Case No. CNU-625-76
Holland Gardens Nursery
and Landscaping, Inc.

Applicant: Mr. and Mrs. Arnold Leupen

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

ORDER AFFIRMING PLANNING BOARD REVOCATION
OF NONCONFORMING USE PERMIT

IT IS HEREBY ORDERED, after review of the administrative record, that the decision of the Planning Board in PGCPB No. 13-92, CNU-625-76, for Revocation of a Nonconforming Use Permit for a nursery and garden center located on the north side of Sellman Road, east of its intersection with Weymouth Avenue, approximately 6.03 acres consisting of Parcels 188 and 151, at 3800 Sellman Road, Beltsville, Maryland, is hereby AFFIRMED, pursuant to Sections 27-132, 27-134, 27-228.01, 27-228.02, 27-244, and 27-245, of Subtitle 27 of the Prince George's County Code.[1]

[1] The Prince George's County Code, Subtitle 27, Zoning Ordinance, (2013 Ed., 2014 Supp.), will be referred to hereinafter as "§27- __.

The Prince George's County Planning Board Resolution No. 13-92 will be referred to as "PGCPB No. 13-92."

See §27-141 ("The Council may take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property, including the approval of a preliminary plat of subdivision"). *See also* RULES OF PROCEDURE FOR THE PRINCE GEORGE'S COUNTY DISTRICT COUNCIL (Adopted by CR-5-1993 and Amended by CR-2-1994, CR-2-1995 and CR-74-1995)
Rule 6: Oral Argument and Evidentiary Hearings:
"(f) The District Council may take administrative notice of facts of general knowledge, technical or scientific facts, laws, ordinances and regulations. It shall give effect to the rules of privileges recognized by law. The District Council may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence."

PROCEDURAL HISTORY

On or about March 12, 2013, Mr. Adam Ortiz, Acting Director of Environmental Resources[2] (hereinafter "DPIE"), filed a request pursuant to §27-245(b)(2) with the Prince George's County Planning Board to revoke Certified NonConforming Use No. 625-76U for the property located at 3800 Sellman Road, Beltsville, Maryland 20705, because the subject property discontinued its certified nonconforming use for a period of more than one hundred eighty (180) consecutive days. *See* Letter dated March 12, 2013, from Mr. Adam Ortiz, Acting Director, to Ms. Elizabeth M. Hewlett, Chairman of the Planning Commission.

On March 28, 2013, Ms. Elizabeth M. Hewlett, Chairman of the Planning Commission, acknowledged receipt of Mr. Ortiz request to initiate the procedures for revocation of a permit for a non-conforming use in accordance with §27-245(b)(2). The letter from the Chair to Mr. Ortiz was sent to Mr. and Mrs. Arnold Leupen, and in relevant part, stated

> [i]n accordance with Section 27-245(b)(2), the Planning Board will schedule the required public hearing. Our technical staff will have the property posted 30 days in advance of the hearing. *We will also send hearing notice to the property owner to your office 30 days prior to the hearing*. You can expect a hearing date no later than 90 days from the date of this letter (emphasis supplied).

See Letter dated March 28, 2013, from Ms. Elizabeth M. Hewlett to Mr. Adam Ortiz.

[2] On July 1, 2013, Prince George's County reorganized certain agencies of the government and renamed/replaced/combined the Department of Environmental Resources ("DER") into its newest department, the Department of Permitting, Inspections and Enforcement ("DPIE"). This 280-person agency combines under one roof the staff and functions that support the authorization and regulation of building, site/road, and utility permits and building licenses which drive the local economy and ensure the health and safety of County residents, businesses and visitors. DPIE consolidates at a single location the various functions associated with the County's regulation and approval of economic development and redevelopment projects within the County and positions the County as a national model for permit processing, inspections, code enforcement, business licensing and environmental stewardship.

See or visit: http://www.princegeorgescountymd.gov/sites/dpie/Pages/default.aspx

On May 7, 2013, and pursuant to §27-245, Senior Planner Ivy R. Thompson sent notification letters to Mr. Adam Ortiz, and Mr. and Mrs. Arnold Leupen. The May 7 letter stated, in relevant part:

> This letter serves as notification that, in accordance with Section 27-245(b)(2) of the Prince George's County Code, a Planning Board hearing is scheduled for Thursday, June 27, 2013 for consideration of a request to revoke Certified NonConforming Use No. 625-76U (the "CNU") for Holland Gardens Nursery and Landscaping, Inc. The purpose of the hearing is to determine whether the CNU is currently operating and has continued to operate as a "Nursery and Garden Center Wholesale and Retail" use without interruption for a period of 180 consecutive days or more.

See Letters dated May 7, 2013, from Senior Planner Ivy R. Thompson to Mr. Adam Ortiz, and Mr. and Mrs. Arnold Leupen.

By letter dated May 13, 2013, addressed to Ms. Ivy Thompson, Mr. Jacobus Leupen of 3800 Sellman Road, Beltsville, Maryland 20705, acknowledged receipt of the May 7, 2013, notification letter and requested additional time to submit supporting documents for his defense. *See* Letter dated May 13, 2013, from Mr. Jacobus Leupen to Ms. Thompson.[3]

On May 22, 2013, Acting Director of Environmental Resources Adam Ortiz also sent a letter to Ms. Thompson acknowledging receipt of her May 7, 2013, notification letter. *See* Letter dated May 22, 2013, and 18 Exhibits, from Mr. Adam Ortiz to Ms. Thompson.

On July 15, 2013, Ronald Twine, Inspector Supervisor within the Property Standards Division of DPIE, created a video depicting the use of the subject property; this video recording

[3] Reviewing the record, Mr. Jacobus Leupen hand-delivered his May 13, 2013, letter to the Planning Board, and at that time, requested to move the June 25, 2013, hearing date, which was granted. The hearing was rescheduled for July 18, 2013. The record also reflects that on June 26, 2013, Mr. Leupen, via telephone, had a conversation with Zoning Staff, wherein he indicated that he would provide staff with supporting documentation demonstrating continuous operation of a nursery, garden and landscaping center (wholesale and retail) at the subject property, but no such documentation was ever received from Mr. Leupen. *See* PGCPB 13-92, p. 4, Technical Staff Report, July 2, 2013, p. 3.

was admitted into the record of proceedings before the Planning Board. *See* PGCPB No. 13-92, p. 4; (7/18/2013, Tr., pp. 67, 71); (5/5/2014, Tr. p.27).

