

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
TOWNE CREST APARTMENTS, LLC**

Applicant

Stacey Hornstein
Charlene Louise Deloatch
David Ager
Barbara Goldberg-Goldman
Wilson Mancilla
Trini Rodriguez
Ronald Seiboth
Perry Berman
Timothy Longfellow
Kevin Foster
Ann N. Randall
Rick Floyd

In Support of the Application

Stephen Z. Kaufman, Esquire
Erin Girard, Esquire
Attorneys for the Applicant

LMA No. G-910

Carla Weinberg
Joseph Davis
Robert Booher
Stacey Umunna
Charles Challstrom
Honorable Georgette Cole

David W. Brown, Esquire
Attorney for the Town of Washington Grove

In Opposition to the Application

Report and Recommendation by: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. EXECUTIVE SUMMARY

Applicant:	Towne Crest Apartments LLC
LMA No. & Date of Filing:	G-910, filed November 9, 2011;
Zoning/Use Sought:	PD-35 Zone; 329 dwelling units in two multi-family buildings and up to 12 townhouses. The Applicant has presented two alternative development plans. In Alternative A, one of the multi-family buildings encroaches into a setback required in the PD Zone. In Alternative B, none of the buildings encroach into the minimum setback.
Current Zone and Use:	3.58 acres is zoned R-T 12.5; 4.53 acres is zoned R-30; existing development includes 107 dwelling units in a mix of multi-family buildings and townhouses.
Location:	The property is located at 17500 Towne Crest Drive in Gaithersburg. It is bordered to the north by the City of Gaithersburg and to the west and south by the Town of Washington Grove.
Acreage to be Rezoned:	The total gross tract area of all parcels is approximately 9.41 acres; the Applicant requests rezoning only of the net tract area of 8.1 acres
Density Permitted in the Zone Requested	294 units (based on the net tract area).
Bonus Density for 15% MPDUs: (22% Bonus Density)	359 dwelling units
Parking Required/Planned:	Alternative A Development Plan: 468 required/500 provided Alternative B Development Plan: 467 required/500 provided
Environmental Issues:	Requires the removal of specimen trees both on-site and within the Town of Washington Grove's forest preserve; potential impacts to existing erosion problem within the forest preserve.
Sector Plan:	1985 Gaithersburg and Vicinity Master Plan
Neighborhood Response:	Supported by communities

- Significant Issues:
- (1) Compliance with recommendations in the Master Plan regarding density;
 - (2) Compliance with the purpose of the PD Zone to implement the Master Plan and to preserve as many trees as possible;
 - (3) Compatibility with the surrounding area and adjacent uses, particularly as to the historic status of the Town of Washington Grove, density, and impact on the Town's forest preserve;
 - (4) Compliance with the required amount of green area in the PD-35 Zone;
 - (5) Compliance with the permitted land uses in the PD-35 Zone;
 - (6) Whether the development plan furthers the public interest.
- Technical Staff Recommends: Approval of a prior version of the development plan requesting rezoning to the PD-44 Zone; Technical Staff did not consider the amended PD-35 request.
- Planning Board Recommends: Denial of the PD-44 development plan; declined reconsideration the PD-35 development plan because it did not address reasons for denial of the PD-44 application.
- Hearing Examiner Recommends: Denial.
- District Council Votes Necessary For Approval 6 votes

II. STATEMENT OF THE CASE

Originally filed on November 9, 2011, the density proposed by this development plan has steadily decreased during the course of these proceedings. The Applicant's original application requested rezoning of approximately 8.11 acres of property located at 17500 Towne Crest Drive in Gaithersburg from the RT 12.5 and R-30 Zones to the PD-60 Zone. The development plan for the PD-60 Application called for 469 dwelling units in four buildings. The two northernmost buildings were five stories in height, decreasing to four and then three stories moving south on the property. The Applicant proposed to designate 12.5% of the units as MPDUs. Exhibit 16. After meeting with Technical Staff of the Maryland-National Capital Park and Planning Commission, the Applicant requested a postponement of the original hearing date of May 4, 2012, to September 7, 2012, to permit the Applicant to address issues raised by Technical Staff. Exhibit 44.

The next iteration to appear was a request for rezoning to the PD-44 Zone filed in June, 2012. Exhibit 46. This plan called for 356 dwelling units in two multi-family buildings between three and four stories in height and up to 12 townhouses. Exhibit 46(a). The Applicant requested postponements of different public hearing dates several times until a public hearing was finally scheduled for October 5, 2012.

Technical Staff recommended approval of the PD-44 application. Exhibit 60. The Planning Board heard the case on September 13, 2012, and recommended denial. Exhibit 71. The applicant then requested a postponement of the October 5, 2012, public hearing to address issues raised by the Planning Board. Exhibit 69. Another public hearing was scheduled for February 15, 2013.

Prior to the February 15th hearing, the Applicant revised its application again, this time requesting rezoning to the PD-35 Zone with 329 dwelling units, 15% of them designated as MPDUs. The Hearing Examiner referred the PD-35 development plan back to the Planning Board and to Technical Staff to provide them with an opportunity to comment (as required by §59-D-1.72 of the Zoning Ordinance). The Chairperson of the Planning Board declined to consider the revisions before the Board because the amendments did not sufficiently address the Board's concerns regarding the PD-44 application. Exhibit 91.

The February 15, 2013, public hearing proceeded as scheduled, and was resumed on February 25 and March 4, 2013. During the public hearing, the Applicant submitted an alternative development plan to address compliance with the setback requirements of the PD Zone. Exhibit 125. The record was held open for submission of closing statements and documentation of the accurate municipal boundary of the Town of Washington Grove (Town). These were timely submitted and the record closed on April 8, 2013. Exhibits 149, 152, 154, and 159. The Hearing Examiner reopened the record on May 17, 2013, to provide the parties with notice that she would be relying on portions of the legislative history of the PD Zone in her Report. She gave the parties an opportunity to direct her attention to any other portions of the legislative history they believed pertinent. They did so and the record closed for the final time on May 23, 2013. Exhibits 157, 163 and 164.

The Applicant's attorney describes this case as a "tale of two neighborhoods," both of which border the subject property. According to the Applicant, the Town wants the area to remain the same (i.e., preserve its "bucolic setting") while those adjacent to the eastern side of the subject property want their neighborhood revitalized. 2/15/13 T. 9-13. The Hearing Examiner, however, must apply County zoning regulations and State law to the development

plan. Because the Applicant has failed to submit sufficient proof that the application meets the following requirements, she recommends denial of the application:

1. The application does not meet the purpose clause of the PD Zone because it does not substantially comply with the Master Plan;
2. The application does not meet the purpose clause of the PD Zone to “preserve and take the greatest possible aesthetic advantage of trees and, in order to do so, minimize the amount of grading necessary for construction of a development.”
3. The application does not provide the minimum amount of green area required in the PD-35 Zone.
4. One alternative development plan (Alternative A, Exhibit 124) does not comply with the minimum setbacks of the PD-35 Zone. While the other alternative does show buildings meeting the minimum setback, this setback has not been incorporated into the binding elements of the development plan.
5. The application does not meet the required mix of residential uses in the PD-35 Zone.
6. The application is not compatible with adjacent properties; and
7. Because the development plan does not substantially comply with the area master plan, it is not in the public interest.

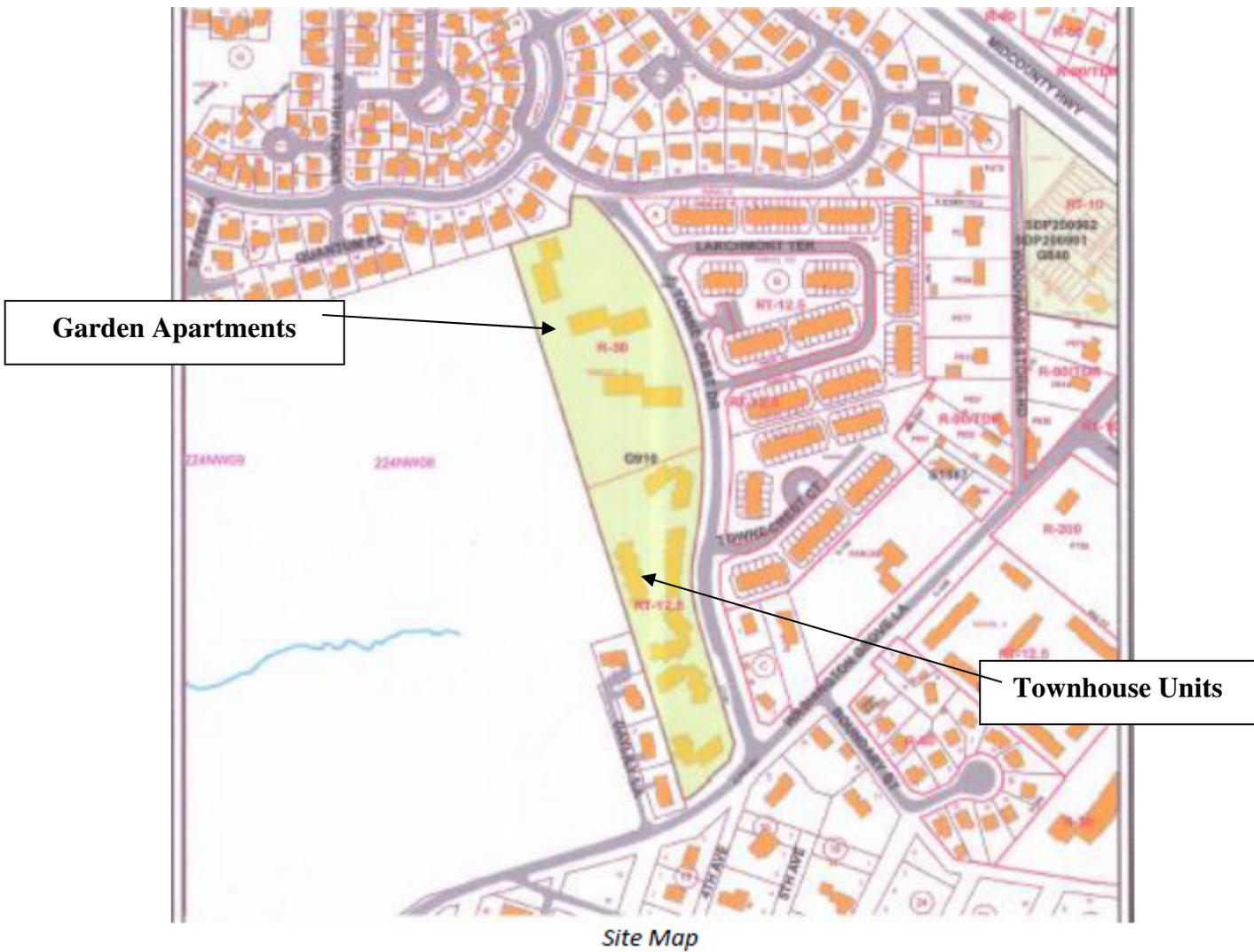
Six votes are necessary for approval of the application because (1) it requests a PD Zone density higher than that recommended by the Master Plan and (2) the Planning Board recommended denial of the application. *Montgomery County Code*, §59-D-1.62; §59-H-8.2(c).

III. FACTUAL BACKGROUND

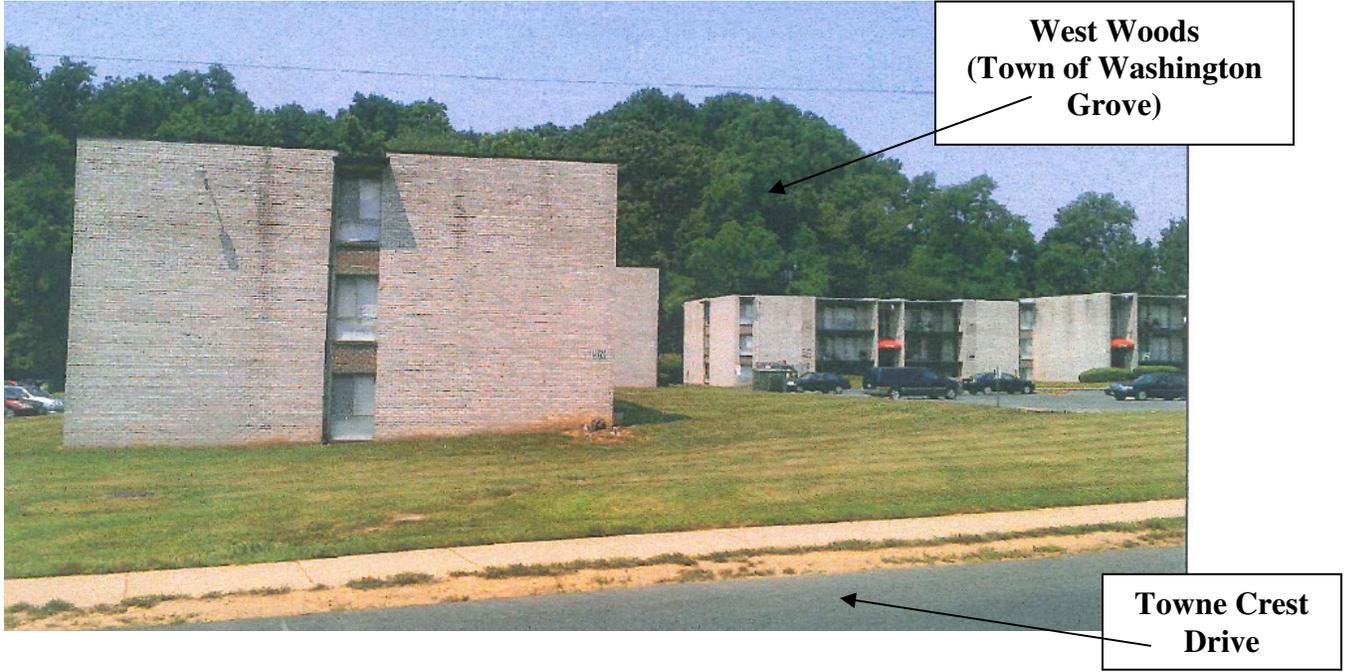
A. Subject Property

The subject property consists of 8.11 net acres (9.41 gross acres) located in the northwest quadrant of the intersection of Towne Crest Drive and Washington Grove Lane, The southern 3.58 acres (closest to Washington Grove Lane) are zoned R-T 12.5; the balance of the property is zoned R-30. Exhibit 60, p. 1.

The property is developed with 6 garden-style apartment buildings containing 60 dwelling units and 47 rental townhouse units with surface parking. These were constructed in the mid-1960's. Technical Staff advises that the site is relatively flat with approximately 1,420 linear feet of frontage on Towne Crest Drive and 180 feet of frontage on Washington Grove Lane. *Id.*, p. 2. There are existing sidewalks along Towne Crest Drive, but no curbs or street trees. *Id.* The location of the existing buildings in relation to surrounding development is shown on the Site Map included in the Technical Staff Report (Exhibit 60, p. 3):

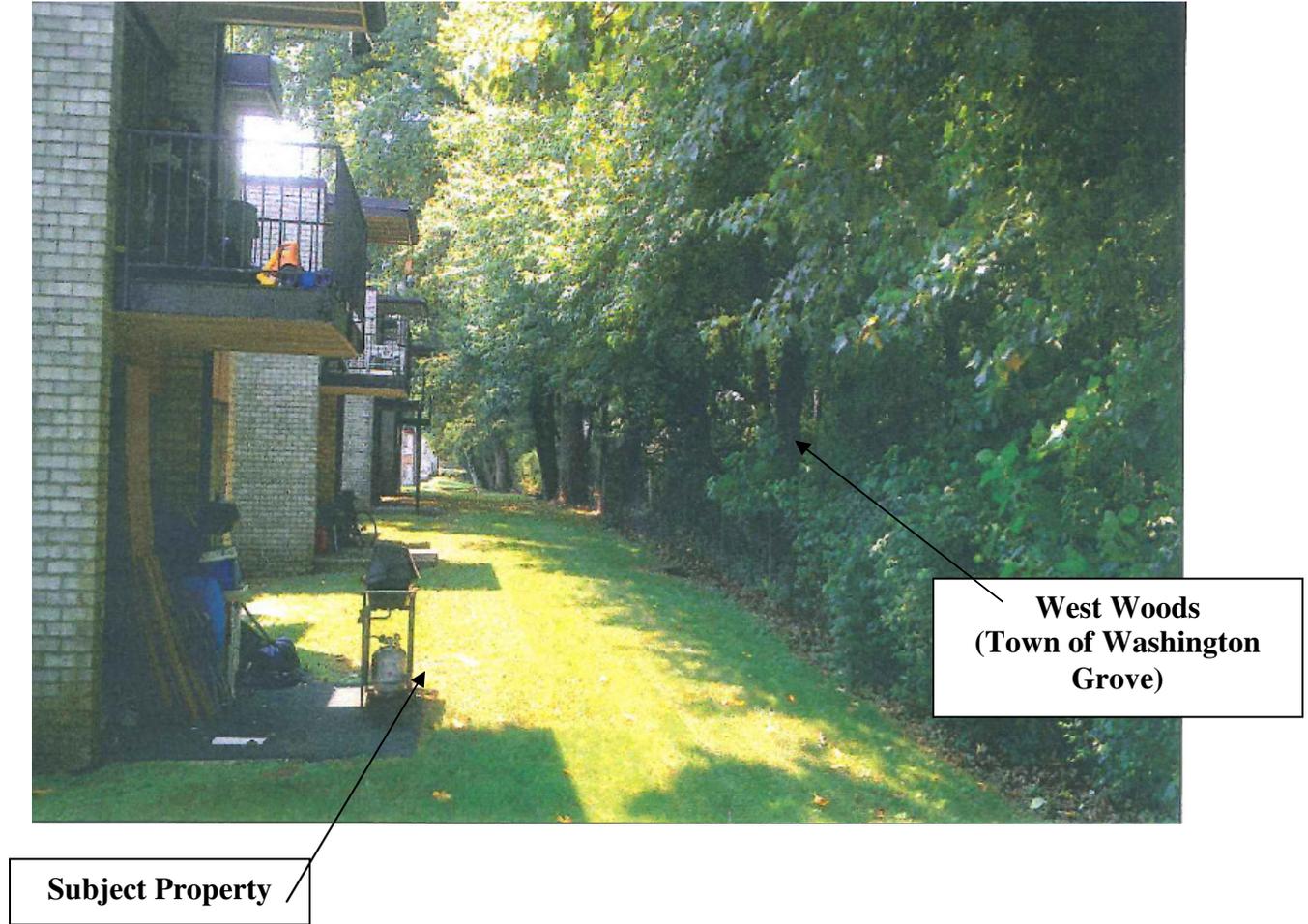


The Applicant submitted photographs of the existing garden apartments and surface parking areas on the subject property, examples of which (Exhibit 104) are shown on the following page.



Towne Crest Drive

Subject Property



B. Surrounding Area

The surrounding area is defined in a local map amendment application in order to determine the compatibility of the proposed use with the area that will be impacted by the new development. Staff defined the boundaries of the “surrounding area” as being the City of Gaithersburg boundary to the north, the Mid-County Highway to the northeast, Washington Square Park to the east, and the municipal boundary of the Town of Washington Grove to the south and west. This defined area is outlined on the following aerial photograph from the Technical Staff Report (Exhibit 60, p. 5), shown on the following page.



Site Vicinity

Two townhouse developments, Wedgewood Court Townhouses Association Nos. 1 and 2 (Wedgewood 1 and Wedgewood 2) border the eastern side of the property and are zoned R-T 12.5. There was a significant amount of testimony that these communities suffer from a shortage of parking because they were developed with only two parking spaces per dwelling. 2/15/13 T. 39, 2/25/13 T. 155-157; 3/4/13 T. 87-92. This creates congestion along Towne Crest Drive and overflows onto Boundary Street to the south (within the Town of Washington Grove). Several individuals testified that the area suffers from crime and is deteriorating, although no evidence quantifying this problem in the record. 2/15/13 T. 131-132; 162. To the north of the subject property are single-family detached homes in the Saybrooke community, within the City of Gaithersburg.

The subject property is bordered on west and south by the Town of Washington Grove (Town). An exhibit showing the subject property, the municipal boundary of the Town of Washington Grove, and the remaining land uses (Exhibit 10(a)), submitted by the Applicant, is shown below. Because the Applicant's exhibit incorrectly delineates the Town's municipal boundaries, the Hearing Examiner has included arrows showing the Town's correct northern boundary:



About three-quarters of the property's western property boundary adjoins Maple Lake Park and the West Woods, a park and forest preserve owned by the Town. The parties do not dispute that an existing stormwater outfall on the subject property has caused an erosion problem within the West Woods, which the Town characterizes as "serious". 2/25/13 T. 69; 3/4/13 T. 84. The southern portion of the western property line borders four single-family detached dwelling

units on Daylily Lane, also within the Town. Across Washington Grove Lane to the south of the property are single-family detached homes along Boundary Street, which forms the northern border of the Town. The Town's Mayor, Ms. Georgette Cole, submitted photographs to demonstrate the character of the area along the western property line (Exhibit 144):



Entrance to Daylily Lane from Washington Grove Lane



Washington Grove West Woods on the South side of Daylily Lane



Seven mature trees that are a screen between Towne Crest and Daylily buildings will be removed. Two belong to Washington Grove.

#7 Daylily Lane

Other than its natural features, the Town consists primarily of single-family detached homes at a density of approximately 1.08 dwelling units per acre. Originally settled in 1873, most of the Town is listed on the National Register for Historic Places. Exhibit 88(j). The Town's layout is derived from a "camp meeting design," similar to that of Chautauqua, New York, with pedestrian avenues radiating from a central circle like spokes on a wheel. According to its nomination for the National Register, the Town is "unique in its roots, its initial land use plan, in the design of its dwellings, in its determination to retain more land in a natural state as forests and parks than developed property, and in its character and its history." *Id.* The streets fan out from a "sacred circle" in the center of the town toward its edges. Exhibit 99(b)(i). The Town prides itself on its natural surroundings, which include two large wooded parks on the outskirts. Some commercial uses are located along Railroad Street along with a MARC train station. 2/25/13 T. 243-244.

The MARC station in Washington Grove offers limited commuter services. There are four flag stops (a flag stop is one where the engineer must physically observe a potential passenger on the platform before the train will stop) in the morning. There are five trains in the evening coming back from Washington, D.C. These are a one-way service; the first three of the five trains are flag stops and the other two are drop-off stops only (i.e., not intended for picking up passengers). Therefore, the station does not provide full transit options as does the Shady Grove station. 2/25/13 T. 176-177, 246; 3/4/13 T. 32-33.

Staff characterized the area immediately surrounding the property as a residential mix of apartments, townhouses, and single-family detached homes. According to Staff, the "larger surrounding area" consists primarily of single-family detached homes within the Town of

Washington Grove and the City of Gaithersburg. *Id.* A church is located to the south of the property at the intersection of Washington Grove Lane and Towne Crest Drive. *Id.* at 4.

Ms. Trini Rodriguez, one of the Applicant's expert land planners, characterized the neighborhood as being split by Washington Grove Lane into "sort of" two zones. The neighboring woodlands happen to create a "zone of its own," and to the south is the Town of Washington Grove, which she believes is an "absolute jewel". To the north, there is a collage of "sub-neighborhoods" that have shown deterioration, including the Wedgewoods, although there is less deterioration to the south. She acknowledged that she "concentrated" her research on the immediate surroundings of the site (i.e., the uses immediately adjacent to the subject property). She did this because Washington Grove Lane is a divider and the immediate surroundings are very discreet. 2/15/13 T. 162-163.

The Hearing Examiner agrees with Staff's broader delineation of the surrounding area, because it includes all of the areas that will be directly impacted by the use. Even the Applicant asserts that residents of the development will use the MARC station in the Town, will walk or drive to the MARC station. In addition, single-family detached homes within the Town are located along Boundary Street is located directly south of the subject property. 2/25/13 T. 147.

The Hearing Examiner agrees with Staff's characterization of the area as a mixture of residential uses; but would add that the Town's character is somewhat more unique than a typical single-family detached suburban neighborhood. Rather, she characterizes the surrounding area as a suburban mix of townhouses and single-family homes within the County and the City of Gaithersburg, transitioning abruptly to the natural features and historic character of the Town of Washington Grove.

C. The Proposed Development

1. Prior Development Plans and Agency Recommendations

Because neither Technical Staff nor the Planning Board submitted an evaluation of the current development plan, the Hearing Examiner will *briefly* describe prior versions so the Council may understand their comments on the application, some of which remain applicable to the PD-35 development plans. The prior development plans (i.e., requesting the PD-60 and PD-44 zoning densities) are shown on the next page. A description of the PD-60 development plan, requesting 469 dwelling units in four multi-family buildings, has already been included in Section I of this Report. Technical Staff never issued a recommendation on this plan, as the Applicant amended the Plan before it published its report.

The PD-44 development plan reduced the density of the project to 356 dwelling units housed in two multi-family buildings and up to 12 townhouses, also with 12.5% MPDUs. The multi-family buildings stepped up in height from three stories along Towne Crest Drive to four stories bordering the West Woods. This plan included 570 parking spaces, 64 spaces above the minimum required. Exhibit 53(a).

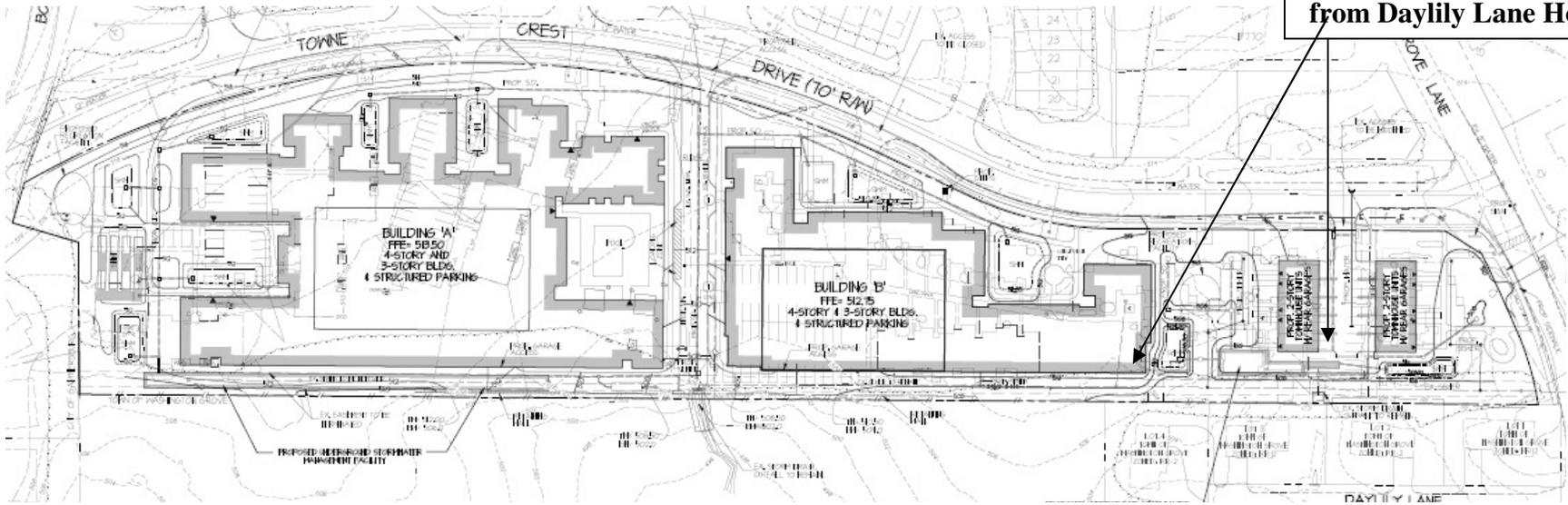
The Applicant justified the density requested in the PD-44 and PD-60 development plans by the proximity of transit (the MARC station in the Town and driving distance to the Metro) and by the project's "wrap" design, centering the structured parking behind the dwelling units and shielding it from the street. Exhibits 14, 53(d).

Technical Staff recommended approval of the PD-44 development plan. Staff concluded that the density requested conformed to the relevant area master plan—the *1985 Gaithersburg and Vicinity Master Plan* (Plan)—primarily because of the Plan's age. Staff noted that "many policies and patterns of development have changed." Exhibit 60, p. 14. These included a



**PD-60 Development Plan
Exhibit 16**

**Areas Less than 100 Feet
from Daylily Lane Homes**



**PD-44 Development Plan
Exhibit 53(c)**

“greater emphasis on directing densities to transit facilities to encourage the use of public transportation.” Exhibit 60, p. 14. Staff reasoned that the PD-44 density would take better advantage of the MARC station in Washington Grove and in the City of Gaithersburg. Staff also found that the PD-44 zoning “integrated” the two existing zoning categories on a single site. *Id.*

The PD-44 development plan located the townhouse strings and one of the multi-family buildings within 100 feet of the single-family detached homes on Daylily Lane (within the Town). To ensure compatibility with surrounding uses, the PD Zone requires that buildings must be setback a minimum of 100 feet from the areas recommended for single-family detached uses in a master plan. *Montgomery County Code*, §59-C-7.15(b).¹ Both the townhouses and a portion of Building B encroached into the 100-foot setback from the single-family detached homes on Daylily Lane. Exhibit 53(c).

Technical Staff agreed with the Applicant that a mandatory setback contained in the PD-44 Zone did not apply to the development. Exhibit 60, p. 18. The Applicant asserts that the setback doesn’t apply to the Daylily Lane homes because the phrase “master plan” used in Section 59-C-7.15(b) refers master plans adopted by the District Council and the Daylily homes are subject to the Town’s zoning authority, not the County’s. Exhibit 65. Were this not the case (the Applicant also argues), municipalities could “override County approvals and development standards.” *Id.* at 3.

The Applicant argues further that Planning Board’s adopted “Land Use Map” implementing the recommendations of the 1985 Gaithersburg and Vicinity Master Plan (Master Plan or Plan) shows the area as parkland, even though the land use recommended in

¹ The Zoning Ordinances authorizes a waiver (in certain circumstances) for properties near Central Business Districts, transit station development areas, and historic properties. *Id.* None of the parties contend that these situations apply here.

the Plan is 2-4 units per acre. Exhibit 149(a). In addition, they argue, the Plan's "Recommended Base Generalized Zoning" also shows the area as parkland. *Id.*

The Planning Board disagreed with Technical Staff's recommendation, both because the PD-44 development plan was not compatible with surrounding uses and because it was inconsistent with the Master Plan (Exhibit 71, pp. 1-2):

Since the Master Plan's land use map designates this property as "High-Density Residential, 8-15 units per acre," the current zone (R-30/R-T 12.5) and density (13.2 units per acre) were deemed appropriate at this location. Because no development was anticipated for this site, the status-quo was maintained as the Master Plan's recommendation...More fundamentally, the Board finds that the proposed rezoning and development plan are so starkly inconsistent with the densities enumerated in the Master Plan, which specifically recommends 8-15 dwelling units per acre, that they should not be approved as submitted.

While the Board recognized that redevelopment of the site may be appropriate, it was "not persuaded" that the relative proximity to transit and the age of the Plan justified a density three times that recommended in the Plan. *Id.* at 2.

While the Planning Board as a whole did not opine on whether the 100-foot setback required by the PD Zone should apply to this property, the Chair expressed the view that the setbacks should apply regardless of whether the "area master plan" was adopted by the County or a municipality within the County. *Id.* The Board's recommendation further requested that the Hearing Examiner:

...ensure that the green area shown on the Development Plan is in compliance with the specified development standard (minimum 50 percent). There was some uncertainty on this point based on the submitted materials. *Id.*

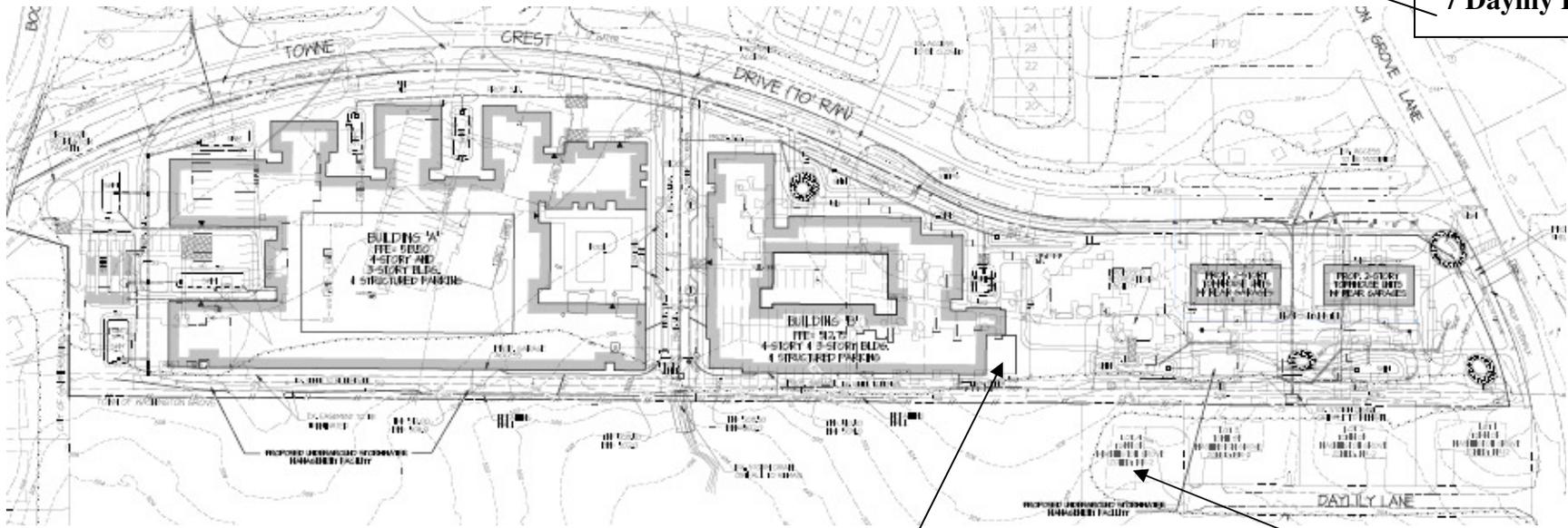
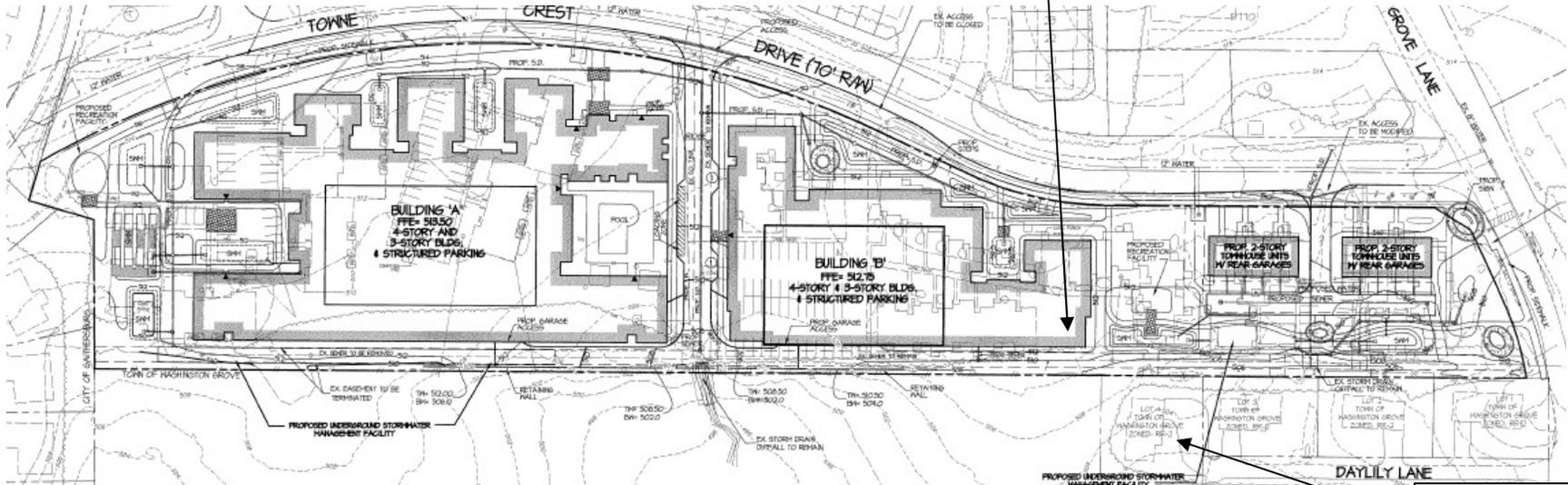
2. The Applicant's Vision for the PD-35 Application

The Applicant's vision for this development has decreased from 469 units in four buildings to 329 units in two multi-family buildings and up to 12 townhouses. At the public

hearing, the Applicant submitted two alternative development plans. Exhibits 124 and 125. Both plans propose 329 units. The two plans differ in two respects. In the plan originally submitted (Alternative A, Exhibit 124), a portion of Building B is setback 35 feet from one of the single-family detached homes on Daylily Lane under the minimum required in the PD Zone. During the public hearing, the Applicant submitted an alternative plan (Alternative B, Exhibit 125) removing Building B from the setback by relocating those units to an area above the parking deck. This setback is not, however, included in the binding elements for Alternative B. Because Alternative B substitutes two efficiency units for two two-bedroom units, one less parking space is required. The minimum parking requirement for Alternative A is 468 and the minimum parking requirement for Building B is 467 units. Exhibit 167. Both plans provide 500 parking spaces, approximately 30 spaces over the required minimum. Unlike the PD-60 and PD-44 development plans, both alternative development plans include a binding element that 15% of the units will be MPDUs. Alternatives A and B are shown on the following page.

