

**BEFORE THE HEARING EXAMINER FOR MONTGOMERY COUNTY, MARYLAND**

Office of Zoning and Administrative Hearings

100 Maryland Avenue, Suite 200

Rockville, Maryland 20850

IN THE MATTER OF:	)	
Notley Road	)	
	)	
Applicant.	)	Local Map Amendment
	)	Application No. H-159
Notley Assemblage LLC	)	
	)	
Opposed to the Application.	)	
	)	
Keith Nusbaum	)	
	)	

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**PRE-HEARING STATEMENT IN OPPOSITION**

Keith Nusbaum (the “Opposition”) is submitting this Pre-Hearing Statement in opposition of the above referenced Local Map Amendment (“LMA”) submitted by Notley Assemblage LLC (the “Applicant”).

**I. STATEMENT OF GROUNDS FOR DENYING THE APPLICATION**

The property, subject to Application No. H-159 (the “Application”), is located in the northwest quadrant of the intersection of Notley Road and New Hampshire Avenue in Silver Spring, Maryland in the community known as Colesville (the “Property”). Specifically, the Property is an assemblage comprised of Part of Lot 1, Part of Lot 2, and Lots 3-5 in the “Price’s Subdivision” as recorded among the Montgomery County Land Records at Plat No. 1767 and two unrecorded parcels in “Beall’s Manor”.

The Property is currently zoned R-200 and is improved with several single-family homes and associated accessory structures. The LMA seeks to rezone the Property to the CRNF-1.0, C-0.0, R-1.0, H-50 zone to accommodate the development of a proposed 130 townhouse living units.

The evidence to be presented will demonstrate: (1) that the Property does not meet the Montgomery County Zoning Ordinance (“Zoning Ordinance”) Section 59.5.1.3 requirements for a CRNF Floating Zone, (2) that the Application seeks an impermissible single-use when the CRNF Zone requires mixed-use, and (3) that the Application cannot satisfy the required findings contained in Zoning Ordinance Sections 59.7.2.1.E.

### **A. Property Does Not Meet the Requirements for a Commercial/Residential Neighborhood Floating Zone**

The Zoning Ordinance sets forth strict prerequisites for a property to qualify as a Floating Zone in Section 59.5.1.3. As Applicant sets forth on pages 6 and 7 of their pre-hearing statement, “[t]hese ‘prerequisites’ were closely analyzed by the District Council in approving the 2014 Zoning Ordinance Re-Write. In fact, there was detailed discussion about where non-residential floating zones should be allowed and what criteria were appropriate for the pre-requisites [sic]. To address concerns expressed about the intrusion of non-residential zones in residential neighborhoods,” these prerequisites were drafted with specificity to significantly limit the number of properties in the County that are eligible for a non-residential Floating Zone. The District Council required in the Zoning Ordinance that Applicant satisfy two prerequisites per category under Section 59.5.1.3.D. Despite Applicant’s conclusory claims, evidence will show that the Property fails to satisfy two prerequisites in the Transit and Infrastructure category and two prerequisites in the Vicinity and Facilities category and, thus, cannot be rezoned as a CRNF Zone.

### **B. CRNF Requires Mixed Use Development**

Applicant’s Land Use Report and Pre-Hearing Statement incorrectly assert that CRNF zones may be single-use, while the plain reading of the Zoning Ordinance makes clear that CRNF is for mixed-use development. The purpose of CRNF zones is three parts, which are conjunctive – all three parts must be read together, as evidenced by “and” being used in Section 59.5.3.2B. Instead, Applicant only focuses on select parts of the purpose statement that suit them: “flexibility in uses” and “communities at a range of density and heights flexible enough to respond to various settings.” The Applicant simply ignores the requirement, written twice in the Zoning Ordinance, that the development within the CRNF is to be mixed-use. In support of their removal of the mixed-use development requirement, they site several prior LMA applications in which the District Council approved CRNF limited to a single-use. A review of the transcripts, filings, and recommendations in each of those cases highlight that there was no opposition to this issue in any of the dockets, and concerns about the requirement for mixed-use in CRNF was never raised or addressed. Moreover, in all those cases, the property was adjoining non-residential zoned properties and provided for direct connection between the property and locations that offered a mix of uses. Here the Property is surrounded entirely by residential zoned properties and there is no potential for mixed-use access. Ultimately, this Application is a case of first impression for the Office of Zoning and Administrative Hearings and the District Council with actual arguments and a recommendation and decision that must include analysis of this requirement.

