

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-  
WASHINGTON REGIONAL DISTRICT IN  
MONTGOMERY COUNTY, MARYLAND

Office of Zoning and Administrative Hearings  
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[www.montgomerycountymd.gov/mc/council/hearing.html](http://www.montgomerycountymd.gov/mc/council/hearing.html)

IN THE MATTER OF:  
**WINCHESTER HOMES, INC.,**

Applicant

Glenn Cook  
Gary Ehrlich  
Daniel Lyons  
Scott Rosen  
Michael J. Watkins

For the Application

Stacey P. Silber, Esquire  
Attorney for the Application

\*\*\*\*\*

Martin Klauber, People's Counsel

Neither in Support of nor in  
Opposition to the Application

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Schain Lolatchy

In Opposition to the Application

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Before: Françoise M. Carrier, Hearing Examiner

Zoning Application No. G-849

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

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## I. STATEMENT OF THE CASE

Application No. G-849, filed on February 8, 2006 by Applicant Winchester Homes, Inc., requests reclassification from the R-90 Zone to the R-T 8 Zone of 4.91729 acres of land on the north side of Darnestown Road, approximately 400 feet west of its intersection with Travilah Road, comprising properties located at 10113, 10119, 10123, 10127, 10131, 10201, and 10207 Darnestown Road, Tax Account Numbers 9-1-772871, 9-1-776297, 9-1-772882, 9-1-769463, 9-1-769452, 9-1-778593, 9-1-776286, 9-1-778525, 9-1-778514 and 9-1-778503, Rockville, Maryland, in the 9th Election District. The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging.

The application was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission ("M-NCPPC") who, in a report dated June 9, 2006, recommended *approval*.<sup>1</sup> The Montgomery County Planning Board ("Planning Board") considered the application on June 22, 2006 and, by a vote of 3 to 1, recommended *approval*. The weight of this recommendation is diminished, however, because it was transmitted with the following "additional finding" (Ex. 28):

The Board is not persuaded that the proposed Schematic Development Plan adequately addresses the issue of noise mitigation for the areas adjoining the Public Service Training Academy (north) and the [sic] Darnestown Road (south). The Board determined it to be critically important that particular attention be given to noise mitigation and urges the hearing examiner to place special emphasis on the need for a serious evaluation of alternative [sic].

While the Planning Board's comment is helpful in that it alerts the Hearing Examiner to a potential problem regarding noise at the subject site, it does not help the Hearing Examiner evaluate and resolve the problem. The Hearing Examiner cannot discern from the comment whether the Planning Board believes the rezoning should be approved regardless of the noise problem, or only if some unspecified alternative schematic development plan is submitted. Fortunately, subsequent analysis by Technical Staff and the addition of a binding element relating to noise, discussed in Part

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<sup>1</sup> The Staff Report is quote and paraphrased liberally in Part II of this report.

II.H. of this report, allow the Hearing Examiner to conclude that if the rezoning is approved, the Applicant will employ noise mitigation measures that will reduce noise exposure to acceptable levels.

A public hearing was convened on June 26, 2006, at which time evidence and testimony were presented both in support of and in opposition to the application. The record was held open for to receive a supplemental submission from the Applicant, and closed on July 25, 2006. The record was later reopened to permit the Applicant to make a proffer of additional buffering, followed by a public comment period, and closed on October 4, 2006. Finally, the record was reopened on October 12, 2006 to accept into the evidentiary record a revised preliminary forest conservation plan that was described in the Staff Report and in testimony. The plan itself had inadvertently been omitted. Because the contents of the forest conservation plan were already described in the record, there was no reason to leave the record open for further public comment. Accordingly, the record closed immediately on October 12, 2006.

## **II. FINDINGS OF FACT**

For the convenience of the reader, the findings of fact are grouped by subject matter. Any conflicts in the evidence are resolved under the preponderance of the evidence test.

### **A. Subject Property**

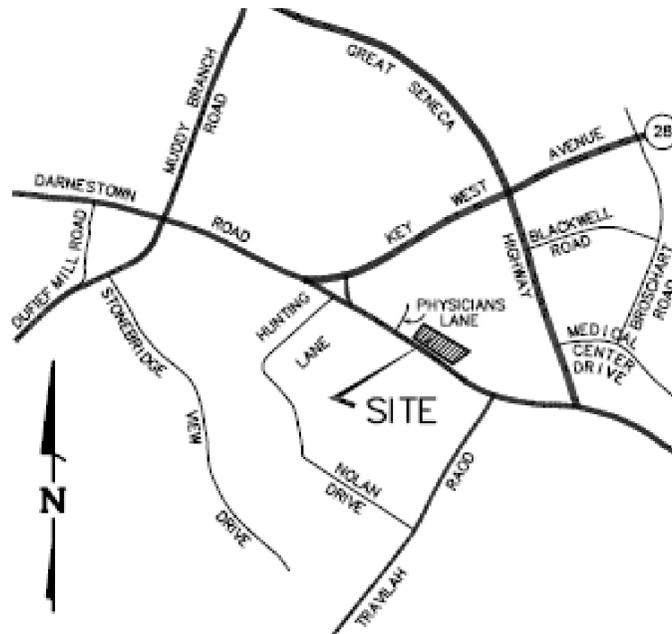
The subject property consists of ten parcels with a combined area of approximately 4.92 acres. The site is located on the north side of Darnestown Road between its intersections with Travilah Road and Key West Avenue, and has approximately 757 feet of frontage on Darnestown Road. The topography reflects a decrease in elevation from the northeast corner of the site to the southwest corner, adjacent to Darnestown Road. The property is currently developed with single-family detached dwellings of various types and sizes, and has seven individual driveways accessing Darnestown Road. The site contains a few mature trees, but no wooded areas that qualify as forest.

To the north, the subject property abuts a county-owned Public Service Training Academy ("Training Academy") that serves as a centralized location for specialized training of public safety employees, particularly police officers and fire fighters. Since 2001, the Training Academy has

also been used for staging and training related to homeland security. It includes classroom space, an outdoor course for driver training, an outdoor space dedicated to training fire fighters, a canine training facility and an unpaved area used as a helicopter landing site. In early 2006, the Planning Board approved a proposal to develop additional facilities at this site, including an expansion of the academic building, construction of a new fire station, construction of a new canine support facility with 1,350 square feet of offices and kennels, paving the helicopter landing site, and adding 220 parking spaces to the existing 107 spaces. See Exs. 42(a) and (b). The existing dog kennel and helipad currently operate by special exception.

To the west, the subject property abuts a medical office building in the O-M Zone. To the east it abuts a single-family detached dwelling in the R-90 Zone that has a residential unit upstairs, and a dance studio operating by special exception on the ground level.

The general location and shape of the subject property are shown on the area map below, excerpted from Ex. 46(b).



Photographs of some existing structures on the subject property and the view from the subject property in various directions are provided on the following pages.

Existing Houses on Subject Site, Ex. 36 Photo C



Lolatchy Residence and Fence Along East Property Line, Ex. 37 Photo H



Front View of Lolatchy Residence from Darnestown Road, Ex. 36 Photo I



View of Office Building Abutting Site to West, Ex. 37 Photo A



**Northern Property Line Abutting Training Academy, Ex. 37 Photo D**

No photographs were provided of the view across Darntestown Road from the site,<sup>2</sup> but aerial photographs in the record suggest that the view from most of the site would be of trees, with perhaps glimpses of backyards. At the east end of the site, it appears that one street of townhouses may be visible, while the larger townhouse development sits farther back, behind a vegetated area.

**B. Surrounding Area**

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. In the present case, Technical Staff defined the surrounding area as bounded generally by Key West Avenue (MD 28) on the north and west, Great Seneca Highway (MD 119) on the

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<sup>2</sup> Close-up photographs of two nearby streets of townhouses were provided, but one is at the edge of the surrounding area and is not visible from the site, and the photograph of the other gives no sense of how that street appears when viewed from the subject site, including the distance between the two locations.

northeast, Travilah Road on the south, the southern boundary of the BAI-Nola Woods Subdivision on the south, and the western boundary of the Hunting Hill Woods Subdivision on the west. Applicant's land planner, Michael Watkins, offered nearly the same definition, although he would include a small commercial area located in the southeast corner of the Travilah Road/Darnestown Road intersection, which is classified under the C-4 Zone. Mr. Watkins' explanation for including this C-4 area was that it was included in the surrounding area for a relatively recent rezoning case in the area. The Hearing Examiner finds this reasoning less than compelling, since it has no real relationship to the impact of the present case. Moreover, Technical Staff's suggested area appears to have logical outlines reflective of the likely impact of the proposed development. Accordingly, the Hearing Examiner designates the surrounding area for this case as the area described above, as recommended by Technical Staff. This area is shown on the aerial photograph on the next page.

The surrounding area as described above contains a mix of residential, institutional and office uses in the R-90/TDR, R-200/TDR, O-M and C-3 (Highway Commercial) Zones. The residential uses, made up of single-family detached homes in the R-200/TDR Zone and townhouses in the R-T Zone, are located in the southern portion of the neighborhood, south of Darnestown Road. A major part of the northern portion of the neighborhood is occupied by the Training Academy. The northern portion of the neighborhood also contains a series of medical office uses at the intersection of Darnestown Road and Key West Avenue, a portion of the Life Sciences Center at the northwest corner of Great Seneca Highway and Darnestown Road, the residence/dance school special exception adjacent to the site, a large child day care special exception abutting the residence/dance school, a PEPCO substation and one remaining single-family dwelling that appears to be solely in residential use.

