Case No.: SDP-0007-03
Amazon.com Services

Applicant: Amazon.com Services, LLC

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL

FINAL DECISION — ORDER AFFIRMING SPECIFIC DESIGN PLAN

IT IS HEREBY ORDERED, that Planning Board's decision to amend a previously approved Specific Design Plan (SDP-0007-03), to increase the land area covered by pavement for parking, loading, and circulation of an existing warehouse and distribution facility, is hereby AFFIRMED.

A. Introduction

Specific Design Plan 0007-03 (SDP-0007-03)[1] is before Council on appeal from three (3) residents of Bowie and United Food & Commercial Workers Local 400 (Union) (collectively Appellants).[2]

Appellants allege the Board erred when it approved Amazon's application request to move into an existing warehouse and distribution building because it claims, among other things, Amazon's business is not a warehouse/distribution use.[3] Appellants, represented by an attorney,

[1] The Board's decision was adopted in Resolution PGCPB No. 2020-129. "-03" denotes the 3rd amendment to SDP-0007, approved in 2000, for a 290,225-square-foot warehouse and distribution facility—the *same* facility Amazon intends to occupy 20 years later. Amendment (-01) was filed and approved in 2001, by the Planning Director to reduce parking spaces and to construct a retaining wall. Subsequently, amendment (-02) was filed but was not processed to completion. None of these amendments are relevant to dispose of this appeal. PGCPB No. 2020-129, p. 2.

[2] Bowie residents are Ray A. Crawford, Kathy H. Crawford, and Dr. Charles Reilly.

[3] Amazon.com Services, LLC is the applicant/owner. Statement of Justification, March 2020, Application Form, March 2020. Since early 2000, the *building* was *used* and *occupied* by owner/tenant Distribution Plus Inc.—A Shipping and Receiving for Specialty Foods. Additional Backup, 232 of 232.

request that Council reverse or, alternatively, vacate the Board's decision to approve SDP-0007-03.[4] Appeal, 8/26/2020.

Planning Board has exclusive original jurisdiction to approve or deny a Specific Design Plan (SDP). Council's review of the Board decision to approve a SDP, based on factual findings, and the application of law to those factual findings, is limited to determining if there is substantial evidence in the record as a whole to support the Board's findings and conclusions, and to determine if the Board's decision is based on an erroneous conclusion of law. Council may *not substitute* its judgment for that of the Board to approve an SDP. Rather, Council must affirm the Board's decision if there is sufficient evidence such that a reasoning mind reasonably could have reached the factual conclusion the Board reached. Because the approval of an SDP is a matter committed to the discretion and expertise of the Board, the decision receives a higher level of deference than the Board's legal conclusions or factual findings, and Council may only reverse the Board's decision if it is arbitrary and capricious. *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co*., 444 Md. 490, 120 A.3d 677 (2015). Arbitrary and capricious means "unreasonably or without a rational basis;" "founded on prejudice or preference rather than on reason or fact;" and "characterized by or guided by unpredictable or impulsive behavior, . . . contrary to the evidence or established rules of law." *Cty. Council of Prince George's Cty. v. FCW Justice, Inc*., 238 Md. App. 641, 193 A.3d 241 (2018) (*quoting Harvey v. Marshall*, 389 Md. 243, 884 A.2d 1171 (2005)).

[4] Amazon filed a response to the appeal. Amazon Response, 9/28/2020. As a threshold matter, Amazon alleges that Appellants are not aggrieved to appeal the Board's decision to Council. *See* discussion *infra*.

For reasons set forth below, the Board's (-03) amendment to SDP-0007, was supported by substantial evidence of record, not arbitrary, capricious, or otherwise illegal.[5] Application Case File–SDP-0007-03, (7/23/2020, Tr.), PGCPB No. 2020-129, (10/5/2020, Tr.).

B. Aggrievement

Before addressing the appeal, Amazon argues, as a threshold matter, that Appellants lack standing or aggrievement to appeal the Board's decision to Council. Amazon contends as follows:

> 1. Appellant UFCW Local 400 fails to meet its burden to demonstrate that it is a party of record, and each appellant fails to demonstrate that they are aggrieved, and thus each appellant lacks legal standing to challenge the Planning Board's decision at the District Council. Amazon Response at 3-8.

Council may review a decision of the Board *only if* 1) the person is an *aggrieved* person that appeared at the hearing before the Board in person, by an attorney, or in writing and 2) the review is expressly authorized. Md. Code, Ann., Land Use Article (LU), § 25-212 (2012, 2019 Supp.) (Emphasis added). Appellants satisfy (in part) the first requirement in LU § 25-212, because they (including the Union) appeared, through an attorney, before the Board. (7/23/2020, Tr., p. 32.). But the first requirement of § 25-212 also require Appellants to show they were *aggrieved* by the Board's decision.

[5] Council may take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property (including a preliminary plan of subdivision)—but Council has *no* jurisdiction (appellate or otherwise) to review the Board's determinations to approve an application for preliminary plan of subdivision. PGCC § 27-141, *County Council of Prince George's County v. Dutcher*, 365 Md. 399, 780 A.2d 1137 (2001). Council may also take administrative notice of facts of general knowledge, technical or scientific facts, laws, ordinances and regulations. It shall give effect to the rules of privileges recognized by law. Council may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence. District Council Rules of Procedure Rule 6.5(f).

Generally, a party is deemed aggrieved if the party can demonstrate the land use decision will adversely affect the party's interest, and that such interest is personal or specific, and not shared by the general public. There are 3 ways to demonstrate standing (1) proximity; (2) special aggrievement; or, (3) direct and specific harm. *120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore*, 407 Md. 253, 271, 964 A.2d 662, 672 (2009) (quoting *Bryniarski v. Montgomery Co.*, 247 Md. 137, 144, 230 A.2d 289, 294 (1967)). An adjoining, confronting or nearby property owner is deemed *prima facie aggrieved. Bryniarski,* 247 Md. at 145, 230 A.2d at 294. A protestant is *specially aggrieved* when farther away than an adjoining, confronting, or nearby property owner, but still close enough to the site of the rezoning action to be considered *almost prima facie* aggrieved, and offers 'plus factors' supporting injury. Direct or specific harm is when a protestant, despite being far removed from the subject property, may nevertheless be able to establish the fact that his personal or property rights are specially and adversely affected by the board's action. *A Guy Named Moe, LLC v. Chipotle Mexican Grill of Colo., LLC*, 447 Md. 425, 451-453, 135 A.3d 492, 508-509 (2016), *Ray v. Mayor & City Council of Baltimore*, 430 Md. 74, 85, 59 A.3d 545, 551-552 (2013).

Amazon's ±28-acre property is in Collington Center, a 708-acre employment park in the Employment and Institutional Area (E-I-A) Zone, which is part of a larger 1,289-acre employment park comprising Collington Corporate Center, Collington Center, and Collington South. The property is bounded to the north by Branch Court, with commercial uses beyond, to the east by commercial warehouse uses, to the south by Queens Court, with commercial warehouse uses beyond, and to the west by Prince George's Boulevard, with commercial uses beyond, all within the E-I-A Zone and Collington Center. PGCPB No. 2020-129, pp. 1-2, Slides 2-8 of 15.

- *Prima Facie* Aggrievement

Based on contemporaneous aerial photography below,[6] Amazon contends Dr. Reilly and Crawford's are not *prima facie* aggrieved because neither are an adjoining, confronting or nearby property owner to the Amazon property. Amazon Response at 5-8.

Under the County Code, a property is adjoining or contiguous when it is touching and sharing a common point or line and a property is considered nearby if it is adjacent but not necessarily abutting, adjoining, or contiguous. PGCC § 27-107.01(a)(1)(4). Because Dr. Reilly's property is *at least* 2,627-feet (or ±1/2 mile) from the *closest* boundary line of the Amazon property, Council finds that the property is not adjoining, contiguous, confronting or nearby. Dr. Reilly does not meet the threshold requirements to demonstrate proximity standing or *prima facie* aggrievement.

[6] *See also* Application Case File–SDP-0007-03, Slides 2-8 of 15.

The Crawford's property *is at least* 857-feet from the *closest* boundary line of the Amazon property. Council finds the Crawford's property is *not* adjoining, contiguous, or confronting to the Amazon property. Contemporaneous aerial photography, above, below, and others in the record, show the topography and environs of the Crawford's property and how they relate to the Amazon property. Amazon Response at 7.

