

Resolution No.: 17-653
Introduced: January 22, 2013
Adopted: January 22, 2013

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

By: District Council

SUBJECT: APPLICATION SDPA 12-1 FOR SCHEMATIC DEVELOPMENT PLAN AMENDMENT of LMA G-851, Previously Approved by the District Council on November 27, 2007 in Resolution 16-392; Jody Kline, Esquire, and Soo Lee-Cho, Esquire, Attorneys for the Applicant, Wildwood Medical Center, L.L.C; OPINION AND RESOLUTION ON APPLICATION; Tax Account No. 07-03669303.

OPINION

On February 24, 2012, Applicant Wildwood Medical Center, LLC, filed an application for approval of Schematic Development Plan Amendment 12-1 (SDPA 12-1) to modify the Schematic Development Plan (SDP) in Local Map Amendment G-851 (LMA G-851), which had been approved by the County Council on November 27, 2007, in Resolution 16-392.

The subject site consists of approximately 3.47 acres (151,220 square feet) on the eastern side of Old Georgetown Road (MD Route 187), just north of its intersection with Democracy Boulevard. The site is described as Lot N-541, Wildwood Manor Shopping Center Subdivision, and it is located at 10401 Old Georgetown Road, in Bethesda, Maryland.

Council Resolution 16-392 reclassified the property from the R-90 Zone to the O-M Zone and approved a Schematic Development Plan (Exhibit 8), which included a new bank building and the then-proposed three-story, general office building on the southern end of the site. A medical office building had been constructed on the site in the 1960s pursuant to Special Exception CBA-1667. The bank building was added following approval of the rezoning.

Finding that recent market conditions did not warrant the addition of the previously planned general office building (Exhibit 28(a), pp. 3-4), Applicant now seeks permission to substitute a five-story, 58-unit, residential building on the southern end of the site, which will provide "productivity housing," at the location originally planned for the general office building. To do so requires both Council approval of the instant SDPA application as well as the granting of a special exception by the Board of Appeals pursuant to §59-G-2.36.2 of the Zoning Ordinance. The special exception petition, S-2830, was filed on February 22, 2012, and approved by the Board of Appeals on November 21, 2012, with conditions.

The SDPA and the special exception petition were amended a number of times by Applicant in an effort to address concerns raised by the Technical Staff of the Maryland-National Capital Park and Planning Commission and by the Wildwood Manor Citizen's Association (WMCA). The proposed final version of SDPA 12-1 is labeled Exhibit 56(a).

Based on these amendments, which include commitments to binding elements in the proposed SDPA 12-1 and conditions for the special exception, WMCA indicated that it would not oppose the special exception or the SDPA. Exhibit 31. However, strong opposition was voiced by individual residents of the neighborhood.¹ The opposition raised concerns about adequacy of parking, traffic congestion, pedestrian safety, school impacts, stormwater management, environmental issues and the placement of the posted notices.

Technical Staff, in a memorandum dated June 29, 2012, recommended approval of both the special exception petition and the SDPA, subject to specified conditions. Exhibit 27, pp. 16-17. On July 12, 2012, the Planning Board voted unanimously to recommend approval of both the special exception and SDPA 12-1. Exhibit 34.

A combined public hearing for both cases was held, as scheduled, on July 27, 2012. Although WMCA did not oppose these applications, six individual neighbors testified in opposition – Joseph Dias, Melitta Carter, Patricia Broderick, Wendy Calhoun, Andrea Gabossy and Brenda Sandler.² At the end of the hearing, the record was held open for 30 days, until August 27, 2012, for additional filings and comments by interested parties. Tr. 297-298.

Because of notice issues regarding the SDPA, the Hearing Examiner scheduled and noticed an additional hearing date for SDPA 12-1. See Order of August 31, 2012 in the SDPA case (Exhibit 50). The follow-up hearing in SDPA 12-1 went forward as scheduled on October 19, 2012, but no opposition parties appeared to testify or further cross-examine Applicant's witnesses.

The proposed SDPA contains binding elements that require consistency with any special exception approved by the Board of Appeals in this case. Therefore, action by the Board of Appeals on the special exception petition was a prerequisite to consideration by the Council of the SDPA application. In order to ensure that the Board of Appeals' resolution would be part of the record in the SDPA case, the Hearing Examiner's August 21, 2012 Order in the SDPA case (Exhibit 40), directed, *inter alia*, that the record in SDPA 12-1 would remain open until 10 days after the effective date of the Board of Appeals' resolution in this special exception case.

On November 21, 2012, the Board of Appeals granted the special exception with conditions. Exhibit 55. Applicant filed the proposed final version of SDPA 12-1 (Exhibit 56(a)) on November 28, 2012, and filed executed covenants (Exhibit 56(b)) on the same date. The record in SDPA 12-1 closed as scheduled on December 3, 2012.

¹ Numerous e-mails from neighbors in opposition to SDPA 12-1 were sent to Technical Staff and also were copied directly to Council members. To avoid *ex parte* contacts, the e-mails were forwarded to OZAH by Council staff to be placed in the public record. SDPA Exhibits 25(a)-(k) and 26. These opposition e-mails raise the same concerns addressed in the opposition letters cited in the main text and discussed at length in the Hearing Examiner's report.

² Two tenants of the adjacent medical office building, Nick Attretti and Adrienne Batten, participated in the hearing by cross-examining one of Applicant's witnesses regarding concerns about the adequacy of parking. They did not testify, nor express opposition to the project. Tr. 74-79 and 86-89.

