



THE PRINCE GEORGE'S COUNTY GOVERNMENT

Office of the Clerk of the Council
301-952-3600

October 19, 2022

**RE: SDP-1603-02 National Capital Business Park
AMS 2022 BTS – Upper Marlboro MD, LLC, Applicant**

NOTICE OF FINAL DECISION OF THE DISTRICT COUNCIL

Pursuant to the provisions of Section 27-134 of the Zoning Ordinance of Prince George's County, Maryland requiring notice of decision of the District Council, you will find enclosed herewith a copy of the Council Order setting forth the action taken by the District Council in this case on October 17, 2022.

CERTIFICATE OF SERVICE

This is to certify that on October 19, 2022, this notice and attached Council Order was mailed, postage prepaid, to all persons of record.

A handwritten signature in cursive script, reading "Donna J. Brown".

Donna J. Brown
Clerk of the Council

Case No.: SDP-1603-02
National Capital Business Park

Applicant: AMS 2022 BTS –
Upper Marlboro MD, LLC

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

FINAL DECISION AFFIRMING PLANNING BOARD

On September 12, 2022, the District Council, using oral argument procedures, considered an appeal from Citizen-Protestants (Opposition) of the Planning Board’s (Board) decision to approve Specific Design Plan (SDP)-1603-02 and Type 2 Tree Conservation Plan TCP2-026-2021-02. Having considered the written appeal from Opposition, Applicant’s written response, oral arguments, and the administrative record, the District Council finds that the Board’s decision to approve the plans was supported by substantial evidence of record, not arbitrary, capricious, or otherwise illegal, and is hereby AFFIRMED.^{1,2}

¹ The District 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. PGCC § 27-141. The District 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. The District Council may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence. District Council Rules of Procedure Rule 6.5(f).

² The Board’s decision to approve SDP-1603-**02** and TCP1-004-2021-**02** was adopted in Prince George’s County Planning Board Resolution No. 2022-76 (PGCPB No. 2022-76) on June 30, 2022. “**02**” of each plan denotes the 2nd amendment to each plan. The Board approved the **1st** amendment to SDP-1603-**01** and TCP2-026-2021-**01** in PGCPB No. 2022-10 on January 27, 2022. Relevant here, as discussed *infra*, the **01** amendment, approved infrastructure for the site, including the proposed street network, sidewalks, utilities, grading, *stormwater management* (SWM), retaining walls, and directional signage that will serve the employment and institutional uses proposed for the portion of the property in the Residential Suburban Development (R-S) Zone. PGCC § 27-528(b) (Prior to approving a Specific Design Plan for Infrastructure, the Planning Board shall find that the plan conforms to the approved Comprehensive Design Plan, prevents offsite property damage, and prevents environmental degradation to safeguard the public’s health, safety, welfare, and economic well-being for grading, reforestation, woodland conservation, drainage, erosion, and pollution discharge). SDP-1603-**01** and TCP2-026-2021-**01** became *final* because no one (including Opposition) timely appealed the Board’s decision to the District Council. PGCC § 27-528.01(a). (The Planning Board’s decision on a Specific Design Plan may be appealed to the District Council upon petition by any person of record... **within thirty (30) days after** the date of the notice of the Planning Board’s decision).

A. Introduction

The applicant in this case is AMS 2022 BTS – Upper Marlboro MD, LLC (AMS). AMS requested, and the Board approved SDP-1603-02, for development of a 3,428,985-square-foot warehouse/distribution facility. The entire acreage of the property (± 426.52 acres) is located north of Leeland Road and west of Robert Crain Highway (US 301) and is in Planning Area 74A, Council District 4. This application (SDP-1603-02) constitutes ± 90.11 acres of the overall acreage on the north side of Leeland Road, approximately 3,178 feet west of its intersection with US 301 (Robert Crain Highway), which represents the first phase in a multi-phase development. PGCPB No. 2022-76 at 1-2, Opposition Appeal at 1, AMS Response at 1.

As detailed *infra*, uses permitted on the entire site along with gross floor area were previously set or approved in the Basic Plan (as amended) by the District Council. For instance, in April 2021, the Basic Plan was amended (A-9968-02) to replace previously approved residential land use patterns for the site with 3.5 million square feet of employment and institutional uses.³ As a result, the Board approved an amendment to the Comprehensive Design Plan (CDP-0505-01) for the site in accordance with 3.5 million square feet of employment and institutional uses set forth in A-9968-02.⁴ SDP-1603-02 is within the 3.5 million square feet limit established in CDP-0505-01.⁵

³ PGCPB No. 2022-76 at 3. *See also* Zoning Ordinance No. 2-2021 approving Basic Plan Amendment A-9968-02, which became final because no one (including Opposition) timely petitioned for judicial review. Land Use Article § 22-407 sets a 30-day deadline to seek judicial review of *any* final decision of the District Council.

⁴ PGCPB No. 2021-50, which approved Comprehensive Design Plan (CDP)-0505-01, became final. No one (including Opposition) timely appealed the Board's decision. *See* PGCC § 27-523(a) (The Planning Board's decision on a Comprehensive Design Plan may be appealed to the District Council upon petition by any person of record. The petition shall be filed with the Clerk of the Council within thirty (30) days after the date of the notice of the Planning Board's decision. The District Council may vote to review the Planning Board's decision on its own motion within thirty (30) days after the date of the notice).

⁵ *See* Appeal at 4 (Opposition also agrees that “[t]he approval of SDP-1603-02 allows [AMS] to construct an approximately 3.5 million square foot distribution facility on the Subject Property”).

For reasons set forth below, the appeal by Opposition lacks factual and legal merit because the Board's prior approvals of SDP-1603-01 and TCP2-026-2021-01, became final without any appeal to the District Council. As such, SDP-1603-02 and TCP2-026-2021-02, are valid amendments under the Zoning Ordinance. Those amendments also conform with prior approvals of the District Council and the Board. *See* Zoning Ordinance No. 2-2021 (Basic Plan Amendment A-9968-02), PGCPB No. 2021-50 (CDP-0505-01), Zoning Ordinance No. 6-2021 (Basic Plan Amendment A-9968-03), PGCPB No. 2022-53 (CDP-0505-02).

B. The Appeal

Opposition alleges that the Board committed ten (10) errors when it approved SDP-1603-02 and TCP2-026-2021-02.⁶ Appeal, 8/5/2022. When reviewing a decision of the Board to approve a Specific Design Plan, the District Council exercises *appellate* jurisdiction. *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co.*, 444 Md. 490, 583, 120 A.3d 677, 733 (2015). Under *Zimmer*, the District Council must apply the same standard of review a court applies to an agency decision on judicial review, which is as follows:

⁶ This appeal includes Opposition from UFCW, Local 400. But that entity was not a person of record below. *See* Party of Record List, 6/30/2022. Senate Bill 564 of 2015 was enacted, in part, "[for] the purpose of . . . providing that, in Prince George's County, a person may make a request to the district council for the review of a certain decision of a zoning hearing examiner or the planning board only under certain circumstances." 2015 Md. Laws ch. 365. The Bill added Section 25-212 to the Land Use article, which provides:

In Prince George's County, a person may make a request to the district council for the review of a decision of the zoning hearing examiner or the planning board only if:

- (1) the person is an aggrieved person that appeared at the hearing before the zoning hearing examiner or planning board in person, by an attorney, or in writing; and
- (2) the review is expressly authorized under this division.

2015 Md. Laws ch. 365, *Zimmer Dev. Co.*, 444 Md. 490, 583, 120 A.3d 677, 733 (2015). As such, UFCW, Local 400, as a matter of law, was not authorized to appeal the Board's decision. *Priester v. Balt. Cnty.*, 232 Md. App. 178, 157 A.3d 301, *cert. denied*, 454 Md. 670, 165 A.3d 469 (2017) (The rule of finality overlaps the rule of exhaustion. "[A] party must exhaust the administrative remedy and obtain a final administrative decision . . . before resorting to the courts.").

Judicial review of administrative agency action 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 agency's findings and conclusions, and to determine if the administrative decision is based on an erroneous conclusion of law. The reviewing court may not substitute its judgment for that of the administrative agency. Rather, the court must affirm the agency decision if there is sufficient evidence such that a reasoning mind reasonably could have reached the factual conclusion the agency reached. Agency decisions receive an even more deferential review regarding matters that are committed to the agency's discretion and expertise. In such situations, courts may only reverse an agency decision if it is arbitrary and capricious. Logically, the courts owe a higher level of deference to functions specifically committed to the agency's discretion than they do to an agency's legal conclusions or factual findings.