On July 18, 2013, pursuant to the prescriptions of § 27-245, the Planning Board held a public hearing to determine whether to revoke Certified Nonconforming Use No. 625-76U. At the conclusion of the hearing, the Planning Board, in accordance with § 27-245, voted to revoke Certified NonConforming Use No. 625-76U because it had been discontinued for a period of one hundred eighty (180) or more consecutive days.[4] *See* PGCPB No. 13-92, p. 1; (7/18/2013, Tr., pp. 232-36).

On September 12, 2013, and pursuant to its Rules of Procedure and the provisions of §27-244, the Planning Board's action vote on July 18, 2013, was embodied within a resolution and adopted accordingly as PGCPB No. 13-92.[5] *See* PGCPB 13-92, p. 6.

On September 17, 2013, in accordance with its Rules of Procedure and the provisions of §27-244, the Planning Board notified DPIE and all persons of record of its final decision to revoke CNU-625-76U in PGCPB 13-92. The parties were also notified of their appellate rights.

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[4] Commissioner Shoaff made the motion to revoke, which was second by Commissioner Bailey, with Commissioners Shoaff, Bailey, Geraldo and Hewlett voting in favor of the motion. Commissioner Washington was absent. *See* PGPCB No. 13-92, p. 6.

[5] *See* Planning Board's Rules of Procedure:

"SECTION 13 – Final Decisions, Resolution and Appeal Rights
(a) Form – A final decision in a contested case shall be reflected in the form of a resolution. The mailing date of Resolution shall be considered the date of the final decision for purposes of reconsideration requests and appeals.
(b) Contents – The resolution reflecting the final decision of the Planning Board shall contain separate statements of:
(i) the findings of fact,
(ii) conclusion of law, and
(iii) appeal rights of the applicant and parties of record.
(c) Time for Filing – The resolution reflecting the Board's decision shall be completed and filed with the Board within twenty-one (21) calendar days of the Board's decision."

See or visit: http://www.pgplanning.org/Assets/Planning/Planning+Board/Rules+of+Procedure.pdf

See Letter dated September 17, 2013, from Alan Hirsh, Chief, Development Review Division to Applicant and all persons of record.

On September 23, 2013, the Clerk of the County Council placed CNU-625-76U on the District Council's Agenda. The District Council took no action in this matter.

On October 11, 2013, Mr. Jacobus Leupen, by and through counsel, filed his notice of appeal with the Clerk of the County Council, appealing the Planning Board's final decision revoking CNU-625-76U to the District Council. *See* Notice of Appeal and Request for Hearing dated October 11, 2013.

On May 5, 2014, pursuant to §27-244, the District Council held a duly advertised public hearing or oral argument. At the conclusion of the proceedings, the District Council, pursuant to the provisions of § 27-132, referred this matter to staff for preparation of an order of approval as to the Planning Board's decision in PGCPB No. 13-92. *See* (5/5/2014 Tr.).

APPLICABLE LAW

The revocation of a certified nonconforming use is governed by §27-245 of the Zoning Ordinance. §27-245 provides, in pertinent part:

> (a) Upon a petition filed by the Director of the Department of Environmental Resources (or his designee), or upon its own motion, the Planning Board shall hold a public hearing to determine whether the certification of a nonconforming use should be revoked.
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> **(b) The Planning Board shall revoke the certification if it finds that either**:
>
> (1) There was fraud or misrepresentation in obtaining the certification;
>
> **(2) A certified nonconforming use has been discontinued[6] for a period of one hundred eighty (180) or more consecutive calendar days, unless**

[6] *See* §27-241(c) ("Continuous, day-to-day operation of a certified use is required to maintain its nonconforming status. Discontinuance of day-to-day operation for a period of one hundred eighty (180) or more consecutive calendar days shall constitute abandonment of the use"). *See also* §27-108.01(23) ("Interpretations and rules of construction. It is not intended that specific requirements be interpreted separately from all other requirements in the Ordinance. The Zoning Ordinance shall be read as a whole.").

the conditions of nonoperation were beyond the control of the owner or holder of the use and occupancy permit; or

(3) Any applicable requirements of Subdivision 2 of this Division have not been met.

(c) The Planning Board shall notify the Director of the Department of Environmental Resources (or his designee) of a revocation. The Director, in turn, shall revoke the use and occupancy permit for the nonconforming use.

(d) The decision of the Planning Board may be appealed to the District Council in the same manner as an original certification.

(Section 27-244(f)(6)) (emphasis supplied).

§27-244 provides, in pertinent part:

(a) **In general**.

(1) A nonconforming use may only continue if a use and occupancy permit identifying the use as nonconforming is issued after the Planning Board (or its authorized representative) or the District Council certifies that the use is nonconforming and not illegal (except as provided for in Section 27-246 and Subdivision 2 of this Division).

(b) **Application for use and occupancy permit**.

(1) The applicant shall file for a use and occupancy permit in accordance with Division 7 of this Part.

(2) Along with the application and accompanying plans, the applicant shall provide the following:

(A) Documentary evidence, such as tax records, business records, public utility installation or payment records, and sworn affidavits, showing the commencing date and continuous existence of the nonconforming use;

(B) Evidence that the nonconforming use has not ceased to operate for more than one hundred eighty (180) consecutive calendar days between the time the use became nonconforming and the date when the application is submitted, or that conditions of nonoperation for more than one hundred eighty (180) consecutive calendar days were beyond the applicant's and/or owner's control, were for the purpose of correcting Code violations, or were due to the seasonal nature of the use;

(C) Specific data showing:

(i) The exact nature, size, and location of the building, structure, and use;

(ii) A legal description of the property; and

(iii) The precise location and limits of the use on the property and within any building it occupies;

(D) A copy of a valid use and occupancy permit issued for the use prior to the date upon which it became a nonconforming use, if the applicant possesses one. (emphasis supplied).

Pursuant to §27-244(f)(5)(D), "the District Council, **on appeal**, **may decide to affirm, reverse, or modify the decision** of the Planning Board" (emphasis supplied). The decision shall be based on the record made before the Planning Board. No new evidence shall be entered into the record of the case unless it is remanded to the Planning Board and a rehearing is ordered. *See also* §27-141 ("The final decision in any zoning case shall be based only on the evidence in the record, and shall be supported by specific written findings of basic facts and conclusions. In addition, the Council may take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property, including the approval of a preliminary plat of subdivision").

