

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

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IN THE MATTER OF:

HERITAGE GARDENS LAND LLC

Applicant

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Daniel Park

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Assn. and the Greater South Glen Assn.

* * * * *

OZAH Case No. CU 22-01

Before: Lynn Robeson Hannan, Hearing Examiner

HEARING EXAMINER'S REPORT AND DECISION

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I. STATEMENT OF THE CASE

On August 17, 2021, Heritage Gardens LLC (hereinafter Applicant or Heritage) filed an application seeking a conditional use to establish a Residential Care Facility (over 16 persons) under Section 59.3.3.2.E of the *2014 Zoning Ordinance*. The property is located at 10701 South Glen Road, Potomac, Maryland 20854 and further identified as parcels P950, P896 and Parcel B of the Glen Vista subdivision. Exhibit 1.

Originally scheduled for December 13, 2021, Heritage requested a postponement of the public hearing to allow Staff time to review materials submitted with the application.¹ The Hearing Examiner granted this request and issued a notice of public hearing for January 28, 2022. Exhibits 36, 37.

On December 22, 2021, Heritage filed revised plans along with a Motion to Amend the application. Exhibits 40-57. On December 23, 2021, the West Montgomery County Citizens Association (WMCCA) and two homeowners filed a motion to postpone the January 28, 2022, public hearing. Exhibit 38. They contended that Heritage should have been required to file a full Traffic Impact Study conforming to the Planning Board's Local Area Transportation Review (LATR) Guidelines. Heritage opposed this motion (Exhibit 98), and the Hearing Examiner referred the matter to Staff of the Montgomery Planning Department for their recommendation. Exhibits 60-61, 64-65. On January 11, 2022, Heritage submitted 26 new exhibits that it intended to produce at the public hearing. Exhibits 66-92.

The Montgomery County Planning Board recommended approval of the application on January 20, 2022, attaching a "Revised and Restated Staff Report" also recommending approval.²

¹ Section 59.7.3.1.C. of the Zoning Ordinance requires the Hearing Examiner to schedule a public hearing within 120 days of the date the application is accepted for filing.

² The "Revised and Restated Staff Report" is the only Staff Report in this record, except for supplemental recommendations requested by the Hearing Examiner.

The Board added conditions to those recommended by Staff. Among these, the Planning Board recommended the following (Exhibit 97):

The Independent Living Units located within the Cottages [fee simple townhouse structures] shall be subject to a Declaration of Covenants recorded in the land records and binding on all successors and assigns that provides for the following:

1. The Cottage Units are part of the overall Residential Care Facility and all services and amenities available to the Independent Living Units located in the Lodge are available to the Cottage unit residents and
2. The Cottage Units are subject to the conditions and all respects of the Conditional Use approval.

Shortly after the Planning Board issued its recommendation, Heritage filed a Motion to Strike WMCCA's request for an expert witness because it had not been disclosed 20 days before the public hearing. Exhibit 99.

The January 28, 2022, public hearing proceeded as scheduled. The Hearing Examiner took WMCCA's Motion to Postpone the hearing (to conduct a Traffic Impact Study) under advisement and granted the applicant's request to strike WMCCA's expert witness. 1/28/22 T. 27, 37.

The public hearing was continued to February 14 and 15, 2022. *Id.* 209. On February 1, 2022, WMCCA requested reconsideration of the Hearing Examiner's decision to strike their expert witness, which Heritage opposed. Exhibits 103, 105. The Hearing Examiner held a decision on the Motion to Strike under advisement with instructions that WMCCA file a pre-hearing statement with the new witness by February 14, 2022. Exhibit 105. WMCCA filed its pre-hearing statement on February 7, 2022, and the Hearing Examiner granted its request for reconsideration and permitted the expert witness. Exhibits 106, 111. On February 11, 2022, the Hearing Examiner remanded the case back to the Planning Department, deciding that Heritage was required to file a Traffic Impact Study under the LATR Guidelines. Exhibit 107.

OZAH issued a new notice of public hearing for February 28, 2022, and March 1, 2022. On March 9, 2022, the undersigned hearing examiner informed the parties that the case would be

reassigned to her and that she would review the video of the January 28, 2022, public hearing. Exhibit 117.

The February 28th and March 1, 2022, hearings proceeded as scheduled. Because the Traffic Impact Study was still outstanding, and to address issues raised by the Hearing Examiner, additional hearings were noticed for May 31, 2022, and June 1, 2022. Exhibit 163. In the interim, Heritage submitted revised conditional use plans, landscape plans, lighting plans, and a stormwater management concept plan, as well as a written summary of the legal structure for the proposed use, among other exhibits, among other items. Exhibits 142, 144, 152-155.

The hearings continued May 31, 2022, and June 1, 2022. Heritage presented expert testimony on the Traffic Impact Study and rebuttal testimony on other aspects of the conditional use. Based on issues raised at the public hearing, the Hearing Examiner left the record open for Heritage to submit a revised site plan and landscaping plan, a revised photometric and lighting plans. Exhibits 181–187. The Hearing Examiner referred these to Staff for their recommendation. Staff advised that the revised landscape plans did not meet Article 6.5 of the Zoning Ordinance and that supplemental forest planting did not conform to the Planning Board's Environmental Guidelines (Exhibit 192). Planning Staff recommended that the Applicant file a request for alternative compliance with the screening requirements of the Zoning Ordinance. Exhibit 188.

Heritage did file a request for alternative compliance (Exhibit 191) and further revised its to include supplemental forest plantings meeting the Environmental Guidelines. Exhibit 191(a)-(h). Staff commented that the revised landscape plan met the requirements of the Zoning Ordinance. Exhibit 196. Due to the additional review of the landscape plan required, the Hearing Examiner extended the date by which the record would close to July 29, 2022. Exhibit 195. Staff submitted their recommendation on July 14, 2022. Heritage submitted a letter disputing statements

made in the opposition's closing argument and the record closed on July 29, 2022. Exhibit 197. The Hearing Examiner extended the time for filing her report on August 29, 2022. Exhibit 199.

After a very careful review of the entire record, the Hearing Examiner finds that the application meets the standards of the Zoning Ordinance, subject to the conditions included in Part IV of this Report.

II. FACTUAL BACKGROUND

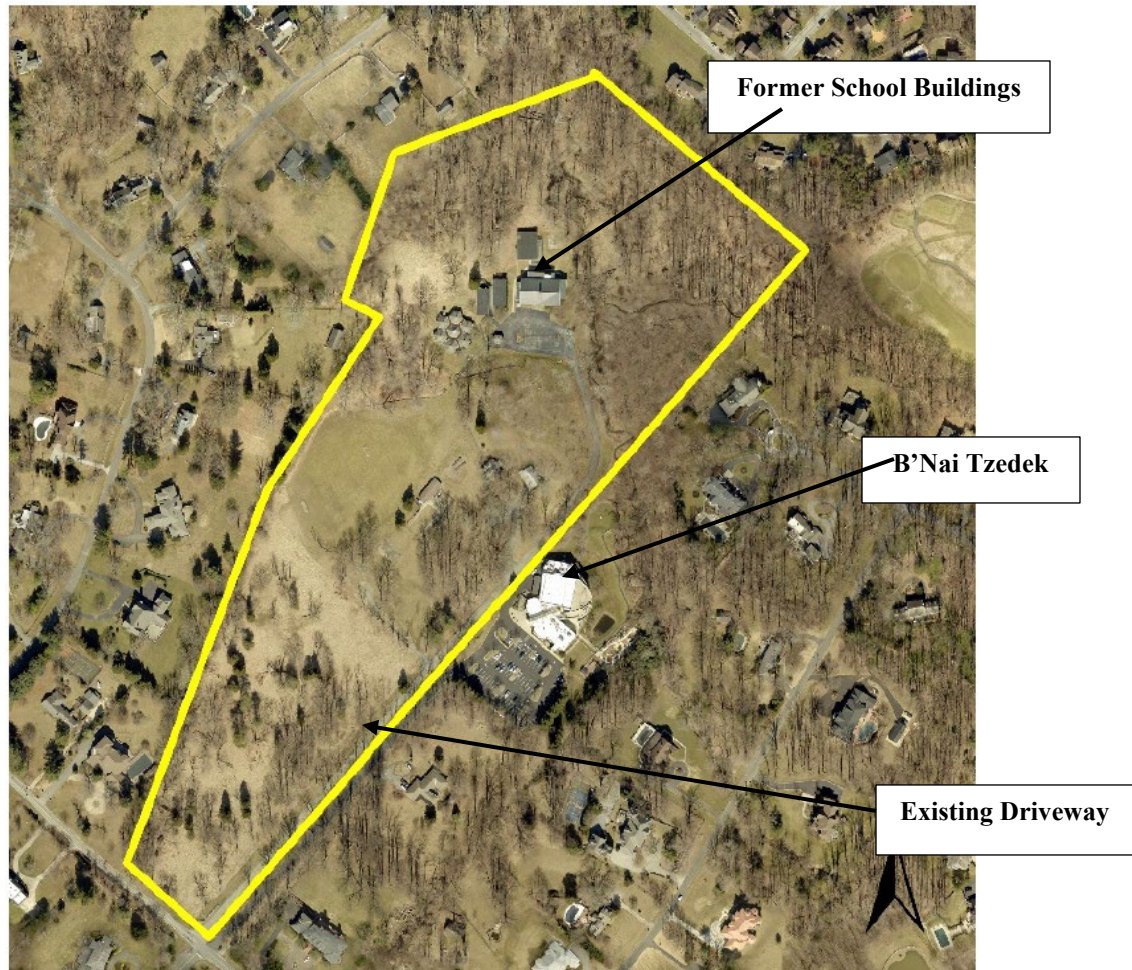
A. The Subject Property

The property is located on the north side of South Glen Road east of Falls Road and north of River Road. An aerial photograph from the Staff Report shows the general vicinity (Exhibit 97(a), 5, below):



Consisting of approximately 30.6 acres, the property is improved with now-abandoned structures used for a former school, the Fourth Presbyterian School. These include a gym and associated parking. The school closed in 2014. Exhibit 97(a), p. 4. Access to the property is from

a driveway located eastern side of the property. Staff advises that this driveway is offset from the intersection of South Glen Road and Norton Road by about 25 feet. *Id.*, p. 6. A second driveway, serving the Congregation B’Nai Tzedek religious facility adjoins the eastern side of the driveway. The Staff Report contains an aerial photograph showing the existing improvements (Exhibit 97(a), p. 7, below):



The property contains several environmental constraints that include floodplain, floodplain buffer, streams, stream valley buffers and existing forest and an existing forest conservation easement. Exhibit 181(b). These are described in detail in Part II.C.2.3. of this Report. Staff advises that there are no endangered species or historic structures on the property. Exhibit 97(a), p. 6.

B. Surrounding Neighborhood

To determine whether the proposed use meets the compatibility standards of the Zoning Ordinance, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). The boundaries delineated by Staff are shown in an aerial photograph in the Staff Report (Exhibit 97(a), p. 9, below):



According to Staff, except for the Congregation B’nai Tzedek facility, the character of the surrounding area is “almost exclusively residential”, consisting of single-family dwelling units in the RE-2 Zone. *Id.*, p. 8. There is one conditional use in the surrounding area, an equestrian

facility for two horses located adjacent to the property at 11021 Dobbin Road, owned by Marie Brigham, a party to this case. Exhibit 121. The approximate location of adjoining homes owned by parties to this case is shown on the surrounding area map.

No one contests Staff's delineation or characterization of the surrounding area. Upon review, the Hearing Examiner adopts the neighborhood boundaries determined by Staff. She agrees with Staff that the neighborhood character is exclusively single-family detached homes in the RE-2 Zone, with the exception of the B'Nai Tzedek facility and Ms. Brigham's special exception on Dobbins Road.

C. Proposed Use

1. Zoning History

The development proposed now has gone through several iterations, beginning in 2019. Because the parties reference the history, the Hearing Examiner summarizes it here.

In 2019, Heritage filed an application for a conditional use to operate an independent living facility for seniors under Section 59.3.3.2.C of the Zoning Ordinance. The proposed facility consisted of 51 townhouses with concierge-style services (some not provided on-site) and a clubhouse. WMCCA opposed the use, arguing that the Zoning Ordinance required senior living facilities to have all units and services within a single structure. Before a ruling on that issue, Heritage withdrew its application. *See*, CU 19-09, Exhibits 157, 158.

In December 2020, the District Council introduced Zoning Text Amendment (ZTA) 20-08. The ZTA amended the definition of "residential care facility" to add a "senior care community". The definition of "senior care community" in the ZTA permits the facility to contain:

...assisted living and residential independent dwelling units and may also include memory care and/or skilled nursing in one or more buildings of any structure type. The health care and services component of the community may be located in a structure physically separated from the independent dwelling units.

ZTA 20-08, Ordinance No. 19-16 (adopted May 31, 2021).

2. The Proposed Development

Heritage seeks to develop a “senior care facility” authorized by ZTA 20-08. The mix of units has been amended since originally proposed.³ At the public hearing, Heritage initially proposed to construct 45 independent living units in 11 three-unit structures (triplexes) and 6 two-unit structures (duplexes). Each triplex and duplex are referred to as a “Cottage”. During the public hearing, Heritage amended the conditional use plan to have 10 triplexes and 7 duplexes, eliminating one dwelling unit in the Cottages to create a pocket park on the property adjoining Mr. Maggin’s property. Heritage also proposes to construct a multi-unit building (the “Lodge”). Throughout the public hearing, Heritage proposed 29 independent senior dwelling units and 105 beds of assisted living/memory care. In proposed conditions submitted after the public hearing, Heritage capped the number of independent living units in the Lodge to 30, an increase of one. Exhibit 180(a). Because all the evidence at the public hearing was based on 29 independent living units in the Lodge, the Hearing Examiner does not accept this proposed condition. Perspective views of a duplex and triplex, submitted by Heritage, are shown on the next page (Exhibit 56).

Staff advises that the multi-unit Lodge is located at the lowest part of the site, away from South Glen Road. Exhibit 97(a), p.41. Because it is nestled into a hill, the top of the Lodge will be lower than adjoining properties. *Id.* Ms. Jane Przygocki, Heritage’s expert in land use planning, opined that The Lodge is at the site’s lowest elevation. It will not be visible or will be barely visible from South Glen Road because due to the topography and screening from a significant

³ Planning Staff based its recommendation on 74 independent living units, 45 of which were in Cottages and 29 of which were in the multi-unit building known as the Lodge. It also proposed a 96-bed assisted living/memory care facility in the Lodge. The Planning Board later recommended increasing the number of assisted living/memory care beds to 105. This was the proposal at the beginning of the public hearing before the Hearing Examiner.



**Duplex
Exhibit 56(g)**



**Triplex
Exhibit 56(g)**

stream valley buffer with forest. A perspective view of the Lodge is shown on the next page (Exhibit 56(e)).

Heritage will provide an on-site services to residents of the Lodge and the Cottages through a resident-case services manager, SageLife. Ms. Kelly Cook Andress, President and founder of SageLife, testified that, while a continuum of care is not guaranteed, seniors in independent living



**Lodge Perspective
Exhibit 56(e)**

will receive priority for available units in the assisted living/memory care section. Ninety-five percent of the time there is turnover even at full occupancy because the average length of stay in the assisted living is a year and a half. SageLife is usually able to accommodate an individual's needs in their existing setting until an apartment becomes available.

Services that SageLife will provide include transportation for those who wish to stop driving; maintenance-free exteriors, dining and meals, a "wellness center", and a "mosaic" recreational program. They transport residents to outside events by a 12-passenger van, a minivan or a town car depending on the location. They regularly schedule transportation to the grocery store, drug store, and medical buildings to serve residents. 1/28/22 T. 88-90.

The amenities will include a commercial kitchen that feeds 3 to 4 dining venues, one dedicated for assisted living, one for memory care, and one for independent living in the Cottages and the Lodge. The wellness center typically provides physician services like doctor's visits. At full occupancy, they typically have medical personnel on hand for about three days a week. They also have a staff nurse and physical therapists on-site as well. 1/28/22 T. 81-88.

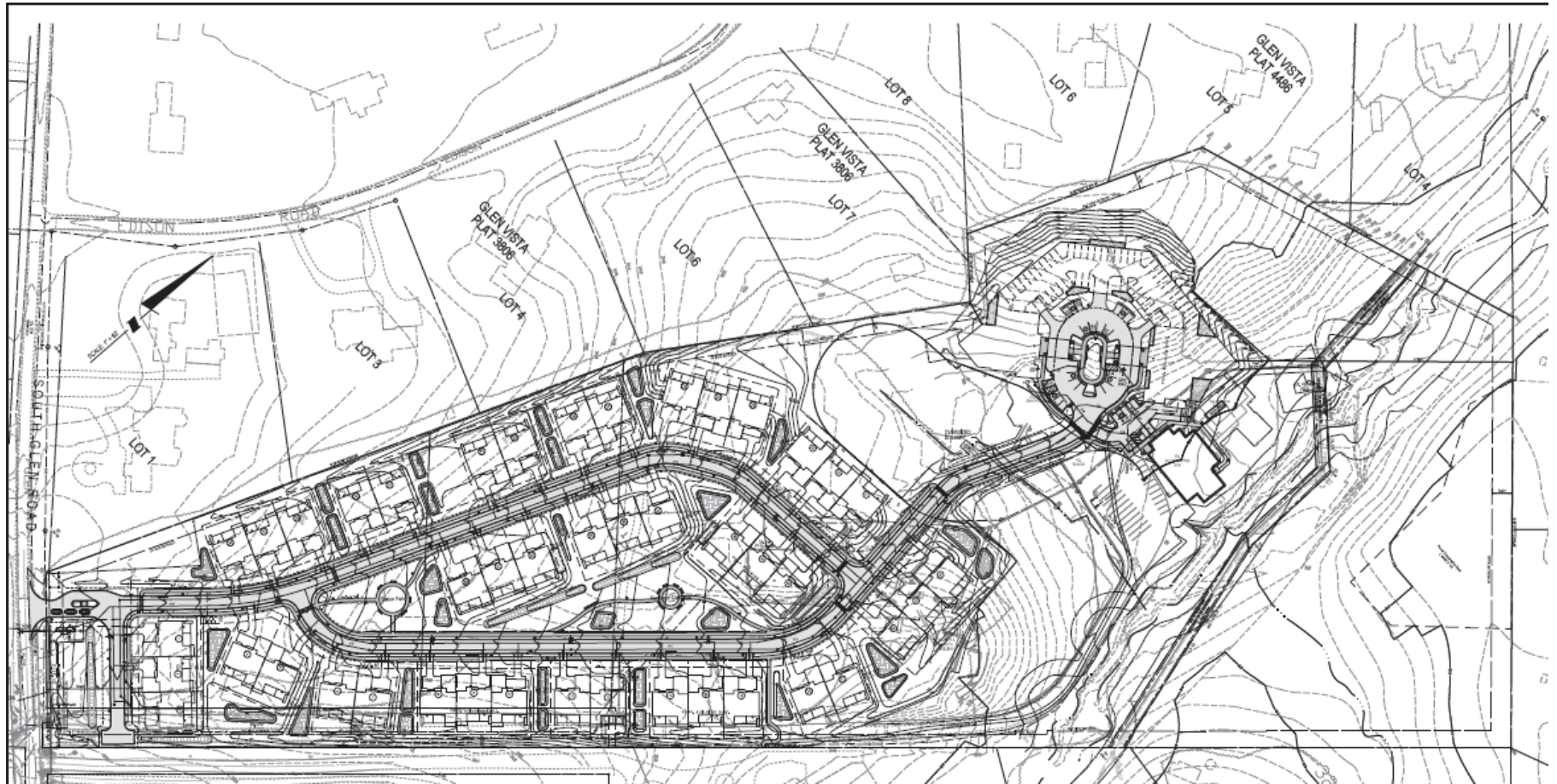
SageLife's "mosaic" recreational program includes programs for outreach, social arts, and intellectual curiosity. Outreach aims to keep residents interacting and participating in the community, including outside organizations. 1/28/22 T. 88-90.

a. Conditional Use Plan, Perspectives and Floor Plans














Due to environmental constraints on the northern portion of the property, Heritage clusters the Cottages toward the southern portion of the property, as shown on the conditional use plan (Exhibit 181(c), on the next page).

The access drive forms a loop road lined on both sides with Cottages, which leads to the Lodge on the north end of the property. Two parks providing the primary open space for the development are located inside the loop road. Exhibit 97(a), p. 16. A perspective of the inner loop road, the Cottages and one of the parks is shown below (Exhibit 56(e)):





**Overall Conditional Use Site
Plan (Exhibit 181(c))**

LEGEND	
	EXISTING SITE BOUNDARY
	PROPOSED RIGHT-OF-WAY
	PROPOSED PUBLIC ACCESS EASEMENT
	EXISTING CONTOUR
	LIMITS OF DISTURBANCE
	PROPOSED OWNERSHIP UNIT
	PROPOSED CONTOUR
	PROPOSED RETAINING WALL
	PROPOSED PUE LINE
	PROPOSED STRUCTURE
	PROPOSED LIGHT
	PROPOSED WAYFINDING SIGNAGE
	PROPOSED SWM AREA

Heritage submitted perspective of the Lodge from grade level (Exhibit 56(e), below):



Staff advises that one triplex unit will front South Glen Road. Exhibit 97(a), p. 16. Ms. Przygocki testified that the triplex unit and landscaping captures the characteristics of nearby properties. Landscaping includes a rail fence and stone pillars similar to other properties. Heritage

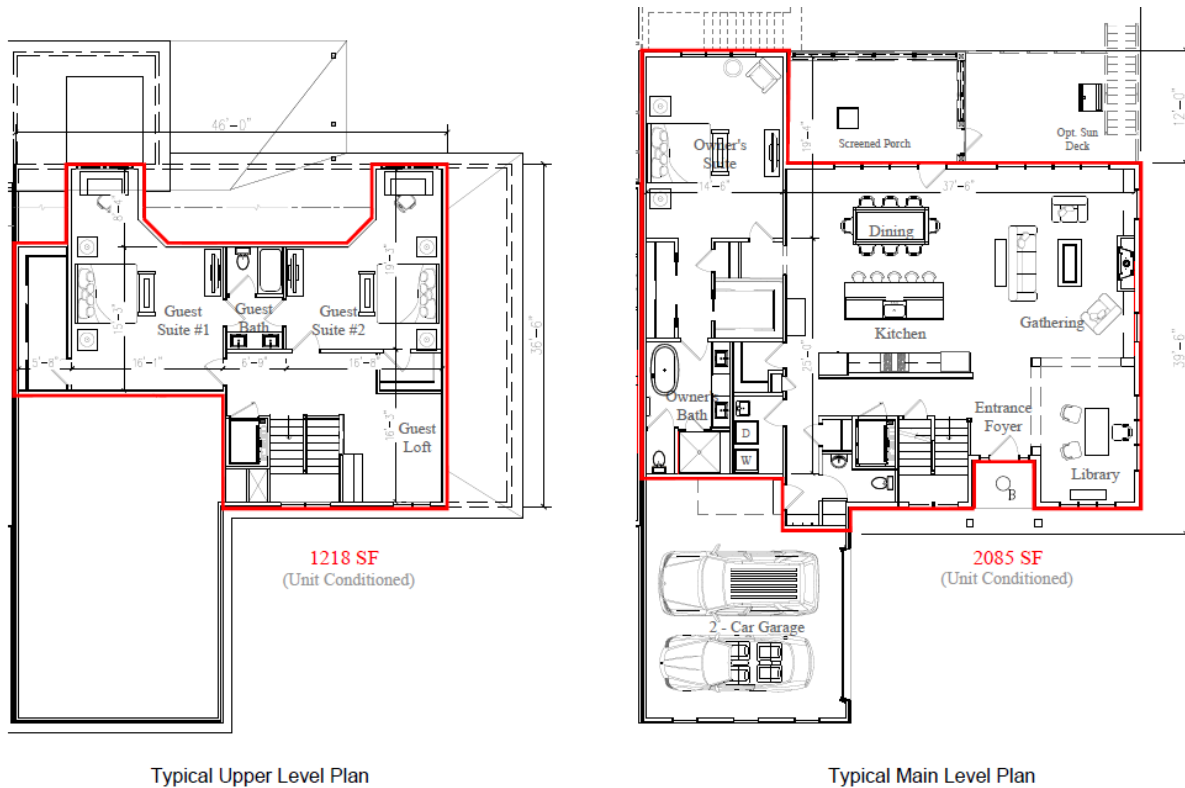
submitted a perspective showing the property's frontage along South Glen Road (Exhibit 56(d), below):



The Cottages will be a maximum of 40 feet in height, although Heritage's expert architect, Mr. Dennis Swihart, testified that most will be closer to the low-30's. The triplex is just under 32 feet tall, and the duplex is approximately 26 feet in height. Because the Zoning Code requires them to calculate the height by the average grade, they stated in the application that the units will not exceed 40 feet in height. Most of the Cottages are much closer to 32 feet and even less in some locations. 5/31/22 T. 103-104.

