

Case No.: SDP-1001

Applicant: Zimmer Development Company

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

ORDER OF DENIAL

IT IS HEREBY ORDERED, after review of the administrative record, including the transcripts and exhibits for the District Council's initial consideration of the applications and the testimony and evidence after the Council's remand to the Planning Board, that the decision of the Planning Board in PGCPB Resolution No. 11-78(A)(C), to approve the Specific Design Plan SDP-1001, for the construction of 22,288 square feet of retail development in a visually-integrated, 13,013-square-foot freestanding pharmacy and a 9,275-square-foot two-tenant building on approximately 4.14 acres in the L-A-C Zone located on a triangular piece of land bounded by Riggs Road (MD 212) to the south, Edwards Way to the west, and Adelphi Road to the east, is:

REVERSED, and Application No., SDP-1001, is hereby DENIED, for the reasons stated in Attachment A, which the District Council hereby adopts as its findings of fact and conclusions of law in this case.

ORDERED this 18th day of June, 2012, by the following vote:

In Favor: Council Members Campos, Davis, Franklin, Harrison, Lehman, Olson, Patterson,
Toles and Turner.

Opposed:

Abstained:

Absent:

Vote: 9 - 0

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: _____
Andrea C. Harrison, Chair

ATTEST:

Redis C. Floyd
Clerk of the Council

ATTACHMENT A
ORDER OF DENIAL FOR SDP-1001
PROCEDURAL HISTORY, FINDINGS AND CONCLUSIONS
PROCEDURAL HISTORY

1. On or about March 14, 2011, applicant Zimmer Development Company, filed a joint application for a Comprehensive Design Plan (CDP-1001), and Specific Design Plan (SDP-1001), with the Prince George's County Planning Board (Planning Board) seeking approval to construct a CVS drugstore and a retail pad site on what is known as the Edwards Property (the Property), located in the northwestern quadrant of the intersection of Riggs and Adelphi Roads, on the eastern side of Edwards Way.
2. On or about March 15, the applicant also filed a joint application for a Preliminary Plan of Subdivision, 4-10019.
3. On June 9, 2011, initial Staff Report for CDP-1001 was filed in the record.
4. On June 16, 2011, Planning Board, after a public hearing, approved CDP-1001 with conditions in PGCPB Resolution No. 11-62, which was adopted July 7, 2011.¹
5. On July 20, 2011, initial Staff Report for SDP-1001 was filed in the record.
6. On July 28, 2011, Planning Board, after a public hearing, approved SDP-1001 with conditions in PGCPB Resolution No. 11-78, which was adopted on September 15, 2011.
7. On November 7, 2011, District Council held oral argument on CDP-1001 and SDP-1001 and took the matter under advisement.
8. On November 14, 2011, District Council remanded CDP-1001 and SDP-1001 to the Planning Board, for reconsideration of its decisions, and take further evidence, including but

¹ The initial public hearing before Planning Board on CDP-1001 and Preliminary Plan 4-10019 was scheduled on June 9, 2011. The Planning Board continued the hearing to June 16, 2011, to allow staff additional time for presentation. (6/09/11 Tr. 2-7). Preliminary Plan 4-10019 was also approved by Planning Board on June 16, 2011, as formalized in PGCPB Resolution No. 11-63(C), which was adopted on July 7, 2011. PGCPB Resolution No. 11-

not limited to, traffic and environmental issues.

9. On February 9, 2012, Planning Board held a hearing on remand and amended its findings. CDP-1001 and SDP-1001 were approved with conditions in PGCPB Resolution No. 11-62(A) and PGCPB No. 11-78(A), respectively, and subsequently adopted on March 8, 2012.

10. On May 21, 2012, after remand from Planning Board, the District Council held oral argument on CDP-1001 and SDP-1001. At the conclusion of oral argument, the District Council voted 9-0 to deny applications CDP-1001 and SDP-1001.²

FINDINGS AND CONCLUSIONS

The Edwards Property

11. The Property is a predominantly wooded undeveloped 4.14 acres triangular piece of land, within the 100-year floodplain, bounded by Riggs Road (MD 212) to the south, Edwards Way to the west, and Adelphi Road to the east. The Property was addressed in the 1990 Approved Master Plan for the Langley Park-College Park-Greenbelt and Vicinity, and Adopted Sectional Map Amendment for Planning Areas 65, 66 and 67 (1990 Master Plan),³ as follows:

“SECTION 2, BE IT FURTHER RESOLVED that the District Council considers the Comprehensive Design Zone process the appropriate way to address concerns related to the approximately 4.1-acre Edwards property bounded by Adelphi Road, Riggs Road, and Edwards Way, although the Sectional Map Amendment retains R-R zoning for this property. *The District Council is specifically concerned about preservation, to the greatest possible extent, of the existing woodland and the control of access to the property. A sensitive approach to site development is warranted and should be facilitated through the CDZ process.* Accordingly, the SMA text should incorporate this expression of intent and the SMA map should

78(A)(C), at 2.

