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**I. EXECUTIVE SUMMARY**

Applicant:	Nova-Habitat, Inc.
LMA No. & Date of Filing:	H-101, filed December 16, 2014
Zoning and Use Sought:	Zone: TF-12 Use: 16 Townhouses
Current Zone and Use:	Zone: R-90 Current Use: Four single-family homes and a roadway to be abandoned
Location:	9213 Kensington Parkway and 3619, 3621 and 3623 Glenmoor Drive, Chevy Chase, Maryland
Applicable Master Plan:	<i>Kensington-Wheaton Master Plan</i>
Minimum Lot Size:	1,000 square feet
Acreage to be Rezoned:	Approximately 1.41 acres of land (61,349 square feet)
Density Permitted in TF-12 Zone:	12 DU/acre (per Zoning Ordinance §59-5.2.5.A.1, when the pre-existing Euclidean Zone is R-90 and the site size is at least 6 times the base lot size of 9,000 sq. ft.) = 16 Dwelling Units (1.41 acres X 12 DUs/acre = 16.92 DU maximum).
Density Planned:	12 units per acre ( <i>i.e.</i> , 16 Dwelling Units on 1.41 acres)
Building Coverage, Defined as Open Space Required/Planned:	10% Minimum per §59-5.2.5.D. / 20% planned
Parking Spaces Required/Planned:	32 required (2 spaces per unit, per §59-6.2.4.B) / 32 garage spaces planned, plus 32 driveway spaces
Building Height Required/Planned:	As established in the Floating Zone Plan / 50 foot maximum planned
Storm Water Management:	Will meet ESD; Details is to be addressed at Site Plan Review
Environmental Issues:	The Site is not in a Special Protection Area; however, the Audubon Naturalist Society has raised concerns about possible impacts on the nearby Rock Creek Stream Valley Park. Applicant addressed this issue at the hearing, and Technical Staff concluded in its report that the proposal would be compatible “with its natural parkland surroundings.” Exhibit 28(b), p. 15. Environmental impacts will be further evaluated at Site Plan review.
Consistency with Master Plan:	The project is consistent with the general intent and objectives of the <i>Kensington-Wheaton Master Plan</i>
Neighborhood Response:	The only community concerns were the letter from the Audubon Naturalist Society and one from a Kensington resident questioning whether the site had access to a non-residential street.
Other Issues:	No traffic issues. Abandonment of Glenmoor Drive segment is a prerequisite to action on the rezoning application.
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval

## II. STATEMENT OF THE CASE

Application No. H-101, filed on December 16, 2014 by Applicant Nova-Habitat, Inc., requests reclassification from the R-90 Zone to the Townhouse Floating Zone (TF-12) of Lots 1, 2, 3, and Part of 4, Block A of the Rolling Hills Subdivision, located at 9213 Kensington Parkway and 3619, 3621 and 3623 Glenmoor Drive, Chevy Chase, Maryland. The property consists of 1.41 acres of land (61,349 square feet), including property to be abandoned on Glenmoor Drive, and it is situated just north of the Capital Beltway I-495 and just east of Kensington Parkway. Applicant proposes to construct up to 16 townhomes, to be known as “Creekside.” The proposal is set forth in a Floating Zone Plan (FZP), Exhibit 38(a), which contains an illustrative diagram and specifications of the proposal, as well as other information regarding the development. This is the first rezoning application to be heard under the new Zoning Ordinance, effective October 30, 2014.

The owners of three of the lots (9213 Kensington Parkway and 3621 and 3623 Glenmoor Drive) have submitted letters indicated that they have contracted with the Applicant to sell their property and that they authorize Nova-Habitat, Inc. to proceed with the rezoning (Exhibits 21, 22 and 23). The fourth lot is owned by Edward Novak, who testified that he is Nova-Habitat’s founder and president. Tr. 11-14. Ownership of all the properties is confirmed by state tax records. Exhibit 35.<sup>1</sup> The remainder of the property consists of a segment of Glenmoor Drive, which is currently the subject of abandonment proceedings before the County Executive, under Abandonment Petition AB-744. Exhibits 36(b) and (c), and Tr. 19-28. The State of Maryland’s Highway Administration (SHA), which owns the property along the south and east sides of Glenmoor Drive (Exhibit 36(b), p. 2), has stated, in writing, that it has no objection to the abandonment. The letter also indicates that, if the roadway is abandoned, SHA has no interest in its 50% share of the roadbed.<sup>2</sup> Exhibit 36(d).

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<sup>1</sup> Tax Account Numbers: 07-00694755 (Lot 1), 07-00694744 (Lot 2), 07-00694733 (Lot 3) and 07-00694802 (Lot 4).

<sup>2</sup> It should be noted that SHA also owns a small portion of Lot 4 in the southern corner of the lot, as shown on the plat maps (Exhibits 29(j) and (k)). That SHA property is not part of the rezoning application site. SHA’s letter refers only to

Applicant's plan is to request County Council approval of the abandonment immediately before the District Council acts on the rezoning.

The application was initially reviewed by Planning Department for completeness on December 5, 2014 (Exhibit 3(a)), pursuant to Zoning Ordinance §59-7.2.1.B.3. The application was filed with OZAH on December 14, 2014, and in accordance with Zoning Ordinance §59-7.5.1., notice of the hearing (Exhibit 24) was mailed out and posted on OZAH's website on December 18, 2014, establishing a hearing date on April 10, 2015 (*i.e.*, within 120 days of filing, as required by Zoning Ordinance §59-7.2.1.C.). At the request of Applicant's counsel, the hearing date was postponed to April 13, 2015. Exhibit 26.

Technical Staff of the Maryland-National Capital Park and Planning Commission ("Technical Staff") reviewed the substance of the application, and recommended approval in a report dated March 13, 2015 (Exhibit 28(b)).<sup>3</sup> The Montgomery County Planning Board ("Planning Board") considered the application on March 26, 2015, and unanimously recommended approval, as set forth in a memorandum dated March 30, 2015 (Exhibit 28(a)).

There was no response from the community until April 9, 2015 (*i.e.*, two business days before the hearing) when Diane Cameron of the Audubon Naturalist Society filed a letter objecting to the rezoning based on the possibility of an adverse impact on the Rock Creek watershed. Exhibit 30. On the day of the hearing, a Kensington resident, Piera Weiss, filed a signed email raising questions as to whether the relevant portion of Kensington Parkway can properly be classified as a non-residential street, since the Zone being sought cannot be applied to a property with access to a residential street. Exhibit 31. There has been no additional input from the community.

A public hearing was convened, as scheduled, on April 13, 2015, at which time the Applicant

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the portion of Glenmoor Drive to be abandoned by the County. Because SHA is the owner of the abutting 495 Beltway right-of-way, it would automatically have a 50% interest in the Glenmoor Drive roadbed once the County abandons it. Tr. 22-28. SHA's letter indicates it has no interest in their 50% share of that roadbed.

<sup>3</sup> The Technical Staff Report is quoted and paraphrased frequently herein.

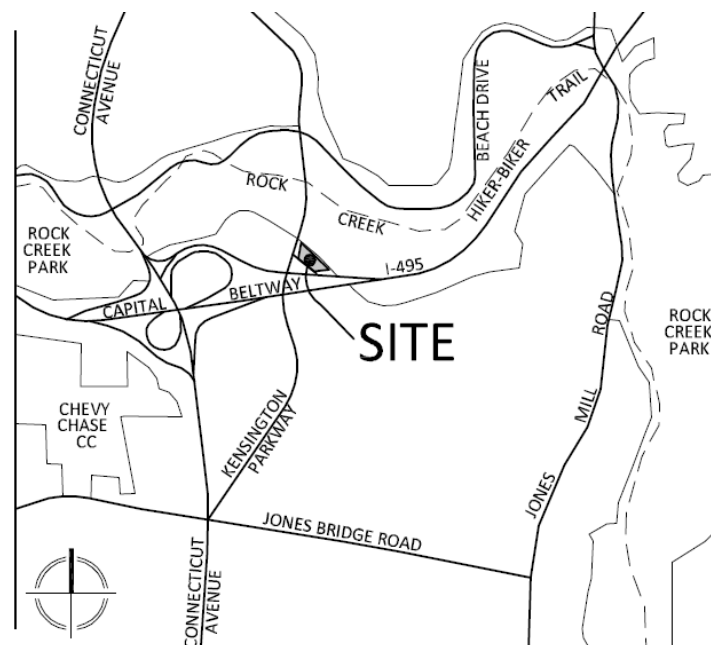
presented evidence and called four witnesses in support of the application. A portion of Applicant's case responded to the concerns raised by the Audubon Naturalist Society and Ms. Piera Weiss. Tr. 32-34, 54-56, 56-57 and 69-71. There was no opposition testimony. The record was held open for two weeks after the hearing, at the Applicant's request, to give its counsel the opportunity to file additional materials. On April 24, 2015, Applicant timely filed a submission addressing a number of issues raised at the hearing (Exhibits 36 and 36(a) – (e)). The record closed, as scheduled, on April 27, 2015. It was reopened on May 12, 2015 (Exhibit 37), to allow Applicant to submit a corrected Floating Zone Plan (FZP). Applicant did so on May 14, 2015 (Exhibit 38(a)), and Technical Staff approved the changes to the FZP on May 18, 2015 (Exhibit 39). The record closed again on May 19, 2015.

Based on the entire record of this case, the Hearing Examiner finds that the requirements for the requested rezoning have been met, and that the application should be granted, if the Council elects to grant the street abandonment request mentioned above.

### III. FACTUAL BACKGROUND

#### A. Subject Property

The subject property, which has an area of about 1.41 acres (61,349 square feet), is located just north of the Capital Beltway I-495 and just east of Kensington Parkway, in Chevy Chase, Maryland, as shown below in the vicinity map from Applicant's Floating Zone plan (Exhibit 38(a)):



The site is comprised of Lots 1, 2, 3, and Part of 4, Block A of the Rolling Hills Subdivision, located at 9213 Kensington Parkway and 3619, 3621 and 3623 Glenmoor Drive, Chevy Chase, Maryland. The property consists of 1.41 acres of land (61,349 square feet), including 47,560 square feet from the four lots and 13,789 square feet of right-of-way to be abandoned on Glenmoor Drive. As mentioned in footnote 2, above, SHA also owns a small portion of Lot 4 in the southern corner of the lot, as shown on the plat maps (Exhibits 29(j) and (k)). That SHA property is not part of the rezoning application site and should not be confused with the abandonment area referenced in SHA's letter (Exhibit 36(d)). That letter refers only to the portion of Glenmoor Drive to be abandoned by the County, and SHA indicates that it has no interest in its 50% share of that roadbed. The area of the proposed rezoning, including the area to be abandoned, is shown on the Plat Map (Exhibit 29(j)):



Technical Staff describes the subject site as follows (Exhibit 28(b), p. 2):

The property is currently improved with four single-family detached homes that were developed under R-90 zoning standards. Today, the tract is predominantly cleared with no forested areas. There are a few specimen trees on the property that are within 100 feet of the site boundaries as identified on the attached existing conditions plan. A 100-year floodplain is located on a small portion of the subject property's northeast boundary shared with adjacent Rock Creek Park. All proposed improvements to the site are located outside the floodplain area. The property is not located within a Special Protection Area. The Maryland Department of Natural Resources determined there are no state or federal records for rare, threatened or endangered species within the boundaries of the proposed project . . .

Staff also notes that when the Rolling Hills Subdivision was originally platted in 1951, Glenmoor Drive contained approximately 36 single-family homes that comprised the Rolling Hills neighborhood; however, "the property was removed from the Rolling Hills community when the Capital Beltway (I-495) was subsequently constructed in the 1960s. The four single-family detached homes that comprise the subject property are aging and are [now] isolated from the Rolling Hills neighborhood . . ." Exhibit 28(b), p. 2.

Technical Staff states that Kensington Parkway, which borders the subject site and accesses Glenmoor Drive, is "a nonresidential street per the Kensington-Wheaton Master Plan." Exhibit 28(b), p. 11. The Kensington/Wheaton Master Plan (p. 96), characterizes Kensington Parkway as a park road, not a residential road.<sup>4</sup> Tr. 56-57.

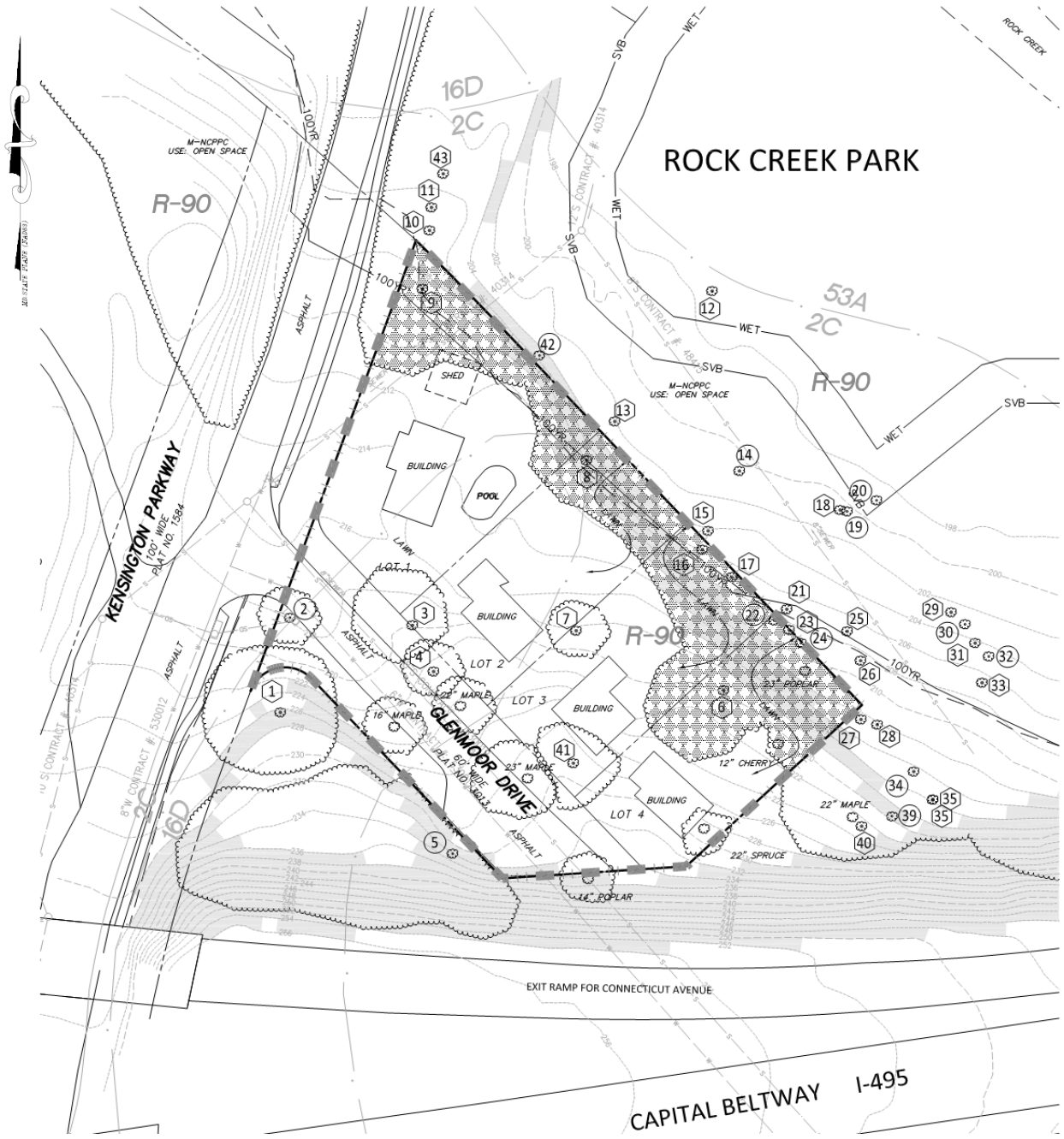
In addition to the Plat Map shown above, and consistent with Zoning Ordinance §59-7.2.1.B.2.g.v.(b), Applicant has provided an "Existing Conditions Plan," certified by a professional (Exhibit 29(e)). It is reproduced on the following pages, and it shows existing site conditions and vicinity within 100 feet, including existing topography; watershed; Special Protection or Primary Management areas [there are none]; floodplains; wetlands; streams and associated buffers; forests; the

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<sup>4</sup> The Master Plan characterizes Kensington Parkway as a primary road north of Beach Drive, as can be seen in the thicker line in the map on page 96 of the Plan, and in the description in Table 5-2, on page 93 of the Plan. If one looks carefully at the map on page 96, the thinner black line for Kensington Parkway, identified in the map key as a "Park Road," can be seen south of Beach Drive, which is where the subject site is located.







