

Resolution No.: 17-1002
Introduced: February 4, 2014
Adopted: February 4, 2014

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY, MARYLAND**

By: District Council

SUBJECT: APPLICATION DPA 13-02 FOR A DEVELOPMENT PLAN AMENDMENT of LMA G-806, Previously Approved by the District Council on September 9, 2003, in Resolution No. 15-326; Robert Harris, Esquire, and Steve Robins, Esquire, Attorneys for the Applicant, Adventist Health Care, Inc. and Cabin Branch Commons, LLC; OPINION AND RESOLUTION ON APPLICATION; Tax Account Nos. 02-00016905, 02-00016916 and 02-00022666

OPINION

The Applicants, Adventist Health Care, Inc. and Cabin Branch Commons, LLC, filed the Development Plan Amendment (DPA) on March 7, 2013, seeking to amend the development plan approved by the District Council on September 9, 2003. The original development plan (Exhibit 21(f)) permitted a maximum of 2,300,000 square feet of office, 120,000 square feet of retail, 75,000 square feet of public uses, 1,139 dwelling units, and 500 senior dwelling units on 283.5 acres in the MXPB Zone. The Applicants seek to increase the amount of retail to 484,000 square feet and reduce the amount of office to 1,936,000 square feet in order to develop a retail outlet center on the northeastern portion of the property. No changes are proposed to the amount of residential and public uses.

Technical Staff recommended approval of the DPA, as did the Planning Board. Exhibits 50-52. The public hearing was held on July 29, 2013 (Exhibit 18), and was continued to August 12th and 14th, September 4th, 6th, and 12th, and October 10th and 15th, 2013.

The Hearing Examiner issued her Report and Recommendation on December 9, 2013, which is incorporated herein by reference. The Hearing Examiner recommended approval of the application subject to the following condition:

The Applicants must submit a revised Preliminary Water Quality Plan (PWQP) in accordance with Chapter 19 of the Montgomery County Code that reflects the development plan approved in this case. If the revised PWQP necessitates any changes to the development plan amendment that are inconsistent with the approved plans, the Applicants must seek a further development plan amendment to effectuate those changes.

Mr. Paul Whit Cobb appeared at the public hearing in this case in opposition to the

application (8/14/13 T. 163-216) and filed a request for oral argument before the Council after the Hearing Examiner's decision was issued. On January 28, 2014, the Council granted his request for oral argument, extended the time for a decision in this case to February 25, 2014 (Council Resolution 17-984), and scheduled oral argument for February 4, 2014. Oral argument before the District Council occurred on February 4, 2014. Having carefully considered the oral arguments from Mr. Cobb, and responding arguments from the Applicants, the District Council hereby approves the application, subject to the condition recommended by the Hearing Examiner, for the reasons that follow.

The Property, Surrounding Area and Zoning History

The subject property consists of 283.5 acres within the Mixed-Use Planned Development (MXPD) Zone. It is part of a larger 535-acre tract designated as the "Cabin Branch Neighborhood" in the *1994 Clarksburg Master Plan and Hyattstown Special Study Area* (Master Plan or Plan). This larger neighborhood is located southwest of the I-270/Clarksburg Road (Md. 121) interchange and is bounded by I-270 to the east, Md. Route 121 to the north and west, and Old Baltimore Road to the south. The subject property comprises roughly the eastern half of the neighborhood. The area of the neighborhood outside of this DPA is zoned RMX-1/TDR, portions of which have approved residential site plans although no houses have yet been developed. 7/29/13 T. 96-97

The boundaries of the development plan amendment generally are I-270 to the east, Md. Route 121 to the north, a planned roadway (labeled "Broadway Avenue" on the DPA) to the west, and Old Baltimore Road to the south. A small portion is located north of the old Clarksburg Road, and is referred to as the "Gosnell Property," which has an approved site plan for a small "highway commercial" development, including a bank, hotel, gas station, car wash and convenience store. 8/12/13 T. 86; 8/14/13 T. 227.

The majority of the property is within the Clarksburg Special Protection Area and the Little Seneca Creek watershed. There are two stream valleys within the larger Cabin Branch neighborhood, one of which is parallel to I-270 and falls within the subject property. The property is currently being farmed, although some clearing activities are occurring on properties that have received site plan approval. *Id.* at 5-6.

The larger Cabin Branch neighborhood as well as the subject property has already received several land use approvals. These include a 2004 preliminary plan approval, which was amended in 2008, a Preliminary Water Quality Plan approved in conjunction with the 2003 rezoning to the MXPD Zone, a site plan for roads and other infrastructure, and a Final Water Quality Plan (FWQP) and Final Forest Conservation Plan (FFCP) approved in conjunction with the infrastructure site plan. Exhibits 50, p. 22, 122(b).

Technical Staff defined the surrounding area by using the boundaries applied in the original rezoning (i.e., LMA G-806). These were I-270 to the east, an undeveloped I-3 zoned parcel adjacent to the Clarksburg Detention Center to the north, Ten Mile Creek to the west, and Black Hill Regional Park and the Linthicum West property to the south. Exhibits 50, p. 6. None of the parties dispute this delineation.