Once the issue is analyzed, it is clear that CRNF Zones are intended for mixed-use development. For single-use residential development, such as Applicant is seeking, there are several residential zones available. Applicant claims that using CRNF over a Residential Floating

Zone provides more flexibility for various building typologies which are not available in other zones. This is simply incorrect. The Apartment Floating Zone, a Residential Floating Zone, provides for all the same residential options that are available to CRNF. Applicant, however, did not seek a Residential Floating Zone because it would result in a reduction in the density of their project. CRNF Zoning would permit them to put in 130 or 150 townhouses, or more. Residential Floating Zones, however, would limit their project to just 39 units. Ultimately, Applicant is attempting an end-around on the Zoning Ordinance so that they can maximize project density and construct dozens of townhouses where they are not permitted by the regulations.

### **C. Application Does Not Conform with the Master Plans**

Applicant erroneously claims that “the White Oak Master Plan’s recommendations remain in effect only to the extent that they are not inconsistent with Thrive 2050” (emphasis in original). Neither of the cases they cite support this interpretation and the plain language in Thrive 2050 provide that the White Oak Master Plan remains the regulatory zoning and development plan governing the Property. In fact, *Maryland-Nat. Capital Park and Planning Com’n v. Greater Baden-Aquasco Citizens Ass’n*, 412 Md. 73 (2009), states the opposite and explains that “the weight to be accorded a master plan or comprehensive plan recommendation depends upon the language of the statute, ordinance, or regulation establishing the standards pursuant to which the decision is to be made,” citing *Richmarr Holly Hills, Inc. v. Am. PCS, L.P.*, 117 Md. App. 607, 636, 701 A.2d 879, 893 (1997). One must then look at the language of both the White Oak Master Plan and Thrive 2050. Thrive 2050 states on page 2 that it “sets a vision for the county” with “broad, countrywide policy recommendations” that are to “provide guidance.” The White Oak Master Plan, in contrast, states that it “should be referred to . . . when decisions are made to affect the use of land within the plan’s boundaries.” White Oak Master Plan at viii. While Thrive 2050 should provide guidance, the underlying White Oak Master Plan controls within the plan’s boundaries.

The White Oak Master Plan, adopted in 1997, is still controlling and provides a legal guide for development in the area. When updates have been needed, they have been made, such as with the White Oak Science Gateway (WOSG) Master Plan that was adopted in 2014. Moreover, the northern part of the White Oak Master Plan covers an area that is little changed since 1997. Most of the property in the area was already developed (see White Oak Master Plan Fig. 10 and 11). As such, there has been no need to amend the current master plan and the conclusions in the plan are still valid.

The White Oak Master Plan identifies Colesville, in which the proposed development sits, as a community of “mostly low-density, single family detached residential.” (White Oak Master Plan page 10). The White Oak Master Plan further envisions the area remaining “residential in nature.” (White Oak Master Plan page 13) It further specifies that “[h]igher density residential development will be located around commercial centers and provide convenient access to shopping and transit.” (*Id.*) This higher density development was previously

performed in the Nottingham Woods neighborhood which was directly adjoining the commercial center. The Property in this Application is instead surrounded by residential zones and does not provide convenient access to shopping or transit.

The White Oak Master Plan further recommends retaining “the existing zoning designations in residential neighborhoods,” and “[e]ncouraging new residential development within residential neighborhoods that is compatible with surrounding neighborhoods and community.” White Oak Master Plan page 38. Based on the conclusions and recommendations in the White Oak Master Plan, there is no support for removing low-density single-family residences to replace them with high-density townhouses. Applicant attempts to justify nonconformance with the White Oak Master Plan by implying that one type of residential community is automatically compatible with all other residential communities. This is not true - the White Oak Master Plan does not recommend this and, in fact, recommends the opposite. White Oak Master Plan page 38.

To the extent Applicant relies on the guidance of Thrive 2050, their reliance also is misplaced. As they highlight, the Property is outside a growth center defined in Thrive 2050, and New Hampshire Avenue is not identified as a major corridor anywhere in the plan. Instead, Thrive 2050 establishes other major corridors, such as State Route 97 and US Route 29, as growth areas for infill housing. While the goals of Thrive 2050 are important for Montgomery County, they simply are not relevant to this property, as it is not in a growth area and not abutting a major corridor.

