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Transcript of Motions to Dismiss Hearing

Date: January 13, 2020

Case: Heritage Gardens Land, LLC

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Conducted on January 13, 2020

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1 A P P E A R A N C E S	1 P R O C E E D I N G S
2 ON BEHALF OF APPLICANT, HERITAGE GARDENS LAND, LLC:	2 HEARING EXAMINER ROBESON: Good morning. Do the parties
3 PATRICIA A. HARRIS, ESQUIRE	3 want to come up? Is the court reporter ready? I'm calling
4 MICHAEL GOECKE, ESQUIRE	4 the case of application number CU 19-09, Heritage Gardens
5 LERCH, EARLY & BREWER	5 Land LLC, a request for conditional use for an independent
6 7600 Wisconsin Avenue	6 living facility for seniors or persons with disabilities
7 Suite 700	7 under 59 5.3.3.2 C of the zoning ordinance. Would the
8 Bethesda, Maryland 20814	8 parties identify themselves for the record?
9 (301) 986-1300	9 MS. HARRIS: Good morning, Pat Harris with Lerch, Early
10	10 & Brewer on behalf of the Petitioner.
11 ON BEHALF OF WEST MONTGOMERY COUNTY CITIZENS	11 HEARING EXAMINER ROBESON: Okay.
12 ASSOCIATION:	12 MR. GOECKE: Good morning. Mike Goecke, also on behalf
13 DAVID BROWN, ESQUIRE	13 of the Applicant.
14 LAW FIRM OF KNOPF & BROWN	14 HEARING EXAMINER ROBESON: And you're with?
15 P.O. Box 59335	15 MR. GOECKE: I'm with Lerch, Early & Brewer on behalf
16 Potomac, Maryland 20854	16 of the Applicant.
17	17 HEARING EXAMINER ROBESON: Okay.
18 ON BEHALF OF GREATER SOUTH GLENN NEIGHBORHOOD	18 MR. BROWN: Morning. Dave Brown, Knopf & Brown on
19 ASSOCIATION, INC, ET AL:	19 behalf of West Montgomery County Citizens Association.
20 WILLIAM J. CHEN, JR., ESQUIRE	20 HEARING EXAMINER ROBESON: All right.
21 CHEN, WALSH, TECLER & MCCABE	21 MR. CHEN: Good morning Madam Examiner. My name is Bill
22 200A Monroe Street	22 Chen and I represent the Greater South Glenn Neighborhood
23 Suite 300	23 Association, Inc. Neil Goldman and Marie Victoria Cram,
24 Rockville, Maryland 20850	24 Rick Magan and Anna Magan, Edward Broom and Marie Brigham
25 (301) 279-9500	25 and Nina Westbroth.

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<p>5</p> <p>1 HEARING EXAMINER ROBESON: Okay. Thank you. Is Mr. 2 Buttnick here? 3 UNIDENTIFIED SPEAKER: (inaudible) here. 4 HEARING EXAMINER ROBESON: Okay. You're actually a 5 party of record. So you're welcome to sit at the table if 6 you want it's up to you. If you're not -- it's fine. Okay. 7 One preliminary matter. I see a lot of people here today 8 and I saw people signed up on the sign-up list. This is a 9 motion for summary decision, which means that the parties 10 have agreed to all the facts. All we are looking at today 11 is whether this use is -- the use requested falls within 12 the definition of independent living facility for seniors. 13 So we will not be taking testimony because one of the 14 reasons -- one of the criteria for summary decision is 15 there is no dispute in any facts. So I really can't take 16 testimony. The parties have agreed to the relevant facts 17 related to the sole issue here today. If I deny the motion 18 to -- the motion here is to dismiss the case because it 19 doesn't fall within this definition under the zoning 20 ordinance. If I deny that motion and the case proceeds, 21 there is a hearing currently scheduled for February 10th. 22 Everybody will be able to have their say at that time. So I 23 just wanted to say that. Do the parties have any 24 preliminary matters? 25 MR. BROWN: Not I. Not me.</p>	<p>7</p> <p>1 It's not butter. It's not an independent living facility 2 for seniors. Instead, you have an imitation that strives to 3 look like the real thing. What it really is, is townhouse 4 living made to look like a conditional use so that it can 5 be inserted into a zone that prohibits townhouse living, 6 but allows the conditional use. Further time, energy, and 7 resources should not go into evaluating whether an 8 imitation of the real thing meets the compatibility and 9 other standards that apply to the real thing. The motion to 10 dismiss should be granted. On a personal note, I've been 11 evaluating land-use applications for two decades now, 12 including several years as a commissioner on the Alexandria 13 Planning Commission. Until now I've never seen a case that 14 comes at all close to what I see here, a blatant, too 15 clever by half manipulation and evasion of the traditional 16 constraints of Euclidean zoning development standards. It 17 is one thing when reasonable minds might differ as to the 18 impact of a new project on existing nearby development as 19 measured by standards of traffic congestion, environmental 20 concerns, compatibility concerns, affordable housing 21 contributions, and the like. That is what a traditional 22 contested zoning case is all about. It is quite another 23 thing however, to try to skirt the zone specific use and 24 density constraints by characterizing a project is 25 something other than what it truly is. That is what is</p>
<p>6</p> <p>1 HEARING EXAMINER ROBESON: Mr. Chen? 2 MR. CHEN: No. 3 HEARING EXAMINER ROBESON: The parties are unusually 4 silent on that issue. I will say this; order of proceeding, 5 we've got cross-motions for summary judgment. So -- 6 summary decision. So Mr. Brown, I will let you go first. If 7 Mr. Chen wants to join with Mr. Brown, we can take you -- 8 we can have the Applicant respond and it's your motion. So 9 you get the rebuttal. All right. So with that, Mr. Brown, 10 do you want to go ahead? 11 MR. BROWN: Good morning Examiner Robeson Hannan. 12 HEARING EXAMINER ROBESON: Just Robeson. 13 MR. BROWN: Robeson, all right. 14 HEARING EXAMINER ROBESON: Okay. It was a legal thing. 15 Okay, go ahead. 16 MR. BROWN: We are all familiar with the old adage that 17 if it looks like a duck, and walks like a duck, and quacks 18 like a duck, well, it's a duck is in it. Well, I'm blessed 19 with a wife that bakes cookies. And she told me early on 20 that when the recipe calls for a stick of butter, you do 21 not put a stick of margarine in instead. It may look like 22 butter, but it's not the same thing and the cookies don't 23 come out the same way. And I can attest to the soundness of 24 that advice. The motion to dismiss today is based on the 25 same idea. What you have before you is not the real thing.</p>	<p>8</p> <p>1 going on here. And has I've explained in my motion papers 2 and will summarize here by first noting key undisputed 3 facts and then making four points. One, the project is 4 household living. Two, it is not group living. Three, the 5 key missing ingredient is shared living space. And four, 6 DPS's enforcement concerns flow directly from how this 7 application disregards the difference between household and 8 group living. I will then -- 9 HEARING EXAMINER ROBESON: Do you mind repeating those 10 four points again? 11 MR. BROWN: Not at all. One, the project is household 12 living. Two, it is not group living. Three, the key missing 13 ingredient is shared living space. 14 HEARING EXAMINER ROBESON: Okay. That's what I'm -- 15 MR. BROWN: And four DPS's enforcement concerns flow 16 directly from how this application disregards the 17 difference between household and group living. I will then 18 conclude with three hypothetical examples that make 19 unmistakably clear the imitation game that the Applicant is 20 playing in pursuing this application. First, the undisputed 21 facts. There is no other senior living -- first, there is 22 no other senior living conditional use in the county where, 23 capital A, the living units are held in fee simple. B, each 24 unit is on his own recorded lot. C, each unit is completely 25 lacking in communal space. Or D, unit owners are joint</p>

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<p>9</p> <p>1 holders of the special exception conditional use. Second, 2 there will be no live person on site outside working hours 3 to provide any form of senior services. Third, technology- 4 based or senior tailored homes services are completely 5 optional to the homebuyer and are generally available to 6 homeowners elsewhere regardless of age. Fourth, the kitchen 7 in the clubhouse is not there for everyday dining use. 8 Fifth, many of the services seniors may need will come from 9 off-site providers not from the Sage Life, quote, Heritage 10 Navigator, unquote. Six, there is nothing, quote, senior 11 services, unquote specific about the provision of 12 landscaping, snow removal, lawn care, and maintenance staff 13 as proposed. These are typical of other townhouse projects. 14 Seventh, particularized care plans and home visits, like 15 the technology services, are completely optional for the 16 homebuyer. Eighth, homeowners are not obliged in any way to 17 share space or interact with their neighbors if they don't 18 want to, especially since the architectural design of the 19 living units makes that very easy to do. Now to my four 20 points. We start with the overall structure of the zoning 21 ordinance, which characterizes three different types of 22 residential uses; household living, group living, and 23 accessory uses. We are all in agreement that this is not an 24 accessory use. We are all in agreement that it is a 25 residential use. We are only in disagreement about whether</p>	<p>11</p> <p>1 MR. BROWN: And three unit living is defined in terms 2 of the townhouse building type. 3 HEARING EXAMINER ROBESON: Right. Okay. 4 MR. BROWN: On to group living. From the very start of 5 the zoning ordinance revision process in 2011, group living 6 has been defined by what it is not, household living. So if 7 a use is household living, it is not group living. This 8 project is household living, not group living. And since 9 the conditional use independent living facility for seniors 10 is a subset of group living and only group living, the 11 project is not that conditional use. That is the simple, 12 straightforward conclusion to be drawn. But I want to 13 reinforce it's correctness by examination of the evolution 14 of the definition of group living from its origin to the 15 present day. And I have an exhibit for you that traces the 16 changes in the statutory language. 17 HEARING EXAMINER ROBESON: Is this from the legislative 18 history? 19 MR. BROWN: Yes. 20 HEARING EXAMINER ROBESON: What is -- what are you 21 giving me? 22 MR. BROWN: I'm going to explain exactly what this is. 23 HEARING EXAMINER ROBESON: Okay. 24 MR. BROWN: This is nothing more than a faithful 25 recollection of the exact language in the various drafts of</p>
<p>10</p> <p>1 it's a household use or a household living use or a group 2 living use. My first point is that it's definitely one of 3 household living. There are 9 duplexes and 11 townhouse 4 triplexes. Each one -- they meet the definition of two 5 unit living, which is, quote, two dwelling units in a 6 duplex building type, and townhouse living, three or more 7 dwelling units in a townhouse building type. The clubhouse 8 and its services do not alter this basic arrangement. There 9 are other townhouse developments that, though not required, 10 for marketing purposes do provide community facilities for 11 residents and services for common areas such as lawn and 12 tree care. This does not convert them from townhouse living 13 into something else. I am accused of conflating use with 14 building type. But here, the use is actually defined in 15 terms of the required building type. Point number two -- 16 HEARING EXAMINER ROBESON: Wait. Which use is defined 17 in terms of building type? Household living or group 18 living? I noticed that household living is defined in terms 19 of building type, but where is the group living? 20 MR. BROWN: I'm only talking at the moment about 21 household living. And so that -- 22 HEARING EXAMINER ROBESON: Okay. All right. 23 MR. BROWN: The statute says that two unit living is 24 specifically defined in terms of a duplex building type. 25 HEARING EXAMINER ROBESON: Right.</p>	<p>12</p> <p>1 the zoning ordinance rewrite. 2 HEARING EXAMINER ROBESON: I was going to ask -- I 3 think the Applicant said the legislative history was 4 silent, but you are saying it's not silent. 5 MR. BROWN: Well, I think history is the wrong word to 6 use. I am only giving you the actual historical changes in 7 the text of the zoning ordinance here. 8 HEARING EXAMINER ROBESON: The 2014 zoning ordinance, 9 yes. You're saying from the inception that you are 10 giving -- sorry. 11 MR. BROWN: I'm -- 12 HEARING EXAMINER ROBESON: You are giving me the text 13 of different drafts of what led up to the 2014 zoning 14 ordinance? 15 MR. BROWN: And nothing more. Plus, I'm also give you 16 the change in that definition after the zoning ordinance 17 went into effect. That's point number 13 on this list. 18 HEARING EXAMINER ROBESON: Any objections? 19 MR. CHEN: Would this be Exhibit 145? 20 HEARING EXAMINER ROBESON: Yes. 21 MR. BROWN: 140 -- 22 MR. CHEN: Five. 23 MS. HARRIS: Yes, as I indicated in our brief, there is 24 no legislative history. These are simply the various 25 iterations of that provision. And actually I believe Mr.</p>