On May 28, 2013, the Court of Special Appeals of Maryland held that the District Council exercises appellate jurisdiction over the Planning Board's decisions, and as such it is only authorized to affirm, reverse, or modify the decision based on the testimony, documents, and evidence presented at the hearing before the Planning Board, and is limited to determining whether the Planning Board's decision was "arbitrary, capricious, discriminatory, or illegal." The Court of Special Appeals further concluded that, because the District Council is vested with appellate jurisdiction, the District Council may not substitute its judgment for that of the Planning Board, even if it had it been so empowered, it might have made a diametrically different decision. The circumstances under which it may overturn or countermand a decision of the Planning Board are narrowly constrained. It may never simply second guess. *County Council of Prince George's County v. Zimmer Development*, ___ Md. App. ___, ___ A.2d ___, 2014 Md. App. LEXIS 50, at 16-19 (filed May 28, 2014), *quoting County Council v. Curtis Regency Serv.*

Corp., 121 Md. App. 123, 137-138, 708 A.2d 1058 (1998) (citing *People's Council for Baltimore Cnty. v. Beachwood Ltd. P'ship*, 107 Md. App. 627, 648-49, 670 A.2d 484 (1995)).[7]

Neither the *Curtis Regency* nor *Zimmer Development* decision defines the 'arbitrary, capricious, discriminatory, or illegal' standard of review. A review of the holdings in Maryland administrative law cases examining the definitions of arbitrary or capricious, the Court of Appeals indicated that "so long as the actions of administrative agencies are reasonable or rationally motivated, those decisions should not be struck down as arbitrary or capricious. Arbitrary or capricious decision-making, rather, occurs when decisions are made impulsively, at random, or according to individual preference rather than motivated by a relevant or applicable set of norms." *Harvey v. Marshall*, 389 Md. 243, 297-300, 884 A.2d 1171, 1203-06 (2005) (internal citations omitted). The Court, in deciding both the *Curtis Regency* and *Zimmer Development* cases, also fails to articulate how an administrative agency, in an appellate capacity, should conduct its review of a subordinate agency decision. We therefore find instructive, for our review in such appellate capacity, the distinction drawn between review of a trial court's decision and review of an agency's decision explained by Judge Rodowsky of the Court of Appeals:

> Judicial review of administrative action differs from appellate review of a trial court judgment. **In the latter context the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court**. However, in judicial review of agency action the court may not uphold the agency order unless it is sustainable on the

[7] Pursuant to Md. Code Ann., Land Use, §22-407 (2012 & Supp. 2014), the District Council voted to file a Petition for Writ of Certiorari in the Court of Appeals requesting its review of *County Council of Prince George's County v. Zimmer Development*, ___ Md. App. ___, ___ A.2d ___, 2014 Md. App. LEXIS 50 (filed May 28, 2014). Notwithstanding this request for further review, and until the Court of Appeals of Maryland disposes of the District Council petition, we apply the *Zimmer Development* standard of review here.

> agency's findings and for the reasons stated by the agency. (internal citations omitted.)
>
> Judicial review of administrative agency action is narrow. The court's task on review is ***not*** to substitute its judgment for the expertise **of those persons who constitute the administrative agency**. A reviewing court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency. A court's role is limited to determining if there is **substantial evidence in the record as a whole** to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. (internal citations omitted.) (emphasis supplied.).

See United Steelworkers v. Beth. Steel, 298 Md. 665, 679, 472 A.2d 62, 69 (1984).

FINDINGS AND CONCLUSIONS

- Motion for Continuance

Mr. Leupen claims that his request for a continuance or stay before the Planning Board, which was denied, is directly before the District Council again, and a stay or continuance should be granted because of pending litigation in the Circuit Court. *See* (5/5/2014 Tr., pp. 2-3, 15). The proper standard of review when disposing of a request for a continuance is whether there was an abuse of discretion. *See Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 240, 13 A.3d 1227 (2011) (holding that a request to continue a trial date is subject to an abuse of discretion standard). *See also Mead v. Tydings*, 133 Md. 608, 612, 105 A. 863, 864 (1919) ("An abuse of discretion for a trial judge to deny a continuance when the continuance was mandated by law or when counsel was taken by surprise by an unforeseen event at trial, when he had acted diligently to prepare for trial"); *Plank v. Summers*, 205 Md. 598, 604-05, 109 A.2d 914, 916-17 (1954) ("Or, in the face of an unforeseen event, counsel had acted with diligence to mitigate the effects of the surprise"). *But compare Cruis Along Boats, Inc. v. Langley*, 255 Md. 139, 142-44, 257 A.2d 184, 186 (1969) (finding no abuse of discretion where an unavailable lead attorney could be replaced with associate counsel at trial).

Initially, we note that after Mr. Leupen received notification from the Planning Board on May 7, 2013, that a public hearing would be held on the revocation of CNU-625-76U, he successfully requested a continuance to provide supporting documentation in opposition of revocation. We also note that Mr. Leupen's second request for a continuance was made on the eve of the Planning Board's July 18, 2013, hearing. Attorney Levi S. Zaslow made the request for a continuance primarily because of pending litigation in the District and Circuit Courts, which he claimed should be resolved before Planning Board acts on the revocation of CNU-625-76U. Mr. Zaslow indicated to the board that although lead counsel, Ms. Nakia Gray, was on vacation, his firm has attorneys who can help, or assist each other, which he was happy to do that day.[8]

We have reviewed Planning Board's lengthy consideration of Mr. Leupen's request for a continuance on July 18, 2013, and find no abuse of discretion. *See* (7/18/2013 Tr., pp. 3-33). Planning Board considered all of the factual and legal issues raised by counsel for Mr. Leupen and DPIE. Planning Board also considered testimony from persons of record opposing the continuance. As a result, we conclude that Mr. Zaslow was not taken by surprise by the July 18, 2013, hearing because Mr. Leupen had previously been granted a continuance. Mr. Zaslow also demonstrated that he had extensive knowledge of the facts in this matter and that he was happy to assist Ms. Gray, lead counsel who was on vacation. *See* (7/18/2013 Tr., pp. 3-33).

