

Resolution No.:	16-1540
Introduced:	October 26, 2010
Adopted:	October 26, 2010

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY**

By: District Council

SUBJECT: APPLICATION NO. G-864, ON REMAND, FOR AMENDMENT TO THE ZONING ORDINANCE MAP, Stephen Kaufman and Yum Yu Cheng, Attorneys for Applicant Christ Evangelical Lutheran Church of Bethesda-Chevy Chase, OPINION AND RESOLUTION ON APPLICATION.

Tax Account Nos.	07-501-00420032	07-001-00420043
	07-501-00434051	07-001-00420054
	07-501-00420087	07-001-00420021
	07-001-00420065	07-001-00420076

OPINION

Application No. G-864 was filed on November 29, 2006 by Applicant Christ Evangelical Lutheran Church of Bethesda-Chevy Chase and former co-applicant, BA Old Georgetown Road, LLC.¹ It requests reclassification from the R-60 zone (single-family residential) to the PD-44 zone (Planned Development, 44 dwelling units per acre) of 1.87 acres of land² located at 8011 and 8015 Old Georgetown Road, Bethesda, Maryland, in the 7th election district. The subject site is identified on Tax Map HN23 as Parcels P860, P869, P816, P859; Lots 1, 2, 3, 4 and 11, Block B of Robertson's Addition to Bethesda; and Lot 9, Block C of Robertson's Addition to Bethesda.

Former Hearing Examiner Françoise Carrier held hearings in the case and recommended denial of the initial (*i.e.*, pre-remand) application in a report dated December 15, 2008. The District Council heard oral argument regarding the pre-remand proposal on February 3, 2009, and decided to remand the case for further proceedings. The Council's Resolution No. 16-838 specified that it was remanding the case to give Applicant the

¹ The former co-applicant, BA Old Georgetown Road, LLC, withdrew from the case following the remand. Ex. 363.

² The area to be rezoned does not include the area of a street (part of Rugby Avenue) and an alley (off of Glenbrook Road) that lie within the site and that the County Council declared abandoned at the request of Applicant (Exhibit 396); the combined area, including the abandoned area, is about 2 acres. It is this figure which is used to calculate density.

opportunity to revise its plans, consistent with the findings in the Hearing Examiner's pre-remand report. Applicant submitted a revised (*i.e.*, post-remand) development plan, and it was reevaluated by Technical Staff (Exhibit 385) and the Planning Board (Exhibit 392), both of which recommended approval. The Planning Board approval was by a vote of three to one.

Applicant's current proposal is to demolish the existing church and related structures on the site and construct two new buildings, a multi-family residential building with 107 units and a maximum height of 94 feet, and a combination church and community center, with a maximum height of 78 feet.³ No commercial uses are proposed. As required under the PD zone, the application was accompanied by a Development Plan with detailed specifications related to land use, density, development standards, and staging. Development under the PD zone is permitted only in accordance with a development plan that must be approved by the District Council.

Hearings were held by former Hearing Examiner Carrier regarding the post-remand Development Plan on February 19, 22, and 23, 2010. After additional submissions by the parties, the record closed again on March 28, 2010. Ms. Carrier left the Office of Zoning and Administrative Hearings before she had the opportunity to write a report and recommendation in the post-remand case, and the Hearing Examiner's time for submitting a report was therefore extended by the Council until September 30, 2010. *See* Resolution 16-1430. Under Zoning Ordinance §59-H-5.13, the record in this case was reviewed by Hearing Examiner Martin L. Grossman, who filed his report and recommendation on September 29, 2010. The Hearing Examiner found that the proposed post-remand Development Plan (Exhibit 417(a)) was not in substantial compliance with the applicable sector plan, did not fully comply with the purposes, standards and regulations of the PD-44 zone, and does not provide for a form of development that will be compatible with adjacent development. Accordingly, the Hearing Examiner recommended denial of the application.

To avoid unnecessary detail in this Resolution, the Hearing Examiner's Report and Recommendation dated September 29, 2010, including the report and findings of the Planning Board and Planning (Technical) Staff, are incorporated herein by reference. Oral argument was held before the District Council on October 19, 2010. Based on its review of the entire record, the Hearing Examiner's Report, and the oral argument (which was confined to the record), the District Council finds that the application meets the standards required for approval of the requested rezoning for the reasons in the Planning Board and Technical Staff's recommendation.

The subject property is the site of Christ Evangelical Lutheran Church of Bethesda-Chevy Chase (the "church"). The property consists of approximately 1.87 acres of land located at the northwest corner of Old Georgetown Road and Glenbrook Road in Bethesda, just north of the Bethesda Central Business District ("CBD"). The site is irregularly shaped, with approximately 320 feet of frontage along Old Georgetown Road on the south, 180 feet of frontage along Glenbrook Road on the east, and a depth of approximately 310 feet along its western property line. The center of the site's Old Georgetown Road frontage is occupied by

³ The original development plan had proposed to retain the existing church structure and add two new buildings – a community center building and a residential building.

the church building, a traditional, brick church with a tall spire. A three-story, brick-and-frame building located adjacent to the church to the east and connected to the church by a breezeway, is used as a community center. Immediately west of the church is a two-story residential building that formerly housed the Bethesda Fellowship House, an elderly day care center serving people with Alzheimer's disease, and is currently a rental dwelling. The rear part of the site holds a surface parking lot with 62 spaces. The subject site also contains two single-family homes, one located behind the community center facing Glenbrook Road, and the other behind the parking lot facing Rugby Avenue. The Rugby Avenue house is used for a child day care program and the Glenbrook Road house for emergency shelter and social services.

