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Date: January 17, 2023

Subject: Public Hearing Testimony for ZTA 22-12

From: The Friends of Ten Mile Creek and Little Seneca Reservoir

Dear Council President Glass and Councilmembers,

We concur with the Planning Department staff report recommendation not to pursue proposed ZTA 22-12 and ask the County Council to reject ZTA 22-12. We furthermore request that the Council amend the Clarksburg Master Plan and the East and West Environmental Overlay zones to remove all road and bikeway impervious surface exemptions, publicly funded or not, to better protect the Ten Mile Creek and Little Seneca Reservoir. To be clear, **we support bikeways so long as they are not exempted from impervious limits.**

Ten Mile Creek is a unique high-quality stream flowing into Little Seneca Reservoir, our region's back-up drinking water supply. It is rated among the very best streams in Montgomery County in terms of water quality and biological condition. Indeed, the 2014 Ten Mile Creek Area Limited Amendment to the Clarksburg Master Plan, including the East and West Environmental Overlay Zones (EOZ), was developed and approved **specifically** to protect this unique and sensitive watershed.

The science of watershed protection tells us that to protect sensitive and high-quality, clean streams such as Ten Mile Creek, we must establish and enforce the strictest-possible limits on development – specifically, on hard, paved impervious surfaces. Any addition of imperviousness to this sensitive watershed threatens both the quality of Ten Mile Creek, and the health of our region's only nearby back-up drinking water supply, Little Seneca Reservoir.

The EOZ states, "*Impervious surface for any publicly funded road or bikeway identified by the Ten Mile Creek Area Limited Amendment to the Clarksburg Master Plan and Hyattstown Special Study Area is exempt from this overlay zone's impervious surface restriction.* The language in the current law is clear: the impervious surface exemption applies to the **identified roads and bikeways that are publicly funded.** ZTA 22-12 would change the EOZ to state, "*Impervious surface for any publicly-funded road or any master-planned bikeway is exempt from this Overlay zone's impervious surface restriction.*"

What ZTA 22-12 proposes is a **significant policy change**. Despite the clear language, that only the publicly funded bikeways identified in the amended Clarksburg Master Plan and Hyattstown Special Study Area were exempted from impervious constraints, the Planning Board's proposed ZTA has improperly substituted "master-planned bikeway." **This would allow any bikeway identified in the Ten Mile Creek Amendment, regardless of funding mechanism to be exempt.** And it would "extend the master-planned bikeway exemption to any bikeway from any master plan and not just those identified in the Ten Mile Creek Amendment."¹ This policy change undermines the environmental provisions that were put in place to constrain all forms of imperviousness to protect Ten Mile Creek.

To the detriment of water quality, ZTA 22-12 would allow additional imperviousness to be exempt from the current impervious surface limits for the Ten Mile Creek watershed, and it would also open the door to further imperviousness exemptions in the future. Neither the existing exemptions from impervious surface limitations, nor the expansion of exemptions proposed by ZTA 22-12, are science-based. They ignore the essential fact that streams are harmed by the negative effects of imperviousness.

The EOZ was designed to implement the impervious surface restrictions and exemptions, including bikeways, as described in the 2014 Clarksburg Amendment. Yet, according to the Planning Board staff report, "The Bicycle Master Plan has already added 0.25 acres of additional impervious bikeways to the overlay zone areas beyond what was included in the Ten Mile Creek Amendment."² At minimum, the Planning Board must follow the law. But even more, the Planning Board must uphold the science-based limits on impervious surface to protect Ten Mile Creek. Additional impervious surface will damage Ten Mile Creek's sensitive watershed, regardless of whether it's publicly or privately funded, master planned or not master planned, roadway or sidepath, rooftop or driveway or parking lot.

To minimize the damage to Ten Mile Creek, the Council should eliminate all road and bikeway impervious surface exemptions, regardless of whether they are publicly funded. The science doesn't support any exemptions. By enabling increases in hard, paved surfaces, these exemptions weaken the County's science-based protection of Ten Mile Creek centered on limiting imperviousness.

The choice is not between clean water and bike paths. We can, and must, have both. The proposed housing developments in Ten Mile Creek, in combination with the bike paths and all other forms of hard surfaces, need to, at a minimum, conform to limits previously established by the Council. Any proposed weakening of these protective limits should be rejected. It is the Council's responsibility to strengthen, not weaken, the protections that were put in place in the Ten Mile Creek Limited Master Plan Amendment and its associated Environmental Overlay Zones, to protect our precious watershed and drinking water supply.

ZTA 22-12 is a damaging policy change that must be rejected as a violation of the Ten Mile Creek Limited Master Plan Amendment and its main enforcement regulation – the limits to imperviousness established in the Clarksburg Environmental Overlay Zones.

¹ Staff acknowledge this as a policy change recommendation. See https://montgomeryplanningboard.org/wp-content/uploads/2022/12/ZTA-22-12-Clarksburg-Overlays_1-12-23.pdf, p.6.

² See https://montgomeryplanningboard.org/wp-content/uploads/2022/12/ZTA-22-12-Clarksburg-Overlays_1-12-23.pdf, p.8.

