

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

---

**REPLY TO MOTION TO DENY CONDITIONAL USE APPLICATION CU20-2502**

Applicants, CTC Retail, LC and Weis Markets, Inc. (“Applicants”) submit this Reply to the Motion to Deny Conditional Use Application No. CU20-2502, submitted by Opponents on February 7, 2025.

**I. INTRODUCTION**

Opponents’ Motion to Deny asserts that a Resolution adopted by the Montgomery County Planning Board in 2006 approving a “Plan of Compliance” (“POC”), (OZAH Exhibit 45) prohibits the incorporation of gas pumps as an accessory use in the parking lot behind the proposed Weis grocery store. Applicants disagree. As set forth below, Opponents misread provisions of the POC, overlook others and ignore the history of the Planning Board’s interpretation of the POC in the 19 years since the Planning Board first approved it. As discussed below, and reflected in the Exhibits referenced herein, nothing in the POC prohibits gas pumps. Express provisions in the POC further include the authority of the Planning Board to make changes even where those changes might directly conflict with express terms of the POC. As such, even if there were a prohibition, the Planning Board could revise it as it has revised the approved plans multiple times over the decades since the POC was approved.

**II. BACKGROUND**

The Clarksburg Town Center mixed-use project was first recommended in the 1994 Clarksburg Area Master Plan. That Master Plan recommended a retail center with a grocery store,

as well as other unspecified commercial and residential uses at the south end of the Clarksburg Town Center Project, near Stringtown Road. It did not provide any specific design nor identify the possible retail uses other than a grocery store which it considered important to ensure viability of the retail (Clarksburg Master Plan, 1994, Page 46). Eventually, construction of the overall Town Center project began but then, in 2005, it came to an abrupt stop when some residents complained that the development was not proceeding in a manner consistent with the approved Project Plan, Preliminary Plan, and Site Plan approvals. As reflected in the POC documents (OZAH Exhibits 43-47), alleged violations included building height, setbacks, phasing and location of moderately priced dwelling units, elimination/reduction in the size of alleys and roadways, altered plan documents and a general lack of conformance of the completed development with the approved development standards. At that time, no part of the town center retail area had been constructed and, in fact, the town center retail still has not been built. As such, there were no identified building violations with respect to the particular portion of the property involved in the current Conditional Use Application.

The POC Resolution (OZAH Exhibit 45) and the related POC documents (Exhibits 43-47) focus on compliance issues that fall generally into three categories. First, there were violations with respect to development that had already occurred (See Page 5 of Opponent's Motion) which could generally be identified as "construction violations." Second, the development approvals for Clarksburg Town Center included incorporation of a variety of amenity features including a grand staircase at the Clarksburg United Methodist Church, a greenway bridge, Sinequa Square, an Eastside Pool, Murphy's Grove Pond and certain park areas. (See Exhibit A, attached hereto and included in OZAH Exhibit 46, "Clarksburg Town Center Plan of Compliance Design Concepts"). Those design concepts were prepared at the time to illustrate how these various amenity features

might be constructed. Third, although construction of the future retail center was discussed in the POC documents, and the POC called for “a new Site Plan for the retail core” (Id. at 4), the POC provisions related to it were very general. Although the “Design Concepts” included a rough concept for the retail core area, they provided no suggestions or prohibitions with respect to specific retail and commercial uses.

### III. ARGUMENT

#### A. Terms and Conditions of the Plan of Compliance

Consideration of the POC 19 years after its approval requires a complete reading of the Resolution (OZAH Exhibit 45, attached hereto as Exhibit B) as well as a reflection on the various issues with which it dealt. Opponents comment that Page 6 of that Resolution “orders the Respondents to comply strictly with each of the elements, terms and conditions of the Compliance Program and expressed otherwise under this Resolution.” The paragraph immediately following that statement, not included in Opposition’s Motion, however, states:

#### **§5. PLANNING BOARD AUTHORITY EXPRESSLY RESERVED.**

Except as expressly provided in this Resolution, nothing provided in this Resolution is intended, nor shall it be construed, to cede, relinquish or otherwise impair the discretion, authority or jurisdiction of the Board to consider any future applications, plans or approvals pertaining to the project according to the terms of this resolution, law and merits applicable. Without limiting the generality of the foregoing, it is understood that the Respondents shall be required in the future to obtain Board approval for one or more amendments to the Project Plan, Preliminary Plan and Site Plans relating to the project. The Planning Board recognizes that the Compliance Program is conceptual in nature and that additional review of more detailed plans may involve modifications. 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 only to require such modifications that are reasonably consistent with the Compliance Program. Subject only to such unforeseen project conditions, applicable law and regulations, express terms of this Resolution and the Compliance Program, the Board expressly reserves all lawful discretion to consider, approve, approve subject to conditions or disapprove any such future application according

to the law and merits presented at the time. Further, the Board expressly retains jurisdiction to consider and act upon any violation in the future that is unrelated to the Violations resolved according to the terms of this Resolution, alleged on the basis of this Resolution, or any act or omission by the Respondents (their successors or assigns) that accrues after the effective date hereof. (OZAH Exhibit 45, (emphasis added) and attached hereto as Exhibit B).