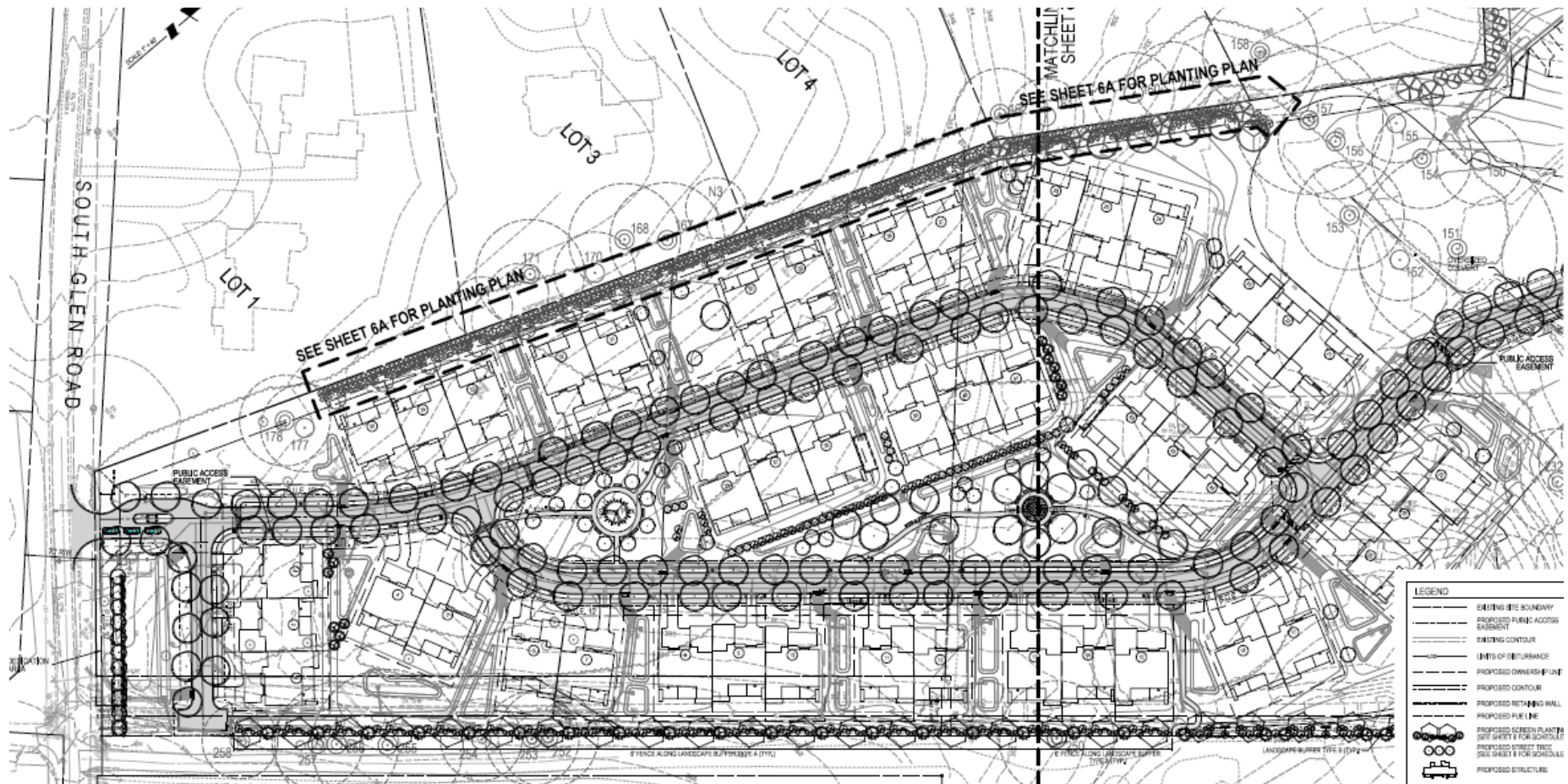
The footprints of the duplexes are approximately 107 feet by 74 feet and triplexes approximately 160 feet by 74 feet, excluding decks and screen porches. T. 100. The County's GIS records do include screen porches, so these will add about 225 square feet to the footprint on the back of the house. 5/31/22 T. 100. With these excluded, the footprint of the triplex is approximately 8,025 square feet and the duplex's footprint is approximately 5,350 square feet. Exhibit 139.

Mr. Swihart submitted a typical floorplan for a dwelling unit in either a duplex or triplex Cottage (Exhibit 140):

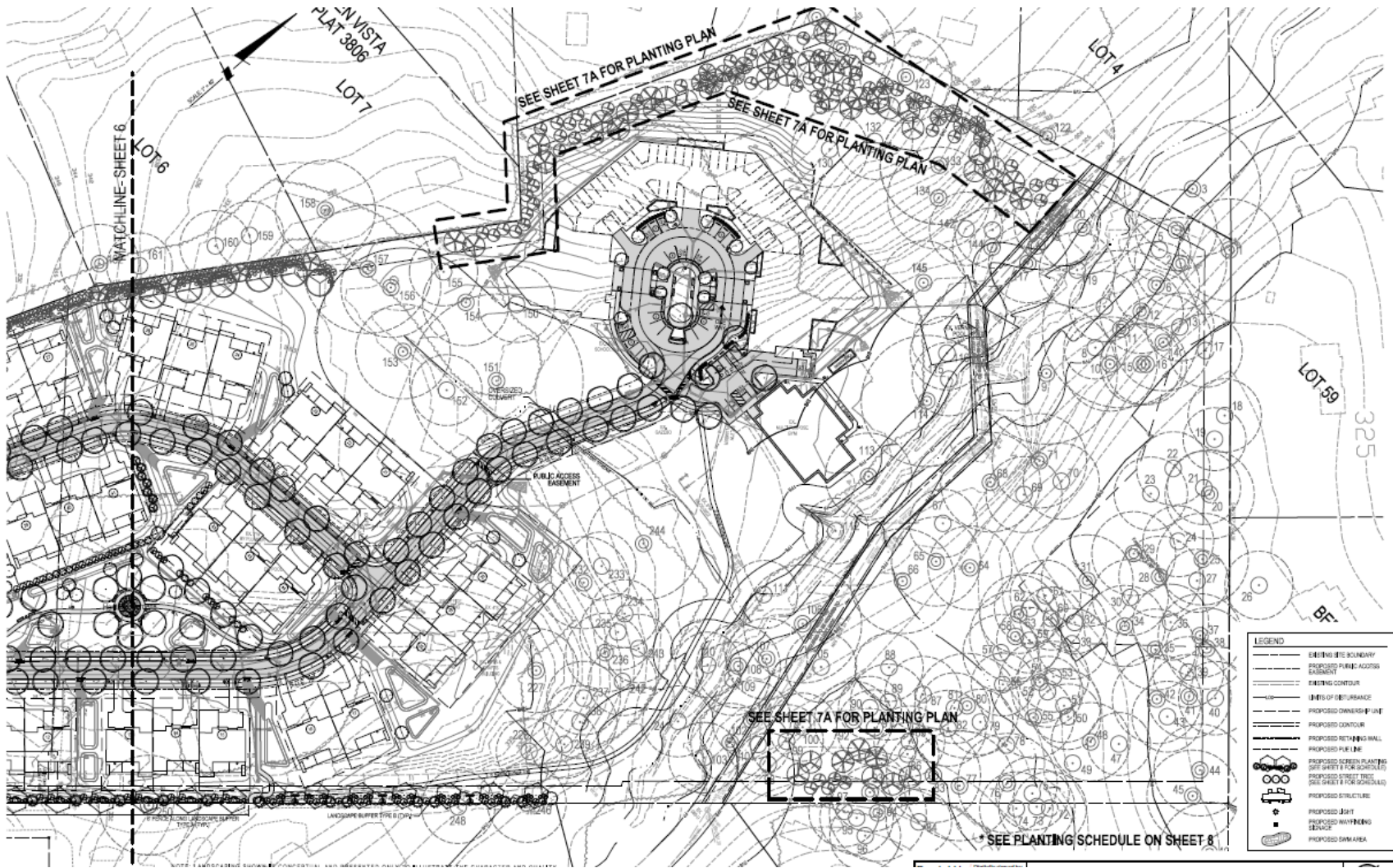


b. Site Landscaping, Lighting and Signage

The landscape plan has been amended several times during these proceedings. Excerpts from the final overall landscape plan are shown on the following pages. Exhibits 191(a), (c). Mr. Daniel Park, Heritage's expert in landscape architecture, testified that Heritage modified the landscape screening to address neighbor's concerns about lack of adequate buffer. 5/31/22 T. 197. Heritage now proposes to create a "green wall" of arborvitae and cryptomeria along Lots 1 through 4 on the western property line. He opined that this exceeds the requirements of the Zoning Ordinance and will provide a dense, uniform and above adequate screening along Lots 1, 3 and 4. The trees will be 10 feet high, spaced at 6 feet on center. They will be matching, of specimen quality, and hand selected and tagged by a landscape architect. This means that they



Excerpt of Landscape
Plan (Southern Portion
of the Property)
Exhibit 191(d)



**Excerpt of Landscape Plan
(Northern Portion of the
Property) Exhibit 191(d)**

will be of the highest quality standards. In his opinion, the plants selected will grow well on the site. 5/31/22 T. 200. Giant green arborvitae is one of the most deer resistant plants available. *Id.* T. 227. Mr. Park testified that a similar type of screening already exists within the neighborhood (Exhibit 151, below):



To “further comply with the minimum screening requirements”, which require canopy trees, as well as understory or evergreen trees and shrubs, Heritage supplemented the screening along adjoining Lots 1 through 4 on the western property line to add understory trees and shrubs east of the arborvitae. Exhibit 193. These did not include canopy trees because shade from these trees would impact the health of the arborvitae. *Id.* Heritage requested alternative compliance to omit canopy trees. *Id.*

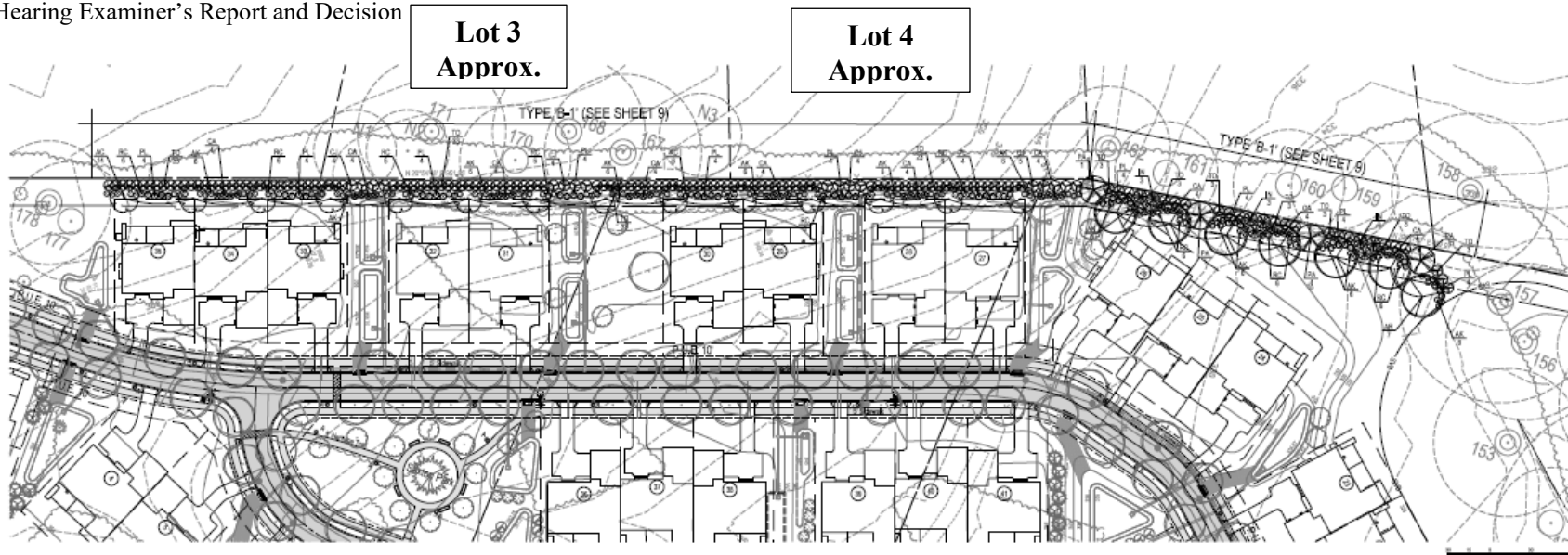
Mr. Park testified that Heritage proposes to integrate shrub and other attractive materials further north along the western property line (on Ownership Lots 24-26, shown on the conditional use plan (Exhibit 181(c))). He opined that these are very effective at providing the same screening that will existing along the southern portion of the western property line. 5/31/22 T. 200-201.

Heritage proposes planting supplemental canopy trees and shrubs there to comply more “strictly” with the screening requirements of the Zoning Ordinance. Exhibit 191.

According to Mr. Park, they took a similar screening approach for Ms. Brigham's and Ms. Baker's properties adjoining the forest, but with plants better suited for forest understory. Exhibit 150 (below) shows generally the areas (in dark green) of supplemental forest planting, although Heritage later amended this plan to remove plantings from the stream valley buffer in response to comments from Staff. 5/31/22 T. 201-202; Exhibits 188, 191, 191(a).



Heritage also submitted perspectives (Exhibit 145) to demonstrate the views of the development from Lot 3 (owned by Mr. Maggin), Lot 4, and Lot 5 (owned by Ms. Marie Brigham) after three- and seven-year growth of the plantings. These perspectives, along with the corresponding excerpts from the landscape plan, are on the next pages.



LANDSCAPE BUFFER PLANT SCHEDULE						
CANOPY TREES						
QTY.	CODE	BOTANICAL NAME	COMMON NAME	SIZE	TYPE	REMARKS
7	AR	<i>Acer rubrum 'October Glory'</i>	October Glory Red Maple	2.5" Cal.	B&B	Single-Stem, Full, Specimen, Matching
ORNAMENTAL TREES						
QTY.	CODE	BOTANICAL NAME	COMMON NAME	SIZE	TYPE	REMARKS
14	AC	<i>Amelanchier canadensis</i>	Shadblow Serviceberry	10' H	B&B	Full, Specimen, Matching
EVERGREEN TREES						
QTY.	CODE	BOTANICAL NAME	COMMON NAME	SIZE	TYPE	REMARKS
17	CJ	<i>Cryptomeria japonica</i>	Japanese Cedar	10' H	B&B	Single-Stem, Full, Specimen, Matching
9	IN	<i>Ilex 'Nellie R. Stevens'</i>	Nellie R. Stevens Holly	10' H	B&B	Single-Stem, Full To Ground
4	PA	<i>Picea abies</i>	Norway Spruce	12' H	B&B	Single-Stem, Full
135	TO	<i>Thuja 'Green Giant'</i>	Green Giant Arborvitae	10' H	B&B	Single-Stem, Full, Specimen, Matching
SHRUBS						
QTY.	CODE	BOTANICAL NAME	COMMON NAME	SIZE	TYPE	REMARKS
69	AK	<i>Abelia 'Kaleidoscope'</i>	Kaleidoscope Abelia	24" H	Cont. #4	Full, 4' O.C.
40	CA	<i>Clethra alnifolia</i>	Summersweet	24" H	Cont. #4	Full, 5' O.C.
44	PL	<i>Prunus laurocerasus 'Schipkaensis'</i>	Schipka Cherry Laurel	30-36" H	Cont. #4	Full, 5' O.C.
60	RC	<i>Rhododendron 'Corleib'</i>	Autumn Embers Encore Azalea	24" H	Cont. #4	Full, 4' O.C.

**Landscaping on Western Property Line
Adjoining Lots 1, 3, and 4 (Ex. 191(b))**



10811 EDISON ROAD
3 Years After Construction



10811 EDISON ROAD
7 Years After Construction

**View from Lot 3 (Maggin Property) Before
Cottage Reduction from Triplex to Duplex**



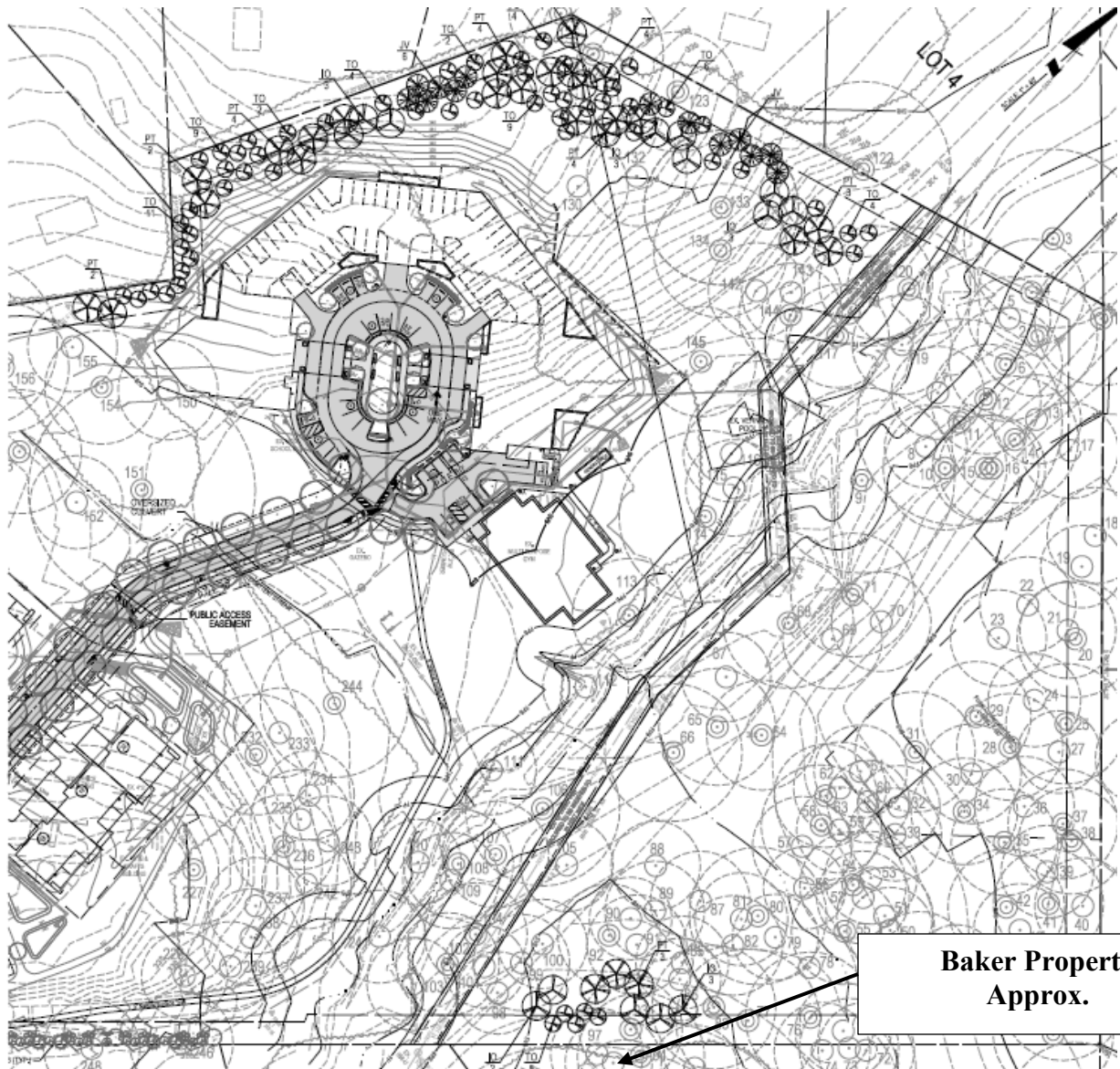
**10821 EDISON ROAD
3 Years After Construction**



**10821 EDISON ROAD
7 Years After Construction**

**View from Lot 4
Exhibit 145**

**Lot 5
Approx.
Brigham Property**



**Baker Property
Approx.**

SUPPLEMENTAL FOREST BUFFER PLANT SCHEDULE

EVERGREEN TREES						
QTY	CODE	BOTANICAL NAME	COMMON NAME	SIZE	TYPE	REMARKS
13	JV	<i>Juniperus virginiana</i>	Eastern Redcedar	10' H	B&B	Single-Stem, Full
27	PT	<i>Pinus taeda</i>	Loblolly Pine	12' H	B&B	Single-Stem, Full
56	TO	<i>Thuja occidentalis</i>	Northern White Cedar	10' H	B&B	Single-Stem, Full, Specimen, Matching
14	IO	<i>Ilex opaca</i>	American Holly	10' H	B&B	Single-Stem, Full To Ground

**Supplemental Forest Plantings (Lot 5, Brigham) and
Baker Property)
Exhibit 191(d)**



11021 DOBBINS DRIVE
3 Years after construction



11021 DOBBINS DRIVE
7 Years after construction

**View of Supplemental Forest Planting from Lot
5 (Brigham Property)
Exhibit 145**

According to Mr. Park, the view from Ms. Baker's property should be like the one experienced by Ms. Brigham. Views of the supplemental forest plantings (from Ms. Brigham's property) are based on a planting schedule that has since been revised at the request of Staff to conform to the requirements for forest conservation areas. Exhibit 196. Views from Lots 3 and 4 do not reflect the additional understory and shrub plantings now included on the landscape plan.

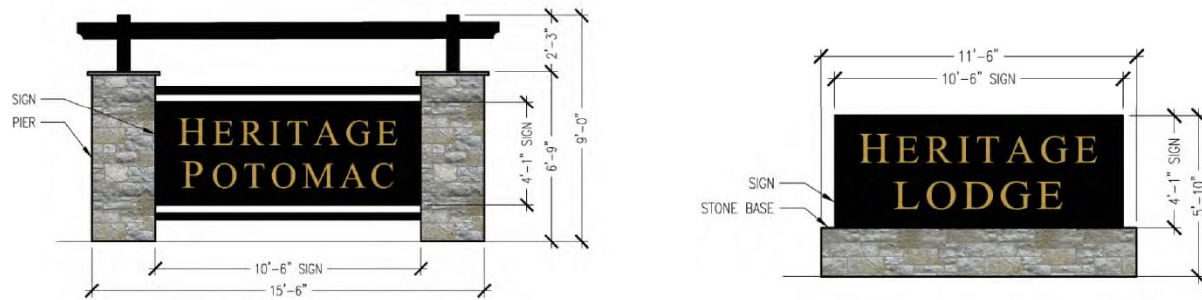
Heritage also amended its original lighting plan to include the proposed lighting on the Cottages, Lodge and gym.⁴ All light fixtures are either recessed, fully shielded, full cut-off fixtures. Some use a frosted globe to further diffuse glare. Mr. Park testified that Heritage revised the street lighting with new pole fixtures and low-level landscape fixtures to further address concerns about light visibility and illumination. The street pole fixtures are still 12 feet high, but they were able to further reduce light levels with new fixtures and globes that diffuse glare. 5/31/22 T. 211-213.

There is one sign light labeled at the entrance and six landscape lights that illuminate piers that run along the front fence. The only other site lighting is at the Lodge. There is another fixture at the sign for the Lodge and 6 landscape lights that will gently illuminate the trees toward the rear of the Lodge courtyard area. *Id.*, T. 212.

c. Signage

Heritage proposes two signs each a maximum of 40 square feet. The proposed entrance sign on South Glen Road is anchored on stone piers with contrasting signage (Exhibit 191(g), shown on the next page). The only other anticipated signage is way-finding signage, required by the fire marshal. 1/28/22 T. 129.

⁴ As originally submitted, the lighting plan only included the proposed street lighting. Exhibit 47.



d. Operations

i. Legal Structure

A major source of controversy in this case is the legal structure of the proposed development. Because the opposition characterizes it as a “non-inherent” operational characteristic of the use, which could warrant denial, the Hearing Examiner summarizes it here.

According to Heritage, the subject property will consist of one record lot. Each dwelling unit in the Cottages, the Lodge multi-unit building, and the common area will be separate fee simple “ownership lots”. Exhibit 126(a). Heritage states that Section 50.7.1.E of the Montgomery County subdivision regulations permits this, providing that, “an ownership plat may be recorded to delineate separate ownership units within a lot.” Heritage compares the structure to condominium regimes, where “ownership lot lines are intended to reflect only ownership interests and have no bearing on zoning requirements.” Zoning requirements are based on the entire record lot. *Id.*, p. 1, fn. 1.

All ownership lots will be subject to a single homeowner’s association (HOA) incorporated under the Maryland Homeowners Association Act. *See, Md. Real Property Code Ann.*, §11B-101, *et. seq.* The HOA will have architectural control and provide maintenance services to the Cottages, but not the Lodge. The Lodge owner must maintain the building and landscaping for the Lodge. The HOA will own the common areas, and provide maintenance, repair, and replacement of

landscaping when needed. *Id.* The owner of the Lodge will be responsible for administration of the conditional use, including compliance with the age restrictions. Exhibit 179.

The HOA will be governed by a three-member board. Two members will be elected by the owner of the Cottages and one member elected by the Lodge Ownership Lot. It will also be responsible for enforcement of the conditional use, although all owners of individual ownership lots will be holders of the conditional use. Changes to the conditional use may not be made without the consent of the owner of the Lodge ownership lot. The owner of the Lodge may unilaterally pursue enforcement of the conditional use throughout the entire development (i.e., the record lot). The Lodge owner may also unilaterally seek changes to the conditional use under certain circumstances. Heritage states that the conditional use approval will run with the property and each ownership lot will be a co-holder of the conditional use. The HOA Declaration of Covenants will require compliance with the Conditional Use and would prohibit any actions that are in violation of the conditional use. Exhibit 126(a).

ii. Staffing

Planning Staff advises that no more than 30 employees will be on-site at any one time (the maximum will occur during shift changes). Exhibit 97(a), pp. 14-15. Employee shifts are divided into three separate categories: (1) administration, housekeeping and maintenance, (2) care staff, and (3) food service staff. Staff shifts are shown below (*Id.*):

- Care staff – three eight-hour shifts
 - 7 AM – 3PM—11 employees
 - 3 PM to 11PM—8 employees
 - 11 PM to 7 AM – 5 employees
- Food service staff – three shifts
 - 6 AM – 1:30 PM – 9 employees
 - 1:30 PM – 9 PM – 5 employees
 - 4 PM – 9 PM – 5 employees

- Administrative, housekeeping and maintenance staff – Generally 7:00 a.m. to 7:00 p.m.

Ms. Andress testified that, during their largest shift change (between 6:30 a.m. and 7:30 a.m.) between 40-60% of employees either rideshare, carpool, or change cars. SageLife expects that 40-60% of their Staff will drive and the opposite percentage will take public transportation. 5/31/22 T. 75. In response to concerns about employees walking along South Glen Road from transit stops, Ms. Andress testified that employees may take Metro into the Potomac shopping center and take a bus. SageLife will make transportation available to pick employees up at the most efficient site for the employees to arrive. They would run SageLife's 12-person van to the site designated for pick-up. SageLife is a competitive employer in a competitive market and doesn't want their employees walking around. They want to get them to work safely. 5/31/22 T. 75-76.

iii. Site Access, Parking, Deliveries and Trash Pick-up

The Applicant's expert in traffic engineering, Mr. Chris Kabatt, testified that the existing site driveway is immediately adjacent to the driveway for the B'nai Tzedek facility. It has one inbound and one outbound lane. The entrance for the proposed residential care facility will be moved further toward the western property line. This separation minimizes the complexity of vehicle turning movements at Norton Road and improves sight distance to the east and west along South Glen Road. Access will be safe, adequate and efficient because it will be built to County standards at a location with better sight distance. 5/31/22 T. 31.

The Applicant's expert in land planning, Ms. Jane Przygocki, testified that a total of 113 spaces are required by the Zoning Ordinance.⁵ The Applicant has provided 165 spaces, some of

⁵ Ms. Przygocki's testimony was based on the earlier proposal for 96 assisted living units and 74 independent senior dwelling units. As the Planning Board recommended up to 105 assisted living units, the number of parking spaces required increased slightly to 116, as discussed in Part III.D.1 of this Report.

which are inside the three wings of the Lodge and underneath the Lodge. Parking for the Cottages will be like residential homes in side-loaded garages. 1/28/22 T. 142.

A trash loading area is below the northernmost end of the Lodge and is screened from the neighborhood by buildings and landscaping. 1/28/22 T. 142. Trash is aggregated from every level. SageLife minimizes food waste by using “digesters” and recycle as many materials as possible. Trash pickups are 3 to 5 days a week. SageLife typically has about one food delivery a day, mostly by box truck. Then, there are “normal” UPS and Amazon deliveries as well. All laundry is done on-site. They have a linens contract, with deliveries about once per week. 1/28/22 T. 90-91.