On December 10, 2012, the Hearing Examiner filed his Report and Recommendation, recommending approval of the schematic development plan amendment, based on his conclusion that the proposed SDPA would be consistent with the purpose and regulations of the O-M Zone, compatible with surrounding development and in the public interest. Based on its review of the entire record, the District Council finds that the application does meet the standards required for approval of the requested schematic development plan amendment, for the reasons set forth by the Hearing Examiner. To avoid unnecessary detail in this Resolution, the Hearing Examiner's Report and Recommendation is incorporated herein by reference and his findings and conclusions are hereby adopted.

The concerns raised by the opposition witnesses were discussed at length in Parts III. C. E. and F. of the Hearing Examiner's report. As will appear more fully below, in spite of their concerns, the record amply supports the approval of this SDPA, with the binding elements recommended by the Planning Board and the Hearing Examiner.

Technical Staff provided the following zoning history of the subject site (Exhibit 27, p. 4):

The subject property was classified under the R-90 zone in the 1954 comprehensive zoning of the area. In 1964, the Board of Appeals approved special exception number BA-1631, allowing construction of a medical office building on the property. The R-90 zoning was reaffirmed by Sectional Map Amendment in 1992 (G-706). The subject property was rezoned from the R-90 zone to the O-M zone by Local Map Amendment G-851 on November 27, 2007, which was submitted under the Optional Method of development requiring an SDP and establishing binding elements with respect to land use, development standards, and staging. The Opinion issued by the County Council is appended to [the] staff report [as Attachment 11]. In 2009, the Planning Board approved a Preliminary Plan 11989271A and Site Plan 820080240. . . .

The subject property consists of 3.5-acres of land in the O-M Zone. It is recorded as Lot N541, Parcel C of the Wildwood Manor Shopping Center subdivision. The site, which is immediately north of the shopping center, is described by Technical Staff as follows (Exhibit 27, p. 2):

. . . The property is located in the southeast quadrant of the intersection of Old Georgetown Road (MD 187) and Rock Spring Drive. The property is developed with a three-story 36,423-square foot medical office building, a 3,460-square foot bank and associated surface parking. There are approximately 206 surface parking spaces on-site. The property has approximately 340 feet of frontage on Old Georgetown Road. The site's parking area interconnects with a gas station abutting the southwest corner of the site and, at three locations along its southern boundary, with the Wildwood Shopping Center. Both the gas station and shopping center have direct access to Old Georgetown Road. The subject property abuts Berkshire Drive to the west, but has no vehicular connection to it.

The property slopes moderately down from the northwest corner to the southeast corner. It is landscaped with trees and shrubs near the existing office building and

bank within the parking area and along Old Georgetown Road. The site contains no sensitive environmental features.

The Applicant, Wildwood Medical Center, LLC, is the owner of the property, per Maryland property tax records, of which the Hearing Examiner took official notice. The property is about 1200 feet south of the I-270 Interchange with Old Georgetown Road (MD 187). Exhibit 27, Attachment 11.

Vehicular access to the site is available from the north by way of a stub road, which in effect extends Rock Spring Drive eastward, a short way across Old Georgetown Road onto an ingress/egress easement. The extension does not continue all the way to Berkshire Drive on the east. The site may be accessed by vehicles from the south via driveways which exist on both the eastern and western sides of the property and connect directly to the northern parking lot of the Wildwood Shopping Center. That parking lot primarily serves customers of Balducci's market, the northernmost retailer in the Shopping Center.

The subject site was further described by Victoria Bryant, Applicant's land planner. There is a significant number of trees along the northern boundary between the site and the single-family homes to the north, and there is a hedge row between the site and Berkshire Drive to the east. Ms. Bryant indicated that there is about a ten-foot difference in elevation between the site of the proposed building and Berkshire Drive. There are trees (a row of hemlocks), which create "a fairly decent evergreen screen" and an existing six-foot wooden fence separating that street and the site. Although there is no vehicular connection between Berkshire Drive and the property, there are pedestrian connections through openings in the fence. There is also a fairly extensive sidewalk system allowing pedestrian movement through the site. A ten-foot planting island delineates the site from Balducci's parking lot. Tr. 96-101.

The property does not have any existing forest, nor is it in a stream valley buffer or a special protection area. Exhibit 27, p. 24. However, there are issues regarding stormwater management which will be discussed below.

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. Staff defined the surrounding area as generally bounded by I-270 to the north, Farnham Drive to the east, Old Georgetown Road to the west, and Cheshire Drive to the south.

Applicant's land planner, Victoria Bryant, accepted this definition (Tr. 93-94); however, the evidence presented by Mr. Joseph Dias (Tr. 175-211 and Exhibit 43(a)) and Applicant's civil engineer, Pearce Wroe (Tr. 287-288), convinced the Hearing Examiner that the surrounding area boundaries should be extended to include the area where there is an outfall of stormwater runoff, a portion of which is generated by the subject site.

It is undisputed that the area immediately around Mr. Dias's home is severely affected by stormwater runoff, some of which comes from the subject site. Although the definition of the surrounding area is usually influenced by distance from the site and natural and man-made barriers (e.g. rivers and roads), the term is generally taken to be that area which will be most directly affected by the proposed development, as discussed by Ms. Bryant at the hearing. Tr. 132-134. While it appears from the evidence that the subject site is but one of many contributors

to the stormwater runoff problem, the Hearing Examiner concluded that a fair definition of the surrounding area should include the area around Mr. Dias's home at 5917 Rudyard Drive, which is just east of Farnham Drive (Technical Staff's proposed eastern boundary). This additional area would project the defined surrounding area eastward to the intersection of Rudyard Drive and Rossmore Drive, as shown by a blue dashed line on the surrounding area map depicted in the Hearing Examiner's report.

