



MONTGOMERY COUNTY PLANNING BOARD
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

JUN 17 2013

MCPB No. 13-74
Project Plan No. 920130020
Project Name: 8001 Newell Street
Hearing Dates: December 20, 2012 and May 16, 2013

RESOLUTION

WHEREAS, under Montgomery County Code Division 59-D-2, the Montgomery County Planning Board ("Planning Board") is authorized to review project plan applications; and

WHEREAS, on September 25, 2012, Comstock Newell, LLC ("Applicant"), filed an application for approval of a project plan for 3,100 square feet of retail and 156,815 square feet of residential development with a maximum of 187 dwelling units, including 12.5% MPDUs; and

WHEREAS, the project is located on an existing 0.94-acre lot bounded on the east side by Eastern Avenue in the District of Columbia and on the north side by Newell Street; and

WHEREAS, the Subject Property is located in the CBD-1 and Ripley/South Silver Spring Overlay zones and included in the 2000 Silver Spring Central Business District Sector Plan ("Sector Plan"), and

WHEREAS, Applicant's project plan application was designated Project Plan No. 920130020, 8001 Newell Street ("Application" or "Project Plan"); and

WHEREAS, following review and analysis of the Application by Planning Board Staff ("Staff") and other governmental agencies, Staff issued a memorandum to the Planning Board, dated December 7, 2012, setting forth its analysis and recommendation for approval of the Application, subject to certain conditions ("Staff Report"); and

WHEREAS, on December 20, 2012, the Planning Board held a public hearing on the Application, and at the hearing, the Planning Board heard testimony and received evidence submitted for the record on the Application; and

Approved as to
Legal Sufficiency:

WHEREAS, at the Hearing, the Planning Board deferred the Application at the request of the Applicant in order to more fully address height and setback restrictions in the Sector Plan and zoning Ordinance; and

WHEREAS, on April 19, 2013, the Applicant submitted revised plans modifying certain elements of the proposed building and site design; and

WHEREAS, following additional review and analysis of the Application by Planning Board Staff ("Staff") and other governmental agencies, Staff issued a new memorandum to the Planning Board, dated May 3, 2013, setting forth additional analysis and a recommendation for approval of the Application, subject to certain conditions ("Staff Report"); and

WHEREAS, on May 16, 2013, the Planning Board continued the public hearing, and heard additional testimony and received additional evidence on the Application; and

WHEREAS, at the Hearing, the Planning Board voted to approve the Application subject to certain conditions, on motion of Commissioner Dreyfuss, seconded by Commissioner Presley, by a vote 5-0, Commissioners Anderson, Carrier, Dreyfuss, Presley, and Wells-Harley voting in favor;

NOW, THEREFORE, BE IT RESOLVED that, the Planning Board APPROVES Project Plan No. 920130020, 8001 Newell Street, for 3,100 square feet of retail, and 156,815 square feet of residential development with a maximum of 187 dwelling units, including 12.5% MPDUs, subject to the following conditions:

1. Development Ceiling

The development is limited to 159,915 square feet of gross floor area

- | | | | |
|----|-----------------|---------|------|
| a. | Residential | 156,815 | s.f. |
| b. | Non-Residential | 3,100 | s.f. |

2. Building Height and Mass

The development is limited to the building footprints delineated in the Project Plan drawings submitted to M-NCPPC dated April 19, 2013, unless modified at site plan review. Building height is limited to a height of 74 feet on Newell Street and to 54 feet on Eastern Avenue as determined by the Department of Permitting Services approved building height measurement point(s).

3. Building Materials

The building is to have the level of quality and style of the materials shown in the rendering on page 8, submitted with the project plan submission dated April 19, 2013 and elevations, sheets A09-A10.¹

4. Housing

The development will provide a minimum of 12.5% moderately priced dwelling units (MPDUs) based upon the total number of units, in accordance with Chapter 25A.