The relationship of the subject property to surrounding land use and zoning patterns may be seen on the zoning map on page 11.



Aerial Photograph of Surrounding Area, from Staff Report

Lolachy  
Residence

Training  
Academy

Subject  
Site

### Zoning Map, Excerpted from Staff Report



#### C. Zoning History

The subject property was classified under the R-R Zone (now R-200) in the 1958 Countywide Comprehensive Zoning. It was reclassified to the R-90/TDR Zone by Sectional Map Amendment G-725 in 1986.

#### D. Proposed Development

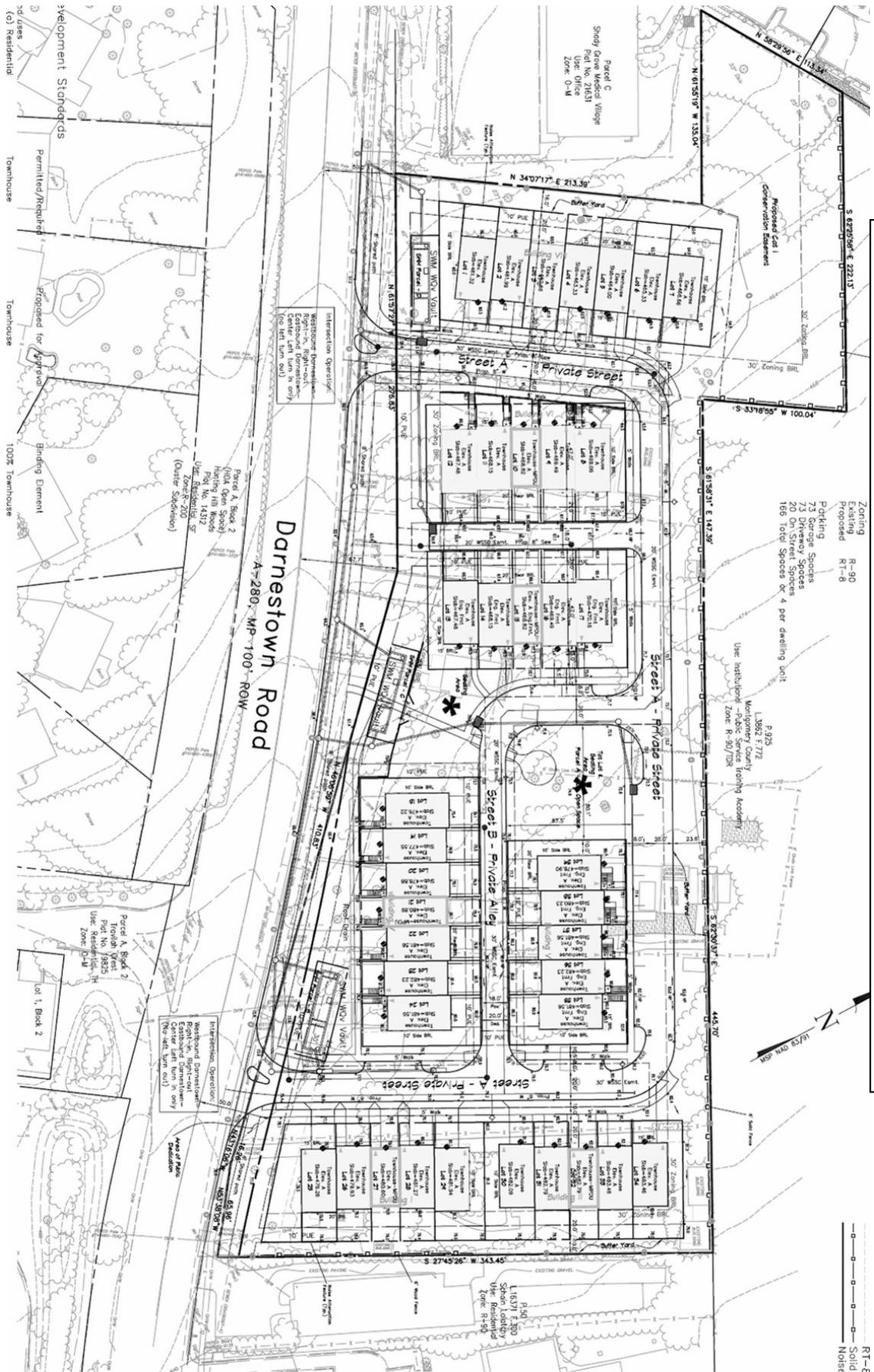
The Applicant proposes to raze the existing structures on the site and build a townhouse community with a maximum of 39 units, including the 12.5 percent Moderately Priced Dwelling Units ("MPDUs") required under Chapter 25 of the Montgomery County Code. The layout

shown on the submitted Schematic Development Plan (“SDP”) is illustrative and may change at later stages of review, if the rezoning request is granted. Applicant’s current plans call for market-rate units 24 feet in width, with two-car garages plus two driveway parking spaces, and MPDUs 20 feet in width, with one-car garages and one driveway parking space. The illustrative layout shows a mixture of front-loaded and rear-loaded units, private internal roads, a common outdoor seating area and tot lot, and 20 guest parking spaces. The plan depicts two access points from Darnestown Road, with a right-in/right-out restriction for the eastern driveway. The western driveway is proposed, conceptually, to allow left turns into the site from a center turn lane on eastbound Darnestown Road, to be constructed by the Applicant. Exiting traffic would be restricted to right turns. According to the testimony of Applicant’s transportation planner, if a center turn lane were not approved upon detailed review later in the development process, safe and adequate access could be provided by limiting both driveway entrances to right-in/right-out movements.

#### **E. Schematic Development Plan and Binding Elements**

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan that specifies which elements of the plan are illustrative and which are binding, i.e. elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding must be set forth in a Declaration of Covenants to be filed in the county land records if the rezoning is approved. The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment. The graphic portion of the SDP in this case is reproduced on the next page, with other elements on the pages that follow.

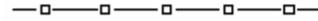
Schematic Development Plan, Ex. 44(d), Graphics Only (Layout is Illustrative)



RT-8  
 Solid  
 Noise

**Schematic Development Plan, Ex. 44(d), other elements**

LEGEND

	Boundary of the Property
	Proposed Lot Line
	Public Utility Easement (PUE)
	Zoning Building Restriction Line (BRL)
	RT-8 Building Restriction Line
	Solid Fence/Wall
	Noise Attenuation Feature

Site Data

Area Tabulations

Gross Tract Area	214,197 sf	or	4.92 ac
Dedication (Darnestown Road)	4,603 sf	or	0.11 ac
Net Tract Area	209,594 sf	or	4.81 ac

Zoning

Existing	R-90
Proposed	RT-8

Parking

73 Garage Spaces  
 73 Driveway Spaces  
 20 On Street Spaces  
 166 Total Spaces or 4 per dwelling unit

GENERAL NOTES

1. Topography from survey by this office with 2' contour intervals.
2. Boundary information from survey performed by this office.
3. Water and sewer category W-1 and S-1, respectively.
4. The property is zoned R-90. The proposed zoning is RT-8. The proposed land use is residential, with one family attached dwellings, townhouses.
5. Number of lots proposed by this plan: 39
6. A Natural Resources Inventory Map/Forest Stand Delineation Plan has been approved by M-NCP&PC Environmental Planning Division, Reference No. 4-03132.
7. This site is within Gaithersburg and Vicinity Master Plan Area. Planning Area #20.
8. The site drains to Whetstone Run, a tributary to Great Seneca Creek. The State of Maryland has designated this portion of the watershed as Class 1-P.
10. Property lines and areas are subject to adjustment at final plat computations.
11. Building locations and grading are graphical representations. Final building location and grading to be computed at Building Permit phase.
12. Existing structures to removed, and existing wells to be abandoned, unless noted.

The Applicant in the present case has proposed four binding elements that are part of the Development Standards Table, which is reproduced below. These binding elements limit development of the site to townhouses, with a maximum of 39 units, including 12.5 percent MPDUs distributed through out the site. They also set a maximum building height equal to the current maximum for the zone, 35 feet; maximum building coverage of 20 percent, significantly below the 35 percent permitted in the zone; and minimum green area of 53 percent, slightly higher than the 50 percent minimum mandated in the zone.

**SDP Development Standards Table, from Ex. 44(d)**



Development Standards	Permitted/Required	Proposed for Approval	Binding Element
Land uses (a) Residential	Townhouse	Townhouse	100% Townhouse
59-C-1.731(a) Tract Area (a) Min. Tract Area	20,000 sq.ft.	214,197 sf	-
59-C-1.731(b) Max. Density	8 du/ac or 39 dus	8 du/ac or 39 dus	Maximum 39 dus, including 12.5% MPDUs
59-C-1.732 Building Setbacks:			
(a) From a detached dwelling lot or land classified in a one-family, detached, residential zone:	30 feet	30 feet	-
(b) From any Public Street	25 feet	25 feet	-
(c) From an adjoining lot			
(1) Side (end unit)	10 feet	10 feet	-
(2) Rear	20 feet	20 feet	-
59-C-1.733 Maximum Building Height			
(a) Main Building	35 feet	35 feet	35 feet
(b) Accessory Building	25 feet	25 feet	
59-C-1.734 Building Coverage and Green Area			
(a) Building Coverage	35% max.	20% or 41,918 sq.ft. max.	20% or 41,918 sq.ft. max.
(b) Green Area	50% min.	53% or 111,159 sq.ft. min.	53% or 111,159 sq.ft. min.
59-E Parking Tabulations Townhouse	2 spaces/d.u.	73 spaces (driveway) 73 spaces (garage) 20 spaces on-street	- - -
	39 spaces total	166 spaces total	-
Chapter 25A-5, MPDUs	39 @ 12.5% = 5	39 @ 12.5% = 5	Provided at 12.5%, distributed through out the site

The Applicant has further proposed eight textual binding elements, which are reproduced on the next page. These binding elements provide parameters for elements such as brick facades, landscape buffers, landscape design along Darnestown Road, on-site forest conservation, fencing, notification to potential homebuyers concerning the Training Academy, compliance with county guidance regarding interior and exterior noise levels, and road right-of-way dedication.

