe and convenient transportation system.
- (d) Whether the pedestrian circulation system is located, designed and of sufficient size to conveniently handle pedestrian traffic efficiently and without congestion; the extent to which the pedestrian circulation system is separated from vehicular roadways so as to be safe, pleasing and efficient for movement of pedestrians; and whether the pedestrian circulation system provides efficient, convenient and adequate linkages among residential areas, open spaces, recreational areas, commercial and employment areas and public facilities.
- (e) The adequacy of landscaping, screening, parking and loading areas, service areas, lighting and signs, in relation to the type of use and neighborhood.
- (f) The adequacy of provisions for construction of moderately priced dwelling units in accordance with chapter 25a if that chapter applies.
- (g) The staging program and schedule of development.
- (h) The adequacy of forest conservation measures proposed to meet any requirements under chapter 22a.
- (i) The adequacy of water resource protection measures proposed to meet any requirements under chapter 19.

As the following Findings demonstrate, the subject Project Plan adequately addresses each of these considerations, as conditioned by the Staff Recommendation.

Section 59-D-2.42 of the Zoning Ordinance establishes the findings that must be made by the Planning Board and in concert with the considerations enumerated above form the basis for the Board's consideration of approval. In accordance herewith, the Staff makes the following findings:

- (a) *As conditioned, the proposal complies with all of the intents and requirements of the zone.*

Intents and Purposes Of The CBD Zones

The Montgomery County Zoning Ordinance states the purposes which the CBD zones are designed to accomplish. The following statements analyze how the proposed Project Plan conforms to these purposes:

- (1) *"To encourage development in accordance with an adopted and approved master or sector plan, or an urban renewal plan approved under Chapter 56 by permitting an increase in density, height, and intensity where the increase conforms to the master or sector plan or urban renewal plan and the site plan or combined urban renewal Project Plan is approved on review by the Planning Board."*

As recommended in the Sector Plan, this proposed Project Plan promotes mixed-use higher-density urban infill redevelopment. The project benefits from increased density and building height recommended by the Sector Plan and realized in the zoning. The proposed additional residential units and office space, combined with street-activating ground-floor retail and restaurants, will enliven and reinvigorate Fenton Village.

- (2) *"To permit a flexible response of development to the market as well as to provide incentives for the development of a variety of land uses and activities in central business districts to meet the needs and requirements of workers, shoppers and residents."*

The Project Plan proposes a variety of land uses, including residential, office, retail and restaurant, and potentially hotel. Residences will include market rate units, MPDUs, and Workforce Housing. The central public use space and extensive pedestrian network will provide opportunity for a diversity of recreational activities, active and passive, for residents of both the project and the larger community as well as visitors.

- (3) *"To encourage designs which produce a desirable relationship between the individual buildings in the central business district, between the buildings and the circulation system and between the central business district and adjacent areas."*

This project will make a significant contribution to the rebuilding of Fenton Village, replacing obsolete one- and two-story commercial buildings with mixed-use residential and office buildings with ground-floor retail and restaurant uses. These buildings will line the street edge, creating vibrant, attractive streetscapes. The smaller retail and restaurant spaces envisioned for this project are intended to retain and reinforce the neighborhood-serving character of the larger Fenton Village. Further, the addition of through-block connections – a new north-south private street and an east-west pedestrian promenade – will expand upon the existing sidewalk network in the CBD and create more opportunities for small retailers. In terms of building height, the taller buildings on the project will be located closest to Georgia Avenue, with height decreasing approaching Fenton Street and the single-family neighborhoods to the east, in conformance with the Sector Plan and the Fenton Village Overlay Zone. As conditioned, the project will also provide a reasonable alternative accommodation to adjacent buildings whose current service operations will be impacted.

- (4) *"To promote the effective use of transit facilities in the central business district and pedestrian access thereto."*

This project is located approximately one-quarter mile from the Silver Spring Transit Center, which includes local and regional rail service as well as numerous metropolitan bus lines. A commercial interstate bus depot is just one block south of the site. The proposed pedestrian-oriented improvements will augment and upgrade the existing sidewalk system and will provide residents and tenants of the project, as well as the larger community, greater access to transit.

- (5) *"To improve pedestrian and vehicular circulation."*

The addition of two through-block pedestrian connections and streetscape upgrades will significantly improve already reasonably high-quality pedestrian circulation. Street-activating ground-floor retail and restaurant uses, as well as residential and office building entrances, will further improve circulation and increase pedestrian safety by placing more eyes on the street and encouraging foot traffic. The new mid-block private street will provide additional connectivity for vehicles within Fenton Village.

- (6) *"To assist in the development of adequate residential areas for people with a range of different incomes."*

Though the final unit mix will be determined during Preliminary and Site Plan review, the project will contain a significant number of residential units that will include substantial proportions of MPDUs and Workforce Housing, providing housing opportunities for people with a range of different incomes.

- (7) *"To encourage land assembly and most desirable use of land in accordance with a sector plan."*

This ambitious project assembles a large number of properties, with a gross tract area of about five acres, currently occupied by buildings and surface parking lots rendered obsolete in a redeveloping CBD. In proposing development in accordance with the goals of the Sector Plan, this project will provide highly desirable land uses and public spaces and amenities for Fenton Village.

Further Intents of the CBD-1 Zone

Section 59-C-6.213(a) indicates additional intent of the CBD-1 Zone:

- (1) *"To foster and promote the orderly development of the fringes of the Central Business Districts of the county so that these areas will provide land uses at a density and intensity which will encourage small business enterprises and diverse living accommodations, while complementing the uses in the interior portions of these districts; and"*

This development will provide an array of land uses – multi-family residential, office, retail, restaurant, and possibly hotel – that readily complements nearby uses, which include single- and multi-family housing, small office buildings, a supermarket, small-scale retail, and restaurants. The density and height of the development provides a

transition between the Georgia Avenue corridor, the Silver Spring Transit Center, and Downtown Silver Spring, and the lower-density development of Fenton Street and East Silver Spring. During Site Plan review, staff will undertake efforts to help ensure the small, diverse, neighborhood-scale of the retail enterprises. At that time, staff will also endeavor to increase the diversity of unit types, sizes, and bedroom counts to maximize the range of living accommodations.

- (2) *"To provide a density and intensity of development which will be compatible with adjacent land uses outside the Central Business Districts."*

Adjacent land uses located outside the CBD and Fenton Village consist primarily of single-family houses, with the buildings along both sides of Fenton Street defining the transition. In accordance with the Sector Plan and the Overlay Zone, the building heights within this project will step down to their lowest point along the west side of Fenton Street. This project will further reinforce Fenton Street as a neighborhood shopping street, providing small-scale retail and restaurant uses and building entrances, helping to activate this street.

Purpose of the Fenton Village Overlay Zone

Section 59-C-18.191 describes the purpose of the Fenton Village Overlay Zone:

- (1) *"facilitate the implementation of an organized and cohesive development pattern that is appropriate for an urban environment;"*

The scale of this Project Plan enables the organized and cohesive development of the large majority of a single block in this revitalizing urban environment. The buildings are located directly on sidewalks and public open spaces, delineating these public streets and open places as the public realm.

- (2) *"encourage attractive design and ensure compatibility with existing buildings and uses within and adjacent to the overlay zone;"*

This Project Plan features an attractive design that fits well between the higher densities along Georgia Avenue and Downtown Silver Spring and the lower-density development east of Fenton Village. The proposed buildings will achieve a minimum LEED-NC Certification and, if the standard is out of pilot phase, the development as a whole will achieve a minimum LEED-ND Certification. As conditioned, the proposed uses, as described above, are compatible with and complimentary to surrounding uses.

- (3) *"provide flexibility of development standards to encourage innovative design solutions;"*

This project benefits significantly from the flexible development standards, balancing private economic benefit with improved public benefit, consistent with the sector plan.

- (4) *“allow for the transfer of the public use space requirement to other properties within the Overlay District; and”*

The proposed development will transfer a total of 74,979 gross square feet of base density from three sending lots located across public rights-of-way, including Mayor Lane, Fenton Street, and Silver Spring Avenue, to the receiving portion of the site.

- (5) *“allow new uses.”*

The three new uses enumerated in the Overlay Zone – catering facilities, small bakeries, and computer component assembly firms – could each be well accommodated within the proposed development.

Requirements of the CBD-1 and Fenton Village Overlay Zones

The table on page 33 of the staff report demonstrates the conformance of the Project Plan with the development standards under the optional method of development. Among other standards, the proposed development meets the area, public use space, building height, and density requirements of the zone.

According to the Zoning Ordinance (59-C-6.215(b)) a further requirement of optional method projects is the provision of additional public amenities:

“Under the optional method greater densities may be permitted and there are fewer specific standards, but certain public facilities and amenities must be provided by the developer. The presence of these facilities and amenities is intended to make possible the creation of an environment capable of supporting the greater densities and intensities of development permitted.”

To this end, the proposed development is proffering the following package of amenities and public facilities:

Amenities and Facilities Summary

On-Site Public Use Space Improvements

- Central public open space, min. 40,000 sf, connected to surrounding streets
- Public art installations designed to highlight the location and identity of the central public space and attract visitors thereto
- Pedestrian promenade from Georgia Avenue/Mayor Lane to Fenton Street, lined with retail and restaurants with outdoor seating

Off-Site and Other Amenity Improvements

- Streetscape improvements along all frontages and on Mayor’s Promenade
- Undergrounding of all utility lines in Mayor Lane, as well as along site frontage on Fenton Street, Thayer Avenue, and Silver Spring Avenue.
- Improvements to Mayor’s Promenade as an extension of the through-block pedestrian system.
- Community trash and recycling centers for adjacent businesses currently using public alleys to locate dumpsters.

- (b) *The proposal conforms to the approved and adopted Master or Sector Plan or an Urban Renewal Plan approved under Chapter 56.*

By providing a mixed-use urban-infill development, this project fulfills each of the themes identified in the Silver Spring CBD Sector Plan regarding downtown development: Transit-Oriented; Commercial; Residential; Civic; Green; Pedestrian-Friendly. This proposal meets the goals of each of these themes. The site is located approximately one-quarter mile from the Silver Spring Transit Center, including local and regional rail and numerous bus lines. The project proposes a vertical mix of uses, with office, multi-family residential, and possibly hotel uses, all above retail, restaurant, and potentially other street-activating ground floor uses. Central to the design is a large public civic green space, and each street, public or private, contained within or adjacent to the site will have street trees, upgraded street lights, and other features of the Silver Spring streetscape standard. Highlighting the civic nature of the central green will be a significant public art project, to be integrated with the design and configuration of the surrounding buildings so as to boldly empower the space to reach out of the center of the block to the adjacent streets and the neighborhoods beyond. Finally, this urban infill project will expand and improve the street and pedestrian network and experience in Fenton Village, with through-block connections, attractive streets, and exciting recreation, retail, and entertainment opportunities.

- (c) *Because of its location, size, intensity, design, operational characteristics and staging, it would be compatible with and not detrimental to existing or potential development in the general neighborhood.*

As conditioned, the project's size, intensity of development, design, operational characteristics, and staging are compatible with the existing adjacent development as well as the plan redevelopment of Fenton Village.

- (d) *As conditioned, the proposal would not overburden existing public services nor those programmed for availability concurrently with each stage of construction and, if located within a transportation management district designated under Chapter 42A, article II, is subject to a traffic mitigation agreement that meets the requirements of that article.*

Other public facilities exist on or near the site and no expansion or renovation of these services will be required by the County. Initial review of this project by Transportation Planning staff and County agencies did not reveal significant issues. The project design and operational details must be approved by the respective agencies prior to preliminary plan approval. Further, the Applicant is replacing in kind the number of public surface parking spaces with public underground parking spaces.

- (e) *The proposal will be more efficient and desirable than could be accomplished by the use of the standard method of development.*

A standard method project would only allow a density of 2.0 FAR on this site. Further, the requirement for public amenities would be removed and the public use space requirement would be reduced by one-half. Because infill development and density at transit hubs is a core

value of smart growth and given the number and quality of public amenities being proffered, the optional method of development is much more desirable and more efficient for this particular site.

- (f) *The proposal will include moderately priced dwelling units in accordance with Chapter 25A of this Code, if the requirements of that chapter apply.*

The proposed development will provide 15 percent MPDUs as required by Chapter 25A, based on the final number of dwelling units to be determined at Site Plan. A final agreement between the Applicant and the Department of Housing and Community Affairs will be required at the time of Site Plan review.

- (g) *When a Project Plan includes more than one lot under common ownership, or is a single lot containing two or more CBD zones, and is shown to transfer public open space or development density from on lot to another or transfer densities, within a lot with two or more CBD zones, pursuant to the special standards of either section 59-C 6.2351 or 59-C 6.2352 (whichever is applicable), the Project Plan may be approved by the Planning Board based on the following findings:*

- (1) The project will preserve an historic site, building, structure or area as shown on the Locational Atlas and Index of Historic Sites or the Master Plan for Historic Preservation; and/or*
- (2) The project will implement an urban renewal plan adopted pursuant to Chapter 56 of the Montgomery County Code; and/or*
- (3) The project will result in an overall land use configuration that is significantly superior in meeting the goals of the applicable master or sector plan and the zone than what could be achieved without the proposed transfer.*

The project will neither preserve a historic site nor implement an urban renewal plan. The proposed development will transfer to the receiving portion of the site a total of 74,979 gross square feet of base density from three sending lots located across public rights of way: Mayor Lane; Fenton Street; and Silver Spring Avenue. The additional density will contribute towards the compact redevelopment of this site and produce a more viable project than would be allowed without the proposed transfer.

- (h) *As conditioned, the proposal satisfies any applicable requirements for forest conservation under Chapter 22A.*

The site is subject to Chapter 22A Montgomery County Forest Conservation Law. A Preliminary Forest Conservation Plan was stamped as received by the Environmental Planning Division on March 13, 2009. There is no forest on-site. Two specimen trees on-site will be removed and one specimen tree off-site on an adjacent property will be preserved. The site's entire requirement will be met with a fee-in-lieu payment.

- (i) *As conditioned, the proposal satisfies any applicable requirements for water quality resources protection under Chapter 19.*

The site's stormwater management concept plan was conditionally approved on January 21, 2009 by the Department of Permitting Services. The conditional approval notes that proposed stormwater management structures are shown different on the project plan than on the concept plan. The proposed method includes two underground vaults and filters. A revised concept plan was recently submitted to DPS to reduce stormwater runoff quantities to be captured by a series of proposed green roof tops. Any outstanding issues will be resolved at Site Plan review.

RECOMMENDATION AND CONDITIONS

Approval of Project Plan 920070010 subject to the following conditions:

1. Development Ceiling
 - a. The base density (i.e., not including any residential density bonuses) of the proposed development is limited to 626,781 square feet of gross floor area. The final total development ceiling, including all density bonuses, dwelling unit counts, and distribution of land uses will be determined at Site.
 - b. If, by time of Preliminary Plan review, the County Council approves a Zoning Text Amendment revising Section 59-C-6.2351 to allow the transfer of optional method density within CBD zones from lots smaller than 22,000 square feet, at Preliminary Plan the Applicant may revise the maximum base density established above without amending this Project Plan.
2. Accommodation of Adjacent Properties
 - a. For the Kalivas Property, the Applicant shall:
 - i. relocate the loading entrance to the west side of the building to facilitate loading from the alley behind the GranDesign building;
 - ii. replace, in close proximity to the rear of their building, the parking spaces currently accessible from the 16-foot alley located at the southeast corner of the Kalivas property;
 - iii. provide a secondary entrance to the building that would be more directly accessible to Studio Plaza patrons;
 - iv. coordinate construction phasing to maintain the loading function of Kalivas tenants;
 - v. construct, if the owners of the Kalivas property are not amenable to the above conditions, the alley configuration referred to in the Project Plan staff report as "Revised Option 2".
 - b. For the Gerecht Property, the Applicant shall:
 - i. install a commercial elevator inside the building convenient to the Fenton Street entrance;
 - ii. enclose the alcove at the parking lot entry as conditioned space;

- iii. make modifications to the building interior to accommodate the addition of the elevator
- iv. remove the pedestrian bridge;
- v. replace signage on the Fenton Street façade;
- vi. set back the proposed building to the north to allow a measure of light and air for the existing windows on the north elevation of 8204 Fenton Street;
- vii. if the owners of the Applicant and the owners of the Gerecht Property cannot agree to changes inside their building, the Applicant must provide one of two exterior options:
 - 1. an exterior elevator, as illustrated in the Project Plan staff report as “Exterior Elevator Option”; or
 - 2. an exterior stair connecting the pedestrian bridge to the Fenton Street right-of-way, referred to in the Project Plan staff report as “Exterior Stair Option.”
- c. The details of these improvements shall be determined at Site Plan.
- d. None of the development, permitting, and construction of the above items shall be at the expense of the owners of the Kalivas property for 8204 Associates.
- e. The final approved Project Plan shall illustrate each of the options described within this condition.

3. Public Use Space and Amenities

- a. The Applicant must provide a minimum of 23 percent of the net lot area for on-site public use space and a minimum of 22 percent of the net lot area for on and off-site public amenity space. The final design and details will be determined during site plan review.
- b. The proposed public use space must be easily and readily accessible to the general public and available for public enjoyment.
- c. The Applicant must provide a public art installation that announces the central public space and connects it in a meaningful, attractive, and enticing fashion to the surrounding streets and the larger community. This artwork should be integrated into the overall environmental design of the project, including the architecture, landscape, and hardscape features.
- d. The Applicant must present the public artwork to the art review panel for comment prior to approval of the site plan.
- e. The Applicant must provide a through-block pedestrian promenade from the intersection of Mayor Lane and Mayor’s Promenade east to Fenton Street. The paving on the existing section of Mayor’s Promenade must match that of the proposed promenade extension to Fenton Street.
- f. The Applicant must install the Silver Spring Streetscape standard, including paving, street lights, street trees, and undergrounding of utilities, along site frontage on public streets.
- g. The Applicant must underground all utilities along Mayor Lane between Silver Spring and Thayer Avenues.

4. Housing

- a. The proposed development must provide a minimum of 15 percent of the final number of all dwelling units as MPDUs, exclusive of Workforce Housing.
- b. Comply with the Workforce Housing provisions of the General Development Agreement (GDA) for Parking Lot #3, Silver Spring, MD, between Michael, LLC, and Montgomery

County, MD, executed on October 24, 2008, by providing 15 percent of the residential density attributable to County Land, per the equation included in the GDA.

- c. The Applicant must provide a minimum of 10 percent workforce housing for residential density attributable to the all portions of the site not included in the original July 25, 2006, Project Plan application, which are grandfathered as exempt, or addressed in the GDA for Parking Lot 3.

5. Sustainability

- a. The development as a whole must achieve at a minimum a Certified rating in the LEED-ND (Neighborhood Development) standard established by the US Green Building Council, provided such Certification is available. The final certification level and timing will be determined at Site Plan.
- b. Each building included in this Project Plan and subsequent Site Plans must achieve at a minimum a Certified rating in LEED-NC (New Construction), or other building-specific LEED rating system, established by the US Green Building Council.

6. Issues to be Addressed at Site Plan

- a. The design of the central open space must demonstrate a significant relationship and connection to the adjacent public streets.
- b. Staged interim alternative public parking accommodation for retailers on Fenton Street.
- c. Safety review of the project by a Montgomery County Police Department CPTED (Crime Prevention Through Environmental Design) Officer.
- d. A site phasing plan that minimizes negative impacts on the adjacent buildings and surrounding community.

APPENDICES

Appendix A: Staff and Agency Memoranda

Appendix B: Site Photos

Appendix C: Development Agreement for the Redevelopment of Parking Lot 3

Appendix D: Correspondence regarding the Kalivas Property

Appendix E: Correspondence regarding 8204 Fenton Street/Gerecht Property

Appendix F: Attendance list for April 17, 2009, meeting at M-NCPPC

Appendix G: Clarification from MCDOT regarding use of Public Parking Lot 3

Appendix H: Community correspondence in support of the project

Appendix I: Community correspondence in opposition to the project

Appendix J: Sample petition page and staff analysis

Appendix K: Base Density Calculation Matrix

Appendix L: Adjacent property owner legal argument regarding easements

Appendices

- Appendix A: Staff and Agency Memoranda
- Appendix B: Site Photos
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- Appendix G: Clarification from MCDOT regarding use of Public Parking Lot 3
- Appendix H: Community correspondence in support of the project
- Appendix I: Community correspondence in opposition to the project
- Appendix J: Sample petition page and staff analysis
- Appendix K: Base Density Calculation Matrix
- Appendix L: Adjacent property owner legal argument regarding easements

Appendix A: Staff and Agency Memoranda



MONTGOMERY COUNTY PLANNING DEPARTMENT
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

May 13, 2009

TO: Elza Hisel-McCoy

FROM: John Marcolin, ASLA, Planner Coordinator *JM*
Design Division,
Bill Barron, South Central Transit Corridor, Team Leader *MB*

SUBJECT: Project Plan #920070010 Studio Plaza

Recommendation: Approve the design with the following conditions:

- The applicant adequately addresses the loading and access needs of those businesses and owners located on the alleys to remain per exhibit 'D' at time of preliminary plan hearing.
- The applicant provide a design for the alleys to remain that specifically meets the loading requirements for those businesses located on those alleys at the time of Site Plan Hearing.
- Applicant to consider widening private road at Thayer Avenue by pulling back proposed building by 20'-30'. This will open up the vista into the green space from Thayer and make it more open to the wider Fenton Village community.
- Widen east-west pedestrian passage or "mews" at Fenton Street for same goals mentioned above.
- Maximize green (lawn area) within proposed green space. Minimum ½ acre is desired goal.
- The applicant to dedicate a majority of ground floor square footage to activating retail uses.

Sector Plan Guidance

The Approved and Adopted Silver Spring CBD Sector Plan, dated February 2000, recommended the facilitation of "...housing that will upgrade the physical environment and bring in new residents, and provide a pedestrian friendly environment that encourages people to stroll and stay." (Silver Spring CBD Sector Plan, 2000, pg 61). There is a strong existing market in the Silver Spring CBD for small scale retail in Fenton Village. However the area is presently "...physically disjointed, due to a lack of significant renovation or infill development.." "...In Fenton Village, the disjointed patterns of commercial activity and the lack of residential population dilutes pedestrian traffic--- a key component to retail activity." The Plan attempts to "...facilitate housing that upgrade the physical environment and bring in new residents, and provide a pedestrian friendly environment that encourages people to stroll and stay."(Ibid, pg 61).

8787 Georgia Avenue, Silver Spring, Maryland 20910 Director's Office: 301.495.4500 Fax: 301.495.1310

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The Sector Plan envisioned Fenton Village as a transitional area between the downtown core and the surrounding neighborhoods composed of a mixture of residential, office and small scale retail uses. New residential development would provide the requisite population density needed for a vital retail environment. The proposed Studio Plaza project helps fulfill the Sector Plan's vision and recommendations for Fenton Village.




MONTGOMERY COUNTY PLANNING DEPARTMENT
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MEMORANDUM

TO: Elza Hisel-McCoy, Planner Coordinator, Development Review

VIA: Stephen D. Federline, Master Planner, Environmental Planning 

FROM: Lori Shirley, Planner Coordinator, Environmental Planning 

SUBJECT: Review of Project Plan No. 920070010- Studio Plaza, including Preliminary Forest Conservation Plan Review

DATE: March 30, 2009

RECOMMENDATION

Environmental Planning staff has reviewed the above referenced project plan, including the accompanying preliminary Forest Conservation Plan. Environmental Planning staff recommends approval of the above referenced project plan with the following conditions:

- 1) Compliance with the conditions of approval of the preliminary forest conservation plan.
- 2) The site's forest conservation requirement shall be met with a fee-in-lieu payment.
- 3) At the time of site plan submittal include green building information to demonstrate a minimum of 60% or more of proposed roof tops will have green roofs consistent with the site's approved Stormwater Management Concept Plan.

Proposal/Background

The site comprises several developed and surplus parking lots as parcels within one city block in downtown Silver Spring with frontage on the south side of Thayer Avenue, the east and west sides of Fenton Street, the north and south sides of Silver Spring Avenue and the east side of Mayor Lane. The site is zoned CBD-1 in the Silver Spring and Takoma Park Planning Area.

The proposal is for a mixed use development with office commercial, residential and retail space. Earlier in 2009, the site underwent review for proposed abandonment of several existing public alleys in Abandonment No. AB-719. The Planning Board deferred action based on access concerns raised by two separate, adjacent property owners. The site is undergoing mandatory referral review as MR2009713-MCDOT-1, which is scheduled for review by the Planning Board in

Project Plan 920070010 – Studio Plaza

April 2009.

Three plans were reviewed for the overall site include the Natural Resources Inventory/Forest Stand Delineation (NRI/FSD), the subject Project Plan and a preliminary Forest Conservation Plan (PFCP). The site's acreage associated with the PFCP (4.41 acres) is used to determine forest conservation requirements.

Environmental Guidelines

A Simplified NRI/FSD 42006358 was recertified on November 25, 2008, to expand the gross tract area based on acquisition of additional parcels. The site contains a total of 4.15 acres on 42006358, including density lots. There are no streams, wetlands, floodplain or associated environmental buffers on-site. There is no forest on-site; however, two specimen trees are on-site and one specimen tree off-site on an adjacent property.

Forest Conservation

The site is subject to Chapter 22A Montgomery County Forest Conservation Law. A PFCP was stamped as received by the Environmental Planning Division on March 13, 2009. There is no forest on-site. Two specimen trees on-site will be removed and one specimen tree off-site on an adjacent property will be preserved.

The site's net tract area is 4.41 acres (3.60 acres plus 0.81 acres of off-site impacts) in the worksheet. The site's forest conservation requirement is 0.66 acres of afforestation and is proposed to be met with a combination of 0.27 acres of credit for tree cover and 0.39 acres of fee-in-lieu payment. The site's entire requirement must be met with a fee-in-lieu payment because proposed shade trees for canopy credit would be planted near new buildings which range in height from 90 to 110 feet. At post-development in an urban environment such as proposed, staff believes the rate of tree survivability will be low due to limited sunlight exposure in relation to the proposed building heights.

Stormwater Management

The site's stormwater management concept plan was conditionally approved on January 21, 2009 by county DPS. The conditional approval notes that proposed stormwater management structures are shown different on the project plan than on the concept plan. The proposed method includes two underground vaults and filters. A revised concept plan was recently submitted to DPS to reduce stormwater runoff quantities to be captured by a series of proposed green roof tops.

Green Building

No information was included in the December 2008 Justification Statement for the project plan to address green building. At the Development Review Committee

Project Plan 920070010 – Studio Plaza

(DRC) meeting, the comment was made that all options for incorporating green roof tops should be explored in the design of buildings and the stormwater management concept plan.

Since the DRC meeting, the applicant's engineer has verbally expressed their intention to incorporate green roof tops into at least 60% of the proposed building roof tops.

RECOMMENDATION

Environmental Planning staff recommends approval of Project Plan 920070010 subject to conditions to address requirements in the preliminary forest conservation plan and the County Council's Green Building legislation.

SDF:LS



DEPARTMENT OF TRANSPORTATION

Isiah Leggett
County Executive

Arthur Holmes, Jr.
Director

February 23, 2009

Mr. Robert Kronenberg, Site Plan Supervisor
Development Review Division
The Maryland-National Capital
Park & Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910-3760

RE: Project Plan #9-20070010
Studio Plaza

Dear Mr. Kronenberg:

We have completed our review of the project plan signed on 12/23/08. This plan was reviewed by the Development Review Committee at its meeting on February 17, 2009. We recommend the following comments to be addressed prior to submission of preliminary plan:

1. Show/label all existing planimetric and topographic details (paving, storm drainage, driveways adjacent and opposite the site, sidewalks and/or bikeways, bus stops, utilities, etc.) as well as existing rights of way on both sides and easements on the preliminary plan.
2. Right of way dedication for Thayer Ave, Fenton Street, Silver Spring Ave and Georgia Ave per Master Plan and for all public alleys as necessary. Also verify the need for truncation at the intersections of public alleys and streets.
3. Grant necessary slope and drainage easements. Slope easements are to be determined by study or set at the building restriction line.
4. A Public Improvements Easement may be necessary along site frontages on Thayer Ave, Fenton Street and Silver Spring Ave, in order to accommodate the required sidewalk construction. Prior to submission of the record plat, the applicant's consultant will need to determine if there is sufficient right of way to permit this sidewalk construction. If not, the applicant will need to either dedicate additional right of way or execute a Declaration of Public Improvements Easement document. That document is to be recorded in the Land Records of Montgomery County, with the liber and folio referenced on the record plat.
5. Show the locations of the proposed driveways on the preliminary plan. Sole site access for commercial, office or multi-family from a public alley is dependant upon demonstrating they are capable of handling the traffic.
6. The preliminary plan should be designed so driveway aprons will not cross the common property lines extended into the right of way.

Division of Traffic Engineering and Operations


101 Orchard Ridge Drive, 2nd Floor • Gaithersburg, Maryland 20878
Customer Service 240-777-6000 • Main Office 240-777-2190 • 240-777-6013 TTY • 240-777-2080 FAX
trafficops@montgomerycountymd.gov

7. Submit storm drain with computations, for our review and approval. Analyze the capacity of the existing downstream public storm drain system and the impact of the post-development ten (10) year storm runoff on same. If the proposed subdivision drains to an existing closed section street, include spread computations in the impact analysis.
8. Submit a completed, executed and sealed DOT Sight Distances Evaluation certification form, for the existing and proposed driveway(s), for our review and approval.
9. At preliminary plan show proposed access points with less than 100' of separation with existing driveway/intersections are not going to create negative impact on the traffic.
10. Private common driveways and private streets shall be determined through the subdivision process as part of the Planning Board's approval of a preliminary plan. The composition, typical section, horizontal alignment, profile, and drainage characteristics of private common driveways and private streets, beyond the public right-of-way, shall be approved by the Planning Board during their review of the preliminary plan. Also homeowners' documents to establish each driveway user's (property owner's) rights & responsibilities with respect to use, maintenance, & liability of the common driveway.
11. Truck loading space requirements to be determined in accordance with the County's "Off-Street Loading Space" policy.
12. Please note the following comments regarding alleys:
 - a) Provide suitable terminus of the alley proposed to remain off Fenton Street (adjacent to "The Adele" property);
 - b) Demonstrate function and how access to adjoining properties and public maintenance will be continued for the two 16' public alleys that are proposed to remain. Viable options will be considered;
 - c) Verify the location of the alleys to be abandoned as our research has yielded no records of some;
 - d) Approval is subject to the granting of any necessary vehicular, pedestrian, drainage, or public utility easements.
13. Access and improvements along Georgia Ave (MD 97) as required by the Maryland State Highway Administration.
14. This site is located in the vicinity of one of the alignments under consideration for the Purple Line. The applicant is advised to contact Mr. Gary Erenrich at the Director's Office to assess the potential impacts on this site.
15. Permit and bond will be required as a prerequisite to DPS approval of the record plat. The permit will include, but not necessarily be limited to, the following improvements:
 - A. Improvements to the public right of way, if any are required, will be determined at the preliminary plan stage based on a review of the additional information requested earlier in this letter.

Mr. Robert Kronenberg
Project Plan No. 9-20070010
Date February 23, 2009
Page 3

Thank you for the opportunity to review this preliminary plan. If you have any questions or comments regarding this letter, please contact Sam Farhadi or Dewa Salihi at (240) 777-2197.

Sincerely,



Gregory M. Leck, P.E., Manager
Development Review Team

m:/subdivision/farhas01/project plans/ 9-20070010, Studio Plaza.doc

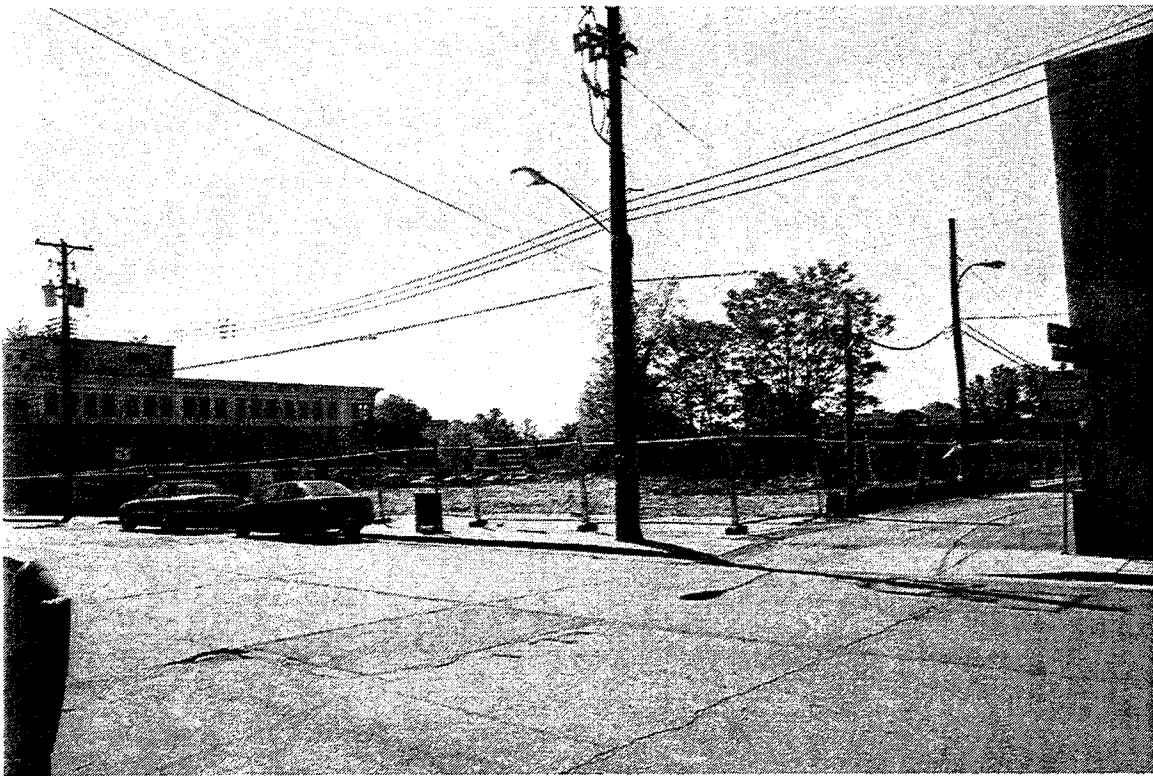
cc: Robert Hillerson, Michael, LLC
Bill Landfair, VIKa
Brian Dayhoff, SK&I Architecture
Trini Rodriguez, Parker Rodriguez
Robert Dalrymple, Linowes & Blocher
Stephen Nash; DOT DOPM
Rick Siebert; DOT DOPM
Gary Erenrich; DOT DO
Joseph Y. Cheung; DPS RWPPR
Sarah Navid; DPS RWPPR
Henry Emery; DPS RWPPR
Shahriar Etemadi; M-NCPPC TP
Sam Farhadi, DOT TEO
Dewa Salihi, DOT TEO
Corren Giles, MSHA
Preliminary Plan Folder
Preliminary Plans Note Book