Based on the spatial relativity depicted above, Council also finds the Crawford's property is *not adjacent* or *nearby* to the Amazon property. *Holland v. Woodhaven Bldg. & Dev., Inc*., 113 Md. App. 274, 281 n.3, 687 A.2d 699, 703 (1996), *abrogated on other grounds by Layton v. Howard Cnty. Bd. of Appeals*, 399 Md. 36, 922 A.2d 576 (2007) (the issue of what constitutes a 'nearby' property owner is, itself, a question of fact which may turn on such circumstances as the topography of the subject property and its environs and the nature of the proposed development).

In *addition* to being *at least* 857-feet, as the crow flies, from the *closest* boundary line of the Amazon property, the topography and environs show the Crawford's property is separated by *heavy* woodlands, two sets of already-*existing* industrial/warehouse buildings, and US 301—a major 5-lane highway, divided by a large median, that runs from Delaware to Governor Harry W. Nice Memorial Bridge into Virginia. Not only is Crawford's property separated by US 301; *heavy*

woodlands block *any* visibility of two sets of already-*existing* industrial/warehouse buildings that *further* separate and block *any* visibility of Amazon's property—including *all* of the application's proposed parking—from the Crawford's property. (7/23/2020, Tr.), Amazon Response at 7. Council finds that these circumstances demonstrate that the Crawford's property is not nearby, or within sight or sound range of the Amazon's property to meet the nearby threshold to establish *prima facie* aggrievement. Thus, they do not meet the threshold requirements to demonstrate proximity standing or *prima facie* aggrievement.

- *Special* Aggrievement

Although there is no bright-line rule as to *distance* for the category of almost *prima facie* aggrieved, protestants who lived more than 1,000 feet from a contested site have been denied standing repeatedly. *Anne Arundel Cnty. v. Bell*, 442 Md. 539, 559, 113 A.3d 639, 651 (2015); *see also, e.g., Ray*, 430 Md. at 84-84, 59 A.3d at 550-51 ("without sufficient proximity, similar facts will only support general aggrievement. For example, when the affected properties are not sufficiently close to the site to qualify as almost *prima facie* aggrieved, claims of increasing traffic, change in the character of the neighborhood, lay opinion projecting a decrease in property values ... have been held to show only general aggrievement."); *White v. Major Realty, Inc*., 251 Md. 63, 64, 246 A.2d 249, 250-51 (1968) (protestant 0.5 miles away, who alleged increased traffic, increase use of water system, overcrowded schools, and change in character of community, not aggrieved specially); *DuBay v. Crane*, 240 Md. 180, 182-84, 185-86, 213 A.2d 487, 488-90 (1965) (protestants 1500+ feet away, who claimed increase in sewage disposal, increased traffic, and lay opinion of decreasing property values, not aggrieved specially); *Marcus v. Montgomery Cnty. Council*, 235 Md. 535, 537-38, 541, 201 A.2d 777, 778-81 (1964) (protestants with claims of increased traffic, increase in school population, 0.25 miles and 0.75 miles away from site only aggrieved

generally). Dr. Reilly's testimony fails to demonstrate "almost *prima facie*" aggrievement because his property is *more than* 1,000 feet from the *closest* boundary line of Amazon's property. (7/23/2020, Tr.).

Mr. Crawford testified that "this particular site … has our concern because of all of the traffic and the noise, the air pollution, the noise pollution …[and] that [e]ven when we had that, the other site we would always hear those trucks with the backing up and all hours of the night," [a]nd our concern is we will still [hear] all of those trucks coming at any and all hours of the night." Council finds that Mr. Crawford's testimony illustrates that these concerns *existed* before the Board's approval of SDP-0007-03. (7/23/2020, Tr.), Amazon Response at 6-7.

Mr. Crawford's testimony also fails to demonstrate almost *prima facie* aggrievement because his property is *not* sufficiently close to Amazon's property. Amazon's ±28-acre property is part of a 708-acre employment park, which is part of a larger 1,289-acre employment park with *substantial existing* development in place. PGCPB No. 2020-129, pp. 1-2, Slides 2-8 of 15. The Crawford's property is *at least* 857-feet from the *closest* boundary line of Amazon's property and the record reflects they are *not* within *sight* or *sound range* of Amazon's property—including *any* of the proposed parking improvements. The Crawford's property is separated by *heavy* woodlands, two sets of already-*existing* industrial/warehouse buildings, and US 301. Mr. Crawford also testified that because there is no longer (as in the past) direct access from US 301 to his property, he must drive ¼ mile up US 301 and back down to get to his property. (7/23/2020, Tr., p. 67). Amazon Response at 7. The Crawford's fail, based on the specific facts of this case, to demonstrate "almost *prima facie*" aggrievement because of distance and spatial relativity to the Amazon property—including topography and environs of the Crawford's property and how they relate to the Amazon property.

- Direct and Specific Harm

For the reasons stated above, Council finds that the individual Appellants fail to establish that their personal or property rights are specially and adversely affected by the Board's approval of SDP-0007-03. The mere allegation of increased traffic and lay testimony about decrease in property value does not meet the threshold to prove direct and specific harm, as required by law. *A Guy Named Moe, LLC,* 447 Md. at 451-453, 135 A.3d at 508-509 (without sufficient proximity, claims of increasing traffic, change in the character of the neighborhood, lay opinion projecting a decrease in property values, and limited visibility have been held to show only general aggrievement). Simply put, the individual Appellants are not aggrieved because they fail to demonstrate the Board's approval of SDP-0007-03, will adversely affect their personal or specific interest not shared by the general public. *120 W. Fayette St., LLLP,* 407 Md. 253, 271, 964 A.2d 662, 672 (2009).

- UFCW Local 400

Attorney for the Union Appellant indicated that he represented the Landover based Union, which has members in the County. No other relevant testimony or evidence is in the record. (7/23/2020, Tr., p. 32). For an organization to have standing to appeal, it must ordinarily have a "property interest of its own—separate and distinct from that of its individual members." *Medical Waste Assoc. v. Maryland Waste Coalition*, 327 Md. 596, 612 A.2d 241 (1992) (quoting *Citizens Planning and Housing Ass'n v. County Executive*)), 273 Md. 333, 345, 329 A.2d 681, 687-688 (1974)). *See also Stocksdale v. Barnard*, 239 Md. 541, 212 A.2d 282 (1965); *Bar Ass'n v. District Title Ins. Co.*, 224 Md. 474, 168 A.2d 395 (1961); *Southland Hills Improvement Ass'n v. Raine*, 220 Md. 213, 217, 151 A.2d 734, 736 (1959); *Norwood Heights Imp. Ass'n v. Mayor & City Council of Baltimore*, 195 Md. 1, 72 A.2d 1 (1950); *Windsor Hills Imp. Ass'n v. Mayor and City*

Council of Baltimore, 195 Md. 383, 73 A.2d 531 (1950); *Md. Naturopathic Ass'n v. Kloman*, 191 Md. 626, 630-631, 62 A.2d 538, 539-540 (1948). Moreover, LU § 25-212 requires the Union to demonstrate it was aggrieved by the Board's decision. Because *no* evidence is in the record the Union has property interest of its own—separate and distinct from that of its individual members, *or* that it has standing by proximity, special aggrievement or, direct and specific harm, it was not authorized to appeal the Board's decision to Council. LU § 25-212, Application Case File–SDP-0007-03, (7/23/2020, Tr.), PGCPB No. 2020-129, (10/5/2020, Tr.).

In the alternative, Council will assume, *arguendo*, Appellants were aggrieved and address the appeal.

C. The Appeal

1. The Planning Board erred when it approved SDP-0007-03 because its Principal Counsel improperly instructed Technical Staff not to respond to any requests for information on any matter from "G. Macy Nelson, Ruth Grover (Weiss), or any individual representing them." Appeal at 3-5.

Appellants misrepresents the record. Principal Counsel informed staff as follows:

***

A lawsuit has been filed in state court against the Commission challenging the Planning Board's approval of the preliminary plan of subdivision for **4-19023 BELTWAY PLAZA**. Please do not respond to any requests for information on this or any other matter from **G. Macy Nelson, Ruth Grover (Weiss), or any individual representing them**. If you are contacted, please do not respond and forward the email or voicemail to Peter and me and one of us will follow up with you.

Any questions let me know.