Therefore, Friends of Ten Mile Creek and Little Seneca Reservoir calls on the Council to reject the proposed zoning change, ZTA 22-12. Furthermore, to minimize harm to Ten Mile Creek, we strongly recommend that the Council eliminate all road and bikeway impervious surface exemptions, regardless of whether they are publicly funded.

We first expressed opposition to this ZTA in a June 22, 2020 letter to then Council President Sidney Katz and fellow council members. The reasons for our opposition are the same now as they were then. We have included the June 22, 2020 letter (see Attachment A) with our testimony to be included as part of the public record for ZTA 22-12. Our June 2020 letter explains in further detail why we oppose the ZTA.

We have also included our January 12, 2023 testimony (see Attachment B) for the Planning Board's hearing on ZTA- 22-12. Our testimony illustrates the Planning Board's attempts to circumvent the impervious surface caps of the Clarksburg EOZ.

The health of this sensitive and important watershed depends on you!
Thank you for seriously considering our comments.

Sincerely,

Anne Cinque, President

Cc
Marc Elrich, County Executive
Claire Iseli, Special Assistant to County Executive

ATTACHMENT A:

Friends of Ten Mile Creek and Little Seneca Reservoir, June 22, 2020 letter to the County Council



To: Council President Sidney Katz and Councilmembers
From: Friends of Ten Mile Creek and Little Seneca Reservoir Board of Directors and Allies
Re: Reject proposed ZTA, and any other proposals that weaken Ten Mile Creek protections
Date: June 22, 2020

Summary of our Request that you immediately reject the requested ZTA.

On April 2, 2020, Planning Board Chair Anderson sent a proposed Zoning Text Amendment (ZTA) to the County Council, which if adopted would expand the existing exemptions from the Clarksburg East and West Environmental Overlay Zones (“EOZs”). The Planning Board’s proposed ZTA would amend the Clarksburg EOZs to state that “any master-planned bikeway” is exempt from the impervious surface limits in the EOZs.

Board members and advisors for the Friends of Ten Mile Creek have reviewed this request, and met with planning staff to learn of the process that generated it. We find no justification for it. If adopted, the proposed ZTA would damage the water quality of Ten Mile Creek, by expanding the stock of impervious surfaces in the watershed, counter to the detailed science-based calculations that went into the 2014 Ten Mile Creek Area Limited Master Plan Amendment (“Ten Mile Creek plan”) and EOZs. Accordingly, we along with our allies request that the Council immediately reject this proposed ZTA.

We make this request on several grounds: (1) The existing Ten Mile Creek LMPA and EOZ text is clear and doesn’t need clarification; (2) Adopting the proposed ZTA would violate the hard-won, science-driven, court tested Ten Mile Creek plan and regulations; (3) The proposed ZTA isn’t necessary in order to support completion of bikeways in Clarksburg; (4) Existing exemptions from the Ten Mile Creek impervious surface limits aren’t science-based; they ignore the fact that natural systems respond to all imperviousness added to a watershed – not only that which is subject to regulations, thus every increment of pavement threatens Ten Mile Creek with additional pollution and all exemptions should be eliminated; and (5) The proposed ZTA opens the door to similar requests for more broadening of exemptions and other types of weakening changes to the Ten Mile Creek protections.

In conclusion, the Friends of Ten Mile Creek and our allied organizations request that the County Council immediately reject the requested ZTA. We further ask that you not waste public resources debating whether to weaken existing protections of Ten Mile Creek. If despite the clarity of the existing plan and EOZs, councilmembers still feel the need to supply a clarification as requested by the Planning Board, we have provided the text of a suitable clarification that honors the letter and intent of the Ten Mile Creek Limited Master Plan Amendment and its associated Environmental Overlay Zones (attached).

Below we describe the basis for each of the grounds we have identified for the Council to immediately reject this proposed ZTA.

(1) The text of the existing Ten Mile Creek plan and Environmental Overlay Zones is clear and doesn't need clarification.

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The text of the Ten Mile Creek EOZs (the Clarksburg Environmental Overlay Zones), and the text of the Ten Mile Creek plan on which the EOZs are based, is clear that exemptions from the impervious surface limits related to transportation facilities are for publicly-funded roads and bikeways. Both EOZs state that "Impervious surface for any publicly funded road or bikeway...is exempt from this Overlay zone's impervious surface restriction."¹ In addition, a review of the Ten Mile Creek LMPA indicates that the term "exemptions" appears three times²; in all three mentions, the context is the scope of the EOZs, and the intent is clearly stated that exemptions are to be limited to small properties and "some public facilities."

Below we quote the text of the existing exemptions in the Ten Mile Creek

LMPA and EOZs: Overlay Zone Boundaries – as described in the Ten Mile

Creek LMPA page 52:

"On the east side of I-270, all properties in Ten Mile Creek, except those in the Historic District, would be within an overlay zone, with exemptions for State and County roads and bikeways."³

Clarksburg East and West Environmental Overlay Zones – as described in the Ten Mile Creek LMPA page 53:

"Exempt small properties from some or all provisions of the overlay zone; Consider limited exemptions for some public facilities, such as State and County roads and park facilities associated with conservation parks (e.g., small parking lots)."⁴

Clarksburg East and West Environmental Overlay Zones – (text of the

EOZs is identical)⁵:

B. Exemptions

4. Impervious surface for any publicly funded road or bikeway identified by the Ten Mile Creek Area Limited Amendment to the Clarksburg Master Plan and Hyattstown Special Study Area is exempt from this Overlay zone's impervious surface restriction.