The PD-35 plans reduce the density of the PD-44 development plan by shortening the southern leg of Building B and re-orienting the townhouses to face Towne Crest Drive. Exhibits 73 and 73(a), 125. According to Ms. Trini Rodriguez, one of the Applicant's expert land planners, the relatively long and narrow shape of the lot presents some constraints. To create development compatible with surrounding used she used a "step up" approach in massing the density, height and size of the buildings. 2/15/13 T. 164. Townhouses are located on the southern end of the site closest to Towne Crest Drive and Washington Grove Lane. In her opinion, this creates a "gateway" to the Town of Washington Grove. *Id.* at T.

**Alternative A
Building B Setback 35 Feet from 7 Daylily Lane**



Alternative B (Building B Setback 100 Feet from 7 Daylily Lane)

7 Daylily Lane

communities, the building heights step up from three stories facing Towne Crest Drive to four stories bordering the Town's forest preserve. 2/15/13 T. 166.

The Applicant continues to assert that the development's density may be accomplished compatibly with the neighborhood because the density *per se* isn't as important as "how you use that density." *Id.* at T. 37. Ms. Rodriguez testified that two design features make the density proposed compatible with the surrounding area. The first is the use of "wrap parking." *Id.* at T. 167. Structured parking for the multi-family units is located on the interior of the development, thus exposing only the units themselves to the residences across Towne Crest Drive. This also permits more room for amenities.

She opined that the second important design feature is the undulating exterior of the larger buildings, which in her opinion creates a perception that the buildings are smaller than they actually are. The Towne Crest frontage consists of wings that project out that mirror the scale of the surrounding buildings, forming a series of corridors between the wings that serve as amenity areas. Services in the larger buildings are all internal. 2/15/13 T. 168. Rendered elevations submitted by the Application (Exhibit 114, on the next page) demonstrate this feature.

Setbacks from Towne Crest Drive are 25 feet, and will include a continuous streetscape which is lacking today. This streetscape will be continued to the north of the property with a path and plantings. According to the Applicant, the area bordering the homes on Daylily Lane will have "extensive landscaping" to buffer the development from the single-family home. A rendered development plan showing potential landscaping is included on page 25.



**Building A Elevation Facing Towne
Crest Drive**



**Building B Elevation Facing Towne
Crest Drive**



**Townhouses Elevations Facing
Towne Crest Drive**

Both development plans show a drive aisle along the western property line that provides access to the parking structures in Buildings A and B. It extends approximately 310 feet along the western side and is set back 5 feet from Town's boundary along the West Woods. 2/25/13 T. 118. A retaining wall also extends along this side of the subject property. As this is a source of controversy regarding the development's impact on trees, the Hearing Examiner includes a detail of this area (from the Alternative A plan, Exhibit 124) on page 27.

The Applicant's representative, Mr. Stacy Hornstein, testified that development will proceed in two phases to accommodate existing tenants. Prior to construction, they will not lease vacant units on the southern portion of the site. Any tenants that wish to stay during construction will be moved at the Applicant's expense to the southern buildings and begin construction of Building A. Once Building A is completed, the tenants will be moved into that building while construction of Building B commences. 2/15/13 T. 54-56.

3. The Development Plan and Binding Elements

The Applicant's Development Plan consists of several required components which are binding on the applicant except where identified as illustrative or conceptual. Illustrative elements may be changed during site plan review by the Planning Board, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment.

Both alternative development plans have the same binding elements (Exhibits 124 and 125). Building setbacks are 25 feet from the western boundary line (although the drive aisle accessing the parking garage is setback only five feet from the West Woods). Although Building B in Alternative B shows a 100-foot setback from Daylily Lane, this setback has not been incorporated into the binding elements.

BINDING ELEMENTS - LOCAL MAP AMENDMENT APPLICATION G-910

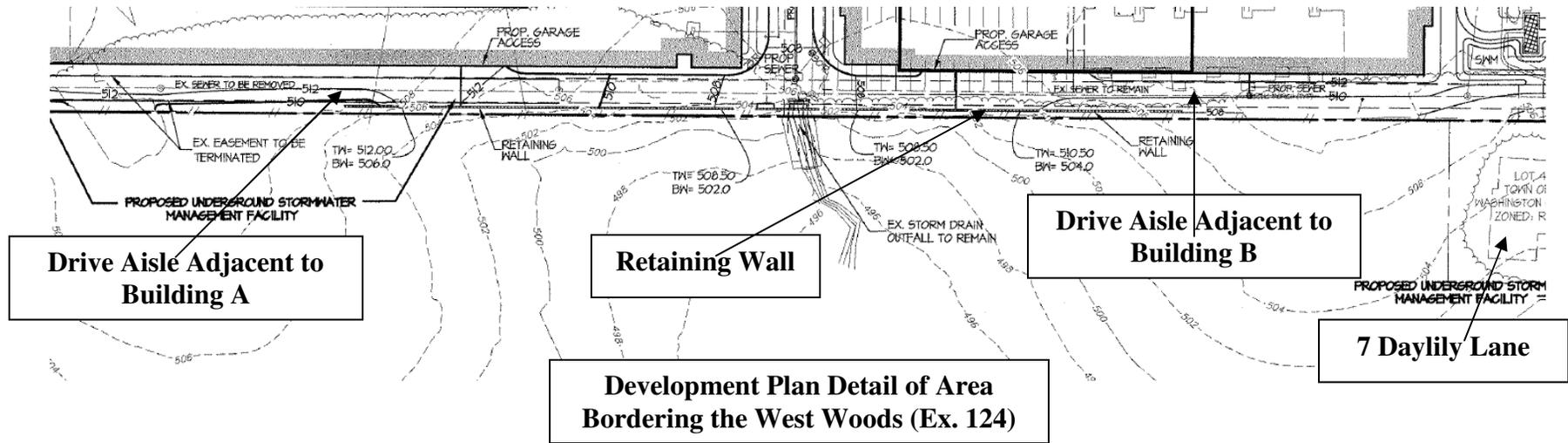
1. Uses on the property are limited to Multi-Family Residential uses and Townhouse Residential Units.
2. The proposed development density shall not exceed 329 dwelling units and the project will provide MPDU's at 15% of the total number of units.
3. Proposed building heights will not exceed 4 stories or 50 feet for Building 'A' and Building 'B', and 2 stories or 35 feet for the Townhouse Units.
4. Green Area for this project shall not be less than 50% of the gross tract area, which may include abandoned right-of-way in the future.
5. The proposed development will be limited to two(2) access points from Towne Crest Drive.
6. The Proposed Multi-family Residential and Townhouse Residential Units will be setback in accordance with the Land Use Summary Table as follows: 100 feet from the Northern Property Line and 25 feet from the Western, Eastern and Southern Property Lines.

The proposed unit mixes and parking tabulations for Alternatives A and B are shown on pages 27 and 28. Parking is based on the number of bedrooms within the project. As a result, the total number of parking spaces will not be determined later in the process when the unit mix is finalized. Exhibits 124, 125.

4. Benefits to the Wedgewood Communities

While not part of the development plan or its binding elements, Mr. Hornstein testified the Applicant will provide benefits to the Wedgewood 2 community if the plan is approved. The Applicant has entered into what he characterizes as a "cooperation agreement" with the Wedgewood 2 Homeowners Association. 2/15/13 T. 38. . This agreement is contingent upon approval of this application.

According to Mr. Hornstein, Wedgewood 2 homeowners felt that their concerns regarding Towne Crest, expressed to the original developer, had not been addressed. The agreement commits the developer to provide additional parking for the Wedgewood 2



Illustrative Landscape Plan

Unit Mix							
Unit Type	Building A 3 & 4 Floors # of Units	%	Building B 3 & 4 Floors # of Units	%	Townhouses 2 Floors # of Units	%	TOTAL
Efficiency	5	3%	12	10%	0	0%	17
One Bedroom	71	32%	20	21%	0	0%	91
One Bedroom/Den	18	8%	12	11%	0	0%	30
Two Bedroom	88	41%	55	51%	0	0%	143
Two Bedroom/Den	14	10%	4	4%	0	0%	23
Three Bedroom	12	6%	3	3%	10	100%	25
Total	213		106		10		329

Notes:

1. Final MPDU number to be based upon total units approved at Site Plan.
2. Exact unit locations to be refined at Site Plan.
3. Exact number of Townhouses to be determined at Site Plan for a maximum of 12 Townhouse units.

Parking Required:		
Multi - Family and Townhouse Dwelling Units		
Unit Type	No. of Units	Required Parking
Efficiency	17	(1 Space/Dwelling Unit)(17 D.U.'s)=17 Spaces
1 Bedroom	121	(1.25 Spaces/Dwelling Unit)(121 D.U.'s)=151.3 Spaces
2 Bedroom	166	(1.50 Spaces/Dwelling Unit)(166 D.U.'s)=249 Spaces
3 Bedroom	25	(2.00 Spaces/Dwelling Unit)(25 D.U.'s)=50 Spaces
Total	329	468 Spaces

Parking Provided		
Parking Level	# of Floors	# of Spaces
G-2	4	328
G-1	2	140
Surface parking	N/A	22
Townhouse Garage	N/A	10
TOTAL=	N/A	500

- Notes:
1. Total parking spaces provided will be established at Site Plan based upon final determinations of users, dwelling unit numbers and final dwelling unit mix.
 2. Dwelling unit number and unit mix to be determined at Site Plan.

**Unit Mix and Parking for Alternative A
Exhibit 124**

Unit Mix							
Unit Type	Building A 3 & 4 Floors # of Units	%	Building B 3 & 4 Floors # of Units	%	Townhouses 2 Floors # of Units	%	TOTAL
Efficiency	5	3%	14	13%	0	0%	19
One Bedroom	71	32%	20	14%	0	0%	91
One Bedroom/Den	18	8%	12	11%	0	0%	30
Two Bedroom	88	41%	51	48%	0	0%	139
Two Bedroom/Den	19	10%	6	6%	0	0%	25
Three Bedroom	12	6%	3	3%	10	100%	25
Total	213		106		10		329

Notes:

1. Final MPDU number to be based upon total units approved at Site Plan.
2. Exact unit locations to be refined at Site Plan.
3. Exact number of Townhouses to be determined at Site Plan for a maximum of 12 Townhouse units.

Parking Required:		
Multi - Family and Townhouse Dwelling Units		
Unit Type	No. of Units	Required Parking
Efficiency	19	(1 Space/Dwelling Unit)/(19 D.U.'s)=19 Spaces
1 Bedroom	121	(1.25 Spaces/Dwelling Unit)/(121 D.U.'s)=151.3 Spaces
2 Bedroom	164	(1.50 Spaces/Dwelling Unit)/(164 D.U.'s)=246 Spaces
3 Bedroom	25	(2.00 Spaces/Dwelling Unit)/(25 D.U.'s)=50 Spaces
Total	329	467 Spaces

Parking Provided			
Parking Level	# of Floors	# of Spaces	
G-2	4	328	
G-1	2	140	
Surface parking	N/A	22	
Townhouse Garage	N/A	10	
TOTAL=	N/A	500	

Notes:

1. Total parking spaces provided will be established at Site Plan based upon final determinations of users, dwelling unit numbers and final dwelling unit mix.
2. Dwelling unit number and unit mix to be determined at Site Plan.

**Unit Mix and Parking for Alternative B
Exhibit 125**

Community. According to residents and the Applicant, this community suffers from a parking shortage because each unit in the Wedgewood communities has only two parking spaces. The Applicant has agreed to assist the community to request abandonment of Towne Crest Drive north of Larchmont Terrace. If the rezoning request and the abandonment request are granted, the Applicant has agreed to take its half of the area abandoned and create additional green space north of the subject property. On the side closest to Wedgewood 2, the Applicant would build a little overflow parking lot for the Wedgewood 2 community. The agreement also would require the Applicant to give the community \$10,000 for an off-duty police officer and to repair monument signs for the Wedgewood community. 2/15/13 T. 38-40.

In consideration of these obligations of the developer, the Agreement requires Wedgewood 2 to “actively and continuously support approval” of the application before the various reviewing agencies. Exhibit 88(i), p. 4. It prohibits the Association from encouraging any individuals to oppose the application and precludes the Association from appealing any approval. *Id.*

D. The Master Plan

1. In General

Because the text of the Plan is the best source of its interpretation, the Hearing Examiner summarizes its relevant provisions. The Plan’s recommendations originate from the premise that the General Plan’s original concept for the City of Gaithersburg as a “corridor city” had not fully materialized, although certain principles remained viable. The concept had been to locate high density at the center of the city, tenting to lower density uses on the perimeter. The Plan attributed the failure to achieve this goal to the location of transit

and employment outside the targeted area. It concluded, however, that the General Plan's "principle objectives" remained valid and could be implemented by the following strategies (*Plan*, p. 7, 9):

- Residential densities are highest near the center of the area [the entire geographic area covered by the Plan], closest to I-270, and lower along the edges of the Planning Area;
- Higher density developments are channeled to areas of high accessibility by private automobile and public transit...

The Plan also recognized the fact that municipalities with independent zoning authority exist adjacent to the planning area. The Plan takes note of the "cooperative relationship" between the County, the cities of Gaithersburg and Rockville, and the Town of Washington Grove (*Plan*, p. 7):

As the cities of Gaithersburg and Rockville and the town of Washington Grove have their own powers of planning and zoning, this Plan makes no land use recommendations for these areas. This planning effort, however, has taken note of the planning policies and development in these jurisdictions and has involved the planning staffs and officials of these jurisdictions.

The land use chapter of the Plan explicitly instructs how the densities recommended in the Plan should be interpreted. It first advises that it follows the "established practice" by recommending base densities for each parcel and indicating on the Land Use Plan where optional densities may be desirable: "[T]he optional zones and densities *shown on the Land Use Plan* are those which may be obtained either by approval of a floating zone for the property or by the use of transferable development rights (TDR's)". *Plan*, p. 10 (emphasis supplied). It instructs that the optional densities recommended represent the upper limit that "appears to be appropriate for the parcel, taking into account the environmental considerations, overall transportation capacity, and relationship to adjacent properties." *Plan*, p. 10. Finally, all densities listed are net of bonuses for MPDUs or TDRs. *Id.* at 9-10.

Because the Plan covered a large geographic area, it made specific land use recommendations by dividing the total area covered into smaller “Study Areas,” which were then further divided into districts, and even further into “analysis areas.” The subject property is located within Analysis Area 2 of the Mid-County District of the Airpark Study Area. The area covered by the Plan, as well as the different Study Areas, is delineated in the hatched areas of Figure 2 (page 6) of the Plan, on the following page.

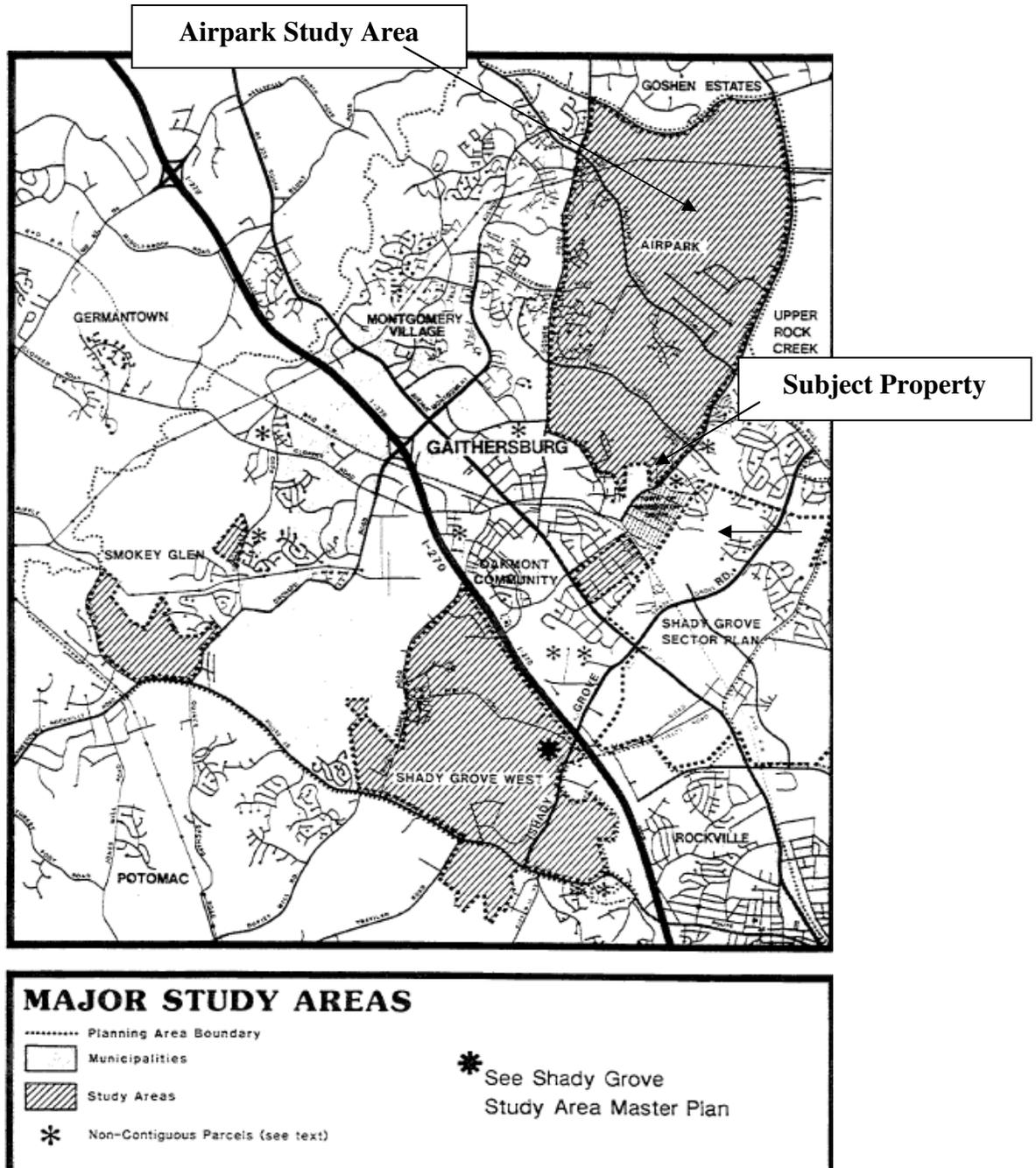
The Plan recognized that, unlike Shady Grove West area, land uses in the Airpark Study area were “largely established”. The Plan goes on to state that, because of this, “most of the land use and zoning recommendations are presented in tabular form...” *Id.* at 36. General goals for the Airpark Study Area germane to this case include:

- To create a transition from the more urbanized I-270 corridor to the wedge area north and east.
- To reflect the capacity of the master-planned roadway network in land use recommendations.
- To channel employment and high residential densities to areas which can be efficiently served by mass transit. *Id.* at 37.

The Plan does not contain general goals for the Mid-County Highway District, which is delineated in Figure 16 (p. 45) of the Plan, shown on page 34. The Plan does explicitly recognize two characteristics of the District: (1) its proximity to the City of Gaithersburg and the Town of Washington Grove, and (2) “good planned or existing access to Metro, employment, and shopping areas.” *Plan*, p. 49. Concerning the latter, the Plan reasons that “[T]his access supports the Plan’s recommendations for higher density on suitable vacant properties.” *Plan*, p. 49.

With regard to the proximity to Gaithersburg and the Town of Washington Grove, the Plan (p. 49) states:

The Plan reflects these borders by recommending appropriate residential densities near existing or planned developments and recommending buffering when necessary.



1985 Gaithersburg and Vicinity Master Plan,
(Figure 2, p. 6)

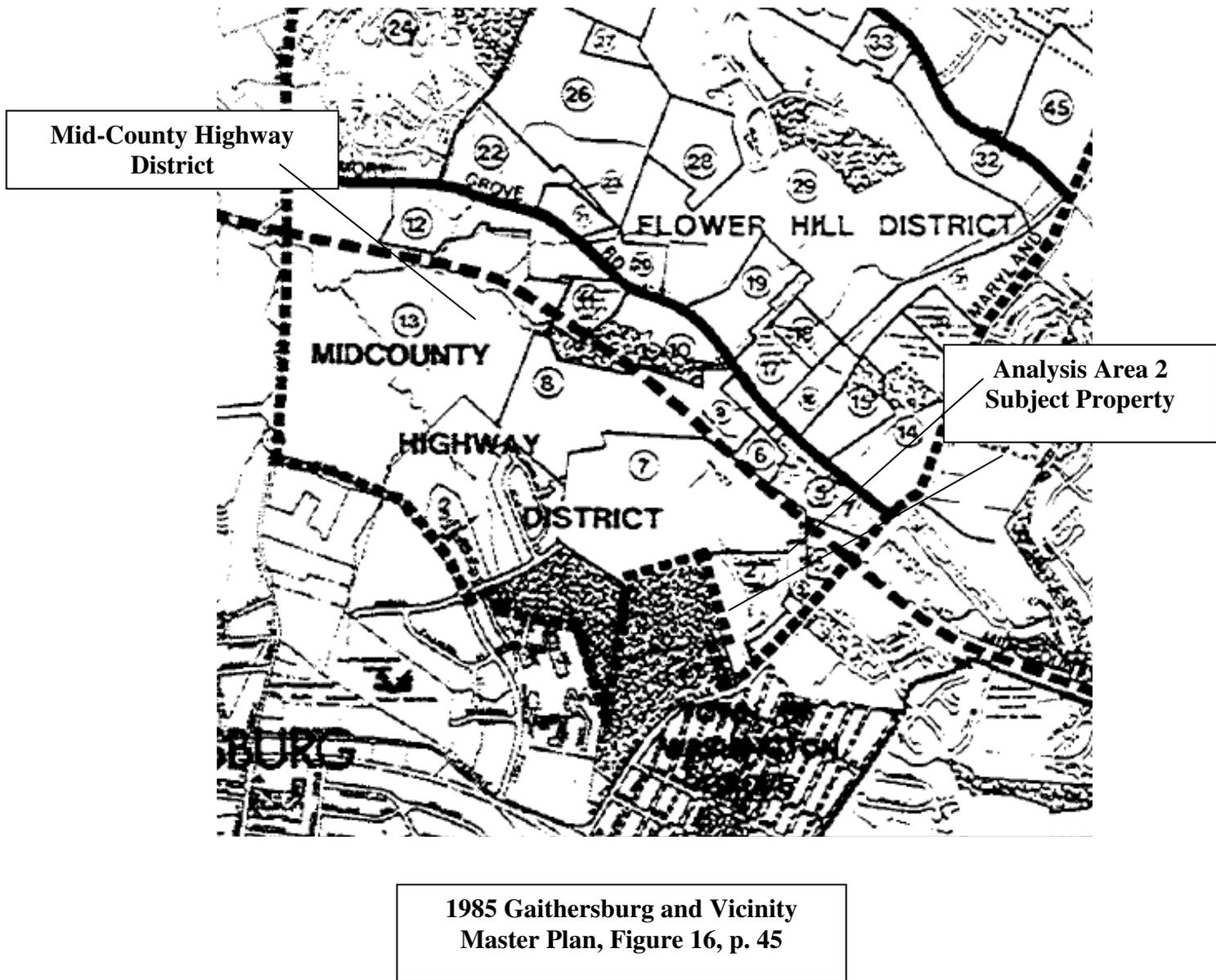


Table 3 of the Plan (*Id.* at 46) sets forth the land use recommendations for Analysis Area 2. Because much of the controversy in this case arises from the interpretation of this Table, the Hearing Examiner includes it on the following page.

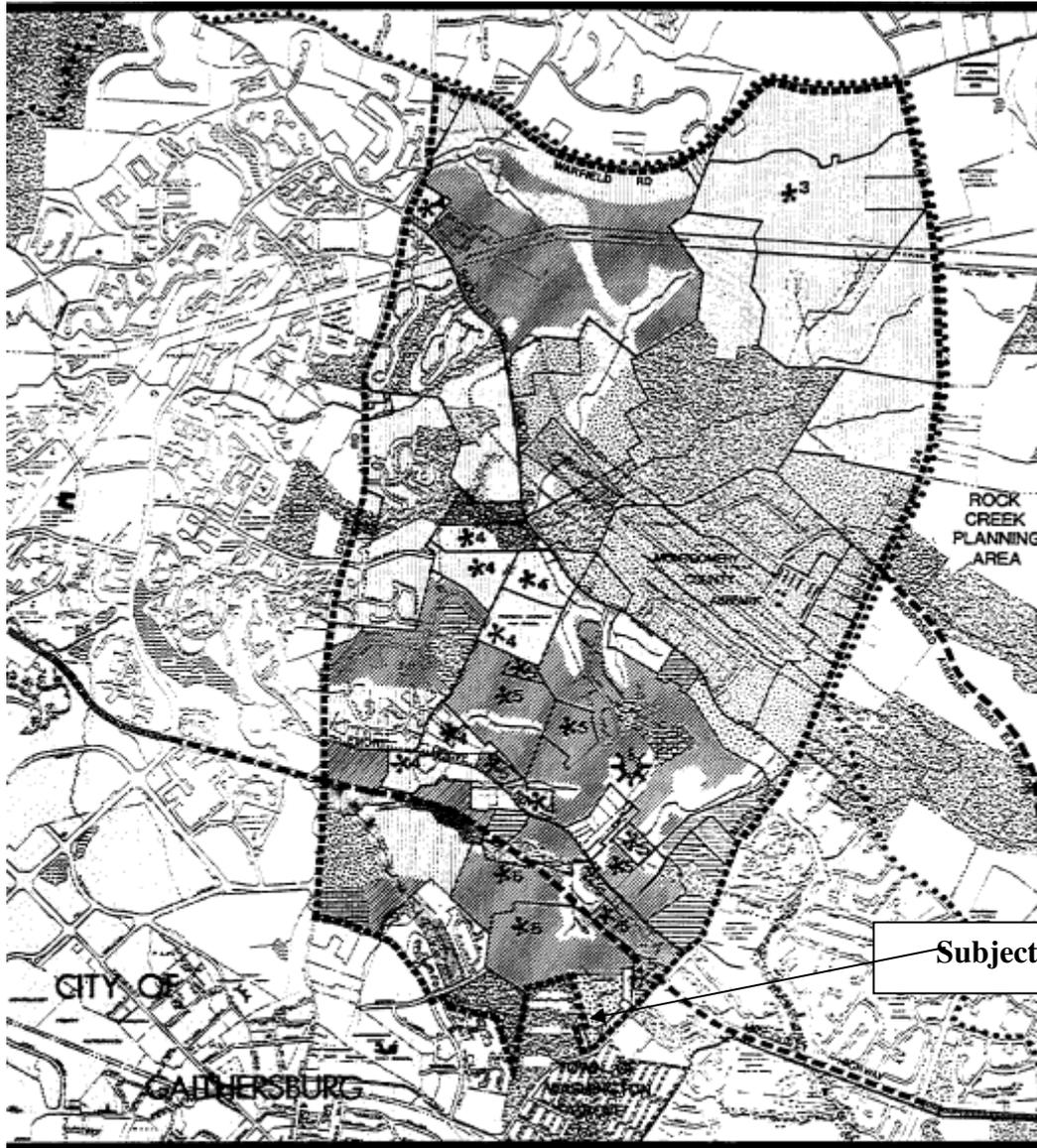
Analysis Area 2

TABLE 3
AIRPARK ANALYSIS AREAS
SUMMARY OF ZONING RECOMMENDATIONS

1	2	3	4	5	6
Analysis Area Number	Acreage	Existing Development	Recommended Zoning Base/Optional	Potential Units Recommended, Base/Optional ¹	Net TDR's Over Base Density
MIDCOUNTY HIGHWAY DISTRICT					
1	1	1 single family	R-200	2/2	0
2	21	171 townhouses 60 garden apts.	R-30 & RT-12.5	231/231	0
3	9	17 single family church	R-90	32/32	0
4	8	vacant	R-90/TDR-5	28/40	12
5	16	vacant	R-60	80/80	0
6	5	vacant	R-90/TDR-5	18/25	7
7	80	vacant	R-90/TDR-6 ²	288/480	192
8	54	vacant	R-90/TDR-6	194/324	130
9	3	1 single family	R-200/TDR-5 ³	6/15	9
10	25	100 single family	R-60	100/100	0
11	10	vacant school site	R-200	20/20	0
12	27	12 single family	R-200/TDR-4	97/108	11
13	(city of Gaithersburg not included in calculations)				
TOTALS	259			1096/1457	361

As set forth above, the Plan lists both existing and proposed development at 231 units for the entire development area, without any recommendation for Transferable Development Rights (TDRs) or PD zoning.

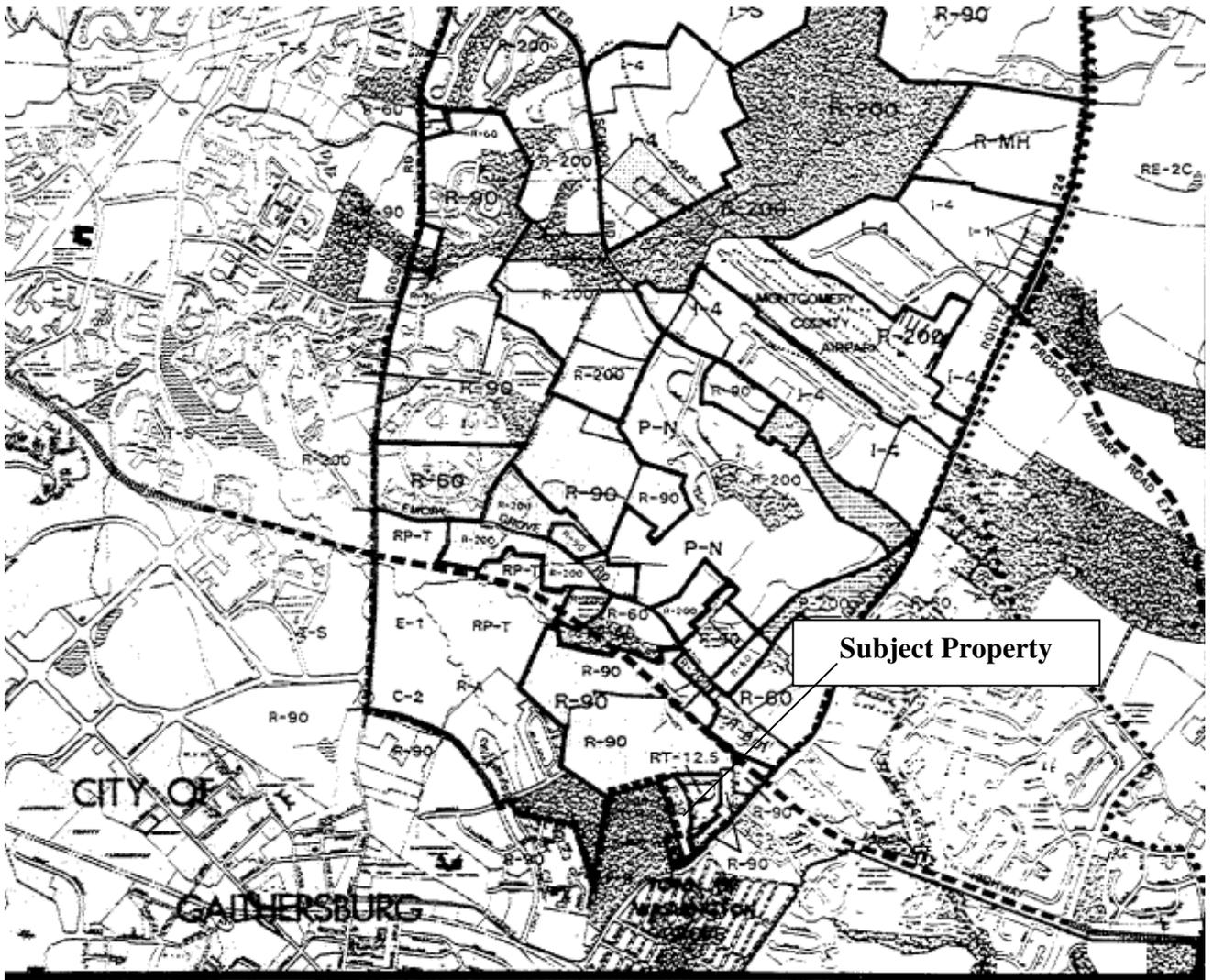
The Plan's recommended land use for the property is "Multi-Family" as shown on Figure 14, "Airpark Area – Recommended Land Use," reproduced on the following page. The Plan's "Recommended Generalized Base Zoning" for the property is R-30, shown on Figure 15 of the Plan, is reproduced on page 37. The R-30 designation would permit a development of up to 143.3 dwelling units (including the MPDU bonus) on the area covered by the development plan (i.e., $8.1 \times 17.69 = 143.3$). *Montgomery County Code*, §59-C-2.421.



AIRPARK AREA-RECOMMENDED LAND USE

- | | | |
|--------------------------------------|-------------------------------|--------------------|
| Planning Area Boundary | Single-Family Residential | Industrial Park |
| ----- Study Area Boundary | Suburban 2-4 Units/Acre | Private Open Space |
| ☀ Planned Neighborhood (Flower Hill) | Medium-Density 5-6 Units/Acre | Institutional |
| *5 TDR Density | Multi-Family | Parks |
| ▭ Municipalities | Commercial (Retail & Office) | |

Mid-County Highway District
1985 Gaithersburg and Vicinity Master Plan
(Figure 16, p. 45)



AIRPARK AREA-RECOMMENDED GENERALIZED BASE ZONING

- Planning Area Boundary
- Study Area Boundary
- Projected Noise Contours
- ▭ Municipalities
- ▨ Parks
- ▧ Properties Recommended For PN Zone
- ▩ Proposed TDR Receiving Areas

NOTE: See Fold Out Map For Details

APPROVED & ADOPTED GAITHERSBURG VICINITY MASTER PLAN
 Montgomery County Maryland  January, 1985

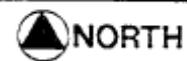
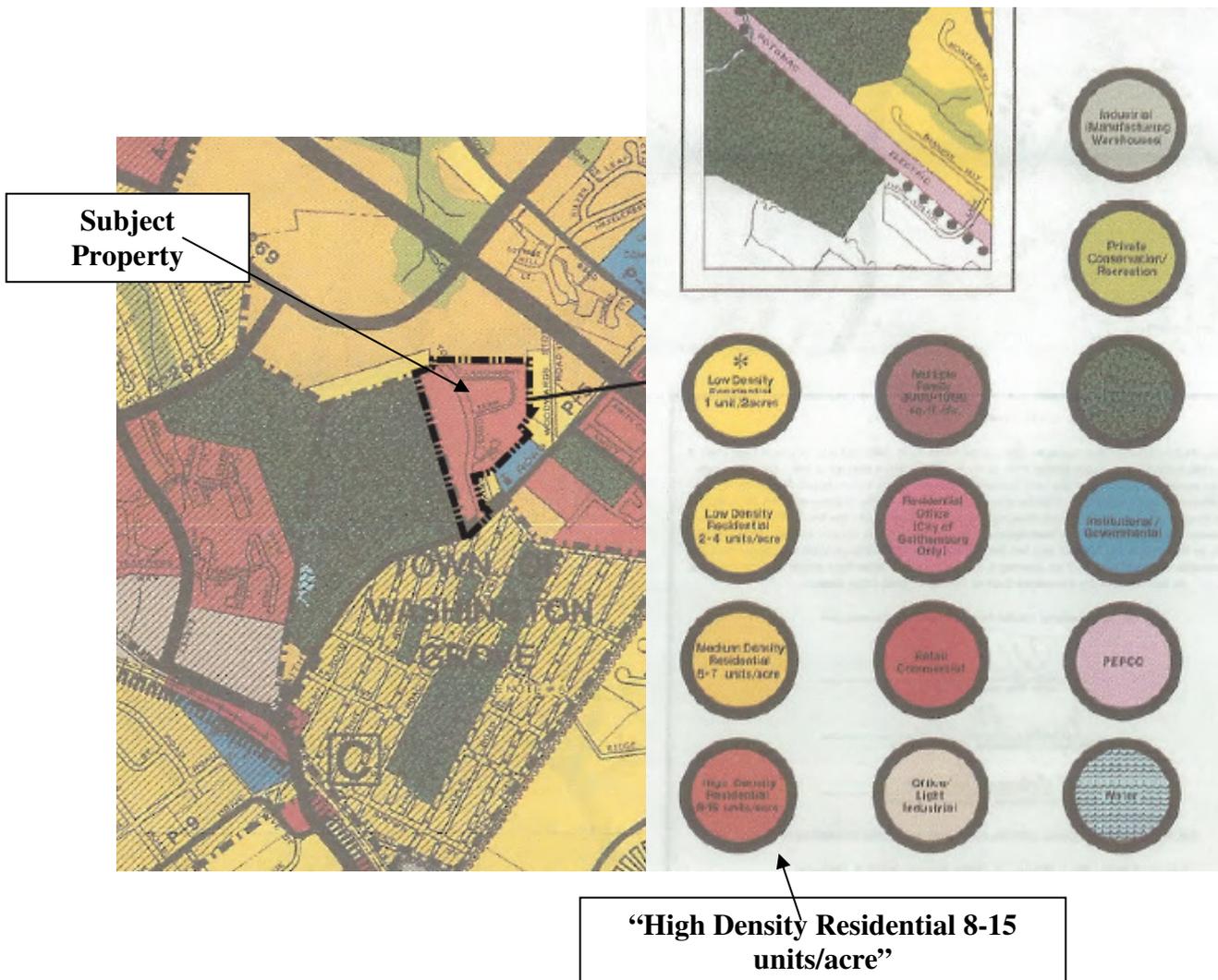


Fig. 15

1985 Gaithersburg and Vicinity Master Plan
 Figure 15, p. 44

The Planning Board approved a “Land Use Map” to implement the recommendations of the Master Plan. Its recommendation differs slightly from the land use recommended in the Plan approved by the County Council. Rather than simply noting, “Multi-family” land use, the Map calls for “high density residential, 8 – 15 dwelling units per acre.” Both parties agree that if density is applied on a per acre basis to the development plan area, the maximum density for this project is 148 dwelling units (15 dwelling units per acre plus the 22% MPDU bonus density). This figure is based on the net tract area covered by the development plan. 2/15/13 T. 144, 2/25/13 T. 170-172. Relevant excerpts from the adopted Land Use Map (Exhibit 107) are shown below (because the Map’s key is coded by color, the Hearing Examiner has identified and quoted the applicable designation):



2. The Applicant's Interpretation of the Plan

The Applicant mounts a multi-fronted assault on any interpretation of the Plan that would limit development to 18.28 dwelling units per acre, the density recommended by the Planning Board's Land Use Map (with the MPDU bonus). The primary weapon at the Applicant's disposal is the Plan's age.

