

REVISED

ED/MFP Committee #1

November 29, 2010

Worksession

Please bring your packet from the November 23 public hearing for use at this Committee meeting and keep this packet for use at tomorrow's Council session.

MEMORANDUM

TO: Education and Management and Fiscal Policy Committees

FROM:  Jeffrey L. Zyontz, Legislative Attorney
Michael Faden, Senior Legislative Attorney

SUBJECT: **Worksession:** Resolution to approve the sale of Peary High School

On October 18, 2010 the County Executive submitted a draft resolution that seeks Council approval of the sale of the former Peary High School property to the Berman Hebrew Academy, to which the school is now leased.

The proposed terms are different from the previous Executive's 2005 sale recommendation in 4 ways:

- 1) The price rejects one appraisal. The 2005 proposal called for a payment of \$1,500,000; the 2010 proposal requires a payment of \$1,914,860.
- 2) The repurchase price is tied to the price paid plus the lesser of the fair market value of improvements made by the tenant or the depreciated actual costs of improvements.
- 3) The Academy's use of the site is limited to school uses. The public will continue to have use of the fields, the gym, and the auditorium during non-school use times.
- 4) The site may be condemned for public school use at the repurchase price (see # 2 above) plus relocation costs with County possession 5 years after the condemnation action is final and non-appealable. (This amendment to the deed was submitted to the Council on November 10.)

The 1996 lease requires the County to undertake a process for acceptance that "is in accordance with all applicable State and local statutes and regulations governing the disposition of property." The lease expressly requires the sale to be approved by the State Board of Public Works. The sale of Peary High School was reviewed by the Planning Board in 2005 as a mandatory referral. The Planning Board recommended approval of the sale on November 18, 2010.

The Council held a public hearing on this resolution on November 23. The majority of speakers supported the proposed sale. The Board of Education and the County Council of Parent-Teacher Associations, among others, opposed it.

Background

Peary High School was closed due to a decline in enrollment in 1984. The site was turned over to the County as a surplus school in 1987. The unoccupied building deteriorated over time. Sometime between 1987 and the adoption of the Aspen Hill Master Plan, the Board of Education recommended using the school as a holding school while other schools were being renovated. After funds for this proposal were not authorized, the Board of Education transferred the property to the County by deed on November 11, 1994. The Aspen Hill Master Plan (approved April 1994), which included the Peary High School site, recommended maintaining public ownership of the school site under all circumstances.

On November 29, 1994, after a public hearing, the Council approved Resolution 12-1874 to allow a lease of the property to a private school and a sale under the following conditions:

Any sale of the property is subject to prior consent of the Council which will consider appropriate elements of the Aspen Hill Sector Plan at that time.¹

The 1994 resolution gave the Executive the authority to seek a long term tenant or a sale with Council approval. The Executive solicited private sector proposals for the site in 1995. After considering other options, the Executive signed a lease with the Berman Hebrew Academy in 1996. The lease included an option to purchase the building and site under the following circumstances:

The Lessee shall have the right to purchase the Premises at any time during the lease term or any extension thereof, subject to the approval of the Montgomery County Council and the Montgomery County Executive, and subject to any restrictions, conditions or requirements which the County Executive and County Council may elect to attach to such a purchase. The Lessee's right to purchase is further subject to the approval of the Board of Public Works, which may also elect to place restrictions, conditions or requirements on the purchase. The Lessee's right to purchase and the County's acceptance thereof shall be exercised in accordance with all applicable State and local statutes and regulations governing the disposition of public property....²

The definition section of the lease states:

Wherever the phrase "approval of the County" is used it shall, unless otherwise provided, mean that such approval shall not be unreasonably withheld.³

The Council approved Regulation 4-99, governing the disposition of closed schools, in 2001. Any lease which predated the regulation, including the lease for Peary High School, was not subject to the regulation.

The then-County Executive recommended in 2005 that the Council approve a resolution to sell the school and site to the Academy. The Management and Fiscal Policy Committee held a worksession on the proposed resolution on October 17, 2005. Both the Planning Board and the Board of Education advised not to sell the school.⁴ The then-MFP Committee Chair commissioned an independent

¹ See © 69.

² 1996 Lease, page 8; see © 31.

³ Ibid., page 5; see © 28.

⁴ See © 71-72.

economic analysis of the terms of the proposed sale by ZHA, Inc., which concluded that the sale terms were not in the County's best interest. The Council took no action after the Committee's worksession.

Legal framework

The Council has full authority to dispose of property formerly used as a public school and conveyed to the County by the Board of Education.⁵ The Council authorized the County Executive to lease the School site in Resolution 12-1874. That resolution did not authorize the Executive to sell the property without the Council's prior consent.⁶ The lease cannot be read as granting the Academy an irrevocable option to purchase. An option to buy might have been made irrevocable by the Council if the Council approved the lease before it was signed and the conditions of sale were removed from the lease. But the Council never approved the lease to the Academy. In fact, even when the Executive sent the Council notice of his negotiations with the Academy, it did not include any condition concerning the option to buy other than the provision for Council approval before a sale could occur.

Even if the Council had approved this lease, it did not create an irrevocable option to buy. Under the lease terms, the Council must approve the sale and could make the sale subject to "any restrictions, conditions or requirements". The lease's requirement that the Council consent and the Council's ability to add conditions and requirements squarely rebut the argument that the lease contains an irrevocable option to sell.⁷ Under the Maryland Court of Appeals' analysis, the requirement for subsequent approval by the Council is a further manifestation of consent that is not an offer to sell. The lease did not place in the hands of the Academy the power to conclude a contract without further action by the Council.

As previously noted, the lease also states that:

Wherever the phrase "approval of the County" is used it shall, unless otherwise provided, mean that such approval shall not be unreasonably withheld.

As a matter of contract law, Maryland courts will honor a provision prohibiting unreasonable withholding of consent to a sublease.⁸ And, unlike with private contracting parties, any action of the Council must be reasonably based. To allow otherwise would make the Council decision arbitrary and

⁵ Maryland Code, Education Article, §4-115(c):

...if, with the approval of the State Superintendent, a county board finds that any land, school site, or building no longer is needed for school purposes, it shall be transferred by the county board to the county commissioners or county council and may be used, sold, leased, or otherwise disposed of, except by gift, by the county commissioners or county council.

⁶ 1996 Lease, Article III, page 8. Any sale of the property is subject to prior consent by the County Council, which will consider the appropriate elements of the Aspen Hill Master Plan at that time.

⁷ Prince George's County v. Silverman, 58 Md. App. 41 (1984).

A contract is formed when an unrevoked offer made by one person is accepted by another. An "offer" is the "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." 1 Restatement Contracts (2d) § 24 (1979). A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows that the person making it does not intend to conclude a bargain until he has made a further manifestation of consent. *Foster & Kleiser v. Baltimore County, Md.*, 57 Md.App. 531, 470 A.2d 1322 (1983).

⁸ *Maxima Corp. v. Cystic Fibrosis Foundation*, 81 Md. App. 602 (1984). Examples of such a good-faith, reasonable objection to a sublease would be an inability to fulfill terms of the lease, financial irresponsibility or instability, unsuitability of premises for intended use, or intended unlawful or undesirable use of premises. Personal likes and dislikes of the accepting party are not a reasonable basis for an action.

capricious. The lease clause prohibiting the County from unreasonably withholding consent does not further restrict the Council's decision-making process. The phrase "approval of the County" is not used in the lease provision (quoted above) that gives the Council the authority to approve a future sale. The County Council and the County Executive must each approve the sale, not "the County". Assuming, arguendo, that the "unreasonably withholding" clause would apply to Council action, the Council can still withhold approval for any valid reason. The Board of Education testimony and the facts in the Planning Staff report of November 4, 2010 would provide good reason to withhold consent.

The Board of Education testified that the site should be retained in current ownership. The Board cited actual enrollment increases since 2005 (5,017 students) and projected enrollment increases by 2017 (another 10,000 students).⁹ Retaining the school site will provide a place to accommodate increasing public school enrollment. Planning Staff noted that 4 out of 5 elementary schools in contiguous service areas were currently over capacity and 4 elementary schools are projected to still be over capacity in 2016.¹⁰ All of these facts constitute a reasonable basis to reject an offer to purchase; however, they do not compel the Council to take that action. The County could approve the sale under the conditions recommended by the Executive or approve it with additional terms.

The following factors support approving this sale. The Executive signed a lease that included the right of the Academy to initiate a purchase. Relying on the "option" to purchase, the Academy spent about \$9 million to rehabilitate a building that was a neighborhood eyesore and liability. Because of their efforts, the building and school are now valued community assets. The Aspen Hill Civic Association and other local residents, as well as state legislators who represent that area, recommended approval of the sale. The Board of Education has not specified a public school use for the site in its proposed capital improvements program. The agreed on price for repurchase by the County is related to the sale price and would not create a unilateral opportunity for a windfall. The Academy is educating about 700 children, many of whom would otherwise attend County schools.

Terms and Conditions

The Executive submitted 4 documents to express all terms and conditions of sale: 1) the 1996 lease; 2) Amendment No.1 to the 1996 lease; 3) covenants; and 4) a deed. Staff will summarize each document to the extent relevant to the sale.¹¹ The major elements of the terms and conditions follow:

1) *Sale price*

The price is \$1,914,860, if settlement occurs before December 17, 2010.¹²

2) *Public Use*

The public would have access to the auditorium and the gymnasium when the facilities are not needed by the Academy. The athletic fields would be open for public use all weekends, Friday after 3:30 PM and Monday through Thursday after 6 PM. The Academy may also schedule events through normal channels in those periods and can prohibit auditorium and gymnasium use by the public during Jewish holidays. The Academy would be able to charge fees to cover its operating costs, including personnel

⁹ Letter from Board of Education President O'Neill to Council President Floreen, October 25, 2010.