Id. 444 Md. at 573-75, 120 A.3d 726-28. This narrow and deferential standard of review will be applied to each error alleged by Opposition in the order presented.

I. The Planning Board's written decision is legally deficient because the Planning Board failed to conduct an independent evaluation of the evidence presented to it. Appeal at 2.

First, Opposition contends that the Board's written decision is deficient because it is essentially a verbatim copy of the Technical Staff Report. PGCC § 17-125.05(a) provides that "[w]here the [] Board is authorized to conduct a public hearing in a zoning or site plan case, the [] Board shall publish on its website a copy of the technical staff report no less than two (2) weeks prior to the scheduled public hearing on the application." Board Commissioner Geraldo made a motion to approve the application as follows:

COMMISSIONER GERALDO: Mr. Chair, based upon Staff's evaluation and analysis, my Staff, **testimony of witnesses and the exhibits**, I move that the Board adopt the findings of the Technical Staff Report and approve SDP-1603-02, and Type 2 Tree Conservation Plan, TCP2-026-2021-02 for National Capital Park, Business Park, subject to the Staff's conditions as modified by Applicant's Exhibit No. 1, with the exception of 1(p), which shall be in the resolution as read into the record by Mr. Lynch and approved by Mr. Zhang. (6/30/2022, Tr., pp. 57-58) (Emphasis added).

The motion carried. In Maryland, it is well established that "[i]t is not unreasonable for the Planning Board to rely on a Staff Report, as the Planning Board did in this case, if the Staff Report

is thorough, well-conceived, and contains adequate findings of fact.” *Greater Baden-Aquasco Citizens Ass’n*, 412 Md. 73, 110, 985 A.2d 1160 (2009). Upon review of the entire record, including a careful review of Staff’s Report, the Board’s reliance on the Staff Report (as its Resolution) was not in error because the Report is thorough, well-conceived, and contains adequate findings of fact. Opposition offers no evidence that the draft Resolution⁷ posted on the Board’s online agenda (prior to the evidentiary hearing) violated any law or rule or that it was unreasonable for the Board to adopt a revised version of the draft Resolution to reflect the actual evidence submitted by the parties. Nor does Opposition offer any evidence (or argument) that the motion made by Commissioner Geraldo was not sufficient to include an evaluation of their testimony and exhibits into the Board’s final written Resolution.

Second, Opposition contends that if the Board is permitted to adopt Staff’s Report as its Resolution, it is only permitted to do so after the Board conducts an independent evaluation of the record. According to Opposition, because the Board adopted the Resolution immediately after it voted to approve the application, it could not have conducted its own independent evaluation of their evidence on the validity of CB-22-2020, the scope of the Board’s authority, compliance with Landscape Manual Section 4.6, impacts to Primary Management Areas, and the sufficiency of TCP2-026-2021-02.

A review of the entire record demonstrates otherwise. Opposition submitted **at least 128 pages** of extensive written testimony into the record *before* the date of the evidentiary hearing on all issues raised in their appeal for the Board’s consideration. *See* Additional Backup at 6 of 134

⁷ The draft Resolution may be viewed at: http://mncppc.igm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=1713&MediaPosition=10027.429&ID=6969&CssClass= (last visited 10/13/2022).

(covering, among other things, extensive submissions on the validity of CB-22-2020, the scope of the Board's authority, compliance with Landscape Manual Section 4.6, impacts to Primary Management Areas, and the sufficiency of TCP2-026-2021-02).

Based on the motion made by Commissioner Geraldo, the Board's final written Resolution did not fail to provide a description of the facts found, law applied, relationship between the two, and conclusions made—*after* the evidentiary hearing. To the contrary, the Board's final written Resolution reflects the opposite. The draft Resolution posted on-line was based on the record at the time before the evidentiary hearing. But it did not (rightfully so) contain a *final* evaluation of the evidence. This practice is not problematic but instead transparent and based on good government because it informs the Board, the public, and the parties of Staff's evaluation of the record in advance of the hearing. When Commissioner Geraldo made the motion (which carried) to approve the application, it was *after* the evidentiary hearing, based on, among other things, testimony of witnesses and exhibits. As a result, the draft Resolution did not become the Board's final written decision because it was revised to adequately articulate the facts found, law applied, and relationship between the two before and after the evidentiary record closed as follows:

- During the public hearing for this SDP, on June 30, 2022, the applicant provided two exhibits: one exhibit of the proposed revisions to Conditions 1n. p., r., and t.; and the other exhibit of sight line analysis from Leeland Road to the subject site. After due discussion, the Planning Board decided that prior Condition 1.r., regarding the 10-foot-wide feeder trail, be deleted because this connection has been provided in SDP-1603-01; that the other three conditions be revised; and that prior Condition 1.t., be renumbered to Condition 1.s., in this resolution. PGCPB No. 2022-76 at 24.
- During the public hearing for this SDP, on June 30, 2022, members of the public submitted 11 exhibits and raised issues concerning the validity of certain laws; the Planning Board's jurisdiction to hear the case, the Planning Board's proposed conditioning of its approvals, such as compliance with stormwater requirements; landscaping; the applicant's proposed uses; PMA impacts; woodland conservation; public facility adequacy; and General Plan and master

plan conformance. Counsel advised the Planning Board that no law applicable to its review of this application has been found invalid; the Board has jurisdiction to hear the case; conditioning the Board's approvals is both legal and appropriate; as well as longstanding practice of the Board; General Plan and master plan conformance is not a finding for approval of an SDP; and approval of an SDP does not constitute approval of the use. Applicant's counsel and the staff report also addressed the findings necessary for approval of PMA impacts; approval of the TCP2, including on-site preservation; the findings required for compliance with the Landscape Manual; public on-site preservation; the findings required for compliance with the Landscape Manual; public facility adequacy; and stormwater impacts. Planning Board counsel and staff also noted those issues raised, and properly addressed, in prior approved basic plans, CDPs, PPs, and infrastructure SDPs for the entire property. PGCPB No. 2022-76 at 24-25.

The Board's reliance on its Staff Report to formulate its final written Resolution was not erroneous because the Report is thorough, well-conceived, and contains adequate findings of fact. Moreover, when the Board's final written Resolution is compared to the record (as a whole) it reflects that the Board considered the factors and conditions required by the applicable provisions in the Zoning Ordinance to approve the application. The law does not require that the Board's final written Resolution restate *all* facts upon which it rests for it to be legally sufficient. *West Montgomery Cty. Citizens Ass'n v. Montgomery Cty. Planning Bd. of the Maryland-National Park & Planning Comm'n*, 248 Md. App. 314, 241 A.3d 76 (2020) (Emphasis added). *See* Appeal at 11 (Opposition concedes that Planning Board is delegated a limited scope of authority to take action related to SDP applications). *See also* Appeal at 16 (Opposition concedes that [PGCC §] 27-528(a) requires the Planning Board to make a finding that SDP-1603-02 satisfies five (5) criteria "*prior to approving*" the SDP application) (Emphasis in original).

II. The Planning Board erred when it approved SDP-1603-02 because the SDP's validity is based on an illegal special law. Appeal at 4.

According to Opposition, “the uses permitted by SDP-1603-02 are based on an illegal special law and SDP-1603-01 must be denied.”⁸ Because this property is in a Comprehensive Design Zone, development occurs in three phases: a Basic Plan, Comprehensive Design Plan, and a Specific Design Plan. A Basic Plan “[s]ets forth proposed *land uses* and general *land use relationships*, including the approximate number of dwelling units and building intensity.” A Comprehensive Design Plan or CDP “refines the approved Basic Plan, establishes the general location, distribution, and size of proposed structures and includes various standards and guidelines.” A Specific Design Plan or SDP (as is the case here) “includes detailed landscaping plans, tree conservation plans, recreational facilities plans, and exterior building elevations.”⁹ (Emphasis added).

Because the Board approved SDP-1603-02, pursuant to criteria in PGCC § 27-528, it did not set forth *land uses* for the property.¹⁰ Opposition does not dispute that SDP-1603-02 was required to be approved pursuant to PGCC § 27-528. *See* Appeal at 11, 16. Land uses and building intensity for the property were set forth in amendments to the Basic Plan, which were approved by the District Council—not the Board. The Basic Plan for this property was amended twice by District Council pursuant to criteria (and procedures) set forth in PGCC § 27-197. *See* Zoning Ordinance

⁸ The applicant in this case is AMS 2022 BTS – Upper Marlboro MD, LLC (AMS). But Opposition contends that CB-22-2020 was intended for NCBP Property, LLC. Appeal at 4-9.

