IN RE:	)	
	)	
CONDITIONAL USE APPLICATION	)	CASE NO.: CU20-2502
	)	
OF CTC RETAIL, LC FOR	)	
	)	
ELM STREET DEVELOPMENT	)	
	)	
AND WEIS MARKETS, INC.	)	

MOTION TO DENY CONDITIONAL USE APPLICATION NO. CU 20-2502

Opponents, Shanker Limited, Ark 25, LLC, and Aries Investment, LLC (the "Patel Parties") move for a ruling denying the Conditional Use Application number CU-20-2502 ("Application") submitted by CTC Retail, LC on behalf of Elm Street Development ("Elm Street") and Weis Markets, Inc. In addition to the grounds set forth in the Patel Parties submission to the Hearing Examiner dated January 17, 2025, the Patel Parties urge the Hearing Examiner to deny the Application for the reasons stated herein as well as those presented during the hearings on the Application.

I. Summary of Argument

The instant property that is the subject of the Application is not governed merely by the regulatory standards applicable to conditional uses that are set forth in the Montgomery County Zoning Ordinances. It is also subject to a binding Resolution adopted by the Planning Board in 2006 that imposed material limitations on the modifications that would be permitted to any subsequent site plans. They are restricted to changes in the law (for example, changes in setback requirements, APFO and the like) or physical limitations extant on the property.

The adoption of this Resolution provided a means for the developer to escape over three million dollars in fines based on conformance to the Compliance Plan which was issued

following the entry of a settlement agreement among residents and the developer. Notably, the economic desires of the developer were not among the bases for allowed deviation from the plan. The current Developer, Elm Street (or Third Try, L.C.) took title to the property subject to the terms of the Resolution.

When the Planning Staff made its recommendations to the Planning Board for approval of the conditional use for a gasoline station, the Staff failed to consider any aspect of the Resolution and Compliance Plan. The Staff report sets forth a very brief history of the prior dispute and acknowledges the existence of the Compliance Plan and various amendments to the Plans and Site Plans. The mandatory requirements of the Resolution and Compliance Plan, however, were not followed in evaluating the conditional use application or even mentioned by Staff. The only criteria it considered were those set forth in the Montgomery Code.

The Planning Board's recommendation for approval then went to the Planning Board. After its hearing on December 19, 2024, the Planning Board made its written recommendation to the Office of Zoning and Administrative Hearings and adopted the findings set forth in the Staff Report with the single exception that the hours for the gasoline station be extended to four o'clock in the morning to midnight. The Planning Board likewise undertook no review of the binding Resolution or the mandatory criteria set forth therein.

The Office of Administrative Hearings should not make the same material mistake. The Resolution mandates that any modifications to the plans must be in conformity with the stated goals and those necessary to implement the Compliance Plan. Modifications to future plans must be viewed within the framework of the Resolution which permits only those required by law or physical project conditions unforeseen by the Board. In this case, the addition of a gasoline station in what is to be a walkable, pedestrian friendly, neighborhood is inconsistent

with the Compliance Plan. No gasoline station was ever before even considered. It is inconsistent with the stated goals of the Resolution and Compliance Plan. For this reason alone, the Application should be denied.

II. Background

The Clarksburg Master Plan ("Master Plan") was approved by the County Council in June of 1994. Staff Report Submission Revised Plans for Plan of Compliance, OZAH Ex. 46 at 2. It called for creation of a Town Center ("Town Center") in Clarksburg, which would include the Historic District as a focal point and surrounded by a mix of office, residential and retail uses. *Id.*

In December of 1994, both a Project Plan (#9-94004) and a Preliminary Plan (#1-95042) were submitted for review by Piedmont and Clarksburg Associates. *Id.* OZAH Ex. 46 at 2. The Plan envisioned a neo-traditional community and called for the construction of a maximum of 1300 residential units, 100,000 square feet of office space, and 150,000 square feet of retail space, to be constructed in phases. *Id.* The Project Plan was approved in June of 1995 and the Preliminary Plan was approved in March of 1996. *Id.*

The first site plan for Phase I (#8-98001) was approved in 1998, and covers the area primarily on the East side of the Town Center. OZAH Ex. 46 at 2. The Phase II Site Plan (#8-02014) was approved in 2002. *Id.* By June of 2006, approximately 725 units of the approved 1,300 dwelling units had been built or were under construction in Phases I and II of the project. *Id.* A Site Plan for Phase III (#8-04034), the retail portion, was submitted but never approved. *Id.*

During the course of development there were numerous failures of the developer to comply with the approved plans and regulations. In April of 2005, a group of residents, who

became known as the Clarksburg Town Center Advisory Committee ("CTCAC") raised these issues before the Planning Board. OZAH Ex. 46 at 2. The Board held a hearing regarding alleged height and setback violations. *Id.* The Planning Board ruled that no violations had occurred. *Id.*; Affidavit of David Brown, attached as Ex. A.