The subject property contains a number of trees, shrubs, and grassy areas near the buildings and along Old Georgetown Road. There are no wetlands, floodplains, forests, streams, rare or endangered species, or critical habitats on the property. There are no historic features on or adjacent to the property.

The surrounding area for this application consists of the area roughly bounded by Battery Lane to the north and west (including structures on the west side of Battery Lane between Keystone Avenue and Old Georgetown Road), Wilson Lane to the south, and Woodmont Avenue to the east.

The surrounding area contains a mixture of residential, office and institutional uses classified under the R-60 (single-family), R-10 (multi-family, high density), CBD (central business district) and C-T (commercial, transitional) zones. To the west, the subject property abuts the Bethesda-Chevy Chase Rescue Squad, which, like the subject site, is classified under the R-60 zone. The rescue squad property contains an institutional building estimated at 25 to 30 feet in height, with the rest of the site occupied by surface parking. Farther west are single-family homes in the R-60 zone and a smattering of multi-family and commercial buildings in the R-10 zone. These buildings range from 3 stories in height to a 12-story multi-family building along Battery Lane.

To the north and northeast, the subject property abuts and confronts a small residential enclave in the R-60 zone, consisting of approximately 20 single-family detached homes on Rugby Avenue and Glenbrook Road. The two roads meet at a joint intersection with Norfolk Avenue, forming a roughly triangular residential neighborhood. Farther north is a mixture of commercial and multi-family uses on the north edge of the Bethesda CBD, in the R-10 zone, with a variety of building heights. Battery Lane Park is located one block northeast of the subject site, stretching from the intersection of Glenbrook and Rugby up to Battery Lane.

On the block backing onto Glenbrook Road to the east, just inside the CBD boundary at the corner of Auburn Avenue and Norfolk Avenue, a nine-story, multi-family building with retail on the ground floor has been approved for construction. Directly to the east, the front part of the subject property confronts an eleven-story office building at the corner of Old Georgetown Road and Glenbrook Road in the CBD-1 zone. That building is a legal nonconforming use; it does not comply with current zoning requirements, but is permitted as a "grandfathered" use. Farther east, on the same side of Old Georgetown Road, is the bulk of the

Bethesda CBD, which contains buildings of varying heights, types, and uses in three CBD zones.

Across Old Georgetown Road, the subject site confronts single-family detached homes in the R-60 zone. Diagonally across Old Georgetown Road to the southeast is an office building in the C-T zone that has three stories facing Old Georgetown and four to the rear. Farther southeast on Old Georgetown Road are one and two-story buildings with commercial services and retail. To the south and west is the Battery Park single-family neighborhood in the R-60 and R-90 zones, stretching away from the CBD for many blocks.

The subject property was classified under the R-60 zone in a 1954 comprehensive rezoning. R-60 zoning was confirmed by Sectional Map Amendment in 1977 (SMA G-20) and 1994 (SMA G-711). The Woodmont Triangle Amendment to the Bethesda CBD Sector Plan, adopted in 2006, recommended designating the property R-60/PD-44. The Woodmont Triangle Amendment is hereinafter referred to as "the Sector Plan."

Applicant's current proposal is to rezone the subject site to PD-44, demolish the existing church and related structures on the site, and construct two new buildings, a multi-family residential building with 175,000 square feet of floor area, 107 dwelling units and a maximum height of 94 feet, and a combination church and community center, with 53,000 square feet of floor area and a maximum height of 78 feet. The pre-remand development plan had proposed to retain the existing church structure and add two new buildings – a community center building and a residential building. No commercial uses were proposed in either version.

The revised plan will reduce the overall church and community center from the original proposal by approximately 11,314 square feet of floor area, and the proposed residential building has been reduced by approximately 13,884 square feet of floor area. These reductions have permitted increased setbacks from adjoining properties. The height of the proposed residential building has been reduced from 106 feet to 94 feet, although the height of the proposed church/community center building has increased from 76 feet to 78 feet.

Since both pre- and post-remand proposals called for 107 dwelling units, of which 15% would be moderately priced dwelling units (MPDUs), there would be a total of 90 market rate units and 17 MPDUs. The roof of the proposed multi-family building is proposed to be partly a green roof with environmental and recreational benefits.

Reverend Tollefson, who has been the pastor at the church for more than 26 years, testified that the church intends for residents and church occupants to access and use all of the facilities and services connected with the project. He expects to work out an arrangement with residents of the new building and the larger community to make all of the facilities available to the community under a management agreement. Reverend Tollefson pledged the church's commitment to adhere to the written binding elements of the development plan, including the additional ones agreed to during the hearing. See Tr. 2-23-10 at 37.

Using a “Programmatic Stacking Diagram” (Exhibit 403), Reverend Tollefson outlined the uses proposed on each floor of the new church/community center building. See *id* at 44-49. The ground floor would have a lobby and the day care center. The next level would hold the two-level church sanctuary (with seating for 300), church offices, classrooms, and a balcony. Above that would be offices for non-profit groups, and above that a two-level multi-purpose social/recreational/assembly space that may be used for senior or youth programs, community theater, music, etc. The multi-purpose space would be built on a basketball court design that qualifies for the local youth league but is not a full court. See Tr. 2-23-10 at 59.