**Binding Elements of Schematic Development Plan, from Ex. 33(a)****BINDING ELEMENTS –IN ADDITION TO THOSE SHOWN IN THE DEVELOPMENT STANDARDS TABLE:**

- A. All units, including MPDUs, to have brick front facades.
- B. Landscape buffers to be provided along the boundary of the property. Plant material and location to be determined at Site Plan review.
- C. Landscape design along Darnestown Road to include, but is not limited to, intermittent masonry walls and/or piers, decorative fencing and decorative and screen landscape materials. Landscape design shall be determined at Site Plan.
- D. Applicant agrees to provide on the Property a minimum of 20,000 square feet of a required .74 acre (or 32,234 sqft.) off-site Category I Conservation Easement.
- E. Applicant will construct a solid fence (materials to be determined at Site Plan) along the Property's northern boundary line adjacent to the County Public Service Training Academy.
- F. Applicant shall include notification in sales contracts to initial homebuyers, and in Homeowner Association Documents of the Property's adjacency to the existing County Public Service Training Academy, which has approved uses, including, but not limited to a fire and rescue station, lighted helipad, driver training course and canine training unit.
- G. Building envelopes will be designed to allow the average interior DNL to be reduced to 45dB or lower, and projected ground level DNL for unit rear yards and common seating areas will be 65dB Ldn or below.
- H. The Applicant agrees to dedicate its proportionate share of the necessary right-of-way width along Darnestown Road, as recommended in the Shady Grove Study Area Master Plan, adopted in July 1990.
- I. Applicant agrees that an eight-foot shared path will be located within the public right-of-way.
- J. Applicant agrees to plant 6–8 foot evergreen trees along the Property's eastern boundary line, adjacent to Parcel 50. Exact location of evergreen trees shall be determined at Site Plan.
- K. Applicant agrees to install a minimum 6 foot high wood fence along its eastern property line, adjacent to Parcel 50. The fence shall begin where the existing wood fence on Parcel 50 ends and shall extend, at a minimum, to the end of Lot 25. The exact fence location shall be determined at Site Plan.
- L. Applicant agrees to include in Homeowner Association documents that parking is precluded on adjacent Parcel 50.

The binding elements are designed, at least in part, to respond to concerns raised by Technical Staff during its review of this application. Community Based Planning Staff at the MNCPPC made a number of additional comments, most of which Technical Staff has indicated may be addressed during site plan review. See Ex. 34. Staff did request that the Applicant specify the number of resident and guest parking spaces as a binding element, but this, the Applicant was not willing to do. Fencing and evergreen plantings promised along the eastern property line were a response to the Hearing Examiner's concern about compatibility with the adjacent residence/dance studio.

Technical Staff considers it unlikely that 39 townhouses can be built on the subject property if requirements for forest conservation, noise attenuation, public utility easements and roadway dedications are all satisfied. Approval of the requested rezoning would allow *up to* 39 dwelling units on the site, leaving open the possibility that the Planning Board may require a reduction in the number of units at a later stage of review.

#### **F. Master Plan**

The subject property is located within the area covered by the *Shady Grove Study Area Master Plan, Approved and Adopted 1990* (the "Master Plan"). The Master Plan addresses the properties comprising the subject site in its discussion of the Training Academy, noting that the entire Darnestown Road frontage south of the Training Academy was divided into numerous parcels, each with its own driveway onto Darnestown Road. See Master Plan at 67, as cited in Staff Report at 11. The Master Plan identified a need to "promote the coordinated development of the Darnestown Road frontage in light of the fragmented ownership pattern." *Id.* The Master Plan sought to encourage joint redevelopment of the frontage parcels by designating the area as suitable for residential development at a density of eight units per acre. *Id.* The properties comprising the subject site are shown on the Master Plan's Land Use Map for residential development at a density of seven to ten units per acre, and on the Master Plan's Zoning Map as R-90/R-T 8. *Id.* The Master Plan's "Zoning Implementation Strategy" table indicates that the site is appropriate for rezoning to R-T 8 if parcels are assembled. *Id.*

Technical Staff opined that the proposed rezoning and development would be consistent with the land use and zoning recommendations in the Master Plan, and that the subject site is appropriate for residential development under the R-T 8 Zone.

One element of the Master Plan that Staff did not address is its recommendation that a density of eight units per acre be permitted on the properties comprising the subject site “only if access is from a new frontage service road along” Darnestown Road. Master Plan at 67 – 68, cited in Watkins report, Ex. 21(a), at 7. Applicant does not propose a service road. The site layout and access are conceptual at this point, but as noted earlier, the submitted SDP shows two points of access via driveways connecting directly to Darnestown Road. One is proposed for right-in/right-out access only, minimizing the impact on traffic flow on Darnestown Road. The other is proposed for right-in/right-out, plus left turns into the site from a new center turn lane on eastbound Darnestown Road. Applicant’s land planner, Mr. Watkins, opined that the access as currently shown would satisfy the purpose of a frontage road by limiting the site to two points of access. Tr. at 119.

The Master Plan’s general goals include providing for a broad mix of residential units, including affordable housing, and providing a sense of community identity for both existing and future residences. Master Plan at 3, 23, cited in Ex. 21(a) at 6-7. Mr. Watkins opined that the proposed development would be consistent with these goals. He calculated that with the proposed development in place, the 303 dwelling units in the surrounding area would consist of 153 single-family detached homes and 150 single-family attached homes, providing a good balance. He also noted that a binding element commits Applicant to dispersing MPDUs throughout the subject site.

### **G. Development Standards for the Zone**

As shown in the table on the next page, excerpted from the Staff Report, the proposed development would be consistent with the applicable development standards for the R-T 8 Zone.

**Development Standards for R-T 8 Zone  
Code §§ 59-C-1.731 - 1.735**

<b>Development Standards</b>	<b>Permitted/Required</b>	<b>Proposed</b>
Minimum tract area	20,000 square feet (about half an acre)	4.92 ac square feet
Maximum density of dwelling units per acre	8 units/acre (39 units)	8 units/acre* (39 units), including 12.5 percent MPDUs dispersed on site
Minimum building setback		
From any detached dwelling lot or land in a one-family detached zone	30 ft.	30 ft.
From public street	25 ft.	25 ft.
From adjoining lot (side)	10 ft.	10 ft.
From adjoining lot (rear)	20 ft.	20 ft.
Maximum building height	35 ft.	35 ft.*
Maximum building coverage	35 percent	20 percent*
Minimum percentage green area	50 percent	53 percent*
Minimum parking (per § 59-E-3.7)	2 spaces per townhouse (79 spaces)	73 garage spaces 73 driveway spaces 20 street spaces 166 total

\* Denotes binding elements.

### H. Noise

As noted in Part I above, the Planning Board focused a good deal of its attention on potential noise impacts on the proposed development from Darnestown Road and the Training Academy. The Applicant presented evidence concerning potential noise impacts in the form of a written noise study and expert testimony, as well as a binding element designed to demonstrate that the proposed development would satisfy county noise guidelines.

The noise guidelines referred to during this proceeding are contained in a document entitled "Staff Guidelines for the Consideration of Transportation Noise Impacts in Land Use Planning and Development", June 1983 (the "Noise Guidelines"), which was prepared by Technical Staff's Environmental Planning Division. See Ex. 42(f). The Noise Guidelines suggest maximum acceptable noise levels that are based on the effects of noise exposure on health, welfare and quality of life; consistency with federal, state and local noise standards; and the relation of noise standards to the existing noise environment in Montgomery County. See Ex. 42(f) at 7. These guidelines are used by

Environmental Planning Staff in making recommendations to the Planning Board regarding site plans, subdivision plans, zoning cases and master plans. *Id.* at 6. The objective of the guidelines is “to foster and encourage noise-conscious development which protects public health and welfare and provides a better quality living environment.” *Id.* at 5. Staff attempts to achieve this objective “without denying development or significantly reducing density in noise-impacted areas,” but “in some extreme cases where noise impact abatement options are very limited, the staff may recommend denial of some or all units proposed in a development or site plan.” *Id.*

The Noise Guidelines make recommendations for maximum exterior noise impacts at the building line for noise-sensitive uses such as residences. They specify three acceptable noise levels, which vary depending on the setting: 55 dBA in permanent rural areas with residential zoning of five or more acres per dwelling unit; 60 dBA in “most areas of the County where suburban densities predominate”; and 65 dBA “in the urban ring, freeway and major highway corridor areas, where ambient levels are such that application of a stricter guideline would be infeasible or inequitable.” *Id.* at 8. The Noise Guidelines acknowledge that noise at this level significantly interferes with activities occurring outdoors, and indoors if the windows are open, but states that “available evidence indicates hearing is adequately protected.” *Id.* The Staff Report in this case indicates that at this location, Staff applies the 65-dBA limit. See Ex. 25 at 18.