Following exhaustive efforts by the CTCAC and its discovery of evidence of height and setback requirements, in July of 2005, however, the Planning Board changed course and voted unanimously that there were violations. Ex. A ¶ 6[1]; OZAH Ex. 46 at 2. That very same day the Planning Board held a hearing to determine whether to impose sanctions or require the creation of a plan of compliance pursuant to its powers (under Md. Code Ann., Land Use § 23-505[2] and Montgomery County Code (MCC) §59-D-3.6). OZAH Ex. 46 at 2. Although the Planning Board agreed that "units that were either under contract and under construction, or under contract but construction had not yet begun as of July 7th, 2005 would be grandfathered in," the remaining violations needed to be addressed. *Id.*

The Montgomery County Council directed the Planning Board to take action immediately finding that "Serious failures in the enforcement of site plans during construction in the Clarksburg Town Center have been exposed through the efforts of citizen activists." July 26, 2005 County Council Resolution 15-1125 ¶ 1, attached as Exhibit B hereto. The Council made plain the actions to be undertaken by the Planning Board to address these violations. *Id.* ¶ 7. They included that no new building permits could be issued and all site plans had to be deferred until "reviews of what went wrong in Clarksburg and elsewhere are completed and the Council has an opportunity to take necessary actions." *Id.* =. Thereafter, the Planning Board issued stop

[1] These violations had apparently been covered up by staff level approval of modification to the height and setback limits shown on Board approved site plans that did not show any Board-approved changes. Brown Aff.
[2] Previously Md. Code, Art. 28, §7-1116(h) (repealed 2012).

work orders on the Town Center development on September 20, 2005, and November 23, 2005, which were not to be released until the Planning Board approved.

In the meantime, more violations came to light:

1) Setback violations with respect to the side and rear yards, as well as the minimum space required between end buildings for townhomes and multi-family dwellings
2) Minimum net lot area
3) Lot Width Minimum at Building Line
4) Lot Coverage Standards for Accessory Buildings
5) Elimination, Rerouting and/or Reduction in Size of Alleys and Roadways
6) Changes to Blocks with respect to unit types and configuration without Planning Board Approval
7) Changes in Grading from Signature Site Plan to Actual construction
8) Modifications of Environmentally-related Features
9) Reduction in required green space
10) Record Plat Irregularities
11) Issues related to the Manor House Amendment
12) Parking Requirements
13) Elimination of "O" Street and the Pedestrian Mews
14) Discrepancies regarding the Site Plan for Phase II
15) Alteration of certain Clarksburg Town Center Documents

OZAH Ex. 46 at 2-3. The Planning Board continued to hold violation hearings until CTCAC, and the developer parties requested that the entire matter be referred to a mediation in November of 2005. *Id.* at 3. Prior to the referral to mediation, over $1,000,000 in fines had been assessed against the developer. OZAH Ex. 45, Att. 4 at 14, Plan of Compliance without attachments attached as Exhibit C for ease of reference.

The mediation group (consisting of members of CTCAC, developer Newland Communities, and builders Bozzuto, Craftstar, Miller & Smith, NV, and Porten Homes) was led by Judge Barbara Howe and occurred over ten days from December 2005 to May 2006. Ex. C at 15; June 27, 2006, County Council Resolution 15-1505, attached as Exhibit D. One-third of the mediation fees and expenses were paid for by the County. *Id.* ¶¶ 1, 3. The County was deeply

invested in addressing the problems within the Planning Department and the rampant violations of the Montgomery County Code.

As a result of the mediation, all parties agreed to a binding settlement agreement.

> The mediation resulted in a settlement agreement that set forth the terms of a detailed proposed plan of compliance for consideration by the Planning Board. The plan of compliance included a new design for a new-urban town center, substantial improvements to parks and recreation areas, including the construction of an indoor lap pool and community buildings, and over $1 million in additional funding over the established budget for landscaping and streetscaping.

