MCP-CTRACK

From: JRDavis1@aol.com
Sent: Friday, January 29, 2010 12:22 PM
To: MCP-Chair
Cc: Krasnow, Rose; Conlon, Catherine
Subject: Comments Concerning Application of the Resubdivision Criteria Policy of 1998
Attachments: Statement concerning resubdivison criteria.docx

Dear Royce,
Attached are comments that I would like the Planning Board to consider as you discuss the merits of the 1998 Policy Concerning Application of Resubdivision Criteria to Non-Residential Uses. As you know, I have significant experience with the resubdivision criteria and I have long believed that the Board's action in 1998 has affected the special exception process in a way never anticipated by County law or policies.

I have no interest in this matter other than wanting to provide some background and historical perspective for the Board's information and consideration. As a County resident, I am concerned that land use policies should be open to public debate and should reflect County laws and procedures. A policy decision should not be used as a way to create new procedures without following appropriate legal protocols. I believe that the Board's action in 1998 went too far and needs to be reconsidered in light of its effect on County land use.

If you, the staff or Board members have any questions concerning my comments and recollection of events please contact me at your convenience. I will try to attend the Board's meeting in February but I do not plan to speak unless Board members have questions for me.
Best regards,
Joe

Joseph R. Davis
1037 Tanley Road
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Statement of Joseph R. Davis
Concerning Application of the Resubdivision Criteria
To Non-Residential Lots

January 29, 2010

As a former Subdivision Supervisor and Chief of the Development Review Division for the M-NCPPC Montgomery County Department of Planning, I have extensive experience working with the "resubdivision criteria", as contained in Section 50-29(b)(2) of the Subdivision Regulations. I also participated in the Planning Board's discussion when the current policy concerning application of the resubdivision criteria to all residentially zoned lots was enacted back in 1998. I support the staff recommendation contained in the Report dated January 4, 2010 recommending that the Planning Board's 1998 policy be changed to apply to lots involving residential use rather than all lots residentially zoned. I would go farther to recommend that the Planning Board should consider the need for this matter to be addressed by a possible subdivision text amendment as it involves significant land use issues that should probably be decided by the County Council. I believe that part of the Planning Board's policy of 1998 was based on a misinterpretation of the Regulations and ignored certain longstanding practice relative to non-residential uses.

Prior to 1985, the definition of the term "subdivision" addressed only the division of parcels into lots. In that year, legislation was proposed by the Planning Board and enacted by the County Council establishing that the assemblage of lots into a larger lot or lots was also a subdivision and subject to all requirements applicable to subdivision approval. In addition, the definition was expanded to state that a resubdivision is a subdivision. I recall that the primary purpose for the 1985 legislation was to amend Section 50-20 of the Subdivision Regulations which concerns limitations on the issuance of building permits. Section 50-20 was amended to preclude the issuance of building permits for buildings located on more than one lot or which crosses a lot line. As I remember, the legislation assured that certain larger scale uses locating on previously recorded lots would be subject to a new subdivision approval, particularly to require the adequate public facilities requirements of Section 50-35 of the Subdivision Regulations.

Up until 1998, the resubdivision criteria of Section 50-29(b)(2) was not applied to assemblages of lots into a larger lot or lots because it was not recognized until then that the 1985 legislation actually applied to that section. In fact, for many years such "assemblage" resubdivisions were routinely referred to as being "reverse resubdivisions" and practice had been to apply the resubdivision criteria to divisions of lots only.

In 1997, the County Council approved a minor subdivision process which, among other things, allowed for the "consolidation" of multiple lots into a single lot that met certain conditions without requiring a preliminary plan. Additionally, the new law provided that the resubdivision criteria would not apply to minor subdivisions, generally. However, APF limitations specifically apply to minor subdivisions in terms of existing approvals and other conditions that may apply to a site. This legislation in 1997 reflected long established

resubdivision philosophy and was unanimously supported by the Planning Board which transmitted the legislation to the Council for introduction. What a difference a year makes!

I believe that the Planning Board correctly determined in 1998 that the resubdivision criteria of Section 50-(b)(2) apply to both divisions and assemblages of lots from previously platted lot(s) based on a plain reading interpretation. I think that this was an unanticipated consequence of the 1985 legislation and, to my recollection, was not discussed when the legislation was considered by staff, the Planning Board and County Council. I also assisted in the processing of the 1985 legislation while serving as a zoning & legislative analyst in the Development Review Division.

In 1998, I presented the staff position at the Board session on this matter and I indicated to the Board that even continuation of the Board's prior practice of applying the resubdivision criteria to divisions of a lot into smaller lots could require new legislation to clarify the Council's intent in 1985. In terms of the Board's action that evening, many years ago, I certainly understood their position regarding the assemblage of previously platted lots into a new lot or lots as being a resubdivision and being subject to the resubdivision criteria based on passage of the legislation in 1985 and the plain reading interpretation. However, I did not share the Board's enthusiasm for deciding that a residential lot meant a lot zoned residential. I felt that this was a new position being articulated, not supported by plain reading of the Regulations and it probably warranted additional legislation. Additionally, whether the criteria applied to "residential use" or a "residential zone" did not seem to matter historically until 1998.

At the 1998 meeting, I recall being somewhat concerned that the Planning Board was attempting to "trump" the Board of Appeals authority relative to their review of "residential special exceptions". I also recall that the Board of Appeals had some concern about this issue and sent a letter to the Planning Board expressing some concerns themselves. I did make reference to this in my remarks to the Planning Board at that time. Be that as it may, staff accepted the direction of the Board and moved to implement the new policy. Some time subsequent to the Planning Board meeting, I did enquire with then Chairman Bill Hussmann concerning possible new legislation to address the Board's policy and he concluded that we lacked staff resource to pursue it and he was comfortable with the policy decision made by the Board members

I believe that the Board's policy does go farther than the 1985 law intended and has created a problem for the County in the review and approval of certain special exception uses. I believe that it is appropriate for the Board to reconsider this policy in light of the wider implications affecting land use policies and procedures in the County. The effect of this policy on special exception uses in the residential zones is quite significant in that it could preclude those uses that require assemblage of lots. This appears to me to go well beyond the Planning Board's and the County Council's original intent in 1985 to assure that such uses were subject to adequate public facility review procedures.

It is important to note that the general conditions for approval of a special exception use, as contained in Section 59-G-1.21(a) of the Zoning Ordinance specifically directs that the Board of Appeals must defer the decision concerning a finding of adequate public facilities (APF) for a

special exception use to the Planning Board as part of a preliminary plan, if subdivision is required for a special exception use. Conversely, the Board of Appeals is authorized to make the APF determination themselves as part of the special exception approval if a new preliminary plan of subdivision is required. Given this clear direction as to authority for APF approvals for special exceptions, I think it prudent that such clear direction should apply to this policy issue as well. I don't believe that there was any intent in the 1985 legislation to provide the Planning Board with authority to override the Board of Appeals in determining the compatibility of a proposed special exception use in a residential neighborhood.