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13	<p>1 Brown concurred with our conclusion that there was no 2 legislative history. Therefore, I don't think this has any 3 value on its own. 4 HEARING EXAMINER ROBESON: Mr. Brown? 5 MR. BROWN: All I'm doing is providing some insight 6 into the -- into how we got to where we are from the 7 various drafts that were adopted. 8 MS. HARRIS: But without the -- 9 MR. BROWN: This is not -- legislative history is 10 usually thought of as explanations or reasons for why 11 something changes. 12 HEARING EXAMINER ROBESON: Yeah, I agree with you. This 13 can be legislative history. I do agree the different 14 iterations as they developed the thing can be legislative 15 history. 16 MS. HARRIS: But I would say without any background or 17 memos indicating what the reason was for the changes, it's 18 simply speculation to conclude that a change in language 19 was intended for a certain purpose. 20 HEARING EXAMINER ROBESON: I understand what you are 21 saying. I think what I'm going to do, I'm going to let it 22 in as 145, but I'm going to give it the weight it deserves. 23 (Exhibit 145 was admitted into the record.) 24 MR. BROWN: All right. 25 HEARING EXAMINER ROBESON: Which I agree there are some</p>	15	<p>1 document -- 2 MR. BROWN: All I'm saying is that we exhausted 3 everything we could to find out why this change was made 4 and came up empty. 5 HEARING EXAMINER ROBESON: I see. Okay. 6 MR. BROWN: And I believe that supports the inference 7 that the dropping of that sentence to not -- should not be 8 thought of as a change in the intended meaning of the -- 9 HEARING EXAMINER ROBESON: A substantive change. 10 MR. BROWN: Of the language. 11 HEARING EXAMINER ROBESON: Okay. 12 MR. BROWN: Now, the very last change in the group 13 living definition took place in 2015 after the zoning 14 ordinance rewrite was adopted. And I also want to show you 15 two exhibits on that change. The actual zoning text 16 amendment that made the change as well as the legislative 17 draft from the -- from I think it was Jeff Zions senior 18 legislative analyst explaining why the change was made. 19 The -- what they did in this particular -- 20 HEARING EXAMINER ROBESON: Well, wait a minute. Wait a 21 minute. Before we start talking about this, these are 22 public records on the other hand. I feel that we should 23 introduce these as exhibit. Are there objections, Ms. 24 Harris? 25 MS. HARRIS: I need a moment to look at the --</p>
14	<p>1 caveats to this. So I am going to let it in because it 2 constitutes legislative history and you can all fight -- 3 discuss the weight it should be given. 4 MR. BROWN: All right. Now to describe this exhibit 5 very briefly, as you can see, for several -- 6 HEARING EXAMINER ROBESON: Wait. What should we call 7 it? History of group living definition, 2014 zoning 8 ordinance. Okay. Go ahead. 9 MR. BROWN: As you can see from several staff draft 10 iterations, the definition included this descriptive 11 sentence at the end. Generally, group living facilities 12 have a common meeting area for residents and residents may 13 receive care or training. This sentence was dropped in the 14 revised plan for draft of March 13, 2013. That's number six 15 on this list. You see where, after that, it's no longer 16 there. So we inquired of staff why this happened. Staff had 17 no record of any specific discussions of this change with 18 the board itself and also no staff notes about the change 19 even after checking with Pam Dunn who was in charge of 20 those details at the time. 21 HEARING EXAMINER ROBESON: Okay. That's not -- I 22 hesitate to accept that because that's not in what's been 23 filed. So I don't want -- I don't think it's fair to hear 24 what -- nobody is under oath, nobody is subject to cross- 25 examination. So if you could glean what you can from this</p>	16	<p>1 MR. CHEN: Just for clarity of the record, is 146 the 2 ordinance number 1808? 3 HEARING EXAMINER ROBESON: I haven't marked it yet 4 because I haven't taken it in. 5 MR. CHEN: Okay. 6 MS. HARRIS: No, we have no objection. 7 HEARING EXAMINER ROBESON: Okay. So 146 is 1808, 8 ordinance number 1808. 9 (Exhibit 146 was admitted into the record.) 10 MR. BROWN: Well, it's an excerpt from it. 11 HEARING EXAMINER ROBESON: Well, what I'm going to do, 12 if it's an excerpt -- oh, because this was the -- 13 MR. BROWN: It's a -- it was the cleanup statute. 14 HEARING EXAMINER ROBESON: Yes, it's huge. 15 MR. BROWN: It's much longer. 16 HEARING EXAMINER ROBESON: Yes, okay. This was ZTA 17 1509? 18 MR. BROWN: Yes. And Exhibit 147 is an excerpt as well. 19 HEARING EXAMINER ROBESON: In 147 is excerpts, fed 20 committee one? 21 MR. CHEN: 2 fed committee one. 22 HEARING EXAMINER ROBESON: What I'm looking at is fed 23 committee number one, work session 2. Oh, that's the agenda 24 item. Okay. Fed committee work session 2 on ZTA 1509. Okay. 25 (Exhibit 147 was admitted into the record.)</p>

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<p>17</p> <p>1 MR. BROWN: Now, if you will look at page 5 of that 2 exhibit -- 3 HEARING EXAMINER ROBESON: The 147? 4 MR. BROWN: Yes. 5 HEARING EXAMINER ROBESON: Okay. 6 MR. BROWN: You will see the next to the last thing on 7 page 5 is a committee -- is committee recommendation on 8 section 3.3.2, which is the one we are talking about. And 9 what it says is, staff noted the Planning Board's 10 recommendation to delete the requirement for a minimum 11 tendency of 30 days for group living. This modification was 12 proposed to allow the continuation of short-term group 13 living uses with tendencies of less than 30 days that 14 currently operate within the County and provide a valuable 15 social service. The committee supported this change. I have 16 been unable to locate any other explanation at the Council 17 level for this change. And it appears to have been enacted 18 without any controversy. 19 HEARING EXAMINER ROBESON: What was the change? 20 MR. BROWN: The change was to -- if you look at 21 the -- at the enacted draft in number 12 on the first 22 exhibit, the phrase; where tenancy is arranged on a monthly 23 or longer basis, is what has been dropped. So the statute 24 now ends simply with section 3.3.3.1. 25 HEARING EXAMINER ROBESON: I see. I think it changed</p>	<p>19</p> <p>1 living uses. It was not necessary to repeat the, quote, not 2 the household living requirement, in each of the more 3 specific definitions for it to apply. There is no conflict 4 or ambiguity in the statutory scheme necessitating resort 5 to the general versus specific rule of precedents espoused 6 by the Applicant. Indeed, in the battle of construction 7 rules, the more apt ones are that the Applicant's argument 8 erroneously renders the group living definition mere 9 surplusage in the statutory scheme and also violates the 10 principle that whenever possible, all statutory provisions 11 are to be given effect and the statute interpreted as a 12 harmonious whole. Moving on to point number three. Shared 13 living space is an essential feature of group living. The 14 plain language of the definition of independent living 15 facility for seniors makes shared living space and 16 essential feature of the conditional use. It means, quote, 17 a building containing dwelling units and related services 18 for senior adults. While it might be reasonable to 19 interpret this -- that provision as allowing more than one 20 building, say if they were very close or connected by 21 breezeway and sharing services, in no way can it mean, as 22 HG argues, that it can be an unlimited number of fee simple 23 houses, townhouses, duplexes, or even single-family 24 detached houses with no shared senior living space required 25 to be provided in any of them. It is telling also, that</p>
<p>18</p> <p>1 the height limitation too, but yes, that does -- 2 MR. BROWN: Well, I'm not exploring any changes in the 3 conditional use. 4 HEARING EXAMINER ROBESON: I see that. I see. 5 MR. BROWN: I'm just talking about group living. 6 HEARING EXAMINER ROBESON: Okay. 7 MR. BROWN: And you will be happy to know I have no 8 other exhibits today. 9 HEARING EXAMINER ROBESON: I am happy to know that. 10 MR. BROWN: So the amendment did not change the 11 expectation of group living; persons occupying some form of 12 multiunit premises as tenants. It expanded the use to short 13 term tenants. Now, in this case, the Applicant argues that 14 the definition is effectively irrelevant because it 15 expresses a general requirement not reiterated in the 16 requirements for the conditional use itself and therefore 17 those more specific precedents, requirements, must take 18 precedence over the general definition. But there is no 19 occasion to apply rules of statutory construction when the 20 plain meaning of the statute is clear and unambiguous. The 21 statute is to be applied as written. Here the statutory 22 plan is clear and unambiguous. There are several group 23 living uses whose nature is specifically defined use by 24 use, something the general category cannot itself do. Each 25 has intentionally been included in the subset of group</p>	<p>20</p> <p>1 neither the owner of the property nor the Applicant, the 2 contract purchaser, claims any expertise or experience with 3 providing services for senior adults or operating 4 independent living facilities for seniors. HG is a 5 developer of high-end townhouses as HG indicates in its 6 most recent brief. While it will be building and selling 7 the 51 townhouses and duplexes, ultimately the conditional 8 use will be held by the HOA and the 51 unit owners and Sage 9 Life, here not a co-Applicant on the conditional use will, 10 quote oversee, unquote, and quote, be responsible for 11 ensuring compliance, unquote. But without any shared use 12 space for senior services in the very buildings where the 13 seniors live, the illusion of senior living has no 14 enforceable reality aside from readily breachable contract 15 relationship with the third party that does have senior 16 living experience, a third party that is changeable and not 17 itself directly subject to the terms and conditions of the 18 conditional use. Any doubt about the Council's expectation 19 that independent living facility for seniors would include 20 some form of shared living space is eliminated by examining 21 the company it keeps among the few use categories that are 22 included in group living; dormitory, personal living 23 quarters, and residential care facility. Not detailed in my 24 reply brief the definitions of each of these, which clearly 25 state or imply that the living arrangements of the</p>

