



Date: October 11, 2016

To: John Marcolin, Montgomery Park and Planning
Susanne Paul, Montgomery Parks
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From: Sarah Morse, Executive Director, Little Falls Watershed Alliance

Re: Equity One Sketch Plan: Legality of Buildings in the Stream Buffer

To Members of the Planning Staff:

After a careful review of Maryland Law, M-NCPPC Environmental Guidelines, the Montgomery County Zoning Ordinance, the Parks, Recreation and Open Space (PROS) Plan, the Incentive Density Implementation Guide, and the Westbard Sector Plan and Appendix, Little Falls Watershed Alliance feels there are serious legal concerns with the Sketch Plan revision submitted by Equity One. It is our belief that these documents mandate that Equity One should not—and may not—construct new buildings in the stream buffer. Further, the documents show that Equity One must dedicate land and substantial funds to support the greenway park early in the development process, and the buildings adjacent to the park must be designed to be attractive and welcoming to park users.

Our review reveals:

1. The Willett Branch buffer must be preserved from encroachment.

a. Maryland Code, Natural Resources Section 8-1801+ and M-NCPPC Environmental Guidelines

- i.* The guidelines treat streams as sensitive areas needing protection from the negative consequences of development, and therefore prohibit buildings in stream buffers; only necessary, minimized infrastructure is allowed. (p.17) State law also protects the buffer as part of restoration of the Bay, stating that new development activity in the buffer is “inimical” to the purposes of preserving water quality and habitats.

The proposed buildings would substantially invade the buffer, violating state law and local guidelines.

- ii.* Exceptions must meet five tests: that reasonable alternatives to encroachment do not exist; encroachment has been minimized; existing sensitive areas such as buffers, streams, and floodplains are avoided; the proposal is consistent with the preferred use of the buffer; and the plan includes compensation for any buffer loss. (p.19)

The proposed buffer encroachment is so great it cannot be justified under these tests. Its extent is not reasonable, nor is it minimized. Buildings would cover existing sensitive areas. The proposal is also not consistent with the park, which is the preferred use of the buffer. Furthermore, there is no mention of compensation for buffer intrusion in the Sector Plan.

- iii.** The guidelines show “special concern” for protecting steep slopes to avoid erosion that would affect stream water quality. (p.3,23)

Most of the proposed buildings would be constructed at the top of very steep slopes. Special concern would dictate that Equity One be required to stabilize any slopes disturbed during construction and continue to maintain them, whether or not it has dedicated the underlying land.

- iv.** The Environmental Guidelines require the Sector Plan and zoning laws to ensure that desired densities can be constructed only on “unconstrained areas” within a site. (p.2)

The balancing test in the Sector Plan could therefore not have been meant to allow the enormous encroachment proposed by Equity One.

- v.** Any Planning Board waivers must show “unreasonable hardship” and provide county benefits. (p.44)

Equity One’s massive encroachments cannot meet an unreasonable hardship test. Equity One has made no demonstration of hardship to the public, and yet it must meet the burden of proof. The Planning Board must honor the public’s trust in it, and make the Environmental Guidelines the rule, rather than the exception.

b. Montgomery County Zoning Ordinance

- i.** The Zoning Ordinance was passed to “promote the conservation of natural resources,” and to “promote or facilitate adequate . . . parks,” etc. (Section 1.2.1) The usable area for development can include only up to 50% of a property, and is reduced if the buffer area is greater than 50%. (Section 1.4.2)

This ordinance is therefore clear that the buffer must be respected, and should be free of construction.

- ii.** Variances from the zoning rules into buffer areas must not “substantially impair the master plan or be adverse to the use and enjoyment of abutting properties.” (Section 7.3.2)

Equity One’s intrusion into the buffer would substantially reduce the size of the stream valley park—central to the Sector Plan—and would lessen the enjoyment of that park.