***

Email from David Warner to Planning Staff, June 26, 2020 (Emphasis in original).

Before the June 26 email and *before* the application was accepted for review on June 1, 2020, Ruth Grover/Weiss (representative of Appellants) sent a request on Sunday, May 17, 2020,

to Thomas Burke—planning staff *assigned* to review the application. The Sunday evening post requested the following:

> From: Ruth Grover<ruth.e.weiss@gmail.com>
> Sent: Sunday, May 17, 2020 8:45 PM
> To: Burke, Thomas<Thomas.burke@ppd.mncppc.org>
> Subject: Hi, Tom
>
> Good morning. Hope you had a good weekend. I am just wondering if you were able to find the list of permitted uses in Collington? If so, might you be able to email it to me?
>
> Thanks and have a good day.
>
> Best,
> Ruth

Email from Grover to Burke, 5/17/2020. Burke *promptly* responded on Monday at 10:37 AM.

> **From**: Burke, Thomas<Thomas.burke@ppd.mncppc.org>
> **Date**: Mon, May 18, 2020 at 10:37 AM
> **To**: Ruth Grover<ruth.e.weiss@gmail.com>
>
> Hi Ruth,
>
> Attached is the **full** Collington CDP and the use chart that we have on file. I'm not sure off hand how this applies to the site. Also, included were amended allowable uses from a letter dated April of 1992. This is a lot of information, that we're trying to organize, and quite honestly I haven't had an opportunity to see how it all ties together with this property.

Email from Burke to Grover/Weiss, 5/18/2020 (Emphasis added).

Even *after* the June 26 email, staff continued to work and communicate directly with representatives of Appellants. Three days later, Appellants' counsel sent an email directly to Principal Counsel, which, in relevant part, stated: "I was engaged to evaluate SDP-0007-03. Ruth Grover is assisting me. Ruth submitted a Map & Data Request Form. On June 29, you advised Ruth that your office would provide the documents, but you requested additional clarification on three general questions. I set forth below your questions in italics and our answers in normal type."

The email expressly stated "[a]t this time, we are not requesting emails, materials submitted by applicants or staff reports," and "[o]ur goal is to make the request in a form that allows your office to efficiently produce these documents." Email from G. Macy Nelson to Warner, 6/29/2020 (Emphasis in original). At hearings before the Board and Council, Principal Counsel stated as follows:

> **"…in addition to our response to the PIA request, I do have e-mails from 12 different staff members that communicated with Mr. Green, Mr. Nelson and Ms. Grover on this application."**

(7/23/2020, Tr., pp. 32, 41, 50, 96, 99, 103, 110; 10/5/2020, Tr.) (Emphasis added). Emails (below) confirm the testimony from Principal Counsel and demonstrates that *even after* the June 26 email, representatives of Appellants were *not* prevented from working or communicating with staff:

***

From: G. Macy Nelson <gmacynelson@gmacynelson.com>
Sent: Tuesday, July 14, 2020 11:02 AM
To: Hunt, James <James.Hunt@ppd.mncppc.org>
Cc: Warner, David <david.warner@mncppc.org>; Goldsmith, Peter <peter.goldsmith@mncppc.org>; Cannistra, James <james.cannistra@ppd.mncppc.org>; Ruth Grover (ruth.e.weiss@gmail.com) <ruth.e.weiss@gmail.com>
Subject: RE: MPIA Request

Got it. Thanks.

-Macy

G. Macy Nelson
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Mobile 443-326-8749
Email gmacynelson@gmacynelson.com
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From: Hunt, James [mailto:James.Hunt@ppd.mncppc.org]
Sent: Tuesday, July 14, 2020 11:01 AM

To: G. Macy Nelson
Cc: Warner, David; Goldsmith, Peter; Cannistra, James; Ruth Grover (ruth.e.weiss@gmail.com)
Subject: RE: MPIA Request

Good Morning Mr. Nelson,

Thanks for your e-mail. We apologize, but our normal processes have been interrupted due to the current health crisis. Below is the link to the dropbox that holds the files you have requested. If you have any questions, please reach out to the team on this e-mail. Thanks!
https://www.dropbox.com/work/Collington%20Center-%20Macy%20Nelson

James R. Hunt
*Planning Division Chief | Development Review Division*14741 Governor Oden Bowie Drive, Upper Marlboro, MD 20772
301-952-3951 | james.hunt@ppd.mncppc.org

***

From: G. Macy Nelson <gmacynelson@gmacynelson.com>
Sent: Tuesday, July 14, 2020 9:21 AM
To: Hunt, James <James.Hunt@ppd.mncppc.org>
Cc: Warner, David <david.warner@mncppc.org>; Goldsmith, Peter <peter.goldsmith@mncppc.org>; Cannistra, James <james.cannistra@ppd.mncppc.org>; Ruth Grover (ruth.e.weiss@gmail.com) <ruth.e.weiss@gmail.com>
Subject: RE: MPIA Request

Good morning,

Yesterday, my office offered to pay the PIA bill of $530.64 by credit card but your office had no easy way to process such a payment. My office then wrote a check and mailed it in accordance with your instructions. My office also sent a pdf of the signed check to James Hunt. Mr. Hunt acknowledged receipt of the email but did not provide a DropBox link for the documents. As you know, the Planning Board hearing is July 23 so we have very little time to review them prior to the hearing. Please provide the DropBox link. Thank you.

-Macy Nelson

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***

From: Hunt, James [mailto:James.Hunt@ppd.mncppc.org]
Sent: Friday, July 10, 2020 5:29 PM
To: G. Macy Nelson
Cc: Warner, David; Goldsmith, Peter; Cannistra, James
Subject: MPIA Request

Dear Mr. Nelson:

The Maryland-National Capital Park and Planning Commission (M-NCPPC) received your Public Information Act (PIA) Request related to Collington Center on June 29, 2020. You specifically requested: "the final approving document for all final site plan applications including any CDP and any SDPs approved on the land area under the CDPs. We are also requesting any DSP that approves square footage and any District Council order showing the square footage finally approved for the project."

You added that your request extends back to the "1978 approved CDP" for the area "the Transportation Planning Section is now calling Collington Center."

In response to your request, the Planning Department's Information Management Division initially conducted an electronic search and analysis of the area to identify all mapped and unmapped cases as potentially pertaining to your request. This research identified approximately 50-60 separate development applications.

Using the data from Information Management, the Development Review Division then conducted a search of its electronic records to identify all available Planning Board Resolutions for each approved development application. The search resulted in the identification of 21 Resolutions along with Certificates of Approval and District Council Action documents relevant to your request.

Because of the current COVID-19 epidemic, searches for "paper" documents and files are not currently available. Please provide a check in the amount of $530.64 made out to Maryland-National Capital Park and Planning Commission and mail it to the following address:

Maryland National Capital Park and Planning Commission
Legal Department- Attn: Lori Smothers
14741 Governor Oden Bowie Drive, 4th floor
Upper Marlboro, MD 20772

Upon receipt of the payment, all documents responsive to your request will be made available by e-mail via a Dropbox folder.

If you have any further questions, please do not hesitate to contact me.

James R. Hunt, MPA
Planning Division Chief | Development Review Division

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From: Burke, Thomas <thomas.burke@ppd.mncppc.org>
Sent: Thursday, July 9, 2020 3:55 PM
To: G. Macy Nelson <gmacynelson@gmacynelson.com>; Ruth Grover <ruth.e.weiss@gmail.com>
Cc: Warner, David <david.warner@mncppc.org>; Goldsmith, Peter <peter.goldsmith@mncppc.org>; Hunt, James <James.Hunt@ppd.mncppc.org>; Kosack, Jill <Jill.Kosack@ppd.mncppc.org>
Subject: RE: SDP-0007-03 Amazon.Com Services

Mr. Nelson,

Attached is the preliminary plan associated with the subject application, per your request. We expect the staff report and backup material will be published today.

Best Regards,

Tom Burke
Planner Coordinator | Development Review Division

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From: G. Macy Nelson <gmacynelson@gmacynelson.com>
Sent: Tuesday, July 7, 2020 1:31 PM
To: Burke, Thomas <thomas.burke@ppd.mncppc.org>; Ruth Grover <ruth.e.weiss@gmail.com>
Cc: Warner, David <david.warner@mncppc.org>; Goldsmith, Peter <peter.goldsmith@mncppc.org>; Hunt, James <James.Hunt@ppd.mncppc.org>; Kosack, Jill <Jill.Kosack@ppd.mncppc.org>
Subject: **RE: SDP-0007-03 Amazon.Com Services**

Hi,

Thank you for speaking with Ruth and me this morning. And thank you for sending the DropBox link with the additional documents. We appreciate it.