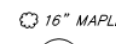



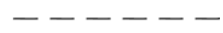





absence of rare, threatened, or endangered species; and that the property is not on the Locational Atlas and Index of Historic Sites.



**SOIL TABLE**

Symbol	Soil Name	Characteristics				
		Prime Agriculture	Erodible	Serpentine	Hydric	K factor
2C	Glenelg silt loam, 8-15%	Yes	No	No	Yes, Grp. B	-
16D	Brinklow-Blocktown silt loams	No	No	No	Yes, Grp. C	-

**LEGEND**

	LIMITS OF SUBJECT PROPERTY
	PROPERTY LINES
	EXISTING CANOPY LINE
	TREE COVER
	EXISTING TREE 16" MAPLE
	EXISTING SIGNIFICANT TREE 24"-29.9" DBH
	EXISTING SPECIMEN TREE ≥ 30" DBH
	100 YEAR FLOODPLAIN (SOURCE: FEMA)
	100 YEAR FLOODPLAIN (SOURCE: MNCPPC)
	STREAM VALLEY BUFFER
	STREAM EDGE / CENTERLINE
	SOIL BOUNDARY & SYMBOL
	SLOPES ≥ 25%
	WETLANDS (MD DNR)

**DATA TABLE**

ACREAGE OF SITE	1.41
ACREAGE OF TRACT REMAINING IN AGRICULTURAL USE	0.00
ACREAGE OF TOTAL EXISTING FOREST	0.00
ACREAGE OF 100-YR FLOODPLAINS	0.10
ACREAGE OF FOREST W/IN 100-YR FLOODPLAIN	0.00
ACREAGE OF WETLANDS	0.00
ACREAGE OF FOREST WITHIN WETLANDS	0.00
ACREAGE OF ENVIRONMENTAL BUFFERS	0.00
ACREAGE OF FOREST WITHIN ENVIRONMENTAL BUFFERS	0.00
LINEAR FEET AND AVERAGE WIDTH OF ENVIRONMENTAL BUFFER PROVIDED	Linear Feet: 0.00' Average Width: 0.00'

**SIGNIFICANT & SPECIMEN TREE TABLE:**

#	Specimen	Botanical Name	Common Name	D.B.H. (Inches) *	Tree Condition	Notes
1	✓	Fagus grandifolia	American Beech	34	Good	split trunk 3' off ground. 5 main trunks.
2		Acer rubrum	Red Maple	25	Good	
3	✓	Quercus rubra	Red Oak	34	Good	
4	✓	Quercus rubra	Red Oak	31	Good	
5		Quercus rubra	Red Oak	28	Poor	declining/dead
6	✓	Acer saccharinum	Silver Maple	36	Good	
7	✓	Quercus rubra	White Oak	30	Good	
8	✓	Liriodendron tulipifera	Tulip Poplar	30	Poor	Substantial canopy die back and branch damage
9	✓	Platanus occidentalis	Sycamore	36	Good	
10	✓	Platanus occidentalis	Sycamore	30	Good	
11	✓	Liriodendron tulipifera	Tulip Poplar	36	Good	
12	✓	Platanus occidentalis	Sycamore	45	Good	
13	✓	Acer saccharinum	Silver Maple	32" & 26	Good	Twin
14		Liriodendron tulipifera	Tulip Poplar	25	Poor	Declining
15	✓	Liriodendron tulipifera	Tulip Poplar	32	Good	
16	✓	Liriodendron tulipifera	Tulip Poplar	40	Good	
17	✓	Liriodendron tulipifera	Tulip Poplar	38	Good	
18	✓	Liriodendron tulipifera	Tulip Poplar	32	Good	
19		Liriodendron tulipifera	Tulip Poplar	29	Good	
20		Liriodendron tulipifera	Tulip Poplar	27	Good	
21		Liriodendron tulipifera	Tulip Poplar	28	Good	
22		Liriodendron tulipifera	Tulip Poplar	28	Good	
23	✓	Liriodendron tulipifera	Tulip Poplar	39	Good	

#	Specimen	Botanical Name	Common Name	D.B.H. (Inches) *	Tree Condition	Notes
24	✓	Liriodendron tulipifera	Tulip Poplar	37	Good	
25	✓	Liriodendron tulipifera	Tulip Poplar	33	Good	
26	✓	Liriodendron tulipifera	Tulip Poplar	30	Good	
27	✓	Liriodendron tulipifera	Tulip Poplar	35	Good	
28	✓	Liriodendron tulipifera	Tulip Poplar	34	Good	
29	✓	Liriodendron tulipifera	Tulip Poplar	33	Good	
30		Platanus occidentalis	Sycamore	24	Poor	Hollow base
31	✓	Liriodendron tulipifera	Tulip Poplar	44	Good	Twin w/ conjoined trunks. 28 DBH 6' of ground.
32		Platanus occidentalis	Sycamore	26	Good	
33	✓	Liriodendron tulipifera	Tulip Poplar	38	Good	
34		Liriodendron tulipifera	Tulip Poplar	28	Good	
35	✓	Liriodendron tulipifera	Tulip Poplar	35	Good	
36	✓	Liriodendron tulipifera	Tulip Poplar	31	Good	
37	✓	Liriodendron tulipifera	Tulip Poplar	34	Good	
38	✓	Liriodendron tulipifera	Tulip Poplar	31	Good	
39		Liriodendron tulipifera	Tulip Poplar	28	Poor	trunk growth stunted from chain link fence and damaged.
40	✓	Liriodendron tulipifera	Tulip Poplar	30	Good	
41	✓	Acer saccharinum	Silver Maple	47	Good	
42		Fraxinus pennsylvanica	Green Ash	27	Good	Construction debris/fill against south side of tree.
43	✓	Liriodendron tulipifera	Tulip Poplar	36	Good	

\*Diameter at Breast Height

## NOTES

SCALE: 1" = 2000'

- 1.) THE STUDY AREA OF THIS EXISTING CONDITIONS PLAN IS LOTS 1 THRU 4 AND THE GLENMOOR DRIVE RIGHT-OF-WAY TOTALING +/- 1.41 ACRES.
- 2.) THERE ARE NO FORESTED AREAS LOCATED ON THE SUBJECT PROPERTY AS DEFINED BY MONTGOMERY COUNTY FOREST LEGISLATION.
- 3.) THERE ARE 12 SIGNIFICANT TREES WITH A DBH OF 24"-29.9" ON THE SUBJECT PROPERTY AND WITHIN 100' OF THE STUDY AREA AS SHOWN ON THE PLAN. SEE TREE TABLE THIS SHEET FOR DETAILS.
- 4.) THERE ARE 31 SPECIMEN TREES LOCATED ON THE SUBJECT PROPERTY AND WITHIN 100' OF THE STUDY AREA. SEE TREE TABLE THIS SHEET FOR DETAILS.
- 5.) THERE ARE NO CHAMPION TREES OR TREES 75% OF THE STATE CHAMPION ON OR WITHIN 100' OF THE STUDY AREA.
- 6.) INFORMATION ON THIS PLAN WAS WITHOUT BENEFIT OF SURVEY. FIELD WORK WAS CONDUCTED BY JAMES BUCHHEISTER, RLA ON APRIL 14, 2014 AND APRIL 18, 2014. A FORESTRY DIAMETER TAPE WAS USED TO MEASURE TREES. ON-SITE AND OFF-SITE TREES ARE APPROXIMATE LOCATIONS BASED ON VISUAL OBSERVATIONS AND FIELD MEASUREMENTS. NO SEPARATE FIELD DATA SUMMARY SHEETS WERE PREPARED WITH THIS PLAN. EXISTING VEGETATION INFORMATION ASSOCIATED WITH THIS PROPERTY IS AS SHOWN ON THIS PLAN.
- 7.) THE SUBJECT PROPERTY IS NOT IDENTIFIED IN THE MONTGOMERY COUNTY LOCATIONAL ATLAS AND INDEX OF HISTORIC SITES.
- 8.) THERE ARE NO WATERS OF THE UNITED STATES LOCATED ON SITE. THERE IS A 100-YEAR FLOODPLAIN LOCATED ON THE SUBJECT PROPERTY AND SOURCE OF FLOOD PLAIN IS FROM FEMA DIGITAL FILES, MAP #24031C0365D, DATED SEPTEMBER 29, 2006 AND MNCPPC DIGITIZED FLOODPLAIN RECORDS.
- 9.) THIS SITE IS NOT WITHIN AN SPA OR PMA.
- 10.) THE SUBJECT PROPERTY IS LOCATED IN THE LOWER ROCK CREEK WATERSHED, A CLASS I/1-P STREAM.
- 11.) THERE WERE NO RARE OR THREATENED OR ENDANGERED SPECIES OBSERVED DURING THE FIELD VISIT. THE MARYLAND DEPARTMENT OF NATURAL RESOURCES WILDLIFE AND HERITAGE DIVISION HAS REVIEWED THIS PROJECT AND CONFIRMED THERE ARE NO RARE, THREATENED, OR ENDANGERED SPECIES IN A LETTER DATED MAY 2, 2014.
- 12.) THE WETLAND AREA SHOWN ON PLAN IS NOT BASED ON A WETLAND STUDY. THE DELINEATION, BASED ON INFORMATION FROM THE MARYLAND DEPARTMENT OF NATURAL RESOURCES, IS APPROXIMATE.
- 13.) THE SUBJECT PROPERTY IS LOCATED ON WSSC MAP 211NW04.
- 14.) SOURCE OF TOPOGRAPHY IS MCATLAS, APRIL 2014.
- 15.) THERE ARE 25% SLOPES AND GREATER. SEE PLAN FOR LOCATIONS OF STEEP SLOPES.
- 16.) SEE SOILS LEGEND FOR SOIL TYPES FOUND ON THE PROPERTY. SOURCE OF INFORMATION IS USDA NRCS WEB SOIL SURVEY.

## SITE DESCRIPTION

THIS 1.41 ACRE (+/-) SITE CONSISTS OF FOUR DEVELOPED SINGLE FAMILY LOTS AND A SECTION OF GLENMOOR DRIVE (60' R/W) BETWEEN KENSINGTON PARKWAY AND THE CAPITAL BELTWAY. THE FOUR SINGLE FAMILY LOTS ARE BOUND BY PARK LAND OWNED BY M-NCPPC TO THE NORTH, KENSINGTON PARKWAY (100' R/W) TO THE WEST, GLENMOOR DRIVE (60' R/W) TO THE SOUTH AND THE CAPITAL BELTWAY R/W TO THE EAST. THERE ARE NO FORESTED AREAS ON THE RESIDENTIAL LOTS OR WITHIN THE SECTION OF GLENMOOR DRIVE R/W. SLOPES 25% AND GREATER ON THE LOTS ARE RESTRICTED TO THE BACK OF THE LOTS ADJACENT TO THE LAND OWNED BY M-NCPPC.

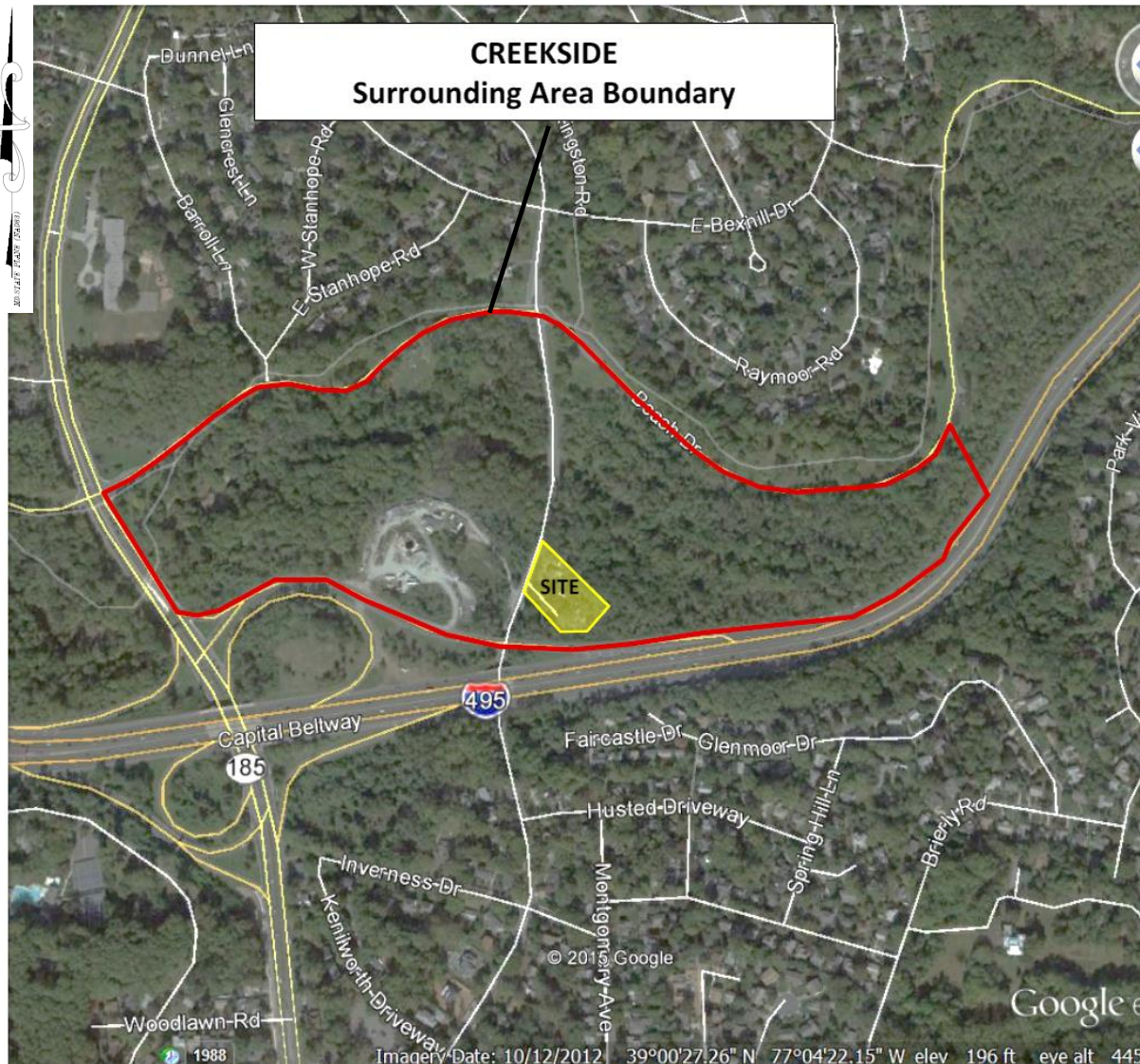
## STREAM VALLEY BUFFER

THE STREAM VALLEY BUFFER (SVB) WAS DETERMINED BY CALCULATING THE SLOPES OF THE STEEPEST 100' WITHIN 200' OF THE TOP OF BANK OF ROCK CREEK. THE STEEPEST SLOPES ARE LESS THAN 15% RESULTING IN A MINIMUM SVB OF 100'. THE 100' SVB WAS EXPANDED TO INCLUDE THE 25' WETLAND BUFFER IN AREAS WHERE WETLANDS ARE PRESENT.