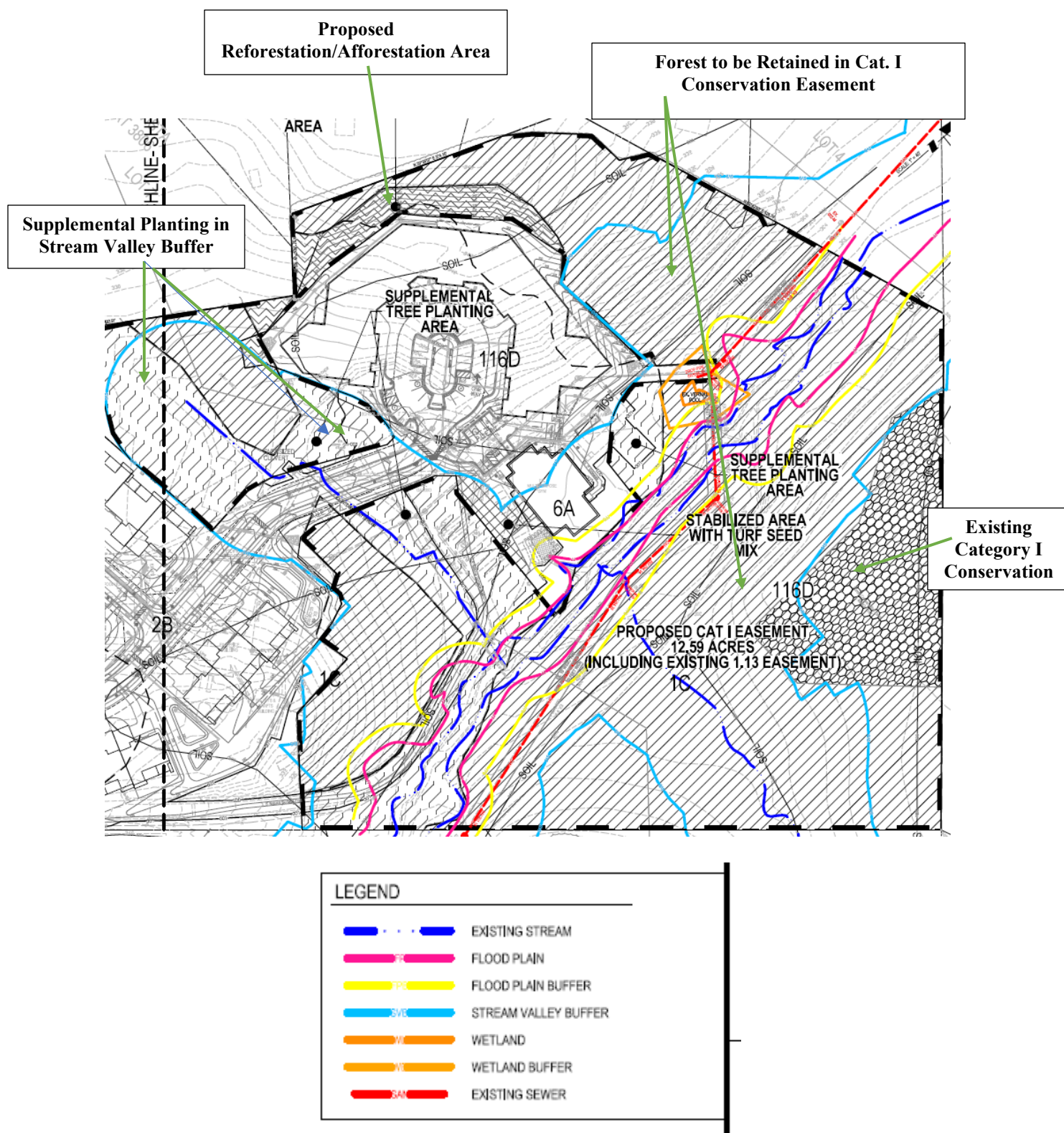
3. Environmental Constraints and Mitigation

a. Environmental Buffers

Mr. Timothy Steman, the Applicant's expert in civil engineering, described the environmental buffers on the property, which are generated by streams, a vernal wetland, and floodplain. There are two major streams on the property. One is a perennial stream that crosses from the east to the northwest sides of the property. There is also an intermittent stream that crosses from the western property line down into the site. 1/28/22 T. 21. Heritage submitted an “Environmental Buffer Exhibit” (Exhibit 74, on the following page) that shows the environmental buffers and proposed mitigation.

b. Buffer Incursions

According to Mr. Steman, some existing improvements extend into the environmental buffers. A major item that transverses the floodplain is the existing road that runs along the east property line and then follows the perennial stream to the west. The project proposes to remove



the existing driveway from the floodplain to convert it to pervious area around the perennial stream. 2/28/22 T. 36. According to Mr. Stemmann, the perennial stream is more environmentally

LEGEND	
	EXISTING SITE BOUNDARY
	PROPOSED RIGHT-OF-WAY
	PROPOSED PUBLIC ACCESS EASEMENT
	EXISTING CONTOURS
	PROPOSED CONTOURS
	PROPOSED RETAINING WALL
	LIMIT OF DISTURBANCE
	EXISTING FLOODPLAIN
	EXISTING FLOODPLAIN BUFFER
	EXISTING INTERMITTENT STREAM
	STREAM VALLEY BUFFER
	EXISTING WETLAND
	EXISTING WETLAND BUFFER
	SOIL LINE
	TREE CANOPY TO REMAIN
	TREE TO BE REMOVED
	LABEL FOR EXISTING TREE
	SIGNIFICANT TREE WITH CRZ
	SPECIMEN TREE WITH CRZ
	PROPOSED FOREST CLEARING AREA
	EXISTING FOREST AREA TO BE RETAINED
	EXISTING CAT 1 EASEMENT
	PROPOSED REFORESTATION/ AFFORESTATION AREA
	PROPOSED SUPPLEMENTAL TREE PLANTING AREA
	PROPOSED STABILIZED AREA WITH TURF SEED MIX
	PROPOSED EASEMENT
	FOREST STAND

Legend to Exhibit 74

sensitive than the intermittent stream and there is a higher priority on protecting that stream.
2/28/22 T. 37-38.

Another existing improvement inside the stream valley buffer is the former gym and associated adjacent parking. The parking area will be removed. The gym will remain and be repurposed for a recreation center. 2/8/22 T. 38.

New improvements in the stream valley buffer will include an upgraded sanitary sewer line near the wetland area and a proposed road connection to the Lodge, which will cross the intermittent stream. Staff determined that eliminating the existing road and relocating it to the alignment shown was preferable from an environmental standpoint because it removes it from the perennial stream buffer and places it in the less environmentally sensitive intermittent stream buffer. 2/28/22 T. 40.

Mr. Steman testified that the existing gym will remain because Staff found it would cause more disturbance to remove it. It also comports with the County's policy to reuse older buildings. There will be no additions or changes to the structure, although there may be some improvements on the interior. 2/28/22 T. 39-40. An existing forest conservation easement was already placed on the northeastern portion of the property to mitigate the incursion of the gym in the floodplain. Mr. Michael Klebasko, an expert in environmental science, testified to additional mitigation proposed by the Applicant (described below).

c. Priority Forest

All parties acknowledge that the forest at the northern end of the property is designated by the Master Plan as "high priority" for preservation, although Mr. Park testified that it is Category 4 for preservation, which is the lowest level of protection unless located in a stream valley buffer. 2/28/22 T. 80.

Mr. Park testified that the proposed development would preserve 94% of the priority forest on the subject property. 2/28/22 T. 85-88. Heritage is proposing to remove 6% or .58 acres of priority forest at the very northwest corner, outside of the stream valley buffer, except for 1,200 square feet of disturbance inside the buffer needed for the sewer connection. Removal of the .58 acres will be compensated by replanting next to the existing forest on the western side of the Lodge,

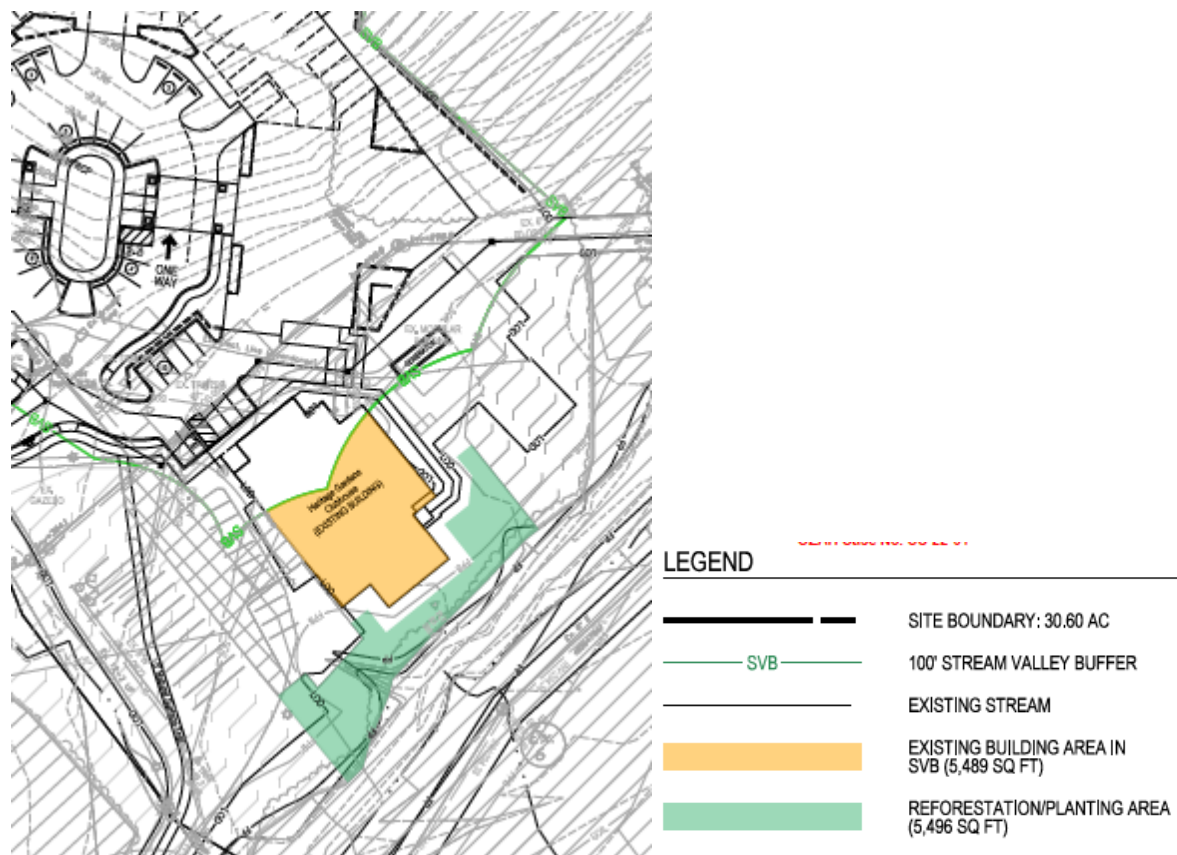
near the vernal wetlands. They will also provide 2.10 acres of supplemental planting south of the intermittent stream. 2/28/22 T. 89-90.

d. Environmental Mitigation

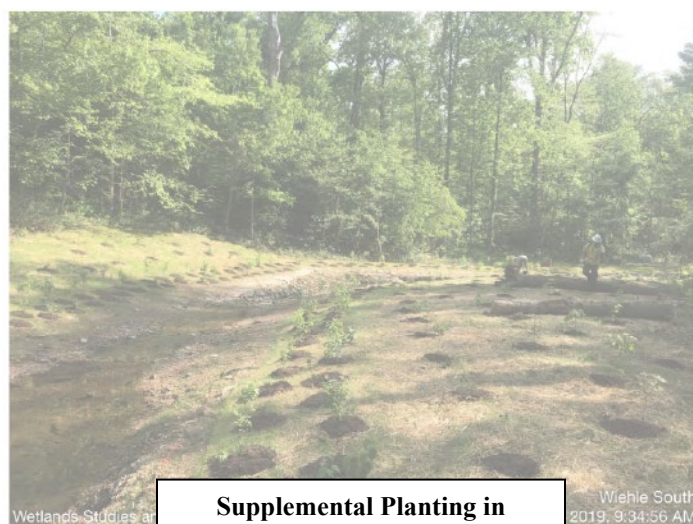
In addition to the 2.1 acres of supplemental planting in the stream valley buffer, Heritage proposes additional mitigation for the gym's location in the stream valley buffer. Mr. Michael Klebasko, an expert in environmental science, opined that the existing gym building could remain because it was constructed under a building permit for the school. To partially mitigate that impact the County required establishment of a 1.13-acre forest conservation easement along the northern property line. 5/31/22 T. 233. The County's general position is that impervious area should be outside of stream valley buffers, but exceptions are certainly made, most typically for utilities and other infrastructure. On occasion, they allow encroachments of previously permitted structures, this site being an example of one approved years ago. The gym building is there by right. The structure is not located in a 100-year floodplain or the floodplain buffer, and it does not appear to be a flood hazard. He opined that there is no evidence that the presence of the structure has caused the stream to migrate or in any way negatively impacted the stream. *Id.*, T. 234-235.

Mr. Klebasko described additional mitigation for the gym's encroachment into the stream valley buffer. Approximately 5,489 square feet of the building is located within the stream valley buffer, or about .12 percent of the total stream valley buffer on site, a very small percentage. He recommends providing an additional 5,489 square feet of riparian plantings within the grass open area between the building and existing stream. These would be woody trees, understory and shrub species throughout the area. In its current condition, it is mostly open mowed lawn. They recommend planting native tree species only, such as red maple, sweet gum, various species of oaks, papaw, ironwood, and northern spice bush. *Id.*, T. 237. Mr. Klebasko submitted an exhibit

showing the area of mitigation proposed along the stream and an example of the supplemental plantings (Exhibit 161, below):



PLANTING EXAMPLE



**Supplemental Planting in
Stream Valley Buffer near
Former Gym
Exhibit 161**

D. Community Response

This application is opposed by the West Montgomery County Citizens' Association (WMCCA), the South Glen Neighborhood Association (SGNA), and several individuals. Ms. Susan Lee, on behalf of WMCCA, testified that WMCCA opposes the application for three major reasons. First, placement and construction of the Lodge complex will violate the environmental protections contained in local, State, and federal laws and regulations. They also argue that the Lodge complex is contrary to the forest preservation requirements of the Potomac Subregion Master Plan. 3/2/22 T. 63.

Second, construction of a facility of this size at this location is inconsistent with the basic framework of the master plan, including its the elderly housing and special exception provisions. *Id.* Third, the ownership structure is so "bizarre" that, coupled with the stringent age restrictions, dooms it to failure and guarantees an enforcement nightmare, all of which would have to be addressed through significant and extraordinarily stringent covenants, staging, and reporting requirements. *Id.*, T. 64.

Others in opposition testified that massing of the Cottages was too dense and not compatible with the surrounding area. They testified that the the screening proposed was inadequate because the existing forest has no understory. Some expressed concerns regarding lighting, noise, traffic delays, pedestrian safety on South Glen Road (which has no sidewalks), and queues along South Glen Road. Others were concerned about flooding and erosion from the streams on the property. The WMCCA and SGNA fear that the fee simple model is not marketable, reaping the developer the benefit of building single-family townhouses in the RE-2 Zone without the age-restrictions or higher tiers of care. These concerns are described in more detail in the next part of this report.

Three individuals supported the application because it offered a housing type for seniors that doesn't currently exist in the area. One, Ms. Heidi Finger, did not observe traffic problems on South Glen Road. 3/2/22 T. 35, 49. Ms. Finger is interested in living there and testified that a school at the same location would have to be lit all night for security with much brighter lights than proposed here. She likes the fact that the development has its own sidewalks and trails and safe area within the development, so she could walk her pets. 3/2/22 T.56. Ms. Finger and another individual testified they were residents thinking of purchasing one of the Cottage dwelling units. 3/2/22 T. 49-58.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific to a particular type of use, as set forth in Article 59.3 of the Zoning Ordinance, and general (*i.e.*, applicable to all conditional uses), as set forth in Division 59.7.3 of the Zoning Ordinance. The specific standards applied in this case are those for a Residential Care Facility. Section 59.3.3.2.E.

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (*Zoning Ordinance*, §7.1.1.), the Hearing Examiner concludes that the conditional use proposed in this application, with the conditions imposed in Part IV of this Report and Decision, will satisfy all the specific and general requirements for the use.

A. Necessary Findings (Section 59.7.3.1.E)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E. of the Zoning Ordinance. Standards pertinent to this approval, and the Hearing

Examiner's findings for each standard, are below.⁶ The criteria for approval fall generally into four categories, discussed in that order:

1. Substantial Conformance with the Master Plan;
2. Adequate Public Services and Facilities;
3. No Undue Harm from Non-Inherent Adverse Effects; and
4. Compatibility with the Neighborhood

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;

Staff determined that this criterion was satisfied (Exhibit 97(a), p. 35):

Applicable previous approvals include Special Exception Nos. 2502 (riding stable for up to 15 horses), 1609, and 1610. To the Applicant's knowledge, Special Exception Nos. 1609 and 1610 which permit the operation of a private educational institution—have not been revoked by the Board of Appeals. However, given that the Fourth Presbyterian School closed in 2014 and there has been no subsequent operation of a private educational institution on the Property since that time, this special exception use has been abandoned pursuant to Section 1.4.2 of the Zoning Ordinance and thus there is no conflict with any previous approval(s) on the subject site.

Conclusion: The Hearing Examiner agrees with Staff that there is nothing in the record indicating Heritage intends to use the property as a private educational institution; however, she imposes a condition requiring Special Exception Nos. 1609 and 1610 to be abandoned under the procedures in Section 59.7.3.1.L.7 of the Zoning Ordinance prior to issuance of the first building permit. With this condition, this criterion is met.

⁶ Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

***b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;*⁷**

Conclusion: This subsection requires an analysis of the standards of the RE-2 Zone contained in Article 59-4; the use standards for a Residential Care Facility (Senior Care Facility) contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively).

1. Substantial Conformance with the Master Plan

c. substantially conforms with the recommendations of the applicable master plan;

The property lies within the geographic area covered by the *2002 Potomac Subregion Master Plan*. Preservation of existing environmental features is one of the main goals of the Plan (*Plan*, p. 1):

As Potomac has evolved from rural and agricultural to a semi-rural and suburban subregion, it has retained much of its green character and environmental qualities. These qualities are under threat. Inexorable population growth continues to foster intense development pressure on the Potomac Subregion. This Master Plan strongly recommends that sustaining the environment be the preeminent policy determinant in a subregion so defined by its natural resources. New development and redevelopment must respect and enhance the Subregion's environmental quality, while helping to build communities and resources that will serve existing and future generations of residents.

The Plan goes on to recognize that prior strategies, such as low-density estate zoning, park acquisition, and common open space, had not been effective (*Plan*, p. 11):

Average home and garage sizes have doubled in many locations with many properties also featuring large patios, circular driveways, pools, and tennis courts, markedly increasing the amount of impervious surface per lot.

⁷ The underlined language was added by the Council when the 2014 Zoning Ordinance was amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

The Plan characterized its “primary challenge” as maintaining “critical” environmental resources, such as floodplains, stream valleys, and forest, in light of trends in home construction.

To ensure forest protection, the Plan recommends (*Plan*, p. 13, below):

- Preserve properties containing forested areas (see Foldout Map F) to prevent fragmentation or to maintain stream valley buffers. This may be accomplished under the current zoning, where it allows clustering of homes away from sensitive areas.

The *Plan* adopts a “special policy” for conditional uses, intended to preserve the residential neighborhoods while meeting important policy goals. These guidelines seek to (1) “avoid an excessive concentration of special exceptions along major transportation corridors,” (2) “protect residential communities from incompatible design,” (3) avoid front-yard parking to minimize commercial appearance, (4) enhance and augment screening, and (4) ensure architecture compatible with the surrounding neighborhood. *Plan*, pp. 35-36.

Another important objective was to increase the amount of senior housing in the Subregion. At the time it was adopted, the Plan estimated that Subregion would need an additional 750 senior dwelling units by 2020 to accommodate demand. To facilitate this, the Plan states (p. 38):

Senior housing is appropriate throughout the Subregion wherever zoning permits this use, either by right or as a special exception use. Projects must meet Zoning Ordinance standards for this use, and impacts on the surrounding neighborhood must be minimized. When significant impacts cannot be mitigated, projects should be located elsewhere in the Subregion. Where it is a special exception, the project must meet the Special Exception Guidelines in this Master Plan.

Staff found that the application met the goals of the Master Plan (Exhibit 97(a), pp. 19-20):

The *2002 Potomac Subregion Master Plan* recommends the preservation of existing forest on properties containing forested areas identified on Foldout Map F to maintain stream valley buffers with the clustering of homes away from sensitive areas. The forest on the north side of the property, labelled as Stand F-A (9.17 ac.) is delineated on Map F and classified as a high priority for preservation. The Applicant has no planting requirement under the Forest Conservation Law (Chapter 22A) but has proposed to provide supplemental planting, above and beyond the requirements of Chapter 22A for master plan conformance.

The proposed residential community will be the subject of a conditional use and is consistent with the Subregion Plan's statement on the appropriateness of senior housing throughout Potomac. It has been designed as a series of two to three-unit structures that will have the residential appearance of single-family dwellings; the number of buildings will be similar to the number allowed in a residential community under the RE-2 Zone. It will look like a residential neighborhood that would be proposed for a property of this size in Potomac.

a. Master Plan's Goal for Senior Housing (Summary of Arguments)

Ms. Przygocki testified that the development conforms to the Master Plan's goal to provide senior housing. She testified that that only 342 senior living units, less than half the Master Plan's goal for 2020, have been developed within the subregion. Most of these units are assisted living and memory care units. 1/28/22 T. 130-133. At the request of the Hearing Examiner, Heritage provided updated information on the need for senior housing in the Subregion. Ms. Przygocki testified that the Council's more recent policies have recognized the need for senior housing and moved in the direction of supporting an increase in housing in areas throughout the County, including Potomac, especially for senior living and life care facilities. This is evident in numerous county documents. 5/31/22 T. 129. One is in a report from the Planning Department, *Meeting the Housing Needs of Older Adults in Montgomery County*, Montgomery Planning M-NCPPC (May 2018) (Housing Needs Report). Exhibit 135. The Montgomery County Planning Department, Department of Finance, the Department of Health and Human Services, the Department of Housing and Community Affairs, and the Commission on Aging all contributed to this report. The report found that the need for senior housing is growing significantly and that accessible housing options are critical for helping older adults age in place. That report states that the county needs to expand its resources and its tools to be able to respond to the growing need for housing demand among older adults. The Housing Needs Report recommends amending the Zoning Ordinance "to allow for more diverse housing types in a wider range of residential zones and explore alternative

approaches to creating a greater mix of housing types such as form-based codes and zoning overlays.” 5/31/22 T. 131; Exhibit 135, p. 12.

According to Ms. Przygocki, the Housing Needs Report also finds that the larger concentrations of seniors over 65 are in the Potomac subregion. Many of those adults wish to remain there. The greatest increases in population expected between 2015 and 2040 is in the 75-84 old age range. The 85+ population is expected to increase by 122 percent. The Report estimates that by 2040, there will be 46,000 more seniors between the ages of 75 and 84. 5/31/22 T. 130-131; Exhibit 135.

Ms. Przygocki testified that the available census and tract information supports the policy position taken in the Report. In 2000 (two years before adoption of the Master Plan), 9.9% of the population was over 65 years of age. By 2019, that had risen to 19.8%, or a 104% increase. At the time the Master Plan was adopted in 2002, they anticipated they would need 750 units by 2020, less than half of which have been built. In addition, none of the senior housing facilities built since the master plan were for independent living. They are all assisted living facilities, so this project fills a need that has gone unanswered. Along with those recommendations from the Report, the Council adopted a ZTA 20-08 knowing the fee simple single-family attached dwelling units would be permitted on this site. They noted that the lifestyle and demographics are changing in this area. 5/31/22 T. 132-134.

Those in opposition agree with the need to provide senior housing but point to the Master Plan's statement that senior housing must meet zoning standards and minimize impacts on the surrounding area. Ms. Lee testified that when these impacts cannot be mitigated, senior housing should be located somewhere else in the region, quoting the Master Plan's goal to “protect residential areas while also attempting to meet important policy goals.” 3/2/22 T. 93. She

interprets the Master Plan as creating a structure that protects large swaths of low-density areas as a “green wedge” between the perimeter of the region or along major roads. More intense development was to occur at these locations, like Fortune Park, now Park Potomac, and along major roads such as River Road. The master plan also listed specific sites that “appear to be appropriate for elderly housing” that meet the criteria she describes. *Id.*

According to Ms. Lee, an earlier version of the master plan spelled out criteria to be used to identify suitable locations for senior housing. These criteria were stricken by the council during its deliberations. From the legislative history, she feels that the Council struck the criteria because it didn't want to restrict locations for affordable housing. She believes, however, post-adoption development in the area reflects this structure. 3/2/22 T. 94-95.

While there are small group homes for the elderly and handicapped throughout the subregion, the larger facilities have been developed consistent with the subregion's low density residential areas, and “green wedge” structure she believes are recommended in the Plan. No large independent living facilities have been constructed in the heart of residential areas, as is proposed here, and there has been an explosion in the number of senior living facilities built in a manner consistent with the overall framework of the Master Plan, the zoning code, and the master plan's recommendations about growth outside of the low-density residential areas. 3/2/22 T. 95.

Ms. Lee listed examples of senior living facilities that have been constructed implementing this policy. The Village at Rockville, located on the boundary of the subregion, has 241 independent living units, with 111 Cottages and 130 apartments. Another facility on River Road, just across the Beltway from the Quarry added 240 independent living units. Just in the last three years, several new major assisted living facilities have been constructed, including Brandywine

with 140 beds, Artis with 72 beds (approved but not constructed) and Spectrum with 100 beds. Brandywine and Spectrum are barely a mile from the Heritage Garden sites. 3/2/22 T. 96.

She believes it is important to look at the dissimilarities between the development proposed here and the other senior living facilities. T. 95-96. All those approved were constructed outside low density neighborhoods on the perimeter of the low-density zone, along major roads with public transportation for the workers directly in front of the facility or nearby within walking distance. Construction did not require violating any of the County's environmental requirements. 3/2/22 T. 96.

Recently, WMCCA joined with abutting neighbors and did not oppose the Spectrum application. WMCCA feels that is a "reasonable location" within existing commercial uses on River Road with public transport, within walking distance of the Village with shopping, doctors' offices, churches, and library. In response to requests from neighbors, the Applicant downsized the facility from 3 to 2 floors and added buffering via walls and larger trees to minimize the impact on abutting neighbors—the opposite of this site. 3/2/22 T. 97.

b. Master Plan Guidelines for Conditional Uses (Summary of Arguments)

Ms. Przygocki opined that the project conforms with the Plan's guidelines for conditional uses. It is not located along a major transportation corridor. The architecture has been strategically designed to promote compatibility with the surrounding neighborhood. The massing and height of the independent living units are compatible; the Lodge massing and placement and overall density and lot coverage are compatible with the surrounding neighborhood. 1/28/22 T. 134.