¹⁰ Memorandum to Planning Board from Kristin O'Connor, November 4, 2010.

¹¹ See ©pages 31-32.

¹² The sale under the lease was based on the appraised price of land in 1996 adjusted by the consumer price index.

costs for security and compliance with parking regulations. Users must carry insurance to indemnify the Academy. The Academy and its successors would be prohibited from altering the fields without prior County approval.

3) *County right to repurchase*

The Academy and its successors would have the ability to use the site for a private school with accessory daycare, day camp, worship space, and private religious center. The County would have the right to repurchase only under two conditions, both controlled by the Academy:

- the use ceases for more than 180 days (not due to renovations); or
- the site is offered for sale to a non-school user.

The County would have 90 days to tender the price paid by the Academy, adjusted by the consumer price index, plus the lesser of the Academy's construction costs or the replacement costs of the Academy's improvements minus depreciation. Failure of the County to repurchase the Property would trigger a developer's right to remove the covenant regarding the use of the property.

If the property is condemned by the County for use as a public school and the County wins the condemnation action, the repurchase price is the same as if the Academy had abandoned the use (the price paid by the Academy, adjusted by the consumer price index, plus the lesser of the Academy's construction costs or the replacement costs of the Academy's improvements minus depreciation). The County can take possession 5 years after the last appealable event in the condemnation action. If the Academy chooses to tender the property to the County before the County prevails, the County must pay the Academy the repurchase price and the Academy pays the county the rental price in the lease (\$60,000 per year, adjusted by the consumer price index from 2002) for its period of occupancy.

Areas of concern

Sale

Overcrowding in nearby schools, with projections indicating future overcrowding in 4 of the 5 surrounding elementary schools, would provide a reasonable basis to reject a sale. Retaining the lease is easier than selling the site and condemning or repurchasing it later. A sale would complicate the issue of public school reuse.

Concern has been expressed for the about 700 students who now attend the Academy. The County is obligated to provide a public education if these children are sent to public school. The school system's reuse of the site would require the Academy to relocate, but not necessarily to cease operations.

At the end of the lease term (without a sale), the County gains all rights to the school without any money due the Academy.¹³ The County's repurchase as proposed under the sale conditions could happen even if the site were needed after the current lease term. Those conditions include a condemnation procedure for a court to satisfy the question of public need, and possibly relocation expenses and other funds due the Academy.

¹³ Article 17, subsection 1, page 26.

Under a condemnation, whenever it occurs, the County has the obligation to pay the agreed-on repayment price, plus relocation costs and other costs associated with condemnation. Relocation costs could include moving costs and tenant fit out of new space. The County may also be required to pay the Academy a location premium for the Aspen Hill site if it is particularly advantageous to the Academy. Disagreement on any of these costs would be subject to litigation.

Early termination of the Academy's tenancy is allowed in the lease.¹⁴ If the County needs the site for school purposes during the lease term, there may be an obligation to pay the Academy for breaking the lease. It would be a condemnation of the lease. Under a condemnation without a sale, the Board of Education could get use of the property without a 5 year waiting period if absolutely necessary. If the County sold the property and then needed to condemn the property, it would be condemning an ownership interest (with an agreed price for that ownership, plus moving and other costs associated with condemnation), not a leasehold interest.

The approved Aspen Hill Master Plan states:

The reuse of Peary High School as a public school, if such a need is found by the Board of Education, would be the most desirable future for the site. In any event, if the site is surplus by the Board of Education, it should be kept in public ownership.¹⁵

A sale of the site would not conform to that Master Plan recommendation. The Council resolution allowing the lease and sale with prior consent said that the Master Plan recommendation must be considered when the Council considers a sale. **Given the current existing and projected school capacity deficits, as evidenced by the recommendation of the Board of Education, Council staff recommends that the Council should not approve a sale.**

If the Council agrees that the Academy's offer to purchase should not be accepted, then the other areas of concern are moot.

Repurchase provisions

Condemnation Requirement

The lease with the Academy expires in 2023. The Academy has the right to extend the lease for 3 periods of 5 years each; however, any time after 2023 the County can terminate the lease with 5 years notice if the site would be needed for education purposes.¹⁶ When the lease expires, all improvements to the real estate become the County's property.

Nothing in the proposed conditions of sale gives the County the right to repurchase without going through condemnation. The right to repurchase provision in the proposed deed refers to a right triggered

¹⁴ Article 8, subsection 4, page 18.

¹⁵ Approved and Adopted Aspen Hill Master Plan, 1994, page 63.

¹⁶ At the Planning Board meeting when this issue was raised, the Academy said that it would argue that the County can only give it 5 years notice to terminate in 2023, making the first termination date of the lease 2028 without its consent. The lease contains the following provision: "the County may terminate this Lease, by providing to Lessee five (5) year's advance written notice of its election to terminate, at any time after the conclusion of the twenty-five years lease term." The issue would be whether the parenthetical phrase "by providing to the Lessee five year's advanced written notice of its election to terminate" modified the first phrase "the County may terminate this Lease" or if it was part of the phrase defining when the notice could be given. Council staff believes it meant the former, so that after giving 5 years' notice the County could take possession at the end of the 25-year term in 2023. Disputes on interpretation of the lease are decided by the County's Chief Administrative Officer.

by the actions of the Academy (abandonment or sale to a non-school user). At best, the County's right to repurchase as proposed is conditional, if not illusory.

The provision concerning condemnation includes a sale price that is based on the purchase price plus an accounting for the improvement value added by the Academy. The County would also pay relocation and other costs awarded in the condemnation process. The condemnation provision prevents County possession of the site until 5 years after the last appealable court decision. The last appealable court decision could be at least 3 years after the County's determination of need. The timing for possession and the requirement to uphold the public need in court are burdens for the County that as proposed seriously qualify the County's "right" to repurchase.

Use Covenants

Under the Executive's recommendation, if the County does not repurchase the Property after the Property has been offered to a developer, the restriction to use the site as a private school would be removed. The result would be a windfall profit.

Council staff recommendation: If the Council believes that a sale is in the public interest, **Council staff recommends** that the deed include a clear right of repurchase under the following terms and conditions:

If the Council includes a public school on the former Peary High School site in the County Capital Improvements Program , then:

- 1) The Council gives notice to the Academy that it will repurchase the property at any time starting in 2018.
- 2) The Academy will have at least 5 years notice that it will be required to turn over possession of the property at the end of the notice period.
- 3) The purchase price will be the repurchase price in the Executive's proposal.
- 4) The Academy will have an option to retain the site but pay the County the cost of acquiring a similarly sized site in the vicinity, minus the cash paid to the County by the Academy inflated by the consumer price index.

If the Council does not exercise its right to repurchase in the course of a proposed sale and the purchaser wants to remove the land use restriction, the difference between the market price and the repurchase price must be paid to the County.

The sale price

The current lease specifies the method to set the value of the site used by the County Executive. It is based on the value of the land in 1996, inflated by the consumer price index to today's dollars. The current price of unrestricted land in that vicinity is far higher than the lease-determined price. The market price would be considerably diminished by the proposed use restrictions in the covenants and the requirement to maintain outdoor athletic fields. The Council's repurchase right at a price related to the purchase price would also negatively affect the site's value.

The County benefited from the Academy's investments in improvements . The Academy took a neighborhood liability (an abandoned, deteriorating building) and turned it into a good neighbor. iIn this

respect the Council's acceptance of the Executive's negotiated terms could encourage future local improvements.

If the Academy could use or sell the land for any purpose, the purchase price would be too low. If the Academy could sell the property to any future user, then the price would be too low. Neither of those value enhancing conditions would apply under the terms of the sale. **Given the lease terms, the proposed covenant to use the land only as a private school with outdoor fields available to the community, and the repurchase provisions, staff concludes that the proposed purchase price is appropriate.**

Availability for public use

The outdoor athletic fields are now available to the public after 5 p.m. and all weekends. Last year (November 1, 2009 to October 31, 2010) 395 hours of community use occurred through permits from the Community Use of Public Facilities office. The Academy used 71 of those hours.

The conditions of sale would not allow public use until 6 p.m. Monday through Thursday (a 4 hour reduction in the time for public use per week) but would allow public use after 3:30 on Fridays (a 1.5 hour gain in the time for public use per week). Last year, 16.5 hours of field use were permitted Monday through Thursday between 5 p.m. and 6 p.m.. The Academy used 14 of those hours; the community used the fields for 2.5 hours. Last year, no permits were issued for the use of the fields on any Friday. The proposed conditions of sale would allow more community use of fields on Friday afternoons.

The lease requires the Academy to make the auditorium and gymnasium available to the community in a manner that does not interfere with the Academy's educational program. Under the conditions of sale, community use of the gymnasium and auditorium during the Jewish Sabbath (Friday sunset through Saturday sunset) and Jewish holidays would be prohibited. There are 19 Jewish holidays in a year, some of which are 8 days long. The exclusion of the public from use of the building on all Jewish holidays is a new restriction on the time available for public use.

Even though the lease requires the Academy to make the auditorium and gymnasium available to the public under the guidelines and regulations for community use of schools, the community use of the indoor facility is currently in the complete control of the Academy. The Community Use of Public Facilities office does not program the community use of the auditorium or gymnasium. The Academy's website states that Girl Scouts, Girls on the Run, the Peary High School Alumni Association, and local cultural groups use those facilities. Executive staff did not provide any information regarding the usage of the auditorium or gymnasium.

The cost for public use

Under the current lease, the auditorium, gymnasium, and outdoor fields are available to the public in accordance with guidelines and regulations for the community use of schools. Under the conditions of sale, the Academy is specifically allowed to add security costs and any cost associated with compliance to parking regulations. The conditions of sale also require insurance by the users.

