

Case No. CSP-13008 Tidler/Wardlaw Property

Applicant: Migus, LLC

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

ORDER OF REMAND DE NOVO

This matter came before the District Council on February 23, 2015, for oral argument pursuant to appeal petitions filed pursuant to § 27-280 of the Zoning Ordinance of Prince George's County, being also Subtitle 27 of the Prince George's County Code ("Zoning Ordinance"), and §§ 22-104 and 22-206 of the Land Use Article of the Annotated Code of Maryland ("RDA").¹ After conducting the hearing proceedings pursuant to the Zoning Ordinance and its Rules of Procedure, the Council took this matter under advisement. On April 13, 2015, the Council referred this case to staff for preparation of an order of remand de novo.²

¹ References to the 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 are styled "District Council" herein; references to the Prince George's County Planning Board of the Maryland-National Capital Park and Planning Commission are styled "Planning Board" herein. Citations to pertinent sections of the Zoning Ordinance of Prince George's County, being also Subtitle 27 of the Prince George's County Code (2011 & Supp. 2014) are styled "§ ____, PGCZO" herein; citations to pertinent provisions within the Regional District Act set forth in Md. Code Ann., Land Use, §§ 20-101–25-807 (2012 & Supp. 2014) are styled "§ ____, RDA" herein.

² The District Council takes administrative notice the Court of Special Appeals of Maryland decision in *County Council of Prince George's County, Sitting as the District Council v. Zimmer Dev't*, 217 Md. App. 310, 92 A.3d 601, *cert. granted*, Sept. Term 2014, Case No. 64 (2014). In particular, we note that the *Zimmer* court expressly affirmed the District Council's authority to remand zoning cases to the Planning Board but limited its decision following the remand to the issues specified within the order of remand. In sharp contrast, we find the *Zimmer* decision at odds with the 2003 decision of the Court of Appeals of Maryland in *Dorsey v. Bethel A.M.E Church*, 375 Md. 59, 825 A.2d 388 (2003), declaring expressly that remands by an agency for further proceedings by agency is not a final administrative decision since it does not dispose of all issues and leave nothing further for the agency to do. *See Dorsey*, 375 Md. at 75–77, 825 A.2d at 397–98. We construe this ruling as clear confirmation by Maryland's high court that our jurisdiction over the entire administrative record is an inextricable part of our statutory duty to render the final decision in zoning cases which is continuing, notwithstanding any limited direction for further action we may impose via adoption of an interim order of remand. Thus, we sought review of the intermediate appellate court's disposition in *Zimmer* on July 10, 2014, and, on September 19, 2014, the high court exercised its discretion to issue a Writ of Certiorari as to *Zimmer*, assigned as Case No. 64. The court conducted oral argument on March 6, 2015, as to Case No. 64, and a final decision from the Maryland high court is pending as of

IT IS HEREBY ORDERED, after review of the administrative record, that application CSP-13008, requesting approval for a mixed-use development, namely 314 multifamily dwelling units and 8,000 square feet of commercial office space, in a single multi-story building, on property in the Mixed Use – Transportation Oriented (M-X-T) Zone located in the northwest quadrant of the intersection of Powder Mill Road (MD 212) and Old Gunpowder Road, Planning Area 61, within Council District 1, is hereby

REMANDED to the Prince George's County Planning Board, pursuant to §§ 27-132–27-133, 27-141, 27-279–27-280 of the Zoning Ordinance, to reconsider its decision embodied within PGCPB No. 14-50 as to CSP-13008; to reopen the record for Applicant to submit a revised Conceptual Site Plan application, which shall consist of a development design plan to include townhouses consistent with the M-X-T Zone, including the specific purposes and regulatory prescriptions set forth in §§ 27-273–27-274, 27-279, 27-542, 27-546–27-548 of the Zoning Ordinance; for Planning Board to consider Applicant's revised CSP application and make required findings in accordance with §§ 27-276 and 27-279 of the Zoning Ordinance.

As the basis for this decision, and as expressly authorized by the RDA, namely Title 22 and Title 25 of the Land Use Article of the Annotated Code of Maryland, as well as the County Zoning Ordinance, we hereby adopt the findings and conclusions within the administrative record as to the proposed application, specifically, the findings and conclusions set forth within PGCPB No. 14-50, except where otherwise stated herein.

April 21, 2015, the date of this Order. Given the current posture of *Zimmer*, we do not intend to limit our final decision in the instant case to any or all issues set forth herein upon resubmission of CSP-13008 after remand. Instead, for the reasons set forth in the findings and conclusions below, we shall REMAND CSP-13008 to the Planning Board to conduct DE NOVO proceedings in accordance with the prescriptions of this Remand Order.

PROCEDURAL BACKGROUND

On or about February 25, 2014, the Development Review Division of the Maryland-National Capital Park and Planning Commission accepted, as filed and for review, conceptual site plan application CSP-13008, requesting approval for a mixed-use residential and commercial office development within a single, five-story building with 314 multifamily dwelling units and 8,000 square feet of office space. The Technical Staff of the Maryland-National Capital Park and Planning Commission reviewed the subject application in accordance with the Zoning Ordinance and, on May 7, 2014, issued its Technical Staff Report as to CSP-13008 recommending approval of the proposed conceptual site plan with conditions. *See* 05/07/2014 TSR, at 3. On May 22, 2014, as prescribed by § 27-546 of the Zoning Ordinance, Planning Board conducted a public hearing on the subject application to consider testimony and evidence in the record. In turn, Planning Board adopted PGCPB No. 14-50 at its June 19, 2014, meeting with its disposition of approval with conditions as to CSP-13008 embodied therein, and provided notice on June 24, 2014, pursuant to the prescriptions of § 27-285 of the Zoning Ordinance. *Id.*

Within thirty (30) days after the date of Planning Board's decision, seven (7) timely written appeal petitions were filed by persons of record in accordance with § 27-280 of the Zoning Ordinance; each alleged various errors within the June 19, 2014, disposition of Planning Board as to CSP-13008 and requested Oral Argument before the District Council.³ Also during the 30-day period following Planning Board's decision, this matter appeared on the July 21, 2014, meeting agenda and the District Council did not elect to review CSP-13008.