Since both the Exemptions text of the Clarksburg East and West EOZs, which is part of Montgomery's Zoning Code, and the description of these exemptions in Ten Mile Creek plan, are clear that only publicly-funded roads and bikeways are to be exempt from the impervious surface limits, there is no need for this proposed ZTA.

(2) The proposed ZTA would violate the science-driven, court-tested Ten Mile Creek plan and EOZs.

The Ten Mile Creek plan and its associated Environmental Overlay Zones are based on the science of watershed protection, which includes over 25 years of county stream quality

surveys, including monitoring stations in Ten Mile Creek. The science that forms the basis for the Ten Mile Creek plan and EOZs includes published, peer reviewed reports from County, State of Maryland, Chesapeake Bay region, national, and international studies. These reports link stream quality, including fish, insect, and other aquatic species' abundance and diversity, with

¹ Montgomery County Code, Chapter 59 – Zoning Ordinance; Article 59-4, Development Standards for Euclidean Zones; [Division 4.9, Overlay Zones](#); Section 4.9.5 Clarksburg East Environmental Overlay Zone; Section 4.9.6 Clarksburg West Environmental Overlay Zone. In each of these, see Part B, Exemptions, Item B.4.

² Montgomery County Planning Department, M-NCPPC [“10 Mile Creek Area Limited Amendment,” 2014](#), pages 52 and 53. ³ Montgomery County Planning Department 2014 Op.cit. at footnote 2.

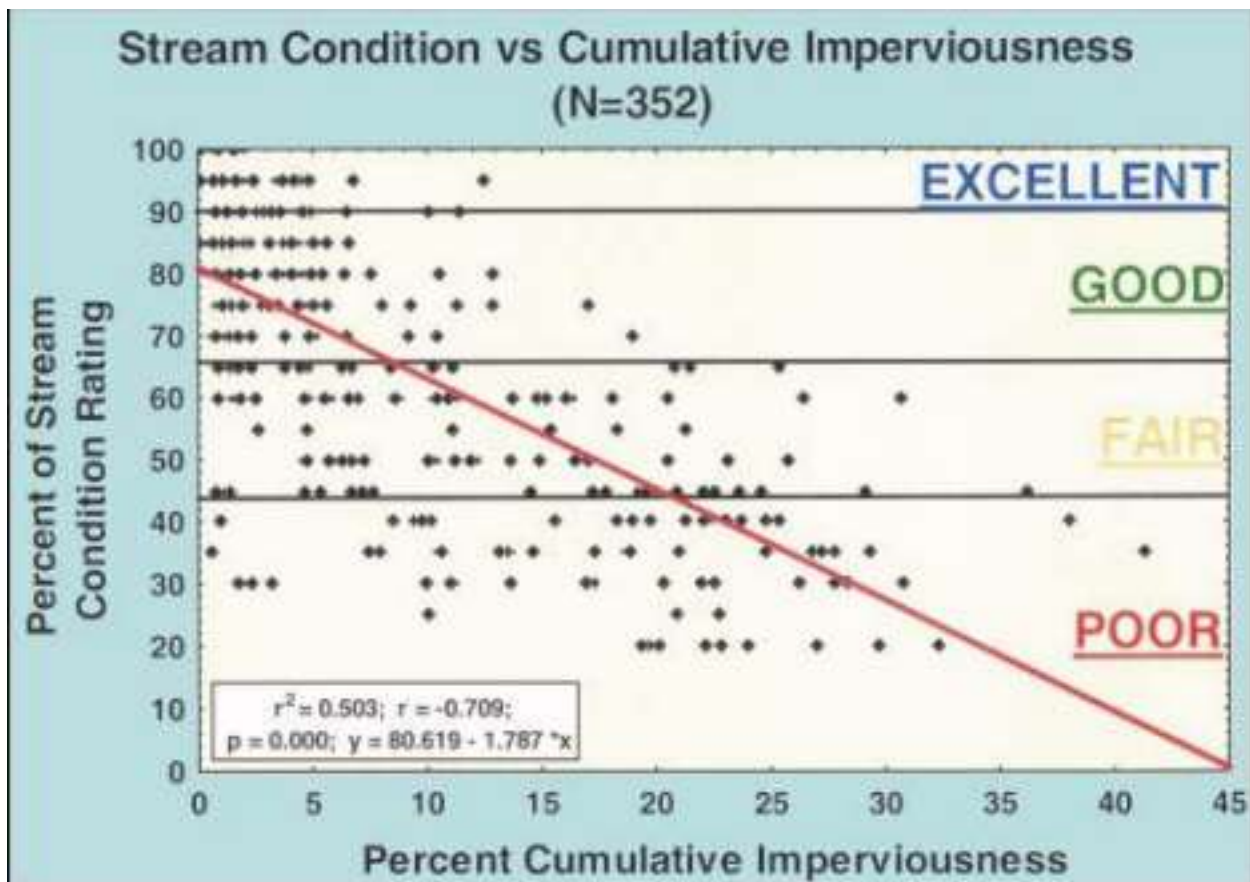
⁴ Montgomery County Planning Department 2014 Op.cit. at footnote 2.