[8] It is clear from the record that Mr. Zaslow has extensive knowledge of the facts in this matter, including how those facts turn on whether the subject property discontinued its certified non-conforming use for a period of more than one hundred eighty (180) consecutive days. *See* (7/18/2013 Tr., pp. 3-33). It is also clear from the record that Ms. Nakia Gray, lead counsel, did not file the appeal in this matter nor did she appear at the public hearing before the District Council. *See* Notice of Appeal and Request for Hearing dated October 11, 2013, and (5/5/2014 Tr.).

We also find that Planning's Board's denial of Mr. Leupen's request for continuance or stay because of his pending declaratory judgment action was not arbitrary, capricious, discriminatory, or illegal. Further, the Zoning Ordinance provides ample and adequate administrative remedies for continuation, certification, alteration, extension, or enlargement of nonconforming uses. *See* §§ 27-241, 27-242, and 27-244. *See also Prince George's County v. Ray's Used Cars*, 398 Md. 632, 922 A.2d 495 (2007), and cases cited therein ("[W]hen administrative remedies exist in zoning cases, they must be exhausted before other actions, including requests for declaratory judgments, mandamus, and injunctive relief, may be brought," *citing Josephson v. City of Annapolis*, 353 Md. 667, 674-78, 728 A.2d 690, 693-695 (1998)); *Fosler v. Panoramic Design, Ltd.*, 376 Md. 118, 128, 829 A.2d 271, 277 (2003) ("[T]he presumption that a statutory administrative remedy is primary is reflected in the Declaratory Judgment Act"); *Brown v. Retirement System*, 375 Md. 661, 669, 826 A.2d 525, 530 (2003) ("This Court adheres firmly to the rule that statutorily prescribed administrative remedies ordinarily must be pursued and exhausted. This principle that statutory administrative remedies normally must be exhausted is a policy embedded in various enactments by the General Assembly and is supported by sound reasoning"); *Dorsey v . Bethel A.M.E. Church*, 375 Md. 59, 76, 825 A.2d 388, 397 (2003) (A "principle of administrative law . . . is the requirement that administrative remedies must be exhausted before bringing an action in court"); *Furnitureland v. Comptroller*, 364 Md. 126, 133, 771 A.2d 1061, 1065 (2001) ("[W]here the Legislature has provided an administrative remedy for a particular matter or matters, there is a presumption that the Legislature intended such remedy to be primary and intended that the administrative remedy must be invoked and exhausted before resort to the courts"), and cases cited therein. *See also PSC v. Wilson*, 389 Md. 27, 88-94, 882 A.2d 849, 885-889 (2005); *Converge v. Curran*, 383 Md.

462, 482-86, 860 A.2d 871, 882-85 (2004); *Moose v. F.O.P.*, 369 Md. 476, 493-95, 800 A.2d 790, 796-802 (2002); *Bell Atlantic v. Intercom*, 366 Md. 1, 12, 782 A.2d 791, 797 (2001). Based on the well-established precedent developed through case law in Maryland, we find that the Planning Board was legally correct to hold a public hearing in order to determine whether the subject property discontinued its certified nonconforming use for a period of more than one hundred eighty (180) consecutive days. *See* (7/18/2013 Tr., pp. 3-33).

For the same reasons above, the District Council denied Mr. Leupen's request for a continuance or stay requested on the eve of the May 5, 2014, public hearing. We found that the Circuit Court cases had no bearing on the District Council's review of the Planning Board's decision. *See* (5/5/2014, Tr.). We also found that Mr. Zaslow waited seven months to advance no new arguments in support of his motion before the District Council and, as support for a continuance or stay, merely restated the same arguments raised before the Planning Board at the time of that motion for continuance or stay. *Id*. at 3.

- Motion to Recuse

On the day of the public hearing proceedings before the District Council, Mr. Leupen's counsel, Mr. Levy S. Zaslow, made an oral request for Council Member Lehman to recuse herself from the proceedings. In support of this oral motion, Mr. Zaslow proffered numerous pages of e-mails between Bridget Warren, Chief of Staff for Council Member Lehman, and others. In addressing the proposed motion, the People's Zoning Counsel,[9] Mr. Stan D. Brown, conducted a *voir dire* examination of Council Member Lehman. After affirming her continuing

[9] The purpose, powers and duties of the People Zoning Counsel is governed by Subdivision 4 of the Zoning Ordinance, §27-136 and §27-139.01.

impartiality, Council Member Lehman indicated that she did not intend to recuse herself and participated in the proceeding. *See* (5/5/2014 Tr., pp.4-6).

On May 14, 2014, Mr. Zaslow filed a five (5) page letter with numerous e-mails included as attachments. In it, Mr. Zaslow contended that Ms. Warren received *ex parte* bi-weekly updates from DER and, based on those updates, encouraged residents to attend hearings so they could speak out against Holland Gardens. *See* Letter dated May 14, 2014, from Mr. Levi S. Zaslow to Clerk of the County Council. As a threshold matter, we find that *ex parte* communication does not apply to Ms. Warren as a matter of law. Pursuant to § 2-296 of the Ethics Code within Subtitle 2 of the Prince George's County Code, the requirements concerning '*ex parte* communication' are as follows:

> An official shall not consider any ex parte or private communication from any person, whether oral or written, which the official knows or should know may be intended to influence the decision on the merits of any matter where a determination or decision by the official is required by law to be made upon facts established by a record of testimony. Any such ex parte or private communication received by the official shall be made a public record by the official and filed in the matter in question, and if made orally, shall be written down in substance for this purpose by the official, made a public record and filed in the matter in question. A communication to the Clerk of the County Council, Board of Appeals or similar agency, concerning the status or procedures of a pending matter shall not be considered an ex parte or private communication. This Section shall not apply to legal advice rendered by the Office of Law and shall not apply to technical advice or explanation rendered by or at the request of the appropriate official of the County.

See Section 2-296 of the County Code, Ex Parte Communication. *See also* District Council Rules of Procedure, Rule 10, Ex Parte Communication ("No person shall communicate orally or in writing with a Member of the District Council in a manner intended to influence the decision of the Member on the merits of any matter which is required to be made upon facts established by a record of testimony. Any such ex parte or private communication received by the Member shall

be made a public record and filed in the matter in question. If the communication is made orally, the Member shall reduce the communication to writing and file the writing in the matter in question. All filings shall be made within five (5) working days after the communication was made or received, whichever is later").

