

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6238

**APPEAL OF SLIGO BRANVIEW COMMUNITY ASSOCIATION, WILLY CALDERON,
ENGA ALMEIDA, RELIABLE CLEANERS (SOOK HYE), CLAUDETTA W. HARDING,
PATRICIA DAUS, JANET CALLIS, RITA CLARK-GOLLUB, REBECCA LAVASH,
MARILYN PIETY, WANDERLY CALDERON, PHILIP A. HOLMAN, RELIABLE
CLEANERS (YONG KIM HYE), JOHN S. FITZGERALD, JOHN CONROY, ROSANNE
EITZEN, CATHERINE SHIELDS**

OPINION OF THE BOARD

(Hearings held July 9, 2008, February 18, 2009, May 13, 2009, and July 29, 2009)
(Effective Date of Opinion: October 2, 2009)

Case No. A-6238 is an administrative appeal filed by William J. Chen, Jr., Esquire, on behalf of the Sligo-Branview Community Association and other listed Appellants ("Appellants") who live or have their businesses near the Property located at 8709 and 8711 Flower Avenue, Silver Spring, Maryland 20901 ("the Property"). Appellants charge administrative error on the part of the County's Department of Permitting Services (ADPS@) in the "issuance of Building Permit 467318, with 445026 also; Mechanical Permit 469083, and Electrical Permit 469539."

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), and Section 2-112 of the Montgomery County Code, the Board scheduled public hearings on this appeal for July 9, 2008, February 18, 2009, May 13, 2009, and July 29, 2009. William J. Chen, Jr., Esquire, represented the Appellants. Edward D. Gehres, Esquire, and Karen Smith Thiel, Esquire, of Patton Boggs LLP, represented Intervenor Mary's Center ("Mary's Center" or "Intervenor"). Stacy P. Silber, Esquire, of Holland and Knight, represented Intervenor property owner Flower Avenue Shopping Center ("FASC" or "Intervenor"). Assistant County Attorney Malcolm Spicer represented Montgomery County.

Decision of the Board: Administrative appeal **DENIED**.

PRELIMINARY MATTERS

On June 20, 2008, the Board received a preliminary Motion to Dismiss this appeal from Counsel for Mary's Center and Counsel for DPS. The Board received Opposition to that Motion, dated July 7, 2008, from Counsel for the Appellants. Pursuant to its authority in

Section 2A-8 of the Montgomery County Code, the Board heard oral argument on these preliminary Motions on July 9, 2008. At the hearing, because documents filed by Appellants failed to specify any grounds for their challenge to Mechanical Permit 469083 and Electrical Permit 469539, the appeals of those permits were dismissed. In addition, the Board dismissed the appeal of Building Permit 445026 for lack of jurisdiction, since that Permit was issued April 3, 2007, and the appeal was not filed until November 20, 2007, long after the 30 day window for appeal set forth in Section 8-23 of the County Code had expired. After considering the issues identified in Appellants' Statement of Misinterpretation of County Code and Reason for Appeal, the Board determined that Appellants had stated some claims upon which relief could be granted. The Board thus denied the remainder of the Motion to Dismiss, and, in a Resolution and Notice dated August 13, 2008, enunciated a list of issues not dismissed and remaining to be heard on appeal, as follows:

Whether, in issuing a building permit, the Department of Permitting Services 1) is required to consider; and, in this case 2) properly considered, the following issues:

The requirement of Section 8-24(f) of the Montgomery County Code, to file a plot plan with a building permit application;

Whether the permit holder is a qualified applicant for the purposes of Section 8-24(c) of the Montgomery County Code;

Whether the proposed use constitutes a medical clinic, whether the proposed use is permissible in the subject location, and the significance of a proposed use in evaluating a permit application;

The extent to which Section 8-26(g) of the County Code and Section 59-A-3.1 of the Zoning Ordinance invoke the parking requirements of Article E of the Zoning Ordinance, and whether those requirements have been satisfied in connection with this permit; and

Whether the proposed use is a change in use for the purposes of Section 8-7(d) of the Montgomery County Code, and the significance of such a determination to the issuance of a building permit.

On January 29, 2009, the Board received a joint Motion for Partial Summary Disposition from Counsel for Mary's Center, Counsel for FASC, and Counsel for DPS, seeking disposition of a portion of the third issue on grounds that undisputed evidence establishes that Mary's Center is not a medical clinic, and disposition of the fourth issue in its entirety on grounds of collateral estoppel based on a decision of the Court of Special Appeals regarding proposed development of the "Arless" property adjacent to the FASC. See Exhibit 30. The Board received Opposition to that Motion, dated February 9, 2009, from Counsel for the Appellants. See Exhibit 34. Pursuant to its authority in Section 2A-8 of the Montgomery County Code, the Board heard oral argument on these motions at the outset of the February 18 hearing, but elected to defer any ruling until the proceedings were concluded.

FINDINGS OF FACT

The Board finds, based on undisputed evidence in the record, that:

1. The subject Property is known as 8709 and 8711 Flower Avenue, Silver Spring, Maryland 20901 (Part of Lot 20, Block 1, Pt. 21 Cissell's Addition to Silver Spring Subdivision), and is located in the C-1, CROZ zone.
2. Building Permit 467318 was issued October 22, 2007, to Mary's Center, granting permission to alter a business building. It includes the following permit conditions: "Remodel for new tenant buildout in space number 8709 & 8711. See also A/P# 445026 that is also related to this [sic] two spaces."
3. Ms. Gail Lucas, Permitting Services Manager for DPS, testified for the County. Ms. Lucas testified that she was familiar with building permit No. 467318, and that the applicant was identified as Mary's Center. She testified that the application was reviewed by her staff, and that it included copies of drawings and plans showing the work to be done, a site plan showing where the building sits on the lot, and other construction drawings. She testified that her division does not take in applications for electrical or mechanical permits except in connection with new construction.

Ms. Lucas testified that the site plan survey at Exhibit 11(b) was submitted with the building permit application. She testified that this document was sufficient to satisfy the plot plan requirement set forth in Section 8-24(f) of the County Code. She testified when reviewing the materials submitted with a building permit application, her staff checks to make sure that a document such as this site plan survey is part of the packet. She testified that her staff checks to ensure that it shows dimensions, that it properly identifies the spaces to be changed or built, and that it has the address and other street information on it. Ms. Lucas then testified regarding each element required by Section 8-24(f), indicating for the Board where each of those required elements was contained on the site plan survey in Exhibit 11(b). See Feb. 18 Tr. at pages 69-71. She testified that a plot plan does not have to be titled "Plot Plan" in order to meet the plot plan requirements of Section 8-24(f), and stated that site plans often satisfy these requirements. On cross examination, Ms. Lucas testified that the information required by Section 8-24(f)(3) about the use of the existing building is contained under the General Notes, the survey comments, and under the legal description. She stated again that the information provided is sufficient to meet the requirements of Section 8-24(f)(3). When asked how many buildings were shown, Ms. Lucas said 5 or 6, and when asked to identify where Mary's Center was, she testified that the site plan survey doesn't say, but on re-direct, she testified that the construction drawings that were submitted with the application contain a schematic which shows the location of Mary's Center. See Exhibit 11(c), page 1.

Ms. Lucas testified that the applicant also submitted construction drawings for this interior alteration. See Exhibit 11(c). She testified that her staff ensures that the application contains these drawings, and that the drawings contain the required information, but that the technical review of these drawings is not done by her staff.

Ms. Lucas testified that page 2 of the building permit application in Exhibit 11(a) identifies Mary's Center as the owner of the Property. She testified that DPS had since received documentation from Mary's Center and FASC clarifying that Mary's Center was not the owner, but was a tenant. This documentation included an affidavit from Greg Fernbok, a partner in FASC LP, stating that Mary's Center was authorized to apply for the building permit. See Exhibit 25, pages 6 and 7, and Exhibit 35. Ms. Lucas testified that DPS considers this an amendment to the permit application, and takes it into the permit record. She testified that this kind of information can be readily revised, that she has seen it done in other instances, and that she has never seen a permit revoked for something like this. Ms. Lucas testified that she had also received an affidavit from Maria Gomez, President and CEO of Mary's Center for Maternal & Child Care, Inc. That affidavit states that James Moore of Rapid Permit Service was a duly authorized individual with authority to execute a Verified Affidavit on behalf of Mary's Center, and acted with approved authority. See Exhibit 25, pages 8 and 9.¹ Ms. Lucas testified that she sent a letter to Ms. Gomez on March 3, 2008,² acknowledging receipt of all of these documents, and accepting them into the permit record. See Exhibit 25, page 10. Ms. Lucas testified that on the basis of these affidavits, DPS was satisfied that all technical deficiencies with the permit application had been corrected.