³ *See generally* 07/18/2014 Mem., Angevine to Floyd; 07/18/2014 Mem., Klaver to Floyd; 07/18/2014 Mem., Karns to Floyd; 07/22/2014 Mem., Mastradone to Floyd; 07/22/2014 Mem., Sollner-Webb to Floyd; 07/23/2014 Mem., Van Horn to Floyd; 07/24/2014 Mem., Daston to Floyd.

Subsequently, on December 9, 2014, the Clerk of the District Council issued notice to all persons of record regarding the oral argument scheduled for January 12, 2015. On December 31, 2014, the Clerk gave amended notice of the February 23, 2015, rescheduled hearing date. We conducted oral argument on February 23, 2015, in accordance with the prescriptions of § 27-131 of the Zoning Ordinance and our District Council Rules of Procedure. *See generally* 02/23/2015 T.; Rule 6, D. Council R. of Proc. During the hearing, counsel for Applicant summarized key components of the development proposal, salient procedural requirements pertinent to the application, and a general assessment as to how the subject application comports with the prescriptions for development on the site. In turn, the Citizens Opposition expounded upon various points raised in their respective written appeals, namely the rezoning of the property in the 2010 *Subregion 1 Master Plan and Sectional Map Amendment* (“SMA”) to the M-X-T Zone, legal sufficiency of qualifying language therein to restrict development of the property below the stated minimum density for development in the M-X-T Zone; the transportation impacts of the proposed development and related need for an access point at Old Gunpowder Road; perceived incompatibility the existing uses surrounding the site. *See generally* 02/12/2015 Ltr., Gibbs to Floyd. *See also* 07/18/2014 Mem., Angevine to Floyd; 07/18/2014 Mem., Klaver to Floyd; 07/18/2014 Mem., Karns to Floyd; 07/22/2014 Mem., Mastradone to Floyd; 07/22/2014 Mem., Sollner-Webb to Floyd; 07/23/2014 Mem., Van Horn to Floyd; 07/24/2014 Mem., Daston to Floyd; 02/23/2015 T. At the conclusion of the proceeding, the District Council took this matter under advisement. 02/23/2015, T. On April 13, 2015, the District Council favorably voted to refer CSP-13008 for the preparation of an Order of Remand De Novo, in the manner prescribed by § 27-132 of the Zoning Ordinance.

FINDINGS AND CONCLUSIONS

This application requests approval of a conceptual site plan for a conceptual mixed-use residential and commercial office development in a single, five-story building with 314 multifamily dwelling units and 8,000 square feet of office space. According to the record, the site proposed for development is surrounded by public rights-of-way to the west, north, and east, and an access drive to each adjacent roadway is shown on the proposed development. More specifically, the site is bounded to the north by the public right-of-way of Montgomery Road with a storage facility for the Prince George's County Department of Public Works and Transportation in the R-R (Rural Residential) Zone beyond; to the west by the public right of way of Montgomery Road with an office park in the C-O (Commercial-Office) Zone beyond; to the south by vacant Lot 1 in the Mixed Use–Transportation Oriented (“M-X-T”) Zone with the public right-of-way of Powder Mill Road (MD 212) beyond; and to the east by the public right-of-way of Old Gunpowder Road with a church and agricultural properties in the R-R Zone beyond. *Id.*

Review of the administrative record for CSP-13008 reveals the proposed construction of a single, large, roughly square building in the northern portion of the site which completely surrounds a recreation courtyard and five-story parking garage. *See* PGCPB No. 14-50 at 2; 05/07/2014 TSR, at 4; App. Stmt. of Just’n, at 1–2. Small surface parking lots are proposed at the northern end of the building, accessed off of Montgomery Road, and at the southern end of the building, adjacent to the commercial office area, with access off of Old Gunpowder Road. The narrow southern end of the site is to remain undisturbed, which the record states will allow for preservation of some specimen trees. *Id.* Stormwater management is proposed along the

western and eastern edges of the building in bioretention areas and bioswales. *See* PGCPB No. 14-50, at 2; 05/07/2014 TSR, at 4–5; App. Stmt. of Just’n, at 3.

The five-story main structure proposed for construction on the site dominates the development project. All the same, we find no specific standards for the building architecture design included with the record for the subject development project. *See* PGCPB No. 14-50, at 2; 05/07/2014 TSR, at 5. Because provisions of the Zoning Ordinance regulate design standards in the M-X-T Zone, we are unable to conclude that the subject application, as currently proposed, meets or will ever meet the statutory prescriptions for development in a Mixed Use - Transportation Oriented Zone in the County. *See* PGCPB No. 14-50, at 2; 05/07/2014 TSR, at 5. As a result, we find that this determination will require revision to the current site plan application in order to ensure that the overall plan meets the requirements and regulations of the M-X-T Zone. *Id.* We further find that the proposed density for the multifamily units are incompatible with the surrounding uses in the area and require a more suburban design to meet the 2014 general plan goal of offering diverse housing options in the County. Accordingly, and based on the foregoing findings in the administrative record, we shall return this matter to Planning Board for Applicant to submit a revised application for townhouses consistent with the statutory prescriptions of the Zoning Ordinance for the M-X-T Zone.

The record next includes a list of proposed on-site private recreational facilities, to include a 7,300-square-foot clubhouse with fitness center and game rooms in the northeastern corner of the building, as well as an outdoor swimming pool and lawn games area. *See* PGCPB No. 14-50, at 2; 05/07/2014 TSR, at 5. Comments submitted to the record by the Department of Parks and Recreation address this proposed facet of the project, and state that private, on-site recreational facilities are appropriate for this development, given the configuration of the

property and the existing facilities in the immediate vicinity. We agree. *See* § 24-134, Prince George's County Code (2011 & Supp. 2014); PGCPB No. 14-50, at 2; 05/07/2014 TSR, at 5, 102; 04/21/2014 Mem., Sun to Kosack, at 2. We further find that, pursuant to the County Subdivision regulations, determinations to quantify the extent of the mandatory dedication of parkland needed for the subject application will not be assessed and finally determined until approval of the preliminary plan of subdivision required for the project. § 24-135(b), Prince George's County Code (2011 & Supp. 2014). *See* PGCPB No. 14-50, at 2; 05/07/2014 TSR, at 5. Given the pre-decisional procedural posture as to on-site private recreational facilities necessary for the development, we are unable to assess the subject application for compliance with local zoning and County Code provisions. Notwithstanding, we find that the on-site facilities shall be construed as the minimum number and type of private facilities required at the time. *See* PGCPB No. 14-50, at 2; 05/07/2014 TSR, at 5, 102; 04/21/2014 Mem., Sun to Kosack, at 2.