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<p>21</p> <p>1 occupants will, to at least some extent, be in shared 2 space. Here there is absolutely nothing shared in the 3 living arrangements of the buyers of these million-dollar 4 homes, not even apparently the walkway from the street to 5 the porch as one sees in most difficult duplexes. 6 Interesting -- interestingly, the Applicant characterizes 7 my depiction of a dormitory as shared living space as a 8 stretch in that there are individual, coveted dormitory 9 structures on the lawn at UVA that are not shared spaces. 10 Maybe so. I don't know. But common sense must prevail. The 11 UVA lawn is nothing more than the exception that proves the 12 rule. It is the Applicant that is doing the stretching. The 13 Applicant has erroneously characterized our claim as 14 insistence that the conditional use be in a single 15 building. That is not our argument. If there are multiple 16 buildings each with shared space, that would not invalidate 17 the conditional use. But if as here, each of the multiple 18 buildings is lacking in shared space, that fails the test 19 of group living. Similarly flawed is the Applicant's claim 20 that somehow our conceding that the project would meet the 21 conditional use requirements if provided in a single 22 building in the RE2 zone is an admission that providing the 23 services in a separate clubhouse or concierge requirement 24 would be sufficient. To the contrary, services provided in 25 the context of shared living space is qualitatively</p>	<p>23</p> <p>1 novel scenario envisioned by Heritage Gardens; 50 plus 2 property owners subject to regulation of the one 3 conditional use. If there are other conditional uses out 4 there with dozens of property owners subject to its 5 regulation, neither HG nor DPS has brought them to your or 6 our attention. Indeed, the zoning ordinance does not even 7 begin to contemplate such an outcome. It states that a 8 conditional use application may include all or part of a 9 property, that's section 59-73.1A2. It says that the 10 applicant must own the subject property or be authorized by 11 the owner to file the application. That's 59-73.1B1A. And 12 that the holder must notify the board of appeals or the 13 hearing examiner of any change in land ownership. That's 14 59-73.114. All of these provisions are plainly geared to 15 regulation of a single property or part of a single 16 property owned by a single entity or at most, joint tenants 17 or tenants in common on the single property. Now the 18 applicant would say that the singular includes the plural 19 in the zoning ordinance. So possibly -- well, contiguous 20 properties under common ownership, each of which will be a 21 co-holder of the conditional use application could be 22 made -- that could be made to work. But that is really a 23 much simpler structure than has been presented to you here. 24 The situation here is likewise not one where tenants 25 execute detailed leases agreed to with one landlord or a</p>
<p>22</p> <p>1 different than the purely voluntary options the Applicant 2 proposes to offer in individual homes and outside the 3 homes. Fourth point; DPS's enforcement concerns and 4 inconclusive finding are links it to the novel notion of 52 5 holders of the conditional use. We previously noted that 6 any proposed prospect of conditional use enforcement would 7 require 52 holders of the entitlement, 51 units plus the 8 LLC holding the common areas or HOA. HG has not disputed 9 this necessity or than what adds this complication is the 10 novel effort to characterize 52 individual properties as 11 within and subject to the umbrella of conditional use, 12 something that would not be necessary if the units were 13 rental and the property owner help the conditional use. 14 That is the case in virtually all of the special exceptions 15 or conditional uses previously approved as senior living 16 facilities except one or two condominium units where the 17 unit owners again are not themselves subject to conditional 18 use regulation. So even though DPS has now opined that 19 multiple buildings and multiple dwelling units with an 20 accessory structure might fit the conditional use 21 definition in the RA2 zone, it found the current 22 applications fit, quote, inconclusive, unquote, expressing 23 enforcement concerns, ownership, details of the HOA 24 structure, resident obligations, and the perpetuity of Sage 25 Life's role. These concerns quite obviously flow from the</p>	<p>24</p> <p>1 condominium board of directors administers a condominium 2 for the benefit of its unit owners under detailed rules and 3 regulations. With dozens of conditional use holders, DPS, 4 the board of appeals, and the hearing examiner are all 5 quite ill-equipped to enter into the fray of whatever 6 internal regulatory processes that would be necessitated to 7 make the conditional use enforcement plausible and 8 effective. Just to cite a few examples. What happens when a 9 unit owner refuses to pay their fees? What if Sage Life 10 defaults on its contractual commitments? What happens when 11 the senior services proposed to be provided by Sage Life 12 turn out to be far less substantial and efficacious than 13 advertised to the buyers of the townhomes? The traditional 14 answer is that the conditional use enforcement process 15 contemplates a single responsible person or entity that 16 must comply with whatever conditions are attached to 17 conditional use approval under pain of conditional use 18 forfeiture. This enforcement regime is simply not going to 19 work here. It's not suited to application to dozens of 20 property owners as conditional use holders. Imagine, for 21 example, one of the unit owners in willful violation of the 22 age restriction. How is a show cause order revocation to be 23 worded and revocation to be forced when none of the other 24 50 unit owners has any blame in the violation? Or imagine 25 if the HOA, as LLC successor, is in violation due to the</p>

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<p>25</p> <p>1 demise of its contractual undertakings with Sage Life 2 regardless of who is at fault? If the conditional use must 3 be revoked because there is no plan to revive and replace 4 those services, what is the status of the 51 other 5 conditional use holders? Presumably, they would no longer 6 be conditional use holders, but nonetheless, owners of 7 residences that are nonconforming uses. That is such a 8 toothless penalty for the HOA, that one can easily foresee 9 the HOA, once all the units are sold, doing very little to 10 maintain senior services and quite possibly petitioning for 11 conditional use abandonment with the developer having 12 successfully profited from more than tripling the density 13 of the single-family housing in this 30 acre patch of the 14 RE2 zone. It's not hard to imagine the HOA lacking any 15 financial incentive or maybe even wherewithal to maintain 16 the illusion that it is overseeing an independent living 17 facility for seniors. Now for my last point, I want to 18 compare this project to three hypothetical projects that it 19 closely resembles. These hypotheticals further drive home 20 the point that the project is solidly grounded in the game 21 of imitating the real thing, a true, independent living 22 facility for seniors. The first scenario I call the 23 rezoning scenario. First, imagine everything about the 24 application, the buildings, the streets, the services, 25 everything, is identical to the current application. The</p>	<p>27</p> <p>1 of right in a particular zone. The condition being that a 2 zoning body must in each case decide under specified 3 statutory standards whether the presumptive compatibility 4 in fact exists. I'm quoting from Crestwell v. Baltimore 5 Aviation Services Inc., 257 Md. 712, page 719, 264 A2d 838, 6 page 842, from 1970. Now given all of this, why has this 7 project not been presented to you as a local map amendment? 8 If it were, your report and recommendation to the District 9 Council would have to address 59-7.2.1 E3A and advise the 10 Council whether there had been either a, quote, and I'm 11 quoting from the statute, substantial change in the 12 carriage of the neighborhood since the original zoning, 13 unquote. Or that, quote, a mistake was made by the district 14 council when it applied the district zoning, unquote. In 15 this context it would be relevant that the land and the 16 surrounding land to the horizon is all zoned RE2 and 17 recommended for continuing RE2 zoning in the Potomac 18 Subregion Master Plan of 2002. With no new plan in 19 contemplation at this time, I think you would agree that 20 even if you had found many positive attributes to the 21 project as I've described, master plan compliance would be 22 an unavoidable stumbling block to rezoning approval. This 23 explains why the case before you is not a straightforward 24 request to simply rezone the property to the TLD zone. 25 Scenario number two. The RE2 zoning compliance scenario. In</p>
<p>26</p> <p>1 only thing that is different is the OZAH approval being 2 considered by you. Instead of it being a conditional use 3 application, it's a local map amendment under 59-7-2.1. The 4 request is before you to rezone the subject property to the 5 TLD zone, which is tailor-made for this sort of duplex and 6 townhome development envisioned here. I daresay you would 7 find the saving of the old gym and its conversion into a 8 clubhouse a welcome addition to the project and maybe even 9 a binding element. And I suggest that you would find 10 nothing in the zoning ordinance precluding the developer's 11 marketing decision to limit sales to 62 and over buyers. 12 Further, the allowed density of development in the TLD zone 13 is far greater than is proposed development in this local 14 map amendment case, a fact you would surely favorably note 15 in your report. And even though independent senior living 16 is an allowed conditional use in the TLD zone, I suggest 17 that you would conclude there is no need for the project to 18 be regulated as a conditional use rather than as a 19 permitted use, as everything about the project is already 20 permitted in the TLD zone. Your conclusion would flow from 21 the fact that permitted use and conditional use are 22 intended to be mutually exclusive use categories. A 23 conditional use formally termed as special exception, 24 quote, is a use which has been legislatively predetermined 25 to be conditionally compatible with the uses permitted as</p>	<p>28</p> <p>1 the second hypothetical, HG avoids the master plan obstacle 2 to rezoning by reconfiguring the development as the maximum 3 number of 2 acre lots for development of detached single- 4 family homes as can be provided in the RE2 zone. 5 HEARING EXAMINER ROBESON: I'm lost. Can you repeat the 6 scenario? 7 MR. BROWN: This is -- this is the RE2 -- 8 HEARING EXAMINER ROBESON: Can you start again with 9 this scenario? 10 MR. BROWN: Zoning compliance scenario, are rezoning 11 necessary? 12 HEARING EXAMINER ROBESON: Oh. 13 MR. BROWN: We have the maximum number of 2 acre lots 14 for development of detached single-family homes as can be 15 provided consistent with other development constraints 16 while keeping the gym converted to a clubhouse for exactly 17 the purpose as now planned. The houses too would be 18 offering the -- be offered the exact same services as are 19 now proposed for the 51 living units, except the number of 20 units has, due to the minimum lot size requirement, 2 21 acres, been reduced to somewhere in the range of 10 to 12, 22 give or take a unit or two. In this hypothetical, there is 23 no development plan with binding elements, there is no OZAH 24 review. There is only planning board review of a 25 preliminary plan, a site plan, and a forest conservation</p>

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<p>29</p> <p>1 plan. There would be no reason for the planning board to 2 question the gym to clubhouse conversion and no reason for 3 the planning board to question the age restricted marketing 4 decision of the applicant. There might be some other issues 5 impacting preliminary plan, site plan, and forest 6 conservation plan approval such as forest conservation and 7 storm water control concerns, but not compliance with the 8 regular development standards for single-family detached 9 homes in the RE2 zone. Most importantly, there would be no 10 need for review and approval of a conditional use for 11 senior independent living as there is nothing about this 12 scenario that is not fully permissible without a 13 conditional use, as explained in the first hypothetical. In 14 short, this hypothetical demonstrates that what I have 15 claimed from the outset is correct; the only reason this 16 project is before you as in need of a conditional use 17 approval is to legitimize A, the change in living units 18 from single-family detached to duplex and townhouse units. 19 And B, to increase the density of units from approximately 20 10 to 12, to more than four times that amount, that is 51. 21 My third hypothetical I call the vanishing bookmobile 22 scenario. In this third scenario, which I will describe in 23 a moment, it's grounded in the Applicant's argument 24 regarding all the things that the independent living 25 facility for seniors need not provide, not statutorily</p>	<p>31</p> <p>1 gym once stood and dispenses the exact same services in 2 essentially the same way as a bookmobile operates. No 3 doubt, the Sage Life mobile is in the parking lot more days 4 and for longer hours than the bookmobile would be, but 5 before and after working hours, it's nowhere to be found. 6 This scenario comes to mind because under HG's reasoning, 7 there's nothing in the conditional use definition making it 8 an essential feature of the project. If item by item 9 enumerated above, HG is not required to provide it, then 10 there's no determinative attribute to the use other than 11 the age requirement, so it can be dispensed with. For 12 instance, if no communal on-site dining is required, how is 13 it that a communal on-site exercise room or social room for 14 lectures and wine and cheese parties mandatory either. Note 15 also that much of the activity now planned for the 16 clubhouse could have instead been provided within the 17 confines of a Sage Life mobile such as health screenings, 18 and to the extent that's not feasible, be coordinated on- 19 site just as many other off-site services are expected to 20 be coordinated. It's no answer to this hypothetical to say, 21 well, HG is actually providing a clubhouse for communal 22 activities. It's not a come and go Sage Life mobile. Why is 23 that no answer? If HG's arrangements are deemed to 24 definitely sufficient for the conditional use, what happens 25 with the next application under this conditional use in a</p>
<p>30</p> <p>1 required to provide. First, HG claims it need not provide 2 the services listed in the definition of the conditional 3 use. That's in their motion at page 6. And second, no staff 4 need to live on site. That's in their reply brief at page 5 3. Third, senior services need not be mandatory, page 3 6 again. Fourth, no communal dining hall is required, reply 7 brief page 4. Fifth, services need not be provided by on- 8 site providers, same site. Sixth, residents are not 9 required to have any interaction with service providers, 10 page 5. Seventh, there is no requirement that there be any 11 shared living space, reply brief page 8. Eighth, there is 12 no requirement that the conditional use holder be one 13 responsible party, page 9. I will put aside for the moment 14 that the first half dozen of these points are classic 15 strawman arguments; reputation of claims we never made in 16 the first place. But they do bring to mind a period in my 17 childhood when I lived distant from any public library and 18 I would check out books thanks to regular visits to my 19 neighborhood by the bookmobile, a bus-sized traveling 20 library. On Wikipedia you can still see that they exist in 21 some places. In this hypothetical, instead of the 22 bookmobile, there is a Sage Life mobile. It replaces the 23 clubhouse because, in my hypothetical, conversion of the 24 gym proved infeasible for any number of reasons. The Sage 25 Life mobile parks in the space reserved for where the old</p>	<p>32</p> <p>1 detached single-family zone? With each unit to be owned in 2 fee and each owner to be part holder of the conditional use 3 and where no unit owner ever need rub elbows in shared 4 living space with any other unit owner, there is nothing to 5 stop the next applicant from forgoing the clubhouse 6 altogether, substituting therefore its own version of the 7 senior services mobile. After all, the mobile is offering 8 some senior services on site and coordinating off site for 9 other services. And all the fee simple owned homes will 10 surely follow the HG model of an initial age restriction on 11 ownership and optional services. In short, this 12 hypothetical points to a future where this project is 13 allowed to move forward, is it existing single-family 14 detached zones are up ended with duplex and town home 15 projects built at multiple times, Euclidean zoned allowed 16 density just on account of the age restriction. Such 17 projects would be indistinguishable from townhouse zone 18 development projects except that they would be age 19 restricted according to the conditional use age 20 restrictions and the resulting townhouse communities would 21 be regularly, or perhaps radically, visited by senior 22 service providers, a presence every unit owner and its 23 family is free to ignore. Put another way, the end result 24 is, for much of the day, indistinguishable in every way 25 from duplex or townhouse household living for all residents</p>