On cross examination, Ms. Lucas testified that she was familiar with Section 8-24(h) of the County Code (pertaining to amendments to the permit application). She testified that DPS did not have any reason to reject the corrections submitted by Mary's Center. She stated that it was her understanding that any deficiencies which may have existed with the permit application had been cured.

Ms. Lucas testified that Section 8-24(c) of the County Code makes Mary's Center, as a tenant of FASC, a qualified applicant, and permits them to apply for a building permit. See Exhibit 36.

On cross examination, Ms. Lucas testified that Exhibit 37 was the Use and Occupancy ("U&O") Certificate for Mary's Center, and that it had been issued on January 9, 2008. She testified that since an applicant can use the premises after a U&O is issued, the work under the permit was completed.

4. Mr. Hadi Mansouri, Division Chief of the Building Construction Division for DPS, testified for the County. He stated that he is a structural engineer and a graduate of the George Washington University. Mr. Mansouri stated that he is familiar with Chapter 8 of the County Code, including Section 8-7(d). See Exhibit 39. As Division Chief, Mr. Mansouri testified that it is his job to interpret Chapter 8.^{3,4} Mr. Mansouri testified that he was familiar with the

1 On cross examination, Ms. Lucas testified that James Moore had submitted the permit application, and that she knew him, because he is a "permit runner" who frequently files building permit applications for his clients with DPS. She testified that in the past, he has corrected any mistakes on permit applications that he filed, and that she did not recall any mistakes which resulted in revocation.

2 Ms. Lucas testified on cross examination that DPS had received the documentation from Ms. Gomez et al. in February, 2008.

3 In response to a Board question asking him to distinguish between interpreting and applying the Code, Mr. Mansouri testified that when it is difficult to meet the terms of the Code, Chapter 8 allows an interpretation to meet

plans and drawings submitted with the application for building permit No. 467318. He testified that the applicant was requesting a change in use from M (mercantile) to B (business),⁵ and that the space met the code requirements for a business use. Mr. Mansouri testified that Section 8-7(d) of the County Code refers to a change of use, and provides that if a portion of a building needs to be changed, it must be brought up to code.⁶

Mr. Mansouri testified that the portion of this building that is undergoing change is separated from the other tenant space by vertical fire separations in the form of concrete masonry walls, and thus meets the first part of Section 8-7(d). See Exhibit 11(c) at page 10 (drawing A-3, page 4, note at top referencing existing CMU (concrete masonry unit) wall). He later testified that this fire separation renders this space a separate “building” for purposes of the IBC 2003.⁷ Mr. Mansouri then testified that the exitway requirement in Section 8-7(d) (“and the existing portion shall be made to comply with the exitway requirements of this chapter”) only applies if the tenant is located in the middle of the shopping center, such that egress from the tenant space to the outdoors would be through other occupied space. He testified that in that instance, if the use was being changed from a less to a more intense use, there would be a need to ensure that the exits could handle the increase in traffic. He testified that because the tenant space for Mary’s Center is its own “building” by virtue of its fire separation walls, and has its own exitways to the front and to the rear, both of which exit directly to the outdoors, the “exitway” requirement of Section 8-7(d) is not relevant to this space.

5. Mr. David Niblock, Zoning Analyst with DPS, testified for the County. He testified that he has worked for the County since 1985, and that he has held his current position since 1993. Mr. Niblock testified that when building permit applications are made, even for interior alterations, he gets to check them for zoning problems. Mr. Niblock testified that the Flower Avenue Shopping Center is zoned C-1, convenience commercial. He testified that the use sought by Mary’s Center is permitted in the C-1 zone. He testified that he recalled questioning the applicant about the type of use proposed,

the intent of the Code.

4 In response to continuing objections regarding interpretations of the Code by DPS personnel, Counsel for the County stated that subparagraphs (A) and (B) of Section 2-42B(a)(2) of the County Code make clear that DPS is responsible for “code enforcement, inspection, and licenses (except where those functions are assigned by law to another department or agency), including: (A) administering, interpreting, and enforcing the zoning law and other land use laws and regulations; and (B) administering, interpreting, and enforcing construction codes, and laws and regulations governing sediment control, stormwater management, floodplain management, special protection areas, and pond and excavation safety....” See Exhibit 47.

5 Mr. Mansouri testified that these designations are set forth in the International Building Code 2003, which has been adopted by the County.

6 Section 8-7(d) of the County Code (“Part change in use”) states that “[i]f a portion of the building is changed in occupancy or to a new use group and that portion is separated from the remainder of the building with the required vertical and horizontal fire divisions complying with the fire grading in this chapter, then the construction involved in the change shall be made to conform to the requirements for the new use and occupancy and the existing portion shall be made to comply with the exitway requirements of this chapter.”

7 In response to a Board question, Mr. Mansouri stated that the Zoning Ordinance has its own definition of “building.” He went on to testify that Chapter 8 adopts the IBC, which states that separate buildings are created by firewalls if the space separated has separate mechanical equipment. In response to a question from counsel, he stated that in his application of Chapter 8, he applies the IBC definitions.

since the building permit application does not specify the use. Mr. Niblock testified that he had contacted the applicant initially to make sure that Mary's Center was not a medical clinic, and that the applicant had stated that there was usually one practitioner, sometimes two, but never more than two. Mr. Niblock testified that a "medical clinic" is defined by the Zoning Ordinance as having three or more medical practitioners, and thus Mary's Center was not a medical clinic. He went on to say that just as the Zoning Ordinance definition of medical clinic clearly requires three or more medical practitioners, so the definition of medical practitioner is similarly clear. See Section 59-A-2.1. Thus Mr. Niblock testified that he ascertained through questioning that Mary's Center was best categorized as a professional and business office, which is a permitted use in the C-1 zone. Mr. Niblock testified that this was a change in the use of this space. He testified, based on an old Use and Occupancy Permit, that the space occupied by Mary's Center had previously been an M (mercantile) use. See Exhibit 11(j) (U&O for supermarket with wine and beer at 8709, U&O for grocery store at 8711).

With respect to parking, Mr. Niblock testified that in a case like this one, where there is a change in the use of an existing building, DPS looks at the previous use of the space to determine how many parking spaces it required. In this case, Mr. Niblock testified that the previous use required 5 spaces per 1,000 square feet of space. He then testified that the proposed use only requires 2.4 parking spaces per 1,000 square feet, less than half of that required by the previous use. Mr. Niblock testified that Section 59-E-5.51, which he read into the record, says that parking lots constructed with a valid permit before 1984 do not have to comply with Article 59-E (the parking Article) unless they were modified as set forth in Section 59-E-6.1. See Exhibits 42 and 44. He testified that the State Department of Assessments and Taxation data for the Flower Avenue Shopping Center property shows that it was built in 1950. See Exhibit 43. He then testified that nothing in Section 59-E-6.1 would trigger a need for compliance of this property with Article 59-E, and went through each subsection of that section explaining why he did not believe that subsection would trigger a need for compliance, as follows:⁸

Regarding subsection (a) of Section 59-E-6.1, Mr. Niblock testified that there was no enlargement or reduction of the building area greater than 10 percent, stating that the building was the same size. Regarding subsection (b), Mr. Niblock stated that he was not aware of any enlargement, reduction or exterior alteration involving costs greater than 10 percent. He stated that this was an interior alteration only. Regarding subsection (c), Mr. Niblock stated that to the best of his knowledge, the alterations did not exceed 25 percent of the value of the building. He testified that per the SDAT records, the assessed value of the improvements on the property (i.e. the building) was about \$3 million. Mr. Niblock affirmed on cross-examination that interior alterations in excess of 25 percent of the value would trigger this provision. Mr. Niblock testified on direct examination that the proposed alterations did not trigger subsection (d). When asked on cross-examination whether this subsection would require DPS to consider the cumulative value of all alterations to this shopping center, Mr. Niblock testified that he

⁸ See Feb. 18 Tr. at pages 112-117. The text of Section 59-E-6.1 is set forth under the heading "Conclusions of Law."

would look at the shopping center as a whole. He further testified that he had searched the electronic records of DPS, which contain everything since 1983, for other permits issued for this shopping center, and found very little—only a couple of electrical permits from the 1990s. With respect to subsection (e), Mr. Niblock testified on direct examination that this section applies to a change in use which requires more parking than the previous use, and that in the instant case, where the use was going from an M (mercantile) use to a B (business) use, less parking was actually required, and so this subsection was not applicable.