The Noise Guidelines provide for a waiver of exterior noise guidelines for residential areas under certain circumstances, including (i) in areas where land use is not based on outdoor activities and internal ventilation permits year-round closing of windows; and (ii) if all feasible exterior noise attenuation measures cannot protect noise-sensitive rooms on upper floors, e.g. bedrooms. See Ex. 42(f) at 10. In such cases, an interior guideline of 45 dBA will be used. See *id.*

In the present case, the Applicant’s noise study presented data from six 24-hour days of noise monitoring on the site. The data shows average noise levels in the northwest corner of the site, near the Training Academy, between 54 and 57 dB. See Ex. 21(g) at 3. These noise levels are well below the 65 dBA standard, so noise mitigation would not normally be required. The owner of the residence/dance studio adjacent to the east, Schain Lolatchy, contends that the neighborhood is

subject to loud helicopter noise once a week, and sometimes twice. This stands in stark contrast to Technical Staff's description of helicopter usage in its Staff Report recommending approval of the recent Mandatory Referral. See Ex. 42(a) at 6. That report describes helicopter activity as infrequent:

The use and frequency of helipad operations are not expected to change over the next five years. Public safety helicopters have been landing in the same location for more than 20 years. . . .

A helicopter is used for training exercises several times a semester or on average 10 times per year which typically takes place during evening hours. Occasionally, helicopter landings occur when severe medical trauma victims must be transported or during infrequent county-wide emergencies such as the 2002 sniper incident. Public service helicopter operators state there is little noise from the aircraft as it approaches the landing pad; no noise complaints have been logged.

Ex. 42(a) at 6.

The Applicant has not proposed any specific noise mitigation measures directed at noise from the Training Academy. The Hearing Examiner finds the Mandatory Referral Staff Report more credible than Mr. Lolatchy's testimony on this issue, which had an air of exaggeration. Accordingly, based on the preponderance of the evidence, the Hearing Examiner sees no need for noise mitigation measures specifically directed at noise from the Training Academy. Nonetheless, the binding element regarding noise does not distinguish the source of the noise – if the project proceeds, the Applicant will be required to satisfy the noise guidelines throughout the site, not just along the Darnestown Road frontage.

The Applicant's noise-related evidence focused on roadway noise. The written noise study used a traffic noise modeling program to estimate which parts of the site would likely be exposed to noise above 65 dB due to traffic on Darnestown Road. The principle input for the noise model is traffic volumes. The traffic volumes used in this study were based on MNCPPC traffic estimates for Darnestown Road in the year 2030. The traffic noise model generated expected hourly sound averages, which were increased by 1.5 dB to estimate future "Day-Night Average Sound Levels," or DNL (a 24-hour average sound level for a calendar day, with 10 decibels added to

nighttime noise) for an array of points on the site.<sup>3</sup> Applicant's expert noise witness, Gary Ehrlich, then used this array of DNL estimates to visually interpolate the location of the 65 dB contour on the site – the line showing which parts of the site are expected to be subject to a Day-Night Average Sound Level above 65 dB.

The projected 65dB DNL contour line shows that based on the current configuration, the end unit in each row of townhouses would be exposed to noise above 65 dB, as well as one entire row of townhouses at the east end of the site, which is shown parallel to Darnestown Road. See Ex. 21(g) at 6. Not all of these exposed areas would call for mitigation, however, per Mr. Ehrlich's understanding of the Noise Guidelines. In his experience, the Noise Guidelines are applied only to *private* outdoor areas that are commonly used for outdoor activity, such as backyards. They are not applied to front yards, walkways or garage areas. Tr. at 38-41. The projected noise contour line shows only four lots where the backyard would be exposed to noise above 65 dB. Accordingly, based on the current layout, Mr. Ehrlich proposed one noise wall at each end of the site and one in the middle, to reduce the exterior noise levels in the four affected backyards and in the common seating area near Darnestown Road.<sup>4</sup> The remaining units shown within the 65 dB contour all have garages in the rear, and only their garage areas are expected to receive noise over 65 dB. Mr. Ehrlich opined, however, that if noise mitigation for other areas of the site is called for during site plan review, there is room on the site to place additional noise walls. Tr. at 42-45; see *a/so* Ex. 42(g).

The Staff Report states that the subject site is affected by significant noise from several sources, and that building construction would be required to reduce interior noise levels to 45 dBA.

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<sup>3</sup> The decision to add 1.5 dB to the hourly averages was based on actual on-site noise measurements that were used to calibrate the model. Applicant's noise experts performed a site survey and measured sound levels at two locations on the site, one in the southeast corner of the site near Darnestown Road, and one in the northwest corner near the Training Academy site. See Ex. 21(g) at 1-2. Noise measurements were taken from 8:30 a.m. on Friday, May 27, 2005 through 11:10 a.m. on Thursday, June 2, 2005. *Id.* at 2. The resulting data were used to determine the difference between the DNL and the Loudest Hour Average Sound Level. *Id.* at 3, 11; Tr. at 52-54. Comparing data from each of the noise monitors on each of the five calendar days, the measured DNL varied from 0.3 decibels ("dB") lower than the loudest hour average to 1.8 dB higher. Applicant's noise experts used this information to estimate that future DNL would be approximately 1.5 dB greater than the loudest-hour average sound level. The noise model works best at generating hourly averages, so Applicant's noise experts took the hourly averages generated by the noise model and added 1.5 dB to estimate the future DNL.

<sup>4</sup> The larger open space/play area in the middle of the site is not within the 65 dB contour, and therefore does not require noise mitigation under the Noise Guidelines.

See Ex. 25 at 18. This is consistent with the binding element that commits the Applicant to using construction methods designed to achieve a 45 dB interior noise level. The Staff Report further states that the layout shown on the submitted SDP does not allow space for the use of “earth berms or noise walls, which are the preferred noise mitigation options in such situations.” *Id.* Mr. Ehrlich described where noise walls could be placed on the illustrative site layout shown on the SDP, and opined that these would be effective.<sup>5</sup>

Between Planning Board’s hearing and the Hearing Examiner’s hearing, Mr. Ehrlich submitted to Staff his calculations of the noise reductions that would be achieved by installing noise walls as he proposed, and Staff agreed, based on this supplemental information and the original noise study, that “the noise walls will reduce the exterior noise levels below 65 dBA Ldn.” Ex. 31. Thus, Staff appears to have concluded that the noise mitigation measures Applicant proposes would be adequate to reduce noise exposure to acceptable levels. The Planning Board apparently did not have this conclusion before it during its consideration of this case.

### **I. Public Facilities**

Under the County’s Adequate Public Facilities Ordinance (“APFO,” Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, area schools, water and sewage facilities, and police, fire and health services will be adequate to support a proposed development, and in turn, whether the proposed development would adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that the County Council sets each year in the Annual Growth Policy (“AGP”) and biennially in the two-year AGP Policy Element.<sup>6</sup> While the final test under the APFO is carried out at subdivision review, the District Council must first make its own evaluation as to the adequacy of public facilities in a rezoning

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<sup>5</sup> Mr. Ehrlich conceded that with a reduction in the number of units, there could be enough space for earth berms, or even for a noise wall stretching across the entire Darnestown Road frontage, if the Planning Board found such measures necessary.

<sup>6</sup> See *2003-05 Annual Growth Policy – Policy Element, Resolution No. 15-375*, adopted October 28, 2003, which remains in effect. The Hearing Examiner hereby takes official notice of the 2003-05 AGP Policy Element.

case, because the Council has primary responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of the Council's review, and the fact that the Council's review is much broader at the zoning stage than what is available to the Planning Board at subdivision, a process designed to more intensively examine the "nuts and bolts" of a development. The District Council is charged at the zoning stage with determining whether the proposed development would have an adverse impact on public facilities and, if so, whether that impact would be mitigated by improvements reasonably probable of fruition in the foreseeable future.

### **1. Transportation**

Under the 2003-05 AGP Policy Element, which remains in effect, subdivision applications are subject to only one transportation test, Local Area Transportation Review ("LATR").<sup>7</sup> The Planning Board recognizes its LATR Guidelines as the standard to be used by applicants in the preparation of reports to the Hearing Examiner for zoning cases. LATR Guidelines at 1. LATR involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the peak hours of the morning and evening peak periods (6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.).

Applicant performed a traffic study as required in this case, taking into account existing roads, programmed roads and available or programmed mass transportation, as well as existing traffic, traffic anticipated from nearby development that is approved but unbuilt ("background" traffic), and trips expected to be generated by the proposed development. With 39 dwelling units, the proposed development would be expected to generate a total of 19 vehicle trips during the weekday morning peak hour and 32 trips during the weekday evening peak hour. The traffic study concluded, and Technical Staff agreed, that with the proposed development in place, critical lane volumes ("CLVs") at the key intersections studied would remain below the CLV standard of 1,450 for the R&D

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<sup>7</sup> See 2003-05 AGP Policy Element at 6-7; *Local Area Transportation Review Guidelines Approved and Adopted July 2004* ("LATR Guidelines") at 1. The Hearing Examiner hereby takes official notice of the LATR Guidelines.

Village Policy Area. See Ex. 26(a) at 2; Staff Report at 14-15. The Hearing Examiner notes, moreover, that based on the traffic study, the proposed development would add only a small number of CLV movements to three of the four intersections studied, and would add no CLV movements to the only intersection that approaches the CLV limit for the planning area, Darnestown Road and Travilah Road. See Ex. 26(a) at 14.

Technical Staff recommended several conditions as part of the APF test for transportation requirements related to approval of the proposed rezoning:

1. Limit development to a total of 42 townhouses (the number requested in the original application).
2. Dedicate a minimum of 100 feet from the opposite right-of-way line for Darnestown Road.
3. Provide a four-foot sidewalk along the internal Street "A" for its entire length.
4. Providing lead-in sidewalks from Darnestown Road to internal sidewalks at the site access points.
5. Satisfy all requirements by State Highway Administration and Department of Public Works and Transportation.