I realize that one can argue that the Planning Board is not examining compatibility in the same way as the Board of Appeals because the Planning Board is focusing on the relationship of lots and not uses. In fact this particular point was discussed in 1998. I think that this may be a distinction without merit because it creates an additional procedural step for an applicant and one that may be impossible to meet. I believe that the resubdivision criteria in the Subdivision Regulations was enacted to protect residential neighborhoods from more intensive residential development that would otherwise be allowed by right in a residential community. I do not believe that the resubdivision procedures are intended to limit the opportunity for special exception uses (residential or non-residential) that should be decided by the Board of Appeals in accord with established zoning law and procedures. I think that this is an important policy distinction that may merit legislation by the County Council to establish the correctly intended procedures and process. Zoning and subdivision procedures should operate in a compatible fashion and not compete or conflict with each other.

Let me conclude by noting that in researching resubdivision procedures and requirements in other jurisdictions around the country, I have not encountered one that has the same rigor as that in Montgomery County, Maryland. The Board's 1998 policy, which is unwritten, adds significantly to the restrictive nature of residential resubdivision in the County. I am not aware of any other jurisdiction that attempts to regulate special exceptions through resubdivision procedures.

I hope that my comments will help facilitate your discussion and consideration of this important land use policy and procedural issue. It is unfortunate that we could not move forward with appropriate legislation in 1998, but maybe this represents a more opportune moment to consider all of the land use planning implications of the current policy. If Board members or staff have any questions concerning my comments or if I may be of further assistance to the Board in this matter, please contact me at your convenience.

Respectfully submitted,

Joseph R. Davis
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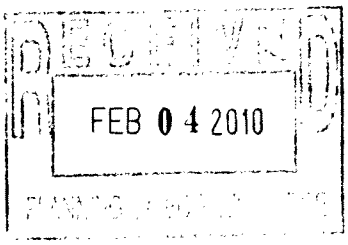

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The Maryland-National Capital Park and Planning Commission
MRO Legal Department

January 29, 2010

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

Re: Application of Resubdivision Criteria to Nonresidential Uses

Dear Chairman Hanson and Members of the Planning Board:

As land use attorneys who have represented, and continue to represent, a number of special exception holders in residential zones, the purpose of this letter is to express our support for Staff's position regarding the inapplicability of the residential resubdivision criteria contained in Section 50-29(b) of the Montgomery County Code (the "Code") to nonresidential uses, an issue that we understand the Board will consider at its February 18, 2010 meeting. While we endorse the position and rationale provided by Staff in its January 4, 2010 Staff Report, we believe the following additional points and background information serve to further strengthen Staff's position and inexorably lead to the conclusion that Staff's position is the only logical and correct interpretation of Section 50-29(b) of the Code. We also request that we be included in any discussion before the Board on this issue.

As you are aware, Section 50-29(b) of the Code states:

> (b) *Additional requirements for residential lots*
>
> * * *
>
> (2) Resubdivision. Lots on a plat for the resubdivision of any lot, tract or other parcel of land that is a part of an existing subdivision previously recorded in a plat book shall be of the same character as to street frontage, alignment, size, shape, width, area and suitability for residential use as other lots within the existing block, neighborhood or subdivision.

(10pg) 2/12/10

As noted by Staff, the issue turns on what the County Council meant by the term "residential lots" when it enacted this provision. We concur with Staff's position that the language is clear and unambiguous that the plain meaning of "residential lots" is lots primarily containing residential uses for the reasons advanced by Staff. Maryland Courts are clear that "where 'the words of a statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meeting,' we 'will give effect to the statute as written.'" *Moore v. Miley*, 372 Md. 663, 677 (2003), *quoting in part, Jones v. State*, 336 Md. 255, 261 (1994). *See also State v. Patrick A.*, 312 Md. 482, 487 (1988) ("We look to the statute itself as the primary source of legislative intent. A corollary to this rule is when the language of a statute is clear and unambiguous, courts may not insert or omit words to make a statute express intentions not evident in its original form."); *Price v. State*, 378 Md. 378, 387-388 (2003); *Bridges v. Nicely*, 304 Md. 1, 10-11 (1985).

However, even assuming, *arguendo*, that the meaning of "residential lots" is ambiguous and that an argument could be advanced that residential zoning is a reasonable interpretation of the meaning of the term "residential lots," a position we do not share, the same result (i.e., "residential lots" means lots used for residential purposes) would be dictated by the rules of statutory construction. Maryland courts are clear that, "[i]f a statute has more then one reasonable interpretation, it is ambiguous" and, therefore, consideration must be given to "the ordinary meaning of the language of the statute and how that language relates to the overall meaning, setting, and purpose of the act." *Mayor and Town Council of Oakland v. Mayor and Town Council of Mountain Lake Park*, 392 Md. 301, 316, 896 A.2d 1036, 1045 (2006). *See also Price v. State*, 378 Md. 378, 387, 835 A.2d 1221, 1226 (2003) ("In some cases, the statutory text reveals ambiguity, and then the job of this Court is to resolve that ambiguity in light of the legislative intent, using all the resources and tools of statutory construction at our disposal.") To aid in interpretation, Maryland Courts " read together statutes on the same subject and harmonize them to the extent possible, so as to avoid rendering either statute 'or any portion, meaningless, surplusage, superfluous or nugatory.'" *Mayor and Town Council of Oakland v. Mayor and Town Council of Mountain Lake Park*, 392 Md. 301, 316, 896 A.2d 1036, 1045 (2006), *quoting Pete v. State*, 384 Md. 65-66, 862 A.2d 419, 429-30 (2004). *See also Bridges v. Nicely*, 304 Md. 1, 10, 497 A.2d 142, 146 (1985)("...when construing one provision of a statute, which is part of a statutory scheme, the legislative intention must be gathered from the entire statute, rather than from only one part....[i]n other words, where statutes relate to the same subject matter, and are not inconsistent with each other, they should be construed together and harmonized where consistent with their general object and scope.")

Using this method of statutory construction, one need look no further than the paragraph immediately following Section 50-29(b) to arrive at the correct and logical interpretation. Section 50-29(c) defines "Nonresidential lots" as lots "reserved or laid out for commercial and

industrial purposes...." The reference to nonresidential lots here clearly refers to the intended *use* of the lots, not the zoning. Therefore, to harmonize these related and immediately adjacent provisions, the rules of statutory construction dictate that the term "residential lots" refer to residentially *used* lots, just as nonresidential lots refer to nonresidentially *used* lots. Additionally, as Staff correctly points out, elsewhere in the Code, references are made to "residentially zoned" lots, when zoning is the issue. *See* Code Sections 50-35(A)(6), 59-A-6.22. Therefore, an interpretation of "residential lots" to mean residentially *zoned* lots would mean that references elsewhere in the code to "residentially zoned" lots are superfluous, a result directly contrary to statutory construction rules. Moreover, an examination of the "overall meaning, setting, and purpose of the act," as dictated by the rules of statutory construction, further supports the interpretation that "residential lots" refer to use. The introductory paragraph to Section 50-29 states, "Lot size, width, shape and orientation shape be appropriate for...*the type of development or use contemplated*...." Section 50-29(a)(1)(emphasis added). Therefore, the focus of all of 50-29 is clearly on use, rather than zoning.