The vast majority of the parking would be contained within the below-grade levels of the proposed garage. Under the Zoning Ordinance, the residence would be required to have 153 spaces, and the church/community center 62 spaces, for a total of 215 required spaces. Applicant plans to provide a total of 236 parking spaces.

Three vehicular access points are planned for the site, Old Georgetown Road, Rugby Avenue and Glenbrook Road, although Binding Element 9 would limit the Rugby Avenue access to emergency vehicles.

Under Zoning Ordinance §59-D-1.11, development under the PD zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD zone. This development plan must contain several elements, including a land use plan showing site access, proposed buildings and structures, a preliminary classification of dwelling units by type and number of bedrooms, parking areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. §59-D-1.3.

Once approved by the District Council, the development plan is binding on the Applicant, except where particular elements are identified as illustrative or conceptual. The project is subject to site plan review by the Planning Board, and minor changes to the plan may be made at that time. The principal specifications on the development plan – those that the District Council considers in evaluating compatibility and compliance with the zone, may not be changed without further application to the Council to amend the development plan.

The principal component of the development plan in this case is a document entitled “Revised Development Plan,” Exhibit 417(a), which is reproduced in the Hearing Examiner’s post-remand report at pages 22 through 24.

Exhibit 417(a) satisfies the requirements of Code §59-D-1.3 by showing access points, the approximate locations of the proposed buildings, preliminary classification of dwellings by number of bedrooms, parking areas, intended right-of-way dedications for Old Georgetown Road and Glenbrook Road, and areas intended for common use but not public ownership (*i.e.*, the green roof, the ground level landscaped areas, setback areas, and walkways).

The Development Plan specifies 12 textual binding elements, which are items that the Applicant wished to make definite, but were more readily expressed in text than in the graphics. Many of these textual binding elements were added following the remand in an effort

to meet concerns of the Planning Board, the Hearing Examiner, and the community. The textual binding elements are as follows:

TEXTUAL BINDING ELEMENTS*

1. The density of the site will be limited to that permitted in the PD-44 zone, including the MPDU density bonus.
2. Primary access points will be from Old Georgetown Road and Glenbrook Road.
3. Within the 60' setback, measured from the face of curb of the existing Old Georgetown Road, the new buildings will not exceed 50' in height as measured from the terrace grade.
4. The maximum height of the residential building will not exceed 94 feet.
5. The maximum height of the church/community center will not exceed 78 feet.
6. The maximum number of dwelling units will be 107, including 15% MPDUs.
7. The green space will meet or exceed 50% of the gross lot area.
8. All green areas (including active/passive recreation rooftop green area) will be accessible to all residents or occupants of the buildings.
9. Except for emergency vehicles, no direct vehicular access from Rugby Road is permitted through the property.
10. The pedestrian path from Rugby Road to Glenbrook Road is to be opened to the public.
11. The location and footprint of the buildings, including the minimum setbacks, as shown on the Development Plan, are intended to set the location of the buildings. However, minor adjustments to the buildings' location will be permitted at site plan review to satisfy environmental site design and stormwater management requirements.
12. The upper three floors of the north wing of the residential building facing Rugby Road will be stepped back on a 1:1 ratio reflecting a 10-foot setback on each of the floors.

The subject application seeks to rezone the property from the R-60 zone to the PD-44 zone. The PD-44 zone falls into a category known as "floating zones." A floating zone is a flexible device that allows a legislative body to establish a district for a particular type of use, with land use regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, *i.e.*, it satisfies the purpose clause and requirements for the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

PD (Planned Development) zones are a special variety of floating zone with performance specifications integrated into the requirements of the zone. These zones allow considerable design flexibility if the performance specifications are satisfied. The applicant is not bound to rigid design specifications, but may propose site-tailored specifications, within the parameters established for the zone, for elements such as setbacks, building heights and types

of buildings. These specifications are set forth on a development plan to facilitate appropriate zoning oversight by the District Council.

Accordingly, the evaluation of zoning issues must begin with the Development Plan and proceed to the requirements of the zone itself. Before approving a development plan, the District Council must make five specific findings under Section §59-D-1.61. These findings relate to consistency with the master plan and the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas.

In addition to these 5 findings, Maryland law also requires that the proposed rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to the County, all zoning power must be exercised:

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

The “Required Findings” are discussed below. Based on its review, the District Council concludes that the evidence in this case supports all of the required findings.

a. The first required finding as to consistency with the Sector Plan and other County policies:

(a) The proposed development plan is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies. However:

(1) To permit the construction of all MPDUs under Chapter 25A, including any bonus density units, on-site in zones with a maximum permitted density more than 39 dwelling units per acre or a residential FAR more than .9, a development plan may exceed:

(A) any dwelling unit per acre or FAR limit recommended in a master plan or sector plan, but must not exceed the maximum density of the zone; and

(B) any building height limit recommended in a master plan or sector plan, but must not exceed the maximum height of the zone.

The additional FAR and height allowed by this subsection is limited to the FAR and height necessary to accommodate the number of MPDUs built on site plus the number of bonus density units. . . .⁴

⁴ The remaining language of this provision is irrelevant to this case.