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<p>33</p> <p>1 and indistinguishable all day, every day for those 2 residents who are indifferent to the senior services 3 Mobile. Finally, I want to note my strong resentment at the 4 following sentence in the Applicant's reply brief 5 conclusion. Quote, the Association's criticism of Heritage 6 Gardens are mere pretense for the fact that it would not 7 agree to an independent living facility under any 8 circumstances, unquote. This sentence is then tied to the 9 fact that West Montgomery has reserved the right to address 10 compatibility if this case goes to hearing. The only issue 11 before the Hearing Examiner now is one of definitional 12 qualification. Compatibility has nothing to do with it and 13 compatibility issues form no part of our definitional 14 argument. Compatibility is a judgmental factor about which 15 reasonable minds might differ from case to case. What West 16 Montgomery seeks is to avoid the tremendous expense and 17 effort of litigating compatibility and other issues to a 18 fare the well over multiple days of hearing when the 19 project itself simply cannot be defended as within the 20 conditional use box the Applicant has tried to fit it. The 21 motion to dismiss is not pretense. It is a commonsense 22 effort to avoid a further waste of everyone's time over 23 this ridiculous project. I respectfully request that the 24 motion to dismiss be granted and even more particularly 25 request that the ruling not be postponed for decision in</p>	<p>35</p> <p>1 point where in a nursing home you might be in a space where 2 you have -- the privacy isn't even a separate room so much 3 as it is a separate bed like in a two -- like in a 4 hospital room that has two patients in it. 5 HEARING EXAMINER ROBESON: Okay. So I'm -- 6 MR. BROWN: What I'm saying that's what I'm saying, it 7 isn't any particular element of communality that is 8 required, but the definition of -- lists several things 9 that would exhibit such communality. And this applicant is 10 saying that none of them have to be in the living space. 11 They can be all divorce and need not even be access. You 12 can basically treat your home as completely -- and you're 13 living in the area as completely not communal. That's not 14 what -- this definition was intended to be something more 15 than simply an age restricted community. But it -- 16 HEARING EXAMINER ROBESON: And that's the line I'm 17 trying to find. Are you saying that shared spaces for -- 18 what's the ADA thing -- daily activities, eating -- sorry. 19 I can't remember the -- essential functions of daily 20 living, which is eating, going to the bathroom. Are you 21 saying that's what needs to be provided? 22 MR. BROWN: No. No. Not at all. In fact, what I said in 23 my brief was, in fact, that if Heritage Gardens provided 24 essentially the same services that they are providing now 25 within the confines of a single multiunit building, that</p>
<p>34</p> <p>1 connection with an evaluation of an evidentiary record on 2 other issues as there are no material issues of fact of 3 that need a hearing for you to decide that the application 4 is not butter. It is not one for independent living for 5 seniors. Thank you. 6 HEARING EXAMINER ROBESON: Okay. I have a few 7 questions. Okay. You have used, in your argument several 8 times, the phrase shared living space. What is shared -- 9 what are you saying? I guess I'm trying to get -- when 10 I've been reading through these briefs or these memoranda, 11 I've been trying to get to what is the essential element of 12 the group living. And you said communal living, shared 13 living space. What does that mean? 14 MR. BROWN: Well, look. I would look at it this way. In 15 an ordinary apartment building you have complete 16 residential units where you enter and leave behind locked, 17 closed doors. In the continuum of communal living beyond 18 that point to say a dormitory, IN a college dormitory you 19 still have locked rooms where you study and you sleep and 20 you leave and you have your clothes and your books and it's 21 still your private space. But outside that private space at 22 least dormitories that I'm familiar with, you have common 23 use bathrooms. You have common lounge areas. You have a 24 shared dining area. As you move up the continuum of group 25 living, it gets I think even more and more communal to the</p>	<p>36</p> <p>1 would be fine. But see, the thing is that the residents who 2 come and go from -- 3 HEARING EXAMINER ROBESON: So you're saying that -- 4 MR. BROWN: From their apartments, they are -- 5 HEARING EXAMINER ROBESON: Are you saying it has to be 6 a multiunit building to be an independent living facility? 7 MR. BROWN: That's what -- that's what they have all 8 been so far except maybe in one or two minor situations 9 where, for example in the context of the Friends House out 10 in -- 11 HEARING EXAMINER ROBESON: I did that case, yeah. 12 MR. BROWN: They have -- that's a continuing care 13 retirement community and there is a small number of 14 these -- 15 HEARING EXAMINER ROBESON: It's a tiered living 16 facility. 17 MR. BROWN: Of these duplexes were you move from one to 18 the other as you age and become less able to care for 19 yourself. But what I'm saying is, that if you draw the line 20 simply at an age restriction and nothing more in these 21 facilities where you live, you really aren't reaching the 22 true definition of what was intended by senior -- 23 HEARING EXAMINER ROBESON: Because it could be 24 household living? 25 MR. BROWN: By placing this within group living.</p>

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<p>37</p> <p>1 HEARING EXAMINER ROBESON: Because it could be 2 household living? What you are saying is it can't be 3 household living. So with the optional services and the 4 independent living facilities, it could be household 5 living. It could meet the definition of household -- 6 MR. BROWN: Absolutely. Absolutely. 7 HEARING EXAMINER ROBESON: Okay. Now you also mentioned 8 fee simple houses. And this may tie into your enforcement 9 argument. I guess, my job is to find the legislative 10 intent. So you're saying it's independent fee simple 11 buildings, but isn't land-use independent of ownership? 12 Doesn't the zoning ordinance regulate land uses and not 13 ownership? 14 MR. BROWN: I think that's correct. But what I see in 15 the zoning regulations is an expectation that the 16 conditional use is going to be -- the regulation of the 17 conditional use is going to be at least reasonably 18 feasible. And it's just not within the wording of the 19 statutes as they have been written and as the enforcement 20 regime has evolved over time for making sure that someone 21 who applies for a conditional use complies with the 22 regulations and standards and conditions that apply to it, 23 that it has never been in the contemplation that a whole 24 subdivision could become conditional use holders. That's 25 really what's going on here. In order -- it's simply to</p>	<p>39</p> <p>1 new zoning ordinance the -- it was never thought of, or 2 certainly never, as far as I could tell, ever applied for 3 in a situation where it was going to be applied to what 4 amounts to a townhouse development. It was applied to 5 multiunit buildings where the people rubbed elbows with 6 each other. Even if they didn't -- even if they lived in 7 separate rooms in separate places they shared experiences 8 and they communicated with each other because they would at 9 least pass each other in the hallway while going from their 10 buildings to their cars, if they still had cars. And in 11 many cases they don't. So it seemed to have been a well 12 understood type of use that produced multiunit building 13 after multiunit building with very little in the way of 14 exceptions which largely proved the rule because those 15 exceptions were themselves either readily explained as 16 steppingstones to even more advanced communal living, or, 17 as units that were created at a time before the statute 18 expressly required it to be group living in 2014, and 19 nobody objected because they were -- they fit in well with 20 the communities where they were put so in a way it's a 21 question that has never seriously been examined before, 22 which is why we're here. 23 HEARING EXAMINER ROBESON: Okay. In one of your memos 24 you looked at household, the definition of household. And 25 the household was limited to five unrelated people, or a</p>
<p>38</p> <p>1 evade the lot size requirement in the RE2 zone, that's the 2 only reason this is happening. 3 HEARING EXAMINER: So if -- to tie it in, you 4 mentioned all the statutory construction principles I think 5 in the beginning of your speech, of your argument. One of 6 them is it can't have -- how do you tie the 7 unenforceability into my -- the statutory construction 8 principles that I have to apply? Is it that it would 9 produce an absurd result? I think that's one of them. So I 10 guess, what I'm saying is it doesn't -- what I'm hearing 11 from the parties is there isn't a huge amount of 12 legislative history, which leaves me to the canons of 13 statutory construction. How do you tie the unenforceability 14 into those canons of statutory construction? That's what I 15 have to do. I mean, I know there is one that says you can't 16 have an absurd result. That one pops to mind. But that is a 17 question. I've got to fit this into those rules without 18 more extrinsic evidence. I have to say this is what the 19 council wanted because -- 20 MR. BROWN: Well, that's an interesting question. I 21 think I would tie it back to the fact that the definition 22 of independent living facility for seniors, although it's 23 undergone a bit of a change, actually very little change, 24 between somewhere -- I'm not sure exactly when it started, 25 somewhere around 1980, or thereabouts, and today, in the</p>	<p>40</p> <p>1 family, I think. How does that impact this application? Are 2 you saying that when it says household the definition of 3 household is grafted into the definition of household 4 living? 5 MR. BROWN: I would put it this way. I see no 6 inconsistency or conflict between the household 7 requirements for household living and the requirements for 8 the conditional use in terms of household. So in fact I 9 think that the liberality of the household definition under 10 household living is a greater then that under the 11 conditional use. So I don't see any problem with requiring 12 compliance with the household living requirement. 13 HEARING EXAMINER ROBESON: Okay, because I have to 14 give -- okay. All right. Let me just see if I had anything 15 else. I don't. Let's take a five minute break. Thank you. 16 We're going to take a 5-minute break. We'll be back at -- 17 well, I will say a 10-minute break and Mr. Chen will go. 18 MR. CHEN: Maybe I can help you. 19 HEARING EXAMINER ROBESON: Okay. That's good. I would 20 like that. 21 MR. CHEN: By Exhibit 133, Madam Examiner, we filed a 22 motion for summary disposition. 23 HEARING EXAMINER ROBESON: Right. 24 MR. CHEN: And at page 2 of that filing we adopted and 25 incorporated by reference Mr. Brown's client's argument and</p>