When considering the correct interpretation of a statute, Maryland Courts are also clear that "[c]onstruction of a statute...that is 'unreasonable, illogical, unjust, or inconsistent with common sense should be avoided.'" *Moore v. Miley*, 372 Md. 663, 677, 814 A.2d 557, 566 (2003), *quoting Degreen v. State*, 352 Md. 400, 417, 722 A.2d 887, 895 (1999). *See also Mayor and Town Council of Oakland v. Mayor and Town Council of Mountain Lake Park*, 392 Md. 301, 316, 896 A.2d 1036, 1045 (2006). Interpreting residential lots to mean residentially zoned lots would have such results. If Section 50-29(b)(2) were applicable to nonresidentially used property (typically, special exception uses), it would require that the lots housing such uses be "of the same character as to street frontage, alignment, size, shape, width, area and suitability for residential use as other lots within the existing block, neighborhood or subdivision." As Staff correctly notes, requiring a nonresidentially used lot to be suitable for residential uses would be absurd. Moreover, most nonresidential uses require larger lots than residential uses, which would make the lot size, frontage, width and area analysis equally illogical and inconsistent with common sense. Finally, such an interpretation would be unjust to the many special exception holders currently operating in residentially zoned areas. Maryland Courts have long recognized that special exception uses are, "uses which the legislative body has determined can, *prima facie,* properly be allowed in a specified use district, absent any fact or circumstance in a particular case which would change this presumptive finding." *Rockville Fuel and Feed Co. v. Board of Appeals of City of Gaithersburg,* 257 Md. 183, 188, 262 A.2d 499, 502 (1970). *See also Huff v. Board of Zoning Appeals*, 214 Md. 48, 60-62, 133 A.2d 83. To severely restrict the operation of special exception uses in residential zones by prohibiting the consolidation of sufficient lot sizes to accommodate such uses, absent the grant of a waiver which may or may not be justified or granted, would circumvent and

directly contradict the clear legislative intent to allow such uses. Such a result would clearly be "unreasonable, illogical and unjust."

Moreover, it should be noted that while the term "residential lots" is not defined in the Code, it is a term used by and defined in the Federal Tax Code. Specifically, Section 1.453C-8T(4), Temporary Income Tax Regs., 53 Fed. Reg. 34725, defines a "residential lot" as "a parcel of unimproved land upon which the purchaser intends to construct (or intends to contract to have another person construct) a dwelling unit for use as a residence by the purchaser." *Discussed in Wang v. Commissioner of Internal Review*, T.C. Memo, 1998-127, 1998 WL 144991 (U.S. Tax Ct.). Therefore, at the federal level, such a term clearly relates to use and not zoning, further supporting the arguments reviewed above.

Finally, we note that Staff cites to a 1998 decision of the Board as the "precedent" for the Board to consider regarding application of the residential resubdivision criteria to nonresidential uses. This 1998 decision was associated with Preliminary Plan No. 1-96068 (Residence at Great Falls). In that case, the Board applied the resubdivision criteria of Section 50-29(b) of the Code to a nursing home facility, the special exception for which the Board had previously recommended denial. However, it should be noted that the Board's denial of that preliminary plan only partially resulted from a finding of lack of compliance with the resubdivision criteria of Section 50-29(b), and the Board also cited and relied on other independent grounds for the denial. What is not recognized in Staff's January 4, 2010 Memorandum to the Board on this issue, however, is that a much more recent preliminary plan established a different precedent, that we believe is controlling and should continue to be followed. In Preliminary Plan No. 120080090 (Chevy Chase Bank Hillandale), approved by Resolution No. 08-109 on September 29, 2008, the Board approved a resubdivision of the National Labor College's property in Silver Spring to form 2 lots: a 1.03 acre lot housing a bank, and a 45.94 acre lot housing the existing National Labor College. The National Labor College's property is zoned R-90 and is subject to a special exception allowing for the College's use. Page 4 of the July 11, 2008 Staff Report explicitly states, "While the National Labor College site is zoned R-90, *conformance with Section 50-29(b)(2) for resubdivision is not applicable because the recorded parcel contains an institutional use.*" (emphasis added) The Board adopted this position on page 4 of Resolution No. 08-109, explicitly adopting and incorporating the Staff Report by reference. Therefore, we believe the current policy of the Board, as established by Preliminary Plan No. 120080090, is to *not* apply the resubdivision criteria of Section 50-29(b) to nonresidential uses, such as institutional uses operating in residential zones by special exception. For the foregoing reasons, we believe this policy is the correct one and should be maintained.

We understand that, as part of the Board's consideration of this issue, it will invite parties to participate in a roundtable discussion, and respectfully request that we be included as a participant in such a discussion. In the meantime, should you have any questions, or desire any additional information, please feel free to contact us. Thank you for your consideration.

Very truly yours,

LINOWES AND BLOCHER LLP

Barbara A. Sears

Erin E. Girard

cc: Rollin Stanley
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SUBURBAN HOSPITAL
JOHNS HOPKINS MEDICINE

January 26, 2010

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

Re: Application of Resubdivision Criteria to Nonresidential Uses

Dear Chairman Hanson and Members of the Planning Board:

As an institutional use that has been operating in a residential zone and serving the healthcare needs of the residents of Montgomery County by grant of a special exception for over 55 years, Suburban Hospital would like to comment on the Planning Board's potential application of residential resubdivision criteria to nonresidential uses operating in residential zones, an issue Suburban understands the Planning Board will be considering on February 18, 2010. Specifically, Suburban endorses the position of Staff in its January 4, 2010 Memorandum and requests that the Board adopt Staff's recommendation to not apply the provisions of Section 50-29(b) of the Montgomery County Code to nonresidential uses operating in residential zones.

As you are aware, Suburban Hospital has existed at its current location along Old Georgetown Road since 1943, and was granted its first special exception in 1955. The land on which Suburban currently operates was initially laid out as large lots on either side of Lincoln Street in 1910. At the time the Federal Government purchased the land for the Hospital's use from the Whalen Family, the large lots were used for agriculture. The western portion of Block 15, lying south of Lincoln Street, was later resubdivided in 1948, and again in 1975, to create a number of residential lots, while the approximately 9 acre balance of the block was retained as a large single lot housing the Hospital's operations. Hospital property on Block 8, lying north of Lincoln Street, was also resubdivided in 1962, and again in 1975, to create the current 3 acre lot in this area used for hospital operations, almost 2 acres of which had previously existed as a single lot since the original 1910 subdivision. The large lots on which the Hospital currently operates have therefore been in existence since the inception of the surrounding neighborhood in 1910, and have been successfully resubdivided on numerous occasions. Additionally, the Hospital has operated on these lots for more than 60 years.