5. Transportation

- a. The Applicant must limit future development on the site to 3,100 square-feet of retail and 187 multi-family residential units.
- b. The Applicant, as part of a future site plan, must show the Newell Street right-of-way of 35 feet from the roadway right-of-way centerline along property frontage consistent with the 2000 Approved and Adopted Silver Spring CBD Sector Plan
- c. The Applicant must coordinate with the District of Columbia Department of Transportation on any proposed improvements along Eastern Avenue.
- d. The Applicant must enter into a Traffic Mitigation Agreement (Agreement) with the Planning Board and the Montgomery County Department of Transportation (MCDOT) to participate in the Silver Spring Transportation Management District (TMD). The Applicant must coordinate details of the Agreement with MCDOT as well as Planning Department Staff and must execute the Agreement prior to the release of any residential building permit for the development.

6. Public Use Space & Public Amenities and Facilities

- a. The Applicant must provide a minimum of 21.87% of the net lot area for on-site public use space and a minimum of 18.17% of the net lot area for on and off-site public amenity and facility space. The final design and details will be determined during site plan review.
- b. The public use space must be easily and readily accessible to the general public and available for public enjoyment.
- c. The Applicant must provide bio-retention areas and other features in general conformance with the illustrative landscape plan depicted in the landscape plan L-01 dated April 19, 2013.

¹ The elevations referred to in this condition were submitted on November 13, 2012.

- d. The Applicant must present the plaza designs and public artwork to the art review panel prior to submittal of the site plan amendment.

7. Staging of Amenity Features

- a. The development will be completed in one phase. A detailed development program will be required prior to approval of the certified site plan.
- b. The Applicant must complete the on-site public use space improvements in accordance with a development program to be developed at site plan.
- c. The Applicant must install the landscaping no later than the next growing season after completion of the building and site work.

8. Maintenance and Event Management Organization

Prior to issuance of use-and-occupancy permits, the Applicant will create and implement a maintenance plan for all on-site public use space unless an alternative arrangement is made with another public entity.

9. Coordination for Additional Approvals Required Prior to Site Plan Approval

The Applicant must obtain written approval from MCDOT for the final design and extent of any and all streetscape improvements within the rights-of-way prior to approval of the site plan.

BE IT FURTHER RESOLVED that all elements of Project Plan No. 920130020, 8001 Newell Street, stamped received by M-NCPPC on April 19, 2013, are required except as modified by the above conditions of approval; and

BE IT FURTHER RESOLVED that, having considered the recommendations and findings of its Staff as presented at the hearings and as set forth in the Staff Reports, which the Planning Board hereby adopts and incorporates by reference (except as modified herein), and having considered the entire record, all applicable elements of § 59-D-2.43, and the relevant provisions of Section 59-D-2.42, the Planning Board, with the conditions of approval, FINDS:

- (a) **The development complies with all of the intents and requirements of the CBD-1 and Ripley/South Silver Spring Overlay zones as applied comprehensively to the Project, and to that portion of the Project within each zone.**

Intents and Purposes of the CBD Zones

The proposed development conforms to the intents and purposes of the CBD zones as follows:

- (1) *"To encourage development in accordance with an adopted and approved master or Sector Plan ... by permitting an increase in density, height, and intensity where the increase conforms to the master or Sector Plan ... and the site plan... is approved on review by the Planning Board."*

With respect to density, the Sector Plan recommends redevelopment of vacant or under-used buildings in South Silver Spring while protecting surrounding residential neighborhoods. Moreover, the Sector Plan calls generally for a residential downtown. This redevelopment replaces a one-story self-storage facility with a five to seven story mixed use development that is compatible with the surrounding residential neighborhood.

The design guidelines in the Silver Spring Central Business District Sector Plan recommend height setbacks adjacent to residential neighborhoods in order to ensure compatibility with adjacent residential neighborhoods. The Project Plan establishes generous setbacks on Eastern Avenue to maximize compatibility with the one-family homes across the street in the District of Columbia. Compatibility is achieved through increased setbacks from the adjoining properties, adding activating uses on Newell Street to address safety, locating an appealing public use space at the corner of Newell Street and Eastern Avenue and varying the height of the building from 54 feet to a maximum of 74 feet, which is considerably less than the 90 feet permitted in the zone.