- c. The Parks, Recreation and Open Space (PROS) Plan** sets forth goals for a hierarchy of parks in each sector, including wooded areas with trails that provide connectivity. It relies on **Vision 2030**, which emphasizes the need for parks and trails downcounty in urbanized areas. The Sector Plan explicitly relies on the both plans.

- i.** The PROS Plan aims to protect sensitive areas, such as streams, to meet state goals to clean up the Bay and conserve natural resources. (p.71,83)

Equity One’s proposed encroachment will not meet state or local environmental goals, or the PROS Plan.

- ii.** The Plan recognizes the need for stream valley parks that include substantial land around the stream for wildlife, trails, and other activities, especially in urbanized areas like Westbard. (p.45-47)

Equity One ignores this need, by drastically proposing to encroach on the buffer and therefore reduce the amount of land for a stream valley park on the south/west side of the stream to practically nothing.

d. The Sector Plan. The Sector Plan repeatedly makes a substantial, vibrant stream valley park the central feature in the Westbard Sector, and describes it as “a regional gem in the Montgomery County park and trail system.” (p.100)

i. The stream valley park is the only large green, open space in the Sector Plan—“the primary community asset.” (p.19). The Appendix references the state and county environmental laws, noting that the Sector Plan recommendations “are predicated on the statutory framework and guidance stating that sensitive areas must be protected and redevelopment cannot occur in the stream buffer.” (p.83)

Equity One should not be able to so thoroughly minimize this park essential to the Sector Plan by deep encroachment into the stream buffer by its buildings along the stream.

ii. Although there is balancing language in the Sector Plan to allow for some redevelopment in the buffer, the other side of the test is the need to create attractive green spaces that improve stream ecology. (p.57,75,101)

Equity One’s massive buffer encroachment ignores any balance in favor of the stream valley. New buildings should not go beyond the footprints of existing buildings (not including surface parking)—if that.

iii. The Sector Plan states that impervious surfaces for roads and parking should be reduced and replaced with shaded, more inviting and healthier landscape.” (p.57) The Appendix states that “buffers must be reclaimed from the built environment in order to facilitate the Willett Branch Greenway.” (p.69) “Roads, buildings, parking lots or similar types of permanent structures should be minimized within the stream buffer and carefully designed to complement the greenway park.” (p. 70)

Instead of naturalizing surface parking along the stream, the Sketch Plan proposes using the surface lots on these properties to expand the footprint of the proposed new buildings, in violation of the Sector Plan.

2. Equity One must commit in their Sketch Plan to providing the stream valley park as a public benefit in Phase One, including land dedication and sufficient funds to develop the park.

a. Incentive Density Implementation Guide

i. The Guide lists a “park” as a Major Public Facility, stating: if a master plan recommends a major public facility on a property, then the Sketch Plan applicant “must provide the major public facility.”(Section 4.7.3.A.2)

The Equity One Sketch Plan does not show the park area as a public benefit, and the developer does not commit to providing funds for the park. Both are needed, in addition to land dedication.

ii. The Guide discusses advance dedication of land for easements. (Section 4.7.3.C. 1)

The planning staff should ensure advance dedication of the land for the park, so that it is not contingent on whether any specific site is developed.

b. Sector Plan

- i.* The Sector Plan lists expected public amenities and benefits: the naturalization of the Willett Branch, creation of the greenway with a trail, and dedication of the stream in order to meet those goals. (p.98-99) The Appendix states that the park will include naturalization, trails, restored wetlands with boardwalks, interpretive signage, seating, and Wi-Fi access. (p.102)

Equity One should dedicate land for the park in the first phase of development, and be responsible for the costs of stream naturalization, trails, and the other amenities mentioned above on the property it dedicates.