The Executive has allowed the Academy to manage the auditorium and gymnasium at its sole discretion in terms of cost and availability. There are no limits to these costs in the Executive's proposal, and there are no cost limits under the lease concerning the community's use of the auditorium and gymnasium.

Lease provision regarding public use after sale

Both the time and conditions for public use are covered by more favorable terms in the lease than in the proposed conditions of sale. The lease states:

In the event the Lessee exercises its option to purchase the Premises, as set forth in this lease, the parties will prepare and record a declaration of covenants at closing, or, in the alternate, a condition in the deed, which will run with the land and survive closing, requiring Lessee to continue to make these facilities available for community use as hereinabove described.¹⁷

The proposed conditions of sale have less favorable conditions of public use than the current lease; however, it would be an extremely small change from the current community use opportunities. Council staff does not recommend any change to the community use provisions.

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¹⁷ 1996 Lease, Article XXXVI(2), page 38.

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**BEFORE THE MONTGOMERY COUNTY COUNCIL
NOVEMBER 23, 2010**

**TESTIMONY OF COUNTY EXECUTIVE ISIAH LEGGETT
IN SUPPORT OF THE BERMAN ACADEMY'S EXERCISE OF ITS PURCHASE
OPTION**

Good evening Madame President and members of the Montgomery County Council. My name is Diane Schwartz Jones and I am pleased to present testimony on behalf of County Executive Isiah Leggett in support of the Berman Academy's exercise of the purchase option contained in its lease.

Mr. Leggett urges the County Council to approve the Berman Academy's exercise of its option to purchase the property it leases. The Berman Academy has had the former Peary school site since 1996 under a lease with an initial 27 year term and 15 years of renewal term.

Simply stated, this proposal – particularly as recently amended – is a win/win/win. It is a win for the community that has received the benefit of the Berman Academy's restoration of a dilapidated structure that was a haven for illicit behavior, and which receives the Academy's ongoing stewardship, upkeep and maintenance of a property that the County and MCPS were not using and did not have the funds to keep up and maintain.

It is a win for the County that receives nearly Two Million Dollars – in a particularly trying fiscal climate -- plus the use of the recreation fields, auditorium and gymnasium without having to pay for the maintenance or the use of these amenities.

And, it is a win for MCPS which receives an ability to reacquire the property for a school -- if it needs it -- at a 1998 price that is less than it would otherwise have to pay, and, if needed, earlier than it would otherwise be able to get the property. Of course, MCPS is also relieved of the financial burden of having to find capacity for and educate the approximately 700 students that attend the Berman Academy.

The history that has led the Berman Academy to the exercise of its option is straightforward. MCPS stopped using the school in 1984. It ultimately transferred the school site to the County for disposition. The property languished unoccupied and unmaintained. It became a serious drain on the community and a hotspot for problems. In 1994 the County Council made the determination that the property could be leased or sold provided that "any sale of the property is subject to prior consent by the County Council which will consider the appropriate elements of the Aspen Hill Master Plan at that time." In 1995 then County Executive Doug Duncan advised the Council that the Berman Academy was the best option for the property and provided the County Council with the principal terms of the lease – including the option to purchase the property. In 1996, pursuant to Council Resolution 12-1874 the County entered into a lease with a purchase option.

By 1996 the property was in a terrible state of disrepair – so much so that the parties agreed, and appraisals substantiated, that the building in its state of decay did not contribute to the value of the property. The Berman Academy proceeded to make repairs and restore the building. In total the Berman Academy has invested nearly Nine Million Dollars in non-secular improvements thus creating any value that exists in the building. Additionally, the Academy has faithfully maintained the ball fields, gymnasium and auditorium -- and made them available to the public for use during non-school hours. These fields are used extensively by the public.

The Berman Academy took a property that was a drain on the County and the community and turned it into a positive presence in the local community. It continues to ask that the County honor its contractual option to purchase.

In exercising this right the Berman Academy has made several significant concessions. First, it has agreed that the property can *only* be used for a school. Second, it has agreed that the fields, gymnasium and auditorium will *in perpetuity* be available for public use at no charge to the County. Third, it has agreed that if the school use is abandoned, or if the property is to be sold, the County can repurchase it at the 1998 costs incurred by the Academy. Finally, the Berman Academy has agreed that if MCPS needs the property back for a school, in any eminent domain action, the price is stipulated to the mentioned 1998 prices, and in making this agreement it would effectively forego any contractual damages to which it would be entitled.

Additionally, the Berman Academy has made a significant concession to MCPS and the County that does not exist under the lease. Under the lease, the right to actually reclaim the property for a public school cannot be realized until 2028. To do so earlier would require a condemnation of the leasehold interest and payment of full just compensation – not the 1998 price -- and the County would face contractual damages.

By agreement, and to address any *real* potential need for a public school, the Academy has stipulated to basically a reimbursement price which by today's standards would not provide them with a replacement facility elsewhere. They have asked for the same relocation period provided in the lease – five years notice. Thus, if there is a real need for a school, there is no need to wait until 2028 and the site, under any measure, is used for a school and available for a school – as envisioned by the Aspen Hill Master Plan and as *unanimously* confirmed by the Planning Board last week. Asking for constitutionally afforded judicial review of the stated need is a small assurance to request.

If MCPS wanted the school now – which it admittedly does not – it would need to condemn the Berman Academy's leasehold interest and the Academy would look to the County for damages due to a breach of the lease. The constitutional right of judicial review of the public need that the Academy has requested for any future reclamation is a meager trade-off to provide the Berman Academy in exchange for the multiple benefits afforded by the structure of the purchase option. The price is stipulated to the 1998 price; contractual damages are eliminated; and the property can be acquired prior to 2028. And, of course, the Berman Academy continues to educate 700 school children that would otherwise be the responsibility of MCPS.

County Executive Leggett recognizes that the County must adhere to the contractual obligations it undertakes. This is particularly the case where millions of dollars have been expended and the County has received and will continue to receive extensive benefits from the deal struck. Mr. Leggett urges the Council to approve the Berman Academy's exercise of the purchase option without further delay. Thank you for your consideration.



OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

November 10, 2010

TO: Nancy Floreen, Council President

FROM: Isiah Leggett, County Executive 

RE: Melvin J. Berman Hebrew Academy Exercise of Contractual Purchase Option

This memorandum is a follow-up to my October 18, 2010 transmittal of the Berman Academy's exercise of its contractual purchase option for the closed Peary High School which was closed by the Board of Education in 1984 and transferred to Montgomery County in 1994. Following the conveyance of the property to the County, the County entered into an agreement with the Berman Academy for the long term lease and the purchase option that the Berman Academy is now exercising.

As I pointed out in my previous transmittal, the property can only be used for a school. If it is abandoned, or if it is offered for sale, the County can repurchase the property for the same base land value as the County is receiving plus payment for the building at a price that is the lesser of i) the then current appraised value of the secular improvements made by the Berman Academy, or ii) the actual costs of the improvements.

On October 25, 2010, the Board of Education wrote to the Council expressing opposition to the Berman Academy's exercise of its purchase option for the school. The Board of Education indicated that "While it is not possible to project our exact facility needs for the future, we know future sites will be needed given the burgeoning enrollments we have seen at all school levels."

In response to this concern the Berman Academy has agreed to an amendment to the exercise of its purchase option which addresses this specific concern and which is arguably even more favorable than what currently exists under the lease. A copy of the Amendment is attached. Specifically, the Berman Academy has agreed that the conveyance does not limit the County's power of eminent domain to reclaim the property for a school. If the County seeks to reacquire it for a school, the Berman Academy stipulates that the reacquisition price is the same base land price and the lesser of the Berman Academy's cost of the improvements or the then fair market value of the improvements. Like the lease, the provision requires a five-year period

Nancy Floreen, Council President
November 10, 2010
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before repossession is effective to enable the school to relocate. *Unlike the lease*, this eminent domain right can be exercised at any time. Under the lease the right to repossession cannot be exercised during the initial 25 year lease term.

I believe that this amendment more than addresses the concern raised by the Board of Education for this school that it closed in 1984. The County should honor the purchase option that it granted to the Berman Academy and that was a basis for the significant investment made by the Academy.

This is a win/win for the County, MCPS, the community and the Academy. The County and its residents get continuing and perpetual use of the ball fields, auditorium and gymnasium without having to pay for their maintenance. The County receives nearly \$2 Million during trying economic times and retains the right to buy back the property if it needs the property for a school at the same price it is selling it for, plus the value of the improvements which can never be more than what the Berman Academy paid for them. MCPS is able to reacquire the school if it needs it sooner than it could otherwise. The community receives the continuing benefit of the Berman Academy's stewardship which has contributed positively to the neighborhood. And, the Berman Academy gets the benefit of the bargain the County struck with it in 1996. For these reasons I am urging the Council to act positively on this matter as soon as possible.

If you have any questions, please feel free to contact me or Diane Schwartz Jones in my office.

Attachment: Amendment

DEED AND RESERVATION OF RIGHT TO REPURCHASE

THIS DEED AND RESERVATION OF RIGHT TO REPURCHASE (the "Deed"), is made this ___ day of _____ 2010, by and between MONTGOMERY COUNTY, MARYLAND, a body corporate and politic and a political subdivision of the State of Maryland (the "GRANTOR") and the MELVIN J. BERMAN HEBREW ACADEMY, a District of Columbia nonstock corporation organized under the laws of the District of Columbia and qualified to do business in the State of Maryland and having a determination letter from the Internal Revenue Service as to its status as a qualified organization under §501 (c) (3) of the Internal Revenue Code of 1986, as amended and the successors, heirs and assigns of the MELVIN J. BERMAN HEBREW ACADEMY (the "GRANTEE"), (the GRANTOR and GRANTEE together the "Parties").