Ex. B ¶ 4. Further, "[t]he settlement agreement called for establishment of new architectural and design guidelines for areas of the Town Center that have not yet been constructed, including the retail area. The parties had hoped to address these matters in the context of the mediation but there was insufficient time to do so." *Id.* at ¶ 6. The Board knew further plans and engineering would have to be completed in conjunction with the development of the property "[e]xcept as otherwise required by or relating to physical project conditions unforeseen by the Board or applicable Law." OZAH Ex.45 at 7, Board Resolution attached hereto as Exhibit E for ease of reference. No changes would thus be permitted unless they fell into these categories. Even then, such changes had to be "reasonably consistent with the Compliance Program". Ex. E at 7. The developer was estopped from challenging any terms of the Resolution and Compliance Program. *Id.* at 5.

After the settlement, the mediation group worked together to develop the proposed points of a Compliance Plan which was submitted to the Planning Staff. Ex. C at 17. Staff generated a Compliance Plan and a Planning Board hearing was held to solicit opinions from the Clarksburg community. Ex. C at 15. It was well received as the community "seemed especially pleased" with the new design plan and proposed development. *Id.* Planning Staff then held a series of

meetings with numerous County agencies and incorporated their feedback into the analysis section of the Plan of Compliance recommendation report. *Id.* On June 15, 2006, the Planning Board along with the full Maryland-National Capital Park & Planning Commission (M-NCPPC) approved Staff recommendations via the Resolution which put the Compliance Plan into effect. Ex. D at 1-7.

III. Requirements of the Compliance Program and Resolution

The Resolution terms and conditions make clear that the Compliance Program requirements were intended as "remedial measures that shall be legally required in order to address certain violations. . . with respect to the Project Plan, various site plans and certain amendments thereto". Ex. E at 2. It provides that the terms of the Resolution shall be deemed and constitute the knowing and voluntary proffer of the Respondents tendered for the purpose of settling and disposing of the Violations in accordance with the lawful authority of the Board. *Id.* The Compliance Plan and Settlement Agreement were supported by material consideration: "it resolved all findings of violations in the CTC (Clarksburg Town Center) including alleged violations that have not yet been resolved by the Planning Board." Ex. C at 14. Those fines were material and totaled over $1,000,000. *Id.*. Recommendations of fines for violations not yet approved by the Planning Board exceeded $2,000,000. *Id.*

The Compliance Plan dictates the process for, among other things, review of a new Site Plan for the retail core. Ex. E at 4. The terms and conditions of the Compliance Program were to be strictly followed. *Id.* at 6. While the Planning Board's authority was preserved and acknowledging that future modifications may be required, the Board was clear that:

> Except as otherwise required by or relating to physical project conditions unforeseen by the Board or applicable law (including the requirements of the Montgomery

> County Zoning Ordinance, Subdivision Regulations or other legal requirements applicable to any future Board action pertaining to the project), the Planning Board intends to require only such modifications that are reasonably consistent with the Compliance Program.

Id. at 7. The only modifications permitted were those set forth above. The only power preserved by the Board in conjunction with its plan review is restricted to modifications that do not call for the deviation from the "express terms of this Resolution and the Compliance Program". *Id.* The Board's discretion was explicitly limited by the Resolution. *Id.* at 6.

The Resolution modified features of the previously approved Plan. These included a mixed-use core with a grocery store, small shops, live-work units, townhouses and the like. Ex. C at 4. Outdoor seating areas, and an open-air market building were to be constructed to "serve as the central focus for the Town Center." *Id.* It was to reduce "extensive surface paving." *Id.* The mixed-use core was to "maintain a pedestrian scale and orientation." *Id.* The "majority of the retail will be located along pedestrian friendly streets instead of adjacent to a surface parking lot." *Id.* at 6. The pool complex was to include a new community building with a commercial kitchen, modification to the existing pool and a new building containing a year round lap pool. *Id.* Retail buildings were limited to three stories and a condominium building was to be eliminated and replaced with townhouses and a small park. *Id.* at 7. It aimed to highlight Clarksburg's small-town environment and natural scenery–as the Master Plan intended–whilst allowing for some more structures such as a 51,000 square foot grocery store and parking garages concealed from direct view. OZAH Ex.45, Att. 4 at 63-65.