Applicable Zoning Ordinance Requirements

Pursuant to the zoning power vested in the district councils by the Maryland General Assembly via §§ 22-104 and 22-206 of the RDA, development within the County must meet the prescriptions of local zoning laws. As such, this proposed conceptual site plan application must comply with all procedural requirements set forth in the County Zoning Ordinance, as well as its regulations for development in the M-X-T Zone, as follows:

The specific purposes of the M-X-T Zone, set forth in § 27-542(a) of the Zoning Ordinance:

(1) To promote the orderly development and redevelopment of land in the vicinity of major interchanges, major intersections, and major transit stops, so that these areas will enhance the economic status of the County and provide an expanding source of desirable employment and living opportunities for its citizens

Based on the information within the record, we find the subject property is located at the intersection of Powder Mill Road (MD 212), a roadway with a transportation functional classification as an arterial roadway within the Subregion 1 Master Plan area; Old Gunpowder Road, a roadway with a transportation functional classification as a major collector within the Subregion 1 Master Plan; and less than one-half mile from the intersection of MD 212 and Interstate I-95, a roadway with a transportation functional classification as a freeway within the Subregion 1 Master Plan. *See* PGCPB No. 14-50, at 6; 05/07/2014 TSR, at 8. Nearness to these intersections of public rights-of-way is the stated basis for Technical Staff's recommendation, and Planning Board's ultimate finding, that the proposed development of this site will enhance the economic status of the County and provide an expanding source of desirable employment and living opportunities for its citizens." *See* PGCPB No. 14-50, at 6; 05/07/2014 TSR, at 8. We disagree, as we question the sufficiency of the evidence cited by Planning Board to support this finding. On the contrary, we find the location of the subject property supplies merely a tenuous nexus with transit- or transportation-oriented public resources, and we are not persuaded that the project's modest proximity to major intersections will have a noticeable effect to enhance employment and living opportunities for County citizens. *Id.* Consequently, on remand, Planning Board shall review and assess the revised application once filed by Applicant and accepted by the Development Review Division Technical Staff, in order to provide specific analysis as to whether the subject proposal complies with requirements of this section.

(2) To implement recommendations in the approved General Plan, Master Plans, and Sector Plans, by creating compact, mixed-use, walkable communities enhanced by a mix of residential, commercial, recreational, open space, employment, and institutional uses

We examined CSP-13008 in the context of the approved general plan and other comprehensive plan recommendations for the area of the subject property. We find that the general conclusions within PGCPB No. 14-50 offer little to elucidate the Planning Board's rationale for its finding that the subject proposal will implement comprehensive plan recommendations for compact, mixed-use, walkable communities enhanced by a broad mixture of uses. What's more, the TSR offers scant insight as to how the project advances a truly mixed-use development, and resorting instead to ineffectual, boilerplate restatements of the statutory criteria in § 27-542 of the Zoning Ordinance. *See* 05/07/2014 TSR, at 8. In fact, the lone source of ostensible support found in the record to support this finding is the testimony offered during the Planning Board hearing from the expert retained by Applicant. *See* PGCPB No. 14-50, at 6. *See also* 07/24/2014 Mem., Daston to Floyd, at 12–13.

Maryland law confers a strong presumption upon agencies to consider and decide zoning matters based on findings drawn from a record of evidence. However, these findings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions. *Turner v. Hammond*, 270 Md. 41, 55–56, 310 A.2d 543, 551 (1973) (denial of application for special use exception by filling out a pre-printed form; "we think the 'reasons' given by the Board for denying the application suggest a rather cavalier attitude in respect of its duties and responsibilities. It made no findings of fact worthy of the name and we think citizens are entitled to something more than a boiler-plate resolution"); *Rodriguez v. Prince George's County*, 79 Md. App. 537, 550, 558 A.2d 742, 748 ("It is not permissible for the Council, or any administrative body, simply to parrot general statutory requirements or rest on broad conclusory statements."), *cert. denied*, 317 Md. 641, 566 A.2d 101 (1989).

Planning Board accepted the expert's testimony over the concerns expressed by some Planning Department staff about the absence of key staff from the Community Planning Division of M-NCPPC to provide comments concerning any outstanding issues pertinent to the proposal, or to elaborate on any insight concerning conformance with the comprehensive land use policies embodied in the 2014 *Plan Prince George's 2035* General Plan update and 2010 *Subregion 1 Master Plan and Sectional Map Amendment*. See PGCPB No. 14-50, at 6–7; 05/22/2014, T. Other evidence within the record on this point is reflected within the appeal letter filed by Barbara Sollner-Webb of the West Laurel Civic Association, includes the 07/24/2014 Mem., Daston to Floyd, at 12–13.

According to the current County General Plan, this property is located within the County's Growth Boundary, and is designated within the County's "Established Communities" tier on the Growth Policy Map, being also Map 11 of Attachment B to the 2014 *Plan Prince George's 2035*, approved by the District Council on May 6, 2014. In reviewing CSP-13008, the Technical Staff made a number of findings concerning proposed design features and uses for the proposed development, nearly all of which were adopted in the Planning Board's disposition as to CSP-13008. All stated that the subject development proposal supports the goals of the General Plan and the *Subregion 1 Master Plan and SMA*. *Id.*

(3) To conserve the value of land and buildings by maximizing the public and private development potential inherent in the location of the zone, which might otherwise become scattered throughout and outside the County, to its detriment

The record reflects that the subject property is largely undeveloped and located adjacent to, in the vicinity of, existing major roadways. PGCPB No. 14-50, at 8; 05/07/2014 TSR, at 9. Developing a mixed use residential and commercial development on the site, according to the

disposition of Planning Board, will maximize the public and private development potential inherent in this location. *Id.* We are not so persuaded.

