

**MEMORANDUM**

December 4, 2009

TO: County Council

FROM: Sherry Kinikin, Legislative Analyst *SK*

SUBJECT: Resolution to authorize Abandonment Request No. AB719  
Abandonment of sections of Public Alley adjacent to Montgomery County Parking Lot No. 3, bounded by Fenton Street to the east, Thayer Avenue to the north, Mayor Lane to the west, and Silver Spring Avenue to the south  
R. Holt Easley's subdivision of Silver Spring  
Proposed Studio Plaza Development

**T&E Committee recommendation (3-0): Approve the abandonment request.**

On June 18, the County Executive requested authority to abandon sections of a public alley adjacent to Montgomery County Parking Lot No. 3, bounded by Fenton Street to the east, Thayer Avenue to the north, Mayor Lane to the west, and Silver Spring Avenue to the south. A total of four parcels and five owners are affected. The proposed project is a public-private partnership that would redevelop the majority of a city block in the Fenton Village area of the Silver Spring CBD, including County Parking Lot 3 located at the center of the block.

The Executive's letter transmitting this request is attached as ©1 and the draft resolution is on ©2. He is requesting the Council approve this request. The letter notifying the property owners is attached on ©8. A letter transmitting the application is on ©9. The Executive Order is on ©24. The Hearing Examiner's Report is on ©25. Two maps are attached at ©35 and 36.

Sec. 49-63. Decision of the Council.

- (a) The Council must consider the record of the proceedings and the report and recommendations of the County Executive, including any recommendations of the government agencies and other parties listed in Section 49-62(h), and any other relevant and material information the Council receives from any person.
- (b) The Council may at any time remand an application to the Executive or the Executive's designee to reopen the record or consider new information.
- (c) A right-of-way may be abandoned or closed if the Council by resolution finds that:

- (1) the right-of-way is no longer necessary for present public use or anticipated public use in the foreseeable future; or
  - (2) the abandonment or closing is necessary to protect the health, safety, and welfare of the residents near the right-of-way to be abandoned or closed. In assessing health, safety, and welfare issues, the Council may consider:
    - (A) any adopted land use plan applicable to the neighborhood;
    - (B) safe and efficient pedestrian and vehicular traffic patterns and flows, together with alternatives, in the immediate neighborhood, for local and through traffic; and
    - (C) changes in fact and circumstances since the original dedication of the right-of-way.
- (d) A right-of-way which is the sole means of access to any property must not be abandoned or closed.

According to the East Silver Spring Citizen's Association, the proposal to develop Lot 3 was entered into without discussion with the community or the building owners, who could have informed the County about existing property rights. Building owners are currently using the alley to receive supplies for their businesses. Issues related to easements, rights-of-way, and condemnations are all subjects of this abandonment. Comments from the East Silver Spring Citizen's Association and building owners/customers in Fenton Village are at ©37. A letter from David Brown, the attorney who represents certain businesses in Fenton Village, is at ©39. Three deeds are attached at ©73, 74, and 75. Another letter from Mr. Brown is attached at ©54, coupled with a letter from June 5, 2009 at ©60. The Kalivas property is located at 908 Thayer Avenue. The Gerecht property is located at 903 Silver Spring Avenue.

It is the Hearing Examiner's recommendation to abandon the property, subject to the following conditions:

1. The Kalivas Property is provided vehicle access to the southwest corner of the Kalivas building.
2. The requested abandonment shall not become effective until Parking Lot 3 is conveyed to the Petitioner and the record plat(s) for the proposed development are recorded.
3. The areas of abandonment must be consistent with the proposed project plan and record plat(s).
4. The abandonment of the alleys does not affect any private property interests, including any easements that benefit the properties that adjoin the parking lot.

According to the Department of Transportation (DOT), accommodations can be made for the rear access that the businesses have. Michael L.L.C. has offered the Kalivases a southwest entrance to their property. The applicant is also taking part of their property so that they will not be able to use it. There will be nothing on the property, but the Kalivases will not be able to use the property because it will be blocked by buildings.

Michael L.L.C. has offered the Gerechts an elevator, rather than the pedestrian bridge which they have had since the building opened. Additionally, they will no longer be able to load supplies, in the way that they have since the building opened, from the loading dock. According to Michael Gerecht, 903 Silver Spring Avenue was clearly designed and approved with a main entrance on the 2<sup>nd</sup> floor, immediately adjacent to Lot 3. A pedestrian ramp enables egress and ingress. His father bought the building in part because this entrance, in a non-elevator building, enables tenants to easily move equipment/materials. The alternative is a long, narrow stairway.

According to Mr. Brown, the abandonment of Parcels 2, 3, and 5 rights-of-way should not be approved because the abandonment would adversely affect his client's easement rights. He states that

the intended sequence of events is clear and undisputed: abandonment, transfer of ownership to developer; project construction in the right-of-way by the developer; project buildings directly impeding access to the easement areas by his clients. Additionally, DOT says that the abandonment of the alleys does not affect any private property interests, including any easements that benefit the properties that adjoin the parking lot.

According to Robert Dalrymple, the applicant's attorney, no property will be denied an adequate means of ingress and egress as a result of the requested abandonment and the ingress and egress that will be established with the Optional Development Method.

All of the deeds say that a dedicated 16-foot public alleyway running over lots 2 and 3 should be maintained. The deed at Liber 2413 Folio 417, ©75, says that "Together with the building and improvements thereupon erected, made or being; and all and every, the rights, alleys, ways, waters, privileges, appurtenances and advantages to the name belonging or in anywise appertaining."

*Council staff recommends that this application be remanded back to the Department of Transportation. It is important that the private alleys or easement rights of the business owners be identified and determined whether or not they are private alleys or easement rights. Additionally, it should be determined whether condemnation is needed.*

DOT staff and attorneys will be present to answer any questions about the Executive's request.

#### Attachments

Executive's transmittal letter	©1
Draft adoption resolution	©2-7
Public hearing notice	©8
Application letter	©9-17
Exhibit E	©18-21
Exhibit F	©22-23
Executive Order	©24
Public Hearing Testimony	©25-34
General Location Map	©35
Detailed Location Map	©36
East Silver Spring Citizen's Association letter	©37-38
May 12, 2009 David Brown letter	©39-53
November 2, 2009 David Brown letter	©54-59
June 5, 2009 David Brown letter	©60-74
Deeds	©73-75
Letter from C. Robert Dalrymple	©76-81

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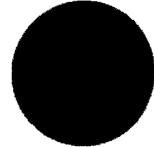
OFFICE OF THE COUNTY EXECUTIVE  
ROCKVILLE, MARYLAND 20850

Isiah Leggett  
County Executive

MEMORANDUM

October 5, 2009

IN FILE



2009 OCT -6 PM 1:17

RECEIVED  
MONTGOMERY COUNTY  
COUNCIL

TO: Phil Andrews, President  
Montgomery County Council

FROM: Isiah Leggett, County Executive  
Office of the County Executive

SUBJECT: DPWT Docket No. AB719, Portions of Public Alleys within  
Parking Lot No. 3, Silver Spring, 13<sup>th</sup> Election District

For your consideration, attached herewith is a proposed Resolution whereby the County Council may approve the abandonment of portions of the public alleys within Parking Lot No. 3 in Silver Spring. Supporting data are submitted as follows:

1. Council Resolution
2. Letter requesting the abandonment from Linowes and Blocher on behalf its client, Michael LLC, the Applicant
3. A Public Hearing was held on January 28, 2009, as announced by Executive Order No. 022-09.
4. The Hearing Examiner's Report and Recommendation
5. A location map and tax map for reference

IL/rg

Attachments

Resolution No: \_\_\_\_\_  
Introduced: \_\_\_\_\_  
Adopted: \_\_\_\_\_

**COUNTY COUNCIL  
FOR MONTGOMERY COUNTY, MARYLAND**

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By County Council

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**SUBJECT:** DPWT Docket No. AB719  
Abandonment – Public Alleys within  
Silver Spring Parking Lot No. 3  
Silver Spring, Maryland

**Background**

1. By letter dated October 30, 2008, from Linowes and Blocher on behalf of its client, Michael L.L.C., the Applicant, a request was made to the County to abandon portions of the alleys within Parking Lot No. 3 in Silver Spring, Maryland.
2. A Public Hearing to consider the abandonment proposal was held on January 28, 2009, by the designee of the County Executive.
3. Washington Gas had no objection.
4. Washington Suburban Sanitary Commission had no objection.
5. PEPCO did not respond within sixty (60) days from receiving notice and therefore, concurrence is presumed.
6. The Police Department approval conditioned upon Preliminary and Site Plan approval by the Montgomery County Planning Board.
7. The Montgomery County Planning Board recommended approval with the following condition:

The requested abandonment shall become effective simultaneously with the recordation of record plat(s) for the proposed Development, with the areas of the abandonment consistent with the approved Project Plan. At Preliminary Plan, the Applicant must satisfactorily demonstrate property ownership over all elements included within the plan. The Preliminary Plan must also provide adequate vehicular and pedestrian access to the Development and address interim and permanent parking needs for independent properties/businesses adjacent to the Development.

8. The Department of Fire and Rescue Services approval conditioned upon Site Plan approval by the Montgomery County Planning Board and the Fire Marshall.
9. The Department of Transportation recommended approval conditioned upon the Applicant obtaining Montgomery County Planning Board approval of the future Preliminary and Site Plans for Studio Plaza No. 9-20070010.
10. VERIZON did not object.
11. The County Executive recommends approval of the proposed abandonment.

Action

The County Council for Montgomery County, Maryland, finds that portions of the alleys within Parking Lot No. 3 as shown on the attachments are no longer necessary for public use, pursuant to Section 49-63 of the Montgomery County Code, and approves the abandonment, subject to the following conditions:

1. The Kalivas property located at 908 Thayer Avenue (Property ID No. 1042465) must be provided vehicular access to the southwest corner of the building.
2. The abandonment shall not become effective until Parking Lot No. 3 is conveyed to the Applicant and the record plat(s) for the proposed development are recorded.
3. The areas of abandonment must be consistent with the approved project plan and record plat(s).
4. The abandonment of the alleys shall not affect any private property interests, including any easements that benefit the properties that adjoin the parking lot.
5. The Applicants must bear all costs for the preparation and recordation of all necessary legal documents and plats.
6. The County Attorney must record among the Land Records of Montgomery County, Maryland, a copy of this Resolution approving the abandonment of the subject area.
7. Any person aggrieved by the action of the Council for abandonment may appeal to the Circuit Court within 30 days after the date such action is taken by Council.

This is a correct copy of Council Action.

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Linda M. Lauer  
Clerk of the Council

~~EXHIBIT E~~

*Attachment*

OCTOBER 24, 2008

DESCRIPTION OF PORTIONS OF  
THE ALLEYS TO BE ABANDONED IN THE  
SUBDIVISIONS KNOWN AS  
"R. HOLT EASLEY'S SILVER SPRING"  
PLAT BOOK 1 PLAT NO. 54 AND  
"SILVER SPRING PARK"  
PLAT BOOK 1 PLAT NO. 68  
(13<sup>TH</sup>) ELECTION DISTRICT  
MONTGOMERY COUNTY, MARYLAND

Being part of an unnamed alley in the subdivision known as "R. Holt Easley's Silver Spring" per plat thereof recorded in Plat Book 1 as Plat Number 54; also being part of the alleys created by deeds recorded in Liber 1208 at Folios 505, 507, 509, 511, 517, 519, 521, 527 and 527 all recorded among the Land Records of Montgomery County, Maryland and being more particularly described as follows:

PART 1

Beginning for the same at a point lying on the southerly right-of-way line of the unnamed alley lying between Blocks E and F as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54 being 150 feet westerly of the easterly end thereof; thence running with a portion of said southerly right-of-way line, as now surveyed in the datum of the Maryland Coordinate System (NAD83/91 MD1900)

- 1.) South 87° 39' 30" West, 200.00 feet to a point marking the southwestern corner of said unnamed alley, said point also lying on the easterly line of Lot 3, Block E as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54; thence running with a portion of said easterly line of Lot 3, Block E
- 2.) North 02° 20' 30" West, 20.00 feet to a point marking the northwesterly corner of said unnamed alley; thence running with a portion of the northerly right-of-way line thereof
- 3.) North 87° 39' 30" East, 200.00 feet to a point; thence leaving said northerly right-of-way line and running so as to cross and include a portion of said alley
- 4.) South 02° 20' 30" East, 20.00 feet to the point of beginning containing 4,000 square feet or 0.09186 acres of land.

**VIKA Incorporated**



PART 2

Beginning for the same at a point lying on the southerly right-of-way line of the unnamed alley lying between Blocks E and F as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54 being 136 feet westerly of the easterly end thereof; thence running with a portion of said southerly right-of-way line, as now surveyed in the datum of the Maryland Coordinate System (NAD83/91 MD1900)

- 1.) North 87° 39' 30" East, 16.00 feet to a point; thence leaving said southerly right-of-way line and running so as to cross and include a portion of Lots 6, 7 and 8, Block E as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54 the following two (2) courses and distances
- 2.) South 02° 20' 30" East, 80.00 feet to a point; thence
- 3.) South 87° 39' 30" West, 130.00 feet to a point on the westerly line of the aforesaid Lot 6, Block E; thence running with a portion of said line
- 4.) North 02° 20' 30" West, 16.00 feet to a point; thence leaving said westerly line of the Lot 6, Block E and running so as to cross and include a portion of Lots 6, 7 and 8, Block E as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54 the following two (2) courses and distances
- 5.) North 87° 39' 30" East, 114.00 feet to a point; thence
- 6.) North 02° 20' 30" West, 64.00 feet to the point of beginning containing 3,104 square feet or 0.07126 acres of land.

PART 3

Beginning for the same at a point lying on the common line of Lots 4 and 5, Block E as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54, being 120.00 feet northerly of the southerly end thereof; thence leaving said common line and running so as to cross and include a portion of Lots 2, 3 and 4, Block E as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54, as now surveyed in the datum of the Maryland Coordinate System (NAD83/91 MD1900)

- 1.) South 87° 39' 30" West, 150.00 feet to a point on the easterly line of the aforesaid Lot 2, Block E; thence running with a portion of said line
- 2.) North 02° 20' 30" West, 16.00 feet to a point; thence leaving said easterly line of Lot 2 Block E and running so as to cross and include a portion of Lots 2, 3 and 4, Block E as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54

- 3.) North  $87^{\circ} 39' 30''$  East, 150.00 feet to a point on the aforesaid common line of Lots 4 and 5, Block E; thence running with a portion of said line
- 4.) South  $02^{\circ} 20' 30''$  East, 16.00 feet to the point of beginning containing 2,400 square feet or 0.05510 acres of land.

#### PART 4

Beginning for the same at a point lying on the easterly line of Lot 1, Block E as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54, being 6.00 feet southerly of the northerly end thereof; thence leaving said common line and running so as to cross and include a portion of Lots 2 and 3, Block E and Lots 1 and 8, Block F, as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54 and a portion of Lot 1, Block O as shown on a plat entitled "Silver Spring Park" recorded in Plat Book 1 as Plat No. 64 among the aforementioned Land Records, as now surveyed in the datum of the Maryland Coordinate System (NAD83/91 MD1900)

- 1.) North  $87^{\circ} 39' 30''$  East, 150.00 feet to a point on the easterly line of the aforesaid Lot 1, Block F; thence running with a portion of said line
- 2.) North  $02^{\circ} 20' 30''$  West, 16.00 feet to a point leaving said easterly line of Lot 1, Block F; thence
- 3.) South  $87^{\circ} 39' 30''$  West, 150.00 feet to a point; thence
- 4.) South  $02^{\circ} 20' 30''$  East, 16.00 feet to the point of beginning containing 2,400 square feet or 0.05510 acres of land.

#### PART 5

Beginning for the same at a point lying on the northerly right-of-way line of the unnamed alley lying between Blocks E and F as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54 said point marking the end of line three (3) of Part One (1) of this description; thence running with a portion of said southerly right-of-way line, as now surveyed in the datum of the Maryland Coordinate System (NAD83/91 MD1900)

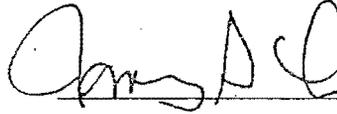
- 1.) South  $87^{\circ} 39' 30''$  West, 16.00 feet to a point; thence leaving said southerly right-of-way line and running so as to cross and include a portion of Lot 4, Block F as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54 the following two (2) courses and distances
- 2.) North  $02^{\circ} 20' 30''$  West, 67.00 feet to a point; thence

- 3.) North  $87^{\circ} 39' 30''$  East, 16.00 feet to a point on the westerly line of Lot 5, Block F, as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54; thence running with said westerly line of Lot 5, Block F
- 4.) South  $02^{\circ} 20' 30''$  East, 67.00 feet to the point of beginning containing 1,072 square feet or 0.02461 acres of land.

The undersigned hereby states that the metes and bounds description hereon was prepared by myself or under my direct supervision and that it complies with the Minimum Standards of Practice for Metes and Bounds Descriptions as established in Title 9, Subtitle 13, Chapter 6, Section 8 of the Code of Maryland Regulations as enacted and amended.

24 OCT 2008

Date



James A Fleming  
Professional Land Surveyor  
Maryland No. 21237



**NOTICE OF PUBLIC HEARING**  
**CONCERNING MONTGOMERY COUNTY**  
**ABANDONING THE PUBLIC USE OF**  
**PUBLIC ALLEY WITHIN PARKING LOT NO. 3**  
**SILVER SPRING**  
**CASE # AB719**

**The designee of the County Executive will conduct a public hearing on**

**Wednesday, January 28, 2009, at 1:30 p.m.**  
**Executive Office Building, Lobby Auditorium**  
**101 Monroe Street**  
**Rockville, MD 20850**

**The subject Alley is within Montgomery County's Parking Lot No. 3 and adjoined by property owned by or under contract to the Applicant, Michael L.L.C., (including Parking Lot No. 3). The abandonment request is associated with development plans for the properties owned by or under contract to the Applicant. Please see the attached Tax Map and ADC road map for the location of this right-of-way.**

**Comments can be made by letter, fax or e-mail to**

**Michael Cassedy**  
**Department of Transportation**  
**101 Monroe Street, 10<sup>th</sup> Floor**  
**Rockville, MD 20850**

**Phone 240-777-7254**  
**Fax 240-777-7259**

**E-mail [michael.cassedy@montgomerycountymd.gov](mailto:michael.cassedy@montgomerycountymd.gov)**

**NOTE: If you need services, aids, translators or barriers removed to participate in this hearing, please contact Michael Cassedy.**

**LINOWES**  
**AND BLOCHER LLP**  
ATTORNEYS AT LAW

AB 719

Exh. 1

October 30, 2008

**C. Robert Dalrymple**  
301.961.5208  
bdalrymple@linowes-law.com  
**Heather Dlhopsky**  
301.961.5270  
hdlhopsky@linowes-law.com

The Honorable Isiah Leggett  
County Executive  
Montgomery County, Maryland  
101 Monroe Street  
Rockville, Maryland 20850

**VIA HAND DELIVERY**

Re: Michael L.L.C. ("Petitioner"); Petition to Abandon part of the Parking Lot 3 Public Alley (the "Parking Lot 3 Public Alley") in the Block Defined by Thayer Avenue, Fenton Street, Silver Spring Avenue and Mayor Lane (the "Subject Block") in the Fenton Village District of the Silver Spring Central Business District ("CBD")

Dear Mr. Leggett:

On behalf of the Petitioner, and pursuant to Sections 49-62 through 49-63 of the Montgomery County Code, 2004, as amended (the "Code"), we hereby request the abandonment of a portion of the Parking Lot 3 Public Alley (the "Surplus Parking Lot 3 Public Alley") previously established within the Subject Block that will no longer be needed to fulfill a public purpose, as further described herein. Section 49-62 of the Code authorizes the closing and abandonment of any right-of-way used by the public, including roads, streets, alleys, and other improvements. As further defined and described below, Petitioner is the owner or contract purchaser of several properties within the Subject Block that are immediately adjacent to and benefited by the Parking Lot 3 Public Alley, including Public Parking Lot No. 3 ("Parking Lot 3"), which is owned by Montgomery County (the "County") and that will be developed by Petitioner (along with Petitioner's other land holdings) in public/private partnership with the County pursuant to an executed General Development Agreement (the "GDA") and as a result of a competitive public solicitation process conducted by the County (the "RFP"). A substantial portion of the Subject Block will thus be redeveloped by Petitioner utilizing the optional method of development in the CBD-1 zone of the County (the "Optional Method Redevelopment"). As a result of the Optional Method Redevelopment and the resulting internal and external vehicular circulation system created thereby, the Surplus Parking Lot 3 Public Alley will no longer be needed to fulfill a public purpose, and thus abandonment of the Surplus Parking Lot 3 Public Alley is sought (all as further described below).

Parking Lot 3 was acquired by the County by a series of deed instruments in or around the year 1948. In order to establish a means of internal ingress and egress to a public street for the remainder of each of the individual properties surrounding Parking Lot 3 and acquired by the

L&B 1045522v12/02015.0029

The Honorable Isiah Leggett  
October 30, 2008  
Page 2

County for Parking Lot 3 (the "Perimeter Properties to Parking Lot 3"), the Parking Lot 3 Public Alley was created by the same deed instruments by which the County acquired and assembled the land for Parking Lot 3 (with the exception that a 20-foot Public Alley running from the middle of Parking Lot 3 to Fenton Street was created by plat dedication rather than by deed instrument). Parking Lot 3 and the Parking Lot 3 Public Alley, intended to provide public ingress and egress to all of the Perimeter Properties to Parking Lot 3, are identified on Exhibit "A" hereto, with Parking Lot 3 shown in red stripes, the Parking Lot 3 Public Alley created by deed instruments shown in orange stripes (with reference to the deed instruments that acquired the respective portion of Parking Lot 3 and also created the respective portion of the Parking Lot 3 Public Alley indicated on Exhibit "A" by liber/folio reference), and the portion of the Parking Lot 3 Public Alley created by plat shown in green stripes (with plat reference also indicated by plat book and number).