⁹ *See* Citizen’s Handbook --- Planning, Zoning, and Development Review in Prince George’s County at 23, which may be viewed at: <https://mncppc.org/DocumentCenter/View/447/Citizens-Handbook-2014-PDF?bidId=> (last visited 10/13/2022).

¹⁰ The Board noted that “[t]his SDP is the first stage of the larger development and proposes a 3,428,985-square-foot warehouse/distribution facility and associated parking and loading spaces to serve the proposed uses on approximately 90.11 acres of the 442-acre larger property, within the prior R-S Zone. The Planning Board finds that the proposed improvements fall within the land uses approved by A-9968-03.” PGCPB No. 2022-76 at 6.

No. 2-2021 (Basic Plan Amendment A-9968-02) and Zoning Ordinance No. 6-2021 (Basic Plan Amendment A-9968-03).¹¹

As noted above, the first Basic Plan amendment (A-9968-02) (and not the SDP) set forth the land uses and gross floor area of 3.5 million square feet for the property. And the second Basic Plan amendment increased the gross floor area for the land uses from 3.5 million to 5.5 million square feet.

Under PGCC § 27-528(a)(1), and relevant here, the Board, prior to approving an SDP (as is the case here), must find that the plan conforms to the *approved CDP*—as opposed to the approved Basic Plan. After the District Council approved each amendment to the Basic Plan, the Board approved corresponding CDPs. In April 2021, the Board approved CDP-0505-01, in accordance with 3.5 million square feet of employment and institutional uses set forth in the first Basic Plan amendment (A-9968-02). In May 2022, the Board approved CDP-0502-02, in accordance with the additional 2 million square feet of gross floor area for employment and institutional uses set forth in the second Basic Plan amendment (A-9968-03). In June 2022, the Board approved a Preliminary Plan of Subdivision (PPS) application (4-21056). The PPS divided the entire property into 27 parcels for development up to 5.5 million square feet. PGCPB No. 2022-70. It is important to reiterate here, SDP-1603-02 (the application at issue here) is within the 3.5 million square feet limit established in CDP-0505-01—not CDP-0502-02. PGCPB No. 2022-76 at 3.

The Board's approval of SDP-1603-02 was not based on an illegal special law. The Board's approval of SDP-1603-02 was based on the criteria in PGCC § 27-528. *See* Appeal at 11

¹¹ The District Council takes judicial notice of the Basic Plan amendment proceedings, which reflects that Opposition did not participate in those proceedings, nor was there any opposition in those proceedings. Zoning Ordinance No. 2-2021, Zoning Ordinance No. 6-2021.

(Opposition concedes that Planning Board is delegated a limited scope of authority to take action related to SDP applications). *See also* Appeal at 16 (Opposition concedes that [PGCC §] 27-528(a) requires the Planning Board to make a finding that SDP-1603-02 satisfies five (5) criteria “*prior to approving*” the SDP application) (Emphasis in original).

Because the Board’s approval of SDP-1603-02 implicated, among other things, “...detailed landscaping plans, tree conservation plans, recreational facilities plans, and exterior building elevations,” but did *not* set forth land *uses* for the property, there is *no* need to address whether, CB-22-2020 (as alleged by Opposition) is an illegal special law because (as conceded by Opposition) the Board’s scope of authority to approve SDP-1603-02 is *limited* to the criteria in PGCC § 27-528.

Moreover, the time for Opposition to file a petition for judicial review to challenge the District Council’s authority to enact CB-22-2020, as an illegal special law, has long passed. The Court of Appeals has held that LU § 22-407 sets a 30-day deadline for filing a petition for judicial review when there is a direct attack upon the power or authority of the legislative body to adopt the legislation from which relief is sought. *Cty. Council of Prince George’s Cty. v. Chaney Enters. L.P.*, 454 Md. 514, 538, 165 A.3d 379, 393 (2017). After the enactment of CB-22-2020, Opposition did not file a petition for judicial review in the circuit court to attack the District Council’s power or authority to enact CB-22-2020, which is the relief they seek in this matter.

CB-22-2020 became final and the Zoning Ordinance was amended in accordance with CB-22-2020. After CB-22-2020 became a valid law, the District Council is only allowed to reconsider CB-22-2020 by introducing a new Zoning Bill, which did not occur here. PGCC § 27-219. Therefore, CB-22-2020 became a valid adoption of a legislative amendment to the local zoning laws of Prince George’s County.

III. The Planning Board erred when it approved SDP-1603-02 because the SDP's validity is based on an illegal text amendment in violation of 22-201(b)(2)(i) of the Maryland Land Use Article. Appeal at 9.

Opposition concedes that this issue was never raised before the Board. Appeal at 9. As noted above, under *Zimmer*, the District Council must apply the same standard of review a court applies to an agency decision on judicial review. Ordinarily, a court reviewing the decision of an administrative agency “may not pass upon issues presented to it for the first time on judicial review. . . .” *Schwartz v. Maryland Dept. of Natural Resources*, 385 Md. 534, 556, 870 A.2d 168 (2005) (quoting *Brodie v. MVA*, 367 Md. 1, 4, 785 A.2d 747 (2001)). Accordingly, “[a] party who knows or should have known that an administrative agency has committed an error and who, despite an opportunity to do so, fails to object in any way or at any time during the course of the administrative proceedings, may not thereafter complain about the error at a judicial proceeding.” *Cremens v. County Comm’rs of Washington County*, 164 Md. App. 426, 443, 883 A.2d 966 (2005) (quoting *Cicala v. Disability Review Bd. for Prince George’s County*, 288 Md. 254, 261-62, 418 A.2d 205 (1980)). The failure to raise an issue before the administrative agency is a failure to exhaust administrative remedies and an improper request for “the courts to resolve matters ab initio that have been committed to the jurisdiction and expertise of the agency.” *Chesley v. City of Annapolis*, 176 Md. App. 413, 427 n.7, 933 A.2d 475 (2007) (quoting *Delmarva Power & Light Co. v. Public Serv. Comm’n of Md.*, 370 Md. 1, 32, 803 A.2d 460, *motion for reconsideration granted on other grounds*, 371 Md. 356, 809 A.2d 640 (2002)), *cert. denied*, 403 Md. 305, 941 A.2d 1105 (2008). Because this question was not raised or presented (in the first instance) to the Board, the question is not preserved for appellate review. Opposition has failed to exhaust administrative remedies and it is therefore improper for the District Council to pass on this question for the first time.

Moreover, even if Opposition had raised the question before the Board, the time for Opposition to file a petition for judicial review to challenge the District Council's authority to enact CB-22-2020, as an illegal text amendment, has long passed. The Court of Appeals has held that LU § 22-407 sets a 30-day deadline for filing a petition for judicial review when there is a direct attack upon the power or authority of the legislative body to adopt the legislation from which relief is sought. *Chaney Enters. L.P.*, 454 Md. 514, 538, 165 A.3d 379, 393 (2017). After the enactment of CB-22-2020, Opposition did not file a petition for judicial review in the circuit court to attack the District Council's power or authority to enact CB-22-2020, which is the relief they seek in this matter.

CB-22-2020 became final and the Zoning Ordinance was amended in accordance with CB-22-2020. After CB-22-2020 became a valid law, the District Council is only allowed to reconsider CB-22-2020 by introducing a new Zoning Bill, which did not occur here. PGCC § 27-219. Therefore, CB-22-2020 became a valid adoption of a legislative amendment to the local zoning laws of Prince George's County.¹²

IV. The Planning Board erred when it approved SDP-1603-02 because it lacks the authority to approve SDP applications contingent on future compliance with statutory requirements. Appeal at 11.

In relevant part, PGCC § 27-528(e) provides that the Board “shall approve, approve with modifications, or disapprove the [SDP] within seventy (70) days of its submittal.” Based on this

¹² The Zoning Ordinance is subject to review and amendment solely by the District Council, which may amend the text to create new zones or repeal zones. This process is called a text amendment. Similarly, it may add permitted uses to a zone, eliminate permitted uses from a zone, or require the grant of a special exception. Indeed, any of the regulations may be changed through the text amendment process. A text amendment may be requested by the County Executive, the Planning Board, or any interested individual or organization. In some instances, the council may initiate an amendment itself. Amending the Zoning Ordinance is a legislative process requiring a public hearing and approval by a majority of the council. *See* Citizen's Handbook --- Planning, Zoning, and Development Review in Prince George's County at 33.

language, Opposition contends that the Board exceeded its limited authority when it *conditionally* approved SDP-1603-02 because most of the *conditions* of approval do not qualify as “modifications” in PGCC § 27-528(e) (Emphasis added). Appeal at 12.