(4) To promote the effective and optimum use of transit and other major transportation systems

The record reveals the subject property proposed for development is located in the general vicinity of existing freeways and major roadways. Thus, Planning Board determined within its disposition resolution for CSP-13008 that the location of the property sufficiently demonstrates consistency with the purpose to promote transit and other transportation systems. *See* PGCPB No. 14-50, at 8; 05/07/2014 TSR, at 8. We are unpersuaded by the evidence supporting this finding of Planning Board, and find that the record contradicts a finding of consistency with the above-stated purpose of the Zone and the proposed development for the site. As we state in Paragraph 1, *supra*, we question the sufficiency of the evidence supporting this finding of Planning Board. Moreover, we find the remoteness from transit serves as a substantial barrier achieving this purpose of the M-X-T Zone, as no transit system currently serves any areas in close proximity to the subject property. *See* PGCPB No. 14-50, at 22. *See also* 07/24/2014 Mem., Daston to Floyd, at 13. In addition, we take further administrative notice of the transportation recommendations within the master plan to upgrade the functional classification of Old Gunpowder to major collector designation in furtherance of the master plan transportation strategy focused on an efficient network of roadways in the area of the site proposed for development so as to “maintain, improve, and construct major collectors as required for current and future development.” *See Subregion 1 Master Plan and SMA*, at 46. Accordingly, on remand Planning Board shall review and assess the revised application once filed by Applicant and accepted by the Development Review Division Technical Staff, in order

to provide specific analysis supporting its disposition as to whether the subject proposal complies with requirements of this section.

(5) To facilitate and encourage a twenty-four (24) hour environment to ensure continuing functioning of the project after workday hours through a maximum of activity, and the interaction between the uses and those who live, work in, or visit the area

The application and statement of justification in the record plainly reflect that the vast majority of the development proposal is multifamily residential dwelling units. As a residential development, there will be activity and a steady presence of people beyond regular business hours. The additional office space will encourage a more active environment during the midday hours. *See* PGCPB No. 14-50, at 8–9; 05/07/2014 TSR, at 9; App. Stmt. of Just’n, at 8.

(6) To encourage diverse land uses which blend together harmoniously

The record reflects a development proposal with 314 residential dwelling units and 8,000 square feet of office space, along with certain private amenities. *See* PGCPB No. 14-50, at 9; 05/07/2015 TSR, at 9; App. Stmt. Just’n, at 2. Accordingly, Planning Board found the project represents a mix of uses which should operate harmoniously. *Id.*

(7) To create dynamic, functional relationships among individual uses within a distinctive visual character and identity

The functional relationships of the individual uses are established during consideration of the conceptual site plan application and reviewed in further detail during consideration of a detailed site plan. *See* PGCPB No. 14-50, at 8; 05/07/2014 TSR, at 9. The visual character and identity of the project will be a function of the architecture of the buildings, entrance features, and landscape plantings, which will be under close examination at later stages of the development process. On remand, the revised application shall demonstrate design with high-quality detailing and varied architectural elements to ensure visual interest. The architecture,

street furniture, landscape treatment, signage, and other elements shall be coordinated to give the development and the property a distinctive visual character.

(8) To promote optimum land planning with greater efficiency through the use of economies of scale and savings in energy beyond the scope of single-purpose projects

Several factors within the administrative record seek to make this design an efficient multipurpose plan. The number of proposed residential units in one multifamily building allows for economies-of-scale in the construction process, and add potential for municipal services required to serve the residents. The mixture of uses proposed near a major existing intersection could facilitate the efficient use of this property that is currently only sparsely developed. *See* PGCPB No. 14-50, at 9; 05/07/2014 TSR, at 9. However, the density proposed in the current development application adds to substantial burden to the existing transportation infrastructure for single occupant automobile trip traffic. *See* PGCPB No. 14-50, at 20–23.

(9) To permit a flexible response to the market

We note that the record reflects a finding by Planning Board that the proposed combination of uses will create a desirable community in the northern part of the county, along I-95, where multifamily dwelling units are in demand. The CSP is in general conformance with this purpose of the M X T Zone. *See* PGCPB No. 14-50, at 8; 05/07/2014 TSR, at 9. We find that the reduction of density for the subject application and construction of townhomes in lieu of a multifamily will still comport with the 2014 general plan recommendation for the County to provide a diverse mix of house options for County residents and the Established Communities Land Use policy calling for maintenance of stable residential neighborhoods and to limit the expansion of commercial development outside of the Regional and Local Suburban Centers. *See* 2014 *Plan Prince George's 2035*, at 93–94.

(10) To allow freedom of architectural design in order to provide an opportunity and incentive to the developer to achieve excellence in physical, social, and economic planning.

The Planning Board found that the current proposal, once approved with conditions and DSP review, the applicant will be allowed freedom in architectural design to provide a unique and attractive product for the area. For the reasons stated in Paragraph (1) on pages 7–8, *supra*, we are not persuaded that the project’s modest proximity to major intersections will have have a noticeable effect to enhance employment and living opportunities for County citizens. *See* PGCPB No. 14-50, at 6; 05/07/2014 TSR, at 8. Consequently, on remand, Planning Board shall review and assess the revised application once filed by Applicant and accepted by the Development Review Division Technical Staff, in order to provide specific analysis as to whether the subject proposal complies with requirements of this section.

Section 27-547 of the Zoning Ordinance provides standards for a required mix of uses for the development of sites in the M-X-T Zone, as follows:

(d) At least two (2) of the following three (3) categories shall be included on the Conceptual Site Plan and ultimately present in every development in the M-X-T Zone. In a Transit District Overlay Zone, a Conceptual Site Plan may include only one of the following categories, provided that, in conjunction with an existing use on abutting property in the M-X-T Zone, the requirement for two (2) out of three (3) categories is fulfilled. The Site Plan shall show the location of the existing use and the way that it will be integrated in terms of access and design with the proposed development. The amount of square footage devoted to each use shall be in sufficient quantity to serve the purposes of the zone:

- (1) Retail businesses;
- (2) Office, research, or industrial uses;
- (3) Dwellings, hotel, or motel.