As part of its PD-60 proposal, the Applicant argued that density for the property should be much higher because of more recent policies directing development to areas where transit is available and that the Plan should be read in light of the "newer" policy. According to the Applicant, transit in the form of the MARC Station in the Town of Washington Grove is 0.6 miles from the subject property; the Shady Grove Metro station is also nearby. Exhibit 14. It made this same argument in support of the PD-44 proposal. Exhibit 53(d).

Undaunted by the Planning Board's recommendation of denial, the Applicant proceeded forward, but down-sized the proposed density once again, this time to 40.5 dwelling units per net acre (with the MPDU bonus).² At the public hearing before the Hearing Examiner, the Applicant unleashed an additional weapon: Two additional expert land planners armed with a new theory as to how the Master Plan should be interpreted.

Mr. David Ager, an expert land planner, testified that the 1985 Plan is "functionally obsolete." 2/15/13 T. 84. In his opinion, a normal life span for a master plan is between 6 and 10 years. He based this in part on recent State legislation mandating that jurisdictions adopt comprehensive plans every six years, although he had no theory on why Montgomery County had been exempted from this requirement. Generally, he posits that as master plans pass their prime into old age, the specific recommendations in the plan should be ignored and

² The Hearing Examiner bases the density on net, rather than gross acre, because that is how the Applicant calculates its density, which is part of its basis for meeting the green area requirement.

only the “broad principles” should be implemented. In his opinion, this is because many policy and regulatory changes that occur during the life of a plan. In this case, these policies include the Housing Element of the General Plan, new stormwater regulations, etc. According to Mr. Ager, the only site specific recommendation (i.e., one that may be ignored) in the 1985 Plan is the density of 8-15 units per acre. *Id.* at T. 85-91.

Mr. Ager bolsters this argument by opining that the 1985 Plan continues the recommendations of the 1971 Gaithersburg Master Plan, adding an additional 14 years to the Plan’s age. He outlined the planning history of the Gaithersburg area. Master plans for the area including the subject property were adopted in 1961, 1971, and 1985. The County adopted a master plan for the Gaithersburg area in 1961, before adoption of the County’s General Plan in 1964, because of the need to address the development pressure in the area. The 1961 Gaithersburg plan designated the area surrounding the property as a high density mixed use area that surrounds downtown Gaithersburg. The 1964 General Plan adopted the “wedges and corridors” concept, which targets growth to corridor cities, including the City of Gaithersburg. In 1969, the Council amended the County’s General Plan because the 1964 General Plan underestimated the population growth in the area. *Id.* at T. 95-101.

Mr. Ager opined that the 1971 Gaithersburg master plan called for a larger area of multi-family housing because it envisioned the area surrounding the subject property as a “community center,” similar to the village concept used in Columbia. *Id.* at T. 97. The 1971 Plan designated the area as “high density residential” and recommended zoning which exceeded the existing development on the subject property. The plan called for more residential where the Wedgewood 2 community now exists because it had not yet been

constructed. Later, in his opinion, the zoning caught up with the improvements and the zoning density recommended by the Plan was reduced. *Id.* at T. 98.

He further opined that the 1985 Master Plan is “out of sequence” with the 1993 amendment to the General Plan; therefore, the 1985 Plan did not have the General Plan’s guidance regarding affordable housing and patterns of development. *Id.* at T. 105.

When the Hearing Examiner asked Mr. Ager how the application *does* conform to the Master Plan, he posited a new interpretation of the Plan. He opined that planners used “broad brush” approaches in older plans that lacked specific recommendations. In his opinion, Table 3 of the Plan recommends an aggregate density (i.e., 231 units) for entire Analysis Area 2, rather than recommending densities per acre. Thus, the total density recommended for the entire 21-acre Analysis Area may be used anywhere within the Area. Because the Analysis Area did not develop to its full potential under the Master Plan, Mr. Ager opines, the unused density may be applied to the subject property. *Id.* at 99, 111-115.

The practical result of the Applicant’s theory is that up to 260 dwelling units may be constructed on the subject property and still comply with the Master Plan’s recommendations. In his opinion, the 329 dwelling units proposed in the development plans exceeds the Master Plan’s recommended density by only 18% for the following reason. If the maximum density recommended by the Plan (i.e., 15 dwelling units per acre plus the MPDU bonus) is applied to the entire Analysis Area, the Plan recommends a total of 384 dwelling units within the Analysis Area. There are 124 dwelling units within the two Wedgewoods. If the 124 existing units are combined with the 329 dwelling units proposed here, the total number of units within the Analysis Area would be 453 units. *Id.* at T. 112-115.

Mr. Ager opined that this interpretation furthers the Master Plan's goal to "cluster" residential development. *Id.* at T. 149. In response to a question from the Hearing Examiner, he stated that the proposed development at 329 dwelling units would account for 72.6% of the density allocated for the entire Analysis Area. *Id.* at T. 145.

Mr. Ager pointed to three rezoning cases that he believes justifies an increase in density above that recommended in the Master Plan. These included Local Map Amendment Applications G-840, G-873, and G-909. He later acknowledged that the Council did not approve increased densities in two of these cases, although it did do so in G-909. In his opinion, these cases represent a more flexible approach to the density recommended in the Master Plan. *Id.* at T. 117-118.

A second expert land planner, Mr. Perry Berman, testified to bolster Mr. Ager's theory. He served as Chief of the Community Planning North Division of the Planning Department at the time the Plan was adopted and oversaw the adoption of many master plans, including the Gaithersburg Plan. According to him, the two primary planning issues in the 1985 Plan were whether to continue the Airpark at the expense of more residential development and to establish the ICC right-of-way because the City of Gaithersburg was granting permits within the right-of-way. 2/25/13 T. 14.

Mr. Berman testified that planning at the time had used a "broad brush" approach and recommendations were made by District because the property maps were not as accurate as they are now. He testified that "we" looked at the densities "we could get" based on a historic average of densities and projected what "we thought we could get" in an area based on those

averages.³ *See, e.g., Id.* at 11-15. He testified that he wanted to encourage the use of the PD Zone to be able to fine-tune compatibility with other projects in a manner that not possible with Euclidean zones and wanted to increase residential housing stock. *Id.* at T. 19.

He recently realized, for the first time, that there is a mistake in Table 3 of the Plan. In his opinion, Table 3 mistakenly lists the existing and recommended densities for the Analysis Area as the same number (i.e., capping development within the Analysis Area at 231 dwelling units). This amount of density represented only the development which existed at the time of the Plan (i.e., 107 units on the Towne Crest property and 124 units in the Wedgewoods totals 231 units), thus leaving no room for additional development of the properties. According to him, there “would never” be a plan discouraging redevelopment of an area. Capping development at existing levels was inconsistent with his goal to encourage the use of the PD Zone. He does not know why the area was not zoned for Transferable Development Rights; nor does he remember why they did not designate the area for the PD Zone. *Id.* at T. 18-24.

When asked by the Applicant’s counsel to state an appropriate density for the subject property, the following exchange occurred (*Id.* at T. 22):

Mr. Kaufman: All right. And so in your opinion then today if you would find that what would the range of density be?

Mr. Berman: Probably in the twenties.

Mr. Kaufman: And then an MPDU on top of that?

Mr. Berman: That’s right.

On re-direct examination, the following exchange occurred (*Id.* at T. 42):

³ Mr. Berman continually used the pronoun “we” or “our” without clarifying which individuals or entities comprise that group. Because the “we” is unclear, the Hearing Examiner will use the phrase “in his opinion” or “according to him” to characterize his testimony.

Mr. Kaufman: Mr. Berman, you did testify a few minutes ago that in your opinion the proposed PD-35 is an appropriate land use for this property, did you not?

Mr. Berman: I did.

When asked what weight should be accorded to a 28-year-old master plan, Mr. Berman replied (*Id.* at T. 44):

Well, I think you're, I think the weight of the plan, you're going through that evaluation during this process. I think that's the good part of Montgomery County. It has a very good process, a hearing examiner process to go through the kind of weight it is. There's no – each part of the County, each recommendation gets looked at individually. I give it less weight than I would one that was done five or 10 years ago for sure. I think somebody in testimony said less luster, the plan has less luster. I thought that was artfully said. Certainly, it's something that we can't throw out. On the other side, we can't say it's not, you know, it's not there. It does, it is a little, it is a policy of the County Council. It is important. They haven't changed it.

But we should remember that it was done in the '80's, before a lot of, well, before things have changed and evolved. That's why we redo a plan every 10 years, 10 to 15 years.

Mr. Berman further opined that the County is in a phase of “transformational planning,” rather than simply adopting “the aerial photograph”. *Id.* at T. 45. In his opinion, this transformational planning has been and should be accomplished by comprehensive rezoning. *Id.*

3. The Opposition's Interpretation of the Master Plan

Needless to say, those opposing the application launched several missiles of their own, all for the proposition that substantial compliance with the master plan may be accomplished with some additional density above the 8-15 acres recommended in the Planning Board's Land Use Plan, but not the amount proposed by the Applicant. Many of those opposing the application testified that they believed that 200 units on the property (or 24.7 dwelling units

per net acre) represented reasonable redevelopment potential that could be consistent with the Master Plan, although the record is not entirely clear as to why they rely on this specific number.

The Town's expert land planner, Mr. Joe Davis, was Chief of the Development Review Division of the Montgomery Planning Department for 31 years, and was in that position when the Plan was adopted. Similar to Mr. Berman's initial testimony, he testified that a logical increase in density for this property based on the age of the Plan would be PD-22. 2/25/13 T. 195. In his opinion, this density is more logical than an increase to 40 dwelling units per acre because the property is not within a transit development area and does not further transit use in the same way as the properties within the Shady Grove Sector Plan area; Shady Grove has full service bus and Metrorail service. According to him, higher densities are placed where reliance on the automobile is reduced. Those properties are not comparable to the subject property, which is .6 miles from a very limited service MARC station. 2/25/13 T. 195-198, 227.

Mr. Davis testified that the PD-35 Zone on the subject property does not comply with the Master Plan's recommendations. In his opinion, the Plan's recommendation for 8-15 dwelling units per acre remains valid because the area has not significantly changed since adoption of the Plan. The County has amended the Plan several times where it desired to implement more recent policies. These included a 2008 amendment to provide more employment in Shady Grove West and adoption of the Shady Grove Sector Plan to implement transit-oriented development at the Metro station in 2006. *Id.* at 173.

In his opinion, the 1985 Plan's failure to designate the subject property for some type of optional method development was part of the comprehensive planning process because the

Plan specifically took note of areas where optional method development would be appropriate. For instance, there are many instances of PD zoning on the west side of I-270, but there are none recommended east of I-270. *Id.* at 180-182.

Nor in his opinion have there been any changes to planned capital improvements that would undermine the Plan's recommendation. He pointed out that the land use recommendations of the Plan already took into account the roadways that have recently been constructed, such as the ICC and the Mid-County Highway. *Id.* at 184-185.

Mr. Davis testified that the Plan does not allow a "transfer" of density from elsewhere in the Analysis Area because there is no legal mechanism to effectuate the transfer. He disagrees with the Applicant's premise that density for the entire Analysis Area may be condensed onto the subject property. Not only does the development plan usurp all of the density available in Analysis Area 2, it adds an additional 69 units to that density. *Id.* at 175-176.

Mr. Davis opined that the zoning recommended in the Plan permits up to 384 units (with the MPDU bonus) in Analysis Area 2. If the existing 231 units are subtracted from that total, there is additional density within the Analysis Area of 153 units. Of these, 41 are available for the subject property and 112 are available for the balance of the Analysis Area. Thus, in his opinion, the Master Plan did allow some development potential for the property. *Id.* at 172.

He also disagrees with the Applicant's theory that concentrating area-wide density on the subject property fulfills the goal of the Plan to "cluster" development. In his opinion, the concept of clustering means concentrating development on one portion of a property to preserve environmental areas or provide amenities. One example of this is the optional

method of development in the TDR zones. He interpreted the term “cluster” as used in the Master Plan to refer to the TDR optional method of development. *Id.* at 182-183.

Mr. Davis opined that the limited transit at this location does not justify the level of density proposed, which similar to the densities adjacent to the Shady Grove Metro station. The locations are not comparable because this location has more limited availability to transit; there is no full, coordinated movement of buses to trains as there is in Shady Grove. The MARC service in Washington Grove is provides limited service that is not coordinated with the bus routes. *Id.* at T. 176-177.

In his opinion, Local Map Amendments G-873 and G-840 do not support the Applicant’s interpretation because they did not involve an increase in density above the levels recommended by the area master plan. In G-909, the Council did approve a density of approximately 15% above that recommended in the master plan. He believes, however, that this case is not comparable to G-909 because a portion of the property was already zoned the desired density, the rezoning furthered other important policy interests, and the property was located within walking distance of two Metro stations. *Id.* at 183-184.

4. The Town’s Master Plan

Although development of the subject site will be governed by 1985 Gaithersburg and Vicinity Master Plan and the applicable provisions of the Zoning Ordinance, the Master Plan for the Town of Washington Grove, which governs development of the adjoining lots on Daylily Lane, also has some relevance to this case. The 2009 Master Plan for the Town of Washington Grove (Washington Grove Master Plan) designates the properties along Daylily for the Town’s RR-2 Zone. Exhibit 143, p. 7. According to the Plan, the RR-2 Zone is a single-family detached zone with a minimum lot size of 7,500 square feet. *Id.* at 9. The

Town presented evidence of the annexation history of the Daylily properties. These properties were incorrectly zoned R-90 after adoption of the 1985 Gaithersburg and Vicinity Master Plan and should have been rezoned R-200. The Planning Board voted to support the 1987 annexation of these properties into the Town, finding that “[a]lthough the property is zoned R-90, the Gaithersburg and Vicinity Master Plan recommends the R-200 Zone.” Exhibit 88(g). The Planning Board further found that the Town’s RR-1 and RR-2 Zones single-family residential zoning “are appropriate for the subject property and do not differ significantly from the uses and density permitted in the County’s R-200 Zone.” *Id.*

E. Compliance with the Standards of the PD Zone

Technical Staff found that the PD-44 development plan met the requirements of the PD Zone. At the public hearing, those opposing the application assert that several requirements have not been met.

1. Purpose Clause

Those in opposition argue that the application fails to meet two of the purposes of the PD Zone. One of these purposes is compliance the Master Plan, which has already been discussed. In addition, they argue that the application fails to comply with the following purpose of the PD Zone:

...[I]t is the purpose of this zone to preserve and take the greatest possible aesthetic advantage of trees and, in order to do so, minimize the amount of grading necessary for construction of a development. *Montgomery County Code*, §59-C-7.11.

Technical Staff concluded that the PD-44 application met this purpose because the redevelopment will not remove a significant amount of *on-site* trees, as did one of the Applicant’s expert land planners. Exhibit 60, p. 15; 2/15/13 T. 173. One of the Applicant’s

expert land planners, Ms. Rodriguez, testified that they would preserve one of the significant trees on the site. She also testified that, when mature, the tree canopy will significantly exceed what currently exists. *Id.* The source of parties' disagreement does not stem from the impact of the development on trees located within the subject property. Instead, the controversy is sown from the impact to trees in the West Woods and to properties along Daylily Lane.

Mr. Foster testified that the County's Forest Conservation Law (*Montgomery County Code*, Chapter 22A), identifies specimen trees, or trees more than 24 inches in diameter, as a high priority for retention. Section 22A-12(b)(3) of the Forest Conservation Law requires an Applicant to retain "Any tree with a diameter, measured at 4.5 feet above the ground, of...30 inches or more..." unless a variance is approved by the Planning Board. Executive Regulations expand on this definition identifying "individual trees in good health that have a diameter at 4.5 feet above the ground (DBH) of 24" as high priorities for retention and by requiring an analysis of the Critical Root Zones (CRZs) of those trees. COMCOR 22A.00.01.07. COMCOR identifies the following forests as high priorities for retention:

- (a) high structural and species diversity;
- (b) few alien or invasive species present;
- (c) very good overall stand health; and
- (d) high potential to provide a significant amount of habitat for forest interior dwelling plant, animal and bird species... *Id.*

Mr. Foster stated that the Forest Conservation Law requires the Applicant to analyze the impact of the development on the CRZ of significant trees. In addition, they must provide a minimum forest threshold of 15% of the site. Because there is no existing forest on-site, they must bring the site up to the minimum threshold. *Id.* at 105. The Planning Board

approved a Preliminary Forest Conservation Plan, with a variance to remove three on-site trees. Exhibit 129.

He testified that there are 14 specimen trees on the site, four of which are over 30 inches in diameter. Three of these will be removed, and one on the northern end of the site will be saved. *Id.* at 106. Mitigation for these is required at a rate of one new tree (at a minimum of three inches in diameter) for every four inches of a specimen tree removed. Because of the 30-inch trees being removed, they will be providing this ratio of mitigation. *Id.* at 106-108. He testified that the Applicant accomplish the mitigation through tree canopy, which is permitted on redevelopments. After redevelopment, tree canopy will exceed what currently exists on-site.

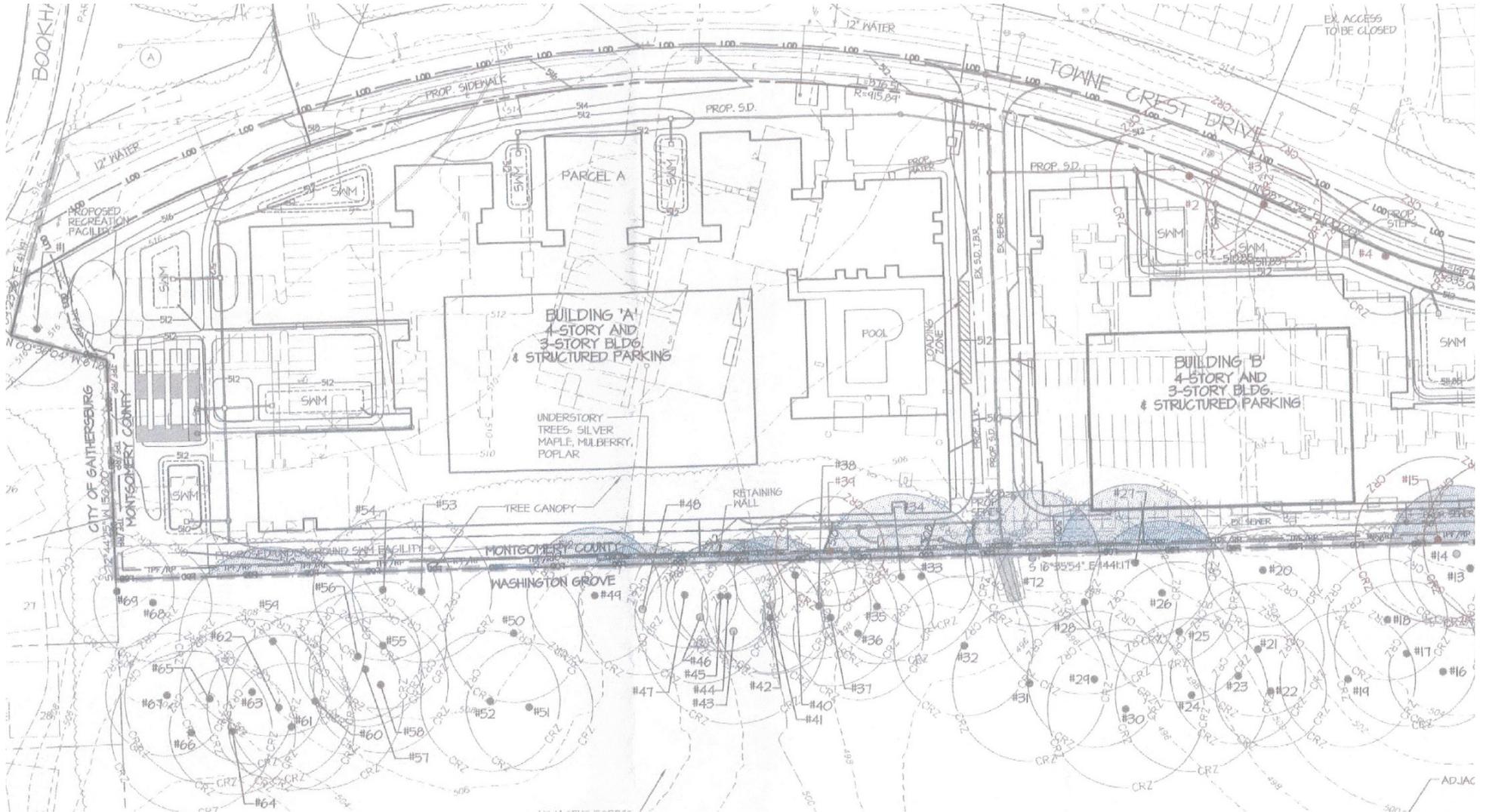
The approved PFCP (Exhibit 129) identifies 57 specimen trees within the West Woods. Several of these trees will experience impacts to their CRZs. Seven of these trees will have CRZ impacts between 34% and 46%. These trees are marked "Save" on the plan with the following footnote (Exhibit 129):

Due to the degree of the Critical Root Zone impacts to these trees, the potential exists that they may not ultimately survive, however, rigorous tree save measures will be taken to attempt to save each of these trees, including progressive root pruning over a number of years in advance of construction, application of tree growth regulator, and crown cleaning.

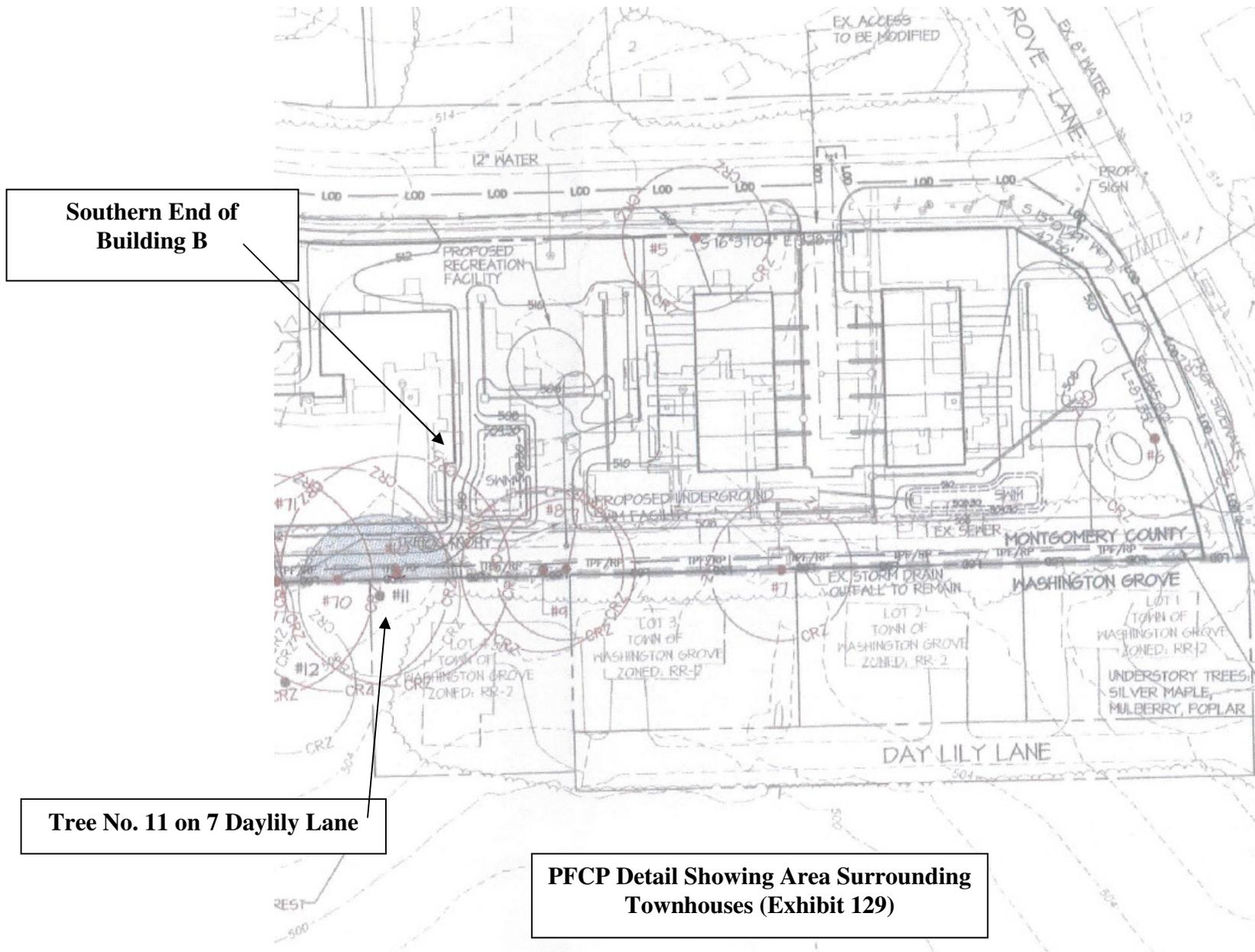
The PFCP also includes a table listing all specimen trees with CRZs that may be impacted by the proposed development. The table lists the percentage of CRZ impact, the species, whether the tree is located on or off-site, and assigns a number keyed to numbers shown on the PFCP. The PFCP is reproduced on the following page.

**Exhibit 129
Approved PFCP**





PFCP Detail (Exhibit 129)
Showing Area Surrounding Buildings A and B



Southern End of Building B

Tree No. 11 on 7 Daylily Lane

PFCP Detail Showing Area Surrounding Townhouses (Exhibit 129)

SPECIMEN TREE LIST

No.	Common Name	Species Name	DBH (in.)	Condition	Location	Disposition	CRZ Area (SF)	CRZ Impact (SF)	CRZ Impacts (%)
1	RED MAPLE	ACER RUBRUM	16", 26"	GOOD	ON-SITE	SAVE	4,778	607	12
2	RED MULBERRY	MORUS RUBRA	18", 28"	GOOD, THIN	ON-SITE	REMOVE	4,161	7,698	84
3	WHITE PINE	PINUS STROBUS	26.5"	GOOD	ON-SITE	REMOVE	4,964	4,554	42
4	WHITE PINE	PINUS STROBUS	26", 27"	GOOD	ON-SITE	REMOVE	5,153	4,663	40
5	TULIP POPLAR	LIRIODENDRON TULIPIFERA	25"	GOOD	ON-SITE	REMOVE	4,418	3,943	40
6	WHITE PINE	PINUS STROBUS	27"	GOOD	ON-SITE	REMOVE	5,153	4,563	84
7	SILVER MAPLE	ACER SACCHARINUM	24", 22"	GOOD	ON-SITE	REMOVE	4,072	2,007	44
8	TULIP POPLAR	LIRIODENDRON TULIPIFERA	24"	GOOD	ON-SITE	REMOVE	4,072	2,236	55
9	PRINCESS TREE	PAULOWNIA TOMENTOSA	28"	GOOD	ON-SITE	REMOVE	5,542	3,032	55
10	WHITE OAK	QUERCUS ALBA	39"	GOOD	ON-SITE	REMOVE	10,751	5,860	54
11	RED OAK	QUERCUS RUBRA	27.5"	GOOD	OFF-SITE	SAVE	5,346	1,990	37
12	TULIP POPLAR	LIRIODENDRON TULIPIFERA	24", 12"	GOOD	OFF-SITE	N/A	4,072	0	0
13	TULIP POPLAR	LIRIODENDRON TULIPIFERA	27.5"	GOOD	OFF-SITE	SAVE	5,346	1,260	24
14	TULIP POPLAR	LIRIODENDRON TULIPIFERA	31"	GOOD	OFF-SITE	SAVE**	6,743	2,676	34
15	TULIP POPLAR	LIRIODENDRON TULIPIFERA	38"	GOOD	ON-SITE	REMOVE	10,207	5,343	52
16	TULIP POPLAR	LIRIODENDRON TULIPIFERA	25"	GOOD	OFF-SITE	N/A	4,418	0	0
17	TULIP POPLAR	LIRIODENDRON TULIPIFERA	33"	GOOD	OFF-SITE	N/A	7,698	0	0
18	TULIP POPLAR	LIRIODENDRON TULIPIFERA	27.5"	GOOD	OFF-SITE	N/A	5,346	0	0
19	TULIP POPLAR	LIRIODENDRON TULIPIFERA	31"	GOOD	OFF-SITE	N/A	6,743	0	0
20	TULIP POPLAR	LIRIODENDRON TULIPIFERA	26"	GOOD	OFF-SITE	SAVE	4,778	1,216	25
21	TULIP POPLAR	LIRIODENDRON TULIPIFERA	30.5"	GOOD	OFF-SITE	N/A	6,576	0	0
22	TULIP POPLAR	LIRIODENDRON TULIPIFERA	25.5"	GOOD	OFF-SITE	N/A	4,546	0	0
23	TULIP POPLAR	LIRIODENDRON TULIPIFERA	31"	GOOD	OFF-SITE	N/A	6,743	0	0
24	TULIP POPLAR	LIRIODENDRON TULIPIFERA	35"	GOOD	OFF-SITE	N/A	8,654	0	0
25	TULIP POPLAR	LIRIODENDRON TULIPIFERA	32"	GOOD	OFF-SITE	N/A	7,238	0	0
26	TULIP POPLAR	LIRIODENDRON TULIPIFERA	38"	GOOD	OFF-SITE	SAVE	7,698	1,145	15
27	TULIP POPLAR	LIRIODENDRON TULIPIFERA	36"	GOOD	OFF-SITE	SAVE**	4,161	3,719	41
28	TULIP POPLAR	LIRIODENDRON TULIPIFERA	42"	GOOD	OFF-SITE	SAVE	12,468	2,181	17
29	TULIP POPLAR	LIRIODENDRON TULIPIFERA	31"	GOOD	OFF-SITE	N/A	6,743	0	0
30	TULIP POPLAR	LIRIODENDRON TULIPIFERA	36"	GOOD	OFF-SITE	N/A	4,161	0	0
31	TULIP POPLAR	LIRIODENDRON TULIPIFERA	35.5"	GOOD	OFF-SITE	N/A	8,908	0	0
32	TULIP POPLAR	LIRIODENDRON TULIPIFERA	32"	GOOD	OFF-SITE	N/A	7,238	0	0
33	TULIP POPLAR	LIRIODENDRON TULIPIFERA	24", 12"	GOOD	OFF-SITE	SAVE	4,072	1,079	26
34	TULIP POPLAR	LIRIODENDRON TULIPIFERA	38"	GOOD	OFF-SITE	SAVE**	10,207	3,541	35
35	TULIP POPLAR	LIRIODENDRON TULIPIFERA	26"	GOOD	OFF-SITE	SAVE	4,778	147	3
36	TULIP POPLAR	LIRIODENDRON TULIPIFERA	30"	GOOD	OFF-SITE	N/A	6,362	0	0
37	TULIP POPLAR	LIRIODENDRON TULIPIFERA	31"	GOOD	OFF-SITE	SAVE	6,743	204	3
38	TULIP POPLAR	LIRIODENDRON TULIPIFERA	24"	GOOD	OFF-SITE	SAVE	4,072	206	5
39	TULIP POPLAR	LIRIODENDRON TULIPIFERA	25"	GOOD	ON-SITE	REMOVE	4,418	2,545	54
40	TULIP POPLAR	LIRIODENDRON TULIPIFERA	28"	GOOD	OFF-SITE	SAVE**	5,542	1,410	34
41	TULIP POPLAR	LIRIODENDRON TULIPIFERA	37.5"	GOOD	OFF-SITE	SAVE	7,074	843	12
42	TULIP POPLAR	LIRIODENDRON TULIPIFERA	25"	GOOD	OFF-SITE	N/A	4,418	0	0
43	TULIP POPLAR	LIRIODENDRON TULIPIFERA	42"	GOOD	OFF-SITE	SAVE	12,468	864	7
44	TULIP POPLAR	LIRIODENDRON TULIPIFERA	25"	GOOD	OFF-SITE	SAVE	4,418	543	12
45	TULIP POPLAR	LIRIODENDRON TULIPIFERA	25"	GOOD	OFF-SITE	SAVE	4,418	563	13
46	TULIP POPLAR	LIRIODENDRON TULIPIFERA	30", 27"	GOOD	OFF-SITE	SAVE	6,362	259	4
47	TULIP POPLAR	LIRIODENDRON TULIPIFERA	24"	GOOD	OFF-SITE	SAVE	4,072	568	14
48	TULIP POPLAR	LIRIODENDRON TULIPIFERA	30"	GOOD	OFF-SITE	SAVE	6,362	639	10
49	TULIP POPLAR	LIRIODENDRON TULIPIFERA	31", 28"	GOOD	OFF-SITE	SAVE	6,743	1,591	23
50	TULIP POPLAR	LIRIODENDRON TULIPIFERA	37.5"	GOOD	OFF-SITE	SAVE	7,074	51	1

**Excerpt from Approved
Forest Conservation Plan
Exhibit 129**

No.	Common Name	Species Name	DBH (in.)	Condition	Location	Disposition	CRZ Area (SF)	CRZ Impact (SF)	CRZ Impacts (%)
51	TULIP POPLAR	LIRIODENDRON TULIPIFERA	29"	GOOD	OFF-SITE	N/A	5,945	0	0
52	TULIP POPLAR	LIRIODENDRON TULIPIFERA	32"	GOOD	OFF-SITE	N/A	1,238	0	0
53	TULIP POPLAR	LIRIODENDRON TULIPIFERA	28"	GOOD	OFF-SITE	SAVE**	5,542	2,216	40
54	RED OAK	QUERCUS RUBRA	28"	GOOD	OFF-SITE	SAVE**	5,542	2,417	44
55	RED OAK	QUERCUS RUBRA	29"	GOOD	OFF-SITE	N/A	5,945	0	0
56	SOUTHERN RED OAK	QUERCUS FALCATA	29"	GOOD	OFF-SITE	N/A	5,945	0	0
57	SOUTHERN RED OAK	QUERCUS FALCATA	26"	GOOD	OFF-SITE	N/A	4,718	0	0
58	SOUTHERN RED OAK	QUERCUS FALCATA	31"	GOOD	OFF-SITE	N/A	6,793	0	0
59	TULIP POPLAR	LIRIODENDRON TULIPIFERA	45"	GOOD	OFF-SITE	SAVE	13,010	1,110	9
60	TULIP POPLAR	LIRIODENDRON TULIPIFERA	40.5"	GOOD	OFF-SITE	N/A	11,594	0	0
61	TULIP POPLAR	LIRIODENDRON TULIPIFERA	29"	GOOD	OFF-SITE	N/A	5,945	0	0
62	TULIP POPLAR	LIRIODENDRON TULIPIFERA	33"	GOOD	OFF-SITE	N/A	7,698	0	0
63	TULIP POPLAR	LIRIODENDRON TULIPIFERA	33"	GOOD	OFF-SITE	N/A	7,698	0	0
64	TULIP POPLAR	LIRIODENDRON TULIPIFERA	29"	GOOD, TWIN	OFF-SITE	N/A	5,945	0	0
65	TULIP POPLAR	LIRIODENDRON TULIPIFERA	39"	GOOD	OFF-SITE	N/A	10,751	0	0
66	TULIP POPLAR	LIRIODENDRON TULIPIFERA	31"	GOOD	OFF-SITE	N/A	9,677	0	0
67	TULIP POPLAR	LIRIODENDRON TULIPIFERA	28"	GOOD	OFF-SITE	N/A	5,542	0	0
68	WHITE ASH	FRAXINUS AMERICANA	27"	GOOD	OFF-SITE	SAVE	5,153	1,151	22
69	MOCKERNUT HICKORY	CARYA TOMENTOSA	26"	GOOD	OFF-SITE	SAVE	4,718	882	18
70	RED OAK	QUERCUS RUBRA	38"	GOOD	ON-SITE	REMOVE	10,207	5,161	51
71	RED OAK	QUERCUS RUBRA	38"	GOOD	ON-SITE	REMOVE	10,207	4,948	48
72	TULIP POPLAR	LIRIODENDRON TULIPIFERA	31"	GOOD	OFF-SITE	SAVE**	6,793	3,134	46

● TREE MITIGATION CALCULATIONS FOR ON-SITE 30" AND GREATER TREES TO BE REMOVED:
 153" DBH / 4 = 38.25" OF TREE MITIGATION / 3" CALIPER PROPOSED TREES = 13 REPLACEMENT MITIGATION TREES

**NOTE: DUE TO THE DEGREE OF THE CRITICAL ROOT ZONE IMPACTS TO THESE TREES, THE POTENTIAL EXISTS THAT THEY MAY NOT ULTIMATELY SURVIVE. HOWEVER, RIGOROUS TREE SAVE MEASURES WILL BE TAKEN TO ATTEMPT TO SAVE EACH OF THESE TREES, INCLUDING PROGRESSIVE ROOT PRUNING OVER A NUMBER OF YEARS IN ADVANCE OF CONSTRUCTION, APPLICATION OF A TREE GROWTH REGULATOR, AND CROWN CLEANING.