As you are also aware, Suburban filed a petition for a major modification of its Special Exception (S-274-D) in March of 2008 ("Modification"), and filed a related Abandonment Petition for the abandonment of Lincoln Street between Old Georgetown Road and Grant Street (AB715) in April 2008 ("Abandonment"). The Modification and Abandonment contemplate the consolidation of the subject portion of Lincoln Street and all contiguous Hospital-owned property on Blocks 15 and 8 into a single lot consisting of approximately 15 acres, which is similar in size to the lot on which Holy Cross Hospital currently operates. The Planning Board considered these petitions on September 25, 2008 and recommended approval of both. These recommendations were followed by 34 days of hearings by the Montgomery County Hearing Examiner on the Modification, with the record closing on November 20, 2009. This process has resulted in the expenditure by Suburban, a non-profit organization, of a tremendous amount of funds and resources. Although we are currently awaiting the Hearing Examiner's Report and Recommendation on the Modification, and the County Executive's Hearing Examiner's Recommendation on the Abandonment, we are hopeful that both will be favorable. If both petitions are granted, Suburban would proceed with the filing of a preliminary plan to consolidate its property to effectuate the Abandonment and Modification.

Application of the residential resubdivision criteria to this potential future preliminary plan, and any similarly situated preliminary plans, would be unfounded and unfair. First, Suburban is not a residential use, and the majority of the property on which it operates has never been in residential use. Therefore, Suburban does not believe resubdivision criteria relating to "residential lots," such as those of Section 50-29(b) of the Montgomery County Code, should apply to its preliminary plan, nor were they apparently applied in the past, as Suburban has previously successfully been allowed to resubdivide and consolidate its lots. Second, application of Section 50-29(b) to nonresidential uses such as Suburban would require the Planning Board to make findings that proposed lots are of the "same character as to street frontage, alignment, size, shape, width, area and suitability for residential use as other lots within the existing block, neighborhood or subdivision." It is uncertain how these criteria would apply to nonresidential special exceptions such as Suburban, particularly when the lots on which they operate are, and always have been, larger than those in the adjacent community, and may never have been residential in nature. If the intent of these findings is aimed at compatibility between a proposed subdivision and surrounding area, which appears to be the case, the issue of neighborhood impact and compatibility is addressed, at length, during the special exception process. In fact, in the case of Suburban, the Board has already made a finding of compatibility through its recommendation of approval of the Modification, a finding that hopefully will soon be echoed by the Board of Appeals.

Additionally, if, despite these arguments, the Board were to apply the residential resubdivision criteria to nonresidential uses such as Suburban's, such an application would put special

exceptions such as Suburban's at great risk. With no certainty as to how the Board may evaluate the resubdivision criteria with regard to their uses, special exception holders could face the possibility of having their special exception petitions granted by the Board of Appeals, only to have them effectively later denied by the Planning Board through application of potentially unachievable resubdivision criteria. Because waivers from these provisions cannot be guaranteed, special exception holders would face risking the considerable time and money that they have spent through the special exception process on the grant of uncertain future waivers. No property owner, particularly one operating as a non-profit to serve the community, such as Suburban, should be subjected to such an uncertain and unfair process.

In light of the above, we respectfully request that the Planning Board consider the illogical and unfair ramifications of applying the resubdivision criteria of Section 50-29(b) of the Montgomery County Code to nonresidential special exception uses such as Suburban, and decide against any such future application. Thank you for your consideration.

Sincerely,

Leslie Ford Weber

Leslie Ford Weber
Senior Vice President, Government and Community Relations

cc: Rollin Stanley
Rose Krasnow
Catherine Conlon

ABRAMS & WEST, P.C.

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February 1, 2010

Royce Hanson, Chairman
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910

RE: Application of Resubdivision Criteria and Non-Residential Uses

Dear Dr. Hanson and Members of the Planning Board:

I support the Planning Board staff's recommendation that the Planning Board should not require lots containing or proposed for non-residential uses in residential zones to comply with the resubdivision criteria in §50-29(b)(2) of the Subdivision Regulations. In addition to the reasons contained in the staff memorandum to the Board dated January 4, 2010, there are additional reasons for supporting this change in interpretation.

Zoning & subdivision laws, as court decisions remind us, should be read in harmony with one another to provide a reasonable and consistent application of those laws. There are various special exception uses allowed in residential zones which are non-residential uses that require unique standards for approval such as a minimum lot size in excess of the lot sizes in specific zones. Landscape contractors and horticultural nurseries and medical clinics are only a couple that come to mind. These minimums would produce larger lots than what is supporting residential uses on adjacent or nearby lots in the same zoning district. The current interpretation for these types of non-residential uses would in essence run counter to the current resubdivision criteria when compared to other residentially zoned lots in the same neighborhood or resubdivision.

The purpose of the resubdivision criteria, I believe was intended to provide compatible and harmonious lot layouts within existing residentially subdivided areas for residential development so that they would not produce potential adverse effects and impacts on existing residential communities. In most special exception situations, the impacts are extensively controlled by zoning standards for the use sought by standards in the Zoning Ordinance and by a series of in-depth reviews, including public meeting and hearings in order to ensure their compatible placement in residentially zoned areas. So the purpose of the resubdivision criteria is being adhered to without this additional layer of standards in the

subdivision regulations.

The resubdivision criteria were originally formulated before the current wide application of the planning and zoning concept of mixed use. Some mixed use projects are platted in phases and could be inconsistent with the resubdivision criteria as presently applied both internally to the project and within a surrounding residential community. This would severely impact the flexibility and utility of this zoning and planning tool particularly in terms of revitalization and redevelopment of older areas of the county where lot assemblage is required.

The resubdivision criteria was not intended to be a straightjacket where one size fits all. The zoning ordinance contains many non-residential permitted uses and special exception uses on residentially zoned land which could not be developed because of the land area needed for buildings and parking would be larger than the size of traditional residential lots in the surrounding area. Churches, hospitals, nursing homes, private educational facilities are but a few examples. As I said previously, the subdivision regulations and zoning ordinance should be read in harmony so that a reasonable result occurs.

I request that you seriously consider and follow your staff's recommendations and not require non-residential uses go through a §50-29(b)(2) analysis.