Current ownership of the Perimeter Properties to Parking Lot 3 that are benefited by the Parking Lot 3 Public Alley is identified on Exhibit "B" as follows:

- The properties currently owned by Petitioner are shown in red stripes;
- Parking Lot 3, which is the subject of the GDA and to be owned and developed by Petitioner as part of the Optional Method Redevelopment, is shown in orange stripes;
- The "Benbassat Property", which is under contract for sale to Petitioner and that will be part of the Optional Method Redevelopment, is shown in blue boxes (Pt. 8). Collectively, the properties currently owned by Petitioner, Parking Lot 3 and the Benbassat Property are referred to as the "Petitioner's Property", and
- The "GranDesign Property" (P. 9), the "Siman Property" (Pt. 3); the "Kalivas Property" (Pt. 4), the "Bloom Property" (P. 10), and the "Katz Property" (Pt. 5) (collectively, the "Remaining Properties"), not owned or controlled by Petitioner and not part of the Optional Method Redevelopment, are shown in green stripes.

To reiterate, all of the Petitioner's Property will be redeveloped by Petitioner as part of the Optional Method Redevelopment per the GDA; the Remaining Properties are not currently proposed to be included in the Optional Method Redevelopment.

The Surplus Parking Lot 3 Public Alley sought to be abandoned by this Petition is shown in orange stripes on Exhibit "C" hereto, and abandonment is appropriate as this portion of the Parking Lot 3 Public Alley is part of Petitioner's Property; future ingress and egress to a public street (the sole intent for the original creation of the Parking Lot 3 Public Alley) will be otherwise established through the Optional Method Redevelopment. The Parking Lot 3 Public

The Honorable Isiah Leggett

October 30, 2008

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Alley for which abandonment is not sought (the "Parking Lot 3 Public Alley to Remain") is shown in blue boxes on Exhibit "C". This Parking Lot 3 Public Alley to Remain continues to be necessary in order to provide ingress and egress to a public street for the Remaining Properties (shown in green stripes on Exhibit "C") in conjunction with the vehicular circulation and ingress and egress improvements already existing or being created through the Optional Method Redevelopment.

The proposed Optional Method Redevelopment is conceptually shown on Exhibit "D" hereto, with the proposed means of ingress and egress to public streets serving Petitioner's Property and the Remaining Properties as a result of the Optional Method Redevelopment also illustrated. As part of the Optional Method Redevelopment, the combination of the Parking Lot 3 Public Alley to Remain (identified by blue boxes on Exhibit "C" and labeled 16'-0" and 20'-0" "Public Alley," respectively, on Exhibit "D") and a newly created private right-of-way established for public use labeled as "Proposed Private Street" on Exhibit "D", will provide internal ingress and egress to public streets for all of the Remaining Properties, thereby preserving the existing rights of all of the properties currently provided such ingress and egress via the Parking Lot 3 Public Alley. As a result, the Surplus Parking Lot 3 Public Alley to be abandoned is no longer necessary. Of the Remaining Properties:

- The GranDesign Property will continue to be provided ingress and egress by the currently improved "16'-0" Alley To Remain" adjoining it to the south and providing access to the "Proposed Private Street" (which provides public access to Thayer Avenue to the north and Silver Spring Avenue to the south);
- The Siman Property will continue to be provided ingress and egress in exactly the same manner as the GranDesign Property described above;
- The Kalivas Property will be provided ingress and egress in exactly the same manner as the GranDesign Property and the Siman Property described above. It should be noted that the Kalivas Property is currently served by a second 16'-0" Public Alley adjacent to the Bloom Property and connecting to the "20'-0" Alley To Remain" created by plat and providing ingress and egress to Fenton Street. This 16'-0" Public Alley is no longer necessary to provide public ingress and egress to the Kalivas Property as the "16'-0" Alley To Remain" and the "Proposed Private Street" provide public ingress and egress for the Kalivas Property to Thayer Avenue and Silver Spring Avenue, thereby preserving public ingress and egress for the Kalivas Property to two public streets;
- The Bloom Property will continue to be served by the currently improved "20'-0" Alley To Remain" adjoining it to the south and providing public ingress and egress to Fenton Street, and

The Honorable Isiah Leggett  
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Page 4

- The Katz Property will be provided public ingress and egress by the "16'-0" Alley To Remain" adjoining it to the north and providing access to the "Proposed Private Street" and Silver Spring Avenue to the south and Thayer Avenue to the north. It should be noted that the "16'-0" Alley To Remain" referenced above has never been improved and/or utilized for ingress and egress to the Katz Property (approximately eight feet of it being in dirt/grass and the remaining approximately eight feet utilized as part of Parking Lot 3). This notwithstanding, Petitioner will improve the "16'-0" Alley To Remain" to allow future public ingress/egress to the "Proposed Private Street" and Silver Spring Avenue and Thayer Avenue, as described, thereby improving circulation for the Katz Property.

All of the Petitioner's Property will have ingress and egress through the integrated design of the Optional Method Redevelopment. All improvements proposed with the Optional Method Redevelopment necessary to maintain ingress and egress to all affected properties will be staged to ensure continuing ingress and egress. No property will be denied an adequate means of ingress or egress as a result of the requested abandonment and the ingress and egress that will be established with the Optional Method Redevelopment. The abandonment of the Surplus Parking Lot 3 Public Alley and the creation of the "Proposed Private Street" for public use will be effectuated through the recordation of a subdivision plat as part of the Optional Method Redevelopment.

For all of the reasons described herein, the Surplus Parking Lot 3 Public Alley to be abandoned is not necessary for public use. Abandonment will allow for the Optional Method Redevelopment as envisioned for Fenton Village and the Subject Block by the Silver Spring CBD Sector Plan and as provided for with the GDA.

Associated with this Petition, also find attached as Exhibit "E" a metes and bounds description of the Surplus Parking Lot 3 Public Alley for which abandonment is hereby sought (the metes and bounds description is in five (5) parts and the five (5) parts are also shown on Exhibit "C"). Also enclosed please find a complete list of adjoining and confronting property owners, attached hereto as Exhibit "F", and a check in the amount of \$2,500.00, representing the filing fee for the proposed abandonment.

Exh #3

We look forward to discussing the requested abandonment in greater detail at the public hearing, and we will be available at that time to answer any questions. In the meantime, however, if you have any questions, or if any additional information is needed, please do not hesitate to contact us.

The Honorable Isiah Leggett  
October 30, 2008  
Page 5

Very truly yours,

**LINOWES AND BLOCHER LLP**



C. Robert Dalrymple



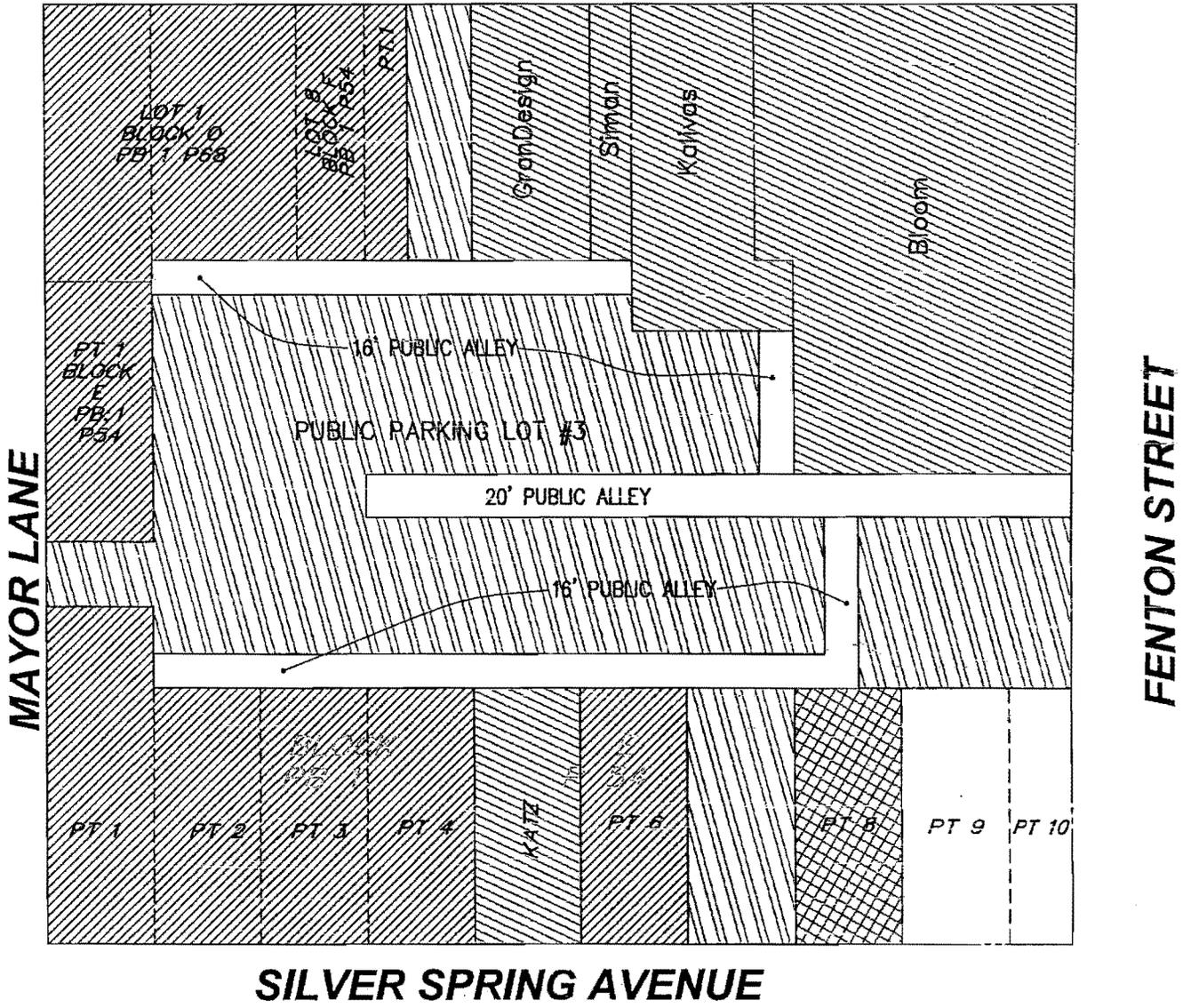
Heather Dlhopsky

Enclosures

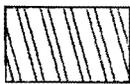
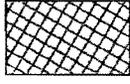
cc: ✓ Mr. Michael S. Cassedy  
Mr. Gregory M. Leck  
Mr. Al R. Roshdieh  
Mr. Stephen Nash  
Mr. Rick Siebert  
Mr. Eliezer H. Benbassat  
Mr. Robert P. Hillerson

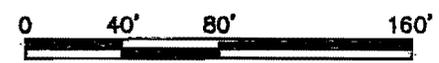


# THAYER AVENUE



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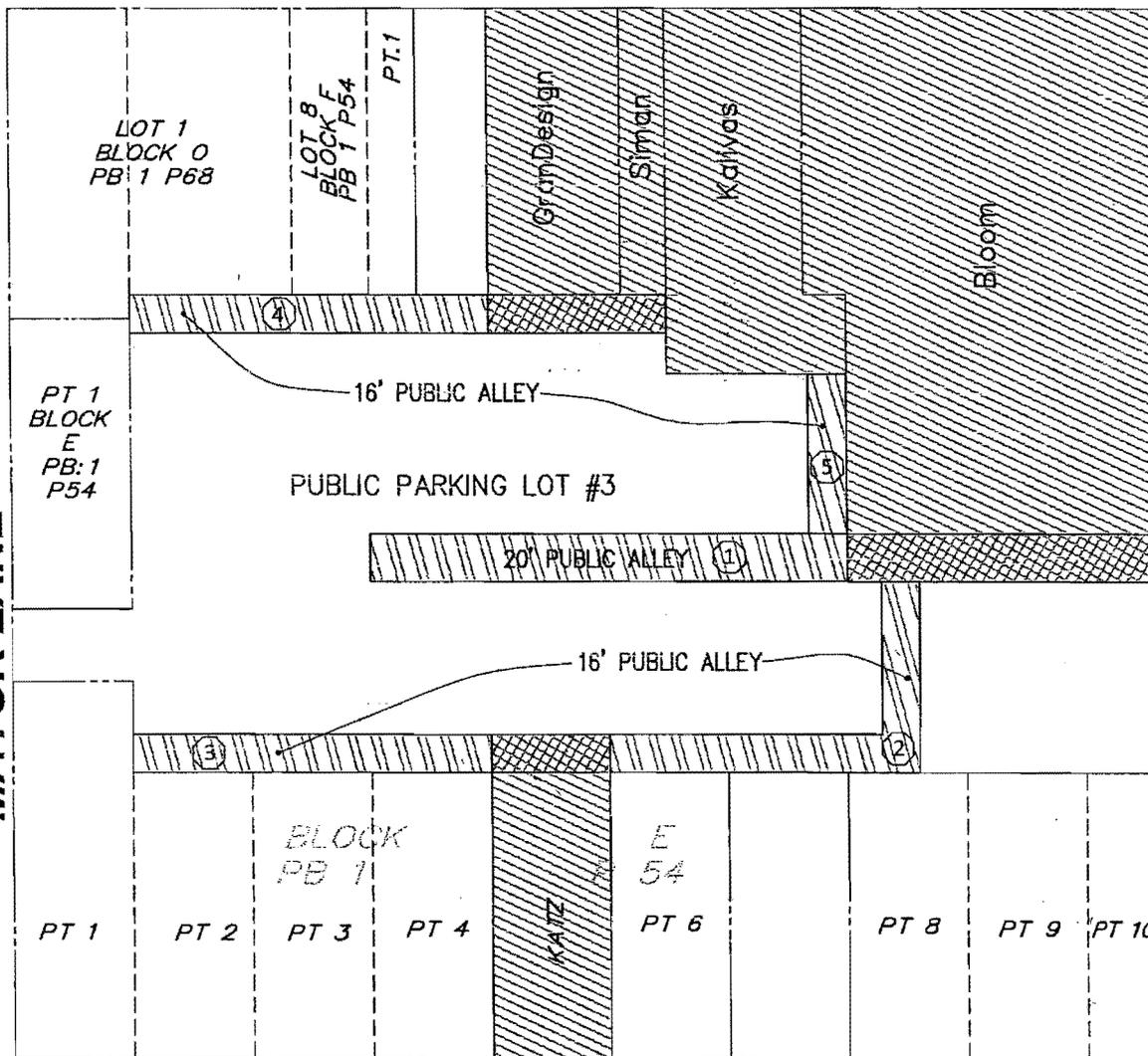
-  Currently Owned by Petitioner
-  Public Parking Lot #3
-  Benbassat Property
-  Remaining Properties



Studio Plaza  
**'Exhibit B'**  
 October, 2008 15



# THAYER AVENUE



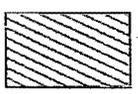
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**MAYOR LANE**

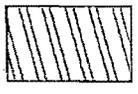
**FENTON STREET**

# SILVER SPRING AVENUE

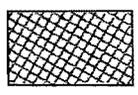
① Part 1 of Legal Description (Typical)



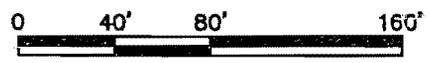
Remaining Properties



Alley to be Abandoned



Alley to Remain

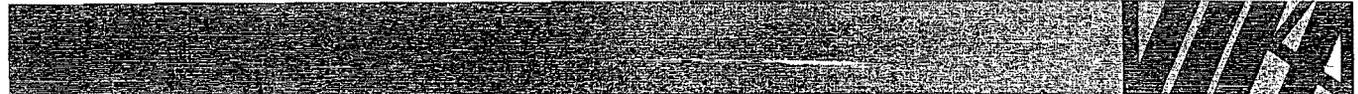


Studio Plaza  
**'Exhibit C'**  
 October, 2008

①







OCTOBER 24, 2008

DESCRIPTION OF PORTIONS OF  
THE ALLEYS TO BE ABANDONED IN THE  
SUBDIVISIONS KNOWN AS  
"R. HOLT EASLEY'S SILVER SPRING"  
PLAT BOOK 1 PLAT NO. 54 AND  
"SILVER SPRING PARK"  
PLAT BOOK 1 PLAT NO. 68  
(13<sup>TH</sup>) ELECTION DISTRICT  
MONTGOMERY COUNTY, MARYLAND

Being part of an unnamed alley in the subdivision known as "R. Holt Easley's Silver Spring" per plat thereof recorded in Plat Book 1 as Plat Number 54; also being part of the alleys created by deeds recorded in Liber 1208 at Folios 505, 507, 509, 511, 517, 519, 521, 527 and 527 all recorded among the Land Records of Montgomery County, Maryland and being more particularly described as follows:

PART 1

Beginning for the same at a point lying on the southerly right-of-way line of the unnamed alley lying between Blocks E and F as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54 being 150 feet westerly of the easterly end thereof; thence running with a portion of said southerly right-of-way line, as now surveyed in the datum of the Maryland Coordinate System (NAD83/91 MD1900)

- 1.) South 87° 39' 30" West, 200.00 feet to a point marking the southwesterly corner of said unnamed alley, said point also lying on the easterly line of Lot 3, Block E as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54; thence running with a portion of said easterly line of Lot 3, Block E
- 2.) North 02° 20' 30" West, 20.00 feet to a point marking the northwesterly corner of said unnamed alley; thence running with a portion of the northerly right-of-way line thereof
- 3.) North 87° 39' 30" East, 200.00 feet to a point; thence leaving said northerly right-of-way line and running so as to cross and include a portion of said alley
- 4.) South 02° 20' 30" East, 20.00 feet to the point of beginning containing 4,000 square feet or 0.09186 acres of land.

PART 2

Beginning for the same at a point lying on the southerly right-of-way line of the unnamed alley lying between Blocks E and F as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54 being 136 feet westerly of the easterly end thereof; thence running with a portion of said southerly right-of-way line, as now surveyed in the datum of the Maryland Coordinate System (NAD83/91 MD1900)

- 1.) North 87° 39' 30" East, 16.00 feet to a point; thence leaving said southerly right-of-way line and running so as to cross and include a portion of Lots 6, 7 and 8, Block E as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54 the following two (2) courses and distances
- 2.) South 02° 20' 30" East, 80.00 feet to a point; thence
- 3.) South 87° 39' 30" West, 130.00 feet to a point on the westerly line of the aforesaid Lot 6, Block E; thence running with a portion of said line
- 4.) North 02° 20' 30" West, 16.00 feet to a point; thence leaving said westerly line of the Lot 6, Block E and running so as to cross and include a portion of Lots 6, 7 and 8, Block E as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54 the following two (2) courses and distances
- 5.) North 87° 39' 30" East, 114.00 feet to a point; thence
- 6.) North 02° 20' 30" West, 64.00 feet to the point of beginning containing 3,104 square feet or 0.07126 acres of land.

PART 3

Beginning for the same at a point lying on the common line of Lots 4 and 5, Block E as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54, being 120.00 feet northerly of the southerly end thereof; thence leaving said common line and running so as to cross and include a portion of Lots 2, 3 and 4, Block E as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54, as now surveyed in the datum of the Maryland Coordinate System (NAD83/91 MD1900)

- 1.) South 87° 39' 30" West, 150.00 feet to a point on the easterly line of the aforesaid Lot 2, Block E; thence running with a portion of said line
- 2.) North 02° 20' 30" West, 16.00 feet to a point; thence leaving said easterly line of Lot 2 Block E and running so as to cross and include a portion of Lots 2, 3 and 4, Block E as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54

(19)



- 3.) North  $87^{\circ} 39' 30''$  East, 150.00 feet to a point on the aforesaid common line of Lots 4 and 5, Block E; thence running with a portion of said line
- 4.) South  $02^{\circ} 20' 30''$  East, 16.00 feet to the point of beginning containing 2,400 square feet or 0.05510 acres of land.

#### PART 4

Beginning for the same at a point lying on the easterly line of Lot 1, Block E as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54, being 6.00 feet southerly of the northerly end thereof; thence leaving said common line and running so as to cross and include a portion of Lots 2 and 3, Block E and Lots 1 and 8, Block F, as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54 and a portion of Lot 1, Block O as shown on a plat entitled "Silver Spring Park" recorded in Plat Book 1 as Plat No. 64 among the aforementioned Land Records, as now surveyed in the datum of the Maryland Coordinate System (NAD83/91 MD1900)

- 1.) North  $87^{\circ} 39' 30''$  East, 150.00 feet to a point on the easterly line of the aforesaid Lot 1, Block F; thence running with a portion of said line
- 2.) North  $02^{\circ} 20' 30''$  West, 16.00 feet to a point leaving said easterly line of Lot 1, Block F; thence
- 3.) South  $87^{\circ} 39' 30''$  West, 150.00 feet to a point; thence
- 4.) South  $02^{\circ} 20' 30''$  East, 16.00 feet to the point of beginning containing 2,400 square feet or 0.05510 acres of land.

#### PART 5

Beginning for the same at a point lying on the northerly right-of-way line of the unnamed alley lying between Blocks E and F as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54 said point marking the end of line three (3) of Part One (1) of this description; thence running with a portion of said southerly right-of-way line, as now surveyed in the datum of the Maryland Coordinate System (NAD83/91 MD1900)

- 1.) South  $87^{\circ} 39' 30''$  West, 16.00 feet to a point; thence leaving said southerly right-of-way line and running so as to cross and include a portion of Lot 4, Block F as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54 the following two (2) courses and distances
- 2.) North  $02^{\circ} 20' 30''$  West, 67.00 feet to a point; thence

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- 3.) North 87° 39' 30" East, 16.00 feet to a point on the westerly line of Lot 5, Block F, as shown on the aforesaid plat recorded in Plat Book 1 as Plat Number 54; thence running with said westerly line of Lot 5, Block F
- 4.) South 02° 20' 30" East, 67.00 feet to the point of beginning containing 1,072 square feet or 0.02461 acres of land.

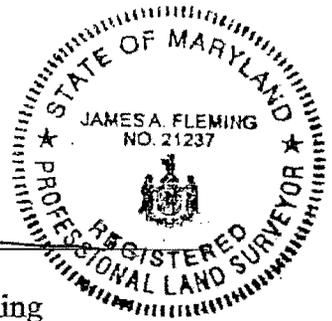
The undersigned hereby states that the metes and bounds description hereon was prepared by myself or under my direct supervision and that it complies with the Minimum Standards of Practice for Metes and Bounds Descriptions as established in Title 9, Subtitle 13, Chapter 6, Section 8 of the Code of Maryland Regulations as enacted and amended.

