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September 28, 2020

Ms. Tiara McCray  
Montgomery County Department of Transportation  
Division of Transportation Engineering  
Property Acquisition Section  
100 Edison Park Drive, 4<sup>th</sup> Floor  
Gaithersburg, MD 20878

Re: Abandonment Request No. AB-771, Ellsworth Drive ("Abandonment")

Dear Ms. McCray:

Thank you for your helpful assistance throughout this process. Following up on the discussions at the September 14, 2020 hearing ("Hearing"), Petitioners, 8515 Georgia Avenue Associates LLC, PFA-A Silver Spring, PFA-B, Silver Spring LC, PFA-C Silver Spring LC, PFA-D Silver Spring, PFA-H Silver Spring LC and PFA Manager LC ("Petitioners"), wish to submit the following into the record of the Abandonment as further support for their Petition.

**Relevance and Materiality of Testimony and Evidence on Synthetic Turf**

As a preliminary matter at the Hearing, Petitioners raised an objection to the receipt of testimony and evidence regarding the use of synthetic turf and requested that such testimony and evidence be restricted. Although the Hearing Examiner explained the requirements that he must consider pursuant to Section 49-62, *et seq.*, of the Montgomery County Code ("Code") with regard to an abandonment request and the discretion he would exercise on testimony, much of the opposition testimony and submissions deal with the use of synthetic turf. The issue before the Hearing Examiner, County Executive and County Council is if the rights-of-way sought to be abandoned by the Petition are necessary for present public use or anticipated public use in the foreseeable future (Section 49-63(c)(1) of the Code). The use of synthetic turf on approximately 8,000 square feet of the 29,225 square feet in the right-of-way subject to the Abandonment was an issue decided by the Montgomery County Planning Board in its approval of Project Plan Amendment No. 91998005C ("Project Plan") and Site Plan Amendment No. 81999002M ("Site Plan") after a public hearing was held on June 18, 2020, and written Resolutions of approval mailed July 7, 2020 ("Resolutions"). Copies of the Resolutions have been entered into the Hearing Record ("Record") as Exhibit X.

As a review of the Planning Staff's detailed Staff Report on the Site Plan ("Staff Report"), dated June 8, 2020 (Record Exhibit V) and attachments thereto demonstrates, the use

of synthetic turf, including questions regarding the safety, maintenance and environmental impact of the turf, were all carefully considered by the Planning Board. Extensive testimony and evidence on both sides was presented, carefully weighed by Staff and the Planning Board, and decided in favor of use of the synthetic turf as proposed. This process also included consideration of the recommendations of other agencies in the development review process, such as MCDOT, the Fire Marshal, and DPS. Additionally, a few days after the hearing, a Request for Reconsideration (“Reconsideration Request”) of the approval of the Project Plan and Site Plan was filed raising the same objections to the use of synthetic turf. A copy of the Reconsideration Request with attachments is found at Record Exhibit Z. Petitioners filed a letter dated July 14, 2020 (Record Exhibit AA) opposing the Reconsideration Request. At its meeting of July 23, 2020, the Planning Board declined to grant the Reconsideration Request and, after no appeal was filed within the statutory 30-day appeal period from the date of mailing of the Resolutions, the Project and Site Plan, which included approval of the use of synthetic turf as proposed, became final and no longer able to be appealed.

The fact that the Project Plan and Site Plan are conditioned on abandonment does not change the finality of the Planning Board’s decision approving the use of synthetic turf in the design. The issue of need of the right-of-way for present or future public use is an entirely separate issue. As demonstrated by the Petition, the County will own all of the right-of-way once it is abandoned, and the County and the Petitioners must enter into a revised lease and access easement. In summary, the Abandonment process may not be lawfully used to collaterally challenge or review the Planning Board’s decision on the Project Plan and Site Plan amendments. Specific statutory provisions for such review by administrative appeal exist and these were not followed by the turf opponents. Thus, testimony and evidence regarding the use of synthetic turf in the Abandonment proceeding are irrelevant and immaterial and such issues are beyond the lawful scope of the Abandonment.

### **Compliance with the ADA**

A contention was made by a witness at the Hearing that, because of the use of the synthetic turf, the requirements of the ADA would not be satisfied. This contention is factually incorrect. Much of the redesign within the Abandonment area will remain in hardscape. Along the periphery of the right-of-way area where the turf will be placed, wide hardscaped sidewalks will remain. ADA-compliant crosswalks and curb depressions will be provided. These are illustrated in the plans submitted by the Petitioners as part of Record Exhibit A and Petitioners’ PowerPoint presentation submitted as Record Exhibit AB. Additionally, the plans received approval by the Department of Permitting Services Fire Department Access and MCDOT (Record Exhibit N) and will be further reviewed at time of final engineering and permit to ensure compliance.