Ms. Przygocki testified that the parking conforms to the Master Plan guidelines for conditional uses as well. Parking in the southern half of the property is no different from many residential subdivisions. Each of the independent living units will have internal, side-loaded

garages, so they are less visible from the street. Surface parking is minimized because 40 spaces will be located underneath the Lodge and 25 surface spaces will be in the front drop-off circle. 1/28/22 T. 135-136.

Ms. Przygocki also opined that the screening from South Glen Road met the Master Plan's Guidelines for conditional uses. Fronting South Glen Road, the closest Cottage structure is setback 142 feet. There is a rail fence and trees within the right-of-way. 1/22/28 T. 136. The relationship of the proposed buildings and adjacent homes are compatible, according to Ms. Przygocki. The Cottages look very much like a single-family estate home. They have generally provided 35-foot rear setbacks rather than the 20-foot setback required. Seventy-five percent of the area is green space, well over the 50% minimum required. *Id.*

While not explicitly addressing the Plan's policy for conditional uses, those in opposition feel that the project does not meet the Master Plan's goal to limit impacts on established residential neighborhoods and disagree that it is compatible. This testimony is discussed in detail under the standards relating to compatibility, although it is also applicable here.

c. Preservation of Priority Forest

Mr. Park testified that the proposed development meets the Master Plan's recommendations for preservation or priority forest. He opined that the Master Plan recommended preserving properties "containing forest in areas to prevent fragmentation or to maintain stream buffers... This may be accomplished under the current zone, or where it allows, clustering of homes away from sensitive areas." The proposed development will preserve 94% of the priority forest on the subject property. 1/28/22 T. 85-88. Heritage is proposing to remove 6% or .58 acres of priority forest at the very northwest corner, outside of the stream valley buffer except for 1,200

square feet of disturbance needed for the sewer connection. Removal of the .58 acres will be compensated by replanting next to the existing forest on the western side of the Lodge, adjacent to the vernal pool and 2.10 acres of supplemental planting south of the intermittent stream. Mr. Park testified that the forest in the area to be removed is severely damaged due to the spread of invasive plant species. 1/28/22 T. 88-90. Heritage submitted photographs of existing conditions of the forest in this area, one of which is shown below (Exhibit 147):



Mr. Park disagrees with the opposition that removing the damaged trees and planting with healthy trees is fragmenting the forest. According to him, “fragmentation” of forest means that there will be non-forested area bisecting a forested area. With the supplemental plantings, no fragmentation of the priority forest will occur. In addition, the Applicant will provide supplemental plantings in the riparian area around the intermittent stream, which is not required. There will be no net change in the amount of forest on the site. 1/28/22 T. 89-93.

Mr. Park testified that the Master Plan states that “attempts” should be made to preserve

priority forest. Heritage has done this by clustering development away from the stream valley buffer, adjusting the form and orientation of the Lodge building, limiting grading by tucking the foundation walls into the grade, and selectively removing only damaged portions of priority forest. At present, the invasive plants cover 39% of the herbaceous floor. Mr. Park opined that most professionals would agree that clear-cutting forest where 39 percent of invasive cover is a better approach to preserving it. T. 208, 219.

This development has much less impact on forested areas than other projects. In his experience, it's very unusual for developments *not* to trigger some type of mitigation. 2/28/22 T. 93. It will create a better environmental condition in years to come because removing the invasives will improve the health of the forest. 5/31/22 T. 221.

Ms. Lee believes that no one can dispute that the proposed development will destroy priority forest. She believes that, under Maryland law, master plans are considered to have statutory effect and its recommendations should be strictly followed. 3/2/22 T. 139. A portion of the forest, including steep slopes, will be destroyed to construct the Lodge. She submitted a technical appendix to the Master Plan that explain forest preservation requirements, titled "*Recommendations for the Enhancement and Preservation of Forests in the Potomac Subregion*", M-NCPPC (1999) (Forest Recommendation). Exhibit 94(e).

According to Ms. Lee, the Forest Recommendation divides forest stands into five categories. Ms. Lee agrees that the forest on the subject property is a Category 4 forest, which is described as described as "forest stands which are within riparian corridors of 300 feet or less...and which are also considered high priority for preservation." Exhibit 94(e); 3/2/22 T. 81. She quoted from the Forest Recommendation (Exhibit 94(e), p. 29; 3/2/22 T. 81-84):

Within Category 4, all the stands are very high priority for preservation since they usually are the last defense between the streams and the development that has

already occurred. The buffers must be saved when properties are developed so most of these stands will be preserved. In a few instances, Category 4 stands have been delineated which contain forest area that extends beyond the minimum stream buffers but doesn't really fit into the next higher category. When these instances occur on developable property, attempts should be made to save all of the stand.

According to Ms. Lee, this mandates that all existing priority forest be preserved. While Ms. Lee acknowledged that the document uses the word "attempts", she believes this applies to restoration rather than preservation of forest. 3/2/22 T. 141. The method for protecting the forest is application of the requirements contained in the environmental guidelines. If they had been followed, the entire forest would be preserved. If the Applicant calculated the stream buffers as required, considering the adjacent slope, and required extensions due to steep slopes with highly erodible soil, the forest stand would be entirely protected. 3/2/22 T. 86-87.

d. Protection of Environmental Resources (Environmental Buffers)

The parties disagree on whether the proposed development meets the Planning Board's *Environmental Guidelines* (adopted July, 2021) (Environmental Guidelines) for protection of stream valley buffers. As environmental protection is one of the primary goals of the Master Plan, the Hearing Examiner discusses it here. Both Staff and Heritage determined that the application complies with the Guidelines.

Staff advises that impervious areas within the stream valley buffer include area necessary for the sanitary sewer, the road leading from the Cottages to the Lodge, and the existing gym building. Exhibit 97(a), p. 27. Staff concluded (*Id.*):

The existing gymnasium building is within the SVB [stream valley buffer] and is proposed to be retained and converted into a recreational amenity space for the community. The existing building and the ability to retain usage of the facility required that a portion of the SVB not be placed within a Category I conservation easement.

The Applicant has proposed to offset the SVB encroachment and clearing of part of Stand F-A by providing 2.29 acres of supplemental planting within the SVB.

Retaining the building and converting it into a new use is a good example of adaptive reuse. This encroachment with the provided mitigation is acceptable.

Mr. Steman likewise opined that all activities proposed in the various buffers are permitted by the Environmental Guidelines. The Environmental Guidelines (Section 5A(1)(b)) provides that “no buildings, structures, impervious structures, or activities requiring clearing or grading will be permitted in the stream buffers except for infrastructure uses, bikeways, and trails found to be necessary, unavoidable, and minimized by Park and Planning Department environmental staff working closely with the utility or lead agency.” Any relocation of the sewer line would have to cross the perennial stream. 2/28/22 T. 42. This language also permits relocation of the road and utility crossings when it is clearly demonstrated that no feasible alternative exists, and every effort is made to minimize disturbance to the wetlands. *Id.*, T. 41-42. The Environmental Guidelines (p. 44) state that the Planning Board may accept incursions on a case-by-case basis. The road and sewer connections are minor incursions and unavoidable in his opinion, and the use complies with the Environmental Guidelines. He also opined that the overall quality of the stream will be maintained. *Id.*, T. 43-45.

Mr. Steman testified that the width of stream valley buffers is calculated based on the use classification of the stream and the grade of intersecting slopes. The streams on this property are Use I/I-P, requiring a minimum width of 100 feet on either side (a total of 200 feet). According to Mr. Steman, these buffers must be expanded when they cross steep slopes that are “hydraulically adjacent” to the buffer. Under the Guidelines, steep slopes are “hydraulically adjacent” to the stream if they occur within 200 feet from the stream bank drainage course and if the slope drains directly to the stream without stopping or changing direction. The buffer is then expanded to include the entire slope, even if it occurs beyond 200 feet. According to Mr. Steman, he expanded the stream buffer in an area west of the stream where the slopes qualify as “hydraulically adjacent”

steep slopes under the Guidelines that. The buffer was also expanded in an area to the east because of steep slopes. 2/28/22 T. 27-30.

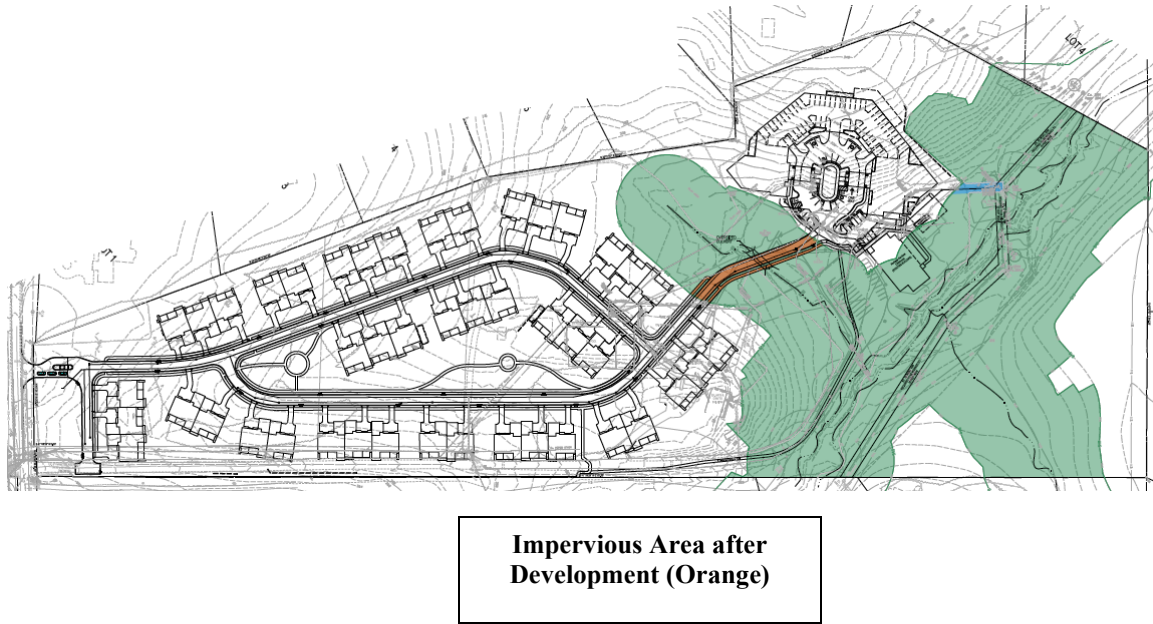
In Mr. Steman's opinion, it is better environmentally to retain the existing gym because removal would require more disturbance in the buffer in his opinion. The County stresses adaptive reuse of old buildings, and there will not be any external changes to the structure. Repurposing the gym for a new use is preferred over new construction. 2/28/22 T. 39-40. In Mr. Steman's expert opinion, all activities proposed in the various buffers are permitted by the Environmental Guidelines.

Mr. Stemann disagreed with opposition testimony that 1.02 acres of stream valley buffer would not be placed in the conservation easement. That's greater than the area being developed. 2/28/22 T. 184.

Mr. Steman submitted an exhibit comparing existing incursions into the stream valley buffer (in yellow) with impervious area that will remain after development (Exhibit 158, sheet 1, below and on the next page):



**Existing Impervious Area
(Yellow)**



With the proposed development, there will be a net gain of 23,000 square feet of pervious area within the stream valley buffer. Moving the road to its current location preserves more buffer because its current alignment is not only deep within the stream valley buffer; it also impacts the floodplain in that area. 5/31/22 T. 186.

Mr. Klebasko testified that the riparian planting proposed along the stream channel had many environmental benefits. When the newly planted trees root, they will help stabilize the soil and prevent future stream bank migration toward the building. They will also improve natural infiltration by loosening the soil and reduce the volume and velocity of runoff. It will also increase shade to keep the stream temperatures cooler.

The existing stream channel shows a typical pattern of erosion and incision like other urban streams in this area. This is not a threat to the building because it is located outside the 100-year floodplain and floodplain buffer. There is at least 20 feet between the building and the existing stream bank, which is a lot of distance because the stream has relatively smaller drainage at that point. 5/31/22 T. 238.

In his opinion, the proposed plantings and removal of the impervious surface will improve the stream valley buffer over existing conditions. He does not find that the current stream bank is eroding at a rate that poses a danger to the existing gym structure in the foreseeable future, *i.e.*, 20 years. *Id.* While the floodplain is within the Limits of Disturbance (LOD) shown on the plan, this is so the existing parking area near the gym may be removed. The LOD also crosses the floodplain where the existing driveway will be removed. Both are an environmental improvement. 5/31/22 T. 240-241.

Ms. Lee testified that development would violate multiple local, state, and federal environmental requirements. A major focus of the Master Plan has been to protect the Watts Branch stream valley by increasing stormwater management and protecting the headwaters with stringent adherence to the environmental guidelines in the watershed. Construction of the Lodge on steep slopes and in stream valley buffers, forested areas, and floodplain buffers will result in the opposite—increased runoff degradation, and sediment in the Watts branch. The Guidelines specifically prohibit grading in stream buffers except for infrastructure uses, bikeways, and trails found to be necessary, unavoidable, and minimized. This is accomplished with Planning Staff working with the lead utility or other agency. 3/2/22 T. 79.

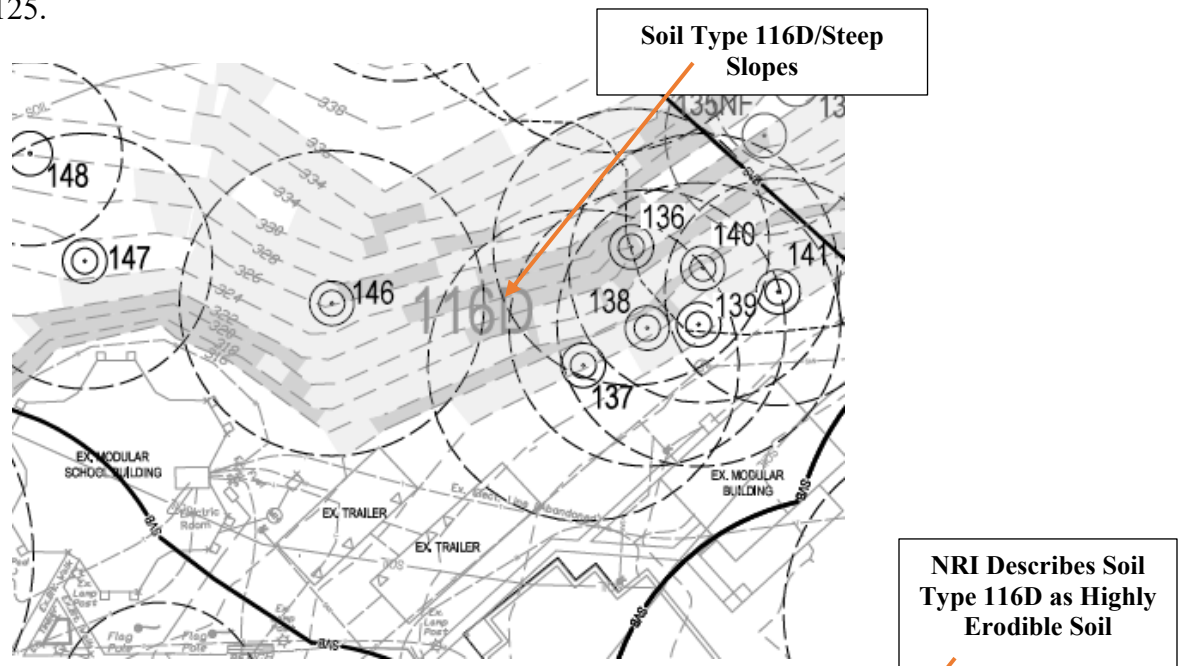
According to her, impacts to the buffers occur primarily from construction of the Lodge, which she believes encroaches or interferes with prized riparian forest, two streams, stream valley buffers and their adjacent steep slopes, slopes with highly erodible soil, floodplain, floodplain buffers, and wetlands. Three-quarters of the gym, which will be used as a clubhouse, sits in the middle of the stream valley buffer, close to a stream that is already eroding. *Id.*, T. 65. The proposed road to the Lodge is also in the stream valley buffer. 3/4/22 T. 64-66. Photographs of the stream, taken by Ms. Lee, are on the next page (Exhibit 94(g)).



**Photos of Stream Near Existing
Gym (Exhibit 94(g))**

The proposed development also requires construction of a new road through one of the streams and its buffer to connect the Lodge complex with the rest of the site. She believes that approximately 1 acre of stream valley buffer and a portion of the floodplain buffer that will be within the limits of disturbance.

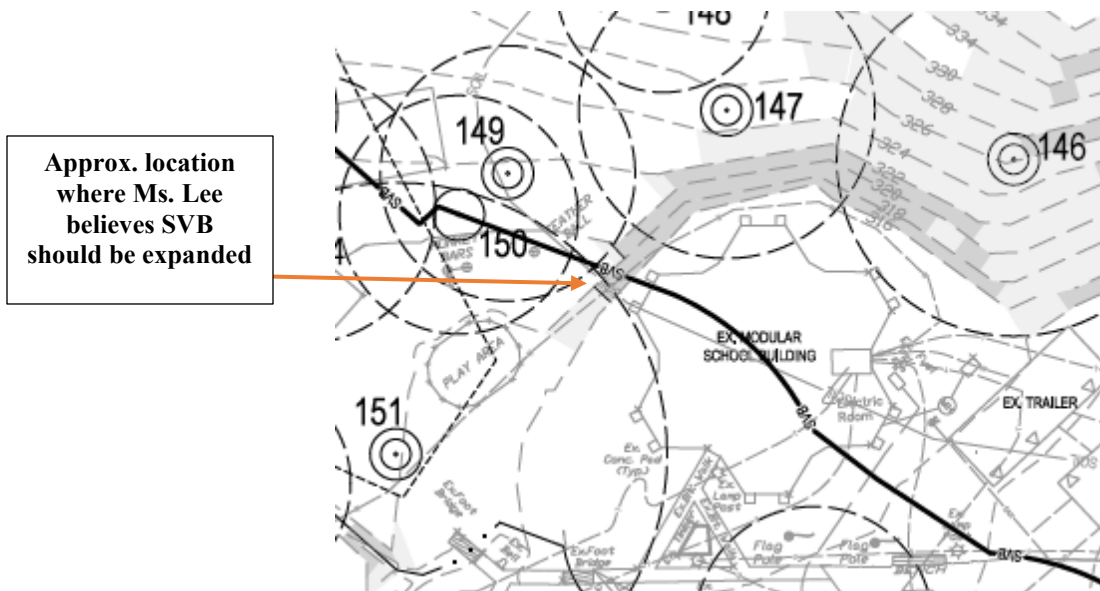
According to her, construction of the Lodge also violates the Environment Guidelines because it will be developed on slopes of 15 to 25 percent that are soil type 116D. The NRI/FSD describes that soil type as highly erodible. 3/2/22 T. 65-67. An excerpt from the NRI/FSD (Exhibit 152, below) shows the location she identified. She acknowledged on cross-examination that the Environmental Guidelines do not list that soil type as one having a severe hazard of erosion. T. 3/2/22 T. 124-125.



Soil Chart						
HERITAGE GARDENS, MONTGOMERY COUNTY, MARYLAND						
MAP UNIT SYMBOL	SOIL TYPE	SLOPE	DRAINAGE CLASS	HYDRIC SOIL	HIGHLY ERODIBLE SOIL	PRIME AGRICULTURAL SOIL
1C	GAILA SILT LOAM	8%-15%	Well drained	Yes	Yes	No
2B	GLENELG SILT LOAM	3% - 8%	Well drained	No	Yes	Yes
6A	BAILE SILT LOAM	0% - 3%	Poorly drained	No	No	No
116D	Blocktown channery silt loam	15% - 25%	Well drained	Yes	Yes	No

Excerpts from NRI/FSD
Exhibit 152(a)

Ms. Lee also contends that Heritage incorrectly calculated the stream valley buffer in one location, near Tree 150 as shown on the NRI/FSD (Exhibit 152(a), below):



She believes that the stream valley buffer should have been expanded in that area because it cross steep slopes of 25%. 3/2/22 T. 71. She did not know whether the slopes in this location were “hydraulically adjacent” or “hydraulically remote”. 3/2/22 T. 138. According to Ms. Lee, the Master Plan provides that the entire area should be protected because the SVB here lies within a riparian forest. Either development should be clustered to avoid any development within the forest stand, or the existing buffers and environmental guidelines should be expanded to include the entire forest stand. 3/2/22 T. 72.

Ms. Lee testified that supplemental planting in the stream valley buffer (the 2.1 acres south of the Lodge) does not remedy incursions into the stream valley buffer. *Id.* At other senior facilities, such as Brandywine and Spectrum, these were protected. The stream valley buffers are protected by statute, and you can’t just say “I will plant something over there...” 3/2/22 T. 76. This would violate the plain language of the Environmental Guidelines. The Guidelines are more than “guidelines”—they incorporate state, local and federal statutory requirements to regulate

development in sensitive areas, including streams and their buffers. T. 74-76. These are designed to protect both structures and prevent erosion, runoff, and sedimentation so that water quality is preserved. 3/2/22 T. 77.

Preventing disturbance of environmental buffers is particularly important to protect the Watts branch. This branch enters the Potomac just above the intake pipe at the WSSC filtration plant located on River Road in Potomac. It produces 280 million gallons of drinking water a day, which is distributed to 4.3 million residents of Montgomery and Prince George's County. Most of that water comes from the Watts branch watershed. Sediment and runoff from Watts branch have historically been a huge problem, especially during storm events, which have increased in frequency and severity in the last years. It has reached such a critical situation that there is a proposal to construct a new intake pipe way out into the Potomac away from the Watts branch. 3/2/22 T. 78.

Ms. Lee testified that a primary goal of the Master Plan is to protect the Watts Branch stream valley by increasing stormwater management and protecting the headwaters with stringent adherence to the environmental guidelines in the watershed. Construction of the Lodge on steep slopes and in stream valley buffers, forested areas, and floodplain buffers will result in the opposite—increased runoff degradation, and sediment in the Watts branch. The Guidelines specifically prohibit grading in stream buffers except for infrastructure uses, bikeways, and trails found to be necessary, unavoidable, and minimized. 3/2/22 T. 79.

e. Conclusion

Conclusion: The Hearing Examiner finds that the application substantially conforms to the Master Plan for the following reasons:

i. Master Plan's Goal for Senior Housing

Due to the age of the Subregion Master Plan, the Hearing Examiner requested that Heritage update information on the need for senior housing in the Potomac Subregion. The uncontroverted evidence presented on remand reinforces that need, and in fact, demonstrates that the demand for senior housing has grown even while the number of units built lag well behind the Master Plan's goal for 2020. The Housing Needs Report projects that the number of senior residents at all ages will grow significantly in the next 20 years. The Report's conclusion is supported by uncontroverted census tract data. The Hearing Examiner finds that the need for senior housing in the Potomac Subregion remains and has increased. Therefore, the proposed development, with 74 senior independent living units and 105 beds of assisted living, meets this goal of the Master Plan.

The Housing Needs Report recommends diversifying housing types in a wider range of residential zones and exploring alternative approaches to creating a greater mix of housing types. The proposed development does this, incorporating townhouse and two-unit living building types in a senior care community in the RE-2 Zone. This is consistent with the Master Plan's recommendation to use clustering and avoid large lot zoning to achieve environmental goals of the Plan.

The Hearing Examiner finds little concrete support for the argument that the Master Plan designated a "green wedge" that confines construction of senior facilities to "edges" of the Plan area and along major transportation corridors. There is simply nothing in the Master Plan explicitly creating such a "wedge." This argument ignores the Plan's explicit instruction that senior housing may be "appropriate throughout" the Subregion. While the Plan may have recommended specific senior living facilities at these types of locations envisioned by Ms. Lee, there is nothing indicating that it intended to preclude senior facilities elsewhere. The only evidence for such an argument is

Ms. Lee's testimony that the Council struck language setting up criteria for siting both senior facilities and affordable housing because they did not wish to limit affordable housing opportunities. The criteria stricken is not in this record. More important, the criteria were taken out, leaving broader choices for potential locations. Instead of accomplishing the goals of the Master Plan, the "wedge" theory could defeat the Plan's explicit goal to provide senior housing "throughout" the Subregion. The Hearing Examiner must be guided by the plain language of the Master Plan.

The Hearing Examiner is cognizant of the caveat to the Master Plan's goal—senior housing may be located throughout the Subregion *provided* its effects on established residential communities can be mitigated. For the reasons discussed below, the Hearing Examiner finds that the proposed development does sufficiently minimize the impact to the surrounding community, as called for in the Master Plan. Because she finds that it meets (at in some areas exceeds) the requirements of the Zoning Ordinance, the protection of environmental resources, and the general criteria for approval, she finds that it complies with the Master Plan

ii. Master Plan Guidelines for Conditional Uses

The Hearing Examiner agrees with Staff and the Applicant that the proposed development meets the Master Plan's guidelines for conditional uses. Heritage's expert, Ms. Przygocki, provided uncontroverted testimony that parking for the Cottages is characteristic of residential parking in garages and driveways. Part of the parking for the lodge is along the interior of the circular building or in an underground parking lot. Exterior parking for the Lodge will be mitigated by supplemental planting in the forested areas and by significant landscaping. Staff concluded that the architectural features of the Cottages mirrored those of the surrounding residential community and views of the exterior parking will also be screened by supplemental planting along

the northwestern and northeaster edges of the property. The property's frontage on South Glen mimics that of adjacent properties, with a single triplex set well back and trees in the right of way. One of the conditional use policies is to limit the impact on residential communities. This is discussed in the next section on compatibility. For the reasons stated there and, in this section, the Hearing Examiner finds that the application meets the Master Plan policies for conditional uses.

iii. Preservation of Priority Forest

After a close review of the testimony and evidence, the Hearing Examiner finds that the application meets the Master Plan's recommendations regarding preservation of Class 4 priority forest on the property for several reasons.

It is well-settled in Maryland that master plans are guides rather than regulations requiring strict compliance. *Floyd v. Cty. Council of Prince George's Cty.*, 55 Md. App. 246, 258, (1983); *Montgomery Cty. v. Woodward & Lothrop, Inc.*, 280 Md. 686, 704 (1977)(master plans serve "as a guide rather than a strait jacket.") Contrary to Ms. Lee's testimony, master plans are guides to achieving the overall goals and objectives of the plan.