24 OCT 2008

Date



James A Fleming  
Professional Land Surveyor  
Maryland No. 21237



AB 719

Exh. 3

LIST OF ADJOINING AND CONFRONTING PROPERTY OWNERS

October 23, 2008

Tax Account No.	Name	Address	Lot/Parcel	Block
<b>Adjoining Property</b>				
13-01041288	Fenton Street Development LLC	4412 Walsh St. Chevy Chase, MD 20815-6008	P5 PT LTS 6 & 7	F
13-02044983	Michael LLC	c/o Robert Paul Hillerson Mgr. 801 Wayne Ave., Ste. 300 Silver Spring, MD 20910-4450	P1	E
13-01043904	Montgomery County	EOB 101 Monroe St. Rockville, MD 20850	P1 LT 7 PT LT 1- 6, 8, 10	
13-01044010	Montgomery County	EOB 101 Monroe St. Rockville, MD 20850	P1 PT 3 PT 8	E E F
13-01043870	Montgomery County	101 Monroe St. Rockville, MD 20850-2540	P1 PT 2, 3, 4	F
13-01045663	8204 Associates Limited Liability Company	8204 Fenton St. Silver Spring, MD 20910-4509	P9	E
13-01046601	Eliezer H. Benbassat, et al.	905 Silver Spring Ave. Silver Spring, MD 20910	P8	E
13-01041324	Michael LLC	801 Wayne Ave., #300 Silver Spring, MD 20910-4450	P1	E
13-01041335	Michael LLC	801 Wayne Ave., #300 Silver Spring, MD 20910-4450	P2	E
13-01041346	Michael LLC	801 Wayne Ave., #300 Silver Spring, MD 20910-4450	P3	E
13-01041357	Michael LLC	801 Wayne Ave., #300 Silver Spring, MD 20910-4450	P4	E
13-01042864	Michael LLC	801 Wayne Ave., #300 Silver Spring, MD 20910-4450	P1	O
13-01043493	Michael LLC	801 Wayne Ave., #300 Silver Spring, MD 20910-4450	P6	E
13-01045218	Michael LLC	801 Wayne Ave., #300 Silver Spring, MD 20910-4450	P8 PT 1	O
13-01045220	Michael LLC	801 Wayne Ave., #300 Silver Spring, MD 20910-4450	P1	F
13-01045231	Michael LLC	801 Wayne Ave., #300 Silver Spring, MD 20910-4450	P1	O
13-01047924	Michael LLC	801 Wayne Ave., #300 Silver Spring, MD 20910-4450	P1	E
13-02044983	Michael LLC	801 Wayne Ave., #300 Silver Spring, MD 20910-4450	P1	E
13-01047217	911 Silver Spring Ave Partnership	4641 Montgomery Ave., #200 Bethesda, MD 20814-3428	P5	E
13-01042465	Athena C. Kalivas, et al.	12301 Overpond Way Potomac, MD 20854-3040	P3 P4	F
13-01043312	Woolf Siman	P.O. Box 2153 Rockville, MD 20847-2153	P3	F
13-01046942	Grandesign Building LLC	912 Thayer Ave. Silver Spring, MD 20910-4570	9	F

**LIST OF ADJOINING AND CONFRONTING PROPERTY OWNERS**

October 23, 2008

<b>Tax Account No.</b>	<b>Name</b>	<b>Address</b>	<b>Lot/Parcel</b>	<b>Block</b>
13-01045674	8204 Associates Lmt'd Liab Co	8204 Fenton St Silver Spring, MD 20910-4509	P10	E
13-01046235	Fenton Street Development LLC	4412 Walsh St Chevy Chase, MD 20815-6008	10	F
13-01042454	Athena & Jerry Kalivas	12301 Overpond Way Potomac, MD 20854-3040	P4	F
13-01044021	Montgomery County	EOB 101 Monroe St. Rockville, MD 20850	P1	O
<b>Homeowners &amp; Civic Associations</b>				
		Heather Dlhopsky, Esq. Linowes and Blocher LLP 7200 Wisconsin Avenue Suite 800 Bethesda, MD 20814	301 961-5270	

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4th. 2



# MONTGOMERY COUNTY EXECUTIVE ORDER

# COPY

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

<b>Subject:</b> Abandonment of Public Alley within Public Parking Lot No. 3, Silver Spring	<b>Executive Order No</b> 022-09	<b>AB</b>
<b>Originating Department:</b> Transportation	<b>Department Number</b> AB 01-09	<b>Effective Date</b> 01/27/09

AB719

1. Pursuant to §49-62 of the Montgomery County Code (2004) as amended, the County Executive or his Designee shall conduct a Public Hearing

at 1:30 p.m. on Wednesday January 28, 2009  
 101 Monroe Street, EOB Lobby Auditorium  
 Rockville, Maryland 20850

to consider an application received from Linowes and Blocher on behalf of its client, Michael L.L.C., the Applicant, seeking abandonment of a portion of the Public Alley within Public Parking Lot No. 3 in Silver Spring.

2. After the aforesaid Hearing, the Hearing Officer shall report his or her findings and recommendations to the County Executive for further consideration as prescribed by County Code.

Approved as to Form and Legality  
 Office of the County Attorney

APPROVED

By:  1/27/09  
 Eric C. Willis  
 Assistant County Attorney

  
 Thomas J. Street  
 Assistant Chief Administrative Officer  
 01/27/09

Distribution:  
 Department of Transportation  
 Department of Finance

OFFICE OF COUNTY EXECUTIVE  
EXECUTIVE OFFICE BUILDING  
ROCKVILLE, MARYLAND 20850

IN THE MATTER OF:

Petition of Michael LLC \* DEPARTMENT OF  
\* TRANSPORTATION  
\*  
PUBLIC ALLEYS ABANDONMENT \*  
WITHIN SILVER SPRING PARKING LOT 3 \* PETITION NO. AB 719  
\*

BEFORE: Mohammad Siddique, Public Hearing Officer

**PUBLIC HEARING OFFICER’S REPORT AND RECOMMENDATION**

**I. Background**

The hearing and public comments in the captioned matter pertain to a petition filed by Michael LLC (“Petitioner”), to abandon portions of public alleys within Silver Spring Parking Lot 3 as shown in Exhibit 1, sub Exhibits A-C of the application dated October 30, 2008. Parking Lot 3 is owned by Montgomery County (“County”) and is bordered by Thayer Avenue to the North, Fenton Street to the East, Silver Spring Avenue to the South and Mayor Lane to the West. Parking Lot 3 is surrounded by properties owned by the Petitioner, GranDesign Studio, Inc., Woolf Siman, Athena Kalivas, Yuav Kaiz and 8204 Associates LLC. The Petitioner claims to have contracted to acquire property PT8 in Block E (the “Benbassat Property”). There are public alleys within Parking Lot 3. Abandonment Petition No AB 719 seeks abandonment of portions of the public alleys on the basis that they are no longer necessary for public use under Montgomery County Code §§ 49-62 and 49-63. The County-owned Parking Lot 3 will

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be developed by the Petitioner pursuant to an executed General Development Agreement (the "GDA") with the County. Petitioner has conceptually proposed a development plan utilizing Parking Lot 3 and its surrounding properties. The plan exhibits submitted with the abandonment application indicate that the Petitioner will provide right-of-way alleys for ingress and egress to several of the properties. (See Exhibit 1).

Pursuant to § 49-62(f) of the Montgomery County Code, a public hearing on the petition was held at 1:30 p.m. on January 28, 2009, in the Lobby Level Auditorium of the Executive Office Building, 101 Monroe Street in Rockville, Maryland. Notice of Hearing was mailed to neighboring property owners and was published in the *Montgomery County Sentinel* newspaper on January 15, 2009 and January 22, 2009. Testimony was received at the hearing and several exhibits were entered into the record. The record was held open for three weeks until 5:00 pm on February 19, 2009. Additional comments were received prior to closing of the records.

The Montgomery County Planning Board scheduled a final hearing on the development plans for the Parking Lot 3 on May 28, 2009. Prior to the final hearing, the Planning Board requested that the record be reopened to incorporate additional comments. The record was reopened and all the parties were notified and were asked to submit comments if any. The record was closed on June 5, 2009. In addition to the Planning Board's comments, three sets of comments were received and were recorded as Exhibits 31 through 34.

## II. Summary of Testimony

Michael Cassedy of the Montgomery County Department of Transportation presented the brief background of the development plan and the layout of the alleys

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proposed to be abandoned. Mr. Cassidy explained the process that was followed up to the hearing.

Robert Dalrymple, an attorney with the law firm of Linowes and Blocher, presented the testimony on behalf of the Petitioner. Robert briefly explained the background of the GDA and the historical background of Parking Lot 3. Mr. Dalrymple also provided the rationale behind the abandonment of the alleys in Parking Lot 3. He explained graphically how the GranDesign, Siman, Kalivas and Katz properties will be provided ingress and egress to and from the lot area. All the graphics were submitted into the record.

John Kalivas, whose mother, Athena Kalivas, owns the Kalivas Property, spoke on her behalf. The property is located at 908 Thayer Avenue and backs to Parking Lot 3. Mr. Kalivas contended that the building tenant has been using the rear of the building for loading and unloading supplies and as such a rear access to the south of the building is the only access to the public alley. Mr. Kalivas explained that if the rear access is denied the tenant will have no choice but to move which will cause a loss of sole income for his mother. Mr. Kalivas pointed out that the Petitioner has offered to modify the building so that it can be accessed from the southwest corner on to the public alley and that this public alley can be used for loading and unloading. A letter from Bernard Cooney who represented the Kalivas family seemed to confirm that such a proposition had been agreed to by the Petitioner. The letter with attachments is entered into the record as Exhibit 17. According to the Petitioner's plan, the public alley to remain will serve the Kalivas, Siman and GranDesign properties. Clarifying further, the Petitioner's counsel pointed out during the hearing that the Petitioner will work closely with Kalivas and

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clarify the ingress and egress scenarios effectively. Mr. Dalrymple submitted pictures of the rear of the Kalivas property where trucks are being loaded or unloaded outside the public alley system. The pictures were entered into record as Exhibit 16. The Petitioner's counsel said that ingress and egress from the building will be accomplished with some retrofit to the building when the project plan is finalized. The Petitioner mentioned that either the owner can retrofit the entrance to the building or the Petitioner can do it for them.

Michael Gerecht also testified. Mr. Gerecht is a "partner" with 8204 Associate LLC, which owns the property identified as "Pt 9" and "Pt 10." (See Exhibit 1). Mr. Gerecht objected to a graphic drawing presented by the Petitioner in which the Gerecht property was color coded as the Petitioner's property. Petitioner's counsel explained that since the property did not directly abut the alley system no designation was assigned to the Gerecht property. Mr. Gerecht pointed out that the County granted his business an easement, in 1990, for a pedestrian bridge. Mr. Gerecht insisted that the easement gives him the right to access his building via the pedestrian bridge. Mr. Gerecht stated that, unlike other properties, the second floor front entrance of his building is connected to Parking Lot 3 via the bridge. Mr. Gerecht maintains that the easement can only be extinguished with his written consent. The copy of the easement has been entered into the record as part of Exhibit 10. In support of his claim, Mr. Gerecht submitted a letter from his counsel, Lynott, Lynott & Parsons, which was entered into the record as Exhibit 15. The letter states that, in the absence of this access to the building, the business will be adversely impacted. The building will, allegedly, lose ingress and egress rights. The Petitioner's counsel acknowledged the presence of the easement and clarified during the

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hearing that the Gerecht property will be provided a solution to this issue in the project plan.

Yoav Katz, the owner of the Katz property, stated that he supports the development project, but he wants to make sure that he has access to the public alley behind the building for ingress and egress to the street surrounding Parking Lot 3. He emphasizes that he has never surrendered the right of access to the public alley. The project plan presented by the Petitioner has addressed this issue.

Woolf Siman, an owner of the Siman property, submitted comments via electronic mail. (See Exhibit 28). Mr. Siman indicated his approval for the abandonment and for the Studio Plaza plans with one recommendation: to widen the 16' alley at the rear of his property.

Tadeo Grodzki, a "principal" of GranDesign Studio, Inc., stated that he fully supports the abandonment and the Studio Plaza plans and that it will enhance the common enjoyment of the area. (See Exhibit 29). However, Mr. Grodzki raised a safety issue arising from the elimination of protection from vehicles striking the GranDesign building. GranDesign states that currently there is a sidewalk within the 16' public alley, but the Studio Plaza plans call for no side walk. And the alley needs to be widened for safe pedestrian and truck traffic.

East Silver Spring Citizen's Association "ESSCA" has opposed the idea of selling Parking Lot 3 stating it will have adverse effect on the businesses on the Fenton Street. (See Exhibit 21). It has supported the views expressed by the Kalivases and Mr. Gerecht regarding their respective properties.

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A private citizen, Jane Gorbaty, also opposed the idea of selling Parking Lot 3 and its adverse impact on the adjoining businesses. (See Exhibit 19). Ms. Gorbaty pointed out that the Petitioner has been using intimidation to force the surrounding businesses to sign on for his development plans. The Petitioner has denied that he has used coercive tactics to get his way. However, this issue is beyond the scope of this hearing. Ms. Gorbaty supported the rights of businesses to have access to the public alleys.

In administering the abandonment provisions of Chapter 49, the County Executive is required to solicit a response to the abandonment proposal from a variety of public agencies, including each public utility authorized by the Public Service Commission to provide service within the area and any grantee of a franchise if the grantee is authorized to use or install facilities in the right-of-way. Under Montgomery County Code 49-62(g), if an agency or other party does not respond within 60 days after notice is first published under section 49-62(e), the County Executive must presume that the agency or other party does not oppose the proposal. Verizon has notified the county that it does not have existing facilities in the PUE/Easement/Dedication which conflicts with this abandonment request. Washington Gas has determined that it has no gas line in the area of proposed abandonment. The police department has indicated it has no objection to this abandonment. Washington Suburban Sanitary Commission has stated that it does not have any facilities in Parking Lot 3. The Department of Fire and Rescue has indicated that it has no objection to the abandonment as long as Planning Board approves the plan. The Department of Transportation has recommended the abandonment provided Planning Board approves the future preliminary site plans for the Studio Plaza No. 9-20070010.

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After the reopening of the record, the Katz, Kalivas and Gerecht property owners submitted additional testimony through their counsel David W. Brown of the law firm of Knopf & Brown. Mr. Brown's letter is entered into the record as Exhibit 34. Mr. Brown challenged Executive Order # 070-09 for its accuracy. The inaccuracy can be taken as a typographical error rather than a substantive one. Mr. Brown argued that the County Executive did not have the authority to execute the GDA. Mr. Brown failed to note that the validity of the GDA is not within the scope of this hearing. Mr. Brown argued that his clients have the right to access the alleys behind their respective properties through the existing public alley system within Parking Lot 3. That claim is also not within the scope of this hearing. Mr. Brown did not address whether his clients' claimed rights of access can be satisfied with the perpetual access system to be provided by the Petitioner. Mr. Brown argued that, "an alley created by plat is a dedication, and upon its abandonment, title to the property reverts to the owner of the abutting properties from whence the dedication arose." Mr. Brown re-emphasized the points already made by three property owners with reference to a similar precedence arising out of court cases.

Petitioner's counsel, Robert Dalrymple, submitted a rebuttal to the argument of Mr. Brown maintaining that the Katz, Kalivas and Gerecht property owners' claims are irrelevant for the purpose of abandonment of the public alleys.

The Planning Board has recommended the approval of the project plan and of the requested abandonment with the condition that

The requested abandonment shall become effective simultaneously with the recordation of record plat(s) for the proposed Development, with the areas of abandonment consistent with the approved Project plan. At the Preliminary Plan, the Applicant must satisfactorily demonstrate property ownership over all elements included within the plan. The preliminary Plan must also provide adequate vehicular and pedestrian access to the

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Development and address interim and permanent parking needs for independent properties/businesses adjacent to the Development.

The plans that the Planning Board reviewed were not submitted into the record.

### **III. Conclusions and Recommendations**

The abandonment of rights-of-way is governed by the provisions of Montgomery County Code §§49-62 and 49-63. Section 49-62 permits an application for the abandonment of a right-of-way by any person or government agency, provides for public agency and utility company review, and requires a public hearing with notice. The hearing and notice procedures have been satisfied, and the public agencies and utility companies have been given an opportunity to review the petition for abandonment as described above.

Section 49-63 allows abandonment if the right-of-way is not needed for public use or if abandonment is necessary to protect the health, safety and welfare of the residents in the neighborhood. Section 49-63(d) precludes abandonment of a right-of-way which is the sole means of access to any property.

In assessing health, safety and welfare issues, the Council may consider 1) any adopted land use plan applicable to the neighborhood; 2) the safe and efficient pedestrian and vehicular traffic patterns and flows, together with alternatives, in the immediate neighborhood, for local and through traffic; and 3) changes in facts and circumstances since the original dedication of the right-of-way.

The Planning Board has strongly supported the abandonment, but added some conditions under which the abandonment should be approved.

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Points raised by individuals or organizations pertaining to the validity of the General Development Agreement are beyond the scope of this hearing and cannot be entertained.

In the case of the Kalivas property, the Kalivases have configured the rear of the building to accept deliveries from the parking lot in general which extends beyond the 16-foot public alley at the rear of the property. The Kalivas property does not have any exit from the property onto the public alley southwest of the property which also serves the Siman and GranDesign properties. Any unobstructed and un-challenged use of the parking lot by the Kalivases for loading and unloading of trucks for several years is not a ground for permanency of access. And Chapter 31 of the County Code prohibits the loading or unloading of commercial vehicles in County parking lots and restricts the size and type of vehicles that may enter a County parking lot. However, the Petitioner has approached the Kalivases to help them re-configure the building for loading and unloading from the southwest corner of the building to the remaining alley.

The Gerecht property benefits from an easement for a pedestrian bridge. The Gerecht property does not abut the alleyways that are proposed to be abandoned and the pedestrian bridge easement does not grant Mr. Gerecht access to those alleyways. Therefore, Mr. Gerecht's testimony and evidence has no bearing on the abandonment petition and may be addressed in a different forum.

Tadeo Grodzki, of GranDesign Studio, Inc., has indicated that there is an existing side walk which must remain for pedestrian safety. The issue of pedestrian safety and the preservation of any sidewalk within the remaining public alley are beyond the scope of this abandonment hearing.

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Based on a thorough review of the testimony and evidence of record, I find that the alleys requested for abandonment are no longer necessary for public use. It is therefore recommended that the abandonment be granted subject to the following conditions:

1. The Kalivas property is provided vehicle access to the southwest corner of the Kalivas building.
2. The requested abandonment shall not become effective until Parking Lot 3 is conveyed to the Petitioner and the record plat(s) for the proposed development are recorded.
3. The areas of abandonment must be consistent with the approved project plan and the record plat(s).
4. The abandonment of the alleys does not affect any private property interests, including any easements that benefit the properties that adjoin the parking lot.

Respectfully submitted,

Date: August 26, 2009

M. Siddique

Mohammad Siddique  
Public Hearing Officer

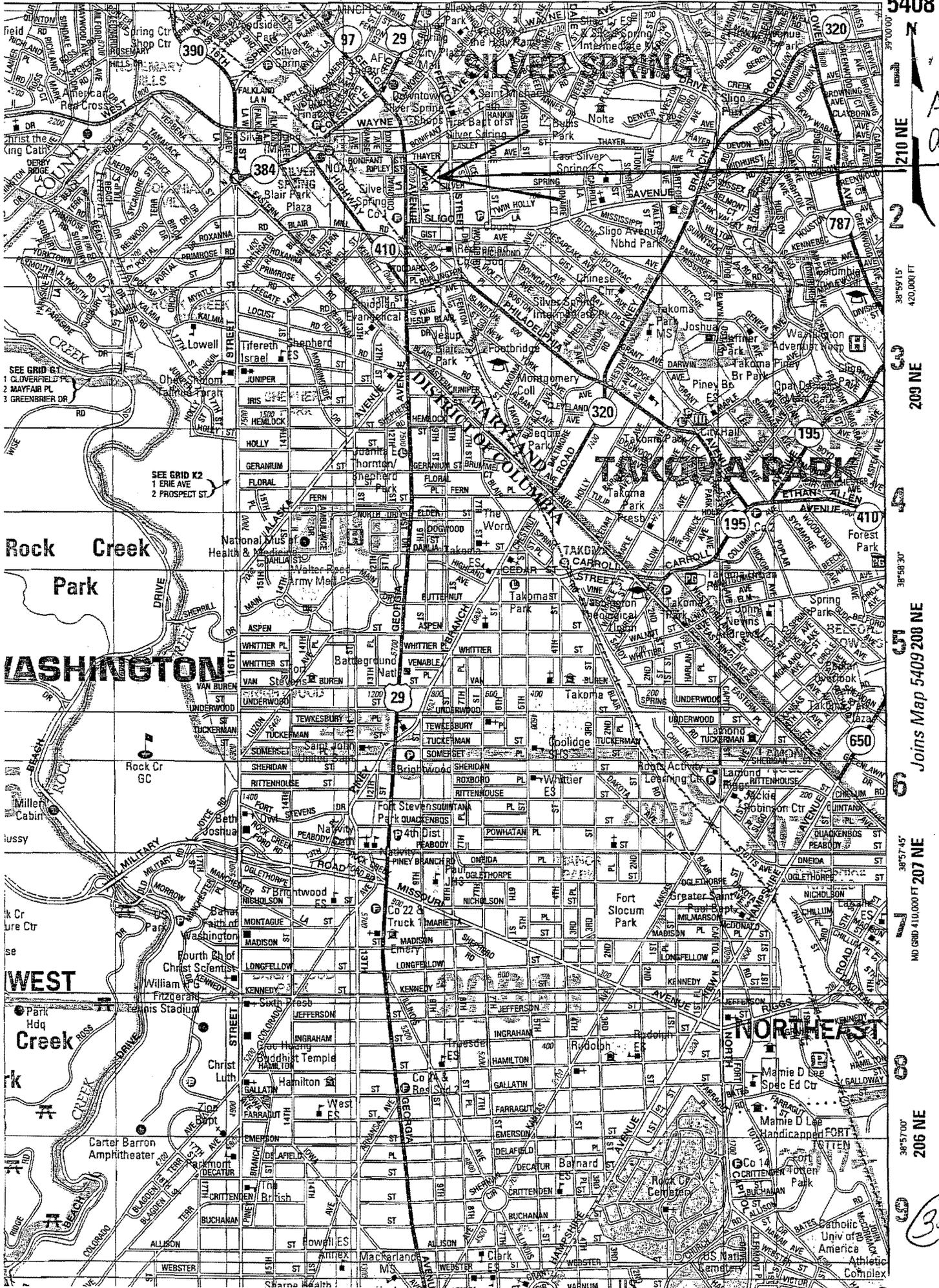
The Public Hearing Officer's Recommendation for Abandonment Petition AB 719 has been reviewed and is approved.