In addition, the Hearing Examiner recommended extending the surrounding area definition to include the properties confronting the subject site directly across Old Georgetown Road, as shown by a blue dotted line on the surrounding area map depicted on page 11 of his report. This expansion would incorporate the commercial properties in the shopping center across Old Georgetown Road from the site because they will be affected by the traffic generated along Rock Spring Drive and Democracy Boulevard by the proposed development. According to the testimony, those roads would be major access routes for the subject site. Tr. 49-52; 259-278. Therefore, the affected properties should be included within the surrounding area definition, even though they are separated from the site by a major roadway. The District Council agrees with both of these extensions of the surrounding area definition proposed by the Hearing Examiner.

Technical Staff described the surrounding area as follows (Exhibit 27, p. 3):

The surrounding area is characterized by a mixture of residential, office, and institutional uses classified in the R-90 and C-1 zones. Surrounding properties to the north and east are developed with one-family detached dwellings in the R-90 and R-90/TDR zones. Properties to the west are developed with a retail shopping center in the C-1 zone and a mix of one-family detached dwellings and townhouses in the R-60 zone. Properties to the south are developed with a retail shopping center in the C-1 zone (Wildwood Shopping Center). Although the shopping center is classified in the C-1 zone, the center's parking lot that is adjacent to the subject property operates pursuant to a special exception (CBA-1667) under the R-90 zone. A gasoline station, zoned C-1, abuts the subject property to the west. A special exception (S-1903) was approved in 1992 for an upgrade and rebuild of this site.

Applicant's land planner added to Staff's description of the surrounding area, noting that across Old Georgetown Road to the west, there is a Giant supermarket, a Chipotle and a couple of other restaurants in the C-1 Zone, and the Walter Johnson High School is behind them. There's an MXPD site that has been partially developed with apartment buildings along Interstate 270, and there are plans for a mixed-use development for the remainder of the site. Tr. 94-95. There are single-family homes to the north and to the east, and commercial uses in the surrounding area. The Hearing Examiner therefore found, and the District Council agrees, that this area is a mixed-use community, rather than solely a single-family, residential community. Tr. 105-108.

Applicant seeks approval of SDPA 12-1, as well as a special exception pursuant to Zoning Ordinance §59-G-2.36.2, to permit the construction of a residential dwelling in a Commercial (O-M) Zone. It would consist of a five-story, 58-unit, residential apartment building, with maintenance services to be handled by employees of the Applicant. Fifty-six of

the apartments would be two-bedroom units and two would be one-bedroom units. Thirty-five percent of the units (*i.e.*, 21 units) will be made available for tenants at “productivity housing” rates for households with incomes below the area-wide median income, as provided for in Chapter 25B, Article IV, of the County Code, and applicable regulations. There would also be 37 market rate units, and 225 parking spaces to serve the entire site, of which 114 spaces would be located in a garage underneath the apartment building and 111 spaces would be available in the surrounding surface parking lot that serves the existing medical office building and bank.

The project was described by Technical Staff as follows (Exhibit 27, p. 5):

The proposed building will be five stories (50 feet) at its highest point, tapering down to four stories and then three stories on the eastern end of the building. The Applicant is proposing landscape screening on the east facades of the fourth and fifth floor roof tops in an effort to soften the view of the building from the Wildwood residential community. A 30-foot buffer, between the right-of-way line Berkshire Drive and the paved area for circulation on the subject property, will include existing trees and enhanced landscaping that will eliminate direct lines of sight to the apartment building. The proposed building will be setback approximately 60 feet from the eastern property line.

These step downs in height along the eastern side of the proposed building will reduce its impact on the residences confronting the site across Berkshire Drive, to the east. With the setback from the property line and the vegetation along Berkshire Drive, Applicant’s architect, Sassan Gharai, testified that it will be very difficult to see the building from the neighborhood to the east. Tr. 33-34. Moreover, the sight lines for an individual standing at the property line along Berkshire Drive will reveal only the lower level of the building, making the structure appear smaller and thus more compatible to the viewer. Tr. 37-40.

According to Mr. Gharai, trees planted on the third and fourth tiers will help to screen those levels from those in the residential neighborhood. Tr. 40-42. Crenulations (*i.e.*, irregularities in the façade) are used to reduce the apparent mass of the building. Tr. 43-44.

The main entrance of the building will be in the center of the lower south bay, which faces the Wildwood Shopping Center and Balducci’s parking lot. There will be a sidewalk that goes around the building and connects to the sidewalk of the existing medical office building. The garage entrance will be on the eastern side of the building, and the loading dock will be located on the north face of the building, in an area between the two commercial buildings. This is where trash will be kept and picked up during the day. In order to avoid odor and noise issues associated with this function, Mr. Gharai tucked the trash area inside the building, and the trash truck will actually pull into the building, pick trash up and remove it with minimal noise and odor. Tr. 47-48. By agreement of the parties, garbage dumpster pick-ups must occur between the hours of 8:00 a.m. and 5:00 p.m. on weekdays. Tr. 66. A condition to this effect is included in the Board of Appeals resolution granting the special exception. The apartment building will have an entry lobby, a community room, a fitness center and a business office.