Here, the Master Plan recommended preserving priority forest to prevent forest fragmentation and maintain the stream valley buffer. To address the first, Heritage presented expert testimony that the forest would not be fragmented due to the 2.1 acres of supplemental planting in the stream valley buffer south of and adjacent to the forest to be removed. Even after development, there will be no net loss of forested area. Expert testimony and evidence established that 0.58 acres of forest to be removed is severely damaged from the growth of invasive plants, as demonstrated by the photographs submitted into the record.

The second reason the Plan recommends preserving Class 4 priority forest is to maintain the stream valley buffer. A review of the map of environmental buffers (Exhibit 74) demonstrates

that only a very small portion of the area to be disturbed lies within the stream valley buffer. To further mitigate retention of the former gym, Heritage proposes plantings next to the existing stream that will stabilize the banks and mitigate the existing. Expert testimony and evidence establish that there will be a net gain of 23,000 square feet of pervious area over existing conditions within the stream valley buffer. Both Mr. Park and Mr. Klebasko testified that the environmental conditions on the site would be significantly improved. Were the Master Plan interpreted to preclude removing any of the Category 4 priority forest, these environmental benefits would not occur. Interpreting the Master Plan strictly ignores the fact that the health of the stream valley and environmental features are improved with this development, particularly where retention of the existing forest results in continuing damage from invasive species.

iv. Protection of Environmental Resources

As to Ms. Lee's argument that the stream valley buffer should have been expanded at the location near Tree 150, Ms. Lee did not know whether the slopes at the location were hydraulically adjacent to the stream. As Heritage's civil engineer *did* expand the buffer in some locations and provided an expert opinion that the stream valley buffer shown on the NRI/FSD complied with the Guidelines, the Hearing Examiner finds that the weight of evidence supports his expert opinion.

Nor does the Hearing Examiner find that the Lodge is built on soils with a severe hazard of erosion. The list of severely hazardous erodible soils in the Environmental Guidelines clearly does not include Soil Type 116D (Exhibit 77) and the Tree Manual lists it as only moderately erodible. There is no explanation for the label on the NRI/FSD that Soil Type 116D is "highly erodible", and the individual that prepared the NRI/FSD did not testify. Given its exclusion from Appendix C of the Environmental Guidelines, the recommendations of Planning Staff, and Mr.

Steman's expert testimony, the Hearing Examiner does not find that the Lodge is constructed on hazardous soils or that the stream valley buffer should have been expanded to include the Lodge.

While the Limits of Disturbance (LOD) for the construction does enter the stream valley buffer around the gym area, the testimony indicates that the disturbance is to *remove* the existing parking area, yielding an environmental benefit, and mitigating the existing erosion occurring there. Based on this record, the Hearing Examiner finds that the proposed development protects environmental resources consistent with the goals of the Master Plan.

2. Adequate Public Services and Facilities

f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or

ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and

a. Local Area Transportation Review

Initially, the Applicant filed a traffic statement (rather than a full Traffic Impact Study) because Planning Staff determined that the new development generated fewer than 50 person trips. Staff found that trips from the school (abandoned in 2014) were "existing trips" that could be credited against the new development. Exhibit 97(a). The Hearing Examiner disagreed and

remanded the application for a full Traffic Impact Study under the Local Area Transportation Review (LATR) Guidelines.

Before submittal of the Traffic Impact Study, several in opposition expressed concern about traffic congestion and roadway and pedestrian safety. Mr. Maggin testified that he does not believe that roads are adequate to serve the use. South Glen has no shoulder and no sidewalks. People walk on the side of the road now; he's amazed that no one has been hit, especially in bad weather. Trip counts were taken during COVID, which is not a typical situation. 3/2/22 T. 173-175.

Mr. Maggin believed that the scope of the accidents was too limited and didn't include all the accidents on South Glen Road. According to him, there were two fatalities since 2019, probably less than a quarter mile from the site. He believes that the fieldwork for any traffic study should be done while schools, especially the Bullis School, is in full session with a normal class schedule. He does not think the traffic should be estimate only by reference to senior housing. The elderly housing in the Lodge and the separate age restricted townhouses are "extremely different" from a traffic perspective. 2/28/22 T. 174.

Several individuals questioned the safety of adding vehicular and pedestrian traffic on away from the existing entrance. Ms. Weisbroth is concerned that the two-lane South Glen Road will become even more congested. She has traffic backing up to her driveway from the intersection of South Glen and Falls Road on some days. She believes that it is "ludicrous" for the applicant to assert that there will be no traffic impact. 3/2/22 T. 16-17.

Ms. Weisbroth is also concerned about the safety of those walking on South Glen Road. There is no bus service to the property. Employees riding the bus to get to work will have to walk down South Glen, which has no shoulders, little lighting, and traffic both day and night. She

believes there is no way of mitigating the potential danger and, in her opinion, demonstrates how inappropriate the project is at this location. 3/2/22 T. 19.

Ms. Catherine Scafide testified that she takes her children to school and commutes to work and has been “shocked” by the traffic and dangers of South Glen. South Glen, in her opinion, is a dangerous road—very narrow with no sidewalks. There is not even enough space to go around cars. There have been numerous and fatal or near fatal accidents on South Glen just west of their street. There is a sharp turn that is very dangerous. 3/2/22 T. 30-31. Ms. Renata Baker, who also lives adjacent to the development, testified that many commuters use this road as an alternative route to commercial developments at Montgomery Mall, which are expanding, and residential communities that are growing around the Democracy Boulevard area. 3/2/22 T. 23. When she leaves to take her son to school in the morning, she must wait to exit from Lockland Road for far more time than reasonable. She believes it is unsafe to try to pull out every morning with the volume of traffic that already exists on the road. She also believes that the proposed development will increase safety hazards for the pedestrians that live in the neighborhood. Adding commercial vehicles to the existing traffic will substantially increase the risk of injury. 3/2/22 T. 23-24.

After remand, the Applicant's expert in transportation engineering, Mr. Chris Kabatt, presented the results of the Traffic Impact Study. The LATR tests the adequacy of four modes of transportation: motor vehicles, pedestrians, bicycles, and transit. 5/31/22 T. 11-12.

For the roadway test, Planning Staff required Heritage to study one intersection in each direction of the site. These included Falls Road and Democracy Boulevard, Norton and South Glen Roads and the driveway to the B’Nai Tzedek building, and the intersection of Norton and River Roads. Mr. Kabatt testified that they took a series of traffic counts in 2018 for the prior application and again in December of 2021, as well as additional counts at some of the intersections

in February or March 2022. 5/31/22 T. 12-13. The counts for the Falls Road/Democracy Blvd/South Glen intersection, the Norton /South Glen intersection, and the South Glen and Glen Road intersection were taken in March 2022. No increase (due to COVID) was applied to these counts because MCDOT and SHA have deemed that traffic is back to typical conditions. 5/31/22 T. 13.

For the motor vehicle adequacy test, the intersections are evaluated based on congestion standards set by the County's Growth and Infrastructure Policy. In the Potomac policy area, the congestion standard is 1,450 CLV (critical lane volume). If an intersection is expected to be at 1,350 CLVs, one must do another delay-based analysis. In addition to existing traffic counts, the motor vehicle adequacy test incorporates estimated trips that will be generated by approved but unbuilt developments or pipeline projects. They identified one of these projects to incorporate into their study, a private school that wants to increase enrollment. Mr. Kabatt testified that they estimated the number of trips from this proposed development based on the Institute of Transportation Engineers (ITE) Trip Generation Manual. The Traffic Impact Study includes different trip generation rates for the different types of senior living units, one for senior independent living in multi-family housing (for the independent living units in the Lodge, one for assisted living, and a different rate for the units in the Cottages because they operate more like a single-family home. That is slightly higher than the rate for independent multi-family senior housing. 5/31/22 T. 13-18.

Mr. Kabatt opined that all the studied intersections will have CLVs below 1,000, below the maximum of 1,450 and below the threshold for any delay analysis, as summarized in the following table from the Traffic Impact Study (Exhibit 134, p. 34, on the next page) 5/31/22 T. 16-17:

Intersection	Control	Congestion Standard	Existing Conditions		Future Background Conditions		Total Future Conditions	
			AM	PM	AM	PM	AM	PM
01. Falls Road / Democracy Boulevard / S. Glen Road	Signalized	CLV (Max of 1450)	904 Pass	909 Pass	898 Pass	923 Pass	914 Pass	937 Pass
02. Congregation B'nai Tzedek Driveway / S. Glen Road / Norton Road	Unsignalized	CLV (Max of 1450)	326 Pass	294 Pass	338 Pass	297 Pass	356 Pass	315 Pass
03. Norton Road / River Road (MD 190)	Unsignalized	CLV (Max of 1450)	909 Pass	972 Pass	917 Pass	973 Pass	918 Pass	975 Pass
04. Glen Road / S. Glen Road	Unsignalized	CLV (Max of 1450)	570 Pass	494 Pass	574 Pass	496 Pass	574 Pass	497 Pass
05. S Glen Road / Site Driveway	Unsignalized	CLV (Max of 1450)	Proposed Site Driveway				264 Pass	205 Pass

Mr. Kabatt opined that the proposed development met the test for adequacy of road network safety (Vision Zero). For this they perform a crash analysis. Under the LATR Guidelines, at this location one must look at the crash data within 250 feet from the property in the last five years. The data showed none of the crashes were severe or fatal. There was accident in the B’Nai Tzedek parking lot, but it wasn’t severe or fatal. 5/31/22 T. 22.

Because of the concerns raised by neighbors, his firm looked back seven years and expanded the minimum radius required by the LATR Guidelines. They identified two crashes that were either severe or fatal. Both occurred on South Glen Road west of the property. One was severe, with personal injury, and the other was fatal. Both were single-vehicle crashes; one occurred in the day and one at night. The fatal crash involved alcohol. T. 22-23.

Part of the Vision Zero test also requires evaluation of speeds on certain roads in the study area. The Guidelines required them to study a portion of South Glen Road along the property frontage west of Norton Road. The LATR requires them to collect data for a full 48 hours, which they did beginning on midnight on February 15, 2022. The data showed that there is speeding along South Glen Road in both directions. The posted speed limit is 30 miles an hour and they

saw speeds that were more than 120 percent of the 85th percentile. In his opinion, the County should be looking at some speed reduction measures and enforcement along South Glen Road. 5/31/22 T. 23.

When Mr. Kabatt visited the site in February 2022, he observed only one pedestrian who appeared to be out for a morning walk. When he reviewed the camera videos, he and his staff looked for pedestrian activity. While there are some pedestrians, it was minimal. He clarified “by no means was it a steady stream of pedestrians.” 5/31/22 T. 63. They also count pedestrians when they do the turning movement count. The pedestrian counts at the South Glen/Norton and South Glen/Falls Road intersections were very low. *Id.* The Traffic Impact Study concludes mitigation will be required for pedestrian safety on South Glen Road, which requires a “fair share” contribution from the Applicant for improvements to increase the Pedestrian Level of Comfort. Exhibit 134, p. 54. Mitigation will also be required for bicycle safety. The amount of the fair share contribution and the mitigation required for bicycle safety will be assessed at the time of preliminary plan. *Id.*, p. 55.

b. Other Public Facilities

Ms. Przygocki testified that fire and police services are adequate to serve the development. State police are 4.5 miles or 11 minutes from property and County Police are 7.8 miles from the property. The closest fire station is 2.4 miles or 5 minutes. 1/28/22 T. 155.

Mr. Steman testified that all utilities, including gas, electric, water and sewer are available to the property. The water/sewer categories are W-1 and S-1, which means that the property is ready for development. The WSSC has approved a hydraulic planning analysis to confirm that there is enough water and sewer capacity to the site. There are other sites in the Potomac subregion that do not have this category. 1/28/22 T. 16-17. He also testified that the Department of

Permitting Services has approved a stormwater manage concept plan for the proposed development. When implemented, runoff from the site will be reduced.

Conclusion: Because this property will have to go through preliminary plan approval, the final determination of the adequacy of public facilities will be made by the Planning Board. While there were anecdotal concerns from neighbors about increased traffic, the more objective evidence (*i.e.*, the Traffic Impact Study) supports a finding that traffic from the neighborhood will not exceed County standards for volume and safety, which will be addressed at the the time of preliminary plan. The more recent (post-COVID) counts are much lower than those previously submitted and there is no countervailing objective evidence that maximum CLV standards will be exceeded.

The same applies to pedestrian and traffic safety, concerns expressed prior to remand. Due to these concerns, Heritage expanded the scope of its crash analysis beyond what is required. The results show that there were two severe accidents, but neither was proximate to the site. Nor does the number or location of the accidents suggest a systemic problem with the roadway system at this location. Mr. Kabatt testified that he reviewed videos from traffic counts and visited the Falls Road intersection. Observations from these indicated that the pedestrian count was quite low in this area. Based on this record, the Hearing Examiner finds that the application meets County standards for adequacy of public facilities, subject to the final determination by the Planning Board.

3. Compatibility with the Neighborhood

Section 7.3.1.E.1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

* * *

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;

* * *

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;**
- ii. traffic, noise, odors, dust, illumination, or a lack of parking;**
- or**
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.**

* * *

Section 59.7.3.1.E.2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

a. Compliance with Sections 59.7.3.1.E.1.d and 59.7.3.1.E.2

Planning Staff determined that the site design meets the criteria of Section 59.7.3.1.E.1.d because (Exhibit 97(a), p. 36):

The Project will not alter the character of the surrounding neighborhood in a manner inconsistent with the master plan because the use is residential in character and adequately buffered with landscaping, and sufficiently located away from sensitive land uses or dwelling units.

Staff found that development met the criteria in Section 59.7.3.1.E.2 because (*Id.*, p. 38):

The structures will be constructed to ensure maximum compatibility with the Surrounding Neighborhood. The architectural features and layout of the duplex and triplex structures will blend in with the surrounding community. Aerial views demonstrate that the building footprints within the proposed Residential Care Facility are comparable in scale to that of suburban neighborhoods within the surrounding community and most of the Potomac Subregion. Features such as attached garages with interior access to the unit, front yard landscaping, and pedestrian sidewalks will accentuate the residential character of the facility and distinguish Heritage Gardens from a traditional Residential Care Facility. The Property is the appropriate location for the proposed use; the Property's topography and existing tree coverage will provide for adequate buffering and screening from nearby properties. Ultimately, after it is fully constructed, Heritage Gardens will become part of the residential fabric of the Surrounding Neighborhood.

Staff based its finding on other factors as well. Exhibit 97(a), pp. 16-17. Staff found that the setting of buildings along the loop road “presents the traditional residential experience while offering a design that caters to Cottage style setting for independent living.” The loop design also provides space for two parks, the primary open space for the community. The Lodge is sited at the lowest location and is placed into the grade, minimizing its impact on the surrounding area and on environmental resources. *Id.* Staff found that the layout, scale and massing of the development is like that in the surrounding area (*Id.*):

The independent living buildings, in duplex and triplex form, provide the appearance of large single-family homes. The larger multi-level assisted living facility is located to the interior of the property away from the surrounding single-family residences. The triplex closest to South Glen Road maintains the front setback established by the existing surrounding houses. A landscaped green space serves as a forecourt for this triplex building. The two central open spaces within the independent living section provide opportunities for passive and active recreation. The landscaped central green space in the assisted living facility provides visual open space for residents and may serves [sic] as a passive seating area for guest visitation.

Many of those who testified in opposition felt strongly that the proposed development was incompatible with the existing character of the neighborhood for several reasons. Some characterized the surrounding area as “rural”, “pastoral” and “quiet”, and “peaceful”, where people see wildlife during walks and stargaze at night. Properties have huge trees, chicken coops, and vegetable gardens in their yards. 3/2/22 T. 15-16, 22, 25, 29, 30, 246.

Ms. Nina Weisberg testified that the project is “100 percent antithetical” to the nature of the existing community. 3/2/22 T. 189. Several mentioned that the neighborhood was dark at night, and expressed concern that the site would be lit up like a “baseball field” or an “island of light”. 3/2/22 T. 15-16, 163-164. Prior to submission of a revised landscape and lighting plans, Ms. Baker testified the development will be on a higher elevation than her house and the developer didn’t address the illumination from the Cottages and Lodge themselves. In the winter, the project

is visible from her home. 3/2/22 T. 26. Ms. Marie Brigham, also adjacent to the property, testified that she can see the lights of the gym through the woods now. She is concerned about lights from the Lodge and headlights from vehicles driving into the property, as the proposed road is a “straight shot” to her house. According to her, there are no streetlights on Dobbin Drive or Edison Road except for one at the intersection of South Glen and Edison. South Glen is designated a “rustic road” about one block north of Edison, and there are not streetlights along that portion. 3/2/22 T. 163. Ms. Brigham testified, since the Lodge is approximately 20 feet higher than the gym, she will be looking at the top two floors. She is expressed concern about lights coming rooms in the Lodge and the parking area. She believes that it will look like a hotel in her backyard. T. 163.

Those concerned about lighting also expressed concern about screening. Mrs. Brigham testified that she can see buildings on the property from her property; she does not look down on tree cover. She looks through the trunks of the trees and can see everything. The hilltop where the Lodge is proposed is going to lose a lot of trees and is going to be even more open and visible from her house. There are a lot of damaged trees in that location that will fall. 3/2/22 T. 164. Mr. Maggin testified that the plans submitted by the Applicant show a large tree canopy in his backyard, but it contains little understory. He can see directly through the understory for five months of the year because there is no foliage under the tree canopies. He can see cars driving to the B-Nai Tzedek on the other side of the subject property. *Id.* T. 178. The landscaping will take 20 years for the proposed landscaped buffer to grow to maturity. Even if they grew tall enough, they aren't going to obscure a 40- or 50-foot high townhouse. Mr. Maggin believes that if the project is approved, Heritage should install a 10-foot high natural stone fence around the entire perimeter of the property. 3.2.22 T. 180.

Some individuals felt the noise and activity from the project would disrupt the peaceful

character of the community. They mentioned noise from ambulances and activity due to the arrival and departure of employees, delivery trucks, and other activities. 3/2/22 T. 9, 25. Ms. Marie Brigham raised concerns about the impact noise would have on her horses. She is very concerned that the proposed development will prevent her from being able to keep horses on her property. She would not be able to house them during the years of construction, which is "heartbreaking" to her. She has paddocks in the front and rear yards, one on the side, and a paddock in front and in back of their barn. If they will bulldoze and cut large trees, there's going to be a "huge" amount of noise and activity, and horses are animals of flight. They get very scared by sudden movements and noises. She had to walk her horse for three hours after a neighbor cut down a tree because the horse was so terrified. 3/2/22 T. 160.

Ms. Lee believes that the project may contribute to flooding and erosion on the site and that neighbors have experienced. She testified that there used to be a footbridge on the property that crossed the stream. It has been totally washed away by water from the site. She also has a neighbor on Dobbins that has experience flooding on her property that's cost the neighbor \$60,000 to fix. 3/2/22 T. 89-90.

The most contested issue in this case is whether the density and massing of the development is compatible with the surrounding area. Mr. Maggin believes that the neighbors know what's compatible and families chose to locate here because of the benefits of large lots and spaces between homes. He feels that the project's size, scale and density is inappropriate and incompatible with the surrounding area. 3/2/22 T. 170.

Many felt that the density was out of character with the neighborhood even though the density proposed is under the Zoning Ordinance maximum. This is because the Cottages are clustered on the developable portion of the property. About 10 acres of the property is the property

was developed with single-family homes under the RE-2 Zone, Heritage would be lucky to get 8-9 lots. 3/2/22 T. 171. Mr. Maggin believes the engineer has done a good job of “cramming” as much gross square footage into the buildable area as possible without respect for compatibility. 6/1/22 T. 18. He believes that, simply hiding the development from adjacent properties does not create compatible open-space relationships. To demonstrate the incompatibility of the development, Mr. Maggin submitted an exhibit comparing the density of development on his property with that proposed (Exhibit 171, below) and an exhibit comparing the amount of green area in other senior living facilities to the green area proposed for this development (Exhibit 167, on page 75).



Exhibit 167
Density of Mr. Maggin's Lots Compared
with Triplexes and Duplexes

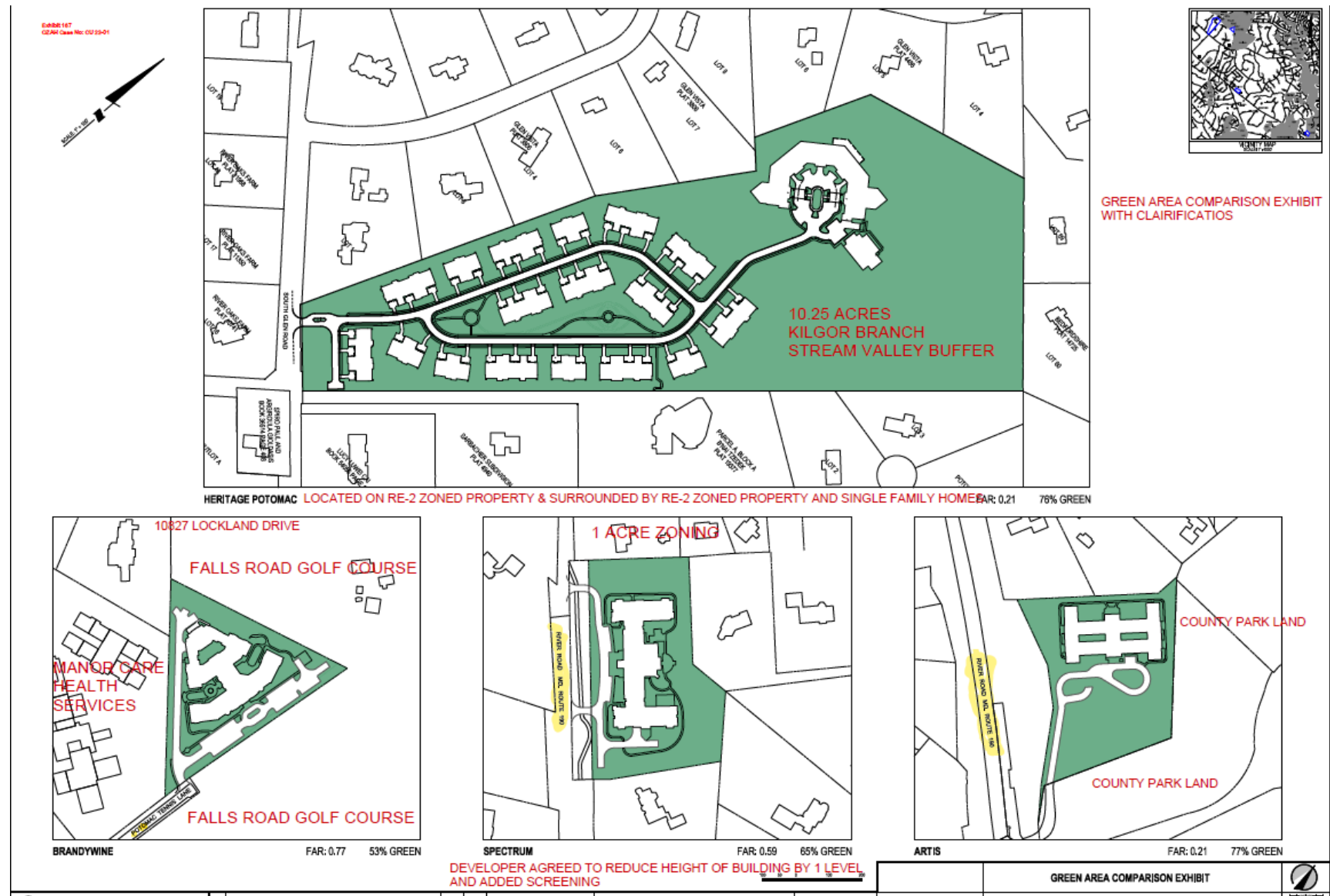
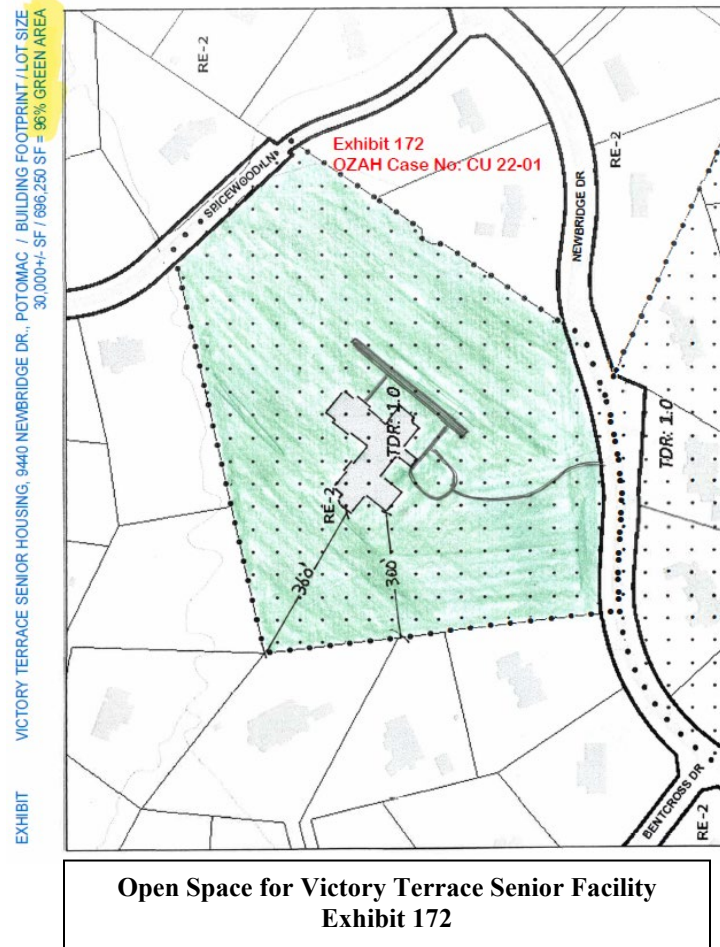


Exhibit Comparing Green Space of Other Senior Facilities
in Potomac and the Proposed Development
Exhibit 171



Mr. Maggin believes that the other senior facilities in the area have significantly more buffering from adjacent properties than the subject development. The proposed Cottages are extremely close to the existing property line at the south end of the property. The Brandywine assisted living facility is surrounded by Falls Road Golf Course on two sides and a single-family home. The Spectrum facility borders a major thoroughfare, River Road. Another facility fronts River Road and has County parkland on two sides. The exhibit of Victory Terrace clearly shows that elderly housing facility has stream buffers all around the perimeter and is also adjacent to 2-acre sites. It has 96% green area.