⁵ Montgomery County Code, Chapter 59, Article 59-4.9.5 and 59-4.9.6, Op.cit. at footnote 1.

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percent impervious cover in the watershed draining to the waterbody being studied. This robust science shows that as pavement and roofs go up, water quality goes down.

The chart below, using data from 352 stream sites in Montgomery County, shows the relationship between stream condition, and watershed impervious cover as a percent of total watershed land area. The stream condition is measured by County scientists using fish and stream-dwelling insects and other aquatic life, as indicators of water quality.⁶



This chart reflects the long-term stream condition monitoring, assessment, and analysis performed by Montgomery County DEP scientists.⁷ It shows that as we add pavement to a watershed, stream condition declines. In most of these monitored sites, stormwater management devices are present in the watershed, but engineered devices do not protect stream conditions sufficiently to maintain biological communities. Montgomery's stream condition monitoring forms the basis for the Special Protection Area program and the impervious surface caps placed on the watersheds of several of our highest-quality, most sensitive streams including Upper Paint Branch, Upper Rock Creek, and Ten Mile Creek.

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⁶Keith Van Ness, Montgomery County DEP Senior Biologist (Retired), chart published in the Montgomery County Department of Environmental Protection Countywide Stream Protection Strategy Update (2003). This report is apparently not available online. For a national context for Montgomery's Biological Stream Monitoring Program, a summary is found at <https://nepis.epa.gov/Exe/ZyPDF.cgi/P1000I19.PDF?Dockey=P1000I19.PDF>

⁷A partial documentation of Montgomery County's response to developers' comments including references to the science of limiting impervious cover in sensitive watersheds is compiled in [this staff packet addendum from 2014](#).

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According to the science and Maryland stormwater law, the first principles of Environmental Site Design are not engineering-based. Rather, ESD first principles are planning-based, centered on developers avoiding disturbance of ecologically-sensitive areas, and on keeping imperviousness and limits of disturbance to the lowest possible levels. The Ten Mile Creek plan and Clarksburg EOZs, along with the Upper Rock Creek and Upper Paint Branch EOZs, all follow this science as the basis for their caps on imperviousness.

The 2018 Fourth Circuit decision in the Pulte v. Montgomery County case, that upheld the District Court's finding in favor of Montgomery County's Ten Mile Creek Limited Master Plan Amendment and Environmental Overlay Zone imperviousness restrictions, is pertinent here. The court held that

"Local zoning authorities must have the ability to protect important natural resources and the interests of their local communities through reasonable land use restrictions without being forced by federal courts to pay compensation to every frustrated developer that had hoped to maximize its bottom line. Development restrictions designed to protect a vulnerable watershed and source of drinking water are an entirely appropriate form of local regulation, and they are unlikely to amount to a regulatory taking particularly where, as here, the landowner is not left with a mere token interest but instead can still develop its property."⁸

We note that citizen involvement in this particular case, including that of the Friends of Ten Mile Creek, was heightened by the 13 subpoenas served by Pulte on 11 citizen groups and two individuals.

(3) The proposed ZTA isn't necessary in order to support completion of bikeways in Clarksburg.

As you know, the purpose of these Environmental Overlay Zones is to protect Ten Mile Creek based on the science of watershed protection. This established science, which is foundational to the Clarksburg EOZs and the Ten Mile Creek plan, tells us that we must restrict addition of

impervious surfaces to the lowest level possible in order to protect high-quality, sensitive streams, including Ten Mile Creek and its tributaries.

As we pointed out in our May 26, 2020 letter to Council President Katz and Councilmembers, we are pro bikeways and pro-clean water, and we affirm that County practice and experience in other watersheds with limits on imperviousness, including Upper Paint Branch, has allowed unforeseen impervious projects to be built while remaining within the science-based limits. Working with developers to remain within the regulatory imperviousness caps in a given EOZ is something we've done before; it's not a new approach for Montgomery's planners. The approach consists of offsetting increases in pavement in one area with decreases in another project element or area. At this point in the review of proposed development projects in the Ten Mile Creek watershed, planning staff have requested that the developers of Ashford Woods (a.k.a. the Egan site), located in the Clarksburg East Environmental Overlay Zone, reduce imperviousness in a range of site elements:

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⁸[United States Court of Appeals for the Fourth Circuit, No. 17-2112.](#)

PULTE HOME CORPORATION; SHILOH FARM INVESTMENTS LLC, Plaintiffs - Appellants, v. MONTGOMERY COUNTY, MARYLAND; MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, Defendants - Appellees. (Appeal from the United States District Court for the District of Maryland, at Greenbelt. George Jarrod Hazel, District Judge.) (8:14-cv 03955-GJH) Argued: September 25, 2018 Decided: November 29, 2018. Quote is from pp. 18+19.

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	Comments are below and also provided in a separate document in the Supporting Documents folder.
	1. General
	a. Staff continues to recommend reducing and minimizing impervious surfaces to better achieve the goals, intent and requirements of the Overlay Zones.
Revisions Requested	b. Consider the following layout changes to reduce the proposed impervious surface level further: cluster development with smaller building footprint on smaller lots with shorter driveways, place houses near the front of a building envelope to reduce driveway length, and provide shared driveways where feasible; design narrower driveways, where feasible, etc. (see Master Plan p.19).