The importance of the Compliance Plan was restated in 2008, Staff reasserted its and the Planning Board's position that it had the authority and intention to bind any developers:

> Staff does not view the Plan of Compliance as purely conceptual, but rather as a binding document that provides specific requirements for implementation. Indeed,

> when approving the Compliance Plan, the Board expressly ordered the Applicant "to comply strictly with each of the elements, terms and conditions of the Compliance Program." Although plan details can change as an applicant responds to comments from reviewers during the site plan review process, that is not what has occurred here. The plans as proposed are not minor modifications to the plans, but significant deviations from the approved Plan of Compliance. Staff has recommended numerous changes, not all of which have been addressed, and has provided conditions that compensate for both the inadequate responses by the Applicant and lack of conformity with the approved Plan of Compliance.

October 22, 2008, Staff Report, attached as Exhibit F at 21. (emphasis added). The site plan amendment specifically referred to the Resolution and Compliance Plan. *Id.* at 67. Likewise, in 2010, the Council re-affirmed the importance of the Compliance Plan. Res. No. 16-1487 attached as Exhibit G.

In 2011, five years after the parties settled, resolution enacted and the Compliance adopted, it was announced that Newland Communities was to sell the Town Center to Applicant Elm Street Development through Third Try, LLC, for a meagre $1. Ex. B ¶ 18; Deed attached as Exhibit H (Newland to Third Try, LC dated December 19, 2011, recorded at Liber 42924 folio 052 in the Land Records of Montgomery County). *See also*, Susan Singer-Bart, *Clarksburg Town Center prepares for new owner*, SoMdNews.com (Dec. 7, 2011), https://www.somdnews.com/archive/news/clarksburg-town-center-prepares-for-new-owner/article_db9fb847-d155-5c4f-ae6e-aaa368920842.html. Attached as Exhibit I. Mr. Flannagan of Elm Street was well aware of the encumbrances upon this property. Indeed, he publicly acknowledged that the approved retail plan would not be "economically feasible for 20 or more years". Ex. I at 2. Elm Street is a sophisticated developer and was well aware of the approved plans at the time of its purchase. Indeed, the one-dollar purchase price of the undeveloped portion of the Clarksburg Town Center by Third Try, L.C. reflects the restrictions imposed on the future development of the property.

IV. ARGUMENT

A. The Resolution and Compliance Plan Are Supported by Material Consideration and Binding on the Applicants

As referenced in The Patel Parties' Letter of Opposition, OZAH Exhibit 49, the Applicant has not conformed with the binding Compliance Plans to warrant approval of the Application to permit a gasoline station. The entire purpose of the Compliance Plan was to ensure the future development of the property conforms to the Plan in exchange for the County's waiver of the massive fines that were or were in process of being assessed. The goal of the Compliance Plan was to create an attractive, charming pedestrian-oriented retail core. OZAH Ex. 45, Att. 4 at 78-80. Residents desired to reduce further development of their community in favor of moderate changes to the historic character of the Town. *Id.* at 63-65. Staff, the Planning Board, and the Applicant are all bound by the Resolution. The Resolution is a binding obligation and supported by consideration. Indeed, the Resolution has all the hallmarks of a contract. It includes an offer and acceptance and consideration. Rstmt. (Second) of Contracts § 24. Here, the Resolution is the written manifestation of the agreement by the County to waive fines in exchange for benefits to the County, it was accepted by the County and the then developer and the parties acted in reliance on the terms of the Resolution. A resolution is an official act by the County documenting this agreement. *See* Montgomery County Code, Section 59-D-3.6 (providing for Plans of Compliance as a means of addressing violations.) *Cf. Inlet Assocs. v. Assateague House Condo. Ass'n*, 313 Md. 413, 429 (1988) (holding that if a municipality's action is of general application prescribing a new plan or policy, it is legislative and must be accomplished by ordinance). In this case, the Resolution was specific in nature, it resolved disputes by the adoption of the Compliance Plan.

The Board required the "completion of the Compliance Program according to its terms *because it provides substantial enhancements to community amenities and facilities planned for the area designated as the Clarksburg Town Center project and Montgomery County as a whole.*" Ex. E at 6, Finding 4.2 (emphasis added). The Applicant and the County are bound by the terms of the Resolution and the Compliance Plan. OZAH Ex. 45, Att. 4 at 17, 63. The Resolution was adopted in exchange for material consideration. The Planning Board accepted the Staff's rationale and incorporated into the Resolution:

> Because the proposed Plan of Compliance exceeds the potential value of the initially proposed fines, proposes significant enhancements to the overall Town Center Development, and eliminates the extensive time that would be needed to continue to hold violation hearings, the Staff finds that acceptance of the Plan of Compliance is in the public interest and offers the best resolution for all concerned.