² After oral argument on May 21, 2012, Planning Board administratively corrected SDP-1001 on May 30, 2012. Specifically, conditions e and h were corrected. PGCPB No. 11-78(A)(C), at 44, 45. († denotes correction).

³ Planning Board and Staff documents incorrectly referred to the adopted year of the Master Plan as 1989, when in fact, the year was 1990.

be annotated to reflect the potential for a Comprehensive Design Zone.”

Md.–Nat’l Capital Park and Planning Comm’n, 1990 *Approved Master Plan for Langley Park-College Park-Greenbelt and Vicinity and Adopted Sectional Map Amendment for Planning Areas 65, 66, and 67*, at 224 (1990). (Emphasis added).

12. In 2004, the District Council rezoned the Property from the R–R Zone (Rural Residential) to the L–A–C Zone (Local Activity Center), subject to ten (10) conditions, A–9954–C. The applicant consented, in writing, to the conditions, and final conditional zoning for the Property became effective September 1, 2004. Zoning Ordinance No. 10–2004.

The Applications

13. In 2011, the applicant filed joint applications for a Comprehensive Design Plan, CDP–1001, Specific Design Plan, SDP–1001, and Preliminary Plan of Subdivision, 4–10019.4 The design features include a 22,288–square–foot retail development, made of up two buildings with associated parking and infrastructure. The building that will front Riggs Road is a 13,013–square–foot freestanding CVS Retail with a drive through pharmacy. The building that will front Adelphi Road is a 9,275–square–foot two–tenant building. The buildings will be connected by a drive–through architectural archway on the second story. PGCPB Resolution No. 11–62(A), at 3, PGCPB Resolution No. 11–78(A)(C), at 2, PGCPB Resolution No. 11–63(C), at 8, Dec. 2010, Statement of Justification, Application Form, and Applicant Dec. 8, 2010 and Jan. 24, 2011 Transmittals to M–NCPPC–Urban Planning.

4 In 2006, the applicant filed applications for Preliminary Plan of Subdivision, 4–06029 and Comprehensive Design Plan, CDP–0502. The applicant withdrew Preliminary Plan of Subdivision, 4–06029 on May 20, 2008. After Staff recommended “DISAPPROVAL” of CDP–0502, the applicant also withdrew CDP–0502 on January 29, 2009. PGCPB Resolution No. 11–62(A), at 3, PGCPB Resolution No. 11–78(A)(C), at 2, PGCPB Resolution No. 11–63(C), at 8, and Dec. 2010 Statement of Justification. Prince George’s County Code (P.G.C.C.), Subtitle 27, §27–141, (2008–09 ed., as amended)(hereinafter “Zon. Ord., § 27– __”)(The Council may take judicial notice of any evidence contained in

14. The Property has 3.35 acres of on-site woodland. The Type I Tree Conservation Plan (TCP1) submitted by applicant will clear the entire 3.35 acres of on-site woodland. A companion variance request was also filed by the applicant for the removal of 24 specimen trees on the Property. PGCPB Resolution No. 11-62(A), at 22, Jan. 13, 2012 Staff Report, at 21-22. Dec. 2010 Statement of Justification. A variation to P.G.C.C., Subtitle 24 (Subdivision Regulations) §24-124(a)(3), was also requested as part of the Preliminary Plan of Subdivision application, to facilitate a right-in/right-out access point on Adelphi Road. PGCPB Resolution No. 11-63(C), at 19.

Non-Compliance with Basic Plan Conditions (A-9954-C)

15. Among the District Council's statutory zoning power, under the Maryland-Washington Regional District Act, *Md. Ann. Code art. 28, § 8-101 et seq.*, is the power to impose conditions when it changes the zoning classification of mapped property within a regional district. When the Council exercises its authority under *Md. Ann. Code § 8-101, et seq.*, to create a condition to a zoning map amendment, the conditions become an integral part of its action. Conditions imposed by the Council shall become a permanent part of the Zoning Map Amendment, and shall be binding for as long as the zone remains in effect on the property, unless amended by the Council. All building plans shall list the conditions and shall show how the proposed development complies with them. *Zon. Ord. §27-157.*

16. The applicant, in 2006, and most recently in 2011, submitted plans for review and approval, which fail to comply with several conditions of rezoning to the L-A-C Zone in 2004. PGCPB No. 11-62(A), at 10, PGCPB Resolution No. 11-78(A)(C), at 18, Apr. 7, 2011 Memo, Edwards Property (CDP-1001 & SDP-1001) Community Planning North Division (The proposal does not conform to all of the conditions of its approval for its rezoning to the L-A-C Zone, A-

the record of any earlier phase of the approval process relating to all or a portion of the same property, including the

9954–C).