Reading this complete document, and observing the manner in which the Planning Board has interpreted the POC over the past 19 years, demonstrates that it is not anywhere nearly as rigid or restrictive as opponents argue, particularly with respect to the design of the retail center and uses included within it.

As noted above, the first, and arguably primary, consideration of the entire POC had to do with code and building violations for construction that had already occurred or was pending at the time, such as those cited by Opponents at Page 5 of their Motion. Given that these were violations of zoning ordinance provisions and specific development approvals, the Planning Board was expressly requiring strict compliance in resolving them unless “physical project conditions unforeseen by the Board, or applicable law” or other legal requirements precluded compliance. (OZAH Exhibit 45 at 6). At the same time, the full text of the POC Resolution cited above, recognized greater flexibility in applying the POC to future construction of the various amenity features as well as the retail center. Given that the amenity features were merely the subject of “design concepts” (OZAH Exhibit 46, and Exhibit A attached hereto) and not fully designed, there necessarily was considerable flexibility there. Indeed, the “design concepts” provided only general information about the future retail center necessarily providing broad discretion on the part of the Planning Board in approving plans for it. Given that the retail center had not been designed at that time, it would have been impossible to “strictly follow” the POC with respect to its design. Moreover, were the POC to be applied “strictly” to the subject Conditional Use approval for gas pumps, the impropriety of Opponents’ argument becomes clear. There is not one word in the entire

350 +/- pages of the POC documents submitted by Opponents that prohibits gas pumps in the parking lot of the Weis store, or precludes a filling station of any sort. Where a document is to be “strictly construed” one cannot go beyond the four corners of that document and read into it provisions that are not otherwise there. Maryland case law concerning contract interpretation confirms this.

Courts in Maryland apply the law of objective contract interpretation, which provides that “[t]he written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of a clear and definite understanding. Dumbarton Improvement Association v. Druid Ridge Cemetery Co., 434 Md. 37, 51, 73 A.3d 224 (2013) (quoting Slyce v. Carozza Props., Inc., 215 Md. 357, 368, 137 A.2. 687 (1958)).

There is no ambiguity in the POC with respect to whether a filling station (or in this case accessory gas pumps) would be allowed in the retail center. There is no mention of it whatsoever. Under a strict interpretation of the Plan of Compliance, the gas pumps thus are allowed just like any of the many other retail and commercial uses likely to be included in the retail center.

Given the absence of any POC provision prohibiting accessory gas pumps for the proposed grocery store, Opponents seek to bootstrap an argument based on comments in the POC documents that the Clarksburg Town Center community was intended to have “an attractive, charming pedestrian-oriented retail core.” (Motion at 10.) The proposed retail core, including the accessory gas pumps achieves this broad objective. Attached to the Conditional Use application as Exhibit 13 a comprehensive circulation exhibit for the area, including the retail core, showing extensive pedestrian facilities. The specific Conditional Use plans for the gas pumps, in the rear of the parking lot behind the stores (Conditional Use Exhibits 6 and 12) show how they are completely screened from those pedestrian facilities and have no impact on them. Additionally, as noted in the various plan approvals over the years, the potential office component, which would have

created significant traffic, has been deleted, meaning that there will be far less automobile traffic in the retail core than originally contemplated. (See Traffic Statement, attached as Exhibit 4 to the Conditional Use application and staff report, Exhibit 36 at 16-17).

#### B. Evaluation of the Plan of Compliance

Interpretation of the POC over the past 19 years, as reflected in the Planning Board's approvals of development that did not strictly follow the POC even where there were specific design concepts, underscores the Planning Board's discretion and supports its support for the subject Conditional Use. Attached as Exhibit C, is a matrix reflecting the many changes to the development plans for Clarksburg Town Center over those past 19 years. These include significant revisions to the concepts contained in the Plan of Compliance for the various amenity features as well as other changes. Not only do these approved plans reflect design changes, they also include deletion of elements like live/work units, retail parking garages, the open air market, office space and the library, all expressly referenced in the POC. These deletions and changes were approved by the Planning Board without the need to find that they were "required by or relating to physical project conditions unforeseen by the Board or applicable law" as Opponents would now assert. Rather, they fell within the Planning Board's broader discretion to "consider, approve, approve subject to conditions or disapprove any such future application according to the law and merits presented at the time." (Id. at p. 7.) The most recent evidence of this discretion was in February of last year. At that time, Ms. Amy Presley (See Exhibit D attached hereto) argued that the POC had to be strictly followed and that the retail center could not be approved as designed. The Board rejected that position based on its authority in the zoning ordinance, the Regional District Act and the POC itself. The Planning Commission staff report related to those amendments (OZAH Exhibit 54 at 57 and excerpts attached hereto as Exhibit E) showed the plan then being approved