Date:

9/14/09

Isiah Leggett  
Isiah Leggett, County Executive

(34)



AB71  
Alley

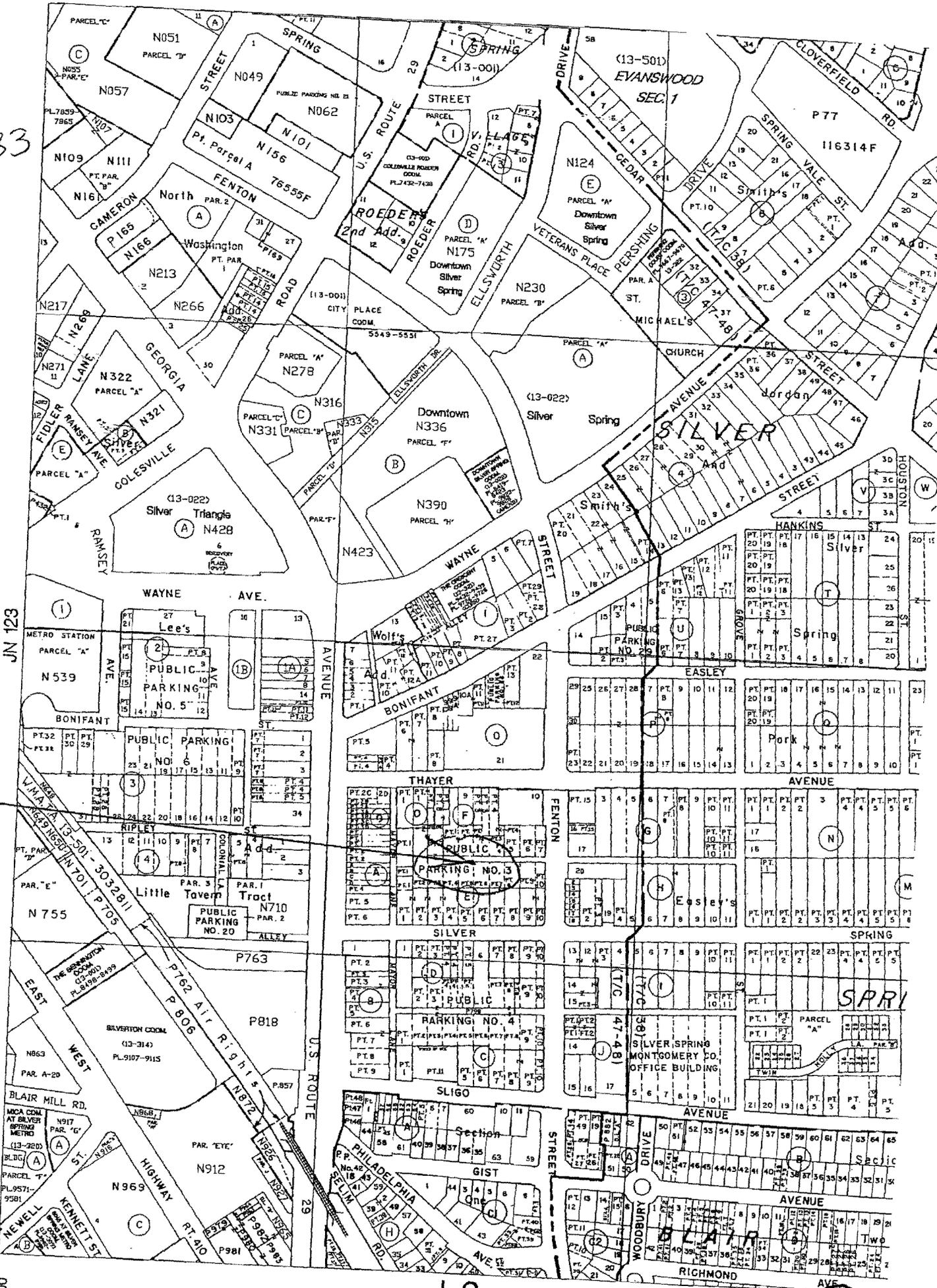
210 NE  
209 NE  
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206 NE

SEE GRID G1  
1 CLOVERFIELD PL  
2 MAYFAIR PL  
3 GREENBRIER DR

SEE GRID K2  
1 ERIE AVE  
2 PROSPECT ST

35

Tax  
Map  
JN 33



N 3  
JN 123

Site

N36000

W6000

J 3

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SCALE IN FEET

COMPILED BY MARYLAND DEPARTMENT OF PLANNING PROPERTY MAPPING SECTION

The information shown on this map has been compiled from deed descriptions and other records and is not an actual survey. It should not be used for legal descriptions. Users noting errors are urged to notify Room 1191, 301 W. Preston St., Baltimore, Maryland 21201.

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SAR GO  
have - CC

TRAN

051568

September 24, 2009

TO: Montgomery County Council.  
FROM: East Silver Spring Citizen's Association,  
Building Owners/Customers/Business Owners in Fenton Village

RE: Upcoming Council Vote on Abandonment of Public Alleys  
In Parking Lot 3 in Downtown Silver Spring

ENCLS IN FILE

**REQUESTED ACTION:**

We respectfully ask the Council to consider our concerns outlined in this letter and attached documents, and vote NO on the proposed abandonment of public alleys in Parking Lot 3.

**BACKGROUND**

The County Parking District several years ago put out an RFP to develop Parking Lot 3 in Silver Spring, a surface lot purchased by the County in the late 1940's from surrounding building owners, exclusively with the intent of maintaining a parking lot for use by customers and tenants of those buildings. The purchase deeds clearly state that future access was guaranteed and to ensure this, specific property rights were created for building owners.

The proposal to develop Lot 3 was entered into without discussion with the community nor building owners, who could have informed the County about existing property rights. Furthermore, no research was done by the County, which would readily have brought our property rights to light. Instead, the County invested significant time and money in closing a deal with a developer, who apparently discovered those property rights only upon executing a title search. Is that the way business should be handled in Montgomery County?

Though MNCPPC recently approved a project plan for the site and does reference issues of building access, their approving resolution clearly states that easement and abandonment issues are beyond their purview—abandonments are a Council issue and easements a legal issue.

We, the residents, business, and property owners on the attached petition and others beseech the Council not to approve this abandonment. As Councilmember Ervin herself informed us some months ago, she is well aware the area is now blighted largely due to the developer's deliberate demolition of surrounding properties, well before such demolition was necessary, and furthermore, by eliminating businesses he has dealt a significant blow to parking revenues in Lot 3—a Lot that was once routinely full but now routinely has ample space!

Abandoning access vital to other businesses, especially at this difficult economic time, rewards a developer (especially one known by business, government and residents for his difficult behavior over the years) who takes actions adversely affecting the economic health of the area and would continue doing so by tearing down recently occupied buildings long before they need to be.

A decision by the County to abandon alleys that are not unused public alleys but ones granted by deed to property owners in return for selling their land to the County for use specifically as a parking lot, with the proviso they would always have unhindered access to their buildings, would show Montgomery County as willing to favor a single private entity's financial well-being over property rights the County granted to others. Is that the desired message?

Lot 3 is sorely needed by the small, and heavily minority merchants of Fenton Street Village. It is also essential for access to surrounding buildings--access they have had, unencumbered for 50 years, regardless of what County officials have said about loading and unloading rights. In reading the deeds, it was clearly the intent of the County to buy the land from the building owners with the provision that access be maintained, and said access for commercial buildings would clearly mean loading and unloading via the parking lot.

Furthermore, this project is contingent on replacing safe surface parking with a fully underground, unstaffed lot. A Silver Spring police spokesperson has publicly stated opposition to this garage on the grounds it presents significant crime concerns and does not comply with what is known as crime prevention through environmental design, and they pointed out that the developer was not willing to even meet with them to discuss their concerns.

This garage, according to Park and Planning and Police public testimony, would be the ONLY fully underground only, unstaffed public parking lot in the County--in an area already beset with safety concerns. A member of the Park & Planning Board bluntly informed the developer at a recent hearing that SHE would not park underground after 4 in the afternoon!. Yet the County Parking Division and the developer are intent on doing away with this safe public parking solely to enable a single private developer to profit at the expense of the community's public safety and the well being of small and minority business owners.

Before the Council votes on this abandonment, we, the merchants, building owners, and residents of Fenton Village urge the Council to look at what you are voting on. There are ways this area could be developed without sacrificing the rights of the people in the interest of one developer. We would be happy to speak with you. Note the 700 signatures on the hastily circulated petition.

Attorney David Brown clearly articulated in his memo to Park and Planning why the proposed abandonment/project run counter to what Montgomery County residents might expect of good local government. We urge you to read his memo thoroughly, and to weigh our points. We would be more than happy to testify or answer further questions.

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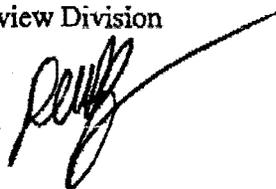
DAVID W. BROWN

**MEMORANDUM**

Via Email

[Elza.hisel-mccoy@mncppc-mc.org](mailto:Elza.hisel-mccoy@mncppc-mc.org)

**TO:** Elza Hisel-McCoy, Assoc. AIA, LEED-AP  
Senior Planner  
Development Review Division  
MNCPPC-MC

**FROM:** David W. Brown 

**DATE:** May 12, 2009

**SUBJECT:** Analysis of Easements on Studio Plaza, Project Plan 920070010

This Memorandum is addressed to the Project Plan 920070010 Application ("Application"), where the Applicant, Michael, LLC ("Applicant"), proposes to construct the Studio Plaza Project ("Project") on property in the block bounded by Silver Spring Avenue, Fenton Street, Thayer Avenue and Mayor Lane ("Subject Property"). It is submitted on behalf of three property owners in that block, as follows:

1. 911 Silver Spring Avenue Partnership  
4641 Montgomery Avenue #200  
Bethesda, MD 20814-3428

Owner of Part of Lot 5, Block E;  
Liber 8041, Folio 671

2. 8204 Associates, LLC  
8204 Fenton Street  
Silver Spring MD 20910

Owner of Part of Lot 9, Part of Lot 10, Block E  
Liber 14707, Folio 370

3. Athena C. and Dimitra Kalivas  
12301 Overpond Way  
Potomac, MD 20854-3040

Owners of Part of Lot 3, Part of Lot 4, Block F  
Liber 26890, Folio 294

I will refer to these individuals and entities hereafter collectively as the "Property Owners."

**The General Development Agreement and Abandonment Proceeding AB-719**

Under the General Development Agreement ("GDA"), Michael, LLC ("Michael") is to acquire Parking Lot #3 from the County and associated alleys in fee simple absolute, "subject to covenants, conditions, restrictions, easements and rights-of-way of record as of the Effective Date," GDA ¶ 5.(a), which is October 24, 2008. GDA ¶ 34 & p. 29. Actual transfer of title is to take place on the Settlement Date, which is supposed to be within 3 years of October 24, 2008. GDA ¶ 2.(a)(i), ¶ 3.(a)(i).

The County has committed, in its capacity as a land owner, to join with Michael in a request for abandonment of the alleys. GDA ¶ 2.(a)(ii). The consummation of the deal is subject to a finding by the County Executive that Lot #3 and the alleys are "to no longer be necessary for public use..." GDA ¶ 10.(b)(i). Michael is the petitioner in Abandonment Proceeding AB-719, filed by Michael on October 30, 2008. It seeks abandonment of part, but not all of the public alleys located adjacent to Parking Lot #3. The request identifies five parcels, four of which are public alleys created by deed, and the fifth an alley created by plat. A copy of a Michael diagram filed in AB-719 depicting the five parcels, and identifying them as Parcels 1-5, is attached.

As detailed below, the issue of ROW abandonment for public use is a distinct matter from extinguishment of private easements in the Subject Property. To date, this distinction has been downplayed or ignored by the Applicant, resulting in the impression before the Board that the only property rights at issue in relation to the Subject Property are the public property rights implicated in AB-719. In some cases, there is no meaningful distinction because Michael is the fee owner of the land subject to an easement, and when ownership of an easement and the land burdened by an easement are in one and the same entity, the easement is extinguished by operation of law. That is, however, most certainly **not the case** with respect to my clients.

In order that the Board may understand the complete picture, I first describe the impact of the abandonment and the GDA in the case of the two ROW parcels where the Property Owners are **not** directly impacted, i.e., Parcels 1 and 4.

**Parcel 1:** This Parcel is the western (approximately 60%) part of the 20' public alley that extends into Lot #3 from Fenton Street. It was created by Plat 54 when this area of Silver Spring was first subdivided in 1904. An alley created by plat is a

dedication, and upon its abandonment, title to the property reverts to the owner of the abutting properties from whence the dedication arose. South Easton Neighborhood Ass'n, Inc. v. Town of Easton, Maryland, 387 Md. 468, 876 A.2d 58, 74 n.17 (2005). In this case, the abutting properties are owned by the County, so the County would be free to sell Parcel 1 upon abandonment, assuming compliance with statutory prerequisites for sale.

**Parcel 4:** This Parcel consists of approximately 2/3 of the westernmost part of the 16' public alley running along the north side of Parking Lot #3 into and through the entryway to Parking Lot #3 from Thayer Avenue, which entryway was acquired by deed by the County in 1948. [The eastern 1/3 of this alley was created separately, by a November 1948 deed, and is not part of the abandonment proceeding (Liber 1208, Folio 513).]

There are three deeds relating to the creation of Parcel 4. The eastern 1/3 of parcel 4 was acquired by the County in two March 1948 deeds that themselves created no public or private easement rights (Liber 1140, Folios 206, 207). The rest of Parcel 4 was acquired by the County for \$5000 in a November 1948 deed (Liber 1208, Folio 519).<sup>1</sup> This deed created a ROW over all of Parcel 4. This ROW was established on the land conveyed to the County in all three deeds, for the benefit of the grantor in the November 1948 deed and the public, in wording essentially identical to that employed in creating the public ROW of which Parcels 2 and 3 are part, as described below.

In contrast to the situation involving the Property Owners, as discussed below, in the case of Parcel 4 the successors to the grantors who hold easement rights in Parcel 4 are only two: the County and Michael, LLC. If the public ROW in Parcel 4 is abandoned, fee simple title to Parcel 4 will revert to the successor to the original grantor, which will be Michael, LLC, either directly (as owner of Lot 1, Block O and Lot 8, Block F) or indirectly (as contract purchaser of all other property held by the grantor in the November 1948 deed creating the easement, i.e., the County). The legal doctrine known as "merger" will extinguish the easement when the sale to Michael, LLC is consummated.

#### **The Easement Held By 911 Silver Spring Avenue Partnership**

Next to be considered are AB-719 Parcels 2 & 3. These Parcels comprise most but not all of an alley created by deed in 1948. The missing piece is a segment in the middle that is about one-eighth of the length of the entire alley. There is no indication from the GDA that there was to be any missing piece in the sale of this alley to Michael, and its exclusion from AB-719 is without any legally coherent explanation or justification. It appears to be based solely on the fact that the abutting property to the south, part of lot 4 in Block E, Plat 54, is not owned or controlled by Michael or the County, but rather by 911 Silver Spring Avenue Partnership ("911 SSA"), as detailed below. As will also be detailed, however, the property rights relative to Parcels 2 & 3 are

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<sup>1</sup> The purchase price is evident from documentary stamps on the deed, as explained in greater detail below in connection with deeds creating the Property Owner's easements.

not limited such that owners of abutting property such as 911 SSA have rights to use of only the portions of Parcels 2 & 3 immediately abutting them. Hence, it is logical and proper to consider the public alley as a whole, i.e., Parcels 2 & 3 together with the part of the alley abutting the 911 SSA property.

The deeds creating the alley were all executed between November 6<sup>th</sup> and 16<sup>th</sup>, 1948. All were recorded within one minute of each other on November 26, 1948 in deed book 1208. All are essentially identically worded, except for the necessarily slightly different descriptions of the property conveyed. In each case, the rear portion of a lot fronting on Silver Spring Avenue was conveyed to the Board of County Commissioners for Montgomery County, with a 10-year option to repurchase at the sales price if the purchaser "shall cease to use the said land for a parking lot, or a parking building." In each case, the consideration paid can be determined from the documentary stamps, placed on the deeds at the rate of \$1.10 per \$1000 of consideration at that time (according to SDAT officials in the Montgomery County office). Consideration to Block E lot owners was as follows: lot 8 - \$2500; lots 4-7 - \$3500; lot 3 - \$4500; and lot 2- \$5000. [The stamps have "X's" through them because a sale to the County was exempt from payment of any transfer tax. The stamps nevertheless reveal the amount of consideration paid by the County.]

Most importantly, in each case, all conveyances were, in addition to money, "in consideration of . . . the agreement of the party of the second part herein [the County] to dedicate, pave and maintain a sixteen foot (16') public alleyway [across the back of all seven of the lots as depicted by Michael in the abandonment application Exhibit A] with a perpetual right in the sellers, their heirs and assigns, to use said alleyway at all times as a means of ingress and egress to and from that portion of [the lot associated with each deed] retained by the parties of the first part..." In each case, the land on which the alleyway is to be maintained is part of the land conveyed by the deed. The alleyway begins at the 20' alley created by plat 54 and ends at the west end of lot 2, block E.

The contemporaneous execution and simultaneous recording of these deeds, all in essentially identical form and language make clear that what was intended was for each of the sellers to have a perpetual easement along the rear of their retained properties, to and from the platted alleyway, the easement being on the property sold to the County. Collectively, these deeds created an easement by express reservation. Miller v. Kirkpatrick, 377 Md. 335, 833 A.2d 536, 544 (2003) ("An express easement by reservation arises when a property owner conveys part of his property to another, but includes language in the conveyance reserving the right to use some part of the transferred land as a right-of-way.").

This situation is the obverse of the usual ROW abandonment situation. The typical context is where a platted street or alley is never finished and the abutting landowners petition for abandonment which, if granted, results in an unencumbered title vesting in the abutting landowners. South Easton supra. More precisely, what happens is that once the public has abandoned the ROW, the owners of the abutting land have title to the land because they never surrendered their fee simple interest in the dedicated land

in the first place; they only granted the public an easement. M-NCPPC v. McCaw, 246 Md. 662, 675, 229 A.2d 584, 591 (1967). Here, instead of the County holding an easement and a private party holding a reversionary fee interest in the ROW, we have the County holding the reversionary fee interest and private parties holding an easement jointly with the public.

This fundamentally different situation produces a fundamentally different outcome upon abandonment of the public ROW. The County Council can perhaps determine, due to planned alternative means of ingress and egress, that the ROW is no longer needed for public use. But such a determination does not end matters, because it does not extinguish the easements held by the grantors of those 1948 deeds and their successors in interest. Such easements could be extinguished by the doctrine of merger if all of the benefitted property (in property law terms, the "dominant estate") were under common ownership with the all of the burdened property (the "servient estate"). Orfanos Contractors, Inc. v. Schaefer, 85 Md. App. 123, 132-33, 582 A.2d 547, 550 (1990); G. Korngold, Private Land Use Arrangements: Easements, Real Covenants and Equitable Servitudes § 6.11 (2d ed. 2004). But here, even after consummation of the GDA, there will be no merger, as the lot adjacent to the portion of the ROW excluded from the abandonment case, i.e., the 911 SSA lot, will not be under common ownership with the owner of the other lots with easement rights in the ROW, i.e., Michael.

In short, while the abandonment proceeding could result in termination of public access to the ROW, it cannot terminate the easement rights of the successor to the grantor who executed the 1948 deed as owner of Part of Lot 4 (Liber 1208, folios 517-18), i.e., 911 SSA. 911 SSA would still have the right to use of either the entire ROW, or at least that portion of it from the west end of its lot to its terminus at the 20' alley created by Plat 54. 911 SSA could relinquish that right upon sale or exchange for alternative access, but it is not required to enter into any such arrangement. Indeed, neither the County nor Michael has offered 911 SSA compensation for its easement or requested that 911 SSA deed over that interest to them, suggesting that a *sub rosa* taking of its easement with no compensation appears to be contemplated.

There are other ways in which an easement can be extinguished, but none of them have any immediate applicability to this situation. For example, upon a proper finding of public purpose, the County could seize the easement by the exercise of the power of eminent domain, under Art. 25A, § 5(B), Md. Code Ann. As noted above, no such effort has been initiated in 911 SSA's case. It is also far from obvious that the Studio Plaza Project would qualify as a public purpose to legitimize the taking of 911 SSA's easement even if it were attempted. First, the private nature of the enterprise suggests that it is certainly arguable that condemnation to facilitate such private development is not a public purpose. See Mayor and City Council of Baltimore v. Chertkof, 293 Md. 32, 441 A.2d 1044, 1051 (1982) ("Where the predominant purpose or effect of a particular condemnation action has been to benefit private interests, we have said that the taking is not for a public use."). Second, long ago, Maryland established that government could not condemn "a portion of a public alley for the purpose of selling it to . . . a private owner of land adjoining the alley." Prince George's County v. Collington Crossroads,

Inc., 275 Md. 171, 339 A.2d 278, 287 ((1975)(referring to VanWitsen v. Gutman, 79 Md. 405, 411-12, 29 A. 608, 610 (1894)). Third, although the controversial Supreme Court case of Kelo v. New London, 545 U.S. 469, 478 (2005) held that a public purpose could be found in a comprehensive urban redevelopment plan, that ruling is of little help to Studio Plaza, which is an isolated development, not part of a comprehensive plan. Since Kelo, the Maryland Court of Appeals has analyzed Kelo in depth and concluded that “while economic development may be a public purpose, it must be carried out pursuant to a comprehensive plan.” Mayor and City Council of Baltimore City v. Valsamaki, 397 Md. 222, 916 A.2d 324, 356 (2007). Moreover, consistent with the Chertkof case, Kelo held that a taking would not be permitted “under the mere pretext of a public use, when its actual purpose was to bestow a private benefit.” 545 U. S. at 477-78.