Excerpt from Approved Preliminary Forest Conservation Plan (Exhibit 129)

Mr. Foster acknowledged that trees with CRZ impacts of greater than 30% trigger the need for more aggressive tree save measures. 2/25/13 T. 121. . He testified there are 14 trees within the Town’s West Woods which will be impacted by the proposed development, but did not believe there would be “significant tree loss”. T. 106. He stated that he was “confident” that the Applicant could provide the work necessary to “save as many trees as possible. *Id.* at 113. According to him, it is difficult to know an exact chance of survival until construction because one doesn’t know exactly how the CRZs will be impacted until construction because “it depends on the trees themselves. *Id.* at 114. In his opinion, four of these might not survive because of the impact to the CRZs. *Id.* When asked to quantify the term “significant tree loss,”

Mr. Foster replied that their proposal gives all of the trees “a good chance of survival.” *Id.* at 110-113. He also acknowledged that tree No. 11 on the approved PFCP was a 27½ inch oak tree located on 7 Daylily Lane. The PFCP lists CRZ impacts of 37%.

As noted on the PFCP, the Applicant proposes to address these CRZ impacts through “aggressive tree save measures,” which include progressive tree pruning, crown cleaning, and using root growth regulator to minimize the impact of construction. Mr. Foster described these measures. He testified that progressive root burning involves cutting back the roots beginning 2 to 3 years before construction, so that by the time of construction, the trees are “much more able to deal with root loss.” Crown cleaning and growth regulator are used to reduce the leaf growth during construction thereby concomitantly reducing the need for water. *Id.* at T. 108. If these methods are used, Mr. Foster asserted that he is “confident they can provide work necessary to save as many of the trees as possible.” *Id.* at T. 106. A condition of the preliminary forest conservation plan approval requires them to do a “tree safe plan” as a component of the final site plan to address the impacts on these trees. He does not believe there will be significant tree loss in the West Woods. *Id.* at 113.

Mr. Hornstein testified that the impact to the Town’s trees is exacerbated by the Town’s failure to cooperate with the Applicant. Had the Town agreed to grant a grading easement on land in the West Woods, the retaining wall would not have been necessary. 2/15/13 T. 58-60; 3/4/13 T. 102-103.

Mr. Foster testified that the location of the drive aisle and an existing sewer line and utility easement running along the western boundary were the root causes of the impact on the West Woods. According to him, the additional setbacks from the West Woods (recommended by Mr. Davis) would not save more trees because of the sewer line. When asked whether the

existing sewer line could be moved, Mr. Foster replied, "That is not within my area of expertise." 2/25/13 T. 122-124. The Applicant did not submit any testimony from the Applicant's civil engineer on this issue.

The Town argues that the Planning Board should not have approved the variance to the Forest Conservation Law because the variance did not take into consideration this purpose of the PD Zone. 2/25/13 T. 211. Mr. Davis opined that buildings on the property should be setback a minimum of 50 feet and the drive aisle for the parking garage should be setback at least 25 feet in order to preserve more trees within the West Woods. In his opinion, this is important for compatibility as well as meeting the purpose clause of the Zone. 2/25/13 T. 189.

The Town also asserts that the development will have a greater environmental impact on the West Woods than estimated by the Applicant. The Town submitted a report from a certified arborist, Ms. Melissa Gildea, summarizing the impact of the PD-44 development on the Town's West Woods. This report states that the Natural Resources Inventory/Forest Stand Delineation (NRI/FSD) fails to show all trees required by the County's Forest Conservation Law, including trees between the homes on Daylily Lane and the subject property as well as trees in the West Woods. Exhibit 88(b).

According to Ms. Mildea, the development plan will require the removal of 10 very large or significant trees located within the West Woods and will heavily impact an additional six large or significant trees. The report opines that approximately 143,600 square feet of tree canopy shown on the PFCP will be removed and an additional 31,000 square feet of tree canopy not accounted for on the PFCP will be removed. Exhibit 88(i).

Mayor Cole testified that construction of the proposed development plan will impact 57 very large or significant trees in the West Woods. Seven of these trees are labeled as being

saved even though all have CRZ impacts of 30% or more. Even if the trees survive, this level of impact to the root zone shortens the tree's life span by one-third to one-half. The loss of large trees on the forest edge also endangers the health of the remaining trees because water flow and wind patterns change and the trees become exposed. Trees that become the "new" outer edge of the forest do not have the structural strength to withstand these forces. 3/4/13 T. 84.

Mayor Cole testified that the loss of tree canopy will exacerbate the already serious stormwater run-off problems in the West Woods from the stormwater outfall on the subject property. According to her, the Applicant has verbally acknowledged inheriting the responsibility for this problem, but feels the site plan will improve the control of water coming from the Towne Crest site. The Town's arborist disagrees with the Applicant that the new stormwater measures will address the problems in the short-term. The arborist estimates that the large amount of tree canopy eliminated will greatly impact the flow of storm water across the property. While this tree canopy will eventually be replaced, coverage will not be fully restored for 20 years. *Id.* at T. 85-86.

In a supplemental report (Exhibit 88(1)), Ms. Gildea recommended some prophylactic measures to accompany construction of the development, including installation of a tree protection fence 40 feet from the property line. For these reasons, the Town does not believe that the purpose clause of the PD Zone, which requires preservation and taking the greatest possible aesthetic advantage of trees, has been met. 3/4/13 T. 86.

Staff recommended approval of the variance request, in part because the proposed density and "site layout and design" necessitated removal of the trees.⁴ The Applicant justified the

⁴ This Report takes no position on the Planning Board's approval of the PFCP or the variance request. The Hearing Examiner includes Staff's analysis of the variance request only for its relevance to the standards for approval of the rezoning in this case (i.e., whether the development plan meets the purpose of the PD Zone to "to preserve and take the greatest possible aesthetic advantage of trees..." *Montgomery County Zoning Ordinance*, §59-C-7.11).

variance request, in part, on the Master Plan's recommendation of "high-density residential use". Exhibit 60, Attachment 3. The standards for approval of the variance and Staff's analysis is set forth below (Exhibit 60, pp. 11-13):

1. Would not confer on the Applicant a special privilege that would be denied to other Applicants.

Granting the variance would not constitute a special privilege because the Critical Root Zones of specimen trees on-site are located within an existing 15 sanitary sewer easement and would be impacted by the removal of the existing buildings independent of the proposed development. In addition, impacts to the critical root zones of other specimen trees located off-site will be mitigated by the use of tree save measures prior to construction. *Given the intensity of the proposed development, impacts to variance trees are to be expected.* Therefore, it is Staff's opinion that granting of the variance will not confer a special privilege to the Applicant.

2. Is not based on conditions or circumstances which are the result of actions by the Applicant.

Staff concurs that the variance is based on the constraints of the site *and the proposed density, public facilities, and amenities*, rather than conditions or circumstances that are the result of actions by the Applicant.

3. Is not based on conditions relating to land or building use, either permitted or non-conforming, on neighboring property.

Staff concurs that the requested variance is a result of the proposed site design and layout on the subject property and not on land or buildings on neighboring property.

2. Minimum Percentage of Green Area

The PD-35 Zone requires the Applicant to provide 50% of the "gross area" of the property as "green area" because it "provides light and air, or scenic, recreational or similar amenities...for the benefit of occupants, neighbors, and the general appearance of openness." *Montgomery County Code*, §§59-A-2.1, 59-C-7.14. As a result, green area may *not* include, "[P]arking lots or vehicular surfaces, accessory buildings other than swimming pools, or areas of

open space so located, small, or circumscribed by buildings, parking or drainage areas as to have no substantial value for the purposes stated in this paragraph.” *Id.*, §59-A-2.1.

For the PD-44 development plan, the Applicant initially calculated the green area based on the net tract area of the property, which does not include previously dedicated right-of-way. *Id.* After Technical Staff requested the Applicant to base the minimum percentage on the gross tract area (yielding a larger amount of green area), the Applicant submitted a revised development plan showing additional green area, calling its omission an “inadvertent error.” Exhibit 58. Approximately 32,409 square feet of the additional green area, however, includes land within the public right-of-way, resulting in more controversy between the parties.

The Applicant’s civil engineer, Mr. Timothy Longfellow, testified that the both alternative development plans include 50% green area based on the gross tract area. The “Land Use Summary Table” on the Alternative A development plan lists green area in the amount of 209,429 square feet, or 51.06% of the gross tract area (i.e., 410,125 square feet). Exhibit 124. Alternative B (Exhibit 125) lists the amount of green area as 216,660 square feet, or 52.83% of the gross tract area.

During the public hearing, Mr. Longfellow acknowledged that 32,409 square feet of the green area listed on both plans is located within the public right-of-way. 2/25/13 T. 73. Without the right-of-way area, Alternative A has only 184,256 square feet of green area, or 43% of the gross tract area. Alternative B, which has more green space than Alternative A, has a total green area of 216,675 square feet. If the right-of-way is subtracted, the total green area is 184,256 square feet, again less than 50% of the gross tract area.

The Applicant now argues that green area may be based on the net tract area of the site, which it calls the “gross area” of the development plan. Exhibit 149(e). In support of this, the

Applicant cites to the definition of green area, which states that it may be a “prescribed portion of the land area encompassed by a development plan.” *Id.* It also argues that the language of the PD Zone bases the calculation of green area on “gross area” rather than the defined term “gross tract area”. As laws should not be interpreted to “read out” specific words, the Applicant argues, the phrase “gross area” applies to the area of the development plan. *Id.*

Counter-intuitively, the Applicant’s argument yields the result that the “gross area” of the development plan is the net tract area of the property. If green area is calculated on this basis, the green area comprises 176,656 square feet (or 50%) of the net tract area of 353,265. *Id.* During cross-examination, Mr. Longfellow was asked whether there was any portion of the development plan other than the “gross area”. Mr. Longfellow testified there was not because “...they are one and the same.” 2/25/13 T. 82.

The Town contends that green area should be based on the gross tract area of the property and that right-of-way should not be included in the calculation. It contends that the terms are “interchangeable” because other portions of the Zoning Ordinance base the minimum percentage of green area on the “gross tract area.” Exhibit 152. It agrees with the Applicant that all provisions of the statute should be interpreted as a whole, but calls the Applicant’s interpretation “tortured”. *Id.*

Mr. Davis testified right-of-way should never be included in the calculation of the minimum green area for a project because to do so would be “bad public policy”. 2/25/13 T. 230. This is because the Department of Transportation has not reviewed either plan, and there is no assurance that this area will be available for green area. In addition, the PD Zone requires the Applicant to show perpetual maintenance of the green area, which cannot be done for areas within the right-of-way. According to him, M-NCPPC had never permitted this because no one

knows what portions of the right-of-way will be available for green area after DOT review. 2/25/13 T. 192-193. He testified that the Department of Transportation had a preliminary meeting with the Applicant to discuss abandonment of the right of way for Towne Crest Drive, but no decision had been made. Whether the development plan includes the minimum amount of green area required by the PD-35 Zone is discussed in Part V.A.3 (on page 99) of this Report.

3. Waivers

a. Multi-Family Height Requirements

Both alternative developments necessitate a waiver of the permitted uses in the PD-35 Zone. Section 59-C-7.131 of the Zoning Ordinance requires minimum percentages of different types of residential units. The PD-35 Zone requires that at least 50% of the buildings be more than four stories. The District Council may waive this requirement if it finds the waiver:

- (a) is more desirable for stated environmental reasons than development in accordance with these limits, or
- (b) achieves goals, policies or recommendations stated in an approved and adopted master or sector plan. *Montgomery County Zoning Ordinance*, §59-C-7.131 (ftn. 1).

Neither of the alternative development plans includes any buildings above four stories. The only detailed justification for the waiver request in the record is contained in a letter from the Applicant's attorneys. They argue that the height was reduced to address compatibility concerns expressed by Technical Staff and "a number of neighbors and the surrounding communities." Exhibit 73, p. 3. They assert that the reduced heights are more compatible with the surrounding area and consistent with adjacent uses. As a result, they argue, the waiver furthers the goal of the Master Plan to "create compatible relationships between developments and contribute to a sense of community identity," citing specific pages of the Plan. *Id.* The

Hearing Examiner examined the cited pages and found only the following portions of the Master Plan possibly relevant to this issue. One of the objectives listed in “Plan Highlights” is:

Providing a sense of community identity for existing and future residents...

The other citation is to page 49 of the Plan, which contains the recommendations for the Mid-County Highway District that includes the subject property. This section states:

Another characteristic of this area is its proximity to the city of Gaithersburg and the town of Washington Grove. The Plan reflects these borders by recommending appropriate residential *densities* near existing or planned developments and recommending buffering when necessary. (emphasis supplied)

The Applicant’s representative, Mr. Stacey Hornstein, testified only that he knew of the waiver request, but did not explain its basis. 2/15/13 T. 34. None of the Applicant’s experts testified in detail on this matter. Ms. Rodriguez testified that the stepped up heights were designed to be compatible with the Wedgewood communities, but did not testify that the reduced heights were necessary to comply with the Master Plan. Another of the Applicant’s expert land planners, Mr. David Ager, testified extensively about compliance with the Master Plan, but did not address the height waiver.

The Applicant’s expert architect, Mr. Ronald Sieboth, testified that the waiver is justified for environmental reasons because the neighbors expressed concern over the height, which he “took” to be an environmental concern. 2/15/13 T. 220. When asked whether the waiver is necessary to meet the goals of the Master Plan, the following exchange occurred (2/15/13 T. 220):

MR. KAUFMAN: You’ve heard testimony from Mr. Ager and Ms. Rodriguez concerning the Master Plan. Do you feel in your expertise it would meet those requirements?

MR. SEIBOTH: Yes, I do.

The Town argues that the 3-4 story heights are more compatible than the five-story heights previously proposed, but asserts that a waiver of the height requirements only underscores the fact that a PD-35 density is inappropriate at this location. Exhibit 152.

Technical Staff failed to address the waiver request and it was not presented to the Planning Board. The record reveals that the request was not filed until January 11, 2013, *after* the Planning Board completed its review of the PD-44 application.

b. 100-Foot Setback from Properties Recommended on a Master Plan for Single-Family Detached Residential Use

Building B as shown in Alternative A is setback 35 feet from the single-family detached property at 7 Daylily Lane. While Alternative B shows Building B setback 100-feet from that property, the setback is not incorporated into the binding elements of the development plan.

As already noted, Staff agreed with the Applicant that this requirement does not apply when the adjoining homes are in a separate jurisdiction with independent zoning authority. Exhibit 60, p. 2. The Chair of the Planning Board disagreed with that assessment. Exhibit 71.

The Applicant continues this argument before the Hearing Examiner. It argues that because Montgomery County may not adopt master plans in other jurisdictions, the term “area master plan” used in the Zoning Ordinance refers only to master plans adopted by the District Council. Were this not the case, according to the Applicant, other jurisdictions could control development within Montgomery County. Exhibit 149(a).

To further bolster its position, the Applicant points to portions of the legislative history of the PD Zone. Prior to adoption, the text amendment called for the 100-foot setback from lots shown on an approved preliminary subdivision plan for development with a one-family-detached residence. Exhibit 161. This language was later changed to impose the setback from “land for which the area master plan recommends a one-family detached zone.” *Id.* The Applicant gleans

from this that the “area master plan” cited in the setback requirement must refer to a master plan adopted by the County. *Id.* The Applicants further note that the Gaithersburg Area Master Plan recommends the properties along Daylily Lane for parkland. *Id.*

The Town takes the opposite position, asserting the 100-foot setback regulates development on land *within* the County, regardless of whether the adjoining single-family detached homes are in another jurisdiction. The Town also argues that the adopted language was intended only to broaden the scope of the requirement beyond properties having an approved preliminary plan. They assert that the language change was not intended to impose jurisdictional requirements. Exhibit 164.

F. Agency Comments on the PD-35 Development Plan

The Zoning Ordinance requires the Hearing Examiner to afford Technical Staff and the Planning Board an opportunity to review amendments to the development plan after the Board’s initial recommendation. *Montgomery County Code*, §59-C-1.72. The Hearing Examiner referred the PD-35 development plan to the Planning Board for the opportunity to comment. The Chair declined to review the plan further, concluding that Board would be “unlikely to find the decrease in density persuasive on the key issue of master plan compliance.” Exhibit 91, p. 2. The Chair noted that the amendments responded to Board’s compatibility concerns “to a limited degree”. She also concluded that other benefits stemming from the development were outweighed by this (Exhibit 91, p. 2):

Although the Planning Board recognizes the need to redevelop the existing aging development and always appreciates an offer of MPDUs above the 12.5% requirement, in my view the master plan compliance finding cannot be made based on the proposed density. I consider it very unlikely that the majority of the Planning Board would disagree with this conclusion. Therefore, I do not believe that further review is warranted at this time.

Technical Staff did not review the PD-35 development plan because it had already recommended approval of the PD-44 plan. *Id.*

G. Public Facilities

1. Local Area Transportation Review (LATR) and TPAR

The Applicant's expert transportation planner, Ms. Ann N. (Nancy) Randall, testified that the proposed development met the requirements of Local Area Transportation Review (LATR). The intersections studied included Mid-County Highway and Washington Grove Lane, Towne Crest Drive and Washington Grove Lane and East Diamond Avenue, Railroad Street and Washington Grove Lane. The intersection of Towne Crest Drive and Washington Grove Lane is not signalized.

The original proposal (i.e., PD-60) would have resulted 142 morning trips and 153 evening trips including a credit for the existing development which will be replaced. 2/25/13 T. 129-131. Applying the trip distribution determined by Technical Staff, she testified that all three intersections studied are below the standard for the policy area, which is a Critical Lane Volume (CLV) of 1,475. The intersection coming closest to the standard is Washington Grove Lane and Mid-County highway, with a CLV of 1422. 2/25/13 T. 132.

She performed a supplemental study for the PD-35 application. Based on that study, the PD-35 project will generate 87 morning peak hour trips and 92 evening peak hour trips. In addition, her firm recounted the three study intersections and concluded that the volumes were lower than those in the previous study. The Washington Grove Lane/Mid-County Highway intersection (previously the highest CLV) now had a CLV of 1390. Ms. Randall stated that the study did not take any credits for proximity to transit. She testified that Technical Staff agreed with the conclusions in the original study, although they had not reviewed the supplemental report. 2/25/13 T. 134-139.

Technical Staff found that the development met PAMR requirements because the Montgomery Village/Airpark Policy Area has no mitigation requirement. Staff advises that, [I]f PAMR is replaced by Transportation Policy Area Review (TPAR) at site plan review, the Applicant must at that time satisfy the applicable requirements of the new subdivision staging policy.” Exhibit 60, p. 9.

2. Transit Proximity

Ms. Randall described the transit facilities serving the site. There is an existing bus stop and crosswalk at the intersection of Towne Crest Drive and Washington Grove Lane. Presently, it is not well-marked and the Applicants will restripe and sign the crosswalk during redevelopment. They will also provide a bus shelter. The bus route does not have a direct line to the Shady Grove Metro station. A MARC station is located approximately 0.6 miles from the site (as the crow flies). One may reach it by walking through the town or by walking along Washington Grove Lane and cutting over to Railroad Street. T. 128. The speed limit on Washington Grove Lane is 30 miles per hour, although there is an advisory speed limit of 20 miles per hour due to the speed bumps along the road. T. 129.

Residents of the Town testified that transit service in the area is limited. Mr. Booher, Chair of the Town’s Historic Preservation Commission, testified that the bus route from the stop next to the MARC station (not from the stop located near Towne Crest), is “pretty direct” to the Metro Station. The bus route leaving from Towne Crest is indirect and travels a “pretty long” distance around to reach Shady Grove. He does not take that bus route because it takes too long to arrive at Shady Grove. From Washington Grove Lane, the route travels northeast, then east, and then south to Shady Grove. The entire route links Shady Grove to Gaithersburg. T. 248-250. Only four MARC trains actually stop in Washington Grove in the morning and five stop in the

afternoon. The Town has tried for a number of years to increase service, but service has been decreased instead. The last train stops at 8:30 a.m. during the week. Trains stop during weekday evenings between 2:00 p.m. and 7:00 p.m.

Mr. Charles Challstrom, Chairman of the Town's Planning Commission, further described the public transit options available near the subject property. According to him, the MARC train station located within the town provides only limited commuter services. He testified that there are only four flag stops in the morning. A flag stop is one where the engineer must physically observe a passenger on the platform before the train will stop. Otherwise, the train proceeds without stopping. There are five trains in the evening coming back from Washington, D.C. These are a one-way service; the first three of the five trains are flag stops and the other two are drop-off stops only (i.e., not intended for picking up passengers). Therefore, the station does not provide full transit options as does the Shady Grove station. 3/4/13 T. 32-33.

According to Mr. Challstrom, the bus stop closest to Towne Crest is Ride-On Bus Route 57. The bus stops approximately every 30 minutes. The length of time necessary to go from the stop on Washington Grove Lane to the Shady Grove Metro varies depending on the particular time of day and the expected number of stops along the way. The time ranges between 16 minutes early in the day and is more typically 18 minutes. At times, it is as high as 22 or 23 minutes, according to the most recent route schedule. The route proceeds from Lakeforest Mall along Washington Grove Lane and goes north into Derwood before arriving at Shady Grove. Another bus (Route 61) proceeds along Railroad Street closer to the MARC station, and is the same distance from the subject property as the MARC station. To his knowledge, there is no WMATA bus service in the area. 3/4/13 T. 33-34.

In response, Ms. Randall testified that the bus which stops immediately across from the subject property is a 5-minute bus ride to the Gaithersburg MARC station, and agreed with Mr. Challstrom that it has scheduled stops scheduled approximately every ½ hour. The bus route at the intersection of Washington Grove Lane and Mid-County Highway (Route 60) goes to the Shady Grove Metro and into Rockville. There are also several additional bus routes that connect with this one to access points in Gaithersburg, although she acknowledged that the route that circulates through the communities is a “long one”. In her opinion, the easiest way to get to the Metro would be to board the bus at the stop across from the subject property and take the Route 57 to the Gaithersburg MARC station, take the MARC train to Rockville, and switch to the red line at Rockville. 3/4/13 T. 175.

3. Parking and Pedestrian Circulation

Ms. Randall described the pedestrian circulation on and surrounding the site. She stated that there is a pedestrian path along Washington Grove Lane. The Applicant will be adding sidewalks along Washington Lane and Towne Crest Drive. It will also enhancing the existing cross-walk and construct a bus shelter on Washington Grove Lane. The path system along Washington Grove Lane connects with various roads leading into the Town of Washington Grove. Sidewalks extend north on Washington Grove Lane to the Mid-County Highway where there is another bus stop. 2/25/13 T. 128, 139-141.

Several individuals, both for and against the application, testified that there is a significant parking shortage in the area. Parking overflows both onto Towne Crest Drive and into Boundary Street in the Town of Washington Grove. Most of those who testified agreed that parking problem stemmed from the design of the two Wedgewoods, which have only two parking spaces per townhouse.

Ms. Carla Weinberg opposed the project because she feels that there is insufficient parking provided on-site and the visitors will end up parking on Towne Crest Drive. She complains that the small neighborhood streets are not equipped to handle the number of parked vehicles. She lives in Wedgewood 2 and testified that she has not been able to have people over because of the parking problem, which has affected her quality of life. She believes that the neighborhood situation demonstrates that two spaces per unit are insufficient for the area. Therefore, she thinks that the 1.5 spaces per unit will exacerbate existing parking problems. Nor does she believe that the small amount of parking provided by the Applicant (if Towne Crest Drive is abandoned) will significantly improve the problem. She considers the 10 extra spaces a “drop in the bucket.” 2/25/13 T. 155-158.

4. Water, Sewer, Schools and Other Utilities

In its review of the PD-44 application, Technical Staff determined that school capacity was adequate to serve the proposed development. Located in the Zadok Magruder High School Cluster, Staff determined that project would cause a net increase (after students from the existing 107 units are subtracted) of 23 elementary, 13 middle, and 21 high school students. Staff advises that the FY 2013 Capital Budget and the FY 2013-2018 Capital Improvements Program has adequate capacity for the middle and high school levels. The elementary schools will exceed 105% of capacity, which will require a school facilities payment at the time of building permit. This does not, however, result in a moratorium. Exhibit 60, p. 7.

The Applicant’s expert civil engineer, Mr. Timothy Longfellow, testified that the site is adequately served by public water and sewer. Mr. Longfellow described the utilities available to the site. He testified that there is an existing 12-inch water line running through Towne Crest Drive that serves the property. Public sewer bisects the property between Buildings A and B and

runs along the western edge of the property line out to Washington Grove Lane. The property is in categories W-3 and S-3 for public water and sewer, respectively. 2/25/13 T. 60-61.

According to Mr. Longfellow, there is an existing storm drain system serving which runs along Towne Crest Drive and also bisects the site between Buildings A and B. This system outfalls into the West Woods and between Lots 2 and 3 on Daylily Lane. The outfall that bisects the site between the two proposed buildings outflows into rip rap; the outfall between the Daylily Lane properties has a concrete apron that flows into a grass swale. 2/25/13 T. 62-63.

The redevelopment will introduce stormwater management for both quantity and quality onto the site where none presently exists. The site will have 10-year quantity control and will fulfill all State Environment Site Design standards. In his opinion, the redevelopment will not increase the existing volume of water into the West Woods and will provide quality control as well. The Applicant's preliminary water quality plan has been conceptually approved by DPS. 2/25/13 T. 62-68.

H. Compatibility

The Applicant asserts that the development is compatible with the surrounding area due to the use of wrap parking (eliminating surface parking), undulating exterior, stepped up building heights from Towne Crest Drive, and increased building massing from the southern portion of the site to the northern portion of the site, as previously described. Although the Applicant originally proposed a much higher (PD-60) density, they contend that they have responded to concerns expressed by the City of Gaithersburg, the Saybrooke community to the north, and the two Wedgewoods. The lack of opposition from these communities, and in the case of the City of Gaithersburg and Wedgewood 2, support for the project means that it is compatible with the

surrounding area. Members of the board of directors for Wedgewood 2 testified that they felt the project was compatible with their community. 2/15/13 T. 70, 156.

Mr. Ager pointed to an example in the Shady Grove Master Plan where PD-35 had been recommended adjacent to townhouse zoning and historic sites. In another example, he testified of a transition between single-family homes, to townhouses, to multi-family in the Metro East and Metro North sections of the Shady Grove Plan. For this, the Plan recommended a four-story height limit. 3/4/13 T. 132-133. He also opined that the proposed density of 40 dwelling units per acre is *less* than the densities proposed immediately next to the Shady Grove Metro. Those properties are within the TOMX/TDR Zone, which permits 70% of a project to be residential. The TOMX densities are expressed in Floor Area Ratio. If converted to units per acre (assuming a standard unit size of 1,000 square feet), the densities would be 48.77 dwelling units per acre. If the entire project were converted to residential, densities could be as much as 90 dwelling units per acre. T. 150-153. He opined that “smart-growth” is more like “anti-sprawl”; it places residential development near existing services which may include roads, sewer, and other public infrastructure. 3/4/13 T. 149.

Those in opposition complain that the project is incompatible with the surrounding area for a variety of reasons. These include the project’s density in relation to the surrounding area, its scale, and its impact on character of the area surrounding the homes on Daylily Lane and the West Woods, and the historic character of the Town. Mayor Cole testified that the Town’s foremost concerns are due to density, proximity to the Daylily Lane homes, and the impact to the West Woods. The Town adopted a Resolution explaining its opposition to the PD-44 application; that still remains valid for the PD-35 application. She stated that the Town found the density of approximately 40 dwelling units per acre incompatible with the Town’s density of

approximately 1.08 dwelling units per acre. The development is also incompatible because it fails to meet the minimum 100-foot setback from single-family residential zones. The Town believes that these failures indicate that the Applicant is trying to force too much development onto the subject property. *Id.* at 3/4/13 T. 70-72.

Mayor Cole also testified that the development is incompatible with the West Woods. The impact on the Town's forest preserve has already been set forth in Section II.E.2 of this Report.

The Town's expert land planner, Mr. Davis, acknowledged that the PD-35 application Zone may be compatible along the northern, eastern, and southern boundaries, but not with the western boundary. In his opinion, the PD Zone places a higher standard than other zones on the preservation of trees, in the nature of a compatibility standard. In his opinion, four stories could be appropriate on the site if there was a greater setback from the woods. He opined that an appropriate setback would be 50 feet from the western property line rather than the five-foot setback for the parking access drive aisle and the 25-foot setback for the building. In his opinion, density permitted under the PD-22 Zone would work "very well" on the site. 2/25/13 T. 185-190.

According to Mr. Davis, the density of 40 dwelling units per acre proposed here is comparable to densities immediately adjacent to the Metro Station in Shady Grove. In his opinion, while the densities are similar, the areas are not comparable because of the availability and proximity of full service transit at Shady Grove. 2/25/13 T. 214-215.

Mr. Robert Booher, a registered architect and Chairman of the Town's Historic Preservation Commission, and Mr. Charles Challstrom, Chairman of the Town's Planning Commission, testified that the project was incompatible in terms of both scale, a primary component of compatibility, and density. The density proposed (i.e., 40 dwelling units per acre)

is not compatible with that of the Town, which has a density of approximately 225 dwelling units over 200 acres (i.e., 1.08 dwelling units per acre). Nor is it compatible with the densities in the Wedgewood communities, which is unlikely to change because of the large percentage of owner-occupied dwellings there.

Mr. Booher testified that the massing of the buildings were also out-of-scale with adjoining properties. He found it “hard to find” the relationship between two four-story buildings and single-family detached homes comparable or compatible. 2/25/13 T. 242. He acknowledged that the Applicant has attempted to variegate the façade facing Towne Crest Drive, but felt they have “essentially turned their back” to the woods. 2/25/13 T. 243. Other developers that have built communities bordering the Town, such as the Saybrooke community to the north and the Amity community southeast of Washington Grove Lane, worked with the Town to protect the woods. In these cases, areas adjacent to the woods developed as single-family detached homes. 2/25/13 T. 243-245.

Mr. Challstrom also found the density out of scale with the surrounding area. He testified that the Town had always had a good relationship with County agencies and this was recognized in Master Plan. The 1985 Gaithersburg Master Plan recommended TDR-6 zoning for the Saybrooke neighborhood, but area bordering the woods was zoned R-90. In another area south of Washington Grove Lane, the Planning Board mandated single-family detached zoning adjacent to the woods to “buffer” the woods from development impacts. 2/25/13 T. 41.

Mr. Booher testified that the development would significantly impact the Town’s historic status. The Town was originally founded in a rural context as an antidote to the urban environment of Washington, D.C. This urban environment has been extended to the suburban development of the surrounding County. Were this density continued around the perimeter of

the Town, it would necessarily intensify impacts on the Town due to increased traffic, despite the Town's master plan to remain at relatively low densities. Currently, the national historic district does not include the woods because at the time of designation the "context" or natural surroundings of the area could not be included. This is no longer the case and the Town is in the process of updating its historic designation to include its natural features. 2/15/13 T. 241-242.

Mr. Booher did not believe that rezoning of this property should occur in a piecemeal process; rather he asserts that it should be comprehensively planned to benefit from a more integrative process. 2/25/13 T. 251.

Mayor Cole testified that the Town Council has ongoing concerns about development of the property. While the Town does not know the source of trash accumulation in the West Woods, it is a concern. They also have continuing concerns about the impact of the storm water run-off. The Town would feel more comfortable were the project redesigned at a lesser density, such as 200 units. She thinks there is a good chance that if this were to occur, more trees in the West Woods would be preserved. 3/5/13 T. 91-92. The Hearing Examiner's findings on the issue of compatibility are set forth in Section V.A.3 of this Report.

I. The Public Interest

As already described, the Applicant contends that the development plan furthers the public interest because of its proximity to transit, and "smart growth" principles because it is located within an area served by public facilities, including bus routes and roads.

The Applicant also points to the need for more housing in the County, in particular affordable housing, citing the Housing Element of the General Plan (Housing Element). Exhibit 142. The Housing Element points out the growing demand for additional affordable units located near "high quality transit service". *Housing Element*, p. 8. More particularly, the

Housing Element recommends locating new housing near public transportation with “easy, multi-modal connections” to jobs, housing, schools, recreation, etc. *Id.* at 14. The Housing Element defines “affordable housing” as housing which consumes between 30 – 35% of a household’s monthly income for mortgage payments or rent, property taxes, and other monthly assessments and stresses the need to protect older neighborhoods as new housing is added. *Id.* at 10.

Mr. Rick Nelson, Director of the Department of Housing and Community Affairs, submitted an e-mail into the record supporting the project because it included 15% affordable housing units and would further DHCA’s goal to revitalize deteriorating neighborhoods. The Applicant testified that 25 of these will be three-bedroom units because these affordable units are needed within the County. 3/4/13 T. 105.

Victory Housing also supported the application because the market units will be aimed at the “mid-market” rather than the luxury market and because the developer would be providing 10 workforce housing units by covenant, although neither of these proposals was mentioned by the Applicant during the public hearing. Exhibit 98(b). Ms. Barbara Goldberg-Goldman testified on behalf the Affordable Housing Conference of Montgomery County, Maryland. The Conference supports initiatives in which a developer proposes to invest and redevelop aging apartments as new, modern, and affordable, although she did not know the exact number of units that would be MPDUs. 2/15/13 T.

Those in opposition also posit that the need for more affordable housing identified in the Housing Element of the General Plan may be met by a less dense, but more compatible development. Nor do they feel that the “high” density proposed here is comparable to the

“transit-oriented” development recommended in the Housing Element. The Hearing Examiner’s findings on the public interest are included in Section V of this Report.

J. Community Response

The Hearing Examiner received numerous letters both for and against the application.

The Wedgewood 1 and 2, covering the area immediately to the east, both supported the PD-44 application. Both indicate that the existing apartment complex is deteriorating and crime is increasing. In addition, Wedgewood 2 supported the application in the hope that redevelopment, along with the improvements required in the agreement with the developer, will revitalize the area. Exhibits 62, 64, 96. Wedgewood 2 submitted a second letter disclaiming responsibility for a letter opposing the application filed by a Ms. Weinberg. Wedgewood 2’s letter suggested that the Town’s desire to maintain its “bucolic setting and trees” did not outweigh Wedgewood’s economic and community interest in the development. Wedgewood 2 also stated that the Town’s trees should not be preserved “solely at the expense of Wedgewood.” Exhibit 96.

Numerous individuals from both Wedgewoods supported the project, primarily via a form letter stressing the need for revitalization of the neighborhood. Exhibits 89, 94, 98(a), Mr. Wilson Mancilla, a Board member of Wedgewood 2, testified that he supported the project because it would revitalize the neighborhood and increase property values. Exhibit 98(c); 2/25/12 T. 154. In addition, residents of the existing Towne Crest apartments supported the project (via a similar form letter) for the same reasons and because the developer has promised to relocate the existing residents to other areas within Towne Crest during construction. Exhibit 97, 102, 118, 135.

A few individuals outside the Wedgewoods, including the owner of 5 Daylily Lane adjacent to the western property line, supported the development because they believe it will eliminate safety concerns, contribute to affordable housing, and because the developer had worked to address their concerns by reducing the proposed density. They asserted that the density was necessary to make the project economically viable. Exhibit 80.