- ii.* The Sector Plan notes that the Westbard II and Bowlmor sites were given additional heights due to constraints on the land. (p.71-72)

Equity One therefore has received benefits for its project, and needs to provide public benefits in return.

c. Environmental Regulations

- i.* To the extent the buffer is encroached upon, Equity One must compensate for that encroachment elsewhere in the stream valley. (p.2) The Appendix to the Sector Plan recognizes this, stating that because encroachment of the buffer may be allowed at Westwood II, it “would need to be offset by supplemental environmental enhancements in other portions of the stream.” (Section C.4.10)

This means Equity One must dedicate funds in advance to compensate for any buffer encroachment, in addition to funds for creating the park.

3. Equity One’s buildings adjacent to the buffer must be attractive and embrace the stream.

a. PROS Plan

- i.* The PROS Plan hierarchy requires each building to provide “outdoor recreation space to serve the residents of that building.” (p.5)

The buildings along the Willett Branch should therefore be designed to face and embrace the stream, pulling residents out into nature.

- ii.* The PROS Plan states that “urban open space systems should support a vibrant and sustainable urban center by creating open spaces that will be comfortable, attractive, easily accessible, and provide a range of experiences,” (p.5) Parks enhance health and “the quality of community life by providing visual relief from the built environment, a sense of place, and an opportunity to connect with community and nature, and space to gather, play and celebrate.” (p.18-19)

Equity One’s buildings come so close to the stream that they cannot create a sense of place or a range of experiences behind them. The two buildings behind and beside Westwood Tower visually and physically block access to the stream. All the buildings disturb the sense of nature for visitors. Please look at the buildings along the Little Falls Branch on Willard Avenue in Bethesda for an example of the canyon-like wall created by multi-storied buildings built within 30 feet of a creek.

b. Montgomery County Zoning Ordinance

- i.* Multi-use buildings allowed in CR-type zones should include “Retail/Service Establishments along the majority of the ground floor facing any street or open space and other nonresidential uses.” (Section 4.1.5)

Equity One is therefore required to make the ground floor of its new construction embrace the park. Visitors to the park should not see the backs of buildings.

- ii. All CR zones are required to integrate a variety of uses with public amenities appropriate to the setting and implement the recommendations of master plans. CRT zones should be pedestrian-oriented with limited ground floor footprints. (Section 4.51)

Equity One must construct buildings that keep the scale and purpose of the sector in mind, therefore better assimilating them into the park. Its Sketch Plan does not meet the CRT zone requirements.

- iii. An apartment building swimming pool, such as the one on the proposed Westwood Tower garage, does not appear to be a permitted use in the CRT zone. (Chapter 59-3)

Equity One would have to apply for a waiver for this use. The pool proposed by Equity One does not belong in the stream buffer, or in the zone at all. Its use on top of the garage extends the footprint unnecessarily into the buffer and blocks access to the stream valley park.

c. **Incentive Density Implementation Guide**

- i. This Guide states that “high quality design is important in urban, integrated-use settings . . . [and] helps attract residents, patrons, and businesses to these areas. (p.33) The Guide defines exceptional design as a “site design whose visual and functional impacts exceptionally enhance the character of a setting,” which includes “creating a sense of place;” “enhancing the public realm in a distinct and original matter;” and “designing compact, infill development so living, working and shopping environments are more pleasurable and desirable on a problematic site.” (Section 4.7.3.E.2)

Equity One dropped exceptional design from its list of public benefits, but quality design should be expected in the Westbard area. Not only should the buildings harmoniously embrace the stream, but there should be areas along the stream used for gathering and special areas set aside as entrances to the park.

- ii. The Guide notes that the “quality of the built environment affects light, shadow, wind, and noise, as well as the functional and economic value of property.” (p.33)

The proposed buildings would be so close to the stream that they will damage the stream valley park with noise and shadow, and overwhelm the space, detracting from public use of the park.