- (2) *"To permit a flexible response of development to the market as well as to provide incentives for the development of a variety of land uses and activities in central business districts to meet the needs and requirements of workers, shoppers and residents."*

The proposed development meets the needs of workers and residents by providing additional housing and the opportunity for people who work in Silver Spring to live there too. The project would also serve the needs

of residents and shoppers by providing a neighborhood-serving retail space.

- (3) *“To encourage designs which produce a desirable relationship between the individual buildings in the central business district, between the buildings and the circulation system and between the central business district and adjacent areas.”*

The relationship of the proposed buildings to existing buildings is appropriate for a central business district. In the CBD, adjacent buildings with windows are required to be set back at least 15 feet from each other or 30 feet if both buildings have windows. This Application exceeds that standard in order to minimize the impacts on available sunlight and existing views, by setting the building back 60 feet from the adjacent 8045 Newell Street building and 30 feet from the rear property line. It is also creating a passive green area within the 30-foot setback to enhance the view of the residents of 8045 Newell Street. In addition, the proposed building is set back 36 feet from the Eastern Village Cohousing condominiums and 29 feet from the property line it shares with that building.

Some plan opponents, from the neighboring 8045 Newell Street building, expressed concern about the impact of the proposed building on their access to air and light. But while there will be some impact, the Board does not believe it will be nearly as bad as some fear. For purposes of the findings that the Board is tasked with making, the proximity of this building to surrounding buildings is appropriate for, and to be expected in, an urban setting such as this. The Board saw ample evidence that in the vicinity of this project there are many courtyards between buildings that are far narrower than the 60 foot setback from the 8045 Newell Street building that this project will deliver. In context, the generous setback of the proposed building, combined with the fact that the building is similar in height to most other nearby buildings, meets or exceeds the setback requirements and ensures its compatibility with surrounding buildings.

The development will enhance pedestrian, cyclist, and vehicular circulation by limiting auto access to one point onsite and providing all required residential parking on-site, thereby limiting future demand for

on-street parking and spaces in the public parking garage. It will enhance the circulation system between the central business district and adjacent areas by fulfilling the Sector Plan goal of creating a green street on Newell Street.

- (4) *"To promote the effective use of transit facilities in the central business district and pedestrian access thereto."*

The development is approximately 0.5 mile from the Silver Spring Metro and 180 feet from the nearest bus stop. As conditioned, the location and accessibility of the development to the local transit system effectively implements the Sector Plan transit and sustainability goals.

- (5) *"To improve pedestrian and vehicular circulation."*

Vehicular circulation is limited to one ingress and egress point for daily circulation. A loading space uses the same access point.

The project provides numerous enhancements to increase the walkability of the South Silver Spring Overlay District, including an upgraded streetscape on Newell Street and an open space at the corner of Newell Street and Eastern Avenue that will accommodate diagonal pedestrian "cut-through."

- (6) *"To assist in the development of adequate residential areas for people with a range of different incomes."*

The development provides 187 residential units, 12.5% of which are Moderately Priced Dwelling Units, providing for a range of different tenant incomes.

- (7) *"To encourage land assembly and most desirable use of land in accordance with a Sector Plan."*

The Sector Plan encourages, but does not require, land assembly. The development will be built on an existing recorded lot, surrounded by developed properties that are not suitable for assembly into this project. The development of this lot on its own, instead of as part of a larger assembly of land, will benefit this area by contributing to the organic

sense of urban growth that occurs when properties are developed separately over time instead of all at once.

Further Intentions of the CBD-1 Zone

Section 59-C-6.213(a) of the Zoning Ordinance states further intentions of the CBD-1 zone:

- (1) To foster and promote the orderly development of the fringes of the central business districts of the county so that these areas will provide land uses at a density and intensity which will encourage small business enterprises and diverse living accommodations, while complementing the uses in the interior portions of these districts; and*
- (2) To provide a density and intensity of development which will be compatible with adjacent land uses outside the central business districts.*

As further described above, this Application will provide land uses at a density and intensity that encourages diverse housing (through inclusion of moderately priced dwelling units), small business enterprises (through 3,100 square feet of retail space) and complements the uses of the interior of the CBD and is compatible with adjacent land uses outside the Central Business District through the use of restricted heights and generous setbacks.