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As noted by planning staff in the above-quoted comments on the proposed Ashford Woods development in Ten Mile Creek (Clarksburg East Environmental Overlay Zone) ⁹there are several options for reducing impervious surfaces in this development project, including smaller building footprints and shared driveways. If necessary, the total number of units may need to be reduced, as staff have also pointed out. This same approach is needed in order to enable much-needed bikeways to be built, while remaining within the confines of the Clarksburg East Environmental Overlay Zone and its 15% cap on impervious surfaces.

(4) Existing exemptions from the Ten Mile Creek impervious surface limits aren't science-based and should be eliminated from the Clarksburg East and West Environmental Overlay Zones.

Existing exemptions in the Clarksburg East and West Environmental Overlay Zones include additions to existing detached houses; any new development on any lot or parcel of less than two acres; and for any publicly funded road or bikeway. Members of the Save Ten Mile Creek Coalition objected to these exemptions when they were proposed at the Council in 2014, noting that the science doesn't support any exemptions. By enabling significant increases in the stock of hard, paved surfaces, these exemptions weaken the County's science-based protection of Ten Mile Creek centered on limiting imperviousness.

We must honor natural boundaries and this means staying within a balanced budget of imperviousness. When seeking to protect natural systems, including Ten Mile Creek, from pollution and degradation, we must acknowledge and respect natural boundaries. Enabling exemptions from imperviousness caps is like a manager charged with maintaining a balanced budget, who keeps some expenditures unrestricted and counted separately from the "official budget". The more unrestricted and separately-counted expenditures – in this case, allowance of exempted imperviousness in Ten Mile Creek outside the regulatory EOZ caps – the more the water quality "budget"- based on protecting the physical integrity and water quality of Ten Mile Creek - will be out-of-balance and in danger of collapse. The resultant increased pollution risk to Little Seneca Reservoir was described in the 2013-2014 testimonies from scientists, citizens, and water resource managers.

Caps on imperviousness are an example of placing and enforcing a human boundary in order to honor a natural boundary. The natural boundary at issue here is Ten Mile Creek's response – in the form of additional pollution and bank erosion, leading to accelerated siltation of Little Seneca Reservoir, in response to land cover conversion from farm and forest to urban development, measured by imperviousness. The human boundary at issue here, whose purpose is to honor the natural boundary, is the pair of Environmental Overlay Zones for Clarksburg East and West, (15% cap for the East and 6% cap for the West). The EOZ imperviousness cap is applied at the level of individual proposed site plans.

⁹February 19, 2020 comments of Montgomery Planning Department staffperson Angelica Gonzalez, Area Subdivision review group, posted in the DAIC comments and accessed on 6/18/2020.

<https://eplans.montgomeryplanning.org/UFS/31445/87991/32-DRC-120200110.pdf/32-DRC-120200110.pdf>

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Ten Mile Creek will respond to all imperviousness added to its watershed with accelerated bank erosion and sediment pollution into the Reservoir, regardless of how the imperviousness is funded, and regardless of whether or not it's subjected to a regulatory cap. The point of the regulatory cap is to strictly limit imperviousness, not to be a mere 'guideline' to be followed or ignored at will. The more exemptions are added, the weaker becomes the regulatory imperviousness cap as an instrument of water resource protection. So, every increment of pavement threatens Ten Mile Creek and Little Seneca Reservoir with additional pollution, and **to follow the science, all exemptions from the imperviousness caps should be eliminated.**

The Friends of Ten Mile Creek and our allied groups now renew our call to eliminate these existing exemptions. We urge the Council to revise the Clarksburg Environmental Overlay Zones in order to follow the science by subjecting all of types of properties, and all categories of building and construction, to the science-based imperviousness caps.

Even without exemptions, imperviousness grows over time, as landowners expand driveways and build patios. Termed “imperviousness creep” the pollution burden from these small projects adds up over the years. We point this out to affirm that in order to stick to the science of watershed protection as the County has committed to do, we must keep allowable and permitted pavement well within the limits in the EOZs in part to account for, and offset, the unpermitted pavement additions that occur over time.

“Impervious Creep” refers to the incremental addition of impervious surfaces such as asphalt, concrete, or rooftop. Examples are an addition to a home, widening a driveway, or enlarging a parking lot. These projects may not undergo the same thorough review of stormwater impacts as a larger project, but cumulatively, they can cause a substantial increase in runoff over time. Each additional 500 square feet (SF) of impervious surface (approximately the size of a two-car garage), would yield 997 gallons of runoff in a two-year 24 hour storm.

The above description of “impervious creep” is from the Wissahickon Creek [PA] Watershed Roundtable Report (2010), authored by Mindy Lemoine for the Pennsylvania Environmental Council.¹⁰ In Montgomery County, planner Katherine Nelson described this problem to the Water Quality Advisory Group in 2012, noting that we lack a regulatory mechanism to address unauthorized increases in imperviousness that also degrade sensitive, high-quality waters.¹¹

Exemptions pile on even more pavement, and in contrast to the problem of “impervious creep,” Montgomery County already has the legal authority to address the problem of exemptions from imperviousness limits: use the science as the basis to remove existing exemptions and refuse to allow new exemptions. Recognizing that every square foot of pavement adds up in a watershed this sensitive, in order to more fully and effectively protect Ten Mile Creek, removing exemptions is a crucial action.