- iii. The Guide provides for public benefits in other aspects of quality design, including desirable architectural elevations and setbacks, historic resource protection [such as the cemetery], public open space, public art, tower step-back, and others. (Section 4.7.3.E)

None of these are mentioned in the Sketch Plan, and all are important for such a massive project.

d. **Sector Plan**

- i. The Sector Plan stresses that the greenway paths should be high quality, inviting, and improve connectivity between nature and the variety of spaces in Westbard. (p. 33,49,51) The Appendix notes that the park would “increase opportunities for social interaction, and increase property values.” (p.108) The Sector Plan stresses the importance of “placemaking” to “activate” buildings and open spaces. (p.54) and calls for improvements like a “landscaped pocket park,” and for the stream to “serve as an amenity for adjacent development.” (p.76)

Equity One’s plan for buildings immediately adjacent to the stream will automatically reduce the attractiveness of the park and trails, creating a walled canyon. The buildings block park access, reduce connectivity, and limit spaces for social interaction. They ignore any sense of placemaking.

- ii.* The Appendix calls for limiting the use of fencing and walls to make the area by the stream as natural as possible, and to have crossings naturalized with space for wildlife passage.

Equity One's plan leaves almost no space for wildlife, and proposes walls of buildings that are not integrated into the environment.

- iii.* The Sector Plan notes that the greenway is important enough to receive Legacy Open Space (LOS) designation (p.101). The Appendix further notes that the park meets the LOS criteria "to increase access to open space and recreation in dense urban communities, to promote interconnectivity of the urban green infrastructure, and to provide community open space for casual use and large community gatherings."(p.93)

Equity One's buildings must comply with this vision.

4. Site-Specific Issues

a. Westwood Tower parking garage:

The area behind Westwood Tower is the heart of the plan for a new park, being the widest space in the currently developable property and the site of an African American cemetery. It should become a major, welcoming access point to the stream area, as shown in the maps on pages 12 and 50 of the Sector Plan. A garage and pool must not be permitted in the buffer in this location.

- i.* The FEMA flood plain covers almost the entire site of the proposed garage, and therefore prohibits its construction.
- ii.* The Sector Plan contemplates redevelopment only on parcel 4b of the Westwood Tower site—not on parcel 4a, where the existing Westwood Tower stands. The Sector Plan further recognizes that "a significant portion of the site [behind Westwood Tower] is restricted by environmental constraints such as a stream buffer and flood plain," (p. 72) implying that no new building should be there. The Plan further states that parts of the Westwood Tower parcels 238, 240, and 175 should be designated "as a floodplain area and as a stream naturalization/amenity area for development within Westbard." (p.76)
- iii.* The area behind and adjacent to the building was a cemetery from 1911 until it was sold in 1958. There are no records that the graves have been moved and oral testimony suggests that they were not. Using this area for a parking garage is inappropriate and not supported by the Sector Plan. The Sector Plan specifically suggests providing "a landscape setting in this location that is respectful of site history." (p.76)
- iv.* The Sector Plan also requires a rebuilt pedestrian crossing on that site, which will not easily link to Westbard Avenue if the parking garage blocks access to it. (p.76)
- v.* The garage would be built on a steeply sloping site currently covered with surface parking. Construction here would cause erosion. The Sector Plan envisions returning the current surface parking lot to nature—not using it for a new structure. (p.57,76)
- vi.* Further, the County Council did not place an exception for the garage in the Sector Plan or adopt language proposed by the HOC regarding the garage structure. The Sector Plan maps do not show a garage or other structure behind Westwood Tower. (p. 12,13,50,52,54,68,74)
- vii.* Other guidance on parking in the Sector Plan favors underground parking and street parking for retail shoppers, rather than above-ground structured parking. (p.74) The American Plant Food site, also adjacent to the stream, is required to screen any parking structure with residential or retail spaces, which should be a model for all redevelopment. (p.80) This model is not possible at the Westwood Tower site.

- viii.* The parking garage, with the accompanying exhaust and noise, will prevent the park from being attractive, stress-free, and quiet for users, as contemplated by the Sector Plan and the PROS Plan.
- ix.* The balancing test allows recommended redevelopment that is necessary, and this garage was neither recommended, nor is it necessary.

b. *Bowlmor Site:*

The Bowlmor site is steeply sloped and new buildings must be spaced back from the buffer to 150 feet to prevent erosion in the creek valley.