Requirements of the CBD-1 and the Ripley/South Silver Spring Overlay Zone

The data table demonstrates the project's conformance with the project plan finding and with optional method development standards. Among other standards, the development meets the area, public use space, building height, and density requirements of the zone.

DATA TABLE

Development Standard	Permitted/ Required	Approved by the Planning Board and Binding on the Applicant
Building Height (feet)		
CBD-Zone-59-C-18.192(b)(1)(E)	90'	54' on Eastern Avenue
		74' on Newell Street
CBD-Zone-RSSOZ		
Within 60' of right of way:	45'	0'
Beyond 60' of right of way:	90'	74'
Setbacks (feet)		
CBD-1		
Front Newell Street)	n/a	2
Front (Eastern Avenue)	60/90 ¹	60
Site Area (square feet)		
Net Tract Area	n/a	41,245
Dedications	n/a	12,060
Gross Tract Area	18,000	53,305
Density		
CBD-1: Floor Area Ratio	3.0	3.0
Allowable S.F.	159,915	159,915
-Residential		156,815 (187 units)
-Non-residential		3,100
Public Use Space (% of net lot)		
On-Site Public Use Space	20	21.87
Off-Site Amenity Space	n/a	18.17
Total Public Use & Amenity Space	20	40.04
Parking		
Residential Parking	196	206
Retail Parking	14	0
Total Vehicle Spaces	210	206²
<p>¹ Section 59_C-18.202(b) (1) requires a 60 foot setback for buildings that exceed 60 feet up to a maximum of 90 as permitted in the CBD-1 zone. The proposed building is set back 60 feet from Eastern.</p> <p>² No Parking is required for this site as it is located in the Silver Spring parking lot district. Total number of spaces will be determined at site plan.</p>		

The Application maintains compatibility with existing buildings by holding the building back 29 feet from the rear property line (the optional method of

development for CBD-1 properties has no setback requirements). The subject property shares the rear property line with two buildings. The first building, 8045 Newell Street, is similar in height to the proposed building (approximately 75' tall). The second building, Eastern Village Cohousing, is approximately 40' tall. The project also sets the building back 60' from the Eastern Avenue right-of-way Holding the building height to a total of 74' (the overlay zone allows 90' at this setback).

According to the Zoning Ordinance, §59-C-6.215(b), another requirement of optional method projects is the provision of additional public amenities:

“Under the optional method greater densities may be permitted and there are fewer specific standards, but certain public facilities and amenities must be provided by the developer. The presence of these facilities and amenities is intended to make possible the creation of an environment capable of supporting the greater densities and intensities of development permitted.”

To this end, the following package of amenities and public facilities is included with the Project Plan:

Amenities and Facilities Summary

The development is providing the following package of amenities and public facilities:

On-Site Public Use Space Improvements

- A public green open space at the corner of Eastern Avenue and Newell Street approximately ¼ acre in size
- Public Art
- Landscaping, including bio-filtration areas
- Seating
- Specialty paving

Off-Site Amenity Improvements

- Brick sidewalks
- Street Trees
- Pedestrian scale street lights
- Street furnishings

- Green panels for street trees and native plantings between the curb and sidewalk on Newell Street

(b) The development conforms to the Sector Plan.

The proposed development is consistent with the recommendations in the Silver Spring CBD Sector Plan. The uses proposed are allowed in this zone, and the proposed development is in keeping with the general guidelines to provide employment uses in the Sector Plan area. The proposed uses are appropriate for the subject site and conform to the Sector Plan.

The Approved and Adopted Silver Spring CBD Sector Plan recommends the South Silver Spring Overlay Zone, which calls for a mix of housing and commercial uses. The Application meets this goal by proposing rental housing and ground floor retail space. Moreover, as explained in detail below, the Sector Plan calls for stepping back buildings confronting residential development in the District, and the proposed development does that.