IN CONSIDERATION of the payment of One Million Nine Hundred Fourteen Thousand Eight Hundred Sixty Dollars (\$1,914,860.00) by GRANTEE TO GRANTOR, and of GRANTEE's past expenditures to rehabilitate the Property, and in reliance upon GRANTEE's acceptance of the covenants and conditions contained in the declaration of covenants attached hereto as **Exhibit A** (the "Declaration of Covenants"), and GRANTOR's right to repurchase recited below, the GRANTOR does hereby grant to GRANTEE as sole owner in fee simple absolute, subject to the limitations set forth in the Declaration of Covenants and GRANTOR's rights to reacquire the Property as covenanted below, certain property located in Montgomery County, Maryland, known as the former Peary Senior High School, consisting of all that piece or parcel of land described in the deed between the Board of Education of Montgomery County, Maryland and Montgomery County, Maryland dated October 17, 1994, and recorded among the Land Records of Montgomery County, Maryland in Liber 13060, folio 122, *et seq.*, more particularly described as

All that parcel of land conveyed to the Board of Education of Montgomery County, Maryland by Edith E. Matthews, by deed dated April 28, 1958, and recorded among the Land Records of Montgomery County, Maryland, at Liber 2457, Folio 339 consisting of a total of 19.52 acres, more or less, being known as the former Peary Senior High School.

together with all improvements, rights, privileges and appurtenances to the same belonging, subject to the conditions and covenants stated below (the "Property")

TO HAVE AND TO HOLD the Property, and all improvements thereon, to the use and benefit of the GRANTEE as sole owner;

SUBJECT, HOWEVER, to all easements, covenants and restrictions of record, including, without limitation, the Declaration of Covenants and to the following right of GRANTOR to reacquire the Property:

RIGHT TO REPURCHASE

GRANTOR hereby grants the Property to GRANTEE and GRANTEE accepts the Property subject to the limitation that the Property may be used only for private educational use, and as incidental uses related and accessory to use for private educational purposes, use for daycare and worship services, private educational day camp and private religious education center. GRANTEE must not change the use of the Property, or sell, or transfer (with or without consideration) the Property to any person or entity for any use other than such operation of a private educational facility and such related and accessory uses unless and until GRANTEE has first offered to sell the Property (including any secular (non-religious) improvements hereafter constructed thereon) to GRANTOR for the Repurchase Price as that term is defined in Amendment No. 1 (the "Amendment") to that certain lease of the Property by and between GRANTOR and GRANTEE dated March 29, 1996 (the "Lease"); and in accord with the terms and conditions of the Lease Amendment regarding exercise of the County's Repurchase Right (as defined in the Amendment).

REAQUISITION BY MODIFIED CONDEMNATION

In addition to the Grantor's Repurchase Right provided for above, nothing herein is intended to be in limitation of the Grantor's right of eminent domain. If a condemnation action is brought based on need by the Montgomery County Public School System (MCPS) for a school, Grantor shall have the right to reacquire the Property by condemnation, provided however, that in any such condemnation action the Grantor and Grantee agree that (i) the fair market value of the Property otherwise required to be paid by the Grantor to the Grantee in any such condemnation action is waived by Grantee and the Grantor and Grantee instead agree that the fair market value of the Property payable by the County in any such condemnation action for an MCPS school shall be an amount equal to the Repurchase Price as provided in Section 7 of the Lease, (ii) in the event the Grantor prevails in the condemnation action, notwithstanding any provision to the contrary regarding the timing of transfer of title and possession of the Property provided by law, the Grantor waives any such rights and the Grantor and Grantee agree that the time in which the Grantor shall be entitled to the transfer of title to the Grantor and repossession of the Property by the Grantor after the condemnation action becomes final and non-appealable, shall be not less than five (5) years from the date that such condemnation becomes final and non-appealable, (iii) Grantee, except with respect to the fair market value compensation for the Property which shall be instead controlled by subsection (i) of this provision, shall be entitled to any and all other compensation to which Grantee might otherwise be entitled in any condemnation action, including without limitation any relocation expenses; and (iv) notwithstanding the provisions of subsection (ii) if the Grantee tenders title to the Property to the Grantor at any time before or after the condemnation action becomes final and non-appealable, then upon the occurrence of such event, Grantor shall pay to Grantee the Repurchase Price at that time and Grantee during the five (5) year period provide for in subsection (ii) shall be entitled to continue to occupy the Property under the same terms and conditions as provided in the Lease and upon the conclusion of such five (5) year period Grantee shall thereupon vacate the Property leaving it in the condition as provided in the Lease and the Grantee shall have no further right to possession or occupancy of the Property.



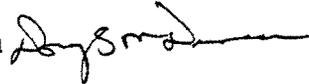
OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Douglas M. Duncan
County Executive

MEMORANDUM

July 25, 1995

TO: Derick Berlage
Council President

FROM: Douglas M. Duncan 
County Executive

SUBJECT: Disposition of Peary High School

This is to inform the County Council as to the status of our efforts toward a disposition of the Peary Senior High School property, in accordance with the Council's November 1994 reuse resolution. You know we have been involved in an additional solicitation and review of proposals for the reuse of this property, following the withdrawal of the French International School in early 1995.

As we related in our last update, seven proposals were received as a result of the solicitation. Some of those proposals have since been withdrawn, due primarily to the enormous economic investment required to bring this property to useable condition. We have had an opportunity to meet with members of the community on several occasions to discuss the remaining applicants. The community has been very direct and straightforward in communicating its opinions to us in this respect. They judged many of the proposals to be incompatible with the character of the neighborhood, and well beyond the scope of permitted uses of the property as set forth in the Council's reuse resolution.

The community believes, and we agree, that of the remaining proposals, only the application of the Hebrew Academy is consistent with the intent of the Council's reuse decisions. This institution proposes to relocate to Peary its traditional instructional programs for students ranging from nursery age through 12th grade, and is willing to abide by the Council's requirement that the Peary facilities remain available for community use. The community is willing to support this user. All other proposals have been judged to be inconsistent with the approved uses for the property, as they exceed the parameters set forth by Council. Those applicants have already been notified of the decision.

John Peary

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Derick Berlage
July 25, 1995
Page 2

Our discussions so far with the Hebrew Academy indicate a good fit between the County's objectives and the Academy's needs. The Academy has made it clear during our discussions that they would grant to the community ongoing access to Peary's recreational and assembly facilities, on a scheduled basis, through the Community Use of Schools Program. They are also willing to work with the Roller Hockey league to continue their use of the property. They have a combined student-teacher population of just over 700, and do not anticipate any difficulties confining their parking needs within the existing Peary property. They operate five school buses during normal school hours, and expect that traffic in the neighborhood will not be adversely affected by their relocation to Peary.

They have been a tenant of the County at the former Montgomery Hills Junior High School for more than 20 years. They were, in fact, one of the first occupants of a closed school in Montgomery County. They have done a good job of maintaining that property, and the surrounding community is pleased with their management of the facility.

Although no documents have been signed, we are largely in agreement with the Academy on the principal terms of a lease. These main provisions are summarized here for your information:

Term - In order to have a reasonable recovery period for their investment, the Academy needs a long term commitment. We are discussing an initial term of 25 years, with options to extend for an additional 15 years.

Future Reuse As Public School - The Academy will not modify or change the building in a way that would preclude its future use as a public school. All changes and renovations of the building are subject to review and approval by the County. The County will have the right to terminate the lease and reclaim the property for public school use after the initial 25 year term, with 5 years advance notice.

Rent - The Academy proposes to pay \$60,000 per year, increased annually by the Consumer Price Index. The rent is to be abated for the first few years of the lease, in order that the Academy's resources can be directed toward the initial repair and renovation of the property.

Option to Purchase - The Academy will have an option to purchase the property, but only with the approval of the County Executive and the County Council.

Derick Berlage
July 25, 1995
Page 3

Assignment and Subleasing - The Academy may not sublease portions of the building, nor assign its leasehold interest without the approval of the County, and then only within the County Council's reuse parameters.

Maintenance and Operating Expenses - The Academy will assume responsibility for all expenses relating to the maintenance and operation of the property.

Capital Improvements, Renovations and Repair - The Academy will be responsible for the complete repair and renovation of the building and grounds, including those areas to be shared with the community through the Community Use of Schools Program.

We have made great progress with regards to the lease terms, but the Academy faces another challenge in bringing this proposal to fruition. They intend to raise much of the needed funding for renovations through a capital campaign that they will conduct during the remainder of 1995. They plan to undertake the renovations to the property during 1996, and open for enrollment in the Fall of 1997. Clearly, there are issues that they must tackle in the coming months.

The opportunity to reuse Peary in a way that is acceptable to the community is worth this additional time and effort. Although the Academy must overcome some obstacles, they are optimistic about their prospects, and have already met with significant success in their discussions with potential donors. If they are not given a chance, the County's only other reuse option appears to be demolition of this property, at a cost exceeding \$1 million. We would then forego any chance for the productive use of the building, and spend money that could be better used in a more constructive way. I have therefore directed the Department of Facilities and Services to continue full negotiations with the Hebrew Academy, with the objective of finalizing a lease agreement on a parallel track with the Academy's fund raising campaign. We anticipate that both would be completed before the end of the year.

Please contact me should you need additional information. I will communicate with Council on this issue as appropriate during the course of the next few months.