In a supplemental submission, Technical Staff indicates that with the exception of the right-of-way dedication, the other recommended transportation conditions are to be addressed at preliminary plan and site plan, if the application moves forward. See Ex. 34. The Applicant has agreed to dedicate the necessary right-of-way along Darnestown Road as a binding element of this application.

The original application in this case did not include the proposal for a center turn lane to allow left turns into the site from Darnestown Road. Transportation Staff concluded, based on that original application, that the two right-in/right-out access points proposed would provide safe and adequate access. Staff Report at 14. In a supplemental submission, Transportation Staff confirmed that the revised traffic study did not affect its findings about the proposed development, and that the proposed center turn lane allowing left turns into the site would be allowed. See Ex. 26(b).

## **2. Utilities**

Technical Staff stated in its report that water and sewer are available at the site, and that the proposed rezoning would not affect water or sewer service in the area. See Staff Report at 14. In light of the highly developed character of the surrounding area, it may be assumed that other utilities such as electric, telephone and gas are available to this site.

### **3. Schools**

The subject property is located within the Stone Mill Elementary School, Cabin John Middle School and Wootton High School service areas. Montgomery County Public Schools (“MCPS”) reports that the 39 dwelling units proposed are expected to generate approximately ten elementary, four middle and six high school students. See Ex. 42(c). Enrollment at Stone Mill Elementary School currently exceeds capacity but is trending down and is projected to have space available beginning in the 2007-08 school year. See *id.* Enrollment at Cabin John Middle School currently exceeds capacity but also is trending down, and is projected to have space available beginning in the 2008-2009 school year. See *id.* Enrollment at Wootton High School currently exceeds capacity and is projected to exceed capacity in the future. See *id.* The current Growth Policy schools test finds capacity adequate in all clusters for purposes of subdivision approval in Fiscal Year 2007.<sup>8</sup>

### **J. Environment and Stormwater Management**

Environmental Planning Staff at the MNCPPC finds that the preliminary forest conservation plan submitted in this case, which proposes to provide approximately half an acre of afforestation on site and meet the remaining 0.24-acre requirement by planting off site or making a fee-in-lieu payment, meets the basic parameters of forest conservation law. Staff Report at 17. These elements of the preliminary forest conservation plan are reflected in a binding element on the SDP, which commits the Applicant to providing at least 20,000 square feet of afforestation on site.<sup>9</sup>

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<sup>8</sup> The Hearing Examiner takes official notice of the Planning Board’s July 6, 2006 letter to the County Council finding that, for purposes of reviewing subdivisions in FY 2007, capacity in each cluster and at every level meets the growth policy’s definition of “adequate.”

<sup>9</sup> Technical Staff points out that the binding element commits to at least 20,000 square feet of on-site forest conservation, which is less than the half-acre commitment that the Applicant made during the Planning Board hearing on this case, and which is shown on the Preliminary Forest Conservation Plan. See Exs. 48, 52. Staff states that while there is no legal requirement for on-site afforestation, the application was recommended for approval in part because on-site tree cover was to be preserved within a forest conservation easement. See Ex. 48. Applicant’s counsel replied that the 20,000 square feet is “only approximately 1,780 square feet less than what is shown on the Preliminary Forest Conservation Plan,” and that the Applicant desired a limited amount of flexibility to respond to all comments from County and MNCPPC agencies without having to revise an approved” SDP. See Ex. 51. The Hearing Examiner finds this minor discrepancy to be immaterial, particularly because, as Applicant’s counsel acknowledges, the Planning Board retains the authority to require a full half-acre of on-site forest conservation when it reviews the Final Forest Conservation Plan for approval.

The subject site is not within a Special Protection Area or Primary Management Area, and has no streams, wetlands or extensive areas of steep slopes. Staff notes that underlying hard bedrock at the surface “may be a limiting factor for tree growth on the property,” and may require adding soil or other special tree protection measures to enhance growth or guarantee long-term sustainability.

The Applicant has submitted a concept stormwater management plan and received concept-level approval from the Department of Permitting Services. See Ex. 24(b). The concept plan calls for on-site channel protection measures via a dry pond, on-site water quality control via grass swales, and storm filters.

### **K. Community Opposition**

The only opposition in the record is the testimony of Schain Lolatchy, who owns and resides on the property abutting the subject site to the east. Mr. Lolatchy and his family have their residence on the upper floor of the building, and Mr. Lolatchy operates a small dance studio on the lower level, pursuant to a special exception for a major home occupation. Mr. Lolatchy’s lot is long and narrow, and at its closest point, his house appears to be less than 15 feet from the boundary with the subject site (based on the Hearing Examiner scaling off the distance on the SDP).

Mr. Lolatchy opposes the proposed rezoning because he believes that the proposed development would have three adverse effects on his property:

1. Decrease in property value.
2. Noise from the large number of residents that 39 dwellings would introduce.
3. Problems with overflow parking spilling over into his parking lot.

Mr. Lolatchy feels that the proposed development would exacerbate problems he already has stemming from noise generated by helicopters at the Training Academy (which he describes as a weekly event), noise from a child day care center next door to the east, which has 100 children outside in the afternoon, and cars leaving the child day care center that use his parking lot to turn around and go east on Darnestown Road, because they are not permitted to turn left from the day care center’s lot.

Subsequent to the hearing in this case, the Hearing Examiner initiated a telephone conference call among the Applicant, Applicant's counsel, Mr. Lolatchy, the People's Counsel and the Hearing Examiner. The purpose of the call was to discuss what type of buffering Mr. Lolatchy might find helpful in reducing his concerns about possible adverse effects from the proposed development. Mr. Lolatchy reiterated the concerns he voiced at the hearing, and appeared to be skeptical that any form of buffering would reduce his concerns. Although a follow-up meeting between Mr. Lolatchy and the Applicant did not take place, the Applicant revised the SDP to add binding elements J, K and L, which provide for fencing and evergreen trees along the property line shared with Mr. Lolatchy, and specify that the homeowners' association documents will prohibit parking on Mr. Lolatchy's property. See Ex. 46. Mr. Lolatchy submitted a subsequent comment letter in which he reiterated his opposition to the proposed zoning, on grounds that his property will be substantially reduced in value if the project goes forward. See Ex. 49. He acknowledged, however, that planting trees that would grow to a height of 30 feet would potentially help alleviate some of the noise issue. He also noted that Mr. Lyons of Winchester Homes had agreed not to allow contractors or utility vehicles to go through Mr. Lolatchy's property.

### **III. SUMMARY OF HEARING**

#### **A. Applicant's Case in Chief**

1. Gary Ehrlich, acoustical engineer. Tr. at 14 – 63.

Mr. Ehrlich was designated an expert in acoustical engineering. His role in this case was to evaluate outdoor noise levels at the subject site and design appropriate noise mitigation measures. Mr. Ehrlich noted that Montgomery County's noise guidelines -- guidelines established at the staff level, by the Environmental Planning Division -- specify that the average sound level should not exceed 65 decibels in private outdoor areas. He testified that the development depicted on the proposed site plan can meet that standard with the use of noise mitigation walls in three general

locations: a five-foot wall on lot 1, shielding lots 1 and 2; a five and a half foot wall on lot 25, shielding lots 25 and 26; and a five and a half foot wall to shield the center seating area. Tr. at 18-19. The noise fences would be solid wood, board on batten fences.<sup>10</sup> He opined that there is enough space on the site to build the proposed fences. [The Hearing Examiner notes that Mr. Ehrlich's analysis and opinion are based on the site layout shown on the current SDP, which may change significantly during later stages of review.]

Mr. Ehrlich noted that Technical Staff agreed, in an email submitted into the record at the hearing, with his conclusion that the proposed noise walls would result in the project satisfying the 65-dB guideline. Tr. at 20. He explained Staff's use of the term "localized" mitigation by stating that each of the walls is intended to reduce noise levels in a specific area where people would use the outdoor space. Tr. at 24 – 25. They are designed for localized effect, not general -- noise does not need to be reduced along the roadways, for example, because people don't sit in lawn chairs in the road. The noise wall locations shown on the site plan are intended to reduce noise exposure in specific outdoor activity areas (rear yards and the common seating area) where Mr. Ehrlich's noise contour projection anticipates noise levels above 65 dBa. Tr. at 38-40. With the noise walls in place, Mr. Ehrlich's "post-mitigation" noise contour shows each of these areas with noise levels below 65 dBa. The noise reductions are projected as a range, because the actual noise level would depend on where a person is standing in the back yard – the closer one is to the noise wall, the lower the noise level will be. Tr. at 57-58.

Mr. Ehrlich did not proposed any mitigation for other areas that are expected to have noise levels above 65 dBa, such as the small yard areas in front of townhouses, because those are not considered noise-sensitive areas where people spend time, like backyards. Tr. at 40-41. Moreover, it would be problematic – and unattractive – to install 5- to 6-foot walls alongside front yards, potentially crossing over or interrupted by sidewalks. Thus, noise mitigation walls are proposed only for units whose *back yards* would otherwise be subjected to noise levels over 65 dBa.

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<sup>10</sup> The "battens" are narrower pieces of wood that cover the boards so daylight cannot be seen between them.