(c) Because of its location, size, intensity, design, operational characteristics and staging, the development would be compatible with, and not detrimental to, existing or potential development in the general neighborhood.

The location is appropriate for the Project Plan's intensity of use and density at the edge of the Central Business District. The building massing, stepbacks and heights are compatible with adjacent and surrounding uses, including in the one-family detached neighborhood to the west, which the Sector Plan calls out for special stepback protections. The project massing has been designed so as not to adversely affect adjacent buildings and uses. The CBD-1 Optional Method of Development has no setback requirement. However, the Applicant has set the building back 30 feet from the rear property line it shares with the multi-family building at 8045 Newell Street and 29 feet from the rear property line that it shares with Eastern Village Cohousing condominiums, in order to minimize its impacts upon the quality of light and air that those structures enjoy. The Ripley/South Silver Spring Overlay Zone limits building heights fronting onto Eastern Avenue to

45 feet for the first 60 feet from the street where the Application confronts a residential zone in the District of Columbia, at which point the building height may increase to 90 feet. The Applicant has proposed to locate a public use space within the 60-foot setback, thereby ensuring compliance with the height limitations confronting residential properties in the District of Columbia. Furthermore, the building is proposed to be 54 feet tall at this setback line. The building then steps back an additional 12 feet to reach a total height of 74 feet. The Applicant has exceeded the requirements of the Ripley/South Silver Spring Overlay zone to reduce the detrimental impact the proposed building could have on the neighbors in South Silver Spring and in the District of Columbia.

- (d) As conditioned, the development would not overburden existing public services nor those programmed for availability concurrently with each stage of construction and, if located within a transportation management district designated under Chapter 42A, is subject to a traffic mitigation agreement that meets all the applicable requirements.**

A draft traffic management agreement has been submitted by the Applicant and will be finalized during the site plan review process. Other public facilities exist on or near the site, and no expansion or renovation of these services will be required to be completed by the County. The Application will not overburden public facilities, including the public parking garage on Kennett Street. The Application will satisfy the residential parking requirement on site; the retail parking requirement will be satisfied by the PLD tax. Requirements for public safety and fire will be minimally impacted due to the nature of the land use and must be approved by the respective agencies prior to site plan approval.

- (e) The development is more efficient and desirable than could be accomplished by the use of the standard method of development.**

A standard method project would only allow a density of 2.0 FAR or 43 dwelling units per acre on this site within the CBD-1 Zone. The number of MPDUs being provided would be significantly reduced through the standard method of development. The requirement for public amenities would be removed, and the public use space requirement would be reduced by half. The total height of the building would be reduced to 60 feet. Infill development and density near transit hubs (the Silver Spring

Transit Center is within a 10-minute walk), is a core value of smart growth. Given the number and quality of public amenities being proffered, the additional MPDUs, and the appropriateness of targeting density in this area, the optional method of development is more desirable and more efficient for this site.

- (f) The development will include moderately priced dwelling units in accordance with Chapter 25A of the Montgomery County Code.**

The development will provide 12.5% MPDUs as required by Chapter 25A. A final agreement to build between the Applicant and the Department of Housing and Community Affairs will be conditioned with the site plan review.

- (g) When a project plan includes more than one lot under common ownership, or is a single lot containing two or more CBD zones, and is shown to transfer public open space or development density from one lot to another or transfer densities within a lot with two or more CBD zones, the project plan may be approved by the Planning Board based on the following findings:**

The development is presently composed of one lot and does not transfer public open space or density.

- (h) The development satisfies applicable requirements for forest conservation under Chapter 22A of the Montgomery County Code.**

The property was granted an exemption from submitting a forest conservation plan on May 14th, 2012 because it qualified as a small property under chapter 22A-5(s)(1) of the County code. The exemption (42012169E) met the conditions as it is less than 1.5 acres with no existing forest, or existing specimen or champion trees, and the afforestation requirements would not exceed 10,000 square feet.

- (i) The development satisfies applicable requirements for water quality resources protection under Chapter 19 of the Montgomery County Code.**

The development is not subject to the water quality resources protection requirements. The Applicant has submitted a Stormwater Concept Plan to

the Montgomery County Department of Permitting Services for their review and approval. The Applicant is proposing green roofs and bio-filtration planters.