Much of this area has not yet developed. The properties located along Old Baltimore Road and Clarksburg Road consist of single-family detached homes and farms. Black Hill

Regional Park is located immediately south of Old Baltimore Road. Although not within the defined neighborhood, Comsat and the Gateway I-270 Business Center are directly across from I-270. Exhibit 50, p. 6. While not yet developed, portions of the property (primarily to the west of the site) have already received site plan approval for construction of single-family detached homes and townhouses. Exhibits 50, p. 41, Exhibit 109.

The Hearing Examiner concluded that it is more appropriate to characterize the neighborhood by these approved uses rather than the existing farming activity. The Council agrees and thus finds that the neighborhood is characterized by a mix of residential uses, primarily on the western portion of the site and the neighborhood, older single-family homes, limited farming activity along Clarksburg and Old Baltimore Roads, and employment along I-270.

Proposed Development and Binding Elements

The DPA includes 2.42 million square feet of commercial development, broken down into 484,000 square feet of retail, and 1.936 million square feet of office. It also calls for 75,000 square feet of public uses, and 1,139 dwelling units that are a mix of townhouse, single-family detached and multi-family units, as well as 500 age-restricted units. Exhibit 132(c). This density is divided into four areas, labeled Areas A through D on the DPA. The DPA lists the mix of uses permitted in each area as well as the maximum amount of permitted density for each use. The DPA does not have any minimum required densities for either retail or office, although there are minimum and maximum ranges for some of the residential uses. Area A, the location of the outlet center, may have approximately 1 million square feet of development that will include the outlet center, and may include a hotel, banks, entertainment uses, restaurants, and live/work and multi-family dwelling units. This mix includes the retail on the Gosnell property. 7/29/13 T. 114-115. Area B may have up to 100 single family detached dwellings, between 150 and 325 single-family attached dwelling units, up to 300,000 square feet of office, and up to 150,000 square feet of retail, along with a maximum of 7,500 square feet of public uses and between 150 and 500 senior dwelling units.

The uses permitted in Area C include up to 100 single-family detached dwelling units, 425 single-family attached dwelling units, between 150 and 350 multi-family dwelling units, up to 1,425,000 square feet of office and up to 30,000 square feet of neighborhood retail. Area D will contain primarily office, but may also include up to 50 single-family detached units, 50 single-family attached units, 100 multi-family units, 10,000 square feet of retail, 20,000 square feet of public uses, and 100 senior dwelling units. Exhibit 132(c).

The DPA proposes 11 binding elements, which are fully set forth in the appendix attached hereto and incorporated herein. All but two of these binding elements are from the original development plan approved with LMA G-806. Two new binding elements were added to address concerns that arose during the public hearing process. The Planning Board recommended a binding element limiting the gross floor area of individual stores to 50,000 square feet to reduce the possibility that, if this DPA were not implemented, big box users would locate on the property and compete with the neighborhood center planned for the Town Center District. Exhibit 52. The second responds to concerns surrounding the potential that little to no neighborhood retail is required in the Cabin Branch neighborhood. This binding element mandates that all of the retail developed in Area C must be neighborhood-serving retail. The Council, however, agrees with the

Hearing Examiner that this binding element does not mandate any neighborhood retail development because there is no required minimum.

The neighborhood “core” envisioned by the Applicants will be along the Wellspring Avenue “greenway.” The greenway consists of a 30-foot wide landscaped lawn area to the side of the paved road. Wellspring Avenue connects an elementary school and local park to the outlet center and eastern stream valley. It will contain sidewalks as well as a meandering path and will provide a visual opening to the stream valley buffer at the intersection of Wellspring and Cabin Branch Avenue that continues into Area B and A. 8/14/13 T. 230. Along the greenway are a series of nodes, particularly in the mixed use area. These nodes will include the amphitheater, stream valley, and the plaza within the retail outlet center, and continue through the retail in Area B. Churches and daycare centers may also be included in Area B. 9/4/13 T. 82-84.

The first phase of construction will be the retail and employment uses in Areas A and B, followed by construction of parks and open space areas in Areas B and C, then by employment and retail in Area C. The General Notes included in the DPA state that development of the MXPDP area will be coordinated with development of the RMX-zoned western portion of the site. Exhibit 132(c).

Standards of Review

Sections 59-D-1.61 and 59-D-1.7 of the Zoning Ordinance require the District Council, before it approves any application for re-zoning to a MXPDP Zone or an amendment to a previously approved development plan in the MXPDP Zone, to consider whether the application, including the development plan, fulfills the “purposes and requirements” set forth in Code Section 59-C of the Zoning Ordinance. In making this determination, the law expressly requires the District Council to make five specific findings, “in addition to any other findings which may be necessary and appropriate to the evaluation of the proposed reclassification.” *Montgomery County Zoning Ordinance*, §59-D-1.61.