Sincerely,

Stanley D. Abrams

SDA:dw

cc: Rose Krasnow

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January 28, 2010

VIA ELECTRONIC AND OVERNIGHT MAIL

Dr. Royce Hanson, Chairman and Members
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910

Re: January 4, 2010 Memorandum
Application of Resubdivision Criteria to Non-Residential Uses
Public Hearing – February 18, 2010

Dear Dr. Hanson and Members of the Board:

The undersigned represents Kensington Nursing, LLC ("Kensington Nursing"), the owner of a nursing home referenced by the Planning staff as one of the applications under consideration for resubdivision that is currently under review by the staff. Kensington Nursing is comprised of approximately 6.2 acres and is zoned R-60, being located in the southeast quadrant of Drumm Avenue and McComas Avenue in Kensington.

Kensington Nursing supports the recommendation of the staff in its January 4, 2010, memorandum to the Montgomery County Planning Board that the Board's current policy of subjecting lots containing or proposed for non-residential uses to the residential resubdivision criteria is based on a misapplication of the subdivision regulations and is inconsistent with the plain language or the intent of the regulations. Section 59-29(b)(2) only applies to residential lots on a plat for resubdivision for residential uses.

In the introduction section of its January 4, 2010 memorandum, the staff points out the urgency of resolving this issue in light of several pending resubdivision applications before the Board, some involving existing non-residential uses in residential zones proposed for expansion, and others involving new non-residential uses in residential zones. However, in addition to the two categories referenced by the staff, Kensington Nursing falls into a third category, since its application seeks neither an expansion of its existing institutional use nor a new non-residential use but, rather, the creation of two new residential lots from the 6.2 acre property while retaining the nursing home without change.

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January 29, 2010

Via Email
mcp-chair@mncppc-mc.org

Royce Hanson, Chairman
Maryland National Capital Park
& Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Re: **Resubdivision "Policy"**

Dear Chairman Hanson:

I strongly urge the Board to reject the proposed resubdivision "Policy" for the following reasons:

I. **The proposal does not address a "Policy" issue, and adopting it would be contrary to the Subdivision Ordinance.**

II. **The Board correctly decided over twelve years ago that resubdivision standards apply to the residential zoning of the lot and not the residential use of the lot.**

III. **No good reason exists for reversing this long-standing decision.**

IV. **The proposed change creates problems.**

Each of these reasons is explained below.

I. THE PROPOSAL DOES NOT ADDRESS A "POLICY" ISSUE, AND ADOPTING IT WOULD BE CONTRARY TO THE SUBDIVISION ORDINANCE

A policy addresses how the Board should rule on a matter within its statutory jurisdiction, but where the applicable statute either does not explicitly prescribe the outcome or provides for the exercise of judgment by the Board. As Chairman Hussmann noted during the 1998 hearing on this matter:

> "...what's before us, a policy, or a law or standard? And I think that almost by definition, you can't have a policy or a standard that is contrary to the law." [Tr. 74-75.]

As discussed below, the Chairman and three other Board members concluded that the issue was one of law which required the subdivision criteria to be applied to residentially zoned lots, regardless of their use. This cannot be changed by adopting a contrary "policy."

II. THE BOARD CORRECTLY DECIDED OVER TWELVE YEARS AGO THAT RESUBDIVISION STANDARDS APPLY TO THE RESIDENTIAL ZONING OF THE LOT AND NOT THE RESIDENTIAL USE OF THE LOT

1. In 1998, after extensive hearings and deliberations, the Board concluded that the plain meaning of §50-29(b) required that the resubdivision criteria be applied to lots zoned residential and not merely lots used for residential purposes. This decision is clearly correct. Any change of this long-standing decision should be made by the Council through an amendment to the law.

2. As stated by Chairman Hussmann, Tr. 74-75:

> "And I think the key issue, when you look at the law, is that paragraph that begins with, at the top, B, [Section 50-29(b)] additional requirements for residential lots. And in my opinion, there, this provision (b)(2) ***makes no sense unless it applies, not to the use that someone wants to put to the piece of property*** but to the lot previously created from [sic] [for] residential purposes. I think this law was established to protect communities and neighborhoods. And to give people...who have already invested most of their life to a piece of property, some confidence that when they are in a plat of subdivision, that the future of that subdivision will be reasonably confirmed to the size, shape, alignment, width, area and suitability for residential use of the subdivision.
>
> * * * *
>
> This section makes no sense unless it is meant to apply to residential lots previously created in the community designed to protect the people who have invested their, most of their, life savings and assets in that neighborhood.... And when you say now it wasn't meant

> to apply to a special exception, there's not only no language in here, but in fact, where an exception exists, it is explicit. It says it does not apply to agriculture.[1] ...I am not a lawyer, but the statutory construction, start making a list of things that are excluded, you start omitting anything else. If it meant to say it didn't apply to special exceptions, it would way so. And that is not in here anywhere. And so when I read that resubdivision of residential lots, its talking about the lot that already exists. Created for residential purposes. ***Otherwise, this thing has no meaning whatsoever, as I see it, if you can pick and choose which category you want to put it into.***" [Emphasis added.]

Accordingly, the Board adopted the following motion [Tr. 113]:

> "That it is the understanding of the Board that the language of 50-29 applies, 1) that it applies to assemblages as well as divisions, and ***2) 29(b) which refers to residential lots, refers to the lot, to the zoning of the lot and not the intended use of the lot.***" [Emphasis added.]

III. NO GOOD REASON EXISTS FOR REVERSING THIS LONG-STANDING DECISION

This long-standing precedent is legally correct and there is no good reason to reverse it.

1. The Board has implemented this decision for the past twelve years and neither the County nor the republic has been in peril.

2. Applying the subdivision criteria to residentially zoned lots irrespective of their use has not and does not preclude non-residential uses on these lots, such as special exceptions. In some cases, the applicant must apply for a waiver, but the need to evaluate waivers in some cases is no reason to create a policy that would obviate case-by-case assessment of waiver criteria.

A waiver evaluation is a process that ensures protection for the homeowners in the vicinity of the proposed subdivision as the Board must find that the waiver is:

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[1] Section 50-2 – Definition of Subdivision: "The division or assemblage of a lot tract or parcel of land into one (1) or more lots...; provided, that the definition of subdivision shall not include a bonafide division of or partition of exclusively agricultural land not for development purposes. A resubdivision is a subdivision.

a. The minimum necessary to provide relief from the requirements;

b. Consistent with the purpose and objectives of the General Plan; and

c. Not Adverse to the public interest. [§50-38(a)]

The materials accompanying the proposal to change resubdivision "policy" state that granting such waivers in certain instances "may be difficult to justify". However, no examples, in fact not even one example – of an actual Board decision reporting a denial of a waiver for a special exception is cited. In any case, if in some instances it is not possible to grant such a waiver because the waiver criteria cannot be met, this would be consistent with the Council's intent in adopting the statutory provisions to protect homeowners in the vicinity. Only the Council should be able to eliminate these protections.

3. Further, we note that a principal purpose of the proposal, to permit otherwise acceptable special exceptions that require large lots, would not be achieved by this proposal. Specifically, there are numerous special exceptions which are residential, e.g., group homes, §59-G-2.26; housing for elderly, §59-G-2.35; nursing homes or domiciliary care homes, §59-G-2.37. None of these uses are non-residential and therefore would not be subject to the policy.