Appendix B: Site Photos

Appendix B: Site Photos



Thayer Avenue, looking east towards the site

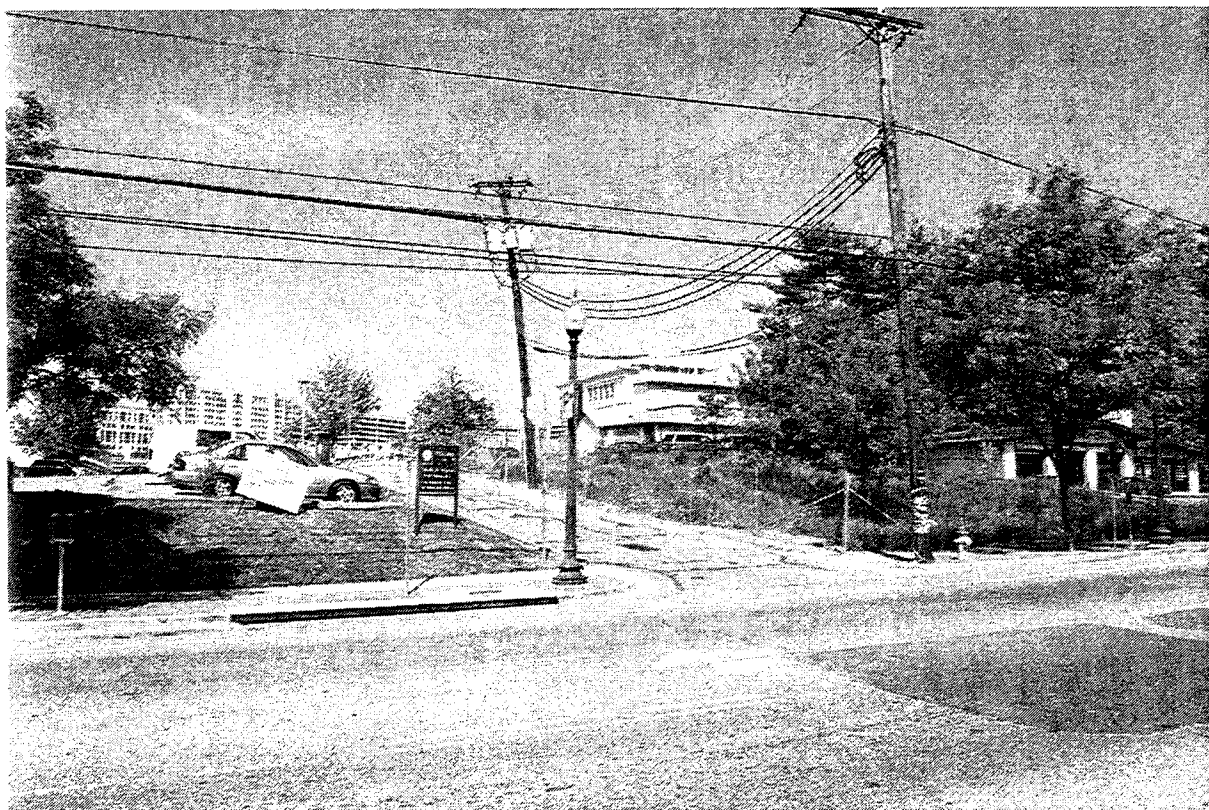


Thayer Avenue and Mayor Lane, looking east

Appendix B: Site Photos



Fenton Street, from Silver Spring Avenue, looking north



Fenton Street Entrance to Parking Lot 3

Appendix B: Site Photos

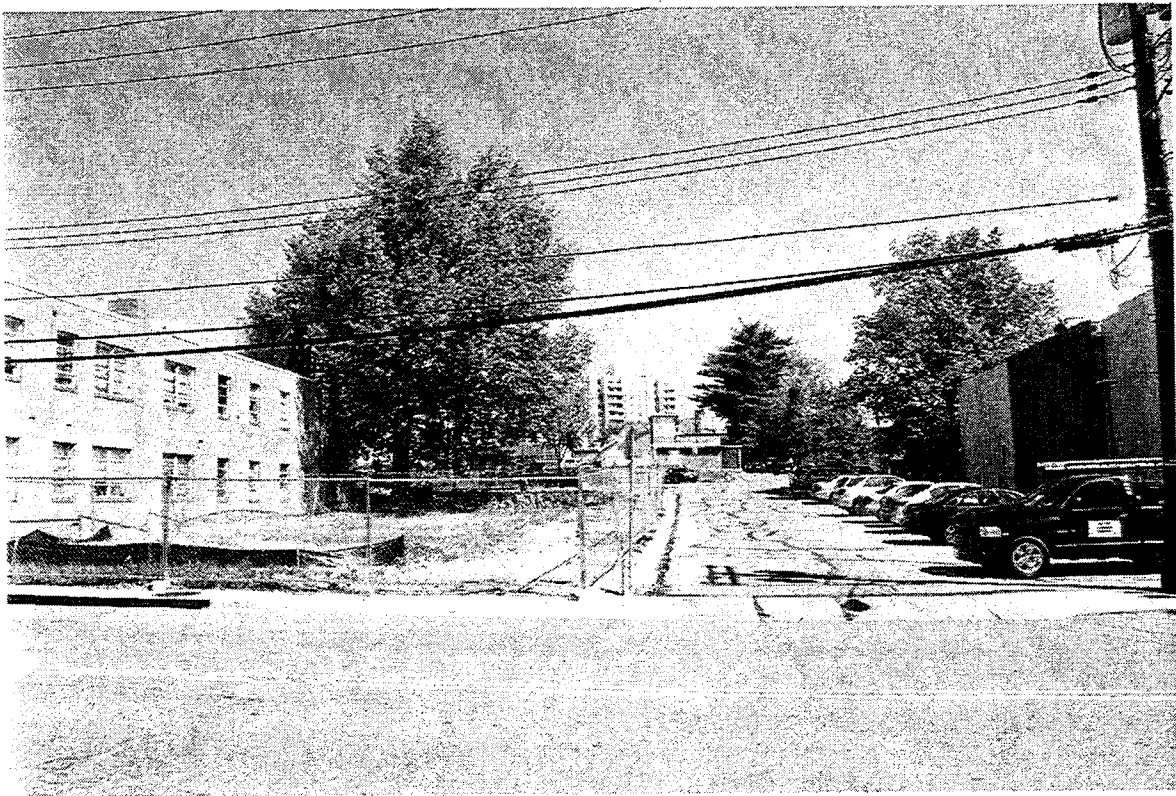


Parking Lot 3, from Fenton Street entrance

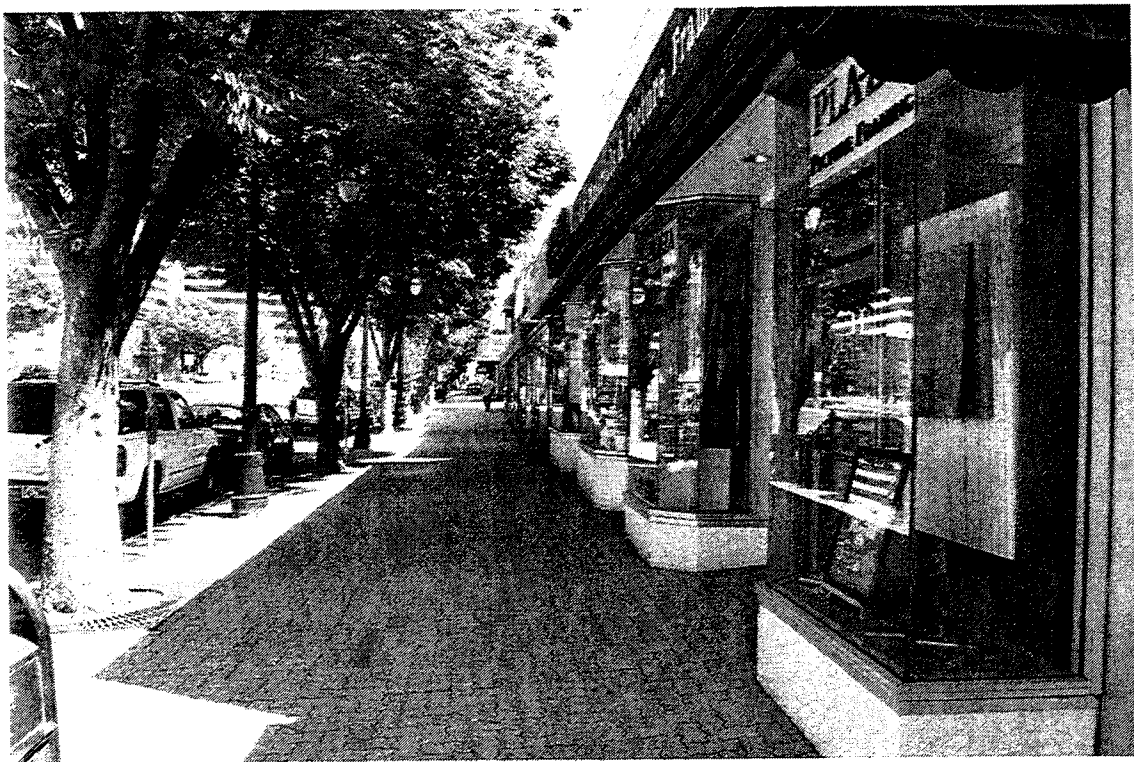


"Mayor's Promenade"

Appendix B: Site Photos



Parking Lot 3, Silver Spring entrance

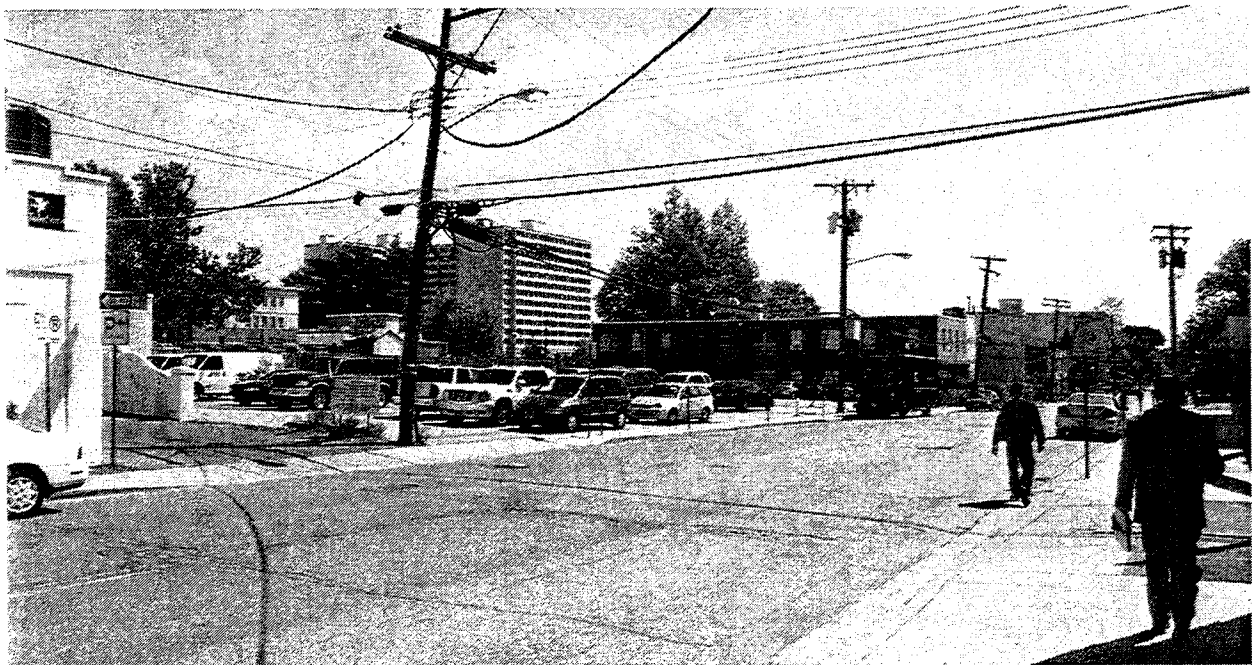


Georgia Avenue sidewalk

Appendix B: Site Photos

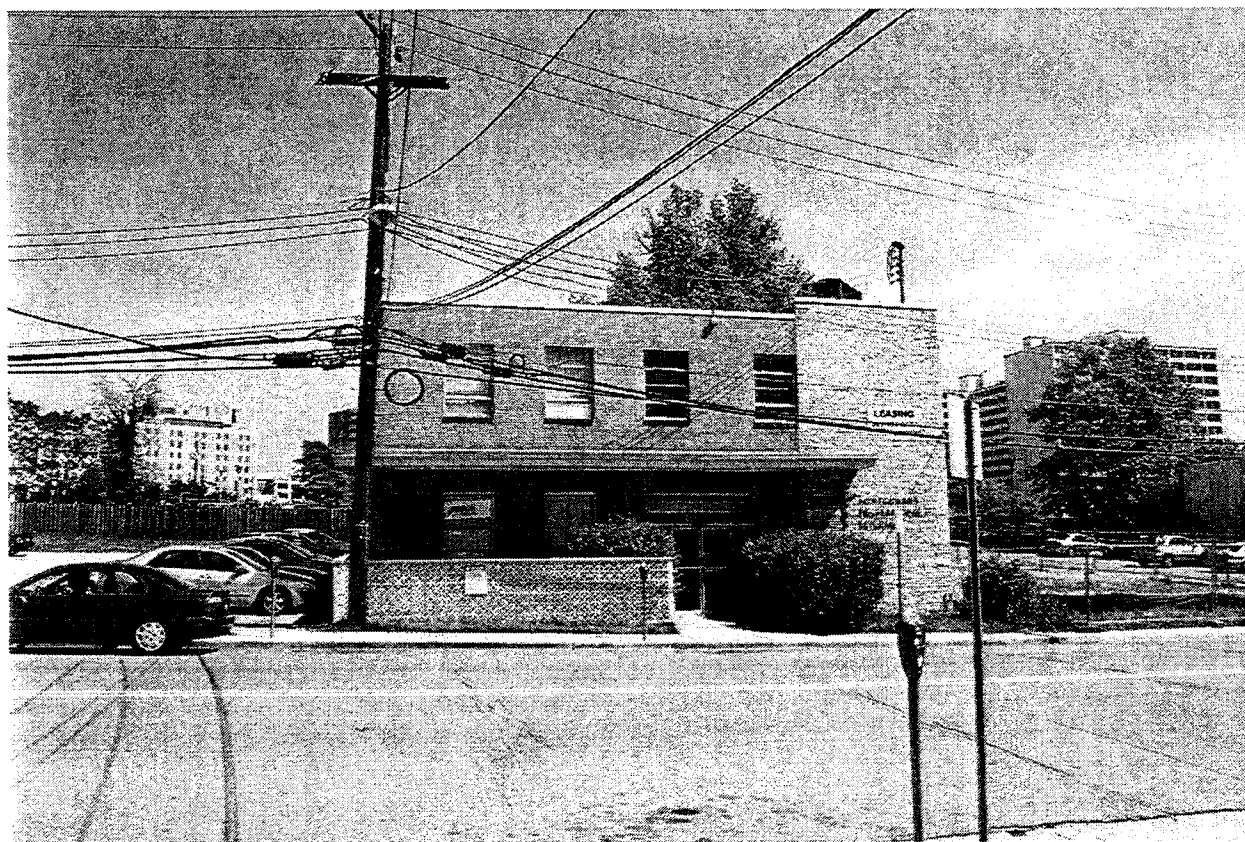


Silver Spring Avenue, looking east

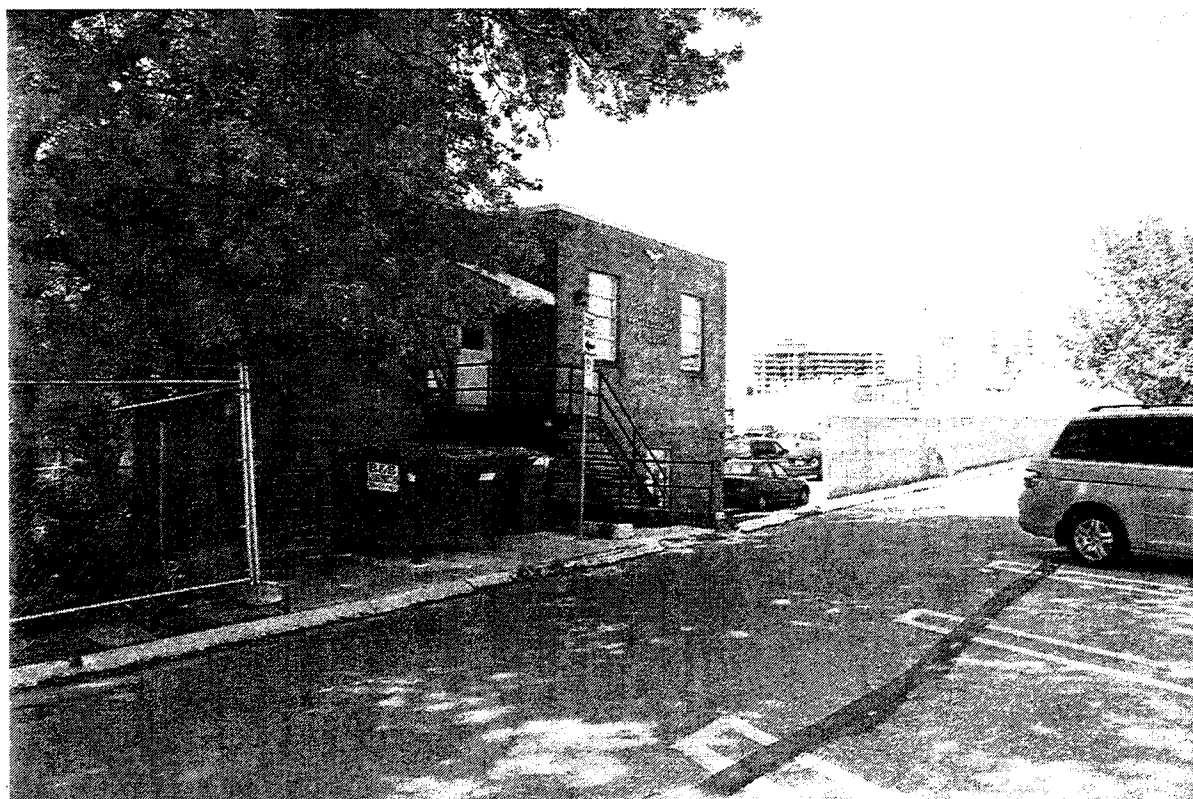


Silver Spring Avenue, north side

Appendix B: Site Photos



911 Silver Spring Avenue



Alley behind 911 Silver Spring Avenue

Appendix B: Site Photos

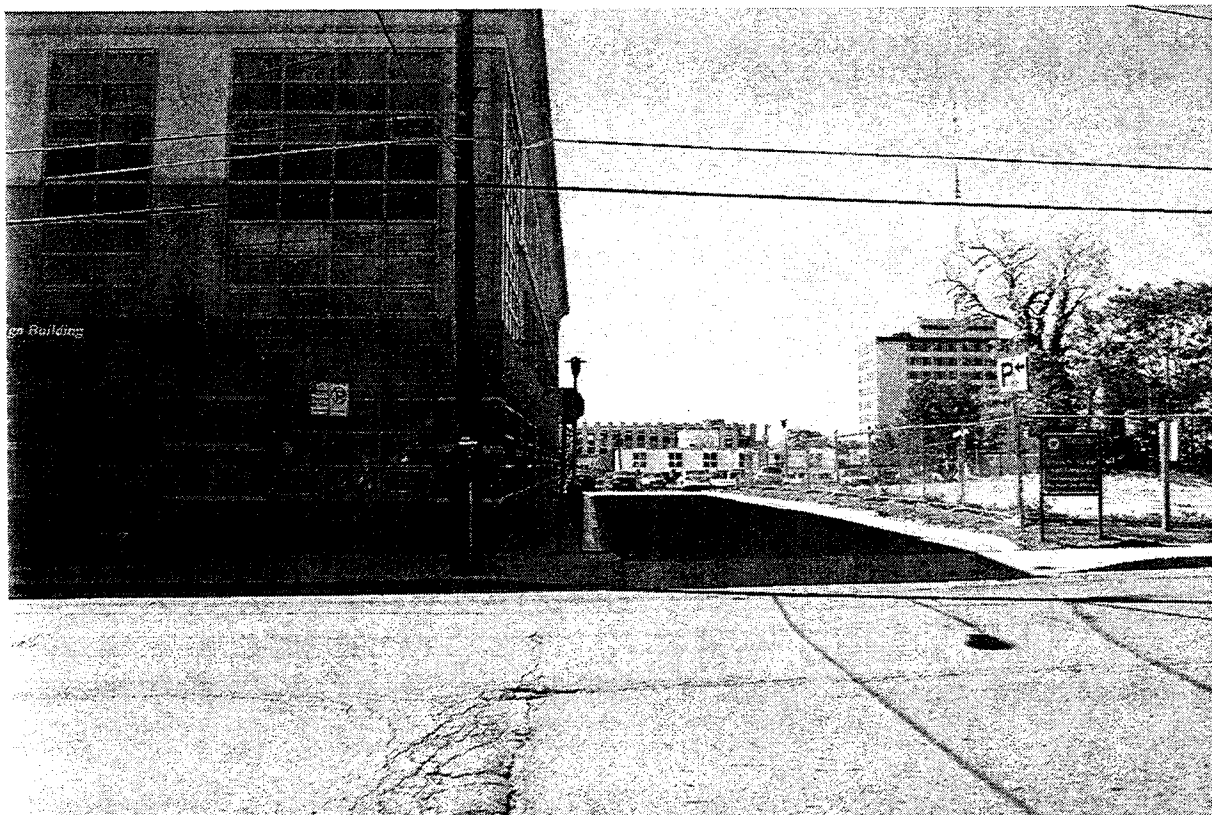


8204 Fenton Street, looking west



8204 Fenton Street, Silver Spring Avenue entrances

Appendix B: Site Photos



Parking Lot 3 entry from Thayer Avenue, proposed location of new private street



Proposed location of new private street at Silver Spring Avenue

Appendix B: Site Photos



Kalivas property (Thai Market), Thayer Avenue entry



Alley and Parking Lot 3, looking east towards Kalivas building (blue)

Appendix B: Site Photos

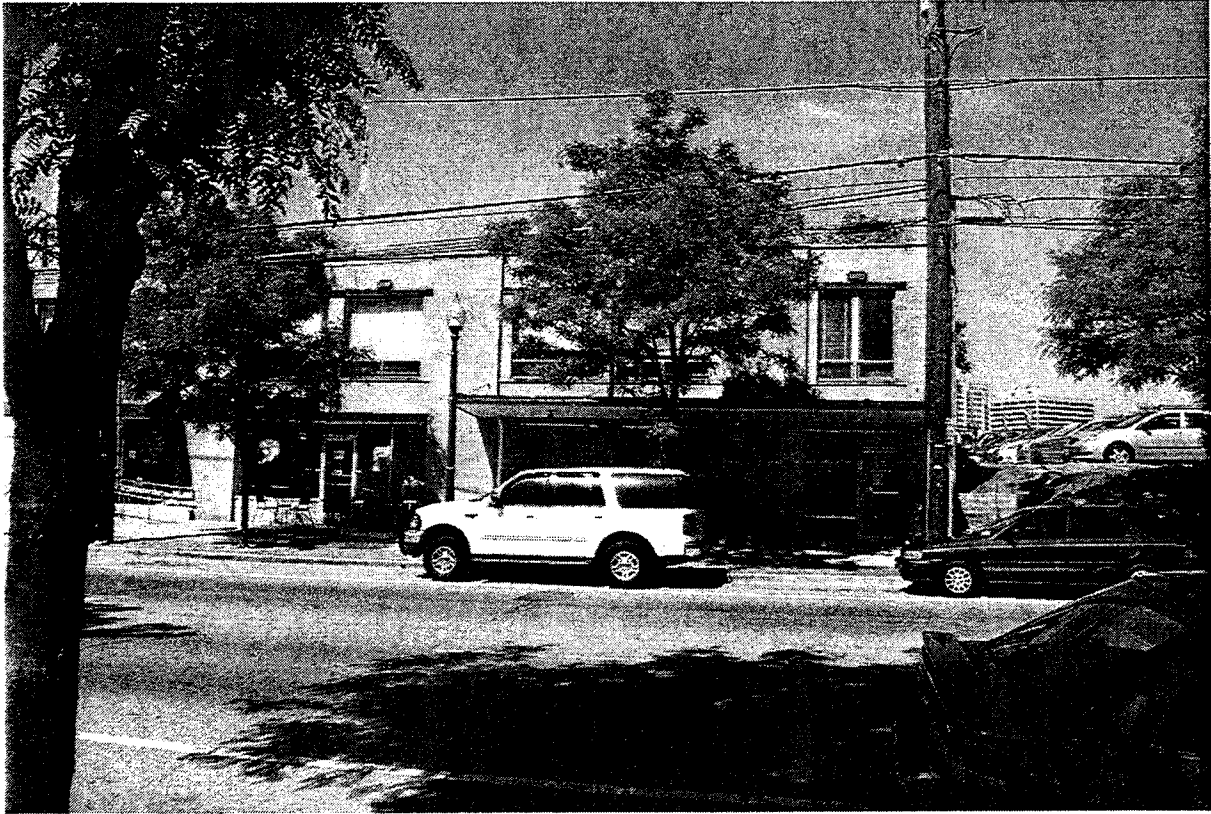


Kalivas building, loading entrance (white door on blue block)



Alley adjacent to Kalivas property

Appendix B: Site Photos

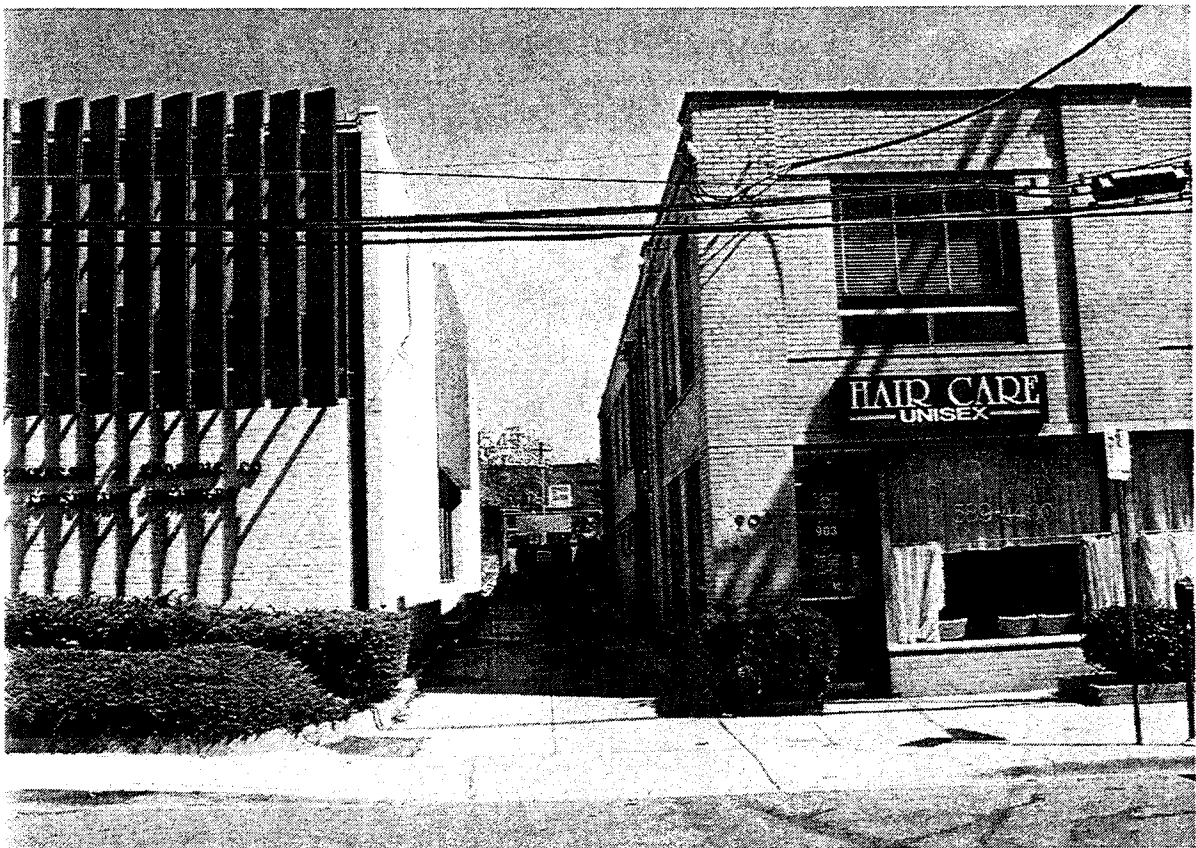


8204 Fenton Street, Fenton Street entrances

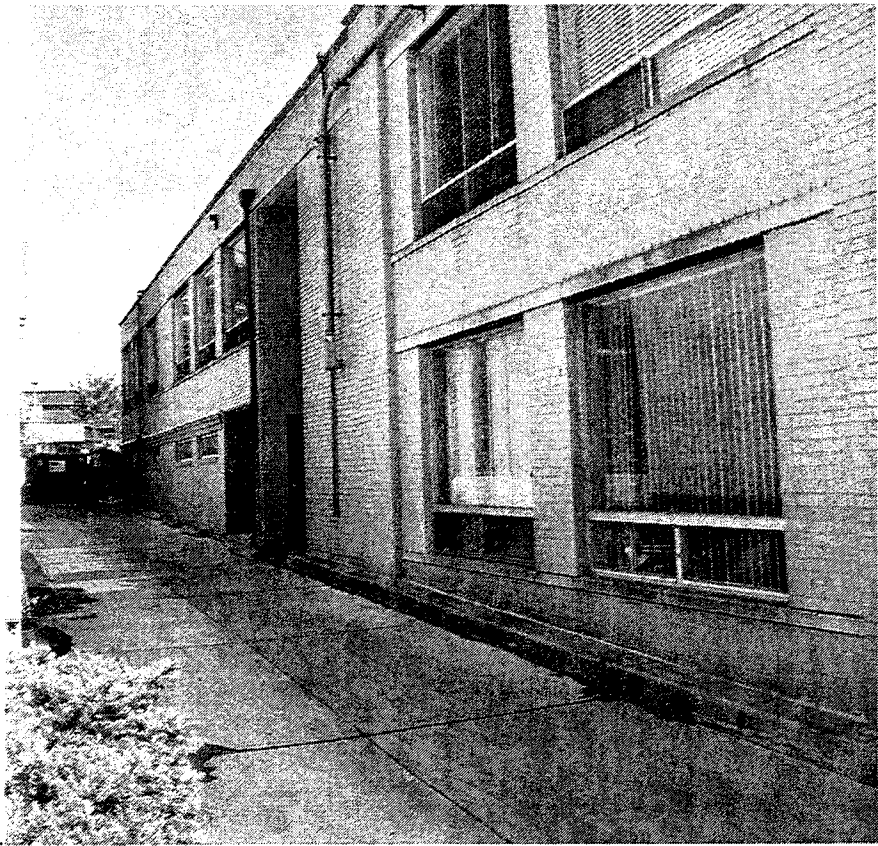


8204 Fenton Street, Parking Lot 3 entrance

Appendix B: Site Photos

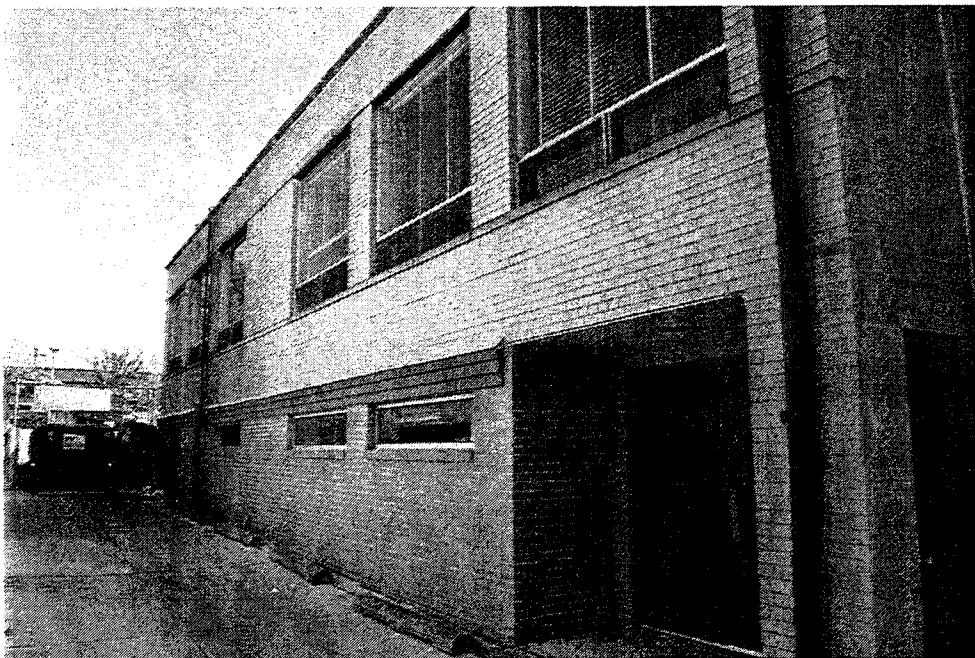
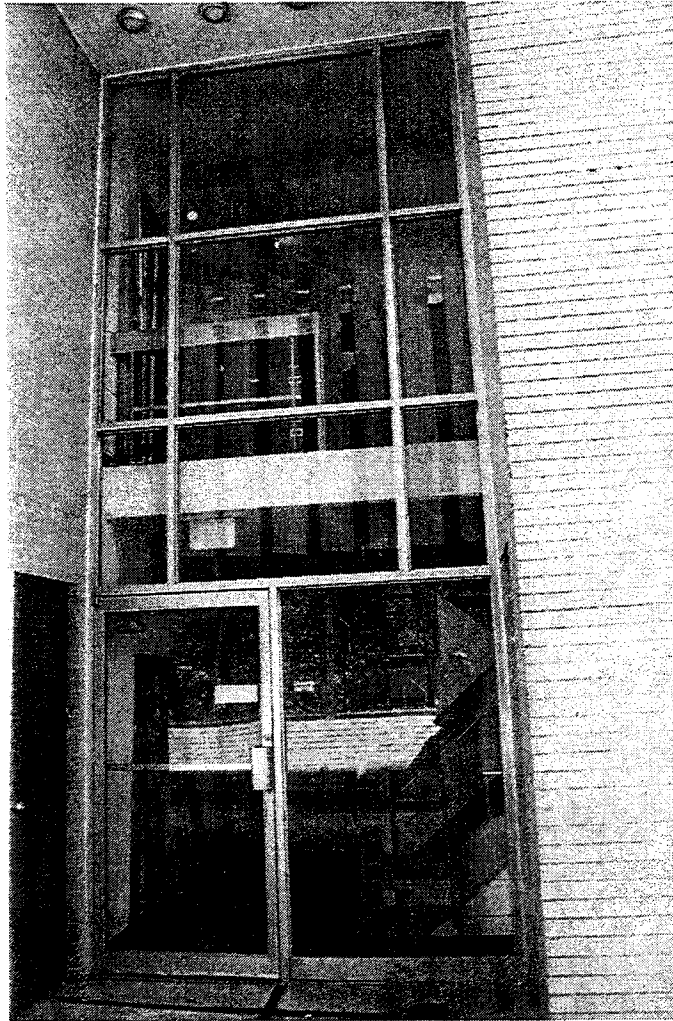


Shared alley off Silver Spring Avenue between Gerecht & Applicant



Gerecht property, alley entry

Appendix B: Site Photos



Gerecht property, alley entrances

Appendix C: Development Agreement for the Redevelopment of Parking Lot 3

GENERAL DEVELOPMENT AGREEMENT

BETWEEN

MICHAEL, L.L.C.

AND

MONTGOMERY COUNTY, MARYLAND

**PUBLIC PARKING LOT #3
SILVER SPRING, MARYLAND**

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Exhibit A-1	Description of County Land
Exhibit A-2	Description of Developer Land
Exhibit A-3	Description of Land
Exhibit B	Project Site Plan – Approximate Location of Public Garage and Private Buildings
Exhibit C	Intentionally Deleted
Exhibit D	Intentionally Deleted
Exhibit E	Parking Garage Design Guidelines
Exhibit F	Definitions

GENERAL DEVELOPMENT AGREEMENT

THIS GENERAL DEVELOPMENT AGREEMENT (this "**Agreement**") dated the ____ day of October 2008, (the "**Effective Date**"), by and between MONTGOMERY COUNTY, MARYLAND (the "**County**") and MICHAEL, L.L.C., a Maryland limited liability company, its successors and assigns (the "**Developer**"), (County and Developer are sometimes referred to herein individually as "**Party**" and collectively as the "**Parties**") is intended to establish an agreement between the County and Developer in a public-private initiative, to develop and construct on a Turnkey Delivery (as defined below) basis, the Public Garage (as defined below) and residential and/or non residential improvements on certain parcels of real estate located in the Central Business District of Silver Spring, Maryland, including that parcel of real estate identified by the County as Montgomery County Public Parking Lot #3 (as defined below). It is understood and agreed that the County is entering into this Agreement in its capacity as a property owner and not in its capacity as a governing body and nothing herein shall be construed as a determination or agreement or act as an estoppel with respect to the County as a governing body or with respect to any of its regulatory powers including any subsequent determinations with respect to matters contained herein which may come before the County or one or more of its agencies in their capacity as a governing body or regulatory authority.

RECITALS:

WHEREAS, the County is the owner of Montgomery County Public Parking Lot #3, located in the Central Business District of Silver Spring, Maryland, and more particularly described on **Exhibit A-1**, attached hereto ("**Lot 3**") plus that portion of certain alleys as shown on **Exhibit A-1**, such alleys being subject to certain existing easements (to the extent such easements are not abandoned in accordance with the terms of this Agreement), (the "**Alley Land**") (Lot 3 and the Alley Land, collectively the "**County Land**"); and

WHEREAS, the County has created the Silver Spring Parking Lot District pursuant to the Montgomery County Code (2004), as amended and desires to enhance the quality of available public parking in the Silver Spring Parking Lot District; and

WHEREAS, the Montgomery County Department of Transportation (the "**DOT**") formerly known as the Montgomery County Department of Public Works and Transportation (the "**DPW&T**") issued Request for Proposal for Mixed Use Development of Public Parking Lot #3 on December 2, 2005, (the "**RFP**") and in response thereto Developer submitted a proposal (the "**Proposal**") to DPW&T on January 31, 2006, as amended on December 21, 2007; and

WHEREAS, the County desires to designate Developer to be the developer of a project substantially in accordance with the Proposal and upon terms and conditions contained herein, that will accommodate public parking in the Fenton Village area of the Silver Spring Central Business District; and

WHEREAS, Developer is the fee simple owner and either is or may become the contract purchaser of certain adjacent parcels of land located in the Central Business District of Silver Spring, Maryland, adjacent to the County Land and more particularly described on **Exhibit A-2**

attached hereto (the "Developer Land" and, collectively with the County Land, the "Land"). The Land is shown attached hereto as Exhibit A-3; and

WHEREAS, Developer desires to purchase the County Land from the County to develop a project (the "Project") on the Land consisting of (i) the public garage (the "Public Garage"), as hereinafter defined and (ii) the "Private Buildings" (as hereinafter defined). For purposes of this Agreement, the Public Garage shall mean an underground public parking structure containing 152 parking spaces which Public Garage shall be a "Turnkey Delivery" (as hereinafter defined) subject to a final design reasonably approved by the County in accordance with the terms of this Agreement, and which shall be designed and constructed in accordance with the Public Garage Design Guidelines (as hereinafter defined) and shall also include a revenue collection system (the "Revenue Collection System") but with Developer responsible for only up to \$50,000 of the cost for the Revenue Collection System. The foregoing notwithstanding, if Developer constructs in excess of 152 parking spaces in the Public Garage (which it is not obligated to do), then, in such event, any such excess spaces shall be conveyed to the County as part of the Parking Garage at no additional cost or expense to the County. The Public Garage shall be built as all or a portion of Phase I of the development of the Project. The foregoing notwithstanding, in the event that the Public Garage is the only improvement initially constructed in Phase I of the Project (as defined in Exhibit "F" – Definitions), any subsequent construction shall not materially impair the use and enjoyment of the Parking Garage by the public. The Developer shall provide pedestrian and vehicular ingress and egress easement(s) to public rights of ways for the benefit of any unabandoned alleys within the Project. For purposes of this Agreement, the "Private Buildings", which may be developed in phases, shall consist of a mixed-use development with layout and uses, including parking and amenities, substantially as shown on Exhibit B attached hereto; provided, however that Developer shall retain flexibility to alter the location, mix and percentages of uses in order to allow for adjustments and modifications to meet market demand and to accommodate prospective tenants, provided that the same shall not without the consent of the County alter the Final Design Approval for the Public Garage, such consent not to be unreasonably withheld, conditioned or delayed; and

WHEREAS, Developer agrees to provide a certain minimum amount of residential development in the Project attributable to the County Land (the "Residential Density"). Such Residential Density shall be equivalent to fifty percent (50%) of the maximum achievable density on the County Land and Developer further agrees to provide fifteen percent (15%) of such Residential Density as Workforce Housing Units ("Workforce Housing Units," as defined in Chapter 25B of the Montgomery County Code, as amended (the "Code"). The Parties agree that the method for determining the number of Workforce Housing Units attributable to the Residential Density shall be as follows:

The Gross Tract Area of the County Land shall be divided by the Gross Tract Area of the Land, which quotient shall be multiplied by fifty percent (50%) (the required residential density on the County Land), which product shall then be multiplied by fifteen percent (15%) (the required amount of workforce housing on the County Land), which product shall be multiplied by the FAR approved by the Maryland-National Capital Park and Planning Commission (the, "M-NCPPC" or "Planning Board"), (but excluding any bonus density attributable to the provision of moderately priced dwelling units pursuant to Chapter 25A of the Code –

"MPDUs"), which product shall be divided by the average unit size, which quotient shall equal the number of Workforce Housing Units to be constructed.