Mr. Niblock testified that the 1948 Zoning Ordinance required one parking space for every 300 square feet for a one-story building devoted to retail trade or merchandising. See Exhibit 45. He testified that according to the construction plans in the record at page 7 of Exhibit 11(c), the space occupied by Mary's Center was approximately 3,245 square feet. He calculated that at 2.4 parking spaces per 1,000 square feet, Mary's Center would require nine parking spaces, rounding up. He testified that this is how DPS calculates parking. He testified that the 2.4 space requirement for this use is set forth in Section 59-E-3.2 of the Zoning Ordinance, noting that the property was located in the southern zone, and was more than 1,600 feet from a metrorail station. See Exhibit 46. Mr. Niblock testified that this requirement for 9 spaces is a little less than half of what was required in 1948. On cross-examination, he testified that there are eight parking spaces immediately in front of Mary's Center, and six others nearby. In response to a Board question, he clarified that these spaces are not reserved for use by clients of Mary's Center. Still on cross-examination, Mr. Niblock testified that it is not the practice of DPS to calculate parking for the entire shopping center except where the new use would require an increase in parking over that required by the old use. In response to additional questioning, Mr. Niblock testified that DPS does not have the manpower to check parking for an entire facility every time they review a permit for an alteration of one store/use within that facility, noting that at present, DPS' inspections are complaint-driven. He expressed concern that closing the doors of existing uses at such time as it might be discovered that they had inadequate parking might amount to a taking.

Finally, Mr. Niblock testified that he has had instances in shopping centers where there would be an increase in the parking requirements. He testified that in that case, the applicant has to provide a parking analysis showing adequate parking, and that otherwise, they would have to change something, relocate, or get a parking waiver. He testified that there was no need for such an analysis in this case, since the amount of required parking was decreasing. See Feb. 18 Tr. at pages 123-124.

6. Ms. Marilyn Piety, a member of the Sligo-Branview Community Association, testified for the Appellants. Ms. Piety testified that she moved into the neighborhood in 1964, and that she is familiar with the Flower Avenue Shopping Center. She stated that she shops there.

Ms. Piety testified that in the fall/winter of 2005, she asked DPS for records pertaining to the Flower Avenue Shopping Center, but that the County would not give them to her. Rather, she testified that she received an email from Joe Koslowski of DPS stating that

DPS had plot plans and U&Os that she could purchase.⁹ She testified that she sent him \$2.40, and that he sent her a plot plan, which she testified she had not altered. See Exhibit 49. She testified that she met with Robin Ferro of DPS in the Spring of 2008 to discuss this plot plan. She testified that this plan was drawn in 1954 when the new building (which she testified was a Woolworth's) was constructed. She testified that the new building occupied space that had previously been a parking lot.¹⁰

Ms. Piety testified about the plot plan she had received. See Exhibit 49. She testified that it showed a shopping center located at Flower Avenue and Piney Branch Road, part of which had been constructed in 1950, and part in 1954. She testified as to the current location of various stores, as well as the location of parking. She testified that two properties in the center of the shopping center are privately owned; she testified that the Arliss lot is located on the left hand side of Exhibit 49. Ms. Piety testified that the 1954 plan required 297 parking spaces based on the uses that were there at the time, but that the shopping center currently has only 94 off-street parking spaces. She testified that this is inadequate. She testified that there should have been 297 parking spaces for this shopping center in 1984 (when the Section 59-E-5.51 grandfathering provision took effect), and that regardless of the number of spaces that Mary's Center needs, they do not have it. She testified that it would have been easy for Mary's Center to calculate required parking on a spread sheet in connection with the plot plan requirements. She then explained how she had calculated the parking requirements for the shopping center as it currently exists. She testified that she used available square footage totals, and estimated the square footage allocations for stores located within larger total "boxes." She clarified that she had to estimate the square footage of the martial arts studio that sits over the food store (about 2,000 square feet). See Exhibit 51. She testified that for uses within the shopping center that had not changed since 1948, she used the 1948 Code to calculate the parking requirements (e.g. the barber shop). She testified that for all other uses, she used the current Zoning Ordinance to calculate the required parking. She testified that the theater is currently vacant and for rent.¹¹ She testified that it needed 236 parking spaces.

In response to Mr. Niblock's testimony that this parking lot should be grandfathered because it was built before 1984, Ms. Piety reiterated her earlier testimony that there should have been 297 parking spaces in 1984, and went on to testify that there have been major changes to the tenants at the shopping center since that time. When asked

9 Counsel for the Appellants attempted to characterize the request for information by Ms. Piety as a complaint to which DPS was non-responsive. Counsel for the County objected to this characterization. In response to a Board question asking if there was a formal procedure for filing complaints with DPS, Counsel for the County stated that DPS has a complaint line, and that Mr. Koslowski does not answer complaints.

10 At this point, Counsel for the Appellants stated that his clients take the position that when an application for a building permit is submitted, the entire building must be reviewed for compliance with the law, including the Zoning Ordinance, per Section 59-A-3.1(b) of the Zoning Ordinance and Section 8-26(g) of the County Code. He argued that the Court of Appeals recognized in the *Remes* case (387 Md. 52 (2005)) that the issuance of a building permit requires compliance with the Zoning Ordinance, and thus that when a building permit application is submitted, DPS has an obligation to evaluate the entire building, not just the bay being altered. At the May 13 hearing, Counsel appeared to change this position, arguing that it was not DPS' duty to evaluate the entire building, but rather that the onus of showing that the entire building complies with the Zoning Ordinance falls on the applicant.

11 When asked by a Board member if she knew how long the theater had been vacant, Ms. Piety testified that to the best of her knowledge, the theater had been vacant for a couple of years.

by a Board member if she knew what the space currently occupied by Mary's Center had been used for in 1954, Ms. Piety testified that 8709 Flower Avenue had been a dry cleaners, and that 8711 had been a bakery. She stated that these old uses were listed in an article that had run in the Washington Post.

Ms. Piety testified that she met with Robin Ferro of DPS in 2008. She testified that she wanted to find out whether the 1954 plot plan (Exhibit 49) showed the approved parking for the FASC, or whether there were later approvals. She testified that Exhibit 49 was the most recent approval.

Ms. Piety testified that she was familiar with FASC, having lived near the shopping center since 1964. She testified that there are 94 parking spaces there, that the parking lot is asphalt with striping, and that there are four driveway aprons. She testified that the parking lot has in and out signs, and that there are islands in the little parking lot in front of the buildings.

Ms. Piety testified that the footprint of the building has not changed since 1964, but that the uses have changed. She testified that the Arliss lot is .91 acres (39,639.6 square feet). She testified that the Arliss lot is shown on Exhibit 49, and that it is the area to the left of the white area on that exhibit, which depicts the two properties owned by others. She testified that there is a pass-through where you can drive a car that goes behind those two properties and connects the Arliss lot to FASC. She testified that the Arliss lot is currently used for parking, and contains 82 spaces.

In response to a question asking about changes to FASC since 1984 (the grandfathering date per Mr. Niblock), Ms. Piety testified that where there is currently a restaurant there used to be a liquor store, and that where there is currently a storefront church there used to be a retail gift/jewelry shop. She testified that these changes in use would occasion a change in the parking requirements.

Ms. Piety testified that after the February 18, 2009 hearing, when the County raised the exemption for parking facilities constructed prior to 1984, she recalculated the parking requirements for the shopping center using the assumption that the lot qualified for the exemption. See Exhibit 54(b). She testified that she also found an accurate list of current uses at the shopping center and the square footage dedicated to those uses. See Exhibit 54(c) (taken from website of leasing agent, H & R Retail). She testified that she used the square footage totals in Exhibit 54(c) to do her revised calculations where there was a discrepancy between those figures and the figures she had previously used, with the exception of the storefront church, which she testified was not shown on Exhibit 54(c). Ms. Piety testified that in making her new parking calculations, where the use had not changed since 1984, she used the parking requirements of the 1948 Zoning Ordinance (shown in italics); where the use had changed, she used the requirements of the current Zoning Ordinance (shown in Roman type). She went on to testify that the El Golfo Restaurant, Mary's Center, and the storefront church were all new uses. She testified that whereas the space now occupied by the El Golfo Restaurant had previously required 20 parking spaces, the restaurant use required 78.6 spaces. She testified that the church needs 12.5 spaces, based on her attendance at a Sunday service at which there were 50 people. Finally, she testified that per DPS,

Mary's Center needed 9 parking spaces. Ms. Piety then testified that she had previously estimated the square footage of the martial arts studio as 2,000 square feet, but that Exhibit 54(c) shows that the space is in fact 2,778 square feet, increasing the number of spaces required by that use to 34.73. Ms. Piety testified that the shopping center required a total of 399.66 parking spaces.