I am writing to follow up on several issues that we discussed this morning. When I mentioned the 1978 CDP, my memory is that Staff suggested that they were not aware of a CDP from 1978. I have attached the CDP. The second page provides the date, November 1, 1978. Pages 7-4 and 7-5 provide trip generation data. We believe that trip generation data is relevant to the current application. We also believe that Staff must compute the traffic generated by the development already approved in order to reach a judgment as to whether the CDP allows the additional trips for the proposed Amazon facility.

Staff mentioned a Preliminary Plan that Staff believed was relevant to the Amazon proposal. Our investigation has revealed no Preliminary Plan. Please forward a copy of the Preliminary Plan Staff referenced.

Thank you.

-Macy

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***

From: Burke, Thomas [mailto:thomas.burke@ppd.mncppc.org]
Sent: Tuesday, July 7, 2020 11:28 AM
To: Ruth Grover; G. Macy Nelson
Cc: Warner, David; Goldsmith, Peter; Hunt, James; Kosack, Jill
Subject: SDP-0007-03 Amazon.Com Services

Good morning Ms. Grover and Mr. Nelson,
The dropbox link provided below includes the following new information, in a folder labeled 7-7-20:

1. The floodplain easement document from 1989,
2. The July 11, 2000 floodplain letter from DER (I incorrectly stated from DPIE in the conference call),
3. A survey dated 2019, showing the recorded easement,
4. The trip cap verification memo dated May 21, 2020.

https://www.dropbox.com/sh/lgvfmu4kfjlvrd9/AABd7iyd19x-X8uNrjxCj3Eoa?dl=0

Best Regards,

Tom Burke
Planner Coordinator | Development Review Division

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Emails reveal, among other things, that 1) staff and Appellants discussed the application via a *conference call* on July 7, 2020, and 2) staff *continued* to work and communicate directly with representatives of Appellants *even after* the June 26 email—including providing Appellants a link to a DropBox with additional application documents.

Representatives of Appellants were also not prevented from "speaking" directly with transportation staff about traffic issues or Comprehensive Design Plan (CDP) issues. Appeal at 5. Ruth Grover/Weiss (representative of Appellants) testified before the Board as follows:

> ***
>
> **MS. GROVER**: …I've worked as a land planner for many years in a variety of private and public positions, including working as a consultant for Macy Nelson, which brings me to this hearing. I've been asked to testify as to my knowledge of process and substance as it relates to the subject application, Specific Design Plan, SDP-0007-03.
> ***
> Early in our interest in this case we talked to staff regarding transportation related evaluation of the project. We asked how traffic analysis was done for the park, we were told that the original traffic study for the project was contained in Section 7 of the original Comprehensive Design Plan document and that when a new plan came along that needed transportation analysis they compared it to the parameters contained in that section of the CDP and made an evaluation as to whether there was sufficient capacity or adequacy to absorb the additional traffic. We were told that the new traffic study wouldn't be required for the project because it was being considered the same use because they did not believe it would generate additional trips.
>
> We then asked if they had a running tally of the development in Collington Center and were told that the history of Collington with the multiple revisions to the various plans and their boundaries were not clear in the consolidated records of the Comprehensive Design Zone. In fact, they stated that they were working on organizing their records, which once were well organized, but that those records were mostly paper files and that they had been moved around and some tossed over the years.
>
> At this point we undertook our own research, requesting the county to provide copies of all approved Detailed and Specific Design Plans in the area called Collington Center by the Transportation Planning Section.
>
> ***

(7/23/2020, Tr., pp. 50-51) (Emphasis added).

All things considered, the June 26 email from Principal Counsel did not arbitrarily change *any* vision statement in the MNCPPC's *Citizen's Handbook*. Appeal at 3. There is substantial evidence in the record that *even after* the June 26 email, representatives of Appellants were not prevented from working or communicating with staff. Moreover, it is undisputed (in the record) that over 8 staff members *promptly* responded to Appellants' Public Information Act request for documents. Appellants fail to show the Board erred when it approved the application because the June 26 email had *no* practical or prejudicial effect on their ability to prepare or oppose the application. Appeal at 5, Application Case File–SDP-0007-03, (7/23/2020, Tr.), PGCPB No. 2020-129, (10/5/2020, Tr.).

2. The Planning Board erred when it denied Appellants' request for postponement on the grounds that the Department of Permitting Inspections and Enforcement ("DPIE") failed to produce to Appellants the relevant stormwater documents that would allow them to analyze whether the Applicant proved compliance with ZO Section 27-528(a)(3). Appeal at 5-7.

On May 13, 2020, Appellants filed a Public Information Act (PIA) request with DPIE—for "all documents related to the Applicant's application for approval of a stormwater management plan." Appeal at 5. Generally, under Maryland law, after a PIA request is filed, the custodian of the agency shall grant or deny the request, but *not more than 30 days* after the request. And whenever the request is denied *or* documents *are not provided timely*, the person making the request may seek relief in the Circuit Court to enforce the PIA request. Md. Code Ann., General Provisions Article (GP), §§ 4-203, 4-362 (2014, 2019 Supp.).

On June 29, 2020 (approximately 45 days after the PIA was filed), Appellants filed a written request asking the Board to continue the July 23 hearing. The written request provides *no* information to the Board whether Appellants had or intended to enforce its PIA request against

DPIE. Exhibit 4.

Appellants concede they were in possession of Amazon's stormwater plans and concept plan approved by DPIE, but alleged since DPIE failed to respond to their May 13 PIA request to provide "stormwater calculations" that formed the basis for the plans and concept approval, the Board should have continued the July 23 hearing. Yet, almost 2 months *after* the PIA request was made, Appellants still did not provide the Board with any information at the hearing whether they had or intended to enforce its PIA request against DPIE. Appeal at 6.

Before the Board denied the request for continuance, the following exchange occurred between the parties:

> **MADAM CHAIR**: I also need to address that we also have a letter which is a request to continue this matter from Mr. Nelson as well.
> ***
>
> The request for a postponement was dated June 29, 2020, and it's Exhibit Number 4. And basically Mr. Nelson has asked for a continuance regarding storm water management issues that he has been unable to get. I don't know if you've gotten them by now, but you've been unable to get information you said that you needed from the County's Department of Permits, Inspection and Enforcement. Mr. Nelson, is that correct?
> ***
>
> **MR. NELSON**: That is correct. We've been trying for some time to obtain copies of the storm water calculations which are the, constitute the background information on which the Site Plan is based. DPIE has been unable to produce those to us despite numerous requests. It's been a longstanding problem at DPIE and of course drainage is a central issue in an SDP case and we have no ability to critique the Storm Water Plan because of DPIE's inability to respond to our proper request for the documents.
> ***
>
> **MADAM CHAIR**: Okay. So Ms. Dlhopolsky [counsel for applicant], do you care to respond?
> ***
>
> **MS. DLHOPOLSKY**: Yes, thank you, Madam Chair. You know, I'm not really sure, the first that we heard of this extension request was yesterday when the materials were submitted by Mr. Nelson. We do have an approved Storm Water

Management Concept Plan. This application would not have been permitted to go to hearing without an approved Storm Water Management Concept Plan. We have our civil engineer on the line and he can certainly speak in more detail to the approved plan, if needed. But I would suggest that we would not be at a hearing without that approved Storm Water Management Concept Plan and that DPIE certainly did what they needed to do in evaluating the calculations and computations prior to approving that plan. So I don't believe that there is any justification for postponement of the hearing in this case.
***

MADAM CHAIR: Let me say this and I know we have our counsel on the phone, I will just say this. The Planning Department and our technical staff will send out, when we get an application we have to send out these, send the application and have it reviewed by countless agencies. We have divisions within the Planning Department, we have things like the State Highway Administration, we have the Army Corps of Engineers, we have the Department of Natural Resources and things of that nature. We have a Fire Department, a Police Department, things of that nature. We will not have the expertise in every conceivable area.