VI. THE PROPOSED CHANGE WOULD CREATE PROBLEMS

A decision applying resubdivision criteria to only lots having "residential uses" rather than to lots that are zoned residential gives rise to major problems.

There are numerous residential uses in the Zoning Ordinance which are on lots not considered to be zoned residential. For example, R-CBD Zone, §59-C-6.2; P-D Zone, §59-C-7.1; TS-R Zone, §59-C-8.5. I believe it would not be appropriate to apply the resubdivision standards of §50-29(b) to such residentially used lots. Presumably the Board agrees, and would not apply the subdivision criteria in such situations. But, this places the Board in the position properly found unacceptable by Chairman Hussmann of having to "pick and choose which category you want to put it into," since the statutory provision would be rendered meaningless. [Tr. 75].

I urge the Board to reject the "Policy" and thank the Board for consideration of these comments.

Sincerely yours,

Norman G. Knopf

cc: Cathy Conlon, MNCPPC catherine.conlon@montgomeryplanning.org
Rose Krasnow, MNCPPC rose.krasnow@montgomeryplanning.org

MCP-CTRACK

From: DeSimone, Cynthia [CDeSimone@adw.org]
Sent: Friday, January 29, 2010 2:10 PM
To: MCP-Chair
Subject: Resubdivision Policy
Attachments: Letter to Chairman Hanson.pdf

Dear Chairman Hanson:

Please find a letter from Jane Belford, Chancellor of the Archdiocese of Washington, attached to this email for your review.
Please let me know if you have any trouble retrieving this document.

Sincerely,
Cynthia DeSimone

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January 29, 2010

Chairman Royce Hanson
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910

By U.S. Mail and E-Mail at MCP-Chair@mncppc-mc.org

Re: "Resubdivision Policy"

Dear Chairman Hanson:

The Roman Catholic Archdiocese of Washington is an active participant in the life of Montgomery County, Maryland. The Archdiocese maintains 38 parish churches or missions and 24 parochial schools within Montgomery County and counts its County parishioners in the tens of thousands. In addition, the Archdiocese provides numerous social services within the County, including the housing programs of its subsidiary Victory Housing, Inc. and many programs of Catholic Charities.

In pursuit of the Archdiocesan commitment to expand our Church, to make Catholic education available to all who seek it, and to provide social services for our neighbors in keeping with our faith's teaching, the Archdiocese has often pursued zoning and subdivision cases in the County. These cases serve the purpose of assuring that public interests are aired and community needs assessed before approvals are granted.

We are aware that the Planning Board is revisiting its interpretation and implementation of certain provisions of the Subdivision Ordinance as they apply to the assemblage of lots in residential zones. The assemblage of lots is often needed in order to achieve a development lot large enough for institutional use--for churches, housing for the elderly or infirm, private schools, daycare and care homes. To the extent redevelopment is being encouraged in areas of the County with small lot subdivisions, the combination of lots will become necessary to make room for these kinds of institutional uses which are an essential part of the fabric of an integrated residential community. The desire to mix uses and to improve the quality of life by reducing dependence on automobile travel also is served by allowing placement of institutional uses where our homes are.

At present, under the "resubdivision criteria," an assemblage of lots to accommodate an institutional use becomes nearly impossible (even where in the case of a special exception, the Board of Appeals, after full hearings, may have found that the institutional use itself harmonizes with the residential character of the neighborhood) if the new lot is bigger, or is of a different shape or width, for example, than most of the residential lots surrounding it. As applied under an existing 1998 interpretation, the resubdivision criteria apply to the assembly of lots if they are residentially zoned, regardless of their intended use. We believe this interpretation is unduly restrictive and not compelled by the wording of Section 50-29 of the Subdivision Ordinance, for the reasons well-articulated in the Staff Report dated January 5, 2010.

We urge the Planning Board to give favorable consideration to the recommended change in applying the Subdivision Ordinance to resubdivision requests for non-residential uses, so as to apply the Section 50-29(c) criteria to non-residential uses in a resubdivision application rather than the criteria for residentially used lots in Section 50-29(b).

Thank you for the opportunity to comment on this matter.

Sincerely,

Jane G. Belford

Jane G. Belford
Chancellor

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JSKLINE@MMCANBY.COM

February 12, 2010

Ms. Rose Krasnow
Chief, Development Review
(Build) Division
Maryland-National Capital
Park & Planning Commission
8787 Georgia Avenue
Silver Spring, MD 20910

Re: Resubdivision Policy

Dear Rose:

Thank you for the additional time in order to be able to formulate and submit comments on the Planning Board's review of the resubdivision criteria.

Let me provide you with three examples of where I think that interpretation of the resubdivision criteria applied to assembly of residential lots for non-detached residential purposes would be contrary to the public interest.

1. Churches and religious institutions. There are so few "parcels" of residentially-zoned land that are available for acquisition by churches, I am sure that religious institutions must be looking to acquire individual single family lots and assembling them into a single larger platted parcel. It strikes me that a conservative or literal interpretation of the resubdivision criteria could frustrate the development of new churches in Montgomery County.

As a concrete example, we represent a Catholic organization known as "Legion of Christ." The organization presently owns a single family detached residence on Falls Road which it uses as a residence for up to five nuns who reside in the house. Legion of Christ is trying to acquire an adjacent single family detached residence with the goal of assembling the two residentially-zoned lots that it will then own into a single parcel of land after which it will construct a convent on the property to accommodate a larger number of nuns.

To accomplish this goal, the client has approached an adjacent property owner who was the original subdivider of the two lots which the church hopes to control and redevelop in the future. That property owner, when it sold off the two lots for development into single-family houses, put a covenant on the property indicating that the lots could only be used as single-family residences. Our client has explained to the original subdivider its program and we anticipate that the subdivider will consent to extinguishment of the covenant.

My point here is that the original subdivider has determined that assembly of two of its lots originally intended to be used exclusively for single-family detached residences is not inconsistent with the developer's original "common scheme of development." It would be a disappointment if the subdivision regulations were then interpreted in a way that would be contrary to the original subdivider's view of how the lots could be assembled and used.

2. Hospitals. We represent Montgomery General Hospital. A recent donation to Montgomery General Hospital involved residential lots that logically should be incorporated into the hospital's main platted campus. While I realize that there is a question about incorporating single family detached residentially-zoned land with residences or former residences into hospital property, anything that would inhibit the growth and logical expansion of hospitals should be considered a negative factor.

3. Housing for the elderly. We represent Victory Housing, Inc., the charitable housing arm of the Catholic Diocese of Washington. Victory Housing has been very aggressive in building affordable projects for the elderly throughout Montgomery County and the Metropolitan Regional area. We recently completed for Victory Housing a project that involved assembly of eight different lots originally platted for single-family residences that will be assembled into a single parcel of land to allow development of an 84-unit affordable apartment building for the elderly. Admittedly, this project is located in the City of Rockville but, nevertheless, it is only a matter of time before Victory Housing finds itself in a similar situation in a Montgomery County setting. It would be a shame if Victory Housing could not go forward with a meritorious project due to a strict interpretation of the resubdivision criteria.