(5) The proposed ZTA opens the door to similar requests for more broadening of exemptions and other types of weakening changes to the Ten Mile Creek protections.

The science-based protection of Ten Mile Creek and our other high-quality waters, including Upper Rock Creek and Upper Paint Branch, is based upon impervious surface caps; weakening any of these EOZs, including by broadening the scope of exemptions, puts these crucial waters at heightened risk of pollution and degradation.

¹⁰ http://archive.phillywatersheds.org/sites/default/files/WissRT_Report_FINAL_Part2.pdf
see also: <https://pecpa.org/wp-content/uploads/Wissahickon-Roundtable-Report.pdf>

¹¹ <https://www.montgomerycountymd.gov/DEP/Resources/Files/downloads/water/advisory-group/wgagj2012f2012.pdf>

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That risk increases when precedents are set that encourage future exemptions and loosening of the EOZ imperviousness caps. Let’s not go there. Let’s eliminate – not broaden – exemptions from our science-based restrictions aimed at protecting Ten Mile Creek and other high-quality waters.

Conclusion

The Council's hearings, committee worksessions, and full Council meetings on Ten Mile Creek in 2013-2014 is a strong and clear record providing the scientific basis for the Ten Mile Creek

plan and EOZ regulations. These documents establish the Council's and County's commitment to fully enforcing and implementing the imperviousness limits; wider buffers; larger reforestation goals; and other environmental provisions of the Ten Mile Creek plan and EOZs.

Wherever staff find there is room for interpretation of any part of the Ten Mile Creek Limited Master Plan Amendment, EOZs, or of any other clean water rules, policies and guidelines, we expect staff and decisionmakers to err on the side of greater protection - not on the side of greater pollution and degradation.

Given the years of research, debate, and scientific testimony presented to the Council and other county government bodies that resulted in the 2014 Ten Mile Creek plan and EOZs, and the County's successful defense against the developers' challenge of the Ten Mile Creek protections in federal court in the case of *Pulte v. Montgomery County*, **the only logical and prudent response by the Council to requests to weaken Ten Mile Creek's protections, is to reject them immediately. So, we urge the Council to reject the Planning Board's request of 4.2.2020 to broaden exemptions from the Clarksburg Environmental Overlay Zones and their impervious surface limits.**

We further urge the Council to eliminate all of the existing exemptions from the Ten Mile Creek plan and Clarksburg EOZs' caps on imperviousness. These exemptions, that we objected to when they were first proposed in 2014, aren't science-based; they hinder the success of the imperviousness caps; and over time they add more land disturbance and pavement, sending additional pollution into Ten Mile Creek and Little Seneca Reservoir.

We ask that the Council tell the Planning Board, and all county development regulators: "*If you see "room for interpretation" in the text of the Ten Mile Creek regulations, then interpret them on the side of more protection, not on the side of more pollution and degradation. Don't bring us any more proposals to weaken these regulations, including proposals that would broaden the scope of exemptions.*" We have attached a "Letter of Clarification" that can be used by the Council and other County authorities to respond to requests for clarification of the Ten Mile Creek plan, EOZs, and other associated regulations.

Thank you for considering our views and information on this important matter.

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Letter Clarifying Scope of Montgomery County's Imperviousness Caps in the Clarksburg Environmental Overlay Zones.

The Honorable Casey Anderson, Chair, and Commissioners
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring Maryland 20910

June 22, 2020

Dear Chairman Anderson and Commissioners,

I write in response to your letter dated April 2, 2020, requesting clarification of the Clarksburg Environmental Overlay Zones' provisions exempting bikeways from impervious surface caps. This same letter also requested clarification of the scope and purpose of the bikeway exemption.

To answer your first request for clarification: The text of the Clarksburg East and West Environmental Overlay Zones (EOZs), (the text on this exemption is identical in the two overlay zones), states:

4. Impervious surface for any publicly funded road or bikeway identified by the Ten Mile Creek Area Limited Amendment to the Clarksburg Master Plan and Hyattstown Special Study Area is exempt from this Overlay zone's impervious surface restriction.

This text indicates that only publicly funded bikeways, along with publicly funded roads, are exempt from the Overlay Zones' impervious surface restrictions. This text is consistent with the related descriptive text in the Ten Mile Creek Limited Master Plan Amendment, further clarifying its intent.

If your staff see ambiguity, or room for interpretation, in any of the Ten Mile Creek Limited Master Plan and Environmental Overlay Zone provisions, we advise them and the Planning Board to interpret them on the side of more protection. Clean streams and lakes are essential to public health and our quality of life. In order to better protect public health during the COVID-19 pandemic and generally to protect our remaining high-quality streams, including Ten Mile Creek, the council will not give priority to proposals that would broaden the scope of exemptions from, or would otherwise weaken, our clean water laws and regulations, including those established in our Environmental Overlay Zones' restrictions on imperviousness. Accordingly, the Council will not pursue the recommended ZTA that you requested on 4/2/20.