#### **D. Application’s Definition of Surrounding Neighborhood is Unjustifiable**

Applicant attempted to significantly increase the size of the surrounding neighborhood to argue that this development is simply part of a larger multi-use neighborhood -it is not. Surrounding neighborhood generally means areas around the property that are directly impacted by the development. Direct impacts generally include things like noise, sight lines, traffic, refuse, and environmental impacts. Applicant’s inclusion of the commercial shopping centers and townhouse PUD development to the south are outside the scope of the surrounding neighborhood as they are unlikely to experience direct impacts because of this Application. Properly defining the surrounding neighborhood results in only residential R-200, R-90, and RE-1 zoning being part of the surrounding neighborhood. This is a more accurate representation of those locations that will be directly impacted.

#### **E. Application Fails to Support the Necessary Findings of Section 59.7.2.1**

The Application fails to provide support for the District Council to make its necessary findings. Namely, the Application does not substantially conform to the master plans, it does not satisfy the intent and standards of the proposed zone, and it adversely affects the character of the surrounding neighborhood. In addition to the findings above, the evidence will show that the traffic study submitted with the Application was flawed, the Application is not compatible with

existing and approved adjacent development, and that the Application does not further the public interest.

## **II. REPORTS INTENDED TO BE INTRODUCED AT THE HEARING**

The Opposition will introduce the following report at the hearing.

1. Maryland Department of Transportation, State Highway Administration, Turning Movement Summary Report

The Opposition reserves the right to introduce additional materials at the public hearing on the Application as may be deemed necessary to refute information presented by Applicant.

## **III. SUMMARY OF EXPERT TESTIMONY**

The Opposition does not expect to call any expert witnesses but reserves the right to call expert witnesses in rebuttal as necessary.

## **IV. OTHER WITNESSES WHO WILL TESTIFY**

The Opposition intends to call the following witnesses to the extent not called by Applicant.

1. David Muller, Manager, Notley Assemblage LLC
2. Joshua Sloan, VIKI Maryland
3. Katie Wagner, Gorove Slade

## **V. ESTIMATED TIME REQUIRED FOR PRESENTATION**

It is estimated that up to one (1) hour will be required for the Opposition to present its case in chief.

This submission is intended to satisfy the requirement of the Office of Zoning and Administrative Hearings Land Use Rules of Procedure Section 3.5. If it is subsequently determined that new or supplemental information is necessary, the Opposition will make a supplement submission in a timely fashion.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Keith Nusbaum", written over a horizontal line.

Keith Nusbaum

Ex. A



Maryland Department of Transportation  
State Highway Administration  
Data Services Division  
Turning Movement Summary Report

Station ID: S1998150327

County: Montgomery

Comments:

Date: 10/25/2023 12:00:00 AM

Town: none

Location: MD 650 at Notley Rd

Weather: Sunny

Interval: 60 Min

PEAK	AM PERIOD	Start	End	Volume	LOS	V/C	PM PERIOD	Start	End	Volume	LOS	V/C
Hours	6:00AM-12:00PM	07:00	08:00	3645	C	0.74	12:00PM-19:00PM	17:00	18:00	3997	C	0.74

	MD 650					MD 650					Notlev Rd					Notley Rd					
	From North					From South					From East					From West					
Begin Hour	U.Turn	Left	Through	Right	TOTAL	U.Turn	Left	Through	Right	TOTAL	U.Turn	Left	Through	Right	TOTAL	U.Turn	Left	Through	Right	TOTAL	GrandTotal
00:00	0	0	81	2	83	1	34	86	0	121	0	0	0	0	0	0	1	0	21	22	226
01:00	0	0	31	0	31	1	18	43	0	62	0	0	0	0	0	0	1	0	12	13	106
02:00	0	0	16	0	16	3	7	34	0	44	0	0	0	0	0	0	1	0	8	9	69
03:00	0	0	35	0	35	0	10	27	0	37	0	0	0	0	0	0	0	0	8	8	80
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07:00	2	4	1878	12	1896	5	158	1306	2	1471	0	0	0	9	9	0	11	0	258	269	3645
08:00	2	4	1685	18	1709	9	179	1161	4	1353	0	1	0	9	10	0	6	0	218	224	3296
09:00	1	4	1256	11	1272	13	163	930	7	1113	0	0	0	12	12	0	10	0	200	210	2607
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AMPEAK	2	4	1878	12	1896	5	158	1306	2	1471	0	0	0	9	9	0	11	0	258	269	3645
PMPEAK	4	7	1626	36	1673	7	263	1784	2	2056	0	1	0	10	11	0	7	0	250	257	3997
DAYPEAK	4	7	1626	36	1673	7	263	1784	2	2056	0	1	0	10	11	0	7	0	250	257	3997