Thus, we find, as a matter of law, that the e-mail communications supplied by Mr. Zaslow, consisting of updates from DER to Ms. Warren, as well as the e-mails between Ms. Warren and residents encouraging them to attend hearings concerning Holland Gardens, do not constitute *ex parte* communication under the prescriptions of § 2-296, and are therefore not unlawful. *See Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63, 68 (4th Cir. 1992) ("We find nothing pernicious in the actions the Sareva Drive residents in opposing Gardner's proposals. These residents were motivated to oppose Gardner's development by, among other things, the prospect of increased traffic congestion on the streets near their homes. Those who live near proposed development have the most significant personal state in the outcome of land-use decisions and are entitled, under our system of government, to organize and exert whatever political influence they might have. Nor is it necessarily improper for municipal government to consider or act upon such political pressure. Such give-and-take between government officials and engaged citizenry is what democracy is about."). In fact, and based on a review of the record of evidence in light of County law, we find that this correspondence constitutes lawful communication between County personnel and a councilmanic office in furtherance of the provision of regular constituent services. Thus, we are unable to find that the evidence provides a basis for any claim for relief as to recusal and obviates any analysis as to potential remedial relief. In sum, we find that because the e-mails constitute lawful communication and do not amount to a sustainable claim for relief, the failure by the District Council to consider or exact

that relief did not prejudice or otherwise deny Mr. Leupen any portion of the due process required by law. *See Burke v. Fidelity Trust Co*., 202 Md. 178; 96 A.2d 254 (1953) ("Due process does not necessarily mean judicial process. It is sufficient if there is at some stage an opportunity to be heard suitable to the occasion and an opportunity for judicial review at least to ascertain whether the fundamental elements of due process have been met"), *citing Anderson National Bank v. Luckett*, 321 U.S. 233, 246, 64 S. Ct. 599, 88 L. Ed. 692 (1944); *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 159, 160, 52 S. Ct. 69, 79 L. Ed. 214 (1931)).

- The Appeal

The Notice of Appeal and Request for Hearing filed on October 11, 2013, indicated that the appeal related to the revocation of the Certified NonConforming Use, File No. CNU-625-76, PGCPB No. 13-92, and all appealable matters related thereto. *See* Notice of Appeal and Request for Hearing dated October 11, 2013. However, the notice of appeal fails to specify the error which is claimed to have been committed by the Planning Board, or those portions of the record relied upon to support the claim. Consequently, we are constrained by the statements of Mr. Leupen's counsel on May 5, 2014. Therein, Mr. Zaslow, counsel for Mr. Leupen stated:

> "One of the most fundamental aspects, and in fact what makes judicial review, or even before judicial review agency administrative law possible is the importance of findings of facts and conclusions of law. Now, what we have as Ms. Thompson summarized is we have a summary of the findings of facts and conclusions of law. However, as part of this finding, which is in and of itself a due process requirement, again, a constitutional due process requirement to allow agencies or county governments to sit in quasi-judicial capacities is the findings of fact and conclusions of law requirement.
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> And no one standing here today, sitting here today, will dispute that nor can anyone dispute that because that is clear. And one of the major, one of the many cases to recognize that is *Fowler v. MBA.* And as part of that requirement, the fact-finding agency must detail and chronicle in the record and in its opinion

> detailed findings of facts and conclusions of law. **It may not ignore wholesale pieces of evidence. That is grounds for automatic reversal**. It's like Monopoly. Do not pass go. Do not collect $200. **You go directly back for a remand**.
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> And again, I don't think anybody here will dispute that. And if anybody does dispute that, I think the Court of Appeals would tell us otherwise. But in the Board's decision in this case, what you'll see is no discussion of Mr. Leupen's evidence. You are not going to find it.
>
> What you're going to find is the Board just adopted the County's argument straight down the line. And in fact, they adopted it straight down the line so obviously that the County of Law actually had input into the decision that it made. But it just adopted the decision straight down the line. **It didn't discuss any of the pictures submitted by Mr. Leupen**. **It didn't discuss the receipts submitted by Mr. Leupen**. **It only – it didn't discuss the substance of his testimony. It didn't discuss the substance of Mr. Swody's testimony**.
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> The opinion is devoid of such a discussion. **And that omission alone is grounds for reversal.**"

See (5/5/2014 Tr., pp. 9-10) (emphasis supplied).

Based on the above statements offered on May 5, 2014, we interpret, in part, that Mr. Leupen requested a remand of this matter back to the Planning Board; however, he did not comply with the requirements of §27-133 governing remands; this Section requires all requests for remands to be submitted in writing, along with the reasons for the remand, to the Clerk of the District Council at least fourteen (14) calendar days prior to the scheduled argument. Because Mr. Leupen requested oral argument with his notice of appeal, he was required to file a written request for remand, setting forth the reasons for the remand, with the Clerk of the District Council, at least fourteen (14) days prior to the scheduled argument on May 5, 2014, and he failed to do so. As such, we find that this failure to comply with the procedural prescriptions of the Zoning Ordinance warrants a denial of his request to remand this matter back to the Planning Board.

Alternatively, even if Mr. Leupen had filed a timely written request for remand, we must deny his request, as we find that the Planning Board's resolution sets forth adequate written findings of fact and conclusions sufficient to apprise him of the facts relied upon in reaching its decision.[10] The requirement to make written findings of fact and conclusions is in recognition of the "fundamental right of a party to a proceeding before an administrative agency *to be apprised of the facts relied upon by the agency in reaching its decision and to permit meaningful judicial review of those findings*. In a judicial review of administrative action, the court may only uphold the agency order if it is sustained by the agency's findings and for the reasons stated by the agency." *Harford County v. Preston*, 322 Md. 493, 505, 588 A.2d 772, 778 (1991) (emphasis supplied). Thus, we find that the Planning Board thoroughly evaluated the following evidence in support of revocation:

1. A letter dated May 22, 2013 summarizing the documentation of nonoperation.

2. Permit CNU-625-76 issued February 24, 1977, to operate a nursery and garden center wholesale and retail for the subject property when it was zoned R-R to Mr. and Mrs. Arnold Leupen for 3800 Sellman Road.