In order to meet concerns raised by the community and to satisfy points raised by the Planning Board, Applicant has agreed to a series of binding elements in the schematic development plan amendment to LMA G-851 (*i.e.*, SDPA 12-1). These binding elements, which *inter alia* incorporate some requirements of the special exception, will establish enforceable

limits on the proposed development. They are imprinted on SDPA 12-1 (Exhibit 56(a)) and are included in an Amended Declaration of Covenants (Exhibit 56(b)) which will be filed in the County's land records. These binding elements and covenants remove and replace the existing binding elements which had required a general office building on the site where Applicant now seeks to construct a residential building. The new binding elements are, in other respects, similar in format and content to the existing binding elements approved in LMA G-851. Absent approval of the requested SDPA, the existing SDP would prevent construction of the proposed residential building. The new binding elements are reproduced below:

CATEGORY	PERMITTED/REQUIRED	BINDING ELEMENT
LAND USE	See Section 59-C-4.2 for O-M Zone	<ol style="list-style-type: none"> 1. <u>Uses Permitted</u> <ol style="list-style-type: none"> A. Existing three story building. (Offices, general and offices, professional and business) Leasable office space must not exceed 30,000 square feet. B. Existing 3,471 square foot building. (Offices, general and professional (bank), <u>excluding</u> medical practitioners) C. Proposed five story residential apartment building containing not more than fifty-eight (58) residential dwelling units, including a minimum of 35% Productivity Housing Units (PHUs).
		<ol style="list-style-type: none"> 2. There will be no vehicular access between the Subject Property and Berkshire Drive. 3. Roof top mechanical equipment on the proposed residential building will be located as far westward on the building as is practicable (to reduce visibility from residences to the east) and will be screened in such a manner as to reduce visibility and the appearance of height. 4. Running the entire length of the Subject Property between the easternmost

		<p>property line of the Subject Property (the right-of-way for Berkshire Drive) and the paved area for vehicular circulation on the Subject Property, there will be a green space, at least 30 feet wide, as a buffer to screen the parking area, including the blocking of headlights of cars exiting the garage, and to screen the lower portions of the buildings. Within this green space the only land uses will be:</p> <ul style="list-style-type: none"> (1) An approximately 6 foot high board-on-board fence; (2) Shade trees; (3) Evergreen plantings on both sides of the fence selected and located to block headlight glare.
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CATEGORY	PERMITTED/REQUIRED	BINDING ELEMENT
<p>BUILDING HEIGHT</p>	<p>See Section 59-G-2.36.2(b)(2) (Not greater than 5 stories or 50 feet in height)</p>	<p>5. The residential building has been designed to rise in height as it progresses from east to west. As a result, there will be a rooftop over a three-story section of the building and a rooftop over a four-story section of the building. On these rooftops, in addition to any environmental/stormwater management features that may be located on such rooftops, Applicant will install and maintain, and replace as necessary, trees in planters or appropriate tree planting containers, intended to provide extensive screening and to reduce the visibility year round of the east facing fourth floor and fifth floor facades from the homes in Wildwood Manor located east of Berkshire Drive. The details of the species of the trees, size at the time of planting, planters, location and spacing, are specified in a Landscaping Plan as part of a companion application in</p>

The legal effect of the covenants is to obligate present and future owners of the property to comply with the binding elements specified in the covenants. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDPA may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a schematic development plan amendment.

In addition to the binding elements, certain “design criteria” were specified in the existing SDP, and they are changed in SDPA 12-1 by deleting references to the previously proposed office building and substituting references to the now proposed residential building. Language was also added to make it clear that the Department of Permitting Services and the Planning Board could impose additional stormwater management conditions, and at the request of WMCA, to exclude the word “Wildwood” from the name of the new building. These design criteria will be considered at site plan review by the Planning Board. They are:

DESIGN CRITERIA TO BE CONSIDERED AT SITE PLAN

1. Development of the Subject Property will be in accordance with the conditions of approval of a stormwater management plan relating to certain features of “green building” technology for the proposed residential building and any other conditions imposed by DPS or the Planning Board.³ If any of the major assumptions on which the stormwater management plan approval is predicated change, due to unforeseen circumstances, the applicant must reapply to Montgomery County, Maryland for a new stormwater management plan approval.
2. New freestanding lighting fixtures will be the same as, or similar to existing lighting in terms of style, height, and wattage. Any lighting fixtures affixed to or associated with the residential building on the Subject Property will be designed, located and operated to provide adequate security lighting and to illuminate the parking and walkway areas, not the buildings themselves. The details of a lighting plan are to be determined at the time of site plan review following completion of the zoning phase.
3. In the unpaved portion of the right-of-way of Berkshire Drive, subject to obtaining necessary permits from Montgomery County, Maryland, the following conditions will exist:
 - A. An approximately four foot wide concrete sidewalk will be installed in the Berkshire Drive right-of-way. The sidewalk will be extended beyond the southern limits of the Subject Property to connect to an existing staircase that provides access to the Wildwood Shopping Center.
 - B. Street trees will be planted in the Berkshire Drive right-of-way, per Montgomery County specifications, between said sidewalk and the street curb.

³ The underlined language was added to comply with a condition recommended by the Hearing Examiner and imposed by the Board of Appeals.

- C. Existing trees and shrubs within the Berkshire Drive right-of-way are to be preserved to the extent practicable.
4. Landscaping shown on the companion "Landscaping Plan" (Sheets LS-1 & LS-2) is intended to provide, among other things, a slightly, all season, green buffer along the Berkshire Drive right-of-way. The landscaping shown is illustrative only. Final locations, sizes and species of landscape materials will be determined at the time of site plan review.
 5. At the time of site plan review, the applicant will have selected, and will use exclusively, a name or identifier for the project which will not include the word "Wildwood" in the title.