DMD:jar

cc: Jonathan Blank, President, Hebrew Academy
Jerry Pasternak, Office of the County Executive
Gloria Kratz, Real Estate Management
Fred Edwards, Capital Projects Management
Bruce Romer, Chief Administrative Officer

Walt Zoning

*JZ
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SBF
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MONTGOMERY COUNTY PLANNING BOARD
CAPITAL PARK AND PLANNING COMMISSION

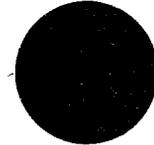
Post-it® Fax Note	7671	Date	11/22	# of pages	1
To	Jeff Zynda	From	Kristin O'Leary		
Co/Dept		Co			
Phone #	240 777 7896	Phone #	301-495-2172		
Fax #	240-777-7888	Fax #			

OF THE CHAIRMAN

November 18, 2010

The Honorable Nancy Floreen
President
Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

059611



SUBJECT: Planning Board Recommendation on Disposition of Peary High School

Dear Ms. Floreen:

At its regular meeting on November 18, 2010, the Montgomery County Planning Board reviewed the sale of the former Peary High School site to the Melvin J. Berman Hebrew Academy (former Mandatory Referral No. 05506-DPWT-1). At the conclusion of the hearing, the Planning Board (F. Carrier, M. Wells-Harley, J. Alfandre, N. Dreyfuss, and A. Presley) unanimously voted to APPROVE the sale of the former school site as shown in the attached revised staff report.

The Planning Board appreciates the opportunity to review this proposal.

Sincerely,

Françoise M. Carrier
Françoise M. Carrier
Chair

FMC:ko:ha

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MEMORANDUM

Approved for Public Dissemination

TO: Montgomery County Planning Board

FROM: Carol S. Rubin, Associate General Counsel 
301-495-4646

DATE: November 15, 2010

RE: Proposed Disposition of Former Peary High School Site to the Melvin J. Berman Hebrew Academy

The question before the Planning Board for its recommendation to the County Council, whether to approve the sale of the former Peary High School ("Peary" or "site" or "property") to Melvin J. Berman Hebrew Academy ("Berman") has an added level of complexity as a result of recent negotiations between the County and Berman. The new proposal has been outlined in a November 10, 2010 memorandum from the County Executive to Council President Floreen [**Attachment One**] after publication of the Staff Report. As set forth more specifically below, the new proposal allows for the County to exercise its option to repurchase Peary earlier than was established under the original Lease [**Attachment Two**]. And it provides more certainty in both the right to reacquire Peary (if the County were to exercise that right prior to the time set forth in the Lease), and the cost to do so.

However, the terms of the new proposal are only triggered by the sale. If the sale is not approved, the County and Berman continue under the terms of the existing Lease. Therefore, because the terms of the new proposal put the County in a better legal posture, and it provides more certainty with regard to i) when the site can be returned to the County, and ii) price (not necessarily a lower cost, but as to risk in determining the ultimate cost), the Board's recommendation for the County Council to make its decision must be weighed in light of those factors.

The pertinent terms of the existing Lease provide the following:

- ξ The Lease term began April 15, 1996 and runs for an initial 27 year period (25 years after 2-year renovation period) through April 14, 2023.
- ξ Berman has the option to extend for 3 additional 5-year periods, subject to the County's right to terminate by providing 5-years advance notice of its intent to

terminate, "at any time after conclusion of the twenty-five year lease term." The County does not have the right to terminate prior to April 14, 2023.

- ξ Berman was granted a right to purchase the site subject to approval by the County Council and the Board of Public Works.
- ξ There is no price established in the Lease if the County files condemnation to terminate the Lease before the expiration of the Lease term. However, possession would be returned to the County at the Lease expiration for no cost with proper notice of termination, if necessary.

The Master Plan provides "if the site is surplus by the Board of Education [which it has been], it should be kept in public ownership." If the 1994 Aspen Hill Master Plan recommendation to retain Peary in public ownership was to be strictly adhered to, the County would not have granted Berman an option to purchase less than 2 years later when the County entered into a Lease granting Berman the conditional right to purchase the site. However, the Master Plan goes further in stating that "...any use of the site that would not preclude its eventual reuse as a public school would be desirable."

It is counterintuitive that sale of the property to Berman rather than continuing under the Lease makes it easier to get it back for public school use. However, the reason this is so is that with the sale come renegotiated terms in the form of the deed. *The sale to Berman triggers the terms of the new proposal. Without the sale, the County must operate under the existing terms of the Lease.*

The pertinent terms of the new proposal compared to the existing Lease are as follows:

1. Use restricted to private educational purposes. The new proposal restricts Berman from using the site for anything other than private educational use and other incidental and related uses, subject to the County being offered the right to repurchase. The Lease does not hold Berman to such a restriction. In fact, under the Lease, the purchase price formula in Berman's option includes a specific provision in the event Berman were to use the site for other than private educational purposes. The cost to the County will be significantly less to convert an operational private school to a public school than to redevelop from some other use.
2. Right to repurchase and established cost through modified condemnation. The new proposal allows for reacquisition by the County through a modified condemnation process. In other words, if there is a public purpose, i.e. MCPS declares the need for the site as a public school, Berman has effectively admitted that the County has the right to condemn, and it has established the repurchase price. Under the Lease, if the County were to attempt to repossess the property prior to the Lease expiration by condemning Berman's leasehold interest, it leaves the determination whether the action is appropriate to the courts, and the cost the County must bear to a jury. And any time the courts get involved, there is a risk of unfavorable outcome. As

indicated earlier, if possession of the property is returned to the County as a result of the Lease expiration or termination after April 14, 2023, it is likely, although not guaranteed that the County would have the property returned for little or no cost.

3. Deed allows earlier repossession through modified condemnation. The new proposal does not restrict the timeframe under which the County can file the condemnation action to reacquire possession; only that it must give the same 5-year notice for Berman to relocate. Effectively, if MCPS declares its need for the site in 2011, the County will have possession in 2016 at a price established by formula in the deed. The Lease may not allow the County to terminate Berman's possession until at least April 14, 2028 (5-year notice no earlier than end of initial Lease term). It could be argued that under the Lease the County can give Berman notice before the end of the initial Lease term so long as the termination does not occur until after the initial term in 2023. However, one can expect that Berman will oppose that interpretation, and that would leave it to the courts to decide the intent of the parties. Even if the County prevails in that interpretation, the earliest date for return to the County under the Lease would be April 14, 2023.

In summary, this recommendation is about the path of least resistance if and when the property is needed for public school use. The terms of the proposed deed provide more certainty to the County, both as to the right to reacquire the property and the cost to do so. Therefore, sale of the property to Berman accomplishes the goals of MCPS and the 1994 Aspen Hill Master Plan not to preclude its eventual reuse as a public school.

Attachment One - County Executive Memo

Attachment Two – Lease

cc: Adrian R. Gardner, General Counsel
Rollin Stanley, Planning Director
Glenn Kreger, Chief, Vision Division

November 17, 2010

SUPPLEMENTAL MEMORANDUM

TO: Montgomery County Planning Board

VIA: Glenn Kreger, Acting Chief
Vision/Community-Based Planning Division

Khalid Afzal, Team Leader, East Transit Corridor Team
Vision/Community-Based Planning Division

FROM: Kristin O'Connor, Senior Planner (301.495.2172)
East Transit Corridor Team
Vision/Community-Based Planning Division

SUBJECT: Discussion Item: Sale of Former Peary High School to the Melvin J. Berman Hebrew Academy (former Mandatory Referral No. 05506-DPWT-1), 13300 Arctic Avenue, Rockville Maryland, R-90 Zone, 1994 Aspen Hill Master Plan

REVISED RECOMMENDATION: Transmit comments to the County Council recommending approval of proposed property disposition.

Based on the new information provided by the Berman Academy (Attachment 1) and the Associate General Counsel's recommendations (Attachment 2), the Vision/Community-Based Planning staff has revised its recommendation and recommends approval of the proposed sale.

On November 10, 2010, six days after the publication of my initial staff report, the terms of the sale were renegotiated between the County Executive and the Berman Academy. After discussions with representatives of the Berman Academy, legal staff has determined that the added provision of a repurchase option provided the County more certainty in the right to reacquire Peary, if the County needs the site in the future due to enrollment increases (see memo from Office of General Counsel).

Staff recommends the Planning Board transmit comments to the County Council recommending approval of the proposed disposition of the Peary site.

Attachments:

1. November 10, 2010 memorandum from the County Executive to Council President Floreen
2. November 15, 2010 memorandum from Carol S. Rubin, Associate General Counsel to the Planning Board

November 4, 2010

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Glenn Kreger, Acting Chief
Vision/Community-Based Planning Division

Khalid Afzal, Team Leader, East Transit Corridor Team
Vision/Community-Based Planning Division

FROM: Kristin O'Connor, Senior Planner (301.495.2172)
East Transit Corridor Team
Vision/Community-Based Planning Division

SUBJECT: Discussion Item: Sale of Former Peary High School to the Melvin J. Berman Hebrew Academy (former Mandatory Referral No. 05506-DPWT-1), 13300 Arctic Avenue, Rockville Maryland, R-90 Zone, 1994 Aspen Hill Master Plan

RECOMMENDATION: Transmit comments to the County Council recommending disapproval of proposed property disposition.

BACKGROUND

On October 18, 2010, the County Executive submitted a draft resolution that seeks Council approval of the sale of former Peary High School to the Melvin J. Berman Hebrew Academy of Greater Washington, which has been leasing the former Peary High School since March 1996. Pursuant to the lease agreement, the academy is exercising its option to purchase the 19.5-acre property with approximately 220,000 square feet of building space located in Aspen Hill. The County Council has scheduled a public hearing on November 23, 2010.