The five specific findings required by §59-D-1.61 the Zoning Ordinance are:

(a) *T[hat t]he zone applied for is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies. [The remaining language of this provision addresses height and density issues not at issue in this case; it is therefore not quoted here.]*

(b) *That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.*

(c) *That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.*

(d) *That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable*

requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.

(e) That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.

Because the general requirement of the law – that the application must fulfill the “purposes and requirements” of the new zone – is subsumed in the language of the five specific required findings (especially in subsection (b)), a determination that the five findings have been satisfied would satisfy the Montgomery County Zoning Ordinance. However, in addition to these five findings, Maryland law also requires that the proposed rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to the County, all zoning power must be exercised to:

- (1) guide and accomplish a coordinated, comprehensive, adjusted, and systematic development of the regional district;
- (2) coordinate and adjust the development of the regional district with public and private development of other parts of the State and of the District of Columbia; and
- (3) protect and promote the public health, safety, and welfare. *Md. Land Use Article Code Ann.*, § 21-101(a)(4)(i).

Thus, there are six findings required (§59-D-1.61(a) through (e) and the public interest).

Compliance with the Master Plan

The Council finds, as did the Hearing Examiner, the Planning Board and Technical Staff, that the DPA substantially complies with the recommendations of the Master Plan. In Maryland, master plans are treated as flexible guides in zoning cases unless a statute elevates them to the status of a regulatory device. *The Maryland National Capital Park and Planning Commission v. Greater Baden-Aguasco Citizens Association*, 412 Md. 73, 98 (2009). In this case, neither the Zoning Ordinance nor State law does so. The Master Plan itself recognizes that “circumstances will change following adoption of a plan and ...the specifics of a master plan may become less relevant over time.” *Plan*, p. vii. The *2011 Limited Amendment to the 1994 Master Plan* (2011 Limited Amendment) expressly reaffirmed 10 key policies in the 1994 Plan for guiding development in Clarksburg, but did not explicitly reaffirm compliance with all of the Plan’s specific recommendations.

The Plan envisions Clarksburg as a transit- and pedestrian-oriented town surrounded by a natural setting. Exhibit 60(a), p. 16. It attempts to balance the residential and employment densities necessary to support transit against the desire to maintain a “town-scale” of development. To further this goal, ten key planning policies are set forth early in the Plan to guide in achieving this balance. Policy 1 (entitled “Town Scale of Development”) directs 80% of residential densities to the Town Center District and “a series of transit-oriented neighborhoods.” *Id.* According to the Plan, important to the “town scale” concept is to create an identity for

Clarksburg “separate from Germantown or Damascus.” *Id.* The Plan’s strategy incorporates the Historic District as part of an expanded Town Center and seeks to maintain the Town Center’s historic function as the center of community life for the larger Clarksburg area. The Plan identifies the location of a grocery store in the Town Center as “critical” to its vitality. *Id.* at 46.

The Plan also reaffirms the role of I-270 as a high-technology employment corridor. *Id.* In addition to the COMSAT and Gateway I-270 sites identified in the Plan, the Plan identifies the Cabin Branch neighborhood as a major contributor to the employment corridor because of its extensive frontage along I-270. It targets the subject property for a total of 2.3 million of “employment” uses. Exhibit 60(a), p. 64. It also recommends 120,000 square feet of retail, as well as public and residential uses. *Id.*

The Plan recognized a major challenge to achieving its vision--how to make future residents “feel part of a larger community.” The tool (or “building-block”) used to meet that challenge was to organize development into “neighborhoods,” characteristics of which are described in Policy 7, entitled “Transit- and Pedestrian-Oriented Neighborhoods.” *Id.* at 28. Cabin Branch is one of the neighborhoods identified in the Plan. This policy calls for a mix of uses in each neighborhood to encourage pedestrian travel and reduce dependency on the automobile. Core uses necessary for a successful neighborhood, according to the Plan, include retail, employment, open spaces, schools and housing. Retail and employment uses are to be at “a pedestrian scale and oriented to the needs of the residents.” *Id.* Recommendations for the locations of these neighborhood cores are included in the Plan. *Id.* at 54, 66-68. Grocery stores in particular are recommended for the Town Center and Cabin Branch, and one is being built in Clarksburg Village.¹ *Id.*; 9/4/13 T. 98.

The parties agree that current office market will not support the large amount of office space recommended for Clarksburg in the 1994 Plan, a fact recognized by the Planning Board in the 10-Mile Creek Limited Amendment. *10-Mile Creek Limited Amendment to the 1994 Clarksburg Master Plan & Hyattstown Special Study Area*, p. 3, October 2013 (10-Mile Creek Limited Amendment). In addition, the Applicant presented extensive expert testimony that the Clarksburg area can no longer support three grocery stores given market changes in the industry. 9/4/13 T. 53-54

The District Council finds that the DPA furthers the primary goals of the Master Plan - preservation of locations for large office developments and the Plan’s core goal to protect the viability of the Town Center as the community focus for the entire area. The Applicant’s expert in market analysis testified extensively that more office development will occur with the outlet center than without it, and that the mix of uses in the DPA is needed to attract office development. Similarly, the record contains significant testimony that changes in the grocery store market, including the introduction of very large food retailers like Wal-Mart and Target into areas nearby, significantly reduced the demand for additional grocery stores in Clarksburg. Because this DPA eliminates the possibility of a full-service supermarket within Cabin Branch, the expert testified that it will strengthen the viability of a neighborhood center within the Town Center District anchored by a grocery store.