- (j) Any public use space or public facility or amenity to be provided off-site is consistent with the goals of the applicable master or Sector Plan and serves the public interest better than providing the public use space or public facilities and amenities on-site.**

The Applicant is providing all public use space and amenities and facilities on-site.

- (k) The building setback along Newell Street meets the requirements of both the zoning code and the Sector Plan.**

The most hotly debated issue about this plan is whether the proposed building is required under the zoning code and Sector Plan to stepback further from Newell Street than the Applicant proposes. Certain plan opponents argue that it is. The Applicant and Staff argue that it is not. The Planning Board finds that it is not. This resolution touches on this issue in other findings, but because of the extent of the debate, and because this issue cuts across findings that the Board has to make with respect to zoning and Sector Plan, the Board will discuss this issue separately.

Section 59-C-18.202(b)(1) states that “[b]uilding height in the Overlay Zone along Newell Street and Eastern Avenue that confronts a residential zone in the District of Columbia must not exceed a height of 45 feet,” and then allows the height to be increased at a greater distance from the street. The Sector Plan, in connection with which the overlay zone was crafted, contains similar language. The Sector Plan recommends to “[l]imit building height for new construction along Eastern Avenue, fronting one-family detached dwellings in the District of Columbia as follows: at the property line, building heights should be limited to 45 feet. Above 45 feet, the building may step back 60 feet and its height may increase to 90 feet.” Later, the Sector Plan states that “[b]uilding heights along Newell Street and Eastern Avenue should ensure compatibility with the adjacent residential neighborhood,” and that “above 45 feet, the building may step back 60 feet and its height increase to 90 feet.”

The Board reads the law and the Sector Plan to limit development to 45 feet within 60 feet of the street to apply on those portions of Eastern Avenue and Newell Street across from residentially zoned properties in the District. In this respect, the Application satisfies both the requirements of the zoning code and the Sector Plan.

The Board recognizes that the use of the term "confronts" in relation to Newell Street is less than artful drafting, but this is the meaning that best gives meaning to and harmonizes all of the provisions. It also makes the most sense in light of what the Board understands to have been the goal of the Sector Plan and overlay zone – protecting the neighborhood of one-family detached residences in the District from denser development in Silver Spring.

The reading of the law and Sector Plan advanced by plan opponents does violence to the plain language of the zoning code and Sector Plan. The only way to read the zoning ordinance and Sector Plan language in the way that plan opponents advocate is either to read the "confronting" language out of the code entirely or to read it to modify only the reference to Eastern Avenue. As argued by opponents' counsel, reading the "confronting" language to have such a limited effect requires one to insert a comma in a sentence where none exists. This is not the exercise in plain language interpretation that opponents' counsel argued should carry the day in this case, but rather involves inserting punctuation into the language to significantly change its meaning.

The Planning Board further rejects the argument by opponents' counsel that reading the "confronting" language to apply to Newell Street where it intersects with Eastern Avenue would limit the application of the height limit to just that corner. It makes sense to interpret these provisions to refer to all of Eastern Avenue that confronts residential properties in the District, and the corner of Newell Street where it meets the District.

The Board's interpretation of the code and the Sector Plan is based not just on the face of the language, but also on how the language carries out what the Board understands to have been the intent of the Sector Plan and the overlay zone. Some plan opponents -- in particular counsel for certain plan opponents -- argued that the language of the overlay zone is clear and unambiguous, and that therefore it is unnecessary (and even inappropriate)

to look at legislative history. At the same time, however, he also argued that the language could be best understood by inserting a comma where none was originally written. The need to insert a comma to derive a certain meaning proves that the statute is at least somewhat ambiguous. The Board is comfortable that it is not foreclosed from considering legislative history. The Board also finds that it is appropriate to consider testimony from Staff and County Council staff about what was intended by these provisions. Although these after-the-fact accounts are not legislative history, they are nonetheless of some value in this process.