There remains only the question of the uses which the County/Michael can make of the property on which 911 SSA’s easement lies. In Maryland, the rule is unequivocal: “The subservient tenement [the County/Michael] may not obstruct the use of the easement.” Miller v. Kirkpatrick, supra, 833 A. 2d at 544. The current Project design is to construct a building in part directly on the 911 SSA easement land, thereby completely obstructing the ROW. Absent an act of condemnation, the County cannot force 911 SSA to accept a different ROW than the one defined in the deed executed by its predecessor in title in 1948. 911 SSA is entitled to the unobstructed use of that ROW, not some other one.

Equally clear is the fact that 911 SSA has not legally abandoned its right to the easement by non-use since the time of creation in 1948. The deeds executed at that time make clear that land was being sold to the County for construction of a surface parking lot or a “parking building.” In the event of parking garage construction, the 16’ wide paved easement prescribed in the deeds would be needed around the outside of the garage to maintain access to the platted alley. In the event of a surface parking lot, the easement would be superfluous, at least for the time the surface lot is in operation, as anyone parking in the lot could freely access buildings adjacent to the lot. Indeed, the very eventuality that would trigger the need to pave the easement is now under contemplation, apparently for the first time since the parking lot was created six decades ago: conversion of the parking lot into a below ground parking garage/above-ground building, an event necessitating **completion**, not **extinguishment** of the easement. There is no evidence of an intent to abandon the easement, and “non-use alone is insufficient to show an intent to abandon....” Chevy Chase Land Co. v. United States, 355 Md. 110, 733 A.2d 1055, 1081-82 (1999).

#### **The Easement Held by Athena and Dimitra Kalivas**

The ROW identified in AB-719 as Parcel 5 is a second 16’ public alley with its terminus on the 20’ alley created by Plat 54. This alley was created by deed simultaneously with the creation of the alley of which Parcels 2 & 3 are a part, in a two-minute recordation period on November 26, 1948 in book 1208—in this case, pages 511-12. The grantors, Preston T. and Louise E. White, owned the eastern half of Lot 3 and all of Lot 4 in Block F, and by this deed sold the County the rear 67’ of their land. The

consideration paid to the Whites was \$4500. The rest of the White property was at that time developed with a building operating as a restaurant. The property was sold to the Kalivas family and certain Kalivas partners who no longer are part owners (Liber 2303, Folio 545); the Kalivases (Mrs. Athena Kalivas and her daughter, Dimitra) are today the sole owners.

In essentially the same manner as was employed to create the public ROW for the other 16' public alley off the 20' platted alley, and with the same legal effect, the Parcel 5 alley was created by the Whites' November 1948 grantor deed, in favor of the public and the grantor. The ROW is, as in the other contemporaneously created alley, established in land that was part of the conveyance, making this a deed creating an easement by express reservation. Miller v. Kirkpatrick, *supra*. This is further confirmed by the location of the easement in relation to the development of the White property at the time. The easement runs from the platted alley all the way up the right-hand side of the property deeded to the County, to a point close to the rear wall of the Whites' restaurant. Plainly, it was intended that this easement would be for off-street loading/unloading for the Whites' business. Exactly like the deeds for the other alleyway off the platted alley, this deed requires the County "to dedicate, pave and maintain a sixteen foot (16') public alleyway..." Hence, not only the Whites, but also the public, would be free to use this alleyway, although in its configuration, it is clear that it would be of more utility to the Whites than any general member of the public that might be coming to use the parking lot that was contemplated. Also, using the same wording as in the other deeds, the Whites had a right of repurchase at the conveyance price during the following ten years if the County "shall cease to use the said land for a parking lot, or a parking building."

Given these facts, the same legal conclusions as are drawn above about the other 16' public alley off the 20' platted alley are applicable to Parcel 5. As explained, the Kalivases have an easement by express reservation, and this is a permanent property right. The Project would not just infringe upon it; it would effectively extinguish the easement, as the plan calls for construction of a building in part on the easement land. Further, the Kalivas' easement cannot be extinguished by an abandonment proceeding; all that can be extinguished is the public's right of access to Parcel 5. Nor can the Kalivases be required to sell their easement rights to the Applicant or exchange their easement rights for some assertedly equivalent access, whether devised by the Applicant or the County, because they have a right to non-interference with this easement. What the Applicant proposes is an exchange of one easement right for another, which, absent a condemnation proceeding, neither it nor the County can force the Kalivases to accept.

With regard to any claim that the Applicant might make that the easement has been lost due to non-use, two responsive points are in order. First, as with 911 SSA, there has been no abandonment from non-use because no parking building adjacent to the easement was erected; rather, the Kalivas building is readily accessible from the surface parking lot, just as is the 911 SSA building. Second, in a decision perhaps lost to history, decades ago when the County first began operating the parking lot, it chose not to fill it with parking spaces to the limit of the designated parking lot area. In particular, the area immediately adjacent to the Kalivas building is not devoted to parking; it is devoted to a

travel lane from surface streets to the actual parking area. Not only did this decision facilitate access to the Kalivas building generally, the travel lane is wide enough to permit commercial trucks to unload supplies into the Kalivas building while still providing ample room for other vehicles to move around the truck to or from parking spaces in the lot. This off-street loading situation, obviously conducive to the free flow of traffic on Thayer Avenue (on which the Kalivas building fronts and where trucks would otherwise be obliged to unload to the businesses there), has been in open and continuous operation for approximately 60 years, if not longer.

The Applicant has repeatedly proclaimed that unloading a commercial vehicle in a parking lot violates County law, but the cited prohibition, § 31-29(a)(10), by its express terms is subject to waiver by the County. Even if there has been no express written waiver, the County cannot seriously claim, after six decades of acquiescence in the open, transparent practice, that it has a legitimate concern over the off-street unloading of goods for the businesses in the Kalivas building, considering that the activity does not disrupt operation of the parking lot. In addition, the County Council has not even prescribed a fine for this activity. See COMCOR 31.33.01, Council Resolution 16-821 (eff. Jan. 25, 2009). Were the County to suddenly get agitated about off-street commercial vehicle unloading to the Kalivas building, it would raise the specter of a constitutional equal protection violation in the form of selective prosecution, even if there were a fine established for the "offense." A sudden shift in enforcement policy would suggest that the motivation for enforcement is not compliance with the law, but rather the improper use of the power of government to achieve an ulterior motive—in this case disciplining a property owner seen to be in the way of advancement of the County's perceived entrepreneurial interest in the Silver Spring Parking Lot District. See United States v. Armstrong, 517 U.S. 456, 465 (1996); In re Laurence T., 285 Md. 621, 403 A.2d 1256 (1979).

#### **Effect of Abandonment Approval on the 911 SSA and Kalivas Easements**

The abandonment request is predicated on the claim that the public will no longer need the various ROW's at issue, given the plans for Studio Plaza to replace the existing surface County parking lot with an equal-sized underground County parking lot, complete with adequate means of ingress and egress. The County is not "frozen in time" when it comes to holding and maintaining ROWs, so it is well within the purview of the County Council to assess whether an existing ROW, even if in public use, is no longer needed for public use in light of either changed circumstances that alter or alleviate that need, or an expectation of changed circumstances that will have that effect. Montgomery County Code § 49-63 (c).

In this case, the abandonment applicant, Michael, has sought to justify ROW abandonment in the context of the decision to convert the existing surface parking lot into a sub-surface lot integrated with the Studio Plaza Project. However, the Studio Plaza Project cannot go forward, at least on the basis of current plans, which appear to simply assume that the easements held by 911 SSA and the Kalivas family will be extinguished. That assumption is unwarranted, and unless and until those property rights are protected

from the planned development or dealt with lawfully, there would appear to be no rationale for the Council to conclude that the ROW's are no longer necessary for public use due to changed circumstances. Whether the Council could approve the abandonment subject to satisfaction in the future of a condition, such as Planning Board approval of the Project, is open to serious question. Some of the rationales that underlie the prohibition on conditional zoning would seem equally applicable in this context. See Montgomery County v. National Capital Realty Corp., 267 Md. 364, 297 A.2d 675 (1972).

### The Easement Held By 8204 Associates LLC

Much of the analysis set forth above for ROW parcels has similar applicability to the 8204 Associates LLC Property ("8204 Property"). Mike Gerecht is the Publisher for CD Publications, with a nominal address of 8204 Fenton Street. His building's principal business entrance is from Lot #3, in the southeastern portion of the Lot. This entrance is connected to Lot #3 via a "pedestrian bridge," a concrete walkway that spans the irregular gap between Lot #3 and the 8204 Property. This "bridge" is believed to have been in place since the early 1960's, when the two separate buildings comprising the 8204 Property were built (one in 1959 and the other in 1962). Today, the two buildings function as one, a condition that has existed since not long after the Gerecht family acquired them in 1989.

At the time of the Gerecht acquisition, the 8204 Property was (and remains) subject to a common driveway agreement between the owner of those parts of lots 8 & 9 in Block E that had not been sold to the County for the parking lot. Liber 2879, folio 218. The driveway is 12' wide, with 6' coming from each lot, for the length of the two lots, to/from Silver Spring Avenue. It appears that this easement would be unimpaired by the Project, which will include redevelopment of the rest of lot 8.

Subsequent to the Gerecht acquisition, two additional easements were entered into, both between the County and the Gerechts' business. One allowed the Gerechts to construct a "trash container alcove" on a 6' x 13' strip of land, part of the parking lot, adjacent to the common driveway for lots 8/9. Liber 9658, folio 93. Based on that easement, such an alcove was constructed around 1991, and it has remained functional ever since. This easement is apparently not at risk in the Project.<sup>2</sup>

It is the other easement that is of concern to the Gerecht family. Upon their acquisition of the 8204 Property, the Gerechts sought to permanently protect the principal access to the building on lot 9 from the parking lot via the long-standing pedestrian

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<sup>2</sup> At least one variation on the Project shown to the Gerechts envisioned closing this easement on the parking lot, to be replaced with a similarly sized easement on lot 8, further south along the joint driveway. If that is not the current plan, then this easement is unimpaired by the Project. If the exchange is contemplated, however, it would be a matter of consent between the parties, absent a condemnation proceeding. The Gerechts do not intend to consent to such an exchange in the absence of a consensus resolution of the loss of the pedestrian bridge easement, discussed next

bridge. As a result, 8204 Associates LP [the predecessor entity to 8204 Associates LLC] entered into an "Easement and Maintenance Agreement" with the County, recorded on May 18, 1990, Liber 9322, folio 513. A copy of this Easement is in the record of this case. The Easement recounts that the pedestrian bridge "was designed and erected as an integral entrance to the 903 Silver Spring Building [the building on lot 9] and maintained without interruption, problem or challenge until the present." The Easement granted 8204 Associates LP "an easement and right-of-way for the pedestrian bridge . . . together with the rights and privileges pertinent to its proper use and benefit by 8204 Associates, its successors and assigns until such time as the building to which the pedestrian bridge is an integral entrance no longer exists." In exchange for 8204 Associates' agreement to maintain the bridge in proper condition, as well as \$1 million in liability insurance in connection with any personal injury or property damage claim associated with the bridge, the County promised that it "will not interfere with the reasonable use and enjoyment of said easement and right of way without 8204 Associates' written consent."

At the time the easement was approved, a County official visited the property with Ash Gerecht, the owner of 8204 Associates LP. At that time, in addition to the pedestrian bridge, there were also glass double doors, at a right angle to the entry door and overlooking a two-foot drop off with no steps into the parking lot area. These doors had been located and installed for ramping materials directly to/from the building landing to Lot #3. The County employee who visited the site asked Mr. Gerecht about proof of insurance, but no questions about loading/unloading via either set of doors. At times in the 20 years since, 8204 Associates LP sought and received DOT permission to bag meters in front of the pedestrian bridge/double glass doors so that trucks could load/unload, and those double doors are still used for that purpose. In all that time, no County employee has raised any questions about the plainly visible and open loading/unloading activity in the parking lot adjacent to the 8204 Building.

In the same vein, for several years the Silver Spring farmers market was relocated in this section of the parking lot. Gary Stith, Silver Spring Redevelopment Office, sought out the approval of Mike Gerecht to ensure that this activity would not interfere with CD Publications' business. The farmers market operated without objection from Mr. Gerecht, as it was during weekend hours that did not impact his business. Of course, the market was a typical operation where commercial trucks would load/unload produce for sale from stalls or tables.

Not long after executing this easement, and in reliance on its continued existence, the Gerechts took steps to integrate their two adjacent buildings into one and made the upper-level entrance from the pedestrian bridge the principal entrance to the combined building. With the pedestrian bridge opening onto a public surface parking lot at the same level as the bridge, there was ample area for business visitors to enter or exit the premises to parked cars or vehicles in the lot, including commercial vehicles there for loading/unloading purposes. This operational situation began almost immediately upon the relocation of the Gerechts' business to 8204 Fenton in 1989, (after nearly 30 years elsewhere in Silver Spring and other locations), and has continued in the two decades since. This "reasonable use and enjoyment" has included visitor use of the parking lot on

a continuous basis, including commercial vehicle loading/unloading, utilizing the pedestrian bridge to make the building entrance there the principal entrance for the business for all purposes. The Gerechts sought legally enforceable protection of this precise outcome via the easement.

From 1989 until very recently, there has never been any complaint or claim by the easement grantor, Montgomery County, that 8204 Associates has improperly been exercising its rights under the easement, or exceeded what constitutes its "reasonable use and enjoyment." On April 3, 2009, however, DOT Director Holmes sent Rose Krasnow, Chief of Development Review, a letter expressing the view that "the easement implies pedestrian access only and would not allow loading from Lot 3." In fact, however, all loading and unloading that has taken place has been in the form of "pedestrian access." Objects are carried into or removed from the premises by persons on foot, sometimes using and sometimes not using devices such as hand trucks. There is, in effect, no access other than pedestrian access, and a pedestrian navigating a hand truck to deliver supplies to the business is not something other than a pedestrian. Such activity is well within the contemplation of the natural and ordinary use of a "pedestrian bridge" over the gap between a parking lot and a business entrance.

The only possible issue of improper use of the pedestrian bridge is really a question of vehicular use of the parking lot as the entryway to the bridge by persons parking in the lot and then crossing the bridge on foot. Mr. Holmes' letter echoes the Applicant in noting that § 31-29(a)(10), Montgomery County Code, prohibits unloading/unloading of commercial vehicles on a County parking lot. That is a wholly separate question from whether someone crossing the pedestrian bridge to enter the 8204 Building with a delivery of goods is a pedestrian under the terms of the easement. In any case, as detailed above in connection with the Kalivas easement, a sudden County interest in enforcing this provision against the Gerechts is inconsistent with long-standing County acquiescence in its disregard. Indeed, Ash Gerecht, who signed the pedestrian bridge easement for 8204 Associates, LP, has had dealings with the County over the years leading to his reasonable belief that the County fully understood, both at the time of its execution of the easement and thereafter, that the pedestrian bridge was intended to serve as the "stepping stone" to the main entrance to his business, not just for business visitors, but also for loading/unloading of commercial vehicles in connection with his publishing business. Further, 8204 Associates, LP has invested substantial sums in the operation of CD Publications at this site in the expectation that it could continue to use the pedestrian bridge as it did when it first commenced use. The County must be viewed as equitably estopped from reversing course now on 8204 Associates, LP's loading/unloading activity. See Heartwood 88, Inc. v. Montgomery County, 156 Md. App. 333, 846 A.2d 1096, 1117 (2004) (equitable estoppel applies against the County when its actions or inactions "cause a prejudicial change in the conduct of the other" party.).

Reinforcing this conclusion is the reliance the Gerecht family placed on the ongoing use of the front entrance to the 8204 Associates building when they purchased it. The current configuration of the building did not originate with or after the Gerechts purchase of it. Well before that time, the building was built, with County approval,

fronting on the parking lot after the parking lot had already been constructed. The building's parking lot entrance, which was designed as a main entrance, is level with the parking lot and is on the common property line with the parking lot. The entry there is to the second floor of the building, and there is no entrance to the second floor on Silver Spring Avenue. The pedestrian bridge was built with County approval at the same time as the building. Absent the pedestrian bridge, there would have been no way to get out of the building on to the parking lot, due to the slope next to the building, and, hence, no utility of the entire second floor absent major internal renovations.

The Project contemplates effective extinguishment of the pedestrian bridge easement by converting the surface parking lot essential to the utility of the easement into a building, and actually physically occupying the easement space with the building. Considering the impact on its business that loss of the pedestrian bridge would cause, 8204 Associates has no intention of surrendering its easement rights to the Applicant, and is therefore opposed to the Project. As with the 911 SSA and Kalivas easements, 8204 Associates cannot be required to sell its pedestrian bridge easement rights to the Applicant or exchange their easement rights for some assertedly equivalent access, whether devised by the Applicant or the County, because they have a right to non-interference with **this** easement. What the Applicant has proposed is an exchange of one easement right for another, which, absent a condemnation proceeding, neither it nor the County can force 8204 Associates to accept.

### Conclusion

All of my clients, 911 SSA, the Kalivases and 8204 Associates, have permanent easement rights in the Subject Property. The Project proposes not a mere infringement on those perpetual property rights, but rather effective eradication of them. This cannot be done without their consent, which, for the most part, has not even been sought, much less obtained. Abandonment proceeding AB-719 changes none of this; it only deals with the general public's right of access to the same areas.

mailed to - Anantia, 909 Thayer Ave. Balt. Md. 1-17-58

LIBER 2413 FROM 417

#7290  
(jtd)

Recorded Dec. 17th, 1957-at-12:29 P.M.

39605  
300F

### This Deed

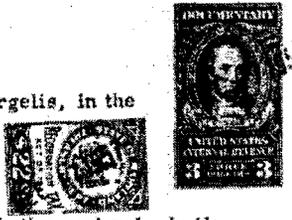
Made this 11th day of December, 1957, by and between

Geo. L. Boswell and Joanne T. Dixon, Joint tenants

party (ies) of the first part, and

Jerasimos Kalivas, James Recachinas and William Margelis, in the interest and estates as hereinafter set forth

party (ies) of the second part:



**Witnesseth**, that in consideration of the sum of Ten Dollars and other good and valuable considerations the said party (ies) of the first part do (es) grant and convey unto the party (ies) of the second part in fee simple ~~the~~ all that property situate in Montgomery County, State of Maryland described as:

All of Lot numbered Four (4) and the adjacent or East half of Lot numbered Three (3) in Block lettered "F" in the subdivision known as "R. HOLT EASLEY'S SILVER SPRING SUBDIVISION" as per plat recorded in Plat Book 1, Plat No. 34, among the Land Records of Montgomery County, Maryland. SAVING AND EXCEPTING THEREFROM HOWEVER the following described land which was conveyed by Preston Isaac White and Louise A. White, his wife to the Board of Commissioners for Montgomery County, by deed dated November 18, 1948 and recorded in Liber 1208, folio 511, among the aforesaid Land Records in consideration of the County agreeing to dedicate, pave and maintain a 16 foot public alleyway, with the East edge of said alleyway being the East boundary line of Lot 4, Block F, running parallel with said East boundary line of Lot 4, Block F, retained by grantors, Conveys: South 67 feet by full width of the East  $\frac{1}{2}$  of Lot numbered Three (3) in Block lettered "F", "R. H. Easley's Silver Spring Subdivision", Plat Book 1, Plat No. 34; containing 1,675 square feet, more or less, South 67 feet by full width of Lot numbered Four (4) in Block lettered "F" of said subdivision and containing 3,350 square feet, more or less.

To have and to hold unto Jerasimos Kalivas as to an undivided  $\frac{2}{3}$  interest, and unto James Recachinas as to an undivided  $\frac{1}{3}$  interest, and unto William Margelis as to an undivided  $\frac{1}{4}$  interest.

**Together** with the building and improvements thereupon erected, made or being; and all and every, the rights, alleys, ways, waters, privileges, appurtenances and advantages to the same belonging or in anywise appertaining.

And the said party (ies) of the first part covenant (s) that they will warrant specially the property hereby conveyed; and that they will execute such further assurances of said land as may be requisite.

Witness their hand (s) and seal (s).

TEST: *Thomas W. Marlowe*  
THOMAS W. MARLOWE  
as to both

*Geo. L. Boswell* (SEAL)  
Geo. L. Boswell  
*Joanne T. Dixon* (SEAL)  
Joanne T. Dixon



STATE OF MARYLAND, COUNTY OF MONTGOMERY  
On this 11th day of December, 1957, before me, the undersigned officer, personally appeared Geo. L. Boswell and Joanne T. Dixon to wit:

known to me (or satisfactorily proven) to be the person(s) whose name(s) is (are) subscribed to the within instrument and acknowledges that he (she) (they) has (have) executed the same for the purposes therein contained.

Witness my hand and official seal.



*Thomas W. Marlowe*  
THOMAS W. MARLOWE  
Notary Public



My commission expires: 5/4/59

(30)

Revised 1936 - Montgomery, Maryland, 1954

LIBER 1208 FOLIO 513

THIS DEED

MADE this 8th day of November, in the year Nineteen Hundred and Forty-eight, by and between EDITH BRYAN HOLLAND, widow, party of the first part, and THE BOARD OF COUNTY COMMISSIONERS FOR MONTGOMERY COUNTY, a Corporation, party of the second part.

WITNESSETH, that for and in consideration of the sum of Ten Dollars (\$10.00) and the agreement of the party of the second part herein to dedicate, pave and maintain a sixteen (16) foot public alleyway running over Lot 2, Block F, and the West twenty-five (25) feet by the full width of Lot 3, Block F, in "R. Holt Easley's Silver Spring Subdivision", and lying one hundred and twenty (120) feet from the south of the front line of said lots and parallel therewith, with a perpetual right in the sellers, their heirs, and assigns, to use said alleyway at all times as a means of ingress and egress to and from that portion of Lots 2 and 3 in Block F of said subdivision retained by the party of the first part, the said party of the first part does grant and convey unto the said party of the second part, in fee simple, the following described land and premises, with the improvements, easements and appurtenances thereto belonging, situate, lying and being in Montgomery County, State of Maryland, namely:

Part of Lot 2, Block F, of "R. Holt Easley's Silver Spring Subdivision" as recorded among the Land Records of Montgomery County, Maryland, in Plat Book No. 1, Plat No. 54, being part of the land devised to Edith Bryan Holland by will, and recorded in the Orphan's Court in Liber H.J.C. 11, at Folio 406, more particularly described as the South 100.00 feet, by the full width of Lot 2, Block F, of said subdivision, containing 5,000 square feet of land more or less.