### **Community Relations and First Amendment Rights**

The Petitioners have a long history of respect for the community and community engagement. As explained by Bryant Foulger, Downtown Silver Spring was conceived as a



public/private project with significant input by the community. After several failed attempts at redevelopment by others of this important Downtown, often called the heart of Silver Spring, Montgomery County and Petitioners closely worked with the community to develop a project of the scale and nature that has made it unique and successful. After nearly 15 years of operation, it is time to refresh the project to stay competitive with other areas of the County while maintaining the attraction the project has always had. The improvements are designed to accomplish just that goal. No new density is proposed. All of the proposed improvements as demonstrated by the Project Plan and Site Plan are being done to enhance the quality of the pedestrian experience and perpetuate the project as a destination that will attract people to linger, enjoy and support shop and restaurant tenants within a comfortable and fun environment. Bicyclists are welcome as are people who just want to experience an enjoyable walk to get to work or another designation. All of these features will ensure the continued success of the Downtown as desired by all.

Downtown Silver Spring has hosted and programmed numerous community events. These have included a Farmers Market, Thanksgiving Day Parade, Halloween Zombie Walk, and many forms of art, musical and dance shows and presentations. These events and programs will continue. They will be enhanced by the new portable stage which, when not in use, will serve as attractive dispersed seating, additional attractive seating, expanded amenity spaces, murals, refreshed art work and sculpture pieces (one of which will incorporate the use of water), games and other attractions. All of these have amenities and have been reviewed and approved by the Planning Board and, where necessary because public art pieces were involved (including the removal of the splash fountain), the Art Review Panel. The improvements are intended to be attractive to all age levels.

One witness lamented the perceived loss of the ability to skateboard. However, this ability is not lost. The majority of the areas involved in the project will remain hardscaped and, to the extent consistent with safety concerns and the County's post-abandonment use requirements, skate boarding may continue. Importantly, many additional activities and amenities attractive to other users will be provided in what is intended to be a fair, inclusive and balanced manner. In this way, diversity will be encouraged.

A second witness complained that Ellsworth Drive had recently been reopened to vehicular traffic contrary to the wishes of certain community members. This, she contended, was evidence that the Petitioners were not cooperating with the wishes of the community. As Mr. Foulger explained, access has been temporarily permitted in order to address the very difficult circumstances caused by the COVID-19 pandemic on tenants and patrons. This access permits the pick-up of food, drive-up services and curb-side delivery, which can provide a lifeline to restaurants and small shops who cannot otherwise maintain pre-pandemic levels of sales and help to keep patrons safe. In a recent survey of tenants in the project by Petitioners, the vast majority supported this temporary access during the pandemic.

Finally, testimony was received that approving the Abandonment will result in the private sector controlling the right-of-way, and rights such as those afforded to citizens under the First Amendment of the United States Constitution may be curtailed. This contention reflects a



misunderstanding of the Abandonment process. Because Montgomery County owns the land subject to the public access easement and all of the land abutting the upper Ellsworth Drive dedication area, Montgomery County will own all of the Abandonment area when the Abandonment is granted and not Petitioners nor any other private entity. As noted in the September 10, 2020 MCDOT recommendation and other documents, Montgomery County must then revise the lease and public access easement for the Abandonment area to allow access for pedestrian, bicycles and emergency vehicles only with the exception of the area providing access to the Wayne Avenue Garage from Georgia Avenue, which will retain public access for vehicles (Record Exhibit N). This is exactly the situation which resulted from the abandonment of the majority of Ellsworth Drive between Georgia Avenue and Fenton Street in 1998 in AB-628. See County Council Resolution 13-1429 entered into the Record as Exhibit C, and the deeds and record plat attachments to Record Exhibit A. Therefore, Montgomery County will control the rights at issue.