So when we send out these referrals for feedback, we have to get comments. So we would not make a decision about adequate police without input from the police and that would be their decision. We would not make a decision with regard to the soils without some sort of soil analysis from someone else. We would not make a decision regarding the signal, traffic warrant signals without input from either the Department of Public Works and Transportation or the State Highway Administration depending on where the signal is needed, or allegedly needed. So we have to rely on information that is submitted to us and the authority and expertise of the agency that submits it to us.

In this particular case, we have, there is an approved Storm Water Concept Plan that we will not challenge the agency, where we won't challenge the expertise of the agency. So, I don't know that that's a grounds for us to postpone this and I think we definitely needed to hear from the applicant on that, as well.

What we perhaps can do, Mr. Nelson, is you know reach out to the agency as well. And we saw your letter and we looked as well and tried to urge that they respond to you. **But I think we have their approved storm water management concept, we note their approval and so we have to defer to their judgment on this**. Mr. Warner, do you have anything to add to that? Or disagree.
***

MR. WARNER: Yes, and only two things just to clarify that Mr. Nelson's inability to get records is due to another agency, not ours. And two, nothing in his letter suggests that there is anything wrong with the storm water either. He just hasn't had a chance to examine the county's work.

> ***
>
> **MR. NELSON**: I'm sorry, I didn't mean to speak over the Chair, I'll be very brief. I understood legally exactly what you said. I understand that the Planning Board relies on what DPIE says to the Planning Board. But I believe in this system my clients have the right to vet what DPIE did and the long and the short of it is DPIE due to some bureaucratic dysfunction has been unable to produce these documents to us. So we've been unable to vet it, we've been unable to present evidence on one of the key criteria for a SDP which is the drainage issue.
>
> We have an expert witness report, Exhibit 6, which says that we cannot critique the plan absent this information. So for all those reasons, those are the reasons I sought the postponement, but I understand your ruling and we're prepared to proceed and we'll preserve that point for another day.
> ***
>
> **MADAM CHAIR**: Let's do that, let's preserve that, thank you. It is duly noted on the record, **Mr. Nelson and we hope that you get the requested information from DPIE. Okay**.

(7/23/2020, Tr., pp. 7-11) (Emphasis added).

Granting of a continuance is within the sound discretion of the Board. *Gnau v. Seidel*, 25 Md. App. 16, 332 A.2d 739 (1975) *citing Bernstein v. Board of Education*, 245 Md. 464, 226 A.2d 243 (1967) (quoting *State Roads Com. v. Wyvill*, 244 Md. 163, 223 A.2d 146 (1966)). Appellants fail to show how its own failure to enforce a PIA request against DPIE *before* the hearing was error or an abuse of discretion by the Board not to continue the hearing. Appellants provided the Board with *no* timeframe when (if at all) it would obtain the documents from DPIE or whether they had *any* intention to enforce its PIA request against DPIE.

On "surface water drainage," the Board is only required to find that "**adequate provision has been made**….so there are no adverse effects on either the subject property or adjacent properties." PGCC § 27-528(a)(3) (Emphasis added). The Board found that PGCC § 27-528(a)(3)

was satisfied because DPIE *approved* a Stormwater Management Concept Approval (SWMCA) on May 29, 2020, which expires on May 29, 2023.[7] DPIE. Case #: 827-2020-00.

To be sure, a concept plan is the *first* of *three* required plan approvals *that includes the information necessary to allow [DPIE] an initial evaluation* of a proposed project. A site development plan is the *second* of three required plan approvals *that includes the information necessary to allow [DPIE to conduct] a detailed evaluation* of a proposed project. And a final stormwater management plan is the *third* required plan approvals *that includes the information necessary to allow* ***all*** *approvals and permits to be issued by DPIE*. PGCC § 32-171(a)(14),(33),(60) (Emphasis added). Amazon's SWMCA "means a documented action by [DPIE] following a review to *determine* and *acknowledge* the *sufficiency* of submitted material to meet the requirements of a state in the Department's development review process." PGCC § 32-171(a)(7)(A)(Emphasis added). The Board did not err when it found that DPIE's approval of Amazon's SWMCA satisfied PGCC § 27-528(a)(3).

Even if Appellants (through its engineer)[8] had an opportunity to review PIA documents from DPIE (including "calculations" that form the basis of the *concept* approval), they *could not* have evaluated whether the stormwater plan satisfied *all* regulatory requirements because DPIE's *concept* approval is *only* the *first* of *three* required plan approvals. Moreover, the Board found, in

[7] Stormwater plans, fee in lieu of, and waivers, are subject to requirements in Subtitle 32, Division 3, of the County Code—known as the Stormwater Management Ordinance. Provisions of the Stormwater Ordinance were adopted pursuant to Md. Code Ann., Environmental Article, Title 4, Subtitle 2 (2009). DPIE (not the Board or Council), is responsible for the coordination and enforcement of the provisions of the Stormwater Ordinance. PGCC § 32-170 (Emphasis added).

[8] Appellants' engineer stormwater comments for this application are misguided because DPIE *only* approved a *concept* plan—the 1st of 3 required plan approvals. Appellants' Exhibit 6.

the first instance, that DPIE's approval of Amazon's SWMCA was adequate provision to address surface water drainage required in PGCC § 27-528(a)(3).

The Board did not err or abuse its discretion denying Appellants' request for a continuance on grounds of an open (but unenforced) PIA request for stormwater documents from DPIE. A continuance would have been futile or serve no other purpose than to delay approval of the application. *See* PGCC § 27-528(c) (The Planning Board may only deny the Specific Design Plan if it does not meet the requirements of Section 27-528(a) and (b)). *Zimmer Dev. Co*., 444 Md. at 535, 120 A.3d at 704 (Planning Board must approve an SDP unless the submission fails to demonstrate that surface water will be handled adequately).

> 3. The Planning Board erred when it approved SDP-0007-03 because the Comprehensive Design Plan governing the Subject Property does not permit a use like an Amazon Last Mile Hub. Appeal at 7-11.

For purposes of this appeal, the question is straightforward. Can Amazon occupy an existing warehouse/distribution building to carry on business or operation of storage and delivery of customer orders? The answer is also straightforward: Yes. The Ordinance does not define *permitted uses* based on tradenames, corporate names, or corporate operations. The Ordinance defines a **use** as:

> "either the *purpose* for which a building, structure, or land is designed, arranged, *intended*, *maintained*, or *occupied*; *or any activity*, occupation, *business*, or *operation carried on in*, or on, a building, structure, or parcel of land."

PGCC § 27- 107.01(a)(244) (Emphasis added). A **warehouse** or warehouse unit is a **use** defined as:

> A building used for the *storage of goods* and *materials in connection* with *the* ***day-to-day operation*** of a *wholesale* ***or distribution business***, or a business that is not located in the same building or on the same property as the warehouse unit. The storage of goods and materials as an accessory use to a business located on the same

> property is not a warehouse unit. A warehouse unit is sometimes referred to as a warehouse.

PGCC § 27-107.01(a)(256). A **distribution** facility is a **use** defined as:

> A facility *to or from* which a *wholesaler **or** retailer ships merchandise*, *materials*, *or supplies for storage **or** distribution* by that *wholesaler **or** retailer* to the sales outlets ***or service operations it supports***; or a business whose functions are similar to those of the United States Postal Service, that is exclusively devoted to the receiving, sorting, sending, and delivery of letters, parcels, and other postal express matter.

PGCC § 27-107.01(a)(64.4)(Emphasis added).

Where a regulation involves two (2) or more items connected by the conjunctions "and," "or," or "either...or," the conjunction shall be interpreted as follows: "And" indicates that all the connected items shall apply; "**Or**" indicates that the connected items *may apply singly or in any combination*. PGCC § 27.108.01(a)(13) (Emphasis added).

The question whether the Board erred when it approved Amazon's application for a warehouse/distribution **use** is one of statutory interpretation. A reviewing court "will apply the same principles of statutory construction" to the Zoning Ordinance "as are required in the interpretation of any statute or regulation." *Harford County People's Counsel v. Bel Air Realty Associates Ltd. Partnership*, 148 Md. App. 244, 259, 811 A.2d 828, 837 (2002). *Bel Air Realty Associates Ltd. Partnership*, explained:

> With respect to statutory interpretation, we will likewise defer in the appropriate case to an agency's interpretation and application of its organic statute. Thus, our scope of review is rather circumscribed. . . .Because this appeal requires us to construe the language of the [Harford County] Zoning Code, [t]he cardinal rule of [statutory construction] is to ascertain and effectuate the legislative intent. In order to ascertain the Council's intent, we begin with the pertinent language of the Zoning Code, and ordinarily will not venture beyond its clear and explicit terms.
>
> We owe no deference when the agency's conclusions are premised on an error of law. In such a case the Court's review is expansive. . . .But the administrator's expertise should be taken into consideration and its decision should be afforded

> appropriate deference in our analysis of whether it was premised upon an erroneous conclusion of law.