Part of Lot 3, Block F, of "R. Holt Easley's Silver Spring Subdivision" as recorded among the Land Records of Montgomery County, Maryland, in Plat Book No. 1, Plat No. 54, being part of the land devised to Edith Bryan Holland by will, and recorded in the Orphan's Court in Liber H.J.C. 11, at Folio 406, more particularly described as the South 100.00 feet by the west half of Lot 3, Block F, of said subdivision containing 5,000 square feet of land more or less.

Retaining and saving unto the party of the first part, her heirs and assigns, the right, privilege and option, for a period of ten years, to repurchase said land, at the same price, for which she has agreed to sell it, plus the reasonable value of any improvements made thereon by the said Board of County Commissioners, it being expressly understood that this option given shall have force and effect only and upon the condition, that the said Board of County Commissioners shall decide to use the said land for a parking lot, or a parking

①  
2F, 3F

LIBER 1208 PAGE 514

building.

SUBJECT to covenants and restrictions of record.

TO HAVE AND TO HOLD the same unto and to the use of the said party of the second part, in fee simple.

AND the said party of the first part hereby covenants to warrant specially the property hereby conveyed, and to execute such further assurances of said land as may be requisite.

WITNESS my hand and seal on the day and year first hereinbefore written.

WITNESSES:

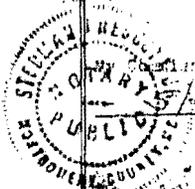
Bernice V. Wall  
BERNICE V. WALL

Edith Bryan Holland (SEAL)  
Edith Bryan Holland

STATE OF MARYLAND, MONTGOMERY COUNTY, ss:

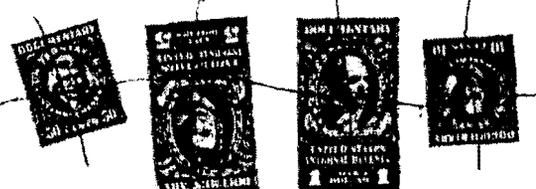
I HEREBY CERTIFY that on this 8th day of November, 1948, before me and either, a Notary Public in and for the said State of Maryland, Montgomery County, personally appeared EDITH BRYAN HOLLAND, Wife and did acknowledge the foregoing Deed to be her act.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.



My Commission Expires 1/14/49

Edith Bryan Holland  
Notary Public



Recorded Nov. 26th, 1948-21-11:34 A. M.

(53)

LAW OFFICES OF  
**KNOPF & BROWN**  
401 EAST JEFFERSON STREET  
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(301) 545-6100

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E-MAIL [BROWN@KNOPF-BROWN.COM](mailto:BROWN@KNOPF-BROWN.COM)  
WRITER'S DIRECT DIAL  
(301) 545-6105

DAVID W. BROWN

November 2, 2009

Committee Chair Nancy Floreen  
and Members of the Committee  
Transportation, Infrastructure, Energy & Environment Committee  
Montgomery County Council  
100 Maryland Ave, 6th Floor  
Rockville, MD 20850

Re: **Abandonment Request No. AB-719**  
**Abandonment of sections of Public Alley adjacent to Montgomery**  
**County Parking Lot No. 3, bounded by Fenton Street to the east,**  
**Thayer Avenue to the north, Mayor Lane to the west, and Silver**  
**Spring Avenue to the South**  
**R. Holt Easley's subdivision of Silver Spring**  
**Proposed Studio Plaza Development**

Dear Committee Chair Floreen and Members of the Committee:

I write on behalf of three property owners to urge the Committee to recommend that the Council deny the above-referenced abandonment request, for the several independent reasons set forth below.

My clients are businesses/property owners adjacent to the public alleys sought to be abandoned. They are (1) 911 Silver Spring Avenue Partnership, which owns a medical office building in the affected block; (2) 8204 Associates, LLC, which operates a publishing business in the block; and (3) Athena C. and Dimitra Kalivas, who own a building leased as a specialty foods market in the block. Their ownership details are set forth in my June 5, 2009 letter that is in the record as Exhibit 34 (referenced in the Hearing Officer's Report and Recommendation at p.7) ("Brown Letter"). All of these businesses have been in operation for many years, if not decades, in the block where Michael LLC wishes to build the Studio Plaza Project on land inclusive of the referenced public alleys ("Project").

What is proposed for abandonment in AB-719 are five public alley parcels, identified as Parcels 1-5 in the attached diagram that is part of the record. By this letter, no objection is raised to abandonment of Parcel 4 or a portion of Parcel 1. As detailed below, however, part of Parcel 1 and all of Parcel 5 are in active and necessary public

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Committee Chair Nancy Floreen  
and Members of the Committee  
Transportation, Infrastructure, Energy & Environment Committee  
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use, precluding abandonment. As for Parcels 2 and 3 (as well as 5), abandonment would violate the necessary and proper recommendation (#4) that “abandonment of the alleys...not affect any private property interests, including any easements that benefit the properties that adjoin the parking lot.” Public Hearing Officer’s Report and Recommendation 10 (Aug. 26, 2009) (“Report”).

#### I. PARCELS 1 AND 5 ARE IN ACTIVE AND NECESSARY PUBLIC USE

Here are the un rebutted facts in the record concerning current public use of Parcels 1 and 5:

Currently the Kalivases, or their tenants, use Parcel 5 daily as a means of ingress and egress to a vacant area of their property which is used to house their trash dumpster as well as a place to park anywhere from 3-5 cars. The Kalivases and their tenants are very much a part of the **public**, and, indeed, perhaps the part of the public **most** interested in continued active use of Parcel 5. This continued use also makes clear that the Applicant has proposed abandonment of more of Parcel 1 than is appropriate. The easternmost 16’ of Parcel 1 is simply that portion of the 20’ platted alley off Fenton Street that is immediately adjacent to Parcel 5. Without maintaining the length of the 20’ alley at least as far as the western boundary of Parcel 5, Parcel 5 would simply be isolated from all ROW’s, negating the current existing access from Parcel 5 to Fenton Street. Hence, the proposed abandonment of Parcel 1 should be reduced by a small square of 320 sq. ft. (16’ x 20’) to permit continued access by the Kalivases to Parcel 5 via the unabandoned portion of the 20’ platted alley.

Brown Letter 8-9 (emphasis in original).

The Report ignores this use and focuses exclusively on the Kalivases’ use of the parking lot as a place for unloading of trucks delivering goods to the specialty market, which the Report concludes “is not a ground for permanency of access.” Report at 9. Putting our disagreement about the validity of this use aside, there can be no doubt that abandonment of Parcel 5 and the easternmost 16’ of Parcel 1 would block pre-existing and active public access to the property where cars are regularly parked. Accordingly, a finding that these Parcels are “no longer necessary for present public use or anticipated

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and Members of the Committee  
Transportation, Infrastructure, Energy & Environment Committee  
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public use in the foreseeable future,” Montgomery County Code §49-63(c)(1), is unwarranted.<sup>1</sup>

## **II. ABANDONMENT OF PARCELS 2, 3 AND 5 WOULD ADVERSELY AFFECT EASEMENTS THAT BENEFIT PROPERTIES THAT ADJOIN PARKING LOT 3.**

The abandonments are inextricably linked to Michael LLC’s proposal to build the Studio Plaza Project in and around Parking Lot #3 in the Silver Spring Parking District. Indeed, much of the rationale for the abandonments is that under Michael LLC’s General Development Agreement with the County (“GDA”), title to the abandoned Parcels will be transferred from the County to Michael LLC, in which event Michael LLC, as fee owner, will build the Project, under, on and over the abandoned rights-of-way.

My clients’ easement rights in the Parcels 2, 3 and 5 rights-of-way are explained in detail in the Brown Letter (at 3-10) and will not be repeated here. The Report neither accepts nor rejects our analysis, and instead recommends as Condition No. 4 of approval that the abandonments not affect any easements found to exist in favor of adjoining properties, including my clients. Report at 10.

The abandonments of Parcels 2, 3 and 5 should not be approved because, without question, these abandonments would adversely affect my clients’ easement rights. The intended sequence of events is clear and undisputed: abandonment; transfer of ownership to developer; Project construction in the right-of-way by the developer; Project buildings directly impeding access to the easement areas by my clients.

Counsel for Michael LLC have disputed the validity of my clients’ easement rights. We regard this contrary assessment as completely lacking any factual or legal merit. It is not necessary, however, for the Council to delve into, let alone resolve, this legal dispute. It is sufficient to note that (a) granting the abandonments is a key step to Michael LLC’s fee ownership of those rights-of-way under it the GDA, and (b) given Michael LLC’s rejection of my clients’ easement claims, abandonment effectively forces my clients to underwrite the substantial legal expense of legal action to protect their easement rights from infringement. Abandonment will necessarily have a substantial adverse affect on my clients’ property interests even if, as we fully expect, those rights are ultimately vindicated in court. The Council should not put its thumb on the scales of justice by taking precipitous action to approve these abandonments, given the unresolved conflicting property rights claims.

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<sup>1</sup> No attempt has been made in the Report to justify the abandonments under §49-63(c)(2) (health, safety and welfare).

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This outcome is in keeping with the Planning Board's approach to approval of any Preliminary Plan for Studio Plaza, the next step to final Planning Board approval of a site plan that would trigger the construction process. As stated in Chairman Hanson's June 2, 2009 letter, "[a]t Preliminary Plan, the Applicant must satisfactorily demonstrate property ownership over all elements included within the plan." This was a condition of Project Plan approval, imposed in lieu of requiring Michael LLC to demonstrate unimpaired ownership of the land subject to Plan approval at the Project Plan stage. The Council should take the same approach with respect to AB-719, and not approve the abandonments unless and until it is demonstrated that Parking Lot #3 ownership is not limited by easements.

### **III. THE COUNTY EXECUTIVE'S APPROVAL OF AB-719 IS LEGALLY DEFICIENT AND SHOULD NOT BE APPROVED**

The Report, dated August 26, 2009, was reviewed and approved by the County Executive on September 14, 2009. Before the issuance of the Report, the Executive had issued Executive Order 070-09, finding that Parking Lot #3 was no longer "needed for public use in light of its replacement by the underground parking garage provided for in the [GDA]." The Order is unclear whether the Executive made this finding acting in a governmental or a proprietary capacity. Montgomery County v. Maryland-Washington Metropolitan District, 202 Md. 293, 96 A.2d 353, 357 (1953) ("a county may hold property in either of two capacities, one being governmental and the other proprietary.").

That the order was issued by the Executive as an entrepreneurial decision is reinforced by the terms of GDA referenced in the finding, which expressly provides that the County entered into it "in its capacity as a property owner and not in its capacity as a governing body." GDA Opening Paragraph. The circumstances of the deal confirm this. Parking Lot #3 is part of the Silver Spring Parking Lot District. That District, like other parking lot districts, keeps separate account of funds received from parking and is intended to be not only self-sustaining, but also to produce excess funds for use in other contexts. Montgomery County Code §60-16. For all that appears, the GDA's proposed switch of Parking Lot #3 – from a surface lot to a subsurface lot under the Project – was simply a business decision calculated to enhance the financial return for the Silver Spring Parking Lot District.

If there were no other property rights affected by this parking-lot-switch arrangement, it might well be viewed as a purely entrepreneurial transaction, one for which Maryland does not require any express statutory authorization for disposal of public property. Montgomery County, *supra*. Here neither the Executive Order nor the Executive's approval of the Report states that the Executive's findings were made by him acting in a governmental capacity. But Parking Lot #3 was acquired with public funds and put into public use, which means Parking Lot #3 "constitute[s] a holding in public

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trust.” Id. Under Art. 25A, §5(B), Ann. Code of Md., the property cannot be disposed of unless it is no longer needed for public use. Hence it is far from clear that Parking Lot #3 could be sold by the County in its entrepreneurial capacity even if no other property rights were affected.

Here, other property rights are implicated in the sale of Parking Lot #3 to Michael LLC. It is also clear that unless my clients’ easement rights are abrogated, they will adversely impact Michael LLC’s intended use of the property. Under these circumstances, although AB-719 is not itself a sale of Parking Lot #3, AB-719 is inextricably intertwined with the sale to Michael LLC.

The Report misinterprets our concern as a challenge to the validity of the GDA. Report 7. It is not. My clients question the absence of an appropriate finding by the Executive approving AB-719 clearly acting in his governmental capacity. It is not enough for him to act in his capacity as an entrepreneurial player in the business of paid parking in Silver Spring.

Further, this omission is not one that can or should be “cured” by a Council finding on AB-719. The Council is entitled to, and should insist on, an explanation from the Executive as to why it is in the public interest to turn Parking Lot #3 from surface to subterranean, and, in the process (a) approve the abandonment of public alleys in public use, and (b) become the unwitting *agent provocateur* who sets in motion a burdensome chain of private litigation over land and property rights where the status quo before now has been over 60 years of peaceful coexistence.

Sincerely yours,

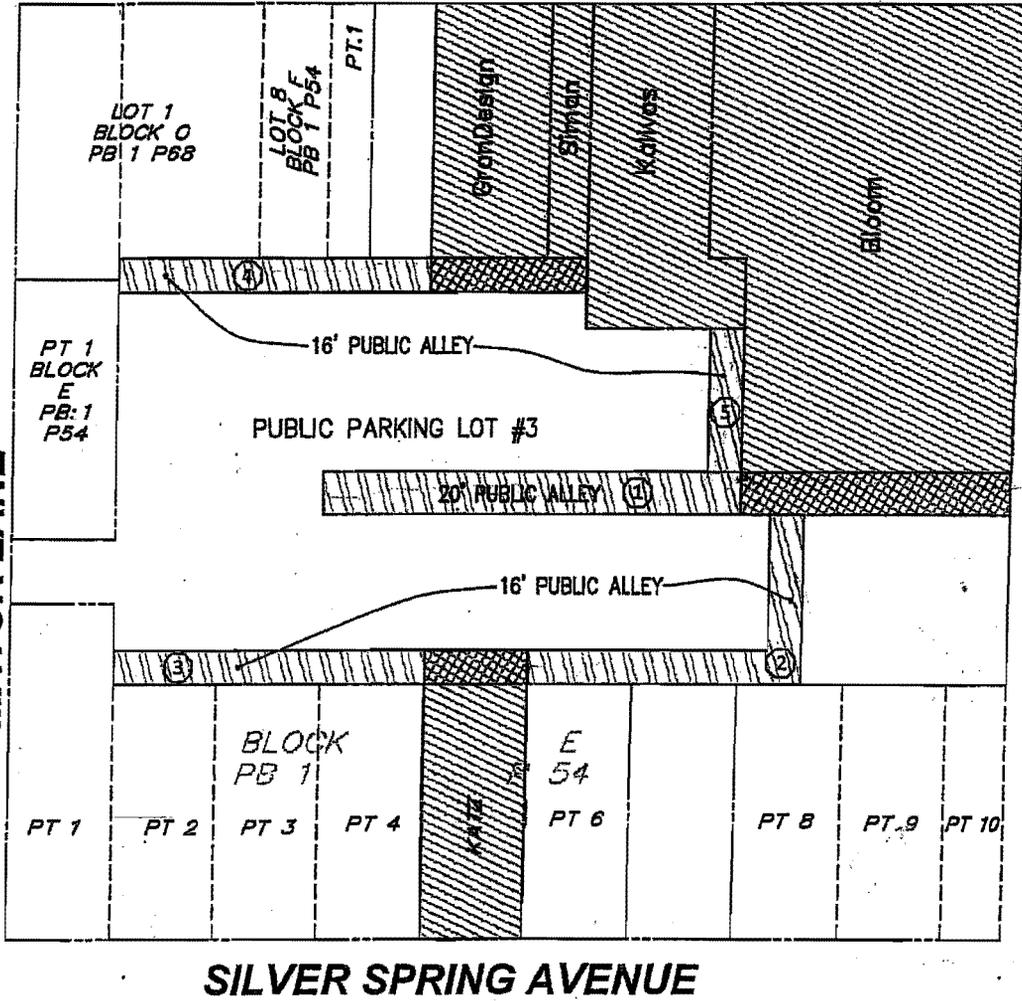


David W. Brown

/enclosure

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# THAYER AVENUE



LAYERS: 0, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100  
 10/24/08 10:23:27 AM

MAYOR LANE

FENTON STREET

① Part 1 of Legal Description (Typical)



Remaining Properties



Alley to be Abandoned



Alley to Remain



0 40' 80' 160'

Studio Plaza  
**'Exhibit C'**  
 October, 2008

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LAW OFFICES OF

**KNOPF & BROWN**  
401 EAST JEFFERSON STREET  
SUITE 206  
ROCKVILLE, MARYLAND 20850  
(301) 545-6100

FAX: (301) 545-6100

2009 JUN 8 PM 1:57  
E-MAIL BROWN@KNOPF-BROWN.COM

WRITER'S DIRECT DIAL

(301) 545-6100

DAVID W. BROWN

June 5, 2009

Mr. Michael Cassedy  
Montgomery County Department of Transportation  
101 Monroe Street, 10<sup>th</sup> Floor  
Rockville, Maryland 20850

Re: **Abandonment Request No. AB-719**  
**Abandonment of sections of Public Alley adjacent to Montgomery**  
**County Parking Lot No. 3, bounded by Fenton Street to the east,**  
**Thayer Avenue To the north, Mayor Lane to the west, and Silver**  
**Spring Avenue to the South**  
**R. Holt Easley's subdivision of Silver Spring**  
**Proposed Studio Plaza Development**

Dear Mr. Cassedy:

This letter is filed in accordance with the decision to reopen the record in the above-referenced abandonment proceeding until June 5, 2009 to receive additional written information from any party of interest. I represent three property owners in the same block as Parking Lot #3, where certain public alleys were created by plat or deed and are the subject of this proceeding. My clients, and their fee simple ownership interests in the block, are as follows:

1. 911 Silver Spring Avenue Partnership, c/o  
Yoav Katz, General Partner  
4641 Montgomery Avenue #200  
Bethesda, MD 20814-3428

Owner of Part of Lot 5, Block E  
Liber 8041, Folio 671

2. 8204 Associates, LLC, c/o  
Michael Gerecht, Partner  
8204 Fenton Street  
Silver Spring MD 20910

Owner of Part of Lot 9, Part of Lot 10, Block E  
Liber 14707, Folio 370

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3. Athena C. and Dimitra Kalivas  
12301 Overpond Way  
Potomac, MD 20854-3040

Owners of Part of Lot 3, Part of Lot 4, Block F  
Liber 26890, Folio 294

The record in this case contains submissions by two of my clients: the Kalivas family (Hearing Exhibits 9 & 29) and Mr. Gerecht (Hearing Exhibits 10 & 15).<sup>1</sup> These submissions and any testimony by my clients at the hearing occurred prior to the commencement of my representation of them. This letter supplements rather than withdraws any prior testimony or submission, except that to the extent there is any inconsistency between prior submissions and this one, please regard this letter as controlling. My clients have numerous procedural and substantive concerns regarding the proposed abandonments. Unless the context clearly indicates otherwise, please regard all matters raised below as having been raised by all my clients.

### Procedural Concerns

**1. Incorrect Executive Order.** On March 19, 2009, County Executive Order 070-09 went into effect. HE \_\_.1. It found Parking Lot #3 “to no longer be needed for public use in light of its replacement by the underground parking garage provided for in the [GDA].” The “ACTION” part of the Order mistakenly orders the sale of “Bethesda Parking Lot No. 3.” This is erroneous, requiring correction of the Order

**2. Missing Public Interest Finding.** Apart from the substantive error in Executive Order 070-09, there is no clear resolution of what capacity the Executive acted in when he issued the Order. The required property disposition finding is a broad public interest finding, not one limited to the County’s entrepreneurial interest in the subject property, which is in and part of the Silver Spring Parking Lot District. That District, like other parking lot districts, keeps separate account of funds received from parking and is intended to not only be self-sustaining, but also to produce excess funds for use in other contexts. Montgomery County Code § 60-16. In short, the County Executive, in issuing Executive Order 070-09, was obliged to carefully distinguish between acting in his governing capacity to effectuate the broad public interest, and merely acting in the entrepreneurial interests of the Silver Spring Parking Lot District. The GDA expressly provides that the County entered into it “in its capacity as a property owner and not in its capacity as a governing body...” HE 11, GDA Opening Paragraph. Given that Executive

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<sup>1</sup> Hearing Exhibits in AB-719 will be given the designation “HE” below. The number for this Exhibit being currently unknown, exhibits to this letter will be given the consecutive denomination “HE \_\_.1, HE \_\_.2, HE \_\_.3, etc.

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Order 070-09 does not specify that the Executive acted in any capacity beyond that of a property owner and party to the GDA, it is defective and incomplete, in that it lacks a clear finding that the contemplated property disposition is in the public interest, rather than just the County's entrepreneurial interest. Since justification for abandonment of public alleys within the subject property is entirely predicated on the sale and redevelopment of the subject property, the absence of the requisite public interest finding for that sale vitiates the proffered justification for any and all proposed abandonments.

### **Private Easements in the Public Alleys**

Previously undisclosed in this proceeding, but critical to its proper resolution, is the fact that the five parcels proposed for abandonment by the Applicant (as Parcels 1-5), are public rights-of-way ("ROWs") that happen to be fully or partially coextensive with private easement ROWs. As to each of the five Parcels, what happens to the underlying land upon abandonment of the public ROW depends on who the owner of the adjacent property is.

**Parcel 1:** This Parcel is the western (approximately 60%) part of the 20' public alley that extends into Lot #3 from Fenton Street. It was created by Plat 54 when this area of Silver Spring was first subdivided in 1904. HE \_\_\_\_\_.2. An alley created by plat is a dedication, and upon its abandonment, title to the property reverts to the owner of the abutting properties from whence the dedication arose. South Easton Neighborhood Ass'n, Inc. v. Town of Easton, Maryland, 387 Md. 468, 876 A.2d 58, 74 n.17 (2005). In this case, the abutting properties are owned by the County, so the County would be free to sell Parcel 1 upon abandonment, assuming compliance with statutory prerequisites for sale.

