



PLANNING & DEVELOPMENT
CITY OF NEWARK

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August 27, 2018

Michael J. Hoffman, Esq.
Tarabicos Grosso, LLP
One Corporate Commons
100 West Commons Blvd.
Suite 415
New Castle, DE 19720

Dear Mike,

The City of Newark's Subdivision Advisory Committee has reviewed the major subdivision sketch plan you submitted on June 6, 2018 for College Square.

We have the following comments:

Electric Department

1. Electric Service is available from Marrows Road, Wyoming Road and Library Avenue.
2. An open utility easement is required and must be listed on the prints.
3. A suitable location approved by the Electric Department will be required for a padmounted transformers.
4. Someone must contact the Electric Department with information on transformer location and electric service needs before any costs can be calculated. Developer must pay all costs for electric service infrastructure. The price is subject to a yearly CPI escalation from the date of council approval
5. No trees growing over 18 feet at maturity can be planted near the electric service pole.
6. Individual electric meters will be required for each commercial unit. The developer will be responsible for the cost of the electric meters.
7. Developer must pay any costs needed to ensure the new smart meters will talk to the

existing system.

Parks and Recreation Department

1. We would like to have a minimum of 8' sidewalk around the Apartment complex, see attached highlighted area. This would give over a 1/3 of a mile walking trail for the residents of the apartments.
2. Expand the sidewalk to 8' at the main entrance from Wyoming Road (opposite sidewalk from apartments), this will help make the connection to and from the Pomeroy Trail.
3. We will require the Developer to pay \$450 per apartment unit for a total of \$137,250 for cash in lieu of land prior to final approval of the construction improvement plan. This is in accordance with Chapter 27, Appendix VI of the Code of the City of Newark, Delaware.

Police Department

No comments

Planning and Development Department

Code Enforcement Division

1. Comments based on 2012 IBC;
2. The proposed buildings must meet all applicable Building and Fire Code requirements. Complete architectural, structural, plumbing, HVAC, electrical and fire protection drawings are required for review prior to permits. Building height and area will be determined by the type of construction. Sprinklers are required;
3. The architectural plans will need to match the architectural rendering/elevations submitted for the project. Confirmation that the elevations will match the rendering will need to be done at the time of architectural plan review. Code recommends that draft floor plans be presented to avoid issues during site plan review;
4. Please consult the 2012 IFC as well as the 2015 Delaware Fire Protection Regulations. Sprinklers, alarms and standpipes will be required for this project. A water flow test will need to be conducted. Final fire hydrant locations will need to be approved. Please label all fire lanes and note that restrictions may be placed on parking in front of the building. Separate curb stops for fire service and domestic water will be required;

5. The proposed building will need to meet the LEED standards as per 2012 IECC;
6. Site must comply with all Accessibility Standards. Please be sure to review the standards for elevators;
7. Demolition permits will be required for any existing buildings. An environmental survey and report will be required for any building. Any underground tanks will need to be removed by a certified contractor;
8. Pre-construction meeting will be required. Proper protection of site and public required during construction. The sequence of construction to be prepared and submitted by a licensed professional engineer. Please note the staging area for construction materials.

Land Use Division

1. Residential use on the ground floor as well as a drive-in food service in conjunction with an eating establishment is not allowed in the BB zoning district. Per the attached letter, variances from these requirements can be sought via the Site Plan Approval process as described in Chapter 32 Article XXVII. Please add these variances to the plan.
2. A shopping center identification sign may be allowed without regard to size or shape if the sign or signs are approved by the planning commission and council as part of the subdivision approval procedure. Provide details of monument signs for consideration by Planning Commission and City Council.

Public Works and Water Resources Department

GENERAL SITE:

1. Add a "Purpose of Plan" to the Cover/Index Sheet. Indicate generally what is being removed and what is being proposed (for example, removal of X existing retail buildings, construction of X retail buildings, construction of X apartment buildings with X number of units, relocation of above ground SWM area, addition of subsurface stormwater management).
2. It appears that parcel "18-021.00-172" at 121 College Square is being subdivided into 2 lots. This should be included in the purposes of the plan.
3. The "traffic circle" in the center of the project does not appear to have the necessary turning radii for larger vehicles and fire trucks. This would also seem to be a high traffic area and not an ideal location for a community plaza.
4. Add the project number "18-05-04" to all plan sheets.