The District Council agrees with the Hearing Examiner's finding that the multi-family use proposed is consistent with the PD-44 zone recommended by the Sector Plan. The District Council disagrees with the Hearing Examiner's finding that the proposed development plan is not in substantial compliance with the recommendations of the Sector Plan.

The Sector Plan does not boldly say it recommends densities permitted in the PD-44 zone; rather, it says, "This Plan recommends PD-44 zoning provided that issues of compatibility with existing single-family homes can be addressed." [Emphasis added.] See Sector Plan at p. 23. The District Council finds that Applicant has sufficiently addressed these compatibility problems. The proposal conforms to the density recommendation in the Sector Plan. The proposed two buildings are bulky structures; however, the Development Plan requires significant setbacks from all its single-family detached home neighbors, particularly those homes across Old Georgetown Road. The proposed buildings will not be out of place in the general context of all the buildings in the larger surrounding area. The setbacks to the houses along Rugby Avenue are compatible in its urban context. The Council gives great weight to the recommendations of the Planning Board and Technical Staff with regard to compatibility.

Compatibility is not just a question of the overall building context in the surrounding area; it is also, and perhaps most importantly, a question of harmony with the immediate neighbors. One of those immediate neighbors is the eleven-story building across Glenbrook Road from the subject site.

The District Council disagrees with the assessment of the Battery Park Citizens Association, as expressed in its resolution of January 13, 2010 (Exhibit 400), that the revised plans have exacerbated compatibility problems vis-à-vis the Battery Park neighborhood across Old Georgetown Road to the southwest of the site, by pushing the mass closer to the roadway in an effort to improve compatibility with adjoining properties. Although one Battery Park resident described the proposal as a 285-foot-long building at a height of 102 feet (94 feet plus the eight-foot terrace) staring directly at his neighborhood from across the street, the buildings would be separated from the Battery Park Community by the setback to Old Georgetown Road and the right of way of Old Georgetown Road. In the Council's opinion, the architectural differentiation between the 2 buildings and the distance between the Battery Park neighborhood and the 2 buildings will make for a compatible relationship.

The District Council also disagrees with the Hearing Examiner that the proposed plan violates the Sector Plan's tenting principle. The site is next to an 11 story building, and the proposed buildings will be lower than that height.

Finally, Council agrees with the Planning Board's finding that the proposed development is in substantial compliance with the building height recommendation of the Sector Plan. The "Vision Division" of Technical Staff noted that Lots 4, 9 and 11, within the subject site, are within the 35 foot height limit area. Since the Applicant's proposed setbacks include Lots 9 and 11, there is no violation of the 35-foot height recommendation on those lots; however, Lot 4 is only partially included in the proposed setback, and the proposed 78-foot tall church/community building intrudes about 19 feet into the 35-foot height limit area. Page 4 of

Attachment 11 to the post-remand Staff Report (Exhibit 385). It is notable that neither the PD-44 zone nor the Sector Plan's recommendations for block 19 (the block in which G-864 is located) have building height limits. The PD-44 zone does not require strict conformance to the Sector Plan recommendations; it only requires substantial compliance. Given: 1) the size of the proposed development; 2) the minor intrusion into the 35 foot height limited area; 3) the fact that most of the area limited to a 35 foot building height is part of the proposed setback (with a building height of 0 feet); and 4) strict compliance with the land use and density recommendations of the Sector Plan, the Council finds substantial compliance to the Sector Plan recommendations.

The PD-44 zone recommendation was expressly conditioned upon satisfying this proviso: "provided that issues of compatibility with existing single-family homes can be addressed." Sector Plan at 23. The following language was also included:

... At the time of rezoning, any application should be reviewed to determine compatibility with existing single-family homes, both north and south of Old Georgetown Road.

Thus, compatibility with the existing single-family homes was an aspect to the Sector Plan's PD-44 recommendation. Exhibit 382(l), section for bulk plane angle, demonstrated the sight angles to the top of buildings between existing residential buildings and between the closest residential build and the closest proposed building. Given the distance between buildings and building heights, the slight angle was steeper between existing residential buildings than it will be between the closest residential building and the proposed building.

The Sector Plan at page 23 went on to say:

In addition, the rezoning should not be allowed to result in multi-family development surrounding or isolating a limited number of single-family homes.

The development proposed by G-864 is only partially multi-family housing. A substantial element of the project is for religious and school activities. The proposed development under G-864 will not be a monolith of multi-family development, which the Sector cautions against. The church will provide worship, recreational and cultural opportunities that would be open to residents of the building and the wider community, as well as social services to people in need in the community. Again, the District Council finds substantial compliance with the Sector Plan.

b. The second required finding requires an evaluation of the PD zone's purpose and regulations:

(b) That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.

1. Purposes of the Zone

The purpose clause for the PD zone, found in §59-C-7.11, contains a number of goals and objectives. The District Council's findings as to each paragraph of the purpose clause are as follows.

First Paragraph: Master Plan Implementation.

The first paragraph establishes consistency with the applicable master plan as an important factor in applying the zone. For the reasons discussed above, the District Council concludes that the proposed development is in substantial compliance with the Sector Plan.

Second Paragraph: Social and Community Interaction, Visual Character, Mix of Uses.