In addition, Applicant has agreed to conditions recommended by the Planning Board for inclusion in Special Exception S-2830. They are incorporated into the conditions imposed by the Board of Appeals in granting the special exception. The conditions imposed by the Board of Appeals in its Resolution of November 21, 2012 in S-2830 (Exhibit 55) are as follows:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and the representations of its counsel identified in this report.
2. The Petitioner must limit subsequent preliminary and site plan amendments to a maximum of 58 mid-rise apartments in addition to the 36,423 square feet of existing medical office space, limited to 30,000 square feet of leasable office space, and 3,470 square feet of bank uses.
3. The Petitioner must provide a minimum of 225 total parking spaces on-site; the Board of Appeals approves shared parking in accordance with the provisions of Zoning Ordinance §59-E-3.1.
4. The Petitioner must receive approval of an amended preliminary plan and site plan by the Planning Board.
5. At the time of preliminary plan amendment, the Petitioner must satisfy the Policy Area Mobility Review (PAMR) test by installing and/or funding off-site non-auto transportation improvements as determined by the total number of units and unit types approved by the preliminary plan.
6. At the time of preliminary plan amendment, the Petitioner must provide sidewalks with at-grade crossing or handicapped ramps around the entire proposed apartment building and to the nearby buildings on the site.
7. At the time of the site plan amendment, the Petitioner must provide the number and location of parking spaces for the proposed residences and existing office

visitors/employees as required in the County Code and Zoning Ordinance, while demonstrating security for the residential parking.

8. At the time of the site plan amendment, the Petitioner must provide bicycle parking for visitors and residents as determined by the total number of units and unit types approved by the site plan.

9. Prior to release of any building permits for each proposed phase, Petitioner must provide the non-auto transportation improvements by making a payment via an acceptable financial instrument either to the Maryland State Highway Administration (SHA) or Montgomery County Department of Transportation (MCDOT).

10. Shade trees must be provided along Old Georgetown Road in conformance with the Master Plan, as determined at Site Plan.

11. The Petitioner must not charge any parking fees for parking spaces within the apartment building that are not reserved for residents.

12. This special exception is conditioned upon the approval by the County Council, sitting as District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland, of SDPA 12-1 in substantially the same form as shown in Exhibit 47(a) in the file of SDPA 12-1, but modified in accordance with Condition 13, below.

13. Petitioner must ensure that this special exception will not result in more stormwater running off the site than currently occurs. In addition, to make it clear that DPS and the Planning Board may elect to impose more stringent stormwater management conditions, Petitioner must amend SDPA 12-1 Design Criterion 1 to read:

1. Development of the Subject Property will be in accordance with the conditions of approval of a stormwater management plan relating to certain features of “green building” technology for the proposed residential building and any other conditions imposed by DPS or the Planning Board. If any of the major assumptions on which the stormwater management plan approval is predicated change, due to unforeseen circumstances, the applicant must reapply to Montgomery County, Maryland for a new stormwater management plan approval.
[Underlining added to note change.]

14. Since the proposed use will require an amendment to the existing preliminary plan of subdivision, in accordance with Zoning Ordinance §59-G-1.21(a)(9)(A), approval of this special exception is conditioned upon approval of an amendment to the preliminary plan of subdivision by the Planning Board. If changes to the site plan or other plans filed in this case are required by the subdivision amendment process, Petitioner must file a copy of the revised site and related plans with the Board of Appeals.

15. During the preliminary plan amendment process, Petitioner must demonstrate to the satisfaction of the Department of Permitting Services and the Planning Board that stormwater runoff from the entire site will comply with current State and County regulations and will not worsen the stormwater runoff conditions that currently exist downstream from the site.

16. The lighting for the site is permitted at the levels specified in photometric lighting plan (Exhibit 6(d)), to the extent the Planning Board finds that measurements exceeding 0.1 footcandles at the side and rear property lines are appropriate for this mixed use area "to improve public safety," as authorized by Zoning Ordinance §59-G-1.23(h).

17. If signage is added to the site, an amended special exception site plan must be filed with the Board of Appeals, so indicating. A sign permit must be obtained for any proposed sign, and a copy of the permit for the approved signage must be submitted to the Board of Appeals before any sign is posted.

18. There must be no direct vehicular access between the subject site and Berkshire Drive.

19. The Petitioner shall install, maintain and replace, as necessary, trees in planters or appropriate tree planting containers, on the third and fourth floor roofs, intended to provide extensive screening and to reduce the visibility year round of the east facing fourth and fifth floor facades from the homes on Wildwood Manor located to the east of Berkshire Drive. The species of trees, size and time of planting, planter locations and spacing shall be as specified in Special Exception Landscaping Plan dated July 20, 2012 and designated Exhibit 26(b).

20. Garbage dumpster pick-ups must occur between the hours of 8:00 a.m. and 5:00 p.m. on weekdays, in accordance with the agreement of the parties. Tr. 66.

21. In accordance with the agreement of the parties (Tr. 66-67), the word "Wildwood" will not be used in the title of the proposed residential building, so as to preserve it as a name pertaining to the adjacent neighborhood of single-family, detached homes.

22. If the community seeks a parking permit program or a program to control non-resident parking on Berkshire Drive and/or other nearby streets, Petitioner must carry out its promise made at the hearing (Tr. 238-239; 279-280) to support those efforts.

23. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

The District Council finds that the proposed binding elements, design criteria and special exception conditions will achieve the desired end of keeping the location, scale and size of the proposed structure compatible with other properties in the immediate area and will ensure appropriate screening of the site.

A floating zone is a 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 be consistent with the purpose and regulations of the proposed zone, as specified in Zoning Ordinance §59-H-2.51, and compatible with the surrounding development, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967). Any zone must also be consistent with a coordinated and systematic development of the regional district and in the public interest, as required by the Maryland Land Use Article, Code Ann. § 21-101(a)(4)(i) (2012).⁴

These are the standards that were applied in 2007 when the subject site was rezoned to the O-M floating zone by LMA No. G-851. The Schematic Development Plan Amendment proposed now must be evaluated under these same standards, with the binding elements discussed above.

The O-M Zone contains a post-zoning review process, site plan review, that generally delegates to the Planning Board the details of site specific issues such as building location, stormwater control, vehicular and pedestrian routes, landscaping and screening. We turn now to the three areas of Council review discussed above – the purposes and requirements of the applicable zone, compatibility with land uses in the surrounding area and relationship to the public interest.

Purpose Clause of the O-M Zone

The purpose clause for the O-M Zone, Zoning Ordinance §59-C-4.310, provides:

It is the purpose of the O-M zone to provide locations for moderate-intensity office buildings in areas outside of central business districts. It is intended that the O-M zone be located in areas where high-intensity uses are not appropriate, but where moderate intensity office buildings will not have an adverse impact on the adjoining neighborhood. This zone is not intended for use in areas which are predominantly one-family residential in character.

The fact that an application complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the application is, in fact, compatible with surrounding land uses and, in itself, shall not be sufficient to require the granting of any application.

Applicant's land planner, Victoria Bryant, testified that the proposed development would comply with the purposes, standards and regulations of the O-M Zone. Tr. 105-108. Technical Staff concurred, stating (Exhibit 27, p. 2):

⁴ 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.

The proposed development conforms to the purpose clause for the O-M zone in as much as dwellings are a permitted use as a special exception in the O-M Zone. Staff believes that with the recommended conditions as specified on pages 16-17, the proposed use conforms to the applicable requirements and regulations for approval of a Special Exception for a residential dwelling use.

Staff expanded on this point later in their report (Exhibit 27, pp. 15-16):

The proposal would replace a previously approved moderate-intensity non-residential use with a less intense residential use. As a result, the residential character of the proposed apartment building will make it more compatible with existing residential uses adjacent to the site. The proposed residential development will occupy a larger footprint than the approved office building, requiring special design treatments, physical separation, and enhanced landscape features to ensure compatibility of the proposed use with its surroundings. The 58-unit, 5-story building is consistent with the scale of the moderate-intensity level of development for the site that was found to be compatible with existing uses in the surrounding areas when the reclassification of the property to the O-M zone occurred. The proposed structure is consistent with the level of development intended by the O-M zone for areas outside of central business districts and near adjoining residential neighborhoods, where high density intensity uses would not be appropriate. The proposed residential building with the revised binding elements, therefore, will be compatible with its surroundings and be in compliance with the purpose clause of the O-M zone.

The Planning Board reached the same conclusion (Exhibit 34, p. 1):

The Planning Board found that the amendment is consistent with the purpose of the Office Building, Moderate Intensity (O-M) zone and that it satisfies all relevant standards of the O-M Zone.

The Hearing Examiner agreed with Technical Staff and the Planning Board, as does the District Council. The Applicant has committed to an extensive set of Binding Elements, design criteria and special exception conditions, all of which are reproduced above. Those binding elements, design criteria and special exception conditions were formulated to protect the neighborhood from adverse effects. Because on their inclusion in the revised SDPA 12-1, the Wildwood Manor Citizen's Association (WMCA) indicated that it would not oppose the special exception or the SDPA. Exhibit 31. WMCA's representative, Ann Bryan, testified that Applicant had made all the amendments to the plans requested by the WMCA. Tr. 17-18. She observed that these changes will mitigate much of the aesthetic impact of Applicant's proposals.

The District Council concludes that, with the addition of the binding elements, design criteria and special exception conditions, the proposed development should not have an adverse impact on the adjoining neighborhood. Moreover, the new proposal would have less of an impact than the general office building previously approved for this location.

Based on this record, the District Council finds that the proposal, limited as discussed, conforms with the O-M Zone's purpose clause.

Regulations (i.e., Development Standards) of the O-M Zone

The regulations of the O-M Zone are provided in Zoning Ordinance §§59-C-4.311 to 59-C-4.314. Technical Staff found (Exhibit 27, p. 25):

The proposed project satisfies all of the development standards listed above for the O-M zone. The proposed density is 16.6 units per acre. The special exception will provide 35% of its housing incomes for incomes at and below 75% of the area wide medium income level pursuant to Section 25B-17(j) of the County Code and Executive Regulation 19-98. The proposed building will be five stories tall at its highest point and will be no more than 50 feet in height as measured from the average grade along the building's Old Georgetown Road frontage. Green area provided over the entire site is approximately 40%. Lot coverage is approximately 22%.

As mentioned above, the Planning Board agreed, stating that the proposed development "... satisfies all relevant standards of the O-M Zone." Exhibit 34, p. 1. Technical Staff also provided a table demonstrating Applicant's compliance with all the development standards of the O-M Zone (Exhibit 27, pp. 22-23), which was reproduced in the Hearing Examiner's report.