Condition (1)

- The Basic Plan shall be revised to show the following rights-of-way along the frontages of the subject property: MD 212 -- 40 feet from center line (toward the ultimate right-of-way of 80 feet); Adelphi Road -- 50 feet from center line (toward the ultimate right-of-way of 100 feet); Edwards Way -- 35 feet from center line (in accordance with Zoning Ordinance requirements adjacent to a commercial zone).

17. CDP–1001, as approved by Planning Board in PGCPB No. 11–62(A), is not in conformance with Condition 1 of the Basic Plan. Prior to approval of a Comprehensive Design Plan (CDP), the Planning Board shall⁵ find that the plan is in conformance with the Basic Plan. Zon. Ord., § 27–521. CDP–1001 does not show dedication 35 feet from the centerline on Edwards Way. PGCPB Resolution No. 11–62(A), at 3, CDP–1001 (Remanded) Staff Report, at 4–5. Preliminary Plan of Subdivision, 4–10019, was also subject to Condition 1. The approved Preliminary Plan of Subdivision, 4–10019, indicated non–conformance to Condition 1 of the Basic Plan, PGCPB Resolution No. 11–63(C), at 16. Further, SDP–1001 indicates that dedication, in Condition 1, will be demonstrated at the time of final plat for the project. PGCPB No. 11–78(A)(C) at 4.

18. Pursuant to Zoning Ordinance No. 10–2004, the Basic Plan was subject to Condition 1 since 2004. The approved 2012 CDP–1001, SDP–1001, and Preliminary Plan of Subdivision, 4–10019—like initial CDP–0502, recommended for “DISAPPROVAL” in 2008—fail to comply with Condition 1 of the Basic Plan. PGCPB No. 11–62(A), at 10, PGCPB Resolution No. 11–78(A)(C), at 18, Apr. 7, 2011 Memo, Community Planning North Division. Pursuant to Zon. Ord. §27–157, Planning Board incorrectly deferred Condition 1—a mandatory condition of the Basic Plan since 2004—to yet another stage of development.

approval of a preliminary plat of subdivision).

⁵ The word "shall" is always *mandatory* and not discretionary. Zon. Ord., § 27–108.01. (Emphasis added).

Condition (2)

- The Applicant will provide a double left-turn lane along southbound/westbound MD 212 at the approach to Adelphi Road. Timing of this improvement will be determined at the preliminary plan of subdivision.

19. Conformance to the Basic Plan is a prerequisite to approval of the plans. There is no evidence in the record or factual finding by Planning Board or Staff that CDP-1001, PGCPB Resolution No. 11-62(A), SDP-1001, PGCPB No. 11-78(A)(C), or Preliminary Plan of Subdivision, 4-10019, PGCPB Resolution No. 11-63(C), as approved, conforms to Condition 2 of the Basic Plan. Even though Planning Board and Staff opined that the intersection will operate below the level-of-service (LOS) threshold for the Developed Tier, Condition 2, as conceded by Planning Board, is required unless rescinded by the District Council. Zon. Ord. §27-157, PGCPB Resolution No. 11-62(A), at 4. PGCPB No. 11-78(A)(C), at 10, 11, 18. PGCPB Resolution No. 11-63(C), at 22, SDP-1001 (Remanded) Staff Report, at 18. Condition 2 has not been rescinded by the District Council. *Id.* Nor did the applicant move to amend this condition. §27-135. Pursuant to Zon. Ord., § 27-521, CDP-1001, SDP-1001, and Preliminary Plan of Subdivision, 4-10019, prior to approval, must conform to Condition 2 of the Basic Plan. Only timing, not conformance, of Condition 2 was to be determined at the preliminary plan of subdivision stage.

20. The record contains no evidence that the applicant will provide a double left-turn lane along southbound/westbound MD 212 at the approach to Adelphi Road. Development of the Property was subject to Condition 2 since 2004. In 2008, after initial CDP-0502 was recommended “DISAPPROVAL,” the applicant merely withdrew that application. The re-filed applications in 2011 suffer similar non-conformance to conditions imposed by the District Council in Zoning Ordinance No. 10-2004. PGCPB No. 11-62(A), at 10, PGCPB Resolution No. 11-78(A)(C), at 18,

Apr. 7, 2011 Memo, Community Planning North Division. Pursuant to Zon. Ord., § 27–521, CDP–1001 must conform to the Basic Plan, and pursuant to § 27–528, SDP–1001, must conform to the approved CDP–1001. Neither has occurred. Planning Board incorrectly approved CDP–1001 and SDP–1001 subject to future conformance to Condition 1 of the Basic Plan. Zon. Ord. §27–157.