Maryland Department of Transportation  
State Highway Administration  
Data Services Division  
Turning Movement Summary Report

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County: Montgomery

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Date: 10/25/2023 12:00:00 AM

Town: none

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Weather: Sunny

Interval: 60 Min

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MD 650

MD 650

Notley Rd

Notley Rd

From North

From South

From East

From West

Begin Hour	School Children	Pedestrians	Bicycles	School Children	Pedestrians	Bicycles	School Children	Pedestrians	Bicycles	School Children	Pedestrians	Bicycles
00:00	0	0	0	0	0	0	0	0	0	0	0	0
01:00	0	0	0	0	0	0	0	0	0	0	0	0
02:00	0	0	0	0	0	0	0	0	0	0	0	0
03:00	0	0	0	0	0	0	0	0	0	0	0	0
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PMPEAK	0	0	0	0	0	0	0	3	0	0	7	0
DAYPEAK	0	0	0	0	0	0	0	3	0	0	7	0





Maryland Department of Transportation  
State Highway Administration  
Data Services Division  
Turning Movement Summary Report

Station ID: S1998150327

County: Montgomery

Comments:

Date: 10/25/2023 12:00:00 AM

Town: none

Location: MD 650 at Notley Rd

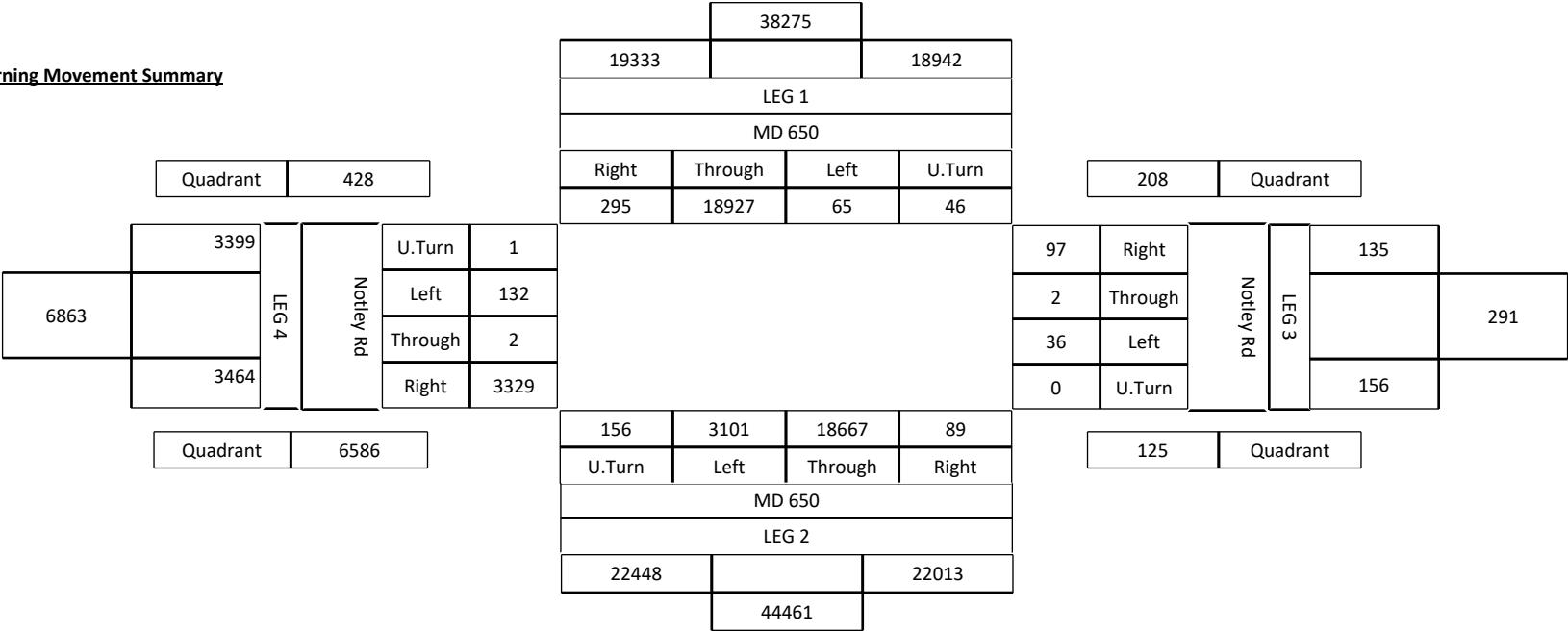
Weather: Sunny

Interval: 60 Min

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Hours	6:00AM-12:00PM	07:00	08:00	3645	C	0.74	12:00PM-19:00PM	17:00	18:00	3997	C	0.74