¹ The “Clarksburg Village” is the current name of the “Newcut Road” neighborhood identified in the Master Plan.

The Applicant argues that the Town Center neighborhood center was only to be the central focus of the Town Center District and not the entire study area. The Council interprets the Plan to prioritize development of the Town Center as the center of community activity for the Clarksburg study area and not solely the Town Center District. The central role of the Town Center in the development of Clarksburg is reinforced in many places in the Plan. These include the desire that the Historic District continue its historic function as the center for community life, to concentrate civic uses there, to locate a transit stop there, and to prioritize its development as a model for community identity. This is reflected in the Plan's staging priorities as well. Development of the Town Center District is recommended before development of employment locations to create community identity in the Town Center that could be modeled in other neighborhoods.

Those in opposition argue that the retail and civic uses proposed in the DPA will compete with the retail and uses called for in the Town Center, thus delaying development of the Town Center District. The Council finds that the regional outlet center will *not* usurp the central function of the Town Center, as did the Hearing Examiner. The expert testimony in this case supports this finding. While land use experts for those in opposition testified that simply having night-time activities such as restaurants, entertainment, and civic uses (such as the amphitheater) usurped the Town Center's central role, the Applicant's expert in market analysis testified that the retail in the outlet center would not compete with the type of retail contained in the Town Center neighborhood center or the "infill" retail in the Historic District. There is no expert evidence that the retail outlet center precludes other civic and community building uses that may create a community identity in the Town Center, such as a library or a farmer's market. Rather than harming the Town Center District, both the Applicants' expert and the developer of the Town Center neighborhood center agree that the retail outlet will generate new activity in the Town Center, both for those looking for a different type of retail experience and from employees of the center. While neighborhood-serving retail, other than uses that overlap with the outlet center, such as chain restaurants, may not occur in the Cabin Branch neighborhood in the amount or at the type of "core" location envisioned by the Plan, the Council finds that the alternative neighborhood core provided by the DPA satisfies this goal of the Plan. A single core location for neighborhood-serving retail is only one aspect of Policy 7, the "Pedestrian- and Transit-Oriented Neighborhood." The DPA does incorporate other pedestrian- and transit-oriented goals of the neighborhood, such connected streets, bikeways, and paths to further reduce reliance on the automobile and will include bus routes to connect Cabin Branch to other areas. Further, while the "core" of Cabin Branch may not include the full array of typical neighborhood retail uses, the "neighborhood core" of the DPA contains activities that also achieve community identity. The "linear" core along Well Spring Avenue includes some neighborhood retail uses as well as civic uses and gathering places, such as the greenway and the amphitheater that may achieve the community building goals of the Plan.

As to the requirement that the DPA comply with the land uses and densities recommended by the Plan, the Council agrees with the Hearing Examiner, Planning Board, and Technical Staff that the DPA meets this standard. This is because the overall density of the commercial area (i.e., 2.42 million square feet) remains the same and the residential uses have not changed. While the amount of retail is larger than originally approved, the DPA still preserves 1.936 million square feet of office space, an amount that not may be fully developed for 20 years. Thus, the DPA changes only a minor portion of the total commercial square footage recommended for Cabin Branch. The Council finds that the Plan did not intend to prohibit additional retail because the MXPDP Zone recommended for the property permits up to 20% of the total area to be retail. The

Council interprets the Plan's recommendation for 120,000 square feet of neighborhood retail as the tool used to ensure a viable neighborhood focal point, as that was the "building block" used in the different Clarksburg neighborhoods to create community identity. While this DPA alters the tool somewhat in Cabin Branch, it offers a different building block in the form of gathering places, civic uses and neighborhood retail to achieve the same result. At the same time, the DPA preserves one of the Plan's core goals to protect the neighborhood retail in the Town Center. Given the purpose of the MXPDP Zone to encourage comprehensively planned multi-use centers (*see*, §59-C-7.50(b)), the Council finds that all retail is not limited to 120,000 square feet.

Other County Plans and Policies

Other than Master Plan compliance, none of the parties contend that the DPA conflicts with other County plans and policies. Evidence demonstrates that road improvements will be privately funded and that the DPA has a valid preliminary plan approval. Mr. Chris Turnbull, the Applicants' expert traffic engineer, presented a traffic report studying the impact on weekday peak hour trips and a supplemental analysis for weekend traffic. Both indicated that traffic generated by the development will not exceed congestion levels for the policy area nor will it exceed the number of trips approved in the preliminary plan. Staff advises the 2005 Facility Plan required by WSSC to bring water and sewer to the site is being implemented. Exhibit 50. For these reasons, the Council finds that the DPA will not conflict with the General Plan, the Capital Improvements program, or other County policies.