3. A site plan dated May 6, 1976.

4. Aerial photographs from PGATLAS showing the property.

5. A Board of Appeals Order dated December 2, 1992, Appeal No. 11493.

6. Affidavits and live testimony from DER Property Standards Division Inspectors Edelen, Twine, and Suniega.

7. Photographs from January 4, 2012 through April 29, 2013 demonstrating the use of the property as a firewood operation.

[10] As a threshold matter, we note that whether the Planning Board's findings of fact and conclusions would permit meaning judicial review is premature because the Circuit Court, not the District Council conducts judicial review, and that review is of the final decision of the District Council, not the Planning Board. *See* Md. Code Ann., Land Use §22-407 (2012, 2013 Supp.)

8. A video created July 15, 2013, demonstrating the current use of the property is not as a nursery and garden center.

See PGCPB No. 13-72, pp. 3-4. Mr. Edelen's affidavit reveals, among other things, that he undertook at least seven (7) physical inspections of the subject property − on January 24, 2012 (clean-up), January 25, 2012 (clean-up), February 23, 2012, March 17, 2012, April 3, 2012 (clean-up), April 4, 2012 (clean-up, and June 22, 2012, respectively. A review of Mr. Twine's affidavit reveals, among other things, that he undertook at least three (3) physical inspections of the subject property − on January 24, 2012 (clean-up), January 25, 2012 (clean-up), and July 11, 2012 (clean-up), respectively. Lastly, Mr. Suniega's affidavit reveals, among other things, that he inspected the property 82 times over a period spanning from January 4, 2012, to May 14, 2013. Each affiant inspector affirmed under the penalties of perjury that, over the course of their inspections of the subject property, none observed activities that they would associate with the operation of a "Nursery & Garden Center Wholesale & Retail." *See* DPIE's Exhibits 5-7, Affidavit of Code Enforcement Officer William Edelen, dated May 22, 2013; Affidavit of Inspector Supervisor Ronnie Twine, dated May 22, 2013; Affidavit of Inspector Andrew D. Suniega, dated May 22, 2013. *See also* (7/18/2013, Tr. pp. 61-109, 150-219). By contrast, we find that the record evidence contains no sworn affidavit(s) from Mr. Leupen. *See* §27-244.

In support of the proposed action, DPIE submitted extensive photographic evidence into the record, spanning a period of 2012 through 2013. *See* DPIE Exhibit 8. *See also* (7/18/2013, Tr. pp. 61-109, 150-219). Mr. Leupen also submitted certain photographic evidence in opposition of the revocation dated June, 1957. Further photographic evidence submitted either

by, or testified to, by Mr. Swody was also considered by the Planning Board. *See, e.g.*, (7/18/2013, Tr. pp. 149-185).

We also find that the Planning Board accepted and considered extensive evidence in the form of receipts submitted to the record, and the record reflects that Planning Board considered the substantive testimony of both Mr. Leupen and Mr. Swody. *See* (7/18/2013, Tr., pp. 109-219). *See, e.g.,* (7/18/2013, Tr., p. 181-183) (Commissioner Shoaff, in response to Mr. Swody's testimony: "And you know I think these are useful it's hard for us to link this to the sales and if there were receipts or other tax documents it would help connect those dots, I think that would help immensely"); (Chair Hewlett, in response to Mr. Swody: "[T]hankfully counsel is prepared with his exhibits, so we're really pleased that there was some things ready to go forward and I understand that according to Mr. Leupen he's got records and receipts and whatnot that we'll be able to see that will show the continuity"). *Id.*

Finally, Planning Board considered video evidence. On July 15, 2013, Ronald Twine, Inspector Supervisor within the Property Standards Division of DPIE, created a video depicting the use of the subject property; this video recording was admitted into the record of proceedings before the Planning Board. *See* PGCPB No. 13-92, p. 4; (7/18/2013, Tr., pp. 67, 71); (5/5/2014, Tr. p.27). *See, e.g.*, (7/18/2013, Tr., p. 233-34) (Chair Hewlett: "I have weighed the evidence on both sides. I found Mr. Swody had some very good points too and I looked at the receipts. Also looking at the video and we did hear some testimony, Mr. Swody and Mr. Leupen's testimony was not the only testimony that we heard and I have to correct you Mr. Zaslow on that. Mr. Zaslow indicated that the only testimony that we heard was that the use continued to operate because we had the customer in there at least once a week, at least once a week whether or not they bought anything. And on the other hand, we have other evidence and testimony from those

people who had been there at least 82 times within that window who said they never saw any sign of any customer. You do see the plants there with no signage on them and no for sale signs. You have to weigh this evidence and ultimately you have to use your commonsense and make a decision in conformance with the law. And I can't, for me the weight of the evidence is that the use ceased to operate for a period of 180 days"). *See Scott v. Harris*, 550 U.S. 372, 380-81, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (holding that where "opposing parties tell two different stories, one of which is blatantly contradicted" by video evidence in the court's record, "so that no reasonable jury could believe it, a court should not adopt that version of the facts . . . ."). The Court further held that rather than relying upon "visible fiction" set forth by the party whose version of events is contradicted by the video evidence, a court should "view[] the facts in the light depicted by the videotape"). Thus, Planning Board concluded, based on the evidence submitted by DER, together with the lack of credible or persuasive contradictory evidence from any other source, that Nonconforming Use Permit CNU-625-76 should be revoked. *See* PGCPB No. 13-92, p. 5. *See also* (7/18/2013, Tr., p. 232) (Commissioner Shoaff: "[T]aking into account I think the weight of the evidence on both side and I think what's been shared with us today and I don't do so lightly because one, I think we are obviously very interested in businesses that want to thrive but in this instance, it seems fairly clear and evident, at least to me, that there's been a cessation of the continuous operation for 180 days if not longer. And so I will move to revoke CNU-625-76"). *See County Council for Prince George's County v. Potomac Elec. Power*, 263 Md. 159, 282 A.2d 113 (1971) (quoting *Board of County Commissioners v. Oakhill Farms*, 232 Md. 274, 283, 192 A. 2d 761, 766 (1963) ("Whether the test of substantial evidence on the entire record or the test of against the weight of all the evidence is followed, the courts have exercised restraint so as not to substitute their judgments for that of the agency and not to choose between

equally permissible inferences or make independent determinations of fact, because to do so would be exercising a non-judicial role. Rather, they have attempted to decide whether a reasoning mind could reasonably have reached the result the agency reached upon a fair consideration of the fact picture painted by the entire record. In the cases dealing with consideration of the weight of the evidence, the matter seems to have come down to whether, all that was before the agency considered, its action was clearly erroneous or, to use the phrase which has become standard in Maryland zoning cases, not fairly debatable.")).