### **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. The surrounding area, as defined on Applicant's Exhibit 25(n), is reproduced below:



Applicant's land use expert, Joshua Sloan, described the boundaries of the surrounding area as "Beach Drive to the north, Rock Creek Park to the east, the off ramp for the Capital Beltway to the south, and Connecticut Avenue to the west." Tr. 40. Technical Staff shows the same map in its report (Exhibit 28(b), p. 4), but Staff's textual description of the surrounding area has a shorter western boundary, extending only to "... Kensington Parkway to the west and the WSSC's Water Tunnel Shaft project on the west side of Kensington Parkway . . .," rather than all the way to Connecticut Avenue, as shown on the above map. Since Technical Staff used the same map depiction of the

surrounding area as did the Applicant, the Hearing Examiner will accept that broader area, stretching all the way to Connecticut Avenue on the west, as the defined surrounding area. Staff's textual description is taken as an indication that the proposed project would be most visible from the area immediately to the west of the site (*i.e.*, from Kensington Parkway), but visibility, though important, is not the only issue in defining a surrounding area. The potential for adverse impacts on the environment is also a factor, and indeed a predominant factor in this case, so it is appropriate to extend the surrounding area to include the forested area to the west of Kensington Parkway, though obviously the possibility of adverse effects is attenuated as the distance from the site increases.

As stated in Applicant's Pre-hearing Submission (Exhibit 29(a), p. 3), "There are no land uses in the surrounding area other than parkland and one temporary WSSC industrial yard." Applicant's land planner, Joshua Sloan, added, "There's not much to be compatible with, except for the parkland and then the highway. So the parkland is the key issue for our development." Tr. 41. The Audubon Naturalist Society describes the nearby parkland as "Rock Creek's wooded riparian area" (Exhibit 30). It is not disputed that the nearby parkland contains forest, stream valley buffers and wetlands, as well floodplains which actually extend 20 to 30 feet into the northern area of the subject site.

### **C. Zoning History**

Technical Staff reports the following zoning history (Exhibit 28(b), p. 3):

At the time of the 1954 comprehensive rezoning of the County, the subject property was zoned in the R-90 zoning classification. In 1958, when the Regional District was expanded to include Upper Montgomery County, the associated comprehensive map amendment confirmed the R-90 zoning classification. The property has remained in the R-90 Zone ever since.

The Hearing Examiner would add to Technical Staff's description the fact that the site's zoning was not changed by the District-wide rezoning on October 30, 2014, which resulted from the District Map Amendment G-956 (adopted July 15, 2014) and modified by Sectional Map Amendment G-965 and Corrective Map Amendments G-967 through G-973.

### D. Proposed Development

The Applicant proposes to construct sixteen, four-story townhouse units, each with a two-car garage and a driveway capable of accommodating an additional two cars. The homes and the garages will front on a private street that will run between groups of townhouses and will be accessed from Kensington Parkway. The maximum height of the units would be 50 feet, but they will be designed to give the appearance, from the street, of three-story townhouses. Exhibit 29(a), pp. 5-6. Applicant’s layout of the project, to be called “Creekside,” can be seen in the rendered Site Plan (Exhibit 25(c)):



Applicant further describes its proposed development in its Pre-hearing Statement (Exhibit 29(a), pp. 4-6):

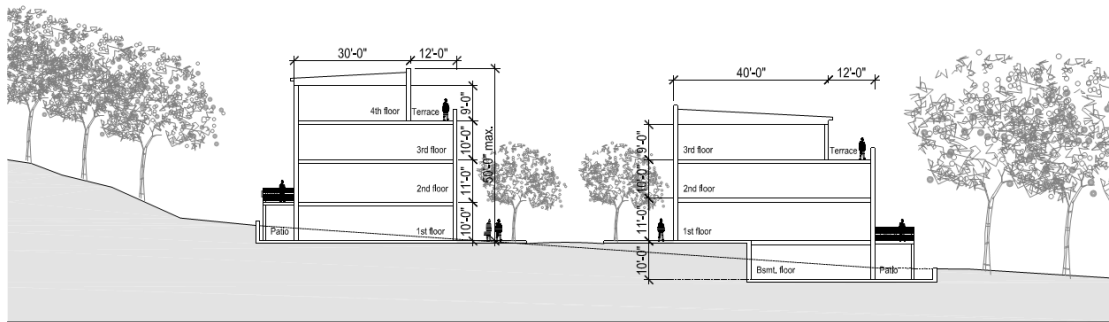
. . . Creekside's proposed site layout reflects a traditional site design where all townhomes will front a private street that bisects the property. The front of the townhomes will provide the main pedestrian realm of the community, along with small pocket parks that can also serve as public gathering spaces to further activate the public realm. The public realm of the community has been designed to increase interaction amongst neighbors through residents congregating in the community's open spaces or through the use of outdoor living features. Similarly, connections to Rock Creek Park will be provided in the proposed community, which will serve to connect future residents to this substantial natural amenity and increase the functionality and use of the existing parkland infrastructure that includes bike trails, walking trails, exercise equipment, picnic areas, and nature watching.

The rears of the homes have been purposefully designed to back to the natural serenity of the park or a wooded setback. These portions of the townhomes will provide residents with private spaces that will allow them to enjoy their tranquil surroundings apart from the shared public realm of the greater community.

Additionally, the townhomes are strategically located to act as a sound barrier to mitigate any noise impacts stemming from the site's proximity to the 495 off-ramp. A preliminary noise analysis shows that at-grade noise levels are approximately 66-67 dBA on the southern portion of the site nearest the off-ramp. The Petitioner is committed to ensuring that internal noise levels will be at 45 dBA and that exterior rear yards will be at 65 dBA or better through the use of site grading techniques and other noise mitigations measures. A further noise analysis will occur at the time of site plan review.

The design intention for the project is to create an appearance of a "natural" architecture with wood, stone, and other natural materials that will complement the unique natural settings abutting the project. The architectural design of the project features two townhouse models with variations between the two units. The units backing to Rock Creek Park (on the north side of the site) are anticipated to be three stories where the homes front the main drive isle and public realm of the community. These units will also feature a walk-out basement facing Rock Creek Park. The top floor in these units will be stepped back to enable a roof top terrace. However, when viewed from street level, a pedestrian will only notice three stories because of the top-level step back. The six (6) units to the south are anticipated to be four story units with a step back on the front facade to accommodate a roof top terrace facing Rock Creek Park. As such, these units will also appear as three story units when viewed at street level. The three-story facades are anticipated to be approximately 35 feet in height.

This last point about the appearance of reduced height is illustrated by Applicant's Site Section view (Exhibit 25(m)), reproduced on the next page:



Applicant's overall vision for the proposed development is illustrated in a series of architectural renderings, which are reproduced below (Exhibits 25(h)-(l)):







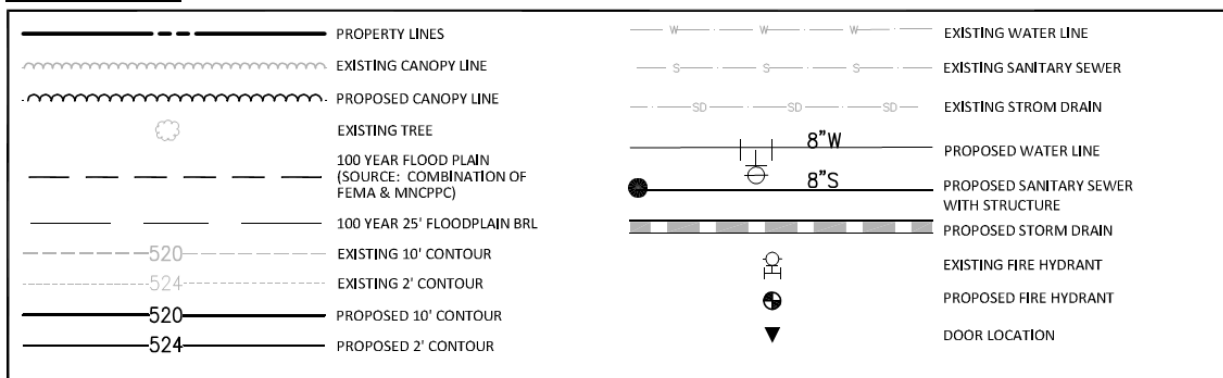
**E. Floating Zone Plan**

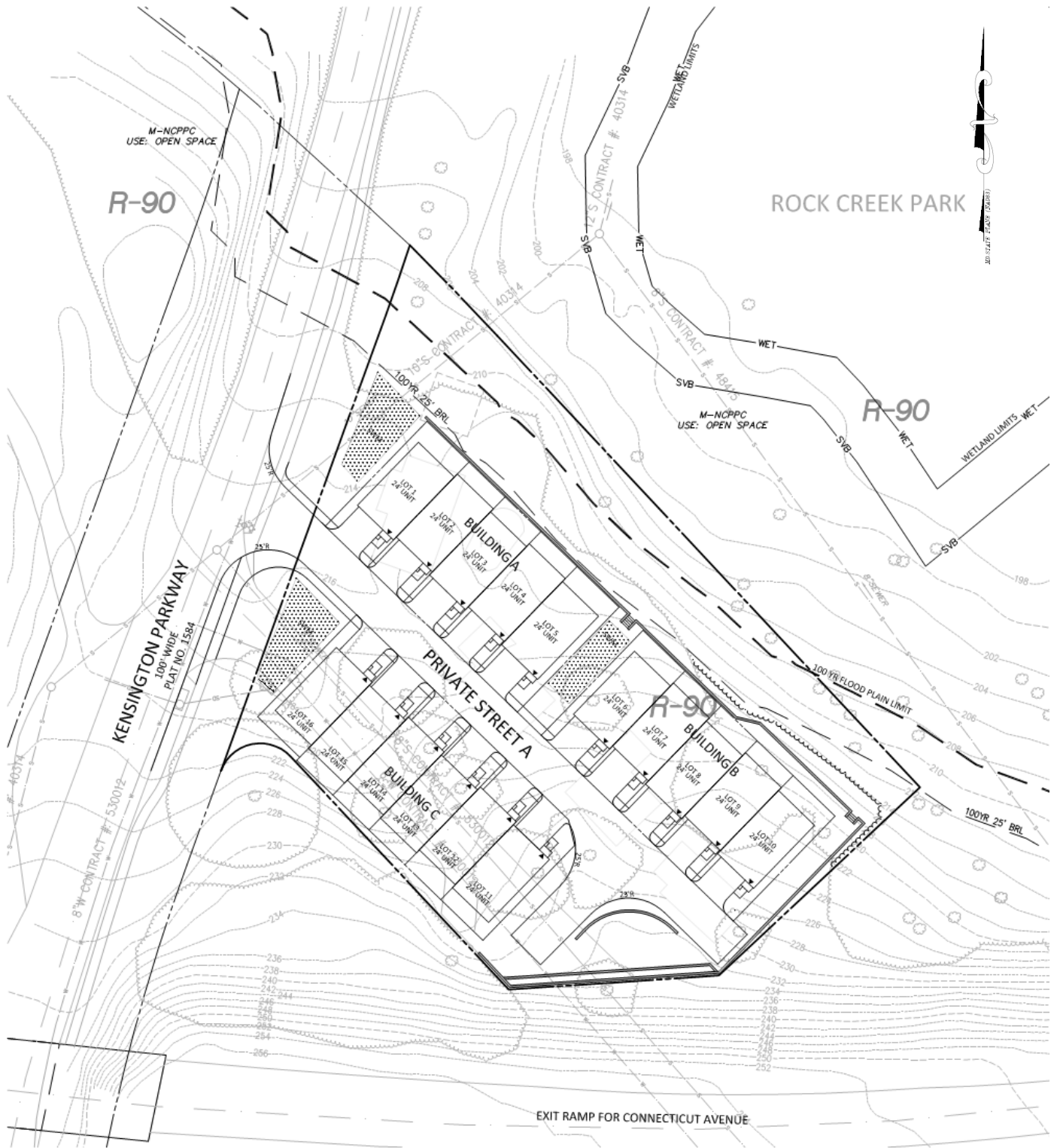
Pursuant to Zoning Ordinance §59-7.2.1.B.2.g., every application for rezoning to a Floating zone must be accompanied by a “Floating Zone Plan” (FZP) that contains the following information:

- i. *building location, density, massing, height, and anticipated use;*
- ii. *locations of open spaces and preliminary stormwater management strategy;*
- iii. *pedestrian, bicycle, and vehicular circulation, parking, and loading;*
- iv. *any binding element on the application. An applicant who proposes a binding element must submit an unexecuted covenant suitable for filing in the land records reflecting any restriction on the development standards, development program, or use that will be applicable to the property if the District Council approves the application; and*
- v. *the following additional information:*
  - (a) *current and proposed zone;*
  - (b) *a plan certified by a licensed professional, showing existing site conditions and vicinity within 100 feet, including total tract area; existing topography; watershed in which the site is located; Special Protection or Primary Management areas; any floodplain, wetland, or perennial or intermittent stream, and any associated buffers; whether or not rare, threatened, or endangered species were observed on the property; whether or not the property is on the Locational Atlas and Index of Historic Sites; the aerial extent of forest and tree cover on the property; and date(s) field work was conducted;*
  - (c) *existing or approved adjacent land uses, buildings, and rights-of-way;*
  - (d) *a Traffic Study under the Planning Board’s LATR Guidelines if the incremental increase in vehicular peak-hour trips between the density of the base zoning and the density of the requested floating zone meets the minimum applicability requirement in the LATR Guidelines; and*
  - (e) *general phasing of structures, uses, rights-of-way, sidewalks, dedications, and future preliminary and site plan applications;*

Applicant has met these requirements by filing its Floating Zone Plan (Exhibit 38(a)) and related documents (Exhibits 29(c)-(1)). The FZP is reproduced below and on the following pages.

**PLAN LEGEND**





**GENERAL NOTES**

1. THE SITE AREA IS 1.41 ACRES.
2. THE SITE IS LOCATED ON WSSC MAP 211NW04.
3. THE SITE IS LOCATED ON TAX MAP GRID HP41.
4. THE SUBJECT PROPERTIES ARE LOCATED ON TAX ASSESSMENT MAP #HP41 WITH TAX ACCOUNT NO'S 07-00694755, 07-00694744, 07-00694733, AND 07-00694802. PROPERTY ALSO INCLUDES THE GLENMOOR ROAD R/W NORTH OF THE CAPITAL BELTWAY/
5. THE SUBJECT PROPERTY IS ZONED "R-90".
6. BOUNDARY IS COMPILED FROM AVAILABLE PUBLIC RECORDS. TOPOGRAPHIC INFORMATION IS FROM MCATLAS, APRIL 2014.
7. THE SUBJECT PROPERTY IS LOCATED IN LOWER ROCK CREEK WATERSHED, A CLASS I/I-P STREAM.
8. THIS SITE IS NOT WITHIN A SPECIAL PROTECTION AREA (SPA) OR PRIMARY MANAGEMENT AREA (PMA).
9. THERE ARE NO WATERS OF THE UNITED STATES LOCATED ON SITE. THERE IS A 100-YEAR FLOODPLAIN LOCATED ON THE SUBJECT PROPERTY AND SOURCE OF FLOOD PLAIN IS FROM FEMA MAP #24031C0365D, DATED SEPTEMBER 29, 2006 AND DIGITAL DOWNLOAD FROM MNCPPC.
10. THE PROJECT IS PROPOSED TO BE SERVED BY PUBLIC WATER AND SEWER SYSTEMS AND IS CURRENTLY IN WATER AND SEWER SERVICE CATEGORIES W-1 & S-1, RESPECTIVELY.

PROJECT DATA TABLE		
CURRENT ZONE: Residential - 90 Zone	R-90	
PROPOSED ZONE: Townhouse Floating Zone	TF-12	
PROPOSED BUILDING TYPE: Townhouse		
SITE AREA:	61,349 sf	1.41 ac
LOTS	47,560 sf	1.09 ac
GLENMOOR DRIVE R/W	13,789 sf	0.32 ac
<b>DEVELOPMENT STANDARD</b>	<b>REQUIRED</b>	<b>PROVIDED</b>
Maximum Density	12 du/ac	12 du/ac
Building Setbacks		
(a) From any detached dwelling lot or land classified in a one family detached residential zone	established by plan	2 ft
(b) From any public street	established by plan	10 ft
(c) From an adjoining lot		
Side (end unit)	established by plan	2 ft
Rear	established by plan	4 ft
Maximum Building Height		
(a) For a main building	established by plan	50 ft
(b) For an accessory building	established by plan	N/A
Minimum Lot Size	established by plan	1,000 sf*
Coverage and Open Space		
Minimum percentage of tract that must be devoted to open space	10%	20%
	6,135 sf	12,270 sf

\*Minimum lot size depicted on plan is approximately 1,680 sf, but there may be a reduction due to final subdivision requirements, architecture, and detailed site engineering.