- i.* The original footprint was already partially in the buffer. The massive size of the proposed building goes deep into the buffer, on land that slopes quickly downhill toward Westwood Tower and the stream. Neither the site nor the proposed size of the building are appropriate for this parcel.
- ii.* The proposed building will be constructed at the top of a very steep slope backing the stream, and will ultimately destabilize that slope. A building in this area is contrary to the Environmental Guidelines, which recommend a 150-foot buffer in areas with steep slopes.
- iii.* The Sector Plan Appendix notes that soils on the site are manmade with fill, and would require extensive stabilization. (Section C.4.15) Allowing construction to the edge of the slope is therefore dangerous and probably costly.
- iv.* The initial proposal by Equity One was for a 125-foot structure. When the height was cut to 110 feet, the FAR was not reduced as it should have been to keep prohibit so much buffer encroachment. It is important that this oversight not be used as rationale for encroaching in the buffer.
- v.* The Sector Plan envisions naturalizing surface parking in the sector, (p.57,76) such as the parking around the current building, and not using that area as a building site.

c. *Westwood II:*

While some encroachment of the buffer was contemplated here to the extent of the existing footprint, the amount of encroachment proposed by Equity One is far too great.

- i.* At the Planning Board, the new building had an allowed height of 90 feet. The Council's reduction to 75 feet, should not therefore permit expansion of the footprint deeper into the buffer. The FAR should have been reduced as well. Again, like the Bowlmor site, this oversight should not be used as rationale for allowing building deep into the buffer.
- ii.* The proposed building will be constructed at the top of a very steep slope, which will ultimately destabilize the slope. Environmental Regulations prohibit building on steep slope for this reason.
- iii.* Some of the proposed site is in the FEMA floodplain and therefore should prohibit construction.
- iv.* The Sector Plan, in general, anticipated changing surface parking to naturalized areas. (p.57,76) The Appendix says of the Westwood II site that "the non-developed area surrounding the stream should be widened and re-naturalized as redevelopment takes place," (p. 59) indicating that construction on the stream buffer was not anticipated beyond the footprint of the current building.
- v.* The Appendix further calls for "buffer and stream enhancements... to the extent possible within the stream valley buffer" and an amenity area with naturalized elements. (Section C.4.10) It proposes a pocket park for dining and seating by a waterfall at this setting, which would be impossible if the building is constructed deep into the buffer.

d. Manor Care:

The Manor Care site is available for townhouses, but there is a tributary to the Willett Branch along the edge adjacent to River Road. The Sector Plan did not contemplate construction within that part of the site.

- i.* Some of the proposed townhouses would be constructed completely within the buffer, if not in the floodplain on that part of the site. This is not acceptable.
- ii.* The Sector Plan noted that the tributary to Willett Branch is less than six feet from the road, with invasive plants and sediment blocking the culvert. It calls for restoration of this site, along with the adjacent parcel 902. (p.75) Townhouses do not belong here.
- iii.* The Sector Plan calls for removing the linear parking lot on the Manor Care site, and reforesting it, to stabilize the stream. (p.76) Townhouses in this area would make this plan impossible.
- iv.* The Appendix also calls for “comprehensive stream naturalization” on the site, and for daylighting the stream to make it a focus of the public open space on the site. (Section C.4.9) Again, townhouses would not be consistent with this vision.
- v.* The Zoning Ordinance calls for common open space for townhouses that is at least 50 feet wide, and it must meet other size specifications. (Section 6.3.5) The proposed townhouses in the stream bed would reduce the available open space on the site, and may not conform to the regulations.

Thank you for your attention to these points. We are grateful to the Planning Staff’s commitment to the naturalization of the Willett Branch and formation of the new park. It will be a real asset to the community and a show piece for Montgomery County. We look forward to seeing it to fruition.

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