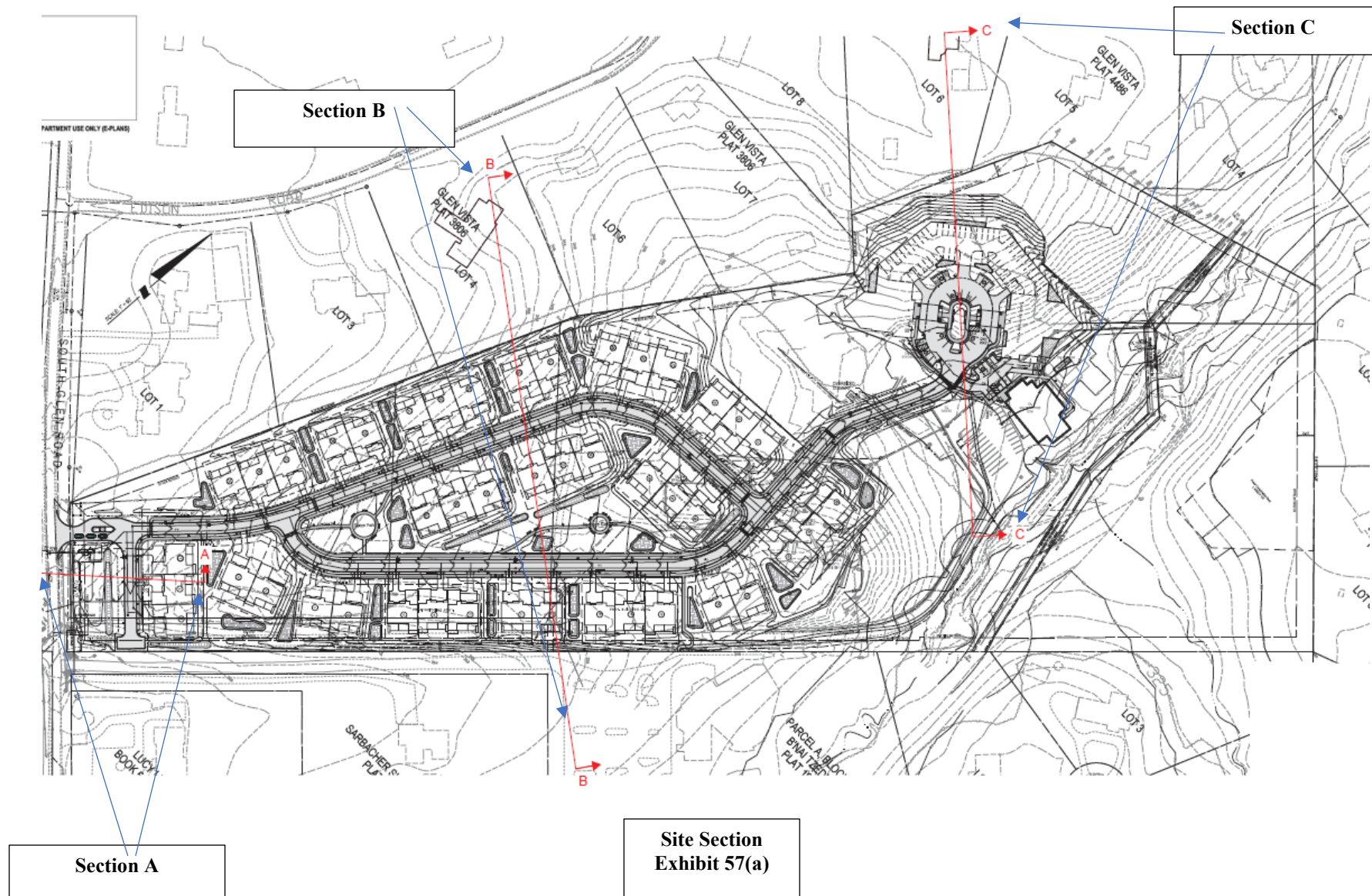
Mr. Maggin felt that the revised landscaping is an improvement, but no substitute for a masonry wall that is 10 feet high because it would immediately block visibility. The additional

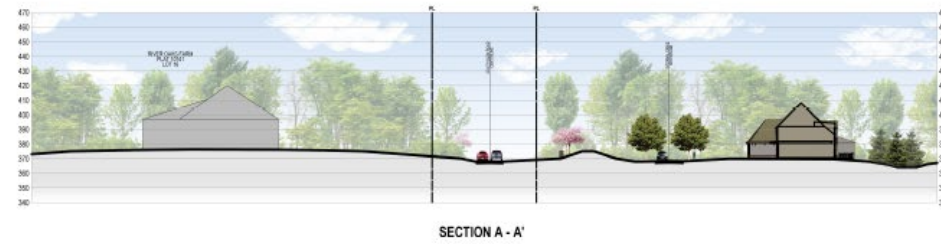
planting Mr. Park proposed requires years to grow and fill in. They require an enormous amount of maintenance to keep them healthy and keep the deer away from them. This would have been unnecessary if the site plan had been appropriate in the first place. T. 19.

Mr. Maggin believes that a more compatible approach would have a single stem road going from south to north on the property toward the lodge, and have resident units located close to the road to provide buffering between the residential neighbors. It would eliminate a number of units, but would significantly improve the site design. Reducing the height of the Lodge by one story would also make a significant improvement to the neighbors that are close to that area. 6/2/22 T. 20-22.

Mr. Neil Goldman, who lives on Edison Road, expressed concern that a property on Edison Road adjacent to the subject property will be used as access to this community. The property is owned by Heritage Potomac South Glen Properties Trust, which he understands to be affiliated with the Applicant. He testified that several individuals are concerned that the development will ultimately spread to that property as well. They do not want that property provide access to the subject property. 2/28/22 T. 11-12.

Heritage argues that it has used of topography, setbacks, and landscaping to mitigate the visual impact of the Lodge and the Cottages (*see*, Exhibits 57(a), 143, on the following page), as already described. On rebuttal, Ms. Przygocki justified the calculation of density based on the entire 30.6 acres. She testified that it is appropriate to calculate density based on the entire tract even though some of it can't be developed. Density is intended to control the limits on overall development. Even if half the parcel is unusable for environmental reasons, there is a benefit to keeping that area open and concentrating the density on the other half of the parcel. This is the





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concept of clustered zoning. 5/31/22 T. 134-135. Calculating density based only on a property's developable area disregards the value of the area left open and unbuilt. The undevelopable area is often dedicated to parks, wildlife preservation, protection of scenic views, and protection of environmental qualities. All of that is integral to overall development and is an important part of the development. Aside from the policy underlying the calculation of density, the plain language of the Zoning Ordinance specifies that density must be calculated based on the entire parcel. 5/31/22 T. 134-135.

Given the concerns of the neighbors, however, Ms. Przygocki calculated the density of this project exclusive of the undevelopable portion. The developable acreage is 16.93 acres out of the 30.6-acre parcel. The Zoning Ordinance permits a maximum density of 15 dwelling units per acre for independent senior living. This means that the maximum density on the developable area is 250 independent living units. This project is proposing only 74. At 15 dwelling units per acre, the independent senior could be developed on only 4.93 acres. This leaves 12 remaining acres of developable property. The maximum density of assisted living facilities is 1200 square feet per bed. This would permit 435 beds. The acreage needed for the development proposed is only 7.67 acres, or 25% of the tract area and 45% of the usable area. T. 137.

Ms. Przygocki compared the density, setbacks, and green area with other senior living facilities and homes in the Potomac Subregion. The floor area ratio (FAR) of Heritage Gardens is 0.21 including the non-developable area. The FAR of the Brandywine facility is .77 FAR, the Spectrum facility is .59 FAR and Artis Senior Living is .21 FAR. Seventy-six percent of the Heritage Garden development is green area. Brandywine has 53%, Spectrum has 65%, and Artis has 77%. The proposed facility is in the top end of dedicated green area. 5/31/22 T. 137-138. Ms. Przygocki pointed out that the rear setbacks of the Cottages exceed the minimum setback from the

property line required by the Zoning Ordinance. The minimum required is 20 feet; the setbacks provided range from 31 to 36 feet, or approximately 50% more than required. 5/31/22 T. 138.

She opined that these setbacks are characteristic and even exceed the distance between the rear faces of other homes in the area. Setbacks between adjacent homes and the proposed development range from 154 to more than 400 feet. Ms. Baker's house is approximately 400 feet away. In the RE-2 Zone, the distance between homes varies widely. Within the surrounding area and nearby, there are examples smaller back-to-back setbacks. Smaller distances between homes can be found at 10817 and 10825 South Glen Road, 10901 South Glen Road backing to 11001 South Glen Road; 10835 South Glen Road to 10837 South Glen Road; 10210 Norton Road to 10610 Barnwood Lane. 5/31/22 T. 139-140, 158.

In Ms. Przygocki's opinion, the proposed development is well under the development standards for lot coverage, exceeds the requirements for setbacks, and is well under the maximum building height of 50 feet. The height of single-family homes could be 50 feet; most of the Cottage heights are in the mid-30's. T. 141.

Additionally, in her opinion, development of single-family dwellings on the property would result in similar setbacks to those in the proposed development. If developed with single-family detached homes, the most efficient layout would be a single road through the middle (going north/south) of the property with houses on either side. Because the property is narrow, the lot configuration would be wide lots with less depth. This would push the houses toward the rear of the property due to the 50-foot front yard setback. In her opinion, it would not be unlike the triplex structures. The homes would likely be built to the 35-foot rear setback, comparable to that proposed in Heritage Garden. They do not anticipate a dramatic difference between the relationship between the homes along Edison to either potential single-family homes or the

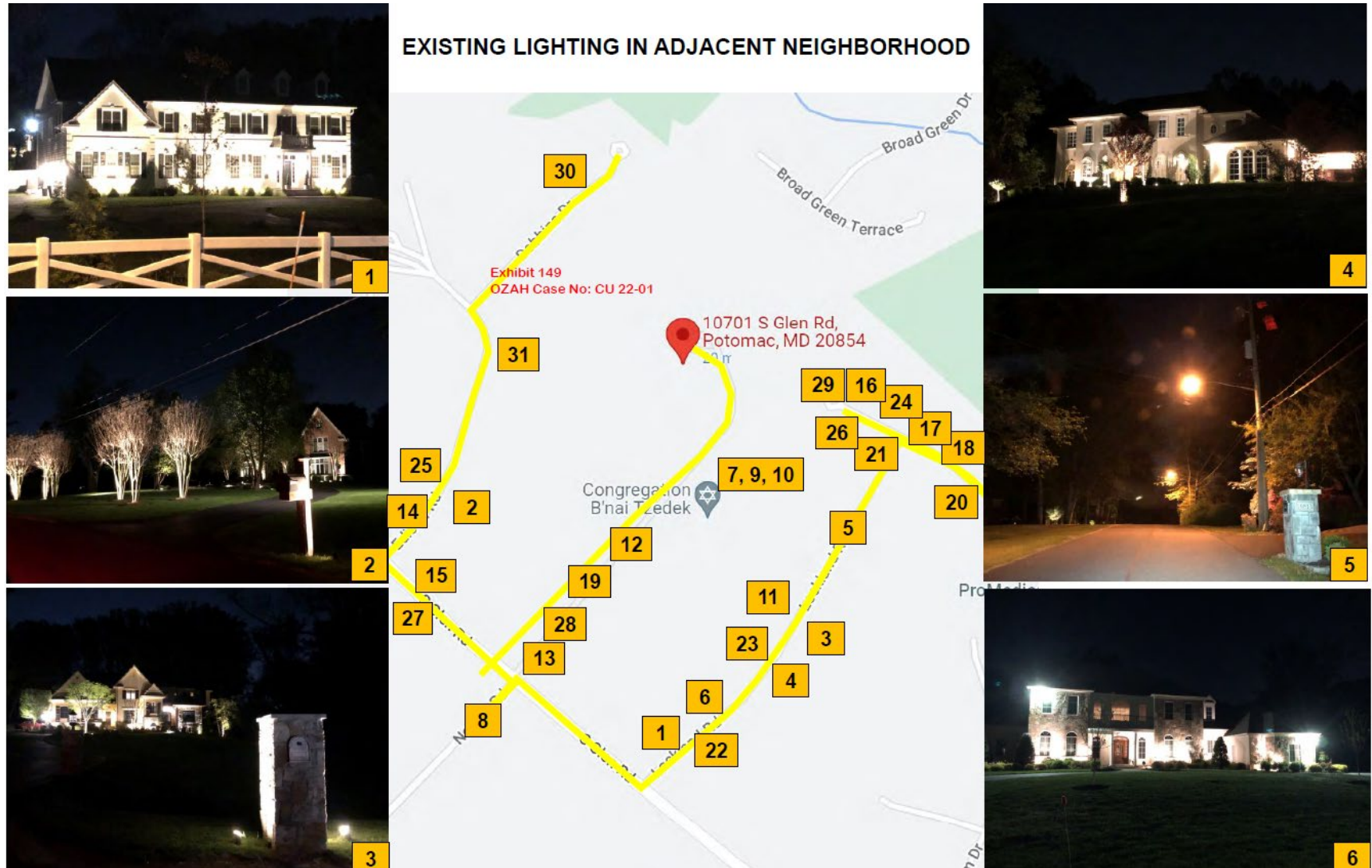
proposed triplexes except that the heights of the single-family homes could be three-stories, or the maximum of 50 feet. 5/31/22 T. 148. Under existing zoning, the homes would also be approximately the same size as the triplexes and could be as close together as 16 feet and 50 feet tall. 5/31/22 T. 174-175. The proximity of these homes to Mr. Maggin's rear yard would be very similar. From a massing standpoint, the proposed development would be comparable to RE-2 development. *Id.* T. 177.

Ms. Przygocki opined that this project is similar to adjacent R-200 and RE-2 zoning elsewhere in Potomac. When the County places the R-200 Zone adjacent to the RE-2 Zone, it is compatible zoning. Compatible doesn't mean the same; it means they can co-exist in a fruitful and healthy matter. The relationship in massing between RE-2 and R-200 lots is similar and has been done elsewhere in the Potomac region. 5/31/22 T. 144-147.

Heritage also disputes the neighbor's contention that the area is dark and without significant lighting. It submitted photographs of homes in the immediate area that with entrances and landscaping that are brightly lit at night. Excerpts from these (Exhibit 149) are shown on the following page.

Pedestrian safety is addressed in Part III.A.2.a of this Report. The Hearing Examiner treats queuing and access to South Glen Road as a compatibility issue. To address residents' testimony that they had difficulty exiting their driveways onto South Glen Road, Mr. Kabatt's firm testified that the proposed use would not add to any queues on South Glen Road.

Mr. Kabatt testified that his firm evaluated queuing along South Glen Road. For a prior application, in March and December 2019, they observed eastbound queues on South Glen Road approaching the Falls Road intersection. The queues formed approximately between 7:30 a.m. and 8:30 a.m. In preparation for this hearing, they also observed conditions in February 2022.



In 2019, the observed queues on South Glen extended from Falls Road to between Lockland Road and Gary Road. No queues were observed during the p.m. peak hour. 5/31/22 T. 24-25. The observed eastbound queues on South Glen Road occurred during a typical commuter peak hour, which would be around 8:20 or 8:30 a.m. Because peak shift changes at Heritage Gardens are at 7:00 a.m., Mr. Kabatt opined that traffic from the proposed development would not affect the queue. 5/31/22 T. 27. The peak traffic for the proposed use is between 7:15 a.m. to 8:15 a.m. 5/31/22 T. 57. The queues were observed at approximately 8:20 a.m. Most of the traffic generated by the development will occur at the shift change at 7:00 a.m. and, in his opinion, will not interfere or contribute to existing queues. *Id.*

b. Inherent v. Non-Inherent Adverse Impacts (59.7.3.1.E.1.g)

i. Physical and Operational Characteristics

Staff concluded that the inherent characteristics of a senior care community include: (1) vehicle and pedestrian trips to and from the site, (2) parking for residents and employees, (3) varied hours of operation, (4) noise or odors associated with vehicles, (4) noise or odors associated with trash collection, (5) an emergency electrical generator, and lighting. Exhibit 97(a), p. 37. The Hearing Examiner refines this list to include explicitly noise from emergency vehicles like ambulances. *See, Hearing Examiner's Report and Decision*, CU 20-05, Spectrum Retirement Communities, p. 29 (March 9, 2021). Staff concluded that there were no non-inherent adverse characteristics association with this development and therefore it would not cause undue harm in any of the categories listed (*Id.*, p. 37):

There are no non-inherent effects associated with the Conditional Use at the proposed location. The appropriate analysis, in this context, is whether there are facts and circumstances that indicate Heritage Gardens would have any adverse effects above and beyond those inherently associated with the use, irrespective of its location within the zone. In some situations, a use may create a non-inherent adverse effect because of situations unique to its physical location, operation, or

size of the proposal. However, with regard to this Conditional Use application, there are no such effects of the proposed Independent Living Community that would go above and beyond. The Project's building design, structural layout, and environmental protection measures were all carefully considered to minimize any impact to the neighboring properties.

Ms. Przygocki opined that the project had no non-inherent adverse characteristics that would cause undue harm in the neighborhood. 1/28/22 T. 150, 156.

Those in opposition argue that the ownership structure for the Cottages is a non-inherent operational characteristic. Susan Brecht, who qualified as expert in the senior housing market, testified that her firm is well known as experts in market research and types of products that are offered to seniors. T. 216.2/28/22 T. 216. She described the different products available. An active adult community is strictly residential and does not provide care. They are offered both on a sale and rental basis, but no supportive services are available to residents. The community may have a clubhouse with areas for social activities and an exercise room. 2/28/22 T. 219.

The next product is a continuing care retirement community (CCRC). These offer multiple levels including independent living, assisted living, memory care and skilled nursing care. Residents typically enter through the independent living component and have a contract that allows them to move to increasing levels of care when needed. The CCRCs require payment of an entrance fee when entering the community, but that is not a purchase. They also have a monthly fee to cover the cost of services. 2/28/22 T. 219-220.

Assisted living and memory care is another level of care and may be contained within a CCRC. These aid with activities of daily living, such as bathing, dressing, toileting, etc. These include three daily meals and transportation services. Memory care is similar except it's for individuals with cognitive impairments. 2/28/22 T. 220.

Ms. Brecht testified that it's not typical to combine an active adult community on the same campus that offers independent living, assisted living and memory care. In her opinion, it combines two segments of the senior living industry. It is typical to find these two combined in other settings, but atypical to have for-sale units for the active adult community. In a typical CCRC, assisted and memory care serve an older segment (entry is typically between the ages of 74 and 80). This segment anticipates requiring support services. Those coming into the independent living portion of the community expect to have the option for services, including meals, housekeeping, transportation, and social activities. This development differs from a CCRC because there is no assurance that residents can move to higher levels of care when needed. Ms. Brecht listed some difficulties in transitioning from an ownership position in the Cottages to a rental in the Lodge. If the owner of the Cottage is carrying a mortgage when the transition is needed, it may be difficult to pay the mortgage and the service fees for the higher level of care. 2/28/22 T. 221-224.

Ms. Brecht opined that the term "aging in place" doesn't equate to fee simple ownership. Rather, the term means you remain in the home surrounded by familiar things. Ms. Brecht reviewed the AARP survey cited by the Applicant for the "growing demand" for ownership and found nothing in the survey to support this. Nor is it reported in the 2018 Montgomery County Senior Housing Report. *Id.* T. 225.

Ms. Brecht contradicted Ms. Andress' testimony that the proposed development was like another CCRC called Willow Valley. That is a traditional CCRC. It does not sell ownership interests. Nor is the other community mentioned by Ms. Andress a CCRC. It is a community where entering seniors make an equity investment and it's a co-op, which isn't the same as owning

the land and building. Springton Lake residents are given priority access to assisted living and nursing home care at two local CCRCs. *Id.* T. 226.

Many in opposition allege that the fee simple ownership structure of the Cottages is a “naked real estate play to put 45 townhomes that they call cottages to make them appear more quaint...in an RE-2 Zone that would permit roughly 8 residences.” 3/2/22 T. 12-13. Ms. Lee foresees a repeat of a similar product by the same developer that ultimately failed to sell. This resulted in non-age restricted townhouses in the R-200 Zone in Potomac (now called the Village of Potomac). These were located a mile away in Potomac Village. 3/2/22 T. 109. Although that occurred many years ago, the marketability of high end fee simple townhouses with very stringent age restrictions didn’t work. The site consisted on 3.5 acres that was zoned R-200, permitting a minimum of 7 detached homes. The developer applied for a special exception to build 12 fee simple high end townhouses and detached houses in addition to maintaining the historic house on the site. The development went on sale, but despite being marketed for at least four years, none of the fee simple age-restricted houses sold. The developer then went to the County and requested a rezoning to a Planned Unit Development zone at 5 dwelling units per acre. To support the rezoning, the developer’s attorney stated, “when prospective buyers realize that they are facing this extreme [restriction] on future resale, they find any excuse not to buy, and sales become virtually impossible.” 3/2/22 T. 114-116. Planning Staff supported the Village of Potomac rezoning because “it makes little sense to leave the unit standing vacant in limbo where they will certainly become an attractive nuisance and eventually an eyesore...” *Id.* T. 116.

To avoid the same result, WMCCA and the SGNA recommend phasing that would require the Lodge to be built first. SGNA proposes that until the Lodge is built, new construction be

limited to a single triplex and duplex. No additional construction of the Cottages would be permitted until all units in the preceding duplex and triplex are completely sold. Exhibit 173.

Aside from the fear that the conditional use will be used to secure luxury townhomes in the RE-2 Zone, opponents argue that several adverse affects flow from the unusual form of ownership. According to them, the ownership structure provides no incentives for self-enforcement. The Lodge owner has the ability but not the incentive to enforce. They argue that others may have the incentive, but not the ability. This is particularly true as to the age restrictions.

WMCCA and SGNA propose a series of conditions designed to ensure enforcement. Because the Hearing Examiner finds the conditional use enforceable, as did the Department of Permitting Services, she includes the discussion of necessary conditions under the specific use standards in Part III.C of this Report.

Heritage argues that fee simple age restricted senior housing is not unique in the area and is found throughout Montgomery County. They cite to OZAH Case No. CU 16-11, Application of Garrett Gateway Partners. In that case, the Hearing Examiner approved 19 "Design for Life" townhomes in fee simple ownership under Section 59.3.3.1.d.2.b. 6/1/22 T. 72. They also point out that the Council knew of this proposed development when it adopted ZTA 20-08 and adopted it to permit its development. To address concerns about constructing the Lodge, Heritage now proposes a condition of approval requiring it to obtain a building permit for the Lodge before issuance of the use and occupancy permit for the 12th "Cottage Unit", as discussed in Part III.C.

ii. Undue Economic Harm

The parties disagree on whether the development will cause undue harm to property values. Mr. Kevin Kagan, Heritage's expert real estate appraiser, prepared a report comparing appreciation rates of homes in the vicinity of a senior living facility to a sales in "control areas" that in similar

communities that were not proximate to a senior living facility. In each type of area (*i.e.*, proximate to a senior facility and a control area), he tracked sales of the same property over time to determine the appreciation rate. He then compared the appreciation rates of properties in the control areas with the rates of appreciation in areas proximate to a senior living facility. He did not compare the sales price of different homes near senior facilities because individual home values are impacted by a number of property-specific factors, such as the size of the home, whether it was recently renovated, number of bedrooms, etc. Determining the impact on value is also dependent on non-property specific factors, such as a recession, seller duress or motivation that might impact the sales price. If a nursing facility or one of the properties studied has an impact on property values, they will see a lower appreciation rate for those sales than in the control areas. T. 171.2/28/22 T. 169-171.

Using this methodology, he found that there was no appreciable difference between the appreciation rates in adjacent areas and control areas. The annual increases were generally the same and he could not identify a difference. He excluded sales that occurred over a short period of time, such as one year, as these are likely to be investors flipping property, which generates very high appreciation rates. He also excluded sales that had very low appreciation rates because these could be a seller under distress. *Id.*, T. 171-172.

In Mr. Kagan's opinion, characteristics of the proposed development will also minimize potential impacts to property values in the vicinity. The development is very residential in nature and the buildings will be of high quality and in line with the other homes in the area. *Id.* T. 174.

Mr. Maggin, who lives adjacent to the subject property, was not qualified as an expert in real estate appraisal, but is a realtor licensed in Maryland and the District of Columbia. 3/2/22 T. 194. Before Heritage revised its landscape plan, Mr. Maggin testified that the economic impact

on his property is going to be substantial. If designed properly with generous setbacks and buffers, it wouldn't be as much of an economic impact. The massive four and five-story building, the thin buffering and screening elements, and the monster duplexes and triplexes that are each approximately 6,000 gross square feet, are too much. Each townhouse is 6,000 square feet; the duplexes are a total of 12,000 square feet and the triplexes are a total of 18,000 square feet. Most of the homes in the neighborhood are only 2,500 – 3,000 square feet.

He disagreed with the approach used in Mr. Kagan's report because most of the sales used to determine the appreciation rate occurred after the facility was built. Therefore, according to him, it did not reflect any reduction in the value that occurred due to construction of the facility.

Mr. Maggin believes that the only relevant facility comparison is from the Brandywine sales. The only property actually adjacent to a senior living facility is 10827 Lockland Road. That home is on a 2.4 acre lot on a cul-de-sac. It has 9,025 feet above grade living area and 13,000 total basement area. The average sales price in Potomac at that time was \$293/s.f. The listed sales price on 9/17/20 was \$200,695,200, which was \$299 a square foot, very close to the average selling price for the above grade living area. The house sold four months later for \$200,050,000, or \$227 per square foot, 23 percent below the average square foot price. The house was on the market for 131 days, although the average time on the market in Potomac then was 30-35 days. Mr. Maggin testified that he spoke with the buyer's agent for the Lockland Road property. The buyer's agent told him explicitly that the client discounted the purchase price due to the home's proximity to the Brandywine development. Because the house had been sitting on the market for so long, based on comparable properties in the area, the sales price per square foot was discounted by about 23 percent from the average sales price of Potomac homes. That broker stated that there's no question whatsoever that development impacted that sales price .3/2/22 T. 186.

Mr. Maggin testified that he had another big broker visit his property. He showed them the plans of what was going to be built at this property and the realtor informed him that there was no question that his property would be devalued because buyers looking for RE-2 aren't going to want that situation in their back yard. The realtor also told Mr. Maggin that the proposed development has already affected his home price because she knew about it. When he showed her the plan, she felt that the price of the property would be affected all the way through the construction and after. At some point, it would settle out, but she could not say how far down the road that would occur. There's no question every single property that abuts thus will be negatively impacted. T. 188.

On rebuttal, Mr. Kagan clarified that his report was not an appraisal. It was intended to evaluate whether a senior housing development would be detrimental to the economic value of surrounding residential real estate. This does not compare actual prices of homes in different communities with this community. Prices of properties in the communities studied were not directly compared. They just compared prices in each control neighborhood to prices in the neighborhood near the senior facility to determine whether the presence of the facility impacted prices of property in that neighborhood. 5/31/22 T. 80. Mr. Kabatt does not agree that the difference between the asking price and the actual selling price is a good comparison of the impact of a particular use. The asking price is often based on the seller's expectation and can be unrealistic in either direction. It can be used as a marketing tool. The most reliable indicator of the value of a home is the selling price. If the asking price is too high, it may turn buyers away and cause the property to sit on the market for an extended period. 5/31/22 T. 84.