**DEVELOPMENT PROGRAM**

THIS PROJECT WILL BE DEVELOPED IN ONE PHASE.

**BINDING ELEMENTS**

NO BINDING ELEMENTS ARE PROPOSED. THE PROPERTY WILL BE DEVELOPED UNDER THE REQUIREMENTS OF THE APPROVED ZONE.

The FZP shows the three groups of proposed townhomes, all facing the central private street which will serve as the single access to the site from Kensington Parkway. Applicant’s land planner, Joshua Sloan, testified that the layout of the units, roughly northwest to southeast, is set based on the grade, which slopes generally from the south down towards the northwest corner. The units step with the grade so that they are always about 30 feet above grade level from the new private road that will be established. About 20 percent of the site will remain an open space for environmental buffers and protections, and stormwater management facilities will take care of the runoff from the new road and the rooftops. There is no forest on the site, but there are some significant trees, which will all be mitigated through tree variances, and Applicant will be planting at least 15 three-inch caliper trees primarily along the forested buffer to further protect the offsite floodplain and stream valley. Each building will have its own garage plus a driveway that is about 20 feet deep, so parking will be ample.

There will be a turn around to accommodate fire and rescue access at the southeast side of the site. Retaining walls will be used to minimize the limits of disturbance. All of the townhouses and their garages will front on the new private road. Tr. 45-47. Applicant's plans include a Circulation Plan (Exhibit 29(h)); a Fire Access Plan (Exhibit 29(i)); and an Open Space Plan (Exhibit 29(g)). The entire development will be completed in one stage, and there are no proposed binding elements.

Technical Staff characterized the proposal as reflecting "a traditional site design," noting that (Exhibit 28(b), p. 5):

. . . the private streets associated with this proposed development will serve as a means of ingress and egress for future residents and visitors of the proposed community. The proposed project will be designed to increase interaction among neighbors through residents congregating in the community's open spaces or through the use of outdoor living features. Pedestrian connections along Kensington Parkway to Rock Creek Park will connect future residents to this natural amenity and increase the functionality and use of the existing parkland infrastructure that includes bike trails, walking trails, exercise equipment, picnic areas, and nature watching.

## **F. Master Plan**

The new Zoning Ordinance has three different approaches that must be satisfied in analyzing rezoning applications in light of applicable master plans. First, the new Zoning Ordinance establishes "Necessary Findings" by the Council for approval of rezoning applications, one of which – Section 59-7.2.1.E.2.a. – specifies that the District Council must find that the Floating Zone Plan will "substantially conform with the recommendations of the applicable master plan, general plan, and other applicable County plans."<sup>5</sup>

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<sup>5</sup> A few words should be said about the legal definition of the term "substantially conform with the recommendations of the applicable master plan," as it is used in Zoning Ordinance §59-7.2.1.E.2.a. The Maryland Court of Appeals held, in the case of *Trail v. Terrapin Run*, 403 Md. 523, 548, 569 and 573-574; 943 A.2d 1192 (2008), that legislative words such as "conform to" a master plan and "consistent with" a master plan were intended to convey the concept of being generally "in harmony with" the master plan, unless the legislation specified otherwise. Subsequently, however, the Maryland legislature enacted the *Smart, Green, and Growing - Smart and Sustainable Growth Act of 2009*, effective July 1, 2009. That Act amended Md. Land Use Article, §§1-301 to 1-304, in an express attempt to legislatively overturn the *Terrapin Run* holding by defining the term "consistent with," as used in land use legislation. Essentially, the Act defines the term "consistent with" as a requirement that proposed legislation or regulations regarding land use further (or at least not impede) master plan policies and goals. On the other hand, it appears from the wording of the Act that the state legislature

Another provision in the new Zoning Ordinance – Section 59-5.1.2.A.1. – provides, *inter alia*, that:

- . . . The intent of the Floating zones is to:
  - A. Implement comprehensive planning objectives by:
    - 1. furthering the goals of the general plan, applicable master plan, and functional master plans; . . .

Finally, in Section 59-5.1.3, the new Zoning Ordinance differentiates between Floating zones that are recommended for a subject site in the applicable master plan and those that are not. If the proposed Floating zone is specifically recommended for a site in the master plan, then Section 59-5.1.2.B. provides that “there are no prerequisites for an application.” In contrast, if the proposed Floating zone is not recommended in the master plan, then Section 59-5.1.2.C. requires that certain density and other standards must be met.

Compliance with the specific requirements of Section 59-5.1.2.C. will be discussed in Part V of this report, which reviews the Council findings called for in the Zoning Ordinance. The present section addresses the recommendations and goals of the applicable Master Plan. The Applicant’s site is located in the area subject to the *Master Plan for the Communities of Kensington-Wheaton* (May 1989, as amended April 1990). The Master Plan makes no site-specific recommendation for the property. Technical Staff made the following comments about the applicable Master Plan (Exhibit 28(b), pp. 8-9):

The Property falls under the land use guidance of the 1989 Master Plan for the Communities of Kensington-Wheaton (Kensington-Wheaton Plan). The Kensington-Wheaton Plan gives no specific recommendations for the subject property. On page 64, the Master Plan’s land use map provides no recommendation for the subject property. Despite the Master Plan’s absence of land use guidance for the site, staff finds that the property is an appropriate location for townhouse development given its locational characteristics.

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did not intend to apply its definition of “consistency” to cover actions on individual rezoning or special exception applications, because it limited the definition of “action” to “the adoption of a local law or regulation” concerning special exceptions and specified other matters, not to the review of specific rezoning or special exception applications. Maryland Code, Land Use Article, § 1-301. The Hearing Examiner therefore concludes that the 2009 legislation does not apply to the instant rezoning application, and that we should still be guided by the holding in *Terrapin Run*.

The project will provide 16 townhomes in a location that is close to some of the County's major employment centers and entertainment districts, such as downtown Bethesda and White Flint. The site's location is within close proximity to multiple transit stations and bus stops. The Property is directly on Ride On Route 33 that provides a direct connection from the site to the Medical Center Red Line Metro Station and Glenmont Red Line Metro Station. The site provides convenient biking access to many nearby employment centers: it is 1.8 miles from NIH and Walter Reed, 1.5 miles from the Kensington MARC Station, and 1.6 miles from Kensington Town Center. The property is currently served by public water and sewer and fire and rescue facilities. The Bethesda-Chevy Chase School Cluster is not in a moratorium.

Technical Staff also noted (Exhibit 28(b), p. 10):

The Kensington-Wheaton Master Plan has not been updated since 1989, over 25 years ago. Since the 1980s, substantial change has occurred in this area of the County, including tremendous population, employment, and retail growth in the nearby downcounty areas. Further, thousands of new jobs were brought to the area with the relocation of Walter Reed Medical Center. Housing preferences have shifted to smaller, more urban dwellings, such as townhomes.

Technical Staff concluded that “. . . the proposal conforms to the general intent and objectives of the 1989 Kensington-Wheaton Master Plan.” Exhibit 28(b), p. 15. In its opening summary, Staff stated, “In general, the proposed development . . . furthers the goals of the 1989 Kensington-Wheaton Master Plan . . .” Exhibit 28(b), p. 2. These findings were supported by the Planning Board, which concluded that the rezoning application “. . . is in harmony with the general intent and objectives of the *Master Plan for the Communities of Kensington-Wheaton.*” Exhibit 28(a).

On page 28 of the Master Plan, the Land Use and Zoning “Goals and Objectives” include:

- To protect and stabilize the extent, location, and character of existing residential and commercial land uses,
- To maintain the well established low- to medium-density residential character which prevails over most of the planning area.
- To ensure that zoning and land use recommendations for sites which have a potential for future development are consistent with the goals of land use stabilization and compatibility with nearby existing development.
- To preserve the identity of residential areas along major highway corridors, to soften the impact of major highways on adjacent homes and to strengthen the distinction between commercial and residential uses,

Joshua Sloan, Applicant's land planner, opined that the proposed development fulfills the general Master Plan objectives of increasing the mix of housing and of protecting stable residential

neighborhoods. Tr. 48. Mr. Sloan agrees with Technical Staff that the 1989 Kensington/Wheaton Master Plan makes no specific recommendation for the subject site. There are general recommendations to increase the mix of housing to support the employment areas, and there is a note that Floating zones should not be applied where they can have an impact on existing stable neighborhoods, which he does not believe applies to this site. The Master Plan does not make any recommendations for or against a Floating zone in this area. The Land Use Plan on page 64 of the Master Plan shows hatching in almost all areas, but there's no hatching on the subject property and no map key for that blank. Although the 1958 comprehensive rezoning confirmed the R-90 zoning, it was not a specific recommendation for this site. Tr. 41-44.

In the transportation and mobility plan (Chapter 5), the Master Plan seeks to promote non-motorized mobility. The proposed development has available public transit, including a bus line at the site that goes right to a Metro station and a future purple line station within about a mile. Tr. 49. The Master Plan (page 36) also seeks to protect water quality of the streams, to prevent erosion and flood damage in the Kensington/Wheaton area and to promote conservation. Again, Applicant is proposing to protect the nearby environmentally sensitive areas with stormwater management, utilizing environmental site design, and by staying out of stream buffers. Tr. 51 and 68-71.

Based on this record, the Hearing Examiner finds that Applicant's proposed development will substantially conform with the recommendations of the Master Plan for the Communities of Kensington-Wheaton and will further its stated goals.

### **G. Public Facilities**

Under the County's Adequate Public Facilities Ordinance ("APFO," Code §50-35(k)), an assessment must be made at subdivision as to whether the transportation infrastructure, area schools, water and sewage facilities, and other services will be adequate to support a proposed development, and in turn, whether the proposed development will 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 are set by the County Council every four years in the Subdivision Staging Policy (SSP). 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 case, as spelled out for traffic issues in Zoning Ordinance §59-7.2.1.E.2.e, quoted immediately below, and for other public facilities in §59-5.1.2.A.2, which will be discussed below.

*For a Floating zone application the District Council must find that the floating zone plan will: . . .*

*e. generate traffic that does not exceed the critical lane volume or volume/capacity ratio standard as applicable under the Planning Board's LATR Guidelines, or, if traffic exceeds the applicable standard, that the applicant demonstrate an ability to mitigate such adverse impacts . . ."*

The principal tool used by the County to evaluate the ability of transportation facilities to handle a proposed development is the Local Area Transportation Review ("LATR"). LATR generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion during the peak hour of the morning and evening peak periods. An LATR traffic study is not required unless a proposed development would generate 30 or more peak-hour automobile trips. For developments that will generate fewer than 30 peak-hour trips, only a traffic statement need be filed,<sup>6</sup> as was done in the subject case. *See* Exhibit 8.

Applicant employed Cherian Eapen, an expert in transportation planning and traffic engineering, who prepared a Traffic Statement (Exhibit 8), which he summarized at the hearing. Mr. Eapen testified that, based on the Planning Department's LATR Guidelines, the proposal for 16 townhomes will generate approximately 8 peak-hour trips in the morning peak hour, and 13 peak-hour trips during the weekday evening peak hour. Subtracting out the traffic generated by the four homes

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<sup>6</sup> Planning Department's *LATR and TPAR Guidelines* (2013), p. 6.

currently on the site (4 trips in the morning and 4 trips in the evening), the proposed development will result in an addition to traffic of about 4 peak hour trips in the morning, and 9 peak hour trips in the evening. These figures are reflected in the Traffic Statement (Exhibit 8), and as noted there, the Transportation Policy Area Review (TPAR) requirements can also be met by making a payment at the time building permits are issued. Tr. 74-75. Mr. Eapen testified that, in his opinion, this proposal would not generate traffic exceeding the critical lane volume or volume capacity ratio standard applicable under the Planning Board's LATR Guidelines, and both the TPAR and LATR findings will be met. Tr. 75-76.

Technical Staff confirmed Mr. Eapen's analysis (Exhibit 28(b), p. 16):

The proposed development will generate only 8 a.m. peak hour trips and 13 p.m. peak trips, a diminimus impact on surrounding roadways; a traffic study is not required to satisfy the LATR test because the proposed use generates fewer than 30 total peak hour-hour trips. If approved and a future preliminary plan review, the TPAR must be satisfied under the approved LATR and TPAR Guidelines. . . .

Based on this record, the Hearing Examiner finds that transportation facilities are adequate and will not be adversely affected by the proposed development.

The new Zoning Ordinance revisits the issue of public facilities in Section 59-5.1.2.A.2., which provides that:

*The intent of the Floating zones is to: A. Implement comprehensive planning objectives by: . . . 2. ensuring that the proposed uses are in balance with and supported by the existing and planned infrastructure in the general plan, applicable master plan, functional master plan staging, and applicable public facilities requirements; . . .* [Emphasis added.]

Thus, the new Zoning Ordinance requires an analysis at rezoning of the adequacy of non-transportation facilities, as well as transportation facilities. In response, Technical Staff determined that "The subject application will be adequately served by public facilities [for water and sewer, schools, police, fire and rescue]," as set forth on pp. 7-8 of the Staff report (Exhibit 28(b)):

Water and Sewer

Public water and sewer are available at the subject property. Currently, the site is

served by a 10” sewer line and an 8” water line, both running along the adjacent Kensington Parkway right-of-way. The proposed townhouse units will not require an upgrade to this service line, nor will the installation of a pump station be required.

#### Schools

The Property is located in the Bethesda-Chevy Chase Cluster with Rosemary Hills Elementary School for pre-K through second grade, North Chevy Chase Elementary School for grades 3-6, Westland Middle School for grades 7 and 8, and Bethesda-Chevy Chase for high school students. The student generation estimated from the proposed 16-unit townhouse development will be approximately 3 elementary school students, 1 middle school student, and 2 high school students.

Rosemary Hills Elementary School has an addition scheduled for completion in August 2015. Westland Middle School is projected to be over capacity in the six-year CIP. Therefore, a new middle school is needed to accommodate the reassignment of grade 6 students from Chevy Chase and North Chevy Chase elementary schools to the middle school level. The scheduled completion date for the new middle school is August 2017. An addition to Bethesda-Chevy Chase High School is needed to address over-utilization. The Board of Education recommended completion date for the high school addition is August 2017.

The FY 2015 Subdivision Staging Policy School Test finds that school enrollment in the Bethesda-Chevy Chase cluster does not exceed 105 percent utilization at any level. Therefore, no schools facility payment is required.

#### Other Public Facilities

Public Safety services are provided by fire and rescue stations within two miles. They include the Chevy Chase Fire Department at 8001 Connecticut Avenue, Chevy Chase, MD, 1.1 miles from the site; the Kensington Volunteer Fire Department, at 10620 Connecticut Avenue, Kensington, MD, 1.6 miles away; and the Silver Spring Volunteer Fire Department at 1945 Seminary Road Silver Spring, MD, 1.7 miles from the Property. There are two police stations within two miles of the site: the Montgomery County Police Station at 3710 Mitchell Street Kensington, MD, 1.3 miles away; and the Montgomery County Police Station at 7359 Wisconsin Ave, Bethesda MD, 1.9 miles from the site.

Based on this record, the Hearing Examiner finds that the proposed use will be in balance with and supported by the existing and planned infrastructure in the general plan, applicable master plan, functional master plan staging, and applicable public facilities requirements.

### **H. Environment**

Under the new Zoning Ordinance, an Applicant for rezoning is not required to submit an approved Natural Resource Inventory / Forest Stand Delineation (NRI/FSD) with its rezoning

application;<sup>7</sup> however, as required by the new Zoning Ordinance, Applicant filed an “Existing Conditions Plan,” (Exhibit 29(e)), certified by a professional and showing the existing conditions on the site and in the vicinity within 100 feet, including existing topography; watershed; Special Protection or Primary Management areas [there are none]; floodplains; wetlands; streams and associated buffers; forests; and the absence of rare, threatened, or endangered species.

There is no forest on the subject site, but there are some significant trees, which will all be mitigated through tree variances, and Applicant will be planting at least 15 three-inch caliper trees primarily along the forested buffer to further protect the offsite floodplain and stream valley. About 20 percent of the site will remain an open space for environmental buffers and protections, and stormwater management facilities will take care of the runoff from the new road and the rooftops.