To determine what areas of the subject site would require noise mitigation, Mr. Ehrlich's company set up two sound level monitors, one closer to Darnestown Road and the other farther away. The data collected from these monitors allowed them to create a map showing which areas on the proposed site plan would be exposed to exterior noise over 65 dBa. The primary focus was noise from Darnestown Road, but the monitoring data also showed that the exterior sound level on the side of the property closest to the Training Academy was roughly 55 dBa, which does not call for any mitigation.

In response to questioning by the People's Counsel, Mr. Ehrlich stated that in his discussions with Technical Staff about the scope of the noise monitoring, the question of noise from intermittent helicopter flights at the Training Academy was not raised. He would be able to do an acoustical study of the noise such flights would generate on the subject site if he had information such as how often they land, their flight altitude, what model helicopters are used and what routes they take. He could then run a noise model to predict the noise impacts. He has not been asked to do that in this case.

In response to further questioning by the People's Counsel, Mr. Ehrlich noted that typically, measures planned to reduce interior noise levels are discussed at one of the later stages in the approval process, when the developer applies for a building permit. At that point, with architectural plans available, Mr. Ehrlich considers it appropriate to talk about interior noise reduction measures. At the zoning stage, he finds it inappropriate to proffer to meet certain sound ratings for windows and doors, because those ratings are not very meaningful without architectural plans showing the layout of the proposed units. Tr. at 25-26.

Mr. Ehrlich testified that as a general rule, if the exterior noise level is 65 dBa or less, no special noise mitigation measures are needed to achieve an interior noise level of 45 dBa or lower – standard construction methods will achieve an interior noise level at least 20 dBa below the outside noise level. Where the exterior noise level is above 65 dBa, Mr. Ehrlich stated that “modest upgrades” in construction materials can be used to achieve an interior noise level of 45 dBa or less. He stated that noise mitigation involves three basic elements: the walls, the doors and the windows.

If the walls are going to be made of brick or covered with siding, that generally is sufficient. Otherwise, the most cost effective upgrade that would work acoustically is to use “resilient channels” to hang the interior layer of wall board. Windows come with a “sound transmission class,” or STC, rating. A typical window would have an STC of 25 to 26. Modestly upgraded windows would have a rating of 27 to 28, and windows are also available “off the shelf” with a rating of 29 to 30. Tr. at 27. For this project, Mr. Ehrlich anticipates that for those units in areas with exterior noise of 65 dBa or greater, standard windows would be sufficient in many rooms, and rooms with larger windows might need windows with an STC rating of 27 to 28. Tr. at 28, 30. He noted that windows with an STC rating of 28 would not significantly increase the cost of a project. Tr. at 35. Mr. Ehrlich described doors as the “weak link” acoustically. Tr. at 28. A typical door might have an STC rating of 23 to 25. Modestly upgraded doors might have an STC rating of 26 to 27, which he anticipates would be adequate for this project. Tr. at 28.

Mr. Ehrlich explained that the regulations and guidelines do not spell out precisely whether the 65 dBa standard is to be measured at ground level, or at window height. He stated that the industry standard is to consider noise levels at a height five feet above ground level. Tr. at 29.

On re-direct, Mr. Ehrlich noted that he understands there have been no complaints about helicopter noise during the 20 years that helicopters have been landing at the Training Academy. Tr. at 33-34. He acknowledged that helicopters make noise when they land, but identified the salient question as whether or not they cause annoyance. He suggests that if they arrive at 2:00 in the afternoon and stay for five or ten minutes, most people would not consider that a significant annoyance. Mr. Ehrlich noted the descriptive information about helicopter activity in the recent Mandatory Referral Staff Report. When asked, he estimated that the Training Academy’s helicopter pad is located approximately 300 feet east of the subject property.

Environmental Planning Staff noted that the current layout of the proposed development does not allow space for the use of earth berms or boundary noise walls, which Staff considers the preferred noise mitigation option. When asked to comment on this, Mr. Ehrlich stated that from an acoustical perspective, it would be easy to put up a wall along the entire site frontage.

However, in this case that would involve entering or crossing property that is encumbered with easements, which creates civil engineering problems. Tr. at 46-47. As a result, creating space for a continuous noise wall across the entire site frontage would require reducing the number of units to move back, away from the easements. Mr. Ehrlich stated that typically, developments along a road like Darnestown Road tend to have smaller noise walls to shield individual backyards, rather than major walls along the entire frontage. Id. at 48. He opined that earthen berms and walls have very similar noise mitigation effects.

2. Michael J. Watkins, land planner. Tr. at 84 –134.

Mr. Watkins was designated an expert in site development and land planning. He first described the location of the subject site and his recommended “surrounding area” designation. His notion of the relevant surrounding area was almost identical to Technical Staff’s, except that included a small area classified under the C-4 Zone that Staff had excluded. Mr. Watkins included it because it was included in the surrounding area that was considered in an earlier rezoning case for land adjacent to the subject site, and he feels that it frames the area now proposed for rezoning. Tr. at 89.

Mr. Watkins identified a series of photographs showing nearby land uses and existing conditions on the subject site. He described existing development in the area, including the zoning and, for residential developments, the density. These include the Training Academy to the north, in the R-90 Zone; the dance studio/residence abutting to the east in the R-90 Zone; a child day care center east of that property, also in the R-90 Zone; and a PEPCO substation at the corner of Darnestown and Travilah Roads. On the south side of Darnestown Road near Travilah Road is Travilah Crest, which was developed under R-T 10 zoning with 49 townhouses and an effective density of 8.27 units per acre. Parts of this development face Darnestown Road and parts face away from the road, but the homes closest to the road are separated from it by a buffer area owned by the homeowner’s association. Adjacent to that site to the west is a property classified under the R-T 6 Zone, which has six townhouses on one acre of land. On the south side of Darnestown Road, opposite the subject site, are two subdivisions: Hunting Hill Woods, developed under the R-200/TDR cluster option, which has a mix of single-family detached and attached dwelling units, but only single-

family detached homes visible from Darnestown Road; and Bai-Nola Woods, developed with single-family homes under the R-200/TDR Zone. [The Hearing Examiner notes that densities were not provided for these developments, but with all detached homes in one, and a large percentage of detached homes in the other, the density can safely be assumed to be substantially lower than the surrounding townhouse communities.] Opposite the corner of Key West Avenue and Darnestown Road is Potomac Corner, a townhouse development in the R-200/TDR Zone with 29 units and an effective density of 7.25 units per acre.

Mr. Watkins conceded that all of the developments confronting the subject property on the west side of Darnestown Road were developed with distinct buffer areas along Darnestown Road – separate parcels owned by the relevant homeowner’s association, which are left in a vegetated state to serve as a buffer from the road. Tr. at 94-98.

Mr. Watkins reviewed a series of photographs showing the view from the subject property in various directions. Tr. at 98-100. He then described the subject property itself, which contains 4.92 acres of land, with approximately 769 feet of frontage on Darnestown Road. He noted that at this location, Darnestown Road is no longer Maryland State Route 28. It is now a county road. It is recommended in the applicable master plan for a right-of-way of 100 feet, and the proposed Schematic Development Plan includes a dedication to provide for that width. The topography reflects a drop in elevation from 478 feet in the northeast corner of the property to 454 feet in the southwest corner. The site, having been combined from several separate parcels, currently has seven curb cuts along Darnestown Road. These would be reduced to two under the proposed SDP. The proposed development would also add stormwater management, which currently does not exist on the site. The site has no existing forest.

Mr. Watkins noted that the proposed development would satisfy all of the development standards for the R-T 8 Zone, including density and setbacks from residentially zoned properties. Both the Training Academy site and the adjacent property to the east are zoned R-90, requiring a 30-foot side building line setback. Mr. Watkins noted that the binding elements commit the Applicant to a

limit of 20 percent building coverage, well below the maximum for the zone of 35 percent, and a minimum green area of 53 percent, slightly higher than the minimum for the zone, which is 50 percent.

With regard to screening, Mr. Watkins pointed out that landscape buffers along the property boundary are a binding element. This represents a commitment to having some buffer, so that the individual lot lines do not extend all the way to the property line for the site. He considers it more effective to have a buffer area owned and maintained by the homeowner's association than to extend the lot lines further and put easements on them.

Mr. Watkins noted that the binding elements limit the use to a maximum of 39 townhouses, all with brick front facades, and provide for distribution of the required 12.5 percent MPDUs throughout the site. The binding elements also provide specifications for landscape design along Darnestown Road that are designed to provide the flexibility to use wooden fences or masonry walls for noise mitigation, and to require landscape elements to enhance the appearance of the roadway frontage.

Turning to the purpose clause for the R-T Zone, Mr. Watkins reviewed the Master Plan, which encouraged the joint redevelopment of parcels along this stretch of Darnestown Road at a density of eight units per acre, provided that access is from a new frontage service road along Darnestown Road. He noted that the Applicant has assembled as many parcels as possible, and proposes a density of eight units per acre. With regard to the frontage road recommendation, Mr. Watkins opined that the access and circulation plan proposed here would be functionally equivalent to a frontage road, because access to and from Darnestown Road would be limited to two locations. He suggested that frontage roads may have either one or two points of ingress and egress.

Mr. Watkins opined that the proposed development is appropriate for the subject site, in light of the densities of existing developments in the surrounding area, and would be in the public interest. He opined that the development would be compatible with its surroundings, particularly with buffer areas to the east, west and north, noting that with the exception of the medical office building to the west, all of the adjacent properties are zoned for residential use. He added that he was given a tour of the Training Academy site, and remains persuaded that the proposed development would be

appropriate at this location. With regard to the concerns voiced by Mr. Lolatchy, Mr. Watkins declined to specifically opine as to whether the proposed development would result in a decrease in Mr. Lolatchy's property value. He suggested that a high-rise development would be detrimental, but that a townhouse development proposes a similar and compatible residential use. Tr. at 124.