As a final thought, let me give you a legal argument why I think that a strict interpretation of the resubdivision criteria regarding the assemblage residential lots for non-residential uses would be contrary not only to County policies but also to other County laws and regulations.

At least two of the categories of uses that I described above require special exceptions before they can be placed in residential zones. In the case of hospitals, (and I believe that all of the hospitals that I can think of in Montgomery County are located in residentially-zoned areas), the minimum acreage requirement is 5.0 acres (Section 59-G-2.31(1) of the Zoning Ordinance). If we were to take a new hospital through the special exception process, or an amendment to an existing hospital, and we meet all of the standards for the granting of a special exception (Section 59-G-1.21(a): *"will be consistent with the general plan for the physical development of the district; will be in harmony with the general character of the neighborhood, considering population density, design, scale, and bulk of any proposed new structures. . .;" "will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties of the general neighborhood;" " will not adversely effect the health, safety, security, morals or general welfare of residents, visitors, or workers in the area at the subject site"*), then I think that it could be argued that denial of an application to resubdivide residentially-zoned lots to implement a special exception granted through a rigorous review process

would be contradictory to the findings presumably made by the Staff, Planning Board, Hearing Examiner and Board of Appeals in the special exception process. I realize that Chapter 50 has as a goal the "harmonious development of the district" but I would argue that the successful completion of the special exception process, which would necessarily involve subdivision to incorporate single-family detached zoned lots into a larger parcel of land in order to implement the special exception, must be approved in order to be consistent with the findings made during the special exception process.

I hope that these brief comments provide you with some information that you can share with the Board in encouraging them to develop a more flexible policy toward assemblage of residential lots intended to support non-residential uses.

Thank you for your consideration of these comments.

Sincerely yours,

MILLER, MILLER & CANBY

Jody

Jody S. Kline

JSK/cdp

cc: Cathy Conlon
Rich Weaver
Erin Grayson
Patrick Butler

WILLIAM KOMINERS

February 5, 2010

VIA ELECTRONIC MAIL

Ms. Rose Krasnow
Chief, Development Review Division
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910

Re: Resubdivision Criteria

Dear Ms. Krasnow:

This letter is written to provide comments for the Planning Board's planned discussion of the resubdivision criteria scheduled for February 25, 2010.

I have reviewed the Staff Report, dated January 4, 2010, regarding the application of the resubdivision criteria, and the Statement of Joseph R. Davis, dated January 29, 2010, on the same subject. While I like the Staff's conclusion -- that the resubdivision criteria should not be applied to resubdivision of lots that are zoned residential, but are intended for non-residential uses -- I am concerned about the validity of the rationale that has been advanced to reach this conclusion. Further, I believe that this approach could result in new unintended consequences for application of the resubdivision criteria in the future that should be clarified or clearly excluded now. The Board should take this opportunity to ensure that the process under Section 50-29(b)(2) is applied only in instances that are appropriate and intended.

I believe that under a plain reading of Section 50-29(b)(2), when read in the full context of the remainder of Section 50-29 and of the Code generally, the term "residential lots" can only intend to refer to "lots that are classified in a residential zone," irrespective of use. At the same time, I also believe that application of those resubdivision criteria to the assemblage of already recorded lots is not consistent with the intent of the 1985 legislation that caused such consolidation to be defined as a "subdivision." Causing consolidations to be treated as a "subdivision" in 1985, as noted by Mr. Davis on p. 1 of his Statement, was intended to assure application of the Adequate Public Facilities Ordinance (APF) to the property and its future use.

My principal concern with the Planning Staff's reasoning arises from concluding that the meaning of "residential lot" under Section 50-29(b)(2) is a "lot primarily

containing residential uses, regardless of zone." (Staff Memo, p. 3). With this reasoning, Staff concludes that the resubdivision criteria is not meant to apply to all residentially zoned lots, but rather only to lots that are to be used for residential purposes. Yet the Subdivision Regulations are not intended to regulate uses; the zoning of a property regulates the uses allowed. Having the Board regulate based on the use of the property, starts down a slippery slope, and is really outside the purview of the Subdivision Regulations.

Under the interpretation now proposed by Staff, assemblage by resubdivision would be allowed for a special exception. That is a good thing. But, there is no guarantee that the special exception will actually go forward. Many circumstances could cause the special exception to be abandoned before implementation. Despite this, the land will remain assembled; the resubdivision does not get undone. Without the special exception, the land can then be "used" for residential uses because it remains in a residential zone, but will not have been evaluated under the resubdivision criteria. This begs the question of whether such an analysis is necessary.

In Paragraph 4 on p. 4 of the Staff Report, part of the rationale used by Staff is the example of applying the resubdivision criteria to residentially used lots in the RDT Zone -- even though the RDT is an "agricultural" zone. If the resubdivision criteria is to be applied in this manner and based on use, what happens in other "non-residential" zones, like the CBD zones, or other mixed use zones, in the case of a multi-family residential use? Under the RDT/use rationale, if platted lots "zoned" CBD are to be resubdivided to be "used" for multi-family "residential," then the resubdivision criteria would apply. If the CBD zoned property is improved with a commercial building that is converted to residential use and seeks to resubdivide for some purpose, the resubdivision criteria would apply. This does not make sense in the context of what the resubdivision criteria evaluate.

This problem really arises from the fact that the Board interprets the resubdivision criteria to apply not only to the division of land into additional lots (i.e., more lots than existed originally), but also to the assemblage or consolidation of land into fewer lots than existed originally. I believe that the resubdivision criteria were never intended to apply (and should not apply) to a consolidation of lots that results in the same number of lots or fewer lots than what existed originally. The other subdivision standards, including APF, might apply, but the resubdivision criteria should not. The safe and efficient layout of these lots can be addressed using the general standards contained in Chapter 50; the resubdivision criteria are not necessary.

As an alternative to the Staff's proposal, I suggest the following:

"The Planning Board should not require resubdivisions of lots in single-family residential zones that result in the same number of lots, or a lesser number of lots than the number of original lots proposed for the resubdivision, to comply with the resubdivision criteria."

Finally, if the Board does decide to interpret Section 50-29(b)(2) as suggested by the Staff Report, then the Board should clarify that the resubdivision criteria apply to such residential uses only in the single-family residential zones and not in any other zones, irrespective of residential use. The resubdivision criteria should not apply even to residential uses when those uses are located in multi-family, mixed use, and CBD zones, etc. (or the proposed CR Zone, if adopted).