Applicant’s land planner, Joshua Sloan, testified that the increases in tree canopy proposed by the Applicant and the steps to be taken to mitigate environmental impacts, as well as the increased stormwater management protections, will actually enhance the quality of water that is outfalling into Rock Creek. The stream valley buffer is well off of the property, and the nearest proposed building is about 90 feet from the stream valley buffer at its closest point. The project is also out of the floodplain by 25 feet at the tightest point, and further in most cases. Tr. 54-55. Mr. Sloan also testified that if the rezoning is approved, Applicant will file a preliminary plan of subdivision and a site plan, at which time details such as the distance from parkland, the setback, the replanting and the like will be looked at quite closely. Tr. 60-63.

Applicant’s civil engineer, Jeffrey Amateau, testified that, although a stormwater management concept plan (SWMCP) is not required as part of the local map amendment application process, he prepared one. It has not yet been reviewed by Department of Permitting Services; however, a copy has

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<sup>7</sup> Compare Section 59-D-1.3(a) of the old Zoning Ordinance with Section 7.2.1.B.2.g.v.(b) of the new Zoning Ordinance, which calls for “a plan certified by a licensed professional, showing existing site conditions and vicinity within 100 feet . . .,” including a variety of environmental information. The approval process for an NRI/FSD is pushed back to site plan review by the Planning Department under the new Zoning Ordinance.

been filed in this case (Exhibit 36(a)). Currently, there is no stormwater management on the site other than a storm drain system. The proposed SWMCP he developed would include three microbiofilters, and these three, in combination, would provide for the target rainfall of two inches. In response to the concerns raised by the Audubon Naturalist Society, Mr. Amateau testified that this result translates into mimicking woods in good condition (*i.e.*, predevelopment rates) as to stormwater runoff. It would achieve 100 percent of environmental site design (ESD) requirements, a considerable improvement over present stormwater management on the site. Tr. 68-71.

Technical Staff concluded that the proposed development will meet the environmental prerequisites required for rezoning approval, in that the limits of disturbance for the development will not overlap any stream, floodplain, wetland or environmental buffer or any slopes greater than 25%, or slopes greater than 15% where erodible soils are present; and the site does not contain rare, threatened, or endangered species or critical habitats listed by the Maryland Department of Natural Resources. Exhibit 28(b), p. 13.

Technical Staff also noted (Exhibit 28(b), pp. 13-14):

If the zoning application is approved, the next step in the development process will be for the Applicant to seek Preliminary Plan approval. This part of the process will involve submission of a formal Natural Resources Inventory/Forest Stand Delineation (NRI/FSD). Based on the results of the NRI/FSD, the environmental buffer on the site may be refined, or RT&E species discovered. Additionally, the Applicant will be required to submit a Stormwater Management Concept Plan for review and approval by the Department of Permitting Services (DPS). In either event, the floating zone plan may have to be modified in order to respect the new information analyzed and reviewed by applicable agencies. . . .

Based on this record, the Hearing Examiner is satisfied that any environmental concerns on and around the subject site are being appropriately addressed, and will be further evaluated at subdivision and site plan review.

### **I. Community Concerns**

There were two issues raised by the community prior to the hearing:

1. The concern of the Audubon Naturalist Society that the development might have an adverse impact on the Rock Creek watershed; and
2. The question raised by Piera Weiss as to whether the relevant portion of Kensington Parkway can properly be classified as a non-residential street.

*1. Possible Impacts on the Rock Creek watershed:*

As noted in the previous section of this report, Applicant's land planner, Joshua Sloan, and its civil engineer, Jeffrey Amateau, both responded to the environmental concerns raised in the letter from the Audubon Naturalist Society (Exhibit 30). For the reasons stated in that section, the Hearing Examiner finds that the environmental concerns raised by the Audubon Naturalist Society are being appropriately addressed, and do not warrant rejection of this rezoning application.

*2. Whether the relevant portion of Kensington Parkway is a non-residential street:*

The question raised by Ms. Weiss's letter (Exhibit 31) as to whether the relevant portion of Kensington Parkway can properly be classified as a non-residential street has also been addressed previously in this report. *See* page 8 and footnote 4. As noted by both Mr. Sloan and Mr. Eapen in their testimony (Tr. 56-59 and 76-78), page 96 of the Kensington/Wheaton Master Plan clearly presents the relevant section of Kensington Parkway as a park road, not a primary street. Thus, that section of the road meets the zoning requirement that it be a non-residential road. Technical Staff reached the same conclusion, stating that Kensington Parkway, which borders the subject site and accesses Glenmoor Drive, is "a nonresidential street per the Kensington-Wheaton Master Plan." Exhibit 28(b), p. 11. There is no evidence to the contrary, and the Hearing Examiner so finds.

#### **IV. SUMMARY OF THE HEARING**

A public hearing was convened, as scheduled, on April 13, 2015, at which time the Applicant presented evidence and called four witnesses in support of the application— Edward Novak, the founder and president of Nova-Habitat; Joshua Sloan, an expert in land planning; Jeffrey Amateau, a civil engineer; and Cherian Eapen, a transportation planner. There was no opposition testimony.

At the inception of the hearing, the Hearing Examiner noted that OZAH had received two letters at the last minute, one from the Audubon Naturalist Society, which came in on April 9, 2015, and one from an individual, Piera Weiss, which arrived on the morning of the hearing. Given their late arrival, the Hearing Examiner indicated he would give the Applicant additional time to respond in writing, or a further hearing day if needed. Tr. 7. On another topic, Applicant's counsel, Damon Orobona, stated that there would be no covenants offered by the Applicant in this case. Tr. 6. In response to the Hearing Examiner's question about the status of abandonment proceedings, Mr. Orobona replied that Mike Subin, hearing officer for the County Executive, held a hearing on it during the preceding week (Exhibit 36(c)) and would transmit the recommendation to the County Council within 45 days. Ideally, from Applicant's perspective, both matters would be scheduled to be before the County Council for its final decision on the same day. Tr. 9.

During the course of the hearing, Applicant submitted an executed affidavit indicating that the zoning notice sign had been properly posted at the site (Exhibit 32). At the conclusion of the hearing, the record was held open for two weeks, until April 27, 2014, at the Applicant's request, to give its counsel the opportunity to file some additional materials. Tr. 84.

1. Edward Novak (Tr. 10-34):

Edward Novak testified that he is the founder and president of Nova-Habitat, the Applicant. He detailed his background and described Nova-Habitat as "an entrepreneurial development company." It has completed a variety of projects, including mixed use, multi-family, retail, and senior living projects. His firm looks at what the applicable master plan says and tries to develop a project that would be suitable for that site. In August of 2014, Nova-Habitat completed Fenwick Station, a 310 unit apartment, multi-family apartment project in downtown Silver Spring, and he has been notified that it achieved LEED Gold classification.<sup>8</sup> Mr. Novak also discussed other Nova-

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<sup>8</sup> "LEED" stands for Leadership in Environmental and Engineering Design. It is a standard by which commercial and

Habitat projects. Tr. 10-12.

Mr. Novak personally purchased the property at 3619 Glenmoor Drive, and Nova-Habitat entered into contracts to purchase the other three properties on the site, subject to the rezoning approval. He described the site as “four homes that have been orphaned by the Capital Beltway.” It was part the Greater North Chevy Chase Village community, but when the Beltway came through, these four properties were orphaned. There were at least 10 other properties along Glenmoor Drive that were condemned as part of the Beltway, but these four, on the north side of the Capital Beltway, were left in place and were really segregated from the rest of the community. So Glenmoor Drive, formerly a through street, is now a *cul de sac*, in a neighborhood of these properties, which are still occupied. He clarified that the Connecticut Avenue off ramp of the Beltway is really what is abutting the State Highway Administration property [located in the southern corner of the easternmost lot (*i.e.*, Lot 4)]. Tr. 13-15.

Mr. Novak felt that it was possible to recreate a small neighborhood through the proposed townhouse redevelopment. Given the size of the site, the 16 townhomes would be of sufficient size to be feasible to redevelop, as well as to meet current stormwater management requirements. Mr. Novak expects the housing demand in the Chevy Chase area to continue to increase, and there will be increased jobs at Walter Reed, with the consolidation at NIH, and both are within close proximity to this site, on a direct bus route, with a current bus stop in front of the property. Thus, the location is very attractive, and the demographics among single professionals, childless couples and empty nesters, has really increased the demand for high quality, but low maintenance townhouses. Although small in scale, the site offers a unique opportunity to create an enclave of high quality homes that will meet the demands of the market in this area, and be very compatible with Rock Creek Park, without

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multi-family projects are rated under a point system. There are four levels of LEED certification – LEED certified, LEED silver, LEED gold, and LEED platinum. As part of the county approval process, many projects are required to achieve LEED silver certification. Tr. 32-33.



having any impact on any abutting single-family residences. Tr. 16-19.

Mr. Novak then discussed the pending application for a street abandonment filed simultaneous with this application for a local map amendment, which he described as “a win/win opportunity for the county.” Glenmoor Drive is currently a county-owned *cul de sac*, that is maintained by Montgomery County Department of Transportation. According to Mr. Novak, the Montgomery County Department of Transportation indicated that it would be pleased to have Nova-Habitat redevelop the entire property, and with the resulting homeowners’ association, take over the responsibility of maintaining a private driveway serving the 16 townhomes. Tr. 19-20.

He noted that the State Highway Administration (SHA) owns the Capital Beltway, and therefore is the abutting property owner. By legal right, they would be entitled to one-half of Glenmoor Drive upon its abandonment. If SHA exercised that right, Mr. Novak testified that it would make the project infeasible. He contacted Dwayne Kershner of the State Highway Administration, and SHA indicated it would not be able to formally abandon property that they don't actually own, but they would not be opposed to the abandonment, and furthermore, they would not be interested in receiving one-half of the right-of-way upon abandonment. Tr. 20-21 and Exhibits 9.

[Mr. Orobona explained that SHA would automatically acquire rights to one half of the right-of-way if the County abandons the property because SHA owns the abutting Beltway right-of-way. He indicated that he would provide a more formal statement from SHA indicating its consent to the abandonment and relinquishment of rights to its 50% of the roadway (which he later submitted as Exhibit 36(d)). He also indicated that he would provide a copy of the Technical Staff report recommending approval of the abandonment (which was later filed as Exhibit 36(b)) and a transcript of the abandonment proceeding (which was later filed as Exhibit 36(c)). Tr. 22-28.]

Mr. Novak further testified that the townhouses have been designed in such a way that the townhouses themselves act as their own sound wall for their backyards. Moreover, the natural

topography helps mitigate the noise impact on that area. The relative noise inside the units would also be easily mitigated by current standards for insulation and building materials. Tr. 29-30.

The units themselves would be four living levels, including a basement. Third level terraces on the front of the units will back to the Beltway, and rear facing terraces on the units will back to Rock Creek Park, so that from the entrance drive, both units appear as three-story facades. Even from the park side, because of the step back on the top floor, the units would appear as a three-story or a two and a half-story facade. The natural topography of the site will thus mitigate any kind of height impact. Nearby Community associations did not appear to have any objections, and several residents voiced support for the redevelopment as both appropriate and attractive. Mr. Novak completed his testimony by asserting that Nova-Habitat has been and continues to be dedicated to environmentally sensitive development. He views the adjacency to Rock Creek Park as both a responsibility and an opportunity. The concerns raised by the Audubon Naturalist Society with respect to stormwater management, landscaping, invasive species, and protecting the trees that are part of Rock Creek Park are all matters that he agrees with, and believes he can achieve. He feels that, given the significant stormwater management now required of new developments, this project will make a significant improvement in the stormwater management abutting Rock Creek Park. Tr. 30-34.

2. Joshua Sloan (Tr. 34-63):

Joshua Sloan testified as an expert in land planning and landscape architecture. Tr. 34-39. He described the subject site and its immediate environs. The site is occupied by four units and was part of the Rolling Hills Subdivision, but it was cut off from that subdivision by the Beltway in the 1960s. There is one public road leading from Kensington Parkway, roughly east to west, and there is a bit of floodplain that actually skirts the northern boundary of the property. All of the project limits of disturbance are out of that floodplain. There is no forest on site, and there are no rare, endangered, or threatened species either on site, or that would be impacted by the development. The stream valley

buffers are well off the site to the north, and the site is not in a special protection area. Currently there are no stormwater management facilities on site, and the road drains directly to a storm drain.

Tr. 39-40.

Mr. Sloan further testified that he agreed with the boundaries of the surrounding area as proffered by Technical Staff, and they are shown in Exhibit 25(n) as Beach Drive to the north, Rock Creek Park to the east, the off ramp for the Capital Beltway to the south, and Connecticut Avenue to the west. He opined that there's not much to be compatible with, except for the parkland and then the highway, so the parkland is the key issue for the development. Tr. 40-41.

According to Mr. Sloan, the 1989 Kensington/Wheaton Master Plan makes no specific recommendation for the subject site. There are general recommendations to increase the mix of housing to support the employment areas, and there is a note that Floating zones should not be applied where they can have an impact on existing stable neighborhoods, which he does not believe this one is. The Master Plan does not make any recommendations for or against a Floating zone in this area. The Land Use Plan on page 64 of the Master Plan shows hatching in almost all areas, but there's no hatching on the subject property and no map key for that blank. Technical Staff also notes (Exhibit 28(b), p. 8) that the Master Plan gives no specific recommendations for the subject property, and the Master Plan's land use map provides no recommendation for the subject property. Although the 1958 comprehensive rezoning confirmed the R-90 zoning, it was not a specific recommendation for this site. Tr. 41-44.

Mr. Sloan described Applicant's proposal, using the illustrative site plan (Exhibit 25(c)). The units are laid out roughly northwest to southeast. They are set based on the grade, which slopes generally from the south down towards the northwest corner, and they step with the grade so that the units are always about 30 feet above grade level from the new private road that will be established. About 20 percent of the site will remain an open space for environmental buffers and protections, and

stormwater management facilities to take care of the runoff from the new road and the rooftops. There is no forest on land, but there are some significant trees, which will all be mitigated through tree variances, and Applicant will be planting at least 15 three-inch caliper trees primarily along the forested buffer to further protect the offsite floodplain and stream valley. Each building will have its own garage plus a driveway that's about 20 feet deep, so parking will be ample. There will be a turn around to accommodate fire and rescue access at the southeast side of the site. Retaining walls will be used to minimize the limits of disturbance. All of the townhouses will front on the new private road. The garages and the front doors are both on the private road. Tr. 45-47.

Mr. Sloan opined that the proposed development fulfills the general Master Plan objectives of increasing the mix of housing and of protecting stable neighborhoods in accordance with Section 5.1.2.A of the new Zoning Ordinance. The proposal complies with Section 5.1.2.B, which states that a Floating zone should encourage the appropriate use of land, because there is transit, both a bus line that goes right to the Metro and a future purple line station within about a mile. So there will not be a large increase in road use by the development. There are existing facilities for utilities that can be tied into, so there will not be a need for increased services. The project will also provide housing for the expanding employment base, federal government primarily, just to the southwest of the site. Thus, the Floating zone would be an appropriate use of the land. In accordance with Section 5.1.2.C, it will be compatible with the surrounding area. It will be expanding the park-like setting and incorporating it into the park-like environment. There are no neighbors to negatively impact. The primary way it protects the neighborhood is by taking a lot of the pressure of redevelopment off of those existing neighborhoods and placing something with a little bit higher density in an area where it will not have negative impacts. Tr. 48-50.

In Mr. Sloan's opinion, the proposal also complies with Section 5.1.3.D, in that it meets the required two prerequisites in each of three categories. For transit and infrastructure, the proposal

meets three of the prerequisites. There's water and sewer that serves this site without need for an upgrade or a pump station. All three elementary, middle and high school levels are under 105 percent capacity, and so there won't even be an extra impact fee for schools. The signalized intersections within a quarter mile are under the existing critical lane volume standards for this area. In terms of the vicinity and facilities, this is on a bike route that goes directly to services within three miles, both to the north in Kensington, and to the south in Chevy Chase. It is also within three quarters of a mile of recreation facilities, provided by a public park along a long walking path. In terms of environmental resources, the project will keep out of all environmental buffers and off the floodplain. There are also no rare, endangered or threatened species, and no forest on site. Tr. 50-51.