By way of illustrative example only and not assuming the Gross Tract Area numbers provided below are accurate:

75,000 square feet (the Gross Tract Area of the County Land) ÷ by 200,000 square feet (the Gross Tract Area of the Land) = .375 X 50% (the required Residential Density on the County Land) = .1875 X 15% (the required amount of Workforce Housing on the County Land) = .0281 X 600,000 square feet (the FAR @ 3 approved by the Montgomery County Planning Board of the M-NCPPC, excluding MPDU bonus density) = 16,860 square feet ÷ 1,000 square feet (the average unit size) = 17 Workforce Housing Units.

WHEREAS, in addition to Workforce Housing Units, Developer agrees to provide fifteen percent (15%) of the Residential Density as MPDUs. Therefore, except as otherwise provided herein, Developer agrees to provide fifteen percent (15%) of the Residential Density as Workforce Housing Units and fifteen percent (15%) of the Residential Density as MPDUs for a total of thirty percent (30%) of the Residential Density; and

WHEREAS, the Workforce Housing Units and MPDUs may be located anywhere within the Project; and

WHEREAS, in addition to the Public Garage (none of which parking spaces shall be included as part of the Project's Code required parking), Developer shall provide private parking for the Project to satisfy at least fifty percent (50%) of the required parking for the Project in accordance with Section 59E of the Code, unless a lesser number of spaces is required by the Planning Board as a condition of site plan approval and may include such additional parking (above the 50%) as the Developer may so determine subject to Planning Board approval; and

WHEREAS, the County, subject to the terms of this Agreement, has agreed to convey the County Land to Developer in exchange for Developer's provision of the turnkey planning, design, development, construction and construction management of the Public Garage and thereafter delivering title (in the form of a condominium unit as more fully described herein) and possession of the complete, ready to operate Public Garage (including the installation of the Revenue Collection System), to the County together with an assignment of any and all warranties obtained by Developer in connection with the construction of the Public Garage (collectively the "Turnkey Delivery"), at which time the County (subject to the terms of this Agreement) will be solely responsible for the costs of operation, maintenance, repair and replacement, if any, of the Public Garage; and

WHEREAS, in order to separately develop, lease, sell, finance, transfer and convey the different elements of the Project (including the conveyance of the Public Garage to the County), the Project will be subjected to a condominium regime consisting of multiple units, including the Public Garage (the "Public Garage Unit") and all or certain portions of the Private Buildings, each of which would constitute a separate condominium unit. It is, however, agreed that the

condominium documents establishing and governing the condominium regime shall further be subject to the reasonable approval of the County and shall provide among other matters that (i) no assessments or cost may be imposed on the Public Garage Unit without the County's express written consent, except with respect to shared components as to which the Parties shall reasonably agree in the condominium documents (ii) that each condominium unit shall be responsible for its own operation, maintenance and repair costs and (iii) that the County shall have no responsibility for the maintenance of the common elements or the public use space in the Project; and

WHEREAS, the County has determined that the public interest can be best served by the utilization of the County Land as hereinabove described.

NOW, THEREFORE, and in consideration of the mutual promises, the Parties agree as follows:

1. INCORPORATION INTO AGREEMENT

The Recitals to this Agreement as well as all Exhibits attached to this Agreement, are hereby incorporated in this Agreement and made a part hereof by this reference.

2. COMMITMENTS OF THE PARTIES

(a) County Commitments.

(i) Subject to the terms and conditions of this Agreement, the County agrees that on or before the Outside Land Settlement Date (as hereinafter defined) it will convey the County Land to Developer in consideration for the Land Purchase Price (as hereinafter defined).

(ii) The County shall, if requested by Developer, solely in its capacity as a land owner, and subject to the terms of Section 15 hereof, and without cost to the County, promptly take all necessary action and join in and execute all applications, submissions, plats, plans, proffers, development conditions, easements, rights of way, and other documents as may be required to close and abandon the Alley Land (the "Alley Closings") which shall, if Developer so elects, be initiated and undertaken in the name of and on behalf of the Developer at its cost.

(iii) In connection with the Developer's obtaining and securing the Land Use Approvals (as hereinafter defined), the County shall, solely in its capacity as a land owner, and subject to the terms of Section 15 hereof and without cost to the County, (1) take all necessary action and join in and execute all such applications, submissions, plats, plans, proffers, development conditions, easements, rights of way, or other documents as may be required to enable the Developer and/or any governmental authority, as applicable, to obtain the Land Use Approvals for the Private Buildings and the Public Garage, and (2) promptly take all necessary steps to obtain the County Approvals (as hereinafter defined).

(iv) On the Effective Date, the County shall permit the Developer, its agents and contactors, to have access to the County Land, subject to the terms of a Right of Entry Agreement to be entered into promptly after the date hereof.

(b) Developer Commitments.

(i) After the County has conveyed the County Land to Developer, Developer will be responsible for the Turnkey Delivery of the Public Garage in accordance with the terms of this Agreement. Subject to Force Majeure (as hereinafter defined), construction of the Public Garage shall be Substantially Completed (as hereinafter defined) no later than twenty-four (24) months after the Land Settlement (as hereinafter defined).

(ii) Developer shall, at its sole cost and expense, and promptly after the Effective Date, diligently seek all necessary Land Use Approvals in connection with Phase I of the Project. As used herein, the term "Land Use Approvals" shall mean the securing of the necessary approvals from the applicable governmental authorities, including but not limited to, project plan, preliminary plan of subdivision and record plat, site plan and all other approvals and permits necessary for the development of the Project (including any building permits).

(iv) Developer will be solely responsible for its legal fees and the County will be solely responsible for its legal fees associated with negotiating and drafting of any and all agreements between the County and Developer including but not limited to this Agreement.

(v) At the Land Settlement, Developer shall record among the Land Records of the County, a covenant, (the "Covenant") binding on its successors and assigns, the terms of which shall provide that the Project shall be burdened with the obligation to construct the Residential Density, as set forth in the Recitals, to this Agreement. The Covenant shall automatically be extinguished and of no further force or effect upon completion of construction of the Residential Density.

3. SETTLEMENT

(a) Land Settlement.

(i) Settlement on the County Land (the "Land Settlement") shall be held on or before the expiration of thirty-six (36) months after the Effective Date, as the same may be extended in accordance with Section 3(iii) below, and upon not less than thirty (30) days' prior written notice from Developer to the County (the "Outside Land Settlement Date"). The Land Settlement may not occur unless the County's Conditions Precedent and the Developer's Conditions Precedent (both as hereinafter defined) shall have been satisfied or waived by the benefited Party.

(ii) Settlement on the Public Garage (the "Public Garage Settlement") shall be held on a date not later than thirty (30) days after Substantial Completion (as defined in Section 7 (h)) of the Public Garage.

(iii) If all Conditions Precedent (as described in Section 4) are not finally satisfied or waived by the benefited Party on or before the Outside Land Settlement Date, then Developer shall have the right, exercisable by written notice given to the County on or before the Outside Land Settlement Date, to terminate this Agreement whereupon except as otherwise expressly provide in this Agreement, both Developer and the County shall be relieved of further liability under this Agreement. The foregoing notwithstanding, if the Conditions Precedent are not satisfied or waived by the benefited Party on or before the Outside Land Settlement Date, Developer shall have the right, exercisable by written notice given to the County on or before the Outside Land Settlement Date, and provided that Developer has diligently pursued the satisfaction of the Conditions Precedent to be satisfied by Developer, to extend the Outside Land Settlement Date for up to twelve (12) months (the "**First Extended Outside Land Settlement Date**") to allow further time for satisfaction of the Conditions Precedent. In such event, the Developer shall pay the County, simultaneous with said notice to extend, the sum of Fifty Thousand and NO/100ths Dollars (\$50,000.00) (the "**First Extension Deposit**"). The First Extension Deposit shall be (a) returned to Developer if Developer consummates closing on the County Land within the First Extended Outside Land Settlement Date, or (b) forfeited to the County if Developer fails to consummate closing on the County Land within the First Extended Outside Land Settlement Date, as full and complete liquidated damages and as the County's sole and exclusive remedy on account of Developer's failure to consummate the Land Settlement as provided herein; and provided further, if the Conditions Precedent are not satisfied or waived by the benefited Party on or before the expiration of the First Extended Outside Land Settlement Date, and provided that Developer has diligently pursued the satisfaction of the Conditions Precedent to be satisfied by Developer, Developer shall have the additional right, exercisable by written notice given to the County on or before the expiration of the First Extended Outside Land Settlement Date, to extend the First Extended Outside Land Settlement Date for up to an additional twelve (12) month period (the "**Second Extended Outside Land Settlement Date**") to allow further time for satisfaction of the Conditions Precedent. In such event, the Developer shall pay the County, simultaneous with said second notice to extend, the sum of Fifty Thousand and No/100ths Dollars (\$50,000.00) (the "**Second Extension Deposit**"). In this event the First Extension Deposit shall be forfeited to the County and the Second Extension Deposit shall be (a) returned to Developer if Developer consummates closing on the County Land within the Second Extended Outside Land Settlement Date, or (b) forfeited to the County if Developer fails to consummate closing on the County Land within the Second Extended Outside Land Settlement Date, as full and complete liquidated damages and as the County's sole and exclusive remedy on account of Developer's failure to consummate the Land Settlement as provided herein. Developer shall not receive interest on either the First Extension Deposit or Second Extension Deposits.

Notwithstanding anything to the contrary set forth in this Section, if in the reasonable judgment of the Developer any Condition Precedent is not being satisfied as a result of delays by the County (in the County's capacity as a land owner and not in its regulatory or governmental capacity). Developer shall have the right to send written notice to the County (a "**Noncompliance Letter**") stating with specificity (i) the Condition Precedent which Developer contends is being delayed by the County and (ii) what it believes the County is doing or failing to do that Developer contends is causing the delay in the satisfaction of the Condition Precedent. If during the thirty (30) day period (the "**Compliance Period**") following County's receipt of the

Noncompliance Letter, the County is unable to reasonably demonstrate that the County is not the cause of the delay, then, in such an event, the Outside Land Settlement Date shall be extended for an amount of time equal to the time of the delay. Furthermore, if any Condition Precedent is not satisfied and/or the Land Settlement is not consummated as a result of a default by the County, Developer shall be entitled to seek specific performance of this Agreement against the County, Developer hereby waiving its right to recover any damages (monetary or otherwise) against the County for Default.

(b) Developer shall have the right, but not the obligation, to pursue or defend any appeals or litigation that may be necessary in order to obtain the Land Use Approvals for Phase I prior to the Outside Land Settlement Date, as the same may be extended, and to the extent legally necessary, the County, in its capacity as owner of the County Land, authorizes Developer, to take such actions, at no expense to the County. If the Developer elects to defend one or more appeal(s) or litigation that may be necessary in order to obtain the Land Use Approvals for Phase I prior to the Outside Land Settlement Date, as the same may be extended, the Outside Land Settlement Date shall be further extended during the pendency of such appeal(s), provided that Developer is duly and diligently pursuing such appeal(s). If the Developer elects not to pursue or defend any appeals or litigation that may be necessary in order to obtain the Land Use Approvals for Phase I prior to the Outside Land Settlement Date, as may have been extended, then the County shall have the right to terminate this Agreement upon written notice to Developer, and if such termination occurs prior to the Outside Settlement Date, except as otherwise expressly provided herein, the Parties shall thereafter be relieved of all liability hereunder at law or in equity; provided that, if such termination occurs after the Outside Settlement Date, but before the First Extended Outside Settlement Date, the County shall be entitled to retain the First Extension Deposit and all interest accrued thereon; and, if such termination occurs after the First Extended Outside Settlement Date, but before the Second Extended Outside Settlement Date, the County shall be entitled to retain both the First Extension Deposit and the Second Extension Deposit and all interest accrued thereon, and except as otherwise expressly provided herein, the Parties shall thereafter be relieved of all liability hereunder at law or in equity.

(c) The settlements are to be held at a location in Montgomery County, Maryland and shall be handled by a recognized title company licensed to do business in the State of Maryland (the "**Title Company**") designated by Developer as to the Land Settlement and as to the Public Garage Settlement by a Title Company designated by the County.

(d) Land Purchase Price.

(i) The consideration to be paid by Developer to the County for the purchase of the County Land (the "**Land Purchase Price**") shall be an amount equal to the "in kind" Turnkey Delivery of the Public Garage which the Parties acknowledge equals or exceeds the fair market value of the County Land.

(ii) To secure Developer's obligation for the Turnkey Delivery of the Public Garage at the Public Garage Settlement, at the Land Settlement, Developer shall deliver to the County, an irrevocable completion guaranty, in form and content and backed by a surety or other credit worthy entity reasonably acceptable to the County and Developer's lender and providing

for (A) the Turnkey Delivery of the Public Garage in accordance with the Final Design Approval and applicable law, and (B) payment of any Developer Liquidated Damages due and owing (the "Public Garage Security"). The Public Garage Security shall be released to Developer at the Public Garage Settlement.

(e) Settlement Documents.

At the Land Settlement, Developer shall be required to deliver the following amounts and documents (all properly executed) into escrow with the Title Company:

(i) The Covenant;

(ii) signed condominium plat and by-laws with respect to the Public Garage Unit.

(iii) The settlement statement for the transaction contemplated by this Agreement reflecting the Land Purchase Price and all adjustments required to be made in accordance with this Agreement or otherwise agreed upon by the Parties (the "Land Settlement Statement");

(iv) Such other documents and materials as are required by either Party under the terms of this Agreement or, subject to the reasonable approval of Developer as to form, substance and content, as required by the Title Company pursuant to any title commitment it issues to Developer with respect to the acquisition of the Land; and

(v) The Public Garage Security.

(f) At the Land Settlement, the County shall be required to deliver the following amounts and documents (all properly executed) into escrow with the Title Company:

(i) special warranty deed to the County Land, subject to the County Land Permitted Exceptions;

(ii) Land Settlement Statement;

(iii) signed condominium plat and by-laws with respect to the Public Garage Unit; and

(iv) such other documents and materials as are required by either Party under the terms of this Agreement or, subject to the reasonable approval of the County as to form, substance and content, as required by the Title Company pursuant to any title commitment it issues to Developer with respect to the acquisition of the County Land, all of which when properly executed, shall be considered good and sufficient tender of performance.

(g) At the Public Garage Settlement, the Developer shall be required to deliver the following documents (all properly executed) into escrow with the Title Company:

(i) special warranty deed with respect to the Public Garage Unit; and

(ii) to the extent applicable, such other documents and materials as are required by either Party under the terms of this Agreement or subject to the reasonable approval of the County as to form, substance and content as required by the Title Company pursuant to the Public Garage title commitment it issues to the County with respect to acquisition of the Public Garage Unit; and

(iii) A settlement statement for the transaction contemplated by this Agreement reflecting all adjustments required to be made in accordance with this Agreement or otherwise agreed upon by the Parties (the "**Public Garage Settlement Statement**"); and

(h) At the Public Garage Settlement, the County shall be required to deliver the following (all properly executed where applicable) into escrow with the Title Company:

(i) The Public Garage Settlement Statement;

(ii) Such other documents and materials as are required by either Party under the terms of this Agreement or, subject to the reasonable approval of Developer as to form, substance and content, as required by the Title Company pursuant to the title commitment it issues to the County with respect to the acquisition of the Public Garage Unit;

(iii) A release of the Public Garage Security; and

(iv) Any sum due pursuant to Section 7(n).

(i) State and County transfer taxes and State recordation tax charged in connection with the conveyance of the County Land to Developer by the County, shall be paid by the Developer. Any recordation and transfer taxes charged in connection with the conveyance of the Public Garage Unit at the Public Garage Settlement, if any, shall be paid by the County. General real estate taxes and special assessments with respect to both the County Land and the Public Garage shall be paid and adjusted as of the date of the Land Settlement and the Public Garage Settlement, respectively.

(j) If Developer defaults in its obligation to settle at the Parking Garage Settlement, County shall be entitled to either:

(i) Terminate this Agreement and retain the First Extension Deposit and Second Extension Deposit (and all accrued interest thereon, if any) as agreed liquidated damages (and not as a penalty) and as County's sole and exclusive remedy, in lieu of, and as full compensation for, all other rights or claims of County against Developer by reason of such default. Upon such payment, this Agreement shall terminate and, except as expressly provided for in this Agreement, neither County nor Developer shall have any further liability or obligation under this Agreement; or

(ii) bring an action for specific performance of Developer's obligation to consummate the Public Garage Settlement, including bringing a separate suit to enforce the Public Garage Security.

(k) If County shall be in default in its obligation to settle at the Parking Garage Settlement, Developer shall have, as its sole remedy therefor, the right to bring an action for specific performance of County's obligation to consummate the Public Garage Settlement.

4. CONDITIONS PRECEDENT

(a) (i) The following, which may be satisfied on or before the Land Settlement, shall be express conditions precedent to Developer's obligation to proceed to the Land Settlement (collectively, the "Developer's Conditions Precedent"):

(1) Developer shall have obtained the Land Use Approvals for Phase I. The foregoing notwithstanding, the Parties acknowledge that the Planning Board may undertake amendment to the Silver Spring CBD Sector Plan (the "Sector Plan") prior to the Land Use Approvals that may include the Land and that could potentially result in 1) the suspension by the Planning Board for a period of time of any and all action on the Land Use Approvals during the pendency of the Sector Plan approval process and/or 2) material changes to land uses (such as but not limited to changes to required greenspace, public use space, parking, mixed-use, height, moderately priced commercial uses, as well as MPDU and/or Workforce Housing Units requirements, limitations on the location and size of commercial uses). In the event the Planning Board undertakes any such Sector Plan process, and Developer determines, in its sole and absolute discretion, that such proposed Sector Plan amendment would materially and adversely affects the economic viability of the Project contemplated herein, then in such event, Developer shall have the right, upon written notice to the County, to terminate this Agreement, whereupon, if such termination occurs prior to the Outside Settlement Date, except as otherwise expressly provided herein, the Parties shall be released of all further liability or obligation hereunder; provided that, if such termination occurs after the Outside Settlement Date, but before the First Extended Outside Settlement Date, the County shall be entitled to retain the First Extension Deposit and all interest accrued thereon; and, if such termination occurs after the First Extended Outside Settlement Date, but before the Second Extended Outside Settlement Date, the County shall be entitled to retain both the First Extension Deposit and the Second Extension Deposit and all interest accrued thereon, and except as otherwise expressly provided herein, the Parties shall thereafter be relieved of all liability hereunder at law or in equity.

(2) Developer shall have, at least twenty-one (21) days prior to the Land Settlement, obtained commitment for the necessary financing and/or equity to fund the construction of Phase I, on terms and conditions reasonably satisfactory to Developer (the "Financial Contingency"). Developer, commencing one hundred twenty (120) days after its Site Plan for the Project is deemed by law to be final and non-appealable, shall begin providing the County with monthly status reports on its efforts to obtain such financing and/or equity; and

(3) Developer shall have received County's Final Design Approval (as hereinafter defined); and

(4) Developer shall have entered into a construction contract with a general contractor for the construction of Phase I, inclusive of the Public Garage, the terms of which shall provide, inter alia, for the Substantial Completion of the Public Garage within twenty

four (24) months after the Land Settlement, subject to Force Majeure (the "Construction Contract").

(5) the County shall have obtained all required approvals including without limitation all advertisements, compliance with any bond covenants, mandatory referral, an Executive order finding the County Land to no longer be necessary for public use and other steps necessary to authorize the conveyance of the County Land to Developer all in accordance with the terms of this Agreement (provided, however that the County shall not be required to undertake any optional method zoning approval as part of its obligations hereunder) (collectively, the "County Approvals"). Promptly after the Effective Date, the County shall make diligent efforts to obtain the County Approvals. Notwithstanding anything contained in this Agreement to the contrary, Developer shall have the right to terminate this Agreement if the County Approvals have not been obtained by the date which is one hundred eighty (180) days after the Effective Date; and

(6) The Parties shall have agreed to the terms of the documents necessary to establish the condominium regime as said documents relate to the Public Garage Unit; and

(7) title to the County Land shall be in the condition required by this Agreement; and

(ii) In the event the County reasonably determines, prior to the Land Settlement, that Developer is not diligently pursuing the satisfaction of the Developer's Conditions Precedent (other than the issuance of the County Approvals) due consideration being given to third party consultants and experts as to the appropriate sequence and timing of seeking satisfaction of such Conditions Precedent, or has abandoned the Project, the County shall have the right to send written notice to the Developer (a "Diligence Letter") stating with specificity why it believes Developer is not diligently pursuing the satisfaction of the Developer's Conditions Precedent. If during the thirty (30) day period (the "Due Diligence Period") following Developer's receipt of the Diligence Letter, Developer is unable to demonstrate to the County's reasonable satisfaction (in the County's capacity as a land owner) that Developer is diligently pursuing the satisfaction of the Developer's Conditions Precedent or that Developer has not in fact abandoned the Project, as the case may be, the County shall have the right to terminate this Agreement by delivering written notice to the Developer within ten (10) days after the expiration of the Due Diligence Period, whereupon, if such termination occurs prior to the Outside Settlement Date, except as otherwise expressly provided herein, the Parties shall be relieved of further liability under this Agreement; provided that, if such termination occurs after the Outside Settlement Date, but before the First Extended Outside Settlement Date, the County shall be entitled to retain the First Extension Deposit and all interest accrued thereon; and, if such termination occurs after the First Extended Outside Settlement Date, but before the Second Extended Outside Settlement Date, the County shall be entitled to retain both the First Extension Deposit and the Second Extension Deposit and all interest accrued thereon, and except as otherwise expressly provided herein, the Parties shall thereafter be relieved of all liability hereunder at law or in equity.

(b) The following shall be express conditions precedent to the County's obligation to proceed to the Land Settlement (collectively, the "**County's Conditions Precedent**"):

(i) Developer shall have obtained and provided County with evidence of the Phase I Land Use Approvals; and

(ii) The Financial Contingency shall be satisfied and reasonable evidence of the satisfaction of the Financial Contingency shall have been provided to the County; and

(iii) Final Design Approval shall have been issued to Developer; and

(iv) Developer shall have entered into a binding Construction Contract; and

(v) Developer shall have delivered the Public Garage Security to the County;
and

(vi) the County shall have obtained the County Approvals; and

(vii) The Parties shall have agreed to the terms of the documents necessary to establish the condominium regime as said documents relate to the Public Garage Unit; and

(viii) Developer shall not be in material default of any provision of this Agreement or the Right of Entry Agreement as to which the County has notified Developer in writing that Developer is in violation.

The County shall have the right to waive some or all of the foregoing conditions in its sole and absolute discretion; provided, however, that no such waiver shall be effective or binding on the County unless it is in writing and executed by an official of the County authorized to execute this Agreement.

5. **TITLE TO COUNTY LAND**

(a) Absolute fee simple title in and to the County Land shall be conveyed at the time of the Land Settlement, free of all liens, encumbrances, judgments, occupancy agreements, but subject to covenants, conditions, restrictions, easements and rights-of-way of record as of the Effective Date (the "**County Land Permitted Exceptions**"). Title to the County Land is to be merchantable, good of record and in fact, and insurable without exceptions except for any covenants, conditions, restrictions, easements and rights-of-way of record as of the Effective Date and the documents establishing and governing the Condominium Regime that have been reasonably accepted as to form, substance and content by the County. Prior to the Land Settlement, Developer may, at its election, obtain an updated ALTA/ACSM survey of the Property certified to the County and Developer and sufficient in form and substance to enable Title Company to remove its standard survey exception (the "**Survey**").

(b) Notwithstanding the above, any deeds of trust, mortgages, judgment liens, bond covenants and other monetary liens against the County Land shall be removed by the County at or before the time of the Land Settlement.

(c) Unless removed on or before the Land Settlement, after the Effective Date, the County shall not, without Developers prior written consent, which consent may be withheld for any or no reason, mortgage, lease or otherwise encumber the County Land, execute any easements, covenants, conditions or restrictions with respect to the County Land, otherwise alter or permit the alteration of title to the County Land, or seek any zoning changes or other governmental approvals with respect to the County Land.

(d) Upon request by Developer, the County shall use good faith efforts to cause to be executed a FIRPTA Affidavit and owner's affidavit (in the form which the County generally executes owner's affidavits); and furnish such written evidence of the County's status and authority to consummate this transaction as the Title Company may reasonably require (and the County generally provides).

6. TITLE TO PUBLIC GARAGE UNIT

(a) Title to the Public Garage Unit shall be good and marketable and shall be conveyed at the Public Garage Settlement to the County by a deed conveying absolute fee simple title in and to the Public Garage Unit. Title to the Public Garage Unit shall be conveyed free of all liens, encumbrances, judgments, occupancy agreements, covenants, conditions, restrictions, easements and rights-of-way, recorded or unrecorded; subject, however, to the following (collectively, the "**Public Garage Unit Permitted Exceptions**"): (i) covenants, conditions, restrictions, easements and rights-of-way of record as of the Effective Date or as may otherwise be established in accordance with and in furtherance of the terms of this Agreement, and (ii) the documents establishing and governing the Condominium Regime which must be in form, substance and content reasonably acceptable to the County. Title is to be merchantable, good of record and in fact, and insurable without exceptions (other than the Public Garage Unit Permitted Exceptions) at standard rates by the Title Company.

(b) Any deeds of trust, mortgages, judgment liens and other monetary liens against the Public Garage Unit shall be removed by Developer at or before the time of the Public Garage Unit Settlement.

(c) Unless removed on or before the Public Garage Unit Settlement or otherwise provided under the terms of this Agreement, after the date of this Agreement, Developer shall not execute any easements, covenants, conditions or restrictions with respect to the Public Garage Unit, otherwise alter or permit the alteration of title to the Public Garage Unit or seek any zoning changes or other governmental approvals with respect to the Public Garage Unit, except as are consistent with this Agreement or first approved in writing by the County, which approval shall not be unreasonably withheld, conditioned or delayed.

(d) Upon request by the County, Developer shall use good faith efforts to cause to be executed, affidavits and other similar type instruments which are reasonably required by the Title Company for the elimination of any standard or printed exceptions in the County's final policy of title insurance (which such affidavits or other instruments shall be based on knowledge (or to the extent acceptable to the Title Company, to the best of Developer's knowledge without inquiry)); and furnish such written evidence of Developer's status and authority to consummate this transaction as the Title Company may reasonably require.

(e) The County acknowledges that it shall only be conveyed title to the Public Garage Unit and that Developer shall retain ownership of all of the land and airspace above and below the Public Garage Unit, including the right from time to time to construct improvements and structures above and below the Public Garage Unit, including multi-story buildings and/or parking for the Private Buildings, subject, however to the terms and conditions of the documents establishing and governing the Condominium. The foregoing notwithstanding, after the Public Garage Settlement, Developer shall not construct any improvements below the Public Garage without first obtaining the County's prior written consent, such consent not to be unreasonably withheld, conditioned or delayed, provided that consideration of structural and stability issues, useful life, ingress and egress, the cost of repairs, maintenance, operation, and replacement, safety, ventilation and similar issues shall not be deemed unreasonable.

7. PUBLIC GARAGE

(a) The Public Garage shall contain 152 parking spaces to be located as generally shown on Exhibit B attached hereto (the "Preliminary Parking Plan") as the same may be amended in accordance with the terms of this Agreement. The Parties acknowledge that the final location and configuration of the Public Garage and parking spaces within the Public Garage shall be conclusively established upon Final Design Approval (as hereinafter defined).

(b) The Developer shall develop a design for the Public Garage complying in all material respects with all applicable statutes, laws, ordinances, building codes, regulations and rules and the Parking Garage Design Criteria (revised May 2007) and the referenced Parking Facility Sign Standards, collectively, the "Parking Garage Design Guidelines"; provided, however, in the event of a conflict between any requirement of applicable law and the Parking Garage Design Guidelines, as may be revised by agreement of the Parties, the more stringent of such requirements shall control. The Parking Garage Design Guidelines are attached hereto as Exhibit E. The Parties acknowledge and agree that the design of the Project may require certain exceptions to the Parking Garage Design Guidelines, which exceptions will be subject to agreement between the Parties (with each Party agreeing to act reasonably, it being agreed that "acting reasonably" for the County includes, but is not limited to considerations of maintainability, durability, operability, security, cost implications and County standard expectations as to useful life of public parking garages). The County is not assuming any responsibility for the construction costs or incremental additional maintenance of the oversized footings and other infrastructure structures necessary for the construction of the Private Buildings or any other structures now or hereafter constructed on the surface of or above the Public Garage Unit.

(c) The County acknowledges and consents to Developer collaterally assigning this Agreement, and all related agreements, documents, certificates and instruments to its lender(s) providing financing for the Project, from time to time. At Developer's request, the County shall enter into a tri-Party agreement with Developer's lender(s), from time to time evidencing the agreement by the County to accept performance by the lender or its designee under this Agreement in the event the lender exercises its rights under such collateral assignment.

(d) During design of the Public Garage, Developer will provide the County with design documents at various stages of design development as stated herein. Within twenty-one

(21) business days after receipt by County of seven (7) sets of any concept finalization documents ("**Concept Finalization Documents**"), schematic design documents ("**Schematic Design Documents**"), design development documents ("**Design Development Documents**"), or construction documents ("**Construction Documents**") for the Public Garage submitted by Developer to the County under this Agreement for County review and approval as an owner (not in its capacity as a governing or regulatory body), the County shall promptly and diligently review the items submitted and either approve them as submitted or notify Developer in writing of the required changes (review by permitting agencies is not subject to this time limitation). If the County fails to approve or disapprove the Concept Finalization Documents, Schematic Design Documents, Design Development Documents, or Construction Documents submitted for review and approval within such twenty-one (21) business day period, Developer shall send to the County Executive, the Chief Administrative Officer, the County Attorney, and the Director of DOT, a notice that it has not received a response to its submission; if the County fails to respond within five (5) business days of such notice, then Developer shall send a second notice to the County Executive, the Chief Administrative Officer, the County Attorney, and the Director of DOT, stating that Developer has not received a response to its submission; if the County fails to respond within five (5) business days of such second notice, the Concept Finalization Documents, Schematic Design Documents, Design Development Documents, or Construction Documents submitted shall be deemed approved. Each notice required in this Section must state in bold all capitalized letters, the date of the required response by the County and the automatic approval of the submission should the County fail to provide a timely response. In the event the applicable Concept Finalization Documents, Schematic Design Documents, Design Development Documents, or Construction Documents are deemed approved due to a failure to reply under this Section, any subsequent changes by the County shall be treated as a County Change Order, as defined hereinafter. The foregoing provision shall be repeated as to each successive stage of Concept Finalization Documents, Schematic Design Documents, Design Development Documents, and Construction Documents. If any submittal or subsequent resubmittal is disapproved by the County (other than as a consequence of a failure to respond to the two (2) notices), the modification and resubmittal review process shall continue until the issues in question are resolved (except the review period shall be reduced from twenty-one (21) business days to fourteen (14) business days. Each resubmission must fully respond with respect to any previously requested changes and/or comments. The final approval (or deemed approval) by the County in accordance with the provisions of this Section 7(d) of the Concept Finalization Documents, Schematic Design Documents, Design Development Documents and Construction Documents shall be the "**Final Design Approval**" for purposes of this Agreement.

Notwithstanding anything contained in this Section 7 or elsewhere in this Agreement to the contrary, the County does not accept any design or construction liability for the Public Garage, including, without limitation, compliance or noncompliance with the Parking Garage Design Guidelines (all of which are and shall remain the responsibility of the Developer) and the County shall have no such liability and waives none of its rights under this Agreement by reason of its approval of the Concept Finalization Documents, Schematic Design Documents, Design Development Documents, Construction Documents, or as a result of its Final Design Approval or by reason of its exercise of its inspection rights or as a result of any validly issued Stop-Order, both as provided under Section 7(f) of this Agreement. All cost and liability associated with the proper design and construction of the Public Garage shall be borne solely and

exclusively by the Developer, excepting only the cost of any County Change Order (as defined in Section 7(m)), the cost of all contractor change orders, field orders and claims shall be at the sole and exclusive cost and responsibility of the Developer.

(e) No later than thirty (30) days after the Effective Date, Developer shall provide the County with a copy of its proposed schedule for pursuing its Project Plan. No later than forty-five (45) days after the Project Plan for the Project is deemed by law to be final and non-appealable, Developer shall submit for the County's review and comment (but not approval) a critical path bar chart schedule listing all major activities; durations and milestone completion dates required for the design through Final Design Approval. Not later than thirty (30) days after Final Design Approval Developer shall provide, or shall have its contractor provide, to the County for its review and comment (but not approval) a Critical Path Method (CPM) schedule for construction of the Public Garage from the date of the Notice to Proceed (NTP) issued to Developer's contractor through final completion of the Public Garage and its acceptance by the County. Developer shall meet with the County on a regular basis (but not less than once per month), from the start of the design phase through the final completion of the Public Garage, to update the critical path bar chart for design and the CPM schedule for construction and to discuss the progress made on the Public Garage during the proceeding time period and highlighting the current and critical activities. The County shall be notified of and shall have the right to attend all pre-construction and construction progress meetings. In addition to such scheduled meetings, within three (3) business days after the written request of either Party hereto, the Parties shall meet to evaluate solutions to design, construction and other problems related to the development and construction of the Public Garage. Within five (5) business days after each such meeting, Developer shall distribute minutes of such meeting to the County and any other person designated by the County. Developer shall notify County in writing of any single or aggregated slippage of thirty (30) days or more in the schedule.

(f) The County shall have the right to inspect the construction of the Public Garage during normal business hours provided that (i) any inspector shall first check in with the on-site Project supervisor, (ii) such inspector shall observe all Project site safety requirements, and (iii) prior to any inspection, the County shall have provided Developer with evidence from the County's third party inspector, of appropriate and customary indemnity and insurance coverage and naming Developer, its members, general contractor and lender(s) as additional insureds. If the County's inspector reasonably determines in a detailed written report, a copy of which is provided to Developer, that Developer has failed to execute a material element of the construction of the Public Garage in substantial conformity with the Final Design Approval and/or the building permit and that the defective work cited in said report is not readily correctable by Developer, the County shall have the right to direct that the Developer cease its construction of the Public Garage (a "Stop-Order"). If the County issues a Stop-Order, and prior to Developer ceasing work, the Developer shall have the right to present evidence to the County that the issuance of the Stop-Order is not justified and, within three (3) business days after submission of said evidence, the County and the Developer shall meet to discuss the County's concerns and the resolution thereof and the County and the Developer shall attempt in good faith to reach a prompt resolution of the issues underlying the Stop-Order. Any validly issued Stop-Order shall not be considered a County Change Order (as defined in Section 7(m)) or otherwise subject the County to any cost or liability

(g) Developer must commence construction of Phase I, including the Public Garage, within thirty (30) days after Land Settlement. Developer shall be required to deliver the Public Garage Substantially Completed (as hereinafter defined) on or before the date that is twenty-four (24) months after Land Settlement, subject to Force Majeure; and shall pay to the County as liquidated damages and not as a penalty Four Hundred Eighty Dollars (\$480.00) per day for every day that Substantial Completion is delayed beyond twenty-four (24) months from the Land Settlement Date (excepting delays due to Force Majeure) ("**Developer Liquidated Damages**"). In the event of a delay which Developer contends is a consequence of Force Majeure, Developer shall provide the County with written notice of the delay and the act of Force Majeure which Developer contends caused the delay within ten (10) days of occurrence of such delay or the delay shall irrevocably and conclusively be deemed to have not occurred as a result of Force Majeure. In connection with the construction of the Public Garage, Developer shall take appropriate measures to remediate the presence of hazardous materials on or about the Public Garage Unit in violation of applicable laws (the "**Developer Remediation Obligations**"). Developer agrees that it shall indemnify and hold harmless County against all loss, cost, damage or expense incurred by County as a result of Developer's failure to undertake the Developer Remediation Obligations.

(h) Developer shall provide the County with no less than thirty (30) days advance notice of the anticipated date of Substantial Completion and delivery of the Public Garage. Construction of the Public Garage shall be deemed to be "**Substantially Completed**" at such time as: (i) Developer's architect or engineer issues an AIA substantial completion certificate including a punchlist, which punchlist items shall not materially impair the beneficial use of the Public Garage; (ii) a temporary certificate of occupancy has been issued for the Public Garage, and (iii) Developer has provided all operating and maintenance manuals and training to the County for systems and equipment within the Public Garage. Promptly after the Public Garage has been Substantially Completed, the Developer and the County shall schedule a mutually agreeable time to walk through the Public Garage and review and/or revise as appropriate, the punchlist, which shall be signed and dated by representatives of both the County and the Developer (the "**Punchlist**") setting forth any defects or incomplete work (each a "**Punchlist Item**"). Developer shall deliver to the County, as security for the completion of the Punchlist Items, cash or a letter of credit, in an amount equal to one hundred fifty percent (150%) of the cost of any remaining Punchlist Items to be held by the County pursuant to an agreement reasonably acceptable to the Parties. Developer shall use its good faith efforts to complete such Punchlist Items within sixty (60) days after Substantial Completion of the Public Garage or at the earliest reasonable date given the nature of the particular Punchlist Item.