See § 27-547(d), PG CZO.

The subject development proposal incorporates two of the three use categories articulated in § 27-547, above, namely the office space and residential dwellings, within CSP-13008. *See* PGCPB No. 14-50, at 2; 05/07/2014 TSR, at 3; App. Stmt. of Just'n, at 2–3.

Section 27-548 of the Ordinance establishes additional standards for the development in the M-X-T Zone, as follows:

- (a) Maximum floor area ratio (FAR):
 - (1) Without the use of the optional method of development -- 0.40 FAR; and
 - (2) With the use of the optional method of development -- 8.00 FAR.
- (b) The uses allowed in the M-X-T Zone may be located in more than one (1) building, and on more than one (1) lot.
- (c) Except as provided for in this Division, the dimensions for the location, coverage, and height of all improvements shown on an approved Detailed Site Plan shall constitute the regulations for these improvements for a specific development in the M-X-T Zone.
- (d) Landscaping, screening, and buffering of development in the M-X-T Zone shall be provided pursuant to the provisions of the Landscape Manual. Additional buffering and screening may be required to satisfy the purposes of the M-X-T Zone and to protect the character of the M-X-T Zone from adjoining or interior incompatible land uses.
- (e) In addition to those areas of a building included in the computation of gross floor area (without the use of the optional method of development), the floor area of the following improvements (using the optional method of development) shall be included in computing the gross floor area of the building of which they are a part: enclosed pedestrian spaces, theaters, and residential uses. Floor area ratios shall exclude from gross floor area that area in a building or structure devoted to vehicular parking and parking access areas (notwithstanding the provisions of Section 27-107.01). The floor area ratio shall be applied to the entire property which is the subject of the Conceptual Site Plan.
- (f) Private structures may be located within the air space above, or in the ground below, public rights-of-way.

(g) Each lot shall have frontage on, and direct vehicular access to, a public street, except lots for which private streets or other access rights-of-way have been authorized pursuant to Subtitle 24 of this Code.

(h) Townhouses developed pursuant to a Detailed Site Plan for which an application is filed after December 30, 1996, shall be on lots at least one thousand eight hundred (1,800) square feet in size, and shall have at least sixty percent (60%) of the full front facades constructed of brick, stone, or stucco. In addition, there shall be no more than six (6) townhouses per building group, except where the applicant demonstrates to the satisfaction of the Planning Board or District Council, as applicable, that more than six (6) dwelling units (but not more than eight (8) dwelling units) would create a more attractive living environment or would be more environmentally sensitive. In no event shall the number of building groups containing more than six (6) dwelling units exceed twenty percent (20%) of the total number of building groups in the total development, and the end units on such building groups shall be a minimum of twenty-four (24) feet in width. The minimum building width in any continuous, attached group shall be twenty (20) feet, and the minimum gross living space shall be one thousand two hundred and fifty (1,250) square feet. For the purposes of this Subsection, gross living space shall be defined as all interior building space except the garage and unfinished basement or attic area. The minimum lot size, maximum number of units per building group and percentages of such building groups, and building width requirements and restrictions shall not apply to townhouses on land any portion which lies within one-half ($\frac{1}{2}$) mile of an existing or planned mass transit rail station site operated by the Washington Metropolitan Area Transit Authority and initially opened after January 1, 2000. In no event shall there be more than ten (10) dwelling units in a building group and no more than two (2) building groups containing ten (10) dwelling units. For purposes of this section, a building group shall be considered a separate building group (even though attached) when the angle formed by the front walls of two (2) adjoining rows of units is greater than forty-five degrees (45°). Except that, in the case of a Mixed-Use Planned Community, there shall be no more than eight (8) townhouses per building group, except when the applicant demonstrates to the satisfaction of the Planning Board or District Council, as applicable, that more than eight (8) dwelling units (but not more than ten (10) dwelling units) would create a more attractive living environment or would be more environmentally sensitive. In no event shall the number of building groups containing more than eight (8) dwelling units exceed twenty percent (20%) of the total number of building groups in the total development, and the end units on such building groups shall be a minimum of twenty-four (24) feet in width. The minimum building width in any continuous, attached group shall be twenty-two (22) feet, and the minimum gross living space shall be one thousand two hundred and fifty (1,250) square feet. For the purposes

of this Subsection, gross living space shall be defined as all interior building space except the garage and unfinished basement or attic area. Garages may not dominate the streetscape. Garages that are attached or incorporated into the dwelling shall be set back a minimum of four (4) feet from the front façade and there shall not be more than a single garage, not to exceed ten (10) feet wide, along the front façade of any individual unit. Garages are preferred to be incorporated into the rear of the building or freestanding in the rear yard and accessed by an alley. Sidewalks are required on both sides of all public and private streets and parking lots. At the time of Detailed Site Plan, the District Council may approve a request to substitute townhouses, proposed for development as condominiums, for multifamily dwellings that were required as a condition of approval in a Conceptual Site Plan approved prior to April 1, 2004. Such substitution shall not require a revision to any previous plan approvals. Further, such townhouses are subject to all other requirements of the Zoning Ordinance.

(i) The maximum height of multifamily buildings shall be one hundred and ten (110) feet. This height restriction shall not apply within any Transit District Overlay Zone, designated General Plan Metropolitan or Regional Centers, or a Mixed-Use Planned Community.

(j) As noted in Section 27-544(b), which references property placed in the M-X-T Zone through a Sectional Map Amendment approved after October 1, 2006, and for which a comprehensive land use planning study was conducted by Technical Staff prior to initiation, regulations for Conceptual or Detailed Site Plans (such as, but not limited to density, setbacks, buffers, screening, landscaping, height, recreational requirements, ingress/egress, and internal circulation) should be based on the design guidelines or standards intended to implement the development concept recommended by the Master Plan, Sector Plan, or the Sectional Map Amendment Zoning Change and any referenced exhibit of record for the property. This regulation also applies to property readopted in the M-X-T Zone through a Sectional Map Amendment approved after October 1, 2006 and for which a comprehensive land use planning study was conducted by Technical Staff prior to initiation of a concurrent Master Plan or Sector Plan (see Section 27-226(f)(3) of the Zoning Ordinance).