Compliance with the Purposes and Development Standards of the MXPDP Zone

The Council finds that the DPA fulfills the purposes of the MXPDP Zone, and will provide for the maximum safety, convenience, and amenity of the residents of the development and will be compatible with adjacent development. The first purpose of the MXPDP Zone is:

- (a) To establish standards and procedures through which the land use objectives and guidelines of approved and adopted master or sector plans can serve as the basis for evaluating an individual multi-use center development proposal.

As described above, the Council finds that the DPA substantially complies with the Master Plan.

- (b) To encourage orderly, staged development of large-scale, comprehensively planned, multi-use centers by providing procedures for the submission of a concept plan for an entire site and subsequent development plans for each stage of development, as identified on the concept plan.

While the Applicants chose not to utilize a concept plan, they will coordinate development of the site with other owners in the Cabin Branch neighborhood and have shown the entire neighborhood on the development plan amendment to demonstrate this. This requirement has been met.

- (c) To provide, where appropriate, higher density residential uses integrated into the overall multi-use center.

The DPA locates two multi-family nodes and senior units in proximity to the neighborhood retail and civic uses along Well Spring Avenue and in Area C and D. The multi-family nodes in Area C are located close to open space. The Applicants presented testimony that bus routes will link different areas of the neighborhood and provide a link to the Town Center retail. For these reasons, the Council finds that this purpose of the MXPD Zone has been met.

(d) To ensure internal compatibility of residential and nonresidential uses by providing a suitable residential environment that is enhanced by the commercial, recreational, employment and institutional amenities within commercial and industrial components of the multi-use center.

(e) To assure compatibility of the proposed land uses with surrounding uses by incorporating higher standards of land planning and site design than could be accomplished under conventional zoning categories.

The Council finds that these purposes have been met because the DPA provides automobile and pedestrian connectivity between all of the uses, it incorporates civic amenities such as greenways and an amphitheater into the commercial uses, and transitions from more intense development close to I-270 to residential townhouse and single-family homes toward the western edge of the property along Cabin Branch Avenue.

(f) To encourage and provide for open space not only for use as setbacks and yards surrounding structures and related walkways, but also conveniently located with respect to points of residential and commercial/industrial concentration so as to function for the general benefit of the community and public at large as places for relaxation, recreation, and social activity. It is also intended that open space and amenities be located so as to achieve the physical and aesthetic integration of the uses and activities within each development. In addition, structured parking within mixed-use planned developments is encouraged to help achieve the open space and amenities objectives of the zone. Where surface parking is necessary, the purposes of this zone may be achieved by the provision of additional landscaping.

The Council finds that this purpose has been fulfilled because the DPA takes advantage of its location near Black Hill Regional Park and provides linkages between the park and the office component. The physical and visual connections to the stream valleys throughout the larger neighborhood, which include parks, trails, and open spaces between buildings, provide opportunities for recreation, relaxation and social activity.

(g) To encourage and provide for the development of comprehensive non-vehicular circulation networks, separated from vehicular roadways, which constitute a system of linkages among residential areas, open spaces, recreational areas, commercial and industrial areas and public facilities.

The Technical Staff report and the Applicant's expert land planner testified that there will be greenways, sidewalks, and bike paths connecting the various uses within the subject property. Exhibit 50, 7/29/13 T. 120-122; 9/4/13 T. 82-84; 8/12/13 T. 106. The Council finds that the interconnected street system designed for pedestrians and the network of bike paths and trails

connecting different areas with each other as well as parks, greenways, bike paths, and natural features fulfill this purpose.

- (h) To encourage and provide for efficient use of energy resources through shared facilities or other economies of scale or technology, including innovative fuels and district heating, etc.

The record shows that the Applicants are aware of this purpose clause and have agreed to explore measures to satisfy its requirements. Exhibit 50. No parties have asserted that the DPA fails to meet this requirement. Based on this evidence, the Council finds that this purpose of the MXPDP Zone has been met.

- (i) To preserve and take the greatest possible aesthetic advantage of existing trees and to minimize the amount of grading necessary for construction of a development.

Technical Staff concluded that this requirement had been met because the DPA conforms to all Forest Conservation Plan, Water Quality Plan and Stormwater Management approvals, which were approved for the overall development of the Cabin Branch community. *Id.* at 22. The Council finds that the application will meet these requirements provided that no changes are required to the limits of disturbance after approval of an amended Preliminary Water Quality Plan.

Development Standards of the MXPDP Zone

None of the parties contend that the DPA fails to meet the development standards of the MXPDP Zone. Staff of the Planning Department concluded that the DPA meets those development standards and sets them out in detail in their reports. Exhibits 50, 52. Based on this evidence, the Council finds that the DPA meets the development standards of the MXPDP Zone.

Safety and Efficiency of Access

The third finding necessary for approval of a development is:

- (c) That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.