5. Due to the overall size of the project, a key sheet or key map is recommended to clarify the general project location for each plan view sheet. Match lines could also be utilized for additional clarity.
6. Include the gross floor area and finished floor elevation of all proposed buildings. Preferably this would be indicated on the building in plan view in addition to any quantities in the data column.
7. Add a note to the Index/Cover Sheet indicating how refuse collection will be handled (public or private).
8. Add trash enclosures to any dumpster locations on site.
9. The limit of disturbance will need to be delineated on the plan and the area added to the Cover/Index Sheet.
10. Drawing SK-02 – There is a dead-end parking lot aisle north of the proposed retail building that should be avoided if possible.
11. A list of all utility owners shall be added to the Index/Cover Sheet as part of the Subdivision Plan submission.
12. Provide adjacent property owner and zoning information for all properties within 200 feet of the proposed project.
13. A bicycle parking rationale shall be provided under the Site Data column on the Index Sheet. One (1) bicycle parking space shall be provided for every five (5) required off-street parking stalls. A total of 383 bicycle parking spaces are required per code. This is likely excessive for the development and may be reduced. PWWR will evaluate the need for bicycle parking in the Subdivision Plan phase for the project. If the number of required parking stalls is reduced, the developer shall provide the balance of the required spaces to PWWR for use in other locations throughout the City.
14. The bike racks and rack layout will need to conform to the City of Newark Bicycle Plan and DeIDOT Standard Construction Detail M-4 – “Bike Rack Layout Details”.
15. ADA compliant sidewalks, curb ramps, and parking will be required for the entire project site including existing parking areas.
16. A DeIDOT Letter of No Objection to Recordation (LONOR) shall be furnished to the Public Works Department prior to CIP approval. It is highly recommended that the developer submit for a Letter of No Objection to Recordation (LONO) from DeIDOT as soon as possible to prevent any delays in the plan review process (Subdivision Plan and CIP phases). LONOR shall be provided concurrently with any future CIP submission.
17. Chapter 27, Appendix XV. Traffic and Transportation of the City of Newark Code requires that a Traffic Impact Study (TIS) be conducted for developments as required by the Delaware Department of Transportation and that the City may make suggestions regarding the scope of the TIS. DeIDOT has indicated that an area-wide study rather than a TIS is warranted for this development and has directed the applicant to pay fee in lieu of performing a TIS. This fee will

go toward the area wide study to be conducted in the future. In addition, the City will coordinate with DeIDOT on any off-site improvements that will be required for this development.

18. Show all existing and proposed utilities (including service lines) along Library Ave, Wyoming Road and Marrows Road, as well as inside the subject site.
19. Show existing and proposed contours. Provide additional high and low point elevations to allow for a determination of stormwater flow on the site.
20. Provide an Existing Conditions Plan with any future Subdivision Plan submission.
21. Provide a Landscape Plan for review during the Subdivision Plan phase. Include bioretention area plantings on the Landscaping Plan.
22. The proposed traffic circle is located directly adjacent to (2) 4-way intersections which makes maneuvering the intersection(s) awkward and is not recommended. Also, the alignment of travel lanes are offset from the lanes in the traffic circle making movement awkward, especially heading eastbound coming out of the circle toward Marrows Road. The traffic circle design and orientation should be revisited to improve proposed traffic flow through the site.
23. Bike lanes should be installed on the connector street to tie into the proposed cycle track on Delaware Avenue.