Condition (3)

- Prior to the approval of the Specific Design Plan for the subject property, the Applicant shall submit an acceptable traffic signal warrant study to the County Department of Public Works and Transportation (DPW&T) for the intersection of Adelphi Road and Edwards Way. The Applicant shall use a new 12-hour count and shall analyze signal warrants under total future traffic as well as existing traffic.

21. The approved SDP–1001 does not conform to the Basic Plan. Although a traffic signal warrant study was submitted, PGCPB Resolution No. 11–62(A), at 4, the applicant has provided no written evidence prior to approval that DPW&T, the reviewing agency, has found the traffic signal warrant evaluation for the intersection of Adelphi Road and Edwards Way acceptable. PGCPB Resolution No. 11–78(A)(C) at 11, 12, 44, PGCPB Resolution No. 11–63(C) at 2.

22. In finding traffic adequacy, Transportation Planning Section (TPS), noted that a signal at Adelphi Road/Edwards Way is warranted. TPS also noted that installation of a signal at Adelphi Road and Edwards Way will greatly reduce delay for traffic using Edwards Way, and should reduce any queuing that currently occurs. TPS further noted that that left turning traffic from Edwards Way encounters conflict with through traffic along Adelphi Road and signalization will remove the conflict by giving left–turning traffic a protected situation to complete the maneuver. And the end result should be less queuing and less overall delay. Jan. 17, 2012 Memo, Transportation Planning Section, at 1–2, SDP–1001 (Remanded) Staff Report, at 20–22.

23. But TPS also indicated that State Highway Administration (SHA) is unlikely to approve a signal at MD 212/Edwards Way, due to proximity of signals at Adelphi Road and

Metzerott Road. Jan. 17, 2012 Memo, Transportation Planning Section, at 1–2, SDP–1001 (Remanded) Staff Report, at 20–22. According to *The Highway Capacity Manual* (Transportation Research Board) procedure for unsignalized intersections, vehicle delay in any movement exceeding 50.0 seconds is deemed to be an unacceptable operating condition at unsignalized intersections. PGCPB Resolution No. 11–62(A), at 11.

24. Condition 3 mandated use of a “new 12-hour count” to analyze signal warrants for total future and existing traffic. TSP noted that SHA had some concerns with applicant’s traffic study and traffic count submitted by the applicant in October 2010. SHA recommended use of the higher traffic count from February 15, 2011, instead of the lower traffic count submitted by the applicant in October 2010. Preliminary Plan of Subdivision, 4–10019, PGCPB Resolution No. 11–63(C), at 22.

25. Aside from SHA concerns and recommendation, opposition citizens also expressed concerns on the issue of traffic. (6/16/11 Tr. 61–83, 2/09/12 Tr. 51–60, 71–90, 109–119). Notwithstanding, TSP used lower traffic counts from 2010 to analyze total future and existing traffic impacts. SDP–1001 (Remanded) Staff Report, at 17–22, PGCPB Resolution No. 11–78(A), at 18–23, PGCPB Resolution No. 11–78(A)(C), at 18–23, PGCPB Resolution No. 11–62(A), at 10–18, PGCPB Resolution No. 11–63(C), at 15. TSP found:

- Under existing traffic conditions, delay at the intersection of Adelphi Road and Edwards Way exceed 50.0 seconds during both peak hours indicating inadequate traffic operations.
- Under background traffic conditions, delay at the unsignalized intersection of Adelphi Road and Edwards Way exceed 50.0 seconds during both peak hours indicating inadequate traffic operations.
- Intersection delays also exceed 50.0 seconds at the intersection of Riggs Road (MD 212) and Edwards Way under future traffic conditions, which will also require a traffic signal warrant study.
- In terms of adequacy, the two intersections exceed the threshold of 50.0 seconds during the PM peak hour.

- Under future or total traffic conditions, the intersection of Adelphi Road and Edwards Way exceeds 50.0 seconds, and
- During the PM peak hour, the unsignalized intersection of MD 212 and Edwards Way exceeds 50.0 seconds.

PGCPB Resolution No. 11–62(A), at 10–18, (2/09/12 Tr. 62)(TPS testified Adelphi Road and Edwards operates unacceptably as a stop controlled intersection. We also determined that Riggs Road and Edwards way in at least one peak hour would operate unacceptably as a stopped controlled intersection). Logically, if the higher traffic count was used as recommended by SHA–satisfying the intent of Council in Condition 3–existing and future delays at these intersections would be worse.