To this end, and mindful of the proscription against substitution of our judgment for that of the Planning Board in evaluating this matter, we find that the Planning Board did not ignore or otherwise fail to consider wholesale pieces of evidence including, but not limited to, receipts, pictures, and the substance of Mr. Swody's testimony, for the reasons set forth above. Furthermore, we find that the Planning Board's resolution sets forth adequate written findings of fact and conclusions regarding its review of the evidence in the record, and that sufficient to apprise Mr. Leupen of the facts relied upon in reaching its decision. PGCPB No. 13-92 found as follows:

> Credibility - Mr Leupen's credibility was severely undermined by his other witness, Mr. Charles Swody, who testified that Mr. Leupen has substantial ongoing memory problems. Mr. Swody, although obviously seeking to help someone he views as a friend and mentor, simply could not be believed due to his demeanor and the overwhelming contradictory evidence of numerous other witnesses, particularly some of whom have no personal interest in this matter.
>
> *See* PGCPB No. 13-92, p. 5.

Simply put, Planning Board's lack of discussion regarding any specific pictures or receipt submitted by Mr. Leupen or Mr. Swody is not probative evidence to substantiate his claim that the Planning Board ignored wholesale pieces of evidence. As a result, Planning Board's findings

and conclusions, as embodied in its resolution PGCPB No. 13-92, are lawful and based on the prescriptions set forth in §27-245 of the Zoning Ordinance as to the specific requirements for revocation of a certified nonconforming use that must be presented to demonstrate that the use has ceased operation for more than 180 consecutive calendar days.

Finally, we reject Mr. Leupen's second argument that either Planning Board or DPIE "did a bit of a – might not be a 180, but certainly a 90 degree turn at the hearing" and changed the request to an "expansion of the use" case violating his due process rights. *See* (5/5/2014, Tr., pp. 12-13). This argument is completely without factual or legal merit. DPIE's March 12, 2013, request for revocation states:

> In late 1990, the Subject Property owners improperly expanded Certified Non-Conforming Use No. 625-76U by receiving deliveries of large logs, cutting the large logs into smaller sections, splitting the smaller sections by mechanical means into firewood and storing the cut firewood on the Subject Property. The Department of Environmental Resources (DER) determined that the Subject Property owners' expanded their certified non-conforming use by engaging in this firewood operation. The Board of Appeals, sitting as the Board of Zoning Appeals, found that" "*[Subject Property] added a firewood operation brought onto the property for cutting, storing and selling. This constitutes an expansion of the nonconforming use*." Board of Appeals Decision, No. 11493 (Jacobus and Catherine Leupen) attached hereto as Exhibit 2.[11] (emphasis in original).
>
> Upon observing additional firewood operations at the Subject Property in 2010, the DER issued zoning violation notices to the Subject Property owners and petitions the District Court of Maryland for Prince George's County for injunctive relief. In April and May of 2011, the District Court entered Orders of Injunction against the Subject Property owners. See Exhibits 3 & 4. The Court Orders of Injunction required the Subject Property owners to, amongst other things, cease use of the premises for all activities requiring a use and occupancy permit until such use and occupancy permits have been obtained. **Since Certified Non-Conforming Use No. 625-76U did not authorize firewood operations, the Subject Property owners were required to cease all firewood operations**.

[11] Prince George's County Code Section 27-243.01 sates "[a] nonconforming use may not be changed to, or changed to include, any use other than that *certified*, unless such other use is permitted, or permitted by grant of a Special Exception, in the zone in which the nonconforming use is located."

On January 4, 2012, DER inspected the Subject Property for compliance with the Court Orders of Injunction. Upon inspecting the Subject Property, code enforcement officers from DER discovered that the Subject Property owners had: (a) continued to conduct extensive unpermitted firewood operations; (b) failed to obtain the required permit, if any, to conduct such firewood operations; and, (c) discontinued use of the Subject Property as a "Nursery & Garden Center Wholesale & Retail." (emphasis added).

II. DISCONTINUED CERTIFIED NON-CONFORMING USE

(January 4, 2013 through July 2, 2012 – 180 days)

Since the January 4, 2012 inspection, the Subject Property has been used primarily for cutting, storing and selling firewood. During this time period, the Subject Property has not been used for the display and sale of nursery stock or garden supplies. **All thirty two inspections conducted by DER since January 4, 2012 have uniformly revealed that the Subject Property has discontinued operations as a "Nursery & Garden Center Wholesale & Retail" in favor of an unpermitted firewood operation**. Inspection records and pictures from the following dates, by way of example, fairly and accurately illustrate the Subject Property's condition and use since January 4, 2012:

1. January 4, 2012. See Pictures attached hereto as Exhibit 5;
2. January 24 & 25, 2012. See Pictures attached hereto as Exhibit 6;
3. February 23, 2012. See Pictures attached hereto as Exhibit 7;
4. April 3 & 4, 2012. See Pictures attached hereto as Exhibit 8;
5. May 21, 22 & 23, 2012. See Pictures attached hereto as Exhibit 9; and,
6. July 2, 2012. See pictures attached hereto as Exhibit 10. (emphasis supplied).

At the scheduled Public Hearing, DER will provide additional evidence demonstrating that the Subject Property has discontinued use as a "Nursery & Garden Center Wholesale & Retail" since January 4, 2012, and continuing for a period of 180 consecutive calendar days.

Also, comparison of the site plan approved for Certified Non-Conforming Use No. 625-76U with the actual conditions and use of the Subject Property over this timeframe will reveal that the Subject Property has discontinued use of all designated planting and tree display areas. Furthermore, the conditions of the Subject Property's non-operations as a "Nursery & Garden Center Wholesale & Retail" were entirely within the control of the Subject Property owners. All

enforcement actions taken by DER against the Subject Property were related to the unpermitted firewood operations. The Subject Property has always been afforded the right to operate within the scope of Certified Non-Conforming Use No. 625-76U.