The sale of the former Peary High School site was the subject of a previous mandatory referral by the Planning Board in September 2005 (attached circle pages 5-12). The Planning Board unanimously opposed the sale of the site. On October 17, 2005, the County Council's Management and Fiscal Policy Committee held a worksession on the proposed sale, and after an economic analysis of the terms of the proposed sale, concluded that the sale terms were not in the County's best interest. The Council took no action after the Committee's worksession.

The history of the school, the details of the 2005 disposition proposal, master plan recommendations against a possible disposition of the property, and staff recommendations against the 2005 proposed sale are included in the attached September 2005 staff report to the Planning Board. The terms of the current proposal are generally similar to the 2005 proposal except for the sale price (\$1,914,680 now v \$1.5 million in 2005).

ANALYSIS

Master Plan

The former Peary High School site is located within the 1994 Aspen Hill Master Plan area. Under Community Facility Recommendations, Public Schools, on page 170, the Master Plan states: "Support the retention of school sites and the modernization and utilization of the existing schools." Regarding the subject property the Master Plan has specific comments in two places:

- 1) In the Facilities Chapter, Public Schools, it states: "The former Peary High School site might reopen as a holding school. This will depend upon the decision of the Board of Education on two other school sites in another part of the County. If it is not used as a holding school and then reopened as a high school, the site might be returned to the County for reuse as a public facility or disposed of for a private use." (p. 186).
- 2) The Land Use Chapter of the Master Plan includes an extensive discussion of this site identified as Parcel #14 (page 63, attached). It states that after closing in 1984, the site was transferred to the County in 1987. The County Executive started the reuse process for the site and proposed the site be reused as a combination regional recreation center, children and youth services center and fine arts center. Before that recommendation was finalized, the Board of Education requested to get the site back for public education. However, funding was not available for converting the site to a holding facility and nothing happened on the site. By 1994, the site was in a major state of disrepair, the Board of Education had no plans to use it for public education use, and the master plan urged "positive action to restore the building and site for the benefit of the County and the neighboring community."

The Master Plan states on page 63 that a public school use would be the most desirable use of the site if such a need is found by the Board of Education. Recognizing that the site may not be needed for a public school use, the Plan envisions other uses such as a private school, among others. "In any event," the Plan states, "if the site is surplus by the Board of Education, it should be kept in public ownership."

School Capacity

In 2005, Montgomery County Public Schools (MCPS) staff indicated that this site was not needed for public education purposes, but the Board of Education opposed the sale of the property. With the current proposal, the Montgomery County Board of Education President, in a letter dated October 25, 2010 (attached, circle page 13) has expressed opposition to the proposed sale of the former Peary High School:

“It is important to note that enrollment is increasing throughout the county, including the Rockville cluster. In order to address enrollment increases in the past, MCPS has found it necessary to rebuild and reopen a number of schools that were closed. Since 1985, three elementary schools, six middle schools, and one high school have been reopened or built at the sites of formerly closed schools. It is important in this era of enrollment increases to maintain all possible facilities and school sites to address enrollment growth.

While it is not possible to project our exact facility needs for the future, we know future sites will be needed given the burgeoning enrollments we have seen at all school levels. For these reasons, we continue to oppose the sale of the former Robert. E. Peary High School.”

School Enrollment Estimates

School enrollment figures (based on Montgomery County Public School's FY 2011 Capital Budget and FY 2011-2016 CIP) for several elementary schools and one middle school in the service area contiguous to the former Peary High School are as follows:

School	Available Space 2010-11	Comments	Available Space 2015-16
Brookhaven ES	(149)	Addition Complete	43 equals 10% of capacity
Rock Creek Valley ES	6		(10)
Sargent Shriver ES	(45)		(70)
Twinbrook ES	(102)	Facility Planning Underway	(175)
Wheaton Woods ES	(116)	Modernization Underway	(106)
Parkland MS	72		80 equals 10% of capacity

- Four of the five elementary schools in the service area contiguous to Peary HS are currently over capacity. Projected enrollment and capacity figures for the 2015-16 school predict that four of five elementary schools will remain over capacity.

- The neighborhood middle school has approximately ten percent of its capacity available for enrollment, currently and projected for 2015-16.
- If County school enrollment pressures continue, further over capacity will continue.
- Even with facility planning to alleviate overcrowding in the lower grades, eventually upper level facilities such as middle schools and high schools will be affected.
- Over the past three years approximately nine school clusters have been over 105 percent of capacity. During the same time period, as many as three school clusters have been in moratorium for new development being more than 120 percent of capacity.

CONCLUSION

Based on the Aspen Hill Master Plan recommendation against the sale of the subject site, the Board of Education's recommendation to retain the site in public ownership, and the possible rise in the future school enrollment primarily through turnover in the existing housing stock, Vision/Community-Based Planning staff continue to believe that the preferred option is to retain the site in public ownership. Staff recommends the Planning Board transmit comments to the County Council recommending disapproval of the proposed disposition of the former Peary High School site.

Attachments:

1. October 26, 2010 memorandum from County Council staff (circle pages 1-3)
2. September 29, 2005 letter from the Planning Board Chairman to County Council (circle page 4)
3. September 8, 2005 staff report to the Planning Board for the 2005 Mandatory Referral No. 05506-DPWT-1 (circle pages 5-12)
4. October 25, 2010 letter from Montgomery County Board of Education President (circle page 13)

The memorandum from the County Executive, Amendment No. 1 to the Lease, Declaration of Covenants, Deed of Reservation of Right of Repurchase, Resolution for Council Introduction, Resolution authorizing the lease/sale 11/29/94 and other documents can be viewed at:

http://montgomerycountymd.granicus.com/MetaViewer.php?view_id=6&event_id=9&meta_id=13074.

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MONTGOMERY COUNTY BOARD OF EDUCATION

Testimony before the County Council on the Proposed Sale of the Former Robert E. Peary High School

November 23, 2010

Good evening, Mrs. Floreen and Members of the County Council. I am Patricia O'Neill, president of the Montgomery County Board of Education. Tonight I am here testifying on the proposed sale of the former Robert E. Peary High School to the current tenant, the Melvin J. Berman Hebrew Academy of Greater Washington. The Melvin J. Berman Hebrew Academy is to be commended for the attractive reuse they have provided for this former Montgomery County Public Schools (MCPS) high school.

My comments tonight are necessitated by the interest the Melvin J. Berman Hebrew Academy has recently indicated in purchasing the property and not by any plans that MCPS has to reuse the facility for public school use now. Due to the Board of Education's concerns over enrollment growth and the limited amount of land available for future school sites, we believe it is essential to maintain the former Robert E. Peary High School property in public ownership. At the November 18, 2010, meeting of the Board of Education there was unanimous agreement to oppose the sale of the property and to add language to the proposed sale contract in case the county goes ahead with the sale over the Board's objections.

Robert E. Peary High School was closed in 1984 as a result of declining enrollment. This school closure was one of 60 schools closed in Montgomery County as enrollment dropped by 36,000 students between 1972 and 1983. This was the period when the "Baby Boom" generation was aging out of public schools and before the boom in economic development in the Washington region in the mid-1980s.

Since 1983, enrollment in MCPS has increased dramatically, and there are 53,000 more students enrolled today than in 1983 with an enrollment of 144,064 students this year. Providing adequate facilities for this enormous enrollment growth has been an ongoing challenge for MCPS and for the county. One very important resource in this era of record enrollment increases has been the county's inventory of closed schools. Between 1985 and the present school year, MCPS has reopened three elementary schools, six middle schools, and one high school that were all closed during the era of declining enrollment. All of these schools are in established areas of the county where little new housing has been built.

During the past three years, significant enrollment growth has occurred with 6,300 more students enrolled this year than in 2007. This trend is continuing with an expected enrollment increase of more than 10,000 students by 2016. The enrollment growth is in the established areas of the county, as well as in the developing Clarksburg community. This fall, members of the Board of Education have adopted a planning study to reopen the former Hungerford Park Elementary School in the Richard Montgomery Cluster. This is another example of the importance of our inventory of closed schools in addressing enrollment increases.

The Board of Education believes it is our responsibility to maintain the inventory of closed schools in a way that makes them retrievable in a reasonable period of time in the future. The original conditions for the sale of the former Robert E. Peary High School were not favorable in terms of the county's ability to retrieve the facility and we were unable to support the sale under those conditions. We acknowledge that the recently amended sale conditions are more favorable for the timely retrieval of the facility and repurchase of the property. If the county does go ahead with the sale of the property, then we would request that additional language be added to the contract. This language was transmitted to County Executive Isiah Leggett on November 19, 2010, and is attached to my testimony.

The language the Board of Education has proposed would avoid the possibility of a protracted condemnation process if and when the need to retrieve the facility occurs. This stipulation indicates that, should Montgomery County or members of the Board of Education adopt a resolution to acquire the property for public use, then this resolution "shall conclusively and absolutely establish public need for purposes of the condemnation action." This language will provide the assurance needed that the facility can be retrieved without a contested condemnation process.

MCPS and the members of the Board of Education are anxious to enable the Melvin J. Berman Hebrew Academy of Greater Washington to continue to be an important educational institution in the county at the site of the former Robert E. Peary High School. We have no plans at this time to retrieve this facility—we only seek to retain the property in public ownership to allow the county flexibility in serving long-range public school needs.

Thank you for the opportunity to provide this testimony.

Attachment



MONTGOMERY COUNTY BOARD OF EDUCATION

850 Hungerford Drive ♦ Rockville, Maryland 20850

November 19, 2010

The Honorable Isiah Leggett
Montgomery County Executive
Executive Office Building
101 Monroe Street, 2nd Floor
Rockville, Maryland 20850

Dear Mr. Leggett:

I appreciate your understanding the Board of Education's concerns about the proposed sale of the former Robert E. Peary High School and your willingness to work with the Berman Academy to amend the proposed agreement. As you know, the Board of Education has ongoing concerns about the sale of the former Robert E. Peary High School. We are facing very challenging enrollment situations in the Bethesda-Chevy Chase and Richard Montgomery clusters, and our Capital Improvements Program will reflect the need to find a parcel of land in the Bethesda-Chevy Chase Cluster for a new middle school and retrieve and reopen a former elementary school in the Richard Montgomery Cluster for a new elementary school. This Board of Education does not want to place a future Board of Education in the position of needing more school capacity in the Aspen Hill area of the county without any satisfactory options to consider.