See § 27-548, Zoning Ordinance.

The *Subregion 1 Master Plan and SMA* rezoned the subject properties from the R-R and R-80 Zones to the M-X-T Zone. Each of the zoning changes therein was accompanied by a discussion that set forth guidance relevant to two properties—zoned C-O and adjoining the

subject properties—and to “properties to be zoned M-X-T.” Based on our review of the administrative record for the subject application, the provisions set forth in the discussions have been determined to be inapplicable. *See* PGCPB No. 14-50, at 15.

This property was rezoned from the C-O to the M-X-T Zone pursuant to the District Council’s approval as to the 2010 *Subregion 1 Master Plan and Sectional Map Amendment* via adoption of CR-58-2010 on June 23, 2010. Our review of the approved master plan document reveals no specific design concept required for the subject property, nor any corresponding design guidelines or standards in furtherance of evaluating conformance with a design concept. *See generally* 2010 *Subregion 1 Master Plan and Sectional Map Amendment*; CR-58-2010, at 17–18. In considering master plan and zoning changes and recommendations for development were adopted for the planning were approved at t. *Subregion 1 SMA*, at 166–67; CR-58-2010, at 17–18. The record also contains significant testimony and discussion surrounding the May 22, 2014, hearing before Planning Board. The Planning Board found the language to be ambiguous and difficult to determine whether it applies to the subject site; in fact, comments on this point even suggests that the provision may relate to property in C-O (Commercial Office) Zone—subject site was never zoned C-O, the District Council’s final action on the *Subregion 1 SMA* approved rezoning the subject property from the R-R and R-80 Zones to the M-X-T Zone, and the site is not to be the subject of a “future rezoning to M-X-T Zone” as stated in the language. *See* 05/22/2014 T. *See also* 05/22/2014 Ltr., Gibbs to Hewlett, at 3. Counsel also expressed concurrence with Applicant’s statement of position within a May 22, 2014, letter to Planning Board as to the specific language of Amendment 26 in the SMA. *See* 05/22/2014 Ltr., Gibbs to Hewlett, at 3–4. Counsel further advised the Board publicly that the purported requirements concerning minimum acreage, targeting development for office and technology uses, and

limiting the amount and density of retail and residential uses, even if it is not intended to apply to the subject property, constitute illegal *de facto* amendments to the Zoning Ordinance regulations for the M-X-T Zone, and constitute illegal conditional zoning. *Id.* Counsel for the Board further advised that the conditions imposed within Amendment 26 to CR-58-2010 conflict with the comprehensive nature and purpose of sectional map amendments as specified in the Zoning Ordinance. *See* CR-58-2010, at 17-18; 05/22/2014, T.

The proposed development is compatible with existing and proposed development in the vicinity

The record shows the site of the proposed development as generally surrounded by public roadways, with the more major roads located to the west and south of the site. *See* PGCPB No. 14-50, at 11; 05/07/2014 TSR, at 10. Accordingly, the proposed office area is located at the southern end of the proposed building, closest to the major intersection. The residential square footage is concentrated at the northern end of the site, closest to the adjacent minor roads and nearby agricultural uses to the north and east. Applicant's expert provided certain land planning testimony at the Planning Board hearing stating that the arrangement of proposed uses on the subject site, use of a parking garage situated so as to be surrounded by the building, and extensive landscaping proposed along the edges of the site would further promote compatibility within the community. *See* 05/22/2014, T. The residential uses and office use will also provide a transitional development from the commercial office park located to the southwest. The Planning Board found that the subject development is being planned and designed for maximum compatibility with the existing and proposed development in the vicinity.

Specimen Trees

Effective October 1, 2009, the Maryland Forest Conservation Act was amended to include a requirement for a variance if a specimen, champion, or historic tree is proposed to be removed. This state requirement was incorporated in the adopted WCO effective on September 1, 2010.

Type 1 tree conservation plan applications are required to meet all of the requirements of Subtitle 25, Division 2, § 25-122(b)(1)(G), which includes the preservation of specimen trees. Every effort should be made to preserve the trees in place, considering the different species' ability to withstand construction disturbance (refer to the Construction Tolerance Chart in the Environmental Technical Manual for guidance on each species' ability to tolerate root zone disturbances).

If, after careful consideration has been given to the preservation of the specimen trees, there remains a need to remove any of the specimen trees, a variance from § 25-122(b)(1)(G) is required. Applicants can request a variance from the provisions of Subtitle 25 provided all of the required findings in § 25-119(d) of the County Code can be met, and the request is not less stringent than the requirements of the applicable provisions of the Annotated Code of Maryland and accompanying regulations ("COMAR"). An application for a variance must be accompanied by a letter of justification stating the reasons for the request and how the request meets each of the required findings.

A Variance Application for the subject application and a statement of justification in support of a variance for the removal of 13 specimen trees were stamped as received by the Environmental Planning Section on February 25, 2014.

Due to the incomplete variance request and the technical revisions needed on the plans, the Planning Board did not approve the variance at this time because a full review cannot be completed based on the information submitted. *See* PGCPB 14-50, at 15–16.

Prince George's County Tree Canopy Coverage Ordinance

Subtitle 25, Division 3, of the County Code, the Tree Canopy Coverage Ordinance, requires a minimum percentage of tree canopy coverage (TCC) on projects that require a grading permit. Properties that are zoned M-X-T are required to provide a minimum of ten percent of the gross tract area in tree canopy.