The District Council recognizes that there is considerable community concern about the adequacy of parking planned for the site; however, as discussed at length in Part III.C.5.b. of the Hearing Examiner's report (pp. 44-54), Applicant's proposal to provide 225 parking spaces more than meets the minimum of 204 parking spaces required for the site, using the shared parking calculation authorized in the Zoning Ordinance. The Planning Board expressly endorsed Technical Staff's recommendation to employ the shared-parking calculation for this site, stating (Exhibits 34, p. 2):

The Planning Board agrees with staff's conclusion that the applicant's proposal to use shared parking in accordance with the provisions of 59-E-3.7 adequately satisfies the parking requirement for the existing and proposed uses on the site. The total shared parking requirement is 204 spaces, while the applicant is proposing 225 total spaces. . . .

The Board of Appeals also endorsed using the shared-parking method of calculating parking space requirements, as specified in Condition 3 to its grant of special exception S-2830 (Exhibit 55).

In order to meet the community's concern about providing adequate on-site parking for non-residents who will be utilizing other services on the site (i.e., bank, medical offices, etc.), the Planning Board recommended a special exception condition to ensure that the upper level garage parking provided for employees, visitors, patients and other nonresidents must be free parking. All of the conditions recommended by Staff and the Planning Board, including that one (Condition 11), have been imposed by the Board of Appeals in granting Special Exception S-2830 (with some minor rewording).

Based on the entire record, the District Council finds that the proposed development meets the purposes and requirements of the O-M Zone.

Compatibility

Applicant's architect, Sassan Gharai, testified that, in his opinion, the building design will be compatible with the surrounding neighborhood. It will be buffered from the neighborhood sufficiently and will clearly be part of the commercial zone in front of it. Tr. 61-62. He also noted that the planned residential building would be "a lot more compatible" with the neighborhood than the previously planned office building. Tr. 90-91.

Applicant's land planner, Victoria Bryant, testified that with the limitations imposed by the binding elements and the design criteria, both the use and the design are compatible with the setting of the subject site. "[It] is a great transitional use between the single-family and the commercial [uses] that exists there today." Tr. 116. She noted that along the east side, the building will be only two feet higher than the 35-foot height allowed under the R-90 Zone for a single-family home. Thus, the massing on the back side has been minimized. Tr. 114-116. Ms. Bryant opined that the proposal will result in an internally compatible development with no adverse effect on the surrounding community. Tr. 130. She noted that traditionally a multifamily building is a good transitional use between commercial and single-family residential uses. In her opinion, it is compatible. Tr. 132-135.

Wendy Calhoun, a neighbor testifying in opposition, stated that she does not understand how one after another of the experts can come in and testify that the proposed building will be compatible with the neighborhood, when those who live there completely disagree. She feels that "the renderings are much better this time around than when I saw them before and the landscaping looks very nice . . .," but she is opposed to it not because of how it looks, but because she believes it will add 200 people to the community. Tr. 229-233.

Technical Staff submitted the following opinion regarding compatibility (Exhibit 27, pp. 24-25):

Provided that the project is developed within the binding elements stipulated in the SDPA application and the conditions specified under the recommended approval of the special exception, both the structure and the use of the subject property are compatible with both the commercial and residential uses that surround the property. The use is a mixed-income residential building that will provide attractive, convenient, and affordable housing in close proximity to nearby employment and commercial centers. The use will complement and enliven the commercial uses in the surrounding area. The project proposes a residential density that conforms to the applicable standards of the zone.

There is no expert evidence contradicting the testimony of Applicant's experts and the evaluation of compatibility presented by Technical Staff. Based on this record, the District Council finds that the proposed building and use, as constrained by the binding elements and special exception conditions, will be compatible with the surrounding development. Moreover, the Planning Board will further evaluate compatibility issues at site plan review.

Public Interest

Maryland Land Use Article, Code Ann. § 21-101(a)(4)(i) (2012) requires that:

(i) planning, zoning, or subdivision control powers in the regional district [must be exercised to:]

(1) guide and accomplish a coordinated, comprehensive, adjusted, and systematic development of the regional district;

(2) coordinate and adjust the development of the regional district with public and private development of other parts of the State and of the District of Columbia; and

(3) protect and promote the public health, safety, and welfare.

Factors which are usually considered in determining the public interest include Master Plan conformity, the recommendations of the Planning Board and its staff, any adverse impact on public facilities or the environment, and positive factors such as provision of affordable housing.

1. Master Plan Conformity, Technical Staff and the Planning Board:

As discussed in Part III. D. of the Hearing Examiner's report, both Technical Staff and the Planning Board recommended approval of this application, finding that the proposed development, as limited by the binding elements, is appropriate and consistent with the North Bethesda/Garrett Park Master Plan, approved and adopted in 1992.

Technical Staff stated (Exhibit 27, pp. 12-13):

The proposed development is consistent with recommendations in the Approved and Adopted (1992) North Bethesda-Garrett Park Master Plan. Although there are no specific recommendations in the Master Plan for subject property at 10401 Old Georgetown Road, several land use objectives of the Master Plan will be implemented with this residential development, including increasing "the variety of housing stock, including affordable housing," and encouraging "a mixture of land uses in redeveloping areas to promote variety and vitality" (p.33). Further, the location of the development along Old Georgetown Road is appropriate since it is within an area that is "best served by transportation infrastructure" (p.33). Old Georgetown Road is identified in the Master Plan as a Green Corridor. The Green Corridors policy is intended to address "the visual effects of roadways and abutting properties. The Green Corridors policy is recommended to "protect and enhance the residential character of the Planning Area" (p.250). The Applicant's landscape plan should be modified at site plan to include street (shade) trees along the frontage of Old Georgetown Road.