The proper application of the resubdivision criteria is only when additional lots are being created (over and above the number of those existing lots included in the proposed resubdivision), rather than based on the proposed use of the lots. If the Board does not agree and instead bases application on the "use" of the property, then the Board should clarify that such resubdivision criteria will not be used for residential uses in multi-family, mixed-use, CBD, and similar zones (and the CR Zone, if adopted).

Thank you for your consideration of my views.

Very truly yours,

William Kominers

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LINOWES | AND | BLOCHER LLP
ATTORNEYS AT LAW

January 29, 2010

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Via Hand Delivery
Dr. Royce Hanson
Chairman
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Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Application of Resubdivision Criteria to Non-Residential Uses

Dear Dr. Hanson and Members of the Planning Board:

On behalf of Darnestown Development, LLC t/a The Goddard School ("Goddard"), the applicant in a pending Special Exception (S-2759) for a child day care in Clarksburg, Maryland, we are submitting this letter to be included in the record of the Planning Board's reconsideration of the Resubdivision Criteria contained in Section 59-20(b)(2) of the Montgomery County Code (the "Resubdivision Criteria"). We fully support Planning Staff's recommendation that you reconsider your prior interpretation of the Resubdivision Criteria and find that it does not apply to non-residential uses in residential zones.

By way of background, the pending Special Exception was filed to develop a child day care facility on Lots 9 and 10 of the "Musgrove's Addition to Neelsville" subdivision (the "Property"), located in the R-200 zone. Goddard has proposed that Lots 9 and 10 will be combined into one lot via a preliminary plan of subdivision to be filed at the end of the special exception process. The new lot will result in one trapezoid-shaped lot containing approximately 5 acres.

The Property is located on Frederick Road (MD 355) north of West Old Baltimore Road. The Property is surrounded by a mix of residential uses including to the west "Musgrove's Addition to Neelsville" (R-200) and "Clarksburg Heights" (R-200/TDR), to the north and east "Greenridge Acres" (R-200), to the southwest "Beau Monde Estates" (R-200), and single-family residences (R-200) confronting the Property on Frederick Road. The Property was formerly part of approved Preliminary Plan 120050950 known as the "Tapestry" subdivision (the "Preliminary

Plan"), which included 78 lots for 66 single-family detached dwelling units and 12 single-family semi-detached dwelling units. A site plan application, Site Plan 820050370 (the "Site Plan"), was filed to implement the Preliminary Plan, however, it never went to the Planning Board for approval, and the "Tapestry" subdivision was not constructed. The proposed Special Exception would place a child day care facility in the midst of a large concentration of residential subdivisions, along a major commuter route, which many of the parents who will utilize the day care facility already use to get to and from work.

The Resubdivision Criteria contained in Section 50-29(b)(2) states:

(b) *Additional requirements for residential lots.*

(2) *Resubdivision. Lots on a plat for the resubdivision of any lot, tract or other parcel of land that is part of an existing subdivision previously recorded in a plat book shall be of the same character as to street frontage, alignment, size, shape, width, area and suitability for residential use as other lots within the existing block, neighborhood or subdivision.*

It is our position that Section 50-29(b)(2) only applies if a lot is to be used for residential purposes, and Goddard's proposed non-residential use as a child day care would not trigger application of this section. Our argument is both practical and legal. From a practical standpoint, the purpose of Section 50-29(b)(2) is to insure that residential subdivisions are reasonably uniform, as opposed to a patchwork or hodgepodge of large and small homes and lots or irregularly shaped lots in the midst of regularly shaped ones.

When, however, a special exception is proposed in a residential subdivision, issues of compatibility with the general character of the neighborhood, the scale and bulk of the structures, the intensity and character of activity, along with a number of other considerations are accounted for in the special exception process. In contrast, residential lots, which are proposed for resubdivision solely for residential development, would not be subject to a compatibility requirement, *but for* Section 50-29(b)(2). Therefore, it is reasonable to surmise that this section was not intended to duplicate or usurp the special exception process, but was instead intended to provide a compatibility review for lots to be used for single-family residences where none would otherwise exist.

The legal argument against applying the residential Resubdivision Criteria to non-residential development is related to a practical one in that the special exception process is one that is conducted by, and under the authority of, a different agency, the Montgomery County Board of Appeals (the "Board of Appeals"). In the general scheme of zoning, planning and subdivision, Montgomery County is unique among jurisdictions in the region and the Country as a whole. Essentially, the bi-county state agency, Maryland-National Capital Park and Planning

Commission (M-NCPPC), is delegated certain authority by state law typically structured in the more common legislative, executive and judicial branches of government that provide the basic balance of power necessary for our system of government. Where the District Council intends to delegate further scrutiny as to the permissiveness of a particular use under the Zoning Ordinance, this delegation is made clear by labeling the use as a special exception, establishing the general and special conditions for considering the appropriateness of the use at a specific location, and retaining for itself this authority or delegating this authority to the appropriate agencies (in this case, the Board of Appeals).

The Board of Appeals is granted jurisdiction over special exceptions in Article 25A §5(U) of the Maryland Annotated Code. *See People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 70-71, 956 A.2d 166, 175-76 (2008) (The Court of Appeals explained that special exceptions add flexibility to a comprehensive legislative zoning scheme by serving as a "middle ground" between permitted uses and prohibited uses in a particular zone. A permitted use in a given zone is permitted as of right within the zone, without regard to any potential or actual adverse effect that the use will have on neighboring properties. A special exception, by contrast, is merely deemed prima facie compatible in a given zone and must meet certain other criteria).

The interaction of zoning laws and subdivision regulations is intended to produce consistency and will operate efficiently only when each agency (in this case the Planning Board and the Board of Appeals) performs functions within their respective grant of authority. When an agency usurps the functions of another, unpredictable and inconsistent results will arise. The inconsistency here is that a special exception in a residential zone, which is designated so by the District Council, should not be derailed by applying general residential Resubdivision Criteria because special exceptions are the province of the Board of Appeals. Section 50-29 (b)(2) was never intended to change, and could not have changed, the balance of power in this manner since the authority of the Board of Appeals and the Planning Board are individually determined by State law.

The section following the residential Resubdivision Criteria, Section 50-29(c), specifically deals with non-residential uses and states as follows:

(c) *Non-residential lots. Depth and width of lots reserved or laid out for commercial and industrial properties shall be adequate for the off-street service and parking requirements needed by the type of use and development proposed.*

This section makes practical and legal sense to apply to a non-residential use subject to special exception as it is limited to off-street loading and parking, two items, which are routinely

determined during subdivision, and are not within the authority and discretion of the Board of Appeals.

Thank you for considering our testimony and including it in the record of this matter. If you have any questions, or need additional information, please contact us.

Sincerely,

LINOWES AND BLOCHER LLP

Stephen Z. Kaufman

Debra S. Borden

cc: Mr. Ross Flax, *Darnestown Development, LLC*
Ms. Cathy Conlon, *M-NCPPC*

L&B 1285270v2/10430.0005