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<p>41</p> <p>1 motion. We do the same today.</p> <p>2 HEARING EXAMINER ROBESON: Well, that was easy. That</p> <p>3 was easy.</p> <p>4 MR. CHEN: Yeah.</p> <p>5 HEARING EXAMINER ROBESON: Okay. So now we are going to</p> <p>6 take a 10-minute break. We are off the record until 5 till.</p> <p>7 (A brief recess was taken.)</p> <p>8 HEARING EXAMINER ROBESON: Will everybody have a seat,</p> <p>9 please. Thank you. Are the parties ready?</p> <p>10 MS. HARRIS: Yes.</p> <p>11 MR. BROWN: Yes.</p> <p>12 MR. GOECKE: We are.</p> <p>13 HEARING EXAMINER ROBESON: Okay, Ms. Harris, you are</p> <p>14 up.</p> <p>15 MS. HARRIS: Thank you. And my partner, Mike Goecke</p> <p>16 will be making the argument.</p> <p>17 HEARING EXAMINER ROBESON: Okay.</p> <p>18 MR. BROWN: Good morning.</p> <p>19 HEARING EXAMINER ROBESON: Good morning.</p> <p>20 MR. GOECKE: We spent -- and again, my name is Mike</p> <p>21 Goecke on behalf of the Applicant, along with Ms. Pat</p> <p>22 Harris.</p> <p>23 HEARING EXAMINER ROBESON: Did you -- can you spell</p> <p>24 your name for the court reporter?</p> <p>25 MR. GOECKE: I did. I'm happy to do it again.</p>	<p>43</p> <p>1 these operations. Under section 1.4.1 E the code says that</p> <p>2 the singular includes the plural and the plural includes</p> <p>3 the singular. So it doesn't have to be a building. It can</p> <p>4 be multiple buildings. And if I heard Mr. Brown correctly,</p> <p>5 this morning, he is saying we are not arguing it needs to</p> <p>6 be contained in a single building. And DPS's letter agrees</p> <p>7 it doesn't need to be contained in a single building. So</p> <p>8 the definition is simple. It needs to be a building for a</p> <p>9 senior community. This is an age restriction of 62 years</p> <p>10 old and older, and it has to provide these services. And we</p> <p>11 are providing a litany of services to the senior community</p> <p>12 here. In fact, in their brief, they admit that were this</p> <p>13 application for a multifamily building, it would satisfy</p> <p>14 the code. It would be enough. In other words, the services</p> <p>15 being offered are enough to satisfy the code. Their real</p> <p>16 beef, the real dispute, is with the nature of the structure</p> <p>17 itself, with the nature of the buildings. And the fact that</p> <p>18 there is not shared commonality, or communal living that</p> <p>19 some mandated on all the residents. But again, as you</p> <p>20 pointed out this morning, where is that in the code? Where</p> <p>21 does the code require that there be a shared bathroom, or a</p> <p>22 dining hall? Or any of those types of features? It doesn't.</p> <p>23 3.3.2.C gives us the definition. And on its face, Heritage</p> <p>24 Gardens meets that definition. So they are spending a lot</p> <p>25 of time trying to show that this duck is different than the</p>
<p>42</p> <p>1 HEARING EXAMINER ROBESON: It's okay. As long as the</p> <p>2 court reporter has it. Okay. Go ahead.</p> <p>3 MR. GOECKE: He gave me a thumbs up so I think we're</p> <p>4 all set. So this morning we spent a lot of time talking</p> <p>5 about, and I think we all agree, and as you pointed out to</p> <p>6 me, we are here on one issue. Whether or not the proposed</p> <p>7 community satisfies the definition of an independent living</p> <p>8 facilities under the code. And during that over an hour</p> <p>9 long conversation we spent very little time talking about</p> <p>10 what that actual definition is. And you asked, at one</p> <p>11 point, and you made the comment my job is to interpret the</p> <p>12 legislation; what did the County Council want here. Well,</p> <p>13 the code is what tells us what the County Council wanted.</p> <p>14 And in less there is some ambiguity with that definition we</p> <p>15 don't even need to go to the, admittedly pithy, legislative</p> <p>16 history. And on its face an independent living facility,</p> <p>17 under the ordinance, section 3.3.2.C, it's an independent</p> <p>18 living facility is defined as follows; Independent living</p> <p>19 facility for seniors or persons with disabilities means a</p> <p>20 building containing dwelling units and related services for</p> <p>21 senior adults or persons with disabilities. Independent</p> <p>22 living facility for seniors or disabilities includes meal</p> <p>23 preparation and service, daycare, personal care, nursing or</p> <p>24 therapy, or any services to the senior adult, or disabled</p> <p>25 population of the community that is an ancillary part of</p>	<p>44</p> <p>1 other ducks that are out there in the community. And our</p> <p>2 position on that is, well, let's look at what the other</p> <p>3 ducks are out there. Let's look at the other senior living</p> <p>4 facilities. And the services that are being provided at</p> <p>5 these other senior facilities are very similar, if not less</p> <p>6 than, what Heritage Gardens is going to provide to its</p> <p>7 residents. All of the comments, all of the criticisms about</p> <p>8 the way the services are being provided or how long the</p> <p>9 staff is going to be there, or how many staff people are</p> <p>10 going to be there, those are issues that are not before the</p> <p>11 Hearing Examiner today. Those issues do not fall under the</p> <p>12 definition -- of the code's definition of what a senior</p> <p>13 living facility is. So to the extent that those details,</p> <p>14 which we are not saying are unimportant, but to the extent</p> <p>15 they need to be resolved and to be addressed the hearing is</p> <p>16 the appropriate time to examine those issues, not at this</p> <p>17 juncture where we have cross motions for summary</p> <p>18 disposition, and whether or not this facility satisfied the</p> <p>19 code's very clear definition. A definition again, that</p> <p>20 although it has changed recently has not changed in any</p> <p>21 substantive, or material way, and certainly not to the</p> <p>22 point where the existing communities that have already been</p> <p>23 approved by the County would no longer be approved. And we</p> <p>24 talked about the Friends Hill Community in Silver Spring.</p> <p>25 There is at least two other communities that we are aware</p>

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<p>45</p> <p>1 of that have more of a horizontal layout. The National 2 Senior Housing Corporation -- 3 HEARING EXAMINER ROBESON: What's the number on that? 4 MR. GOECKE: It is S-2423, and I think S-2474. And then 5 there is also the Meadow Ridge Senior Villas. 6 HEARING EXAMINER ROBESON: I want to know if they are 7 under the old or the new zoning ordinance. 8 MR. GOECKE: They are under the old zoning ordinance. 9 HEARING EXAMINER ROBESON: Okay. 10 MR. GOECKE: They are. But there is precedent out there 11 for -- we've had a lot of conversation about well, this 12 isn't the traditional mold for what a senior living 13 facility looks like. And it used to look differently. Well, 14 when we go back to look at what they use to look like not 15 that long ago, the County approved communities that looked 16 a lot like what this community is going to look like. 17 Again, compatibility and harmonious is not before the 18 Hearing Examiner today. But that was the point of designing 19 the community in this fashion. Again, the Association is 20 criticizing the Applicant and saying well, they are just 21 trying to circumvent the density requirements. They are 22 just trying to monetize this and make more money. The 23 developer could have made more money by developing a 24 multifamily apartment building and putting more units in 25 there. It wasn't designed that way, and that only made it</p>	<p>47</p> <p>1 amendment (inaudible). Again, that is not before the 2 Hearing Examiner today. We have our application, we 3 proposed a senior living facility. Does it meet the code 4 definition or not? And we agree with the Association; we 5 think this is ripe for adjudication on this issue. And we 6 think there should be a ruling made in our favor that there 7 is no dispute that this does meet the code's definition of 8 what a senior living facility is. And to the extent that 9 the DPS letter is relevant or sheds some insight on that, I 10 would like to make a couple of comments. On the one hand, 11 DPS makes the point that their analysis is not to be taken 12 one way or the other. It is not intended to benefit one 13 side or the other. But in terms of the key issues here, you 14 know whether or not these multiple buildings and services 15 that are being provided to the occupants of those buildings 16 satisfy the code, DPS seems to agree that in general, DPS 17 opines that an RE2 zoned property, with a site containing 18 multiple buildings, multiple dwelling units and accessory 19 structures providing care and other services in support of 20 its onsite senior adult population fits the definition of 21 an independent living facility for seniors. So my reading 22 of that is the nature of the buildings and the services 23 being provided satisfy the code definition. They go on to 24 say that our analysis is not complete however because we 25 have other concerns. We have concerns about the ownership</p>
<p>46</p> <p>1 less profitable. But it was designed that way for a reason. 2 Because this is what people want these days. People want to 3 age in place. People want to live in their home as long as 4 they can. And this community will enable people to do that. 5 It will provide them a place where they have -- they can 6 keep their car if they want to, whether they drive or not 7 is up to them. But they will have a garage for that. They 8 will be able to stay in place. To the extent that they want 9 to live in a community where there is a dining hall, or 10 there is more of the forced, or mandatory communality that 11 Mr. Brown is referring to there are options out there. 12 There are very few options like this community today. And 13 that is why it is being proposed in this way. And it's not 14 only what people want, in our opinion, again, it is more 15 compatible with the neighborhood. A taller building with 16 more -- with higher density with generating more traffic, 17 we think, would be less compatible with the community. This 18 development, as proposed, is going to be more harmonious 19 with the community it's going to have less density than it 20 otherwise could have, and it's going to blend in. It's 21 going to be contextualized in a way that we think is going 22 to be more attractive, and it's going to be less of an 23 impact on the community around it. So there was also 24 several points raised about hypothetical situations in 25 which in this community could have been proposed as a map</p>	<p>48</p> <p>1 details, the HOA structure, how is that going to work, 2 what's the specific role of Sage Life? And you know, is 3 that contract going to exist in perpetuity? Because what 4 DPS is getting at it's going to impact whether inspection 5 staff would be able to enforce the decision of the Hearing 6 Examiner should the conditional use be granted. The 7 enforcement mechanisms and the enforcement issues that come 8 up down the road, again, are issues that should and can be 9 addressed at the hearing. They don't go to the definition 10 of what is a senior living facility. And in our brief we've 11 pointed out that the code makes no requirement on 12 ownership. It doesn't mandate that it has to be a community 13 association, or that it has to be rental units. It's 14 totally silent as to the nature of the ownership. And as 15 you pointed out this morning, not only does the code not to 16 govern that for independent senior living facilities, but 17 the whole point of the ordinance is to govern how the land 18 is used, not the ownership nature of it. It governs what 19 buildings you can build, what they can look like, what the 20 materials must be consisted of. It does not govern the 21 ownership and so the whole issues about ownership while 22 germane to enforceability down the road are not relevant at 23 this juncture in this case. After we received this letter 24 we did come across another case that was a design for life 25 community that was approved recently. And let me grab the</p>