PGCC § 27-108 governs the applicability of interpretations and rules of construction for Subtitle 27 (also known as the Zoning Ordinance), and to the wording of any *conditions* placed on *any* final decision made in accordance with the Zoning Ordinance, such as *conditions* placed on the *approval* of zoning cases. PGCC § 27-108.01 governs interpretations and rules of construction and how words and phrases are to be interpreted. The word “approve” includes “approve with *conditions, modifications, or amendments.*” PGCC § 27-108.01(a)(10) (Emphasis added). When a regulation (such as PGCC § 27-528(e)) involves two (2) or more items connected by the conjunction “*or*,” it indicates that the connected items may apply *singly* or in *any combination*. PGCC § 27-108.01(a)(13) (Emphasis added).

The Board approved SDP-1603-02 subject to three (3) conditions. PGCPB No. 2022-76 at 25-27. The Board’s conditional approval of SDP-1603-02 falls squarely within its authority (limited or otherwise) under the Zoning Ordinance. The Board’s conditional approval of SDP-1603-02 is an example of due diligence after a meaningful review of the application and the record as a whole. Such conditional approval is in the public interest, will protect and conserve the County’s resources and time because AMS has the duty to ensure that those conditions are satisfied prior to formal certification, if not SDP-1603-02 will not be certified. Moreover, as noted by AMS, approvals from the Board generally contain *conditions* because the Board does not have the expertise on certain issues and must rely on other County agencies to ensure that the applicant complies with conditions of approval. AMS Response at 9.

V. The Planning Board erred when it approved SDP-1603-02 because the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies [PGCC] § 27-528(a). Appeal at 16.

Opposition contends here (in six (6) sub-arguments), that the record lacks substantial evidence. Appeal at 16-30. On appeal, the Board's factual findings are reviewed to determine whether they are supported by substantial evidence in the record. *Md. Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island*, 425 Md. 482, 514 n.15, 42 A.3d 40 (2012). Questions about findings from the evidence should be resolved in *favor* of the Board unless the record has *no* evidence – not even a “scintilla” to support them. *Turner v. Hammond*, 270 Md. 41, 310 A.2d 543 (1973), *County Comm'rs v. Oak Hill Farms*, 232 Md. 274, 192 A.2d 761 (1963). The substantial evidence test does *not* concern whether an *aggrieved party* provided substantial evidence to support its position before the administrative agency. On the contrary, the substantial evidence test requires a determination of whether the *agency's decision* is founded upon substantial evidence in the record. *Motor Vehicle Admin. v. Shea*, 415 Md. 1, 997 A.2d 768 (2010) (Emphasis added). There is no substitution of judgment for that of the Board in reviewing its findings of fact. *Lillian C. Blentlinger, LLC v. Cleanwater Linganore, Inc.*, 456 Md. 272, 293-94, 173 A.3d 549 (2017). The substantial evidence test is about *reasonableness, not rightness.*” *Md. Dep't of the Env't v. Riverkeeper*, 447 Md. 88, 134 A.3d 892 (2016) (quoting *Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 399, 396 A.2d 1080 (1979)) (Emphasis added). Each sub-argument will be addressed against this backdrop.

1. SDP-1603-02 does not conform to the approved and certified Comprehensive Design Plan as required by [PGCC] § 27-528(a)(1). Appeal at 16.
2. SDP-1603-02 does not conform to the applicable standards of the Landscape manual as required by [PGCC] § 27-528(a)(1). Appeal at 18.

Opposition is legally incorrect on both issues. First, the Board is *not* required to find that SDP-1603-02 must conform to a *certified* CDP. The word *certified* does not appear anywhere in PGCC § 27-528(a)(1). When construing a statute, it is *not* permitted to *insert* or omit words to make a statute express an intention not evidenced in its original form. *Taylor v. Baltimore*, 51 Md. App. 435, 443 A.2d 657 (1982). In relevant part, PGCC § 27-528(a)(1) provides that [p]rior to approving a Specific Design Plan, the Planning Board shall find that “[t]he plan *conforms* to the *approved* Comprehensive Design Plan, the *applicable standards* of the Landscape Manual...” The Board is only required to find that SDP-1603-02 *conforms* to the *approved* CDP and *applicable* standards of the Landscape Manual.

Specifically, with regards to PGCC § 27-528(a)(1), the Board made the following findings and conclusions:

Finding 8. a. Through the adoption of Council Bill CB-22-2020, the District Council expanded the uses permitted in the R-S Zone, to allow nonresidential uses that are generally permitted in the E-I-A Zone on the subject property, under certain conditions. This SDP is for the middle 90.11 acres of the site for a warehouse/distribution facility, which is a use permitted by CB-22-2020 and otherwise complies with the findings in both A-9968-03 and CDP-0505-02, regarding the uses on the property. PGCPB No. 2022-76 at 8.

Finding 8. b. Section 27-480 (General development regulations) of the Zoning Ordinance and those regulations in the R-S Zone, as stated in Sections 27-511 to 514 of the Zoning Ordinance, are mainly for residential uses. Since this SDP is for a warehouse/ distribution facility use that is generally permitted in the E-I A Zone, those regulations are not applicable to this SDP. PGCPB No. 2022-76 at 8.

Finding 8. c. The site improvements proposed in this SDP will support the development described in *approved* CDP-0505-02 and each of the conditions of approval. The improvements also comply with the requirements of the Landscape Manual and the design guidelines *applicable* to this SDP, *as discussed in findings herein*. Therefore, the Planning Board finds that the SDP conforms with the approved CDP and the *applicable* standards of the Landscape Manual. PGCPB No. 2022-76 at 9 (Emphasis added).

Finding 12. 2010 Prince George's County Landscape Manual: Per Section 27-528(a)(1) of the Zoning Ordinance, an SDP must conform to the applicable standards of the Landscape Manual. *The subject SDP is the first stage of the larger development and only Section 4.2, Requirements for Landscape Strips Along Streets; Section 4.3, Requirements for Parking lot Interior Planting; and Section 4.9, Sustainable Landscape Requirements, apply to this site. The landscape plans included with the SDP show the required landscape schedules that are in conformance with the applicable requirements.* PGCPB No. 2022-76 at 16 (Emphasis added).

Second, when the Board approved the first amendment to SDP-1603 or SDP-1603-01, it made the following findings concerning the Landscape Manual:

Finding 8. c. The site improvements proposed in the infrastructure SDP will support the development described in approved CDP-0505-01, and each of the conditions of approval. The improvements also comply with those requirements of the 2010 *Prince George's County Landscape Manual* (Landscape Manual), and the design guidelines applicable to the infrastructure SDP, as discussed in findings herein. Therefore, the Planning Board finds the infrastructure SDP conforms with the approved CDP and applicable standards of the Landscape Manual. PGCPB No. 2022-10 at 7.

Finding 11. 2010 Prince George's County Landscape Manual: Per Section 27-528(a)(1) of the Zoning Ordinance, an SDP must conform to the applicable standards of the Landscape Manual. However, when reviewing an infrastructure SDP, due to its limited scope, only certain regulations are applicable. For this infrastructure SDP, only Section 4.2, Requirements for Landscape Strips Along Streets; Section 4.6-2, Buffering Development from Special Roadways (Leeland Road), and Section 4.9, Sustainable Landscape Requirements, apply to this site. The landscape plans included with the SDP are in conformance with the applicable requirements. However, the applicant does not include the required landscape schedules for each respective section to demonstrate conformance on the landscape plans. A condition has been included herein to require the applicant to provide landscape schedules prior to certification of this infrastructure SDP. PGCPB No. 2022-10 at 15.

Accordingly, the Board approved SDP-1603-01 subject to Condition 1. e., which required the applicant to provide the following prior to certification: "Provide Sections 4.2, 4.6, and 4.9 landscape schedules and a tree canopy coverage schedule on the landscape plan." PGCPB No.

2022-10 at 26. Collectively, these findings by the Board are supported by substantial evidence in the record. Moreover, the Board's conditions of approval clearly demonstrate that SDP-1603-01 and SDP-1603-02 will conform to the approved CDP and applicable standards of the Landscape Manual, including buffering along Leeland Road for the proposed development. PGCPB No. 2022-76 at 4-9.