The City of Gaithersburg Planning Commission also supported the PD-44 project, finding that it would stabilize crime rates and serve as a catalyst for future redevelopment of the area. The Commission also concluded that the stormwater management and “reforestation plan for the West Woods of the Town of Washington Grove will provide significant environmental benefits within the surrounding area.” The Commission offered several comments for future approvals, including one to, “[E]nsure the provision of appropriately sized active open space areas onsite.” Exhibit 60, Attachment 12.

As is clear by now, the Town of Washington Grove opposed the Application, formally expressed in a Resolution adopted on September 11, 2012. Exhibit 88(h). Their reasons for their position have been set forth in numerous areas of this report. Briefly, the Town feels that the development plan does not protect and is incompatible with its forest preserve both because the removal of trees will impact the existing erosion problem and because of the number of trees that must be removed within the Town’s boundaries. In addition, the Town believes that the density and height proposed are incompatible with the immediate and larger area, inconsistent with the 1985 Gaithersburg and Vicinity Master Plan, and incompatible with the historic nature of the Town, which incorporates its natural setting.

Ms. Stacey Umunna, the owner of 7 Daylily Lane, also opposed the application. She believes that locating a four-story building approximately 30 feet from her back yard will destroy

her family's peace and privacy. Currently they see only one balcony from the existing apartments from their rear yard. She believes that the four-story structure and parking garage would strip her children of privacy in their rear-facing bedrooms.

She still opposed the proposed density even with Alternative B because she has concerns about noise coming from the drive aisle and parking garage. She is fearful that the tree located on her property, shown on the PFCP, will cause damage on her property because 37% of its CRZ will be impacted. The tree is tall enough to fall on her children's bedroom and it acts as a privacy buffer from the apartments. 3/4/13 T. 6-12.

Both Montgomery Preservation, Inc. and Preservation Maryland also opposed the application. Preservation Maryland concluded that the Town is of "national significance" because it is a "rare example" of a 19th century camp meeting that retains much of its original design. That design included an "equal proportion of developed and natural spaces" which evokes a "unique sense of time and place not easily found in Montgomery County." Exhibit 99(c). Preservation Maryland further concluded that the height and density of this project are incompatible with the Town's historic character. *Id.*

Montgomery Preservation also noted the Town's historic origins, stating that it had been purchased by the Methodist Church as a summer tent revival and education campgrounds, similar to Chataqua. Exhibit 133. Because of its historic nature, Montgomery Preservation found that the PD-35 density, "one step down" from urban high density, was inappropriate for the area and inconsistent with the Master Plan. It pointed out that revitalization of the area could be implemented in many ways and that this redevelopment would result in a net loss of affordable housing because only 15% of the units will be MPDUs and the others will be replaced by market-rate units. *Id.*

Numerous individuals within the Town also opposed the application. They cited the adverse impacts caused by removal of trees within the West Woods, adverse impacts to the existing erosion problem, and increased traffic along the two-lane Washington Grove Lane. They also believed that the project's density and height were incompatible with the surrounding area and with the homes on Daylily Lane, inconsistent with the Master Plan, and would exacerbate an existing parking problem. Many also expressed the opinion that the development was incompatible with the historic character of Washington Grove, which incorporates its forest preserves as an integral element of its historic philosophy. Exhibits 67, 72, 75, 81, 83-87, 90, 93, 95, 99, 100.

IV. SUMMARY OF HEARING

The Applicants' presented testimony from the owners of the subject property as well as experts in land use planning, architecture, and civil engineering. The Town presented testimony from its Historic Preservation Commission, its Planning Commission, and the Mayor. It also presented testimony from an expert land planner, Mr. Joseph Davis. Ms. Barbara Goldberg-Goldman testified on behalf of the Affordable Housing Conference of Montgomery County, Maryland. Representatives from the Wedgewood 1 and 2 testified in support of the application and one Wedgewood resident testified in opposition to the application. Their testimony is set forth where relevant in this Report and a more complete summary is included in an Appendix to this Report.

V. ZONING ISSUES AND REQUIRED FINDINGS

The subject application seeks to rezone the property from the R-30 and R-T 12.5 Zones to the PD-35 Zone. The PD-35 Zone falls into a category known as "floating zones." A floating zone is a

flexible device that allows a legislative body to establish a district for a particular type of use, with land use regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, *i.e.*, it satisfies the purpose clause and requirements for the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

PD (Planned Development) zones are a special variety of floating zone with performance specifications integrated into the requirements of the zone. These zones allow considerable design flexibility if the performance specifications are satisfied. The applicant is not bound to rigid design specifications, but may propose site-tailored specifications, within the parameters established for the zone, for elements such as setbacks, building heights and types of buildings. These specifications are set forth on a development plan to facilitate appropriate zoning oversight by the District Council.

Pursuant to Zoning Ordinance §59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone. Once it is approved, the development plan provides the design specifications for the site, much as the Zoning Ordinance provides design specifications for more rigidly applied zones. Accordingly, the evaluation of zoning issues must begin with the Development Plan and proceed to the requirements of the zone itself.

Before approving a development plan, the District Council must make five specific findings set forth in Code § 59-D-1.61. These findings relate to consistency with the master plan and the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas.

Because the general requirement of the law – that the application must fulfill the “purposes and requirements” of the new zone – is subsumed in the language of the five specific required findings, a determination that the five findings have been satisfied would satisfy the Montgomery County Zoning Ordinance. However, in addition to these five findings, Maryland law also requires that the proposed rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to the County, all zoning power must be exercised to:

- (1) guide and accomplish a coordinated, comprehensive, adjusted, and systematic development of the regional district;
- (2) coordinate and adjust the development of the regional district with public and private development of other parts of the State and of the District of Columbia; and
- (3) protect and promote the public health, safety, and welfare. *Md. Land Use Article Code Ann.*, § 21-101(a)(4)(i).

In sum, there are six findings required (§59-D-1.61 (a) through (e) and the public interest). The “Required Findings” are discussed below in the order set forth in the statute to facilitate review. Based on this review, the Hearing Examiner concludes that the evidence in this case supports some, but not all, of the required findings.

A. Review of the Development Plan

1. Consistency with the Master Plan

The first required finding relates to consistency with the Master Plan and other County policies:

(a) The proposed development plan substantially complies with the use and density indicated by the master plan or sector plan, and does not conflict with the general plan, the county capital improvements program, or other applicable county plans and policies. However:

(1) To permit the construction of all MPDUs under Chapter 25A, including any bonus density units, on-site in zones with a maximum permitted density more than 39 dwelling units per acre or a residential FAR more than .9, a development plan may exceed:

(A) any dwelling unit per acre or FAR limit recommended in a master plan or sector plan, but must not exceed the maximum density of the zone; and

(B) any building height limit recommended in a master plan or sector plan, but must not exceed the maximum height of the zone.

The additional FAR and height allowed by this subsection is limited to the FAR and height necessary to accommodate the number of MPDUs built on site plus the number of bonus density units.

The above requires a finding that the development plan is in substantial compliance with the “use and density” recommended in the Sector Plan. Clearly, the proposed development complies with the land use recommended in the Master Plan itself, which calls for “multi-family” land use. The real issue in this case is the project’s proposed density.

The Hearing Examiner does not agree with the Applicant’s interpretation of the Master Plan, which would permit all of the development capacity in Analysis Area 2 to be located on the subject property. Such an interpretation contradicts too much of plain language of the Plan. *Stickley v. State Farm Fire & Cas. Co.*, Court of Appeals Case No. 48, September Term, 2012, 2013 Md. LEXIS 274 (Filed Apr. 25, 2013)(The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature...which begins with the plain language of the statute, and ordinary, popular understanding of the English language dictates interpretation of its terminology.) The Planning Board’s Land Use Map describes the “land use” by dwelling units per acre. Given this explicit instruction, it is difficult to construe this language to permit density on a single parcel to balloon far above the 8 – 15 dwelling units per acre recommended.

Nor does the zoning recommended in the Plan support the Applicant’s theory. The Plan places the entire property in the R-30 Zone. The R-30 Zone permits a density of 14.5 dwelling

units per net acre (17.69 dwelling units with the MPDU bonus), which is consistent with the density recommended on the Planning Board's Land Use Map.

The Hearing Examiner does not find credible Mr. Berman's testimony that, after 30 years of implementation, he has suddenly discovered a mistake in Table 3 of the Plan. Contrary to Mr. Berman's testimony that the Plan was "broad brush" and the underlying maps were difficult to put together, Table 3 very accurately identifies exactly how many dwelling units had been developed in the area, a number confirmed by the Applicant's experts. 2/15/13 T. 142. Given that the Plan accurately reflected the existing development, the Hearing Examiner agrees with the Planning Board that Table 3 should be interpreted simply to maintain the *status quo*. This is consistent with earlier language in the Plan stating that the land use recommendations for already-developed areas were made in tabular form; Analysis Area 2 clearly was one of those areas. Contrary to Mr. Berman's contention, the Plan does not prohibit any further additional development on the subject property; an additional 41 dwelling units are available for development on the property under the recommendation of 8-15 dwelling units per acre.

Other language of the Plan also contradicts the Applicant's theory. The Hearing Examiner agrees with the Town's expert land planner that failure to designate this for PD Zoning in the Land Use Plan was not an omission, but part of the comprehensive planning. Language contained in the early chapters outline how the Plan should be interpreted. This language clearly states that it designated properties appropriate for optional method densities *on the Land Use Plan*. The subject property simply was not one of them.

Rejecting the Applicant's interpretation of the Master Plan does not mean the Plan's recommendation is "frozen" as of 1985 or that the PD Zone may never be appropriate at this location. In this case, rejection of the Applicant's theory affects only the baseline for comparing

the Master Plan's recommended density with the density proposed by the Applicant. The parties agree that under the Planning Board's adopted Land Use Map (permitting 8-15 dwelling units per acre), up to 148 dwelling units could be developed on the property with the MPDU bonus. This would permit an additional 41 dwelling units (net of the 107 existing dwelling units) on redevelopment. 2/15/13 T. 141; 2/25/13 T. 172. Using 148 units as the baseline for comparison, the Applicant's proposed density more than doubles the density recommended by the Plan, rather than the 18% asserted by the Applicant.

The question then becomes whether doubling the recommended density may still be in substantial compliance with the 1985 Plan, especially given its age. In this case, the Hearing Examiner finds it important that Master Plan compliance is one of the primary purposes of the PD Zone. In fact, the purpose of PD Zone is to implement the Master Plan *better* than developments in other zones:

It is the purpose of this zone to implement the general plan for the Maryland-Washington Regional District and the area master plans by permitting *unified development consistent with densities proposed by master plans*. It is intended that this zone provide a means of regulating development which can achieve flexibility of design, the integration of mutually compatible uses and optimum land planning with greater efficiency, convenience and amenity than the procedures and regulations under which it is permitted as a right under conventional zoning categories. In so doing, *it is intended that the zoning category be utilized to implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories*. *Montgomery County Zoning Ordinance, §59-C-7.11* (emphasis supplied).

While the Hearing Examiner believes this plain language is already clear, it may be helpful to review portions of the legislative history of the zone.⁵ Before adoption, many were concerned that the design flexibility permitted in the zone could be used to "break" master plan

⁵ The Hearing Examiner takes official notice of the portions of the legislative history relied upon in this Report and Recommendation.

recommendations. *Minutes of County Council Worksession on Zoning Application F-721 Revised, Planned Development Zone* (January 19, 1973). At one point, the Council rejected a proposal requiring the zone to be designated on a master plan, in part because of the strong language (emphasized above) in the purpose clause. In preparation for a Council briefing, the Planning Board published a report containing the proposed zone accompanied by explanatory comments by Technical Staff. With regard to the issue of compliance with the Master Plan, Technical Staff explained:

Since densities are to remain the same as shown on the master plan, the granting of the zone is based on the acceptability of this development design. The developer is required to demonstrate to the satisfaction of the County Council that his plan not only complies with all of the purposes of the zone (pages 2, 4) and complies with the master plan as to density, but that the proposed development would be superior to what could be done under the conventional zoning recommended on the master plan, and that it would be compatible with adjacent development.

Montgomery County Planning Board, *The Proposed Planned Development Zone, Text of Zoning Application No. F-721, as revised by the Planning Board on July 6, 1972, and further revised at County Council worksessions, with an explanation by Montgomery County Planning Board Staff* (undated). Other language in the Zone itself indicates there was no intent to stray too far from the Master Plan's recommended densities. Section 59-C-7.14(a) provides:

(b) The District Council must determine whether *the density category applied for is appropriate, taking into consideration and being guided by the general plan, the area master or sector plan, the capital improvements program, the purposes of the planned development zone, the requirement to provide moderately priced dwelling units in accordance with Chapter 25A of this Code, as amended, and such other information as may be relevant. Where 2 or more parts of the proposed planned development are indicated for different densities on a master plan, a density category may be granted which would produce the same total number of dwelling units as would the several parts if calculated individually at the density indicated for each respective part and then totaled together for the entire planned development* (emphasis supplied).

The Applicant argues that Maryland courts have long taken the position master plans in zoning cases are more in the nature of advisory guides and that density should not be “frozen” at 1985 levels, relying on *Kanfer v. Montgomery County Council*, 35 Md. App. 715, 733 (1977)(the master plan is “at best a flexible guide”). The Town argues that, because of changes in State law, the purpose clause of the PD Zone elevates Master Plan compliance “to the level of a true regulatory device,” citing *M-NCPPC v. Greater Baden-Aquasco Citizens Association*, 412 Md. 73 (2009)(Court reversed the Planning Board’s approval of a subdivision which failed to consider master plan growth tier recommendations.)

The Hearing Examiner does not interpret the purpose clause to “freeze” density at 1985 levels because it requires the Council to be “guided” by the master plan when determining density. Section 59-D-1.62 of the Zoning Ordinance recognizes that there may be times when the Council does approve a development plan for the PD Zone with density higher than recommended in the master plan, although this requires six rather than 5 votes. She does find, however, that this purpose requires the master plan to be given more weight than the rule enunciated in *Kanfer*.⁶ The Zone gives an applicant design flexibility to comply with master plan in a manner *better* than could be done under Euclidean zoning. Given the purpose of the Zone, the Hearing Examiner agrees with Mr. Davis that master planned density should only be exceeded when the application furthers important public policies, responds to circumstances which have changed since adoption, and when it meets other purposes and development standards in the Zone.

⁶In light of recent state legislation, *Kanfer* may no longer represent a “well-established” rule in Maryland. In 2009, the State enacted legislation purporting to abrogate the Court of Appeals decision in *Trail v. Terrapin Run LLC*, 403 Md. 523 (2008) applying the rule to a special exception. See, *M-NCPPC v. Greater Baden-Aquasco Citizens Association*, 412 Md. 73, fn. 28 (2009). The new law does not explicitly apply to piecemeal rezoning applications, although its purpose is to prevent “a broader interpretation...[that] could undermine the importance of making land use decisions that are consistent with the comprehensive plan...” *2009 Laws of Maryland*, Chapter 181. Because the Hearing Examiner holds in this case that the purpose clause of the PD Zone requires a higher showing of compliance with a master plan, she need not reach the issue.

The Applicant posits several policies to justify more than doubling the Master Plan-recommended density: (1) it will provide the additional housing called for in the Housing Element of the General Plan, (2) it will promote smart growth and transit-oriented development, and (3) it will revitalize the area. The Hearing Examiner agrees that these goals are important, but does not find the circumstances here compelling enough to justify such a large deviation from the Master Plan without a better nexus between this particular development and these general goals. Otherwise, these broader policies would swallow up the concurrent requirement for compliance with the master plan.

While the Hearing Examiner agrees with Ms. Randall and Mr. Ager that the project represents Smart Growth in the broader sense that it is located near existing services and in a priority funding area, the Hearing Examiner does not find that it represents “transit-oriented” growth, which has justified higher densities in other areas of the County. The MARC station in Washington Grove offers only limited services and is slightly further than the standard used as a reasonable “walking distance” from transit. Nothing in the record shows that this service is likely to increase in the near future. While there is one short (i.e., 5-minute) Ride-On bus route to the Gaithersburg MARC station, other routes are not direct and more lengthy. As a result, the Hearing Examiner does not find that the density here is justified by proximity to mass transit.

In addition, other than the 15% MPDUs, there is no indication that the housing here will be “affordable” as that term is used in the Housing Element. While there was some indication in a letter from Victory Housing that the developer intends to develop mid-market rental properties, the Applicant provided no testimony on this at the public hearing. Provision of 15% MPDUs is commendable; however, the Hearing Examiner agrees with the Chair of the Planning Board that it doesn’t outweigh the “stark” diversion from the density recommended in the Master Plan.

The Applicant also argues that the age of the plan has rendered it obsolete and additional development is justified by changes that have occurred within the planning area. The Applicant is correct that the Council has (in a non-PD Zone cases) held that changes occurring since adoption of the Plan may justify deviations from its recommendations. *See, Council Resolution 15-1586* (Exhibit 141). In that case, over one-half of the original parcel was taken for construction of the Mid-County Highway. Given that circumstance, the Council found that townhouse development was suitable for the property. Even assuming that this argument applied to the PD Zone, the Applicant has failed to provide that there are any circumstances specific to the planning area that have changed. Mr. Ager testified that a number of new policies have been adopted, such as the Housing Element, new stormwater management regulations, etc., but these policies would similarly apply to any redevelopment of the property. Mr. Davis testified that the surrounding area had *not* significantly changed. According to him, both construction of the Mid-County Highway and the ICC were contemplated within the 1985 Plan. The Hearing Examiner agrees with Mr. Davis and so finds.

This is consistent with the Council's decision in Local Map Amendment G-909 (the only one of the three zoning cases submitted by the Applicant which actually approved an application for the PD Zone with density exceeding the master plan limits). In that case, the Council recommended approval of a 15% density increase above the density recommended master plan. The facts of that case were quite different, however. First, that Council had already expressed its desire (in an adjacent master plan) to increase housing within the plan area. Second, the application significantly furthered several policies specific to the planning area, including the provision of TDRs, workforce housing, and MPDUs. In addition, the development truly was "transit-oriented." Located in the Battery Lane District of the Bethesda Sector Plan, it was

within ½ mile of two Metro stations. Finally, the Applicant presented evidence that the BRAC relocations would create a large amount of jobs in the area, thus creating an immediate need for more housing.

The Planning Board Chair commented that, “[A]lthough the Planning Board recognizes the need to redevelop the existing aging development and always appreciates an offer of MPDUs above the 12.5% requirement, in my view the master plan compliance finding cannot be made based on the proposed density.” Exhibit 91. The Hearing Examiner agrees. Because the development is more than double the density recommended by the Plan and doesn’t sufficiently further other public policies in a manner different than any residential redevelopment of the property, the Hearing Examiner finds that the application does not substantially comply with density recommended in the Master Plan.

2. Compliance with the Purpose Clauses of the PD Zone

The second required finding requires an evaluation of the PD Zone’s purpose and regulations:

(b) That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.

The purpose clause for the PD Zone, found in Code §59-C-7.11, is set forth below, followed by relevant analysis and conclusions for each paragraph:⁷

[1] It is the purpose of this zone to implement the general plan for the Maryland-Washington Regional District and the area master plans by permitting unified development consistent with densities proposed by master plans. It is intended that this zone provide a means of regulating development which can achieve flexibility of design, the integration of mutually compatible uses and optimum land planning with greater efficiency, convenience and amenity than the procedures and regulations under which it is permitted as a right under conventional zoning categories. In so doing, it is intended that the zoning category be utilized to implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more

⁷ Numbering of the paragraphs has been added by the Hearing Examiner for ease of reference.

closely compatible with said county plans and policies than may be possible under other zoning categories.

Conclusion: For the reasons set forth above, the Hearing Examiner finds that neither development plan meet this purpose of the PD Zone.

[2] It is further the purpose of this zone that development be so designed and constructed as to facilitate and encourage a maximum of social and community interaction and activity among those who live and work within an area and to encourage the creation of a distinctive visual character and identity for each development. It is intended that development in this zone produce a balance and coordinated mixture of residential and convenience commercial uses, as well as other commercial and industrial uses shown on the area master plan, and related public and private facilities.

Conclusion: Ms. Rodriguez testified that the project's "wrap" design creates a distinctive visual character by screening public parking from the street. Amenities will include two tot lots located to serve different areas of the development. There also are a series of corridors and sitting areas, along the frontage facing Towne Crest Drive, and a pool located within an internal courtyard. To the north is a large amenity area created when density was reduced to the PD-44 Zone. 2/15/13 T. 168. No commercial uses are proposed. Technical Staff found that the common area and amenities proposed would generate a degree of social and community interaction better than the existing apartments.

The Hearing Examiner agrees and so finds.

[3] It is furthermore the purpose of this zone to provide and encourage a broad range of housing types, comprising owner and rental occupancy units, and one-family, multiple-family and other structural types.

Conclusion: Both of the alternative development plans call for a mix of single-family attached, multi-family units, with 15% of the units designated as MPDUs. The Hearing Examiner finds that this purpose has been met.

[4] Additionally, it is the purpose of this zone to preserve and take the greatest possible aesthetic advantage of trees and, in order to do so, minimize the amount of grading necessary for construction of a development.

Conclusion: It is difficult to say on this record that this purpose of the PD Zone has been met. It is important to recognize that the standards for granting the variance from the Forest Conservation Law and those of the rezoning are different. The purpose of the PD Zone is to provide flexibility to design a *better* development product than could be done under Euclidean zoning, including preservation of more trees.

Technical Staff determined the development met this standard because there were few *on-site* trees to be removed but did not address the impact to off-site trees. One of the Applicant's land planners, Ms. Rodriguez, came to the same conclusion for the same reason.

At the public hearing, the Applicant responded to the adverse impact on the off-site trees by asserting that it will use the "aggressive tree-save measures" described to save the trees. It could not, however, quantify the likelihood that these would be successful. Instead, Mr. Foster expressed "confidence" that they could perform the work necessary "to save as many as possible." When asked to be more specific, he testified there will not be a "significant" impact on the West Woods. When asked to define the term "significant," he characterized the chances of survival as "good," although he acknowledged that at least four may not survive.

The Town's arborist estimates that the impact on trees in the West Woods will be much greater, in part because all required trees have not been shown on the NRI/FSD and because some of the trees are not required to be shown. The Town also submitted evidence and testimony that, even if the impacted trees survive, their life span will be significantly shortened, and will impact the ability of interior trees to survive. There is nothing in the record to refute this evidence. Perhaps of most concern is the uncontroverted evidence from the Town that loss of tree canopy (until full canopy is restored in 20 years) will exacerbate the existing severe erosion problem within the West Woods. Thus, reforestation of the area will not address the impacts to the woods.

The Hearing Examiner does not find that the approval of the PFCP addresses this purpose of the PD Zone. The justifications for the variance request refer repeatedly to the intensity, density, design and layout of the project. Only one reason unrelated to those was the existence of the sewer line on the western boundary of the site. Yet, the Applicant presented no expert testimony that the sewer line necessitated the removal of trees. Therefore, the question becomes whether these impacts could have been reduced by a different design, i.e., whether the flexibility in the PD Zone was used to maximize tree preservation.) The Hearing Examiner finds that the Applicant has failed to demonstrate this.

The Applicant also argues that the Town has contributed to the loss of trees because it would not grant the developer a grading easement. The Hearing Examiner finds that the burden in a application for the PD Zone is on the Applicant to prove it meets the standards of the Zone, and not on those opposing the application to cooperate on a development with which they disagree.

[5] It is further the purpose of this zone to encourage and provide for open space not only for use as setbacks and yards surrounding structures and related walkways, but also conveniently located with respect to points of residential and commercial concentration so as to function for the general benefit of the community and public at large as places for relaxation, recreation and social activity; and, furthermore, open space should be so situated as part of the plan and design of each development as to achieve the physical and aesthetic integration of the uses and activities within each development.

Conclusion: Ms. Rodriguez testified that the undulating façade facing Towne Crest drive provided opportunities for open space where people could gather and that the Applicant used the additional area along the northern portion of the site (available when the density was reduced density) to create a stormwater feature accessible from a pathway for residents.

While the Hearing Examiner agrees with Ms. Rodriguez that the design of the open space along the eastern and northern portions of the site are conducive to recreation and social activity as required, she finds that the Applicant has failed to provide it meets the minimum required amount of

green area, as addressed more specifically below. As a result, she finds that the development plan does not meet this purpose clause.

[6] It is also the purpose of this zone to encourage and provide for the development of comprehensive, pedestrian circulation networks, separated from vehicular roadways, which constitute a system of linkages among residential areas, open spaces, recreational areas, commercial and employment areas and public facilities, and thereby minimize reliance upon the automobile as a means of transportation.

Conclusion: Ms. Rodriguez testified that the development would provide additional streetscape along Towne Crest Drive and Washington Grove Lane. Ms. Randall testified that the Applicant will restripe the existing bus stop and install a bus shelter. Technical Staff concluded that the PD-44 application achieved this purpose because of the pedestrian walkway connecting the multi-family buildings and the townhomes and because of the additional streetscape. The Hearing Examiner finds that the development plan fulfills this purpose of the PD Zone.

[7] Since many of the purposes of the zone can best be realized with developments of a large scale in terms of area of land and numbers of dwelling units which offer opportunities for a wider range of related residential and nonresidential uses, it is therefore the purpose of this zone to encourage development on such a scale.

Conclusion: Technical Staff concluded that the proposed development met this purpose by providing a “more comprehensive” mix of multi-family and townhouse units. Exhibit 60, p. 15. In addition, the Applicant asserts that the “wrap” design of the project introduces a new typography of housing unit developed within the last 15-20 years to the area.

The Hearing Examiner disagrees with this analysis because she finds that the development plan does not include the mix of land uses required in the PD-35 Zone, an issue that Technical Staff never addressed. Section 59-C-7.131 of the Zoning Ordinance requires that at least 50% of the buildings be more than four stories to encourage the large-scale development envisioned by the plan. While the Zoning Ordinance does permit a waiver of this requirement, the Hearing Examiner finds

that the Applicant has failed to demonstrate that it meets the standards for approval of a waiver, as discussed more specifically below.

[8] It is further the purpose of this zone to achieve a maximum of safety, convenience and amenity for both the residents of each development and the residents of neighboring areas, and, furthermore, to assure compatibility and coordination of each development with existing and proposed surrounding land uses.

Conclusion: Technical Staff concluded that the PD-44 development plan met this requirement because there were pedestrian and vehicular connections between buildings, sidewalk connections to Towne Crest Drive and Washington Grove Lane. It also found that stepping the building height from 3 to 4 stories helped to ensure compatibility with the developments to the east across Towne Crest Drive.

Those opposing the application disagree with Staff's assessment because they believe that a parking ratio under two spaces per unit would exacerbate an existing parking problem and because the development is incompatible with the Town.

While there is evidence to demonstrate there is a problem with overflow parking in the area, there is no evidence other than generalized fears that redevelopment will exacerbate this problem. As a result, the Hearing Examiner finds that the evidence on this matter is speculative and those opposing the application have not demonstrated by a preponderance of evidence that parking problems will increase.

As to compatibility, both the Applicant's expert land planners and the Town's expert land planners testified that the property was compatible with adjacent uses to the north, east and south. The Town continues to assert, however, that the development is not compatible with the properties along Daylily Lane and the Town's forest preserve. Because the Hearing Examiner finds that the project is not compatible with adjacent uses along the western property boundary, as set forth more particularly below, she finds that this standard has not been met.

[9] This zone is in the nature of a special exception, and shall be approved or disapproved upon findings that the application is or is not proper for the comprehensive and systematic development of the county, is or is not capable of accomplishing the purposes of this zone and is or is not in substantial compliance with the duly approved and adopted general plan and master plans. In order to enable the council to evaluate the accomplishment of the purposes set forth herein, a special set of plans is required for each planned development, and the district council and the planning board are empowered to approve such plans if they find them to be capable of accomplishing the above purposes and in compliance with the requirements of this zone.

This paragraph of the purpose clause does not add new requirements. Based on the preponderance of the evidence and for the reasons stated above, the Hearing Examiner concludes that present application does *not* support the comprehensive and systematic development of the County.

3. Standards and Regulations of the Zone

The standards and regulations of the PD Zone are summarized below, together with the grounds for the Hearing Examiner's conclusion that neither development plan satisfies all of these standards.

Section 59-C-7.121, Master Plan Density. Pursuant to Code §59-C-7.121, "no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher."

Conclusion: The Master Plan recommends R-30 zoning for the subject property which permits a density of 14.6 dwelling units per acre. The Planning Board's adopted Land Use Map calls for zoning between 8-15 dwelling units per acre. Based on this evidence, the Hearing Examiner finds that this requirement has been met.

Section 59-C-7.122, Minimum Area. Code §59-C-7.122 specifies several criteria, any one of which may be satisfied to qualify land for reclassification to the PD Zone. The subject application satisfies the first of these criteria, which states the following:

That it contains sufficient gross area to construct 50 or more dwelling units under the density category to be granted.

Conclusion: The property is currently development with 107 dwelling units and could accommodate an additional 41 under the existing zoning. Therefore, this requirement has been met.

Section 59-C-7.131, Residential Uses. The PD-35 Zone, designated as “high density” requires that at least 50% of the buildings be greater than four stories in height. A waiver is permitted for if it: (1) is more desirable for stated environmental reasons than development in accordance with these limits, or (b) achieves goals, policies or recommendations stated in an approved and adopted master or sector plan. Technical Staff never addressed this issue, and the Applicant did not formally request the waiver until after the Planning Board made its recommendation on the PD-44 Plan.

The only testimony regarding the first waiver standard came from the Applicant’s architect, who simply stated that neighbors had complained about the height of the project, referring to the height as an “environmental concern.” Other than this single statement, no other evidence supports this theory. There is much more extensive testimony that the height was reduced for compatibility reason, specifically at the request of the City of Gaithersburg, the Saybrooke community, and the Wedgewood communities. The Hearing Examiner finds that the architect’s conclusory statement is insufficient to approve the waiver for environmental reasons, given the extensive testimony on compatibility. *Howard County v. Dorsey*, 292 Md. 351, 358 (1982)(opinion of expert is of no greater weight than the soundness of his underlying reasons).

As already noted, Applicant's expert land planners provided little rationale that the waiver was necessary to comply with the specific recommendations of the Master Plan. The source of this argument is in the waiver request itself, wherein the Applicant's attorneys assert that the following provisions of the Master Plan justify the waiver (*Plan*, p. 1):

Providing a sense of community identity for existing and future residents...

The other sentence relied upon by the Applicants is the following description of the Mid-County Highway District:

Another characteristic of this area is its proximity to the city of Gaithersburg and the town of Washington Grove. The Plan reflects these borders by recommending appropriate residential *densities* near existing or planned developments and recommending buffering when necessary. (emphasis supplied)

Based on this evidence, the Hearing Examiner concludes that the Applicant has failed to prove that a waiver is needed to comply with the Master Plan. There is no evidence specifically stating how the a waiver of the minimum height for the multi-family buildings furthers either of the two quoted passages of the Master Plan, particularly as the latter quote refers to density rather than height. What is apparent is that the height was reduced to address *compatibility* concerns of the surrounding communities.

The Hearing Examiner disagrees that a waiver may be granted for compatibility reasons alone. In general, the goal of every Master Plan is to provide compatible and systematic development for the Regional District. If this broad goal justified a waiver, then the exception would swallow up the rule. Zoning Ordinances should not be interpreted to "read out" specific requirements in the ordinance, nor should they be interpreted to yield absurd results. *Stickley, supra*. In this case, the failure to meet the height requirements only demonstrates why the area is not appropriate for density at this level.

Section 59-C-7.132, Commercial Uses. Commercial uses are permitted but not required. None of the alternative development plans propose commercial use; therefore, the standards governing these uses are not applicable to the application.

Section 59-C-7.14, Density of Residential Development. The Zoning Ordinance provides the following direction for the District Council in considering a request for the PD Zone (§ 59-C-7.14):

(b) The District Council must determine whether the density category applied for is appropriate, taking into consideration and being guided by the general plan, the area master or sector plan, the capital improvements program, the purposes of the planned development zone, the requirement to provide [MPDUs], and such other information as may be relevant. . . .

(c) The density of development is based on the area shown for residential use on the master plan and must not exceed the density permitted by the density category granted. However, the maximum density allowed under subsection (a) may be increased to accommodate the construction of Moderately Priced Dwelling Units and workforce housing units as follows...

(e) The District Council may approve a density bonus of up to 10 [percent] above the maximum density in the approved and adopted master plan for the provision of TDRs, if TDRs are recommended for the site.

Conclusion: For the reasons previously stated, the Hearing Examiner finds that the density proposed is not appropriate because it does not substantially comply with the Master Plan nor does it further other public policies sufficiently to justify a density of over twice that recommended in the Master Plan.

Section 59-C-7.15, Compatibility. Section 59-C-7.15(a) provides:

(a) All uses must achieve the purposes set forth in section 59-C-7.11 and be compatible with the other uses proposed for the planned development and with other uses existing or proposed adjacent to or in the vicinity of the area covered by the proposed planned development.

Conclusion: This subsection requires that a proposed development be compatible internally and with adjacent uses. The Zoning Ordinance imposes some minimum compatibility standards to

aid in this analysis. Section 59-C-7.15 imposes a minimum 100-foot setback from adjacent properties recommended in an “area master plan” for single-family detached development. This setback is imposed in order to “assist in accomplishing compatibility for sites that are not within or in close proximity to a central business district or transit station development area”.⁸

Under Alternative A, Building B is located 35 feet from the property at 7 Daylily Lane. The Applicant contends that the setback doesn’t apply because the single-family home is located in the Town, which has separate planning and zoning jurisdiction.

The Hearing Examiner agrees with the Chair of the Planning Board and the Town. By its terms, the purpose of the setback is to ensure that development *on the PD Zoned site* is compatible with adjacent development. Thus, the regulation restricts land within the County, regardless of whether the adjoining single-family homes are within the Town. Regulations governing land within the County are clearly within the County’s zoning authority even when they protect property in a different jurisdiction. *Holiday Point Marina Partners v. Anne Arundel County*, 349 Md. 190, 208 (1998)(County ordinance restricting the length of piers to protect shellfish beds in State waters was within County’s zoning authority). The practical result of the Applicant’s theory would mean that a PD development could defeat the Council’s standard for compatibility solely by virtue of a jurisdictional boundary imposed without any relationship to zoning. There is simply no basis in this record for this conclusion.⁹ The homes along Daylily Lane are recommended in the Town’s Master Plan for RR-2 zoning, a single-family detached residential zone. Exhibit 143. As a result, the Hearing Examiner finds that Alternative A does not meet the required 100-foot setback from the homes on Daylily Lane.

⁸ This Section does permit a waiver for certain properties, but neither party contends that the development qualifies for this waiver.

⁹ Such a locational distinction could be deemed arbitrary without more evidence supporting the public purpose intended to be served. *Cf. Verzi v. Baltimore County*, 333 Md. 411 (1994); *Lonaconing Trap Club v. Inc. Md. Dep’t of the Env’t*, 410 Md. 326 (2009).

The legislative history of the PD Zone does not require a different result. As originally drafted, the setback was imposed on properties *developed* with single-family detached homes. This language was changed prior to adoption to apply to properties based on the master plan-recommended land use. The Hearing Examiner agrees with the Town that this broadens the scope of the provision, but finds no an inference from this to support the Applicant's jurisdiction distinction.

Alternative B *does* comply with the minimum setback in the PD Zone, although the setback is not included within the binding elements. Despite this, the parties still diverge as to whether it is compatible with adjacent and surrounding uses. Both expert land planners for the Applicant and the Town testified that the massing and scale of the project are compatible with development on three sides of the property: the southern, eastern and northern edges. They disagree on whether the project is compatible in relation to the western side of the property, bordering the homes on Daylily Lane and the West Woods. Representatives of the Town also believe that the scale and density of the project is incompatible with the surrounding area, which consists generally single-family detached and attached homes.

The Hearing Examiner agrees that that the development is compatible with adjacent uses on three sides, but finds that it is not compatible with land along the western boundary because of the impacts to the Town's forest preserve. The parties are far apart on the exact impact because of the Town's allegations that the PFCP does not include all of the trees that need to be shown. The Applicant simply could not provide an estimate regarding the chances that the trees would survive other than "good". They provided no evidence to refute Mayor Cole's testimony that even if they did survive, their life span would shorten and endanger the survival of interior trees. Nor did they address the evidence that even the temporary (over 20 years) loss of tree canopy could exacerbate the existing erosion within the West Woods.

The final purpose clause of the PD Zone states that the zone is “in the nature of a special exception.” Were this truly a special exception, one could find that exacerbating erosion in West Woods (already caused by existing development on the subject property) is a “non-inherent” adverse impact. While this is not a special exception case, the Hearing Examiner does not find that the Applicant has fully addressed the impact on the Town’s forest preserve and therefore, cannot say on this record that the use is compatible with adjacent property.

Section 59-C-7.16, Green Area. The parties differ on two of the requirements for meeting the green space requirements: (1) whether minimum amount of green area may be based on the net tract area (which the Applicant refers to as “gross area” of the development plan), and (2) whether land in the right-of-way may be counted toward the green area requirement.