Ex. C at 13; *see also*, Ex. I ("Newland or its successor will be held responsible for meeting all requirements of approved plans", said Rose Krasnow, chief of the Planning Board's development review division. 'They will be cited with a violation if they are not putting in brick where they are supposed to,' she said.").

The Resolution is binding on all successors and assigns to the property. In a case similar to the case at hand, the Court in *Cty. Commr's. of Charles Cty. v. St. Charles Assoc's. Ltd. Partnership*, 366 Md. 426 (2001), the Supreme Court of Maryland held that the terms of a settlement agreement with a prior developer ran with the land and did not require a separate assignment. 366 Md. at 463. The fact that the deeds transferring the property from the settling developer did not specifically refer to the covenants in the settlement agreement did not affect their validity. *Id.*

The test for evaluating whether covenants run with the land was articulated whether "'(1) the covenant 'touch[es] and concern[s]' the land; (2) the original covenanting parties intend the covenant to run; and (3) there be some privity of estate and that (4) the covenant be in writing.'" (Citation omitted.) *Id.* at 454. There, the developer plaintiff asserted that it was entitled to discounted tap fees that were contained in a settlement agreement between Charles County and the prior developer. The Supreme Court of Maryland agreed.

The Court, considering the first issue, relying on *Mercantile-Safe Deposit and Trust Co. v. Mayor and City Council of Baltimore*, 308 Md. 627, 633–637 (1987) noted that:

> Whether a covenant touches and concerns the land may be considered in terms of the burdens or benefits it imposes. Thus, the test is met if the performance of the covenant will 'tend necessarily to enhance [the] value [of the land] ... Whether a covenant touches and concerns the land may be considered in terms of the burdens or benefits it imposes. Thus, the test is met if the performance of the covenant will 'tend necessarily to enhance [the] value [of the land] ...' It will be noted that the 'benefit' and 'burden' tests are stated in the alternative; if either is met, the covenant may be one running with the land....

366 Md. at 448 (internal quotations and citations omitted). Thus,

> "[For] 'a covenant to run with the land [it] must extend to the land, so that the thing required to be done will affect the quality, value, or mode of enjoying the estate, conveyed, and thus constitute a condition annexed, or appurtenant to it.... Applying this definition, Maryland cases have determined a variety of agreements to be covenants running with the land: an undertaking, in a mortgage, to pay ground rent and taxes; an agreement to keep mortgaged property insured and to make repairs or rebuild; a contract not to construct improvements without prior approval of external design and location; and an agreement to share pro-rata the cost of installation of certain streets and utilities."

Id. at 460-461.

Here, the first criterion is met. It provides benefits (waiver of fines over three million dollars and grandfathering in previous non-conforming construction) and burdens (development

restrictions and substantial amenities determined by staff to have a value in excess of fourteen million dollars) which specifically "touch and concern the land". Ex.C at 14. And, certainly, the encumbrances affected the value of the land as demonstrated by its purchase price of one dollar. Ex. H.

With respect to the second criterion, the parties' intent, this is determined from the language of the Resolution. While the Resolution did not explicitly state that the restrictions were binding on successors and assigns, it did not have to. In this case, we have a Resolution, adopted by a government body, that dictates the future development of the land in the Clarksburg Town Center. In addition, the Resolution, by its plain language, confirms that it is binding on all future development: "the Compliance Program approved by this Resolution are intended by the Board as remedial measures that shall be legally required in order to address certain violations . . .", Exhibit E at 2. It applies to future site plans, (*Id.* at 2-4); "completion of the Compliance Program according to its terms . . . provides substantial enhancements to the community amenities and facilities planned for the areas designated as the Clarksburg Town Center project and Montgomery County as a whole." (*Id.* at 6); it was adopted in lieu of imposing fines or monetary penalties". *Id.* If a different person wanted to challenge determinations on subsequent site plans, the Resolution accounted for that as well. It does not bar any non-parties appeal rights or causes of action that might accrue with respect to future action of the Board. *Id.* at 5. Further, the deed transferring the property to Third Try, LLC (c/o Elm Street) explicitly provides that the conveyance is "SUBJECT TO all easements, encroachments, rights of way, *site plans, development plans and agreements, subdivision plats and other matters of every kind and nature which are of public record* or are discernible from a visual inspection of the property." Ex. H at 2 (emphasis added). The language in this deed exceeds that of a typical deed and that contained