Revocation of Certified Non-Conforming Use No. 625-76U is consistent with established zoning principles in Maryland. The Court of Appeals previously noted:

[T]he problem inherent in accommodating existing vested rights in incompatible land uses with the future planned development of a community is ordinarily resolved, under local ordinances, by permitting existing uses to continue as nonconforming uses subject to various limitations upon the right to change, expand, alter, repair, restore, or recommence after abandonment. Moreover, this Court has further recognized that the purpose of such restrictions is to achieve the ultimate elimination of nonconforming uses through economic attrition and physical obsolescence.

See *County Council of Prince George's County v. E.L. Gardener, Inc.*, 293 Md. 259, 268, 443 A.2d 114, 119 (1982). The Subject Property was permitted to continue as a non-conforming use in 1977; however, that right to continue was limited to a "Nursery & Garden Center Wholesale & Retail." **The Subject Property has completely discontinued its certified use and changed its use to an extensive, unpermitted firewood operation expressly disallowed by the Board of Appeals**. Therefore, I request the Planning Board revoke Certified Non-Conforming Use No. 625-76U. (emphasis supplied).

III. REQUEST FOR PUBLIC HEARING

Since the Subject Property has **discontinued its certified non-conforming use as a "Nursery & Garden Center Wholesale & Retail**" for a period of more than one hundred eighty (180) consecutive calendar days, I respectfully request that the Prince George's County Planning Board of the Maryland-National Capital Park and Planning Commission schedule a Public Hearing on the revocation of Certified Non-Conforming Use No. 625-76U pursuant to the Prince George's County Code, Title 17, Subtitle 27, Division 6, Subdivision 1, Section 27-245(b) (2). (emphasis supplied).

See Letter dated March 12, 2013, from Mr. Adam Ortiz, Acting Director, to Ms. Elizabeth M. Hewlett, Chairman of the Planning Commission. The purpose of the requirement of notification is to inform and it is satisfied where the record reflects that the parties possessed actual knowledge of the intended zoning matter. This is especially apparent where the protesting parties

arrive at the public hearing prepared to contest many facets of the zoning application and do so through testimony of record. *See Largo Civic Ass'n v. Prince George's County*, 21 Md. App. 76, 318 A.2d 834 (1974). Ordinarily, the failure of an administrative board to give statutorily prescribed notice of a hearing is fatal to the jurisdiction of the board. *Cassidy v. Baltimore County Bd of Appeals*, 218 Md. 418, 421-22, 146 A.2d 898 (1958). Where, however, the complaining litigant had knowledge of the facts, "the requirement of notification purposed to inform may be satisfied by actual knowledge, especially when it is acted upon." *Landover Books, Inc. v. Prince George's County, Maryland*, 81 Md. App. 54, 566 A.2d 792 (1989) quoting *McLay v. Maryland Assemblies, Inc.*, 269 Md. 465, 477, 306 A.2d 524 (1973) (citation omitted) (no showing of prejudice regarding statutory notice requirements where parties appeared at and participated in zoning board hearing). *See also Clark v. Wolman*, 243 Md. 597, 600, 221 A.2d 687 (1966) (where public notice given and parties attended zoning hearing, failure to receive written notice did not invalidate city's action). We find that the March 12, 2013, letter expressly stated that expansion of use was fully contemplated in DPIE's request for a public hearing to revoke Certified NonConforming Use No. 625-76U because the subject property *discontinued its certified non-conforming use* for a period of more than one hundred eighty (180) consecutive days.

The subsequent notification letter sent to and acknowledged by Mr. Leupen on May 7, 2013, stated, in relevant part:

> This letter serves as notification that, in accordance with Section 27-245(b)(2) of the Prince George's County Code, a Planning Board hearing is scheduled for Thursday, June 27, 2013 for consideration of a request to revoke Certified NonConforming Use No. 625-76U (the "CNU") for Holland Gardens Nursery and Landscaping, Inc. **The purpose of the hearing is to determine whether the CNU is currently operating and has continued to operate *as a* "Nursery and**

> **<u>Garden Center Wholesale and Retail</u>"** use without interruption for a period of 180 consecutive days or more. (emphasis supplied).

See Letter dated May 7, 2013, from Senior Planner Ivy R. Thompson to Mr. and Mrs. Arnold Leupen. We also find that the May 7 notification letter provided fair and adequate notice to Mr. Leupen that the "purpose" of the hearing was to determine whether Certified NonConforming Use No. 625-76U was *currently* operating and has *continued* to operate *as a* Nursery and Garden Center Wholesale and Retail Use *without interruption for a period of 180 consecutive days* or more. In other words, Mr. Leupen was fully informed that the purpose of the public hearing was to revoke Certified NonConforming Use No. 625-76U because the subject property *discontinued its certified non-conforming use* for a period of more than one hundred eighty (180 consecutive days, which included an expansion of use. Furthermore, even assuming that notification to Mr. Leupen was partially deficient, he and his counsel appeared and participated at the public hearing with actual knowledge of the facts because they vigorously opposed expansion of use as grounds for revocation of Certified NonConforming Use No. 625-76U. *See* (7/18/2013, Tr.). *See also Burke v. Fidelity Trust Co*., 202 Md. 178; 96 A.2d 254 (1953) ("Due process does not necessarily mean judicial process. It is sufficient if there is at some stage an opportunity to be heard suitable to the occasion and an opportunity for judicial review at least to ascertain whether the fundamental elements of due process have been met"), *citing Anderson National Bank v. Luckett*, 321 U.S. 233, 246, 64 S. Ct. 599, 88 L. Ed. 692 (1944); *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 159, 160, 52 S. Ct. 69, 79 L. Ed. 214 (1931)).

<u>CONCLUSION</u>

For the reasons stated above, Planning Board's decision was not arbitrary, capricious, discriminatory, or illegal, because it was not made impulsively, at random, or according to

individual preference. *Harvey*, 389 Md. 243, 297-300, 884 A.2d 1171, 1203-06 (2005). Further, we may not substitute our judgment for that of the Planning Board, *Zimmer Development*, ___ Md. App. ___, ___ A.2d ___, 2014 Md. App. LEXIS 50, at 16-19.

Accordingly, the decision of the Planning Board in PGCPB No. 13-72, to REVOKE Nonconforming Use Permit CNU-625-76U is AFFIRMED.

Ordered this 30th day of June, 2014, by the following vote:

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

Opposed:

Abstained:

Absent: Council Member Campos.

Vote: 8-0

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

By: _____
Mel Franklin, Chairman

ATTEST:

_____
Redis C. Floyd
Clerk of the Council