The proposed development would encourage social and community interaction by creating an open space area at grade and a green rooftop recreation area where building residents would have the opportunity to come together, and by enabling the church to continue providing worship, recreational and cultural opportunities that would be open to residents of the building and the wider community, as well as social services to people in need in the community. Many of the church activities would offer opportunities for social and community interaction. It thus would also provide a coordinated mixture of residential and institutional uses.

The proposed development would create a distinctive visual character, as suggested in the purpose clause, and it will be appropriate at this location. As discussed above, the increased setbacks from the homes on Glenbrook Road and Rugby Avenue will assure compatibility.

Third Paragraph: Broad Range of Housing Types.

This development would increase the stock of multi-family housing available in downtown Bethesda and create a new housing option on this part of Old Georgetown Road.

Fourth Paragraph: Grading and Trees.

Phil Perrine, Applicant's land planner, testified that there is an existing terrace, from Old Georgetown Road up to where the church is, and "that basic land form has been maintained." Tr. 2-22-10 at 117. Presumably, therefore, there will be little grading needed.

With regard to tree preservation, in the pre-remand Hearing Examiner's report, Ms. Carrier found that the removal of the two specimen trees on the site could not be reconciled with the PD-44 zone's purpose to retain trees. *See* Pre-remand report at p. 138. A change in the law and tree-review practices since that report caused the post-remand Hearing Examiner to reach the opposite conclusion in his report. *See* Post-remand report at pp. 193-194. The District Council agrees with the Hearing Examiner reassessment.

Mr. Perrine testified, as did Applicant's architect, Michael Foster, that the two existing specimen trees do not appear to be flourishing in their setting. Given the condition of the trees, he opined that they should be removed and replaced with a species that is hardy and can withstand this kind of a setting. Tr. 2-22-10 at 117.

Mr. Perrine's opinion is supported by the Environmental Planning Division of Technical Staff, whose memorandum of January 27, 2010 is appended to the Technical Staff remand report as Attachment 10. Staff notes that under State law that went into effect on October 1, 2009 (*i.e.*, after the remand), removal of any specimen tree requires a "tree variance." Staff recommended approval of Applicant's tree variance request, noting that the County arborist had not objected; that one specimen tree is in poor health and the other is "a non-native invasive;" that neither is a champion tree; that many new or redevelopment applications will often necessarily and unavoidably result in a loss of a specimen tree or trees; and that an alternate site layout would not alter the need for the removal of these two trees. Given the extensive tree review, the District Council finds that the purpose of the PD-44 zone has been accomplished in this regard.

Fifth and Sixth Paragraphs: Open Space and Pedestrian Networks.

Mr. Perrine testified that open space has been conveniently located in the revised plan for use by the community as a whole. The open space to the rear provides a buffer or transition between the proposed buildings and the closest residences, as well as a play area for the day care center and seating area for the residential building. He considers the open space now proposed at the rear of the site to be a considerable amount of open space at a location adjacent to a CBD. He noted that there is also a broad open space near the entrance to the church, appropriately located at the corner of Old Georgetown and Glenbrook Roads. Tr. 2-22-10 at 107-120. There is also provision for a pedestrian connection between Rugby Avenue and Glenbrook Road, and from the residential building and the church/community center building to the surrounding street sidewalk system. Tr. 2-22-10 at 122. The site's location in downtown Bethesda places it near to countless shops, restaurants, and other activities accessible within a short walk, which would encourage pedestrian activity.

Technical Staff agreed, stating (Remand Staff Report, Exhibit 385, p. 4),

The increased setbacks create a large open space with a landscaped park/garden, including a fenced playground area for the daycare and a pedestrian path to allow citizens to walk through the church property from Rugby Road [sic] to Glenbrook and Old Georgetown Roads. . . .

The Glenbrook Road façade of the church/community has been revised and now includes a semi-circular shape in order to provide open space at the northwest quadrant of Old Georgetown Road and Glenbrook Road.

Given this increase in available open space, the District Council finds that Applicant's design has fulfilled the goals of the fifth and sixth paragraphs of the purpose clause.

Seventh Paragraph: Scale.

The PD zone encourages, but does not require, development on a large scale. If anything, as already discussed, the scale of the proposed development is compatible with the area in which it is located.

Eighth Paragraph: Compatibility and Maximum Safety, Convenience and Amenity.

For the reasons stated above, the District Council finds that the proposed development would be compatible with the immediate surrounding area.

The evidence demonstrates that the proposed development would provide a high degree of safety, convenience and amenity for site residents, with a convenient downtown location and on-site amenities, including a rooftop recreation area. It would also provide convenience and amenities for area residents generally, by allowing the church to continue providing worship, recreational and cultural opportunities open to the general public, as well as social services for people in need. The evidence also supports a conclusion that the proposed development would not be detrimental to the safety of the community, given the small number of vehicular trips projected on the narrow neighborhood streets.

Ninth Paragraph: Summary of Required Findings.

Paragraph 9 of the purpose clause states that the PD zone “is in the nature of a special exception,” and shall be approved or disapproved based on three findings:

- (1) the application is or is not proper for the comprehensive and systematic development of the county;
- (2) the application is or is not capable of accomplishing the purposes of this zone; and
- (3) the application is or is not in substantial compliance with the duly approved and adopted general plan and master plans.