To answer your second request for clarification: essentially, you asked whether the bikeway exemption is limited to bikeways identified in the Clarksburg Master Plan and Hyattstown Special Study Area, or whether it can be construed to pertain to all bikeways planned to be located in Ten Mile Creek. You also indicated that "the goal of exempting the master-planned bikeways was not to have the impervious surfaces count as part of the development because these paths benefit the entire region, beyond the development." To your question about which bikeways are subject to the Clarksburg imperviousness limits, the answer is any and all bikeways proposed to be located in the Clarksburg East and West Environmental Overlay Zones, that are not publicly-funded, are fully subject to those EOZ limits on imperviousness.

To your comment that the goal of exempting master-planned bikeways from the imperviousness limits was to benefit the entire region: it's arguable that any large development project provides value and amenities that

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benefit the entire region, including but not limited to bikeways. Since Ten Mile Creek is the cleanest source of water to Little Seneca Lake, the greater DC region's only nearby emergency back-up drinking water supply, the benefit to the entire region of keeping imperviousness to the lowest levels possible, is a crucial element that forms the core purpose, along with wise development of the Clarksburg Town Center, of the 2014 Ten Mile Creek plan and its associated EOZ regulations and their caps on imperviousness.

We are confident that, based on prior experience in other Special Protection Areas, Planning staff and the Planning Board will be able to work with developers to accommodate much-needed bikeways in Clarksburg, while remaining within the imperviousness caps.

Sincerely yours,

Sidney A. Katz, President

Montgomery County Council

ATTACHMENT B:

Friends of Ten Mile Creek and Little Seneca Reservoir, Jan 12, 2023 testimony to the Planning Board



Board of Directors

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Mike Gravitz

Royce Hanson

Caroline Taylor

Tenley Wurglitz, *Past*
President

Date: January 12, 2023

To: The Montgomery County Planning Board

From: The Friends of Ten Mile Creek and Little Seneca Reservoir

Re: Item 8, ZTA 22-12, Overlay Zones - Clarksburg East & West Environmental Overlay - Exemptions

Dear Commissioners,

We concur with the staff recommendation that “no action be taken on ZTA 22-12 at this time” but disagree with several elements of the staff report. To be clear, **we support bikeways so long as they are not exempted from impervious limits.**

1. ZTA 22-12 is clearly promoting a policy change that would weaken the impervious exemptions to include all master-planned bikeways regardless of the funding mechanism.

A. Staff asserts: “the intent of the exemption language remains unclear”³ and merely requires “clarification” This is simply not true.

The EOZ states,

“Impervious surface for any publicly funded road or bikeway identified by the Ten Mile Creek Area Limited Amendment to the Clarksburg Master Plan and Hyattstown Special Study Area is exempt from this overlay zone’s impervious surface restriction.”

The language in the current law is clear: *the impervious surface exemption applies to the **identified roads and bikeways that are***

publicly funded.

ZTA 22-12 would change the EOZ to state,

“Impervious surface for any publicly-funded road or any master-planned bikeway is exempt from this Overlay zone’s impervious surface restriction.”

³ https://montgomeryplanningboard.org/wp-content/uploads/2022/12/ZTA-22-12-Clarksburg-Overlays_1-12-23.pdf, p.10.

ZTA 22-12 proposes a **significant policy change**. Despite the clear language, that only the *publicly funded bikeways* identified in the amended Clarksburg Master Plan and Hyattstown Special Study Area were exempted from impervious constraints, the Planning Board's proposed ZTA has improperly substituted "master-planned bikeway." **This would allow any bikeway identified in the Ten Mile Creek Amendment, regardless of funding mechanism to be exempt.** And, in the staffs' own words, it would "**extend the master-planned bikeway exemption to any bikeway from any master plan and not just those identified in the Ten Mile Creek Amendment.**"⁴ This clear policy change undermines the environmental provisions that were put in place to constrain all forms of imperviousness to protect Ten Mile Creek.

B. The Ashford Woods staff report clearly illustrates that the Planning Board implicitly recognized that 'publicly funded' applies to bikeways.

In response to community concerns regarding exemptions from the impervious surface calculations for bikeway facilities, the January 2021 Ashford Woods staff report offered the following justification:

"A contribution will be made by the Applicant for the proposed bike improvements directly to MCDOT as part of a road participation agreement. These funds will be provided to fully support the extension of the currently under construction Frederick Road Bike Path along the length of the Subject Property. **The Application's contribution is exempt from impervious surface calculations as any bike facility to be constructed on the Subject Property through this application will be constructed by others as part of a publicly-funded project.**"⁵ [Bold added]

2. By contrast, in approving the Mikes Coppola project a year later, in July of 2022, the Planning Board operated as if the passage of the ZTA was a done deal and that all master-planned bikeways were exempted from impervious caps. In so doing, the Planning Board violated the Clarksburg East Environmental Overlay requirements.

On July 21, 2022 the Planning Board approved the Miles Coppola Preliminary Plan.⁶ The Staff Report included a series of attachments, including Attachment 11, the Impervious Surface Plan.⁷

The Impervious Surface Plan contains a chart of exempt bikeways and roadways, highlighted in yellow, each with the following footnote:

"1) Per Sec. 4.9.5.B4 of the Zoning Ordinance impervious surface for master planned bikeways and existing roadways are exempt from this Overlay zone's impervious surface restriction.