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<p>49</p> <p>1 number for you. But in that community it was the Garrett 2 Gateway Partners LLC where they had 19 fee simple lots. And 3 it was a very lengthy opinion and in that opinion the 4 hearing examiner did not even address the issue of how it 5 was going to be enforced in the future. So it was analogous 6 in the sense that you had different owners of the lots. 7 HEARING EXAMINER ROBESON: What's the -- 8 MR. GOECKE: Case number? 9 HEARING EXAMINER ROBESON: Yeah. 10 MR. GOECKE: CU 16-11. And again, that's the matter of 11 Garrett Gateway Partners, LLC. 12 MR. BROWN: I'm sorry, I didn't hear that. 13 HEARING EXAMINER ROBESON: C -- oh go ahead. 14 MR. GOECKE: Yeah, CU 16-11. So the ownership, you 15 know, we think while relevant in the big picture is not 16 relevant here today. There is going to be an HOA. The HOA 17 will be in charge of working with Sage Life if 20 years 18 from now they don't want to work with Sage Life they will 19 be responsible for hiring another sort of operator or 20 manager. But there will be people in place for DPS to 21 interact with and to enforce the conditional use should it 22 be approved and really, in many respects it's no different 23 than a lot of other conditional uses that are approved. 24 Ultimately, somebody has to be responsible for that and the 25 hearing can identify clearly who that entity or person is</p>	<p>51</p> <p>1 questions, after reading this. Let me let you finish so you 2 can make sure we get out all your points and then I'll ask 3 my questions. 4 MR. GOECKE: Okay. I think I'm getting near the end 5 here. Yeah, I think those are the main points. If there's 6 something else that comes to mind I'll tell you -- 7 HEARING EXAMINER ROBESON: And I have your brief. 8 MR. GOECKE: And you have our brief, and I think most 9 of the points are in there, but I am curious and anxious to 10 hear your questions. 11 HEARING EXAMINER ROBESON: Well, I'm really struggling 12 because I know buildings that are, for instance, doormen -- 13 my in-laws live in New York and they have a doorman 14 building. And a lot of the services that -- and it's not 15 age restricted. It happens to be mostly older people, 16 but -- and I also know concierge buildings. And I'm really 17 struggling why is this -- why should this come -- you could 18 easily structure this scenario into a concierge service 19 anything without being -- you know, whether it's 20 townhouses, whether it's -- there's a project in Columbia 21 that's a concierge level where they, you know, they arrange 22 everything so what's the difference? And they have staff. 23 They have staff so what's the difference? 24 MS. HARRIS: If I could. The whole point of a 25 conditional use is recognizing that it's a use that may not</p>
<p>50</p> <p>1 going to be, or persons are going to be. Turning back to -- 2 in addition to the market reasons, and the capability 3 reasons, another reason why Heritage Gardens is 4 appropriately a senior living facility is because of the 5 staff. So we're going to start off with one full-time and 6 one part-time staff. If it were just household living you 7 would not have staff approved. That's a key. 8 HEARING EXAMINER ROBESON: Well, that's not true. 9 because if you look at the definition in multifamily 10 dwelling, or multifamily unit, that has staff, and that's 11 household living. 12 MR. GOECKE: In a multifamily unit if it's qualified -- 13 if it meets the definition of household living but also has 14 staff, you're saying? 15 HEARING EXAMINER ROBESON: Yes. 16 MR. GOECKE: Okay. So accepting that argument then, so 17 then how can that be household living and group living? If 18 they're saying that -- 19 HEARING EXAMINER ROBESON: Well, that's my question to 20 you. 21 MR. GOECKE: But the point is, and again, we think that 22 there's conflation here between the structure of the 23 building and what that building is being used for. 24 HEARING EXAMINER ROBESON: I'm not necessarily sure I 25 agree with the conflation. Let me do this. I have some</p>	<p>52</p> <p>1 be automatically consistent and compatible with the 2 surrounding area because it may be more intense in some 3 ways and therefore it needs to be evaluated as such. Here, 4 as Mr. Goecke indicated, starting off there would be 1-1/2 5 full time employees provided by Sage Navigator. There's 6 also 51 units. 51 units for the age that is going to be 62 7 plus and when those people age there will be continual 8 operation or third-parties; service providers, whether it's 9 a home-health care aids, whether it's nutritionists that 10 come in, whether it's medical overseers. And the whole 11 purpose of an independent living -- a conditional use is to 12 take the project as a whole and have the hearing examiner 13 to be able to evaluate the impacts that we will be 14 providing -- impacts to the community that those extra 15 services associated with an independent living would 16 potentially have on the neighborhood. 17 HEARING EXAMINER ROBESON: Well, I guess that gets to 18 my next question because a lot of your memos says that this 19 that this doesn't have the impact of a typical senior 20 living facility and I'm thinking, in my mind, why make it a 21 conditional use because at least in the cases we've had the 22 senior living facilities have a much larger staff. They 23 have a communal kitchen so they have food service delivery. 24 They have dumpsters they have -- and so I guess this is 25 not that different from -- I guess that's what I'm getting</p>

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<p>53</p> <p>1 at. These people -- say Sage Life wasn't there. These 2 people could do everything that Sage Life provides, or much 3 of it. They could do everything Sage Life provides through 4 a homeowners association and individually contracted 5 services. So why should 1-1/2 employees mean suddenly that 6 you are an independent living facility?</p> <p>7 MS. HARRIS: To respond just to that. One, is I would 8 note that as Exhibit A to our reply brief we actually 9 identified eight other facilities that had comparable 10 services, or maybe less so. So some had less staff, some 11 had communal rooms that were one quarter of the size of 12 what's being provided here. None of them had communal 13 kitchens. The most recent conditional use, independent 14 living facility that I worked on, Penrose, had --</p> <p>15 HEARING EXAMINER ROBESON: When was that? Or what's 16 that -- is that 2/20/14?</p> <p>17 MS. HARRIS: It was -- yes because it was CU 17-04.</p> <p>18 MR. BROWN: What was that number?</p> <p>19 MS. HARRIS: CU 17-04. So for instance, they had staff 20 that was on -- were there during the day, not the night. 21 No communal kitchen. The common area was 2,800 square feet, 22 it was the ground floor of a multifamily building. There 23 were no grocery services, they could contract with a third 24 party for that. The intent of the commonality space was for 25 daily activities such as games, or a fitness area, a</p>	<p>55</p> <p>1 provisions of the code in pari materia. And to me the 2 biggest limitation on this use is not in the definition. 3 The way you are reading the definition there could -- it's 4 very broad. But to me the big -- and you do have that 5 section that says the singular includes the plural. So 6 where's the line? And to me the line is in the definition 7 of group living which is this is classified as group 8 living. And it says the -- and it doesn't include any form 9 of household living. So for instance, Friends House, they 10 had a continuing care situation. But I look back to the 11 2004 zoning ordinance and that does not have that exclusion 12 in there.</p> <p>13 MS. HARRIS: I'm sorry, which exclusion?</p> <p>14 HEARING EXAMINER ROBESON: If you look at group living 15 under the --</p> <p>16 MS. HARRIS: The distinction between group living and 17 household living?</p> <p>18 HEARING EXAMINER ROBESON: Yeah.</p> <p>19 MS. HARRIS: That's correct.</p> <p>20 HEARING EXAMINER ROBESON: And it says -- and our 21 zoning ordinance says -- 2014 says -- and it doesn't 22 include any form of household living.</p> <p>23 MS. HARRIS: But our -- I agree it says that. But I 24 would also say under -- based on that provision, a 25 multifamily building that's independent living couldn't be</p>
<p>54</p> <p>1 cybercafé. So from a services standpoint we can look to at 2 least eight others, and believe me we did not exhaust 3 the --</p> <p>4 HEARING EXAMINER ROBESON: Under the 2014?</p> <p>5 MS. HARRIS: No. So part of this is under the 2014, 6 there just simply haven't been that many conditional uses 7 since 2014. I would point to another case which wasn't a 8 conditional use which was approved that was in the CR zone 9 so it wasn't a conditional use. That was just approved in 10 Kensington and they had comparable services to -- it was 11 independent living, comparable services to the Penrose that 12 I just noted. But I think part of this is just a timing 13 issue that since 2014 I believe there has only been one 14 independent living units --</p> <p>15 HEARING EXAMINER ROBESON: And that's CU 17-04?</p> <p>16 MS. HARRIS: Right. But I would see, and Mr. Brown 17 indicated this, the definition hasn't changed since, as he 18 said, since the 1980s. So what was approved previously 19 under the old zoning ordinance should have just as much 20 precedential value. And so therefore, under the old zone we 21 have seven other examples of, again, comparable levels of 22 services.</p> <p>23 HEARING EXAMINER ROBESON: Well, I guess my concern 24 about that is that is when I read the definitions, you know 25 when you do statutory interpretation you have to take all</p>	<p>56</p> <p>1 group living because it, in fact, qualifies as household 2 living. Household living is duplexes, townhouses, single- 3 family, and multifamily. If you are not one of those -- if 4 you are one of those the argument goes, by Mr. Brown, then 5 you can't be group living. But if those are --</p> <p>6 HEARING EXAMINER ROBESON: But that's what it says.</p> <p>7 MS. HARRIS: So then how could a multifamily 8 independent living building be approved?</p> <p>9 HEARING EXAMINER ROBESON: Well, that's what I'm asking 10 you. I'm saying where is the line? You've got an intention 11 in the zoning ordinance to have something that is not 12 household living.</p> <p>13 MS. HARRIS: I would say two things. One is I would say 14 that the household living focuses more on typology than 15 use, but I would say second, there is a commonality of the 16 individuals that live in this community. I mean the purpose 17 of the --</p> <p>18 HEARING EXAMINER ROBESON: But it's not mandatory.</p> <p>19 MS. HARRIS: Well, it's not mandatory but the reality 20 is that based on the definition that's a menu of services. 21 If you were just simply 62 years old, just age restricted, 22 and nothing more, we would not be sitting here today 23 beating -- at least we wouldn't be sitting here today.</p> <p>24 HEARING EXAMINER ROBESON: Well what do you --</p> <p>25 MS. HARRIS: Because we are providing, of that menu of</p>

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<p>57</p> <p>1 services that includes a meal preparation service, daycare, 2 personal care, nursing or therapy, or any other related the 3 service. We are providing from that menu of services, 4 services to the community. When you don't -- and they are 5 not mandated but you have to provide them all, but you 6 certainly have to provide some. Otherwise it is -- I agree 7 you are just simply an age restricted community. 8 HEARING EXAMINER ROBESON: So what are you providing 9 from the list of those services? 10 MS. HARRIS: We are providing -- 11 HEARING EXAMINER ROBESON: The list that is in 59.5- 12 3.3.2 C. I just had my 2014 (inaudible) out. 13 MS. HARRIS: So the Sage Life -- and let me just back 14 up, when I say Sage Life has more than a dozen communities, 15 they are opening three more this month or next month, in 16 fact. They have had more than 30 years of experience 17 providing senior housing in the Northeast corridor. So the 18 purpose, the role of the Sage Life employee is really -- 19 is threefold. One is to provide a social component, and I 20 know you can get that other places, but I don't want to 21 minimize that because as we all know, one of the major 22 issues for seniors is a lack of social interaction and 23 compatibility. So they will be organizing social things. 24 There is an overseeing of the health component, and that 25 has lots of variables. That includes bringing in third</p>	<p>59</p> <p>1 approved was independent living because that's the use that 2 they were. And again, very similar level of services. 3 HEARING EXAMINER ROBESON: But that was -- 4 MS. HARRIS: And so I -- 5 HEARING EXAMINER ROBESON: Okay. I'll look back at 6 that. 7 MS. HARRIS: Okay, but it was that the Planning Board, 8 not the -- 9 HEARING EXAMINER ROBESON: Well, if it was at the 10 planning board it didn't need a conditional use. 11 MS. HARRIS: No, that's what I'm saying. But the use 12 that it was was independent living. They didn't get 13 approval for a multifamily building. They got approval for 14 independent living. 15 HEARING EXAMINER ROBESON: Under what section of the 16 zoning ordinance? 17 MS. HARRIS: Well, they had to go through sketch plan, 18 site plan -- or they had to go through site plan and 19 preliminary plan. 20 HEARING EXAMINER ROBESON: Yeah, but I guess what I'm 21 saying is what -- I don't know if I'm working with apples 22 and oranges here. Were they designated an independent 23 living facility under 59-3.3.2? 24 MS. HARRIS: No because -- but under the use table of 25 the zoning ordinance, and I don't know that section off</p>
<p>58</p> <p>1 parties to conduct medical type screenings, whether it's 2 blood pressure, whether it's a nutritionist coming in, they 3 will also have monitoring the actual individual independent 4 living units. And so if by 10:00 or 11:00 in the morning 5 they haven't heard from Mrs. Black in Unit 3, they'll make 6 a visit to that unit to see whether she's up or not. So 7 that's the second part. They are acting as a coordinator to 8 third-party services that are critical for, and important 9 for an independent living. If the community decides, or 10 some of the people in the community decide, you know what, 11 we want to have a Mexican dinner they can organize that, 12 that will occur in the clubhouse. I mean they will have -- 13 and they are not -- we don't have -- there is not an in- 14 house kitchen to do all of that but there is the Sage Life 15 employee there that will be coordinating that and providing 16 that in the 8,000 square foot clubhouse. The other 17 thing -- 18 HEARING EXAMINER ROBESON: Let me interrupt you for a 19 minute. If this were in a zone that permitted townhouses 20 you wouldn't need a conditional use, would you? 21 MS. HARRIS: I will answer that based -- I think we 22 would. And I would go back, and I'm going to use the CR 23 example that was just approved in Kensington. It was an 24 independent living use in Kensington that was in the CR 25 zone so it's not a conditional use. But the use that was</p>	<p>60</p> <p>1 hand -- 2 HEARING EXAMINER ROBESON: 3.1.6. 3 MS. HARRIS: Under 3.1.6 and they were an independent 4 living use. Then, you look at what zone they are in, they 5 are in the CRT zone, I believe. And so then that dictates 6 the administrative approval that's required. But the use, 7 is dictated by the use table. So to answer your 8 question -- 9 HEARING EXAMINER ROBESON: Where is this -- has that 10 been submitted? 11 MS. HARRIS: It was approved by the Planning Board in 12 July. 13 HEARING EXAMINER ROBESON: But was it designated, that 14 use, under 59-3.3.2 C? 15 MS. HARRIS: The definition. Yes. So actually, so the 16 classification is independent living. So you go to the 17 definition, and that is what it was defined as. Then, that 18 section then says if you are not permitted as right, which 19 they were, then that section further defines if you are a 20 limited use, or a conditional use, how you will be handled. 21 But the starting point, yes, was 3.3.2, which was the 22 definition, that's the use that they were. So I think to 23 answer the question about the townhouses, I would say we 24 would be coming to you. We would be an independent 25 living --</p>