Traffic Study for the Area of the Subject Property

The Planning Board found general agreement with the findings and conclusions of the traffic study. *See* PGCPB No. 14-50, at 20–23. The Maryland State Highway Administration (SHA) reviewed the traffic study and provided comments, along with the Prince George's County Department of Public Works and Transportation ("DPW&T"). *Id.* In an April 22, 2014, letter (Issayans to Masog), DPW&T stated the following:

- (1.) The existing northbound evening (PM) peak hour traffic volumes at Montgomery Road and Old Gunpowder Road gained 98 vehicles from Powder Mill Road (MD 212) at Old Gunpowder Road. The existing southbound morning (AM) peak hour traffic volumes at MD 212 and Old Gunpowder Road lost 17 vehicles from Montgomery Road and Old Gunpowder Road. The existing traffic volumes between the two study intersections should be balanced prior to performing all capacity and operational analysis.
- (2.) This discrepancy would not have affected the final level-of-service in relation to the adequacy threshold. However, these changes will be addressed at the time of the preliminary plan phase of the development.
- (3.) The two percent growth rate used for only two movements at the intersection of MD 212 and Old Gunpowder Road should be incorporated at all studied intersections for all movements.

- (4.) Queuing analysis should be conducted at MD 212 and Old Gunpowder Road to determine the queue length on southbound Old Gunpowder Road and the impact on the proposed access on Old Gunpowder Road. While a queuing analysis is not necessary for an adequacy finding, it can be useful from an operational perspective in determining the location of an access point. This evaluation will be done at the next phase of the development. While the Planning Board did not agree with this comment, but traffic impacts will be analyzed further at the time of preliminary plan application.

See PGCPB No. 14-50, at 20–23.

We find the foregoing assessment persuasive support for reduction of the proposed residential density in developing the subject property. In addition, we find the assessment very congruent with established transportation policies within the 2010 *Subregion 1 Master Plan and Sectional Map Amendment*. In particular, we note the transportation recommendation to upgrade the transportation functional classification for Old Gunpowder Road by designation as a major collector road (“MC-101”). Although the eastern side of the property includes frontage on this road, Planning Board found that no additional right-of-way will be required. *Id.*

The initial site plan application proposed three access points, including a right-in/right-out along access point along Old Gunpowder Road. This proposal generated significant testimony in the record from the Citizens Opposition in the subject proposal. On remand, the Planning Board will need to reassess the transportation requirements pursuant to the proposed specifications of the revised application submitted by Applicant. Given the significant reduction in the density for the subject proposal, we note that the demand on the surrounding residential uses find that access point onto Old Gunpowder Road shall be removed in a revised application submitted by Applicant. We note that the findings embodied within PGCPB No. 14-50 were based on the Planning Board’s assessments as to transportation based on the record created under

the original application CSP-13008, and it was based on a proposed residential density of 314 multifamily units. On remand, Planning Board shall reassess and make findings as to transportation upon filing of a revised application by Applicant, once accepted by the Development Review Division Technical Staff as to the required access point at Old Gunpowder Road; however, with the reduced density proposed pursuant to a revised application submitted by Applicant including a density range of 100-112 of units total for the project.

Transportation Findings

(1) The application analyzed is a CSP for a development consisting of 314 (garden) apartment dwelling units and 8,000 square feet of commercial office space. Based on trip rates from the “Guidelines for the Analysis of the Traffic Impact of Development Proposals” (Guidelines), this development will be adding 179 (45 in; 134 out) AM peak hour trips, and 203 (125 in; 78 out) PM peak hour trips.

(2) The traffic generated by the proposed plan would impact the following intersections:

MD 212 and Old Gunpowder Road

Old Gunpowder Road and Montgomery Road

Site Access 1 and Montgomery Road

Site Access 2 and Montgomery Road

Site Access 3 and Old Gunpowder Road

(3) The application is supported by a traffic study dated July 12, 2013 provided by the applicant and referred to SHA. The findings outlined below are based upon a review of these materials and analyses conducted by the Transportation Planning Section, consistent with the Guidelines.

(4) The subject property is located within the Developing Tier as defined in the 2002 *Approved Prince George's County General Plan*. As such, the subject property is evaluated according to the following standards:

(a) Links and signalized intersections: Level-of-service (LOS) D, with signalized intersections operating at a critical lane volume (CLV) of 1,450 or better;

(b) Unsignalized intersections: The Highway Capacity Manual procedure for unsignalized intersections is not a true test of adequacy, but rather an indicator that further operational studies need to be conducted. Vehicle delay in any movement exceeding 50.0 seconds is deemed an unacceptable operating condition at unsignalized intersections. In response to such a finding, the Planning Board has generally recommended that the applicant provide a traffic signal warrant study and install the signal (or other less costly warranted traffic controls) if deemed warranted by the appropriate operating agency.

(5) The following intersections identified in (2) above, when analyzed with the total future traffic as developed using the Guidelines, were found to be operating at or better than the policy service level defined in (4) above:

EXISTING CONDITIONS		
Intersection	AM (LOS/CLV/Delay)	PM (LOS/CLV/Delay)
MD 212 and Old Gunpowder Road	A/930	B/1126
Old Gunpowder Road and Montgomery Road *	48.9 seconds	39.9 seconds
*Unsignalized intersections are analyzed using the Highway Capacity Software. The results show the level-of-service and the intersection delay measured in seconds/vehicle. A maximum delay of 50 seconds/car is deemed acceptable. For signalized intersections, a CLV of 1450 or less is deemed acceptable as per the Guidelines.		

(6) The traffic study identified three background developments whose impact would affect some or all of the study intersections. A second analysis was done to evaluate the impact of the background developments. The analysis revealed the following results:

BACKGROUND CONDITIONS		
Intersection	AM (LOS/CLV/Delay)	PM (LOS/CLV/Delay)
MD 212 and Old Gunpowder Road	A/988	C/1174
Old Gunpowder Road and Montgomery Road *	55.0 seconds	45.0 seconds
*Unsignalized intersections are analyzed using the Highway Capacity Software. The results show the level-of-service and the intersection delay measured in seconds/vehicle. A maximum delay of 50 seconds/car is deemed acceptable. For signalized intersections, a CLV of 1450 or less is deemed acceptable as per the Guidelines.		