by the Planning Board for both the grocery store and a pad in the parking lot behind the stores for the future gas pumps. This area was identified as “future development” due to the required approval of a Conditional Use application to implement it. In response to Ms. Presley’s comments about the Plan of Compliance, at that time, staff noted at Page 62 that the key elements of the POC had been completed and that the proposed retail center would both serve the public interest and be in substantial conformance with the POC. It noted that the retail center with the Weis Grocery would “complete the unbuilt commercial core, bring much-needed retail and services to the community, provide a plaza and splash fountain, all while responding to a notably changed retail sector and post-pandemic office market.” Id. at 62.

An analogous example of the Planning Board’s discretion in approving new development might be the County’s master planning process. By law, master plans are only considered to be “guides” not “straightjackets.” Montgomery County Md. v. Woodward & Lothrop, 280 Md. 686, 376 A.2d. 483 (1977); Trail v. Terrapin Run, LLC, 403 Md. 523, 943 A2d. 1192 (2008). Indeed, the 1994 Clarksburg Master Plan goes even further stating that:

Master plans generally look ahead about 20 years from the date of adoption, although they are intended to be updated and revised about every 10 years. It is recognized that circumstances will change following adoption of a plan and that the specifics of a master plan may become less relevant over time. Any sketches or drawings in an approved master plan are for illustrative purposes only and are intended to convey a general sense of desirable future character rather than a specific commitment to a particular detail design. (Attached as Exhibit H).

The Planning Board has correctly applied that flexibility, recognizing the Master Plan is now more than 30 years old and the POC is 19 years old.

Finally, Opponents argue that the planning staff and Planning Board, in their support of this Conditional Use application, should have evaluated the issue of the gas pumps further and considered how they would or would not conform with the POC. Given the Planning Board’s

interpretation and application of the POC over a 19 year period, and its analysis of that issue yet again in the February, 2025, approvals for the retail center (Exhibits 53 and 54), as well as the absence of any contrary testimony at the hearing, this was not necessary. In its recommendation for approval of the gas pumps (See OZAH Exhibit D attached hereto at Page 11), staff explained that the previously approved plan showed the gas pumps at the proposed location. They concluded the pumps were “one element of the Town Center vision.” The Planning Board’s role in a Conditional Use application is to provide any comments or recommendations that deem appropriate and they saw no inconsistency with the POC.

The overarching objective of the POC was to complete Clarksburg Town Center as a mixed-use community with supporting retail, including a grocer. For many reasons, that retail component has proven to be a substantial challenge. Applicants have worked hard to bring that component to fruition in a manner that can include the strongly desired grocer and other retail in a manner that will enable that retail to open and remain open. Applicant will present evidence at the hearing as to why the gas pumps are a critical component to achieving that vision. In the meantime, not only has the planning staff and Planning Board supported this Conditional Use application, but multiple members of the community have submitted letters of support as well. There is no basis to conclude that the POC precludes approval.

#### **IV. CONCLUSION**

The planning staff and the Planning Board both have found that the application meets all of the standards for approval of a Conditional Use in Section 59.7.3.1.E of the Zoning Ordinance, conforms with previous approvals for the site (Exhibit 5 at 11) and will be harmonious with the surrounding neighborhood (Exhibit 5 at 14). This application meets any applicable provisions of the POC and the overall Conditional Use requirement and should be approved.



Respectfully submitted:



Robert R. Harris, Esquire  
Lerch, Early & Brewer, Chtd.  
7600 Wisconsin Avenue, Suite 700  
Bethesda, Maryland 20814  
(301) 841-3826  
rrharris@lercheearly.com  
Counsel for Applicants

Dated: February 18, 2025

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Reply to Motion to Deny Conditional Use Application No. CU20-2052 was e-mailed and mailed first-class this 18<sup>th</sup> day of February, 2025, to Leslie A. Powell, 19 North Court Street, Suite 201, Frederick, Maryland 210701 and by email to Amy Presley.



Robert R. Harris, Esquire