in the deeds in the *Charles County* case. *See* 366 Md. at 462. This conveyance was expressly made subject to the Resolution and Plan of Compliance which are "other matters of public record". Ex. H at 2. The intent of the parties that this Compliance Plan is binding on future development is made plain. If someone does not like the plans adopted pursuant to the dictates of the Compliance Program, he can either sue or appeal the application thereof.

The third and fourth criteria are easily met. Here, as to the third, there is privity of estate, the land passed directly from Newland, the prior developer – with the benefits and burdens - to Third Try care of Elm Street. Ex. H. Elm Street was well aware of the benefits and burdens which enabled it to purchase valuable property for one dollar.

Finally, the Resolution is in writing. The fourth criterion is met. While the *Charles County* case involved conveyance of discounted tap free agreement, the same holds true here. Certainly, Elm Street would be arguing the converse if the Resolution contained discounted tap fees. However, as *Charles County* makes clear, whether it is a benefit or burden on the property does not matter. It runs with the land.

This Resolution is a contract with the public and the developer. It is a covenant running with the land and binds all subsequent developers. Elm Street is required to comply with its terms. The Applicant had notice of the encumbrance by virtue of the pats, subdivision plans, the Resolution and Compliance Plan, and Deed. The Applicant also had actual knowledge of the restrictions. The Resolution was duly adopted and bound the land. Applicant's choice to enter into a purchase agreement that had encumbrances affecting the Applicant's plans with respect to the property's development potential rests solely on the Applicant. The 2008 Amended Site Plan

likewise conformed to the Compliance Plan and expressly referred to it. Ex. F at 67. [3] It is not the province of the Hearing Examiner to relieve the application of its well-known burdens. *See Arthur E. Selnick Ass'n, Inc. v. Howard Cty, Maryland* 206 Md. App. 667, 704 (2012). (Purchaser acquired property with knowledge of encumbrances and it was not Court's obligation to "relieve a party of its prior decision.").

If the Staff or Board had given consideration to the intent and requirements of the Compliance Plan, it would have determined that this hurdle was not met. Adding a gas station is completely inconsistent with what was envisioned and guts what was to be the center of a walkable community. No gasoline station in the center of the Town was ever contemplated in any prior plan. The addition of the gas station amidst a sea of asphalt does not promote a walkable, scenic neighborhood. Further, the conditional use indicates that it is not simply to be included at the Developer's whim. The Applicant is not immune from compliance with the government mandates set forth in the Resolution.

The Compliance Plan makes plain that the only deviations permitted from it are restricted to changes in the law or to physical restrictions unknown on the property. Nowhere in the Application does Elm Street even acknowledge this limitation. Instead, Elm Street simply states that it is "not binding". 1/23/2025 Tr. 47: 9-11. This assertion is completely contrary to the plain language of the Resolution and the law. The Application for the conditional use does not fall into one of the permitted criteria allowing deviation from the Compliance Plan and it should

[3] While the 2013, amendments incorporated most of the requirements, Staff permitted that some deviation. Ex. C at 6. Certainly the wisdom of this decision is in doubt given that the parking structures were of material value. At that time, however, the members of the CTCAC were exhausted and out of funds.

be rejected out of hand.[4] Any ability to deviate from the Compliance program was expressly waived. Ex. E at 5; OZAH Ex. 45, Att. 4 at 32, 78. The purchase included undeveloped lots and the Town Center where further residential development is permitted along with commercial. Ex. H. Elm Street did not get to purchase all of this for $1.00 without accepting the burdens on the Property that came with it. *Id.* The arrogance to suggest otherwise is breathtaking.