(i) The Land Purchase Price shall be deemed to be paid in full and the Turnkey Delivery of the Public Garage shall be deemed to occur ("**Final Completion**") upon the last to occur of the following: (1) the Public Garage is Substantially Completed and the Punchlist Items are completed, (2) waivers of liens from the general contractor, all subcontractors, and all materialmen and suppliers, and any other persons who by law could file a mechanics lien against the Public Garage or the payment bond have been provided to the County, (3) any mortgage or financing lien or security interest encumbering the Public Garage Unit must be discharged as of the Parking Garage Settlement, (4) a final certificate of occupancy shall have been issued for the Public Garage, (5) a certificate of final completion from Developer's architect/engineer for the

Public Garage shall have been issued; (6) Developer shall provide to the County "As-Built" plans for the Public Garage on a CAD diskette; and (7) Developer has provided to the County an assignment of all warranties obtained by Developer for work on the Public Garage; and (8) the Public Garage Settlement shall have occurred.

(j) In addition to any other warranties at law, the Developer warrants for one (1) year from the date of Substantial Completion, that the Public Garage is free from any defect of equipment, material or design furnished, or workmanship performed by, or on behalf of the Developer, or any of its contractors, subcontractors or suppliers and that all materials are new and conform to the Final Design Approval, and the Parking Garage Design Guidelines (the "Developer's Warranty"). Under the Developer's Warranty, the Developer shall remedy at its own expense any such failure to conform or remedy any such defect. In addition, the Developer shall remedy at its own expense any damage to County-owned or controlled real or personal property if said damage is the result of any failure or defect covered by the Developer's Warranty or if said damage results from any work carried out under the Developer's Warranty. All work performed under the Developer's Warranty shall be warranted for one (1) year after the completion of said work. The County shall notify the Developer in writing within a reasonable time after the discovery of any condition covered by the Developer's Warranty. Should the Developer fail to commence to remedy any such condition within thirty (30) days after receipt of written notice thereof, the County shall have the right to replace, repair, or otherwise remedy such failure, defect, or damage at the Developer's expense, which costs shall be payable by Developer promptly after receipt of a proper invoice therefor.

(k) Developer shall provide to the County copies of all agreements (and amendments) to be entered into with all architects, engineers, contractors and other third Party consultants with respect to the Public Garage. Developer shall also provide to the County copies of all bid submissions and requests for information, qualification or clarification delivered to it or its architects, engineers and contractors with respect to the Public Garage. Developer is aware of the County's Minority, Female and Disadvantaged ("MFD") program and agrees that it shall use good faith efforts to provide twenty percent (20%) MFD participation on the construction of the Public Garage. Developer further agrees that the contracts with its architects, engineers and general contractor for the Public Garage will require that the architects, engineers and general contractor name the County as a third Party beneficiary of all contracts, warranties and/or guarantees (the form of which provisions must be in form and substance approved by the County) with rights of enforcement in connection with the design, construction, and construction management/oversight of the Public Garage.

(l) As the same may relate to the Public Garage, Developer shall neither issue, agree to, nor permit any additions to, modifications or amendments of, departures from or change orders to the Final Design Approval during the construction of the Public Garage excluding immaterial field modifications (collectively, "Developer Change Order") without the prior written approval of the County, which approval shall not be unreasonably withheld, conditioned or delayed, it being agreed that "acting reasonably" for the County includes, but is not limited to considerations of maintainability, durability, operability, security, cost implications and County standard expectations as to useful life of public parking garages, and provided that the provisions of this sentence regarding approval shall not apply to any such additions, modifications,

amendments, departures or change orders to those portions of the Project which do not concern the Public Garage, which do not materially affect the Public Garage, and which do not materially interfere with or make more costly the operation, maintenance, or repair of the Public Garage or impair its structural integrity or useful life. Developer shall provide the County with written notice of any proposed additions, modifications, amendments, departures or change orders for which the County's approval is required-hereunder, which notice shall contain a copy of such proposed additions, modifications, amendments, departures or change orders, and the County shall use diligent efforts to give Developer prompt written notice of its approval or its disapproval thereof. Any approved Developer Change Order cost shall be funded by the Developer.

(m) Any requested change orders initiated or requested by the County with respect to the Public Garage after the Final Design Approval ("County Change Order") shall be communicated to Developer in writing. Developer shall determine what effect such requested County Change Order has on the schedule and/or cost of the Project. Provided that such requested County Change Order does not adversely affect the Private Buildings in any material manner or materially delay the schedule for completion of the Private Buildings, and further provided that the County and Developer agree in advance on the cost of the change order, which cost shall include all costs associated with any delay caused by such County Change Order, such requested County Change Order shall be approved and performed by Developer. Any approved County Change Order cost shall be funded by the County and shall not be commenced by Developer until appropriation or other evidence of funding is provided to Developer. Any such County Change Order cost shall be paid within thirty (30) days of receipt of a draw request prepared and approved by the Developer's architect and/or engineer.

(n) The cost of the Revenue Collection System in the Final Design Approval in excess of Fifty Thousand Dollars (\$50,000) shall be paid by the County at the Public Garage Settlement.

(o) Notwithstanding anything to the contrary set forth in this Agreement, the County shall be solely responsible for the cost of any third party contractors retained by the County in connection with the Public Garage.

8. CONDOMINIUM REGIME

Developer intends to subject various components of the Project to a condominium regime (the "Condominium Regime") with the Public Garage being one unit in such regime. To the extent that the Condominium Regime impacts upon the Public Garage or the County, the terms of the declaration of the condominium regime shall be subject to the County's reasonable approval, which approval shall not be unreasonably withheld, conditioned or delayed.

9. PROJECT REPRESENTATIVES.

Each Party will designate an individual as its Project representative (respectively, the "County Project Representative", and the "Developer Project Representative" and collectively the "Project Representatives"), for purposes of coordinating the exchange of information, processing of requests, and agreeing on solutions relevant to the Project and

otherwise implementing the terms of this Agreement but not amending or otherwise altering or modifying the terms of this Agreement. As of the date of this Agreement, (a) the County Project Representative shall be Rick Siebert, (b) the Developer Project Representative shall be Robert P. Hillerson. Each party shall deliver to the other notice of any change in the identity of its Project Representative. Each Party shall be entitled to rely upon the designations made in this Section or subsequently made, and upon the full authority of each of the representatives named in this Section to act on behalf of its Party to coordinate the Project, until such Party receives written notice of a change of designation or limitation of authority from the other Party. Any agreement relative to expenditure of, or a commitment for expenditure of, funds must be reduced to writing and signed by a person with authority to contractually bind the Party.

10. REPRESENTATIONS, WARRANTIES AND COVENANTS

(a) Developer's Representations, Warranties and Covenants. To induce the County to enter into this Agreement, Developer covenants, warrants and agrees that:

(i) Developer is a limited liability company duly organized and validly existing and in good standing under the laws of the State of Maryland, and is duly qualified to enter into this Agreement and undertake the obligations provided for herein.

(ii) Developer has the full and unrestricted lawful power and authority to enter into and carry out the terms of this Agreement or other agreement contemplated herein. The execution, delivery and performance of this Agreement and any other agreement contemplated herein and the consummation of the transactions contemplated hereby and thereby have been or will be as of the date of execution hereof, duly authorized and approved by all requisite action, as the case may be, and this Agreement and all other agreements contemplated herein, documents contemplated hereby or thereby, when duly executed and delivered, will each constitute a valid and binding agreement of Developer and, as applicable, its affiliates, enforceable in accordance with its terms.

(iii) To Developer's knowledge, except for the Land Use Approvals and the Alley Closings for the Project, no consent, approval or authorization of any other person or entity is required to be obtained by Developer in connection with the execution, delivery or performance of this Agreement or any other agreement contemplated herein.

(iv) To Developer's knowledge, neither the execution or delivery of this Agreement or any other agreement contemplated herein, nor the consummation of the transactions contemplated hereby or thereby, will: (a) conflict with, or result in a breach of, the terms, conditions or provisions of or constitute a default under its operating agreement or any agreement or instrument to which it is a Party or is subject; (b) violate any agreement, restriction, easement, restrictive covenant, or instrument to which it is a Party or to which it or any of its assets is subject; or (c) constitute a violation of any applicable code, resolution, law, statute, regulation, ordinance, rule, judgment, decree or order.

(v) There are no actions, suits, proceedings or investigations pending or, to the knowledge of Developer, threatened against or affecting Developer which question the validity of this Agreement or any agreement, instrument or document delivered or to be delivered

pursuant hereto or thereto, or any action taken in, under or in connection with any of the provisions hereof or thereof, at law or in equity, before or by any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality; and Developer has no reason to believe that any such action, suits proceeding or investigation may be brought or threatened against Developer and subject to the satisfaction of all terms and conditions of this Agreement.

(vi) Developer has not retained any person or entity to solicit or secure this Agreement from the County upon an agreement or understanding for a commission, percentage or brokerage fee, other than bona fide employees or bona fide established commercial selling agencies retained by Developer for the purpose of securing business, and other than attorneys rendering legal services.

(vii) Developer shall use commercially reasonable efforts to take, or cause to be taken, all actions necessary or desirable to cause the representations and warranties of Developer set forth herein to be true and correct until final completion of the development and construction of the Project. Developer shall use commercially reasonable efforts to refrain from taking any action which would cause, or threaten to cause, any such representation or warranty to become untrue or incorrect at any time during such period.

(viii) Subject to the terms of this Agreement, Developer shall reasonably cooperate with the County, to facilitate the processing of such plans, permit applications and easements as are necessary for the development of the Project.

(b) County Representations and Warranties. To induce Developer to enter into this Agreement, the County represents and warrants to, and covenants and agrees with, Developer as follows:

(i) The County is a political subdivision of the State of Maryland and has the full and unrestricted lawful power and authority to enter into and carry out the terms of this Agreement. The execution, delivery and performance of this Agreement and the consummation of the transactions contemplated hereby and thereby have, except for advertisement of the disposition of County property pursuant to Maryland Annotated Code, Article 25A, Section 5(B), an Executive Order finding the County Land to no longer be necessary for public use, compliance with any bond covenants and mandatory referral review, has been (or at the time of the Land Settlement will be) duly authorized and approved, and this Agreement and all other agreements, documents and instruments contemplated hereby or thereby, subject to advertisement of the disposition of County property pursuant to Maryland Annotated Code, Article 25A, Section 5(B), any bond covenants, an Executive Order finding the County Land to no longer be necessary for public use, and mandatory referral once duly executed and delivered, each will constitute a valid and binding agreement of the County, enforceable in accordance with its terms, all of which the County shall use diligent efforts to accomplish on or before the expiration of one hundred eighty (180) days after the Effective Date.

(ii) Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereby or thereby will: (a) conflict with, or result in a breach of, the terms, conditions or provisions of, or constitute a default under, the County's

Charter or the Code, or any agreement or instrument to which it is a Party or (b) constitute a violation of any applicable judgment, decree or order or, to the County's knowledge, any applicable code, resolution, law, statute, regulation, ordinance or rule.

(iii) The County shall use diligent efforts to take, or cause to be taken, all actions necessary or desirable to cause the representations and warranties of the County set forth herein to be true and correct until the Public Garage Settlement.

In the event that the lender or lenders providing construction and/or permanent financing for the Project so require, the County will execute an estoppel certificate in form and substance reasonably acceptable to the County certifying as to the status of the Agreement.

11. INDEMNIFICATION

Except to the extent such is due solely to the negligence or willful misconduct of the Indemnified Parties (as hereinafter defined), the Developer hereby agrees, covenants, and warrants to protect, indemnify, and hold the County and its respective officers, members, employees, contractors and agents (collectively, the "Indemnified Parties") harmless from and against all liabilities, actions, damages, claims, demands, judgments, losses, costs, expenses, liens, encumbrances, suits or actions and reasonable attorneys' fees, and the cost of the defense of the Indemnified Parties in any suit, including appeals, arising out of, or relating in any manner to all work or obligations undertaken by Developer pursuant hereto, activities resulting therefrom and/or as a result of the Developer's, or its contractors, subcontractors, agents, employees or invitees presence on, access to, or activities on or about the County Land.

12. DISPUTES

Each Party hereby consents and submits to the jurisdiction of the courts of the State of Maryland, and the Montgomery County Circuit Court, specifically, for all purposes in connection with the resolution of controversies or disputes hereunder. Each Party irrevocably consents to the service of process or notice of motion or other application to any of the aforementioned courts, and any papers in connection with any proceedings before any of such courts, by the mailing of copies thereof by certified or registered mail, postage prepaid, to such Party at its address designated in Section 22 hereof; except, however, the County's agreement to accept service does not constitute a waiver of any of the notice of claim or other procedures or liability caps required by the Local Government Tort Claims Act. Developer's resident agent is Robert P. Hillerson with an address of 801 Wayne Avenue, Suite 300, Silver Spring, MD 20910.

13. USE OF WORDS AND PHRASES

Use of the singular shall include the plural and use of the plural shall include the singular as appropriate. Where this Agreement requires the performance of obligations, such performance, unless otherwise stated, may be performed by the Party or its contractor or agent on its behalf.

14. CONSTRUCTION OF DOCUMENT

All Parties to this Agreement are represented by counsel and this Agreement reflects input from both Parties. Therefore, in the event of a dispute over, or any ambiguity of the terms of this Agreement, the Parties agree that common law rules of construction in favor of one Party or against another Party shall not apply.

15. COUNTY CONSENT AND APPROPRIATION /

Approvals and consents required from the County in this Agreement do not substitute for regulatory approvals required under applicable law. Regulatory approvals by the County required by law or regulation do not substitute for approvals and consents required from the County in this Agreement. Any time Developer's or the County's approval or permission is required by this Agreement, such approval must be in writing. Nothing in this Agreement is intended to be, and shall not be construed as, a limitation of the police powers of the County. The Parties further acknowledge that any payment required from the County pursuant to this Agreement is expressly subject to the appropriation of funds by the County for such payment and failure to make such appropriation is not a breach or default of this Agreement by the County.

16. WAIVER

Waiver of any requirements of this Agreement by any Party may only be granted by the waiving Party pursuant to a formal written waiver executed by the waiving Party and signed by a Party having authority to execute the Agreement. Failure of any Party to exercise any right or remedy hereunder shall not impair any of its rights nor be deemed a waiver thereof and no waiver of any of its rights shall be deemed to apply to any other such rights, nor shall it be effective unless in writing and signed by the waiving Party.

17. DEFINITIONS

Capitalized terms in this Agreement have the meanings ascribed herein and are listed on Exhibit F attached hereto. All other capitalized terms have common meanings, unless they are terms of art used in the proper context.

18. TIME OF THE ESSENCE

The Parties acknowledge and agree that time is of essence in the performance of their obligations under this Agreement. The Parties shall cooperate with each other to ensure the deadlines provided for herein are met; provided that the same shall not require either Party to relinquish any right provided it under this Agreement or to undertake any obligation not otherwise required of it under this Agreement.

19. APPROVALS

Where any Party's approval is required under this Agreement, the Party whose approval is required must not unreasonably withhold, condition or delay the rendering of such approval; unless otherwise expressly provided in this Agreement as to such approval.

20. NO DISCRIMINATION

No covenant, agreement, lease, rental contract, conveyance, or other instrument shall be effected or executed by Developer, or any of its successors or assigns, whereby the Project, or any portion of the Project, is restricted upon the basis of race, color, religious creed, ancestry, national origin, age, sex, marital status, disability, genetic status, presence of children, family responsibilities, source of income, or sexual orientation in the sale, lease, rental, use, or occupancy thereof, or otherwise prohibited by any existing or hereafter adopted local, State or federal law. Developer will comply with federal, state, and local laws prohibiting discrimination upon the basis of race, color, religious creed, ancestry, national origin, sex, marital status, age, disability, presence of children, family responsibilities, source of income, sexual orientation, or genetic status in the development and operation of the Project.

21. FORCE MAJEURE

If Developer is actually delayed in the performance of its obligations under this Agreement or any document executed pursuant to this Agreement as a direct result of unforeseeable causes beyond its control and without its fault or negligence, including, without limitation, acts of God or of the public enemy, riot, insurrection, war, terrorism, casualty, flood, epidemic, quarantine restrictions, freight embargoes, unusually severe weather, shortage of materials or labor, County Delays (collectively, "Force Majeure"), the time for performance of said obligations shall be extended for the period of the enforced delay; provided, however, that the Developer shall, within ten (10) business days after the beginning of such enforced delay, have first notified the County in writing of the causes thereof and shall be proceeding diligently during such period in good faith to perform all of its other obligations hereunder, and to overcome to the extent commercially reasonable, the cause of such Force Majeure. Increase in cost shall not be an event of Force Majeure.

22. NO PARTNERSHIP OR JOINT VENTURE

It is mutually understood and agreed that nothing contained in this Agreement is intended or shall be construed in any manner or under any circumstances whatsoever as creating or establishing the relationship of co-partners or creating or establishing the relationship of a joint venture by or between the County and Developer or as constituting Developer as the agent or representative of the County for any purpose or in any manner under this Agreement, it being understood that Developer is a separate entity.

23. NOTICE

A notice or communication under this Agreement by or between the County and Developer shall be sufficiently given or delivered if dispatched by either (a) certified mail, postage prepaid, return receipt requested, (b) nationally recognized overnight delivery service, or (c) hand-delivery (if receipt is evidenced by a signature of the addressee or authorized agent), and addressed:

- (a) In the case of a notice or communication to Developer, as follows:

c/o 801 Wayne Avenue
Suite 300
Silver Spring, MD 20910
Attention: Robert P. Hillerson

with a copy not constituting notice to:

Linowes and Blocher LLP
7200 Wisconsin Avenue, Suite 800
Bethesda, Maryland 20814
Attention: C. Robert Dalrymple, Esq. And Richard M. Zeidman, Esq.

(b) in the case of a notice or communication to the County, as follows:

Montgomery County Government
Office of the County Executive
101 Monroe Street, Second Floor
Rockville, Maryland 20850
Attention: Chief Administrative Officer

with copies not constituting notice to:

Montgomery County Government
Department of Transportation
101 Monroe Street, Tenth Floor
Rockville, Maryland 20850
Attention: Arthur Holmes, Jr., Director

and to:

Montgomery County Department of Transportation
Division of Parking Management
101 Orchard Ridge Road, Second Floor
Gaithersburg, Maryland 20878
Attention: Stephen C. Nash, Chief

and:

Montgomery County Government
Office of the County Attorney
101 Monroe Street, Third Floor
Rockville, Maryland 20850
Attention: John Fisher, Associate County Attorney

Notices may be addressed to such other address in respect to any of the foregoing Parties as that Party may, from time to time, designate in writing, dispatched as provided in this Section.

All notices and approvals required in this Agreement must be in writing to bind the submitting or receiving Party.

24. EXECUTED IN MARYLAND

This Agreement has been executed by the County and Developer in the State of Maryland.

25. CONFLICTS OF INTEREST

No member, official, representative, or employee of the County or Developer shall take any action regarding this Agreement, the Project or any agreements relating to either which conflicts with, or is prohibited by, any ethical requirements to which they are subject.

26. TITLES OF PARAGRAPHS AND SUBPARAGRAPHS

Any titles of the several parts, sections, subsections, paragraphs and subparagraphs of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

27. COUNTERPARTS

This Agreement may be executed in counterparts, each of which shall be deemed to be an original, and all such counterparts shall constitute one and the same instrument.

28. ANCILLARY DOCUMENTS AND FURTHER ASSURANCES

The County and Developer shall execute such further assurances as are necessary to effectuate the intentions of this Agreement or to offer further assurances with respect to such matters as the Parties may reasonably require provided that the terms of the Agreement are not thereby changed.

29. AMENDMENTS

Any amendment to this Agreement must be executed in writing and, except as otherwise expressly provided in this Agreement, with the same formality as this Agreement.

30. PERFORMANCE ON SATURDAY, SUNDAY, OR HOLIDAY

Whenever the provisions of this Agreement call for the performance of any act on or by a date that is not a County business day, including the expiration date of any cure periods provided herein, then such payment or such performance shall be required on or by the immediately succeeding County business day.

31. STATE LAW

This Agreement shall be interpreted in accordance with the laws of the State of Maryland.

32. INVALIDITY OF PARTICULAR PROVISIONS

If any term, covenant, condition, or provision of this Agreement, or its application to any person or circumstance shall, at any time or to any extent, be held to be invalid or unenforceable, then the balance of the Agreement shall (except to the extent such result materially changes the obligations or expectations of the Parties under the terms of this Agreement) not be affected thereby, and under such circumstances each term, covenant, condition, and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

33. COMPLIANCE WITH LAWS

The County and Developer shall, at all times, be subject to all applicable law pertinent hereto.

34. EFFECTIVE DATE

The Effective Date of this Agreement shall be the date of the last signature upon which this Agreement has been approved and executed by the County and Developer.

35. NO RECORDATION

This Agreement shall not be recorded without the prior written consent of the County and Developer.

36. SURVIVAL

(a) The terms and provisions of this Agreement shall survive the execution and delivery of any deed to the County Land or any deed to the Public Parking Garage Unit.

(b) Upon request by Developer, the County shall, subject to the provisions of Article 15 above, do, execute, acknowledge and deliver, or cause to be done, executed, acknowledged and delivered, all further acts and deeds, assignments, transfers, conveyances, powers of attorney and assurances as may be reasonably required to better effectuate the transaction contemplated by this Agreement, provided the same do not require the County to relinquish any rights under this Agreement or incur any costs not otherwise required by this Agreement. Upon request by the County, Developer shall do, execute, acknowledge and deliver, or cause to be done, executed, acknowledged and delivered, all further acts and deeds, assignments, transfers, conveyances, powers of attorney and assurances as may be reasonably required to better effectuate the transaction contemplated by this Agreement, provided the same do not require the Developer to relinquish any rights under this Agreement or incur any costs not otherwise required by this Agreement.

(c) The indemnity obligations of Developer set forth in Section 11 and Developer's obligations under the Right of Entry Agreement shall survive the expiration or earlier termination of this Agreement.

37. ASSIGNMENTS

Developer may not assign its interest in this Agreement without the consent of the County which consent shall not be unreasonably withheld conditioned or delayed, provided that consideration of assignee's development, design and construction experience and financial condition and key personnel and similar factors effecting the assignees ability to perform under this Agreement shall not be considered unreasonable. The foregoing notwithstanding, Developer shall have the right without obtaining the County's approval to make assignments of this Agreement to any Affiliate, parent or wholly owned subsidiary entities or to its bona fide lender as security, in which event, in order for such assignee to realize the benefits of this Agreement the assignee must assume and fulfill all of Developer's obligations hereunder.

38. ENTIRE UNDERSTANDING

This Agreement expresses the entire understanding by and between the County and Developer with respect to the matters set forth herein and no Party shall be bound by any terms, covenants, or agreements not herein contained.

39. BINDING EFFECT

All of the covenants, conditions and obligations contained in this Agreement shall be binding upon, and inure to the benefit of the respective successors and assigns of the County and Developer.

[SIGNATURE PAGES FOLLOW]

IN WITNESS WHEREOF, the County and Developer have caused this Agreement to be duly executed as of the date first above written.

MICHAEL, L.L.C., a Maryland limited liability company

By: Robert P. Hillerson
Robert P. Hillerson
Title: Managing Member

Date: 10/06/08

MONTGOMERY COUNTY, MARYLAND

By: Diane R. Schwartz-Jones
Diane Schwartz-Jones
Assistant Chief Administrative Officer

Date: 10/24/08

RECOMMENDED BY:

By: Arthur Holmes, Jr.
Arthur Holmes, Jr.
Director, Department of
Transportation

Date: 13 OCT '08

APPROVED AS TO FORM AND LEGALITY:

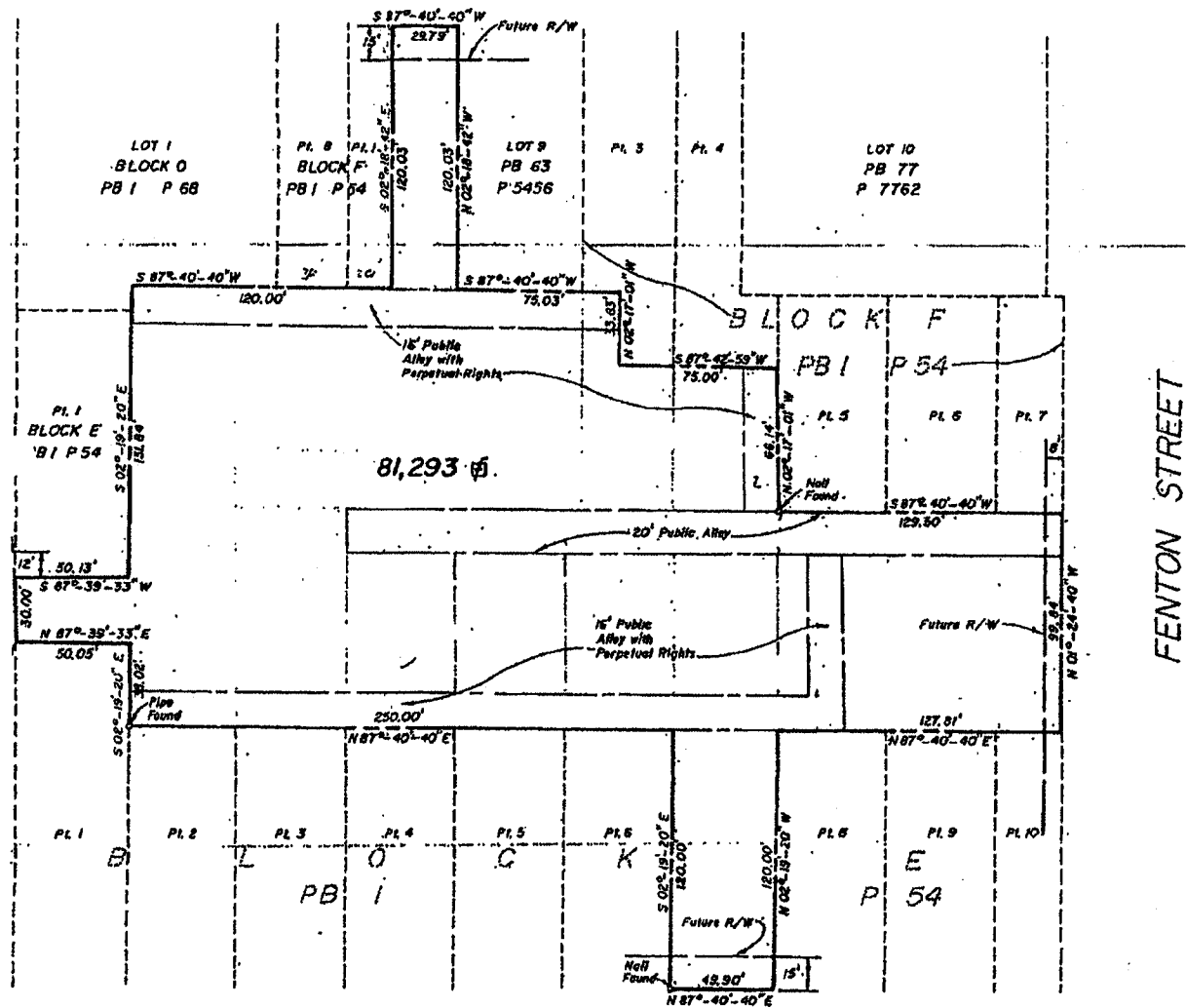
OFFICE OF THE COUNTY ATTORNEY

By: John Fisher
John Fisher
Associate County Attorney

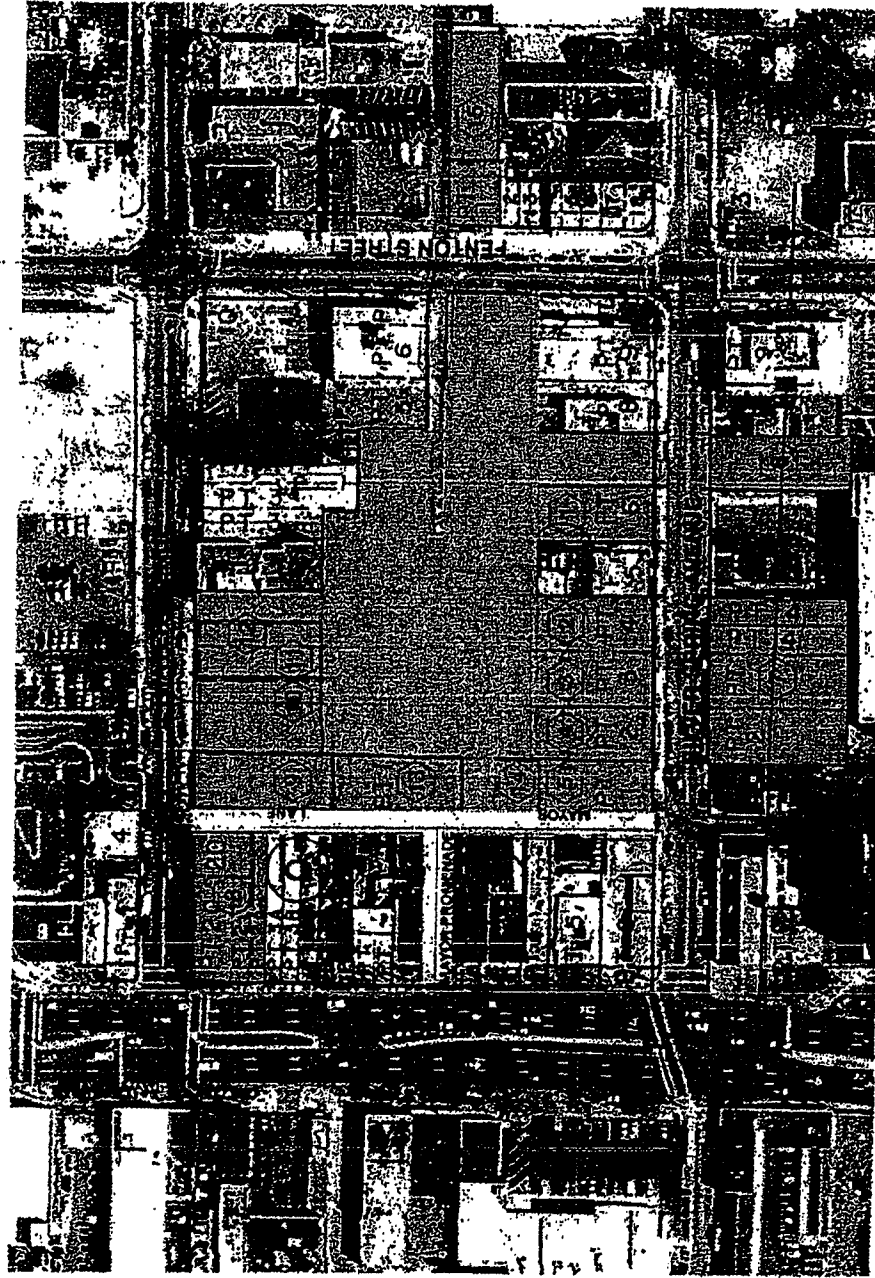
Date: 10/19/08

N

SILVER SPRING AVENUE



Prepared By Montgomery County, Md
Department of Transportation



Public Parking Lot 3
Proposer Properties ¹

1. 908 Silver Spring Avenue
2. 913 Silver Spring Avenue
3. 915 Silver Spring Avenue
4. 917 Silver Spring Avenue
5. 919 Silver Spring Avenue
6. 906 Silver Spring Avenue
7. 914 Silver Spring Avenue
8. 8241 Georgia Avenue
9. 854 Thayer Avenue
10. 916 Thayer Avenue
11. 914 Thayer Avenue
12. 916A Thayer Avenue
13. 8225 Mayor Lane
14. 8211 Mayor Lane (aka 8225 Georgia Ave.) ²
15. 8215 Fenton Street

Exhibit A-2
and Exhibit A-3

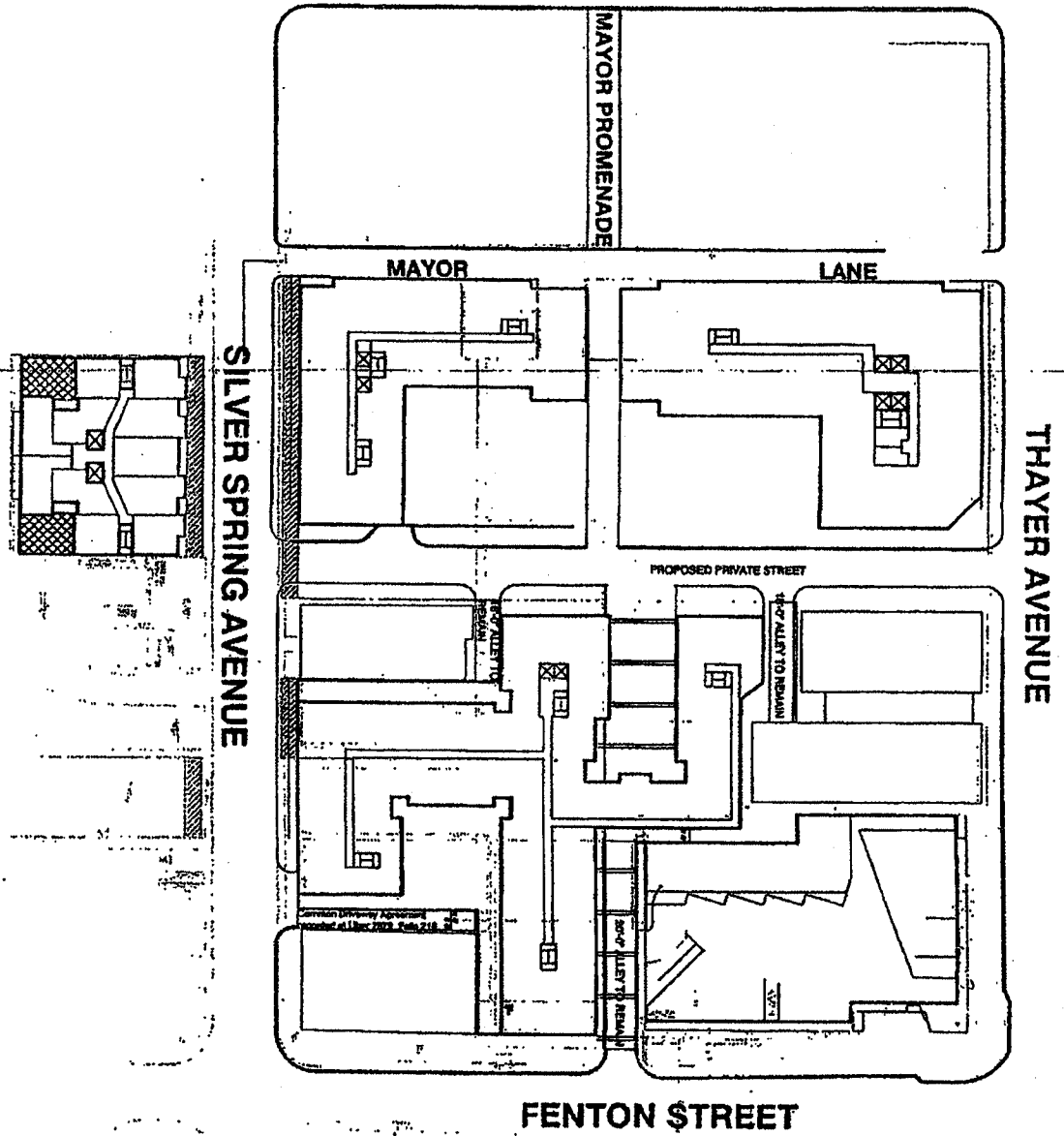
Notes:
1. Properties owned by Michael, LLC. and/or owned by Robert Paul Hillerson.
2. Property shown in RFP exhibit as owned by the Silver Spring Parking Lot District, but actually owned by Proposer.

1 PROPERTY OWNERSHIP
SCALE: 1/8"

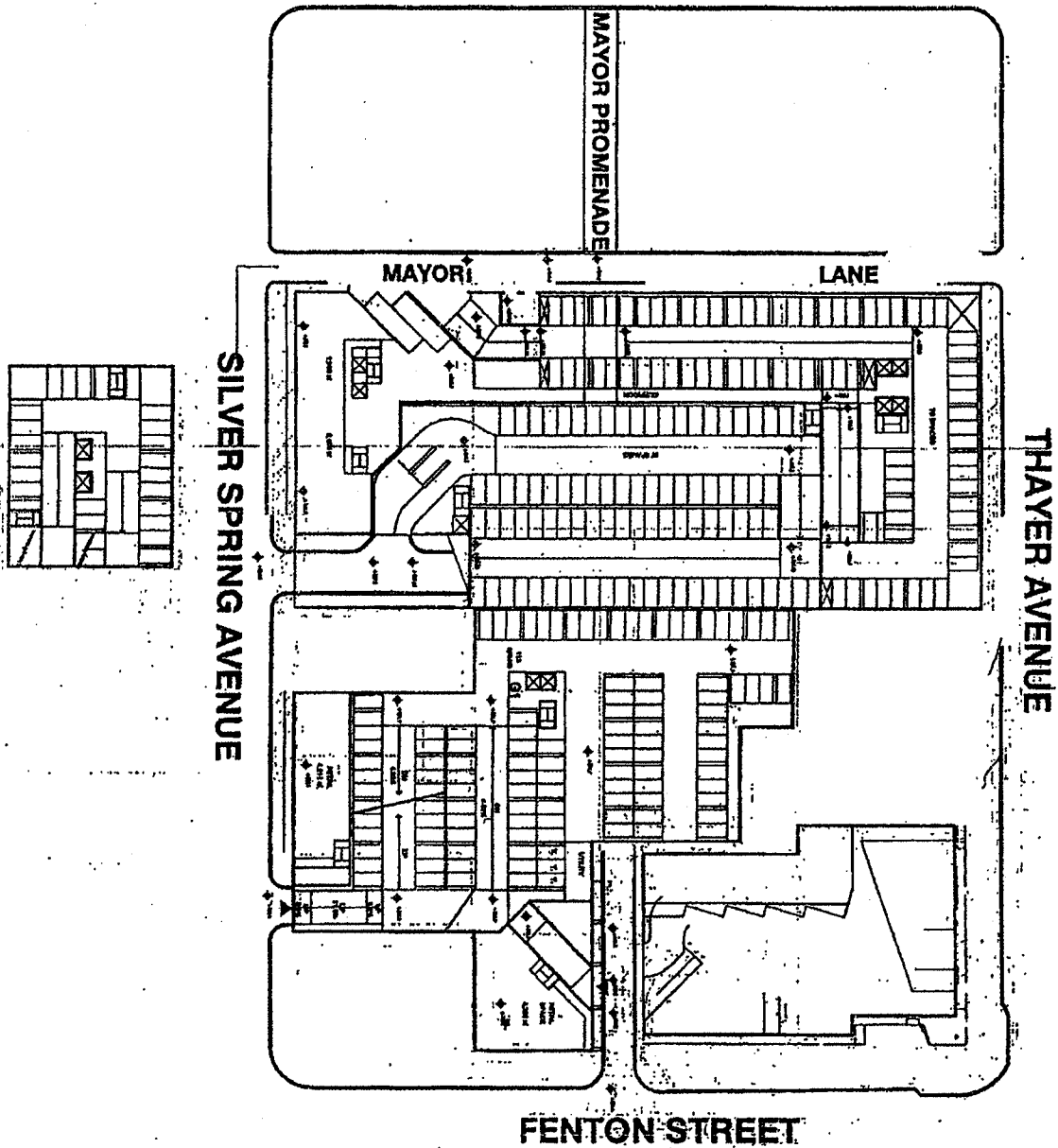
STUDIO PLAZA - LOT #3

MICHAEL, LLC. SILVER SPRING, MD

GEORGIA AVE.