With the exception of the easternmost 16' of Parcel 1, my clients do not have a stake in this particular proposed abandonment. The issue concerning the 16' segment of this Parcel is discussed below in connection with adjacent 16' wide Parcel 5 and the Kalivas property.

**Parcel 4:** This Parcel consists of approximately 2/3 of the westernmost part of the 16' public alley running along the north side of Parking Lot #3 into and through the entryway to Parking Lot #3 from Thayer Avenue, which entryway was acquired by deed by the County in 1948. [The eastern 1/3 of this alley was created separately, by a November 1948 deed, and is not part of the abandonment proceeding (Liber 1208, Folio 513).]

There are three deeds relating to the creation of Parcel 4. The eastern 1/3 of parcel 4 was acquired by the County in two March 1948 deeds that themselves created no public or private easement rights (Liber 1140, Folios 206, 207). The rest of Parcel 4 was acquired by the County in a November 1948 deed (Liber 1208, Folio 519). This deed

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created a ROW over all of Parcel 4. This ROW was established on the land conveyed to the County in all three deeds, for the benefit of the grantor in the November 1948 deed and the public, in wording essentially identical to that employed in creating the public ROW of which Parcels 2 and 3 are part, as described below.

In contrast to the situation involving my clients, as discussed below, in the case of Parcel 4 the successors to the grantors who hold easement rights in Parcel 4 are only two: the County and Michael, LLC. If the public ROW in Parcel 4 is abandoned, fee simple title to Parcel 4 will revert to the successor to the original grantor, which will be Michael, LLC, either directly (as owner of Lot 1, Block O and Lot 8, Block F) or indirectly (as contract purchaser of all other property held by the grantor in the November 1948 deed creating the easement, i.e., the County). The legal doctrine known as "merger" will extinguish the easement when the sale to Michael, LLC is consummated.

#### **Parcels 2 & 3 - The 911 Silver Spring Avenue Partnership Easement:**

Parcels 2 & 3 comprise most but not all of an alley created by deed in 1948. The missing piece is a segment in the middle that is about one-eighth of the length of the entire alley. There is no indication from the GDA that there was to be any missing piece in the sale of this alley to Michael, and its exclusion from AB-719 to date has been without any legally coherent explanation or justification from the Applicant. It appears to be based solely on the fact that the abutting property to the south, part of lot 4 in Block E, Plat 54, is not owned or controlled by Michael or the County, but rather by 911 Silver Spring Avenue Partnership ("911 SSA"), as detailed below. As will also be detailed, however, the property rights relative to Parcels 2 & 3 are not limited such that owners of abutting property such as 911 SSA have rights to use of only the portions of Parcels 2 & 3 immediately abutting them. Hence, in looking at the impact of abandonment of Parcels 2 & 3, it is logical and proper to consider the public alley as a whole, i.e., Parcels 2 & 3 together with the part of the alley abutting the 911 SSA property.

The deeds creating the alley were all executed between November 6<sup>th</sup> and 16<sup>th</sup>, 1948. All were recorded within one minute of each other on November 26, 1948 in deed book 1208.<sup>2</sup> All are essentially identically worded, except for the necessarily slightly different descriptions of the property conveyed. In each case, the rear portion of a lot fronting on Silver Spring Avenue was conveyed to the Board of County Commissioners for Montgomery County, with a 10-year option to repurchase at the sales price if the purchaser "shall cease to use the said land for a parking lot, or a parking building." HE \_\_\_\_\_.3, a copy of the deed from the predecessor in title to 911 SSA, which can be found at Liber 1208, folio 517-18. In each case, the consideration paid can be determined from

<sup>2</sup> In liber 1208 of the County Land Records, the following pages relate to the indicated block E lots: lot 2 - 521-22; lot 3 - 509-10; lot 4 - 505-06; lot 5 - 517-18; lot 6 - 527-28; lot 7 507-08; and lot 8 - 529-30.

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the documentary stamps, placed on the deeds at the rate of \$1.10 per \$1000 of consideration at that time (according to SDAT officials in the Montgomery County office). Consideration to Block E lot owners was as follows: lot 8 - \$2500; lots 4-7 - \$3500; lot 3 - \$4500; and lot 2- \$5000.<sup>3</sup>

Most importantly, in each case, all conveyances were, in addition to money, "in consideration of...the agreement of the party of the second part herein [the County] to dedicate, pave and maintain a sixteen foot (16') public alleyway [across the back of all seven of the lots as depicted by Michael in the abandonment application Exhibit A] with a perpetual right in the sellers, their heirs and assigns, to use said alleyway at all times as a means of ingress and egress to and from that portion of [the lot associated with each deed] retained by the parties of the first part..." HE \_\_\_\_3. In each case, the land on which the alleyway is to be maintained is part of the land conveyed by the deed. The alleyway begins at the 20' alley created by plat 54 and ends at the west end of lot 2, block E.

The contemporaneous execution and simultaneous recording of these deeds, all in essentially identical form and language make clear that what was intended was for each of the sellers to have a perpetual easement along the rear of their retained properties, to and from the platted alleyway, the easement being on the property sold to the County. Collectively, these deeds created an easement by express reservation. Miller v. Kirkpatrick, 377 Md. 335, 833 A.2d 536, 544 (2003)("An express easement by reservation arises when a property owner conveys part of his property to another, but includes language in the conveyance reserving the right to use some part of the transferred land as a right-of-way.").

This situation is the obverse of the usual ROW abandonment situation. The typical context is where a platted street or alley is never finished and the abutting landowners petition for abandonment which, if granted, results in an unencumbered title vesting in the abutting landowners. South Easton, *supra*. More precisely, what happens is that once the public has abandoned the ROW, the owners of the abutting land have title to the land because they never surrendered their fee simple interest in the dedicated land in the first place; they only granted the public an easement. M-NCPPC v. McCaw, 246 Md. 662, 675, 229 A.2d 584, 591 (1967). Here, instead of the County holding an easement and a private party holding a reversionary fee interest in the ROW, we have the County holding the reversionary fee interest and private parties holding an easement jointly with the public.

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<sup>3</sup> The stamps have "X's" through them because a sale to the County was exempt from payment of any transfer tax. The stamps nevertheless reveal the amount of consideration paid by the County.

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This fundamentally different situation produces a fundamentally different outcome upon abandonment of the public ROW. It is within the purview of the County Council to determine, due to planned alternative means of ingress and egress, whether the ROW is no longer needed for public use. But such a determination does not end matters, because it does not extinguish the easements held by the grantors of those 1948 deeds and their successors in interest. Such easements could be extinguished by the doctrine of merger if **all** of the benefitted property (in property law terms, the "dominant estate") were under common ownership with the **all** of the burdened property (the "servient estate"). Orfanos Contractors, Inc. v. Schaefer, 85 Md. App. 123, 132-33, 582 A.2d 547, 550 (1990); G. Korngold, Private Land Use Arrangements: Easements, Real Covenants and Equitable Servitudes § 6.11 (2d ed. 2004). But here, even after consummation of the GDA, there will be no merger, as the lot adjacent to the portion of the ROW excluded from the abandonment case, i.e., the 911 SSA lot, will not be under common ownership with the owner of the other lots with easement rights in the ROW, i.e., Michael.

In short, while the abandonment proceeding could result in termination of public access to the ROW, it cannot terminate the easement rights of the successor to the grantor who executed the 1948 deed as owner of Part of Lot 4 (Liber 1208, folios 517-18), i.e., 911 SSA. 911 SSA would still have the right to use of either the entire ROW, or at least that portion of it from the west end of its lot to its terminus at the 20' alley created by Plat 54. 911 SSA could relinquish that right upon sale or exchange for alternative access, but it is not required to enter into any such arrangement. Under Maryland law, an owner of private property is not obliged to surrender or exchange its existing property rights, even under circumstances where the applicant would be expected to complain that the easement holder's refusal would subject the burdened property to "great injury" and provide the easement holder "comparatively little benefit." Columbia Hills Corp. v. Merchantile-Safe Deposit and Trust Co., 231 Md. 379, 190 A.2d 635, 638 (1963). Columbia Hills teaches that the government has no power to take or modify an express easement except through the power of eminent domain, which, quite obviously is not a possible outcome of this abandonment proceeding, in which the only relevant issue is whether there is continuing need for public, not private, use.

When the issue of the 911 SSA easement arose in the course of the Planning Board consideration of the Project Plan for Parking Lot #3, the Applicant claimed that 911 SSA had abandoned it. 911 SSA strongly disagreed. The deeds executed at the time of easement creation make clear that land was being sold to the County for construction of a surface parking lot or a "parking building." HE \_\_\_\_3. In the event of parking garage construction, the 16' wide paved easement prescribed in the deeds would be needed around the outside of the garage to maintain access to the platted alley. In the event of a surface parking lot, the easement would be superfluous, at least for the time the surface lot is in operation, as anyone parking in the lot could freely access buildings adjacent to the lot. Indeed, the very eventuality that would trigger the need to pave the easement is now under contemplation, apparently for the first time since the parking lot

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was created six decades ago: conversion of the parking lot into a below ground parking garage/above-ground building, an event necessitating **completion**, not **extinguishment** of the easement. There is no evidence of an intent to abandon the easement, and “non-use alone is insufficient to show an intent to abandon....” Chevy Chase Land Co. v. United States, 355 Md. 110, 733 A.2d 1055, 1081-82 (1999).

Presented with competing legal claims by 911 SSA and the Applicant, the Planning Board concluded at its May 28, 2009 hearing that it was not going to involve itself in the issue other than to make clear that in addressing both the abandonment and project plan matters before it, nothing it said or did was to be construed as any sort of response on the merits in favor or either side on the easement claims.

If, as 911 SSA claims, the easement has not been abandoned, this fact has significant repercussions for the advisability of abandonment of Parcels 2 & 3 (or those Parcels plus the small excluded strip behind the 911 SSA property). The rationale for abandonment is that the 16' public ROW it encompasses, with an exit into the 20' platted ROW that comes into the property from Fenton Street, will no longer be needed when the Studio Plaza project is built. There will instead be different means of ingress and ingress for the public. In Maryland, what is planned is unequivocally precluded: “The subservient tenement [the County/Michael] may not obstruct the use of the easement.” Miller v. Kirkpatrick, *supra*, 833 A. 2d at 544. The current Studio Plaza design is to construct a building in part directly on the 911 SSA easement land, thereby completely obstructing the ROW. Absent an act of condemnation, the County cannot force 911 SSA to accept a different ROW than the one defined in the deed executed by its predecessor in title in 1948. 911 SSA is entitled to the unobstructed use of that ROW, not some other one. The record in this case contains no “design around” solution that would leave the 911 SSA easement intact and replace the public alley with a different means of ingress and egress to/from the subject property. Absent such a solution, there is simply no justification for a finding that the ROW is no longer needed for public purposes.

#### **Parcel 5 -The Easement Held by Athena and Dimitra Kalivas**

The ROW identified in AB-719 as Parcel 5 is a second 16' public alley with its terminus on the 20' alley created by Plat 54. This alley was created by deed simultaneously with the creation of the alley of which Parcels 2 & 3 are a part, in a two-minute recordation period on November 26, 1948 in book 1208 – in this case, pages 511-12. HE \_\_\_4. The grantors, Preston T. and Louise E. White, owned the eastern half of Lot 3 and all of Lot 4 in Block F, and by this deed sold the County the rear 67' of their land. The consideration paid to the Whites was \$4500. The rest of the White property was at that time developed with a building operating as a restaurant. The property was sold to the Kalivas family and certain Kalivas partners who no longer are part owners (Liber 2303, Folio 545); the Kalivases (Mrs. Athena Kalivas and her daughter, Dimitra) are today the sole owners.

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In essentially the same manner as was employed to create the public ROW for the other 16' public alley off the 20' platted alley, and with the same legal effect, the Parcel 5 alley was created by the Whites' November 1948 grantor deed, in favor of the public and the grantor. The ROW is, as in the other contemporaneously created alley, established in land that was part of the conveyance, making this a deed creating an easement by express reservation. Miller v. Kirkpatrick, supra. This is further confirmed by the location of the easement in relation to the development of the White property at the time. The easement runs from the platted alley all the way up the right-hand side of the property deeded to the County, to a point close to the rear wall of the Whites' restaurant. Plainly, it was intended that this easement would be for off-street loading/unloading for the Whites' business. Exactly like the deeds for the other alleyway off the platted alley, this deed requires the County "to dedicate, pave and maintain a sixteen foot (16') public alleyway..." Hence, not only the Whites, but also the public, would be free to use this alleyway, although in its configuration, it is clear that it would be of more utility to the Whites than any general member of the public that might be coming to use the parking lot that was contemplated. Also, using the same wording as in the other deeds, the Whites had a right of repurchase at the conveyance price during the following ten years if the County "shall cease to use the said land for a parking lot, or a parking building."

Given these facts, the same legal conclusions as are drawn above about the other 16' public alley off the 20' platted alley are applicable to Parcel 5. As explained, the Kalivases have an easement by express reservation, and this is a permanent property right. The Project would not just infringe upon it; it would effectively extinguish the easement, as the plan calls for construction of a building in part on the easement land. Further, the Kalivas' easement cannot be extinguished by an abandonment proceeding; all that can be extinguished is the public's right of access to Parcel 5. Nor can the Kalivases be required to sell their easement rights to the Applicant or exchange their easement rights for some assertedly equivalent access, whether devised by the Applicant or the County, because they have a right to non-interference with **this** easement. What the Applicant proposes is an exchange of one easement right for another, which, absent a condemnation proceeding, neither it nor the County can force the Kalivases to accept. ? ?

The Applicant claimed before the Planning Board that the Kalivases do not have a private easement; only the public was granted use of Parcel 5. The Kalivases disagree, but even if the Applicant were correct, it would only reinforce the conclusion that public access to Parcel 5 is still very much needed. Currently the Kaliveses, or their tenants, use Parcel 5 daily as a means of ingress and egress to a vacant area of their property which is used to house their trash dumpster as well as a place to park anywhere from 3-5 cars. The Kalivases and their tenants are very much a part of the **public**, and, indeed, perhaps the part of the public **most** interested in continued active use of Parcel 5. This continued use also makes clear that the Applicant has proposed abandonment of more of Parcel 1 than is appropriate. The easternmost 16' of Parcel 1 is simply that portion of the 20'

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platted alley off Fenton Street that is immediately adjacent to Parcel 5. Without maintaining the length of the 20' alley at least as far as the western boundary of Parcel 5, Parcel 5 would simply be isolated from all ROW's, negating the current existing access from Parcel 5 to Fenton Street. Hence, the proposed abandonment of Parcel 1 should be reduced by a small square of 320 sq. ft. (16' x 20') to permit continued access by the Kalivases to Parcel 5 via the unabandoned portion of the 20' platted alley.

With regard to any claim that the Applicant might make that the easement has been lost due to non-use, three responses are in order. First, the easement is in active use on a day-to-day basis, as detailed above. Second, as with 911 SSA, as to loading/unloading use, there has been no abandonment from non-use because no parking building adjacent to the easement was erected; rather, the Kalivas building is readily accessible from the surface parking lot, just as is the 911 SSA building. Third, in a decision perhaps lost to history, decades ago when the County first began operating Parking Lot #3, it chose not to fill it with parking spaces to the limit of the designated parking lot area. In particular, the area immediately adjacent to the Kalivas building is not devoted to parking; it is devoted to a travel lane from surface streets to the actual parking area. Not only did this decision facilitate access to the Kalivas building generally, the travel lane is wide enough to permit commercial trucks to unload supplies into the Kalivas building while still providing ample room for other vehicles to move around the truck to or from parking spaces in the lot. This off-street loading situation, obviously conducive to the free flow of traffic on Thayer Avenue (on which the Kalivas building fronts and where trucks would otherwise be obliged to unload to the businesses there), has been in open and continuous operation for approximately 60 years, if not longer.

The Applicant has repeatedly proclaimed that unloading a commercial vehicle in a parking lot violates County law, but the cited prohibition, § 31-29(a)(10), by its express terms is subject to waiver by the County. Even if there has been no express written waiver, the County cannot seriously claim, after six decades of acquiescence in the open, transparent practice, that it has a legitimate concern over the off-street unloading of goods for the businesses in the Kalivas building, considering that the activity does not disrupt operation of the parking lot. In addition, the County Council has not even prescribed a fine for this activity. See COMCOR 31.33.01, Council Resolution 16-821 (eff. Jan. 25, 2009). Were the County to suddenly get agitated about off-street commercial vehicle unloading to the Kalivas building, it would raise the specter of a constitutional equal protection violation in the form of selective prosecution, even if there were a fine established for the "offense." A sudden shift in enforcement policy would suggest that the motivation for enforcement is not compliance with the law, but rather the improper use the power of government to achieve an ulterior motive – in this case disciplining a property owner seen to be in the way of advancement of the County's perceived entrepreneurial interest in the Silver Spring Parking Lot District. See United States v. Armstrong, 517 U.S. 456, 465 (1996); In re Laurence T., 285 Md. 621, 403 A.2d 1256

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(1979). Alternatively, the County must be viewed as equitably estopped from reversing course now on the loading/unloading activity by the Kalivases, whose building has been configured with a loading/unloading door in the rear to match the current mode of loading/unloading that regularly takes place. See Heartwood 88, Inc. v. Montgomery County, 156 Md. App. 333, 846 A.2d 1096, 1117 (2004) (equitable estoppel applies against the County when its actions or inactions “cause a prejudicial change in the conduct of the other” party.).

### **Easement on the Gerecht Property**

HE 10 is a January 23, 2009 email to Mr. Cassedy from Michael Gerecht, Partner of 8204 Associates, LLC. Mr. Gerecht identifies and discusses a “pedestrian bridge” easement over a portion of Parking Lot #3 that is used by employees of and visitors, including delivery persons, to his business, CD Publications, located in a building on the same block as the Studio Plaza project.

As Mr. Gerecht makes clear, his easement with the County is not proposed for abandonment in this proceeding, but it is imperiled by the proposed abandonments. More specifically, the abandonment of Parcel 2 would make possible the construction of that portion of the Studio Plaza project proposed to be immediately adjacent to the Gerecht building’s main entrance, resulting in a “bridge to nowhere.” If Parcel 2 is not abandoned, then it, along with the existing 20’ platted ROW to which it connects, would preserve an existing vehicular ROW to the Gerecht’s pedestrian bridge, particularly in light of Planning Board action on the Studio Plaza Project Plan on May 28, 2009. In the Board’s action of approval, it became clear the Board will insist on an adequate setback of the Studio Plaza construction from the Gerecht building, as well as adequate means of access to the Gerecht building, including deliveries. Hence, 8204 Associates, as a very much affected member of the public, believes there is a strong need for continued public use of Parcel 2, precluding the requisite finding needed for abandonment.

### **Planning Board Recommendation**

On June 2, 2009 Royce Hanson, Chairman of the Planning Board, sent in a letter for the record in this case. The letter states that the Board had approved the abandonment request, subject to a specified condition. The Board’s recommendation, therefore, is not an unqualified endorsement of the proposed abandonments.

In particular, the Board’s condition expressed concern that the applicant ultimately be able to “satisfactorily demonstrate property ownership over all elements within the plan.” In light of the discussion at the hearing on this matter before the Board on May 28, 2009, this is a clear reference to the easement problems identified above, all of which were raised with the Board at that hearing.

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The Board's conditional approval also highlights the issue of vehicular and pedestrian access to my clients' properties in the event of abandonment. As detailed above, the abandonments of Parcels 1, 2, and 5, as currently proposed, would impair such access to my clients' properties. They should be denied.

Sincerely yours,

A handwritten signature in black ink that reads "David W. Brown". The signature is written in a cursive style with a long horizontal flourish extending to the right.

David W. Brown

/enclosures

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# MONTGOMERY COUNTY EXECUTIVE ORDER

COPY

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

<b>Subject</b> Sale of Public Parking Lot # 3 to Michael, LLC	<b>Executive Order No.</b> 070-09	<b>Subject Suffix</b>
<b>Originating Department</b> Department of Transportation	<b>Department Number</b>	<b>Effective Date</b> 3/19/09

### BACKGROUND

1. Public Parking Lot No. 3 is located in the 8200 block of Fenton Street in the Silver Spring Parking Lot District. The property is made up of approximately 81,293 square feet and contains 152 public parking spaces.
2. On October 6, 2008 the County entered into a General Development Agreement with Michael, LLC., which provides for the sale of the County property, in return for, *inter alia*, (i) construction of a new 152 space County owned parking garage (of equal or greater value than the fair market value of Lot 3) and certain covenants on the development of the property. The covenants include a minimum residential development with required Moderately Priced Dwelling Units, Work Force Housing Units and the construction of a stipulated minimum number of private parking spaces. The development includes the County property and a number of properties in the same block assembled by Michael, LLC.
3. The sale of the County property has been advertised and has gone through mandatory referral to the Maryland-National Capital Park and Planning Commission.
4. In accord with the provisions of Article 25a, Section 5(B) of the Maryland Code Lot 3 has been determined to no longer be needed for public use in light of its replacement by the underground parking garage provided for in the General Development Agreement.
5. Parking Lot 3 is further inexpedient and unprofitable for use in connection with the Parking Lot District in light of its replacement by the underground parking garage provided for in the General Development Agreement.

### ACTION

It is hereby ordered that Bethesda Parking Lot No. 3 be sold to Michael, LLC under the terms of the General Development Agreement between the parties.