As for the noise walls on Darnestown Road that Mr. Lolatchy mentioned, Mr. Watkins noted that there are noise walls farther west on Darnestown Road, where it is designated a major highway, MD Route 28. He feels that a frontage noise wall would be inappropriate for the subject site, where Darnestown Road is considered an arterial road. Tr. at 126-27.

Addressing forest conservation, Mr. Watkins explained that the Applicant has an afforestation requirement of 0.74 acres in this case, but would not normally be required to satisfy it on site. Tr. at 131-32. He noted that 0.74 acres equates to 32,234 square feet, and the area shown on the submitted SDP shows 24,267 square feet of forest conservation, which equates to 75 percent of the afforestation requirement. Tr. at 132. [The Hearing Examiner notes that the binding elements require a minimum of 20,000 square feet of afforestation on site. See Ex. 44(d).]

3. Scott Rosen, civil engineer. Tr. at 134 – 137.

Mr. Rosen was designated an expert in civil engineering. He testified that his office prepared a stormwater management concept plan for the proposed development. Applicant's counsel interjected that the concept plan has been approved by DPS. Tr. at 136-37. Mr. Rosen stated that the approval did not contain any conditions or suggest a need for waivers. He added that water service is available to serve the proposed development on Darnestown Road.

4. Glenn Cook, traffic engineer. Tr. at 137 – 144.

Mr. Cook was designated an expert in transportation planning and traffic engineering. His firm prepared an original and a revised traffic study for this application. The original study was based on a proposal for 42 townhouses, and it assumed that access along Darnestown Road would be right in, right out. That study concluded that the proposed development would not have a negative impact on the area road system. The second report addressed the current proposal, with a maximum of 39 townhouses, and took into account the Applicant's proposal to create a center turn lane on

eastbound Darnestown Road, which would allow left turns into the property from one driveway. Tr. at 139. No left turns would be permitted out of the site, for safety reasons. The construction of the center turn lane would be at Applicant's cost. Mr. Cook expects the proposed center turn lane to be approved if the project goes forward. In the event that it is not approved due to concern about widening the road, he suggested that the Applicant could extend an existing center turn lane located about 300 feet west of the site (at Yearling Drive) to provide access to the subject site. He added, moreover, that a center turn lane would be just a convenience for the residents, not a safety measure, so if the center turn lane is not approved, the development would still have safe access with the right-turn-only curb cuts.

Mr. Cook described the proposed project as a very low traffic generator, with approximately 30 trips during the peak hour. He noted that the proposal would "clean up" the site frontage by reducing the number of curb cuts from seven to two. He opined that as proposed, vehicular and pedestrian access would be safe, adequate and efficient. Tr. at 143.

With regard to the concern voiced by Mr. Lolatchy concerning sight distance from his driveway, Mr. Cook stated that a structure would have to be within 42 feet of the travel lane at Darnestown Road in order to obstruct the sight lines from his driveway. Thus, it would have to be almost at the front edge of Mr. Lolatchy's property. Tr. at 144.

5. Daniel Lyons, Applicant's representative. Tr. at 144-47.

Mr. Lyons is a development manager with Winchester Homes, and has a background in urban planning and real estate development. His role in this project includes acting as a liaison with the community and staff. Mr. Lyons acknowledged that he is not an expert in real estate valuation, nor is he an appraiser or real estate agent, but based on his experience as a developer, Mr. Lyons opined that the proposed development would not adversely affect the value of Mr. Lolatchy's adjacent property. Mr. Lyons interpreted Mr. Lolatchy's comments about a Winchester home representative to mean that someone from Winchester told Mr. Lolatchy that he would be able to realize additional value from the sale of his property if it were included in the present rezoning, not that his property would decrease in value if the rezoning went forward without him.

Mr. Lyons also stated, in behalf of the Applicant, that he is comfortable with a new binding element, which was proffered during the hearing, to guarantee interior noise levels no higher than 45 dBa. Tr. at 147.

### **B. Opposition**

Lolatchy has his home and operates a dance studio in the building adjacent to the subject site to the east. He obtained a special exception for the dance studio, which is on the lower level, and lives on the upper level with his family. Mr. Lolatchy testified that the investors who brought the five properties comprising the subject site “pestered” him numerous times to get him to sell his property. Tr. at 65. He alleged that threats were made to “make sure that my property will remain worthless.” Tr. at 66. He further testified that when Winchester Homes became involved in the project, a Winchester representative who was trying to buy his property told him that with the proposed development in place, Mr. Lolatchy’s property would be worthless, because its shape would limit its use to one single-family home, and it would be worth less for that use with townhouses next door. Mr. Lolatchy confirmed this prediction with various real estate agencies. As a result, he objects to the proposed rezoning on the basis that it would lower the value of his property.

Mr. Lolatchy is concerned that if a noise barrier were built along the front of the subject property, it would block the sight distance from his property (which is already poor with the tall, uncut grass on the site). He noted that there are already three long, high noise walls on Darnestown Road in the area. Tr. at 67.

Mr. Lolatchy is also concerned about noise impacts of the proposed development on his property. He stated that the property adjacent to the east has a day care center, operating by special exception, which has well over 100 children outside in the afternoons. He was required (presumably by the Board of Appeals) to make his building soundproof, and the noise from the children is still very loud. He also suffers from noise from the Training Academy, where activities start at 6:00 a.m. Mr. Lolatchy testified that helicopters land about once a week, sometimes twice, and they shake his entire building. Tr. at 68. He has lived at this location since 1999, and stated that the

frequency of helicopter landings has been steady during that period, except for the sniper crisis, when they were taking off every two or three hours.

Traffic is an additional concern for Mr. Lolatchy. He testified that the day care center parking lot has a “no left turn” restriction, so cars leaving that site make a U-turn in Mr. Lolatchy’s parking lot, then turn left on Darnestown Road. He says that the signs he has posted make no difference. He foresees the same kind of thing happening if the proposed development is built with 39 townhouses – every time someone has a party, the cars will park on his property.

Under questioning from Applicant’s counsel, Mr. Lolatchy agreed that the houses currently on the subject site are abandoned eyesores. He believes, however, that the site can be redeveloped with beautiful single-family detached homes, like other developments on Darnestown Road.

### **C. People’s Counsel**

In an opening statement, the People’s Counsel, Martin Klauber, stated that he participated in this hearing to try and clarify the record concerning noise mitigation, in light of Environmental Planning Staff’s failure to reach a conclusion as to whether the proposed development would satisfy county noise regulations prior to the Planning Board’s consideration of this case, and resulting confusion during the Planning Board hearing. Tr. at 10-11. Mr. Klauber maintained that compliance with noise regulations is an issue for site plan review, not for the zoning stage of a proposed development. He noted, however, that the Planning Board had made it an active issue.

In closing remarks, Mr. Klauber argued that Mr. Ehrlich’s testimony and the results of his noise study demonstrated that (i) there is enough space on the subject site to mitigate the effects of noise emanating from Darnestown Road; and (ii) interior noise is capable of being reduced by means that may be explored in greater detail at a later step in the regulatory process, if the proposed rezoning is granted. Tr. at 75. Moreover, he concluded, the record indicates that the Applicant is well aware that the county’s noise regulations not only must be satisfied but can be. On that basis, Mr. Klauber recommended approval of the rezoning request.

#### IV. ZONING ISSUES

Zoning involves two basic types of classifications: Euclidean zones and floating zones.

The term “Euclidean” zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development such as permitted uses, lot sizes, setbacks, and building height.

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

Montgomery County has many floating zones, including the R-T Zone. The R-T Zone contains development standards and a post-zoning review process that delegate to the Planning Board site specific issues such as building location, landscaping and screening. The application of the zone to the subject property involves an evaluation of eligibility under the purpose clause, compatibility with existing and planned land uses in the surrounding area, and relationship to the public interest.

##### A. The Purpose Clause

The intent and purpose of the R-T Zone as stated in Code §59-C-1.721 is set forth below.

The purpose of the R-T Zone is to provide suitable sites for townhouses:

- (a) In sections of the County that are designated or appropriate for residential development at densities allowed in the R-T Zones; or
- (b) In locations in the County where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.

It is the intent of the R-T Zones to provide the maximum amount of freedom possible in the design of townhouses and their grouping and layout within the areas classified in that zone, to provide in such developments the amenities normally associated with less dense zoning categories, to permit the greatest possible amount of freedom in types of ownership of townhouses and townhouse developments, to prevent detrimental effects to the use or development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole. The fact that an application for R-T zoning complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the resulting development would be compatible with surrounding land uses and, in itself shall not be sufficient to require the granting of the application.

The R-T Zone may be applied (1) in areas that are designated for R-T Zone densities (implying a master plan designation); (2) in areas that are appropriate for residential development at densities that are allowed in the R-T Zones; or (3) where there is a need for buffer or transitional uses. The subject site satisfies the first of these alternatives, having been recommended for consolidation and R-T zoning in the Master Plan.

The present application satisfies only marginally the intent of the R-T Zone to provide amenities normally associated with less dense zoning categories. Much will depend on what the Planning Board approves at site plan, if the application goes forward. The layout on the submitted SDP shows limited green area in amongst the townhouses, given the need for buffers and the decision to place the forest conservation area in a corner of the property that is separate from the area designated for development. Nonetheless, the submitted SDP shows a small recreation area, a seating area near Darnestown Road, and landscaped buffers, all of which would be amenities. Moreover, it is clear that the site is susceptible of development under the R-T 8 Zone (perhaps with a slight decrease in the number of units, or a layout reconfiguration) in a form that would provide more amenities for residents.