This paragraph of the purpose clause does not add new requirements. Based on the preponderance of the evidence and for the reasons stated above, the District Council concludes that present application is proper for the comprehensive and systematic development of the County, is in substantial compliance with the Sector Plan, and therefore would accomplish all of the purposes of the zone.

2. Standards and Regulations of the Zone

The standards and regulations of the PD-44 zone are summarized below, together with the grounds for the District Council’s conclusion that the proposed development would satisfy all of the applicable requirements.

Section 59-C-7.121, Master Plan Density. Under §59-C-7.121, “no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units

per acre or higher.” The subject property is recommended in the Sector Plan for residential development at a density of up to 44 units per acre, so this requirement is satisfied.

Section 59-C-7.122, Minimum Area. Section §59-C-7.122 specifies several criteria, any one of which may be satisfied to qualify land for reclassification to the PD zone. The subject application satisfies the first of these criteria, which states the following:

That it contains sufficient gross area to construct 50 or more dwelling units under the density category to be granted.

The District Council finds that the subject property contains sufficient gross area to permit the construction of 50 or more dwelling units.

Section 59-C-7.131, Residential Uses. All types of residential uses are permitted, but parameters are established for the unit mix. The residential portion of a PD-44 development with less than 200 units may, as proposed here, consist of 100 percent multi-family units.

Section 59-C-7.132, Commercial Uses. Commercial uses indicated on the applicable master plan are permitted in the PD zone. Commercial uses are neither recommended for this site in the Sector Plan nor proposed in the Development Plan.

Section 59-C-7.133, Other Uses. This section provides, in relevant part,

(a) *Noncommercial community recreational facilities which are intended exclusively for the use of the residents of the development and their guests may be permitted.*

(b) *Any nonresidential, noncommercial use may be permitted at the discretion of the district council on a finding that it is compatible with the planned development and satisfies the requirements of section 59-C-7.15.⁵*

In this case, Applicant proposes a church/community center building in addition to its residential building. Section 59-C-7.133(a) permits only noncommercial community recreational facilities which are intended exclusively for the use of the residents and their guests, and §59-C-7.133(b) requires a finding that the community center use would be compatible with the planned development and would satisfy the compatibility requirements of §59-C-7.15. The proposed community center use clearly is designed for the use of non-residents (as well as residents).

The District Council agrees with the Hearing Examiner’s finding that Applicant’s plan for parking and shared use arrangements would facilitate the joint use of the site by the residents and the church/community center. For all the reasons discussed above, the District Council finds that the proposed development would satisfy the compatibility requirements of §59-C-7.15(a), and therefore would satisfy the requirements of §59-C-7.133.

⁵ The remainder of §59-C-7.133 addresses uses not sought in this case, and it is therefore not quoted here.

Section 59-C-7.14, Density of Residential Development. The Zoning Ordinance provides the following direction for the District Council in considering a request for the PD zone (§59-C-7.14(b)):

The District Council must determine whether the density category applied for is appropriate, taking into consideration and being guided by the general plan, the area master or sector plan, the capital improvements program, the purposes of the planned development zone, the requirement to provide [MPDUs], and such other information as may be relevant. . . .

The Zoning Ordinance classifies the density category applied for, PD-44, as a high-density planned development zone, which may be appropriate in an urban area. It is, moreover, the density conditionally recommended for the subject site in the Sector Plan. For reasons discussed above with regard to compatibility, the zoning category is appropriate.

Section 59-C-7.15, Compatibility. Section 59-C-7.15(a) provides:

(a) All uses must achieve the purposes set forth in section 59-C-7.11 and be compatible with the other uses proposed for the planned development and with other uses existing or proposed adjacent to or in the vicinity of the area covered by the proposed planned development.

This subsection requires that a proposed development be compatible internally and with adjacent uses. As discussed at length above, the District Council finds that the proposed development would be compatible with existing development in the immediate surrounding area.

For the reasons discussed in Part III.F.4. of the Hearing Examiner's post-remand report, Section 59-C-7.15(b) is inapplicable to this development, which is in close proximity to the Bethesda CBD.

Section 59-C-7.16, Green Area. The PD-44 zone requires a minimum of 50 percent green area. The Development Plan (Exhibit 417(a)) specifies that the development will meet this requirement by providing 45,918 square feet of green area out of a gross tract area (including the abandonment areas) of 87,417 square feet. This would amount to over 52% green area. Applicant's green space/[building] coverage exhibit (Exhibit 382(g)) diagrams and specifies green space and physical building coverage proposed for the site. It is reproduced on page 27 of the Hearing Examiner's post-remand report.

Both Exhibits 417(a) and 382(g) specify that 4,000 square feet of the proposed green space will be on the roof of the proposed residential building. Exhibit 382(g) specifies that this amounts to 4% rooftop green area and 48% at grade.

The pre-remand Hearing Examiner's report of December 15, 2008 has a lengthy discussion (at pp. 142-146) relating to whether rooftop green area should be counted towards green area as it is defined in the Zoning Ordinance. As Ms. Carrier noted, Technical Staff and the Planning Board interpret the Code definition to include areas on rooftops, and the

legislative history does not indicate that the Council intended to prohibit green area from being located on a roof. Ms. Carrier correctly concluded that the fundamental intent of the definition and the green area requirement was to provide useful outdoor recreation space for apartment dwellers, and that goal can be satisfied with a well-designed rooftop recreation area as well as on the ground. There was no new evidence presented in the post-remand proceedings that would lead the District Council to reach a different legal conclusion. Therefore, the District Council finds that Applicant's proposal meets the green area requirements of the PD-44 zone.