Approved as to Form and Legality by  
The Office of the County Attorney

APPROVED

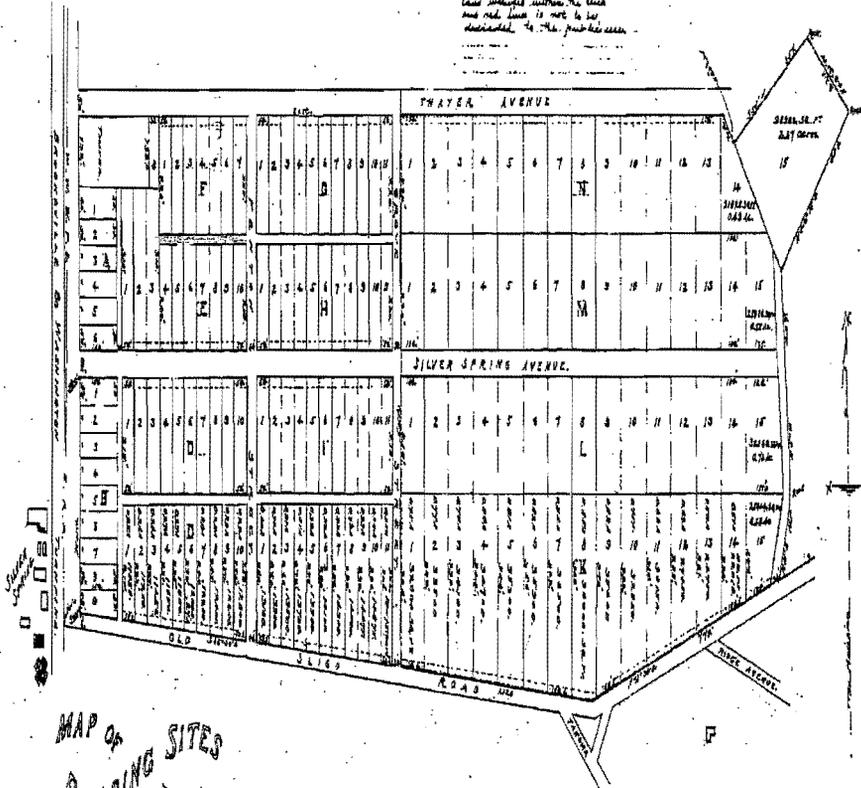
By: [Signature]  
Date: 2/25/09

[Signature]  
Isiah Leggett  
County Executive

(71)

Plat No. 54

Note  
Sections A, L, M and the  
land adjacent section A, B, C  
and old line is not to be  
deducted to the purchaser.



MAP OF  
BUILDING SITES  
FOR SALE

SILVER SPRING  
LYING NEAR THE DEPOT  
of the  
BALT. & OHIO RAILROAD.  
On the Electric Line 10 Minutes from  
WASHINGTON.

The Property of  
R. HOLY EASLEY Esq.  
in  
Montgomery County Md.

Area - 67.23 Acres.  
Scale  
1 inch = 200 feet

I hereby certify that all the lots shown, street and alleys included on this plat are a part of the whole land conveyed to R. Holy Easley, trustee of this plat by deed dated July 23<sup>rd</sup> 1904 recorded Sept 15<sup>th</sup> 1904 in Liber T. 20, no. 22, folio 448 and July 23<sup>rd</sup> 1904 recorded Sept 15<sup>th</sup> 1904 in Liber T. 20, no. 22, folio 449 and further that all the buildings have been constructed to the true dimensions and that a removal of the same is prohibited by law in the ground and that of one of the proposed lines of said street and that the location of said streets do properly indicated on said plat.

Witness my hand and seal of the County of Montgomery this 23<sup>rd</sup> day of July 1904

John P. Shuppert  
County Clerk

The grantor R. Holy Easley, in dedicating to the public the street and alleys of this plat to be known as Silver Springs Subdivision, and in establishing the accompanying maplets to be made of the lots and the length of the proposed to be shown thereon, in having a general and complete government for building purposes and in the interest of public health and convenience as aforesaid running with the land, wishes to reserve the following rights and conditions:

(1) Government with such other public and private rights that may now or hereafter exist in that respect, to lay water pipes and water mains for fire and ice pipes, gas and electric lines, telegraph, telephone and street car lines over, through and under any and all street and alleys included in this subdivision including the franchise or easement hereto indicated on the Streets and Washington Terraplane.

(2) To require that any private or public, in or from time and season, shall not construct any building on the premises conveyed, nor make any such disposition of ground or structure on the premises as may tend to obstruct any view of the street, or the view on either side of any lot of the plat.

(3) That if any person or persons shall ever erect or construct, lay or place any building, structure, or other improvement on any lot hereon, the same shall be constructed on the street or alley immediately adjacent thereto, and the space of all streets, alleys, or lanes on the same may be controlled by the grantor, his heirs and assigns, or by any municipality or other authority or agency, provided that the price of the change for the use of said common shall be reasonable.

Dated July 23<sup>rd</sup> 1904.

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LIBER 1208 FOLIO 518

SUBJECT to covenants and restrictions of record.

TO HAVE AND TO HOLD the same unto and to the use of the said party of the second part, in fee simple.

AND the said parties of the first part her-by covenant to warrant specially the property hereby conveyed, and to execute such further assurances of said land as may be requisite.

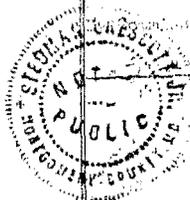
WITNESS their hands and seals on the day and year first hereinbefore written.

WITNESSES:

<u>[Signature]</u>	<u>[Signature]</u> (COPIAL)
	Henry A. Widmayer
<u>[Signature]</u>	<u>[Signature]</u> (COPIAL)
Stedman Freese	William John Widmayer

STATE OF MARYLAND, MONTGOMERY COUNTY, ss:

I HEREBY CERTIFY that on this 11th day of December, 1945,  
 before me, the undersigned, a Notary Public in and for the State of Maryland,  
 Montgomery County, personally appeared WILLIAM JOHN WIDMAYER  
WIDMAYER, her husband, and did acknowledge the foregoing deed to be their act.  
 IN WITNESS WHEREOF, I have hereunto set my hand and official seal.



[Signature]  
 Notary Public  
 Stedman Freese

Recorded Nov. 26th, 1945-at-11:34 A. M.

74

mailed to - Hicantes, 908 Thayer, am. 2d. St. Md. 1-17-58

LIBER 2413 FID 417

#7290  
(jtd)

Recorded Dec. 17th, 1957-at-12:29 P.M.

39603  
3208

### This Deed

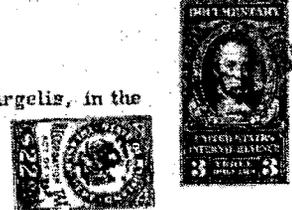
Made this 11<sup>th</sup> day of December, 1957 by and between

Geo. L. Boswell and Joanne T. Dixon, Joint tenants

party (ies) of the first part, and

Jerasimos Kalivas, James Recachinas and William Margelis, in the interest and estates as hereinafter set forth

party (ies) of the second part:



**Witnesseth**, that in consideration of the sum of Ten Dollars and other good and valuable considerations the said party (ies) of the first part do (es) grant and convey unto the party (ies) of the second part in fee simple ~~and~~ all that property situate in Montgomery County, State of Maryland described as:

All of Lot numbered Four (4) and the adjacent or East half of Lot numbered Three (3) in Block lettered "F" in the subdivision known as "R. HOLT EASLEY'S SILVER SPRING SUBDIVISION" as per plat recorded in Plat Book 1, Plat No. 54, among the Land Records of Montgomery County, Maryland. SAVING AND EXCEPTING THEREFROM HOWEVER the following described land which was conveyed by Preston Isaac White and Louise A. White, his wife to the Board of Commissioners for Montgomery County, by deed dated November 18, 1948 and recorded in Liber 1208, folio 511, among the aforesaid Land Records in consideration of the County agreeing to dedicate, pave and maintain a 16 foot public alleyway, with the East edge of said alleyway being the East boundary line of Lot 4, Block F, running parallel with said East boundary line of Lot 4, Block F, retained by grantors, Conveys: South 67 feet by full width of the East  $\frac{1}{2}$  of Lot numbered Three (3) in Block lettered "F", "R. H. Easley's Silver Spring Subdivision", Plat Book 1, Plat No. 54; containing 1,675 square feet, more or less. South 67 feet by full width of Lot numbered Four (4) in Block lettered "F" of said subdivision and containing 3,350 square feet, more or less.

To have and to hold unto Jerasimos Kalivas as to an undivided  $\frac{3}{8}$  interest, and unto James Recachinas as to an undivided  $\frac{3}{8}$  interest, and unto William Margelis as to an undivided  $\frac{1}{4}$  interest.

**Together** with the building and improvements thereon erected, made or being; and all and every, the rights, alleys, ways, waters, privileges, appurtenances and advantages to the same belonging or in anywise appertaining.

**And** the said party (ies) of the first part covenant (s) that they will warrant specially the property hereby conveyed; and that they will execute such further assurances of said land as may be requisite.

Witness their hand (s) and seal (s).

TEST:

*Thomas W. M. M.*  
THOMAS W. M. M.

*Geo. L. Boswell*  
Geo. L. Boswell

*Joanne T. Dixon*  
Joanne T. Dixon

STATE OF MARYLAND, COUNTY OF MONTGOMERY

On this 11<sup>th</sup> day of December, 1957, before me, the undersigned officer, personally appeared Geo. L. Boswell and Joanne T. Dixon

known to me (or satisfactorily proven) to be the person(s) whose name(s) is (are) subscribed to the within instrument and acknowledges that he (she) (they) has (have) executed the same for the purposes therein contained.



*Thomas W. M. M.*  
Notary Public

My commission expires: 5/4/59

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**LINOWES**  
**AND BLOCHER LLP**  
ATTORNEYS AT LAW

November 17, 2009

**C. Robert Dalrymple**  
301.961.5208  
bdalrymple@linowes-law.com  
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hdlhopsky@linowes-law.com

**VIA HAND DELIVERY**

The Honorable Nancy Floreen, Councilmember  
Chair, Transportation, Infrastructure, Energy & Environment Committee  
Montgomery County Council  
100 Maryland Avenue, Sixth Floor  
Rockville, Maryland 20850

Re: Abandonment Petition No. AB719: Public Alley, Parking Lot 3 (the "Abandonment Petition") for the Studio Plaza Project in Fenton Village, Silver Spring (the "Property") – Submission of Memorandum in Response to 11/2/09 David W. Brown Memorandum, "Proposed Studio Plaza Development"

Dear Councilmember Floreen:

On behalf of Michael, L.L.C. (the "Applicant") and in response to David W. Brown's Memorandum dated November 2, 2009 entitled "Proposed Studio Plaza Development," we hereby submit this Memorandum. The Abandonment Petition is a necessary process to allow for redevelopment of Public Parking Lot #3 and the Applicant's surrounding properties in the Fenton Village Overlay Zone of Silver Spring with a public/private mixed-use development including a new underground Public Parking Garage and private street connection through the project between Thayer Avenue and Silver Spring Avenue (the "Project"), all as envisioned in the Approved and Adopted Silver Spring CBD Sector Plan (the "Sector Plan"). This Memorandum is in addition to the written materials previously submitted by the Applicant for this and the other processes in pursuit of the Project, namely Project Plan Application No. 920070010 (the "Project Plan"), Abandonment Petition No. AB719 (the "Abandonment Petition"), and Mandatory Referral Application No. MR09-713 (the "Mandatory Referral"), all of which are incorporated herein by administrative reference. This Memorandum also supplements written and oral testimony provided before, during, and after the January 28, 2009 County Executive's Hearing Officer (the "Hearing Officer") hearing on the Abandonment Petition, February 12, 2009 Planning Board hearing on the Abandonment Petition, and May 28, 2009 Planning Board hearing on the Project Plan, Abandonment Petition, and Mandatory Referral, also incorporated herein by administrative reference.

In short, the Project is dependent upon the approval of the Abandonment Petition, and the public ingress and egress intended to be provided by the public rights-of-way for which abandonment is sought will be maintained and/or improved upon by the Project following abandonment. As the

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Hearing Officer's (and Planning Board's) recommendation for approval of the Abandonment Petition is conditioned upon a subsequent final approval of the Project (preliminary plan and site plan approvals remain necessary), including resolving all issues pertaining to ingress and egress to the general public and to all properties impacted by the Abandonment Petition (final approval to be evidenced by a record plat of subdivision), the framework for addressing all issues raised by Mr. Brown is in place. Mr. Brown does not raise any new factual or legal issues with his latest Memorandum, and Mr. Brown's "clients" are protected by the simple fact that the abandonment will not be made effective until a record plat is approved following preliminary plan and site plan review of Studio Plaza, during which processes all of the relevant issues raised by Mr. Brown are to be addressed.

In his November 2<sup>nd</sup> Memorandum, Mr. Brown purports to represent three owners of property located nearby the Project, and states that approval of the Abandonment Petition will "have a substantial adverse affect [sic]" on his clients' property interests. As can be seen from this Memorandum and the attached materials, this is an incorrect assertion by Mr. Brown for several reasons. Even assuming that Mr. Brown actually represents the three clients he claims to and that each of the three clients is actually affected by the proposed abandonment (the first of which is suspect and the second of which is incorrect as explained below), his concerns are unwarranted and have already been addressed by both the Planning Board recommendation and the Hearing Officer's Report and Recommendation on the Abandonment Petition. Thus, provided the County Council approves the recommendations on the Abandonment Petition provided by the Planning Board and Hearing Officer, Mr. Brown's concerns are more than accommodated by the procedures delineated by those recommendations.

On May 28, 2009, the Planning Board unanimously approved the Project Plan and Mandatory Referral and unanimously recommended to the County Council approval of the Abandonment Petition, with the abandonment to become effective upon recordation of the record plat for the Project. [Copies of the Planning Board's resolution on the Project Plan and recommendation on the Abandonment Petition are attached hereto as Exhibit "A" and Exhibit "B", respectively. In addition, for background reference and so that the County Council can further familiarize itself with the Project if desired, we have attached a copy of the Applicant's powerpoint presentation given at the Planning Board hearing on May 28<sup>th</sup> as Exhibit "C".] The Planning Board found that the Abandonment Petition satisfies the findings required to be made for approval of an abandonment provided that at the time of preliminary plan the Applicant demonstrates property ownership over all elements included within the Project, that the preliminary plan provides adequate vehicular and pedestrian access to the Project, and that the preliminary plan addresses interim and permanent parking needs for independent properties and businesses adjacent to the Project. Because these issues will be addressed at the preliminary plan stage (and the manners in which the issues will be addressed are outlined and framed for resolution by the approved Project Plan), the Planning Board recommended that the abandonment should not become effective until

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recording of the record plat for the Project (which cannot occur until both a preliminary plan and site plan have been approved). A record plat can only be recorded if the Planning Board approves a site plan for the Project, and a site plan will only be approved if issues relative to the adjacent properties are satisfied (*see* Project Plan conditions of approval #2c, 2d, and 2e). The Planning Board's discussions on the Project Plan and their ultimate decision reflected this rationale, and appropriately set the framework and schedule for these additional processes to occur in an orderly fashion. Additionally, the Planning Board determined that Mr. Brown's assertions as to retained private easements had no bearing on the matters before them and should be resolved privately through other means if pursued. Nevertheless, in order to protect and provide adequate access to adjacent properties, the Planning Board made clear in its decisions that abandonment of the alleys will only occur upon recording of the record plat after the above access and ownership concerns are satisfactorily addressed.<sup>1</sup>

Similarly, the Hearing Officer found that the abandonment satisfies the findings required to be made for approval, provided the abandonment not become effective until Parking Lot #3 has been conveyed to the Applicant and the record plat has been recorded, again ensuring that any outstanding issues of access and ownership are resolved prior to abandonment of the public alleys. [A copy of the Hearing Officer's Report and Recommendation is attached hereto as Exhibit "E".] Thus, both the Planning Board's and Hearing Officer's recommendations provide more than ample safeguards for adjacent and nearby property owners and render Mr. Brown's concerns unwarranted. We urge the Transportation, Infrastructure, Energy and Environment Committee (the "T&E Committee") to recommend approval of the Abandonment Petition, with the condition that the abandonment shall only take effect upon approval of the record plat for the Project.

While Mr. Brown simply reiterates claims and assertions already made in earlier submissions already part of the public records for the Project Plan, Abandonment Petition, and Mandatory Referral, we will again briefly summarize the Applicant's refutation of Mr. Brown's claims, including the lack of existence of any private easement rights retained by his clients (please see the Applicant's letter dated May 27, 2009 to Planning Staff, included in the record of the Abandonment Petition, which details extensively the lack of private rights of Mr. Brown's clients), and further reasons for which Mr. Brown's purported clients do not have any further legal interests in the proceedings on the Abandonment Petition.

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<sup>1</sup> The applicable period for any interested party to request judicial review of the Project Plan approval has expired without any such timely request. Mr. Brown did request that the Planning Board reconsider its approval of the Project Plan, and on November 5, 2009 the Planning Board had this reconsideration request before it and denied the request (a copy of the Planning Board Legal Staff's memorandum on this reconsideration request is attached hereto as Exhibit "D"). As such, the Project Plan is deemed a final approval by law.

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911 Silver Spring Avenue Property (the "Katz Property")

As to the Katz Property, the owner of this property (Mr. Katz) has indicated to the Applicant on numerous occasions that Mr. Brown does not represent him. This notwithstanding, the Hearing Officer's Report and Recommendation recognizes that Mr. Katz supports the Project and that the Project Plan addresses Mr. Katz' desire to ensure that he has access to the public alley behind his building for ingress and egress to the street surrounding the Project (*see* Hearing Officer's Report and Recommendation, p. 5). Subsequently, by letter dated May 22, 2009, Mr. Katz indicated his desire for the Planning Board to approve the Project Plan, including the access alley being provided by the Applicant to the rear of Mr. Katz' property.<sup>2</sup> As well, during the Planning Board's public hearing on the Project Plan, Mr. Katz again reiterated his support of the Project and approval of the Abandonment Petition provided the means of ingress and egress to the Katz Property is implemented as shown on the Project Plan as approved by the Planning Board. As a result, approval of the Abandonment Petition will have no effect on Mr. Katz' property interests as his interests are fully accommodated through the Project Plan approval (*see* Project Plan condition of approval #2e).

8204 Associates LLC Property (the "Gerecht Property")

As to the Gerecht Property and as previously detailed in the Applicant's May 27<sup>th</sup> letter to Planning Staff, this property is not situated adjacent to any of the alleys proposed to be abandoned and has never had direct legal access to any of these alleys (*see* Hearing Officer's Report and Recommendation, p. 9). Notwithstanding the Gerecht Property having no legal interest in the subject public rights-of-way, Mr. Brown asserts that the owner of the Gerecht Property has legal rights to continued use of Public Parking Lot #3 and that approval of the Abandonment Petition would infringe on these rights. As found by all other review agencies, the Gerecht Property does not have any legal right to use of Public Parking Lot #3 in the first place (as also concluded by the Montgomery County Department of Transportation in response to Ms. Rose Krasnow referenced in the Staff Report for the Project Plan, a copy of which is attached hereto as Exhibit "F"), and the Hearing Officer correctly found that Mr. Gerecht's testimony and evidence has no bearing on the Abandonment Petition (*see* Hearing Officer's Report and Recommendation, p. 9). Nevertheless, any issues relative to the continued viability of uses of the Gerecht Property, including means of ingress and egress and provision of loading, unloading, and service, were well-documented and identified during the Planning Board's review of the

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<sup>2</sup> The relevant portion of Mr. Katz' May 22<sup>nd</sup> letter states, "We would like the public alley at the back of 911 Silver Spring Ave. to remain as a private street with direct access to Silver Spring Ave. and Thayer Ave. for pedestrian traffic." The requested access is provided on the approved Project Plan, with a pedestrian connection from the back of the Katz Property directly to the new north-south street through the Project.

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Project Plan, and the Planning Board established in the Project Plan resolution the framework for resolution of these issues at the time of site plan review (*see* Project Plan condition of approval #2d). Mr. Gerecht has no legal interest in the proceedings on the Abandonment Petition, and the Planning Board has delineated an appropriate procedure by which any other concerns relating to the development of Studio Plaza resulting from the approval of the Abandonment Petition will be timely addressed.

908 Thayer Avenue (the "Kalivas Property")

As previously detailed in the Applicant's May 27<sup>th</sup> letter to Planning Staff, no private right to use of the public alley adjacent to the Kalivas Property (identified as Parcel 5 on the exhibit to Mr. Brown's Memorandum and in the public record) was retained in the deed that transferred this land to the County, and thus the Kalivas Property has no private right to this public alley. Again, however, any issues relative to the Kalivas Property stemming from the Abandonment Petition or the development of Studio Plaza were well-documented and identified during the Planning Board's review of the Project Plan, and the Planning Board established in the Project Plan resolution the framework for resolution of these issues at the time of site plan review (*see* Project Plan condition of approval #2c).

As such, all issues and/or concerns repeated by Mr. Brown on behalf of his purported clients again in this latest Memorandum are preserved for resolution by the condition that the abandonments become effective only upon record plat approval for Studio Plaza (including Public Parking Lot #3) as recommended by the County Executive, Hearing Officer, and Planning Board.

Finally, Mr. Brown again erroneously argues that the sale of Public Parking Lot #3 to the Applicant pursuant to the General Development Agreement entered into between the Applicant and the Montgomery County Department of Transportation on October 24, 2008, is somehow legally deficient. First, the Council's consideration of the Abandonment Petition is not the legal forum for resolution of this issue. Second, the County Attorney's Office has evaluated this legal contention and has determined it to be of no merit (as also found by the Hearing Officer's Report and Recommendation). Last, Mr. Brown's contention is wrong. The County Executive has acted properly in pursuing the sale or other disposition of the property as provided for by law, including Section 60-2(b) of the Montgomery County Code (as to property in a parking lot district).

In conclusion, as the Planning Board and Hearing Officer recommended, the T&E Committee should recommend approval of and the County Council should approve the Abandonment Petition, conditioned upon approval of the record plat. This will set into motion the various other processes and protections afforded the adjacent properties while enabling the Applicant to

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proceed with this Project that has been recognized by Planning Staff as “a significant contribution to the rebuilding of Fenton Village.” Approval of the Abandonment Petition will allow the vision of the Sector Plan for Fenton Village to be realized, will allow the next phase of the revitalization of the Silver Spring CBD to occur, and is in the best interests of the general public.

Please let us know if you have any further questions or concerns, and please do not hesitate to contact us if additional information is necessary prior to the T&E Committee’s consideration of the Abandonment Petition.

Sincerely,

**LINOWES AND BLOCHER LLP**

*C. Robert Dalrymple / HD*

C. Robert Dalrymple

*Heather Dlhopsky*

Heather Dlhopsky

Enclosures

cc: Councilmember Roger Berliner  
Councilmember George Leventhal  
Council President Phil Andrews  
Dr. Glenn Orlin, Council Staff Deputy Director  
Ms. Sherry Kinikin, Legislative Analyst  
Mr. Robert Hillerson