WATER & SEWER:

1. Provide location and details for connection to City water and sewer.
2. The following notes should be added to the Major Subdivision Plan:
 - a. "All construction shall be in accordance with the latest City of Newark standards and specifications, building code, and fire code."
 - b. "As-Built Plans and Checklist shall be submitted to the City of Newark prior to issuance of Certificate of Occupancy." *There is a short review process for As-built submissions so it is recommended that the submission be done in advance of expected occupancy to avoid delays.*
 - c. "All handicapped parking stalls, logos, and access aisles shall be marked with blue paint and hatched accordingly."
 - d. "An "Approval to Construct" will be required from the Department of Public Health Office of Drinking Water. A copy of the approved permit shall be furnished to the City prior to CIP approval."
 - e. "An "Approval to Operate" from the Department of Public Health shall be provided to the City prior to the use of any domestic water or issuance of any certificate of occupancy."
 - f. "A DNREC "Construction of Wastewater Collection and Conveyance Systems" permit will be required and shall be furnished to the City prior to CIP approval." *Required for all projects generating more than 2000 gallons per day average sewer flow.*
 - g. "A signed and sealed copy of the DNREC approved sanitary sewer as-built plans shall be furnished to the City within 30 days of DNREC approval."

- h. "The Developer shall pay the Sewage Treatment Plant (STP) fee prior to the issuance of any building permit." *A credit will be given for any existing building that is to be removed.*
 - i. "Individual water meters will be required for each commercial and residential unit and shall be located in one or more centrally located meter room(s) as close as possible to where the domestic main enters the building. The meter room(s) shall be readily accessible to the City of Newark. A ¼ turn locking ball valve shall be located immediately on both sides of each meter in a meter bank setup. The developer will be responsible for the cost of the meters. The city will determine the size of the meters in coordination with the developer."
 - j. "The Developer shall pay all water meter fees prior to the issuance of any building permit."
 - k. "The Developer shall be responsible for the installation and perpetual maintenance of the meter pits, valves, associated piping, and weighted check valve."
 - l. "The owner will be responsible for the installation of additional transmission equipment as necessary should the proposed building negatively affect the performance of the City's wireless meter reading system."
 - m. "All water valves shall be Mueller unless otherwise approved by the City of Newark Public Works and Water Resources Department."
 - n. "All unused water and sewer services shall be terminated at the utility main or at a location determined by the Public Works and Water Resources Department."
 - o. "Any damage to the City storm sewer, water, or sanitary sewer infrastructure shall be repaired or replaced to the satisfaction of the Public Works and Water Resources Department."
 - p. "All on-site storm sewer and sanitary sewer is private. On-site manholes shall not have "NEWARK" anywhere on the lid."
 - q. "The required fire protection flow rate(s) is/are _____." *The required flow rate(s) for each buildings sprinkler system shall be determined by the engineer/sprinkler designer and provided with Subdivision Plan submission.*
 - r. "The developer shall paint all existing and proposed fire hydrants associated with this project to reflect the flow capacity and apply 2-inch reflective tape in accordance with the State Fire Code."
 - s. "The Developer shall televise any existing sanitary sewer laterals to be re-used and provide a copy of the video to the City for review. The condition will be evaluated to determine the suitability for reuse." *This note only applies if existing laterals are to be reused. Contact Shawn Gealy, Water and Wastewater Inspector, at (302) 229-1396 a minimum of 48 hours in advance of the CCTV work and provide a digital copy to the Public Works and Water Resources Department.*
- 3. Provide a wastewater flow generation summary on the future Subdivision Plans to show existing and proposed average and peak wastewater flows using New Castle County Department of Special Services flow generation standards.
 - 4. Provide an overall utility plan showing the full extent of the development and all existing and proposed utilities on one sheet.
 - 5. Existing tops and inverts of all storm and sanitary structures will be required to be shown on the Subdivision plans.
 - 6. A hydrant flow tests will be required to verify the flow rate and system pressure are consistent with the basis of design. The water system throughout the site is private. All valves and hydrants

will need to be operated by the owner (or owner's representative). Public Works and Water Resources personnel must be present during flow testing to collect flow test results. Please submit a fire flow test request to PWWR.