The PD-35 Zone requires that 50% of the “gross area” of the property be green area. Technical Staff required the Applicant to base the green area on the gross tract area, but permitted it to include land in the right-of-way to meet that requirement. The Planning Board did not opine on the issue, requesting the Hearing Examiner instead to ensure that the full amount of green area was provided. The Applicant continues to argue that green area may be based on the net tract area of the site as long as long as the Applicant doesn’t use the gross tract area to calculate density.

Courts mandate that language in a Zoning Ordinance should be given its plain meaning, and the plain meaning must be used as the primary means of determining what the Council intended. In addition, laws should not be construed to have absurd results. *Sticker, supra*.

The dictionary defines the term “gross” as “consisting of an overall total, exclusive of deductions.” *Merriam Webster Online Dictionary*; see also, *Merriam Webster’s II, New Riverside University Dictionary II* (1976)(defining “gross” as “exclusive of deductions”). Thus,

the term compares the whole of something with a smaller defined portion. Yet, when asked whether there were any portions of the development plan other than the “gross area,” the Applicant’s civil engineer replied there were not because “they were one and the same.” 2/25/13 T. 22.

The Hearing Examiner must apply the plain meaning of the term “gross,” which leads to the result that the minimum green area must be based on the gross tract area of the property. This is further supported because the Applicant’s interpretation would yield an unusual result: Applicants could increase or decrease the amount of green space required simply by delineating the boundary of the development plan differently, resulting in developments with different amounts of green area depending on where the boundary of the development plan is drawn. The Hearing Examiner does not find that this is the result the Council intended.

The Applicant argues that the definition of green area permits the percentage to be based on net tract area because it refers to a “prescribed portion of land encompassed by a development plan.” Exhibit 149. That definition does not support the Applicant’s interpretation because it does not address the *amount* of green area required. Whether based on the net or gross tract area, the green area will always be a “prescribed portion” of a development plan in the PD Zone.

As the Hearing Examiner finds that the minimum percentage of green area must be based on the “gross area” of the site, the next question is whether right-of-way can be included in that amount.

Technical Staff required the minimum green area to be based on the gross tract area, but permitted the Applicant to include the right-of-way to meet this requirement. The Town’s expert testified that during his tenure with the Planning Department, right-of-way had never been

included as part of the green area. In his opinion, it is “bad public policy” because no one knows at the zoning stage exactly what road improvements will be required.

The Hearing Examiner does not necessary agree that right-of-way may *never* be counted toward meeting the minimum green space requirement. There may be instances where DOT has reviewed a development plan and indicated that portions of the right-of-way will not be needed for improvements. This is not the case here. The Applicant’s civil engineer testified that DOT had not yet reviewed the development plan and therefore, there was no guarantee that the right-of-way may be used for this purpose. 2/25/13 T. 81-82. Technical Staff relied on the possibility of green area from the road abandonment promised by the Applicant. A commitment to the road abandonment, however, is not a binding element of the development plans and has only been preliminarily discussed with DOT. Based on this record, the Hearing Examiner finds that the Applicant has failed to demonstrate that it is able to provide the minimum green area required by the PD Zone.

Section 59-C-7.17, Dedication of Land for Public Use. This section requires that land necessary for public streets, parks, schools and other public uses must be dedicated to public use, Such land as may be required for public streets, parks, schools and other public uses must be and shown on the development plan. Technical Staff never made a finding on this issue. Exhibit 60, p. 19. The Applicant submitted a statement that all of the right-of-way for Towne Crest Drive has been dedicated, and thus none is shown on the development plan. Given this evidence, the Hearing Examiner finds that this requirement has been met.

Section 59-C-7.18, Parking Facilities. Off-street parking must be provided in accordance with the requirements of Article 59-E of the Zoning Ordinance. All development plans provide the required number of spaces to support the multi-family and single-family attached uses.

While there was testimony expressing concern that the number of parking spaces was insufficient to support the use and would exacerbate an existing shortage of parking, the Hearing Examiner finds this testimony and evidence speculative, and finds that this standard has been met.

4. Remaining Findings

The third required finding evaluates access and site circulation:

(c) That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.

Technical Staff found that site circulation and access were sufficient to support the use and there is no contravening testimony in the record. For this reason, the Hearing Examiner finds that this standard has been met.

The fourth required finding evaluates environmental concerns:

(d) That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.

Technical Staff found that this requirement has been met because little grading is needed on the site. It did not look beyond the boundaries of the site. The Hearing Examiner notes that the language above specifically references preservation of natural vegetation and other natural features “of the site.” For this reason, she finds that this standard has been met and but the off-site adverse impacts render the development incompatible with adjacent uses and compromises compliance with the purpose of the PD Zone.

The fifth required finding pertains to ownership and maintenance of common areas:

(e) That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.

Applicant's ownership of the subject site is set forth in Exhibit 5. The Applicant has provided an affidavit as to its responsibility for perpetual maintenance of common areas (Exhibit 4), and therefore the Hearing Examiner finds this requirement has been met.

B. Assessment of the Public Interest

The final finding required under Maryland law is that the proposed rezoning will be in the public interest. When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment and public benefits such as provision of affordable housing.

Based on the determination of the Planning Board and other evidence of record, the Hearing Examiner finds that the proposed development plans do not comply with the 1985 Gaithersburg and Vicinity Master Plan, she concludes that the application does not further the public interest.

C. Conclusions

Based on the foregoing analysis and after a thorough review of the entire record, I reach the following conclusions applicable to the Alternative A and B:

1. The submitted development plans do not substantially comply with the Master Plan.
2. These development plans not comply with the purposes, standards and regulations of the PD-35 Zone.
3. The development plans propose internal vehicular and pedestrian circulation systems and points of external access that will be safe, adequate and efficient.
4. The development plans will not adversely impact *on-site* natural vegetation or features.

5. Documents have been submitted to show the ownership and method of perpetual maintenance of areas intended to be used for recreational or other common or quasi-public purposes, demonstrating that the Applicants intend to arrange for maintenance of the common areas.

6. The proposed rezoning would not be in the public interest under the proffered development plans.

I further find that Alternative A does not comply with Section 59-C-7.15 of the Zoning Ordinance, mandating a 100-foot setback for properties recommended on a master plan for single-family residential development.

VI. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-910, requesting that 8.11 acres of land located at 17500 Towne Crest Drive, in the 9th Election District, be *denied*.

Dated: June 7, 2013.

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized 'L' and 'R' followed by a long horizontal line extending to the right.

Lynn A. Robeson
Hearing Examiner

APPENDIX

Summary of Testimony

February 15, 2013, Public Hearing

1. Mr. Stacy Hornstein:

Mr. Hornstein described his professional background. According to him, he began his career in real estate as a public official in Florida responsible for the development of public works. In this capacity, he handled over 200 zoning cases. After 13 years in that position, he began work with a Washington, D.C. real estate development firm which specialized in mixed use projects and retail. Representative projects include Potomac Mills, and residential development on Pennsylvania Avenue at Market Square. He has worked for the firm for the last 30 years. T. 20.

The subject property is currently owned by the Kramer family. It was originally developed in the 1960's; the original developer, Melvin Kramer, subdivided it into the three communities that exist today: Towne Crest, and Wedgewood I and II. Mr. Hornstein testified that property has "fallen in a little bit lack of attention just given the age of the family" prior to Mr. Kramer's death. Mr. Kramer's son has received control of the property and is paying more attention to it. T. 20-21.

Mr. Hornstein testified that the property is bordered by the Wedgewood I and II communities and the stand of trees within the Town of Washington Grove. It is located approximately .6 miles from a MARC station and is close to the ICC, Mid-County Highway and Washington Grove Lane. T. 21. The city of Gaithersburg is immediately to the north, which includes the Saybrooke community bordering the subject property. T. 22.

Mr. Hornstein submitted photographs of the existing improvements. He stated that the photographs show there is only a sidewalk without trees, curb or gutter. In his opinion, the buildings are obsolete, past their useful life, and can't be improved. Some of the

buildings are 17 and 20 feet from the property lines, which met Code requirements at the time they were built. T. 25-26. He advised that the four homes bordering the rear of the subject property (along Day Lily Lane) were constructed after Towne Crest was developed and were placed only 30 feet from the apartment buildings. T. 26.

Mr. Hornstein outlined the amendments made to the application after it was initially filed. Their original application requested the PD-44 Zone and 469 total dwelling units. These units were in four buildings utilizing the existing four access drives from Towne Crest Drive. Two of the buildings were five stories, one building was four stories and one was three stories. It improved the existing streetscape by adding curbs, gutters, and trees along Towne Crest Drive as well as structured rather than surface parking. T. 28. The proposed design wrapped the residential units around an interior parking garage, a competitive feature in the current market. T. 27-28. According to Mr. Hornstein, the original design attempted to balance the high expense of providing structured parking with including other amenities such as a pool, Internet café, exercise facilities, and libraries, all of which were “packed” within what they felt was a well-designed building.

Subsequent feedback from the surrounding communities (Wedgewood I and II, Saybrooke, and the Town of Washington Grove) indicated that some desired a less dense development which was more compatible with their communities. T. 29. Mr. Hornstein stated that the Applicants responded to this by reducing the density to 356 (units under the PD-35 Zone) and by introducing a west to east “step-down” feature, reducing the building heights to four stories in the rear of the property and three stories along Towne Crest Drive. T. 29-30. Physically, the closest neighboring property is the woods owned by Washington Grove, but the closest residential development is the Wedgewood community. T. 30. This

plan also reduced the number of access points while maintaining all of the amenities originally proposed. T. 30.

Feeling that there was some remaining concern with the density of 356 units, Mr. Hornstein testified that they thought it would be helpful to get down to what is “really the bare minimum of a development” that would support the amenities proposed and they reduced the density further to 329 dwelling units. The applicant also felt that, from a design perspective, they could create a “perspective” for the homes along Day Lily Lane, (i.e., a vista between the townhouses and Building B) by eliminating reducing the size of the wing on Building B. That reduction resulted in the site plan presented at the public hearing before the Hearing Examiner. T. 30-33.

Mr. Hornstein described the other revisions to earlier versions of the development plan. The number of parking spaces provided on the current version still exceeds the number required, although less so than in the previous development plans. This development plan still uses wrapped structured parking; the current version requires only two decks of structured parking for Building B. Buildings A and C will still have three decks of structured parking (at 80 spaces per deck). Buildings A and B are 10 feet taller, but are still four stories on the western side and three stores facing Towne Crest Drive. The townhouses are two stories. Mr. Hornstein acknowledged that the PD-35 Zone requires that at least 50% of the buildings be at least four stories in height, but permits a waiver of that requirement. T. 33-34.

Mr. Hornstein testified that his company had a number of meetings with representatives of the surrounding communities during the application process, including the communities of Wedgewood 1 and 2 and Saybrooke. According to him, the Applicants have

entered into an agreement with the homeowners association for Wedgewood 2, which Mr. Hornstein characterizes as a “cooperation agreement,” in response to a time when the original developer did not respond to the concerns of Wedgewood 2 residents. T. 38. Towne Crest has also agreed to provide additional parking for the Wedgewood 2 community where Towne Crest Drive currently dead ends. T. 38. They met with the two that responded and knocked on the doors of those who did not respond. They also met with the community groups registered with Park and Planning and made a couple of presentations to the Shady Grove Alliance. In addition, they established a web page with updates on the project and mailed postcards to over 1,200 with the web address. T. 35-36.

Mr. Hornstein described the presentations made to planning commissions. They made a presentation to the City of Gaithersburg Planning Commission, which approved the project unanimously. According to Mr. Hornstein, the chairman stated that the density wasn't as important as “how you use it.” T. 37.

He also summarized a contractual agreement made between the Applicant and the Wedgewood 2 Homeowners Association, which he characterized as a “cooperation agreement.” T. 38. According to Mr. Hornstein, Wedgewood 2 homeowners felt that their concerns regarding Towne Crest, expressed to the original developer, had not been addressed. The agreement provided addresses these concerns and outlines how the parties will cooperate with each other.

Mr. Hornstein testified that the Wedgewood 2 agreement commits the developer to take several steps to provide additional parking for the Wedgewood 2 development, which, according to the residents, has a parking shortage because each unit has only two parking spaces. The Applicant has agreed to help the community with their request that the County

abandon Towne Crest Drive north of Larchmont Terrace. If the rezoning request and the abandonment request are granted, the Applicant has agreed to take its half of the area and create additional green space. On the side closest to the Wedgewood 2 community, the Applicant would build a little overflow parking lot for the Wedgewood 2 community. T. 38-40.

The Wedgewood 2 agreement also requires Towne Crest to provide additional security for the neighborhood, according to Mr. Hornstein. Currently, Wedgewood 2 assesses approximately \$10,000 annually to have off-duty policeman patrol the area. The Applicants would contribute to that for a certain number of years to provide security for both developments. According to Mr. Hornstein, the agreement also requires both parties to review the situation in the future and determine if continued funding is necessary. T. 42.

In addition, the agreement requires the developer to repair monument signs which announce the Lakewood community to improve the neighborhood. Under the agreement, the applicant would repair and landscape these signs. T. 42-43.

Another improvement proposed to the existing conditions is to extend sidewalks to Washington Grove Lane where there currently are none. T. 43.

Mr. Hornstein stated that the Town of Washington Grove expressed concerns about the development. Along the western edge of the property, they had initially designed a drive-out and parking for townhouses behind the woods to provide circulation and fire access. In addition, there were concerns about stormwater flow. The outfall from both Wedgewoods and Towne Crest outflow into two pipes, one between Buildings A and B and one on the south between two properties along Day Lily Lane. Because of the age of the existing development, the stormwater is untreated and very concentrated primarily through

the large pipe between Buildings A and B. This has caused some erosion in the Westwoods (owned by the Town), generating their concern about the redevelopment of the property. T. 47. Both the Town and the Saybrooke community to the north also wanted fencing along the border of the property, although, according to Mr. Hornstein, there wasn't a consensus of whether it should be a chain link, wooden or wrought iron fence. He felt that the lower density (i.e., PD-44) plan addressed these concerns. The revised application was submitted to the Town's Planning Commission.

They attended the meeting before the Planning Commission, although Mr. Hornstein reported they had not been invited. T. 49. The Commission was reviewing a memorandum or resolution that they were going to send to the Council recommending denial of the project, but he believed that the Commission had not looked at the revised plan. He believes this is an important fact because he believes that Washington Grove opposes anything that comes near them. T. 51. He does not know for certain, however, whether the Commission looked at the revised plan or not. T. 54. Later, he stated that when he attended the meetings with the Town of Washington Grove, the plans were on the wall. T. 58. The Applicants had had their engineer design three solutions for the potential loss of trees within the Town, some of which impacted more trees, some of which impacted fewer trees, and some of which would have required a grading easement from the Town. T. 58. He believes that the Town issued its denial before they were able to deliver these potential solutions. T. 58-59.

Mr. Hornstein described the phasing of the project as it related to tenant occupancy. The Applicant proposes to construct the project in two phases. The first phase will be on the northern portion of the site above the stormwater outfall. They plan to begin construction about one year after approval. During that time, they will not lease vacated apartments, thus

losing some tenants through attrition. Once they begin construction of the first phase, they will move the remaining tenants to the southern portion of the property at the Applicant's expense. After the northern phase is completed, they will relocate the tenants from the southern portion of the site and continue with construction of Building B and the townhouses. T. 54-56.

On cross-examination, Mr. Hornstein testified that the time for requesting an abandonment of Towne Crest Drive is not included in the agreement. He expected that that would begin construction of the Wedgewood parking lot at the same time they construct their own parking because it is less expensive. T. 61. He acknowledged that neither the abandonment petition, the success of the abandonment petition, nor construction of the overflow parking for Wedgewood were binding elements to the development plan. He could not guarantee that the abandonment would be granted. T. 62.

Mr. Hornstein also acknowledged that there was no information in the record supporting the assertion that 329 units is the bare minimum necessary to have an economically viable project. T. 65.

2. Charlene Louise Deloatch:

Ms. Deloatch testified in support of the petition. She has lived in the community for many years and is passionate about the community. She believes that the community is depressed because of the existing Towne Crest development. In her opinion, the project will make the community look much better. T. 67. She doesn't want to see the project downsized for fear of losing the existing neighbors, although she acknowledged that there are only 107 units in the existing complex. T. 69. She still believes that more density is necessary to have people who are homeless come in and have a nice place to stay. T. 70.

She feels that the step-down from four to three stories along Towne Crest Drive will be compatible with her community and she likes the amenities because kids will have somewhere to go. T. 70-71.

3. Mr. David Ager:

Mr. Ager qualified as an expert in land use planning. T. 73. He opined that the proposed development was consistent with the Master Plan and described the reasons for his conclusion.

Mr. Ager opined that the 1985 Gaithersburg and Vicinity Master Plan is 28 years old and is therefore “functionally obsolete.” T. 83. State law now mandates that master plans be updated every 6 years, although Montgomery and Prince George’s Counties are exempt from that requirement (for what reason he did not know). He reiterated that State and private professionals now find it “appropriate” to look at a master plan every 6 - 10 years. According to Mr. Ager, Montgomery County has taken the position that master plans should be reviewed every 6-10 years. T. 88-91. Montgomery County is unique statewide because they update their master plans by work program based on budget and without relation to time. T. 89.

Mr. Ager described the planning history of the area surrounding the subject property. He stated that the Regional District began as 300 acres in Prince George’s and Montgomery County surrounding the District of Columbia; it did not include Gaithersburg or its vicinity. During the 1930s through the 1950’s, there was no plan for the area. According to Mr. Ager, in 1957 the County created a preliminary master plan for residential land use in the Gaithersburg area due to development pressure along what is now I-270. This plan was the initial framework for the adoption of the General Plan, “On Wedges and Corridors,” in 1964.

In 1969, the Council amended the General Plan because the 1964 Plan had underestimated population growth in the area. In his opinion, it is important to note that development of the subject property in 1965-66 took place before this amendment to the General Plan. T. 91-94. Master plans for the area, including the subject property, were adopted in 1961, 1971, and 1985.

The 1961 Master Plan predates the General Plan because of the need to address the development pressure in the area, in his opinion. This plan designated the subject property as being within a high density mixed use area that surrounds downtown Gaithersburg. According to Mr. Ager, the 1969 General Plan amendment specifically indicates that population near the subject property had been greatly underestimated. Both plans called for “high density” for the subject property. T. 92-96.

Mr. Ager opined that the 1971 Plan called for a larger area of multi-family housing because it envisioned the area surrounding the subject property as a “community center,” similar to the village concept used in Columbia. T. 97. This has not always been clear because there is a substantive typographical error in the Plan: the text refers to the property as the “northwest area;” it is actually the “northeast” area. The 1971 Plan designated the area as “high density” and recommended zoning which exceed what exists today. The Plan envisioned more residential where the Wedgewood 2 community now exists because it had not yet been constructed. Later, the zoning caught up with the improvements and the zoning density recommended by the Plan was reduced. T. 98.

The 1985 Plan, Mr. Ager related, shows the subject property as part of a 21-acre area denominated “Analysis Area 2.” The land use map recommends “high-density” development of between 8 and 15 dwelling units per acre. The Plan also clarifies that the densities

recommended in the Plan are exclusive of MPDU bonus densities. This is recommended for the entire area, and therefore, doesn't reflect as built conditions, according to him. The Gaithersburg Plan was amended in 1988 and 1990, but the amendments did not apply to Analysis Area 2. T. 98-100.

Mr. Ager believes that, at the time the Plan was developed, planners used "broad brush" approaches that lacked specific recommendations. In his opinion, the only specific recommendation made for the subject property in the 1985 Plan was the density recommendations. He related that today's plans are much more specific. T. 99-100.

He further opined that the 1985 Master Plan is "out of sequence" with the 1993 amendment to the General Plan; therefore, the 1985 Plan did not have the General Plan's guidance regarding affordable housing and patterns of development. He believes that the Plan should be discounted because of the number of County policies that have changed so that the Plan's specific recommendations are no longer valid. There are many planning concepts, such as Kentlands, that did not exist when the Plan was approved. T. 105.

When asked how the application is consistent with the Master Plan, Mr. Ager testified that it "seems" the planners delineated geographic areas with common circumstances and wanted to apply a generalized density to that area. T. 110. The lowest density is to the north of the Airpark at three dwelling units per acre. This gradually increases to 4, then 5, then 6, to between 8 and 15 dwelling units per acre for the Analysis Area 2. He believes this is because properties with the latter designation are closest to where the Plan intended more compact development: along the rail line and highway infrastructure and within the water and sewer envelope. T. 110-111.

According to Mr. Ager, the development plan is consistent with the Master Plan because the Master Plan recommended a total development potential of 384 units for Analysis Area 2, based on the maximum density recommended in the Plan (i.e., 15 units dwelling units per acre plus the 22% MPDU bonus). T. 112. He testified that there are 124 existing dwellings in both Wedgewoods. If these are added to the 329 dwelling units proposed in this development plan, the total number of units in Analysis Area 2 will be 453 units, only 18% above the Master Plan density. T. 112. According to Mr. Ager, it is common to spread density across a master planned area with some acres higher than the average density and some acres lower than the average density. T. 115.

Mr. Ager acknowledged that if this development is approved, it will use all remaining density within the Analysis Area. He does not see this as problematic because, according to him, the support for the application comes from within the Analysis Area and the opposition comes from outside the Area; thus, no one will object to the use of the density. In addition, while recognizing this was “speculation,” he did not think it probable that 124 separately owned lots could agree to be redeveloped. T. 116.

Mr. Ager concluded that a density increase here is consistent with other actions of the District Council. In G-873, the Council found that a 33% increase above the master plan density was reasonable and that it was important to look at the broad objectives of a master plan. In LMA G-909, the Council also approved density that was 15% above the density recommended in the relevant master plan; this is similar because the new development there replaced 1950’s and 1960’s garden apartments that had no MPDUs. T. 117.

He also stated that the Gaithersburg and Vicinity Master Plan is scheduled to be updated in 2013 with completion in 2015. T. 124.

On cross-examination, Mr. Ager agreed that State law referred to updated “comprehensive” plans and that, unlike many other counties, Montgomery County has numerous plans for areas within the County. He also agreed that the 2006 Shady Grove Sector Plan took into account Smart Growth policies because it concentrated growth at a Metro station. T. 137.

Finally, Mr. Ager testified that if the property were developed at the Master Plan density of 18.3 dwelling units per acre, it would yield 148 dwelling units. If the entire unused density for the Analysis Area were combined with the existing units on the property, the total density would be 260 dwelling units or 32 dwelling units per acre. This would be approximately a 75% increase over the Master Plan density of 18.3 dwelling units per acre. T. 144. The 40 dwelling units per acre proposed is a 221% increase over the Master Plan density. T. 145. In response to a question from the Hearing Examiner, he stated that the proposed development at 329 dwelling units would account for 72.6% of the density allocated for the entire Analysis Area. T. 145.

On re-direct, Mr. Ager stated that he believed some of the calculations in the preceding paragraph were based on a faulty premise: they measured the increases by reference to the existing number of units rather than the density recommended in the Master Plan. T. 146. He believes that the proposed development furthers the Master Plan’s goal to “cluster” residential development and is consistent with the Plan’s objective to provide affordable housing. T. 149.

4. Barbara Goldberg-Goldman:

Ms. Goldberg-Goldman testified that she is co-chair of the Affordable Housing Conference of Montgomery County, Maryland. She stated that the Conference has been in

existence for 22 years. It brings elected officials, housing and community development leaders, business professionals and people from all walks of life together who have an interest in affordable housing.

Ms. Goldberg-Goldman testified that the Conference supported the project because there are very few opportunities now in Montgomery County to create and maintain affordable housing. The County has a waiting list of over 1,000 families and public funds are insufficient to meet the needs of people that are sometimes living in a vehicle on the side of the road. As a result, the Conference supports initiatives in which a developer proposes to invest and redevelop aging apartments as new, modern, and affordable.

She testified that the neighborhoods closest to Towne Crest have seen the deterioration of this property and have experienced crime in their neighborhoods. The populations is rich in diversity and ethnic origins and the current residents, as she understands it, will be returned to the new development at a rental rate comparable to what they currently pay. T. 132.

On cross-examination, Mr. Goldberg-Goldman testified that she did not know the exact percentage of MPDU units that were being provided. She was unaware that the developer had previously proposed 59 units with the higher density project, but stated that she didn't wish to have more units than the developer could afford. T. 134.

5. Mr. Wilson Mancilla:

Mr. Mancilla testified that he has been a resident of Wedgewood 2 since 1992. He came to America because he wished to improve his life and believes that America has given him the opportunity to do so. T. 151.

He wants to see his neighborhood improve. The Towne Crest Apartments are old and are deteriorating; he believes that they will not be safe for residents in a few more years. T. 152. He believes the renovation of the apartments will improve the future of the neighborhood. In his opinion, the community deserves to live in a better environment. T. 153.

He testified that if the project is built, his property value will increase. If Towne Crest stays the same, it will decrease. He stated no one asked them about the Washington Grove courtyard development, which took down many trees, but he said nothing because he wanted what was good for them. The sidewalk along Washington Grove Lane is an improvement. In his opinion, prosperity means change and we need to be open for that. He's been on the Board of Directors of the Wedgewood 2 Community Association for approximately 10 years because that is his way of giving back to the neighborhood. He believes his neighbors are happy to see this change. He feels the redevelopment will be compatible with his neighborhood. T. 154-156.

6. Ms. Trini Rodriguez:

Ms. Rodriguez qualified as an expert in land planning, zoning and urban design. T. 158. She testified that, in her experience, there has been a change in topologies of buildings and designs that are relevant to how master plans have evolved and how growth and compatibility have been addressed. T. 159-160. She stated that she spoke with many of the residents of the Wedgewood communities who expressed concern about crime and deterioration. T. 161-162.

In Ms. Rodriguez's opinion, the neighborhood is split by Washington Grove Lane, the main roadway, into "sort of" two zones. The neighboring woodlands happen to create a

“zone of its own,” and to the south is the Town of Washington Grove, which she believes is an “absolute jewel.” T. 162. To the north, there is a collage of “sub-neighborhoods” that have shown deterioration, including Wedgewood 2, although there is less deterioration to the south. She acknowledged that she “concentrated” her research on the immediate surroundings of the site. This is because Washington Grove Lane is a divider and the immediate surroundings are very discreet because the only access is by Towne Crest Drive. T. 162-163.

One factor she considered in designing the site is that the property is very long and narrow, which presents some constraints. The development plan creates a “step up” approach in massing both in the density, height, and size of the buildings. T. 165. Located on the southern portion of the site, the townhouses are in two rows fronting Towne Crest Drive and Washington Grove. This attempts to create a new gateway toward Washington Grove. There is a park in the front as a “gesture” and gateway in that area.

As you travel north into the community, the buildings have been setback 25 feet and will create a continuous streetscape that is not there today. Continued streetscape, including trees, sidewalks, and plantings will become a pathway with a pond on the northern portion of the site.

All of the access to the townhouses is in the rear of the units. These have been setback approximately 100 feet from the rear property line and have extensive landscaping there to provide buffering.

Ms. Rodriguez testified that the massing of larger buildings has been undulated, with a minimum setback of 25 feet. This creates a series of courtyards along the front that are used as amenity space. The buildings step up from three stories along Towne Crest Drive to

4 stories at the rear of the site to enhance their compatibility with the Wedgewood 2 community. The parking access is in the rear of the buildings. The largest building, Building A, is the northernmost building and is separated by an internal street created with sidewalks and street trees. This will function as a normal street which provides access to the rear parking. T. 166.

Ms. Rodriguez stated that the buildings wrap around the parking: she related that this is a new topology that has been developed in the last 10 or 15 years. The parking structures are costly, which is one reason a certain level of density is necessary to support a viable project. These have been well-received in the market and create a wonderful sense of community because there is no exposed parking or structures of any kind. The units are accessed internally. T. 167.

According to Ms. Rodriguez, the undulating exterior on the larger buildings is used to create a perception that the buildings are smaller. These buildings have wings that protrude out which mirror the scale of the surrounding buildings. In the middle of the wings, there are a series of corridors which are amenity areas. Services in the larger buildings, including trash and loading, are internal to the building. T. 168.

Ms. Rodriguez described the project's amenities. She testified that there will be two tot lots located to serve different areas of the development. There also are a series of corridors and sitting areas, and a pool located within an internal courtyard. To the north is a large amenity area created when they moved the building setback to 100 feet. On the edge that backs to the Westwoods, the Applicant proposes additional planting; they have worked hard with the engineers to create a stormwater management system that is really part of the project's fabric and not just an after thought. T. 168.

Ms. Rodriguez stated that she could not testify with certainty whether the wrap design of the buildings existed as of the date of the master plan. It is part of building typology that has evolved. According to her, the development plan represents a suburban rather than an urban typology, such as that employed in downtown Silver Spring or Bethesda. This typology replaces the concept of garden apartments; the densities referred to in the master plan of between eight and fifteen units are townhouse densities today. Townhouse densities rise as high as 30 dwelling units per acre. T. 169.

Ms. Rodriguez opined that the proposed development plan meets the purposes of the Planned Development Zone. The higher densities at the time of the Plan's adoption were much lower than what is considered "high density" today. In addition, she believes that this plan uses flexibility in design to integrate the uses to achieve greater efficiency careful massing and sensitive architectural design. T. 171. According to her, they have been able to reduce the negative visceral impacts of the automobile by having parking internal to the building. She also believes that the plan maximizes social interaction with the residents. She stated that the playgrounds are open for the use of the community, although she acknowledged that they are not available for public use. She strongly believes that this area needs a catalyst for revitalization. T. 171.

In Ms. Rodriguez opinion, she believes the development provides a balanced and coordinated mixture of residential uses because it brings a typology (i.e., apartments), not present in the immediately surrounding area (that consists primarily of townhouses and single-family homes). T. 172.

The development plan also preserves and takes advantage of trees to the greatest extent possible, she opined. There are very few trees within the site; the Applicant is

preserving one of the larger trees. T. 172-173. They also have pedestrian networks that tie into different courtyards that connect throughout the community.

With regard to setbacks, Ms. Rodriguez opined that there is a 100-foot setback from the northern property line. The development is not setback 100 feet from the Westwoods, but she does not believe that setback applies because the County's master plan shows the woods as open space. T. 174. The townhouses are setback 100 feet from the single-family detached homes on Day Lily Lane, although one corner of Building B is within 100 feet of the northern-most lot on Day Lily Lane. T. 176-177.

Ms. Rodriguez felt that the Planning Board's recommendation focused only whether the density is consistent with the Master Plan and did not convey a lot of the discussion among Board members indicating that the plan was a good design and the area needed revitalization. She does not agree with the Board's recommendation of denial because she feels that the Master Plan only provides a dynamic guide for future development. She quoted the Plan as stating, "Manages and directs a dynamic growth potential of the Gaithersburg vicinity master planning area." T. 179. It's obvious from her perspective that 28-year old plans are not doing justice to that goal. She believes that the development satisfies the purposes of the PD Zone, will be compatible with existing and planned uses in the surrounding area, and will not cause any adverse effect on the neighborhood. Rather, she believes that the proposed development will revitalize the neighborhood. T. 180-181.

In response to whether removing all development potential in Analysis Area 2 was an adverse impact, Ms. Rodriguez replied that she does not know when the next plan revision will occur. In her opinion, it takes about five years to complete one. If one were to go

through, she believes that this area would be recommended for higher density because of the projected growth in Gaithersburg's population. T. 182.

Ms. Rodriguez testified that she believes that public facilities will be adequate to served the proposed development. T. 183. The elementary school is over capacity, so the Applicant would have to pay a fee to proceed. T. 183.

On cross-examination, Ms. Rodriguez stated more weight should be placed on Technical Staff's recommendation of approval of the PD-44 application than the Planning Board's continued recommendation of denial on the PD-35 recommendation. She believes that Staff is "thinking outside the box" whereas Chairperson Carrier really "goes by the book." T. 187. She thinks more deviation from the Plan's density limitations are appropriate because they have more tools now to mitigate some of the issues relating to high density. T. 187.

Ms. Rodriguez also acknowledged she did not author the legal analysis regarding the 100-foot setback from the Westwoods contained in her land planning report. She also acknowledged that much of the language used to justify compliance with the PD Zone purposes in the Technical Staff Report was very similar to the language in her land planning report. T. 194-196.

7. Mr. Ronald Sieboth:

Mr. Sieboth qualified as an expert architect, specializing in multi-family development. T. 198-200.

He testified that the property is irregularly shaped, which is its most unusual aspect. It is wide at the north end and narrow at the south end, which constrains the types of buildings that one places on the site and how they relate to the woods located to the west of

the property. T. 201. He testified that he was commissioned to determine what type of architecture would best lend itself to redevelopment that was compatible with the surrounding uses, included amenities, and needed security. T. 202. According to Mr. Sieboth, the wrap building is predicated upon a precast parking structure in the center dwelling units surrounding it. It was developed to appease communities in the appearance of projects from the street; there is typically a lot of parking associated with a garden apartment because there are many units in one building. By hiding the parking in the center, the community does not see the parking. This is more appealing because one views the architecture from the street, and more amenities may be provided because the parking is stacked. T. 203.

Mr. Sieboth testified that increased density is needed to construct these projects because building and fire codes have increased their requirements and other requirements, such as LEED certification, are being added. T. 203-204.

In his opinion, the proposed development meets the development standards of the PD-35 Zone. He explained that when he initially designs a project the average dwelling unit size for apartments is 1,000 square feet. This development plan proposes that 38% of the units are one-bedroom, 55% are two bedrooms, and 7% are three bedrooms. T. 205-206. The three-bedroom units are closer to 1,200 square feet. Within that mix, Mr. Sieboth testified that there are one and two dens and some efficiency units. Because they are including three-bedroom units, this development is more family-oriented than others. T. 206.

Mr. Sieboth testified that the building height steps from three stories closest to Towne Crest Drive to four stories at the rear of the property. He's used hip roofs to soften the edges. In his opinion, the stone base of the building will be hardy plank or cement board siding to

maintain a residential character. In addition, the architecture is more traditional so it will fit in with the surrounding architecture. T. 208.

The design of the structured parking was modified somewhat when the Applicant amended its application from the PD-44 to the PD-35 Zone, according to Mr. Sieboth. Building A has a 4-story deck and each level is oriented to the residents on that building level so people can drive up to their floor. This avoids strain on the elevator and stairway systems. In addition, Building A and B have elevators which permit all units to be handicapped accessible. Many of the traditional garden or walk-up apartments cannot accommodate this. T. 209.

Mr. Sieboth also testified that the roof design is compatible with the surrounding dwellings, which have traditional builder's sloped roofs. By having the narrow widths of the hipped roofs on the proposed building present to the street, the width of the building appears more proportional to the existing dwellings in the neighborhood. T. 210.

Under the current development plan, according to Mr. Sieboth, the townhouses are setback 100 feet perpendicular to the houses on Day Lily Lane. The corner of Building B, however, does encroach into the 100-foot setback. T. 211. He presented a sketch which eliminated this setback encroachment by removing the encroaching units and relocating them in two levels above Building B's parking deck. The parking deck has been reduced from three to two levels with two levels of units above. Thus, Building B will still be four stories high from the rear. T. 212-213. This revision still contains 329 units. The Applicant may still provide the number of parking spaces required by the Zoning Ordinance. T. 213. Based upon the proposed unit mix, the Zoning Ordinance requires 1.43 parking spaces per bedroom. The revised development plan (i.e., eliminating the encroachment into the 100-foot setback)

has 500 parking spaces, which is 1.52 parking spaces per unit. Therefore, this revision still provides more than the required number of spaces, although not as many as the original PD-35 plan. T. 216. Mr. Sieboth testified that Building B in the original PD-35 development plan encroached 65 feet into the 100-foot setback. T. 216.

Mr. Sieboth also opined that the development met the requirements for a waiver from the required that 50% of the buildings be five-stories in height. T. 216. According to Mr. Sieboth, it addressed environmental concerns because the neighbors expressed concern over the height, which is an environmental concern. He also feels that it meets the second basis for a waiver as well. T. 220.

On cross-examination, Mr. Sieboth testified that, if the site were not constrained by its narrow width, a reasonable spacing between buildings would be 40 feet. In his opinion, breaking up the façade through architectural elements may be more important than physically separating the buildings. T. 223-224. It is his opinion that the distance between the buildings on the development plan is appropriate because there is probably over 100 feet between the townhouses and Building B and about 60 feet between Buildings A and B. The distance between the townhouses and Building B in the original PD-60 development plan was approximately 80 feet. T. 226.

February 25, 2013, Public Hearing

1. Perry Berman:

Mr. Berman qualified as an expert in land use planning. T. 9. He testified that he had been Chief of the Community Plan North Division when the Master Plan was adopted. He supervised the plan and attended all of the work sessions and meetings with the County. His role at the time was to be the interface between the Council and the planning staff and to

make sure all of the planning recommendations were consistent and to get involved in the major policy issues. They had many master plans going at the same time. T. 10-11. He testified that he was surprised how much he remembered about the plan, but stated that he had “gaps” in his memory. T. 14. He remembered that this was a very big plan; it covered a large area of the County. His staff focused on two major issues: (1) whether they should re-confirm the Montgomery County Airpark as a land use or substitute residential development, and (2) preserving the right-of-way for the Inter-County Connector interchange with I-270. T. 14. According to Mr. Berman, the principle goal of the Plan was to attempt to coordinate the growth of Gaithersburg as a corridor city under the General Plan. One of Staff’s major goals was to achieve more housing in Gaithersburg. This remains a major goal today, because in his estimation, the County had a housing shortage then as it does now. T. 14-15.