When the record is reviewed as a whole, and in context of a multi-phase development, there is substantial evidence in the record to support the Board's findings that SDP-1603-02 conforms to the approved CDP and applicable requirements of the Landscape Manual as required in PGCC § 27-528(a)(1).

3. The record lacks substantial evidence to support a finding that the development will be adequately served by public facilities as required by [PGCC] § 27-528(a)(2). Appeal at 22.

Opposition contends that AMS provided no evidence that existing or programmed public facilities will be adequate to serve the proposed development. Appeal at 23. The Board is only required to find, in relevant part, that "[t]he development will be adequately served *within a reasonable period of time* with existing or programmed public facilities..." (Emphasis added).

And the Board made the determination as required by the statute as follows:

Finding 8. c. *The subject property is governed by an approved and valid PPS, 4-21056, which was approved by the Planning Board on June 2, 2022, and determined that this development will be adequately served, within a reasonable period of time, with existing or programmed public facilities.* The site improvements described in this SDP are the first phase of the envisioned development occupying the middle of the larger site, that was approved with PPS 4-21056, which supersedes PPS 4-20032. *This SDP meets this requirement.* PGCPB No. 2022-76 at 9-11 (Emphasis added).

Moreover, the Board approved SDP-1603-02, subject to the following conditions:

1. m. Provide a phasing plan showing the US 301/Leeland Road and Prince's Boulevard/Queens Court intersection improvements phased

with the development provided in the SDP. Any improvements generated by the SDP, as shown in the phasing plan, shall be provided at the time of building permit.

n. Provide a fee schedule with the total cost of the applicant's contribution to the US 301 County Improvement Program improvements associated with the phased development of the SDP. In lieu of the fee payment, the applicant may provide physical improvements along US 301, within the limits of the US 301 CIP Project, consistent with the phasing plan that will be submitted by the applicant.

o. Provide a truck turning plan, with design vehicle classification. If the truck turning plans show inadequate circulation for truck maneuvers on-site, the applicant shall modify the site to provide sufficient circulation for safe truck movements. Any modifications to the site that are needed, based on the review of the truck turning plans, shall be accepted by the Transportation Planning Section. PGCPB No. 2022-76 at 26-27.

When the record is reviewed as a whole, and in context of a multi-phase development, there is substantial evidence in the record to support the Board's finding that the development in SDP-1603-02 will be adequately served *within a reasonable period of time* with existing or programmed public facilities as required in PGCC § 27-528(a)(2).

4. The record lacks substantial evidence to support a finding that adequate provisions have been made for draining surface water as required by [PGCC] § 27-528(a)(3). Appeal at 24.

The Board approved SDP-1603-01 and TCP2-026-2021-01 on January 27, 2022. PGCPB No. 2022-10. Relevant here, that approval was for infrastructure for the site, including the proposed street network, sidewalks, utilities, grading, *stormwater management* (SWM). See PGCC § 27-528(b) (Prior to approving a Specific Design Plan for Infrastructure, the Planning Board shall find that the plan conforms to the approved Comprehensive Design Plan, prevents offsite property damage, and prevents environmental degradation to safeguard the public's health, safety, welfare, and economic well-being for grading, reforestation, woodland conservation, drainage, erosion, and

pollution discharge). Here, the Board made the following findings:

Finding 10. 4. Development of this site shall be in conformance with the approved Stormwater Management Concept Plan (42013-2020-00) and any subsequent revisions. An approved SWM Concept Plan (42013-2020-00) was submitted and approved with SDP-1603-01 for the entire 442-acre site. As discussed previously, a revision to the approved SWM concept plan is in review, and this SDP is in conformance to the draft plan. The revised SWM concept plan approval is required, prior to certification of the SDP, as conditioned herein. PGCPB No. 2022-76 at 12.

Finding 8. c. Adequate provision has been made for draining surface water so that there are no adverse effects on either the subject property or adjacent properties. As discussed above, the application included an approved and valid SWM concept plan for the entire larger site, and the site improvements proposed in the SDP support, or otherwise do not hinder, the plan. Therefore, the Planning Board finds that, to the extent the improvements proposed in this SDP are the first phase of the larger development, adequate provision has been made for draining surface water and ensuring that there are no adverse effects on the subject property or adjacent properties. In addition, a revision to the previously approved SWM concept plan is in the review process and this SDP is in conformance to the draft plan. A *condition* has been included herein requiring that the revised SWM concept plan be approved, prior to certification of the SDP. PGCPB No. 2022-76 at 9-10.

But the Board went further. The Board imposed the following condition to ensure *adequate provision* for draining surface water so that there are no adverse effects on either the subject property or adjacent properties:

1. Prior to certification of the specific design plan (SDP), the applicant shall provide the following information and/or revise the site plan to provide the following:
 - c. Provide an approved revised stormwater management concept plan. PGCPB No. 2022-76 at 25.

When the record is reviewed as a whole, and in context of a multi-phase development, there is substantial evidence in the record to support the Board's finding that *adequate* provisions have been made for draining surface water as required by PGCC § 27-528(a)(3).¹³

¹³ See also AMS Response at 13 (Approval of the revised stormwater management concept plan (SWM) is a condition of certification of SDP-1603-02 and will be overseen through continuing reviews by the Department

5. The record lacks substantial evidence to support a finding that SDP-1603-02 conforms with an approved Type 2 Tree Conservation Plan as required by [PGCC] § 27-528(a)(4). Appeal at 25.

As noted above, the Board approved SDP-1603-**01** and TCP2-026-2021-**01** on January 27, 2022. PGCPB No. 2022-10. Relevant here, the Board previously considered and approved TCP2-026-2021-**01**. The Board's approval of TCP2-026-2021-**01** in PGCPB No. 2022-10 was a *final* decision subject to judicial review, but Opposition did not file a petition for judicial review to challenge the Board's approval of TCP2-026-2021-**01** as embodied in PGCPB No. 2022-10. *Chesapeake Bay Found., Inc. v. Creg Westport I, LLC*, 2022 Md. LEXIS 337, 2022 WL 3695920 (filed August 26, 2022). As such, TCP2-026-2021-**01** as embodied in PGCPB No. 2022-10, is not subject to appellate review here except as *modified* in SDP-1603-**02**/TCP2-026-2021-**02**.¹⁴

Concerning the modifications to TCP2-026-2021-**02**, the Board made the following findings:

Development of this subdivision shall be in conformance with approved Type 1 Tree Conservation Plan (TCP1-004-2021-03). The following note shall be placed on the final plat of subdivision:

“This development is subject to restrictions shown on the approved Type 1 Tree Conservation Plan (TCP1-004-2021-03 or most recent revision), or as modified by the Type 2 Tree Conservation Plan and precludes any disturbance or installation of any structure within specific areas. Failure to comply will mean a violation of an approved Tree Conservation Plan and will make the owner subject to mitigation under the Woodland and Wildlife Habitat Conservation Ordinance (WCO). This property is subject to the notification provisions of CB-60-2005. Copies of all approved Tree Conservation Plans for the subject property are available in the offices of the Maryland-National Capital Park and Planning Commission, Prince George's County Planning Department.”

(continued...)

of Permitting, Inspections, and Enforcement (DPIE) and Soil Conservation District. Grading of the site must be performed during the initial construction phase, and no grading permit will be issued by DPIE unless the revised SWM is approved).

¹⁴ The National Capital Business Park project is subject to the [Woodland and Wildlife Habitat Conservation Ordinance (WCO) and the Environmental Technical Manual (ETM)]. A rough grading permit was recently approved for the site, utilizing the [Limits of Disturbance] LOD of TCP2-026-2021. TCP2-026-2021-01 was approved with SDP-1603-01 and TCP2-026-2021-02 was submitted with SDP-1603-02. PGCPB. No. 2022-76 at 16 (Emphasis added).

The Planning Board finds that the revised Type 2 Tree Conservation Plan (TCP2-026-2021-02) is consistent with TCP1-004-2021-03 approved with PPS 4-21056, and with TCP2-026-2021-01 approved with SDP-1603-01. PGCPB No. 2022-76 at 15-16.

As a result, the Board concluded with the following additional finding:

Finding 8. c. Type 2 Tree Conservation Plan TCP2-026-2021-02 was submitted to the Environmental Planning Section on April 26, 2022. The Planning Board finds that the subject SDP conforms to TCP2-026-2021-02, subject to conditions that have been included in this resolution. PGCPB No. 2022-76 at 10.

PGCPB No. 2022-76 at 10. The Board also imposed certain conditions on the TCP2-026-2021-02 that AMS must satisfy prior to certification of SDP-1603-02. *Id.* at 25-26.