Mr. Sloan further testified that the new Floating zones are quite flexible in terms of development standards – when a recommendation isn't made specifically for a property, it strictly limits the density you can ask for. It also establishes a minimum open space to regulate density, and the proposal is within the density established by this property's parameters, its size, and its previous zoning. The open space required for this building type (*i.e.*, a townhouse building) on this size property is 10 percent, and Applicant will provide 20 percent open space. Lot size, height, and setbacks are established through a negotiation with Technical Staff, and those have all been laid out in the development table. The only applicable general requirement is the parking requirement, which is two per unit, and the proposal will provide those. The density of the development will be 12 units per acre, and the maximum height would be 50 feet to accommodate the slopes that are on site. The structures would be well below the canopy line or the sight lines of any potential residences around. There would be a 10-foot setback from the public right-of-way, a minimum 2-foot setback on the side for the end units, and a 4-foot setback from the rear. Technical Staff doesn't set a minimum for lot size. The proposed units are 800 square feet, and lot sizes would be a minimum of 800-900 square feet. Tr. 51-53.

In Mr. Sloan's professional opinion, this proposal would further the public interest of the county. It's providing a modest increase in density where it can provide housing for the increases in employment opportunities in the nearby Walter Reed and the federal buildings to the southwest. It's at an area that is not going to negatively impact schools. It's in an area that has infrastructure that can accommodate it. It will be increasing the amount of stormwater treated, and thus further protecting the important Rock Creek Park to the northwest of the site. And, it will be mitigating any impacts to trees and then providing a significantly greater tree canopy with replantings on the site. Tr. 53-54.

Mr. Sloan also testified that there are adequate public facilities to cover this development in the area. The schools are well below the moratorium level, and below the 105 percent of capacity that requires an extra impact fee. There are three fire stations within two miles of the site. There are two police stations within two miles of the site. The roads are below the critical lane volume (CLV) within the quarter mile surrounding area, so there are adequate transportation facilities. Tr. 54.

Mr. Sloan also responded to the letter from the Audubon Naturalist Society (Exhibit 30), stating that he supports their mission and understands their concerns. He feels that the increases in tree canopy, the mitigation of any impacts, and the increased stormwater management protections will actually enhance the quality of water that is outfalling into Rock Creek. The stream valley buffer is actually well off of the property, and the closest proposed building is about 90 feet from the stream valley buffer at its closest point, so it will basically accommodate their interest in a 100-foot setback from the stream valley buffer. The project is also out of the floodplain by 25 feet at the tightest point, and further in most cases. More generally, this project takes pressure off of outlying areas, rural areas, and areas that don't have the infrastructure for transit and facilities that this one does. So, it will actually minimize impacts compared to this kind of density further out. Tr. 54-55.

In response to the email from Piera Weiss, who had a question about the road classification of Kensington Parkway (Exhibit 31), Mr. Sloan stated that there is a map on page 96 of the

Kensington/Wheaton Master Plan indicating that Kensington Parkway is a park road, not a primary street. Technical Staff thus correctly found that this was a non-residential street. Mr. Sloan does not disagree with any of the findings in the Technical Staff Report (Exhibit 28(b)). [Mr. Orobona also indicated that the Applicant adopts the Technical Staff Report findings as part of its evidence in this case.] Tr. 56-59.

Mr. Sloan further testified that if the rezoning is approved, Applicant will file a preliminary plan of subdivision and a site plan, at which time details such as the distance from parkland, the setback, the replanting and the like will be looked at quite closely. He also opined that the Floating Zone Plan will meet the standards set forth in Section 59-7.2.1.E. of the Zoning Ordinance for the reasons previously stated, in that it will substantially conform to the Master Plan; it will further the public interest; it will satisfy the intent, purpose and standards of the proposed Zone; and it will be compatible with existing and approved development. [The remaining issue of traffic not exceeding the CLV standards under the Planning Board's LATR Guidelines will be addressed by another witness.] Tr. 60-63.

3. Jeffrey Amateau (Tr. 63-70):

Jeffrey Amateau testified as an expert in civil engineering. Tr. 64-67. He opined that this project will have adequate public water and sewer capacity to support 16 proposed townhomes at this location. Adjacent to the site there is existing public water and sewer. The sewer is a 10 inch line, and the water is a 8 inch line. They will have capacity, as confirmed by WSSC. No upgrades for water service and sewer capacity would be necessary. Tr. 67-68.

A stormwater management concept plan (SWMCP) is not required as part of the local map amendment application process, but he has prepared one, which has not yet been reviewed by Department of Permitting Services. Currently, there is no stormwater management system on site other than a storm drain system. The proposed SWMCP he developed (Exhibit 36(a)) would include

three microbiofilters, and these three, in combination, would provide for the target rainfall of two inches. In response to the concerns raised by the Audubon Naturalist Society, Mr. Amateau testified that this result translates into mimicking woods in good condition (*i.e.*, predevelopment rates) as to stormwater runoff. It would achieve 100 percent of environmental site design requirements, a considerable improvement over present stormwater management on the site. Tr. 68-71.

4. Cherian Eapen (Tr. 71-81):

Cherian Eapen testified as an expert in transportation planning and traffic engineering. Tr. 71-73. He stated, based on the Planning Department's Local Area Transportation Review (LATR) Guidelines, the proposal for 16 townhomes will generate approximately 8 peak-hour trips in the morning peak hour, and 13 peak-hour trips during the weekday evening peak period. Subtracting out the traffic generated by the four units currently on the site (4 trips in the morning and 4 trips in the evening), there is an increment in traffic of about 4 peak hour trips in the morning, and 9 peak hour trips in the evening. These figures are reflected in the Traffic Statement (Exhibit 8), and the Planning Department staff concurred in their staff report. The transportation policy area review (TPAR) can also be met at the time of building permitting. Tr. 74-75.

In response to a question about the standards required for the townhouse Floating zone, as specified in Section 59-7.2.1.E. of the Zoning Ordinance, Mr. Eapen testified that, in his opinion, this proposal would not generate traffic exceeding the critical lane volume or volume capacity ratio standard as applicable under the Planning Board's LATR Guidelines, and both the TPAR and LATR findings will be met. Tr. 75-76.

Mr. Eapen also addressed Mrs. Weiss's concern about the classification of Kensington Parkway (Exhibit 31). He noted that page 96 of the Kensington/Wheaton Master Plan, clearly presents the relevant section of Kensington Parkway as a park road. In his professional opinion, that section of the road therefore meets the zoning requirement that it be a non-residential road. Tr. 76-78.



Mr. Eapen further testified that a sight-distance study (Exhibit 29(1)) clearly shows that the sight distance for the proposed driveway will be more than adequate for the local speed limits. Tr. 78-79. Mr. Eapen noted that the Zoning Ordinance parking requirement is two parking spaces per unit. In addition to the two garage spaces for each unit, each of the units will have a driveway which is 20 feet wide, accommodating two additional vehicles. That is double the code requirement. Tr. 79-80.

## V. 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 to the Council that the proposed development will meet the standards set forth in the new Zoning Ordinance that went into effect on October 30, 2014, and that it will be consistent with a coordinated and systematic development of the regional district, as required by the 2012 Maryland Land Use Article, Code Ann. § 21-101(a)(4)(i).<sup>9</sup>

Montgomery County has many Floating zones, including the TF Zones. The TF-12 Zone contains development standards and a post-zoning review process that generally delegate to the Planning Board the details of site specific issues such as building location, stormwater control,

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<sup>9</sup> Effective October 1, 2012, the Regional District Act, Article 28, Md. Code Ann., was re-codified, without a change in substance, into a new “Land Use Article.” Section § 21-101(a)(4)(i) of the Land Use Article contains the rough equivalent of the previous language in Article 28, Md. Code Ann., § 7-110.

vehicular and pedestrian routes, landscaping and screening. The Council has a broader and more discretionary role in determining whether to approve a rezoning.

Under the old Zoning Ordinance, a request to rezone a property to a Residential Townhouse Floating zone (e.g., RT-10) required three Council findings: 1. That the proposed development would satisfy the purpose and requirements of the new zone; 2. That the proposed use would be compatible with surrounding development; and 3. That the rezoning would be in the public interest. The new Zoning Ordinance requires a more structured and detailed analyses for the Council's review of rezoning applications, as follows:

**Zoning Ordinance §59-7.2.1.E. establishes a set of “Necessary Findings” the Council must make for any Floating Zone application:**

- 1. A Floating zone application that satisfies Article 59-5 may not be sufficient to require approval of the application.*
- 2. For a Floating zone application the District Council must find that the floating zone plan will:*
  - a. substantially conform with the recommendations of the applicable master plan, general plan, and other applicable County plans;*
  - b. further the public interest;*
  - c. satisfy the intent, purposes, and standards of the proposed zone and requirements of this Chapter;*
  - d. be compatible with existing and approved adjacent development;*
  - e. generate traffic that does not exceed the critical lane volume or volume/capacity ratio standard as applicable under the Planning Board's LATR Guidelines, or, if traffic exceeds the applicable standard, that the applicant demonstrate an ability to mitigate such adverse impacts; and*
  - f. when applying a non-Residential Floating zone to a property previously under a Residential Detached zone, not adversely affect the character of the surrounding neighborhood.*

As is apparent, Finding 2.c. of these “Necessary Findings” incorporates requirements spelled out elsewhere in the Code-specifically under sections that establish “the intent, purposes and standards” of the TF-12 Zone. Those standards are found in Sections 59-5.1.2., 5.1.3., 5.2.1., 5.2.2., 5.2.3., 5.2.4. and 5.2.5. of the new Zoning Ordinance. This report will first address the general “Necessary Findings” set forth above, and will then review the specific standards which must be met

to rezone to a TF-12 Zone.

When the reclassification sought by an applicant is recommended by the Planning Board, approval of the rezoning by the Council requires an affirmative vote of 5 Council members; however, when the Planning Board does not recommend the reclassification sought (or if approval would be contrary to the recommendation of the municipality in which the property is located), the Zoning Ordinance requires an affirmative vote of 6 members of the Council for approval. Zoning Ordinance §59-7.2.1.F.2. The Planning Board did recommend approval of the rezoning and no municipality is involved in this case, so a simple majority of 5 members of the Council is required for approval.

**A. The “Necessary Findings” Required by Zoning Ordinance §59-7.2.1.E.2.**

*For a Floating zone application the District Council must find that the floating zone plan will:*

*a. substantially conform with the recommendations of the applicable master plan, general plan, and other applicable County plans;*

For the reasons set forth in Part III.F. of this report, the Hearing Examiner finds that the proposed Floating Zone Plan will substantially conform with the recommendations of the applicable master plan, general plan, and other applicable County plans.

*b. further the public interest;*

Applicant’s land planner, Joshua Sloan, testified that this proposal would further the public interest of the county. It will provide a modest increase in density where it can offer housing to accommodate the increases in employment opportunities in the nearby Walter Reed Hospital and the federal buildings to the southwest. It is located in an area that is not going to negatively impact schools. It is in an area that has infrastructure that can accommodate it. It will be increasing the amount of stormwater treated, and thereby further protecting the important Rock Creek Park to the northwest of the site. And, it will be mitigating any impacts to trees and providing a significantly greater tree canopy with replantings on the site. Tr. 53-54.

Technical Staff agreed, stating (Exhibit 28(b), p. 15):

The project furthers the public interest in many regards. The redevelopment of the site will replace four aging single-family houses with up to 16 townhouses that fit within the character of the surrounding area. Connections to the nearby Rock Creek Park will provide opportunities for the new residents to enjoy the existing parkland. Environmental improvements to the site will be provided in the form of updated and environmentally sensitive stormwater management facilities. Additional housing at this location will provide support for the many nearby employment centers and commercial businesses near the site. The site is already served by nearby transit infrastructure, such as the Medical Center Metro, Ride On Bus Route 33, the Kensington MARC Station, and the Capital Beltway. The site is also near the future Connecticut Avenue Purple Line station. The improvements proposed are for an infill location that has existing public water and sewer capacity and school system capacity. All of the above reasons justify a sufficient relationship to the public interest to warrant the proposed project.

Based on this undisputed evidence, the Hearing Examiner finds that the proposed development will further the public interest.

*c. satisfy the intent, purposes, and standards of the proposed zone and requirements of this Chapter;*

For the reasons set forth below in Parts V.B., V.C., V.D. and V.E. of this report, the Hearing Examiner finds that the proposed Floating Zone Plan will satisfy the intent, purposes and standards of the proposed zone and the requirements of the Zoning Ordinance.

*d. be compatible with existing and approved adjacent development;*

Land planning expert, Joshua Sloan, testified that the proposed development will be compatible with the surrounding area. It will be expanding the park-like setting and incorporating it into the park-like environment. There are no neighbors to negatively impact. The primary way it protects the neighborhood is by taking a lot of the pressure of redevelopment off of those existing neighborhoods and placing something with a little bit higher density in an area where it will not have negative impacts. Tr. 48-50, 60-63. Technical Staff agreed, stating (Exhibit 28(b), p. 15):

The proposed project is compatible with its surrounding conditions. There are no immediately adjacent homes near the subject property, so there will be no adverse impact from the proposal to any nearby resident. The townhomes will be designed

with a height, massing, and building materials that will ensure the project's compatibility with its natural parkland surroundings.

Based on this undisputed evidence, the Hearing Examiner finds that the proposed development will be compatible with existing and approved adjacent development.

*e. generate traffic that does not exceed the critical lane volume or volume/capacity ratio standard as applicable under the Planning Board's LATR Guidelines, or, if traffic exceeds the applicable standard, that the applicant demonstrate an ability to mitigate such adverse impacts; and*

For the reasons set forth in Part III.G. of this report, the Hearing Examiner finds that the proposed development will not generate traffic that exceeds the critical lane volume or volume/capacity ratio standard as applicable under the Planning Board's LATR Guidelines.

*f. when applying a non-Residential Floating zone to a property previously under a Residential Detached zone, not adversely affect the character of the surrounding neighborhood.*

This provision is inapplicable because the Floating zone being proposed is residential.

### **B. The Intent of the Zone as set forth in Section 59-5.1.2.**

The next step in the review process is a determination of whether the proposed development will satisfy the intent and purpose of the TF-12 Zone. These standards are set forth in **Zoning Ordinance §59-5.1.2:**

*The Residential Floating, Commercial/Residential Floating, Employment Floating, and Industrial Floating zones are intended to provide an alternative to development under the restrictions of the Euclidean zones mapped by Sectional Map Amendment (the Agricultural, Rural Residential, Residential, Commercial/Residential, Employment, Industrial, and Overlay zones). To obtain a Floating zone, an applicant must obtain approval of a Local Map Amendment under Section 7.2.1. The intent of the Floating zones is to:*

- A. *Implement comprehensive planning objectives by:*
  1. *furthering the goals of the general plan, applicable master plan, and functional master plans;*
  2. *ensuring that the proposed uses are in balance with and supported by the existing and planned infrastructure in the general plan, applicable master plan, functional master plan staging, and applicable public facilities requirements;*

*and*

*3. allowing design flexibility to integrate development into circulation networks, land use patterns, and natural features within and connected to the property; and*

**B. Encourage the appropriate use of land by:**

*1. providing flexible applicability to respond to changing economic, demographic, and planning trends that occur between comprehensive District or Sectional Map Amendments;*

*2. allowing various uses, building types, and densities as determined by a property's size and base zone to serve a diverse and evolving population; and*

*3. ensuring that development satisfies basic sustainability requirements including:*

*a. locational criteria,*

*b. connections to circulation networks,*

*c. density and use limitations,*

*d. open space standards,*

*e. environmental protection and mitigation; and*

**C. Ensure protection of established neighborhoods by:**

*1. establishing compatible relationships between new development and existing neighborhoods through limits on applicability, density, and uses;*

*2. providing development standards and general compatibility standards to protect the character of adjacent neighborhoods; and*

*3. allowing design flexibility to provide mitigation of any negative impacts found to be caused by the new use.*

The first test listed under this section is whether the proposal will:

**A. Implement comprehensive planning objectives by:**

*1. furthering the goals of the general plan, applicable master plan, and functional master plans;*

*2. ensuring that the proposed uses are in balance with and supported by the existing and planned infrastructure in the general plan, applicable master plan, functional master plan staging, and applicable public facilities requirements; and*

*3. allowing design flexibility to integrate development into circulation networks, land use patterns, and natural features within and connected to the property;*

The standard set forth in §59-5.1.2.A.1. is, of course, repetitive of the previously discussed Master Plan standards, and for the reasons set forth in Part III.F. of this report, the Hearing Examiner finds that the proposed Floating Zone Plan will further the goals of the general plan, applicable master plan, and functional master plans.