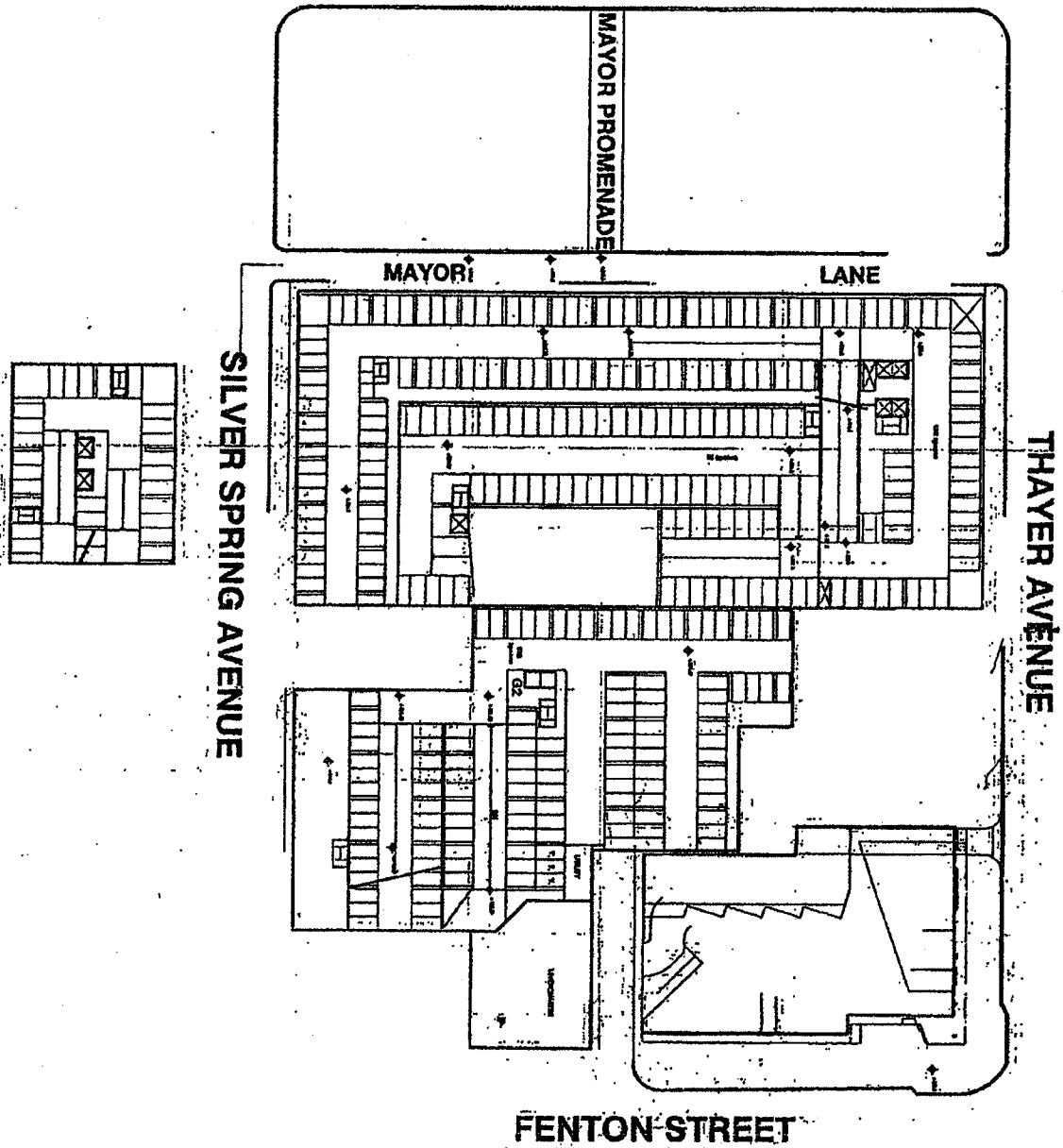


GEORGIA AVE.



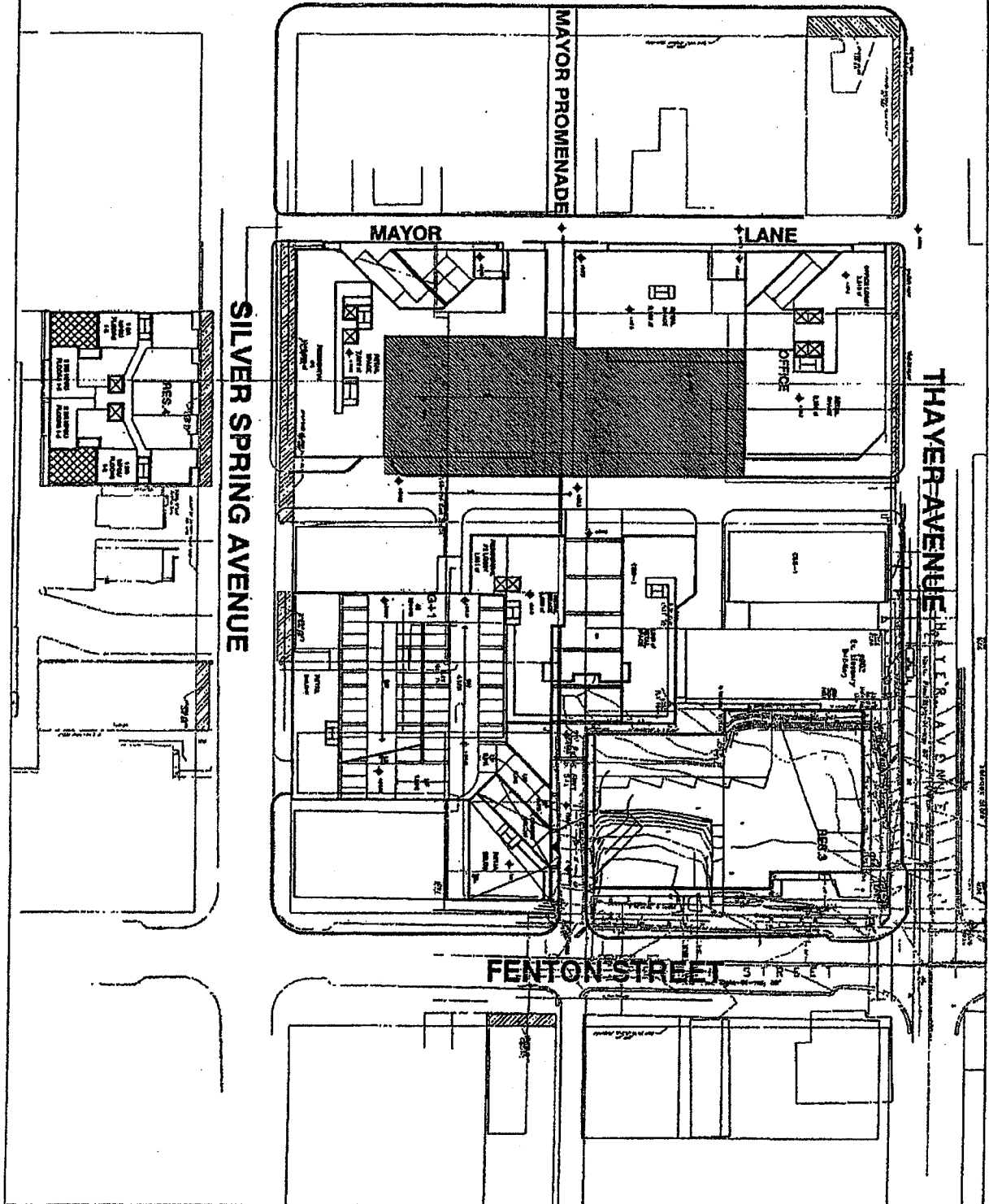
Proposed 152-Space Public Garage

GEORGIA AVE.



Proposed 152-Space Public Garage

GEORGIA AVE.



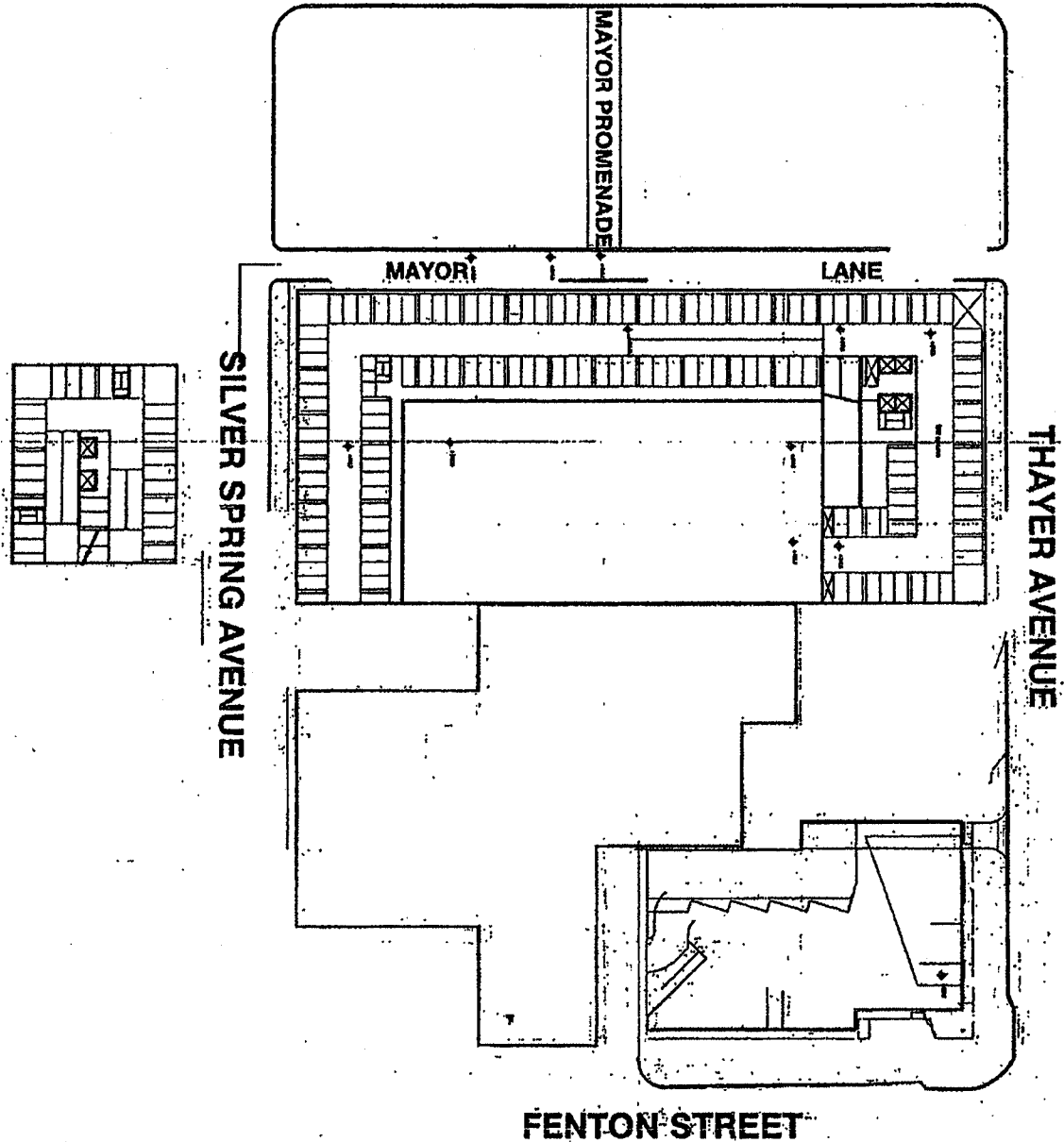
1.04

STUDIO PLAZA
SILVER SPRING, MARYLAND

G+1 THAYER AVE. FLOOR PLAN
MICHAEL, LLC

SK&I
Project:
Job Name:
Job Number:
Scale:
Date:

GEORGIA AVE.



1.01

STUDIO PLAZA
SILVER SPRING, MARYLAND

G3 FLOOR PLAN
MICHAEL, LLC

Project #12
Job Name
PCB-02-14
Scale
1/8" = 1'-0"
2004-08-18

SK&I

Appendix D: Correspondence regarding the Kalivas Property

**LINOWES
AND BLOCHER LLP**
ATTORNEYS AT LAW

RECEIVED

APR 08 2009

DEVELOPMENT REVIEW

April 7, 2009

C. Robert Dalrymple
301.961.5208
bdalrymple@linowes-law.com
Heather Dlhopsky
301.961.5270
hdlhopsky@linowes-law.com

VIA EMAIL AND HAND DELIVERY

Mr. Elza Hisel-McCoy
M-NCPPC, Development Review Division
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Studio Plaza, Silver Spring (the "Project") – Project Plan Application No. 920070010
(the "Application") – Options for Ingress/Egress/Loading Access to 902 Thayer Avenue
(the "Kalivas Property")

Dear Mr. Hisel-McCoy:

On behalf of Michael, L.L.C. (the "Applicant"), and in response to comments received at a number of meetings with Staff and the Kalivas family, we hereby submit the enclosed plans and materials which reflect various options for accommodating loading to the Kalivas Property. The Applicant's post-Development Review Committee (DRC) submission, dated March 16, 2009, explains the current loading configuration of the Kalivas Property and details the efforts made by the Applicant to accommodate the owners of the Kalivas Property. As previously indicated in the post-DRC submission, the Applicant has spent considerable time and effort to work with the Kalivas family (also utilizing involvement of Planning Staff). Let it be stated clearly that the Applicant very much wants to ensure that the commercial use of the Kalivas Property remains successful and viable with the proposed public/private redevelopment of the Project known as Studio Plaza, and the Applicant has been acting and will continue to act, utilizing commercially reasonable efforts, to accommodate the Kalivas Property in order to perpetuate successful operations. The purpose of this current submission is to present the Applicant's best and final offer for accommodating loading access to the Kalivas Property in advance of the May 7th Planning Board hearing date on the Project Plan Application.

During the course of the past year, the Applicant has designed and presented a number of options for loading to the Kalivas Property. [As you know, but we do not intend to repeat beyond this mention, the Applicant had every reason to believe that an agreement relative to future loading operations for the Kalivas Property had been reached between the Applicant and an attorney representing himself to be acting for the owners of the Kalivas Property prior to the Applicant's submission of the Abandonment Petition – the "Kalivas/Cooney Agreement"]. In evaluating options that will provide the Kalivas Property with adequate and lawful means of loading, we are mindful and are attempting to address the inadequacies that currently exist. The delivery and

L&B 1151061v1/02015.0029

Mr. Elza Hisel-McCoy

April 7, 2009

Page 2

trash trucks currently serving the Kalivas Property cannot physically drive within the existing 16-foot-wide alley south of the Kalivas Property and the existing 20-foot-wide public alley south of The Adele property, as demonstrated by the AutoTURN studies prepared by VIKa, Inc. and previously submitted to you as part of the Applicant's post-DRC submission. Furthermore, the loading door to the Kalivas Property is not on the alley system. In order to provide loading operations for the existing tenant of the Kalivas Property, service trucks are using Public Parking Lot #3 for both ingress and egress and to provide loading operations to the rear of the improvements on the Kalivas Property (which use of the County parking lot is not permitted under County law).

As a result of further refinement of these options by the Applicant's design team and discussions with Planning Staff, the Applicant has designed and hereby presents two final options for ingress/egress and loading access to the Kalivas Property. The first option (Attachment 1) is essentially that which was the subject of the Kalivas/Cooney Agreement. Under this option, the Applicant would relocate approximately 400 square feet of space in the Kalivas building from the west side of the Kalivas Property to the east side of the Kalivas Property. The resulting area on the west side would be paved, and could be used for loading, parking, or trash at the Kalivas' discretion. This option would allow loading access from the west side of the Kalivas Property via the 16-foot-wide public alley remaining to the west of the Kalivas Property and the proposed 25-foot turning radius to be provided at the western end of this public alley at Street 'A' (which will permit a WB-40 tractor-trailer to lawfully access the Kalivas Property by use of Studio Plaza's Street 'A' and the 16-foot-wide public alley, with access to both Thayer Avenue and Silver Spring Avenue, as demonstrated by the AutoTURN Study prepared by VIKa, Inc. and previously submitted to you as part of the Applicant's post-DRC submission). Tenants of the Kalivas building would have access to a community trash and recycling center within the Studio Plaza Project in Building #3 (similar to the community trash and recycling centers on the Applicant's property to serve the Mayor Lane businesses). A pedestrian connection has also been added from Studio Plaza's Street 'A' to the Kalivas building consisting of a 5-foot-wide sidewalk located on the north side of the 16-foot-wide public alley, adjacent to the existing GranDesign and Siman buildings.

The second option (Attachment 2) would require no renovations to the existing building on the Kalivas Property. This option would allow loading access from the west side of the Kalivas Property via the existing 16-foot-wide public alley connecting to Studio Plaza's Street 'A' and 25-foot turning radius at the western end of this public alley at Studio Plaza's Street 'A'. Under this option, the Applicant would create an approximately 7-foot-wide secured, exterior corridor for handtruck access from the eastern end of the 16-foot-wide public alley to the existing Kalivas Property service door located at the rear of the building on the Kalivas Property. This serviceway would lie partially on the Kalivas Property and partially on the Applicant's property, requiring a shared access agreement between the parties. The Applicant would provide two

Mr. Elza Hisel-McCoy

April 7, 2009

Page 3

parking spaces at the eastern end of the public alley on the Applicant's property for tenants of the Kalivas building, and tenants would also have access to a community trash and recycling center within the Studio Plaza project in Building #3. A pedestrian connection from Studio Plaza's Street 'A' to the Kalivas building would be provided via a 5-foot-wide sidewalk located on the north side of the 16-foot-wide public alley, adjacent to the existing GranDesign and Siman buildings.

It is our understanding that you intend to evaluate these options and meet directly with the Kalivas family and their attorney, David Brown. By copy of this letter to David Brown, we again offer to meet with him and his clients either separately or with the Planning Board Staff to reach an amicable agreement. Thank you for your consideration of the Application and these revised materials, and please do not hesitate to contact us if additional information is necessary prior to the Planning Board hearing scheduled for May 7, 2009.

Sincerely,

LINOWES AND BLOCHER LLP

C. Robert Dalrymple, HB

C. Robert Dalrymple

Heather Dlhopsky

Heather Dlhopsky

Enclosures

cc: David W. Brown, Esq. (*Via Overnight Mail*)
Mr. Robert Hillerson (*Via Email and First-Class Mail*)
Mr. Brian Dayhoff (*Via First-Class Mail*)
Mr. Chris Kabatt (*Via First-Class Mail*)
Mr. William Landfair (*Via First-Class Mail*)
Ms. Trini Rodriguez (*Via First-Class Mail*)

**KALIVAS PROPOSAL FOR ACCOMMODATION OF BUILDING #3
WITH 902/908 THAYER AVENUE BUILDING**

**(Recommended conditions for inclusion in Planning Board approval of
Project Plan)**

1. Open up and finish, inside and outside, a new loading entrance to the 902/908 Thayer Avenue Building ("Building") on the west side of the Building, adjacent to the public alley where the trucks will unload. .
2. Replace the existing loading door at the rear of the Building with a finished entryway designed for pedestrian use, such as the doors at the front of the Building.
3. At the time of construction of Building 3, finish the area between Building 3 and the Building as a pedestrian walkway in a way that unifies the Building with Studio Plaza.
4. Confirm the practicality of the public alley as an offloading area, including assurances that (a) temporary blockage of parking on the Siman property or of the entryway to Gran Design will not be a problem, and that (b) the narrow clearances (4' on either side) will not be a problem for delivery trucks or walkway pedestrians.
5. Due to the loss of access to 3 parking spaces on the east side of the Building, provide 3 parking spaces dedicated to the Building in Building 3 parking, upper level, with direct access to the rear of the Building.
6. All work to be coordinated with Building 3 construction so that there is no interruption in existing off-street loading capability prior to completion of replacement capability.
7. Studio Plaza will assume responsibility for securing the permission of the Kalivas' tenant(s) to the work, including financial responsibility to Kalivas for any reduction in rent to Kalivas made necessary due to disruption of tenant(s)' operations.
8. Studio Plaza will assume financial responsibility for all costs associated with implementing changes to Building required as a condition of project approval, including, but not limited to, fees of attorneys, architects, permitting authorities and the like; materials; demolition; and installation.

DAVID W. BROWN

LAW OFFICES OF
KNOFF & BROWN
401 EAST JEFFERSON STREET
SUITE 208
ROCKVILLE, MARYLAND 20850
(301) 545-6100

FAX: (301) 545-6103
E-MAIL BROWN@KNOFF-BROWN.COM
WRITER'S DIRECT DIAL
(301) 545-6105

May 12, 2009

Elza Hisel-McCoy, Assoc. AIA, LEED-AP
Senior Planner
Development Review Division
MNCPPC-MC
8787 Georgia Avenue
Silver Spring, MD 20910

Re: Project Plan # 920070010, Studio Plaza

Dear Mr. Hisel-McCoy:

This letter will serve to place on the record of the above-referenced proceeding the efforts made by my clients, the Kalivases, to resolve with the Applicant, Michael, LLC, issues of ingress/egress to the Kalivas Property, 902/08 Thayer Avenue, adjacent to the Studio Plaza Project that will arise if the Project is to go forward.

Preliminarily, I wish to note that before I was retained in this matter in March 2009, the Kalivases had been briefly represented by another attorney. According to my clients, that attorney sought to "cut a deal" with the Applicant under terms and conditions that my clients had not approved, and they disavowed his offer and ceased further reliance on his representation. Further, the offer he submitted on behalf of the Kalivases was modified by Michael, LLC, resulting in a counteroffer that was never acted upon. I have accordingly taken the position with the Applicant's counsel that there is no legally enforceable agreement in place between our respective clients regarding the matters discussed below.

I met with the Applicant and his counsel, with you in attendance, on April 28, 2009, and provided the Applicant with a list of eight conditions that the Kalivases believe are minimally necessary to be imposed in the event the Project were approved, all in furtherance of ameliorating the impact of the Project on the continued efficacious operation of the businesses that lease the Kalivases' Property. Exhibit 1. This was discussed at some length, resulting in a response from the Applicant that in part accepted, rejected and modified the Kalivas proposal. Exhibit 2. I have discussed the Applicant's response at length with my clients. We reviewed the particulars in detail, with special attention to the proposals made in meetings with the Kalivases prior to my representation of them, inclusive of drawings of proposed ingress/egress solutions attached to an April 7, 2009 letter to you from the Applicant's legal counsel. As a result of this discussion, I am reporting that the Kalivases do not fully agree to the modifications proposed by the Applicant.

I will not burden you with the details of what is or is not acceptable, and why that is so, because resolving those differences is beside the point in the current posture of the matter. The Applicant has made clear that its willingness to accommodate the Kalivases as it has proposed is contingent upon the withdrawal by the Kalivases of any and all objections to the Project, as well as surrendering their property interest in the use of the 16' public alley between their Property and the platted 20' alley into Parking Lot #3 from Fenton Street. By separate letter, I have explained what the Kalivases' property interest in that alley is, and that they do not intend to surrender that interest in order to facilitate the Project, to which they remain opposed. Under these circumstances, the Applicant has advised that its only proffered condition relative to the Kalivas ingress/egress issue is the following:

"The applicant will provide for the benefit of the Kalivas property adequate and legal means of access and loading utilizing the alley to remain on the west side of the Kalivas property, with further details to be provided at site plan."

A copy of the email conveying this proffer is attached as Exhibit 3.

The Kalivases prepared a proposal intended to avoid burdening the Applicant either financially or practically, one that assumes completion of the Project as intended by the Applicant. Accordingly, while it is clear from Exhibit 3 that the Applicant obviously feels otherwise, the Kalivases do not feel it is necessary for there to be any "quid pro quo" action by them in exchange for the requested commitments. Rather, leaving some room for discussion to fine-tune the details, they regard their suggestions as nothing more than what should be minimally expected in the way of a proffer from a developer who is undertaking to redevelop large portions of a commercial city block with a project from which their property has been excluded. Their suggestions are all the more reasonable considering that what is before the Board is a project that reflects no serious effort to create any positive inter-business integration or synergistic interaction with the excluded businesses in the block.

If you would nevertheless like a more detailed reaction to the gap between the specific Kalivas and Michael proposals, I will be happy to oblige, either in advance of the hearing before the Board on May 28th, or during the hearing itself.

Sincerely yours,



David W. Brown

/enclosures: Exhibits 1-3

**KALIVAS PROPOSAL FOR ACCOMMODATION OF BUILDING #3
WITH 902/908 THAYER AVENUE BUILDING**

**(Recommended conditions for inclusion in Planning Board approval of
Project Plan)**

1. Open up and finish, inside and outside, a new loading entrance to the 902/908 Thayer Avenue Building ("Building") on the west side of the Building, adjacent to the public alley where the trucks will unload.
2. Replace the existing loading door at the rear of the Building with a finished entryway designed for pedestrian use, such as the doors at the front of the Building.
3. At the time of construction of Building 3, finish the area between Building 3 and the Building as a pedestrian walkway in a way that unifies the Building with Studio Plaza.
4. Confirm the practicality of the public alley as an offloading area, including assurances that (a) temporary blockage of parking on the Siman property or of the entryway to Gran Design will not be a problem, and that (b) the narrow clearances (4' on either side) will not be a problem for delivery trucks or walkway pedestrians.
5. Due to the loss of access to 3 parking spaces on the east side of the Building, provide 3 parking spaces dedicated to the Building in Building 3 parking, upper level, with direct access to the rear of the Building.
6. All work to be coordinated with Building 3 construction so that there is no interruption in existing off-street loading capability prior to completion of replacement capability.
7. Studio Plaza will assume responsibility for securing the permission of the Kalivas' tenant(s) to the work, including financial responsibility to Kalivas for any reduction in rent to Kalivas made necessary due to disruption of tenant(s)' operations.
8. Studio Plaza will assume financial responsibility for all costs associated with implementing changes to Building required as a condition of project approval, including, but not limited to, fees of attorneys, architects, permitting authorities and the like; materials; demolition; and installation.

**KALIVAS PROPOSAL FOR ACCOMMODATION OF BUILDING #3
WITH 902/908 THAYER AVENUE BUILDING**

(Recommended conditions for inclusion in Planning Board approval of Project Plan)

1. Applicant to make minor modifications (interior and exterior) to the Kalivas Property in order to create a new loading entrance to the 902/908 Thayer Avenue Building ("Building") on the west side of the Kalivas Property, adjacent to the public alley where the trucks will unload.
2. To create pedestrian access from the Studio Plaza redevelopment, Applicant will construct a sidewalk along the alley to the west of the Kalivas Property and add a door (similar to that existing on the front of the building) at the end of said alley similar to Applicant's proposed Option-02 in the April 7, 2009 letter from Linowes and Blocher to M-NCPPC relating to the Kalivas Property.
3. Confirm the practicality of the public alley as an offloading area, including assurances that (a) temporary blockage of parking on the Siman property or of the entryway to Gran Design will not be a problem. See Applicants proposed Option-02 in the April 7, 2009 letter from Linowes and Blocher to M-NCPPC relating to the Kalivas Property.
4. Applicant will provide, at no cost to the Owners of the Kalivas Property 2 parking spaces dedicated to the Kalivas Property on the Studio Plaza property, south of the public alley at the West of the Kalivas Property and as shown in Option-02 in the April 7, 2009 letter from Linowes and Blocher to M-NCPPC relating to the Kalivas Property.
5. The Applicant shall coordinate construction in such manner as to provide the Kalivas Property with adequate and continuous means of loading to the Building on the Kalivas Property throughout construction of the Project.
6. The Owners of the Kalivas Property will not bear any costs associated with implementing changes described herein and incorporated as a condition of Project Plan approval, including costs and fees attributable to Applicant's designer, demolition and construction and occupancy of the Kalivas Property consistent with the other terms of Project Plan approval. Owners of the Kalivas Property shall be responsible for costs associated with consultants retained by the Owners of the Property).

X-Spam-Flag: NO

X-Envelope-From: bdalrymple@linowes-law.com

Subject: Studio Plaza - conditions of approval

Date: Wed, 29 Apr 2009 17:38:13 -0400

X-MS-Has-Attach: yes

X-MS-TNEF-Correlator:

Thread-Topic: conditions of approval

Thread-Index: Acnl+EcmeaEvbWi3TcCM0PEXVmFu8QAGWWVRw

From: "Dalrymple, C Robert - CRD" <bdalrymple@linowes-law.com>

To: "David W. Brown" <brown@knopf-brown.com>, <Elza.Hisel-McCoy@mncppc-mc.org>

Cc: "Rose Krasnow \E-mail\" <rose.krasnow@mncppc-mc.org>,
"Bob Hillerson \E-mail\" <RHillerson@aol.com>

X-MMR: 0

X-Antivirus: Scanned by F-Prot Antivirus (<http://www.f-prot.com>)

Dave/Elza: as we were requested to do during our meeting yesterday (April 28), we have reviewed and responded (attached) to the conditions of approval proposed by Mr. Brown on behalf of the Kalivas family that would be acceptable to the Applicant as a substantial compromise to facilitate an approval of the project plan without objections from the Kalivases. In the event that there is continued opposition to our plan, and thus no quid pro quo giving reason for the Applicant to commit substantial resources to the benefit of those opposing the plan (especially when the current loading operations for the Kalivas property, as determined by the recent MCDOT letter, are not in accordance with the recorded easements and are unlawful), this is not to be considered to be a proffer of conditions by the Applicant; rather, the condition of approval that is proffered by the Applicant is as follows: The Applicant will provide for the benefit of the Kalivas property adequate and legal means of access and loading utilizing the alley to remain on the west side of the Kalivas property, with further details to be provided at the time of site plan approval.

As for the changes to the conditions proffered by Mr. Brown on behalf of the Kalivases, we have deleted Mr. Brown's proposed condition 3 as it has now been incorporated into condition 2. We have also deleted condition 7 as the Applicant is unable to determine the responsibilities relating to tenant permission for the improvements that are sought to be transferred to the applicant by reason of having been denied on all requests to review the existing lease with the tenant. As such, it is not possible to agree to an open-ended assumption of unknown responsibilities. The other changes are consistent with the comments we made during our April 28 meeting.

Please let me know if you have any questions. Thanks. Bob

C. Robert Dalrymple
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<<Kalivas Proposal.DOC>>



Kalivas Proposal.DOC

Appendix E: Correspondence regarding 8204 Fenton Street/Gerecht Property

RECEIVED

LYNOTT, LYNOTT & PARSONS, P. A. DEC 16 2008

ATTORNEYS AT LAW

11 NORTH WASHINGTON STREET

SUITE 220

ROCKVILLE, MARYLAND 20850-4208

JOSEPH A. LYNOTT
JOSEPH A. LYNOTT, III
JAMES L. PARSONS, JR.

DEVELOPMENT REVIEW

(301) 424-5100 (phone)
(301) 279-0346 (fax)
writer's e-mail:
jlynott@LLPlawfirm.com

December 15, 2008

Mr. Elza Hisel-McCoy
Development Review Division
Maryland National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

**RE: 8204 Fenton Street, Silver Spring and
"Studio Plaza" Project**

Dear Mr. Hisel-McCoy:

This office represents 8204 Associates Limited Partnership and CD Publications in connection with the impact of the above-referenced project on its property at 8204 Fenton Street. Our client's property is also known as parts of Lots 9 and 10 in Block E in the subdivision known as R. Holt Easley's subdivision.

As you may be aware, our client's property is benefited by several easements which burden two parcels adjoining our client's land, namely: a common driveway easement established by instrument recorded in Liber 2879 at Folio 218; an easement and maintenance agreement with Montgomery County for a trash container alcove recorded in Liber 9658 at Folio 94; and an easement and maintenance agreement with Montgomery County for a "pedestrian bridge" connecting the front entrance of our client's building to the Montgomery County parking lot on the remainder of Lots 9 and 10 recorded in Liber 9322 at Folio 513. Copies of the above referenced easement agreements are enclosed.

It is our understanding the two adjoining properties burdened by the above easements have been incorporated into the development plans for the Studio Plaza project.

My client is concerned that the proposed project will adversely impact our client's land and impair the rights benefiting our client's property contemplated under the above easements. Our client is particularly concerned that the project will block the main entrance to its building and will deprive our client of its rights to ingress and egress and access to public parking contemplated under the easement agreement with Montgomery County recorded in Liber 9322 at Folio 533.

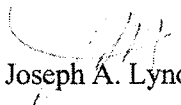
LYNOTT, LYNOTT & PARSONS, P. A.

Mr. Elza Hisel-McCoy
Development Review Division
Maryland National Capital Park and Planning Commission
December 15, 2008
Page 2

My client and I would like to meet with you to discuss the above project in more detail at your early convenience. Please give me a call upon your receipt of this letter so that we may arrange to meet to discuss this matter further.

Thank you for your cooperation.

Very truly yours,



Joseph A. Lynott, III

JAL,III/tb

cc: Mike Gerecht
CD Publications



CD Publications

8204 Fenton Street, Silver Spring, MD 20910-4571 Phone 301-588-6380 Fax 301-588-6385

E-mail: info@cdpublications.com Website: www.cdpublications.com

Elza Misel-McCoy
Development Review Division
Maryland National Capitol Park & Planning Commission
8787 Georgia Ave.
Silver Spring, MD 20910

RECEIVED

DEC 16 2008

RE: Studio Plaza Project Application

DEVELOPMENT REVIEW

December 12, 2008

Dear Mr Hisel-McCoy:

I have concerns regarding the Studio Plaza Project for Lot 3. We've owned 8204 Fenton Street for 20 years, leasing to various, quite stable, minority small businesses and our 50-year-old, family small business, CD Publications. We've been in Silver Spring 30 years and have a national reputation. One of our publications actually covers community development!

The building was built in 1962 on its property line with the County. Its main entrance is on the 2nd floor facing the Lot and level with it due to an elevation increase. The County requested we formalize the easement with them after we purchased the property, and at that time we added language permitting us to grade a portion of the County property that sloped steeply towards our building, causing maintenance issues. The attached easement indicates the County shall not interfere with our reasonable use and enjoyment of the easement and right of way, so long as we maintain the bridge, which we have.

We also obtained a County easement for a dumpster enclosure shared with the building next door, and we have an agreement with that property for joint use of the driveway between us.

We strenuously object to a public/private partnership enabling a private developer to purchase public land, block our right of access to our property, and cause us significant financial harm so that that developer can maximize his investment, with County help, at our expense. Blocking access that has existed since the building was constructed significantly affects the value and utility of our property and would cause significant financial harm to our primary tenant.

We paid a premium for the building and invested heavily in renovations because the design met our needs better than other properties we explored, in terms of our need to readily move equipment and material. We added extra doors to our 2nd floor entrance solely to enable us to move items from truck to floor without using steps.

Silver Spring's Redevelopment Office itself has had concerns over our access--Gary Stith asked, prior to relocating the Farmer's Market to Lot 3 at one point, if blocking access on Saturdays posed a problem. It rarely did, and we and the vendors amicably resolved any conflicts.

The Project as planned fully blocks our main entrance. Hillerson indicated to us that if the Lot weren't there, the easement is "useless." Our position is that the easement allows us access clearly intended

by the County when it approved the building and bridge in 1962 and used without challenge or interruption ever since—namely, rights of vehicular and pedestrian ingress and egress from the main door of our building and on out to public right of ways.

It would be difficult and a burden for us to operate without that access. A handicapped employee recently accessed the building through that entrance, but otherwise could not have. (As an older building, we are not ADA-compliant overall.) Hillerson suggests an elevator, however, that's not a desirable nor cost-effective alternative for us.

I was on the Silver Spring Regional Advisory Board and Silver Spring Redevelopment Committee, and worked with MNCPP staff, such as Sandra Tallant, to help them understand the needs of Fenton Street Village, through a group I formed called the Silver Spring Merchant's Association. We worked with the civic association and succeeded in having mutual concerns addressed. I testified to the County Council to convince them that zoning favored by MNCPPC would harm Fenton businesses. MNCPPC reversed its position and recommended even higher zoning than we sought. Ironically, if this Project goes through it will have caused us more harm than the initial restrictive zoning we fought to overcome.

For the record, developer Hillerson, though he owned several Silver Spring properties, took little if any role in redevelopment efforts. In addition to my individual efforts to aid redevelopment, our business has been recognized by the County for its contributions.