STORMWATER:

1. The SAS checklist and SAR have not been submitted for review. The Sediment and Stormwater Program Project Application Meeting will need to be scheduled with the City's Planning and Design Engineer (Ethan Robinson, Phone: (302) 366-7000 Ext. 2108).
2. Stormwater management will be required for the subject site. As a redevelopment project, runoff reduction practices shall be employed to achieve a 30% reduction in the effective imperviousness based on the existing conditions. The approach to stormwater management for the site will be further discussed during the SAS Project Application Meeting.
3. Show the existing stormwater infrastructure and facilities on the plans including those which are to be removed, namely the large stormwater area on the east side of Lot 4.
4. Redevelopment projects that require a detailed Sediment and Stormwater Management Plan or exceed 1 acre in disturbance also require NPDES permit coverage through submittal of a Notice of Intent (NOI). Proof of the NOI submission to DNREC will be required during the CIP phase.
5. A wetlands report is required to be submitted for major subdivisions involving new and/or additional construction in accordance with Chapter 27, Section VIII of the City Code of Ordinances. If there are no wetlands, a letter certifying no wetland are present will need to be submitted by a wetland scientist or the professional engineer of record.

This Subdivision Plan review is solely based upon the information and details provided in the submitted documents. Additional comments may be generated during any future submission or CIP phases.

I hope you find this information helpful. Should you have questions or need more information, please do not hesitate to contact me at 366-7000, extension 2040.

Sincerely,



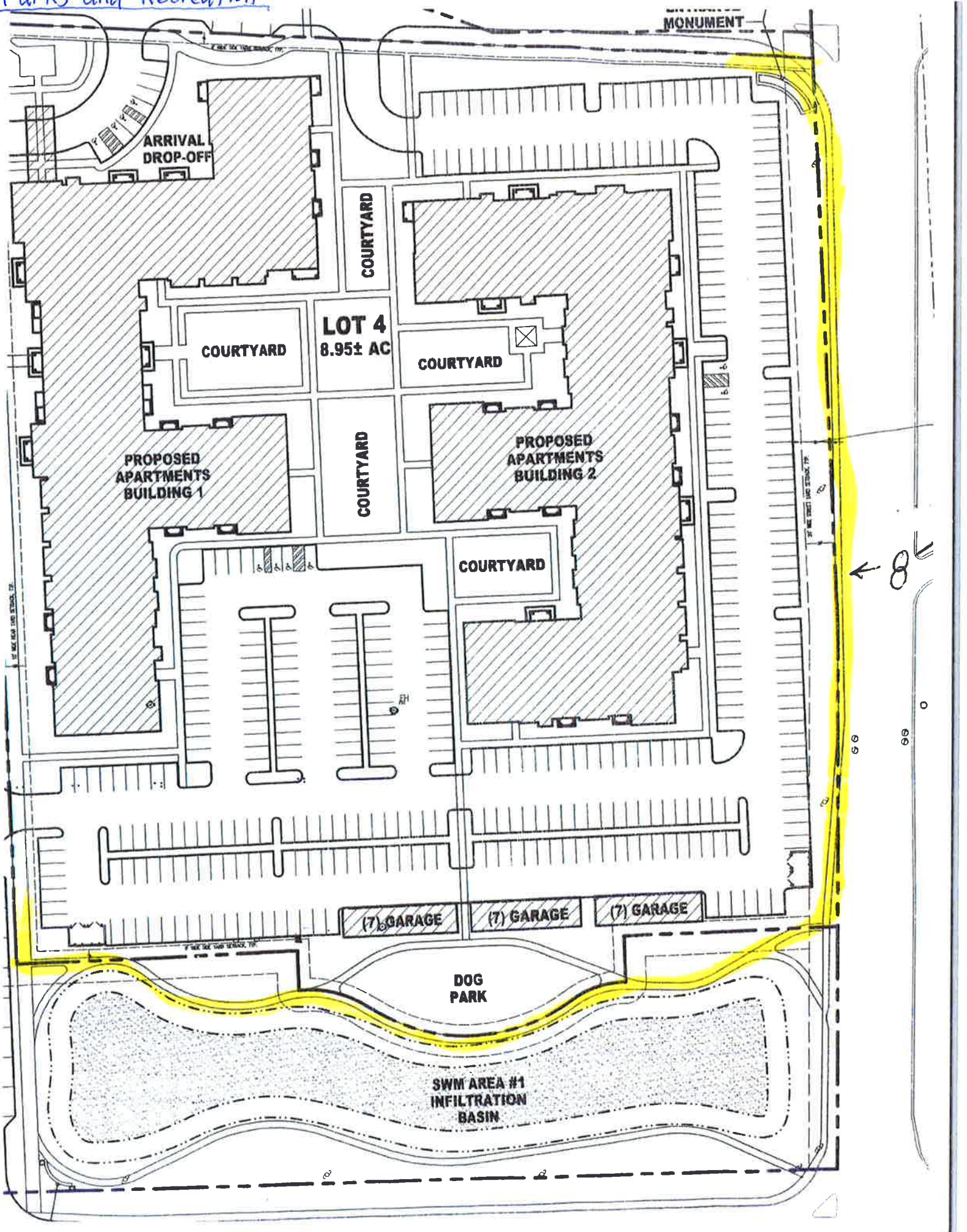
Mary Ellen Gray, AICP
Planning and Development Director