Id. at 258-59 (internal citations and quotation marks omitted). In *Lockshin v. Semsker*, 412 Md. 257, 274, 987 A.2d 18, 28 (2010), the Court of Appeals reiterated that "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature." The Court added, however, that, although we begin our analysis of the legislature's intent with the "normal, plain meaning of the language of the statute," we

> do not read statutory language in a vacuum, nor do we confine strictly our interpretation of the statute's plain language to the isolated section alone. Rather, *the plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute*.

Id. at 275-76 (internal citations omitted) (Emphasis added). Amazon describes its business operations as follows:

> Amazon Logistics ("AMZL"), a division of the Applicant, specializes in the "last mile" delivery of customer orders. AMZL *delivery stations* receive packages from other Amazon facilities *and deliver the packages to the customers*. Packages arrive from line haul trucks, are sorted by delivery routes and then loaded into delivery vans operated by delivery service providers ("DSP") or personal vehicles operated by individuals ("Amazon FLEX"). Delivery stations operate 24/7, with the majority of the sortation activity done early in the morning when the line haul trucks arrive with customer packages. *Packages are typically in the delivery station for under 12 hours prior to being loaded onto the DSP vans and Amazon FLEX cars for delivery*.
>
> The first "wave" of DSP drivers arrive at a delivery station first thing in the morning. Depending on the design and layout of the delivery station, DSP drivers either park their personal vehicles onsite and pick up their delivery vans or park their personal vehicles offsite, pick up their delivery vans and drive to the delivery station. Once at the delivery station with their delivery van, *DSP drivers load their delivery van and depart to deliver packages directly to customers*. Each delivery wave takes about 30 minutes to load and depart. As a wave of DSP drivers prepare to depart, a new wave of DSP drivers queue and prepare to load their delivery van. The last wave of DSP drivers depart the delivery station in the early afternoon.
>
> After DSP drivers complete their routes, *they* ***return to the delivery station with any packages that may have been non-deliverable***. After proper checkout and release, the DSP drivers park the delivery van either onsite or at the offsite location

> and leave using a personal vehicle or public transport.
>
> AMZL also uses Amazon FLEX to deliver packages. Amazon FLEX is a new innovation from Amazon that allows individuals to use their own vehicles to deliver packages to customers. FLEX loading waves similarly take 30 minutes to complete. *FLEX drivers only* ***return to the station at the end of the route if any packages were undeliverable***.
>
> After departure of the last wave of delivery vehicles, *delivery station associates prepare the delivery st ation for the* ***next day's delivery*** *of packages from the line haul trucks*.

Statement of Justification, 3/26/2020, p. 3, PGCPB No. 2020-129, pp. 3-4, (7/23/2020, pp. 20, 23) (Emphasis added).

At the public hearing, the Board (through legal counsel) provided the following interpretation of uses permitted for Amazon's property pursuant to the Comprehensive Design Plan and the E-I-A zone:

> [W]ith a zoning code staff is always required to look at a static list of table of uses and determine if it's reasonable to conclude specific, a proposed use within the definition of a use that's listed on the table. And obviously that's never an exact science in a world where people do a wide range of activities on their property. But as Debra said it was certainly, in our opinion and the Boards opinion last week, that this same type of facility was reasonably categorized as a warehouse use in that particular zone. And that same use is permitted in this zone as well.
>
> And in order to make that determination, the Board just needs to have a reasonable basis for making that determination and you would look to your staff's recommendation. You would look at anything else in the record which interestingly enough includes materials submitted by Mr. Nelson that in fact provides that this is a warehouse use. The Land Use Code or the Land Use 155 section that he's recommending staff use to calculate trip generation is in fact a warehouse use. It's a high-cube warehouse, that's how it's defined, and in fact I looked up the ITE definitions for those high-cubes and they include within that definition, parcel hubs and fulfillment centers as warehouses. So you have evidence in the record from Mr. Nelson as well as from your staff that this is a warehouse use.
>
> And I thought that it would be kind of important just to also explain that in situations where you have to make a decision about whether something is a permitted use or not, you're an administrative agency that's given wide deference as to making that

> decision. The courts will tell you that they rely on an agency's expertise, not theirs to make determinations specifically about permitted uses. So that's what you have to consider on the use question as to whether this is a warehouse or not.

(7/23/2020, Tr., pp. 91-92, 109-110), Amazon's Response, p. 15. The Chair of the Board also provided additional analysis as follows:

> **You mentioned that about the Amazon this last mile being a warehouse and that has already been determined by planning staff. But it was not just determined by planning staff, it was determined by this Planning Board, the decision makers**. The planning staff did recommend it to us, it was also explained to us by legal. I know that Mr. Nelson does not agree with that interpretation, we discussed this at length last week during the Washington Gateway hearing, we discussed it again this week and what some may call arbitrary and capricious I will call fairly debatable. **Our decision is that this is a warehouse**. There's no precise definition for every conceivable use that can come up in this antiquated ordinance. And so you look at something that's very, very closely related, it was stated very clearly today by Counsel Warner and it was stated very clearly last week by Deputy General Counsel Debra Borden and the Planning Board agreed with that. So I just want to make sure that that's on the record as well.

(7/23/2020, Tr., pp. 91-92, 109-110), Amazon's Response, p. 15 (Emphasis added).

Amazon's property is in the Employment and Institutional Area (E-I-A) zone. Warehouse and distribution facilities *are permitted uses in* the E-I-A zone and CDP. PGCC § 27-515(b) Table of Uses, PGCPB No. 2020-129, p. 4, 1978 Comprehensive Design Plan, (7/23/2020, Tr., p. 93), PGCPB No. 00-136, Amazon Response at 13. No different than the specialty food *distribution business* that occupied the building before, Amazon intends to occupy, use, and maintain the *same* ≤300,000-square foot warehouse/distribution building and land for day-to-day operations to receive, store, sort, and deliver or distribute customer orders. Packages and materials will be stored in the building *before* deliveries and *undeliverable* packages will be returned and stored in the

building.[9] Statement of Justification, 3/26/2020, p. 3, PGCPB No. 2020-129, pp. 3-4, (7/23/2020, Tr., pp. 20-23, 91-92, 109-110), Amazon's Response at 12-16.

The Board did not err when it approved the application because its interpretation of a warehouse/distribution use was legally correct.

> 4. The Planning Department erred when it approved SDP-0007-03 without requiring the Applicant to exhaust its administrative remedies by applying to add the Amazon Last Mile Parcel to the list of permitted uses in the Collington Center. Appeal at 11- 12.

This argument is also based on Appellants' misunderstanding of a **use** in the Ordinance. *Permitted uses* are not defined based on tradenames, corporate names, or corporate operations. As discussed above, *a warehouse/distribution **use** is permitted by right* in the E-I-A zone and CDP for Amazon's property. Regardless of Amazon's nomenclature for business operations (Amazon Logistics/Last Mile Delivery/Last Mile Parcel Hub), those operations are *permitted by right* in a warehouse/distribution building because Amazon intends to occupy, use, and maintain an *existing* ≤300,000-square foot warehouse/distribution building and land for its day-day operations to receive, store, sort, and deliver or distribute customer orders. *See discussion supra*.

The Board did not err when it approved the application because Amazon was not required to seek administrative remedy *to add a use already permitted* in the E-I-A zone and CDP. PGCC § 27-515(b) Table of Uses, PGCPB No. 2020-129, p. 4, 1978 Comprehensive Design Plan, (7/23/2020, Tr., p. 93), PGCPB No. 00-136, Amazon Response at 13.

[9] Appellants *opine* that because Amazon packages will not be in the warehouse for more than ½ a day that doesn't amount to *storage*. Appeal at un-numbered page 10. The Ordinance does not define storage by stopwatch. Council will not arbitrarily and capriciously start one for Amazon.