Mr. Kagen reviewed the sale of 10827 Lockland Road, adjacent to the Brandywine Senior Living Facility. The home at 10827 Lockland Road sold at a significant discount from the original

asking price. The asking price was \$2.6 million and it sold for \$2 million. He spoke with the seller's broker for that property who informed him that the buyer was from California, bought the property sight unseen and therefore didn't even consider that it was next to a senior living facility. The seller's broker also informed him that the house stayed on the market for about 100 days because it needed an all-new kitchen, all new bathrooms, and updates throughout. 5/31/22 T. 89-90.

c. Conclusion

i. Compatibility with Neighborhood (Sections 59.7.3.1.E.1.d and 59.7.3.1.E.2)

Zoning Ordinance §59.7.3.1.E.2. requires an examination of the compatibility of the use with the character of the residential neighborhood in which it is located. This question is like the one raised by Zoning Ordinance §59.7.3.1. E.1.d., above, which asks whether the proposed use will be harmonious with the neighborhood as envisioned by the master plan.

The Hearing Examiner finds that the proposed development is compatible with the surrounding area under Sections 59.7.3.1.E.1.d and 59.7.3.1.E.2 of the Zoning Ordinance. While the use requested was recently authorized, a physically similar use could always have been proposed as a continuing care retirement community. The real question here is whether the massing and density of the triplexes and duplexes are compatible with the surrounding area.

The Hearing Examiner is persuaded that the proposed development is compatible for several reasons. She agrees with the Applicant's expert testimony that "compatible" doesn't mean the "identical". Rather, it indicates that the two uses can co-exist with healthy and harmonic relationships. Were it to require identical relationships, the Master Plan's goal to establish senior housing "throughout" the Subregion would be easily defeated.

While she understands the neighbor's position, the "cluster" concept recommended by the Master Plan to preserve environmental resources demands non-identical relationships. Many aspects of the development, however, remain comparable to the surrounding area. The Hearing Examiner finds persuasive Ms. Przygocki's testimony that development of single-family detached homes on the property have similar, although not identical, relationships to adjoining properties. She agrees with Ms. Przygocki that the narrow width of the property and the front yard setback in the RE-2 Zone would push single-family detached homes close to the western property line. The minimum rear setback in the RE-2 Zone is 35 feet, identical to the one proposed here. Another compatible aspect is siting only one of the Cottages, a triplex, fronting South Glen Road at the same setback as nearby homes. Nothing contravenes Ms. Przygocki's testimony that the setback from South Glen Road is comparable to setbacks on adjacent properties and the landscaping there mirrors that on frontages nearby.

The Hearing Examiner agrees with Staff and the expert testimony of Mr. Swihart that the duplexes and triplexes are of similar size and architecture as the "estate" homes that exist within the surrounding area. Examples of some of these are included in Exhibit 149, which Heritage submitted to show existing lighting within the area. While Mr. Maggin presented a comparison of footprints of the Cottages with adjacent homes, this comparison does not include the character of the entire surrounding area, which Staff states includes estate homes. While some in opposition argue that homes in the surrounding neighborhood vary in size (some are ranchers), the expert testimony and opinion of Staff indicate that many newer homes are "estate" homes of similar size and architecture to both the duplexes and triplexes, and it is this type of home that would likely be developed on the property. Some residents preferred the variable types of homes that exist in the

neighborhood, but it is speculative to say that new single-family detached homes would be developed as one-story ranchers or other older styles.

The distance between the rear faces of the Cottages and adjoining homes are also comparable and exceed the same relationship of homes elsewhere in the area. Ms. Przygocki testified that the distance between rear faces of some homes is well under the distances here. The distances between the rear faces of the proposed development and adjoining homes are significant—between 154 and 400 feet.

The height of the Cottages is another aspect where development under the RE-2 Zone could have potentially have a greater impact than what Heritage proposes. Mr. Swihart testified that the height in feet of the triplexes would be in the low 30-foot range. The duplexes may be even lower. New homes under the RE-2 Zone could be as high as 50 feet. The Lodge is sited in the lowest elevation on the property and partially appears as three stories because it is set into the grade and the lowest story is partially underground.

The most contested issue is density and massing of the homes. The Hearing Examiner understands that those in the community desire more spacing between the Cottages. However, she believes that the site should be viewed in its entirety. Aside from the mandatory requirement for calculating green area in the Zoning Ordinance, the massing of the development is essentially a cluster concept, a concept recommended by the Master Plan to provide flexibility to achieve senior housing and at the same time, protect environmental resources. The conditional use plan accomplishes this and has significantly more green space than other senior housing facilities.

The Hearing Examiner agrees with those in opposition that not all aspects of the development are *identical* to adjoining properties. Because they are clustered, the side setbacks of the Cottages are not as great as those of adjacent homes. However, the Hearing Examiner finds

that this is significantly mitigated by the revisions to the landscaping, lighting, and conditional use site plans. The Hearing Examiner finds credible Mr. Maggin's testimony that the off-site forest on his property contains little or no understory, resulting in a direct view of the development from his property. She assumes that the spacing between the side yards of the Cottages is the potential "wall" that he is concerned about. The Hearing Examiner finds that Heritage has adequately addressed this impact in several ways. First, the revised landscape plan is far more robust than the one initially proposed and addresses the lack of understory on Mr. Maggin's property. The landscaping proposed grows relatively quickly and will significantly block the view within seven years, as demonstrated by the perspectives submitted by Mr. Park. This arborvitae screen will not be supplemented by understory and shrubs, further mitigating any views. Finally, Heritage has changed the triplex originally adjoining Mr. Maggin's property to a duplex. While those in opposition dismiss this revision as minor (a 2.2% change in total green space (Exhibit 190)), it mitigates the potential for any "wall-like" impact along the western property line while the landscaping matures. The duplex is lower in height and mass than the triplex. With this change, three of the Cottages closest to the western site boundary are duplexes rather than triplexes. The next triplex (proceeding north) is setback a greater distance from the site property line and will be separated by the supplemental planting in the stream valley buffer.

The opposition also argues that green buffers from the proposed development and overall green space are not comparable to other senior facilities in the area. They compare the green space and buffering in multi-unit senior facilities, such as Brandywine, Artis, and Spectrum. While Ms. Przygocki testified that the total green space is higher in the proposed development and the FAR is lower than the facilities identified, she finds that those in opposition are seeking a greater green buffer from adjoining homes.

The Hearing Examiner does not find the opposition's comparisons Brandywine, and other senior facilities to be comparable. The Cottages are far more residential in character than the multi-story assisted living facilities identified in the opposition exhibits. They are much lower in height and mass and have virtually no commercial aspects such as loading, surface parking, and trash removal. The multi-unit Lodge does have these but is well buffered by forest, topography, distance, and supplemental forest plantings from adjoining homes. In a sense, it is buffered very similarly to other senior facilities mentioned.

In closing comments, those in opposition state that "[t]his area of Potomac is replete with open fields and stands of forest...It is marked by a feeling of open, expansive, space, not a series of walled-in, gated communities." Exhibit 190. This is similar to the descriptions of the area as "rural" made by those in opposition. The Hearing Examiner does not agree with that description of the area. A review of the aerial photograph from the Staff Report demonstrates that this area is not rural and full of open space, but consists of residential, two-acre lots, as the zone implies. Neighboring properties include a golf course. While there are clusters of what appear to be mature trees on individual properties, there is no support for the proposition that forests and open spaces abound in the surrounding area, except for the forest partially on the northern end of this property.

Residents also believe that the landscaping proposed creates a "walled community", out of character with the surrounding area. Again, the Hearing Examiner disagrees. The giant green arborvitae landscaped along the southern portion of the western side occupies only a portion of the property's border. It transitions to shrubs and understory plantings, and supplemental forest plantings along the northwestern and northeastern sides of the property. The frontage along South Glen Road mirrors that of the surrounding area and does not look like a "wall". As demonstrated

by the photographs submitted into the record, the use of the giant arborvitae along one portion of the development is a landscaping and screening technique used elsewhere in the area.

While concerns about safety and queuing on South Glen Road were raised by neighbors, expert testimony established that there have been no accidents proximate to the site in the last seven years. Expert testimony also demonstrates that the project will not contribute to queues on South Glen Road because shift changes occur outside the times when queues were observed. To ensure this remains the case, the Hearing Examiner imposes a condition mandating the shift times proffered by Heritage. A contribution to additional pedestrian and mitigation for bicycles will be determined at preliminary plan.

ii. Inherent and Non-Inherent Adverse Impacts (Section 59.7.3.1.E.1.G)

This standard requires consideration of the impact of inherent and non-inherent adverse operational and physical effects of the proposed use on nearby properties and the general neighborhood. Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” *Zoning Ordinance*, §1.4.2. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* Non-inherent adverse effects are a sufficient basis to deny a conditional use, alone or in combination with inherent effects, if the harm caused by the adverse effects would be “undue.”

Staff and expert testimony identified characteristics of the use that have an “effect” on the surrounding area, which the Hearing Examiner refined to include explicitly noise from ambulances. The opponents argue that the legal structure (incorporating fee simple ownership) is

a non-inherent operational characteristic. The Hearing Examiner does not agree. Incorporating fee simple ownership as part of a senior care community doesn't cause an "effect" on the surrounding area. Forms of ownership are not typically relevant to the type of effects considered in zoning cases. *See, e.g., Beall v. Montgomery Cty. Council*, 240 Md. 77, 88 (1965) ("Zoning ordinances are concerned with the use of property, the height of buildings and the density of population...They are not concerned with the ownership of the property involved..."). There is nothing in this record to support an argument that the form of ownership impacts the height, density, or compatibility of the use, considerations that are relevant to the standards of approval for this case.

In an application for a continuing care facility, BOA Case No. S-856-B, *Petition of Friend's House, Inc.*, the Hearing Examiner adopted Staff's description of the broad characteristics to consider in determining the inherent and non-inherent characteristics of the use: size, scale, scope, light, noise, traffic, and the environment. *Hearing Examiner's Report and Recommendation*, BOA Case No. S-856-B, pp. 41-42. Characteristics analyzed by Staff in this and other cases involving age-restricted or senior living facilities relate directly to these factors to determine the "effects" on the surrounding area. *See, e.g.,* Hearing Examiner's Report and Recommendations in CU 16-01, *Brandywine Senior Living*, pp. 62-63 (March 21, 2016); CU 20-05, *Spectrum Retirement Communities*, p. 29 (March 9, 2021). Nothing in this record demonstrates that the fee simple ownership will alter the scale, size, scope, noise, traffic or environment or any other "effect" of the use in a manner different than any other residential care facility, including a continuing care facility that could also go on this property.

This is demonstrated by the harm projected by the only expert opining to the uniqueness of the ownership. She testified that active adult and assisted living/memory care are combined in

other facilities. Her testimony characterized this use as an “atypical” product in the senior care industry solely due to the fee simple ownership. The only adverse “effect” that she mentions is that owners of the independent units may have difficulty securing higher tiers of care while paying a mortgage on their fee simple dwelling. The inability to sell a fee simple unit is a risk personal to the buyer, which would be the same in any age-restricted fee simple community where continuum of care is not guaranteed. Simply the fact that the senior care community proposed here may have an “atypical” business structure in the industry does not equate to a non-inherent characteristic under the Zoning Ordinance.

Aside from whether the ownership generates an “effect” on the community, Heritage correctly points out that fee simple ownership in age-restricted communities is not unique or “non-inherent”. There are examples of fee simple age-restricted townhouse communities in the area. In OZAH Case No. CU 16-11, the Hearing Examiner approved another new type of age-restricted product (“Design for Life” townhomes) that had recently been authorized by a Zoning Text Amendment. *Hearing Examiner's Report and Decision*, OZAH Case No. 16-11, Garrett Gateway Partners, LLC, p. 3. In that case, the Hearing Examiner approved 19 fee simple townhomes as a conditional use. The fee simple ownership was never identified as a non-inherent characteristic of the use. The Hearing Examiner found (*Id.*, p. 40):

The proposed development should have no physical or operational characteristics that are different from a townhouse residential community of comparable size, except that it will include an accessibility component which is an inherent characteristic of this type of conditional use (in fact, it is its *raison d'être*). There is no evidence that the proposed use will produce any non-inherent adverse impact in any of the areas listed in this provision of the Zoning Ordinance. The Hearing Examiner therefore concludes that the proposed use will not cause undue harm to the neighborhood as a result of a non-inherent adverse...

Likewise, is no evidence here that the physical or operational characteristic will be different than any other senior care or continuing care community.

Those in opposition search for a non-inherent effect that does relate to zoning. They posit the prospect that the development will fail financially, leaving non-complying townhouses in the RE-2 zone—the “naked real estate play” they fear. They insist that a condition be imposed requiring the Lodge to be built first to ensure that it complies with the definition of the use under the Zoning Ordinance. There is no evidence in this record that this project will fail financially, or that the Lodge will never be built. This argument is entirely speculative and certainly would not support denial of this application. *Miller v. Kiwanis Club of Loch Raven, Inc.*, 29 Md. App. 285, 296 (1975)(Special exception should not be denied when there “is no evidence that those feared conditions presently exist, nor indeed that there is more than a possibility (as opposed to probability) that they will ever exist.”) The only support for this position is the example of Village of Potomac, age-restricted townhomes that had to be rezoned because they were not marketable. Even Ms. Lee acknowledges that this was “many years ago” and there is no evidence that subsequent fee simple age-restricted communities, such as the one approved in Gateway Partners, have failed. There is not even evidence that Village of Potomac was structured like this project, as it does not appear to have included an assisted living facility. Nor does the testimony and evidence on need for senior facilities in the Subregion support this. Two individuals at the hearing testified that they were interested in buying the units. While this is anecdotal, it does not support the speculative argument of the opposition. WMCCA argues need for senior living units does not equate to need for fee simple senior units but offer nothing to indicate that fee simple ownership will fail.

WMCCA and SNGA argue that we must know now that the Lodge will be constructed so that the development conforms to the definition of residential care facility in the Zoning Ordinance. As proposed by Heritage, this project will be developed in phases; not all components are required

to be built at the same time to ensure compliance with the Zoning Ordinance. A condition of approval will limit the number of townhouses that may be built before construction of the Lodge must begin.

Finally, the opposition turns to the structure of the HOA to argue that the conditional use cannot be enforced, because there is no "incentive" or ability for the Lodge to enforce the restrictions on the Cottage units (particularly the age restrictions) or *vice versa*. DPS found the proposed structure enforceable, if conditions of approval "clearly identify" the owner of the Lodge to be both responsible for adherence to all conditions as well as remitting the yearly conditional use fee. The Hearing Examiner does as well. The incentive to comply with the conditional use is the requirement to comply with federal, State and County laws, and the County Zoning Ordinance or face penalties. This incentive is no different for every conditional use. To ensure compliance, Hearing Examiner does alter some of the conditions proposed by Heritage, as discussed under the specific standards for the use in Part III.C of this Report.

Because there is no non-inherent characteristic, the Hearing Examiner need not get into the evidence of undue economic harm. Assuming, *arguendo*, that there is a non-inherent characteristic, the Hearing Examiner finds the weight of evidence favors the Applicant but is somewhat equivocal. The only individual qualified as an expert that does not have an interest in the outcome of the case is Mr. Kagan, who opined that senior living facilities in the area did not impact the appreciation of nearby homes. While Mr. Maggin correctly points on that the only sale that compared appreciation before and after a senior facility (Brandywine) existed is 10827 Lockland Road, the hearsay testimony on why the asking price was discounted is contradictory. Mr. Kagan spoke with the seller's agent who stated that the property was discounted because the

buyer purchased it sight unseen and that it needed renovations. Mr. Maggin spoke with the buyer's agent, who attributed the discount in price directly to the proximity to the senior living facility.

The Hearing Examiner doesn't find this contradictory hearsay particularly persuasive because the senior living facilities studied are not the same as the use proposed here. Mr. Kagan testified that Heritage's Gardens has more residential characteristics than the large multi-unit, multi-story facilities included in his study. He recognized that the residential character and high-quality materials of the structures, in line with other homes in the neighborhood, minimized potential impacts to property values. 3/2/22 T. 174. Certainly, proximity to a large, multi-story facility is different than from structures that mirror similar homes in the area. While the multi-story Lodge remains a component, it is situated well away from other properties and will be surrounded by forest, supplemental forest planting, and additional planting within the stream valley buffer. Without more evidence that undue economic harm will occur, the Hearing Examiner finds that there will not be undue economic harm from the proposed development.

B. Development Standards of the Zone (Article 59.4)

To approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the RE-2 Zone, contained in Article 59.4 of the Zoning Ordinance. Staff concluded that the application met the development standards (Exhibit 97(a)), pp. 17-19), as set out in Table 2 from that Report.

Conclusion: No party contests Staff's finding that the application meets the required development standards in the RE-2 Zone. The Hearing Examiner finds from the uncontroverted evidence that the proposed development meets these standards.

C. Use Standards for a Residential Care Facility (Section 59.3.3.2.E)

1. Enforcement Mechanism and Conditions of Approval

Many of the specific use standards are typically mandated by conditions of approval. Because enforcement has been a controversial issue in this case, the Hearing Examiner addresses it here. In response to the concerns raised by WMCCA and SGNA, the Hearing Examiner asked Heritage to clarify several aspects of the enforcement mechanism. Heritage responded that internal disagreements about enforcement of the conditional use could be raised by the owner of any Ownership Lot (Exhibit 179):

Compliance with the Conditional Use will be mandated by the HOA governing documents and each Lot Owner as well as the Board will have the authority to enforce the HOA governing documents. These rights to enforce are independent and may be exercised even where Lot Owners and/or the Board disagree about whether a particular issue is a violation of the HOA documents and/or the Conditional Use. Enforcement action would be in the form of a lawsuit...up to the court to decide...⁸

Of more concern to the Hearing Examiner was the question whether the DPS could enforce the conditional use. When asked, Heritage responded (Exhibit 179):

Nothing in the proposed legal structure in any way diminishes DPS' right to oversee the Conditional Use as they would any other conditional use in Montgomery County, including having the right to inspect during reasonable hours. The legal structure is additive; not only will DPS have the authority to enforce the Conditional Use but so will the Lodge Owner and Cottage Owners. In addition, the HOA Board has a fiduciary duty to exercise reasonable business judgement in the operation of the community. Implicit in this is the operation of the community in accordance with the Declaration and by extension, the Conditional Use.

The Lodge Owner is the administrator of the Conditional Use and as such is responsible for all records relating to Conditional Use compliance; conducting the required resident census; verifying occupant's compliance with age restrictions of the Conditional Use; conducting meetings; and serving as the point of contact for all issues related to the Conditional Use. In this role, the Lodge Owner will meet with DPS as needed to verify all aspects of the Conditional Use.

After referring these responses to DPS, DPS responded that (Exhibit 132):

DPS doesn't foresee any difficulty in its ability to enforce any condition associated with CU 22-01. Our only recommendation would be that one of the conditions

⁸ The Montgomery County Common Ownership Commission (CCOC) offers a more streamlined resolution option than resorting to a lawsuit in Court. *See, Montgomery County Code*, Chapter 10B-1, *et. seq.*

clearly identify the owner of the Lodge to be both responsible for adherence of all conditions as well as remitting the yearly conditional use fee.

In its proposed conditions, however, Heritage relies on incorporating conditions into the Declaration of Covenants to ensure enforcement. Exhibit 180(a). For instance, Heritage feels that a provision in the Covenants vesting the Lodge owner with responsibility to enforce compliance with the conditional use will be adequate. *Id.*

The Hearing Examiner disagrees. While she understands Heritage's argument that an HOA Board has a fiduciary duty to manage the property for the benefit of the residents and to comply with the law, these types of conditions would be met simply by incorporating the provision into the Declaration. The Hearing Examiner finds this insufficient to meet DPS' concern that the conditions of approval clearly identify the owner of the Lodge as responsible for enforcement of the conditional use. If conditions of approval are limited solely to what must be incorporated into the Declaration of Covenants, the Lodge owner's default will simply be a violation of the covenants and not a violation of the conditional use. DPS' standing to sue under the Covenants should not be an issue that it has to deal with.

While the Hearing Examiner agrees that certain provisions should be mandated in the Declaration of Covenants, the Hearing Examiner finds that additional conditions directly requiring compliance are appropriate. She adds a condition making the Lodge owner responsible directly responsible for maintaining compliance and enforcing with the conditional use, and paying DPS' inspection fee, in addition to requiring this under the Declaration of Covenants. This should not affect the status of the owner of the Lodge, as the owner will already be liable for compliance under the covenants and has the right under the covenants to enforce against any other lot owner to make itself whole if necessary. With the conditions proposed in Part IV of this Report, the Hearing Examiner finds that the conditional use is capable of being enforced.

2. Use Standards

The specific use standards for approval of a Residential Care Facility are set out in Section 59.3.3.2.E. of the Zoning Ordinance.

1. Defined, In General

Residential Care Facility means a group care or similar arrangement for the care of persons in need of personal services, supervision, or assistance essential for sustaining the activities of daily living, or for the protection of the individual, in which:

- a. the facility must meet all applicable Federal, State, and County certificate, licensure, and regulatory requirements;**
- b. resident staff necessary for operation of the facility are allowed to live on-site; and**
- c. the number of residents includes members of the staff who reside at the facility, but does not include infants younger than 2 months old.**

Conclusion: Those in opposition briefly argue that the above definition requires those living in the independent living units to need assistance in the activities of daily living. The Hearing Examiner disagrees, as the same definition explicitly applies to a continuing care retirement facility, which may have independent seniors as well. In addition, Ms. Andress testified that most individuals entering independent living do need some services.

WMCCA and SGNA want a condition of approval requiring the Lodge to be built first to ensure that the development will meet the definition of “residential care facility” (*i.e.*, there will be persons in need of personal services, supervision, etc. living on the property). This is also to ensure that Heritage doesn't receive a windfall by building luxury townhouses without the required Lodge component. Heritage counters with a phasing schedule that requires the infrastructure for both the Lodge and Cottages in the first phase. It also proposes a condition requiring the first building permit for the Lodge to be issued before the Certificate of Use and Occupancy for the 12th “Cottage unit” is issued.

Due to the lack of evidence that the project will fail financially, the Hearing Examiner doesn't impose the condition requested by WMCCA and SGNA. This is a phased development and doesn't require all components of the use to be constructed up-front, but over time. Nevertheless, the infrastructure necessary for the Lodge will be in the first phase, an expense it need not incur.

The Hearing Examiner alters Heritage's proposed condition relating to the timing of the first building permit for the Lodge. That requires the first Heritage to obtain the first Lodge permit before the Use and Occupancy permit for the 12th "Cottage unit" is issued. The Hearing Examiner has reviewed the Applicant's submissions on the legal structure and can't find this term defined. It is not clear whether "Cottage unit" refers to a triplex or duplex (allowing 2/3 of the Cottages to be built) or a dwelling unit within a triplex or duplex (allowing a maximum of three triplexes.) WMCCA and SGNA assume it is the former, and the Hearing Examiner agrees based on the public hearing record. The Hearing Examiner clarifies the condition to use the term "duplexes and triplexes" rather than "Cottage units".

Heritage does not propose having resident Staff live on-site. Nor does it propose to have infants younger than 2 months old reside at the facility.

Section 3.3.2.E.2.c.ii. Where a Residential Care Facility (Over 16 Persons) is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:⁹

(a) The facility may provide ancillary services such as transportation, common dining room and kitchen, meeting or activity rooms, convenience commercial area or other services or facilities for the enjoyment, service or care of the residents. Any such service may be restricted by the Hearing Examiner.

Conclusion: Ms. Kelly Cook Andress described the services that SageLife would provide both to

⁹ The Hearing Examiner does not include the standard in Section 59.3.3.2.E.2.c.2(b) because it relates to residential care facilities for children.

the independent living units and the Lodge. To ensure that services are available to all residents (independent and assisted living), the Hearing Examiner adopts the condition recommended by the Planning Board to include a provision in the Declaration of Covenants requiring Heritage to make these services available to the Cottage owners as well as other residents. She also adds this as a condition of approval outside of the Declaration of Covenants.

(c) Where residential dwelling units are provided

- (1) the maximum residential density per lot area is 15 units per acre or the maximum density allowed in the zone, whichever is greater; and**
- (2) the minimum green area is 50%.**

Staff found that this application meets these requirements (Exhibit 97(a), p. 40):

Pursuant to this provision and based on the 30.6-acre Property, the maximum number of residential dwelling units at Heritage Potomac is 459 units. Heritage Potomac, with a total of 74 independent dwelling units, does not approach this maximum density.

The green area proposed at Heritage Potomac is 75 percent, well in excess of the 50 percent minimum.

Conclusion: The Hearing Examiner agrees with Staff that the application meets these standards.

Ms. Przygocki testified that the maximum area permitted for 74 independent dwelling units is 4.93 acres, well under the size of the property.¹⁰

Under this section, density is calculated “per lot area”. The Zoning Ordinance defines “lot area” is “the geographic extent defined by lot boundaries.” *Zoning Ordinance*, §§59.4.1.7.A.3, 59.4.1.7.A.4. The evidence is uncontroverted that the development must obtain approval of a preliminary plan to create a single lot for the entire property of approximately 30.6 acres, which is required as a condition of approval of the conditional use. The opposition’s arguments relating to

¹⁰ With the elimination of the single Cottage dwelling unit, the maximum number of independent dwelling units is 73, less than the acreage stated in Ms. Przygocki’s testimony.

calculation of density based on the developable area relate to the compatibility of the use, but do not affect compliance with this standard. This requirement is met.

(d) Where facility size is based on the number of beds, not dwelling units, the following lot area is required:

* * *

(2) In all other zones, the minimum lot area is 2 acres or the following, whichever is greater:

* * *

(A) in RE-2, RE-2C, RE-1, and R-200 zone: 1,200 square feet per bed;

Staff concluded that proposed development meets this density standard (Exhibit 97(a), p. 40):

Heritage Potomac includes 73 Assisted Living and Memory Care units, containing a total of 96 beds. These units do not meet the definition of dwelling unit and thus the density is appropriately evaluated under this provision. Based on the provision of 96 beds, 115,200 square feet of land area (2.64 acres) is required. The Property is 30.6 acres in size.

Ms. Przygocki opined that the density remains well under this standard even if calculated on the developable area net of the minimum area required for the independent living units. The minimum land area required for 96 beds is 7.67 acres, or 25% of the tract area and 45% of the usable area. 5/3/22 T. 137.¹¹

Conclusion: Heritage now proposes 105 beds of assisted living/memory care, which requires a minimum of 126,000 square feet or approximately 2.9 acres.¹² This difference does not change the substance of Ms. Przygocki's testimony that the density is well below the maximum density permitted. Even if density is calculated on the developable acreage net of the area required for the independent living units, it falls well under this use standard. Ms. Przygocki testified that the developable area of the property is 16.93 acres. The minimum area required for the independent

¹¹ The Planning Board recommended approval of 105 beds, which the Applicant proposed during the public hearing. Ms. Przygocki's testimony is based on 96 beds of assisted living. 5/31/22 T. 137.