B. Applicant is estopped from violating the plans

Applicant stands in the shoes of Newland and is estopped from challenging the Compliance plan and its application to this property.[5] Applicant knew it "agreed to be estopped from contesting any portion of the Compliance Program." Ex. E at 5. All plans submitted for approval had to "reflect the elements of this Compliance Program." Ex. E at 5, ¶ C. As set forth above, the Compliance Plan provides that except as otherwise required by or relating to physical project conditions unforeseen by the Board, or applicable law, no other modifications are permitted. Ex. E at 7. While the Board reserved its rights to make such modifications, even then the only modifications permitted are those that are reasonably consistent with the Compliance Program. *Id.*

In addition to being estopped by the text of the Resolution, Applicant is estopped based on principles of equity. Equitable estoppel precludes a party at both equity and law from asserting rights against another person where there is 1) voluntary conduct; 2) reliance on said

[4] The Planning Board also instructed Staff to undertake all reasonable measures to detect and report the developer's compliance or noncompliance pursuant to § 59-D-3.6(b). Ex. E at 6. Instead of detecting and reporting non-compliance with the Compliance Plan, Staff promoted the inclusion of the gasoline station even though it did not meet the strict criteria set forth in the resolution.

[5] The Resolution does allow for challenges to the future actions of the Board as explained above regarding implementation of the Compliance Plan. The binding nature of the Compliance Plan itself, however, was established by the Resolution.

conduct; and 3) detriment to the other party because of the reliance. *Anderson v. Great Bay Solar I, LLC*, 243 Md. App. 557, 608-09 (2019).

As stated above, Applicant's predecessor developer voluntarily agreed to go to mediation with CTCAC and to enter into the compliance program to avoid being penalized. It had the option to turn down the accommodation and accept its fate. In turn, because the developer agreed to mediate and create compliance parameters, the Planning Board and the community changed their position. Concessions were even made to allow the developer to avoid the violations that had already occurred. Ex. E at 5; *but see Old Republic Ins. Co. v. Gordon*, 228 Md. App. 1, 12, 137 A.3d 237 (2016) (Where party did not allege that her position changed based on other party's actions, equitable estoppel was nonetheless inapplicable). Based on the plain language of the Resolution, the Applicant, now in the shoes of the original developer, cannot obtain a change that does not meet the exceptions to the Compliance Plan. The promise to preserve the Town Center did not include a gasoline station placed in the middle of it.

While Elm Street is estopped, estoppel cannot be asserted against the County. Staff's or the Board's previous flexible, or even incorrect interpretations of the Compliance Plan, do not amount to a relinquishment of the requirements therein. *See Schaeffer v. Anne Arundel Cty., Maryland*,17 F.3d 711, 714 (4th Cir. 1994) ("Generally no estoppel as applied to a municipal corporation can grow out of dealings with public officers of limited authority where such authority has been exceeded or where the acts of its officers and agents were unauthorized or wrongful. . .") (Citation omitted.) *See also*, *Cty. Council for Montgomery Cty., Maryland v. District Land Corp.*, 274 Md. 691, 707 (1975), (holding that fact that developer had spent more than one million dollars on plans and studies did not result in vested rights in a zoning classification, even though building permits had issued.) In that case, District Land attacked the

resolution of the Council's application for a sectional map amendment as spot zoning. This was likewise rejected by the Court.

The Court then turned to the issue of benefit to the public. "Since we have satisfied ourselves that Resolution 7-797 was not a local amendment covering two tracts as the court below determined, but rather a sectional plan amendment and thus comprehensive rezoning, we turn to the question whether the rezoning bore a substantial relationship to the public health, comfort, order, safety, convenience, morals and general welfare. If it did, the rezoning enjoys a strong presumption of validity and correctness. 274 Md. at 701-02 (citation omitted). The Court so found based on the evidence before it. *Id.* at 702-704. So too here, the instant Resolution was amply supported by evidence indicating that the waiver of fines in exchange for conformance with the Compliance Plan and the benefits it provided to Montgomery County as a whole in addition to the residents of the greater Clarksburg community.

Indeed, the only instances in which estoppel has been applied against the government is where a zoning administrator has taken an action within its scope of authority, but not contrary to law, and the party alleging estoppel has materially changed its position based on that representation. *Permanent Financial Corp. v. Montgomery County, Maryland*, 308 Md. 239, 250 (1986). In *Permanent Financial Corp.,* the ordinance at issue was "open to at least two reasonable and debatable interpretations." 308 Md. at 251. Further, the County shared that interpretation and issued the building permit to Permanent on that basis. *Id.* Permanent Financial changed its position based on the issuance of the building permit and proceeded to construction. In contrast, here, there is no basis for any interpretation other than what the Resolution actually states and, for the most part, the County has recognized its binding nature.