Ms. Piety also testified about the plot plan requirements. She testified that the documents submitted in connection with the application for Building Permit 467318 did not satisfy all of the plot plan requirements of Section 8-24(f), stating that no dimensions, location or use of the existing building were given, and that the location of Mary's Center was shown incorrectly on the diagram. She testified that the number of individual "units" in the shopping center was incorrect, that in some areas too many units were shown, in some areas, too few were shown, and that not all of the addresses were correct. See the first page of Exhibit 11(c), and Exhibit 55. She testified that the purpose of the plot plan is to show where in the building the construction of Mary's Center would be located. When asked by a Board member what exactly on Exhibit 55 she took issue with, Ms. Piety testified that the striped "area of work" is shown as being in the middle of a bank of stores, but that the spaces are depicted too far to the right, and that in fact, they are at the end, adjoining the department store space. She testified that the addresses shown were correct, but asserted that the footprint shown was inaccurate; she compared it to the footprint on a document submitted in connection with the issuance of the use and occupancy permit for this space. See Exhibit 56. She stated that the applicants were required to show the existing units in the building, their sizes and uses, but that they had not submitted anything to satisfy this requirement. She testified that information about these other uses is needed to calculate parking. She finished by saying that the applicant is supposed to submit a correct drawing. When asked by a Board member if this wasn't a distinction without a difference, she testified that there is nothing in the permit application which shows dimensions, to which counsel for the County responded that scaled drawings showing the dimensions for Mary's Center and correctly identifying its address were submitted as part of the application package, and that an inspector would know where to go to look at the work. Counsel for the County continued by saying that any defect would have been cured by Exhibit 54(c), which shows uses and square footage.

When asked if she could explain why this appeal had been filed, Ms. Piety testified that the appeal was filed because there is insufficient parking for this shopping center, which creates parking problems in surrounding residential areas and occasions overcrowding in other areas of the parking lot. She stated that this situation is now worse with the removal of the Arliss lot.¹²

On cross-examination, Ms. Piety testified that she works for Montgomery County, but not for DPS. She testified that she has been active in her community for years, and has spent a lot of time reading the Zoning Ordinance. She testified that she initiated this appeal in the Fall of 2007, and that she understood that it was a legal action against DPS. She testified that she called DPS employee Robin Ferro directly when she met with her in Spring, 2008, and identified herself by name, but did not provide Ms. Ferro

¹² Later testimony indicated that the Arliss lot is still a parking lot, marked for shopping center parking.

with a business card. She said she called Ms. Ferro in the morning, and Ms. Ferro told her to come to DPS. She testified that she did not contact counsel for DPS to tell him or anyone else that she wanted to ask DPS questions related to this appeal. Ms. Piety testified that she met Ms. Ferro in the big lobby at DPS—not in a conference room or Ms. Ferro’s office—and that the meeting was short. When asked if she remembered any of the specifics of her meeting with Ms. Ferro, Ms. Piety testified that she wanted to make sure that Exhibit 49 was a valid document that accurately showed the parking for the shopping center. She testified that she didn’t recall if she told Ms. Ferro how she had obtained this document, but that she had told Ms. Ferro she was concerned because the actual parking was less than that shown on this document. She testified that Ms. Ferro agreed that this was a valid document that showed parking, but did not say why she thought it was valid. She testified that she didn’t recall that Ms. Ferro checked any records.

When asked on cross-examination whether she stood by her original parking calculation that 470 spaces were needed, as shown on Exhibit 51, or by her revised calculation calling for 399 spaces, contained in Exhibit 54(b), Ms. Piety testified that that depends on the assumptions made. She testified that if you assume that the parking lot is grandfathered by the 1984 exemption, then she stands by Exhibit 54(b). She testified that if the parking lot is not grandfathered (and she asserts that it is not), then she stands by the calculation in Exhibit 51, with minor modifications to reflect the data she received from the leasing agent. She testified that regardless of what the correct number is, it is higher than the 94 spaces that are currently there, adding that even the 297 spaces shown on the 1954 plot plan is more than 94. When asked why she included parking in Exhibit 54(b) for the theater which she had testified had been vacant for years, she testified that because the theater was for rent, she thought it should be included, and that even without it, the number of required spaces would still be more than 94. When asked about her earlier statement that the theater was for rent, and “should be used,” Ms. Piety clarified that FASC should only try to lease and use this space if they have adequate parking.

On cross-examination, Ms. Piety confirmed her assertion that FASC has 94 parking spaces. When asked if the Arliss lot had parking spaces today that one could park on, Ms. Piety said yes, but added that she wasn’t sure if it was legal to park there. She stated that she had not included that parking in her calculations of parking available for Mary’s Center. She stated that you can drive onto that lot, but that it’s private property. She stated that if you include the Arliss lot, there are 176 parking spaces. When asked by a Board member if the Arliss lot was posted for parking, Ms. Piety testified that the Arliss lot has signs that say “Parking for Flower Avenue Shopping Center.” She testified on cross-examination that the application did not show the Arliss lot, that it only showed the 94 parking spaces. When asked why she didn’t count the 5 street parking spaces shown on Exhibit 53, and asked if she was aware that those spaces were on FASC property, she testified that even if the shopping center had 99 parking spaces, it still did not have close to the required number of spaces.

7. Ms. Sheila Daniel Kaplan testified for Intervenor Mary’s Center. Ms. Kaplan testified that she has worked as an interior architect for 27 years, and that she designed the space for Mary’s Center. Ms. Kaplan testified that she

started working with Mary's Center in the Spring of 2007, and that she had signed a letter agreement for a space plan. She testified that she knew the space was leased from FASC, and that Greg Fernbok was the landlord's representative. She testified that she understood from the beginning that Mr. Fernbok had authorized the work undertaken, and that she was responsible for getting the necessary permits.

Ms. Kaplan stated that she recognized Exhibits 11(a), (b), and (c), testifying that Exhibit 11(a) was the building permit and underlying application, that Exhibit 11(b) was the site plan submitted with the permit application, and that Exhibit 11(c) contained the architectural and engineering construction drawings. Ms. Kaplan testified that she had James Moore at Rapid Permitting Service apply for the permit. She testified that she used a permitting service because it was less expensive than filing for the permit herself, and because permitting service companies are, by virtue of their work, very familiar with the people and procedures at DPS. She testified that she uses Rapid Permit Services "all the time," and that they are reliable. Ms. Kaplan testified that she provided Mr. Moore with Exhibits 11(b) and (c), and that he filled out the permit application found in Exhibit 11(a) based on the information in the drawings that she had given him. She stated that the application was submitted on August 13, 2007. She testified that she did not know why the permit application listed Mary's Center as the owner of the property, but suggested that that was a common error, and that perhaps it was due to the fact that Mary's Center was paying the bills. Ms. Kaplan testified that DPS did ask questions about the permit application. She testified that DPS asked for structural calculations for the rooftop air conditioning units, and that she provided that information. She testified that DPS was satisfied, and that they issued the building permit.

Ms. Kaplan testified that the work encompassed by her design documents began in early to mid-September of 2007. She stated that a contractor had been selected by that point. She testified that neither she nor Mary's Center instructed the contractor to start at that time, and that the building permit was still in process. She stated that a stop work order was issued, and that the contractor complied with that order, performing no further work until the permit was received from DPS. Ms. Kaplan testified that DPS did not raise any other concerns.

Ms. Kaplan testified that she first learned of this appeal at the final walk-through, at the end of 2007. At that time, she testified she learned about the concern with the absence of a plot diagram. She testified that she is familiar with the plot diagram required by Section 8-24 of the County Code. She testified that Exhibit 11(b), which was submitted with the permit application, is an ATLA site plan. When asked what the difference was between a site plan such as that submitted in Exhibit 11(b) and a plot diagram, Ms. Kaplan testified that a plot diagram shows the building outline relative to the property lines for the purpose of showing setbacks, and that a site diagram such as this ATLA site plan shows more detail. She testified that a site plan is more detailed and accurate than a plot diagram. On cross-examination, she testified that Exhibit 11(b) showed the square footage of the lot, the square footage of the building, 94 parking spaces, and a lot of other information. She testified that she was not familiar with the Arliss lot.