When the record is reviewed as a whole, and in context of a multi-phase development, there is substantial evidence in the record to support the Board's finding that SDP-1603-02 is in conformance with an approved Type 2 Conservation Plan as required by PGCC § 27-528(a)(4).

6. SDP-1603-02 does not preserve and/or restore regulated environmental features to the fullest extent possible as required by [PGCC] § 27-528(a)(5). Appeal at 27.

The Board is required to find that SDP-1603-02 *demonstrates* that the regulated environmental features are preserved and/or restored to the fullest extent possible in accordance with the requirement of [PGCC] § 24-130(b)(5). PGCC § 27-528(a)(5). Opposition argues here that the Board should be reversed because the record lacks evidence to support a finding that the requested impacts to the Primary Management Area (PMA) are necessary and therefore the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies the required criteria in PGCC § 27-528(a). Appeal at 30. But the record *demonstrates* otherwise.

The Board made the following findings and conclusions:

The plan demonstrates that the regulated environmental features are preserved and/or restored to the fullest extent possible in accordance with the requirement of Subtitle 24-130(b)(5).

The site improvements described in this SDP are only for a portion of the larger site and do not expand the approved land use quantities, included in A-9968-03, that preserve more than half of the entire site in a natural state. This condition was further evaluated at the time of approval of PPS 4-21056, and conformance was demonstrated. The Planning Board concluded, after review of the SDP and the proposed TCP2-026-2021-02, that the [Regulated Environmental Features] REF on the subject property will be preserved and/or restored, to the fullest extent possible, based on the level of detail provided with SDP-1603-02 for one proposed impact for a stormwater outfall.

PGCPB No. 2022-76 at 10. The Board's findings and conclusions, including PMA impacts, was based on the following evidence in the record:

Environmental Planning: In a memorandum dated June 10, 2022 (Nickle to Zhang), incorporated herein by reference, a review of the site's environmental features and prior conditions of approval was presented. Findings related to the prior applicable conditions have been included above. Additional comments have been summarized, as follows:

Regulated Environmental Features: There is PMA comprised of REF, which include streams and associated buffers, 100-year floodplain, steep slopes, and wetlands with their associated buffers. Under Section 27-521(a)(11) of the prior Zoning Ordinance, the plan shall demonstrate reservation and/or restoration of REF in a natural state, to the fullest extent possible. The development proposes impacts to the PMA. A letter of justification (LOJ), with exhibits, was submitted by the applicant on April 26, 2022, May 24, 2022, and June 7, 2022, for review with SDP-1603-02.

Section 24-130(b)(5) of the prior Prince George's County Subdivision Regulations states, "Where a property is located outside the Chesapeake Bay Critical Areas Overlay Zones the preliminary plan and all plans associated with the subject application shall demonstrate the preservation and/or restoration of regulated environmental features in a natural state to the fullest extent possible consistent with the guidance provided by the Environmental Technical Manual established by Subtitle 25. Any lot with an impact shall demonstrate sufficient net lot area where a net lot area is required pursuant to Subtitle 27, for the reasonable development of the lot outside the regulated feature. All regulated environmental features shall be placed in a conservation easement and depicted on the final plat."

Impacts to REF should be limited to those that are necessary for development of the property. Necessary impacts are those that are directly attributable to infrastructure required for the reasonable use and orderly and efficient development of the subject property, or are those that are required by Prince George's County Code for reasons of health, safety, or welfare. Necessary impacts include, but are

not limited to, adequate sanitary sewerage lines and water lines, road crossings for required street connections, and outfalls for SWM facilities. Road crossings of streams and/or wetlands may be appropriate if placed at the location of an existing crossing, or at the point of least impact to REF. SWM outfalls may also be considered necessary impacts, if the site has been designed to place the outfall at a point of least impact. The types of impacts that can be avoided include those for site grading, building placement, parking, SWM facilities (not including outfalls), and road crossings where reasonable alternatives exist. The cumulative impacts for development of a property should be the fewest necessary and sufficient to reasonably develop the site, in conformance with the County Code.

Two areas of PMA impact are proposed with SDP-1603-02. The first is a stormwater outfall from a stormwater facility, in the northwestern portion of the Parcel 6 development. The second area is the result of the final engineering of the road crossing for Queens Court, which is an expansion of a previously approved impact. This application does not propose revisions to the previously approved impacts, which will remain, as approved with PPS 4-21056 and SDP-1603-01.

Impact for Stormwater Outfall for Parcel 6: The first impact for the proposed stormdrain outfall is in the northwestern portion of the Parcel 6 development. The applicant proposes to convert a temporary sediment control facility, that was previously approved in that location, into a permanent stormwater facility, which requires an outfall to be located close to the stream channel, limiting erosion at the discharge point. Comments were provided regarding this proposed stormdrain outfall at an SDRC meeting on May 13, 2022, requesting an update to the LOJ and the exhibit, to provide the proposed totals for the impacts to the floodplain, stream buffer, and expanded PMA. A revised LOJ was received on May 24, 2022, for the newly proposed impact shown on the TCP2 and amended SDP. The current LOJ and associated exhibit reflect one proposed impact to REF associated with the proposed development, totaling approximately 0.10 acre. The following finding provides an evaluation of the proposed impact, as outlined in the applicant's justification.

This impact for a proposed SWM outfall is a revision to the overall stormwater design that was approved for the National Capital Business Park subdivision. Impacts to the PMA, that were approved by the Planning Board as part of the prior PPS 4-21056 and SDP-1603-01 cases, are to remain as approved. The new impact requested with SDP-1603-02 is for a stormdrain outfall estimated for 0.12 acre located on the north side of the development and includes 403 square feet of floodplain impact, 3,287 square feet of stream buffer impacts, and 1,343 square feet of expanded PMA impact. The stormdrain outfalls meet best management practices for discharging water back into the stream, while limiting erosion at the discharge points. The development shown on the SDP obtained preliminary approval from both DPIE and the Soil Conservation District (SCD).

The proposed PMA impact for a SWM outfall is considered necessary to the orderly development of the subject property. This impact cannot be avoided because it is required by other provisions of the County and state codes. The plan shows the preservation, restoration, and enhancement of the remaining areas of PMA.

Impacts for Queens Court Road Crossing: The second series of impacts is required by DPIE to support construction of the entrance road, Queens Court. This new area of impact is an expansion of an impact approved by the Planning Board with the PPS and SDP. The design of Queens Court crosses a stream and floodplain. Fill is needed to support the road, and a culvert was designed to not impede the flow of the stream. Because of the fill, clearing is needed downstream to provide compensatory storage for the floodplain, to prevent a rise to the floodplain. Compensatory storage of floodplain is a standard practice, which preserves the ability of the floodplain to store water. An LOJ and exhibits for the floodplain compensatory storage PMA impact were received on June 7, 2022. The current LOJ and associated exhibit is reflected in three parts, continuing the numbering system of the overall development impacts as Impacts 17, 18, and 19, totaling 1.20 acres of proposed impact to REF associated with the proposed site infrastructure. The following finding provides an evaluation of the proposed impact, as outlined in the applicant's justification.

This impact for the addition of floodplain compensatory storage is a revision to the overall road network design approved for the National Capital Business Park Subdivision. Impacts to the PMA that were approved by the Planning Board, as part of the prior PPS 4-21056 and SDP-1603-01 approvals, are to remain, as approved. The new impact requested with SDP-1603-02 is an expansion of Impact C, that the Planning Board approved with 4-21056. Impacts 17, 18, and 19 include 1.13 acres of floodplain, with an additional 0.07 acre of PMA, for an overall total of 1.20 acres. The use of compensatory storage of the floodplain in the three areas meets best management practices for providing an equal amount of floodplain storage, to support the grading and culverts required for the road infrastructure. The development shown on the PMA exhibits obtained preliminary approval from both DPIE and SCD. The majority of the graded floodplain will be reforested. The proposed floodplain clearing and reforestation shall be reflected in the worksheet and on the TCP2, prior to certification of SDP-1603-02.

The proposed PMA impact for compensatory storage is considered necessary to the orderly development of the subject property. This impact cannot be avoided because it is required by other provisions of the County and state codes. The plan shows preservation, restoration, and enhancement of the remaining areas of PMA. As a result of this analysis, it is recommended that the Planning Board approve the PMA impacts.