The reason that plan opponents' counsel would have preferred for the Board to ignore legislative history is that the legislative history supports that the focus of the overlay zone and Sector Plan, which the overlay zone implemented, was on protecting abutting residential development in the District of Columbia, not other properties along Newell Street.

The Board's interpretation of the zoning and Sector Plan makes even more sense in the context of the surrounding zoning. The properties across Newell Street, which are in Montgomery County, not the District, and which are developed currently with garden apartments, are zoned R-10, a zone with no height limit. As a practical matter, density limits would prevent these properties from developing very high, but within this zoning context it would make little sense that the Council would provide the same setback protection as it did for the detached residential properties in the District along Eastern Avenue.

The Board acknowledges that it referenced a stricter stepback requirement along Newell Street when it approved the development on a neighboring property ten years ago. But the stepback issue was not disputed in that proceeding, and therefore, the Board believes, was not decided with the benefit of the full vetting that the issue has had in this case. Moreover, because the issue has been so fully vetted in this case, the Board has additional information that leads it to conclude differently.

The Board also acknowledges the testimony of a Planning Board staff member who worked on the Sector Plan that the height limit was intended to apply along Newell Street as well as Eastern Avenue. But the Board also received a detailed analysis of this issue from a member of the County Council staff who was closely involved in the preparation of the Sector Plan

and the accompanying overlay zone that indicated the height limit was to apply along Newell Street only at the intersection of Eastern Avenue where it confronts residential development in the District (and along the rest of Eastern Avenue). Given that the County Council has the final say over the contents of Sector Plans and zones -- and the Planning Board an advisory role -- it makes sense to resolve the conflict between the Planning Staff's recollection of the Board's objectives and the Council Staff's recollection of the Council's objectives in favor of the Council staff.

On a procedural note, at the second hearing in this matter opponents' counsel referred to the Board as having already made up its mind about the issue of the required building setback along Newell Street, even referring incorrectly to the Board having voted on the matter. These statements misconstrue the posture in which the Board left this matter after the first hearing. It is true that at the first hearing several board members expressed a concern about whether there was a stricter setback requirement along Newell Street than this Application was proposing. And on that basis the Applicant requested, and the Board granted, a deferral. That deferral did not preclude the Applicant, or any other party, from presenting additional information about the issues in this case. Contrary to the characterization of opponents' counsel, the Board did not vote at the conclusion of the first hearing, but instead left the record open on all issues. The Board's decision in this matter is, as required by law, based on the entire record of both hearings in this matter.

BE IT FURTHER RESOLVED that this Project Plan shall remain valid as provided in Montgomery County Code § 59-D-2.7; and

BE IT FURTHER RESOLVED that this Resolution constitutes the written opinion of the Planning Board, and that the date of this Resolution is JUN 7 2013 (which is the date that this Resolution is mailed to all parties of record); and

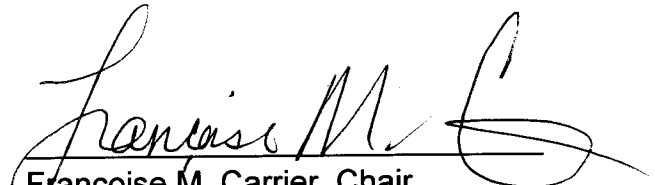
BE IT FURTHER RESOLVED that any party authorized by law to take an administrative appeal must initiate such an appeal within thirty days of the date of this

Resolution, consistent with the procedural rules for the judicial review of administrative agency decisions in Circuit Court (Rule 7-203, Maryland Rules).

* * * * *

CERTIFICATION

This is to certify that the foregoing is a true and correct copy of a resolution adopted by the Planning Board of The Maryland-National Capital Park and Planning Commission on motion of Commissioner Dreyfuss, seconded by Commissioner Anderson, with Chair Carrier, Vice Chair Wells-Harley, and Commissioners Anderson, Dreyfuss, and Presley voting in favor of the motion, at its regular meeting held on Thursday, May 16, 2013, in Silver Spring, Maryland.



Françoise M. Carrier, Chair
Montgomery County Planning Board