Ms. Kaplan testified that Exhibit 53 is a tax assessment document which indicates that the value of the improvements at FASC is \$2,732,100. Ms. Kaplan then testified that she was the project manager for Mary's Center, and that she has personal knowledge of the project budget and the costs actually incurred.¹³ Ms. Kaplan testified that those costs did not exceed 25 percent of \$2.7 million. She further testified that subtracting the costs for plumbing, electrical, and mechanical work would significantly reduce the total costs incurred, to a total cost of about \$90,000 without those trades.

When asked on cross-examination how the stop work order had come about, Ms. Kaplan testified that the contractor had started demolition prior to the issuance of the permit, and that someone from the County had come by, noticed the work, and issued the stop work order. She testified that Mary's Center had hired the contractor and had set up a schedule for the work, but did not order the work started. She testified that she did not know how the fact that the work had started prior to the issuance of a permit came to the attention of the County.

8. Ms. Julie Ann Beecher testified for Intervenor Mary's Center. She testified that she has undergraduate degrees in engineering and nursing, a graduate degree from the Medical College of Virginia making her a nurse practitioner, and a graduate degree in public health from Johns Hopkins. She testified that she has been employed by Mary's Center for over three and a half years, stating that prior to October, 2008, she was the Vice President of Planning and Business Development for Mary's Center in the District of Columbia and Maryland, and that she is now a consultant to Mary's Center. She testified that Mary's Center is a community service organization that has been around for 20 years. She testified that the mission of Mary's Center is to build futures for people, and that the Center's services include job training, education, literacy, child day care licensing, healthcare (including dental, prenatal, and mental health), and WIC services (in the District of Columbia).

Ms. Beecher testified that Mary's Center has received the designation "federally qualified health center" from the federal government, which gives them tools to better serve people, but also imposes some strings on their operation resulting in their having to do more than an average office. For example, she testified that as a federally qualified health center, Mary's Center has to provide transportation and translation services. She testified that Mary's Center received their Certificate of Occupancy in January, 2008, and that they hired a social worker and had a play group on site. She testified that they began offering a full array of services in June, 2008, and that the Center has been operating continuously since then. She testified that she is familiar with the allegation that Mary's Center is a medical clinic. She testified that they have two part-time (60%) physicians, and a full time (100%) nurse practitioner.¹⁴ She stated that

¹³ Ms. Kaplan testified on cross-examination that the cost of the work was approximately \$320,000, including the costs for plumbing, electrical, and mechanical work (which get separate permits).

¹⁴ Ms. Beecher testified at the July 29, 2009, hearing that between the May hearing and the July hearing, there had been a change in staffing, and that the Center now had two part-time physicians totaling .8 full time equivalents. She testified that there have never been more than two physicians, and that the Center has no plans to ever exceed two physicians.

they have no dentists on staff, but will have prenatal and nutritional counseling. She testified that at this point, they have no plans to have additional physicians on staff. She testified that their full-time social worker helps to link clients to other providers in the County. She testified that the Center is open Monday through Friday, from 8:00 a.m. until 5:30 p.m., noting that the Center is not open evenings or weekends.

Ms. Beecher testified that she was involved with the planning and opening of the Flower Avenue site, and that prior to that time, Mary's Center had no operations in Maryland. She stated that the District of Columbia headquarters of Mary's Center was receiving a lot of clients from Maryland. She stated that, per her public health degree, she chose the Flower Avenue site after looking at the median income, the age distribution, infant mortality, access to healthcare, and access to transportation. She stated that the location presented an accessible, thriving community. Ms. Beecher testified that she signed a lease with FASC on June 15, 2007, for what had been a small grocery store. She testified that she understood that FASC authorized them to seek building permits, and that in fact, they had told her to do that.

Ms. Beecher testified that Mary's Center needed to convert what had been grocery space into office space and healthcare space. She stated that the space had to comply with the Americans with Disabilities Act. She testified that she hired Ms. Kaplan, who helped her solicit bids from contractors for the work. She testified that Mary's Center knew permits were needed for this work, and that Ms. Kaplan took care of this. She testified that the renovation began with demolition in September, 2007, that it began in earnest in October, and that it was almost complete by December. She testified that she did not instruct the contractor to commence work before the permit was issued. She testified that a stop work order had been issued, and that the contractor stopped work. She stated that after answering a couple of questions for the County, the permit was issued. She testified that other than the stop work order, she was not aware of any other concerns raised by DPS or any other Montgomery County agency.

Ms. Beecher testified about Exhibits 16(t) and 57, stating that they were pre-typed letters of support for Mary's Center that the Center had handed out to neighboring businesses, asking them to return, signed, if they supported Mary's Center. She said that the letters at Exhibit 16(t) were done on December 28, 2007. She testified that Mary's Center sought the updated letters, at Exhibit 57, because the hearing was ongoing and the Center wanted to demonstrate continued support. She testified that the letters at Exhibit 57 differed from the letters at Exhibit 16(t) in that in addition to evidencing continued support for the Center, they asked specifically about parking.

Ms. Beecher testified that in her role as a consultant, she monitors Mary's Center, and is responsible for submitting the required reports to the federal government. She testified that Mary's Center has tracked how its clients get to the Center. She testified that in connection with this hearing, she designed a survey, and instructed staff on how and when to use it. See Exhibit 16(j). Ms. Beecher testified that the surveys were periodic samples, and that they were undertaken for a full month in June 2008, and for a one-week period in each of January through July, 2009. She testified that she supervised data collection efforts, and reviewed and analyzed the data collected. She testified that one-third of Mary's Center clients took public transportation, that the results

of the transportation surveys were provided in Exhibit 60, and that she had prepared Exhibits 60(b)–(e). She explained that Exhibit 60(c) was the transportation survey that she had developed. With respect to that survey, she testified that staff asked each participant the questions listed. Ms. Beecher testified that Exhibit 60(d) is a tool that she developed to count cars in the FASC lots. She testified that cars were counted three times a day, at 10 a.m., 2 p.m., and 4:45 p.m., and that she tabulated the number of cars versus the number of spaces, and calculated percentages. She testified that she did no analysis beyond addition and the percentage calculations.¹⁵ She testified that in June, 2008, one-third of the clients drove to Mary's Center and parked, 45 clients took public transportation, and 53 walked. She testified that of those who drove and parked, 97 percent parked in the side corner lot, next to the El Golfo restaurant. With respect to the one-week samples taken in 2009, Ms. Beecher testified that of the 438 participants surveyed, 47 percent took public transportation, 33 percent drove (most parking in the corner lot next to the El Golfo), and 10 percent walked. She testified that Mary's Center encourages patrons to use the side (corner) lot to facilitate good relations with its neighbors.

Ms. Beecher testified that there was an additional parking lot for the Flower Avenue Shopping Center at the corner of Flower Avenue and Arliss Street (the "Arliss lot"). She testified that it is a corner lot with 81 spaces, located on property that is contiguous and connected to FASC. She testified that the lot has signs saying that FASC patrons can park there. Ms. Beecher testified that she had met with Greg Fernbok, the owner of the Arliss lot, before the hearing, and that she had received the "Arliss lot site plan" from him. See Exhibit 61(b). She testified that this site plan shows that a road connects this lot to FASC. She further testified that this lot is part of FASC, and that Mr. Fernbok had confirmed that the parking lot shown on Exhibit 61(b) is parking for FASC patrons. She testified that he had told them this when the lease was originally signed for Mary's Center, and that he had confirmed on July 28, 2009, that that was still the case.¹⁶ She stated that Exhibit 61(b) was not submitted with the building permit application. With respect to the five "on-street" spaces that had previously been discussed, Ms. Beecher testified as to where those spaces were shown on Exhibit 61(b), and stated that they were marked with a sign saying "FASC Patrons Only." She testified that Mr. Fernbok confirmed that these spaces were not open street parking, but rather that he owns them. In sum, Ms. Beecher testified that there are more than 94 parking spaces available at the FASC, based on what she reviewed the day before. She testified that the parking lot in front of Mary's Center contained 17 parking spaces, including one handicapped space. She testified that the side lot had five parallel parking spaces available. She testified that the larger "corner" lot, next to the El Golfo restaurant, had 82 spaces, and finally that, as shown on Exhibit 61(b), the Arliss lot had 81 available parking spaces. She testified that she had counted the spaces available herself, and that based on that count, there were a total of 185 parking spaces available for FASC.

Ms. Beecher testified about the results of the three-times-daily car counts that she conducted. She testified that in June 2008, the higher number of cars that she counted

¹⁵ Ms. Beecher testified that the car counting surveys and transportation surveys were used at the same time.