It is our understanding that the proposed revisions to the agreement do not limit the county's or the Board of Education's power of eminent domain to reclaim the property if it is needed for use as a public school sometime in the future. However, the language in the agreement stating, "In the event the Grantor prevails in the condemnation action..." suggests that the Berman Academy intends to contest any effort to reclaim the property by eminent domain. We are concerned such an action could result in a protracted condemnation process and the possibility of not prevailing in such a legal proceeding.

We believe the only issue that should be contestable is the amount of compensation for the taking of the property. This question seems to have been resolved to the satisfaction of the parties. Therefore, we have proposed language for your consideration, which is enclosed, regarding the condemnation process itself. The language clarifies that an official action by the county or the Board of Education will establish the public purpose for the condemnation action. Any condemnation lawsuit will deal only with confirmation of the repurchase price and any other compensation payments the Berman Academy may be entitled to receive by law. Since the Deed refers to the repurchase price as that term is defined in Amendment No. 1, and since that Amendment does not address reacquisition through condemnation, the Amendment also should be modified. The second enclosure inserts a new section in the Amendment to accomplish this.

The Honorable Isiah Leggett

2

November 19, 2010

If you decide to sell this property over our objections, please consider these proposed amendments as you move forward in your negotiations with the Berman Academy. Please call me if you would like to discuss this matter.

Respectfully,



Patricia B. O'Neill
President

PBO:lsh

Enclosures

Copy to:

Members of the County Council
Members of the Board of Education
Dr. Weast
Mr. Bowers
Mr. Song

Changes to Berman Deed

RIGHT TO REPURCHASE

GRANTOR hereby grants the Property to GRANTEE and GRANTEE accepts the Property subject to the limitation that the Property may be used only for private educational use, and as incidental uses related and accessory to use for private educational purposes, use for daycare and worship services, private educational day camp and private religious education center. GRANTEE must not change the use of the Property, or sell, or transfer (with or without consideration) the Property to any person or entity for any use other than such operation of a private educational facility and such related and accessory uses unless and until GRANTEE has first offered to sell the Property (including any secular (non-religious) improvements hereafter constructed thereon) to GRANTOR for the Repurchase Price as that term is defined in Amendment No. 1 (the "Amendment") to that certain lease of the Property by and between GRANTOR and GRANTEE dated March 29, 1996 (the "Lease"); and in accord with the terms and conditions of the Lease Amendment regarding exercise of the County's Repurchase Right (as defined in the Amendment).

REACQUISITION BY MODIFIED CONDEMNATION

In addition to the Grantor's Repurchase Right provided for above, the Grantor shall have the right to reacquire the Property by condemnation and nothing contained herein shall be deemed to waive the Grantor's right to reacquire the Property by condemnation, provided however, that in any such condemnation action the Grantor and Grantee agree that (i) the adoption of a resolution by the Grantor Montgomery County or by the Board of Education of Montgomery County to acquire the Property for public use shall conclusively and absolutely establish public need for purposes of the condemnation action so as to entitle Grantor and/or the Board of Education to acquire the Property, leaving only the issues of the Repurchase Price as provided in the Amendment and other compensation to be determined by the Court; ~~(i)~~ (ii) the fair market value of the Property otherwise required to be paid by the Grantor to the Grantee in any such condemnation action is waived by Grantee and the Grantor and Grantee instead agree

that the fair market value of the Property payable by the County in any such condemnation action shall be an amount equal to the Repurchase Price as provided in Section 7 of Amendment No. 1 to the Lease, ~~(ii)-(iii) in the event the Grantor prevails in the condemnation action,~~ notwithstanding any rights that the Grantor may have to transfer of title and possession of the Property provided by law, the Grantor waives any such rights and the Grantor and Grantee agree that the time in which the Grantor shall be entitled to the transfer of title to the Grantor and repossession of the Property by the Grantor after the condemnation action becomes final and non-appealable, shall be not less than five (5) years from the date that such condemnation becomes final and non-appealable, ~~(iii)-(iv)~~ Grantee, except with respect to the fair market value compensation for the Property which shall be instead controlled by subsection (ii) of this provision, Grantee shall be entitled to any and all other compensation to which Grantee might otherwise be entitled in any condemnation action, including without limitation any relocation expenses, and ~~(iv)-(v)~~ notwithstanding the provisions of subsection (iii) if the Grantee tenders title to the Property to the Grantor at any time before or after the condemnation action becomes final and non-appealable, then upon the occurrence of such event, Grantor shall pay to Grantee the Repurchase Price at that time and Grantee during the five (5) year period provided for in subsection (iii) shall be entitled to continue to occupy the Property under the same terms and conditions as provided in the Lease and upon the conclusion of such five (5) year period Grantee shall thereupon vacate the Property leaving it in the condition as provided in the Lease and the Grantee shall have no further right to possession or occupancy of the Property.

. . .

MELVIN J. BERMAN HEBREW ACADEMY LEASE

a. Add to Lease Amendment No. 1

8. Reacquisition Right Through Condemnation. In addition to other provisions set forth in this Amendment, the County shall have the right to reacquire the Property by condemnation if the County Council or the Board of Education of Montgomery County determine that the Property is needed for public school purposes. If the County or the Board of Education adopt a resolution approving the reacquisition of the Property through condemnation, the official action of the County Council or the Board of Education shall be conclusive and absolute evidence of the public purpose for which the Property is being taken. The fact of public purpose being agreed to herein by the parties, the condemnation action will proceed only on the issues of the Repurchase Price as provided in Section 7 and the Lessee's entitlement to any additional compensation required by law.

b. Re-number remaining sections of Amendment No. 1

DECLARATION OF DENNIS BERMAN

I, Dennis Berman, declare as follows:

1. My name is Dennis Berman, and this declaration is based on my personal knowledge.

2. In or around 1996, the Montgomery County government issued a request for proposals (RFP), seeking interest from private entities in renovating the property at 13300 Arctic Avenue, in Rockville. The site formerly housed the Peary High School, which was closed in 1984 and surplused back to the County in 1994.

3. Several groups responded to the RFP, but none except for the Hebrew Academy of Greater Washington (now the Melvin J. Berman Hebrew Academy) was able and willing to undertake the extensive renovations that were required. As chairman of the school's construction committee, general contractor and on-site supervisor for the prospective project, I was a participant in the negotiations with the County on behalf of the Academy.

4. In the over a decade since the school had been closed, the building had fallen into complete disrepair. Vandals and thieves had stripped the building of almost everything of value. I remember when the County conducted a tour of the building to the groups that responded to the RFP, we had to navigate several inches of standing water on the floor throughout the facility as a result of multiple leaks to the building's roof. The building had been stripped of most of its copper wire, and I saw hundreds of holes in the walls where the structure's piping had been stolen. Graffiti covered the surfaces, the windows were broken and boarded – the building was completely uninhabitable.



5. During the years since the high school had closed, the property had become a haven for illegal drug use, gang and other criminal activity. The site was dragging down property values in Aspen Hill, and the neighbors were at their wits' end.

6. In assessing the work that would be required to restore the site, the Academy made clear that it would not be in a position to undertake the significant expense – and fundraising – that would be required unless we could purchase the property. It was our plan and preference to raise the funds necessary for the purchase and then to renovate the site. At the time, the school was renting another facility (at Montgomery Hills) from the County, and there was no urgency to a move. However, we agreed instead to apply all funds raised toward immediate renovation and relocation to minimize the amount of time until the school was in the facility.

7. In return, the County agreed to include a purchase option in our lease agreement that we could exercise at any time during the lease term. Key to our agreement to this arrangement was a provision ensuring that future County approval of our purchase could not unreasonably be withheld. In the real estate industry that language is commonly understood to mean that, absent something wholly unexpected and extraordinary, a right or option will be granted.

8. The renovations process was difficult and required nearly two years of work. The process required nearly \$9 million in funds – a figure that would have been substantially higher had the work been undertaken by the County or had we engaged a contractor on standard business terms. (In addition to contributing to the funds needed for the project, I donated

approximately 3,000 hours of my time to overseeing the project and absorbed or minimized costs wherever possible.)

9. After moving into the school in September 1999, the Academy rapidly became a valued neighbor in the community. Property values stabilized and began to rise, and I believe new residents were and continue to be attracted to the Aspen Hill area as a result of the neighborhood's stabilization.

10. I feel so strongly about the school and its connection to the Aspen Hill area that for the past several years I have made available a program to incentivize prospective Academy families to locate in Aspen Hill, offering forgivable loans to those who purchase homes and settle there – another way in which the school is putting down roots in the community.

11. In my view, a refusal to approve exercise of the Academy's purchase option – particularly in light of the additional concessions that the school has made beyond those required by the lease agreement – would not only be unfair, it would send a signal to the private sector that the County cannot be trusted to honor its contractual commitments.

12. I cannot stress enough one simple fact: had it not been for the County's assurances that we would be able to purchase the site, I never would have agreed to renovate the property, my family and I (and other donors) would not have donated the necessary funds, and the school never would have signed the lease agreement. We relied on the County's promise.

Paul B. ...

I, Dennis Berman, hereby declare under penalty of perjury that the foregoing, to the best of my knowledge and belief, is true and correct.

Executed this 15th day of November, 2010.