MEG/tf

Attachments:

- Parks and Recreation diagram
- Letter from Mary Ellen Gray dated August, 27, 2018
- Letter from Mike Hoffman dated May 30, 2018

Parks and Recreation





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CITY OF NEWARK

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August 27, 2018

Michael J. Hoffman, Esq.
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100 West Commons Blvd.
Suite 415
New Castle, DE 19720

Dear Mike,

Thank you for your May 30, 2018 letter regarding the College Square Redevelopment project seeking relief from the municipal code to 1) allow apartments on the ground floor (hereinafter the "Apartment Regulation") and 2) to allow a drive through in conjunction with an eating establishment (hereinafter "Drive-Through Regulation"). This relief is being sought by way of the Site Plan Approval process as described in Chapter 32 Article XXVII.

By way of background, this project is located on three (3) contiguous parcels just south of Library Ave and north of Wyoming Ave comprising 46.18 +/- acres, identified as New Castle County tax parcel numbers 18-021.00-172, 18-021.00.196, and 18-021.00-199. This property is zoned BB Central Business District.

In consultation with the City of Newark's legal Counsel, Paul Bilodeau, Esq., relief from the Municipal Code for the City of Newark (hereinafter "Code") for the Apartment Regulation and Drive-Through Regulation can be sought through the Chapter 32, Article XXVI, Site Plan Approval provision of the Code. This determination is based on the case law as presented in your May 30, 2018 letter and the provisions Chapter 32 Article XXVII, Site Plan Approval. Please find a discussion of this determination below.

1. Court Cases

As indicated in the following Court cases, both the Apartment Regulation and the Drive-Through Regulation would require "area" variances in the BB Zone. As with the *Village of Highway One* case, the applicant is trying to build something allowable with a special use exception, but in a manner prohibited by Code. Or as the Court noted in *Council of Civil Organization of Brandywine Hundred* case, the requested variances relate to "the manner of a permitted use". In both cases, the Court determined it was an area variance being sought.

2. Site Plan Approval

The Site Plan Approval provisions allow for reasonable variations from the use and area regulations as well as variations to permitted uses.

As noted in Section 32-97(a):

“the purpose and intent of site plan approval is to provide alternatives for new development redevelopment proposals, to encourage variety and flexibility, for new development and redevelopment, and to provide the opportunity for energy efficient land use **by permitting reasonable variations from the use and area regulations stated in this chapter**” (emphasis provided).

And in Section 32-98(g), it states:

“The commission may recommend in approving the plan, conditions and **variations pertaining to permitted uses**, lot size, yard dimensions, distance between buildings, height of buildings, density, the placement of signs, **etc.**” (emphasis provided)

I believe that both requested variances to the Apartment Regulation and the Drive-Through Regulation could easily come under variations from the use and area regulations or variations to permitted uses as described above. And by adding the word “etc” to the list only serves to expand rather than limit the type of variances that can be considered.

In conclusion, based on the discussion above, relief from the Code to allow apartments on the ground floor (Apartment Regulation) and to allow a drive through in conjunction with an eating establishment (Drive-Through Regulation) can be sought by way of the Site Plan Approval process as described in Chapter 32 Article XXVII.

Please let me know if you have any questions.

Thank you.

Sincerely,



Mary Ellen Gray, AICP

Cc: Paul Bilodeau, Esq.