I also offer a further major concern. When I was on the Redevelopment Committee much focus was on ensuring survival of Fenton's small and minority businesses. Parking was as critical then as it is now. Currently, Lot 3 is almost always filled weekdays and by our entrance it remains well-occupied nights and weekends by people frequenting area businesses.

While I'm aware of the County's desire for reduced parking requirements, nonetheless, the Project's proposed parking clearly is not only poorly situated for existing Fenton Street businesses, but it can't possibly be sufficient given the significant numbers of new residences and retailers planned for the area—at which point little land will be left for expanded parking.

The only other public parking nearby is, according to the developer himself, a deteriorating garage whose top floors are closed for that reason. Private parking would mean private control on rates and hours. I ask that you consider the parking needs of our home-grown, independent, small businesses as you focus on this Project.

Why not instead leave the lower part of Lot 3 by our entrance as more costly short-term parking for shoppers and thus allow us access as well? Perhaps lose a few spaces and provide a pocket park even, since the only green nearby is useless and unused, near East-West Highway.

Thank you for listening. Please feel free to contact me at 301-588-6380 or via email at mgerecht@cdpublications.com.

Sincerely,



Mike Gerecht
Partner/8204 Associates
President & Publisher/CD Publications

APR 08 2009

DEVELOPMENT REVIEW

April 7, 2009

C. Robert Dalrymple
301.961.5208
bdalrymple@linowes-law.com
Heather Dlhopsky
301.961.5270
hdlhopsky@linowes-law.com

VIA EMAIL AND HAND DELIVERY

Mr. Elza Hisel-McCoy
M-NCPPC, Development Review Division
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Studio Plaza, Silver Spring (the "Project") – Project Plan Application No. 920070010
(the "Application") – Options for Loading Access to 8204 Fenton Street (the "Gerecht
Property" or "CD Publications")

Dear Mr. Hisel-McCoy:

On behalf of Michael, L.L.C. (the "Applicant"), we hereby submit the enclosed plans and materials which reflect various options for accommodating the Gerecht Property. The Applicant's post-Development Review Committee (DRC) submission, dated March 16, 2009, explains the current configuration of the Gerecht Property and details the efforts made by the Applicant to accommodate the stated interest of the owner of the Gerecht Property.

For ease of reference, we will again describe the current configuration of the Gerecht Property. The Gerecht Property consists of two small buildings that were, in the past, incorporated into one larger building. It sits at the intersection of Fenton Street to the east and Silver Spring Avenue to the south. The address of the property is 8204 Fenton Street, and there is a building lobby on the first floor at Fenton Street and a staircase to the second floor. The first floor of the Gerecht Property adjacent to Fenton Street and Silver Spring Avenue is leased to a coffee shop, an Ethiopian market, and a beauty parlor. There also exists a joint driveway easement to the west that is shared with the Benbassat property (which is under contract to the Applicant), accessed from Silver Spring Avenue. The first floor space adjacent to the joint driveway easement was originally created as a parking lot beneath the second floor of one of the buildings, which was subsequently enclosed and is now used by CD Publications for its printing operation. The second floor is used entirely by CD Publications as office space. There is also a secondary means of ingress/egress through a stairway off of the joint driveway easement. In addition, there exists an easement (the "Pedestrian Bridge Easement") at the north side of the building on Public Parking Lot #3, seven steps below the level of the second floor of the Gerecht Property. The second floor of the building on the Gerecht Property is not handicapped-accessible from Fenton Street, Silver Spring Avenue, the joint driveway easement, or the Pedestrian Bridge Easement.

Mr. Elza Hisel-McCoy

April 7, 2009

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As previously indicated in the post-DRC submission, the Applicant has spent considerable time and effort to work with this property owner (also utilizing involvement of Planning Staff), as it is in everyone's best interest to ensure that the Gerecht Property remains a viable commercial use after construction of the proposed public/private redevelopment Project known as Studio Plaza. The Applicant's good faith efforts to integrate the Gerecht Property in a manner appropriate and compatible with the redevelopment Project has resulted in this current submission, intended to be the Applicant's best and final offer for accommodating the Gerecht Property in advance of the May 7th Planning Board hearing date on the Application.

The owners of the Gerecht Property have indicated that they are currently utilizing the Pedestrian Bridge Easement on Public Parking Lot #3 for loading and unloading from Public Parking Lot #3 to the second floor of their building. To the extent that this is the current use, it is not permissible per County law and continued direct loading and unloading utilizing this Pedestrian Bridge Easement is not feasible. Furthermore, it is not desirable from an urban design perspective with the redevelopment Project. As the existing Pedestrian Bridge Easement grants pedestrian access from the bridge to a public right-of-way (and does not grant loading access from a public parking lot), the Applicant has evaluated how to continue to provide pedestrian access to a public right-of-way with the redevelopment Project. Alternatively, if the primary issue is future loading and unloading from the second floor of the Gerecht Property, the Applicant has evaluated how this can be provided with the redevelopment Project (even though no legal rights exist for special consideration of loading/unloading for the Gerecht Property).

During the course of the past year, the Applicant has presented Mr. Gerecht with five options which, the Applicant believes, would accommodate the loading and/or pedestrian access needs of the Gerecht Property. The work proposed under all options has been offered at no cost to Mr. Gerecht. Initially, the Applicant presented three options requiring internal renovations to the Gerecht Property, each option consisting of an elevator and related renovations, and Mr. Gerecht has rejected all of them. Subsequently, and as a result of further refinement by the Applicant's design team and discussions with Planning Staff, the Applicant has designed and hereby presents two final options for ingress/egress/loading access to the Gerecht Property, one which addresses loading and unloading for the second floor of the Gerecht Property without the need to do any interior work in the Gerecht Property and one which maintains the pedestrian rights of ingress/egress to a public right-of-way utilizing the existing pedestrian bridge.

The first option offered by the Applicant (Attachment 1) moves beyond the literal retention of pedestrian ingress/egress rights via the existing easement and instead provides loading and unloading at the Pedestrian Bridge Easement near the second floor of the Gerecht Property. Under this option, truck access would be provided by the private joint driveway easement to the west of the Gerecht Property. Trucks would back into this private alleyway from Silver Spring Avenue. The trucks would unload at the end of the joint driveway easement, and deliveries

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would be handtrucked approximately 30 feet to the pedestrian bridge easement on the Applicant's property. A portion of the joint driveway easement would be ramped up to bring the level of the truck to the desired delivery point. The ramp would begin north of the doors to the Gerecht Property, assuring ingress and egress to the Gerecht Property from the joint driveway easement. The ramp would be lower than all windows on the west side of the Gerecht Property to prevent any negative impact on leasing efforts related to the first floor space facing the joint driveway easement. In addition, there currently exists a trash dumpster easement at the end of the joint driveway easement. The Applicant has offered to handle trash from the Gerecht Property in the Applicant's adjacent trash room, creating a community trash and recycling center (similar to the community trash and recycling centers on the Applicant's property to serve the Mayor Lane businesses), thereby eliminating the need for the trash dumpster easement.

The second option (Attachment 2) would provide an external staircase leading from the existing pedestrian bridge on Public Parking Lot #3 to Fenton Street. This would provide pedestrian access to the second floor of the Gerecht Property, essentially maintaining the same rights granted by the existing easement – access to a public right-of-way for pedestrian ingress and egress. This external staircase would be located on the Applicant's property and would be designed and constructed at the Applicant's cost and expense. This is a direct and literal response to the existing legal rights retained by the owners of the Gerecht Property.

As indicated above, as of the date of this letter Mr. Gerecht has rejected all of the options that the Applicant has presented, and insists that direct loading access be provided from the existing Public Parking Lot #3. This is not legally required and it is totally inapposite of good urban planning principles for the urban redevelopment of this block as envisioned in the Approved and Adopted Silver Spring CBD Sector Plan for Fenton Village. The existing Pedestrian Bridge Easement does not provide any legal rights for loading/unloading operations serving the Gerecht Property (and instead, as discussed, provides pedestrian access to a public right-of-way). Further, there exists a legal prohibition on loading or unloading of commercial vehicles from a County-owned or -leased and operated public parking facility pursuant to Section 31-29(a)(10) of the Montgomery County Code (and Section 31-27 of the Code further prohibits a range of truck types due to their weight or size from using County parking facilities for any reason, as explained in detail in the Applicant's post-DRC submission and in the Montgomery County Department of Transportation letter dated April 3, 2009 – Attachment 3). Notwithstanding this, the Applicant will continue to exercise commercially reasonable efforts to accommodate adequate, workable access for the Gerecht Property, with necessary modifications and alterations offered to be provided at no cost to Mr. Gerecht. While it has been our understanding that Mr. Gerecht has been acting in good faith in an effort to amicably find a mutually acceptable resolution to outstanding issues, a number of signs have recently been posted on the Gerecht Property (Attachment 4) that might suggest otherwise.

Mr. Elza Hisel-McCoy

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We understand that you will be evaluating these options as part of your Project Plan review and will meet with Mr. Gerecht directly to discuss in further detail. By copy of this letter to Mr. Gerecht's attorney, Joseph A. Lynott, III, the Applicant is also willing and prepared to discuss these options with Mr. Gerecht and his attorney, either with or apart from Planning Board Staff involvement. Thank you for your consideration of the Application and these revised materials. Please do not hesitate to contact us if additional information is necessary prior to the Planning Board hearing scheduled for May 7, 2009.

Sincerely,

LINOWES AND BLOCHER LLP

C. Robert Dalrymple, H O

C. Robert Dalrymple

Heather Dlhopsky

Heather Dlhopsky

Enclosures

cc: Joseph A. Lynott, III, Esq. *(Via Overnight Mail)*
Mr. Robert Hillerson *(Via Email and First-Class Mail)*
Mr. Brian Dayhoff *(Via First-Class Mail)*
Mr. Chris Kabatt *(Via First-Class Mail)*
Mr. William Landfair *(Via First-Class Mail)*
Ms. Trini Rodriguez *(Via First-Class Mail)*

LINOWES
AND | BLOCHER LLP
ATTORNEYS AT LAW

RECEIVED
APR 22 2009
DEVELOPMENT REVIEW

April 21, 2009

C. Robert Dalrymple
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bdalrymple@linowes-law.com

Mr. Elza Hisel-McCoy
Senior Planner, Development Review Division
Maryland-National Capital Park and
Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Via Hand Delivery & E-Mail

Re: Project Plan No. 920070010; Studio Plaza / Public Parking Lot 3 ("Studio Plaza") --
Revised Proposed Solution for Gerecht Property/CD Publications

Dear Mr. Hisel-McCoy:

As a result of our meeting on Friday, April 17, 2009, attended by Ash Gerecht, Mike Gerecht and Gary Rogers, representing the Gerecht/CD Publications' Property, Al Roshdieh, Steve Nash and Rick Seibert, representing the Department of Transportation, Diane Schwartz Jones, representing the Office of the County Executive, Benjamin Stutz, representing Councilwoman Valerie Ervin, Rose Krasnow, Bill Barron, Elza Hisel-McCoy and John Marcolin, representing M-NCPPC Staff, and Robert Dalrymple and Robert Hillerson, representing the Applicant, the Applicant has developed another alternative solution to accommodate the Gerecht/CD Publications' Property. During our meeting, we heard from the representatives of the Gerecht/CD Publications' Property that they need to be able to have direct loading to the existing improvements, while minimizing disruption of their business operations during construction activity. We also heard a strong need for their overall operations to be independent of any other uses within Studio Plaza.

During this meeting, we briefly reviewed all of the options previously offered by Applicant, as reflected in the attached April 7, 2009 letter from Linowes and Blocher LLP to Mr. Hisel-McCoy, all of which have been rejected by Mike Gerecht. The most recent proposed option offered by the Applicant prior hereto (service trucks backing up to the rear of the Gerecht/CD Publications' Property utilizing a ramp and the existing joint driveway easement), reflected as Attachment 1 to the April 7 letter, was rejected purportedly because it would require deliveries to be hand-trucked approximately 30 feet to the existing pedestrian bridge and entrance to the

Mr. Elza Hisel-McCoy
April 21, 2009
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building (held out by Mr. Rogers to be an issue specific to transporting equipment such as a high-resolution copying machine – an issue refuted by Mr. Roshdieh based upon his prior experiences with the County working with printing equipment and his observations that such equipment is always delivered in parts and assembled on-site).

The three options first offered by Applicant (and described in the April 7 letter) consisted of retrofitting the Gerecht/CD Publications' Property with an internal elevator to provide loading in various locations. We have been advised by Mike Gerecht that these options did not meet his needs, with no further explanation. However, at our Friday meeting, Mr. Rogers indicated that at first they were somewhat interested in the internal elevator, but ultimately rejected same due to their perception that there would be a 3-6 month period of business disruption during the construction process. While the Applicant believes that it can retrofit Mr. Gerecht's building with an internal elevator in a much shorter period of time and would do so in a manner designed to minimize disruption, the Applicant now at least understands the concern.

Therefore, the Applicant has developed another option, designed to eliminate, to the greatest extent possible, disruption to Mr. Gerecht's business operations while meeting the needs criteria that he has expressed. We briefly discussed this option at our April 17 meeting, and Ash Gerecht indicated that he would be interested in further exploring how it could work. It consists of an elevator constructed wholly on the Gerecht/CD Publications' Property, within the joint driveway easement on the west side of the Gerecht/CD Publications' Property. This elevator, however, is outside of the existing Gerecht/CD Publications' building, to eliminate the disruptions of business operations perceived to be problematic with the internal elevator options. As proposed, the elevator opens from the front door onto the joint driveway easement on the ground level, and into the Gerecht/CD Publications' building through the back door at any existing window opening anywhere from the north end of the joint driveway easement to as close to the south as 40 feet from the face of the Gerecht/CD Publications' building on Silver Spring Avenue (which would require retrofitting of the existing building, but this would be a nominal construction activity that could be scheduled on a weekend or other time of convenience to minimize disruption). This gives Mr. Gerecht a great deal of flexibility as to where he prefers the elevator and loading access to his building. In addition, the Applicant has designed a proposed trash dumpster location for the Gerecht/CD Publications' Property's sole and exclusive use that would allow continued safe and efficient solid waste removal consistent with the proposed new loading/elevator improvement described above. This new trash dumpster location, while on Studio Plaza Property (through creation of a new easement), is accessible for vehicles from the existing joint driveway easement and provides convenient service by being adjacent to the rear doors to the existing building on the Gerecht/CD Publications' Property (the new easement for this location would be in replacement of the

Mr. Elza Hisel-McCoy
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existing trash dumpster easement currently providing service at the north end of the joint driveway easement). This new trash dumpster location would not be accessible through any Studio Plaza building and again would be exclusively used for the benefit of the Gerecht/CD Publications' Property, thus maintaining complete independence desired by Mike Gerecht.

To further describe this new proposal, please find attached four sketches. Sheet numbered 1 is a plan view of the joint driveway easement on the west side of the Gerecht/CD Publications' Property. It shows the elevator at the north end of the joint driveway easement, but wholly on the Gerecht/CD Publications' Property. The elevator can be constructed in this location or at any other window opening south, provided that it is no closer than 40 feet from the face of the building on Silver Spring Avenue. This is to accommodate the proposed trash dumpster easement on the Studio Plaza Property shown across the joint driveway easement from the back doors to the Gerecht/CD Publications' Property, and in replacement of the existing trash dumpster easement on Lot 3 at the north end of the joint driveway easement.

Sheet numbered 2 is an elevation view of the Gerecht/CD Publications' Property from the west. It shows the elevator in the same location as sheet 1. It also shows the location of the windows on the second floor that could be utilized as an alternative location for the elevator.

Sheet number 3 shows the proposed trash dumpster location area within the Studio Plaza Property that would be allowable by grant of easement to and exclusively for the Gerecht/CD Publications' Property.

Sheet numbered 4, is a plan view of a portion of Studio Plaza in relation to the Gerecht/CD Publications' Property. It shows the existing trash dumpster easement and pedestrian bridge easement, both of which would be extinguished and replaced with the new trash dumpster easement and elevator, and it also shows the relationship of the proposed trash dumpster location on the Studio Plaza Property for the exclusive use of the Gerecht/CD Publications' Property.

All improvements shown, including design, permits and construction, would be at no cost to the Gerecht/CD Publications' Property. Similarly, all legal documentation required to implement and perpetuate these new proposals and extinguish those easements replaced would be at no cost to the Gerecht/CD Publications' Property.

We believe that this option provides the Gerecht/CD Publications' Property with a legal, sustainable, and independent means of loading, the construction of which will result in minimal disruption to their business operations. While the elevator in itself will not make the

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Gerecht/CD Publications' Property fully ADA compliant, it will certainly help in this regard when the need for ADA retrofit arises in the future. It also provides a convenient, functional and independent area for handling the trash generated by the Gerecht/CD Publications' Property.

In accordance with the MCDOT letter attached as Attachment 3 to the April 7, 2009 letter, unless the owners of the Gerecht/CD Publications' Property agree to extinguish the said easements on Lot 3 and execute replacement easements as offered by the Applicant and described herein, the Applicant shall construct the pedestrian ingress/egress from the pedestrian bridge easement to Fenton Street described in the April 7 letter in compliance with the legal requirements as set forth in the MCDOT letter (even though this would seemingly replicate existing pedestrian access to the Gerecht/CD Publications' Property from Fenton Street that exists parallel to this proposed new means of pedestrian ingress/egress).

While there have been several alternative proposals put forward relating to the continued operations of the Gerecht/CD Publications' Property within the context of the urban redevelopment of the remainder of the block, we believe that this latest proposal meets the needs and addresses the concerns expressed by the owner's representatives of the Gerecht/CD Publications' Property at our April 17 meeting. We are hopeful that this will bring resolution to these issues and can be incorporated into the Project Plan approval pending for Studio Plaza. Please consider this responsive offer to be a proposed part of the Project Plan to be presented to the Planning Board on May 14, 2009, subject to acceptance or rejection by the Gerecht/CD Publications' Property representatives. We believe that this effort and all previous efforts of the Applicant to reach a resolution, including efforts made by M-NCPPC staff, meet and exceed the test of reasonableness necessary to address issues of compatibility for co-existence of new urban redevelopment and maintenance of existing, viable adjacent uses not included in redevelopment plans.

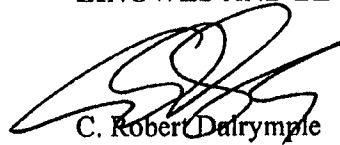
We are sending a copy of this proposal to attorneys Joseph Lynott, Esquire and David Brown, Esquire as it is not clear to us which of these two attorneys is presently representing the owners of the Gerecht/CD Publications' Property (based upon correspondence from the last week). By these copies, we are also offering to meet to discuss this further or to answer any questions that anyone may have pertaining to this latest and final responsive proposal from our meeting on April 17.

Similarly, if Planning Staff needs additional information or explanation, we are available at your convenience to meet to discuss this further. Thank you for your assistance in helping to create a solution to the issues described herein.

Mr. Elza Hisel-McCoy
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Very truly yours,

LINOWES AND BLOCHER LLP



C. Robert Dalrymple

CRD:pi
Enclosures

cc: Joseph Lynott, III, Esq.
David Brown, Esq.
Ms. Rose Krasnow
Mr. John Marcolin
Mr. William Barron
Mr. Al Roshdieh
Mr. Stephen Nash
Mr. Rick Siebert
Diane Schwartz-Jones, Esq.
Mr. Benjamin Stutz (representing Councilwoman Valerie Ervin)
Heather Dlhopsky, Esq.

Proposed Accommodations to 8204 Associates LP by Studio Plaza
April 30, 2009

David:

While we feel our current arrangement works best for us for a number of reasons, and we are not waiving our rights to disagree with any or all aspects of the Studio Plaza project, or to contest any diminution of our property rights as protected in recorded easements. We are nonetheless submitting the following GENERAL rundown of what might work for 8204 Associates LP ("8204") in the event Studio Plaza were to become a reality. This is neither a settlement offer nor a final and definitive list of conditions that 8204 would deem satisfactory.

- County/Michael LLC to be fully responsible for all legal/engineering/architectural and related costs of third parties hired by 8204 for independent consultations, as well as any and all legal/engineering/architectural and related professional service costs incurred by the County/Michael LLC themselves.
- County/Michael to be responsible fully for all aspects of 8204 renovations and installation, including but not limited to permits, insurance, inspections, and collateral costs.
- No building permit is to be issued for that portion of Lot 3 adjacent to the 8204 building until all work agreed to for 8204 has been inspected and approved by 8204 and by the County.
- Studio Plaza building adjacent to 8204 building must be set back from Fenton Street at least to the same building line as the 8204 building.
- Applicant will pay for and install new signage as approved by 8204 to make up for lost visibility.

The previous elevator proposals do not work for us because, among other problems (a) they treat the 8204 building as if it were to always have one tenant on its second floor, although that will not necessarily be the case in the future; and (b) all the other proposals would cause 8204 to lose additional rentable square footage forever. Below is a proposal (pending of course architectural/engineering feasibility) that might work:

- Install commercial elevator in current entranceway of our second floor, with the rear of cab where current double doors are, extending outside the building lot line if necessary to accommodate the depth of the cab.
- The floor where cab the would open facing down our 2nd floor hallway would need to be built up about 4 feet so that when you exit the elevator you will be at the same level as the 2nd floor.
- Current alcove entrance would need to be closed off and the area converted into usable space in our building.
- Due to presence of elevator, the current stairwell from the first floor off Fenton Street would need to be rerouted and affected areas would need to be refinished as usable office space.

The lower level would then need substantial renovation.

- The entrance door off Fenton Street, kept locked for safety reasons, would need to be replaced with a wider and more secure door to readily move in larger bulky items that currently are brought in through our double doors up above. The door would need to be outfitted with a buzzer/intercom/camera security system so that it can readily be unlocked by any current or future tenants from other parts of building.
- The elevator entrance would be located in what is now leased space for our copy shop. Thus the wall/door to our copy shop would need to be moved back so that entry into the leased space is not required if one needs to use the elevator. We would face a perpetual loss of rental income from making this accommodation and would expect to be compensated once the exact amount of lost space is determined.
- In addition, the first floor would need to be reconfigured, if architecturally and mechanically possible, so that there is a wider foyer for moving large items through to the elevator. For various reasons this may quite likely pose difficulty, given the mechanical systems involved. Currently a storage closet and janitorial closet take up much of the left side wall, leaving only a narrow opening between the closets and the existing stairwell.
- The pedestrian bridge would need to be removed.
- We would request compensation to cover long-term elevator maintenance, repair, insurance costs we don't currently incur, and assurances the renovation would not disrupt CD Publications M-F activities, enabling access to our second floor at all times, with any disruptive work to be conducted weekends or evenings.
- There are a number of metered parking spaces along the west side of Fenton Street, adjacent to the 8204 building and to the parking lot. In order to avoid disrupting the flow of traffic on Fenton Street, several of these spaces, north of those fronting our own tenant space, would need to be permanently removed so that we have a permanent loading/unloading zone to replace the lost loading/unloading area in the parking lot.
- The Studio Plaza building to be built adjacent to our building must be set back a reasonable (to be negotiated) distance from our main office window now fronting on the parking lot, so as to minimize loss of light and air and the degrading of a windowed office, and to readily enable access to that portion of our building for maintenance.

DAVID W. BROWN

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May 12, 2009

Elza Hisel-McCoy, Assoc. AIA, LEED-AP
Senior Planner
Development Review Division
MNCPPC-MC
8787 Georgia Avenue
Silver Spring, MD 20910

Re: Project Plan # 920070010, Studio Plaza

Dear Mr. Hisel-McCoy:

This letter will serve to place on the record of the above-referenced proceeding the efforts made by my client, 8204 Associates, LLC, to resolve with the Applicant, Michael, LLC, issues of ingress/egress to the 8204 Associates property, adjacent to the Studio Plaza Project that will arise if the Project is to go forward.

I met with the Applicant and his counsel, with you in attendance, on April 28, 2009, and indicated that I would undertake to discuss with my client the terms and conditions under which 8204 Associates would be prepared to accept the loss of their business-critical pedestrian bridge easement from Parking Lot #3 to the second floor of their business property. I advised that my client had not found any of the previous solutions proffered by the Applicant to be acceptable, but that I hoped to prevail upon the business to define for me and for the Applicant a possible solution other than mere retention of the pedestrian bridge and access to it via a surface parking lot, as has long been the case (as detailed in a Memorandum provided to you under separate cover today).

It was in this same meeting that I explained, on behalf of another client, the Kalivases, that they were not seeking a "settlement" in which withdrawal of their objections to the Project would be the quid pro quo for undertakings by the Applicant. I made the same point with respect to 8204 Associates: agreement on the terms for implementing an alternative means of ingress/egress to 8204 Associates' publishing business would not be in exchange for withdrawal of opposition to the Project.

This explanation did not obviate my commitment to define for the Applicant what 8204 Associates would regard as a feasible substitute for its pedestrian bridge. Subsequent discussion with Mike Gerecht, a principal at 8204 Associates, produced

Elza Hisel-McCoy, Assoc. AIA, LEED-AP
May 12, 2009
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Exhibit 1, a list detailing how the Applicant, in a manner acceptable to 8204 Associates, could ameliorate the substantial adverse impact on 8204 Associates that would otherwise flow from loss of the pedestrian bridge. Exhibit 1 was sent to the Applicant on April 30, 2009; there has been no response.

I see no need to discuss here the differences between the Applicant's various solutions and that proposed by 8204 Associates. Wholly apart from 8204 Associates' response, I anticipate that the Applicant, consistent with its stance toward the Kalivases, regards its willingness to accommodate 8204 Associates as it has proposed is contingent upon the withdrawal by 8204 Associates of any and all objections to the Project. By separate letter, I have explained that 8204 Associates does not intend to withdraw its objections to the Project for any reason.

As I hope the Board will understand, 8204 Associates made a proposal that is reluctantly predicated on the notion that, if the Project is approved, they will have to endure significant disruption occasioned by the major retrofit of their business space so that the Project can be built as intended by the Applicant. Under these circumstances, 8204 Associates does not feel obliged to withdraw its objections to the Project in exchange for the requested commitments by the Applicant, whether as proposed by the Applicant or by 8204 Associates. It should suffice to say that 8204 Associates regards its suggestions as eminently reasonable, particularly in response to a developer who is undertaking to redevelop large portions of a commercial city block, but not the entire block. Their suggestions are all the more reasonable considering that what is before the Board is a project that reflects no serious effort to promote compatibility with the existing businesses on the block, including 8204 Associates' publishing business.

If you would nevertheless like a more detailed discussion of the differences between the specific 8204 Associates and Applicant proposals, I will be happy to oblige, either in advance of the hearing before the Board on May 28th, or during the hearing itself.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "David W. Brown", with a long horizontal flourish extending to the right.

David W. Brown

/enclosures: Exhibits 1

Proposed Accommodations to 8204 Associates LP by Studio Plaza
April 30, 2009

David:

While we feel our current arrangement works best for us for a number of reasons, and we are not waiving our rights to disagree with any or all aspects of the Studio Plaza project, or to contest any diminution of our property rights as protected in recorded easements. We are nonetheless submitting the following GENERAL rundown of what might work for 8204 Associates LP ("8204") in the event Studio Plaza were to become a reality. This is neither a settlement offer nor a final and definitive list of conditions that 8204 would deem satisfactory. This proposal assumes that Studio Plaza will not be occupying any of the land subject to either our joint driveway easement, dating from 1961, or our trash container alcove easement, dating from 1991.

- County/Michael LLC to be fully responsible for all legal/engineering/architectural and related costs of third parties hired by 8204 for independent consultations, as well as any and all legal/engineering/architectural and related professional service costs incurred by the County/Michael LLC themselves.
- County/Michael to be responsible fully for all aspects of 8204 renovations and installation, including but not limited to permits, insurance, inspections, and collateral costs.
- No building permit is to be issued for that portion of Lot 3 adjacent to the 8204 building until all work agreed to for 8204 has been inspected and approved by 8204 and by the County.
- Studio Plaza building adjacent to 8204 building must be set back from Fenton Street at least to the same building line as the 8204 building.
- Applicant will pay for and install new signage as approved by 8204 to make up for lost visibility.

The previous elevator proposals do not work for us because, among other problems (a) they treat the 8204 building as if it were to always have one tenant on its second floor, although that will not necessarily be the case in the future; and (b) all the other proposals would cause 8204 to lose additional rentable square footage forever. Below is a proposal (pending of course architectural/engineering feasibility) that might work:

- Install commercial elevator in current entranceway of our second floor, with the rear of cab where current double doors are, extending outside the building lot line if necessary to accommodate the depth of the cab.
- The floor where cab the would open facing down our 2nd floor hallway would need to be built up about 4 feet so that when you exit the elevator you will be at the same level as the 2nd floor.
- Current alcove entrance would need to be closed off and the area converted into usable space in our building.

- Due to presence of elevator, the current stairwell from the first floor off Fenton Street would need to be rerouted and affected areas would need to be refinished as usable office space.

The lower level would then need substantial renovation.

- The entrance door off Fenton Street, kept locked for safety reasons, would need to be replaced with a wider and more secure door to readily move in larger bulky items that currently are brought in through our double doors up above. The door would need to be outfitted with a buzzer/intercom/camera security system so that it can readily be unlocked by any current or future tenants from other parts of building.
- The elevator entrance would be located in what is now leased space for our copy shop. Thus the wall/door to our copy shop would need to be moved back so that entry into the leased space is not required if one needs to use the elevator. We would face a perpetual loss of rental income from making this accommodation and would expect to be compensated once the exact amount of lost space is determined.
- In addition, the first floor would need to be reconfigured, if architecturally and mechanically possible, so that there is a wider foyer for moving large items through to the elevator. For various reasons this may quite likely pose difficulty, given the mechanical systems involved. Currently a storage closet and janitorial closet take up much of the left side wall, leaving only a narrow opening between the closets and the existing stairwell.
- The pedestrian bridge would need to be removed.
- We would request compensation to cover long-term elevator maintenance, repair, insurance costs we don't currently incur, and assurances the renovation would not disrupt CD Publications M-F activities, enabling access to our second floor at all times, with any disruptive work to be conducted weekends or evenings.
- There are a number of metered parking spaces along the west side of Fenton Street, adjacent to the 8204 building and to the parking lot. In order to avoid disrupting the flow of traffic on Fenton Street, several of these spaces, north of those fronting our own tenant space, would need to be permanently removed so that we have a permanent loading/unloading zone to replace the lost loading/unloading area in the parking lot.
- The Studio Plaza building to be built adjacent to our building must be set back a reasonable (to be negotiated) distance from our main office window now fronting on the parking lot, so as to minimize loss of light and air and the degrading of a windowed office, and to readily enable access to that portion of our building for maintenance.

Elza Hisel-McCoy
Senior Planner/Development Review Division
MNCPPC
8787 Georgia Ave.
Silver Spring, MD 20910

Re: Studio Plaza Project Application
May 11, 2009

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MAY 11 2009

DEVELOPMENT REVIEW

Dear Mr. Hisel-McCoy:

The past few months you have had opportunities to hear concerns I and others have regarding Studio Plaza. I'd like to summarize these without focusing on the separate access issues we have already spent much time on. As you know, I was active years ago organizing businesses to support higher zoning in this area, over what P&P recommended. So this is not about opposing development, but about what works for all stakeholders in Fenton Village, not just what one developer or the County wants.

It seems this project is being "rammed through" for some reason, with little prior research and discussion done before the County initiated its dealings with Mr. Hillerson, thus putting Park and Planning at a considerable disadvantage, once an agreement was signed. Perhaps the question can be raised as to whether this project was conducted in a manner inconsistent with County policy and requirements, leaving your staff to resolve a wide array of public policy/legal issues that should have been researched before so much time and money was spent. Meanwhile, in meetings I have attended it appears the focus is solely on what planners say is good urban design and the County's desire for high density development near Metro Stations—as opposed to weighing what the community needs and wants.

I am reminded of the time 10 years ago when Park & Planning was spending thousands on streetscapes but didn't consult businesses and residents—nor had staff even taken the time to walk the streets and get to know the area. Ultimately, P&P staff were floored to learn the #1 issue was safety and lighting, not bricks and planters, and the project was put on hold. That was the right decision, and putting in the streetscape later was appreciated.

So the question I pose for your staff is whether ALL that matters is urban design and what the County says is good for its residents. I ask you not to get lost in the desire to approve a project because you are being pressured to do so, or because it is the easy thing to do, or that it would look good on a resume as a model urban infill project, but to look without bias at all aspects of this project.

Let's start with the impact of taking away a public facility without any public input. That seems contrary to what most in this County would want to see happen to any public facility. It's not just a matter of having meetings, it's a matter of communicating, working with the parties involved, listening, and determining what's truly best for an area.

We are talking about redeveloping a public asset that for decades has benefited businesses and customers in this area. This can be seen in legal documents from 60 years ago--the parking lot was built with the promise of accommodating surrounding businesses fully, and there was every intention of having that Lot remain a parking lot. Even our building, with its main entrance on the parking Lot, was clearly permitted by the County because the County obviously assumed the Lot would remain.

That the area around Lot 3 is "blighted" is correct. But why, when Silver Spring is booming? Councilwoman Ervin told us when we met her that it is blighted because Mr. Hillerson has torn down

buildings, and put off building in the hope he could make his project larger. So now he is being rewarded for "encouraging blight? Is that how P&P would encourage development deals? Is that what County taxpayers and residents would want to see? Permitting a property owner to deliberately put off building in order to get what he desires?

What does the current parking lot offer the surrounding and long established community? On most days the Lot is filled. At night cars are parked visiting local stores, such as my tenant's coffee shop. The Lot is convenient, safe, and provides very accessible parking as it has for over 50 years. Good parking was a good reason to locate in this area and sign long-term leases. Were these businesses given any consideration? We are trying to encourage them with the Council's Buy Local program, while at the same time making it more and more difficult for them to survive.

THE UNDERGROUND PARKING ISSUE

Let's look at the proposed underground parking. When this project was first proposed, P&P staff routinely noted in public forums that underground public parking was common in the County—as if to say, there's no need to worry about safety. But your own research now shows otherwise—in fact, there are no other comparable lots in the County—i.e. public, underground only, unstaffed, designed for shoppers 24/7. The NOAA Lot has or had federal agents guarding it since 9/11, is primarily an employee lot, not a lot for customers, and has above ground parking as an option.

Given that, how can such a lot be approved or recommended by P&P staff, or written into an agreement by DOT, when considerations of safety of parking structures clearly require sound research? The Silver Spring police have written repeatedly about their very serious concerns over public safety of underground parking in this project, and went so far as to state that typically with underground parking, customers soon learn to become wary of such structures and stay away, ultimately having an adverse impact on the surrounding businesses. I have that in writing if you'd like to see it.

I'd also suggest you research the archives from the Downtown Silver Spring Project. At the time of that project the County agreed to tear down a couple fairly new, multimillion parking garages that were above ground, because architecturally they presented some significant crime prevention concerns.

This project requires underground-only parking, though even above ground parking wasn't safe enough for Downtown, and underground public parking is not being used anywhere else in the County, much less in an area with Silver Spring's crime concerns. This would be a 24-hour, unmanned Lot. The Police aren't comfortable with it. Yet it is being proposed because without underground parking the project would not be viable. The message from the media, I suspect, will be that the County puts private profit over public safety. And once built, the community will have to live with it. What arguments does P&P have to counter concerns over crime, other than merely stating that higher density mean more people, thus less crime.

Access to parking remains another critical issue that has not been adequately addressed. How can you justify removing the direct vehicular access to street front parking on Fenton Street, which is one of the busier side streets in Downtown, when it's existed so many years and is so vital? Businesses that count on easy access to parking will lose critical "stop and shop" access, except for a few street slots.

Last, I urge you and your staff to walk the streets and talk with people, not just businesses that would benefit, but also those that would be harmed by this project. See what the area is like. Fenton is comprised of many small businesses, a unique multi-ethnic area—just the type the County, and area residents like to see as it lends much-needed diversity and flavor...a key ingredient in successful urban planning. It adds character to an urban environment that would otherwise be little more than the same

franchises found in Downtown or on Rockville Pike or in Anytown U.S.A. Is that P&P's innovative vision of the future?

Character is important to vitality of an area, not just design, and small business is universally seen as the engine that drives growth in the County and Country. Many of these foreign-born tenants put every dollar they had into their businesses. They should be encouraged, not challenged simply because their buildings don't fit someone else's vision. Mr. Hillerson is free to do what he wants with his properties. But giving away a public asset, at the expense of small businesses, and to the public safety detriment of their customers is hard to justify, or can you?

I'd also ask you to ask yourself, how this project benefits the County. Perhaps that decision is out of your hands. But it surely is not needed to jumpstart growth as Downtown was justified. For example, in an area intended for thousands more employees there would be no added public parking. Private parking is what it is...private control over rates/hours. History has already shown that people prefer free, readily available parking...witness the many who no longer go to Bethesda because it's too hard to park, regardless of how much the County wants to encourage public transit. That's the reality.

While this may be out of your purview, we essentially have a project that harms existing businesses, doesn't give the County anything more than it has, (in fact gives them less as they get underground parking), and gives the Developer one heck of a deal on a valuable County asset within walking distance of Metro. From a public policy perspective, from the perspective of being an employee charged with looking out for the interests of consumers, how can this be acceptable?

BUILDING ACCESS

I am leaving the issue of access out of this discussion, which clearly is my #1 interest, as I believe that will be addressed by David Brown who is address this issue on behalf of neighboring properties, and you are quite familiar with those concerns. However, as you are keenly aware, throughout all of our discussions on access the Developer refused to concede so much as an inch, while we offered various proposals. My understanding is that an optional method developer must seek to be compatible with surrounding properties. Yet, realistically, little effort has been made in that regard. When one steps back, every aspect of this project puts the focus on what the developer wants, not the surrounding community.

Last, but not least, we have suggested, as have others, that if this project were to go through that you recommend leaving the stub of parking by our building. This would readily serve two goals: It would eliminate the need for the County to spend hundreds of thousands of dollars providing us with access when our current access works, and it would more importantly preserve readily available surface parking for Fenton Street Businesses, and could be easily made into a more attractive surface lot with more greenery.