Mr. Berman testified that Staff took the area covered by the Plan and broke it into Districts. Then, Staff looked at the density that could be achieved in each District based on the historic average of densities project forward. T. 15. They looked at each area without regard to property lines. T. 16. After that, they put together a table summarizing the Districts.

He now believes that the table included in the Master Plan is incorrect for Analysis Area 2. T. 17. They included the existing zoning, but then included 231 units as both the existing and potential development. T. 18. It appears to him that they included only the actual development at the time and mistakenly did not include any potential for additional development. T. 18. It’s inconsistent with Staff’s goal of using floating zones for areas which are recommended for high-density residential development. He wanted to use floating zones to be able to fine-tune compatibility with other projects in a manner that is unavailable

with Euclidean zones. T. 18-19. He does not know why the area was not zoned for Transferable Development Rights; nor does he remember why they did not designate the area for the PD Zone. T. 19. Still, Mr. Berman maintained that there was no intent to maintain the existing uses because there was “never a plan where we would discourage redevelopment.” He does not remember a time that a plan ever discouraged redevelopment other than in area with houses already in a community. T. 20.

Mr. Berman’s main point that one of the major goals of the Plan was to provide for employment opportunities, a sense of community, an increase in housing stock, and the appropriate mix of affordable housing. T. 21. Mr. Berman stated that in 1985, the zoning for the property was considered to be high density; he then stated, “[B]ut we wanted to have medium density, all right density there or medium residential density there. And we thought in our terminology eight to 15 was that, was that, the correct level.” T. 22. Any MPDUs provided would not be included in the base density recommended. T. 22. The testimony contains the following exchange between the Applicant’s attorney and Mr. Berman (T. 22):

Mr. Kaufman: All right. And so in your opinion then today if you would find that what would the range of density be?

Mr. Berman: Probably in the twenties.

Mr. Kaufman: And then an MPDU on top of that?

Mr. Berman: That’s right.

Mr. Berman testified that the type of architecture they were dealing with at the Plan was adopted were garden apartments. T. 23. He also envisioned that the uses within the District would be clustered rather than averaged over the entire area. According to Mr. Berman, clustering was a big concept at the time and is being used more and more with property lines being less significant. T. 24.

Mr. Berman reiterated that the goal of increasing residential development was so important, the Plan contained the recommendation that it would be better to close the Airpark than not to have housing. This testimony was then made subject to the caveat that “[w]ell, it doesn’t, it doesn’t quite say that, but the, and the, that was the issue.” T. 25. He then explained that “they” studied the flight paths of the planes from the Airpark very hard, and the “big issue” was whether the Airpark “should continue or whether we should have housing.” At the end of the day, according to Mr. Berman, they recommended housing, but recommended that people who bought houses within the flight path should have notice to that effect. He further stated, “But, nevertheless, we felt compelled to have more—we could not, more important for the County to have housing in this area than the airpark. If we had to close it, that was, that was what would have to happen.” T. 26.

Mr. Berman confirmed that the total number of units permitted by the Plan’s recommended zoning for Analysis Area 2 would be 331 units, 100 more than the amount listed in Table 2 of the Plan. If a 22% density bonus were added to that, the potential density would be 384 dwelling units for the Analysis Area. T. 26-27.

In the letter he wrote to Dave Ager, Mr. Berman stated that the Planning Board meetings on the plan were not well attended. No one showed up at the public hearing, so they did not have the opportunity to correct mistakes they had made in Table 2.

Were the Plan to be revised today, he believes that density would be taken from the entire Analysis Area and placed on this property. He thought that the use of structured parking to achieve this level of density makes sense and is in keeping with what he would come up if re-doing the Plan. T. 29. Were they to do this, he would be meeting with property owners, talking to them and to the community and discovering what was reasonable.

There is a County-wide program that is in Park and Planning's capital budget to review properties developed with garden apartments and see whether they could be redeveloped. T. 29. He believes that they would try to provide a variety of housing in this area and attempt to stabilize the community. T. 30. This would be balanced with the traffic and school capacity, which are much different now than they were in the 1980's. T. 30.

On cross-examination, Mr. Berman acknowledged that the Plan contained the statement that there were three significant vacant areas and uncommitted land which provided substantial opportunities to meet County-wide development goals and that one of these areas was in the Airpark Study Area. T. 33. Mr. Berman agreed that none of the land within Analysis Area 2 was vacant at the time.

In addition, Mr. Bergman agreed that the Plan looked at basically two categories of designations—the Euclidean or base density and then others with a bonus or optional density, which could include either PD or TDR Zones. T. 36. Seventeen areas were recommended for optional densities, although no properties were specifically designated for the PD Zone. Mr. Berman believes that this is an error, although he acknowledged that he worked for the Maryland-National Capital Park and Planning Commission for another 11 years and never discovered this mistake. He did state that another portion of the plan listed the PD Zone as a development option. T. 36.

Mr. Berman testified that the Plan's recommended zoning for Analysis Area 2 had not been fully utilized at the time the Plan was adopted; an additional 100 units could potentially be developed under the base zoning recommended. T. 38.

With regard to the language emphasizing the need for buffering from the Town of Washington Grove and the City of Gaithersburg, Mr. Berman stated that this buffering

should occur at site plan, which is one of the reasons to use the PD Zone. T. 40. He noted that the same density was recommended on both sides of the woods; he believes that the “fine grain” compatibility should be determined at site plan. T. 41.

On re-direct, Mr. Berman stated that, in his earlier testimony, he said that he felt that PD-35 was compatible for this property. In his opinion, the woods will be an adequate buffer from Washington Gove; other than the homes on Day Lily Lane, most residences within the town are located quite a distance from the subject property. T. 42.

When asked what weight should be given to a 28-year old master Plan, Mr. Berman replied that such a Plan has “less luster” than a newer plan, although it couldn’t be ignored. T. 43. He also stated that there had been a lot of evolutions in planning since this Plan had been adopted, as can be seen by the significant amendments to the Plan. T. 44. In his opinion, planning in Montgomery County is in a transitional stage; in earlier years, the County was adopting the “aerial photograph” of an area. In his opinion, these transformations can and should be accomplished by comprehensive planning. T. 45.

2. Mr. Timothy Longfellow:

Mr. Longfellow qualified as an expert in civil engineering. T. 48. He submitted a revised development plan correcting the parking tabulations in the previous development plan.

Mr. Longfellow described the development characteristics listed on the development plan. According to him, the net tract area of the subject property is 8.11 acres. Fifteen percent (or 50) of the units will be MPDUs. Buildings A and B and will approximately 50 feet in height; the townhouses will be approximately 35 feet high. T. 50-51.

He stated that amount of green area provided is based on the net tract area, which he calls the “gross area” of the development plan. T. 52-53. He opined that the development plan may meet the green area requirement if calculated on gross tract area, although he doesn’t think that the Zoning Ordinance requires this. To meet the required green area (based on the gross tract area), he has included green space located within the public right of way along Towne Crest Drive. The Applicant is not basing its density on the gross tract area. T. 52-54.

Mr. Longfellow submitted a second, alternative development plan in which Building B does not encroach into a 100-foot setback from the northernmost home on Day Lily Lane. T. 57.

Mr. Longfellow described the utilities available to the site. He testified that there is an existing 12-inch water line running through Towne Crest Drive that serves the property. Public sewer bisects the property between Buildings A and B and also runs along the western edge of the property line out to Washington Grove Lane. T. 60-61. The property is in categories W-3 and S-3 for public water and sewer, respectively. T. 60-61.

According to Mr. Longfellow, there is an existing storm drain system which runs along Towne Crest Drive and also bisects the site between Buildings A and B. This system outfalls into the Westwoods and between Lots 2 and 3 on Day Lily Lane. The outfall that bisects the site between the two proposed buildings outflows into rip rap; the outfall between the Day Lily Lane properties has a concrete apron that flows into a grass swale. T. 62.

The redevelopment will introduce stormwater management onto the site where none presently exists. The site will have 10-year quantity control and will fulfill all State Environment Site Design standards. T. 63. As a result, the redevelopment will not increase

the existing volume of water into the Westwoods and will provide quality control as well. The Applicant's preliminary water quality plan has been conceptually approved by DPS. T. 63-68.

In Mr. Longfellow's opinion, there are adequate water, sanitary sewer, storm drainage and other public improvements to serve the redevelopment. He believes that development will improve the environment because it provides stormwater management and does not add to the erosion in the Westwoods. T. 69. He opined that PD-35 development is suitable for the site and the surrounding area. T. 69

On cross-examination, Mr. Longfellow testified that the water quality plan conceptually approved by DPS will have to be revised to reflect moving a portion of Building B outside of the 100-foot setback from the home on Day Lily Lane. T. 70-72.

With regard to the minimum green area required, Mr. Longfellow testified that the smaller footprint of Building B on the revised site plan results in an additional 7,600 square feet of green area. If, however, one bases the green area on the gross tract area and subtracts the green area included in the right of way, the development plan does not meet the 50% green area requirement of the PD-35 Zone. T. 74. In his opinion, however, the Zoning Ordinance does not require the developer to base the minimum green area on the gross tract area. T. 79. He acknowledged that if the right-of-way were counted toward green area, then there would be no guarantee that the green area would actually be provided on the site. T. 81. When asked what would be the "net" area of the "gross area" of the development plan, Mr. Longfellow stated that there would be none. T. 82.

On re-direct examination, Mr. Longfellow also asserted that there was no legal requirement for a 100-foot setback from the closest dwelling on Day Lily Lane because that

was located within another jurisdiction. T. 85. He believes that a rezoning application need not be based on the gross tract area when the developer does not take density from the right of way. T. 96. He testified that another rezoning application, G-808, counted the area within the right of way as green space. He stated that the existing building on the subject property encroaches 70 feet into the setback, but didn't know how tall it is.

3. Mr. Kevin Foster:

Mr. Foster qualified as an expert in landscape architecture. He testified that the Westwoods was logged sometime after World War II and is now developed with a "monocultural" tree stand of fairly mature poplars with a very tight overstory and little understory. According to Mr. Foster, the understory is invasive ground cover.

He stated that he worked with a certified arborist when developing the NRI/FSD. T. 97. He described the existing landscape of and surrounding the property. The landscape of the subject property is currently grassland. There are 14 trees on the NRI/FSD that qualify as specimen trees, which are defined as trees with a diameter over 24 inches. Trees with diameters over 30 inches are of special concern under the Forest Conservation regulations.

According to Mr. Foster, two of the specimen trees on the site have been removed; he believes that PEPCO removed the trees in an effort to upgrade electric service. Beginning at the north end of Towne Crest Drive, there are a mulberry and a poplar tree. There are 4 white pines along Washington Grove Lane. On the western edge adjoining the homes along Day Lily Lane, there is a single row of trees which are on the subject property and a fence along the property line. Not all of those trees are shown on the NRI/FSD because they are not specimen trees. T. 100-101. This buffer is not very broad—it is a mix of mulberries, poplars and red maples which were probably not intentionally planted. T. 102.

There are several specimen trees further north along the western property line, where it borders Westwoods. These trees are very large, mature poplars. Some of the trees which will be impacted are located on the subject property and some are located within the Town of Washington Grove. The trees on the subject property will be removed upon redevelopment. T. 102.

Mr. Foster testified that the County's forest conservation law requires a review of a development's impact on specimen trees as well as a requirement to provide forest on the site. When analyzing the impact of the redevelopment on existing trees, the Forest Conservation regulations require them to look at the impact on the CZR of each tree, which is approximately 100-foot circumference around each tree. T. 102-103. As a result, trees on adjoining property that are within 100 feet of the subject property must be analyzed.

Mr. Foster stated the law requires that 15% of the site be forested after development. Because there is no existing forest, the developer here must provide 15% forest cover. T. 105.

According to Mr. Foster, there are 14 specimen trees on the property; four of these exceed 30 inches in diameter. Three of those trees will be removed upon redevelopment. There are also 14 trees located in Westwoods that will be impacted by redevelopment of the site. The Applicant proposes to address this by doing "significant progressive tree pruning, crown cleaning, and using root growth regulator to minimize the impact of construction." Mr. Foster explained these terms. Progressive root burning involves cutting back the roots beginning 2 to 3 years before construction. The first year, 1/3 of the root system is trimmed, that same amount is trimmed the following year. According to Mr. Foster, by the time of construction, the trees are "much more able to deal with root loss." Crown cleaning and

growth regulator are used to reduce the leaf growth during construction thereby concomitantly reducing the need for water. T. 108. If these methods are used, Mr. Foster asserted that he is “confident they can provide work necessary to save as many of the trees as possible.” T. 106. A condition of the preliminary forest conservation plan approval requires them to do a “tree safe plan” as a component of the final site plan to address the impacts on these trees. He does not believe there will be significant tree loss in the Westwoods. When asked to define the term “significant,” Mr. Foster replied that their proposal gives all of those trees “a good chance of survival.” He stated that four of the fourteen trees in the Westwoods may not survive, but it is difficult to give an exact percentage. T. 110-113. The proposed drive aisle on the western edge of the property extends about 310 feet and is approximately 5 feet from the property line. T. 118.

Mr. Foster testified that trees behind the lots on Day Lily Lane will be removed, but development will not impact the trees within the Day Lily lots. According to Mr. Foster, the Applicants are proposing a “pretty extensive” landscaped buffer along the edge of those lots. T. 114-117.

Mr. Foster opined that the development will not have an adverse impact on the health and safety of residents, visitors, or workers in the area or an adverse impact on the environment. T. 119.

On cross-examination, Mr. Foster stated that one of the trees to be preserved has a CRZ impact percentage of 37% and acknowledged a 30% impact is considered the baseline of considering whether other measures are needed to protect the trees. T. 121. One would not know the exact measures necessary until closer to construction when they knew the limits of disturbance and the type of construction impact that would occur. Each tree is analyzed

on an individual basis. T. 122. He acknowledged that eight trees showed a CRZ impact of 33% or more and were all on property within the Town of Washington Grove. T. 123. He did not believe an additional setback from the property line would reduce the impact because a sewer line and utilities were located along that edge. When asked whether the sewer line could be moved, Mr. Foster replied, “[T]hat’s not really my area of expertise.” T. 123. Finally, he testified that only one on-site specimen tree will be saved. T. 124.

4. Ms. Ann N. (Nancy) Randall:

Ms. Randall qualified as an expert transportation planner. T. 125. She testified that all access to the site would come from Washington Grove Lane via Towne Crest Drive. The revised development plan has two access points from Towne Crest Drive into the site. T. 127.

Ms. Randall described the existing road and transit facilities serving the site. There is an existing bus stop and crosswalk at the intersection of Towne Crest Drive and Washington Grove Lane. Presently, it is not well-marked and the Applicants will restripe and sign the crosswalk during redevelopment. They will also provide a bus shelter. The bus route does not have a direct line to the Shady Grove Metro station. A MARC station is located approximately 0.6 miles from the site (as the crow flies). One may reach it by walking through the town or by walking along Washington Grove Lane and cutting over to Railroad Street. T. 128. The speed limit on Washington Grove Lane is 30 miles per hour, although there is an advisory speed limit of 20 miles per hour due to the speed bumps along the road. T. 129.

Ms. Randall testified regarding the result of the LATR study performed for the development. She stated that the intersections studied included Mid-County Highway and

Washington Grove Lane, Towne Crest Drive and Washington Grove Lane and East Diamond Avenue, Railroad Street and Washington Grove Lane. The intersection of Towne Crest Drive and Washington Grove Lane is not signalized. T. 129.

According to Ms. Randall, the Applicant included the following background developments in its traffic study: the Jackson property, the Residences at Hidden Creek, Archstone at Oldtown, Mainheart property, and the Casey property. They then added these trips to the existing off-site traffic, but credited the trips currently generated by the subject property (i.e., 49 morning and 68 evening peak hour trips). She testified that (based on the original PD-60 application), the proposed development would generate 191 morning peak hour trips and 221 evening peak hour trips. Once the existing on-site traffic is credited against this, the resulting new peak hour trips is projected at 142 morning trips and 153 evening trips. T. 130-131.

Ms. Randall testified that the Planning Department distributed these trips as follows: 45% of the traffic is to and from the southeast via Mid-County Highway, 10% to and from the northwest via Mid-County Highway, 5% to and from the northeast via Washington Grove Lane going north to Howard County, 25% to and from the northwest via East Diamond Avenue, and 15% to and from the southeast via Railroad Street. T. 131.

According to Ms. Randall, after adding the background traffic and new trips from the proposed development, all three intersections studied are below the standard for the policy area, which is 1,475 CLV. The intersection coming closest to the standard is Washington Grove Lane and Mid-County highway, with a CLV of 1422. T. 132.

Ms. Randall submitted a supplemental report showing the impact of reducing the size of the development on the critical lane volumes. Ms. Randall testified that the supplemental

report demonstrated that the development will generate 87 morning peak hour trips and 92 evening peak hour trips. T. 134. In addition, her firm recounted the three study intersections and concluded that the volumes were less than those in the previous study. The Washington Grove Lane/Mid-County Highway intersection (previously the highest CLV) now had a CLV of 1390. T. 136. Ms. Randall stated that the study did not take any credits for proximity to transit. T. 138. She testified that Technical Staff agreed with the conclusions in the original study, although they had not reviewed the supplemental report. T. 138-139.

Ms. Randall described the pedestrian circulation on and surrounding the site. She stated that there is a pedestrian path along Washington Grove Lane. The Applicant will be adding sidewalks along Washington Lane and Towne Crest Drive and enhancing the existing cross-walk. The path system along Washington Grove Lane connects with various roads leading into the Town of Washington Grove. Sidewalks extend north on Washington Grove Lane to the Mid-County Highway where there is another bus stop. T. 139-141.

Nearby roads will have adequate capacity to serve the development, which will not adversely impact surrounding properties, Ms. Randall opined. T. 142-143. She stated that the traffic impacts are compatible with the surrounding properties. T. 143.

On cross-examination, Ms. Randall acknowledged that the supplemental report showed that traffic volumes increased at the intersection of Railroad Street and East Diamond Avenue. In her opinion, this may occur because of a change on either road that didn't impact making a left turn onto Washington Grove Lane. T. 144.

She also testified that the bus route goes many places, but not directly to the Shady Grove Metro station. The MARC train connects to Shady Grove and then continues south. She is unsure of the exact southern connections, although she knows that there is a

connection in Gaithersburg. She expects that residents will avail themselves of the available transit. T. 144-147.

5. Mr. Rick Floyd:

Mr. Floyd testified that he resides in the Wedgewood I community and his family grew up there. According to Mr. Floyd, the residents are excited about the prospects of the development and believe that it is one of the best things that could happen for them. This is because it will bring road improvements and sidewalks. T. 148-149. He believes that the development will be compatible with the surrounding area because the existing project is run down and needs to be removed. T. 150.

6. Ms. Carla Weinberg:

Ms. Weinberg testified in opposition to the application. She lives in Wedgewood 2 and would love to see improvements to Towne Crest Drive and Washington Grove Lane because these roads are narrow and congested. T. 155-156. She is also concerned about the impact on parking in the area and the density of the project. Id.

She stated that she is “baffled” by the traffic study because she regularly travels the local roads to Gaithersburg and other locations. When she travels to Gaithersburg, she often has to wait through two light cycles of the signal at East Diamond and Railroad Street. The same condition exists at the intersections of Mid-County Highway/Washington Grove Lane and Washington Grove Lane/Railroad Street. T. 156.

She feels that the neighborhood streets are not equipped to handle this density; it will triple the number of double-parked trucks, cars, and school buses currently blocking Towne Crest Drive. In her opinion, the parking provided for the new development is inadequate and won't resolve existing parking problems in the neighborhood. Her community has no visitor

parking at all; the homes have two parking spaces, but most residents have 3-4 cars. The lack of parking has impacted her quality of life, but when she has complained, she is told, “[W]hy don’t you move?” T. 156-157.

On cross-examination, Ms. Weinberg acknowledged that the president of her association supports the application. Ms. Weinberg testified that she and every other resident received an e-mail from the president stating that there would be increased cooperation between her community and the Towne Crest apartments and that Towne Crest parking would be removed from the streets. She is skeptical that this will be the case because the number of overflow parking spaces provided by the developer is so small; in her opinion, the overflow parking will be a “drop in the bucket.” T. 158.

7. Mr. Joseph R. Davis:

Mr. Davis opined that the waiver request to permit 50% of the buildings to be under 5 stories is not justified by the criteria set forth in the Zoning Ordinance: there is no environmental finding justifying the waiver nor is the waiver necessary to implement the Master Plan. T. 168.

In his opinion, the application does not comply with the Master Plan, which recommended residential densities between 8 and 15 dwelling units per acre exclusive of bonus densities for MPDUs. With the MPDU density bonus included, the maximum Master Plan density for the subject property is 18.28 dwelling units per acre. T. 169-170.

Mr. Davis submitted his analysis of the density calculation in the Plan (Exhibit 132). The Plan recommends a maximum of 184 dwelling units on the subject property and 236 dwelling units in the two Wedgewood communities. As a result, there remains potential

density for an additional 153 dwelling units in Analysis Area 2. Of these, 41 are available for the subject property and 112 are available for the balance of the Analysis Area. T. 172.

Mr. Davis acknowledged that the Plan is old relative to other master plans, but opined that the recommendations are still valid. According to Mr. Davis, the Council updated the plan numerous times where needed. These amendments included the Shady Grove West plan in 1990, the Shady Grove Sector Plan in 2008, and an update for the new technology corridor. These Plans created significant density increases where it could be served by mass transit. This area is not identified as a transit development area in the Plan. T. 173. In his opinion, the 1985 Plan recognized the existing development in place and recommended the status quo, although leaving some additional development potential. T. 174.

Assuming that the age of the Plan justifies some density increase, Mr. Davis opined that the policy question is how much density is appropriate today. The PD Zone is different than other zones because the purpose of the Zone requires compliance with a master plan. Once the Master Plan is discarded due to its age, he questioned where the starting point is for additional density. T. 174.

In his opinion, the Plan should not be interpreted to permit the “transfer” of density assigned to other parts of the Analysis Area because there is no provision for this in the PD Zone as there is in some other zones. There is no formal procedure in place to effectuate this transfer. T. 174-175. Not only does the application usurp all of the density available in Analysis Area 2, it adds an additional 69 units to that density. T. 176.

Nor did Mr. Davis agree that a density of 40 units per acre is appropriate at this location. This density is comparable to the density of properties within the Shady Grove Sector Plan area. T. 176. In his opinion, the locations are not comparable because this

location has more limited availability to transit; there is no full, coordinated movement of buses to trains as there is in Shady Grove. The MARC service in Washington Grove is provides limited service that is not coordinated with the bus routes. T. 176-177.

In his opinion, the Master Plan recommended optional densities where these were found appropriate. There are not many optional densities in the Airpark area; only one property in Flower Hill is recommended for the Planned Neighborhood Zone. T. 180. No PD Zoning is recommended on the east side of I-270, although there are several properties recommended for optional density on the west side of I-270. T. 181-182. He doesn't believe the lack of PD or optional method zoning in the Airpark District is an omission of the Plan; rather, it is part of the comprehensive planning for the area. T. 181.

Nor does he agree that the density here implements the Plan's goal to "cluster" new development. Mr. Davis opined that clustering is a concept where development is concentrated in one area to better protect environmental or other resources, or where optional densities are placed on property to support amenities or other public policies, such as the optional method CBD Zones. When he saw the term "clustering," he interpreted it to refer to the TDR optional method densities recommended in the Plan. T. 182.

Mr. Davis does not agree that the previously approved Local Map Amendment applications cited by the Applicant support the increased density requested here. Mr. Davis opined that the Council's decision in Local Map Amendment G-873 did not support an increase in density above the level recommended in the Master Plan in this case. In G-873, the site had been designated for entirely residential development. The Council approved a PD-28 rezoning which replaced existing offices with a private school and residential development. T. 178-179. Less residential development was approved in G-873 than was

recommended by the Master Plan. T. 216. In G-909, the increases were necessary to further other public policies, such as provision of workforce housing and the purchase of TDRs. LMA G-909 is also distinguishable because portions of the property were already zoned for 100 dwelling units per acre and were proximate to transit in Bethesda. T. 184. There has been no transportation improvement in the area surrounding the subject property not already accounted for in the Plan.

Mr. Davis opined that the application does not fulfill one of the purposes of the PD Zone, which is to encourage flexibility of design in order to protect trees. This is particularly important in areas like the subject site, where the trees are part of a public park. The adverse impact to the trees, in his opinion, is an element of compatibility and the design of this development does not demonstrate that protecting trees was an important goal. T. 185-186.

According to Mr. Davis, the densities recommended in the Master Plan remain valid. The Plan did preclude any additional development; there is additional density of 41 dwelling units for the subject property. In his opinion, any increase in density above that amount should further an important policy or goal of the Plan. A better means of increasing the density for this property would be an individual Master Plan Amendment, which would look at comprehensive issues and policies. T. 186.

Mr. Davis further testified that he analyzed what density would be compatible with the surrounding neighborhood. In his opinion, the development should be no more than four stories and should be set back 100 feet from the single-family detached homes on Day Lily Lane. He agrees that the second, alternative, development plan submitted by the Petitioner does accomplish this. If this is addressed, his primary concern regarding the setbacks and compatibility is the setback along the western property line bordering the woods. At this

location, the drive aisle is within five feet of the property line and the building is 25 feet from the property line. He believes that the building should be setback 50 feet from the property line to better protect the Westwoods. T. 189.

He believes that this setback should apply even when the adjoining single-family detached development is within another jurisdiction with independent zoning authority. T. 190. While at the Maryland-National Capital Park and Planning Commission, they applied this principle as a “matter of course.” Otherwise, they would have treated properties as if they were the “end of the world” when they reached the border of Montgomery County’s zoning authority. T. 190.

Mr. Davis testified that the development plan does not provide sufficient green area to meet the zoning requirements. In his opinion, minimum percentage of green area should be based on the gross tract area. Both the size of the tract counted for density and the size of tract counted for green area should be the same to ensure consistency in the amount of green area provided. T. 191-192. He disagreed that LMA G-808, cited by the Applicant, based its green area on less than the gross tract area. T. 198.

Nor did Mr. Davis agree with the Applicant that land located within a right-of-way should be counted as “green area” as does the development plan here because it is “bad public policy.” The Montgomery County Department of Transportation has not yet reviewed this development plan to determine what improvements will be required within the right of way of Towne Crest Drive. In addition, there is no guarantee that the road abandonment will actually occur or whether DOT will require a cul-de-sac. Because of the density requested, DOT may also require a monument entrance and other improvements, such as acceleration and deceleration lanes, to ensure safe access and egress. T. 192-194.

In his opinion, a logical increase in density for this property based on the age of the Plan, would be PD-22. This is more logical than an increase of between 8 and 15 dwelling units per acre to 40 dwelling units per acre because it is not within a transit development area and does not further transit use in the same way as the properties within the Shady Grove Sector Plan area. In his opinion, “Smart Growth” places this level of density where it may best be served by transit; Shady Grove has full service bus and Metrorail service. According to him, higher densities are placed where reliance on the automobile is reduced. T. 227. Those properties are not comparable to the subject property, which is .6 miles from a limited service MARC station. T. 195-198.

On cross-examination, Mr. Davis testified that some zones do specifically permit the applicant to take density from the net tract area, but the PD Zone is not one of them. In his opinion, the same relationship must exist between the area used to calculate density and the area used to calculate the minimum green space. He acknowledged that he interpreted the term “gross area” used to calculate the minimum green space in the PD Zone to mean “gross tract area.” He still did not find it appropriate that the area used for these calculations should vary from application to application. T. 203. The PD Zone permits one to calculate density based on the gross tract area with the *quid pro quo* of providing green space based on the same area. T. 204.

In addition, Mr. Davis did not agree with the Applicant that land within the right-of-way should be counted as “green area” and could not remember a time when this was done. He does not agree that LMA G-808 used less than the gross tract area to calculate green area because the resolution stated that the green area listed was 30.1% of the gross tract area. He was not sure whether the green area approved was within the right-of-way. T. 206.

He acknowledged that the practice of recognizing the zoning in other jurisdictions was just that, a practice. It did not rise to the level of an interpretation of the Zoning Ordinance to his knowledge. T. 208.

He believed that staff incorrectly approved the waiver from the forest conservation requirements to permit the Applicant to remove specimen trees because they did not take into account the purpose clause of the PD Zone. T. 210. He was aware that the road improvements had not been vetted because he spoke with a source at DOT who informed him that there had been discussions, but nothing had been decided. T. 213.

Mr. Davis acknowledged that the age of the Plan is unusual and not a good planning practice. T. 213. While he is aware of the impact of minor master plan amendments on the Planning Board's work program, he believes the process is still viable. He also recognized that even though of legal transfer of development rights were not involved in this case, he believed that an interpretation of the Master Plan to concentrate density from other areas onto this property is "problematic." T. 221. He does not agree that the application "clusters" density as intended by the Plan. While the Flower Hill District includes some densities that are higher or lower than recommended in the Plan, all densities were contemplated in the Plan; they were not achieved by usurping the density from another area. T. 221. In his opinion, it is better to increase density this much through a policy-making process. In response to a question whether the owners should just "sit and wait," he responded that they should be pro-active legislatively. T. 223.

On re-direct, Mr. Davis testified that the density proposed here is 40 dwelling units per acre even though it is within the PD-35 Zone and therefore is comparable to densities in

Shady Grove. T. 225. He is not familiar with any other master plan closer to Shady Grove which recommends this level of density. T. 225.

8. Mr. Robert Booher:

Mr. Booher testified that he is an architect registered in Maryland and Chairman of the Town of Washington Grove's Historic Preservation Commission. T. 237.

Mr. Booher testified that Montgomery County's Historic Preservation Commission and the Town's are two separate and parallel bodies which provide guidance and regulatory action on properties that are on their respective historic atlases. T. 238. The Town of Washington Grove is on the State and National register of historic places, but is not on the County's historic atlas. The Town's HPC defers to the County's to provide guidance on historic resources outside of the Town and vice versa. T. 238.

Mr. Booher stated that the Town's HPC presented testimony to both the Planning Board and the Hearing Examiner regarding the impact of the development on trees within the Town. They did not feel the reduction in density to the PD-35 Zone was significant and the HPC's evaluation support's Mr. Davis's evaluation.

Mr. Booher described the impact of the development on the Town of Washington Grove. The urban-type of development would fundamental change the historic context of Washington Grove. The Town was established in the context of farms, fields and forest, an antidote to an urban environment. Their has been some diminution of this context to a more suburban environment, but the density here would significantly change and basically eliminate the original historic context in which the Town originated. T. 240.

Mr. Booher added that the development would also create a precedent at the edge of Washington Grove which would have a significant impact if carried out along the entire

perimeter of the Town, which is a low-density development. The connection of the MARC station and the high-density development surrounding the perimeter would go right through the Town and would have a cumulative effect on the “very nature” of Washington Grove. T. 241. In his opinion, approval of this development could impact the Town’s status on the National Register of Historic Places. The boundary of the property when designated on the Register 30 years ago did not include the woods. These designations, however, have changed radically over time and now the National Register will designate natural surroundings as the context of the historic resource. According to him, the Town is currently in the process of updating their registration to include the natural surroundings. T. 241-242.

The HPC does not feel that the development is compatible with the Town’s context in terms of scale, use or organization. The project proposed is 40 units per acre; the Town of Washington Grove has 225 units on 200 acres, a little over one dwelling unit per acre. In addition, the development aggregates most of its density into two fairly large, 4-story structures immediately adjacent to the single-family detached homes and a forest. In his opinion, it is difficult to find the two uses compatible in either density or scale. The Applicant has made an attempt to variegate the façade facing Towne Crest Drive in relationship to the property across the street, but has essentially “turned their back” on the property adjacent to the woods. T. 243. Nor have they provided any public recreation spaces at all and therefore the development is not integrated with the surrounding communities. T. 243.

In contrast, Washington Grove is a 19th century example of Smart Growth. The houses are clustered in order to preserve the surrounding woods. There is ample recreation

space which is open to all of the community. It has a small commercial area adjacent to the train and is therefore a living thriving community. T. 244.

The community of Saybrooke to the north, according to Mr. Booher, was designed by the developer to have a direct relationship with the Town in scale and character. The development consists of single-family homes and respects Westwoods as an integral part of the Washington Grove community. T. 244. Another nearby community is a mix of single-family, multi-family and town homes and has integrated facilities for use by the public, as does Washington Grove and Saybrooke. T. 245.

Mr. Booher also testified that the development does not represent Smart Growth because transit service is limited. Only four MARC trains actually stop in Washington Grove in the morning and five stop in the afternoon. The Town has tried for a number of years to increase service, but service has been decreased instead. The last train stops at 8:30 a.m. during the week. Trains stop during weekday evenings between 2:00 p.m. and 7:00 p.m. According to Mr. Booher, Smart Growth starts with the highest density adjacent to the Metro stop with integrated community retail. The density then tapers off until it reaches the half-mile walking distance from the transit stop where is no longer is a “transit-oriented” development. He believes that the proposed development is opposite of this because the highest density is at the very edge of the Town, and low density lies between the development and the transit stop. T. 247. The HPC participated in the adoption of the Shady Grove Sector Plan and supported the Plan because it represented Smart Growth and transit-oriented development. The Sector Plan has integrated retail, office and public facilities with the surrounding development. That is different from just placing density in one spot. T. 247.

He also believes that the application does not meet the purposes of the PD Zone because it does not include residential and convenience retail uses to promote a broad range of housing types. T. 248.

Mr. Booher described his experience using the bus system. He takes the bus from the Town of Washington Grove at the MARC station (not from the stop located near Towne Crest), which is “pretty direct” to the Metro Station. The bus route leaving from Towne Crest is indirect and travels a “pretty long” distance around to reach Shady Grove. He does not take that bus route because it takes too long to arrive at Shady Grove. T. 248. From Washington Grove Lane, the route travels northeast, then east, and then south to Shady Grove. T. 248. The entire route links Shady Grove to Gaithersburg. T. 249-250.

In Mr. Booher’s opinion, the master plan process should not be by-passed. It’s his understanding that the proper process is to avoid piecemeal development and to encourage participatory comprehensive deliberation for a larger area that takes into consideration of all of the needs of the community, resulting in an integrated Plan that works for everyone. If the process is to be by-passed, the development should have clear benefits to the community and the County, which are absent here. T. 250-251.

On cross-examination, Mr. Booher acknowledged that he was not testifying as an expert in Smart Growth or as an expert architect. T. 251-252. He did not know whether the Town participated in the 1985 Plan because he did not live there at the time. T. 254. He is aware that 50% of the area would be green space, but did not think it could be used by the public. T. 254. He believes that the PD Zone calls for a higher level of amenities than typically provided. T. 254. He does not agree that the woods belonging to the Town are an appropriate buffer between the Town and the development because the Town was established

as an antidote to an urban environment and has been carefully preserved so that the community remains within nature. He believes that the woods are an integral part of the historic resource and not a buffer that placed between to shield development. T. 256. In his opinion, a preferred option would have everything within a certain distance of the woods should be low-scale residential or open space. T. 256. He believes that the County has been attempting to accommodate the population growth in areas that can support this growth, but not at this location. T. 256. He believes that appropriate uses in the broader surrounding area should be analyzed comprehensively. T. 257. He acknowledged that increased ridership on the MARC may cause the frequency of stops to increase. T. 257. He stated that nothing would prevent someone from walking to the bus stop at the MARC station and taking that bus to the Shady Grove Metro, although it is at the limit of a comfortable walking distance. T. 258.

March 4, 2013, Public Hearing

1. Ms. Stacey Umunna:

Ms. Umunna testified that she lives at 7 Day Lily Lane. Her property abuts the Towne Crest property. She believes that the new development will negatively impact her family's privacy, quality of life, and resale value. T. 6.

She finds some appeal at the prospect of upgrading the condition of the existing property, which she believes is long overdue. She does not, however, believe the way to accomplish that is to triple the density as presented in the development plan. She does not support the plan for Building B or the damage to the trees on her property and in the Westwoods. T. 7.

She would like the developers to redesign the development plan to provide at least a 100-foot buffer from her home and to eliminate the need to remove the trees from her property and the Westwoods. The current version of the plan provides a 100-foot setback for all of the properties on Day Lily Lane with the exception of hers. Under the current configuration, Building B is only 30 feet from her property line.

She would like the plan to be redesigned to protect her family's peace and privacy. Currently, they see only one balcony from her children's rear bedroom. Under existing conditions, privacy is not a concern. In her opinion, the proposed development plan will significantly change this because multiple rows of windows, balconies, and the parking garage would strip any privacy for her children's rear-facing windows. They will also experience an unacceptable level of noise from the apartments and the parking garage. T. 7-8.