¹²(1,200 s.f. x 105 beds or 126,000)/43,560 (one acre) = 2.9 acres.

living units is 4.93 acres. Subtracting 4.93 acres from 16.93 acres still leaves 7.63 acres, well above the amount required for the maximum density of the assisted living units.

(e) Principal building setbacks for all building types must meet the minimum setbacks required under the standard method of development for the subject building type in the R-30 zone (see Section 4.4.14.B.3, Placement).

Staff concluded (Exhibit 97(a), p. 40):

The Project is proposed as a campus setting on one record lot. Given that there are no internal lot lines, this provision is not applicable.

Conclusion: The Hearing Examiner agrees with Staff that that setbacks internal to the site do not apply to this standard. Internal setbacks between structures are discussed relating to compatibility in Part III.A.3 of this Report.

Principal building setbacks from the property lines do apply, however. The required required rear setback from the property line for this building type is 20 feet. *Zoning Ordinance*, §59.4.4.14.B.3. The front setback required (applicable to the triplex facing South Glen Road) is also 20 feet. *Id.* The Conditional Use Plan (Exhibit 181(c)) marks the required setback lines. All structures shown are within the setbacks.

(f) The minimum side setback is 20 feet to abutting lots not included in the application.

Conclusion: Staff concluded that this standard was met because the side setback required is 20 feet. The Cottages will be setback 35 feet from the property line, exceeding this standard. The minimum setbacks are shown on the Conditional Use Plan, which demonstrates that all structures are outside the side setback. Exhibit 181(c).

(g) Independent dwelling units must satisfy the MPDU provisions of Chapter 25 (Section 25.A-5).

Staff advises that Heritage will meet its MPDU obligation by executing an Alternative MPDU Payment Agreement, authorized by §25-5A of the Code. This will require payments to

the Housing Initiative Fund (HIF), estimated to be approximately \$2,000,000. Staff determined that this resulted in a “substantial public benefit.” Exhibit 97(a), p. 40.

Conclusion: Section 25-5A of the Code does authorize this method of complying with the County's MPDU law. The Hearing Examiner will impose a condition requiring the agreement to be executed prior the sale of the first independent dwelling unit. As conditioned, this requirement will be met.

(h) In a Continuing Care Retirement Community and a Senior Care Community, occupancy of any independent dwelling unit is restricted to persons 62 years of age or older, with the following exceptions:

- (1) the spouse of a resident, regardless of age;**
- (2) another relative of a resident, 50 years of age and older;**
- (3) the resident widow, widower, or other surviving relative of a resident who dies while residing at the Continuing Care Retirement Community or the Senior Care Community is allowed to remain, even though the resident widow, widower, or other surviving relative has not reached the age of 62.**

A minimum of 80% of the dwelling units must be occupied by at least one person per unit who is 55 years of age or older.

Normally, this requirement is met simply by making compliance with the age restrictions a condition of approval. WMCCA and SNGA argue that the use should be denied because these restrictions will be unenforceable. As discussed, they argue that the ownership structure provides no incentives for self-enforcement. Exhibit 165. They also worry that ownership lots could be purchased by corporations, trusts, or limited liability companies and then rented. Opponents recommend several conditions to remedy their concerns. Among many, these would require occupants of the independent living units to provide documentation of their ages to the Lodge owner quarterly, that the Board of Appeals be notified if the age-qualified population falls under 80%, limiting ownership to “natural persons”, that the Lodge owner approve a transfer prior to sale (to verify age), semi-annual certification to the Lodge Owner that the Cottage Owner is current on his financial obligations (such as a mortgage), to ensure the development is financially sound.

They also seek a condition limiting ownership to “natural persons” to prevent it turning into a rental community, and a provision in the covenants that title to the Cottage Ownership Lots would revert to the Lodge owner if no age qualified persons occupies the property. Exhibit 165.

Heritage considers the restrictions on sale and conditions imposing age-reporting requirements “onerous”, “burdensome”, and “unnecessary”. Exhibit 174. They argue that federal law (the Housing for Older Persons Act or HOPA) mandates surveys of residents every two years; the opponent’s conditions would impose a requirement eight times higher. *Id.* They also point out that any older individuals place their residences in trust for estate planning purposes. *Id.*

Conclusion: The Hearing Examiner is concerned that the verification requirements proposed by WMCCA and SGNA are so onerous, they raise the specter of discrimination against this housing development. She agrees with Heritage that ownership should not be limited to natural persons, as many older people hold property in trusts for estate reasons. The key to meeting the standards is occupancy, not rental versus non-rental. In addition, she finds the possibility of a single entity buying up luxury townhomes to rent speculative. Even if it were to occur, it would not impact compliance with the criteria for approval which is based on occupancy. Nor does the Hearing Examiner have the authority to regulate reversion of title to the Lodge ownership. As with every other senior living facility OZAH has approved, the Hearing Examiner imposes a condition simply requiring compliance with the age restrictions in this section of the Zoning Ordinance.

With the conditions imposed in Part IV of this Report, the Hearing Examiner finds this standard has been met.

(i) Height, density, coverage, and parking standards must be compatible with surrounding uses; the Hearing Examiner may modify any standards to maximize the compatibility of the building with the residential character of the surrounding neighborhood.

Conclusion: This has already been discussed in Part III.A.3 of this Report. The Hearing Examiner

reduced the density by one unit.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. Under the amendments to Section 59.7.3.1.E.1.b. of the 2014 Zoning Ordinance, effective December 21, 2015, the requirements of these sections need be satisfied only “to the extent the Hearing Examiner finds necessary to ensure compatibility.”¹³ The applicable requirements, and whether the use meets these requirements, are discussed below. Technical Staff's report (Exhibit 28, pp. 23-27) discusses the requirements of the following Divisions of Article 59.6: Division 6.2 Parking, Queuing and Loading, Division 6.4 General Landscaping and Outdoor Lighting, Division 6.5 Screening, and Division 6.7 Signs.¹⁴

1. Parking, Queuing and Loading (Division 59.6.2)

Staff's analysis of the total number of parking spaces was based on 96 assisted living/memory care units and 74 independent living units. Staff found that 113 parking spaces were required. The unit mix has changed slightly since then. Both Staff and the Applicant agree that the conditional use plan provides 165 spaces. Exhibit 97(a); p. 19; 1/28/22 T. 141.

Using the parking rates applied by Staff (and required in the Zoning Ordinance), the Hearing Examiner calculates that 73 parking spaces are required for the independent living units (1 space per dwelling) and 43 for the assisted living/memory care (Section 59.6.2.4.B.):

Vehicle Parking	1 sp. per IL dwelling unit	73
Residential Care Facility	0.25 sp. per Bed (Asst. Living)	27
	0.5 spaces per Employee¹⁵	15

¹³ The 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), was amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

¹⁴ Requirements for site access to not apply to this development because it is in the RE-2 Zone. *Zoning Ordinance*, §6.1.2. Nevertheless, a Fire Access Plan has been approved for the property. Mr. Steman testified that the site driveway will be moved to the north to provide better sight distance. 2/28/22 T. 15. Mr. Kabatt testified that access will be safe, adequate and efficient because it will be built to County standards at a location with better sight distance.

¹⁵ Based on the maximum number of employees on the site at any one time, exclusive of landscaping and snow removal personnel.

		Total = 115
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The Zoning Ordinance (Section 59.6.2.4.C.) requires Heritage to provide 0.25 bicycle spaces per independent living unit and .10 bicycle spaces per employee for the assisted living facility, resulting in a total of 22 spaces.¹⁶ Heritage has requested a waiver “to the extent necessary” under Section 59.6.2.10 of the Zoning Ordinance to reduce the number of spaces for the independent living units in the Lodge, stating (Exhibit 9):

Given the anticipated age of the residents of the Independent Living Units located within the Lodge (the average age of residents moving into an Independent Living community is 84), there is no expectation that these residents will own a bicycle. Moreover, given the location of the Project, it is not expected that employees will bike to work. Thus, requiring the Applicant to provide a dedicated bike parking room is simply a waste of space and the applicant requests a waiver from the nine-space bicycle storage facility.

Staff recommended approval of the waiver “given the nature of the independent living units” that will permit bicycles to be stored inside each unit. Exhibit 97(a), p. 19.

Conclusion: The Hearing Examiner interprets Heritage’s waiver to be from the required parking spaces for the independent living units *and* employees of the residential care facility in the Lodge. Section 59.6.2.10 permits the Hearing Examiner to waive these requirements “if the alternative design satisfies Section 6.2.1.” The intent of the parking regulations is to “to ensure that adequate parking is provided in a safe and efficient manner.” *Zoning Ordinance*, §59.6.2.1. Staff recommended approval of the waiver because “given the nature of the IL units”, there would be sufficient space within each unit for the bicycle parking space. Exhibit 97(a), p. 19. Having no evidence to contradict either Staff’s recommendation for the independent living units, the Hearing Examiner grants this request. The only evidence in the record regarding a waiver for employees of the residential care facility is Heritage’s statement that it does not foresee employees biking to

¹⁶ (.25x73=18.25) + (.10 spaces per 30 employees=3 spaces) = 22 spaces.

the facility given its location. Without any evidence to the contrary, the Hearing Examiner grants this waiver request as well.

Staff reports that the application meets the Zoning Ordinance requirements for loading spaces, contained in Section 59.6.2.8. Exhibit 97(a), p. 14. Based on this uncontroverted testimony, the Hearing Examiner finds that this standard has been met.

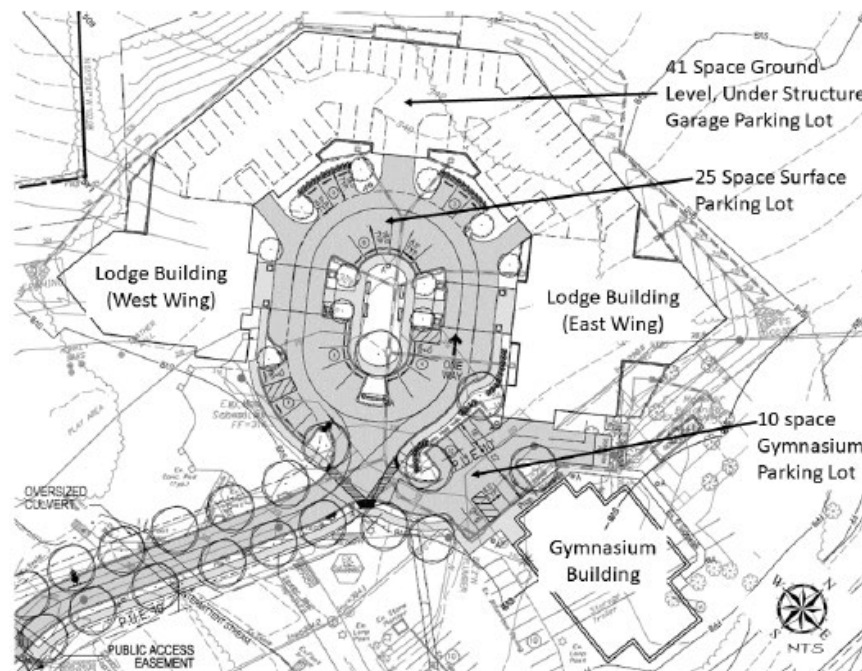
2. Parking Lot Landscaping

Heritage seeks two waivers of the parking lot landscaping requirements. To qualify for a waiver from parking requirements, an applicant must demonstrate that the alternative design satisfies the intent of the parking standards in Section 59.6.2.1, which is to “ensure that adequate parking is provided in a safe and efficient manner.”

The waivers sought by Heritage include a waiver from the canopy coverage required under Section 59.6.2.9.C.2 for the Lodge parking lot. The other is a waiver from the parking lot perimeter landscaping required under Section 59.6.2.9.C.3 for both Lodge and the gymnasium parking lot. The locations of these are shown on Figure 10 from the Staff Report (Exhibit 97(a), p. 22, shown on the following page).

Mr. Park testified that the waivers are appropriate given the size and location of the parking, which will be buffered. He testified that the perimeter plantings abutting a residential detached zone requires a 10-foot width of planting area, including a six-foot hedge, fence, or wall, canopy trees every 30 feet on center and two understory trees for every canopy tree. There is also a canopy coverage requirement for a minimum of 25% of the area at 20 years growth. 2/28/22 T. 75-77.

Staff recommended approval of both waivers. According to Staff, the size of the planting pits surrounding the Lodge do not support the size of trees needed to create enough canopy to meet requirements. Staff also found that larger trees could interfere with pedestrian circulation,



particularly involving older or handicapped individuals. Staff was also concerned about the health of trees planted at that location due to the shade created by the building. They felt that “small understory trees are better suited for this area.” Exhibit 97(a), p. 23.

Section 59.6.2.9.C.3 contains the specifications for perimeter landscaping surrounding a parking lot, including width, height, and mandates for understory and canopy trees. Staff recommended approving the waiver because (Exhibit 97(a), pp. 23-24):

The two surface parking lots are bordered by the Lodge Building and the existing gymnasium building from the southwest to the northeast and southeast directions...The south side of the parking lot is approximately 450 feet to the nearest property line to the south with existing vegetation, landscape, plantings and reforestation plantings between the parking lots and the neighboring residential lots. Furthermore, the main building is sunk into the ground and is positioned to minimize impacts to the environmental features on the Property. Additionally, the parking lots have been designed to minimize their footprint to the extent possible, while adequately serving the proposed uses and minimizing impacts to the environmental features on site.

Conclusion: None of the parties to the hearing contested the appropriateness of the waiver. The

Hearing Examiner approves both waivers for the reasons stated by Staff.

3. Site Landscaping and Screening (Division 6.5)

The revised landscaping for the site perimeter is described in Part II.C.2.b of this Report. The minimum standard required calls for a mix of canopy trees, shrubs, understory or evergreen trees, either 8 or 12 feet in width, depending on whether a fence is provided. Zoning Ordinance, §59.6.5.C.7. An applicant may seek alternative compliance with these provisions when:

The applicable deciding body may approve an alternative method of compliance with any requirement of Division [6.1](#) and Division [6.3](#) through Division [6.6](#) if it determines that there is a unique site, a use characteristic, or a development constraint, such as grade, visibility, an existing building or structure, an easement, or a utility line. The applicable deciding body must also determine that the unique site, use characteristic, or development constraint precludes safe or efficient development under the requirements of the applicable Division, and the alternative design will:

- A. satisfy the intent of the applicable Division;**
- B. modify the applicable functional results or performance standards the minimal amount necessary to accommodate the constraints;**
- C. provide necessary mitigation alleviating any adverse impacts; and**
- D. be in the public interest.**

As recommended by Staff (Exhibit 188), Heritage submitted a request for alternative compliance for landscaping along the rear of Ownership Lots 24-35. Exhibit 191. Heritage retains its proposal to plant arborvitae and cryptomeria evergreens along that border but adds flowering understory trees and shrubs east of the evergreens to “further comply” with the Zoning Ordinance. It seeks to substitute the understory trees instead of the canopy trees called for in the Zoning Ordinance to ensure the health of the evergreen trees. According to Heritage, the canopy trees would provide shading that could impact growth of the arborvitae. Exhibit 191. Heritage also seeks alternative compliance for the spacing of shrubs in order to “avoid planting shrubs in the swale which, given the moist soil, would likely compromise the health of the shrubs and to provide

enough room for the additional plant material to thrive. According to Heritage, the additional plantings will add “visual interest and depth” to the landscape buffer.

Staff concluded that the revised landscape plans “meet the four findings under Section 6.8.1 Alternative Method of Compliance and is acceptable.” Exhibit 196. It also determined that revised supplemental forest plantings “are acceptable and will be added to the Final Forest Conservation Plan when it is submitted.” *Id.* Staff did not recommend additional conditions, as the landscape plan and Final Forest Conservation Plan will be subject to enforcement after approval. *Id.*

Conclusion: Division 6.4 of the Zoning Ordinance sets minimum standards for site landscaping, which are intended to “preserve property values, preserve and strengthen the character of communities, and improve water and air quality.” §59.6.4.1 The Hearing Examiner agrees with Staff that the request for alternative compliance meets the intent of the landscaping requirements because the screening proposed provides a far greater buffer than would the minimum required. It also contributes to the compatibility of the use in the near as well as longer term. The addition of shrubs and understory trees behind the arborvitae and cryptomeria supplement even more the screening already provided. This landscaping and supplemental forest planting mitigates the concerns of property owners expressed at the public hearing that the forest either off-site (on the western property line) or on-site (along the northern portions of the property) has little understory, making the development more visible. For that reason, the Hearing Examiner concludes that alternative compliance is warranted.¹⁷

¹⁷ Section 59.7.3.1.E.1.b also gives the Hearing Examiner the ability to waive provisions of Article 6 to the “extent needed to ensure compatibility.” The Hearing Examiner finds that the supplemental screening significantly reduces the visual impact of the use given the primarily deciduous forest along the property lines.

4. Outdoor Lighting

Conclusion: The outdoor lighting proposed for the conditional use was discussed in Part II.C.2.b. of this Report. As indicated there, permissible lighting levels for a conditional use are specified in Zoning Ordinance §59.6.4.4.E., which provides,

Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.

The proposed fixtures must also meet the design requirements and fixture height limits specified in Zoning Ordinance §59.6.4.4.B.

Conclusion: Heritage's photometric study demonstrates that illumination levels are at 0.0 footcandles well within the interior of the property along all property boundaries. No one contests that the fixtures proposed do not meet the applicable standards. This requirement has been met.

5. Signage

Permitted signage for residential zones is set forth in Zoning Ordinance §59.6.7.8. Additional signage area is allowed for subdivisions and multiunit developments, as specified in Zoning Ordinance §59.6.7.8.B.1.:

B. Additional Sign Area

1. Subdivision and Multi-Unit Development Location Sign

Additional sign area is allowed for a permanent location sign erected at any entrance to a subdivision or Multi-Unit development if the sign is a ground sign or wall sign located at an entrance to the subdivision or building.

- a. 2 signs are allowed for each entrance.***
- b. The maximum sign area is 40 square feet per sign.***
- c. If the driveway entrance to the subdivision or development is located in the right-of-way, a revocable permit issued jointly by the Sign Review Board and the appropriate transportation jurisdiction must be obtained to erect the sign.***
- d. The maximum height of a sign is 26 feet.***
- e. The sign may be illuminated (see Section 6.7.6.E).***

Staff characterized the signage proposed as “modest”, consisting of one monument sign at the South Glen Road entrance and one at the entrance to the Lodge.

Conclusion: The Hearing Examiner finds that the entrance sign is compatible with the surrounding area, but exceeds the amount permitted under the Zoning Ordinance. She imposes a condition of approval requiring the Applicant to seek a variance from these requirements from the Sign Review Board.

IV. Conclusion and Decision

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Heritage Land LLC (CU 22-01) for a conditional use under Section 59.3.3.2.E.2.b. of the Zoning Ordinance to build and operate a Residential Care Facility (Senior Care Community) at 10701 South Glen Road, Potomac, Maryland is hereby **GRANTED**, subject to the following conditions:

1. Physical improvements to the Subject Property are limited to those shown on the Applicant's Conditional Use site plan (Exhibit 181(a), (d), and (e)), and Landscape and Lighting Plan (Exhibits 191(a)-(h).
2. The maximum number of independent dwelling units for seniors is limited to 73 independent living units in the following configuration:
3. 44 independent senior dwelling units located in Cottage units.
4. 29 independent senior dwelling units in the multi-use building (the Lodge).
5. The maximum number of beds in the Lodge shall be 105.
6. The maximum number employees on-site at any given time shall not exceed 30 employees, exclusive of landscaping and snow removal staff.
7. Shifts for Care and Food Service Staffs shall be:
 - a. Care Staff (three eight-hour shifts):
 - i. 7:00 a.m. to 3:00 p.m.
 - ii. 3:00 p.m. to 11:00 p.m.
 - iii. 11:00 p.m. to 7:00 a.m.

- b. Food Service Staff—three shifts:
 - i. 6:00 a.m. to 1:30 p.m.
 - ii. 1:30 p.m. to 9:00 p.m.
 - iii. 4:00 p.m. to 9:00 p.m.
- 8. The special exception approvals in BOA Case Nos. S-1609 and S-1610 must be abandoned by the Board of Appeals prior to issuance of a building permit for new construction.
- 9. The Applicant must execute an Alternative MPDU Payment Agreement prior to the sale of the first dwelling unit.
- 10. The Applicant must provide ancillary services such as transportation, common dining room and kitchen, meeting or activity rooms, convenience commercial area or other services or facilities for the enjoyment, service or care of the residents as required by Sec. 59-3.3.2.E.2.c.ii.a.
- 11. The collection of solid waste refuse and recyclable materials must occur on a weekday between 7:00 a.m. and 9:00 p.m. and not on Saturday or Sunday.
- 12. Prior to the issuance of any building permit, the Applicant must obtain approval of a Preliminary Plan Subdivision and Record Plat pursuant to Chapter 50 of the Montgomery County Code.
- 13. The owner of the Lodge Ownership Lot shall be responsible for administering the Conditional Use, collecting, and maintaining all records necessary to verify compliance, responding to Notices of Violation and ensuring adherence to all conditions of approval.
- 14. The owner of the Lodge Ownership Lot shall be responsible for providing the annual inspection fee to the Department of Permitting Services.
- 15. All services available for Independent Living Units in the Lodge must be made available to occupants of the Cottage Independent Living Units.
- 16. The Independent Living Units located within the Cottages shall be subject to a Declaration of Covenants recorded in the land records and binding on all successors and assigns that provides for the following:
 - a. all services and amenities available to the Independent Living Units located in the Lodge are available to the Cottage Unit residents.
 - b. the Cottage Units are subject to the conditions and all aspects of the Conditional Use approval.
 - c. Establish a legal structure consistent with the framework identified in Exhibits 126(a), 174 and 179.

- d. State that, in addition to any other provisions of the Declaration, the Owner of the Lodge ownership lot shall be responsible for enforcing compliance with the conditional use.
 - e. Require the deed to the initial purchase of a Cottage Ownership Lot (defined in Exhibit 126(a)) and the deed for each subsequent conveyance to contain notice that the Subject Property is subject to the Declaration, that must comply with the conditions of approval in this conditional use case, including without limitation, the age-restrictions contained in Section 59.3.3.2.E.2.c.ii(h) of the Montgomery County Zoning Ordinance (2014 as subsequently amended).
17. Occupancy of the independent living units must meet the requirements of Section 59.3.3.2.E.2.c.ii(h) of the Montgomery County Zoning Ordinance, as it may be amended.
18. The entire Property, including all ownership lots containing Cottage Units, shall be subject to a community association ("HOA") that maintains all shared roads and open space parcels on the subject property.
19. The HOA must maintain shared roads and open space parcels.
20. The HOA must maintain and replace, in a timely manner, all landscaping located within the HOA parcels and the common area ownership lot, including taking all necessary actions to deer proof the landscape buffer along the western property line.
21. Plantings within the stream valley buffer shown on Exhibit 161 shall be limited to those plants identified on Exhibit 161 and must be reviewed and approved by Staff of the Planning Department prior to installation.
22. The Applicant must provide shuttle service for all employees utilizing public transportation to and from a bus stop and/or metro station.
23. Applicant shall complete the project in two phases:
- a. Phase I: construction and installation of the utilities and infrastructure necessary for both the Lodge and Cottages.
 - b. Phase II: construction of senior independent living dwelling units in Cottages.
 - c. The construction of the Lodge building must commence prior to the issuance of the use and occupancy certificate for the 12th duplex or triplex.
24. No vehicular access shall be provided to the Property from the property located at 10901 Edison Road.
25. Each Cottage Independent Living Unit shall be denoted as a separate account for property tax purposes with the State Department of Assessments and Taxation.

26. Notwithstanding anything to the contrary in the Montgomery County Zoning Ordinance, the owner and occupants of a senior independent living dwelling unit in a Cottage structure may not establish any additional conditional use on a Cottage ownership lot.
27. Except for no-impact and home occupations, no accessory use permitted as of right in the RE-2 zone may be established on a senior independent living dwelling unit.
28. Prior to receiving a use and occupancy certificate for the Lodge, the Applicant must meet all applicable Federal, State and County certificate, licensure and regulatory requirements pertaining to the Assisted Living and Memory Care units.
29. The Applicant and any successors in interest must obtain approval of a Preliminary Plan of Subdivision per Chapter 50 of the Montgomery County Code.
30. The Applicant must obtain approval of a Final Forest Conservation Plan that includes the supplemental forest planting shown on Sheets 7 and 7A of the Landscape Plan (Exhibits 191(c) and 191(d)).
31. The facility must be operated in accordance with all applicable County noise regulations.
32. Transfers to successor conditional use holders must follow the procedures in Rule 27.0 of OZAH's Amended Land Use Rules of Procedure.
33. The conditional use must be operated in a manner to provide the facilities and services to residents outlined in Applicant's Statement of Operations (Exhibit 6). Use of the on-site facilities and services must be restricted to residents of the conditional use site, their guests and employees, and personnel providing services to the residents.
34. The Applicant must obtain a sign permit from the Sign Review Board and the appropriate transportation jurisdiction for any proposed sign and must file a copy of any such sign permit with OZAH. The final design of the proposed sign must follow the Zoning Ordinance restrictions for signs displayed in a residential zone, or the Applicant must first obtain a sign variance from the Sign Review Board.
35. Waivers of the following provisions of Division 6.2 are hereby granted pursuant to §59.6.2.10:
 - a. Section 6.2.4.C, number of bicycle parking spaces.
 - b. Section 59.6.2.9.C.2, number of canopy trees for parking area.
 - c. Section 59.6.2.9.C.3, parking lot perimeter screening requirement.
36. The Applicant and any successors in interest must obtain and satisfy the requirements of all Federal, State, and County licenses, regulations, and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant and any successors in interest shall at all times ensure that the conditional use and premises comply

with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 6th day of September 2022.



Lynn Robeson Hannan
Hearing Examiner

RIGHT TO APPEAL

Any party of record may file a written request to appeal the Hearing Examiner's Decision by requesting oral argument before the Board of Appeals, within 10 days issuance of the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Additional procedures are specified in Zoning Ordinance §59.7.3.1.f.1. Contact information for the Board of Appeals is:

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600
<http://www.montgomerycountymd.gov/boa/>

Please contact the Board of Appeals by calling 240-777-6600 or visit its website (<http://www.montgomerycountymd.gov/boa/>) with any questions or to obtain updated procedures for filing an appeal.

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be

considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law.

NOTICES TO:

Patricia Harris, Esquire
David Brown, Esquire
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Patrick Butler, Planning Department
Cliff Royalty, Esq., Office of the County Attorney
Greg Nichols, Department of Permitting Services
Michael Coveyu, Director of Finance
Parties of Record to CU 22-01