The only objection posed so far, other than from Mr. Hillerson, is the concept of an unbroken street front of retail, rather than having parking on a street front. While in theory that is certainly conventional wisdom, from a practical standpoint, one only needs to survey Bethesda, Silver Spring, and countless other new projects and instead you'll note parking garages (even new ones) that are street facing. Wayne Ave is a notable example, as are many Bethesda Garages. So despite being sound urban design, the simple fact is that that concept gives way to practicality and simple construction limits. Why should Fenton Village be viewed any differently?

If compromise is what's needed to get this project passed, then I ask you to consider the simple solution we propose. Leave surface parking and acknowledge the need not to harm the residents/businesses of Fenton Village, and at the same time resolve the costly issue of access for my

building. This is scarcely the time for the County to spend hundreds of thousands of dollars to permit access that we already have.

Nearly 800 People Have Signed A Petition Opposing the Project!

Elza—We have attended many meetings, and listened to you and Mr. Hillerson. What I ask of you is that you and your staff listen to the business that would be affected. Try speaking with them...many don't speak English which is why you've not heard from them, and don't understand the impact of this project. Nearly 800 people signed our petition...in an effort that simply involved sticking them in a few shops and then picking them up. It was not an all out grass roots effort by any means, and quite a few got lost/stolen, damaged or never returned. But the bottom line is 800 people oppose what you would do to their parking and safety in an area that consists of just a few square blocks. .

June 7 is Mr. Hillerson's deadline for avoiding workforce housing. Will he, against your wishes once again, get another extension, at a time when affordable housing is sorely needed? Envision the headlines: "Planning Board gives wealthy Potomac developer his 3rd pass on requiring much-needed affordable housing in 800,000 sf giveaway of public property." Yes, the new project would comply, but not his surrounding buildings. The question residents must ask is that if affordable housing near Metro was important enough to legislate it, why are we giving a pass to the perfect location for workforce housing, and not negotiating hard to have it implemented? Mr. Hillerson argued for the extension because he said he needed 6-9 months to resolve issues with the lot. That time is long past.

I appreciate your efforts at mediating this Elza. But I ask you, look at this not simply from an urban design standpoint, but from the standpoint of the overall community.

Thank you.

Mike Gerecht
8204 Fenton St.



Appendix F: Attendance list for April 17, 2009, meeting at M-NCPPC

Studio Raya
4.17.09

<u>Name</u>	<u>Org.</u>	<u>phone</u>
Elysa Hisel-McLay	MNCPPC-DRD	301.495.2115
Bob Dalrymple	Linows & Blocher	301 961 5208
Rahed Ali	Michael, LLC	(301) 585-1191
Jim Kyrle	CD Pubns	301-588-6306
Mike Gerecht	8204 Assoc	301-588-6360
Ash Gerecht	CD Pubns	301-588-6300
Benjamin Stutz	Councilmember Ervin	240-777-7957
JOHN MARCOLIN	MNCPPC - DESIGN	301 495-4547
RIK SIEBERT	MC - DOT	240-777-8732
STEVE NASH	MC-DOT	240-777-8711
Al Rashdieh	MC DOT	-7175
Rose Krasnow	MNCPPC	301-495-4591
BILL BARRON	MCPD	301-495-4556
Diane Jones	OCE	240 777-2561

Appendix G: Clarification from MCDOT regarding use of Public Parking Lot 3



DEPARTMENT OF TRANSPORTATION

Isiah Leggett
County Executive

Arthur Holmes, Jr.
Director

April 3, 2009

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DEVELOPMENT REVIEW

Ms. Rose Krasnow, Chief
Development Review Division
Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Dear Ms. Krasnow:

Thank you for your letter dated March 9, 2009, asking for the County's opinion regarding a number of issues posed by the mixed use development of Public Parking Lot 3, in Silver Spring. I will respond to each of your questions as you numbered them.

1. For the Kalivas and Gerecht properties, to what extent, if any, is loading permitted from the County Parking Lot?

It is our opinion that neither Kalivas, nor Gerecht have an express right to perform "loading" from Lot 3. By deed and plat (though the latter appears to be unrecorded), Kalivas is allowed access to the rear of her property via a 16' "public alleyway" that crosses Lot 3. Access could include loading and unloading of vehicles, though Kalivas would have to confine those activities within the easement area.

The County has granted an easement for the benefit of the Gerecht property. The County granted to 8204 Associates Limited Partnership "an easement and right-of-way" for a "pedestrian bridge" that connects Gerecht's building to Lot 3 (*Liber 9322, Folio 513*). Other than provisions that allow 8204 Associates, and the County, access to the bridge for the purposes of reconstruction, repair, maintenance and the like, the easement implies pedestrian access only and would not allow loading from Lot 3.

In addition, Sec. 31-29(10) of the County Code specifically prohibits the loading or unloading of commercial vehicles on a County parking lot.

2. What sort of access (e.g. pedestrian, loading) to Parking Lot 3, if any, does the easement for the Gerecht property pedestrian bridge confer upon its owner?

Because the easement is for a "pedestrian bridge," the easement is seemingly intended to allow pedestrian access to the bridge.

Office of the Director

101 Monroe Street, 10th Floor • Rockville, Maryland 20850 • 240-777-7170 • 240-777-7178 FAX
www.montgomerycountymd.gov

Located one block west of the Rockville Metro Station

Ms. Rose Krasnow
April 3, 2009
Page 2

3. Speak to the intent of the existing easements on the Gerecht property.

See the above responses.


4. For the Kalivas and Gerecht properties, what might your staff consider to be reasonable loading access accommodations, in view of the proposed Project Plan.

With regard to the Gerecht property, my staff has suggested that the Project Plan should provide for pedestrian access from the pedestrian bridge to the public right of way.

The 16 foot wide public alley to the south of the Kalivas property cannot physically accommodate the service trucks currently used for loading by that property. My staff has advised me that the loading access to the Kalivas property proposed in the Project Plan provides convenient access that accommodates the current service and is a reasonable accommodation.

I hope I have been able to fully respond to your questions regarding this issue. If you have any further questions regarding the joint development of the Public Parking Lot, please contact Mr. Stephen Nash, Chief, Division of Parking Management, at 240-777-8711 or by email at steve.nash@montgomerycountymd.gov.

Sincerely,


Arthur Holmes, Jr.
Director

Appendix H: Community correspondence in support of the project



April 27, 2009

Royce Hanson, Ph.D.
and Members of the Montgomery County Planning Board
Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Optional Method Development in the Fenton Street area of Silver Spring

Dear Dr. Hanson and members of the Planning Board:

On behalf of the Greater Silver Spring Chamber of Commerce, I am writing to express the Chamber's enthusiastic support for Studio Plaza, the optional method development proposed in the Fenton Street area of Silver Spring (surrounding and including Montgomery County's Public Parking Lot No. 3). Our Economic Development Committee has reviewed this project at its various stages and members have expressed their desire to see the development move forward.

We support development in this location for two reasons. First, as we have often said, the redevelopment of Silver Spring is not yet finished. Much work is still needed to expand revitalization beyond the central core. As such, we believe that the Fenton Street area represents one of the next critical areas for redevelopment in Silver Spring. Given its proximity to the current Silver Spring Metro Station and future Paul S. Sarbanes Transit Center, this area is ideal for a development that includes commercial office and residential space, including a substantial amount of workforce housing. We particularly support development that includes substantial ground-floor retail space built around a large green public area will put feet on the street and enliven the neighborhood. We believe the kind of project represented in the Studio Plaza proposal will achieve all of these goals. We are also encouraged to learn that an overwhelming majority of businesses in the Fenton Street area have expressed their support for this project.

We urge the Board to approve this project and allow plans to revitalize this neighborhood to move forward. We thank you for the opportunity to present our views on this development.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jane Redicker".

Jane Redicker
President



Loan Closets of Durable Medical Equipment, Information, Referral
8220 Mayor Lane Silver Spring, MD 20910 - 4576 301 - 495 - 0277

Dignity through Programs for Access

April 30, 2009

Elza Hisel-McCoy, Planner/Coordinator
Development Review Division
Maryland-National Capital Park
And Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

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MAY 05 2009

DEVELOPMENT REVIEW

Dear Mr. Hisel-McCoy:

I would like to express our support for the Studio Plaza Project (Project Plan #920070010).

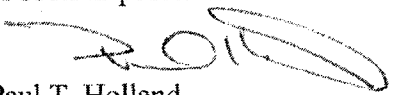
The Wheelchair Society is a non-profit organization which has been located in the Downtown Silver Spring District since 1986. We receive donated, broken wheelchairs, which we repair and then give to those in need.

Currently [for the past 5 years], the Society is located on Mayor Lane between Silver Spring Ave., and Thayer Ave.. Previously, we have been located on Colesville Road [now the Lee Building], Bonifant Street [the soon to be Library], and Thayer Avenue [the redeveloped GranDesign Building].

Over the plus twenty years, we have had to relocate as our previous space has come up for redevelopment. Each time this has occurred, we understood that it was necessary for the overall betterment of the Downtown District, and the neighborhood as a whole.

Being 'veterans' of redevelopment change, we have been aware of, and following, the evolution of the plans for this Project and find much to recommend it. We appreciate the ADA compliant Studio Plaza Project, particularly the accessibility to the large central plaza and retail muse.

Also, as our entrance is on Mayor Lane, we are very pleased that this Project will clean up the alley. Presently the alley is strewn with garbage dumpsters, infested with rodents, and generally unsightly and unsafe. The community trash and recycling centers, new lighting, and increased pedestrian activity, will greatly enhance the area. Understanding that any Project may have detractors dissatisfied with a particular aspect, we believe the Studio Plaza Project will be a positive improvement to Silver Spring, and we ask that you approve it as soon as possible.


Paul T. Holland
President

June 4, 2009

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MAY 15 2009

DEVELOPMENT REVIEW

Mr. McCoy
Planner/Coordinator
Development Review Division
Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Mr. McCoy,

It is with great excitement and anticipation, that I am sending this letter of support and recommendation on behalf of the Park and Planning Commission for Project Plan #920070010.

I have been the owner of "Alanni Hair Designs Inc." in the Silver Spring area for the past 26 years. During my tenure in the Silver Spring area, I have had the opportunity to be a major participant over the years in the growth of one of the most prestigious areas in Montgomery County.

When I was informed about this project and given the opportunity to review the plans, I could not help but think of the many opportunities I would be allotted as a business owner and neighbor.

I look forward to an exciting future with the Studio Plaza project and would like to extend the invitation for you to contact me in the future if needed.

Sincerely,

Ms. Rosslyn Rowe (Proprietor)
Alanni Hair Designs Inc.

Hisel-McCoy, Elza

From: Rob Masciola [robmasciola@yahoo.com]
Sent: Wednesday, April 29, 2009 10:33 AM
To: Hisel-McCoy, Elza; councilmemberervin@montgomerycountymd.gov
Subject: Fenton Village - Hillerson Development

Ms. McCoy-Hisel and Councilwoman Ervin,

I wanted to write to extend my support for the businesses in Fenton Village. As a neighbor and frequent customer of these establishments, I hope the Planning Commission and the County Council do all they can to protect these businesses. I am all for the Hillerson development, but I want to make sure businesses such as Thai Market and Highland Coffee are not severely effected.

I look forward to receiving your reply on the County's plan to ensure the new development and our Fenton Village shops can both exist in harmony. Thank you for your time.

Rob Masciola
737 Thayer Ave
Silver Spring 20910
301-5882-779

GranDesign Studio, Inc.

ARCHITECTS . ENGINEERS . PLANNERS

WWW.GRANDESIGNSTUDIO.COM

Date: January 26, 2009

To: **Mr. Elza Heisel-McCoy**
Development Review Division
M-NCPPC
8787 Georgia Avenue, Silver Spring, MD 20910

From: **Tad Grodzki, Ali Sohrab, Principals**
GranDesign Studio LLP
GranDesign Studio, Inc.
912 Thayer Ave, Silver Spring, MD 20910

Re: Notice of Application
Project Plan No. 920070010
Studio Plaza, Silver Spring. Md.

We just received a copy of the Project Plan application for the project noted above. We are owners and occupants of the GranDesign building located on Thayer Ave, adjacent to the proposed Street "A".

We are generally very impressed by the proposal and look forward to it being approved and implemented. We think that the Studio Plaza project as envisioned shows a strong commitment to the further development of Downtown Silver Spring. And we appreciate and fully support Mr. Hillerson's architectural aesthetics as well as his efforts to include an amphitheatre, open green spaces, and pedestrian walkways. We will undoubtedly enjoy being right next to it.

We do however have an issue with one aspect of the proposal that directly affects our existing building. The GranDesign building was carefully and beautifully redesigned and renovated three years ago and we are jealous guardians of its safety and integrity. Our concern relates to the elimination of protection from vehicles hitting the rear of our building currently provided by a sidewalk within the existing 16' public alley; and, that acceptable means of ingress / egress requirements for such vehicular movement are met.

We would appreciate it if our concern is duly noted and that means of mitigating impact to our building be considered. We look forward to working with Mr. Hillerson through the site development processes to protect the rear of our building, and subject to this concern we enthusiastically support this Project.

Sincerely,


Tad Grodzki, Principal
GranDesign Studio, Inc.

Cc: Bob Hillerson, John Reinhard

SIMAN

REALTY

Real Estate Services

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JAN 27 2009
DEVELOPMENT DIVISION

January 26th, 2009

Mr. Elza Heisel-McCoy
Development Review Division
M-NCPPC
8787 Georgia Avenue
Silver Spring
Maryland 20910

Re- STUDIO PLAZA, Notice Of Application
Project Plan 920070010
Silver Spring, MD

Dear Mr. Heisel-McCoy,

We, as the property owner of 910 Thayer Avenue are very impressed with the proposal and concept of Studio Plaza, and look forward to this project being approved and implemented.

This concept will be in the best interest of Downtown Silver Spring, the public and the adjacent property owners.

We only have one small issue which Mr. Hillerson needs to address. The 16 foot Public Alley in the rear of our property needs to be wider, to allow for pedestrian use and large trucks to offload.

Thank you.

Sincerely,



Woolf Siman
(Principal)

Copy: Bob Hillerson



January 26, 2009

Elza Hisel-McCoy
Planner/Coordinator
Development Review Division
Maryland National Capital Park and
Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Dear Ms. McCoy:

I am writing in support of the Studio Plaza project in downtown Silver Spring. Our company has been located in the proposed site for about 18 years. We recently moved from Mayor Lane to our current location at 914 Silver Spring Avenue.

By way of background I am a former chairperson of the board of directors of the Greater Silver Spring Chamber of Commerce and of the Montgomery County Chamber of Commerce. I have served on the Silver Spring Urban District for several terms and a few times as chairperson of the Urban District. I have served on the three redevelopment advisory committees.

I have reviewed the Studio Project plan, phasing and narrative as well as meeting with Mr. Robert Hillerson. He provided insight and his passion for this project. After the redevelopment of the "core" many of us have wondered what happen to the rest of Downtown Silver Spring. Now comes a project that combines the very best of new "urbanism" and aspects of mixed use. As important is the sensitive nature to the adjoining existing businesses. One example is the loading and recycling areas for Mayor Lane's businesses. Another impressive observation is the manner in which the access for the other adjoining businesses on Thayer, Fenton and Silver Spring Avenue. The treatment for the "medical building" and the intent of contributing to creative solutions for the other business is impressive.

I therefore wish to express my support for this project and encourage a speedy process and with any luck and an improved financial atmosphere this project will become a reality.

Sincerely,

Charles H. Atwell
Charles H. Atwell
President

Innovative Business Interiors, Inc.
914 Silver Spring Ave, Suite 100 • Silver Spring, Maryland 20910 • Maryland 20910
• 301-589-1500 • www.ibi-inc



Since 1947

8201 Georgia Avenue, Silver Spring, Maryland 20910

301-588-1300 • Toll Free 800-775-5459 • Facsimile 301-585-6775

January 14, 2009

Elza Hisel-McCoy
Planner Coordinator, Development Review Division
MNCPPC
8787 Georgia Avenue
Silver Spring, MD 20910

Re: Project Plan #920070010- Studio Plaza

Mr. Hisel-McCoy,

I write today as an adjoining property owner of this proposed project, a lifelong resident of Montgomery County, and the third generation of my family to own and operate Bell Flowers at 8201 Georgia Avenue, where we have operated since 1947.

I've been involved in the redevelopment efforts in downtown Silver Spring for over 25 years, having served on the Silver Spring Urban District Advisory Board for many years as well as serving on the Citizens Advisory Committee for the 1990 Silver Spring CBD Sector Plan. I've been concerned for years that the renewal and redevelopment not stop at the edges of the "redevelopment area" but spread throughout our CBD where and when possible.

After reviewing the project plan, I must say that Studio Plaza looks like it will be a magnificent mixed use project in an area of Silver Spring in dire need of redevelopment and renewal. The additional retail, office and residential uses in this block should have a profound, long term, positive impact on the Fenton Street Village and Georgia Avenue retail markets.

I have reviewed the project plan and applaud Mr. Hillerson's work and specifically the recent changes along the alley (Mayor Lane) directly behind my building. Mayor Lane desperately needs a facelift and the service areas he will include in his project will be a strong step in that direction. I look forward to working with him further to mitigate the impact of the garage access from Mayor Lane, directly behind my buildings rear entrance.

I appreciate your work on this project and look forward to the renewal of this block!

Sincerely,

Dale A. Mangum
President



SMITTY DOG ENTERPRISES, INC T/A
REGAL PAINT CENTERS
8121-A PINEY BRANCH ROAD
SILVER SPRING, MARYLAND 20910
(301) 587-9311 TELEPHONE
(240) 247-0405 FAX
WWW.REGALPAINTCENTERS.COM

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IAN 13 2009

DEVELOPMENT REVIEW

Elza Hisel-McCoy
Planner Coordinator, Development Review Division
Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

I am the property owner of 8211 Georgia Avenue, Silver Spring, Maryland and the proprietor of the Benjamin Moore Paint store at the same location. We front Georgia Avenue, but use Mayor Lane for services.

I would like to voice my unconditional support for the Studio Plaza Project (Project #920070010). I have operated my business at this location for over 20 years. The revitalization of the Fenton Village as envisioned by the Sector Plan is well served by this project, and at the same time accommodates the existing small business owners. I believe that the mix of uses will activate the streets both during the day and at nighttime. There will be small retail spaces wherever there can possibly be pedestrian traffic. The project will adhere to the massing/height limits so important to us in the Fenton Village. The public use space is fantastic. I and my customers will certainly take advantage of the central plaza during lunch and when there are scheduled activities. The state of the art Public Parking Garage will support my customers.

If that isn't enough, this developer is proposing to rehabilitate Mayor Lane at the rear of my business. Undergrounding the utility wires is great. But more importantly, creating enclosed Community Recycling Centers will rid the area of vermin. We have unsuccessfully been fighting this battle for years.

In conclusion, I believe that Studio Plaza would be of great benefit to the Fenton Village and ask you to approve this project at the earliest possible time.

Sincerely,

A handwritten signature in dark ink, appearing to read "B R Smith".

Brian R. Smith
President

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JAN 13 2009

DEVELOPMENT REVIEW

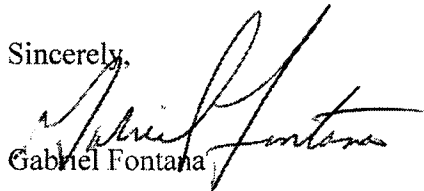
January 12, 2009

Elza Hisel-McCoy
Planner Coordinator, Development Review Division
Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Dear Ms. Hisel- McCoy:

I own the property located at 8227 Fenton Street across the street from the proposed Studio Plaza Project. The project is exactly what we need in my area and I support it.

Sincerely,


Gabriel Fontana

Dale Music Co.
8240 Georgia Ave.
Silver Spring MD 20910-4575



Supplying your Music
Needs Since 1950

March 24, 2009

Elza Hisel-McCoy, Planner/Coordinator
Development Review Division
Maryland-National Capital Park
and Planning Commission
8787 Georgia Avenue
Silver Spring MD 20910

Dear Mr. Hisel-McCoy:

Yesterday I saw the plans for the Studio Plaza Project. My building is leased at 8223 Gerogia Avenue. My property backs to Mayor Lane. I enthusiastically support the project.


The studio Plaza Project will be a large step in the revitalization of the Fenton Village. The presence of new businesses and residents that it will attract will benefit the existing community by bringing in more shoppers and patrons. The area will be safer with this additional activity, both day and night, and with the addition of street lighting and pedestrian walkways.

The community recycling center is a great feature which I enthusiastically support. Mayor Lane is presently strewn with dumpsites and containers of every size and shape. It is unsightly, infested with rodents and unsafe. The community recycling centers will allow the consolidation of trash and recycling receptacles, rodent control and generally a much safer and neater appearance.

I also own Dale Music Where I work on a regular basis. I look forward to enjoying the beautiful Plaza and other amenities included in the Project.

This letter is to encourage the approval of the Studio Plaza Project as soon as possible.

Sincerely,


Carol Warden
President
Dale Music Co.
301-589-1459 x103

LaBAMBA RESTAURANT
8241 GEORGIA AVENUE
SILVER SPRING, MD 20910

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MAR 24 2009

March 24, 2009

DEVELOPMENT REVIEW

Elza Hisel-McCoy, Planner/Coordinator
Development Review Division
Maryland-National Capital Park
And Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Dear Mr. Hisel-McCoy:

This letter is to indicate my support or the Studio Plaza Project (Plan #920070010). For the past 17 years I have owned and operated LaBamba, a Guatemalan restaurant located at 8241 Georgia Avenue. My restaurant backs to Mayor Lane. I have been looking forward to the construction of the Studio Plaza Project to improve the Fenton Village.

The area has been a problem behind my restaurant with numerous dumpsters, odors and rodents. We very much like the community recycling center to clean up this area. We also understand that the developer intends to re-light the alley to improve safety. We believe the mixed use development of retail, residential and office will bring customers to our restaurant daytime and nighttime. Studio Plaza will greatly enhance the value of my business and we look forward to its construction at the earliest possible time.

Very truly yours,



Armando Guerra

March 18, 2009

Elza Hisel-McCoy, Planner/Coordinator
Development Review Division
Maryland-National Capital Park
And Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

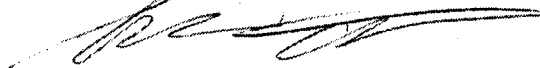
Dear Mr. Hisel-McCoy:

This letter is to support approval of the Studio Plaza Project. I own the retail location at 904 Silver Spring Avenue, which is leased to a car rental business. My property is directly across the street from this project.

The Studio Plaza Project will be great for the Fenton Village. It will replace old, worn out buildings and fill vacant lots. The four entrances to the Project and retail stores on the public streets will provide the integration with existing businesses that I was hoping for. There will be people in the area daytime and nighttime which will provide more activity for all local businesses.

This Project will certainly increase my tenant's business. Please approve Studio Plaza as soon as possible.

Sincerely,



Emanuel Athanasakis



Sure-Fit Security

8213 Fenton Street

Silver Spring, MD 20910

301-585-4595 202-296-4710

e-mail: info@surefitsecurity.com Fax: 301-585-5017

RECEIVED

DEVELOPMENT REVIEW

March 16, 2009

Elza Hisel-McCoy, Planner/Coordinator
Development Review Division
Maryland-National Capital Park And Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Dear Mr. Hisel-McCoy:

I am writing in support of the Studio Plaza Project in the Fenton Village of Silver Spring. Our company has been located at Fenton Street for 47 years. The Fenton Village has been designated an Enterprise Zone for good reason. There are many buildings that are outdated, and many vacant lots. I am looking forward to continuing the process of revitalizing Silver Spring and the Fenton Village in particular.

I have reviewed the Studio Plaza Project Plan, and I am impressed that we will have a project that combines the very best of new "urbanism" and aspects of mixed use. The mix of uses will assure activity day and night. The pedestrian pathway east-west and north-south help integrate the Project with the adjacent neighborhoods. I know that I may have to change the way I do business, being more retail and less central station for my delivery trailers, but in balance this change will be very good.

Therefore, I want to express my support for this project and encourage its prompt approval.

Sincerely,

Jim Mullins

President

Sure-Fit Security

8213 Fenton Street

Silver Spring MD 20910

Phone: 301-585-4595

Fax: 301-585-5017

e-mail: jim@surefitsecurity.com





RECEIVED

3/13/09

MAR 18

DEVELOPMENT REVIEW

Elza Hisel-McCoy, Planner/Coordinator
Development Review Division
Maryland-National Capital Park
And Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Dear Mr. Hisel-McCoy:

On behalf of Brainbox Enterprises, this letter is to express our enthusiastic support of the Studio Plaza Project (Project #920070010). We are located at 8215 Fenton Street, directly across Fenton Street from the Studio Plaza Project. During our lease negotiations with Mr. Hillerson in 2007, he showed us his plans for Studio Plaza. It was a huge factor in our decision to build our business in this location. Our staff is a young, lively urban group of individuals who will definitely take advantage of the anticipated new retail stores, the open green spaces, and pedestrian walkways. Many of our employees commute by public transportation, and the ability to walk safely, mid-block, from Metro is exciting. I can even anticipate that some of our employees will relocate to new housing within the community. We love the new Downtown Silver Spring, and look forward to Studio Plaza bringing a similar new life and revitalization to our home base in the Fenton Village.

We wholeheartedly encourage you to approve the Studio Plaza Project.

Thank you,

Chris Panagopoulos
VP of Finance
Brainbox Enterprises, Inc.

Mr. Roberto Pietrobono
Olazzo Inc
8235 Georgia Avenue
Silver Spring, Maryland 20910

RECEIVED
DEVELOPMENT REVIEW

Elza Hisel- McCoy
Montgomery Park and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Dear Mr Hisel-McCoy,

I would like to express my support for the Studio Plaza project (Plan#920070010). I have been a Silver Spring resident for over 35 years. For the past two years I have owned and operated a business at 8235 Georgia Avenue called Olazzo. One of the major factors that attracted me to our present location was the developments that were proposed within the Fenton Village area. The Studio Plaza project is/was the development I was most excited about.

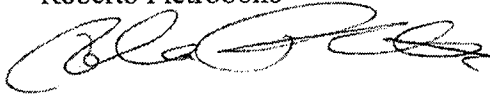
Studio Plaza would replace an area which has been a problem area since our business has been here. The improvements that would be made would bring more lighting, improved streetscape and a safer environment. The parking lot in its current state has very poor lighting. My employees have had their cars broken into several times in addition to witnessing other break-ins. Most of my female employees feel unsafe walking to their cars at night in that general area. The beer and wine store was a haven for vagrants, pan handlers and drunks. My back door which opens out to Mayor lane has been used as a restroom and a target for graffiti vandals several times. The proposed area in its present state offers absolutely very little value to the existing businesses in the area. In my opinion it has been a deterrent for prospective shoppers and diners that want to come frequent the area.

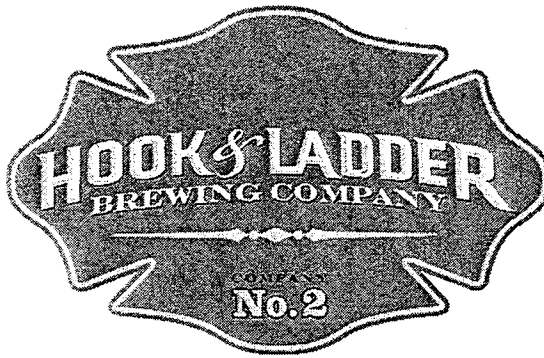
Due to scheduling conflicts I have been unable to attend public hearings for Studio Plaza. I have read some of the arguments that oppose the project. One of these arguments would be that the proposed project would isolate businesses outside of the development. As one of these businesses, I disagree with this premise. Businesses like my own depend on foot traffic and a safe means to frequent our establishments. Studio Plaza represents a step in the right direction to achieve those goals. More foot traffic in that area along Thayer Avenue, Mayor Lane and Silver Spring Avenue brought on by Studio Plaza will decrease the likelihood of street crime in that area.

Please consider some of these issues when deciding on the fate of this project. As a lifetime resident of Silver Spring I am proud of the history and positive changes that have

taken place in recent years. In my opinion this project represents positive growth that will continue to make this area a great place to live and work.

Sincerely,
Roberto Pietrobono

A handwritten signature in black ink, appearing to read 'Roberto Pietrobono', written in a cursive style.



RECEIVED

APR 06 2009

DEVELOPMENT REVIEW

Fleischer Enterprises, Inc.
Dba Hook & Ladder Brewing Co.
8113 Fenton St.
Silver Spring, MD 20910

April 6, 2009

Elza Hisel-McCoy, Planner/Coordinator
Development Review Division
Maryland-National Capital Park
And Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Dear Mr. Hisel-McCoy:

We have reviewed the proposed Project Plan and would like to express our enthusiastic support of the Studio Plaza Project (Project #920070010). As you know, we own the old Silver Spring Fire Station at the corner of Georgia Avenue and Silver Spring Avenue, which will be renovated into the Hook & Ladder Restaurant and Brewery.

The Studio Plaza project presents a unique opportunity to revitalize nearly an entire block in the Fenton Village, with uses as envisioned by the Sector Plan. The mix of uses, including residential, office, and retail, will bring much needed activity and economic growth to the area. The pedestrian-friendly public walkways, lighting, and public parking garage will make shopping and visiting convenient, safe, and inviting.

We believe that Studio Plaza is integrated with the Fenton Village and will bring much needed economic benefit to the area. It will certainly bring potential customers to our restaurant during the day and in the evening. We look forward to serving the existing and new residents and businesses in the Fenton Village area.

We ask that you approve this project at the earliest possible time.

Sincerely,

A handwritten signature in dark ink, appearing to read "Rich Fleischer", is written over a light-colored background.

Rich Fleischer
Vice-President
Founder and Brewmaster
Hook & Ladder Brewing Company



SCOTT PROPERTIES, LLC

RECEIVED

APR 03 2009

DEVELOPMENT REVIEW

8120 FENTON STREET

SUITE 300

SILVER SPRING, MARYLAND 20910

April 3, 2009

Elza Hisel-McCoy, Planner/Coordinator
Development Review Division
Maryland-National Capital Park
And Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Dear Mr. Hisel-McCoy:

I am the managing member of Scott Properties, LLC which owns 8120 Fenton Street at the corner of Fenton Street and Silver Spring Avenue. We have owned our property for almost 10 years. The proposed Studio Plaza Project is across the street from our property. I am writing to express my support for this Project.

The Studio Plaza Project will revitalize the Fenton Village with the addition of new businesses, stores, and residents. I believe the existing community will benefit from increased activity, both during day and evening hours. The convenience of the parking garage, the beautifully designed public space, and pedestrian friendly features are inviting, and I believe will create a sense of safety.

Studio Plaza will transform nearly an entire block from a dilapidated, uninviting condition into an area that accomplishes what is envisioned for the Fenton Village - a sense of community and destination. Therefore, I encourage you to please approve the Studio Plaza Project as soon as possible.

Very truly yours,

John J. Scott, Managing Member
Scott Properties, LLC

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APR 03 2009

DEVELOPMENT REVIEW



April 3, 2009

Elza Hisel-McCoy, Planner/Coordinator
Development Review Division
Maryland-National Capital Park
And Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Dear Mr. Hisel-McCoy:

I am the Vice President of Associated Insurance Management, Inc. at 8120 Fenton Street, Silver Spring, MD. AIM has been located in Silver Spring since 1969 and at this address since 1983. We've been through the bad, worse and now, finally, the improving Silver Spring. The proposed Studio Plaza Project is across the street from my property. I am writing to express my support for this Project.

The Studio Plaza Project will revitalize Fenton Village and extend the revitalization of downtown Silver Spring with the addition of new businesses, stores, and residents. I believe the existing community, as well as our staff of 35, will benefit from increased activity, both during day and evening hours. The convenience of the parking garage, the beautifully designed public space and pedestrian friendly features are inviting, and I believe will create a sense of safety – just Like Downtown Silver Spring did three blocks north.

Studio Plaza will transform nearly an entire block from a dilapidated, uninviting condition into an area that accomplishes what is envisioned for the Fenton Village, a sense of community and destination. Therefore, I encourage you to please approve the Studio Plaza Project as soon as possible.

Very truly yours,

Leonard P. Marinaccio
Vice President
(240)638-4022
lpm@aimcommercial.com

DEVELOPMENT REVIEW

APR 03 2009

RECEIVED

March 27, 2009

Elza Hisel-McCoy, Planner/Coordinator
Development Review Division
Maryland-National Capital Park
And Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Dear Mr. Hisel-McCoy:

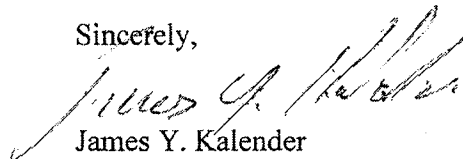
I am the owner of two properties located in the Fenton Village at 8211 Fenton Street, and 8010 Fenton Street. I am writing to express my support of the Studio Plaza Project #920070010.

The Fenton Village is in need of revitalization, and this project presents a unique opportunity to comprehensively redevelop nearly an entire block. The design of the public space is beautiful and the pedestrian friendly features create a sense of safety and will draw people into and out of the project to enjoy the Fenton Village and the community as a whole. The central location of the new parking garage will be convenient for patrons on Georgia Avenue and on Fenton Street.

I believe the influx of new residents, retail customers, and office workers will stimulate business in the entire area. My property at 8211 Fenton Street, which is directly across the street from the proposed Project, is leased to a beer and wine store, and I anticipate that their business will benefit from these new customers, both day and evening hours. I believe this will increase the value of my properties.

I encourage you to please approve the Studio Plaza Project as soon as possible.

Sincerely,



James Y. Kalender

nicaro
RESTAURANT LOUNGE

Pedro Matamoros
Nicaro Restaurant
8229 Georgia Ave/
Silver Spring, MD 20910

Elza Hisel-McCoy
Montgomery Park and Planning Commission
8787 Georgia Ave.
Silver Spring, MD 20910

Mr. Hisel-McCoy,

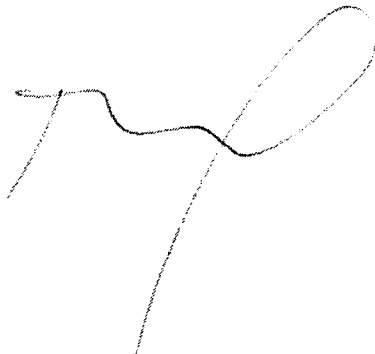
I would like to express my support for the Studio Plaza Project (plan #920070010). For almost two years I have owned and managed a successful restaurant, Nicaro. One of the main attractions to this location was its growing neighborhood. The Studio Plaza Project is a perfect example of what Silver Spring needs.

Studio Plaza will replace the dismal and sometimes "not to safe" area of our neighborhood. These improvements will make our environment safer by providing more light for the parking lot. Late at night the lot has poor lighting. The employees have had their cars broken into and we will not let the females walk out alone. The beer and wine store is a popular spot for vagrants and drunks to hang out. This lot currently has no value to the existing businesses in the area. Many customers have asked for alternate parking places in the evening.

An argument that opposes this project is that it will isolate businesses outside of this area. I do not agree with this because I am one of these businesses who rely on foot traffic and a safe way to frequent this establishment. Studio Plaza is exactly what is needed to attain this. The increase of foot traffic along Thayer Ave., Silver Spring Ave, and Mayor Lane will also decrease the likelihood of street crime in this area.

Please consider some of these issues when deciding to go forward with this project. I have lived in Silver Spring for 15 years and I am proud of its history and the positive changes it has taken recently. This project represents a positive growth that will continue to make this area safe and great place to live/work.

Sincerely,
Pedro Matamoros



THE FENTON GROUP LLC
Specialists in Residential and Commercial Development

March 26, 2009

Elza Hisel-McCoy
Development Review Division
M-NCPPC
8787 Georgia Avenue
Silver Spring, MD 20910

Re: Studio Plaza Project Plan No. #920070010

Dear Mr. Hisel-McCoy:

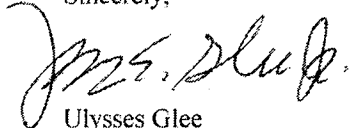
This letter is written to offer my support for the Studio Plaza project as presented in Bob Hillerson's Project Plan submission. I am the property owner of 8113-8115 Fenton Street and several lots along Silver Spring Avenue. I am in the process of developing the lots into a mixed-use project to further enhance Fenton Village and feel that Studio Plaza will be a complement to my project and Silver Spring overall.

The Project Plan as submitted by Robert Hillerson was very well conceived and designed since its inception. I have not been involved with the entire process of the development of this project, however I have had the opportunity to preview the project at some of the M-NCPPC hearings and was able to weigh in at community discussions at the East Silver Spring Citizens' Association meeting prior to the Project Plan submission. I am impressed with the project and I thought the community raised many legitimate questions and concerns that have been addressed with the lowered scale of the buildings.

I personally admired the vision to have this project to be a mixed-use project to address many of the needs of the community, particularly among small business owners. Most important, the proposed project helps this area of Silver Spring which has lagged behind the "core" developments that have delivered. I have now had a better opportunity to preview the entire project, and I realize the sensitive nature of this project and how it relates to the entire community. I know that there were issues with members of the community, however I know that they have had the opportunity to voice those concerns at different forums. I feel that there will be an overall synergy with private development that still values the mom-and-pop feel of Fenton Village.

Clearly, I think that this project was well thought through and well conceived with great attention to design and vision. Therefore, without reservation, I fully support this project and welcome the addition of this project to the community. I look forward to following Studio Plaza's progress while venturing to improve my own corner of Fenton Village.

Sincerely,



Ulysses Glee
President
The Fenton Group, LLC

Spa Mesu
hair • nails • skin

RECEIVED

MAR 27 2009

DEVELOPMENT REVIEW

Elza Hisel-McCoy, Planner/Coordinator
Development Review Division
Maryland-National Capital Park
And Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Dear Mr. Hisel-McCoy:

I am writing to express my support for the Studio Plaza Project (Project Plan #920070010). I own and operate Spa Mesu at 8215 Fenton Street, which is across the street from the Project.