26. Despite these failing numbers, Planning Board and Staff gave the green light on traffic adequacy. Staff also found traffic adequacy despite applicant’s non–conformance with Condition 9 F of Zoning Ordinance No. 10–2004, which requires applicant to construct a bus pull–off area to allow the loading and unloading of passengers out of the travel lanes of the roadways, within the public rights–of–way. SDP–1001 (Remanded) Staff Report, at 19, 20.

27. In an effort to improve traffic capacity, DPW&T recommended widening Adelphi Road at Riggs Road (MD 212) and the provision of an exclusive left–turn lane on southbound Adelphi Road. SHA concurred. TSP declined to recommend this improvement as a condition of approval. PGCPB Resolution No. 11–63(C), at 22, Dec. 13, 2011 Letter from SHA.

28. From these staff observations and findings, the District Council must conclude that adequate traffic facilities would not exist to serve the proposed development. Compare *K.W. James Rochow, et al. v. Maryland National Capital Park and Planning Commission, et al.*, 115 Md. App. 558, 827 A.2d 927 (2003)(Even if the Council were to be satisfied that there are adequate traffic facilities for a plan, it may decide not to approve it if elected officials wished to consider constituent concerns that proposed plan will generate more traffic). See (6/16/11 Tr. 61–83, 2/09/12 Tr. 51–60,

71–90, 109–119).

Condition (4)

- During the review of Preliminary Plan of Subdivision, the Applicant shall provide more detailed operational analyses at the intersections of MD 212/Edwards Way and MD 212/ site entrance. The scope of these analyses will be determined after approval of the proposed Basic Plan and in consideration of the permitted access to the site.

29. For the same reasons stated under Condition 3, the applicant has failed to satisfy

Condition 4.

Condition (7)

- Development of the subject property shall have a woodland conservation threshold of 20 percent. If off-site mitigation is proposed, the first priority for mitigation sites shall be within the Anacostia Watershed.

30. In 1990, the District Council—to preserve the existing woodland to the greatest extent possible—determined that a sensitive approach to site development was warranted. Md.–Nat’l Capital Park and Planning Comm’n, 1990 *Approved Master Plan for Langley Park-College Park-Greenbelt and Vicinity and Adopted Sectional Map Amendment for Planning Areas 65, 66, and 67*, at 224 (1990). (Emphasis added). When the Property was rezoned in 2004—consistent with the 1990 Master Plan to preserve the existing woodland to the greatest extent possible—the Council increased the woodland conservation threshold of the Property from 15 percent to 20 percent, a condition, the applicant consented to in writing. Zoning Ordinance No. 10–2004.

31. The 2011 Type I Tree Conservation Plan (TCP1) submitted by applicant will clear the entire 3.35 acres of on-site woodland. A companion variance request was also filed by the applicant for the removal of 24 specimen trees on the Property. Condition 7 of the Basic Plan required development of the property subject to a threshold of 20 percent of the net tract or .73 acre. PGCPB Resolution No. 11–62(A), at 22, CDP–1001 (Remanded) Staff Report, at 21–22.

32. One of the reasons for Comprehensive Zones is to fulfill the purposes of the General Plan, Master Plan, or Sector Plans in selected areas. §27–476. One of the purposes of the L–A–C Zone is to establish regulations through which adopted and approved public plans and policies, such as Master Plans and Sector Plans, can serve as the criteria for judging individual physical development proposals. §27–494.

33. The Maryland Court of Appeals recently held that when statutes link planning and zoning, Master Plans are elevated to the level of true regulatory devices. *HNS Development, LLC v. People’s Counsel for Baltimore County, et al.*, __ Md. __ (2012), No. 85, September Term, 2011, filed April 23, 2012, affirming *HNS Development, LLC v. People’s Counsel for Baltimore County, et al.*, 200 Md. App. 1, 24 A.3d 167 (2011), citing *Mayor & City Council of Rockville v. Rylyns Enters., Inc.*, 372 Md. 514, 814 A.2d 469, (2002). The Court also held that plans that did not conform to the Master Plan must be rejected. *Id.*, citing *Maryland-National Capital Park & Planning Commission v. Greater Baden-Aquasco Citizens Association*, 412 Md. 73, 985 A.2d 1160 (2009), *Coffey v. Maryland-National Capital Park & Planning Commission*, 293 Md. 24, 441 A.2d 1041 (1982).

34. Clearing the entire 3.35 acres of on-site woodland does not preserve the *existing* woodland to the greatest extent possible or promote a sensitive approach to site development as expressed in the 1990 Master Plan/Approved Sectional Map Amendment for this site. CDP–1001 and SDP–1001, as approved, do not conform to 1990 Master Plan/Approved Sectional Map Amendment for this site.