5. The District Council should reverse the Planning Board's approval of SDP-0007-03 because the Planning Board arbitrarily and capriciously created a trip cap for the Subject Property. Appeal at 12-14.

Appellants must show that the Board's trip cap was "unreasonabl[e] or without a rational basis;" "founded on prejudice or preference rather than on reason or fact;" and "characterized by or guided by unpredictable or impulsive behavior, . . . contrary to the evidence or established rules of law." *FCW Justice, Inc*., 238 Md. App. 641, 193 A.3d 241 (2018) (*quoting Harvey,* 389 Md. 243, 884 A.2d 1171 (2005)). Appellants fail to do so.

The Board's decision incorporated by reference, a memorandum from the Transportation Planning Section dated June 19, 2020. In relevant part, the memorandum stated as follows:

> **On July 13, 2000, the Planning Board approved a Specific Design Plan (SDP)-0007 for the subject property. Based on information presented in PGCPB No. 00-136, that SDP was approved for the development of a warehouse with a gross floor area (GFA) of approximately 290,225 square feet**. Given the acreage of the property (28.02 acres), and *applying a floor area ratio (F.A.R) of 0.4, which is typical for that E.I.A Zone, the site could potentially be developed with a GFA of approximately 488,170 square feet*. **While no explicit trip cap was ever established for the subject property, based on trip generation rates from the *Trip Generation Manual, 10th Edition* (Institute of Transportation Engineers), 488,170 square-feet of warehousing will generate 84 AM trips and 86 PM trips during the peak hours**. **Staff is in receipt of documentation from the applicant that outlines the 24-hour site operation**. **The documentation shows that during the traditional peak hours of the adjacent street traffic (6:30-7:30 AM), (4:00-5:00 PM) the proposed development will generate two trips in the AM peak hour and 85 trips in the PM peak hour**. Staff conclude[s] that the original implied trip cap will not be exceeded.

Burton to Burke Memo, 6/19/2020, PGCPB No. 2020-129, pp. 9-10 (Emphasis added). The applicable trip cap, using 0.4 FAR, was established in the original SDP up to 488,170 square-feet of development. PGCPB No. 00-136, pp. 7-8 (…all square footage caps have generally been based on a floor-to-area ratio of 0.40, with warehouse, office and light industrial uses all accommodated within the cap. **Such a cap for this 28.02-acre site should have allowed for up to 488,170 square**

feet of development) (Emphasis added). Below is a summary of testimony, relevant to trip cap generation, the Board considered:

> Testimony of Samantha Mazo (Entitlements Manager at Amazon)
>
> [F]rom a traffic perspective, Amazon's production and Amazon's logistics on these delivery stations has really evolved over time and has been curated. Our intent and our effort is to take the trips off the peak hour time period, to make sure that both the trips for the delivery station associates, who are coming in to pick up the vans but most importantly for the vans when they are coming out are not going to be impacting the peak hours of the surrounding roads. And that is borne out in Mr. Kabatt's traffic report and the trip count. To that end, the station is designed for the vans to be loaded in a staged manner so that vans are loaded at approximately 40 vans at a time. They are then sent off onto the street in again a staged manner based on the operational nature of this particular site. And so through the operations of this particular building, there will not be a situation where hundreds of vans are thrown onto the streets during on particular time, rather this is a very, almost puzzle piece like logistics in order to both load the vans in a very quick manner and then to have them on the streets for such a time period that they are not impacting the peak hours.
>
> The vans would then leave in these waves, the waves leave approximately around 20, approximately 20 minutes after each one and then they would return about eight hours later, again outside the peak hour, empty, where at that point again we're outside the peak hour, the drivers would drop off the vans, pick up their own vehicles and then drive home. You know, again, this is an incredibly well thought out process that is being pursued elsewhere around the country. It is a manner in which Amazon really believes it can be a win/win for everybody to the extent that our customers are satisfied with receiving their packages outside of the early morning or you know they're happy to receive packages during the day. And then more importantly, we're happy to keep our trips off the roads during the peak hour time periods. And so with that, I hope that gives you an overview of how this station would work in terms of an operational standpoint.

(7/23/2020, Tr., pp. 21-23).

> Testimony of Chris Kabatt (Applicant's Engineer - Wells and Associates)
>
> So and then on to the trip cap, just as Samantha had mentioned, Amazon's operation is specific for this delivery station and it is an off peak operation. And our comparison is for the trip cap is for the comparison of peak hour, commuter peak hour a.m. and p.m. trip generation and that's what's we compared to the warehouse. So while there are trips coming on and off the site, the majority of them have been at traditionally non-peak hours, midday and then into the late evening. And then as

you see in the record and now our trip cap memorandum, with that operation, we are below the number of trips the peak hour trips that would be generated by the warehouse that is permitted.

(7/23/2020, Tr., pp. 30-31).

[T]he Land Use Code 150 for warehouse that was used of the allowed use up to approximately 480,000 square feet of warehouse. That was used to calculate the trip cap number for that size warehouse. We compared that to the number of trips that would actually be generated by the Amazon delivery station. I do want to point out that Land Use Code 155 that they keep referring to and was used, you know, in their study and other studies, that is a land use in ITE but right there in the ITE Manual it says to use caution and that is because that trip rate was only based on two studies, two data points. And both of those data points, both of those buildings were very large compared to our use. One was approximately 800,000 square feet and the other one was approximately 1.5 million square feet and that just a flag for the traffic engineer as the Institute says, to use caution and to use more other available data and that's what we did.

We used specific data for this Specific Design Plan Amendment. We have a specific use here and we essentially know what the driveway counts are going to be because of their operation. And again, as I stated earlier during the a.m. and p.m. peak hours we stay within that trip cap based on those conservative estimates for the warehouse use for the 480,000 square feet.

The other point, the comparison between the Washington Gateway site, obviously I am not, I can't speak to you know the determination as to why those trips rates were used for that site. I just wanted to point out that again that Washington Gateway site, that is a Preliminary Plan application and you know perhaps they need some flexibility with who the user might be or what the type of operation might be for a Preliminary Plan determination, an adequacy determination. And just pointing out again that here we have a specific use for this Specific Design Plan Amendment and we went through with both DPIE and with your Planning Department staff on the appropriate trip rates to use for this determination, and that's the result of our study and we remain under the trip cap.

(7/23/2020, Tr., pp. 81-82).

Testimony from Glenn Burton – Planning Department's Transportation Section

And so my conclusion therefore is that while I may have reached that conclusion using a different path, but I feel comfortable that based on this analysis the 488,000 square foot implied development cap would still generate a higher number than the 290 square foot which is before you today. So that's my take on the comparisons

> between 150 versus 155. As far as the other issues regarding traffic, and I think someone eluded to this earlier, this is not a Preliminary Plan of Subdivision.
>
> There is no test for adequacy and so from my perspective this is really a comparison between what is versus what could have been. What could have been was that someone would come in and develop this property with 488,000 square feet of warehouse. They could have, but they didn't. They used a smaller density. So this is really from a transportation standpoint nothing more than an exercise comparing one GFA versus another. And that's why I didn't think it was appropriate for us to reinvent the wheel, if you will, by reexamining the entire Collington area to see whether we're still under the original cap that was envisioned 30 years ago when the CDP was done.
>
> My own experience tells me that if you looked, and while this was not documented in my referral, I think it's safe to say that if you looked totally at what's been built in the larger Collington area to date versus what could have been built 30 years ago when the CDP was envisioned, I am fairly confident that what's on the ground now is far less dense than what could have been or what was envisioned when the CDP was done 28, 30 years ago. So from whatever perspective one chooses to look, I am satisfied that the trip cap implied would not be exceeded with the application that's before you today.

(7/23/2020, Tr., pp. 88-89).

> In response to the testimony above, the Chair of the Board summarized as follows:
>
> So basically there are a number of ways you could do an analysis and anyway, from your professional perspective, anyway you look at it, this particular application will generate less trips, less peak hour trips than what could have been under the previous CDP approval. It's a matter of 290 square feet of warehousing versus 488 square feet of warehousing. In addition to that, what I'm hearing from the applicant also, if you put that together with what the apartment's saying, even though this will generate fewer trips based on their operation, which typically involves nonpeak hour traffic. The two things coupled together means that this is likely generate far less peak hour traffic.

(7/23/2020, Tr., pp. 89-90).