She feels that noise and traffic along the rear of the proposed development will greatly diminish the sense of tranquility and quality of life her family experiences by living so close to the Westwoods. T. 8.

In Ms. Umunna's opinion, the proposed height and density are not just detrimental to her family, but is incompatible with the historic nature of the Town of Washington Grove, which is a community that prides itself on the preservation and maintenance of green space, trees and wooded areas. T. 8. According to her, the trees contribute to the character of Westwoods and provide a buffer of privacy for her home. If a 100-foot setback from her property is maintained, it will not be necessary to remove trees. She welcomes a redesign plan that addresses the concerns of her neighbors and the Town of Washington Grove. T. 9.

Ms. Umunna acknowledged that the Applicant had submitted a proposal move the corner of Building B 100 feet from her property. Despite this, she still has concerns because the density is so high. She feels that the traffic from the development may cause problems attempting to exit Day Lily Lane and she remains concerned about the noise from the development. She also agreed with the expert testimony of Mr. Davis and felt that a development of approximately 200 dwelling units is a more reasonable use for the property. She believes that a smaller development may reduce the impact of one of the trees on her property, which has a 37 percent chance of root damage. She is concerned that the tree will fall into her children's bedroom. The tree also provides privacy for her children to play in their back yard. T. 10-12.

On cross-examination, Ms. Umunna testified that she and her husband purchased their property on June 29, 2012. At the time she purchased the property, she researched this rezoning application. She did not, however, look at the Gaithersburg Vicinity Master Plan and its recommendations for the property. T. 13. She also acknowledged that the closest distance between her property line and an existing building on the subject property is between approximately 17 and 25 feet. T. 13. She believes that building is approximately 50 feet high.

2. Mr. Charles Challstrom:

Mr. Challstrom testified that he has lived in the Town of Washington Grove for 34 years. T. 14. During that time, he has served as an elected official for 17 years; he served on the Town Council for 15 years and was mayor for two years. In addition, he has been appointed a member of the Town's Planning Commission and Board of Appeals for a combined total of 13 years. During his tenure in these positions, he has played a leading role

in seven annexations, and the establishment of the Town's railroad park. In his opinion, his most important role has been to expand the Town's involvement with other governmental entities, and in particular with the M-NCPPC, the Planning Board, Planning Department Staff, and the County Executive. He testified during the public hearings on the Master Plan and participated in the Washington Grove Master Plan update. Currently, he is Chairman of the Town's Planning Commission. T. 15.

Mr. Challstrom described the Planning Commission review process as the application has evolved. It considered the originally proposed development plan during a work session and several monthly meetings. The Commission also evaluated the earlier proposals as well as the most recent amended plan. In considering the development plan, the Commission reviewed items in the Town's archives dating back to 1965, including the plat of the Towne Crest property, the files from 1981 to 1985 on the Gaithersburg Vicinity Master Plan, the 1987 neighboring annexation, 1994 information on dumping occurring adjacent to the Towne Crest property, plus a collection of forestry documents on the Town's website. T. 16. In addition, the Planning Commission consulted with several County representatives, including Rick Brush, William Campbell, and Atiq Panjshiri. Planning Commission members participated in meetings with Technical Staff and with the Applicant on several occasions. The Planning Commission met in December of 2011, to review the issues involved and establish an agenda for evaluation of the rezoning, which at the time requested rezoning to the PD-60 Zone. They held a worksession on January 11, 2012, and in February of 2012, submitted the Commission's evaluation to the Town Council. T. 16. On March 26, 2012, they revised their February, 2012 recommendation. Documentation of all of these activities was posted on the Town's website. In May, 2012, the Commission met with the Applicants

and approved an amended evaluation on June 6, 2012. On September 5, 2013, the Planning Commission reviewed and approved another amended evaluation of the PD-44 development plan. On September 13, 2012, he testified on behalf of the Planning Commission before the Montgomery County Planning Board. T. 17. On January 16, 2013, he submitted a memorandum summarizing his review of the PD-35 development plan. T. 19. The latter document was not the result of a full Commission review of the plan. T. 20.

Mr. Challstrom described his January 16, 2013, evaluation of the PD-35 development plan. He confirmed the density calculations of the revised development plan, reviewed the proposed setbacks and the separation from adjoining residential properties. After doing so, he confirmed that the revised plan did not affect the basis of the Town's 2012 Resolution disapproving the development plan. Mr. Challstrom explained that his memorandum was presented to the town Planning Commission at its February 6, 2012, meeting. The Commission did not take any formal action on the memorandum. T. 21.

Mr. Challstrom compared the similarities between the Commission's evaluation of the development plan and Mr. Davis' evaluation. Both concluded that the development did not meet the requirements of the PD Zone because it is inconsistent with the Master Plan, cannot be justified by the proximity of transit, and is not compatible with adjoining property in the Town of Washington Grove. T. 22. The Commission concluded that the project does not yield a balanced and coordinated mixture of residential and convenience service uses as required by the PD Zone. According to Mr. Challstrom, there is no retail on or near the Towne Crest property. In addition, the overwhelming number of trips from the property to commercial and employment areas will be made by automobile. Further, the development

plan does not meet the required 100-foot setback from adjoining residential uses in the PD-Zone. T. 22-23.

Mr. Challstrom also disagreed with the Applicant's witnesses about the town's role in development of the Gaithersburg and Vicinity Master Plan. According to Mr. Challstrom, the Town actively participated in hearings and work sessions with the Planning Board and met with Technical Staff as well as staff of other County agencies. They invited County representatives to walk through the forest preserve (i.e., the west and east woods). Representatives of the town testified at the Staff Draft of the Gaithersburg and Vicinity Master Plan dated 1981. In 1983, the Town and the Planning Board adopted a joint resolution to address problems arising from the Towne Crest property, including storm water runoff, vandalism, litter, and lack of adequate services to support the development. The resolution particularly noted that single-family zoning provided the most effective buffering to protect the forest preserve. As a result of this, many of the Town's concerns were addressed in the final draft of the Master Plan, dated September, 1983. T. 23-24. Mr. Challstrom submitted excerpts from the 1983 Final Draft Master Plan, including sections acknowledging the "considerable discourse" between the two jurisdictions' and the Planning Board's belief that it had satisfactorily addressed the Town's concerns. T. 25-26.

Mr. Challstrom also submitted a 1987 letter from Norman Christeller, then Chairman of the Planning Board, to Mr. Challstrom. According to Mr. Challstrom, the letter demonstrates that the Applicant must provide a 100-foot buffer between buildings on the subject property and the properties on Day Lily Lane. The letter states that the single-family detached zoning recommended by the Washington Grove Master Plan is consistent with the

single-family detached zoning recommended by the Gaithersburg and Vicinity Master Plan. T. 27-28.

Mr. Challstrom read portions of the Gaithersburg and Vicinity Master Plan which he believes are pertinent to this application. These included passages (1) noting the cooperation between the two jurisdictions in coordinating the planning policies in the two jurisdictions, and (2) a passage acknowledging that the land uses in the area of the subject property are “largely established.” T. 28-29. Another passage acknowledges that the Gaithersburg Plan intended to provide buffering with neighboring jurisdictions “when necessary.” T. 29. Other portions of the Plan recommend single-family detached zoning for the properties adjacent to the Town’s forest preserve. Finally, Mr. Challstrom read a quote from page 10 of the Plan which he believes reinforces the intention not to recommend any optional densities for the Towne Crest property in the context of the specific recommendations for buffering:

The recommended optional densities represent the upper limit that appears to be appropriate for the parcel, taking into account the environmental considerations, overall transportation capacity and relationship to adjacent properties.

Based on the Town’s involvement in the development of the Gaithersburg and Vicinity Master Plan, he believes that Mr. Berman’s testimony that the Plan mistakenly failed to recommend optional density for this parcel “was unfortunate and inaccurate.” T. 30.

Mr. Challstrom testified that the Airpark Study Area described in the Gaithersburg Plan has not changed significantly since the Plan was adopted. He has lived there for 34 years, 30 of which he has been a town official. Additional single-family detached housing has been added to the town along Day Lily Lane, Boundary Street and Silver Dollar Court. In the Saybrooke community to the north of Towne Crest, there are 32 townhouses under construction. None of the changes that have occurred have included multi-family housing.

All of the roadways were included in the 1985 Plan and there have been no changes in transit services in the area. In his opinion, the 1985 Gaithersburg and Vicinity Master Plan is still appropriate and valid for the community. T. 31.

Mr. Challstrom described the public transit options available near the subject property. According to him, the walk to the station is approximately .7 to .8 miles. The MARC train station located within the town provides only limited commuter services. He testified that there are only four flag stops in the morning. According to Mr. Challstrom, a flag stop is one where the engineer must physically observe a potential passenger on the platform before the train will stop. Otherwise, the train proceeds without stopping. There are five trains in the evening coming back from Washington, D.C. These are a one-way service; the first three of the five trains are flag stops and the other two are drop-off stops only (i.e., not intended for picking up passengers). Therefore, the station does not provide full transit options like the Shady Grove Metro station. T. 32-33.

According to Mr. Challstrom, the property is served by the Ride-On Bus Route 57. Service is approximately every 30 minutes. The length of time necessary to go from the stop on Washington Grove Lane to the Shady Grove Metro varies depending on the particular time of day and the expected number of stops along the way. The time ranges between 16 minutes early in the day and is more typically 18 minutes. At times, it is as high as 22 or 23 minutes, according to the most recent route schedule. T. 33-34. The route proceeds from Lakeforest Mall along Washington Grove Lane and goes north into Derwood before arriving at Shady Grove. Another bus (Route 61) proceeds along Railroad Street closer to the MARC station, so is the same distance from the subject property as the MARC station. T. 34. To his knowledge, there is no WMATA bus service in the area. T. 34.

In preparation for the hearing, Mr. Challstrom testified that he reviewed the Shady Grove Sector Plan. During the planning process, he received reports from Town representatives who were more actively involved than he was. He has read through the Sector Plan and participated in meetings of the Greater Shady Grove Civic Alliance where details of the plan were periodically discussed as it proceeded to adoption. T. 35.

He compared the rationale for some of the recommendations in the Shady Grove Sector Plan with the Applicant's justifications for the level of density proposed on the subject property. In the Shady Grove Plan, the Metro West area is divided into two sub-areas. The sub-area closest to the Metro stations is recommended for residential densities between 30-40 units per acre. The sub-area further from the Metro station is recommended for 25-30 units per acre. The residential densities recommended for the Metro South area are the same: between 30-40 units per acre for the area closest to the Metro and 25 to 30 dwelling units per acre for the more distant area. T. 36. Bonus densities are recommended for MPDUs and TDRs. He believes that the Plan states that residential densities may be as high as 50 or 60 dwelling units per acre with the bonus density. T. 37.

In addition to density, Mr. Challstrom examined the walking distance between these areas and the closest entrance to the Metro station. The distance between the points furthest in the Metro South neighborhood to the Metro stations is approximately .5 miles or perhaps slightly over. That area has a maximum density of 30 units per acre. T. 36. The Master Plan justifies these densities by because the area is within walking distance of the station. T. 37.

In his opinion, the Gaithersburg Master Plan captures the expected density of a significant portion of the area very accurately. According to him, SDAT records indicate that 91 of the 123 homes in the Wedgewoods are owner-occupied, which leads to his conclusion

that the density and character of the area are not going to change significantly. As a result, he believes the area as developed is in complete compliance with the Gaithersburg Plan's recommendation. He also believes that this reinforces the validity of the evaluations by the Washington Grove Planning Commission regarding compatibility with the surrounding area—the Gaithersburg Plan is an accurate reflection of the community for the foreseeable future. T. 38. In his opinion, the community could support development at around 200 dwelling units per acre, which they believe is compatible and in compliance with the Master Plan. T. 39.

In response to a question from the Hearing Examiner on whether it is necessary to provide additional buffering next to the woods, Mr. Challstrom testified that the Town worked with the developer of the Saybrooke community, which was designated TDR-6. The developer ultimately decided to place R-90 zoning adjacent to the forest preserve to provide adequate spacing and land use surrounding the preserve. T. 40-41. Another developer had proposed townhouses on property bordering the east woods along Silver Dollar Court, but the Planning Board recommended single-family detached houses because of its proximity to the woods. T. 41. The Town has continually urged that development bordering the woods be zoned in order to protect and preserve the trees in the forest preserve. T. 42.

On cross-examination, Mr. Challstrom testified that that he did not have formal training as “an architect in plans.” He had not been involved in the recent amendments to the County's General Plan. T. 44. He has reviewed the 1971 Gaithersburg and Vicinity Master Plan. He disagreed that there have been no changes since that plan because there have been several amendments since that time. He did not know whether the Mid-County Highway had actually been constructed at the time the 1983 Master Plan was adopted, but stated that the

Plan's analysis assumed completion of these roads. T. 46. He agrees that the need for housing in the County has increased since the time of the Master Plan, although he is not familiar with recent statistics for the Gaithersburg area. *Id.* He is generally aware of policies encouraging housing near transit and promoting affordable housing. T. 47.

He acknowledged that in 1983 the Town submitted a request to the County to zone areas adjacent to its borders at a low density to provide a permanent buffer. T. 52. He is aware of some testimony in the Shady Grove Master Plan that the Town views urbanization surrounding its borders as a threat to its traditional historic way of life. T. 53. He disagreed that the Town had opposed the Girard Plaza development in 1986/1987; rather, he viewed the process as achieving an excellent, mutual solution. T. 53. He did not know whether the Town had opposed every zoning case between 1983 and 2009. T. 54. He was not familiar with the Housing Element of the General Plan. T. 57. He did not agree that language from the Housing Element of the General Plan could be interpreted to mean that master plans become less relevant over time. T. 58. He has heard in testimony that "wrap" construction was not developed at the time the current Gaithersburg Master Plan was developed. He stated that density was still an important issue, although good design planning was also important. T. 60.

Mr. Challstrom also testified on cross-examination that he was on the Town's Planning Commission when the Town's Master Plan was adopted, although he was not chairman. T. 61. He explained that the Town opposed the finding of several agencies that construction of the ICC would have no impact on the Town because it was incorrect. The Town hired its own noise consultants and negotiated follow-up noise assessments. T. 63-64. Language in the Town's Master Plan supports a finding that single-family detached housing

along the woods reduces the amount of dumping, vehicles, and vandalism that occurs there, as opposed to the area bordering Towne Crest. T. 65. The Town has documented repeated dumping of trash over the fence, apparently from the Towne Crest property. T. 69.

On re-direct examination, Mr. Challstrom testified that the Town supports some increased density on the property and would not be opposed to a development of approximately 200 units. This is because the Town found that some features of the development would be of value to the larger community. They believed that structured parking is a positive improvement and a more efficient method of redeveloping the area with a smaller footprint. The Town felt that a smaller footprint would allow the developer to reduce the development's impact on the woods. T. 68-69.

3. Mayor Georgette Cole:

Mayor Cole testified that she was a member of the Town's Council for six years and is currently its mayor. T. 69. She has been present at all of the meetings with the Town Crest representatives and with Technical Staff throughout 2011 and 2012. She is the liaison between the Town's Planning Commission and the Council. Both she and the Commission make sure that the Council gets all of the information relating to the project. T. 70.

After the Commission evaluated the PD-44 development plan, the Council decided to express official agreement with that evaluation, which was the purpose of the Council's resolution. The Council voted unanimously to approve the resolution because many of their residents opposed the project. The development is a standard item on the Council's agenda and they are updated on changes in the project. T. 70-71. She stated that the Town Council had read and reviewed Mr. Challstrom's memorandum and discussed it at their February 11, 2013, meeting. She and the Council agreed with the conclusions set forth therein. T. 71.

She has reviewed the development plan for the PD-35 Zone. The amendments have not caused the Town to change its position on the plan. She has read Mr. Davis's testimony considers the Town's position essentially the same as Mr. Davis' position. T. 70-72.

She stated the Town's position; the Town does not oppose redevelopment and believes an improvement of housing conditions on the property is good for the tenants and community. The Town's concerns surround the proposed density, the proximity to the single-family homes on Day Lily Lane, and the impact on the existing trees in the Westwoods. T. 72. The Town does not believe that the proposed density is consistent with the Gaithersburg and Vicinity Master Plan. The Town also believes that the application is contrary to the purpose clause of the PD Zone. The density requested, almost 40 dwelling units per acre, is incompatible with the Town of Washington Grove, which has a density of 1.08 dwelling units per acre. T. 72-73.

The Town does not agree with the Applicant's position that the minimum 100-foot building setback from other residential properties does not apply to the properties along Day Lily Lane because they are in a different zoning jurisdiction. T. 73. She was "appalled" when she first read the Applicant's position because the County "has always been so good about following that in our experience." T. 73. The developer is trying hard to fit a large development on a small property; the density of the PD-60 and PD-44 plan, combined with the structured parking, did not allow them to honor the setback for the homes on Day Lily Lane. T. 73. Even at the lower density, there is still an encroachment of the setback from the northernmost house on Day Lily Lane. T. 74. While this has also been modified to honor fully the 100-foot setback, this is only an alternative plan to the original PD-35 development plan. T. 74.

Mayor Cole presented an exhibit she called, “A Walk on Day Lily Lane.” T. 75. In her opinion, the exhibit demonstrates the character of the lane and the impact of removing the existing trees between the Towne Crest property and the existing single-family homes. T. 76. According to her, there are “a lot” of trees that are not listed on the Preliminary Forest Conservation Plan (PFCP). Elimination of these trees, in her opinion, will make a big difference to this area. T. 76. The forest conservation law requires trees more than 6 inches in diameter to be listed on the forest conservation plan. She visited the Day Lily Lane properties with the Council member responsible for forestry and they measured two specific trees in excess of 20 inches in diameter that had not been included in on the PFCP. There are a number of trees that are 50 to 60 feet in height. Once removed, the area is going to look very different. T. 78. These trees are definitely on the Applicant’s property. *Id.* If the developer has to do something about the sewer, obviously these trees will be impacted and will probably have to be removed because they are right on the border of the two properties, although primarily on the Towne Crest property. T. 79. Mayor Cole showed a picture of the property at 7 Day Lily Lane in order to show how green the area is, although only some of these trees will be removed. She showed additional photos of the property boundaries with the Westwoods north of the Day Lily homes, with large trees. If the sewer is replaced at that location, the trees will have to be removed which will make a big difference to the area. T. 82.

According to Mayor Cole, the Town has worked with an arborist to evaluate the PFCP and the PD-44 development plan. Her conclusions were submitted into the record. The arborist found that the PD-35 plan impacts a tree on the northeast corner of Ms. Umunna’s property. T. 83. Because a significant amount of the critical root zone is

impacted, she is concerned that the tree may damage her property and home. Construction of the proposed development plan will impact 57 very large or significant trees in the Westwoods. Seven of these trees are labeled as being saved and all have critical root zone impacts of 30% or more. Footnotes on the PFCP admit that even if the trees survive, this level of impact to the root zone shortens the tree's life span by one-third to one-half. The loss of large trees on the forest edge also endangers the health of the remaining trees because water flow and wind patterns change and the trees become exposed. T. 84.

She disagrees with Mr. Hornstein's testimony that the Town has rejected his offer to become joint stewards of the Westwoods. The Town felt that entering into a financial agreement would be inappropriate when the Town significantly disagreed on how the property would be developed. T. 84.

Contrary to the Applicant's evidence, the town does have ongoing plans for restoration and maintenance of the forest preserves. Their program began in 2007 and is continuing aggressively by controlling the spread of non-native invasive species and to control erosion stemming from a stormwater outfall from the Towne Crest area. T. 85.

Mayor Cole testified that the loss of trees affects the integrity and aesthetic value of the Westwoods as a whole and therefore the larger community as well. A large number of people use the woods for walking, and it serves as an amenity for the larger area rather than simply the Town. According to her, the loss of tree canopy will have a deleterious effect on the already serious stormwater run-off problems in the Westwoods from the existing Towne Crest and Wedgewoods communities. T. 85. The Applicant in conversations verbally acknowledged inheriting these responsibilities but feels the site plan will improve the control of water coming from the Towne Crest site. T. 85. The Town's arborist disagrees that the

new stormwater measures will not address the problems in the short-term. The arborist estimates that approximately 143,600 square feet of tree canopy will be eliminated and will greatly impact the flow of storm water across the property. While they will be adding trees, the canopy coverage will not be fully restored for 20 years. T. 86. Ms. Gilday, the Town's arborist, recommended some prophylactic measures to accompany construction of the development. She recommended that a tree protection fence be installed 40 feet from the property line. T. 86. Based on this information, the Town does not believe that the purpose clause of the PD Zone, which requires preservation and taking the greatest possible aesthetic advantage of trees, has been met. T. 86.

Mayor Cole also testified that the agreement between the developer and the Wedgewood 2 community association should be placed in the record because they acknowledged the parking problems that exist in the area. Residents of the Town who occupy Boundary Street (confronting the property) frequently complain of people from Towne Crest and the Wedgewoods using the street as overflow parking. Mayor Cole testified that both developments (i.e., Towne Crest and the Wedgewoods) have a "serious parking problem." The developer provided only two parking spaces per unit, which apparently is "woefully inadequate" to provide parking for the number of vehicles. T. 89. The Town is concerned because only 1.43 new spaces are required in the PD-35 Zone; the new development will provide only 1.52 parking spaces per unit. She believes that requirement assumes that the higher density PD Zone will be in closer proximity to transit. T. 89-90. Prior versions of the development plan called for a higher ratio of parking spaces to dwelling units; this version raises more concerns about the impact on existing parking. T. 90.

Mayor Cole testified that the Town Council has ongoing concerns about development of the property. While the Town does not know the source of trash accumulation in the Westwoods, it is a concern. They also have continuing concerns about the impact of the storm water run-off, although the Applicant has been good about acknowledging some responsibility for this, and they look forward to working with them in the future. In the meantime, the Town would feel more comfortable were the project redesigned at a lesser density, such as 200 units. T. 91. She thinks there is a good chance that if this were to occur, more trees in the Westwoods would be preserved. T. 92.

On cross-examination, Mayor Cole testified that she did not have the expertise to determine whether a lower density development would better preserve trees. She has reviewed the landscaping plans for both the PD-44 and PD-35 and believes that a “sensitively done” landscape plan in that area will provide something that looks good. T. 94. In its recommendation that redevelopment occur at 200 units, the Town did not consider whether or not structured parking could be provided. Nor did she know whether a lesser density would remove the necessity for a retaining wall along property’s boundary with Westwoods. T. 98.

4. Stacey Hornstein:

Mr. Hornstein testified for the Applicant’s rebuttal case. He stated that the Applicant will include as a binding element that the Applicant develop according to the Alternative B development plan (i.e., setting Building B back 100 feet from the property at 7 Day Lily Lane).

Mr. Hornstein testified that the property managers for the existing Towne Crest have informed him that the current development has plenty of parking and therefore, Towne Crest

is not the source of the lack of parking on Boundary Street. T. 101. He believes that the Wedgewoods may be the source of the parking problem there because they are most three and four bedroom townhouses with only two parking spaces. He agreed that there is a recognized problem, which is why the Applicant agreed to provide additional parking as part of the Towne Crest redevelopment. T. 102. He also suspects that overflow parking from two churches located to the east on the south side of subject property also contribute to the parking problem. T. 102.

He testified that the Applicant's engineers had been asked to come up with solutions to the problem of having to provide a retaining wall on the border with Westwoods. If the Town had been willing to give the developer an easement to grade into the Westwoods, the Applicant could have avoided using a retaining wall and preserved more trees. T. 102-103. Without the easement, the Applicant must install the retaining wall so all of the work may be done on its property. T. 103.

As to trash, Mr. Hornstein testified that the property managers have worked hard with the existing residents to prevent them from throwing trash over the fence. Some of the trash migrates to the Westwoods because people leave trash outside the existing dumpsters. When redeveloped, all trash collection will be inside the parking garages. He believes that the redevelopment will be much more attractive than the existing project because of that. T. 104.

The development plan also provides for some excess parking, according to Mr. Hornstein. T. 104. Both alternative development plans provide 30 spaces in excess of the Code requirement, although the final bedroom count has not yet been determined. T. 105. Right now, they plan to provide 25 3-bedroom units at the request of the Department of Housing and Community Affairs. Representatives of DHCA encouraged the Applicant to

provide these because there is a shortage of 3-bedroom affordable units in the County. T. 105. The Applicant will enter into an agreement with DHCA to provide these units. T. 106.

5. Ron Sieboth:

Mr. Sieboth, the Applicant's expert architect, testified that he prepared two exhibits showing the relationship between 7 Day Lily Lane and the existing and proposed development on the subject property. T. 106-107. One exhibit shows the distance between closest corners of the house at 7 Day Lily Lane to the existing buildings on the subject property. Currently, a distance of 56 feet separates the house with the closest existing apartment building. T. 108. The Alternative B development plan shows that the proposed development will be 140 feet from the same corner of the house. T. 107. A second exhibit shows the site line from the closest place on the property line of 7 Day Lily Lane to the existing buildings and the development under Alternatives A and B. T. 110. The existing buildings are in a cone of vision of approximately 22 degrees when standing at that location. The cone of vision increases to the top of the third floor under Alternative A. Under Alternative B, however, the cone of vision at 22 degrees is well above the building. T. 110. In his opinion, the exhibit demonstrates Alternative B will create a feeling of being more open than under existing conditions, even though the building is higher. The additional distance also creates the opportunity for more screening and therefore, more privacy. T. 111. This landscaping would further screen the residents of 7 Day Lily Lane from the proposed development. T. 111. In his opinion, the rear yard of the Day Lily Lane property will feel more open than it currently does. T. 112.

Mr. Sieboth testified as an architect that he did not think that the residents would experience noise from the project. Most of the outside noise is usually created by air

conditioning condensers or other heating/cooling equipment. The proposed project will have the air conditioning condensers on each deck inside a room with insulation around the condenser. He has found that this design results in much less noise generation. T. 113.

In his opinion, the enclosed parking garage serves as a better barrier to noise transfer than does surface parking, therefore, the residents will have some insulation from parking activities. T. 113.

They would have to change the design of the redevelopment to a different product type if it were limited to 200 units. He guessed that it would be smaller buildings with surface parking. The design is driven by ground value per unit; once the ratio increases, one must decrease the cost of amenities. In his opinion, the smaller buildings would look more dense than a few taller buildings. Even though smaller buildings would have open spaces between the buildings, he believes the courtyards included in the front façade of the proposed buildings accomplish the same purpose. T. 115. Fewer buildings also necessitate fewer access points along Towne Crest Drive. T. 115. In response to questions from the Hearing Examiner regarding whether it is possible to reduce access points among smaller buildings, he responded, “[T]heoretically you could.” T. 116. He acknowledged that the cost of the structured parking is driving some of the density on the site. T. 116.

On cross-examination, Mr. Sieboth testified that he did not prepare an exhibit showing the distance between 7 Day Lily Lane and Building B under Alternative A. He testified that Alternative A would have a greater site impact on Day Lily Lane than existing conditions. T. 118-119. He stated that the height of the existing building closest to 7 Day Lily Lane is approximately 30 feet, rather than 50 feet, as Ms. Umunna testified. T. 120.

According to him, it probably feels taller because the distance between them is so short. T. 120.

When asked whether structured parking is economically infeasible in developments containing 200 units, Mr. Sieboth replied, “[I]t really depends on how urban it is. I mean if you’re within the city limits, you obviously would, if you had 200 units you’d be doing structured parking because of the ground values closer to the urban core is. As you get further away from the urban core, you’re less likely to have structured parking.” T. 120.

6. Mr. David Ager:

On rebuttal, Mr. Ager testified that he disagreed with Mr. Davis’ interpretation of the Master Plan. The existing zoning permits 134 units on the subject property, or 16.52 dwelling units per acre. Using the gross tract area given by Mr. Davis would permit 154 units or 16.36 dwelling units per acre. This would mean the entire analysis area would have a total of 331 units or 15.7 dwelling units per acre. T. 123.

In his opinion, the age of the Master Plan greatly affects how it should be interpreted. He’s reviewed as many Master Plans as possible since the last hearing and observed a trend as the plans became more recent. The plans have become more complicated, more detailed, and more specific the newer they are. As an example, he compared the Shady Grove Sector Plan to White Flint master plan, the Gaithersburg plan in 1985 to the Clarksburg plan in 1994. The older plans used large areas to establish density. Within those areas, they used certain parameters that didn’t establish which properties got which density. According to Mr. Ager, many of the zoning lines don’t follow property lines. In his opinion, that is a very critical difference between the older and more recent plans. T. 124. The Clarksburg plan is

similar, although it provides slightly more narrative and illustrative diagrams to explain the zoning recommendations. T. 124.

In addition to the Gaithersburg master plan, according to Mr. Ager, other County policies are relevant to the proposed development. T. 125. The Housing Element of the General Plan signifies an enormous amount of effort on affordable housing and population growth. The Housing Element is very specific on how affordable housing and housing in general should be accomplished. T. 125. The Housing Element of the General Plan was an important component of the Council's density to exceed the density recommended in the Master Plan in G-840, which is located at the intersection of the mid-County connector and Washington Grove Lane. T. 127.

Mr. Ager testified on rebuttal that he disagreed with Mr. Davis' analysis of the Master Plan. T. 122. Those opposing the application have compared gross densities with net densities, which, in his opinion, is a very important distinction. T. 122. In addition, they have compared density of the proposed project with existing density, which he also believes is incorrect because compliance with a Master Plan should be compare the Master Plan recommended density with the density of the proposed project. The proposed project does not triple the density recommended by the Master Plan. T. 122. The existing improvements consist of 107 dwelling units. The existing zoning would permit 134 units. If all of the remaining capacity in the Analysis Area is applied to this property, 154 units would be permitted. T. 123. In his opinion, the older master plans are not nearly as specific as the more recent plans; the older master plans tend to make recommendations by large areas, but did not get into a lot of details within those areas. T. 123-124.

The PD Zone's purpose includes compliance with the General Plan, area master plans, and other important goals and policies. In Mr. Ager's opinion, the Housing Element of the General Plan was very specific about accomplishing additional housing and, in particular, affordable housing. T. 125. In his opinion, all Master Plans should be reviewed in light of that policy. T. 125. The Council's decision to rezone property in G-840 to a level above that recommended in the Master Plan was influenced by the Housing Element. T. 126.

When questioned why the Housing Element couldn't be used to support *any* increase in zoning, Mr. Ager responded that Mr. Davis' recommendations were not entirely clear because he actually proposed three different densities. One was an upper limit of 200 dwelling units. The other was for the PD-22 Zone. This could be calculated based on net or gross tract area, resulting in 217 or 253 units, respectively. T. 128. The highest density recommended by Mr. Davis (i.e., 253 units) is only 76 units less than what the Applicant is proposing on the subject property. T. 134. Thus, the density recommended by Mr. Davis is approximately the balance of the density recommended for the Analysis Area. T. 135.

He also disagreed with Mr. Davis that the Master Plan recommended density should be evenly distributed throughout Analysis Area 2. In his opinion, the Analysis Area has two unique characteristics that justify higher density on this property than elsewhere in the Area. The first is that the existing zoning on the subject property permits higher density than elsewhere in the Analysis Area; thus, it makes sense to have most of the density on the subject property. Second, the 1971 Plan shows multi-family zoning recommended for Wedgewood II; it follows that the planners intended this community to be more intensely developed than it was. The 1985 Plan affirms the existing development—redevelopment of Wedgewood II is unlikely because of the number of fee simple owners. T. 129. In his

opinion, the appropriateness of a PD-35 adjacent to townhouse zoning is more a question of compatibility than one of Master Plan compliance. T. 129. He thinks that the proposed development *is* compatible because it's "not density necessarily, but it's how you use it..." T. 129.

Mr. Ager pointed out portions of the Shady Grove Sector Plan where the PD-35 Zone was recommended for properties confronting townhouse zoning. T. 131-133. In one case, the PD Zone recommended does not have a density limit—the Plan lets the density be determined by compatibility with townhouses and single-family detached zoning across the street, although there is a four-story height limit. T. 134.

Mr. Ager submitted a time line he prepared to illustrate the planning history of the area to demonstrate that some of the assumptions made by Planning Board members were incorrect. T. 136. According to him, Planning Board members referred to the proposed density as being "three times" the density recommended by the Master Plan. T. 138. That is not a correct assumption if one interprets the Plan to permit the density recommended for the entire Analysis Area to be located on a single property. T. 139. In response to questioning from the Hearing Examiner, he testified that the total number of units permitted by the recommended zoning would be 154 units (based on the gross tract area), or 16.9 units per acre. T. 139. The density proposed here totals 329 dwelling units, or 36.4 units per acre.

In his opinion, individual Planning Board members struggled over process versus substance. He testified that certain portions of the transcript from the Board's hearing indicate that they believe that PD-35 is appropriate for the property. T. 144. In addition, the Planning Board members had not been presented with Mr. Ager's interpretation of the

density permitted by the Master Plan. T. 144. There was no discussion of the density for the entire Analysis Area. T. 144.

Mr. Ager described three rezoning cases, which he believes recognize that an increase in density is warranted when a master plan is old. T. 145. These cases included G-873, G-840, and G-909. He agrees with Mr. Davis that he misinterpreted the Council's decision in G-873. The other two cases, according to him, have found reasons that density recommended in a master plan should be increased. He opined that the Council had approved G-909, even though it called for an increase in density above that recommended in the master plan, because the rezoning implemented some important County policies and because of a variance that occurred between 2006 and 2012. T. 146. According to Mr. Ager, G-840 is important (even though it didn't require density above that recommended by the Master Plan) because the Council recognized the importance of the Housing Element. T. 147.

Mr. Ager testified that the project will implement Smart Growth. T. 149. Smart Growth isn't limited to projects sitting on top of Metro stations; it is generally targeted toward areas with infrastructure and services in place, such as the area surrounding the subject property. T. 149.

Nor, in his opinion, is the PD-35 Zone comparable to the residential densities in the Shady Grove Sector Plan. Properties within the Districts closest to the Metro station are zoned TOMX/TDR, which permits mixed commercial and residential development up to a 1.6 FAR. The zone requires that minimum of 70% of the development to be residential and the remaining 30% to be commercial. On the west side of the Metro station, there is no cap on the number of dwelling units. To express FAR here in dwelling units per acre, he

converted the FAR to square feet and divided by 1,000 square feet, a reasonable size for a residential unit. This yields a total of 695 units, or 48.77 dwelling units per acre. If one adds bonus densities for MPDUs and Workforce housing, the total yield is 918 units or 90 dwelling units per acre, although this would not occur because of the required residential element. On the north side of the Metro, the unit per acre cap is 30 dwelling units per acre. If averaged across the Sector Plan area, the density is 25 dwelling units per are. In his opinion, were the Council to redo this Sector Plan today, there would be much higher density at the Metro, similar to the 4.0 density in the White Flint plan. T. 150-156.

On cross-examination, Mr. Ager testified that the Council would evaluate Shady Grove independent of what had occurred in White Flint. T. 159. He testified that the Shady Grove Plan called for PD-35 Zoning within 400-1,500 feet from the Metro. The subject property is approximately 9,000 or 10,000 feet (approximately 2 miles) from the Shady Grove Metro (as the crow flies). T. 160. The Plan recommends 21.3 dwelling units per acre for the most dense rezoning closest to the Metro. T. 161. He acknowledged that the 1.6 FAR recommended by the Sector Plan is roughly equivalent to 30 to 40 dwelling units per acre if measured across the entire gross area. T. 162. Some of those zones are TOMX-2 with a TDR bonus. He agreed that some of the zones in Analysis Area 2 also have a TDR bonus recommendation. T. 163.

Mr. Ager agreed that he had made a mistake in concluding that Council's decision in G-873 increased the residential density above that recommended in the master plan by placing a bonus on top of the existing density. T. 164.

He read a section of the Housing Element of the General Plan stressing the pressure for redevelopment on older mid-County neighborhoods closer to facilities and services. A

passage also recognized that these neighborhoods are an important source of affordable units. The Housing Element recommends taking measures to protect these neighborhoods as a means of preserving the existing, more affordable housing stock. Mr. Ager agreed that the existing housing on the subject property falls within these recommendations. T. 166-167.

7. Ms. Nancy Randall:

Ms. Randall testified that the bus which stops immediately across from the subject property is a 5-minute bus ride to the Gaithersburg MARC station and has stops scheduled approximately every ½ hour. The bus route at the intersection of Washington Grove Lane and Mid-County Highway (Route 60) goes to the Shady Grove Metro and into Rockville. There are also several additional bus routes that connect with this one to access points in Gaithersburg, although she acknowledged that the route which circulates through the communities is a “long one.” In her opinion, the easiest way to get to the Metro would be to board the bus at the stop across from the subject property and take the Route 57 to the Gaithersburg MARC station, take the MARC train to Rockville, and switch to the red line at Rockville. T. 175.

In Ms. Randall’s opinion, the proposed development does represent “Smart Growth,” which she defines as building near existing infrastructure, including roads and highways. There is excellent access to the road network because of the property’s proximity to the ICC and to I-370, as well as transit services. She compared the project with the Annapolis Towne Center; it is proximate to highways, although the Metro is ½ mile away. T. 176.