35. Alternatively, when the Council exercised its authority under Md. Ann. Code § 8–101, *et seq.*, to impose Condition 7 in Zoning Ordinance No. 10–2004, the condition became an integral, permanent, and binding part of A–9954–C, for as long as the zone remains in effect on the property,

unless amended by the Council. Zon. Ord. §27–157, §27–135. See also *K.W. James Rochow, et al. v. Maryland National Capital Park and Planning Commission, et al.*, 115 Md. App. 558, 827 A.2d 927 (2003)(recognizing the power of the District Council to impose conditions on the zoning map amendment where special traffic, aesthetic, and environmental concerns surround the prospect of developing a geographically sensitive location). The applicant consented, in writing, to Condition 7. Zoning Ordinance No. 10–2004. The approved TCP to clear the entire 3.35 acres of on–site woodland and the grant of the companion variance request for the removal of 24 specimen trees effectively negated Condition 7 of the Basic Plan.

36. The Planning Board could not disregard the preservation of 20 percent or .73 acre. of the *existing* woodland on the Property. The threshold requirement resulted from a condition imposed by the District Council on a zoning map amendment that remained mandatory and binding under Zon. Ord. No. 10–2004 for the subsequent development of the Property. Condition 7 was binding on the applicant and Planning Board. It was a condition only the District Council could amend. §27–135. This was especially the case here because the second component of Condition 7, off–site mitigation, also could not be satisfied by the development of the Property. See *K.W. James Rochow, et al. v. Maryland National Capital Park and Planning Commission, et al.*, 115 Md. App. 558, 827 A.2d 927 (2003)(Planning Board was obligated to comply with conditions of a zoning map amendment where Council expressed concerns about development of unique property). Unlike Condition 6 of the Basic Plan, the Council did not provide applicant the option to seek a variance because of its long standing concerns since 1990 to preserve the *existing* woodland to the greatest extent possible and promote a sensitive approach to site development for the Property.

37. As stated, CDP–1001 and SDP–1001, as approved, to clear the entire 3.35 acres of on–site woodland and the grant of the companion variance request for the removal of 24 specimen

trees effectively negated the expressed concerns of the District Council since 1990 to preserve the *existing* woodland to the greatest extent possible and to promote a sensitive approach to site development of the Property. CDP-1001 and SDP-1001 do not conform to the 1990 Master Plan/Approved Sectional Map Amendment.

Condition (8)

- During the Comprehensive Design Plan and the Specific Design Plan review, the Applicant shall address the following issues:

- A. Architectural design shall be distinctive in order to create an image of quality and permanence.

38. The proposed architecture does not conform to Condition 8 of the Basic Plan. The architecture is to be completed largely in brick and resembles the typical prototype CVS building seen in numerous suburban retail locations. PGCPB Resolution No. 11-62(A), at 5, CDP-1001 (Remanded) Staff Report, Item 6 Architectural Elevations. PGCPB Resolution No. 11-78(A), SDP-1001 (Remanded) Staff Report, Item 7. (6/16/11 Tr. 87)(Technical Staff review of site plans indicate a suburban design with building structure in the middle surrounded by surface parking). The CDP-1001 hearing indicated a proposed rectangular building with an archway that was not in full compliance with the Basic Plan but more specific architectural design was expected at the hearing on SDP-1001. (6/16/11 Tr. 6-10). The SDP-1001 hearing indicated the same. (6/28/11 Tr. 4). There was no testimony from the Applicant or a qualified urban planner expert that the proposed design is distinctive and creates an image of quality and permanence as intended in Condition 8 of the Basic Plan. Testimony from applicant's attorney falls distinctively short of substantial evidence, and is self serving at best.

- B. A build-to line shall be considered in order to create an inviting streetscape.

39. A build to line was not proposed for the site, instead the development is set back from the street and separated by a wide parking lot adjacent to the street, which is part of a significant portion of surface parking located adjacent to both Riggs and Adelphi Road. A masonry wall treatment integrated with landscaping has been proposed as an alternative to the build-to line. Apr. 7, 2011 Memo, Community Planning North Division, at 4. (6/16/11 Tr. 91)(Technical Staff testified that the idea of the knee wall providing a build-to line is new and that a building would provide a better build-to line concept). The CDP-1001 hearing indicated that a build-to line would cut down on the developable area of the Property because the buildings would have to be pulled forward. But the applicant presented no alternative plan. (6/16/11 Tr. 14).

40. At the evidentiary hearing, the Chairman of the Planning Board indicated that proper building design may meet some of the objectives of what the Council intended in Condition 8. The questioned was raised why is this the best solution for this difficult site, conceptually, as opposed to something else? (6/16/11 Tr. 26–27, 45–56). There was no testimony from a qualified urban design planner or similar expert that the proposed design was the only alternative to a build-to line or that a knee wall in lieu of a build-to line is an acceptable industry standard design. Testimony from applicant's attorney is not evidence. To the contrary, there is substantial evidence in the record that the applicant did not consider a build-to line as mandated in Condition 8. The District Council also finds that there is substantial evidence in the record that a build-to line was not considered in order to create an inviting streetscape.