As to §§59-5.1.2.A.2 and A.3, land planner Joshua Sloan testified that the proposed use is

supported by existing and planned infrastructure, in that there is available transit, including a bus line that goes right to the Metro and a future purple line station, within about a mile. There are also existing facilities for utilities that can be tied into, so there will not be a need for increased services. Water and sewer service is provided for the site without the need for an upgrade or a pump station. All three elementary, middle and high school levels are under 105 of percent capacity, so there will not be an extra impact fee for schools. The site can also access existing circulation networks, in that there is a bike route that goes directly to services within three miles, both to the north in Kensington, and to the south in Chevy Chase. It is also within three quarters of a mile of recreation facilities, provided by a public park and a long walking path. Tr. 48-51. Technical Staff agreed that “The subject application will be adequately served by public facilities [for water and sewer, schools, police, fire and rescue],” as set forth on pp. 7-8 of the Staff report (Exhibit 28(b)).

Technical Staff also determined that the subject site “is an appropriate location for townhouse development given its locational characteristics.” Exhibit 28(b), p. 8. Staff noted (Exhibit 28(b), p. 9):

The project will provide 16 townhomes in a location that is close to some of the County’s major employment centers and entertainment districts, such as downtown Bethesda and White Flint. The site’s location is within close proximity to multiple transit stations and bus stops. The Property is directly on Ride On Route 33 that provides a direct connection from the site to the Medical Center Red Line Metro Station and Glenmont Red Line Metro Station. The site provides convenient biking access to many nearby employment centers: it is 1.8 miles from NIH and Walter Reed, 1.5 miles from the Kensington MARC Station, and 1.6 miles from Kensington Town Center. The property is currently served by public water and sewer and fire and rescue facilities. The Bethesda-Chevy Chase School Cluster is not in a moratorium.

Based on this record, the Hearing Examiner finds that the proposed development will satisfy the intent standards for the TF-12 Zone as set forth in §59-5.1.2.A.

The second portion of the intent provision under this section asks whether the proposal will:

***B. Encourage the appropriate use of land by:***

- 1. providing flexible applicability to respond to changing economic,*

*demographic, and planning trends that occur between comprehensive District or Sectional Map Amendments;*

*2. allowing various uses, building types, and densities as determined by a property's size and base zone to serve a diverse and evolving population; and*

*3. ensuring that development satisfies basic sustainability requirements including:*

*a. locational criteria,*

*b. connections to circulation networks,*

*c. density and use limitations,*

*d. open space standards,*

*e. environmental protection and mitigation; and*

Land Planner Joshua Sloan testified that the proposal will encourage the appropriate use of land, as called for in Section 59-5.1.2.B, based on the factors listed in response to the previous section and because the project will also provide housing for the expanding employment base, federal government primarily, just to the southwest of the site. Tr. 48-51. Technical Staff agreed, stating (Exhibit 28(b), pp. 9-10):

The proposed project encourages the appropriate use of land by creating a sense of place that can significantly improve upon the poorly planned urban conditions that severed the outlying homes of the subject property from their original neighborhood. The proposal will have no negative impact upon any nearby residential neighborhood or commercial activity, as the subject property is encircled by natural or parkland settings and the Capital Beltway. The project is adequately set back from Rock Creek Park's walking and biking trails and picnic areas so that the creation of a neighborhood community in this location will not adversely affect the current use of the park.

The project will also provide numerous other benefits, such as providing much-needed housing choice near major downcounty employment centers and commercial settings (NIH, Walter Reed, Bethesda CBD, White Flint, Chevy Chase Lake Shopping District, and Kensington Town Center), increasing density near existing and planned transit infrastructure (Medical Center Metro Station, Connecticut Avenue Purple Line Station, Kensington MARC Station, Ride On Route 33 between Medical Center and Glenmont Metro stations, and easy access to the Capital Beltway).

This application is an example of using a flexible floating zone to respond to changing economic and demographic trends between sectional map amendments. The Kensington-Wheaton Master Plan has not been updated since 1989, over 25 years ago. Since the 1980s, substantial change has occurred in this area of the County, including tremendous population, employment, and retail growth in the nearby downcounty areas. Further, thousands of new jobs were brought to the area with the relocation of Walter Reed Medical Center. Housing preferences have shifted to smaller, more urban dwellings, such as townhomes.



Staff believes that the proposed project provides the appropriate use of land by responding to changing demographic trends to serve a diverse and evolving County population.

Based on this undisputed evidence, the Hearing Examiner finds that the proposed development will satisfy the intent standards for the TF-12 Zone, as set forth in §59-5.1.2.B., and will encourage the appropriate use of the land.

The third prong of the intent provision for the zone seeks to:

***C. Ensure protection of established neighborhoods by:***

- 1. establishing compatible relationships between new development and existing neighborhoods through limits on applicability, density, and uses;*
- 2. providing development standards and general compatibility standards to protect the character of adjacent neighborhoods; and*
- 3. allowing design flexibility to provide mitigation of any negative impacts found to be caused by the new use.*

Land Planner Joshua Sloan testified that, in accordance with Section 5.1.2.C , the proposed development will be compatible with the surrounding area. It will be expanding the park-like setting and incorporating it into the park-like environment. There are no neighbors to negatively impact. The primary way it protects the neighborhood is by taking a lot of the pressure of redevelopment off of those existing neighborhoods and placing something with a little bit higher density in an area where it will not have negative impacts. Tr. 48-50.

Technical Staff agreed, stating (Exhibit 28(b), p. 10):

The proposed project is compatible with the surrounding area. The project has been specifically designed to blend well with its natural and parkland setting, with connections from the development to adjacent sidewalks and trails. There are no immediately adjacent homes or commercial uses near the subject property. The proposed townhouse community is buffered by wooded setbacks or transit infrastructure on all sides, so there will be no adverse impact from the proposal on any established neighborhood. The project's scale has been established at a height and massing that allows the surrounding tree cover to buffer and screen the townhomes from any nearby users of Rock Creek Park. Further, the final design of the townhomes, including the proposed construction materials, will be selected to allow the homes to be compatible with the site's natural woodland setting.

The compatibility requirements of this section are repetitive of the compatibility findings required in §59-7.2.1.E.2.d, above. As was stated there, the Hearing Examiner finds that the proposed development will be compatible with existing and approved adjacent development.

**C. The Applicability of the Zone as set forth in Section 59-5.1.3.**

Section 59-5.1.3. of the new Zoning Ordinance sets up a series of tests to determine whether the requested Floating zone may be applied to the site in question. To avoid repetition, each subsection is listed separately below, followed by the Hearing Examiner’s finding on each:

***A. A Floating zone must not be approved for property that is in an Agricultural or Rural Residential zone.***

Subsection “A” is not applicable since the subject site is in a Residential zone, not in either an Agricultural or a Rural Residential zone.

***B. If a Floating zone is recommended in a master plan, there are no prerequisites for an application. For properties with a master plan recommendation for a Floating zone for which an application can no longer be made as of October 30, 2014, the following table identifies the equivalent Floating zones for which an applicant may apply:***

<b><i>Master Plan Recommended Floating Zone</i></b>	<b><i>Equivalent Floating Zone</i></b>
<i>C-Inn</i>	<i>None</i> <i>(See Use Table under Section 3.1.6)</i>
<i>R-MH</i>	<i>RDF</i>
<i>RT-6.0, RT-8.0, RT-10.0, RT-12.5, RT-15.0</i>	<i>TF</i>
<i>R-H, R-4plex</i>	<i>AF</i>
<i>P-D</i>	<i>AF or CRNF</i>
<i>C-T</i>	<i>CRNF</i>
<i>MXN, MXP, PNZ, PRC, T-S</i>	<i>CRTF</i>
<i>H-M, TS-M, TS-R</i>	<i>CRF</i>
<i>C-3, PCC</i>	<i>GRF</i>
<i>C-P, I-3, O-M</i>	<i>EOFF</i>
<i>RS</i>	<i>IMF</i>

Subsection “B” is not applicable since the Kensington-Wheaton Master Plan neither recommends nor opposes a Floating zone on the subject site. It is silent on the issue.

***C. If a Floating zone is not recommended in a master plan, the following apply:***

***1. The maximum allowed density is based on the base zone and on the size of the tract as stated in Division 5.2 through Division 5.5. Any density bonus requested under Chapter 25A may be added to the density allowed under Division 5.2 through Division 5.5 and included in the units per acre or FAR of the zone requested.***

Subsection “C” is applicable since the Kensington-Wheaton Master Plan does not expressly recommend a Floating zone on the subject site. Subsection “C.1.” requires the maximum density to be calculated in accordance with Section 59-5.2.5, which is done in the next part of this report. As will be shown there, the proposed use of 16 townhomes on 1.41 acres will be within the maximum density allowed (12 units per acre). No density bonus has been requested in this case.

***2. Residential Base Zone***

***a. When requesting a Residential Detached Floating (RDF) zone for a property with a Residential base zone:***

- i. If neither commercial uses nor any increase in density above that allowed by the base zone is requested, there are no prerequisites for an application;*
- ii. If a commercial use or an increase in density above that allowed by the base zone is requested, the application must satisfy a minimum of 2 prerequisites for each of the categories under Section 5.1.3.D.*

Subsection “C.2.a” is not applicable since the Applicant is not requesting a Residential Detached Floating (RDF).

***b. When requesting a Townhouse Floating (TF) zone, Apartment Floating (AF) zone, or Commercial Residential Neighborhood Floating (CRNF) zone for a property with a Residential base zone:***

- i. The property must front on a nonresidential street or must confront or abut a property that is in a Residential Townhouse, Residential Multi-Unit, Commercial/Residential, Employment, or Industrial zone; and*
- ii. The application must satisfy a minimum of 2 prerequisites for each of the categories under Section 5.1.3.D.*

Subsection “C.2.b” is applicable since the Applicant is requesting a Townhouse Floating (TF-

12) zone for a property with a Residential base zone (R-90). Thus, it must meet both tests set forth in subsections “C.2.b.i. and ii.” As discussed in Part III.I., on page 30 of this report, Kensington Parkway, in the area of the subject site, is classified as a park road, not a residential street, and Glenmoor Drive is to be abandoned as a necessary prerequisite to this project. Therefore, the first test is satisfied. As will be seen below, the application meets a minimum of 2 prerequisites for each of the categories under Section 5.1.3.D., thus satisfying the second test in this subsection.

*c. When requesting a Commercial Residential Floating (CRF) zone, Commercial Residential Town Floating (CRTF) zone, or any Employment Floating zone (NRF, GRF, EOFF, LSCF) for a property with a Residential base zone:*

*i. The property must front on a nonresidential street or must confront or abut a property that is in a Commercial/Residential, Employment, or Industrial zone; and*

*ii. The application must satisfy a minimum of 2 prerequisites for each of the categories under Section [5.1.3.D.](#)*

*d. When requesting any Industrial Floating zone (ILF or IMF) for a property with a Residential base zone:*

*i. The property must abut a property in an Industrial zone; and*

*ii. The application must satisfy a minimum of 2 prerequisites for each of the categories under Section [5.1.3.D.](#)*

### **3. Non-Residential Base Zone**

*When requesting a Floating zone for a property with a non-Residential base zone there are no prerequisites for an application.*

Subsection “C.2.c.” is not applicable since the Applicant is not requesting a Commercial Residential Floating (CRF) zone, Commercial Residential Town Floating (CRTF) zone, or any Employment Floating zone (NRF, GRF, EOFF, LSCF). Similarly, Subsection “C.3.” is not applicable because the base zone in this case is residential.

### ***Section 5.1.3.D. Prerequisites***

Prerequisites for the Townhouse Floating Zones are listed in the Table below. The first two columns of the table duplicate the table set forth in the Zoning Ordinance. In the right-hand column, Technical Staff has checked off the two prerequisites in each of the three categories that the application satisfies in this case (Exhibit 28(b), p. 12):

Category	Prerequisite Choices	Met
<b>Transit &amp; Infrastructure</b>	At least 75% of the site is within ¼ mile of a Level 3, ½ mile of a Level 2, or ¾ mile of a Level 1 transit station/stop.	
	The site has frontage on and vehicular, bicycle, and pedestrian access to at least 2 roads, at least one of which is nonresidential.	
	The site is served by existing water and sewer infrastructure that will not require either an upgrade to the service line or installation of a pump station due to the proposed development.	√
	All signalized intersections within ¼ mile of the site boundary are operating below the applicable congestion standard.	√
	The project is age-restricted or senior housing, or if proposing development that may generate students, the site must not be in an area that is under moratorium due to school capacity or result in a school utilization rate greater than 120% because of the proposed development. For any site within 2 school clusters, only the portions of the site that satisfy this requirement can proceed.	√
<b>Vicinity &amp; Facilities</b>	The site is in a transitional location between property in an existing Residential Multi-Unit, Residential Townhouse, or non-Residential zone and property in a Residential Multi-Unit, Residential Townhouse, or Residential Detached zone.	
	The site is adjacent to a bicyclist route that provides access to commercial services within 3 miles.	√
	The site is adjacent to a route that provides access to an existing or master-planned school within ½ mile.	
	The site is adjacent to a pedestrian route that provides access to existing public park and recreation facilities that satisfy a minimum of existing public park and recreation facilities that satisfy a minimum of 30% of the recreation demand under the Planning Board's Recreation Guidelines, as amended, within ¾ mile.	√
	The site is adjacent to a pedestrian route that provides access to an existing grocery store or County-permitted farmer's market within ¼ mile.	
<b>Environment &amp; Resources</b>	The limits of disturbance for the development will not overlap any stream, floodplain, wetland, or environmental buffer or any slopes greater than 25% or slopes greater than 15% where erodible soils are present.	√
	The site does not contain any forest or, if forest is present, the limits of disturbance for the development will not reduce the forest cover to less than an area of 10,000 square feet and width of 35 feet at any point.	
	The site does not contain any rare, threatened, or endangered species or critical habitats listed by the Maryland Department of Natural Resources.	√
	The site is on land containing contaminated soils and is developed in conjunction with an environmental Voluntary Cleanup Program under the Maryland Department of Environmental Protection.	
	The site is currently developed with more than 75% impermeable surfaces, including paving and roofed-structures, and does not currently provide stormwater management meeting the standards applicable on the date of filing.	

Staff then explains how the application meets the listed Prerequisites (Exhibit 28(b), p. 13):

*Transit & Infrastructure:* the site is served by a 10” sewer line and an 8” water line, both running along the adjacent Kensington Parkway right-of-way. The proposed townhouse units will not require an upgrade to this service line, nor will the installation of a pump station be required. There are no signalized intersections within ¼ mile, so no signalized intersections within ¼ mile of the proposed development exceed the applicable congestion standard. Finally, the site is within the Bethesda-Chevy Chase Cluster, which is not in moratorium; the proposed development will not result in a utilization rate greater than 120 percent.

*Vicinity & Facilities:* the site is adjacent to a bicyclist route with 18 miles of trails and additional routes to commercial services in both Kensington and Chevy Chase both within 3 miles. The site is also adjacent to a pedestrian route that provides access to existing public parks within ¾ of a mile – Rock Creek Park and North Chevy Chase Local Park – with facilities that exceed 30 percent of the Planning Board’s Recreation Guidelines requirements, including trails, natural areas, picnic and seating areas, playgrounds, and athletic facilities. (See Transportation Memo Attachment 3)

*Environment & Resources:* At this time, the proposed development meets the following two environmental prerequisites:

1. *Prerequisite: The limits of disturbance for the development will not overlap any stream, floodplain, wetland or environmental buffer or any slopes greater than 25% or slopes greater than 15% where erodible soils are present.*

The concept plan shows a floodplain boundary based on FEMA mapping extending onto the northeastern edge of the property. The plan respects the floodplain as mapped, including a 25-foot building restriction line. The floodplain represents the outermost boundary of the environmental buffer for Rock Creek adjacent to the property. This buffer incorporates the stream buffer, wetlands and wetland buffers, floodplain and steep slopes.