Specimen Trees: A timber harvest permit was previously approved for the site utilizing the approved LOD on the TCPII approved for the previous residential development, Willowbrook. Within the limits of the timber harvest area were 50 specimen trees. No variance was required for removal of these specimen trees because the TCPII was approved under the 1993 Woodland conservation Ordinance and was grandfathered from the variance requirements that were established in the WCO. The current development is subject to the WCO, which requires a variance for removal of specimen trees. A variance request was reviewed with 4-20032, and the Planning Board approved the removal of 69 specimen trees. A variance request was reviewed with SDP-1603-01 for infrastructure, and the Planning Board approved the removal of Specimen Trees 320 and 321. A variance request was resubmitted and reviewed with 4-21056, and the Planning Board approved the removal of 11 specimen trees. The trees were located generally in the area proposed for development, outside of the REF. No additional trees are requested for removal with SDP-1603-02.

Stormwater Management: SWM Concept Plan 42013-2020-00, approved on June 28, 2021, was submitted which shows the use of seven submerged gravel wetlands, four underground storage treatment facilities, and sand filters. The SWM concept approval letter indicates that additional micro-scaled environmental site design facilities will be evaluated when details of the development pads are proposed with later reviews. The proposed development, specific to SDP-1603-02, filed a revised Site Development Concept Plan (6108-2022-00) to amend the SWM facilities. The revised SWM concept plan approval is required, prior to certification of the SDP. The geographic area for this development proposes three submerged gravel wetlands and one wet pond. This development will be subject to a site development fine grading permit and continuing reviews by DPIE and SCD.

Soils: According to the *Prince George's County Soil Survey*, the principal soils on the site are in the Adelphia, Bibb, Collington, Colemantown Elkton, Howel, Marr, Monmouth, Sandy Land, Shrewsbury, and Westphalia series. Adelphi, Collington and Marr soils are in hydrologic class B, and are not highly erodible. Bibb and Shrewsbury soils are in hydrologic class D and pose various difficulties for development, due to high water table, impeded drainage, and flood hazard. Colemantown and Elkton soils are in hydrologic class D and have a K factor of 0.43, making them highly erodible. Howell and Westphalia soils are in hydrologic class B and are highly erodible. Monmouth soils are in hydrologic class C and have a K factor of 0.43, making them highly erodible. Sandy land soils are in hydrologic class A and pose few difficulties to development.

Marlboro clay is found to occur extensively in the vicinity of and on this property. The TCP2 shows the approximate location of the unmitigated and mitigated 1.5 safety factor line, in accordance with a geotechnical report dated August 6, 2021, and prepared by Geo-Technology Associates, Inc. The global stability analysis on Sections 2, 2R, 3, 4, 5, 5R, and 15 for the mitigated conditions was performed. The

geotechnical report recommends undercutting the Marlboro clay and replacing it with structural fill for the failed slope sections (Section 5 and Section 15). Section 5 is in the geographic area of SDP-1603-02. Prior to the SDRC meeting, staff requested the applicant to reanalyze Section 5. In the additional global slope stability analysis submitted May 24, 2022, Section 5R resulted in higher than minimum required factor of safety 1.5 for the mitigated conditions, considering the undercut, the problematic soil, and replacement with structural fill. Therefore, the revised location of the Marlboro clay undercut/replacement shall be shown on the TCP2.

Erosion and Sediment Control: The site is located within a sediment total maximum daily load (TMDL) related to Tier II waters, as established by the state. Watersheds within a TMDL for sediment will typically require erosion and sediment control measures, above and beyond the standard treatments. The site also contains REF species, including fish located in the Collington Branch. Redundant erosion and sediment control measures are also required for protection of the rare, threatened, and endangered species. Additional information, as determined by DPIE and SCD, in their respective reviews for SWM and erosion and sediment control, may be required.

The County requires approval of an erosion and sediment control plan, prior to issuance of a grading permit. The TCP must reflect the ultimate LOD, not only for installation of permanent site infrastructure, but also for installation of all temporary infrastructure, including erosion and sediment control measures. Prior to certification of SDP-1603-02, a copy of the erosion and sediment control technical plan must be submitted, so that the ultimate LOD for the project can be verified and shown on the TCP2.

The REF on the subject property have been preserved and/or restored, to the fullest extent possible, based on the level of detail provided with SDP-1603-02 for one proposed impact for a stormwater outfall. No specimen trees are proposed for removal with this application. The Environmental Planning Section recommends approval of this SDP and TCP2-026-2021-02, with three conditions that have been included in the Recommendation section of this report.

PGCPB No. 2022-76 at 19-23. Because under *Zimmer* the District Council must apply the same standard of review a court applies to an agency decision, it is not the function of the District Council to retry or second-guess the Board. *Ginn v. Farley*, 43 Md. App. 229, 235-36, 403 A.2d 858, 862-63 (1979). Nor is it the function of the District Council to set aside a decision of an administrative agency merely because [it] might weight the evidence differently. *Crowder*, 43 Md.

App. 276 (1979) (explaining that a “court may not set aside a decision of an administrative agency merely because the court might weight the evidence differently”). There is no substitution of judgment for that of the Board in reviewing its findings of fact. *Cleanwater Linganore, Inc.*, 456 Md. 272, 293-94, 173 A.3d 549 (2017). The substantial evidence test is about *reasonableness*, *not rightness*.” *Riverkeeper*, 447 Md. 88, 134 A.3d 892 (2016). (Emphasis added).¹⁵

When the record is reviewed as a whole, and in context of a multi-phase development, there is substantial evidence in the record to support the Board’s finding that SDP-1603-02 *demonstrates* that the regulated environmental features are preserved and/or restored to the fullest extent possible in accordance with the requirement of [PGCC] § 24-130(b)(5).

VI. The Planning Board erred when it approved SDP-1603-02 because the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies all of the applicable conditions imposed by previous applications. Appeal at 31.

This argument has no merit. The Board is not required to find that SDP-1603-02 satisfies all conditions imposed by previous applications. The Board may only deny SDP-1603-02 if it does not meet the requirements in PGCC § 27-528(a) and (b). PGCC § 27-528(c), *Zimmer Dev. Co.*, 444 Md. 490, 535, 120 A.3d 677, 704 (2015). Required findings for the Board to approve SDP-1603-02 are set forth in PGCC § 27-528. The Board made those findings. *See* discussion above.

VII. The Planning Board erred when it approved SDP-1603-02 because the proposed use, “a High-Cube Fulfillment Center Warehouse – Sortable,” is not permitted on the Subject Property under the Prior Zoning Ordinance. Appeal at 34.

Warehouse and distribution facility are permitted uses at the subject property. The Zoning Ordinance defines a *use* as:

¹⁵ It is irrelevant that Opposition thinks other alternatives may exist concerning PMA impacts. Appeal at 30. The standard of review here is whether the Board’s decision is reasonable and supported by substantial evidence.

“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). 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). When the Board approved SDP-1603-02, it found that “[t]he subject SDP is the first phase of the larger National Capital Business Park project for a 90.11-acre site for a 3,428,985-square-foot *warehouse/distribution facility* in one building. PGCPB No. 2022-76 at 1-4 (Emphasis added). Therefore, the Board did not err when it approved SDP-1603-02 for a warehouse and distribution facility.

Opposition argues that according to the Board’s approval of the Preliminary Plan of Subdivision (PPS) 4-21056 application for the site, the proposed 3.5 million square foot facility will be utilized as a “High-Cube Fulfillment Center Warehouse – Sortable.” That is a mischaracterization of the Board’s decision in the PPS application. “High-Cube Fulfillment Center Warehouse” is a *type of warehouse use* the Board considered as part of its transportation analysis to determine trip generation and whether *adequate public facilities* exist to serve the proposed development. But these issues are *not* before the District Council. Nor could they be. As a matter

of law, the District Council has no authority and, therefore, no jurisdiction, for immediate review of the Board's action on such matters when it approves a PPS application. *County Council of Prince George's County v. Dutcher*, 365 Md. 399, 780 A.2d 1137 (2001).

VIII. The Planning Board erred when it approved SDP-1603-02 and TCP2-026-2021-02 because the proposed impacts to the Primary Management Area (PMA) are not necessary.

In response to this argument, the District Council adopts and incorporates by reference, as if fully restated here, its response to argument V. 6 above.

IX. The Planning Board erred when it approved TCP2-026-2021-02 without requiring the Applicant to demonstrate that it had exhausted on-site preservation methods before being approved for off-site preservation. Appeal at 39.