¹⁶ On cross-examination, when asked if she knew that a medical building was proposed for the Arliss lot, Ms. Beecher testified that she did not know that from the owner, but that Washington Adventist Hospital had informed them that they hoped a medical building would be built there for the community.

in the corner lot was 41 (41 cars in 82 spaces), and that the highest number of cars she counted in the Arliss lot was 3 (3 cars in 81 spaces). She testified that during the survey weeks in January through May 2009, the highest number of cars she observed in the corner lot was 45 (45 cars in 82 parking spaces), and that the highest number of cars she observed in the Arliss lot was again 3 (3 cars in 81 spaces). Ms. Beecher testified that at the same times that she conducted the FASC car counts, she also counted the cars in the 8 spaces at the parking lot for the Reliable Cleaners (off-site, across Flower Avenue from the corner lot), and that she never saw more than 7 cars in that lot.

Finally, Ms. Beecher testified that she first became aware that appellants had filed objections to the building permit issued for Mary's Center on December 26, 2007. She testified that she understood the issues on appeal to include the classification of Mary's Center as a business, the adequacy of parking, and the sufficiency of the documents submitted in connection with the building permit application. She stated that she was concerned about this challenge, and that she went to see if there were additional documents that Mary's Center should submit. She testified that Exhibit 16(c) contains a comprehensive site plan, which was added to the permit file, letters stating that Mary's Center leases its space from the owner and that the owner was aware of and consented to the building permit, and authorization from Mary's Center for the permitting service to apply for the building permit. Ms. Beecher testified that she coordinated the assembly of this package, but that it was done under the signature of Maria Gomez, the CEO for Mary's Center. She stated that Exhibit 16(d) is a letter from DPS stating that these exhibits had been received into the file. She testified that this letter acknowledges the receipt of and corrections made by these documents, and adds that they have all been made part of the permit record. On cross-examination, Ms. Beecher acknowledged that Exhibits 16(c) and (d) were generated after the appeal of the building permit had been filed.

9. Ms. Robin Ferro, a senior permitting specialist with DPS, was called by the County as a rebuttal witness. Ms. Ferro testified that her duties include plan review and zoning code enforcement. She testified that she currently reviews residential plans, but that she had done commercial plan review for five years.

Ms. Ferro testified that she was present at the May 2009 hearing when Ms. Piety testified about meeting with her in the spring of 2008. Ms. Ferro testified that she recalled meeting with Ms. Piety at the zoning counter, and that she had spoken with her on the phone prior to that meeting. She testified that Ms. Piety walked up and introduced herself while she (Ms. Ferro) was at the zoning counter. Ms. Ferro testified that Ms. Piety did not indicate that she was an appellant in an appeal of a DPS action. She testified that Ms. Piety had a copy of an older site plan for FASC, and that Ms. Piety said she had received it from DPS' records. Ms. Ferro testified that Ms. Piety gave her an address, and asked if DPS had additional information on file. Ms. Ferro testified that she checked the computer and found the same plan that Ms. Piety had with her (Exhibit 49).

Ms. Ferro testified that she and Ms. Piety discussed parking requirements at their meeting. She stated that Ms. Piety was familiar with the FASC site, that Ms. Piety had

said that some of the spaces were not occupied by the tenants shown on Exhibit 49, and that Ms. Piety had also stated that the parking shown on that Exhibit did not accurately reflect parking conditions today. Ms. Ferro testified that Exhibit 49 was over 50 years old, and that it did not contain a stamp, seal or signature, nor did it contain permit numbers. She testified that the parking requirements have changed since that time, and that she had not checked to see if Exhibit 49 correctly indicated the 1950 parking requirements. When asked if she recalled telling Ms. Piety that Exhibit 49 was valid and controlling for the parking at FASC, Ms. Ferro testified that she did not, and that it was unlikely that she would have said such a thing, given that the Exhibit was over 50 years old, that it contained no indicia that it was ever approved, and that she had just seen it for the first time. She testified that Section 107-18a(1)(a) of the 1954 Zoning Ordinance states that designs and plans are to be approved by a building inspector, but that Exhibit 49 does not indicate such approval. See Exhibits 49 and 63. She testified that Exhibit 49 had markings on it which appeared to change the number of parking spaces available. For example, she testified that near the food store, the number "15" is crossed out and the number "13" is written in, yet she stated that if you count the parking spaces shown, there are 15. She testified that this is further evidence that this is not a plan that would have been approved, continuing by saying that all of the uses were not even taken into account, and that the accuracy of the tabulation was questionable.

Ms. Ferro testified that construction undertaken in 1950 (such as the first phase of this shopping center) would have been subject to the parking requirements of the 1948 Zoning Ordinance. See Exhibit 62. She stated that the 1954 construction (of the department store space) would have been subject to the 1954 Zoning Ordinance. See Exhibit 63. Ms. Ferro testified that the square footage shown on Exhibit 49 is broken into sales and service areas, but that in the parking tabulation area, there are no spaces shown for the service area. She then testified that the 1948 Zoning Ordinance would have required parking for the service area. Similarly, Ms. Ferro testified that Section 107-18d(7) of the 1954 Zoning Ordinance, which would have applied to the department store space, required one parking space for every 100 square feet of floor area used for retail sales, trade or merchandising, and one parking space for every 300 square feet of space used for office, storage, or other purposes, but that Exhibit 49 shows parking for the department store area based only on the square footage of the retail area. She testified that there was no calculation of parking needed for the 350 square feet of service area shown on Exhibit 49.

Finally, Ms. Ferro testified that before a Use and Occupancy permit can be issued, final inspections of the building, electrical, and mechanical permits would have to take place.

On cross-examination, Ms. Ferro testified that she had compared the numbers on the plot plan to the requirements of the 1954 Zoning Ordinance, and indicated that one parking space was required for every 100 square feet of retail space, and that one parking space was required for every 300 square feet of office space. She then testified that the department store required 77 spaces, and that the attendant office area required 1 space. She testified that parking for the remaining uses would have been calculated under the 1948 Zoning Ordinance, and that she had not made those calculations. Finally, Ms. Ferro testified that Exhibit 61(a) was also a plot plan. When

asked if she'd done any calculations as to the required parking under the current Zoning Ordinance, Ms. Ferro replied that she had not.

CONCLUSIONS OF LAW

1. Section 2-112(c) of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the Montgomery County Code, including sections 2B-4, 4-13, 8-23, 15-18, 17-28, 18-7, 22-21, 23A-11, 24A-7, 25-23, 29-77, 39-4, 41-16, 44-25, 46-6, 47-7, 48-28, 49-16, 49-39A, 51-13, 51A-10, 54-27, and 58-6, and chapters 27A and 59.
2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.
3. Chapter 8 of the Montgomery County Code governs buildings. Section 8-7 deals with existing buildings, and subsection (d) of that Section provides that:

Sec. 8-7. Existing buildings.

Except as provided in this section, existing buildings when altered or repaired as herein specified shall be made to conform to the full requirements of this chapter for new buildings:

* * * * *

- (d) Part change in use. If a portion of the building is changed in occupancy or to a new use group and that portion is separated from the remainder of the building with the required vertical and horizontal fire divisions complying with the fire grading in this chapter, then the construction involved in the change shall be made to conform to the requirements for the new use and occupancy and the existing portion shall be made to comply with the exitway requirements of this chapter.

* * * * *

4. Section 8-24 of the County Code pertains to the application for a building permit. Subsections (c) and (f) of that Section read as follows:

Sec. 8-24. Application for permit.

* * * * *

- (c) Qualified applicants. Application for a permit shall be made by the owner or lessee of the building or structure, or agent of either or by the licensed engineer or architect employed in connection with the proposed work. If the application is made by a person other than the

owner in fee, it shall be accompanied by a duly verified affidavit of the owner or the qualified person making the application that the proposed work is authorized by the owner in fee and that the applicant is authorized to make such application. The full names and addresses of the owner, lessee, applicant and of the responsible officer, if the owner or lessee is a corporate body, shall be stated in the application.

* * * * *

- (f) Plot diagram. Each applicant for a building or occupancy permit must file 2 copies of a plot plan drawn to scale, showing:
 - (1) The lot upon which the proposed building is to be erected, lot dimensions, lot and block numbers and subdivision name, if any;
 - (2) Name and width of abutting streets;
 - (3) Location, dimensions and use of existing buildings and other structures on the same lot;
 - (4) The location, dimensions and proposed use of buildings and other structures for which a permit is requested;
 - (5) Front and rear yard widths;
 - (6) North point and scale of plan; and
 - (7) If the permit is for a new residential building or accessory structure or an addition to an existing residential building, and a storm water management plan has not already been approved for that construction, the location of any existing and proposed drainage structure, including any swale, and the general flow of water, indicated by arrows, to and from each structure.