⁴ Staff acknowledge that this is a policy change recommendation. See https://montgomeryplanningboard.org/wp-content/uploads/2022/12/ZTA-22-12-Clarksburg-Overlays_1-12-23.pdf, p.6.

⁵ See p. 59 of Ashford Woods staff report, https://montgomeryplanningboard.org/wp-content/uploads/2021/01/item5_StaffReport_AshfordWoods_120200110_FINAL_01112021.pdf

⁶ https://montgomeryplanningboard.org/wp-content/uploads/2022/07/120220010-Miles-Coppola-Staff-Report-Preliminary-Plan_FINAL.pdf

⁷ <https://montgomeryplanningboard.org/wp-content/uploads/2022/07/Attachment-11-Impervious-Surface-Plan.pdf>

This approach the staff and the Planning Board pursued in the approval of Attachment 11 as part of the overall approval of the Preliminary Plan was in violation of the Clarksburg East Environmental Overlay requirements. The Council never enacted a ZTA to exempt master-planned bikeways, as set out in the 2018 Bicycle Master Plan. Yet the staff and Board persisted in acting as if all master-planned bikeways were exempted and ignored the publicly funded component as well.

The Planning Board needs to rectify all past actions that exempted bikeways from impervious calculations regardless of their funding mechanism and their master plan status. Until then, the Miles-Coppola preliminary plan approval should be nullified.

3. The science of watershed protection does not support exemptions from impervious surface limitations.

To the detriment of water quality, ZTA 22-12 would allow additional imperviousness to be exempt from the current impervious surface limits for the Ten Mile Creek watershed, and it would also open the door to further imperviousness exemptions in the future. Neither the existing exemptions from impervious surface limitations, nor the expansion of exemptions proposed by ZTA 22-12, are science-based. They ignore the essential fact that streams are harmed by the negative effects of imperviousness.

The EOZ was designed to implement the impervious surface restrictions and exemptions, including bikeways, as described in the 2014 Clarksburg Amendment. Yet, according to the Planning Board staff report, “The Bicycle Master Plan has already added 0.25 acres of additional impervious bikeways to the overlay zone areas beyond what was included in the Ten Mile Creek Amendment.”⁸ At minimum, the Planning Board must follow the law. But even more, the Planning Board must uphold the science-based limits on impervious surface to protect Ten Mile Creek. Additional impervious surface will damage Ten Mile Creek's sensitive watershed, regardless of whether it's publicly or privately funded, master planned or not master planned, roadway.

We request that the 2014 Ten Mile Creek Limited Amendment be amended to eliminate all exemptions for roads and bikeways. Furthermore, a subsequent amendment to the overlay will be required to implement these provisions.

4. Staff asserts that the original ZTA was tabled in 2020 due to Covid.

However, it is more likely the ZTA was tabled for political reasons due to vigorous opposition by the Friends of Ten Mile Creek, the general public and by the County Executive in the lead up to the 2020 Council elections.

ZTA 22-12 is a damaging policy change that must be rejected as a violation of the Ten Mile Creek Limited Master Plan Amendment and its main enforcement regulation – the limits to imperviousness established in the Clarksburg Environmental Overlay Zones.

Therefore, Friends of Ten Mile Creek and Little Seneca Reservoir calls on the Planning Board to **reject** the proposed zoning change, ZTA 22-12. Furthermore, to minimize harm to Ten Mile

⁸ See https://montgomeryplanningboard.org/wp-content/uploads/2022/12/ZTA-22-12-Clarksburg-Overlays_1-12-23.pdf, p.8.

Creek, we strongly recommend the elimination of all road and bikeway impervious surface exemptions, regardless of whether they are publicly funded.

Sincerely,

Anne Cinque, President

Cc

Marc Elrich, County Executive

Claire Iseli, Special Assistant to County Executive



FRIENDS
OF
TEN MILE CREEK
&
LITTLE SENECA RESERVOIR

Protecting a clean water source
for the Washington D.C. region

December 13, 2022

Dear Councilmember,

On behalf of the Friends of Ten Mile Creek and Little Seneca Reservoir, I am writing to let you know that we oppose ZTA 22-12 Overlay Zones - Clarksburg East & West Environmental Overlay - Exemptions, which is to be introduced today.

As we explained in a June 22, 2020 letter to the Council the previous time the earlier version of this ZTA was being considered, we believe that,

1. The ZTA "clarifies" language that is already clear;
2. There is no impediment to building out the sidepaths without the ZTA;
3. The ZTA, if passed, would further damage water quality in Ten Mile Creek and Little Seneca Reservoir.

The Council should not exempt further impervious surface from counting towards the science-based limits in the Ten Mile Creek Special Protection Area. Rather, the Council should act to ensure that all impervious surfaces count towards the limits, including publicly-funded roads and sidepaths, which are currently exempt.

We plan to submit both oral and written testimony at the public hearing on January 17 at 1:30 pm.

Sincerely,

Anne Cinque
President, Friends of Ten Mile Creek and Little Seneca Reservoir

CC:
Marc Elrich, County Executive
Livhu Ndou, Legislative Attorney
Claire Iseli, Special Assistant to County Executive
Debbie Spielberg, Special Assistant to County Executive
Meredith Wellington, Office of the County Executive

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