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<p>61</p> <p>1 HEARING EXAMINER ROBESON: But they didn't come to me.</p> <p>2 MS. HARRIS: That one didn't because independent living</p> <p>3 is permitted in the CR use without conditional use</p> <p>4 approval. An independent living in the TLD zone, I believe</p> <p>5 Mr. Brown had said independent living is not permitted in</p> <p>6 the TLD zone.</p> <p>7 HEARING EXAMINER ROBESON: So exactly what makes it</p> <p>8 this different from a concierge, even some of the more</p> <p>9 wealthy community associations, they provide these</p> <p>10 services. Is the only thing that makes this different that</p> <p>11 they coordinate wellness services?</p> <p>12 MS. HARRIS: No. I would say what makes this</p> <p>13 different --</p> <p>14 HEARING EXAMINER ROBESON: I mean let me just back up.</p> <p>15 What you are saying is that if I have this luxury product</p> <p>16 which I understand this is a luxury product. If I have a</p> <p>17 luxury product that the HOA, I guess, the HOA pays for</p> <p>18 these services?</p> <p>19 MS. HARRIS: Yes. I mean the individual -- similar to a</p> <p>20 normal multifamily building. You pay a rent.</p> <p>21 HEARING EXAMINER ROBESON: Yes.</p> <p>22 MS. HARRIS: And then you pay additional -- you can pay</p> <p>23 additional for additional services.</p> <p>24 HEARING EXAMINER ROBESON: No, but who pays the</p> <p>25 employees?</p>	<p>63</p> <p>1 trying to contextualize the product to be more compatible</p> <p>2 with the neighborhood, now we are hearing well, it doesn't</p> <p>3 rise to the occasion of an independent living. But if we</p> <p>4 come back here with a 60 foot tall building that has the</p> <p>5 same exact thing, but within the building itself there</p> <p>6 would be no argument that it's independent living. And we</p> <p>7 know -- I mean the Penrose case --</p> <p>8 HEARING EXAMINER ROBESON: Well usually when</p> <p>9 they're --the Penrose case I'll have to go back and read.</p> <p>10 Those cases, you know if it wasn't litigated it may just</p> <p>11 not have been addressed.</p> <p>12 MR. GOECKE: Well, let me give another example, because</p> <p>13 it was litigated. Well, I believe it was litigated. There</p> <p>14 was also -- I didn't see it in the opinion.</p> <p>15 MS. HARRIS: The Meadow Ridge Senior Villas, and that's</p> <p>16 a situation where you have 10 separate buildings. Each</p> <p>17 building is a quad, so you have four condominium</p> <p>18 independent living units within each quad, and then one of</p> <p>19 the quads has half of it devoted to the common community</p> <p>20 area. And in that project, the staff consists of one</p> <p>21 nonresident. Their hours are 10:00 a.m. to 8:00 p.m. The</p> <p>22 responsibilities of the staff person are to coordinate</p> <p>23 upkeep and maintenance of the community, fix appliances,</p> <p>24 shovel snow, cutting grass, coordinate weekly social and</p> <p>25 educational activities, function as a concierge to assist</p>
<p>62</p> <p>1 MS. HARRIS: The residents of the community.</p> <p>2 HEARING EXAMINER ROBESON: Through their HOA fees?</p> <p>3 MS. HARRIS: Through their HOA fees. But I would say</p> <p>4 there are additional fees because an entity -- when you</p> <p>5 move in and you are 70 years old, you may not need some of</p> <p>6 the things that ultimately can be provided. So as you age</p> <p>7 up, and you may need more things, so you may need that Sage</p> <p>8 Life person to come to your house every day to make sure</p> <p>9 you have taken your meds. You will pay for that.</p> <p>10 HEARING EXAMINER ROBESON: I guess I'm just really</p> <p>11 struggling with -- it's very difficult. The only</p> <p>12 difference I see between a townhouse community that had a</p> <p>13 concierge level of care and this project is you have an</p> <p>14 employee that knocks on -- where do I draw the line in the</p> <p>15 services?</p> <p>16 MS. HARRIS: Let me ask a question. If this were say</p> <p>17 two separate buildings, multifamily buildings, multiunit</p> <p>18 buildings, or keep it simple and say it's one. One multi-</p> <p>19 unit building with the same level of services, which, as</p> <p>20 Mr. Brown said, he wouldn't be contesting whether it was</p> <p>21 independent living in that case, and we have other examples</p> <p>22 of that. Why would that, then, be -- we wouldn't be having</p> <p>23 this discussion. Why?</p> <p>24 HEARING EXAMINER ROBESON: Because he didn't raise it.</p> <p>25 MS. HARRIS: And so the irony is when the Applicant,</p>	<p>64</p> <p>1 residents with scheduling burdensome day-to-day activities.</p> <p>2 There is no healthcare, there is no transportation services</p> <p>3 provided. And that project had a technological component</p> <p>4 which was home security system monitored from the office.</p> <p>5 The common area was 1,400 square feet. That, to me, of all</p> <p>6 the eight that we found that in one way or another, are</p> <p>7 similar to this project, that one is probably the most</p> <p>8 similar.</p> <p>9 HEARING EXAMINER ROBESON: Which one is that?</p> <p>10 MS. HARRIS: That's S-2423. But we took guidance from</p> <p>11 again, a handful of other cases. There were eight other</p> <p>12 cases, and I've said it several times, that where the level</p> <p>13 of services is very comparable to what we are providing</p> <p>14 here. I don't know if any of them were --</p> <p>15 HEARING EXAMINER ROBESON: So the exact services you</p> <p>16 are providing that are not landscaping or anything like</p> <p>17 that, because they could be provided -- dog walking, you</p> <p>18 know I know of a condo in Columbia where they have staff</p> <p>19 that will walk your dog and bring in food and all that kind</p> <p>20 of stuff. So the difference between that and this is that</p> <p>21 you have employees that will coordinate health services?</p> <p>22 MS. HARRIS: That's one component, yes. And in varying</p> <p>23 gradations depending on the need of the resident. So for</p> <p>24 instance, if someone needs to go in for a medical exam and</p> <p>25 they want information about various providers, the Sage</p>

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<p style="text-align: right;">65</p> <p>1 Life person will help coordinate that. There is also -- so 2 that function exists in the medical realm, but it also 3 exists in the social realm which I think is important for 4 the senior community as well. 5 HEARING EXAMINER ROBESON: Is there a management 6 company? 7 MS. HARRIS: There will be a management company. 8 HEARING EXAMINER ROBESON: Is that separate from Sage 9 Life? 10 MS. HARRIS: We don't have -- that is to be 11 determined. We don't know that yet. 12 HEARING EXAMINER ROBESON: And so this differs from 13 design for life townhouses? 14 MS. HARRIS: Design for life townhouses -- 15 HEARING EXAMINER ROBESON: Because of the coordinated 16 services? 17 MS. HARRIS: A designed for life townhouse is simply 18 townhouses that have a certain label of ADA provisions 19 within each individual unit. There is no on-site staff 20 person to do anything. 21 HEARING EXAMINER ROBESON: So what's your response to 22 Mr. Brown's argument that household is defined as 23 household, and there is an exclusion on household living? 24 MS. HARRIS: You mean his argument that says a group 25 community can't be something that is household?</p>	<p style="text-align: right;">67</p> <p>1 arguing. 2 MS. HARRIS: And I would say, and we will get to this 3 at the time of the conditional use, it's not -- the Sage 4 Life person, like the eight other people -- eight other 5 cases that we cite, is the coordinator for those additional 6 level of services. It could be physical therapy, it could 7 be medical screenings -- 8 HEARING EXAMINER ROBESON: You are defining and an 9 entire use by -- I guess I'm just having a hard time. You 10 are defining an entire use by one employee, and one package 11 of services. You've told me in your memorandum that this 12 doesn't prohibit this, and this doesn't prohibit this, and 13 this doesn't prohibit this. So if I have a condo 14 association in Bethesda that has a whole management office 15 with people who do this, and it's age restricted, I guess 16 that's where I'm having -- the only difference I can see 17 in your argument is that if you have a staff person that 18 provides some level of social activity, say even social, 19 forget the wellness stuff. Would that be, and it's age 20 restricted, would that be an independent living facility? 21 MS. HARRIS: I would say it wouldn't because the 22 social, in and of itself, is not listed in the definition. 23 I think you need to get into the needs of the aging 24 population. 25 HEARING EXAMINER ROBESON: But they don't -- so say</p>
<p style="text-align: right;">66</p> <p>1 HEARING EXAMINER ROBESON: Yeah. And the definition of 2 household is five -- I forget. It's any number related by 3 blood or five or fewer unrelated people. 4 MS. HARRIS: So for that -- 5 HEARING EXAMINER ROBESON: Because again, it's pari 6 materia. I have to construe the zoning ordinance, all the 7 provisions of the zoning ordinance together. 8 MS. HARRIS: Well, the first thing I would do is, is 9 that I would go back to what I said before that by virtue 10 of the group living definition that says it does not meet 11 any of the definition of household living, every single 12 type of -- any conceivable type of independent living is 13 listed in the group. Any conceivable type of independent 14 living community is going to be listed in the household 15 living section. Unless we're talking about people living in 16 tents or something. Because multifamily duplexes, towns, 17 and single-family are all listed. 18 HEARING EXAMINER ROBESON: But doesn't that beg Mr. 19 Brown's point that there needs to be some communal aspect 20 in the building? I mean the line is so fine, and it depends 21 only on services. So you could use this use as -- Mr. 22 Brown's argument is, you can use this use to build anything 23 you want in any zone, typology -- you know, density and 24 typology wise as long as you had an on-site employee that 25 provided some level of service. I think that's what he's</p>	<p style="text-align: right;">68</p> <p>1 they don't want to take the services. They are like my 2 father who refused services. What does that do? 3 MS. HARRIS: I think we need to look at the spectrum of 4 the aging population. So at the one end you have people 5 that are in nursing. We know what that is. A step down from 6 that is assisted living and memory care. And we know what 7 that is. So even in assisted living you may go in and you 8 have a base level of services and then you pay for more 9 services as you need them. The step down from assisted 10 living is independent living. It's greater oversight than 11 most, I'd say everyone in this room. It's a level of 12 services that is there that's available that would be made 13 available if you pay into it, as you needed it. So for -- 14 HEARING EXAMINER ROBESON: The thing that makes this 15 different, the thing that makes this independent living is 16 the services provided for health? 17 MS. HARRIS: And I would say health broadly. But again, 18 going back to the definition; meal preparation and service, 19 day care, personal care, nursing or therapy. 20 HEARING EXAMINER ROBESON: But you are not providing 21 that. You're coordinating it? 22 MS. HARRIS: Coordinating. That is correct. Well, we 23 are coordinating -- for instance, a physical therapist or 24 a home healthcare person. But what we are providing is the 25 oversight, again, and I think the best example is someone</p>

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18 (69 to 72)