* * * * *

5. Section 8-26(g) of the County Code requires compliance with all applicable zoning regulations, as follows:

Sec. 8-26. Conditions of permit.

* * * * *

- (g) Compliance with zoning regulations. The building or structure must comply with all applicable zoning regulations, including all conditions and development standards attached to a site plan approved under Chapter 59. The issuance of a permit by the Department for the building or structure does not affect an otherwise applicable zoning regulation.

* * * * *

6. Section 59-A-2.1 of the Zoning Ordinance defines "medical or dental clinic" as "[a]ny building or group of buildings occupied by 3 or more medical practitioners and related services for the purpose of providing health services to people on an outpatient basis."

7. Article E of the Zoning Ordinance governs parking. Section 59-E-5.51 of that Article, entitled "Exception provision," is a grandfathering provision which provides that:

All parking facilities constructed in accordance with an approved building permit, filed prior to June 28, 1984, that do not conform to the requirements of this article shall not be considered in violation of this article. This exception provision shall not apply to parking facilities that are subject to compliance requirements because of subsequent modifications as enumerated in section 59-E-6.1.

Section 59-E-6.1 of the Zoning Ordinance, referenced in Section 59-E-5.51, provides the following exceptions to that general grandfathering provision:

Sec. 59-E-6.1. When required.

In accordance with the exception provisions of section 59-E-5.51, parking facilities constructed in accordance with an approved building permit, filed prior to June 28, 1984, that do not conform to the requirements of this article, are not considered in violation of this article. Under the following circumstances, however, such parking facilities must be brought into conformance with the requirements and standards of this article unless waivers from specific requirements are approved under the waiver provisions of section 59-E-5.52. In accordance with the provisions of section 59-E-6.3 concerning perimeter landscaping for certain parking facilities constructed prior to June 28, 1984, the landscaping requirements of section 59-E-2.7 do not apply if strict adherence to the landscaping requirements would result in the loss of more than 5 percent of required parking as specified in the schedule of requirements in section 59-E-3.7.

- (a) For any enlargement or reduction of a building or structure that is greater than 10 percent of the total floor area approved prior to June 28, 1984, the off-street parking must be brought into conformance with the requirements and standards of this article.
- (b) For any enlargement, reduction or exterior alterations of a building or structure which involves costs that are greater than 10 percent, but less than 25 percent of the total value of the building or structure, a perimeter landscape area must be provided around the parking facility as prescribed in Section 59-E-6.3.
 - (1) The total value of the building or structure is defined as the full cash value as determined by the most recent appraisal by the Supervisor of Assessments for tax assessment purposes.
 - (2) For the purposes of this section, exterior alterations include any changes in a building facade or exterior changes that alter the use or purposes of the building.
 - (3) The cost estimates for an enlargement, reduction or exterior alteration must be based on reasonable costs for similar construction or remodeling in Montgomery County. The actual costs must be demonstrated by affidavit after completion of the work.
- (c) For any enlargement, reduction or alteration of an existing building or structure, which exceeds 25 percent of the total value of the building or

structure, off-street parking must be brought into conformance with the requirements and standards of this article.

- (1) For the purposes of this section, an alteration includes exterior alterations as described in subsection (b) above, and interior alterations that require the approval of permits by the Department. Tenant trade fixtures, mechanical equipment, plumbing, electrical improvements and interior wall treatments are not included as interior alterations.
 - (2) The cost estimates for the enlargement, reduction or alteration must be based on reasonable costs for similar construction or remodeling in Montgomery County. The actual cost must be demonstrated by affidavit after completion of the work.
 - (d) Any successive enlargements, reductions or alterations to buildings or structures must be considered in cummulation with previous enlargements or alterations made after October 15, 1984, to determine application of subsections (a), (b), and (c) above.
 - (e) Any proposed change to a building or a change in use that would require a greater number of parking spaces than were required by this Article prior to June 28, 1984 must be in conformance with the requirements of this Article.
 - (f) For parking structures constructed in accordance with a building permit issued prior to June 28, 1984, perimeter landscaping in accordance with the provisions of Section 59-E-6.3 must be provided if enlargements, reductions or alterations to the building and/or parking structures are proposed that meet the compliance criteria established in subsection (a) through (e) above.
8. At the outset of this hearing and as a result of the Preliminary Motion to Dismiss, the Board, in its August 13, 2008 Resolution and Notice, limited the scope of this appeal to the following five issues:
- (1) The requirement of Section 8-24(f) of the Montgomery County Code, to file a plot plan with a building permit application;
 - (2) Whether the permit holder is a qualified applicant for the purposes of Section 8-24(c) of the Montgomery County Code;
 - (3) Whether the proposed use constitutes a medical clinic, whether the proposed use is permissible in the subject location, and the significance of a proposed use in evaluating a permit application;
 - (4) The extent to which Section 8-26(g) of the County Code and Section 59-A-3.1 of the Zoning Ordinance invoke the parking requirements of Article E of the Zoning Ordinance, and

whether those requirements have been satisfied in connection with this permit; and

- (5) Whether the proposed use is a change in use for the purposes of Section 8-7(d) of the Montgomery County Code, and the significance of such a determination to issuance of a building permit.

We shall address each of these issues in turn.

The Plot Plan

Section 8-24(f) of the County Code requires submission of a plot diagram in connection with a building permit application, as follows:

- (f) Plot diagram. Each applicant for a building or occupancy permit must file 2 copies of a plot plan drawn to scale, showing:
 - (1) The lot upon which the proposed building is to be erected, lot dimensions, lot and block numbers and subdivision name, if any;
 - (2) Name and width of abutting streets;
 - (3) Location, dimensions and use of existing buildings and other structures on the same lot;
 - (4) The location, dimensions and proposed use of buildings and other structures for which a permit is requested;
 - (5) Front and rear yard widths;
 - (6) North point and scale of plan; and
 - (7) If the permit is for a new residential building or accessory structure or an addition to an existing residential building, and a storm water management plan has not already been approved for that construction, the location of any existing and proposed drainage structure, including any swale, and the general flow of water, indicated by arrows, to and from each structure.

Ms. Gail Lucas, Permitting Services Manager for DPS, testified that the documents submitted with this building permit application, specifically the site plan survey at Exhibit 11(b), satisfied the plot diagram requirement of Section 8-24(f). She addressed each element of Section 8-24(f), stating why each was met. See Feb. 18 Tr. at pages 69-71. In response to questioning on cross-examination, on re-direct Ms. Lucas testified that the construction drawings at Exhibit 11(c) depicted the location of Mary's Center. The Board finds the testimony of Ms. Lucas credible and sufficient to demonstrate that the documents in evidence and submitted in connection with this building permit application complied with Section 8-24(f). Thus the Board finds that DPS correctly determined that the documents submitted by Mary's Center in connection with this permit application satisfied the plot plan requirement of that Section, and that Appellant's appeal of this issue must be denied.

Was Mary's Center a "Qualified Applicant"?

Section 8-24(c) of the County Code makes clear that only "qualified applicants" can apply for building permits, and defines "qualified applicants" as follows:

- (c) Qualified applicants. Application for a permit shall be made by the owner or lessee of the building or structure, or agent of either or by the licensed engineer or architect employed in connection with the proposed work. If the application is made by a person other than the owner in fee, it shall be accompanied by a duly verified affidavit of the owner or the qualified person making the application that the proposed work is authorized by the owner in fee and that the applicant is authorized to make such application. The full names and addresses of the owner, lessee, applicant and of the responsible officer, if the owner or lessee is a corporate body, shall be stated in the application.

Appellants challenged the issuance of this building permit on grounds that the applicant was not the owner in fee, and the application was not accompanied by an affidavit from the owner authorizing the work. Indeed, Ms. Lucas testified that page 2 of the building permit application incorrectly identified Mary's Center as the owner of the Property. See Exhibit 11(a). That said, Ms. Lucas went on to testify that DPS had subsequently received documentation from Mary's Center and FASC clarifying that Mary's Center was not the owner of the property, but was a tenant. These documents included an affidavit from Greg Fernbok, a partner in FASC LP, which stated that Mary's Center was authorized to apply for the building permit. See Exhibit 25, pages 6 and 7, and Exhibit 35. Ms. Lucas testified that DPS considers these documents to be an amendment to the permit application, and takes them into the permit record. She testified that this kind of information can be readily revised, that she has seen it done in other instances, and that she has never seen a permit revoked for something like this.