- D. Massive surface parking facilities adjacent to either Riggs Road or Adelphi Road shall be prohibited.

41. Adjacent is defined as nearby, but not necessarily "abutting," "adjoining," or contiguous." Zon. Ord. § 27-107.01(a)(4). There is massive surface parking facilities adjacent to Riggs Road and Adelphi Road. PGCPB Resolution No. 11-62(A), CDP-1001 (Remanded) Staff Report, Item 6 Architectural Elevations, PGCPB Resolution No. 11-78(A)(C), SDP-1001 (Remanded) Staff Report, Item 7. (6/16/11 Tr. 87)(Technical Staff review of site plans indicate a suburban design with building structure in the middle surrounded by surface parking). Apr. 7, 2011 Memo, Community Planning North Division, at 4. The Plans are not in conformance with Basic Plan Condition 8 because there is adjacent parking to Riggs Road and Adelphi Road and landscaping screening does not negate this prohibition.

E. An architectural focal point and/or sculpture located within a green area shall be provided at the intersection of Adelphi and Riggs Road.

42. The applicant has proposed a focal feature for the project at the intersection of Adelphi and Riggs Road including enhanced landscaping, a trellis, two brick wall features flanking a sign that reads "Welcome to Adelphi," a brick pier on either side of the trellis, and an evergreen hedge behind it. PGCPB Resolution No. 11-62(A), at 6, CDP-1001 (Remanded) Staff Report, at 7, PGCPB Resolution No. 11-78(A)(C), at 6, SDP-1001 (Remanded) Staff Report, at 7.

43. A green area is defined as an area of land associated with, and located on the same parcel of land as, a "Building" for which it serves to provide light and air, or scenic, recreational, or similar purposes. "Green Area" shall generally be available for use by the occupants of the "Building," but may include a limited amount of space to enhance the amenity of the development by providing landscaping features, screening for the benefit of people in neighboring areas, or a general appearance of openness. "Green area" may include lawns, decorative plantings, sculptures, wooded

areas, landscaped areas covering structures that are not more than twelve (12) feet above ground level, sidewalks and walkways, furniture, active and passive recreational areas, and water surfaces that comprise not more than ten percent (10%) of the total "Green Area." It shall not include "Parking Lots" or other vehicular surfaces, or "Accessory Buildings," except as otherwise provided. Zon. Ord. § 27-107.01(a)(103).

44. The proposed focal feature is not within a green area as defined by Zon. Ord. § 27-107.01(a)(103). CDP-1001 and SDP-1001, as approved, do not conform to the Basic Plan. The plans also do not conform to the applicable design guidelines set forth in §27-274 of Part 3, Division 9 of the Zoning Ordinance. §27-247 requires on-site green areas to complement other site activity areas and make them appropriate in size, shape, location and design to fulfill their intended use. CDP-1001 and SDP-1001, as approved, do not conform to §27-247.

F. No loading and/or dumpster areas shall be visible from adjacent roadways.

45. Adjacent is defined as nearby, but not necessarily "abutting," "adjoining," or "contiguous." Zon. Ord. § 27-107.01(a)(4). Loading and dumpster areas are located on Edwards Way frontage, an adjacent roadway to the Property. PGCPB Resolution No. 11-62(A), at 6, CDP-1001 (Remanded) Staff Report, at 7, PGCPB Resolution No. 11-78(A)(C), at 6, SDP-1001 (Remanded) Staff Report, at 7. Despite screening, the loading space and dumpster enclosure are also located on Edwards Way frontage, an adjacent roadway to the Property, and will be visible. As approved, CDP-1001 and SDP-1001 are not in conformance with the Basic Plan.

Condition (9)

F. The developer of the subject property shall work with the various transit authorities and agencies to maintain the locations of the existing bus stops along Riggs Road and Adelphi Road. The developer shall construct a bus pull-off area to allow the loading and unloading of passengers out of the travel lanes of the roadways, within the public rights-of-way.

46. This Condition has not been met to date. Two bus stops are indicated. PGCPB Resolution No. 11-62(A), at 8, CDP-1001 (Remanded) Staff Report, at 9, PGCPB Resolution No. 11-78(A)(C), at 9, SDP-1001 (Remanded) Staff Report, at 9. But notes on SDP-1001 indicate “Proposed Bus Stop Location to Be Determined and Permitted by SHA or DPW&T”, and the bus pull-off areas are not shown along MD 212 (Riggs Road) and Adelphi Road out of the travel lanes and within the public rights-of-way. Jul. 7, 2011 SDP-1001 Memo, Transportation Planning Section, at 2, PGCPB Resolution No. 11-78(A)(C), at 20, SDP-1001 (Remanded) Staff Report, at 19, 20. As approved, CDP-1001 and SDP-1001 are not in conformance with the Basic Plan.