<p>69</p> <p>1 falls in their unit. The Sage Life employee gets the 2 notice. 3 HEARING EXAMINER ROBESON: What happens at night? 4 MS. HARRIS: It's a very similar to what happens in 5 these other facilities. 6 HEARING EXAMINER ROBESON: With a medical alert? 7 MS. HARRIS: There is a backup from the medical alert, 8 but not the Sage Life entity. But that's, again, no 9 different than the other independent living projects that 10 have been approved previously. 11 HEARING EXAMINER ROBESON: Well, most of the ones you 12 recommend, you know there are cottages at Friends House, 13 there's -- but it's a continuum of care to the point where 14 you can go in the nursing home. 15 MS. HARRIS: At Friends House. Friends House is very 16 different than the -- in but the eight that we list, it 17 doesn't include Friends House because we recognize that, 18 that Friends House is that continuum 19 HEARING EXAMINER ROBESON: I thought I saw Friends 20 House in there. 21 MS. HARRIS: Not on Exhibit A for that very reason. 22 HEARING EXAMINER ROBESON: Oh, okay. 23 MS. HARRIS: The services provided of the facilities on 24 Exhibit A is somewhat in any of the eight is somewhat 25 interchangeable with the services provided here.</p>	<p>71</p> <p>1 living were not allowed in the RE2 zone we wouldn't be here 2 having this discussion. 3 HEARING EXAMINER ROBESON: So if I have a design for 4 life -- 5 MS. HARRIS: You could not -- 6 HEARING EXAMINER ROBESON: You can't have services in a 7 design for life? The HOA can't say we really feel like 8 people want to stay here. We built these units for the 9 elderly, they're going to age and we want to provide some 10 services. You can't do that in a design for life? 11 MS. HARRIS: I -- you may be able to. I don't know. But 12 I would also say design for life is a conditional use and 13 therefore the hearing examiner will be evaluating all the 14 other implications. 15 HEARING EXAMINER ROBESON: But if I have one 16 conditional use that allows the same thing as another 17 conditional use then -- 18 MS. HARRIS: They're not the -- I would say they're 19 not -- the definition of design for life is different than 20 the definition for independent living. And if you look at 21 the four corners of the definition this project meets 22 those -- meets the definition. If there's an issue with the 23 definition, the definition could get changed. But for more 24 than -- since 1980 the County has been operating under this 25 definition.</p>
<p>70</p> <p>1 HEARING EXAMINER ROBESON: So when it excludes 2 household living, you are saying it excludes household 3 living so -- but this allows household living. 4 MS. HARRIS: The definition, if I recall correctly, 5 HEARING EXAMINER ROBESON: I mean it excludes -- okay, 6 go ahead. I'm sorry. 7 MS. HARRIS: What I'm not sure about, and I did not 8 bring this section of the code, is independent living -- 9 so it's the person over 62, their spouse, there can be a 10 home healthcare provider. I don't know -- and it certainly 11 can be conditioned that they can't -- that it's not for the 12 offspring of that couple that is 62 years of age or older. 13 It is for an aging individual and/or their partner or 14 spouse. And home healthcare, you know a live-in provider. 15 HEARING EXAMINER ROBESON: What do you say to the 16 argument that this could allow any typology in any zone? 17 Defining a use solely by a group of services allows any 18 structure in any is owned. 19 MS. HARRIS: I would say that that is the exact reason 20 why we have a conditional use process because the -- 21 HEARING EXAMINER ROBESON: But you said it's not a 22 conditional use. You know, it's only a conditional use 23 because this is in the RE2 zone. 24 MS. HARRIS: Right. But your question was what would 25 you say to that it would allow any use. If independent</p>	<p>72</p> <p>1 HEARING EXAMINER ROBESON: No, since 2014. 2 MS. HARRIS: The definition of independent living and 3 the definition under which independent living units were 4 approved previously is almost identical. 5 HEARING EXAMINER ROBESON: Except for the exclusion of 6 household living. 7 MS. HARRIS: The household versus group living 8 distinction. I agree with that. 9 HEARING EXAMINER ROBESON: I guess I've grilled you 10 enough. 11 MR. GOECKE: Let me just add one point on that. So if 12 the purpose of that amendment was to change the code in 13 such a way that these eight communities that were approved 14 before are no longer approved, and yet there's no 15 legislative history showing that that was an issue or that 16 was the purpose of this pretty substantial change, I would 17 argue that -- 18 HEARING EXAMINER ROBESON: But that's speculation. I 19 agree that some of Mr. Brown's argument was speculation. 20 It -- you know I have to give meaning to every word in the 21 zoning ordinance. That's my charge if I apply the 22 principles of statutory construction and that's what I'm 23 trying to do by grilling you. Just because there wasn't a 24 memo saying we intend to do this I have to take the plain 25 language as it is. Which, you know, isn't -- so anyway.</p>

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<p style="text-align: right;">73</p> <p>1 Anything else from you?</p> <p>2 MS. HARRIS: No, thank you.</p> <p>3 HEARING EXAMINER ROBESON: Mr. Brown?</p> <p>4 MR. BROWN: I'll be brief.</p> <p>5 HEARING EXAMINER ROBESON: Huh?</p> <p>6 MR. BROWN: I'll be brief. There's not a lot that I</p> <p>7 feel I need to respond to. Let me mention first of all,</p> <p>8 that while I think you were correct and prudent in asking</p> <p>9 DPS for their opinion on this issue, I think their view on</p> <p>10 this statute is something that you can attach or not attach</p> <p>11 weight to differentially depending on the quality of the</p> <p>12 analysis. In this case, you got a conclusion. You didn't</p> <p>13 get any analysis. So I would give that little weight,</p> <p>14 myself, because they didn't bother to tell you why they</p> <p>15 felt the way they did. At least in terms of it being an</p> <p>16 allowed use. And it was a very general statement anyway. I</p> <p>17 want to go back because it's, you know, I don't want to be</p> <p>18 accused of neglecting the statutory definition of</p> <p>19 independent living facility for seniors because I think it</p> <p>20 leads directly to the point that I have made to you about</p> <p>21 the need for there to be some sort of shared space within</p> <p>22 the living structure that is shared by the senior adults.</p> <p>23 Independent living facility for senior, quote, means a</p> <p>24 building containing dwelling units and related services for</p> <p>25 senior adults. Let's focus on the phrase, building</p>	<p style="text-align: right;">75</p> <p>1 definition. Now, we hear them say, well, we could make more</p> <p>2 money as a multifamily and you would be less satisfied</p> <p>3 because it would be less compatible. To which I say, all of</p> <p>4 that is irrelevant to the question of what the statute</p> <p>5 means and how one is to be interpreted. Sure, my clients</p> <p>6 might have reason to object on compatibility grounds to a</p> <p>7 multifamily building on these 30 acres. But we wouldn't be</p> <p>8 here before you on definitional grounds. We would fight out</p> <p>9 the compatibility fight in the hearing. The hearing that I</p> <p>10 am hoping to avoid by focusing on the definition. With</p> <p>11 regard to various precedents that I've heard bandied about</p> <p>12 that haven't really been discussed in detail in the memos,</p> <p>13 I'm at a loss to describe and distinguish them. So I don't</p> <p>14 know what to say except that I will say that even in the CR</p> <p>15 zone the uses don't change. The uses and the use table are</p> <p>16 the same across the board for all of the zoning categories.</p> <p>17 In this particular case, in the CR zones the independent</p> <p>18 living facility for seniors is a limited use, not a</p> <p>19 conditional use. And I haven't really studied the</p> <p>20 implications, but I do know that as far as I can tell, what</p> <p>21 changed about the definition of independent living facility</p> <p>22 for seniors between the old zoning ordinance and the new</p> <p>23 zoning ordinance is that you have to read into the new</p> <p>24 definition that it's not household living. And the reason</p> <p>25 you have to do that is because it's under the rubric of</p>
<p style="text-align: right;">74</p> <p>1 containing dwelling units and related services. The phrase,</p> <p>2 and related services, modifies building just as much and</p> <p>3 just as easily as the phrase dwelling units. So the</p> <p>4 building needs to contain two things. It has to contain</p> <p>5 dwelling units and it has to contain related services. And</p> <p>6 what we have pointed out to you, an undisputed fact, is</p> <p>7 that those people who are going to be buying these 51 units</p> <p>8 are going to be told you have the option to have your unit</p> <p>9 equipped with various features that are desired by seniors,</p> <p>10 if you want them, but you're not required to have them. So</p> <p>11 there's no obligation under the arrangement that we have</p> <p>12 here for related services for seniors to be included within</p> <p>13 the building and that's contrary to the definition of</p> <p>14 independent living facility for seniors in the statute.</p> <p>15 Now, we don't say that this list of, may include, or</p> <p>16 includes, is prescriptive, it's descriptive. Meal</p> <p>17 preparation and service, well, that's descriptive of what</p> <p>18 should be expected. Daycare, descriptive. Personal care,</p> <p>19 descriptive. Nursing or therapy, descriptive. We're not</p> <p>20 saying that you need to provide any one or all of those in</p> <p>21 order to meet the definition of independent living facility</p> <p>22 for seniors. And we even went so far as to say, that if</p> <p>23 they provided all of the services that they are proposing</p> <p>24 to provide whether it's on-site or conciergeries offsite,</p> <p>25 if it's all provided withing the building it meets the</p>	<p style="text-align: right;">76</p> <p>1 group living, which is defined as not household living.</p> <p>2 That particular nuance has to be read into the definition</p> <p>3 of each of the examples within group living of uses that</p> <p>4 constitute group living. The Meadow Ridge case was brought</p> <p>5 up under the old statute where the phrase not household</p> <p>6 living was -- no part of the statute, there was no</p> <p>7 litigation in that case about whether it was, or was not</p> <p>8 household living or group living as far as I could tell</p> <p>9 from reading the report in that case. This is the first</p> <p>10 case coming up under the new zoning ordinance where a</p> <p>11 deliberate decision was to categorize residential uses into</p> <p>12 two categories, household living and group living. And the</p> <p>13 decision was made to put this one in the latter category.</p> <p>14 HEARING EXAMINER ROBESON: This is not, I think what</p> <p>15 she said is that this is not the first case. There is one</p> <p>16 other. But, the question here is this may be the first one</p> <p>17 where it's being litigated.</p> <p>18 MR. BROWN: I stand corrected. Exactly correct. Thank</p> <p>19 you. So I don't see those prior cases as a giving you</p> <p>20 precedential value with regard to this contested issue. I</p> <p>21 said I was going to be brief, there really isn't anything</p> <p>22 important to say that I haven't already said.</p> <p>23 HEARING EXAMINER ROBESON: Okay.</p> <p>24 MR. BROWN: So we will leave it at that.</p> <p>25 HEARING EXAMINER ROBESON: Okay. Thank you. Mr. Chen,</p>

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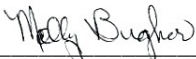
20 (77 to 80)

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1 do you want to add anything at this --
2 MR. CHEN: I --
3 HEARING EXAMINER ROBESON: Or are you going to employ
4 your former strategy?
5 MR. CHEN: I've been lengthy in my presentation today
6 and I think I've said enough.
7 HEARING EXAMINER ROBESON: Record that. All right.
8 Anything else?
9 MR. GOECKE: Nothing to add.
10 HEARING EXAMINER ROBESON: Okay. Well thank you very
11 much. The briefs were excellent. I did read them and it is
12 an interesting issue. So I've ordered -- I don't have a
13 time frame on this but I will try -- I've ordered an X but
14 decided transcript.
15 COURT REPORTER: Two days.
16 HEARING EXAMINER ROBESON: Two days. So hopefully we
17 will not keep the parties waiting too long. Thank you.
18 (The recording was concluded.)
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1 CERTIFICATE OF TRANSCRIBER
2 I, Molly Bugher, do hereby certify that the foregoing
3 transcript is a true and correct record of the recorded
4 proceedings; that said proceedings were transcribed to the
5 best of my ability from the audio recording as provided;
6 and that I am neither counsel for, related to, nor employed
7 by and of the parties to this case and have no interest,
8 financial or otherwise, in its outcome.
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13 Molly Bugher
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