The Applicants' traffic study indicates that the approval of the DPA will not adversely affect the surrounding area roadway. The testimony of the Applicants' traffic engineer supports this conclusion. Staff further concluded that the site access, internal circulation and pedestrian facilities shown in the DPA are adequate and safe. Exhibit 50, p. 28. Based on this evidence, the Council finds that this standard has been met, as did the Hearing Examiner.

Environmental Findings

The fourth criterion for approval of the DPA is:

(d) That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.

The Applicants argue that the 2003 Preliminary Water Quality Plan remains valid and need not be revised. Thus, they argue, no further water quality review is necessary until the final development stages (i.e., site plan and building permit). While they acknowledge that some of the stormwater facilities shown on the 2003 Plan may not be built (because of changes to the stormwater management regulations), any revisions will be minor. The expert emphasized that the retail outlet center will not require changes in the Limits of Disturbance (LOD), thus eliminating the need to revisit protection of forest, wetlands, buffers and stream valleys. He stated that there was no change in the imperviousness of the site, and in fact, the imperviousness may be reduced, as this is calculated based on the Limits of Disturbance. He also pointed out that approximately 81% of the subject property has already received final approval for stormwater, and presented expert testimony that there is ample room on the balance of the site to provide facilities meeting the current regulations. 10/10/13 T. 37.

Those in opposition assert that both the Zoning Ordinance and Chapter 19 of the County Code require the Applicant to amend the 2003 PWQP when amending the original development Plan. They point out that the Zoning Ordinance requires the Applicants to include information on water quality treatment on the original development plan:

(i) If a property proposed for development lies within a special protection area, the applicant must submit water quality inventories and plans and secure required approvals in accordance with Article V of Chapter 19. The development plan should demonstrate how any water quality protection facilities proposed in the preliminary water quality plan can be accommodated on the property as part of the project. *Montgomery County Code*, §59-D-1.3(i).

The opposition also asserts that Section 59-D-1.74 requires the Applicants to submit all relevant information required for an original development plan when submitting a development plan amendment. In this case, they argue, a revised PWQP is relevant because the DPA changes the layout and type of development previously approved. Executive Regulations implementing the County Code requirements for stormwater management state that a PWQP must be filed when there is an amendment to a development plan. COMCOR 19.67.01.03.

The two agencies responsible for reviewing PWQPs disagree on whether the 2003 PWQP remains valid. The County Code divides the responsibility for reviewing PWQPs between two agencies, the Planning Board and the Montgomery County Department of Permitting Services (DPS). The Planning Board is responsible for protecting sensitive environmental resources; DPS

reviews the design and adequacy of the stormwater management facilities. The County Code vests final authority for review of a PWQP in DPS, if findings of the Planning Department conflict with those of DPS. *Montgomery County Code*, §19-65(a).

In this case, Technical Staff of the Planning Department advises that the 2003 PWQP approved for Cabin Branch remains valid (Exhibit 122); DPS advises amendments will be required to the PWQP prior to the final development stages (Exhibit 129). Technical Staff points to the extent of environmental approvals already in place for the development, the minor nature of the revisions required, and the additional 14 acres of green area that will be added as a result of the DPA. Exhibit 122.

The Council finds that the PWQP must be revised as required by the regulations, but given the minor nature of those revisions, the Applicants have provided sufficient evidence for the Council to find that all stormwater management regulations may be met under the proposed development plan. As a result, the Council agrees with the Hearing Examiner that it may approve the DPA, subject to the requirement that the Applicants formally revise the 2003 PWQP. If amendments to the PWQP require further revision to the DPA, the Applicants must amend the approved DPA.

Section 59-D-1.3(i) of the Zoning Ordinance requires all development plan applications in special protection areas to contain “water quality inventories and plans and secure required approvals in accordance with Article V of Chapter 19. The development plan should demonstrate how any water quality protection facilities proposed in the preliminary water quality plan can be accommodated on the property as part of the project.” *Montgomery County Zoning Ordinance*, §59-D-1.3(i). Chapter 19 of the *Montgomery County Code* specifies these requirements, among which is the approval of a Preliminary Water Quality Plan (PWQP). *Montgomery County Code*, §19-65. Subsequent sections of the Zoning Ordinance make clear that applications to amend an approved development plan must contain all relevant information required for an original development plan, including the water quality information set forth above. *Montgomery County Zoning Ordinance*, §59-D-1.74. Executive regulations implementing the Code specifically require submission of a PWQP for approval when amending a development plan. COMCOR 19.67.01.03.A(ii)

The record demonstrates that a PWQP for the entire site was approved in 2003 in conjunction with the original development plan. A Final Water Quality Plan (FWQP) associated with the infrastructure site plan for the Cabin Branch neighborhood was approved in 2008. The administrative practice in Cabin Branch has been to update the FWQP for infrastructure as individual site plans are approved for the residential development. The Applicants did not prepare a revised PWQP reflecting the proposed use nor did Technical Staff forward the DPA for review by DPS. Technical Staff concluded that the original PWQP remains valid for the development plan amendment. Exhibit 122(b). DPS indicates that revisions to the 2003 PWQP will be required. Exhibit 129.