Dennis Berman

Detailed Summary of the Proposed Terms and Conditions Relating to a Sale and Repurchase

The Lease

The Lease (survives the purchase as the only source of lease terms which come into play under an option in the deed if the County condemns the property...it is also the source of the sale price)

Article 2 Renovation period, lease term, an expiration

- 1) From 4/15/96 the Academy has a 2 year renovation period; thereafter the lease is for 25 years. The Academy has the option to extend the lease for 3 additional 5 year periods subject to the County's right to terminate.
- 2) For public education purposes, "the County may terminate this Lease, by providing to Lessee five (5) year's advance written notice of its election to terminate, at any time after the conclusion of the twenty-five years lease term."

Article 3 Right to Purchase

- 1) Purchase by the Academy is subject to the approval of the Executive, the Council, and the Board of Public Works, all of who may place any restrictions, conditions, or requirements on the purchase (Repeated in Amendment No. 1)
- 2) The County must approve the sale under state and local statute and regulations governing the disposition of property
- 3) The price to purchase will be determined by the appraised value of the land in 1996, adjusted by the consumer price index

Article 4 Rent

- 1) \$40 for the first 4 years
- 2) \$60,000 a year thereafter, adjusted by CPI with a 5% cap on the increase in any year

AMENDMENT NO. 1

Amendment No. 1 to the Lease (survives the purchase by a reference in the deed as the source for calculating the repurchase price)

- 1) The purchase price is \$1,914,860 if the purchase occurs before December 17, 2010
 - 2) Settlement must occur within 30 days of the last party's approval required in #3 below
 - 3) The Council and the Board of Public Works must approve and may impose conditions and requirements; the Academy may reject condition in writing within 30 days and continue with the lease
 - 4) Covenants must be recorded before settlement (exhibit A)
 - 5) Covenants include public use and repurchase right if the use is abandoned
 - 6) The County has the right to repurchase (if exercised within 90 days) if the site is not used for a school or sold to a non-school user
 - 7) Repurchase price is the sale price adjusted by CPI plus the lesser of: 1) construction costs; or 2) replacement costs minus depreciation
- * * *
- 11) Future owner may request a release of covenants except those regarding community use

Article 14 Expiration

- 1) At the expiration or early termination of the lease and the extensions thereof all improvements become the property of the County
- 2) The Academy may remove all fixtures, furnishings, and equipment.

Covenants (exhibit A to the deed) applies to the Academy and its successors

- 1) Community Use
 - A) Gymnasium, Auditorium, and outdoor athletic field open for community use on an "as available" basis.
 - (i) Gymnasium and Auditorium open to community when it would not interfere with the Academy.
 - (ii) All users must be under the County self insurance or maintain insurance to indemnify the Academy
 - (iii) Users will be responsible for Academies building operating and personnel costs in connection with such use and for compliance with parking regulations.
 - (iv) For the building interior the Academy may require security measures paid for by the user
 - (v) No public access to the Gym or Auditorium on Saturdays or Jewish Holidays
 - B) No public use until 6:00 PM Monday through Thursday and until 3:30 Friday; during the public time, the Academy must schedule its own use with CUPF
 - C) No material alteration of fields without prior approval
- 2) Maintenance: the Academy must keep the property in good repair
- 3) Insurance: the Academy must have insurance
 - A) minimum \$1 million general liability
 - B) property insurance equal to replacement costs
 - C) the County must be a named insured
 - D) County notice requires 45 days before any insurance changes
 - E) MCGS is the certificate holder
- 4) Use limited: Only for a private school with accessory daycare, day camp, worship services and private religious center; the Academy is responsible for getting use and occupancy permits
- 5) Abandonment: unless the school is under renovation, 180 days of non-school use would trigger the County's right to repurchase

Deed and Reservation of Right to Repurchase (references the covenants and the lease amendment)

- 1) \$1,914,860 to be paid to the County
- 2) Covenants attached (exhibit A)
- 3) "Right" to repurchase ONLY if the school use is abandoned or a sale for non-school use; purchase price determined by "the Amendment"... Repurchase price is the sale price adjusted by CPI plus the lesser of: 1) construction costs; or 2) replacement costs minus depreciation
- 4) If condemned by the Council and the County wins the condemnation action:
 - A) the repurchase price is governed by "the Amendment" plus relocation expenses and any other payments required under the condemnation process
 - B) the County can get possession 5 years after the last appealable event
 - C) if the Academy chooses to tender the property to the County before the County prevails, the County must pay the purchase price to the Academy and the Academy must pay the County the rental price in the lease for the 5 year period.

Resolution No.: _____
Introduced: _____
Adopted: _____

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND**

By: County Council

SUBJECT: Sale of the former Peary High School Property

Background

1. Under Section 4-115 of the Maryland Education Code Annotated, the Council has authority to dispose of school property that has been declared surplus to public school needs.
2. The Board of Education declared the former Peary High School site (the Property) surplus and deeded the property to the County on November 1, 1994. The Property included an abandoned High School building and outdoor athletic fields on 19.52 acres of land.
3. Under Resolution 12-1874, adopted November 29, 1994, the Council authorized the Executive to lease the Property for a private school with appropriate community use of outdoor facilities, gymnasium, and auditorium. It also stated that any sale of the Property was subject to the prior consent of the Council.
4. The Executive solicited proposals for reuse or disposition of the Property during 1995.
5. On July 25, 1995 the Executive sent a memorandum to the Council apprising it of the status of the disposition of the Property and the terms of the proposed lease of the Property to the Hebrew Academy of Greater Washington, now known as the Melvin J. Berman Hebrew Academy (the Academy). The Council was made aware that the lease would include an option to purchase, but only with the approval of the Executive and the Council.
6. On March 29, 1996 the Executive signed a lease with the Academy. The lease included provisions for sale if initiated by the Academy before the termination of the lease. A sale required the approval of the Council.
7. The Academy is currently seeking to purchase the Property for use as a private educational facility with accessory uses.

8. On October 18, 2010 the Executive indicated agreement with the Academy on the terms and conditions of a sale of the Property to the Academy. The Executive transmitted a proposed deed, covenants, and lease amendment to the Council for approval.
9. Under the Executive's recommendations:
 - (a) the Property may only be used for private educational use and accessory use related to private education purposes, including daycare, worship services, day camp, and a private religious center;
 - (b) the County would retain a right to reacquire the Property if it is offered for sale or is not used for those purposes;
 - (c) the Academy and its successors would make the outdoor athletic fields available to the public at certain times through the Montgomery County Community Use of Public Facilities;
 - (d) the outdoor athletic fields could not be changed by the Academy or its successors without County consent; and
 - (e) the Academy would allow community use of the gymnasium and auditorium in a manner that did not interfere with school, at a cost that allowed the Academy to recover all its expenses, and would indemnify the Academy in the event of accidents.
10. On November 10, 2010 the Executive transmitted an amended deed providing for a stipulated value if the County reacquires the Property for public school purposes through eminent domain.
11. On November 23, 2010 the Council held a public hearing on the Executive's recommendations.
12. On November 29, 2010 the Education and Management and Fiscal Policy Committees held a joint meeting to make a recommendation to the Council on the proposed sale.

Action

The County Council for Montgomery County, Maryland approves the following resolution:

The Council approves the sale of the former Peary High School site under the terms and conditions in the attached deed, covenants, and lease addendum.

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council

Staff recommended Amendments:

Community Use:

Amend the proposed **covenants** as follows –

Page 5 subsection 4, second sentence: put a period after accessory use; delete the remaining provision starting with “unless” and replace it with the following:

If the Academy has first offered to sell the Property to the County for the Repurchase as that term is defined in Amendment No. 1 (the “Amendment”) to the lease of the Property dated March 29, 1996 (the “lease”) and the County has declined to exercise its right, then the successor to the Academy may remove the restriction after paying the County the market value of Property minus the repurchase price as defined in the Amendment.

Amend the proposed **AMENDMENT NO. 1** as follows:

Page 4 subsection 11 Release of Covenants: Delete the proposed subsection and replace with the following:

If:

- (a) the Lessee sells the Property to any purchaser under a Proposed Sale;
- (b) the County does not exercise its right to repurchase in Section 6; and
- (c) the purchaser pays the County the market value of Property minus the repurchase price;

then the County agrees (at no cost to the County) that it will execute such instrument(s) as may reasonably be requested by the purchaser releasing the declaration of covenants, except the covenant regarding community use in the Declaration of Covenants attached hereto (EXHIBIT A), which covenant shall remain in full force and effect and continue to run with the property.

Right to repurchase:

Amend the proposed **deed** as follows –

- 1) Delete the proposed “Reacquisition by modified condemnation” subtitle and the paragraph that follows it. Replace that subtitle and paragraph with the following:

Reacquisition

The conveyance under this deed reserves to the County the right of the County to repurchase the Property under the following conditions instead of condemnation. If the Council includes the use of the property as a public school by the County Board of Education in its Capital Improvements Program, then GRANTEE must sell the property back to the grantor under the following terms:

- 1) the Council must give the Grantee 5 years notice that the property be sold back to the GRANTOR;
- 2) the GRANTEE must deed the Property back to GRANTOR and vacate the property no later than 5 years after notice of reacquisition;
- 3) the GRANTOR must pay the GRANTEE the total of the Repurchase Price as defined in the RIGHT TO REPURCHASE provision in this deed;
- 4) If the Council gives notice of reacquisition to the GRANTEE before April 15, 2018, the GRANTOR must pay the GRANTEE reasonable relocation costs in addition to the Repurchase Price.

If the Grantee pays the Council an amount of money sufficient for the County to acquire a similarly sized site in the same geographic area minus the purchase price inflated by the consumer price index, the Grantee may retain ownership of the Property.