Condition (10)

- The developer shall make its best efforts to include a restaurant as an ancillary tenant on the subject property.

47. This Condition has not been met. No evidence has been provided, in the record, of any communications with restaurants. Apr. 7, 2011 Memo, Community Planning North Division, at 4. Instead, the applicant cited lack of parking and lack of development intensity for the site as a basis for not including a restaurant as an ancillary tenant on the Property. Dec. 3, 2010, Statement of Justification, at 3. Both reasons are contrary to best efforts and the evidence. First, there is massive surface parking facilities adjacent to Riggs Road and Adelphi Road. PGCPB Resolution No. 11-62(A), CDP-1001 (Remanded) Staff Report, Item 6 Architectural Elevations, PGCPB Resolution No. 11-78(A)(C), SDP-1001 (Remanded) Staff Report, Item 7. (6/16/11 Tr. 87)(Technical Staff review of site plans indicate a suburban design with building structure in the middle surrounded by surface parking). Apr. 7, 2011 Memo, Community Planning North Division, at 4. Second, the base commercial intensity is 0.16 Floor Area Ratio (FAR) and maximum commercial density is 0.31 FAR

for the L–A–C Zone. §27-496(a)(4). The proposed development of 0.13 FAR is less than the mandatory minimum FAR required by the L–A–C Zone regulations and general standards. §27-496(a)(4). Applicant’s failure to maximize commercial intensity and density is not a basis for non-compliance with this condition of the Basic Plan.

Non-Conformance with Comprehensive Design Zones

48. The Comprehensive Design Zone (CDZ), encompassing the L–A–C Zone, includes as general standards, a list of public benefit features and density or intensity increment factors. Zon. Ord. §27–489, §27–494, §27–496. Increment factors and land use area calculations are provided for in §27–485. Density and intensity calculations are provided for in §27–486.

49. The applicant proposed site plan is for a Neighborhood Center on 4.14 acres of land, with 0.13 FAR. Dec. 3, 2010, Statement of Justification, at 3. For 4 adjoining gross acres in the L–A–C Zone, the base commercial intensity is 0.16 FAR and maximum commercial density is 0.31 FAR. §27–496(a)(4). The proposed development of 0.13 FAR is less than the mandatory minimum FAR of 0.16 required by the L–A–C Zone regulations and general standards. §27-496(a)(4). As approved, CDP–1001 and SDP–1001 are not in conformance with the L–A–C Zone regulations and standards. §27–496(a)(4).

Community Center

50. On remand, Planning Board, addressed the feasibility of a community center facility, on the 4.14 acre site. Comparing the regulations and general standards in §27–496 for the L–A–C Zone, Planning Board, indicated that the minimum lot size for a “Community Center” is 20 adjoining gross acres and for a “Village Center” the minimum lot size is 10 adjoining acres. Based on this comparison, Planning Board concluded that the 4.14 acreage of the Property was too small for a “Community Center.” CDP–1001 (Remanded) Staff Report, at 35–36, SDP–1001 (Remanded)

Staff Report, at 39. Planning Board erred in its comparison and conclusions.

51. For purposes of §27-496, regulations and general standards, the word “adjoining” also includes properties separated by streets, other public right-of-ways, or railroad lines. §27-496(e)(1). The 4.14 acre lot size of the Property was not dispositive of whether it qualifies for a community center, as long as adjoining properties in the L-A-C Zone have a minimum size of 20 adjoining gross acres. Under §27-496, regulations and general standards, for a community center, the base commercial intensity/floor area ratio (FAR) is 0.2. §27-496(a)(4).

52. For 4 adjoining gross acres, the base commercial intensity is between 0.16 FAR and a maximum commercial density of 0.31 FAR for the L-A-C Zone. §27-496(a)(4). The Property is not too small for a community center because the base commercial intensity/floor area ratio (FAR) for a community center is 0.2, well within the maximum FAR of 0.31. More to the point, the proposed development of 0.13 FAR is less than the mandatory minimum and maximum FAR permitted by the L-A-C Zone regulations and general standards. §27-496(a)(4). As approved, CDP-1001 and SDP-1001 are not in conformance with the L-A-C Zone regulations and standards. §27-496(a)(4).

Conclusions

For the reasons stated above, the applicant did not meet its burden, Planning Board approval of Application SDP-1001 is REVERSED, and the District Council must DENY Application SDP-1001.