In addition, Ms. Lucas testified that she had received an affidavit from Maria Gomez, President and CEO of Mary's Center, stating that James Moore of Rapid Permit Service was a duly authorized individual with authority to execute a Verified Affidavit on behalf of Mary's Center, and that he acted with approved authority. See Exhibit 25, pages 8 and 9. Ms. Lucas testified that she sent a letter to Ms. Gomez on March 3, 2008, acknowledging receipt of all of these documents, and accepting them into the permit record. See Exhibit 25, page 10. Ms. Lucas testified that on the basis of these affidavits, DPS was satisfied that all technical deficiencies with the permit application had been corrected. The Board finds the testimony of Ms. Lucas and the underlying documents persuasive proof that Mary's Center was a qualified applicant under Section 8-24(c) of the County Code, and thus concludes that this aspect of the appeal must be denied. Indeed, counsel for the Appellant conceded this issue in his closing argument. See July 29 Tr. at page 103.

Is Mary's Center a "Medical Clinic"?

A "medical or dental clinic" is defined in Section 59-A-2.1 of the Zoning Ordinance as "[a]ny building or group of buildings occupied by 3 or more medical practitioners and related services for the purpose of providing health services to people on an outpatient basis." Appellants initially alleged that Mary's Center was a medical clinic, but later conceded that the evidence shows otherwise. See July 29 Tr. at pages 104-105. Indeed, Dave Niblock, a Zoning Analyst with DPS, testified that he had questioned the permit applicant to make sure that Mary's Center was not a medical clinic, and that the applicant had stated that there was usually one practitioner, sometimes two, but never more than two. Mr. Niblock testified that a "medical clinic" is defined by the Zoning Ordinance as having three or more medical practitioners, and thus Mary's Center was not a clinic. Testimony from Julie Beecher reiterated this. Ms. Beecher stated that the combined hours of the two medical practitioners at Mary's Center comprised less than one full time equivalent, and that Mary's Center would never have more than two medical practitioners on staff. Thus the Board finds, based on this uncontroverted evidence of record, that Mary's Center is not a "medical clinic" for purposes of the Zoning Ordinance because it does not have three or more medical practitioners.

Are the Parking Requirements Satisfied?

By far the largest percentage of time and evidence in this appeal was spent on the issue of parking, with Appellants asserting that Section 8-26(g) of the County Code should be read to require that before Building Permit No. 467318 could be issued, the parking for the entire shopping center needed to be reviewed to ensure that it complied with the requirements of the Zoning Ordinance, in order to ensure that there was adequate parking under the Zoning Ordinance for Mary's Center.

Section 8-26(g) provides that:

- (g) Compliance with zoning regulations. The building or structure must comply with all applicable zoning regulations, including all conditions and development standards attached to a site plan approved under Chapter 59. The issuance of a permit by the Department for the building or structure does not affect an otherwise applicable zoning regulation.

The Board is not persuaded that parking for the entire shopping center needs to be evaluated in connection with the issuance of this building permit. Dave Niblock testified that the use of the space was changing from a retail use to an office use, and that an office use required less parking than a retail use (2.4 spaces per 1,000 square feet versus 5 spaces per 1,000 square feet). Mr. Niblock testified that Section 59-E-5.51 of the Zoning Ordinance says that parking lots constructed with a valid permit before 1984 do not have to comply with Article 59-E unless they were modified as set forth in Section 59-E-6.1. See Exhibits 42 and 44. There is no dispute that the Flower Avenue Shopping Center was built in 1950. See Exhibit 43.¹⁷ Mr. Niblock went through each of

¹⁷ Other evidence of record indicates that an addition to this shopping center was constructed in 1954, but in any event, all construction was completed long prior to 1984.

the circumstances set forth in Section 59-E-6.1 which, if applicable, would require that the parking facility be brought into compliance with the requirements of Article E, and stated with respect to each why compliance was not triggered. See Feb. 18 Tr. at pages 112-117. This testimony was buttressed by the testimony of Sheila Kaplan, who testified that the cost of the interior renovations undertaken pursuant to Building Permit No. 467318 was \$90,000, far less than 25% of the total value of the structure (which Mr. Niblock had testified was about \$3 million, per SDAT). In light of this testimony, the Board finds that the proposed interior alterations for Mary’s Center did not trigger a need for compliance pursuant to Section 59-E-6.1 with the Article E parking requirements. The Board further finds that the parking facility at the Flower Avenue Shopping Center was grandfathered by Section 59-E-5.51 since it was constructed prior to 1984, and that since Section 8-26(g), per its own terms, only requires compliance with *applicable* provisions of the Zoning Ordinance (emphasis added), it does not impose a requirement that this parking facility be brought into compliance with the current parking requirements of Article E.

The Board is not persuaded by Appellants’ argument that Building Permit No. 467318 could not be issued unless someone--the permit applicant, the property owner/landlord, or DPS--performed a calculation showing that the parking facility had sufficient spaces available for Mary’s Center and for all of the other uses on the site. Despite their repeated representations that a baseline parking calculation was required prior to the issuance of this building permit, Appellants’ have not been able to point to any language in the County Code or the Zoning Ordinance that would require such a calculation in this case. Mr. Niblock testified that DPS does not perform such a calculation unless a change in use increases the parking requirements, which was not the case here. As noted above, the Board has found that Section 59-E-5.51 exempted this parking facility from compliance with Article E, and thus that the general language in Section 8-26(g), requiring compliance with applicable provisions of the Zoning Ordinance, did not impose such a duty. Thus while Appellants have argued and presented evidence which they contend demonstrates that the number of parking spaces is inadequate to serve the uses currently on-site at the shopping center, the Board finds that there was no obligation for DPS to calculate the adequacy of parking for the entire shopping center in connection with the issuance of this building permit, or to require such a calculation from the applicant. Accordingly, the Board has determined that the parking requirements of Article E of the Zoning Ordinance, to the extent applicable, have been satisfied, and this aspect of the appeal should be denied.

The Change in Use and Attendant Requirements

Section 8-7(d) of the County Code provides that when existing buildings are altered or repaired, they have to conform to the full requirements of Chapter 8 for new buildings except:

* * * * *

- (d) Part change in use. If a portion of the building is changed in occupancy or to a new use group and that portion is separated from the remainder of the building with the required vertical and horizontal fire divisions complying with the fire grading in this chapter, then the construction involved in the change shall be made

to conform to the requirements for the new use and occupancy and the existing portion shall be made to comply with the exitway requirements of this chapter.

Appellants conceded that the testimony of Hadi Mansouri, Division Chief of the Building Construction Division for DPS, resolved any questions concerning compliance with this Section. See July 29 Tr. at page 104. Indeed, the Board finds the testimony of Mr. Mansouri to be conclusive in this regard. Mr. Mansouri testified that the applicant was requesting a change in use from M (mercantile) to B (business),¹⁸ and that the space met the code requirements for a business use. He testified that the portion of this shopping center that is undergoing change is separated from the other tenant space by vertical fire separations in the form of concrete masonry walls, and thus meets the first part of Section 8-7(d), but went on to testify that this fire separation renders this space a separate “building” for purposes of the IBC 2003. See Exhibit 11(c) at page 10 (drawing A-3, page 4, note at top referencing existing CMU (concrete masonry unit) wall). He then testified that the exitway requirements in Section 8-7(d) (“and the existing portion shall be made to comply with the exitway requirements of this chapter”) apply only if the tenant is located in the middle of the shopping center such that egress from the tenant space to the outdoors would be through other occupied space. He testified that because the tenant space for Mary’s Center is its own “building” by virtue of its fire separation walls, and has its own exitways to the front and to the rear, both of which exit directly to the outdoors, the “exitway” requirements of Section 8-7(d) are not relevant to this space. The Board finds this uncontroverted testimony persuasive as to the facts and the law, and thus finds that this aspect of the appeal must be denied.

9. Based on the foregoing, the Board finds that Building Permit No. 467318 was properly issued.

The appeal in Case A-6238 is **DENIED**.

On a motion by Vice Chair David K. Perdue, seconded by Member Carolyn J. Shawaker, with Chair Catherine G. Titus, Member Walter S. Booth and Member Stanley B. Boyd in agreement, the Board voted 5 to 0 to deny the appeal and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

Catherine G. Titus
Chair, Montgomery County Board of Appeals

¹⁸Mr. Mansouri testified that these designations are set forth in the International Building Code 2003, which has been adopted by the County.

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 2nd day of October 2009.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).