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May 30, 2018

VIA FIRST CLASS AND ELECTRONIC MAIL

Ms. Mary Ellen Gray, Director
Department of Planning and Development
City of Newark
220 South Main Street
Newark, Delaware 19711

RE: College Square Redevelopment – Site Plan Approval

Dear Mary Ellen:

As you know, our firm represents Fusco Management, Inc. (hereinafter “Fusco”), which is seeking approval for the redevelopment of the College Square Shopping Center. Currently, the College Square property consists of three (3) contiguous parcels along Library Avenue in Newark, collectively containing approximately 46.18 acres of land, also identified as having New Castle County tax parcel numbers 18-021.00-172, 18-021.00-196, and 18-021.00-199 (hereinafter the “Property”). Fusco’s redevelopment concept for the Property proposes a vibrant, walkable and bikeable, active lifestyle center (hereinafter the “College Square Redevelopment”).

Our preliminary review of the College Square Redevelopment has identified two areas where relief from the Municipal Code for the City of Newark, Delaware (hereinafter the “Code”) will be required: (1) to allow apartments on the ground floor (hereinafter “Apartment Regulation”); and (2) to allow a drive-through in conjunction with an eating establishment (hereinafter “Drive-Through Regulation”). As area and density regulations, deviation from such standards is proper though the City of Newark’s (hereinafter the “City”) Site Plan approval process.

The Property is zoned BB – Central Business District. According to the Code, in the Central Business zoning district, drive-through and apartment uses are permitted with a Special Use Permit.¹ However, the Code places limitations on how these permitted uses may be utilized

¹ City of Newark Municipal Code, Section 32-18(b)(2) and (13) (providing that “[d]rive in and curb service, for other than eating establishments” and “[a]partments . . . in conjunction with any nonresidential uses permitted in this district, except on ground floor locations” are permitted within the Central Business District with a Special Use Permit).

in the zoning district. Specifically, the Code provides that drive-throughs are permitted but not in conjunction with eating establishments, and residential apartments are permitted, but not when they are located on the first floor of a building.² As a result, the Apartment Regulation and Drive- Through Regulation represent limitations placed on permitted uses within the Central Business District.

Through Site Plan approval, the Code provides a mechanism through which a property owner may seek relief from *area and density regulations* which place limitations on otherwise permitted uses.³ While the Code does not define what constitutes an area and density regulation for purposes of Site Plan approval, the common law of Delaware provides some analogous analysis in the context of area and use variances that help differentiate what may be considered “area and density” regulations (relief from such is proper through Site Plan approval) from a “use” regulation.

Delaware courts have long recognized the distinctions between an area variance and a use variance. The seminal case of *Board of Adjustment of New Castle County v. Kwik-Check Realty, Inc.*, provides that a use variance “changes the character of the zoned district by permitting an otherwise proscribed use,” while an area variance “concerns only the practical difficulty in using the particular property for a permitted use.”⁴

To explain further, an area variance “allows deviations from zoning restrictions relating to the use of the property itself.”⁵ On the other hand, a use variance permits “a particular piece of property to be used in a manner otherwise prohibited by applicable law or zoning regulation.”⁶ A classic example of a use variance is one which permits a commercial use in a residential district.⁷ Specific examples of courts interpreting the differences between an area and use regulation help further illustrate the distinctions.

In *Stingray Rock, LLC v. Board of Adjustment of the City of Rehoboth Beach*, the landowner was seeking a variance from the 5,000 square foot floor plan limit for restaurants.⁸ The restaurant was located within a zoning district where restaurants were permitted; however the floor plan of the restaurant covered an area in excess of 6,000 square feet.⁹ The Superior Court held that the landowner was “clearly seek[ing]” an “area variance” as it was “in the proper zoning district to operate its restaurant, but its floor plan [was] non-conforming.”¹⁰

² *Id.*

³ *Id.* at Section 32-97(a) (providing that “[p]rovisions for site plan approval are hereby made for the area and density regulations for all permitted uses within a zoning district . . .”).

⁴ 389 A.2d 1289, 1291 (Del. 1978).

⁵ *Wawa, Inc. v. New Castle Cnty. Bd. Of Adjustment*, 929 A.2d 822, 830-31 (Del. Super. Ct. 2005); *see also id.* at 830 (noting that “an area variance is the relaxation of incidental limitations to a permitted use”) (citation omitted).