The Council finds that the applicants meet the provision for providing all relevant information under Section 59-D-1.74 but that the Applicants must get an amended PWQP under Chapter 19 after the approval of the DPA. This requirement remains because the administrative practice used for Cabin Branch does not satisfy the water quality regulations applicable to the DPA. Those in opposition correctly point out that Maryland courts instruct that an administrative

practice cannot substitute for what is otherwise required by law. *County Council of Prince George's County v. Billings*, 420 Md. 84, 103 (2011). Agencies must follow their own rules of procedure. *Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 503 (2003).

The Zoning Ordinance requires an applicant for a development plan amendment to submit all "relevant" information required for an original development plan application. It also requires the Council to find that all requirements of Chapter 19 of the Code will be met. Executive Regulations implementing Chapter 19 specifically require a revised PWQP for a development plan amendment. Thus, reading the Zoning Ordinance and Chapter 19 together, a revised water quality plan is "relevant" to a development plan amendment, at least where the amendment significantly changes the building layout and design of the original development plan. Because the intent of the new stormwater regulations is to incorporate stormwater management in the initial design of projects, the Zoning Ordinance requires a different development design to be reviewed in the same manner as the original development plan. As the outlet center is designed differently than the hospital and medical offices previously approved, and because the facilities shown on the PWQP are outdated, a revised PWQP is required.

While in some circumstances an agency's interpretation of a statute is entitled to great weight, *see, e.g., Comptroller of the Treasury v. John C. Louis Co.*, 285 Md. 527 (1979), those circumstances are not present here. There is no long-standing agency interpretation applicable to this case because the practice has been applied to other properties in the neighborhood that are consistent with their original approvals (i.e., either the 2003 DPA or the initial approval for the RMX-1 zone properties), thus meeting the requirements in Chapter 19 of the Code. The proposed development here is inconsistent with the initial approval, triggering the requirements for review of water quality in special protection areas.

Second, the County Code divides the responsibility for approval of a PWQP between two lead agencies: the Montgomery County Department of Permitting Services (DPS) and the Montgomery County Planning Board. *Montgomery County Code*, §19-65. These two agencies disagree on whether the 2003 PWQP remains valid. Staff of the Planning Department asserts that it does; DPS states that changes will be required. Thus, there is no coordinated agency agreement that would constitute a "long-standing" interpretation. As DPS is the lead agency for approving the stormwater management concept plan, and that agency has not reviewed this DPA, Council finds that the Applicants must comply with the plain requirements of the Zoning Ordinance and Chapter 19 and submit a revised PWQP reflecting the proposed development.

Because of the expert evidence and testimony from Planning Department Staff (Exhibit 122(b)) and the Applicants' expert civil engineer that revision of the Preliminary Water Quality Plan (PWQP) will not change the site design of the DPA or its limits of disturbance (10/10/13 T. 32), the Council finds it appropriate to require a revision to the 2003 PWQP as a condition of approval, rather than remanding the application until the 2003 PWQP is actually approved. The Hearing Examiner recommended placing the following condition upon the approval of the DPA, with which the Council agrees:

The Applicants must submit a revised Preliminary Water Quality Plan (PWQP) in accordance with Chapter 19 of the Montgomery County Code that reflects the development plan approved in this case (Exhibit 132(c)). If the revised PWQP necessitates any changes to the development plan amendment that are inconsistent

with the approved plans, the Applicants must seek a further development plan amendment to effectuate those changes.

Those in opposition raise similar arguments regarding the 2003 Preliminary Forest Conservation Plan (PFCP) because it has not been updated to reflect the proposed development. Mr. Gary Unterberg, the Applicant's expert in land planning and landscape architecture, testified that the limits of disturbance will not change from that approved in 2003. According to him, the updates are minor and typical of those performed at the Final Forest Conservation Plan (FFCP). 9/6/13 T. 74-76. Planning Department Staff indicates that changes may be required due to elimination of the stormwater management ponds, however, these increase the amount of forested area. As the Planning Board is the lead agency for approving PFCPs and Technical Staff indicates that the DPA conforms to the 2003 PFCP, the Council finds that there is no need to revise the 2003 PFCP. Exhibits 50, 51.

Perpetual Maintenance of Common Areas

The last requirement for approval of a DPA is:

(e) That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.

The development plan amendment includes a note carried forward from the original development plan stating that documents assuring perpetual maintenance of common areas would be submitted at site plan. (Exhibit 132(c)). The Applicants correctly point out that the Hearing Examiner in LMA G-806 found this sufficient to meet this finding. 9/6/13 T. 35. The Council finds that this requirement has been met.

The Public Interest

When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment and public benefits such as provision of affordable housing.