Turning Movement Summary





Maryland Department of Transportation  
State Highway Administration  
Data Services Division  
Turning Movement Summary Report

Station ID:

S1998150327

County:

Montgomery

Comments:

Date:

10/25/2023 12:00:00 AM

Town:

none

Location:

MD 650 at Notley Rd

Weather:

Sunny

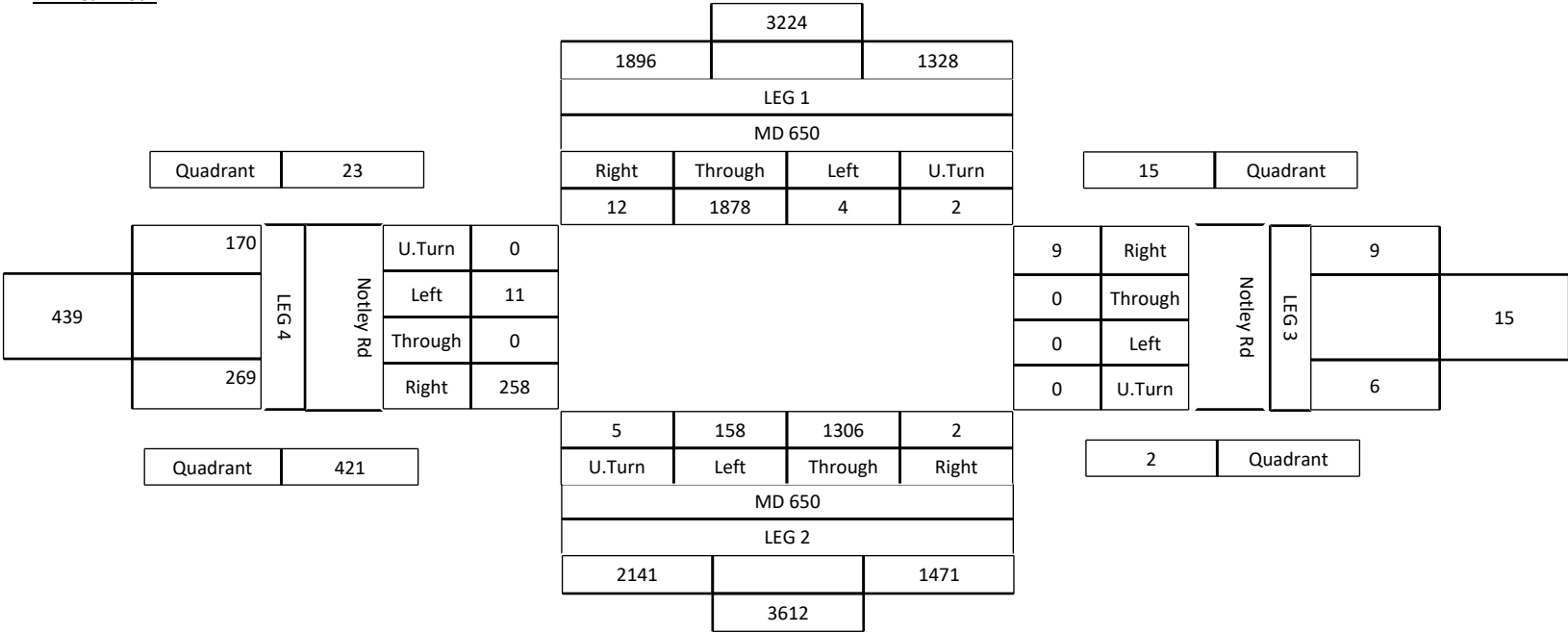
Interval:

60 Min

PEAK	AM PERIOD	Start	End	Volume	LOS	V/C	PM PERIOD	Start	End	Volume	LOS	V/C
Hours	6:00AM-12:00PM	07:00	08:00	3645	C	0.74	12:00PM-19:00PM	17:00	18:00	3997	C	0.74



AM Peak Hour





## Turning Movement Summary Report

Comments:

Town: none

Weather: Sunny

PEAK	AM PERIOD	Start	End	Volume	LOS	V/C	PM PERIOD	Start	End	Volume	LOS	V/C
Hours	6:00AM-12:00PM	07:00	08:00	3645	C	0.74	12:00PM-19:00PM	17:00	18:00	3997	C	0.74