⁶ *Id.* at 831 (citations omitted).

⁷ *Kostyshyn v. City of Wilmington Zoning Bd. of Adjustment*, 1990 WL 58226, at *1, (Del. Super. Ct. Apr. 12, 1990).

⁸ 2013 WL 870662, at *1 (Del. Super. Ct. Feb. 28, 2013).

⁹ *Id.*

¹⁰ *Id.* at *3; *see also Rivers v. Turner*, 1991 WL 215670 (Del. Super. Ct. Oct. 1, 1991) (holding that frontage variances constitute area variances, not use variances), *aff'd*, 609 A.2d 669 (Del. 1992).

Similarly, in the *Village of Highway One v. Board of Adjustment of Sussex County*, the landowner was permitted under the code to erect a billboard; however, the landowner sought a variance from the height limit for billboards.¹¹ The Court held that what the landowner was seeking was an area variance since it “ha[d] the permission and ability, through the grant of a special use exception, to build a billboard on its land, but wishe[d] to build it in a way prohibited by the Code.”¹²

Likewise, in *Council of Civil Organization of Brandywine Hundred v. New Castle County Board of Adjustment*, the landowner was seeking a variance from the three story building limit in a more restrictive district in order to create additional parking for the use of a sixteen story commercial building located on an adjacent commercial lot.¹³ The Council of Civil Organizations of Brandywine Hundred, an umbrella group of civic organizations (hereinafter “CCOBH”), opposed the variance and argued that the landowner was seeking a use variance and not an area variance based on the theory that accessory parking lots must be zoned to permit the principal use of the adjacent lot which it serves. The Superior Court disagreed and held:

The C-2 zoning classification allows both parking and commercial office buildings, a fact which CCOBH concedes. It argues in response that accessory parking lots must be zoned to permit the principal use of the adjacent lot which it serves, and a sixteen-story building cannot be erected in a C-2 zone. However, this fact does not change the nature of the use. The only difference between the two zones for present purposes is that an O-2 zone allows taller commercial office buildings. The variance is related to the *manner of a permitted use*, parking for a building in excess of three stories located on an adjacent parcel of land. It did not seek to allow a use that was proscribed. As a result, the Board properly characterized the application as one seeking an area variance and applied the correct test.¹⁴

Here, the Area Regulation and Drive-Through Regulation are properly characterized as area and density regulations since they relate to the manner of how already permitted uses are utilized within the zoning district.¹⁵ With respect to the Apartment Regulation, similar to *Stingray*, the College Square Redevelopment’s apartment use is permitted with a Special Use Permit; however, its floor plan deviates from the Code (i.e., due to the location of apartments on the first floor). Also, like *Brandywine*, the Drive-Through Regulation does not change the nature of the drive-through use, already permitted via a Special Use Permit; rather, it involves the manner and extent to which drive-through services will be utilized within the zoning district. Critically, neither the Apartment Regulation nor Drive-Through Regulation propose a prohibited

¹¹ 2015 WL 799536, at *7 n.45 (Del. Super. Ct. Feb. 23, 2015).

¹² *Id.*

¹³ 1995 WL 717202, at *1 (Del. Super. Ct. Nov. 27, 1995).

¹⁴ *Id.* at *5 (emphasis added).

¹⁵ See *Wawa*, 929 A.2d at 830; see also *Village*, 2015 WL 799536, at *7; *Stingray*, 2013 WL 870662, at *3; *Brandywine*, 1995 WL 717202, at *5.

Ms. Mary Ellen Gray
May 30, 2018
Page 4

use within the Central Business zoning district.¹⁶

Given the above, as the Apartment Regulation and Drive-Through Regulation are area and density regulations, relief through Site Plan approval is appropriate.

Very truly yours,



Michael J. Hoffman

cc: Paul Bilodeau, Esquire City Solicitor (via electronic mail)

¹⁶ City of Newark Municipal Code, Section 32-18(b)(2) and (13) (providing that apartments and drive-through services are permitted in Central Business District with Special Use Permits).
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