### **Stormwater Management**

A few opponents to the synthetic turf complained that the stormwater management system serving the project would be inadequate if synthetic turf as proposed is used. This is not the case. There is no increase in runoff from implementation of the new design compared to existing conditions. The Staff Report at page 19 cites the October 30, 2019 confirmation of DPS that the Site Plan consisted of less than 5,000 square feet of disturbance. Testimony of witnesses and documents submitted in the Abandonment on behalf of Petitioners not only confirmed these facts but also described that the existing curbs and inlets would stay in place. Further, runoff would continue to run to an existing two-vault system located under Ellsworth Drive and pass through 386 X-CFS storm filter cartridges which filter and capture suspended solids, oils, greases, and metal as small as 20 microns (0.000787402 inches). Lastly, approximately 15 existing manholes provide maintenance access to these facilities which the County handles under a contract to a third party. Petitioners pay a pro-rated share of this maintenance expense. See Record Exhibit AD and the further discussion of the impacts of the synthetic turf on stormwater runoff below.

### **Key Responses to Synthetic Turf Objections**

As noted above, Petitioners object to the consideration of the opposition claims regarding synthetic turf. However, subject to this objection, Petitioners note that extensive materials were submitted and discussed during the Site Plan process in support of the use of the turf which have been made a part of the Abandonment Record. Specifically, Record Exhibit V is the Staff Report. The Staff Report discusses the several turf issues raised in this proceeding at pages 17-19. These include safety/flammability, pollutants, and drainage.

As to the pollutants and drainage, the Staff describes the two large storm filters referenced above and states that “DEP is not aware of any degradation artificial turf may have on these systems but recommends regular maintenance of the turf to avoid material dislodging.”

*Id.*, 19. Attachment C to the Staff Report contains the Synthetic Turf Manufacturer's Care and Maintenance Manual. The Planning Board conditioned the approval of the Site Plan as follows:

**"4. Maintenance**

**In addition to the maintenance agreement integrated into the MCDPS FDA approval, the Applicant must provide the Manufacturer's Care and Maintenance Manual with the Certified Site Plan and regularly maintain the synthetic turf according to the latest version of this Manual."**

Planning Board Resolution MCPB No. 20-047, Record Exhibit X.

As to safety and flammability concerns, the Staff Report refers to attached materials submitted by Petitioners which contain a heat map study showing that the synthetic turf as proposed "maintains a high degree of shade and is not expected to create unsafe heat conditions." Additionally, the Staff Report refers to attached supplemental information on the synthetic turf which details flammability testing that demonstrates that the material "is effective against severe test exposure, affords a high degree of fire protection, and does not present a flying hazard in terms of spread of flame". *Id.*, 19. Further, the Staff Report discusses and attaches the Fire Access approval of the Department of Permitting Services (Attachment D to Record Exhibit V). This approval required that a Fire Access Plan be approved by the Fire Marshal and a Long Term Maintenance Agreement be signed by the Applicant. Both of these requirements have been satisfied. See Attachment D to Record Exhibit V. These requirements were also incorporated as a condition to Resolution approval of the Site Plan (Condition 3 of Record Exhibit X).

**Petitioners' Further Responses to Turf-Related Issues**

As a result of the submission of several emails and other correspondence prior to the Hearing and subject to Petitioners' objections to the consideration of the use of synthetic turf as part of the Abandonment, Petitioners submitted responses ("Responses") to the key turf-related claims on September 14, 2020, which is found at Record Exhibit AD. The Responses further refute the contentions asserted regarding stormwater runoff, cleaning protocols, toxicity, heat gain, recyclability, flammability, alternatives to turf, dog access, and the Thanksgiving Day Parade.

Petitioners believe that all these issues were covered in the above discussions and before the Planning Board at the time of Site Plan. However, Petitioners would like to point out the following from the Responses:

- The synthetic turf that will be used does not contain any infill particles similar to athletic fields
- Pet waste, stains, and blemishes may be cleaned with a mild solution of granular household detergent (Simple Green, a bio-friendly cleaner, is recommended); oil-



based stains and chewing gum may be cleaned with limited application of mineral spirits or grease spot removers that are also used to clean sidewalks, streets, and plazas, and the turf to be used is treated to prevent the buildup of microbes of the face fibers.

- Unlike the application on athletic fields, the turf to be used on Ellsworth does not include infill material such as drainage mats and shock pads that must be separated to allow recycling. Instead the turf may be pulled up and recycled as a single unit. Additionally, the manufacturer has a recycling stream that will recycle the turf to make nailing boards.

### **Conclusion**

For all of the above reasons and those presented by Petitioners in writing and at the Hearing, Petitioners respectfully request that the Abandonment be granted as proposed.

Please include this letter in the Record of the Abandonment.

Thank you.

Very truly yours,

MILES & STOCKBRIDGE P.C.



Barbara A. Sears

cc: Eric Willis  
Bryant Foulger  
Paul Weinschenk  
Don Hoover