This argument has no merit. The Board made the following findings and conclusions:

Prince George's County Tree Canopy Coverage Ordinance: Subtitle 25, Division 3, the Tree Canopy Coverage Ordinance, requires a minimum percentage of the site to be covered by tree canopy for any development projects that propose more than 5,000 square feet of gross floor area or disturbance and require a grading permit. Properties in the R-S Zone, to be developed per Section 27-515(b), Footnote 38, are required to provide a minimum of 10 percent (398,226 square feet) of the gross tract area in tree canopy coverage (TCC). This SDP includes a TCC schedule that shows approximately 11 percent (450,595 square feet) tree coverage of the property, in a combination of the existing non-woodland conservation area and landscape trees, that exceeds the requirements. However, the total site area on the TCC schedule is not consistent with that on the SDP. The applicant should address the inconsistency in site area, prior to certification, as conditioned herein. PGCPB. No. 2022-76 at 17.

Prior to *certification* of the specific design plan (SDP), the applicant shall provide the following information and/or revise the site plan to provide the following:

1. b. Address the inconsistency in site area between the Tree Canopy Coverage schedule and that labeled on the SDP.

PGCPB No. 2022-76 at 25. In addition, because this argument overlaps with V. 5 and V. 6 above, the District Council adopts and incorporates by reference, as if fully restated here, its responses to

argument V. 5 and V. 6 above. When the record is reviewed as a whole, and in context of a multi-phase development, there is substantial evidence in the record to support the Board's approval of TCP2-026-2021-02.

X. The Planning Board erred when it approved SDP-1603-02 because it conflicts with the General Plan and the applicable Area Master Plan. Appeal at 40.

The Board did not err when it approved SDP-1603-02 because PGCC § 27-528 does not require compliance with the General Plan and the applicable area Master Plan. Opposition concedes this point. Appeal at 40. Yet, Opposition advances an argument that such plans are still relevant. They are not. In relevant part, the Board made the following finding:

Community Planning: The Planning Board reviewed and adopts a memorandum dated May 27, 2022 (Lester to Zhang), incorporated herein by reference, which noted that, pursuant to Part 8, Division 4, Subdivision 2, of the prior Zoning Ordinance, master plan conformance is not required for this application.

PGCPB No. 2022-76 at 18. When the record is reviewed as a whole, and in context of a multi-phase development, there is substantial evidence in the record to support the Board's approval of SDP-1603-02 and TCP2-026-2021-02.

C. Conclusion

The Board's decision, as adopted in PGCPB No. 2022-76, to approve SDP-1603-02 and TCP2-026-2021-02, is AFFIRMED, subject to the following conditions:

1. Prior to certification of the specific design plan (SDP), the applicant shall provide the following information and/or revise the site plan to provide the following:
 - a. Obtain final certificate approval of Zoning Map Amendment (Basic Plan) A-9968-03, Comprehensive Design Plan CDP-0505-02, and Preliminary Plan of Subdivision 4-21056, and provide a note listing the prior applicable approvals.

- b. Address the inconsistency in site area between the Tree Canopy Coverage schedule and that labeled on the SDP.
- c. Provide an approved revised stormwater management concept plan.
- d. Revise the Type 2 tree conservation plan (TCP2), as follows:
 - (1) Show the revised location of the Marlboro clay undercut/replacement 1.5 safety factor line.
 - (2) Show the regulated environmental features on the plan as black lines, not grey.
 - (3) In the legend, add “temporary” to the line type for the temporary tree protection fence.
 - (4) Revise the total plant units in the Reforestation Planting Schedule for reforestation Area M from “565” to “685,” and correct the total for this table.
 - (5) Correct Note 1 of the Standard Type 2 Tree Conservation Plan Notes to list the specific case number of “SDP-1603-02,” and remove the other case numbers.
 - (6) Revise Sheet C-303, in accordance with the proposed stormwater outfall, to remove the proposed reforestation from the easement area and update the totals for the label in the charts and worksheet, accordingly.
 - (7) Revise Sheet C-309 to adjust Preservation Area 15 to follow the limits of disturbance, and update the total areas for the label in the charts and worksheet, accordingly.
 - (8) On Sheet C-310, revise the note regarding the proposed park facilities and Collington Branch Trail to reflect the current case number, “SDP-1603-02.”

- (9) Revise Sheet C-318 to add a label for MC-600 and add the hatch pattern to the legend.
 - (10) Revise Sheet C-319 to add a label for MC-600 and add the hatch pattern to the legend.
 - (11) Revise the worksheet and plans to reflect the grading, limits of disturbance, and reforestation proposed with the floodplain compensatory storage areas, for construction of Queens Court.
 - (12) Have the revised plan signed and dated by the qualified professional preparing the plan.
- e. Submit a copy of the erosion and sediment control technical plan, so that the ultimate limits of disturbance can be verified and shown on the final Type 2 tree conservation plan.
 - f. Revise the parking and loading table and notes on the SDP, to be consistent.
 - g. Provide a sign face area calculation table on the SDP.
 - h. Clearly show and label the 10-foot-wide public utility easement along both sides of public rights-of-way, in accordance with the approved preliminary plan of subdivision, on all applicable plan sheets.
 - i. Provide bearings and distances for all parcel boundary lines and provide the parcel labels and areas on all applicable plan sheets.
 - j. Remove the public right-of-way for Warehouse Way and depict the parcel and road layout, in accordance with Preliminary Plan of Subdivision 4-21056.
 - k. Revise General Notes 2 and 4 on the cover sheet to list the correct zoning designation for the property.
 - l. Revise General Notes 11 and 12 to correctly identify the number of parcels included with this SDP (Parcels 4-6, in accordance with Preliminary Plan of Subdivision 4-21056).

- m. Provide a phasing plan showing the US 301/Leeland Road and Prince's Boulevard/Queens Court intersection improvements phased with the development provided in the SDP. Any improvements generated by the SDP, as shown in the phasing plan, shall be provided at the time of building permit.
 - n. Provide a fee schedule with the total cost of the applicant's contribution to the US 301 County Improvement Program (CIP) improvements associated with the phased development of the SDP. In lieu of the fee payment, the applicant may provide physical improvements along US 301, within the limits of the US 301 CIP Project, consistent with the phasing plan that will be submitted by the applicant.
 - o. Provide a truck turning plan, with design vehicle classification. If the truck turning plans show inadequate circulation for truck maneuvers on-site, the applicant shall modify the site to provide sufficient circulation for safe truck movements. Any modifications to the site that are needed, based on the review of the truck turning plans, shall be accepted by the Transportation Planning Section.
 - p. Provide bikeway guide signs (D1 1-1/Bike Route; D1-1, D1-2, and D1-3/Destination Plates; and R4-I I/Bicycles May Use Full Lane), in association with bicycle facilities on the subject site.
 - q. Provide long-term bicycle parking and associated facilities at an appropriate location adjacent to the building.
 - r. Provide notes on the SDP, in accordance with Condition 7 of Preliminary Plan of Subdivision 4-21056.
 - s. Resolve all discrepancies between the SDP and the building elevations, so that all plans are consistent with each other related to building square footage and parking schedules.
2. Prior to issuance of a use and occupancy permit representing over 40 percent of the square footage approved in Comprehensive Design Plan CDP-0505-02, or three years from issuance of the first building permit, whichever comes last, the park and Collington Branch Stream Valley Trail shall be complete. Notwithstanding the above, the developer may request additional time from the Prince George's County Department of Parks and Recreation (DPR) to complete the portions of the master plan trail requiring

approval of a permit from the Maryland Department of the Environment and/or the US Army Corps of Engineers. Provided the developer is making good-faith efforts to complete said trail portions, in a timely manner, DPR shall not unreasonably withhold its approval of such request and such extension shall be documented by an amendment to the recreational facilities agreement.

3. Within 20 months after issuance of the first building permit for National Capital Business Park, the applicant shall obtain all applicable permits for construction of the 20-acre park. Should the permits for the 20-acre park not be obtained after 20 months, the Maryland-National Capital Park and Planning Commission (M-NCPPC) reserves the right to deny the applicant's request for any further permits within National Capital Business Park. Notwithstanding, M-NCPPC's approval of permits shall not be unreasonably withheld, provided that the applicant is making good-faith efforts to obtain all necessary permits for construction of the 20-acre park, in a timely manner.

Ordered this 17th day of October, 2022, by the following vote:

In Favor: Council Members Burroughs, Glaros, Franklin, Harrison, Hawkins, Ivey Medlock, Streeter, Turner and Taveras.

Opposed:

Abstained:

Absent: Council Member Dernoga.

Vote: 10-0.

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: Calvin S. Hawkins, II
Calvin S. Hawkins, II, Chair

ATTEST:

Donna J. Brown
Donna J. Brown
Clerk of the Council