Planning Staff, the Planning Board, and the Hearing Examiner have recommended approval of the DPA. Uncontroverted evidence and testimony indicates that the standards for traffic meet the test for adequate public facilities and that water and sewer will be available to serve the proposed development. The Council finds that the DPA substantially complies with the Master Plan. Other than the procedural requirement of submitting a revised PWQP reflecting the proposed development, the only expert testimony here supports a finding that stormwater management for the development may be accommodated in accordance with Chapter 19 of the Code. For the reasons stated, the Council finds that the DPA will be in the public interest.

Action

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Development Plan Amendment No. DPA 13-02, seeking to amend the development plan approved by the District Council on September 9, 2003, in Local Map Amendment Application No. G-806 to increase the amount of retail space from 120,000 to square feet to 484,000 square feet and to decrease the amount of office space to 1,935,000 square feet from 2,300,000 square feet, is ***approved***, subject to the specifications and requirements of the Development Plan Amendment, Exhibit 132(c), provided that the Applicants submit to the Hearing Examiner for certification a reproducible original and three copies of the Development Plan Amendment approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance, as required under Code §59-D-1.64, and subject to the following condition:

The Applicants must submit a revised Preliminary Water Quality Plan (PWQP) in accordance with Chapter 19 of the Montgomery County Code that reflects the development plan approved in this case. If the revised PWQP necessitates any changes to the development plan amendment that are inconsistent with the approved plan (Exhibit 132(c)), the Applicants must seek a further development plan amendment to effectuate those changes.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council

APPENDIX (Binding Elements)

BINDING ELEMENTS

1. Transferable Development Rights and Moderately Priced Dwelling Units

The property that is the subject of this application (283.5 acres) is part of a larger, mixed-use community planned for 535 acres shown on the Development Plan, of which the Applicants are also owners. The portion of the property not being rezoned MXP, is zoned RMX-1/TDR and will require the purchase of Transferable Development Rights (TDR's) for the development planned by Applicants. Based on calculations developed with M-MCPPC staff, the total Master Plan residential density for the 535-acre community is 1,676 market rate units plus 210 Moderately Priced Dwelling Units. Assuming this density and the mix of unit types called for in the Master Plan for the entire Cabin Branch Neighborhood (including a maximum of 20% multifamily) the 535-acre project will require 635 TDR's. The Preliminary Plan of Subdivision application(s) for the MXP area and the remaining RMX-1/TDR area shall require the purchase of TDR's in conformance with this calculation.

2. Off-site Amenities and Features

By the time of issuance of building permits for the 100th dwelling unit in the Cabin Branch Community, which consists of the larger, mixed-use community of 535 acres shown on the Development Plan, the Applicants will dedicate the sites shown on the Development Plan for an elementary school, a local park and a recreation facility. The school site will be rough-graded at a time determined at the earliest Preliminary Plan of Subdivision application for the Cabin Branch Community, subject to Montgomery County Public School approval.

3. Trip Reduction Measures

At the time of Preliminary Plan of Subdivision, the Applicants, M-MCPPC Transportation Planning staff, and Department of Public Works and Transportation (DPWT) staff will consider mutually acceptable trip reductions measures. The parking ratios for non-residential uses in the Cabin Branch Community will be determined at Site Plan, considering trip reduction goals.

4. Street Network

A network of public streets shall be provided, supplemented by private streets, in a grid pattern that promotes interconnectivity. Public streets will consist of Master Plan streets and additional business and residential streets to form blocks that, with the exception of Area D defined on the Development Plan, are substantially similar to the street system shown in the Road Hierarchy Plan of the Development Plan and that are subject to M-MCPPC and DPWT approvals.

5. Area D Street Network

Area D will be designed with a public or private street connecting First Avenue (Route A-304) and Newcut Road (Route A-302) in a grid pattern with a particular emphasis on a building line to frame Newcut Road Extended, with parking in the rear.

6. Street Character

All streets will adhere to a pedestrian-friendly design to the extent practicable, which places particular emphasis on a building line to frame the street, with parking in the rear, excluding retail and entertainment uses. Within the core, pedestrian friendly uses including retail, residential, or office will be located on the first floor. The entire MXPB area will conform to a Cabin Branch Community Streetscape Plan that is designed to integrate the entire community, which will be submitted at Site Plan and is subject to M-NCPPC and DPWT approvals.

7. Special Roads

A-307 will be designed as an open section arterial road with wide green edges to provide a gateway to Black Hill Regional Park, subject to M-NCPPC and DPWT approvals. The rural character of West Old Baltimore Road will be maintained by minimizing environmental impacts and providing generous green edges.

8. Service/Public Uses

Service/Public uses may include up to 500 units for independent living for Senior Adults or persons with disabilities, assisted living, life care, or continuing care.

9. On-street Parking

Applicants will include on-street parking on streets adjacent to retail facilities. (Excluding MD Route 121, Wellspring Street and Goldeneye Avenue.)

10. No single retail store will have a gross floor area that is greater than 50,000 square feet, which will be a condition of site plan approval and will be referenced on the Certified Site Plan.

11. The retail uses located in Area C will be neighborhood retail.