The Board applied the logical approach to calculate the trip cap for this application—i.e.—to utilize the methodology established in the Original SDP in 2000. This methodology was *not* "unreasonabl[e] or without a rational basis;" "founded on prejudice or preference rather than on reason or fact;" and "characterized by or guided by unpredictable or impulsive behavior, . . .

contrary to the evidence or established rules of law." *FCW Justice, Inc*., 238 Md. App. 641, 193 A.3d 241 (2018) (*quoting Harvey,* 389 Md. 243, 884 A.2d 1171 (2005)).[10]

6. The District Council should reverse the Planning Board's approval of SDP-0007-03 because the Planning Board arbitrarily and capriciously analyzed the quantity of traffic generated by the proposed use. Appeal 15-19.

Like Appellants' last argument, they contend here, the Board arbitrarily and capriciously analyzed the quantity of traffic generated by this SDP versus traffic generated across town in a separate approval for an application for subdivision. Appeal at 18. Similarly, Appellants must show that the Board's analysis of the quantity of traffic for this SDP versus the application for a subdivision across town was "unreasonabl[e] or without a rational basis;" "founded on prejudice or preference rather than on reason or fact;" and "characterized by or guided by unpredictable or impulsive behavior, . . . contrary to the evidence or established rules of law." *FCW Justice, Inc*., 238 Md. App. 641, 193 A.3d 241 (2018) (*quoting Harvey,* 389 Md. 243, 884 A.2d 1171 (2005)). Appellants fail to do so.

Amazon's **±28-acre property** is in Collington Center, a **708-acre** employment park in the Employment and Institutional Area (E-I-A) Zone, which is part of a larger **1,289-acre employment park** comprising Collington Corporate Center, Collington Center, and Collington South. PGCPB No. 2020-129, pp. 1-2, Slides 2-8 of 15 (Emphasis added).

[10] Planning Board approved Comprehensive Design Plan CDP-8712 (PGCPB Resolution No. 88-224) on May 19, 1988, for Collington Center. On November 8, 1990, the Board approved CDP-9006 (PGCPB Resolution No. 90-455), which revised CDP-8712, subject to 16 conditions. On May 17, 2001, the Board approved CDP-9006-01 (PGCPB Resolution No. 01-95), to eliminate the requirements for the provision of recreational facilities in CDP-9006. On March 31, 2005, the Planning Board approved CDP-9006-02 (PGCPB Resolution No. 05-83(C)), to add residual acreage from the vacation of Willowbrook Parkway to the CDP. PGCPB No. 2020-129, p. 2.

The development summary for Amazon's SDP, as approved by the Board, is as follows:

	EXISTING	**APPROVED**
Zone	E-I-A	E-I-A
Use	Warehousing/Distribution	Warehousing/Distribution
Total Acreage	28.01	28.01
Lots	1	1
Gross Floor Area (square feet)	290,225	290,225
Green Space (20 percent required per the CDP Text)	52 percent (14.57 acres)	29 percent (8.13 acres)

PGCPB No. 2020-129, p. 1.

The Preliminary Plan of Subdivision (PPS) application consists of **one** existing parcel totaling approximately **17.90 acres**, known as Parcel A of Briggs Tract. The site is located southwest of the intersection of Columbia Park Road and Cabin Branch Drive and is within the **Heavy Industrial (I-2) Zone**. The subdivision application proposes **one parcel for 172,200 square feet of industrial development**, and one out-lot. Specifically, the project proposes ***redevelopment*** in the **Heavy Industrial (I-2) Zone**—*versus* **no redevelopment** in the ***E-I-A Zone***—**with a single, one-story 172,200-square-foot building and associated parking**. Preliminary Plan of Subdivision 4-19048 (Emphasis added).

The development summary for the PPS application, as ***proposed*** by the Board, is as follows:

	EXISTING	***PROPOSED***
Zone	I-2	I-2
Use(s)	Industrial	Industrial
Acreage	17.90	17.90
Gross Floor Area	N/A	172,200 square feet
Dwelling Units	0	0
Parcels	1	1

PGCPB No. 2020-124, p. 4 (Emphasis added).

The Board's findings and conclusions concerning quantity of traffic generated by this SDP application versus traffic generated across town by the PPS application were based on two separate and distinct types of zoning application requests—i.e.—the Board utilized the methodology logically established in the Original 2000 SDP application ***not*** the methodology appropriate and logical for the (different) PPS application. The Board's findings were legally correct because it was *not* "unreasonabl[e] or without a rational basis;" "founded on prejudice or preference rather than on reason or fact;" and "characterized by or guided by unpredictable or impulsive behavior, . . . contrary to the evidence or established rules of law." *FCW Justice, Inc*., 238 Md. App. 641, 193 A.3d 241 (2018) (*quoting Harvey,* 389 Md. 243, 884 A.2d 1171 (2005)).

D. Conclusion

The Board's decision, as adopted in PGCPB No. 2020-129, to amend a previously approved Specific Design Plan (SDP-0007-03), to increase the land area covered by pavement for parking, loading, and circulation of an existing warehouse and distribution facility, is hereby AFFIRMED, subject to:

1. Prior to certification of the specific design plan (SDP), the applicant shall revise the plans or provide additional information as follows:

    a. A partial release and abandonment of the 100-year floodplain easement shown on the record plat for Lot 19, Block C shall be reviewed by the Prince George's County Department of Permitting, Inspection, and Enforcement, and recorded in the Land Records of Prince George's County, Maryland.

    b. Delineation of the vacated 100-year floodplain easement shall be removed from the SDP and landscape plans.

    c. Correct the tabulations for interior parking to match the plan and verify the number of standard and van spaces.

    d. Label the proposed canopy on the east façade as an addition on the SDP and elevations.

e. Provide a detail for the fabric, high-speed, roll-up doors.

f. Cloud the area(s) of revision on the plan with a revision number designator and include the numbered revision in the revision blocks of all applicable sheets.

g. Provide a detail on the plan for the existing monument sign and the proposed refacing.

h. Provide the following General Notes on the SDP:

(1) "The applicant shall install and maintain automated external defibrillators (AEDs), in accordance with the Code of Maryland Regulations requirements (COMAR 30.06.01-01). The recommendation includes a requirement for a sufficient number of AEDs to be installed so that any employee is no more than 500 feet from an AED."

(2) "The applicant shall install and maintain hemorrhage control kits that shall be installed next to a fire extinguisher. The Fire Protection Code requires fire extinguishers be no more than 75 feet from any employee."

i. Provide a total of ten inverted-U style bicycle racks near the northeast corner of the building.

j. Revise the landscape plan, as follows:

(1) Correct Schedule 4.3-2 for Parking Lot Area B calculation errors in lines 2 and 4, which should show 9,794 square feet and 34 shade trees, respectively.

(2) Provide a minimum of 7,675 square feet of interior landscaped area, with a minimum of 26 trees for Parking Lot Area C and revise the appropriate Schedule 4.3-2 to reflect these changes.

(3) Correct the minimum number of shade trees required on line 4 of Schedule 4.3-2 for Parking Lot Area E to 12 trees and provide the additional tree on the plan.

(4) Correct the Section 4.9-1 schedule to reflect the above corrections.

2. Prior to certification of the specific design plan, the Type II tree conservation plan (TCPII) shall be revised, as follows:

    a. The delineation of Lot 19, Block shall be accurately depicted and labeled.

    b. The most current version of the TCPII approval block shall be provided on the plan sheet. All information about prior approvals and revisions shall be completed in typeface.

    c. Provide an Owner's Awareness Certificate to the cover sheet for signature by the appropriate party.

3. Prior to final certificate of occupancy, the applicant shall provide a pre-incident emergency plan for their facility conducted by the closest station to the site, Bowie-Pointer Ridge Fire/EMS Co. 843. The pre-incident emergency plan will involve establishing points of contact and timely response options, facilitating emergency vehicle access throughout the site, creating a consistent marking protocol for the identification of system components that require special attention during an emergency, and developing appropriate standard operating procedures, or standard operating guidelines for addressing on-site emergencies.

Ordered this 26th day of October, 2020, by the following vote:

In Favor:

Opposed:

Abstained:

Absent:

Vote:

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND, SITTING AS THE DISTRICT COUNCIL FOR THAT PART OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT IN PRINCE GEORGE'S COUNTY, MARYLAND

By: _____
Todd M. Turner, Chair

ATTEST:

_____
Donna J. Brown
Clerk of the Council