2. *Prerequisite: The site does not contain rare, threatened, or endangered (RT&E) species or critical habitats listed by the Maryland Department of Natural Resources.*

The Maryland Department of Natural Resources (DNR) issued a letter on May 2, 2014, indicating that DNR has no record of rare, threatened, or endangered species (RT&E) or critical habitats listed by the Maryland Department of Natural Resources on this site.

Based on this undisputed record, the Hearing Examiner finds that the subject Floating Zone application meets all the tests set forth in Section 5.1.3 for applying the requested TF-12 Zone to the site in question. Section 5.1.4 notes that an application for a Floating Zone must be approved as a

Local Map Amendment under Section 7.2.1. As discussed in Part V.A. of this report, the application does meet the requirements set forth under Section 7.2.1. Section 5.1.5 is inapplicable to the zone sought in this case.

**D. The Residential Floating Zones, their Purpose and Uses, as set forth in Section 5.2**

Zoning Ordinance §59-5.2 lists the Residential Floating Zones, specifies their purpose, designates the allowed uses and building types and sets forth the applicable development standards. The development standards are discussed in the next part of this report, Part V.E. In the current part – Part V.D. – we will address the remainder of Section 5.2

Section 59-5.2.1 lists the Zones included as Residential Floating zones under the new Code:

***Section 5.2.1. Zones***

***A. There are 3 Residential Floating zone categories.***

***B. Residential Floating zones are mapped using the zone's initials followed by a number indicating the maximum allowed units per acre approved by a Local Map Amendment under Section 7.2.1:***

- 1. Residential Detached – Floating (RDF-#);***
- 2. Townhouse – Floating (TF-#); and***
- 3. Apartment – Floating (AF-#).***

The Zone sought in the instant case is the Townhouse Floating Zone, at a density of 12 units per acre.

It is known by the shorthand label, TF-12.

***Section 5.2.2. Purpose***

***The purpose of the Residential Floating zones is to:***

- A. allow flexibility in residential development, including site layout, lot size, and placement;***
- B. allow residential development of a certain size to provide limited accessory commercial uses for the daily needs of the community; and***
- C. provide residential development that is compatible with the surrounding neighborhood.***

The Applicant in this case has utilized the flexibility of the zone to plan a residential development that will be compatible with the surrounding community, as previously discussed. No accessory on-site commercial uses are planned due to the small size of the development. Based on the undisputed record, the Hearing Examiner finds that the subject Floating zone application satisfies the purpose of

the TF-12 Zone.

Part A. of Section 5.2.3. lists the permitted land uses allowed in the Residential Floating Zones.

Only the portion of the table that applies to the Townhouse Floating zones is reproduced below:

<i>Floating Zone Category</i>	<i>Approved Density</i>	<i>All uses Allowed</i>
<i>TF</i>	< 12 units/acre and < 150 total units	TLD
	< 12 units/acre and ≥ 150 total units	TLD, CRN
	≥ 12 units/acre and < 150 total units	TMD, THD
	≥ 12 units/acre and ≥ 150 total units	TMD, THD, CRN

For a TF-12 development of 16 units, at a density greater than or equal to 12 units per acre, the Euclidean Zone uses of Townhouse Medium Density (TMD) and Townhouse High Density (THD) would be permitted. Looking at the Use Table in Section 59-3.1.6, “Townhouse Living,” which is the only use proposed in this case, is a permitted use in both the TMD and THD Zones.

Part B. of Section 5.2.3. contains provisions which govern the permitted uses, as shown below:

***B. Use Provisions***

- 1. In the Residential Floating zones the maximum area of the site for nonresidential uses is 25% and the maximum nonresidential density on that 25% of the site is 0.25 FAR.*
- 2. The lot on which any approved commercial uses are located must be separated from the boundary of the tract included in the Local Map Amendment by residential lots or open space and must not share a lot line with any properties in a Residential zone not included in the Local Map Amendment.*
- 3. An applicant may voluntarily prohibit specific uses or establish binding elements that restrict specific uses to support the necessary findings of approval under Section 7.2.1.*

None of the listed restrictions apply to the proposed development because no non-residential uses are proposed; nor are binding elements proposed.

Section 5.2.4 lists the permitted building types in the Residential Floating Zones.



**Section 5.2.4. Building Types**

**A. Building types are allowed as follows:**

	<i>Detached House or a Building for a Cultural Institution, Religious Assembly, Public Use or conditional use allowed in the zone</i>	<i>Duplex</i>	<i>Townhouse</i>	<i>Apartment Building</i>	<i>Multi Use Building</i>	<i>General Building</i>
<b>Zone</b>						
RDF	A				S	S
TF	A	A	A		S	S
AF	A	A	A	A	S	S

*KEY A = Allowed S = Subject to approval of commercial uses under Section 5.2.3*

**B. An applicant may voluntarily prohibit specific building types or establish binding elements that restrict specific building types to support the necessary findings of approval under Section 7.2.1.**

There are no bidding elements proffered in this case; however, Applicant’s Floating Zone Plan calls for only townhouses.

Based on this undisputed record, the Hearing Examiner finds that the subject Floating zone application satisfies all the requirements set forth in Section 5.2 for the purpose, permitted uses and allowed building types in the requested TF-12 Zone.

**E. Development Standards for the Zone as set forth in Section 5.2.5.**

Development Standards for the TF-12 Zone are spelled out in Zoning Ordinance §59-5.2.5:

**A. Density**

**1. Residential Density**

- a. *If a Floating zone is recommended in a master plan, residential density must not exceed that recommendation, except where MPDUs above the minimum required or TDRs are provided.*
- b. *If a Floating zone is not recommended in a master plan and the base zone is Residential, the following residential density limits apply, calculated on site area:*

Pre-Existing Euclidean Zone	Base Lot/Site Size	Base Density in Units per Acre	Maximum Allowed Density in Units per Acre		
			Less than 3 times the base lot/site size	3 to <6 times the base lot/site size	At least 6 times the base lot/site size
RE-2, RE-2C	2 acres	0.50	0.50	0.75	1.00
RE-1	40,000 SF	1.09	1.09	1.63	2.18
R-200	20,000 SF	2.18	2.18	3.27	4.36
<i>R-90</i>	<i>9,000 SF</i>	<i>4.84</i>	<i>4.84</i>	<i>7.26</i>	<i>12.00</i>
R-60	6,000 SF	7.26	7.26	10.89	14.52
R-40	4,000 SF	10.89	10.89	16.33	21.78
TLD	20,000 SF	9.00	9.00	13.50	18.00
TMD	20,000 SF	12.00	12.00	18.00	24.00
THD	40,000 SF	15.00	15.00	22.50	30.00
R-30	12,000 SF	14.50	14.50	21.75	29.00
R-20	16,000 SF	21.70	21.70	32.55	43.40
R-10	20,000 SF	43.50	43.50	65.25	87.00

Because the TF-12 Zone was not specifically recommended in the Kensington-Wheaton Master Plan, Subsection 5.2.5.A.1.a. does not apply to this development, but Subsection 5.2.5.A.1.b. does apply, and we must use the above table to determine the maximum allowed density for the development. Turning to the italicized row in the above table, we see that for a site that has an R-90 pre-existing Euclidean Zone, the base lot size is 9,000 square feet, and the base density is 4.84 units per acre. Since the lot size in this case is 61,349 square feet (1.41 acres), it is over 6 times larger than the base lot size of 9,000 square feet (*i.e.*,  $61,349/9,000 = 6.82$ ), which then points us to the final column. The final column in the table establishes the permitted density of 12 units per acre for this development. Applying that permitted density to the lot size of 1.41 acres yields the allowed number of townhouse units as 16 (1.41 acres X 12 DUs/acre = 16.92 DU maximum).

*c. If a Floating zone is not recommended in a master plan and the base zone is non-Residential, the following residential density limits apply, calculated on tract area:*

\* \* \*

This subsection (§5.2.5.A.1(c)) is not applicable to this development because it will be residential, and not commercial.

**2. Commercial Density**

*Commercial density, if allowed under Section 5.2.3, is limited to 0.25 FAR, calculated on 25% of the site's land area*

This subsection (§5.2.5.A.2) is not applicable to this development because it will be residential and not commercial.

**3. Modifications by Applicant**

*An applicant may limit density below the maximum allowed by Section 5.2.5.A to support the necessary findings of approval under Section 7.2.1.*

This subsection (5.2.5.A.3) is not applicable to this development because the Applicant is not limiting density to satisfy other provisions.

**B. Setback and Height**

1. *If a Floating zone is recommended in a master plan, height must not exceed that recommendation.*
2. *Maximum height and setbacks are established by the floating zone plan.*
3. *Height must satisfy the compatibility standards for the applicable building type under Section 4.1.8.B.*

Since the TF-12 Zone was not specifically recommended in the Kensington-Wheaton Master Plan, Subsection 5.2.5.B.1. does not apply to this development, but Subsections 5.2.5.B.2 and B.3. do apply in determining required setbacks and maximum heights. In accordance with Subsection 5.2.5.B.2., the Floating Zone Plan (Exhibit 38(a)) establishes a maximum height of 50 feet and the following setbacks: 2 feet from any detached dwelling lot or land classified in a one-family detached residential zone; 10 feet from any public street; 2 feet from Adjoining Lot (Side-End Unit); and 4 feet from Adjoining Lot (Rear).

**C. Lot Size**

*Minimum lot sizes are established by the floating zone plan.*

This provision calls for the minimum lots sizes to be established by the Floating Zone Plan. The Hearing Examiner interprets this section to be referring to the individual lots for each proposed unit. Although the site diagram on the FZP shows proposed townhouse lots of approximately 1,680 square feet each, the Project Data Table on the revised Floating Zone Plan (Exhibit 38(a)) specifies a minimum lot size of 1,000 square feet, with a note indicating that lot sizes depicted in the site diagram may be reduced due to final adjustments made at preliminary plan review. The Hearing Examiner agrees that the exact size of the individual lots will be worked out at site plan and preliminary plan review, and that the revised FZP gives sufficient detail regarding anticipated lot sizes for Council review at the rezoning stage.

**D. Coverage**

*Minimum open space must be provided as a percentage of the site area as determined by the most intense building type approved and density in units per acre.*

<b>Open Space Required</b>				
<b>Building Type</b>	<b>Minimum Open Space Required Based on Units per Acre</b>			
	<b>1-19 units/acre</b>	<b>20-39 units/acre</b>	<b>40-59 units/acre</b>	<b>60+ units/acre</b>
Detached House or a Building for a Cultural Institution, Religious Assembly, Public Use or conditional use allowed in the zone	0%	10%	10%	15%
Duplex	0%	10%	15%	20%
<i>Townhouse</i>	<i>10%</i>	<i>15%</i>	<i>20%</i>	<i>25%</i>
Apartment, Multi Use, or General Building	15%	20%	25%	30%

Since the building type will be townhouses, and the proposed density is 12 units per acre, the above table calls for a minimum of 10% open space in the development. Applicant’s Floating Zone Plan (Exhibit 38(a)) proposes to provide 20% open space, thus far exceeding the statutory minimum.

**E. General Requirements**

1. *Parking, recreation facilities, screening, and landscaping must be provided under Article 59-6 as required for the Euclidean zone that establishes uses under Section 5.2.3 for each applicable residential or commercial area.*
2. *The floating zone plan may provide for additional parking, open space, recreation facilities, screening, or landscaping or further restrict lighting to allow the District Council to make the necessary findings of approval under Section 7.2.1.*

Recreational facilities, screening and landscaping will be evaluated at site plan review. The minimum amount of parking is determined in Section 59-6.2.4.B., which calls for a minimum of 2 parking spaces per dwelling unit for townhouse living outside of a Parking Lot District, as shown below in the portion of the Table in Section 6.2.4.B that applies to “Residential Household Living.”

USE or USE GROUP	Metric	Agricultural, Rural Residential, Residential, and Industrial Zones	Commercial/Residential and Employment Zones		
			Within a Parking Lot District or Reduced Parking Area		Outside a Parking Lot District or Reduced Parking Area
			Baseline Minimum	Baseline Minimum	Baseline Maximum
<b>RESIDENTIAL</b>					
<b>Household Living</b>					
Single-Unit Living Two-Unit Living Townhouse Living	<i>Dwelling Unit</i>	2.00	1.00	2.00	2.00
Multi-Unit Living	Efficiency Dwelling Unit	1.00	1.00	1.00	1.00
	1 Bedroom Dwelling Unit	1.25	1.00	1.25	1.25
	2 Bedroom Dwelling Unit	1.50	1.00	1.50	1.50
	3+ Bedroom Dwelling Unit	2.00	1.00	2.00	2.00

As mentioned previously in this report, each unit will have its own two-car garage, plus each of

the units will have a driveway which is 20 feet wide, and can accommodate the parking of two additional vehicles. Tr. 79-80. Thus, Applicant's plan will provide double the number of parking spaces required by the Zoning Ordinance.

Based on this undisputed record, the Hearing Examiner finds that the subject Floating zone application meets all the development standards set forth in Section 5.2.5. of the Zoning Ordinance.

#### **F. The Impact of the Pending Abandonment of Glenmoor Drive**

The final zoning issue in this case concerns the proposed abandonment by the County of the Glenmoor Drive right-of-way adjacent to the single-family homes in the subject site. This project will only work if the abandonment is granted. As mentioned earlier in this report, the segment of Glenmoor Drive in question is currently the subject of abandonment proceedings before the County Executive. Exhibits 36(b) and (c), and Tr. 19-28. The State of Maryland's Highway Administration (SHA), which owns the property along the south and east sides of Glenmoor Drive (Exhibit 36(b), p. 2), has stated, in writing, that it has no objection to the abandonment. The letter also indicates that, if the roadway is abandoned, SHA has no interest in its 50% share of the roadbed. Exhibit 36(d).

Because rezonings cannot be made conditionally, the Hearing Examiner recommends that the Council not act on the instant rezoning application until it decides the abandonment application. Applicant's plan is to request County Council approval of the abandonment immediately before the District Council acts on the rezoning, which appears to be a reasonable way to handle the logistics of this matter. As of the date of the closing of the record in this case, the County Executive had not yet submitted his recommendation on the abandonment application.

### **VI. CONCLUSIONS**

Based on the foregoing analysis and after a thorough review of the entire record, the Hearing Examiner concludes that the proposed reclassification and development will meet the standards set forth in the new Zoning Ordinance that went into effect on October 30, 2014, and that it will be

consistent with a coordinated and systematic development of the regional district, as required by the Maryland Land Use Article, Code Ann. § 21-101(a)(4)(i) (2012). More specifically, the evidence demonstrates compliance with Zoning Ordinance §59-7.2.1.E., which spells out the general requirements for approval of a rezoning to a Floating zone, and with Sections 59-5.1.2., 59-5.1.3., 59-5.2.1., 59-5.2.2., 59-5.2.3., 59-5.2.4. and 59-5.2.5, which together detail the intent, purposes, and standards of the proposed TF-12 Zone.

## VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. H-101, requesting reclassification from the R-90 Zone to the Townhouse Floating (TF-12) Zone of 1.41 acres (61,349 square feet) of land known as Lots 1, 2, 3, and Part of 4, Block A of the Rolling Hills Subdivision, located at 9213 Kensington Parkway and 3619, 3621 and 3623 Glenmoor Drive, Chevy Chase, Maryland, and the adjacent Glenmoor Drive right-of-way to be abandoned by the County, be **approved** in the amount requested and subject to the specifications and requirements of the Floating Zone Plan, Exhibit 38(a); provided that the Council elects to first grant the right-of-way abandonment mentioned above, and that Applicant submits to the Hearing Examiner for certification a true copy of the Floating Zone Plan approved by the District Council within 10 days of approval, in accordance with §59-7.2.1.H.1.b. of the Zoning Ordinance.

Dated: May 21, 2015

Respectfully submitted,



Martin L. Grossman  
Hearing Examiner