C. Waiver

Applicant's Counsel also appeared to argue at the prior hearing that because the Master and Compliance Plan requirements have somehow been waived. However, waiver requires the "intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right." *Anderson,* 243 Md. App. at 608; *Chawla v. Transamerica Occidental Life Ins. Co.*, 440 F.3d 639, 645 (2006). There is no waiver unless a known right is clearly and intentionally renounced. *Chawla,* 440 F.3d at 645 (citing *Travelers Indem. Co. v. Nationwide Constr. Corp.*, 244 Md. 401, 291-92 (1966)). Here, neither the Board nor the members of the Clarksburg Town Center Advisory Committee have agreed to waive anything and no clear and intentional renunciation can be established. *See* Tr. at 63: 4-64 to 64: 1-20.

Applicant has proffered no evidence to support its contention that the County or the Planning Board intentionally waived the requirements of the Compliance Plan. That fact that there is no basis for waiver is further evidenced by the fact that the Board did allow for some deviations to the Master Plan for pre-existing violations whilst narrowly tailoring the Compliance Plan to stop future violations. Ex. E at 5. In contrast, Elm Street waived its own rights when it purchased the property subject to the requirements of the Resolution.

Based on these facts, there is no basis for arguing that the Resolution is "not binding". 1/23/2025, Tr. 47: 9-11. The fact that a Board may not have appreciated the significance of the Compliance Plan does not justify throwing it out and the Applicant in this case has not changed its position or detrimentally relied on any assertions of the Staff or Board – which were, in fact, directly contrary to the Resolution when they recommended approval of the conditional use. The *Shaeffer* Court noted that "the only exception to the limitation of estoppel against municipal corporations in Maryland arises when 'injustice sufficient to overcome the superior and

overriding claims of the public would result if estoppel was not invoked against the [municipality.'") *Id.* (alteration in original, citation omitted.) The Resolution makes plain that the agreement reflected in the Resolution was in the best interests of Montgomery County. The prior approval by the Board of deviations from the Compliance Plan does not translate into an "anything goes" approach to site plans.

V. Opponents' Requested Ruling from the Hearing Examiner.

Under Montgomery County's zoning scheme, the Planning Board provides a recommendation to the Hearing Examiner who can choose to approve or deny the conditional use. Montgomery County Code, Art. 59, App. A ("The Hearing Examiner will use these rules to govern zoning, conditional use and Board of Appeals referral cases."). Specifically, regarding gas station conditional uses, the Hearing examiner determines whether it will be permitted under Conditional Use § 7.3.1 and the Use Standards of § 3.5.13.C.2. § 3.5.13.C.2. The Planning Board's determination is a recommendation only; the decision rests solely with the Hearing Examiner.

Unfortunately, in this matter, the Planning Staff and Planning Board completely failed to consider the material requirements of the Compliance Program and Staff only paid lip service to it in the introduction to its report. The Application itself was not examined within the confines of the applicable Resolution. The Compliance Program and Resolution were also a settlement agreement. The terms and conditions run with the land. The Resolution and Compliance Plan continue to dictate how this property can be developed. The Application for a conditional use is neither necessary to accommodate a physical condition on the property nor is it required because of a change in law. It is a conditional use only. To permit the cavalier treatment of the Resolution and Compliance Program in this case would be a return to the days when Staff

allowed the developers to build and construct without regard to duly adopted plans that are actually in accord with the Montgomery Code and Regulations adopted thereunder. This case is the perfect opportunity for the Examiner to set the record straight and to deny the conditional use application for a gas station to maintain consistency with the Compliance Program and Resolution of the Board.

The Patel Parties respectfully request that the Examiner deny the application for conditional use for lack of conformance to the Resolution and Compliance Plan.

Respectfully submitted,

Leslie A. Powell, CPF No. 8612010408
Powell, LLC
19 North Court Street, Suite 201
Frederick, Maryland 21701
lpowell@powell-ll.com
(301) 668-7575-phone; (301) 668-7755-fax
Counsel for Opponent, the Patel Parties

Dated: February 7, 2025

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion To Deny Conditional Use Application No. Cu 20-2502 was e-mailed and mailed first-class this 7th day of February, 2025, to Robert R. Harris of Lerch, Early & Brewer, Chtd., 7600 Wisconsin Avenue, Suite 700, Bethesda, Maryland 20814, Counsel for Applicant.

/s/ Leslie A. Powell
Leslie A. Powell, CPF No. 8612010408