Section 59-C-7.17, Dedication of Land for Public Use. This section requires that land necessary for public streets, parks, schools, and other public uses must be dedicated to public use, with such dedications shown on all required development plans and site plans. The Development Plan shows the proposed dedications along Old Georgetown and Glenbrook Roads.

Section 59-C-7.18, Parking Facilities. Off-street parking must satisfy the requirements of Article 59-E of the Zoning Ordinance. As discussed in Part III.G. of the Hearing Examiner's post-remand report, the Development Plan provides for more than the required number of spaces for the residential use and for the church/community center.

c. The third required finding evaluates access and site circulation:

(c) That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.

The development plan in this case shows 3 access points to the proposed development, Old Georgetown Road, Glenbrook Road, and Rugby Avenue; however, Binding Element #9 to the development plan provides, "Except for emergency vehicles, no direct vehicular access from Rugby Road [*sic*] is permitted through the property." Exhibit 417(a).

Applicant's transportation planner, Michael Lenhart, testified that even with a Rugby Avenue access point, there would be very little traffic using it during the peak hours. *See* Tr. 2-22-10 at 247. He feels it would have a de minimis impact on Rugby Avenue. Mr. Lenhart opined that without a Rugby Avenue entrance, traffic would use the Glenbrook Road entrance. *See id.* at 249.

Vehicular access from Old Georgetown Road and Glenbrook Road did not change after the remand (although the loading dock was moved from the Glenbrook Road area to the driveway on the northern end of the site, adjacent to the Bethesda Chevy-Chase Rescue Squad). The access from Old Georgetown Road would be at the same location as the existing driveway, with a new driveway leading to the garage entrance on the north side of the development. Access to the garage is also proposed from Glenbrook Road.

Applicant's architect, Michael Foster, testified on remand that a relatively small site like this typically has only one parking and loading entrance, but this plan proposes two points of access: a Glenbrook Road driveway to serve as the primary access for church/community center visitors, and an Old Georgetown Road alley entrance, as the primary residential entry

point. This, he observed, allows a conflict-free flow for day care center drop-off and pick-up as well as a separate, unobstructed traffic flow for residents of the multi-family building. Tr. 2-22-10 at 23-28. He noted that the day-center itself has to have ground level space for emergency access.

Applicant's civil engineer, Edward Wallington, submitted a Fire Department Access Plan, Exhibit 407, which was first prepared at the time of the original application or shortly thereafter to reach a conceptual agreement with Fire and Rescue Department staff for emergency access. See Tr. 2-23-10 at 86. The exhibit demonstrates how a fire truck could get to the site and leave without having to make multiple turns, recognizing that the turning radius of the Rugby Avenue cul-de-sac is too small for a fire truck. The original drawing was then updated to reflect the revised development plan, but the concept that Fire and Rescue Staff found acceptable a year ago has not changed. See *id.* at 87-88. The drawing also shows that the fire truck could come down Glenbrook and turn into the site driveway if it needed to reach that part of the site.

For the reasons discussed above and in Part III.G. of the Hearing Examiner's post-remand report, the District Council finds that the proposed internal vehicular and pedestrian circulation systems and points of external access would be safe, adequate, and efficient.

d. The fourth required finding evaluates environmental concerns:

(d) That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.

As discussed above in connection with paragraph 4 of the PD zone's purpose clause, grading will be minimized on the site and appropriate review has been given to the retention of trees. Former Hearing Examiner Carrier expressed concern about the plan to remove specimen trees from the site. Since the writing of her report, the State of Maryland has imposed additional requirements for justifying removal of specimen trees and requires "tree variances," which have been recommended in this case by Technical Staff.

Environmental Planning Division Staff also recommended approval of the revised preliminary forest conservation plan (PFCP). See Attachment 10 to the Remand Staff Report (Exhibit 385). A forest conservation requirement of 15 percent of on-site afforestation must be provided for a planned development application, and the Planning Board noted that the revised PFCP shows the 15 percent afforestation requirement to be met on-site with canopy coverage credit. Exhibit 392, p. 2.

As discussed in Part III.H. of the Hearing Examiner's post-remand report, Technical Staff also noted that the stormwater management concept will be subject to the state's new

stormwater management standards, requiring environmental site design (ESD) to the maximum extent practicable. Staff supports deferral of the formal stormwater management concept approval to later reviews. Remand Staff Report (Exhibit 385, p. 3).

Given the additional regulation protecting specimen trees and the uncontroverted evidence that forest conservation and water resource protection requirements would be adhered to, the District Council finds that the record satisfies this required finding.

e. The fifth required finding pertains to ownership and maintenance of common areas:

(e) That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.

Applicant's ownership of the subject site is established in the record by the State of Maryland's real property tax records. *See* Exhibit 4. The Applicant has not provided any draft documents regarding perpetual maintenance of common areas, and therefore the adequacy of any such documents cannot be evaluated. In the pre-remand case, a representative of Bozzuto Homes, Inc. ("Bozzuto") a partner of former co-Applicant, BA Old Georgetown Road, LLC, testified that Bozzuto's affiliate and the church planned to enter into an agreement for shared use of the entire property, including maintenance of quasi-public areas. *See* Tr. 2-24-08 at 34-35. Reverend Tollefson also acknowledged the church's intention to enter into such an agreement. *See id.* at 55-56. BA Old Georgetown Road, LLC is no longer a co-applicant, and there does not appear to be any post-remand evidence in the record that addresses the question of future maintenance of common areas.