(7) Using the trip rates from the Guidelines, the study has indicated that the proposed development will be adding 179 (45 in; 134 out) AM peak hour trips and 203 (125 in; 78 out) PM peak hour trips. A third analysis depicting total traffic conditions was done yielding the following results:

TOTAL CONDITIONS		
Intersection	AM (LOS/CLV/Delay)	PM (LOS/CLV/Delay)
MD 212 and Old Gunpowder Road	B/1054	C/1215
Old Gunpowder Road and Montgomery Road *	114.7 seconds	101.9 seconds
Site Access 1 and Montgomery Road *	9.0 seconds	9.0 seconds
Site Access 2 and Montgomery Road *	8.7 seconds	8.8 seconds
Site Access 3 and Old Gunpowder Road *	11.2 seconds	14.7 seconds
*Unsignalized intersections are analyzed using the Highway Capacity Software. The results show the level-of-service and the intersection delay measured in seconds/vehicle. A maximum delay of 50 seconds/car is deemed acceptable. For signalized intersections, a CLV of 1450 or less is deemed acceptable as per the Guidelines.		

Based on the results shown above, the traffic study concluded that the study intersections will operate at acceptable levels of service adequately if the proposed development is approved.

However, the intersection of Old Gunpowder Road and Montgomery Road will operate with a delay in excess of 50 seconds per car. Typically, when an unsignalized intersection is projected to operate with delays in excess of 50 seconds per car, a determination of the approach volume of at least one minor street approach must be evaluated. The Montgomery Road leg of this intersection is the minor approach of this three-legged intersection. This minor approach volume is not projected to exceed 100 peak trips. Pursuant to the Guidelines, this intersection is deemed to operate acceptably. The Planning Board also considered testimony from the applicant's transportation engineer, who prepared the traffic study, and who was qualified as an expert in the field of transportation planning and engineering. This witness testified that the scope of the traffic study was approved by the Transportation Division prior to the study being prepared and that all background developments required by staff, as well as an annual growth rate through 2019, were included. The witness also testified that contrary to other lay testimony, the development project would not generate 600 trips of 600 cars during the AM and PM peak hours. The witness reiterated the findings in his report and conclusion that all intersections in the scoped and approved study area would continue to operate at acceptable levels, and that the proposed subject application would have no adverse impacts from a transportation perspective.

We are persuaded by the evidence within the administrative record that the access point on Old Gunpowder Road should be removed in a revised application submitted by Applicant for the subject development proposal.

Based on the foregoing, we find that further review of this development proposal is necessary for Applicant to amend the Conceptual Site Plan, and for assessment and disposition by Planning Board upon a new administrative record. To this end, we remand this matter to the

Planning Board for *de novo* proceedings, with instruction that Planning Board allow additional interested parties to become persons of record within the administrative record.

ORDER

Based on the foregoing review of the administrative record, and the findings and conclusions herein, REMANDED and returned to the Prince George's County Planning Board, pursuant to §§ 27-132–27-133, 27-141, 27-279–27-280 of the Zoning Ordinance, to reconsider its decision embodied within PGCPB No. 14-50 as to CSP-13008; to reopen the record for Applicant to submit a revised Conceptual Site Plan application, which shall consist of a development townhouses consistent with the the M-X-T Zone, including the specific purposes and regulatory prescriptions set forth in §§ 27-107.01(a)(198), 27-132(f)(2), 27-273–27-274, 27-279, 27-542, 27-546–27-548 of the Zoning Ordinance for Planning Board to consider a revised CSP application submitted by Applicant, and to make required findings in accordance with §§ 27-276 and 27-279 of the Zoning Ordinance:

- (1.) On remand, the revised Conceptual Site Plan submitted by Applicant shall address:
 - (a.) Removal of the access point onto Old Gunpowder Road.
 - (b.) Proposed residential townhouse dwelling with a stated density range of 100–112.
 - (c.) Proposed construction materials shall be stated in the revised application, shall be of the highest quality to ensure compliance with the provisions of § 27-542 of the Zoning Ordinance.
 - (d.) Maximum landscaping, screening, fence and / or berm buffering residential uses from adjacent uses; and
 - (e.) To the maximum extent possible, preserving existing specimen trees on the development site.

- (2.) On remand, the Planning Board shall direct technical staff to prepare the revised application over again as if it were a new one; as such, Planning Board is instructed to consider and incorporate all findings and conclusions set forth in this Order, to conduct all necessary referrals, and to issue all specified reports set forth in Part 3, Division 9 of the Zoning Ordinance and §§ 22-104 and 22-206 of the RDA. Accordingly, after conducting a new public hearing after submission of the new technical staff report, Planning Board shall adopt a new decision on the subject application, and transmit its adopted resolution to the District Council pursuant to § 27-279 of the Zoning Ordinance.
- (3.) On remand, Planning Board shall process this matter anew in accordance with the prescriptions of Part 3, Division 9 of the Zoning Ordinance. In conducting *de novo* proceedings, the District Council instructs the Planning Board to evaluate the revised proposal for compliance with the provisions of the Zoning Ordinance, as well as the provisions of the 2014 *Plan Prince George's 2035* General Plan, the 2010 *Subregion 1 Master Plan and Sectional Map Amendment*, and any functional master plan in order to make specific findings and determinations as to conformance with approved comprehensive plans for the area of the subject property.
- (4.) On remand, the Planning Board shall review the revised project application based on a new administrative record, and other pertinent policy changes affecting development in the area of the subject proposal.
- (5.) On remand, the Planning Board shall review all applicable master plans and area master plans for the area that includes the site

proposed for this project. To this end, Planning Board is instructed to create a new administrative record incorporating specific analysis as to the recommendations within all applicable master plans. The District Council also instructs the Planning Board to conduct a new public hearing where County staff, the Applicant, and all Persons of Record will be permitted to present evidence regarding compatibility with applicable master plan recommendations, and to present evidence regarding whether the proposed development is consistent with the purposes of the M-X-T Zone and compatible with surrounding communities.

- (6.) As provided in §27-107.01(a)(198), a Remand De Novo is a remand of a zoning case back to the Planning Board for the purpose of processing the application over again as if it were a new one, all persons who wish to do so may register as persons of record in the de novo proceedings for this matter.

ORDERED this 21st day of April, 2015, by the following vote:

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

Opposed:

Abstained:

Absent:

Vote: 9-0

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

BY: _____
Mel Franklin, Chairman

ATTEST: _____

Redis C. Floyd
Clerk of the Council