It is also the intent of the R-T Zone “to prevent detrimental effects to the use or development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole.” Mr. Lolatchy, owner of the adjacent property to the east, contends that the construction of a townhouse development on the subject site would be detrimental to the use of his property due to noise and

traffic, and would cause its monetary value to decrease. He states that his expectation of a decrease in property value is supported by the views of real estate agents with whom he discussed the matter, and with a statement made during an earlier conversation with a representative of Winchester Homes. The Winchester Homes representative at the hearing, Mr. Lyons, presented credible testimony, based on his experience in land development, that Mr. Lolatchy's property value would not decrease as a result of the proposed development. Lacking any expert testimony or written study on this point, the Hearing Examiner relies principally on the greater credibility of Mr. Lyons' direct testimony, compared with the hearsay testimony offered by Mr. Lolatchy. This conclusion is bolstered by the common-sense observation that Mr. Lolatchy's property is already located on a block with several non-residential uses, and that the lots comprising the subject property are currently occupied by dilapidated buildings, which all agree are eyesores. Moreover, the Applicant has committed to providing buffering along the eastern property line, between the subject site and Mr. Lolatchy's property, in the form of a wooden fence at least six feet high, plus 6- to 8-foot evergreens. See binding elements on Ex. 46(b). The Applicant has further committed to include in homeowner's association documents a provision prohibiting parking on Mr. Lolatchy's property.

There is no evidence to suggest that the proposed development would have any adverse effect on other adjacent or confronting properties or the neighborhood in general. The proposed townhouse development would blend well with the mix of residential and non-residential uses in the surrounding area, and would be very unlikely to adversely affect either the medical office building adjacent to the west, or the Training Academy to the north, both of which have more intense levels of activity than would be expected from the proposed development. Some of the residential uses across Darnestown Road are lower in density than the development proposed here, but any possible adverse impact from the proposed development would be mitigated by the width of the road, substantial vegetated buffering on the south side of Darnestown Road, and landscape buffering planned along the subject site's frontage.

For all of the above reasons, based on the preponderance of the evidence, the Hearing Examiner concludes that the proposed rezoning and development would be consistent with the intent and purpose of the R-T Zone.

### **B. Compatibility**

An application for a floating zone reclassification must be evaluated for compatibility with existing and planned uses in the surrounding area. For the reasons discussed in the previous section, the Hearing Examiner agrees with the findings made by the Planning Board and Technical Staff that the requested reclassification to the R-T 8 Zone, and the development proposed, would be compatible with existing and proposed land uses in the surrounding area.

### **C. Public Interest**

The applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“. . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities. Additional issues affecting the public interest may also be considered.

The Planning Board and Technical Staff opined that the proposed development would substantially comply with the Master Plan, and the Hearing Examiner agrees. The Master Plan recommends reclassification of the parcels comprising the subject property (as well as additional nearby parcels) to the R-T 8 Zone as an incentive for the consolidation and coordinated development of these parcels. The properties comprising the subject site are designated on the Master Plan's Land Use Map for residential development at a density of seven to ten units per acre, and on the

Master Plan's Zoning Map as R-90/R-T 8. The proposed development would also serve the Master Plan's general goals of providing for a broad mix of residential units, including affordable housing, and providing a sense of community identity for both existing and future residences. As the Applicant's land planner pointed out, the proposed development would contribute to a good balance between detached and attached single-family homes in the surrounding area.

As noted in Part III.F. above, Technical Staff did not address the Master Plan's recommendation that a density of eight units per acre be permitted, on the properties comprising the subject site, only if access is from a new frontage service road. Given that both Staff and the Planning Board recommend approval of the rezoning, the lack of a service road apparently did not impede their finding of substantial compliance with the Master Plan. Moreover, the Applicant's planner opined that the two site entrances proposed on the illustrative SDP would serve the same function as a service road by limiting access to two locations along Darnestown Road. The Hearing Examiner also recognizes that *substantial* compliance with the Master Plan requires compliance with its essential elements, not necessarily every detail.

Based on the preponderance of the evidence, the Hearing Examiner concludes that the requested reclassification and proposed development would substantially comply with the objectives and recommendations of the Master Plan.

Turning to public facilities, the evidence indicates that while the local high school experiences some overcrowding and is expected to do so for the next several years, the County Council made the judgment in the current AGP Policy Element that adequate school capacity exists in the planning area. Moreover, the maximum of 39 dwelling units proposed here is expected to generate only six high school students. Under these circumstances, the minimal evidence of potential adverse effects on school overcrowding is not sufficient to warrant denial of the application.

No evidence was presented to suggest that the proposed development would have any adverse effect on public roads, utilities or other public services.

For all of these reasons, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification and development would have no adverse effect on public facilities that warrants denial of the application.

The Planning Board raised an additional public interest issue: the impact of noise from the Training Academy and Darnestown Road on residents of the proposed development. As noted in Part I above, the Planning Board qualified its recommendation of approval by stating that the SDP does not adequately address noise mitigation, and that the Hearing Examiner should “place special emphasis on the need for a serious evaluation of alternative[sic].” Ex. 28. The Hearing Examiner discusses the question of noise impacts at this juncture to allow the District Council to consider whether it is in the public interest to permit a townhouse development to be built on the subject site, under the R-T Zone, despite evidence that the site is impacted by high levels of noise. The noise issue could also be considered in connection with the R-T Zone’s intent clause, which contains language similar to the Enabling Act.

Subsequent to the Planning Board’s consideration of this matter, the Applicant provided additional information to Technical Staff and obtained a response, by email, in which Staff agrees that the mitigation measures proposed would reduce noise to below the prescribed 65 dB maximum on a localized basis – meaning in backyards and the common seating area near Darnestown Road. Also subsequent to the Planning Board’s consideration of this matter, the Applicant added a binding element to the SDP that makes two commitments regarding noise mitigation: (i) building envelopes will be designed to allow the average interior DNL (day-night average sound level) to be reduced to 45 dB or lower; and (ii) projected ground level DNL for unit rear yards and common seating areas will be 65 dBA Ldn or below. The effect of both the Applicant’s proposed noise walls and the binding element addressing outdoor noise would be limited to backyards and the common seating area near Darnestown Road. Staff’s email agreeing that the noise walls would have the intended localized effects is brief, and does not address whether Staff has concerns about noise impacts in areas other than backyards and the common seating area, such as front yards and garage entryways. However, testimony provided by the Applicant’s noise expert suggests that additional

noise mitigation measures can be taken, if the Planning Board and Technical Staff find the “localized” effects of the proposed noise walls inadequate. Some additional measures might require redesigning the site layout and/or reducing the number of units, but the layout as currently shown is illustrative, so the Planning Board has the discretion to require such changes during a later stage of review.

The evidence supports a conclusion that the written binding element addressing noise would result in homes with acceptable levels of interior noise, as long as residents keep their windows closed, and acceptable levels of outdoor noise in the areas where residents are likely to spend the most time – their backyards, and the common seating area near Darnestown Road (the larger open space/play area is not expected to receive noise levels above the accepted 65 dB level). The Hearing Examiner can imagine other layout choices for this site that might result in a more attractive and pleasant living environment, such as putting the reforestation area along the Darnestown Road frontage, instead in the back corner of the site. That change would give residents a wooded buffer from the road noise, similar to the buffers enjoyed by existing residential developments across Darnestown Road from the subject site. The site layout likely could also be made more attractive by reducing the number of units. However, in light of the county policy and Master Plan goal favoring housing diversity, there must be room in the County for housing that does not subject residents to levels of noise above the County’s own guidelines, but is in a noisy location and, presumably, priced accordingly.

This is not a case where the District Council is responsible for approving a binding Development Plan. The submitted SDP has an illustrative layout that is subject to change at later stages of review, provided that the binding elements are followed. In this case, the District Council is responsible for deciding whether the application of the requested zone is appropriate at this location, taking into account the binding elements shown on the SDP. The Hearing Examiner concludes, after a careful review of the record, that the requested reclassification is appropriate for the subject site, and that with careful enforcement of the written binding elements at later stages of review, a development of no more than 39 townhouses can be built on the subject site that will be compatible with its surroundings and in the public interest.

For all of the above reasons, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification bears sufficient relationship to the public interest to warrant its approval.

## V. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I make the following conclusions:

1. The application satisfies the requirements of the purpose clause;
2. The application proposes a form of development that would be compatible with existing and planned land uses in the surrounding area;
3. The requested reclassification to the R-T 8 Zone bears sufficient relationship to the public interest to justify its approval.

## VI. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-849, seeking reclassification from the R-90 Zone to the R-T 8 Zone of 4.91729 acres of land on the north side of Darnestown Road, approximately 400 feet west of its intersection with Travilah Road, comprising properties located at 10113, 10119, 10123, 10127, 10131, 10201, and 10207 Darnestown Road, Tax Account Numbers 9-1-772871, 9-1-776297, 9-1-772882, 9-1-769463, 9-1-769452, 9-1-778593, 9-1-776286, 9-1-778525, 9-1-778514 and 9-1-778503, Rockville, Maryland, in the 9<sup>th</sup> Election District, be **approved** in the amount requested and subject to the specifications and requirements of the final Schematic Development Plan, Ex. 46(b); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan within 10 days of approval, in accordance with § 59-D-1.64 of the Zoning Ordinance.

Dated: October 13, 2006

Respectfully submitted,

Françoise M. Carrier  
Hearing Examiner