I moved my business to Silver Spring in anticipation of the Project. The Studio Plaza Project will be a great benefit to the Fenton Village. I eagerly anticipate the activity generated by the mix of office tenants, additional retail stores, and new residents in the area. I believe my business and others in the area will be stimulated by this increased exposure.

I am pleased with the integration of this Project with the Fenton Village at large. The availability of the public amenities, and safe and easy access through the block is provided by the pedestrian walkways from Fenton Street and the other adjoining public streets.

Please approve Studio Plaza at the earliest time.

Sincerely
Andarge Asfaw

 3.14.09

RECEIVED

MARCH 27 2009

DEVELOPMENT REVIEW

**Larry
Rosen**
Commercial & Investment
Realty Associates, LLC

March 27, 2009

Elza Hisel-McCoy, Planner/Coordinator
Development Review Division
Maryland-National Capital Park and
Planning Commission
8787 Georgia Avenue
Silver Spring, Md. 20910

Dear Mr. Hisel-McCoy,

I have reviewed the proposed development project known as Studio Plaza and I would like to show my support for this project.

I am a commercial real estate broker, with over 25 years of experience. I specialize in the Silver Spring downtown area. I have completed several hundred transactions in this area. As the Silver Spring Redevelopment area was being completed I could see its affects on the neighboring properties. Several properties were sold or leased making way for new development, restaurants, and residential projects.

It is my hope that this project in Fenton Village will have the same effects not only for the area immediately surrounded by this development but the properties south of the development. The entire Fenton Village area could use this development to spur additional activity. There are so many infill and small user sites in Fenton Village. I think this and other developments that could follow can provide a more comprehensive development approach and sandwich the planned library site between Studio Plaza and the Silver Spring Redevelopment sites.

Sincerely,


Lawrence R. Rosen

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APR 14 2009



Bloom Builders, Inc.

PO Box 430 . Glen Echo, Maryland . 20812-0430 . Fax: 301.576.5253 . Email: info@thebloomcompanies.com

DEVELOPMENT REVIEW

March 5, 2009

Elza Hisel-McCoy, Planner/Coordinator
Development Review Division
Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

RE: Studio Plaza Project (Project #920070010)

Dear Mr. Hisel-McCoy:

As the property owner of the Adele project located at the corner of Thayer Avenue and Fenton Street in downtown Silver Spring, I am writing in support of the Studio Plaza Project (Project #920070010).

Fenton Village's revitalization, as envisioned by the Sector Plan, is well served by this project. In my opinion, the mix of uses will activate and enliven the Village during both day and evening. Additionally, the project adheres to the massing/height limits so important in the Fenton Village.

The numerous retail spaces, beautiful public use space and centrally located public parking garage are all great amenities for the neighborhood

The Studio Plaza Project will continue the momentum to revitalize the Fenton Village. It is my hope that you move to quickly approve this project.

Sincerely,

Lewis S. Bloom
Managing Member
Fenton Village, LLC

AV Investments Maryland LLC
6237 Clearwood Road
Bethesda, MD 20817-5634

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

December 15, 2008

Elza Hisel-McCoy, Assoc. AIA, LEED-AP
Planner Coordinator
Development Review Division
David Paine
Transportation Planning Reviewer
John Maccolin
Urban Designer
8787 Georgia avenue
Silver Spring, Md 20910

Re: Studio Plaza

Gentlemen:

My partner and I own the building at 8205-8207 Georgia Avenue (Plaza Art Building). I am unhappy with several design aspects of the Studio Plaza project. My primary concerns relate to the parking lot in the middle of the block and the planned use of Mayor Lane as an entrance and exit to new buildings being built. Currently, Mayor Lane serves the delivery, pickup and trash hauling needs of the retail businesses on the 8200 block of Georgia Avenue. Additionally, it is used by the merchants, customers and employees on the block as both a pedestrian and vehicular access-way to the parking lot in the middle of the block. The proposed changes will increase the vehicular traffic, making it difficult and dangerous to continue these uses. Further, with 61,000 square feet of new retail space being added to the block, replacing the current 152 space surface parking lot with an underground lot of the same size is inadequate. With both increased demand for parking by the new merchants and the additional obstacles for pedestrians to access the lot from Silver Spring Avenue, the current merchants are effectively losing the use of the parking lot.

Allowing motor vehicles to enter and exit on the new buildings on Mayor Lane will cause conflict with its current users. Delivery trucks and customers sometimes park in the alley for several minutes while picking up or delivering merchandise. It does not make sense to instead have delivery trucks and customers double park on Georgia Avenue to conduct business. Further, the developer intends to discourage pedestrian traffic on Mayor Lane so that it will be used exclusively for vehicular traffic and trash trucks. Patrons of stores on Georgia Avenue will only be able to access the parking lot in the center of the block by walking up to a passage way where the statue of the mayor is located. Now they can park in the public lot in the center of the block and walk through the alley. Pedestrians will, regardless of signs, use the alley, if that is more convenient. Why not have a walkway built along the alley for pedestrians? The design should be



SAUNDERS and SCHMIELER
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SUITE 600
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WASHINGTON, DC 20036
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8737 Colesville Road, Suite L-201
Silver Spring, Maryland 20910-3921

Telephone: (301) 588-7717 Facsimile: (301) 588-5073
Website: www.sslawfirm.com

BALTIMORE OFFICE
2420 N. CALVERT STREET
BALTIMORE, MD 21218
(410) 235-7558

ARLINGTON OFFICE
SUITE 700
2111 WILSON BOULEVARD
ARLINGTON, VA 22201
(703) 243-1100

COLUMBIA OFFICE
UNIT #5
5405 TWIN KNOLLS ROAD
COLUMBIA, MD 21045
(410) 715-9933

Jeffrey R. Schmieler
(schmielerj@sslawfirm.com)

March 25, 2009

Dr. Royce Hanson, Chairman
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910

Re: Studio Plaza- Project Plan 920070010

Dear Chairman Hanson:

I am writing to strongly urge the Montgomery County Planning Board to approve Project Plan NO. 920070010- Studio Plaza. Please enter this letter as official testimony in favor of the proposal. This outstanding project is the first large scale multi-use development proposed for this portion of Silver Spring. It will revitalize the area by transforming property that currently is a major eyesore and security problem into a high quality, pedestrian friendly mixed use area..

Shortly after my admission to the Maryland Bar in 1967 I opened my law practice at 8225 Georgia Ave , an adjoining property. Subsequently, in 1977 I purchased the property and continued to practice at that location until 1995. I have owned 8225 Georgia Avenue since the time I acquired it and have practiced law in Silver Spring continuously from and after the date my practice commenced. As my practice grew and my clientele included a number of major insurance companies, corporations and clients, I was forced to relocate my law office from that address 15 years ago because my employees , clients and I felt that the access alley area and parking lot made walking to and from the office unsafe, and the area unpleasant to be in. The alley and adjacent properties have continued to deteriorate through the years and the dumpsters are unsightly and unsanitary. I can still recall the unpleasantness in walking through the Mayor Lane access walkway to the public parking lot and the stench that one had to endure in order to enter and leave the premises.

It is readily apparent that this section of Silver Spring has been neglected by all concerned and exists today as an exemplar of not only improper planning, but property owner neglect. At present our office staff consists of 20 members when fully staffed, roughly half of which are Attorneys. As an owner and former owner/occupant, I have often considered improving 8225 Georgia Ave in order to accommodate our law firm, however, in view of the present surroundings, it is not deemed economically feasible nor desirable to do so.

The Studio Plaza project is a well designed and planned development which if approved and built, is just the type of mixed use development that this area of Silver Spring requires in order

Dr. Royce Hanson
Page Two
March 25, 2009

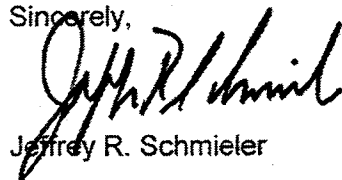
to trigger further improvement of the area, especially along Mayor Lane. In the event this project is approved and built, the very first thing that I will do as a property owner is improve 8225 Georgia Ave in order to accommodate our practice. I will once again be proud to have an office in this area. However, in its present state of decay, I can not and will not make the necessary investment to do so.

It is my firm belief that this project is outstanding because it will transform a large deteriorated urban area into an attractive urban neighborhood with retail, a mix of housing, offices and or/hotel uses, all activated by street level retail. I am particularly enthusiastic about undergrounding the parking lot and providing a public use space Plaza including an amphitheater, lawn for informal recreation, and tables and chairs. The Urban promenade will provide an attractive, safe walking connection for the people coming from the metro to the area and to Fenton Street Village. The new street will open up the area, increasing visibility and security.

Lastly, what is the alternative to the revitalization of this neglected area of Silver Spring? It appears to me that the developers of Studio Plaza are ready willing and able to implement the project. The area is in need of proper development and has been for the entire length of time that I have been in Silver Spring. The need for this project is indisputable. I am unaware of any viable alternative. Further delay will only exacerbate the urban rot that this area exemplifies.

In summary, for the reasons stated above, I strongly urge the Planning Board to approve this project and allow it to proceed without further delays.

Sincerely,



Jeffrey R. Schmieler

JRS:jm

cc: Elza Hisel-McCoy, Planner/Coordinator

Appendix I: Community correspondence in opposition to the project

Hisel-McCoy, Elza

From: Phyllis Giroux [portland2175@gmail.com]
Sent: Friday, May 01, 2009 8:03 PM
To: Hisel-McCoy, Elza; councilmemberervin@montgomerycountymd.gov
Subject: Fenton Street Businesses

Dear Madam:

I want to speak on behalf of the businesses around Fenton Street and Thayer/Silver Spring Avenue where developer Bob Hillerson wants to build 3-story underground parking.

My reasons:

- the safety issues: 3 story underground parking would be welcomed by drug and criminal elements, and clients and customers of businesses would be put in danger.
 - the lone entrance is convenient for the developer's new retail areas but not for businesses on the Fenton St. end of the block.
 - the public parking on the south side of Silver Spring Avenue is sufficiently close. If the building is not in good condition, then fixing it is in order, either by the county or the developer. No additional parking to what is already in the present parking lot between Fenton/Thayer/Silver Spring would be added by the new underground parking.
 - business access by current business owners would be severely limited.
- Most are small businesses. The "little guy" loses again.
- the developer excludes current businesses from his retail design, yet creates a private road to access his own chosen businesses.
 - the county gave the developer rights to a parking lot without public input. Working under the radar is not a compliment to the integrity of county officials.
 - the county says it supports small businesses; this project harms businesses and their clients/customers.

Money speaks. It seems to be talking so loudly in this case that county officials cannot hear the voices of small businesses.

Yours truly,
P Giroux
Silver Spring MD
and a customer of at least two businesses in that area

MCP-CTRACK

From: Jane GGG [silverspringjane@yahoo.com]
Sent: Thursday, January 29, 2009 1:08 AM
To: MCP-Chairman; Hanson, Royce; Cryor, Jean; John Robinson
Subject: please don't sell parking lot 3 in Fenton Village - Hillerson project.

RECEIVED
0155
JAN 29 2009

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

Good Morning Mr Chairman & Commissioners Cryor and Robinson.
please don't sell parking lot 3 in Fenton Village & concerns about the Hillerson project.
Let me know if there is another person to whom I should send comments.

Mr Hanson, I did read your article in today's paper. I agree with you. I'm enclosing some quotes at the bottom of my note ... and one here:

"...Livability: Developing livable places demands detailed attention to how we design both the public realm and the private and public structures that frame, define and confront it. Active, well-designed and landscaped streets, sidewalks and public gathering places foster commerce and civic life. <snip> .. Sustainable development also respects community history and character while encouraging compatible change.

Just to keep in contact, and hoping that you are collecting opinions - I'm coming to the opinion that the above ground parking lot 3 should NOT be sold to anyone, including Hillerson. I think that each of his buildings should be developed separately so that each can stand alone and meet P&P standards and assure that each has the required amenity. I am worried that for this particular developer, there is a risk that the consolidation is providing loop holes and he would develop what he wants and conveniently "run out of money" by the time the required amenities are on the schedule. Already, he is "socializing" the idea that one of the apartment/condo buildings (on Silver Spring Ave) will be a Hotel instead of containing housing.

I think the Fenton street village needs above ground parking for the 10-15 minute type stops to the coffee shop, shoes, cleaners, etc. Who is really going to park in an underground lot proposed to enter up by Georgia and SSp avenue. Hillerson's plans show the entrance into the below ground replacement lot at Georgia Ave and SSp. You would enter at the end of the alley across from the old fire station - way far away from Fenton street. To walk to the businesses you would have to walk a full block down SSP and then a block north. This does not serve the 10-15 minute type stop to the shoe man..

The examples of existing above ground parking at the fringe of a CBD are (1) corner of Georgia and Colesville in Silver spring, and also (2) if you want to look at Bethesda, go the little strip mall on Bradley on the edge of the Bethesda business district - hardware store, bakery, drug store, etc , book ended by the two Grocery stores: Giant and Safeway. I am looking for the analogous word for "ergonomic" as it applies to a community , perhaps it is "livability".

In an unscientific poll at that district 20 democratic breakfast club, I could not find any woman that would favor parking in an underground lot verses the above ground parking lot 3 on Fenton. I found many men that agree with that as well.

In addition, the confluence of - (a) this particular developer and his (b) exploited workforce housing idea with the extra floors with no way to measure how much is enough for the developer to make money, and (c) selling the above ground parking lot #3 and (d) the absence of green space viewable from Fenton Street - appears to be a disaster from a neighborhood livability point of view.

The developer has said, and it has been recorded in many meeting minutes (Urban district meeting and ESSCA meeting and Round house meeting) that (1) the entire block will be a war zone for 10 years (2) there will be NO parking available AT ALL for at least the first 2 years of the project. He has also said that he would leave it looking awful for the next 20 years if he doesn't get what he wants.

Also, It has been reported to me that the developer is trying to intimidate adjacent property owners to "sign over" their easement rights on the alleys around the parking lot. He as told them that they must sign their rights over or else he will take action with his lawyers. One of these owners is an 85 year old . She now has a property atty. Equally disturbing is that people from the SS Regional center are accompanying the developer on these visits. These folks need their easements to receive deliveries and conduct business.

It has been reported to me that since the intimidation tactics are not working, the developer is formally requesting that these pieces or alleys are declared as "abandoned" and not as part of the project but as a stand alone action, so that there are no conditions to the "abandonment". I hope that the county will check this proposed action and make sure that the property owners' rights are protected.

Further, and I probably should mention this first, the current proposal does not benefit the exiting residential community at all, rather it is a development of a self sufficient block, turned into itself, which is enclosed and serves itself, not anyone in the community. The design could be plopped anywhere and does not integrate into the community or call the community into it. The green space inside the block is really the backyard for the buildings. It's like a secret court yard. That's a really cool thing , but NOT for this project in this location. It would be good for a City College campus, or a cloister, where you are trying to create a mini, succinct sub-environment, like they do at GW University on 21 street, and on H between 20 and 21st.

I hope that this is useful communication for you, as input from a community member.
and if you would like additional information.

I think that work force housing could work successfully in this spot, green space can be placed in this spot, viewable and accessible from Fenton street, and the above ground parking lot 3 can be maintained, an additional underground lot can be added , but we are going to have to work very hard to make sure it happens to the benefit of the community. At this time, we don't see any benefits, only negative impacts.

Thank you, Jane Gorbaty,
Grove Street, Silver Spring

your article:

http://www.gazette.net/stories/01282009/montcol174603_32471.shtml

<snip>

Diversity: Great centers are places where people of all incomes, ages, and household sizes can live, work and meet their changing needs. We can create them here by planning for centers that perform distinct economic and social functions. Each should offer a range of housing opportunities, mobility options, economic activity, entertainment, recreation and culture. Spaces for local merchants, places for spontaneous activity, and opportunities for organic growth and change are essential.

Livability: Developing livable places demands detailed attention to how we design both the public realm and the private and public structures that frame, define and confront it. Active, well-designed and landscaped streets, sidewalks and public gathering places foster commerce and civic life. Public buildings must set high standards for outstanding design, energy efficiency, and environmental protection. Sustainable development also respects community history and character while encouraging compatible change.

We can enhance the livability of established neighborhoods by increasing opportunities for housing for all life stages. We also want to require more options for moving people while we improve the aesthetic and natural environment. We can reinforce neighborhood stability by improving access to parks, calming traffic, remodeling schools, and beefing up programs in safety, recreation and environmental health.

Flexibility: A sustainable growth policy will encourage experimentation and timely adjustments to markets and public needs. Our zoning regulations are outdated, complex and rigid. They keep pigs out of parlors but provide little room for creative design.

Achieving sustainable growth will involve transforming a culture of planning and development defined largely by what cannot be done to one defined by performance: Does a plan, project or building improve the county's economy, environmental quality and social equity?

There will be some short-term disruptions and inconvenience. We will make mistakes. But the choices we make now are as critical to the next generation as those made some 40 years ago were to this one.

1. **Problem:** The proposed project negatively impacts and denies access to adjacent properties.

Solution: We understand that you will be working with these property owners to find a solution. If agreeable to the owners of these buildings, we would like to see the Thai market building included more in the new development by creating an entrance in the rear of their building onto the new retail plaza. Also, if access is provided to the CD publishing building, we would like to add 10-12 surface, short-term parking meters which can be seen from and accessed by Fenton Street in front of the CD publishing building. Again, we suggest this only if it is agreeable to the current property owners.

2. **Problem:** The proposed project is isolated from the rest of Fenton Village and will not encourage foot traffic on Fenton Street and Thayer Avenue. The project is not integrated with the rest of Fenton Village.

Possible Solutions:

Lighting: Require the same lighting throughout Fenton Village. Fenton Street, Thayer Avenue and Silver Spring Avenue have very poor lighting. As proposed, the new project will have brighter lights and its own security. This will give the appearance of an oasis surrounded by dark, scary streets and discourage pedestrians from venturing out of the new project. Consistent lighting would integrate all of Fenton Village and identify the whole village as a place instead of just one shopping plaza.

3. **Problem:** Poor Visual and Tunnel Effect from Fenton Street

Possible Solutions:

Move green space closer to Fenton Street so it can be more easily seen and accessed from Fenton Street.

Allow entrance to parking garage from alley on Fenton.

4. **Problem:** Access to Parking is not Equitable
The proposed project moves the current 150 spaces west across the street from a parking garage on Silver Spring Avenue and away from the businesses on Fenton Street. The proposal also allows for 350 parking spaces for an office building one block from a parking garage and two blocks from the Metro station.

Although we understand the desire to encourage the use of public transportation and limit driving, it is the existing businesses on Fenton Street who will make the parking sacrifice--not the new development. The spaces on the current lot will be moved further west to accommodate the 60,000 new square feet of retail at the expense of existing businesses.

Possible Solutions: Locate the underground parking further east toward Fenton Street and allow access from Fenton Street via the existing driveway.

Repair Silver Spring Parking Garage No. 4 (west of Fenton Street and south of Silver Spring Avenue) across the street from the proposed development and use this garage for parking for the new retail businesses.

5. **Problem:** Underground Parking has not been successful in the past due to crime and inconvenience. We understand the need to maximize land use. However, once again Fenton Village is asked to make the sacrifice and will be at a disadvantage in competing with the above ground parking in the downtown.

Possible Solutions:

Install some short-term surface parking close to Fenton Street. This allows for the safety of above ground parking, supports existing businesses on Fenton Street and creates a more open visual affect from Fenton Street

Repair Parking Garage No. 4. Leave this garage above ground and do not develop it.

6. **Problem:** The density proposed by this development will have a significant effect on our community. We are pleased that green space is included in the new development. However, this green space will serve as the "front yard" for 500 housing units (500-1,000 residents) and border a new retail street and an office building. There will be no green space benefit for the current residents of Fenton Village.

Possible Solutions: The Police Station on Sligo Avenue is scheduled to move to White Oak in the next few years. We would like to see this parcel turned into a park. It would greatly alleviate the crowding in Fenton Village and serve as a buffer between the commercial area and the single-family homes in the adjacent neighborhood. Since it is zoned as R-60, only 1-2 homes could be built there anyway, so there is no major loss of housing.

7. **Problem:** Slippery Streetscaping Bricks. The required streetscaping in Fenton Village east of Georgia Avenue includes brick sidewalks that are extremely slippery when wet. Some pedestrians are now walking in the street to avoid falling. Disabled pedestrians are now also requesting a change because the bricks are uneven from settling.

Solution: Do not require the Studio Plaza to put these bricks on any public street that it will border, e.g. Fenton Street, Thayer Avenue and Silver Spring Avenue. It would be a waste of money, since it appears that the County will have to change them for the disabled.

We trust that you will give our suggestions serious consideration and look forward to hearing from you soon.

Sincerely,

Board of Directors
East Silver Spring Citizen's Association (ESSCA)
Bob Colvin
President

Appendix J: Sample petition page and staff analysis

YOUR HELP IS NEEDED. PLEASE SIGN BELOW!

- The Studio Plaza development proposed for Parking Lot 3 has County support, however:
- ❖ Property owners with access rights backing on the Lot would lose access.
 - ❖ We lose all safe and convenient surface parking near Fenton Street.
 - ❖ We lose our parking entrance/exit on Fenton Street.
 - ❖ We do not get any added public parking, despite 800,000 sf of new development.
 - ❖ A 3-story, unstaffed, underground public garage will be built instead, posing significant safety risks, especially at night—

All so that a single developer can have increased density for a project partly on public lands and for which there was no prior public input!

**PLEASE HELP AREA SMALL BUSINESSES BY INDICATING YOUR SUPPORT.
THIS PROJECT IS MOVING FORWARD FAST WITH STRONG COUNTY BACKING.
A PROJECT HEARING IS APRIL 23.**

Name	Address	Business/resident/Customer	Specific concerns
James S. Byrne JAMES S. BYRNE	7403 ROCKNEY RD TAKOMA PARK, MD 20912	Business/resident/Customer TENANT OF COMMUNITY DEV PUBLICATIONS	SEVERELY LIMITED ACCESS
Mike Gerecia	9805 H. H. Road Kensington	Business/resident/Customer	Access Public Safety
Clayton Mills	1650 HARVARD ST NW W, DC 20009	Business/resident/Customer	ACCESS/ SAFETY
Sharon Livermore	8204 Fenton St Silver Sp. MD 20902	Business/resident/Customer	Parking
Paula Donnell	8402 Cedar St. Silver Spring MD	Business/resident/Customer	Access/Safety Parking
David Stove	505 NEW CREEK AVE TAKOMA PARK MD 20912	Business/resident/Customer	ACCESS / SAFETY PARKING
Kindu Chin	7765 Allaway Ter.	Business/resident/Customer	Access for pe.
Brian Shappell	2110 Pierce St. Apt. 4 Glen Burnie, MD	Business/resident/Customer	Parking
Rita Jitapetchai	11504 Gallagher Wy, Olney	Business/resident/Customer	Parking
Chase	86 Cedar Cov Park	Business/resident/Customer	Parking
Michael Jain	7803 Stafford Hill Glen Burnie MD	Business/resident/Customer	Access/Parking

Staff Analysis of Petition Received from Mike Gerecht

City			Issue		
Silver Spring	449	64.6%	Safety	149	25%
Adelphi	1	0.1%	Access to 8204 Fenton/Kalivas	27	5%
Aspen Hill	1	0.1%	Parking (amt., loc., convenience)	304	51%
Baltimore	3	0.4%	Small/Local Business	71	12%
Beltsville	4	0.6%	"overdevelopment"	14	2%
Bethesda	4	0.6%	Process/Public Input	12	2%
Bowie	1	0.1%	Congestion	17	3%
Brentwood	1	0.1%			
Brookville	1	0.1%			
Burtonsville	5	0.7%			
Carrolton	2	0.3%			
Cheverly	1	0.1%			
Chevy Chase	7	1.0%			
Clinton	3	0.4%			
College Park	1	0.1%			
Columbia	6	0.9%			
DC	67	9.6%			
Derwood	1	0.1%			
Emmitsburg	1	0.1%			
Gaithersburg	3	0.4%			
Germantown	4	0.6%			
Glen Burnie	2	0.3%			
Hyattsville	10	1.4%			
Kensington	14	2.0%			
Laurel	6	0.9%			
Landover	1	0.1%			
Millersville	1	0.1%			
Mitchellville	2	0.3%			
Mt. Rainier	3	0.4%			
North Bethesda	3	0.4%			
Olney	3	0.4%			
Oxon Hill	1	0.1%			
PA	1	0.1%			
Port Republic	1	0.1%			
Potomac	4	0.6%			
Riverdale	1	0.1%			
Rockville	19	2.7%			
Spencerville	1	0.1%			
Takoma Park	42	6.0%			
TN	1	0.1%			
TX	1	0.1%			
University Park	1	0.1%			
VA	7	1.0%			
West Hyattsville	1	0.1%			
Wheaton	3	0.4%			
Sum	695				

Appendix K: Base Density Calculation Matrix

Parcel	Zone	Site Plan (if avail.)	Current Lot Area	Previous Dedication	Gross Lot Area	Proposed Dedication	Net Lot Area	Development Method	Max. FAR by Zone	Max. Allowable Optional Method Density	Max. Allowable Standard Method Density	Density Already Built	Remaining Transfer Density	Maximum Total Density (Before Bonuses)
1	CBD-2		9374	8974	18348	1573	7801	Standard	3		55044	13800	41244	41244
2	CBD-1		6500	2800	9300	250	6250	Optional	3	27900				27900
3	CBD-1		14400	3000	17400	600	13800	Optional	3	52200				52200
4	CBD-1		6079	1216	7295	0	6079	Optional	3	21885				21885
5	CBD-1		14116	303	14419	0	14116	Optional	3	43257				43257
6	CBD-1		4200	0	4200	0	4200	Optional	3	12600				12600
7	CBD-1		7800	750	8550	150	7650	Optional	3	25650				25650
8	CBD-1		6300	1200	7500	0	6300	Optional	3	22500				22500
9	CBD-1		3953	0	3953	0	3953	Optional	3	11859				11859
10	CBD-1		4000	0	4000	0	4000	Optional	3	12000				12000
11	CBD-1		2405	481	2886	0	2405	Optional	3	8658				8658
12	CBD-1		2400	0	2400	0	2400	Optional	3	7200				7200
13	CBD-1		3200	0	3200	0	3200	Optional	3	9600				9600
14	CBD-1		3200	800	4000	0	3200	Optional	3	12000				12000
15	CBD-1		3200	0	3200	0	3200	Optional	3	9600				9600
16	CBD-1		3200	0	3200	0	3200	Optional	3	9600				9600
17	CBD-1		2496	500	2996	0	2496	Optional	3	8988				8988
18	CBD-1		4000	500	4500	0	4000	Optional	3	13500				13500
19	CBD-1		2334	2300	4634	0	2334	Optional	3	13902				13902
20	CBD-1	820050210	9460	3581	13041	0	9460	Standard	2		26082	6847	19235	19235
21	CBD-1		23500	6350	29850	2000	21500	Optional	3	89550				89550
22	CBD-1		6000	1250	7250	500	5500	Optional	3	21750				21750
23	CBD-1		6000	1250	7250	500	5500	Optional	3	21750				21750
24	CBD-1		3104	0	3104	0	3104	Optional	3	9312				9312
25	CBD-1		6000	1250	7250	500	5500	Optional	3	21750				21750
26	CBD-1		15000	3125	18125	1250	13750	Optional	3	54375				54375
27	CBD-1		6000	1250	7250	500	5500	Standard	2		14500	0	14500	14500
28	CBD-1		2400	0	2400	0	2400	Optional	3	7200				7200
29	CBD-1		0	1072	1072	0	0	Optional	3	3216				3216
Total			180621	41952	222573		172798			551802	0		74979	626781

Appendix L: Adjacent property owner legal argument regarding easements

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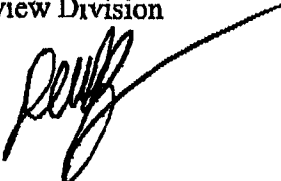
DAVID W. BROWN

MEMORANDUM

Via Email

Elza.hisel-mccoy@mncppc-mc.org

TO: Elza Hisel-McCoy, Assoc. AIA, LEED-AP
Senior Planner
Development Review Division
MNCPPC-MC

FROM: David W. Brown 

DATE: May 12, 2009

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

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

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

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

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

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

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

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

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

The General Development Agreement and Abandonment Proceeding AB-719

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

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

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

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

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

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

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

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

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

The Easement Held By 911 Silver Spring Avenue Partnership

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Easement Held by Athena and Dimitra Kalivas

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

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

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

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

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

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

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

Effect of Abandonment Approval on the 911 SSA and Kalivas Easements

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

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

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

The Easement Held By 8204 Associates LLC

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

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

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

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

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

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

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

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

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

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

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

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

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

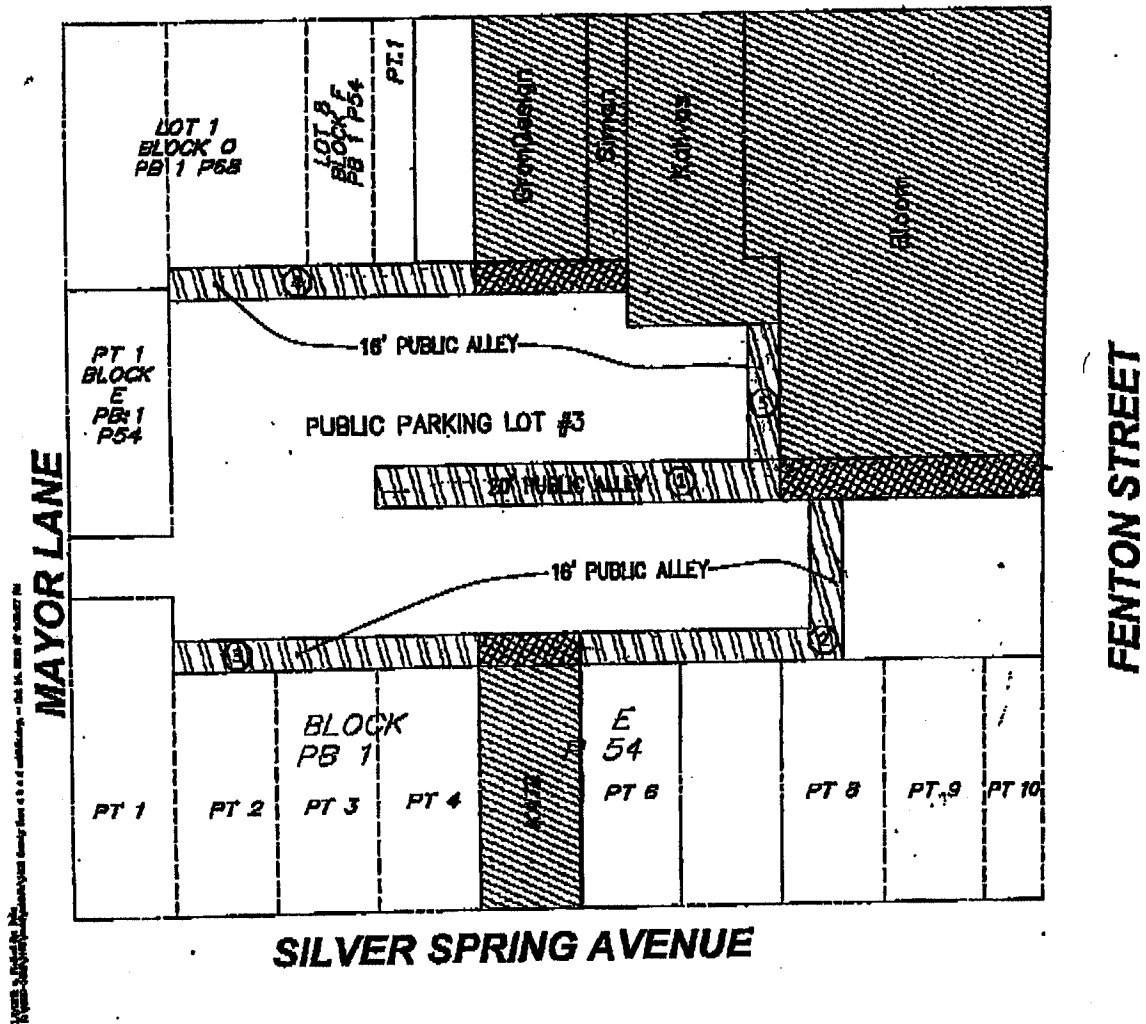
fronting on the parking lot after the parking lot had already been constructed. The building's parking lot entrance, which was designed as a main entrance, is level with the parking lot and is on the common property line with the parking lot. The entry there is to the second floor of the building, and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


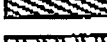

The Project contemplates effective extinguishment of the pedestrian bridge easement by converting the surface parking lot essential to the utility of the easement into a building, and actually physically occupying the easement space with the building. Considering the impact on its business that loss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

Conclusion

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

THAYER AVENUE



- ① **Part 1 of Legal Description (Typical)**
- | | |
|---|------------------------------|
|  | Remaining Properties |
|  | Alley to be Abandoned |
|  | Alley to Remain |



Studio Plaza
'Exhibit C'
October, 2008

exh. 1

ATTACHMENT 5

LINOWES
AND | BLOCHER LLP
ATTORNEYS AT LAW

September 25, 2009

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VIA EMAIL AND HAND DELIVERY

Mr. Rollin Stanley, Planning Director
Maryland-National Capital Park
and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Studio Plaza, Silver Spring (the "Project") – Response to 9/22/09 and 9/24/09 Petitions
for Reconsideration of the 9/15/09 Planning Board Resolution on Studio Plaza Project
Plan No. 920070010 (the "Project Plan")

Dear Mr. Stanley:

This letter is submitted on behalf of Michael, L.L.C. (the "Applicant") in response to David W. Brown's September 22 and September 24, 2009 Petitions for Reconsideration (the "Petitions") of the September 15, 2009 Planning Board Resolution on the Project Plan (the "Resolution"). The requests must be rejected by reason of there being no errors of fact or law that support reconsideration on the basis of mistake, inadvertence, surprise, fraud, or other good cause. Instead, the reconsiderations request retroactive revisions to the Project Plan conditions that were clearly not intended by the Planning Board in acting on the Project Plan and that are more appropriately addressed at the time of site plan for the Project.

The conditions set out in the Resolution were thoroughly and exhaustively discussed, detailed, and approved by unanimous vote at the May 28th Planning Board hearing on the Project Plan. While Mr. Brown and his clients may not agree with the conditions and/or may like to "shape" the conditions other than how the Board approved them, this is not appropriate grounds for reconsideration. The Applicant has again reviewed the Planning Board proceedings in light of these reconsideration requests, and is fully confident that the conditions of approval as expressed in the Resolution reflect what occurred on the record at the Planning Board hearing. Again, the substance of what Mr. Brown requests in the Petitions will be more appropriately addressed by all parties, including the Planning Board, at the time of site plan review.

Mr. Rollin Stanley
September 25, 2009
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In his September 22nd Petition, Mr. Brown requests revisions to Condition #2.d.vii with regard to the Gerecht Property (which is specifically identified in the Staff Report accompanying the Project Plan). Mr. Brown's argument is that the revisions proposed in his Petition are necessary to avoid an unintended consequence of the relevant condition due to mistaken and inadvertent phraseology. To the contrary, Condition #2.d.vii in the Resolution is phrased verbatim to that proposed in the Staff Report dated May 15, 2009 (identified as Condition #2.b.vii in the Staff Report) that was included in the approved Planning Board motion. This is not a situation where new language was created during the public hearing process itself and open to subsequent interpretation based upon a review of the transcript; rather, the exact language of approved Condition #2.d.vii was before the Planning Board and the relevant parties from May 15th when the Staff Report was issued through and including the time of the Planning Board vote approving the Project Plan. There was significant discussion of the Gerecht Property and several other conditions affecting the Gerecht Property at the hearing, and while the Planning Board and its Staff meticulously edited several of the proposed conditions of approval at the hearing (that are reflected in the Resolution), it specifically did *not* edit Condition #2.d.vii. Mr. Brown further argues for certain changes to the language of other subparts of Condition #2.d and #2.j. As above, every single one of these conditions to which he proposes revisions is phrased nearly verbatim to that proposed in the May 15th Staff Report, and the Planning Board specifically did *not* edit the language of these conditions at the public hearing or intend for the conditions to be edited after the hearing at the request of a party of record. Because all of the issues Mr. Gerecht raises in his September 22nd petition were addressed in full at the Planning Board hearing and the intent of the Planning Board is clear based on a review of the proceedings, the reconsideration request to amend conditions contrary to Board action is after-the-fact based upon dissatisfaction with the end result of the proceedings and is not appropriate.

Similarly, in his September 24th Petition, Mr. Brown requests revisions to Condition #2.c, #2.i, and #2.j with regard to the Kalivas Property (which is specifically identified in the Staff Report accompanying the Project Plan) "to more accurately reflect the needs and wishes" of his client. As above, every single one of the conditions of approval Mr. Brown references in his Petition are phrased nearly verbatim to that included in the May 15th Staff Report that was also included in the Planning Board's motion approving the Project Plan. The Planning Board considered these conditions on the record, and painstakingly edited a number of proposed conditions but decided specifically *not* to edit the conditions Mr. Brown references. Again, it is inappropriate to use a Petition for Reconsideration to retroactively request substantive changes to approved conditions that clearly reflect the intent of the Planning Board simply because of dissatisfaction with the end result.

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We respectfully request the Planning Board to deny the September 22nd and September 24th Petitions for Reconsideration of the Project Plan. Please let us know if you have any further questions or concerns, and please do not hesitate to contact us if additional information is necessary.

Sincerely,

LINOWES AND BLOCHER LLP

C. Robert Dalrymple, H.D.

C. Robert Dalrymple

Heather Dlhopsky

Heather Dlhopsky

cc: Mr. Robert A. Kronenberg (*Via Email and First-Class Mail*)
Mr. Elza Hisel-McCoy (*Via Email and First-Class Mail*)
David B. Lieb, Esquire (*Via Email and First-Class Mail*)
David W. Brown, Esq. (*Via First-Class Mail*)
Mr. Robert Hillerson (*Via Email and First-Class Mail*)
Parties of Record per M-NCPPC