Given Reverend Tollefson's uncontradicted pre-remand testimony, the District Council finds that the church intends to arrange for maintenance of the common areas if development is approved.

f. The final finding calls for an assessment of the public interest:

The final finding which is required under Maryland law is that the proposed rezoning will be in the public interest. When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment and public benefits such as provision of affordable housing.

It is clear from this record (mostly the pre-remand record) that Applicant does many good works in the community and would continue to do so if the rezoning and development plan are approved. Those good works are clearly in the public interest. Moreover, the provision of affordable housing is also clearly in the public interest.

The issues of the proposed development's ability to function in harmony with the surrounding community were discussed above in connection with the Sector Plan consistency and neighborhood compatibility. Although both Technical Staff and the Planning Board found

that the proposed development would be compatible and in substantial compliance with the Sector Plan, the Hearing Examiner found to the contrary. The District Council agrees with the Planning Board's recommendation and findings. Therefore, the District Council finds that the proposed rezoning and development would be substantially consistent with the recommendations of the Sector Plan and, consequently, consistent with the public interest.

For the reasons in Part III.G. of the Hearing Examiner's post-remand report, the District Council finds it likely that the proposed development would have no meaningful adverse effects on public facilities.

In her December 15, 2008 pre-remand report, former Hearing Examiner Carrier found that transportation facilities would be adequate under the initial proposal, and the facts that bear on the adequacy of transportation facilities have not changed significantly. Applicant is still seeking to construct a 107-unit residence and maintain a church and community center. The pre-remand traffic study concluded, and Technical Staff agreed, that critical lane volumes ("CLVs") at all of the studied intersections would be well below the applicable thresholds of 1,600 and 1,800. Therefore, Local Area Transportation Review ("LATR") was satisfied.

Applicant's transportation planner, Michael Lenhart, testified that the proposal on remand is no different from a traffic perspective: same land uses, same quantities, same trip generation. Mr. Lenhart confirmed in his testimony that the level of transportation services is adequate and would be so with the proposed development. *See* Tr. 2-22-10 at 245. The 30% mitigation requirements of the Policy Area Mobility Review test, known as PAMR, can also be met, mostly by contributing to the Bethesda Transportation Management Organization. *See* Tr. 2-22-10 at 251. Technical Staff agreed with these post-remand conclusions. Exhibit 385, Attachment 12.

The evidence also indicates that utilities are readily available, and that forest conservation and stormwater management regulations can be satisfied.

With regard to public schools, the subject property is in the Bethesda Elementary School, Westland Middle School and Bethesda-Chevy Chase High School service areas. *See* Ex. 112. Based on 107 dwelling units, Montgomery County Public Schools ("MCPS"), before the remand, projected the proposed development to generate approximately 5 elementary, 5 middle and 4 high school students. *See* Ex. 112. Since the post-remand proposal also calls for 107 dwelling units, these projections should still be reliable.

The results of the Planning Board's school capacity evaluation for Fiscal Year 2009 indicated that eight school clusters, including the Bethesda-Chevy Chase cluster, exceeded 105 percent of program capacity at the elementary level. *See* Pre-remand Hearing Examiner's Report of December 15, 2008, pp. 58-59.

On December 1, 2009, the Council approved Resolution No. 16-1201, adding funding to the FY 09-14 Capital Improvements Program to allow construction of classrooms in the Bethesda-Chevy Chase High School Cluster, in order to bring it out of moratorium. Exhibit 378(r). Moreover, Applicant's land planner, Phil Perrine, testified following the remand that

the Planning Board, on January 14, 2010, approved a recommendation from Technical Staff for mid-cycle fiscal year 2010 school test results, to bring the Bethesda-Chevy Chase and Seneca Valley clusters out of moratorium. *See* Tr. 2-22-10 at 123-124 and Exhibit 382(f).

Given this additional evidence and the small number of students expected to be generated, the District Council finds it reasonably probable that available public school facilities and services will be adequate to serve the proposed development (although school facilities payments will likely still be required).

The District Council concludes that approval of the present application would be in the public interest because it will aide in establishing coordinated and systematic development in the County, due to consistency with the Sector Plan, and compatibility with the immediate neighborhood.

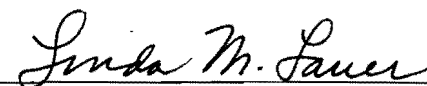
For these reasons, the application will be **approved**, as follows.

Action

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-864, requesting, on remand, that 1.87 acres of land located at 8011 and 8015 Old Georgetown Road, Bethesda, Maryland, in the 7th Election District, be reclassified from the R-60 zone to the PD-44 zone under a Development Plan specified as Exhibit 417(a), is hereby **approved** in the amount requested subject to the specifications and requirements of the Revised Development Plan approved by the District Council, Exhibit 417(a); provided that within 10 days of receipt of the District Council's approval resolution, the Applicant must submit to the Hearing Examiner for certification a reproducible original and three copies of the approved Development Plan, in accordance with §59-D-1.64.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council