The Planning Board adopted Technical Staff's findings in this regard in its July 18, 2012, letter from Francoise Carrier to the Council conveying the Planning Board's recommendation for approval of SDPA 12-1 (Exhibit 34, p. 1):

The Planning Board agrees with staff's conclusions that the proposed amendment is in accord with the land use recommendations of the 1992 North Bethesda-Garrett Park Master Plan . .

It should also be remembered that the Council reviewed the subject site only five years ago when it approved Resolution 16-392, rezoning it to the O-M Zone in LMA G-851. Exhibit 9. On page 8 of that Resolution, the Council stated:

. . . The District Council agrees with the findings made by the Hearing Examiner, the Planning Board and Technical Staff that the proposed development would comply with the Master Plan. The proposed development would further many of the relevant goals in the Master Plan, including focusing development on areas with existing infrastructure, increasing variety and vitality among land uses, and encouraging a land use pattern that provides opportunities for housing and employment.

The present proposal would change only one aspect of the project being considered by the Council in 2007 when it found Master Plan compliance – it would substitute an apartment building, including 21 “productivity housing” units, for an office building. This change, if anything, would make the subject site more in tune with the Master Plan’s goal of “increas[ing] the variety of housing stock, including affordable housing.” Master Plan, p. 33.

It appears to the District Council that all the evidence introduced in this case supports the proposition that the present proposal is consistent with the 1992 North Bethesda/Garrett Park Master Plan. Given this record, the District Council concludes that the proposed use is consistent with the goals of the Master Plan.

2. Public Facilities and the Environment:

(a) Transportation Facilities:

One of the chief concerns of the community is the possibility that adding the proposed building will increase traffic congestion in the neighborhood, especially at the intersection of Old Georgetown Road and Cheshire Drive, and at the intersection of Old Georgetown Road and Democracy Boulevard. See S-2830 Exhibits 21, 30 and 49(a); and the testimony of Melitta Carter (Tr. 211-224), Patricia Broderick (Tr. 224-228), Wendy Calhoun (Tr. 229-233), Andrea Gabossy (Tr. 234-242) and Brenda Sandler (Tr. 242-248).

Applicant’s evidence addressed traffic issues in general and the problems at both intersections. Applicant’s primary point is that the peak-hour traffic which will be produced by the proposed residential building will be much less than the traffic which would have been produced by the office building previously approved for this location. Moreover, traffic generated by the proposed building is unlikely to aggravate the condition on Cheshire Drive because other, more convenient exits will be used by the residents.

Applicant’s expert in transportation planning, Craig Hedberg, testified that he was involved in the traffic study for the initial rezoning. The previous proposal, the 30,000 square foot office building, would have generated 63 peak-hour trips. In the current modification, with the 58 apartment units, the trip generation drops to about 28 peak-hour trips, much lower than what was reflected in the original traffic study. With that drop in peak hour trips, no further traffic study was required since the property already had an approval for a higher ceiling. Tr. 145-147.

Both Mr. Hedberg and Applicant’s architect, Sassan Gharai, testified that the occupants of the subject site are not likely to progress through the shopping center to its southern exit onto

Cheshire Drive because they have a larger, more convenient exit available just south of the proposed building, across from Democracy Boulevard. Tr. 150-152; 259-278.

Mr. Hedberg stated that in his professional opinion, this project will be served adequately by existing facilities and the transportation network since there is very good access to major roadways, arterials, all the way up to freeways, and Applicant has provided local access improvements to add capacity at the principal access point opposite Rock Spring Drive. Tr. 158.

The Transportation Planning staff reviewed the SDPA and found that it meets all requirements of Local Area Transportation Review and Policy Area Mobility Review, as discussed in Part III. C. 5. a. of the Hearing Examiner's report. All of the expert evidence echoes Technical Staff's conclusion that "The existing traffic problems . . . are not adversely impacted by the proposed apartment building that replaces the previously-approved office building and generates fewer site-generated peak-hour trips." Exhibit 27, p. 12.

Mr. Hedberg also addressed the assertion made by a number of neighbors that the intersection of Democracy and Old Georgetown Road was designated by the Montgomery County Planning Department's 2011 Mobility Assessment Report as the most congested intersection in Montgomery County. Tr. 246. According to Mr. Hedberg, that designation was the result of a calculation error due to a misplacement of numbers in the data sheet. Apparently, the Old Georgetown Road volumes were repeated for the Democracy Boulevard volumes, which completely threw off the calculation. Technical Staff checked this issue just before the hearing with the person that compiled that report and did a recalculation with the correct numbers. The recalculation, as indicated in the Planning Board minutes, revealed that the intersection operates well within the critical lane volume standard. Tr. 285.

Based on this record, the District Council finds that the traffic generated by the proposed building will not have adverse effects on the neighborhood transportation facilities greater than, or even equal to, the effects that would occur if the previously approved office building were erected on the site.

(b) School Facilities:

The adequacy of school facilities was discussed in Part III. C. 5. c. of the Hearing Examiner's report. Wendy Calhoun, the President of the Ashburton Elementary School PTA, testified concerning existing and projected overcrowding in the schools. She observed that the Applicant "can pay a fine to get around that, but that doesn't solve the problem of where these kids go and it doesn't pay for more teachers and more classrooms." Tr. 228-232. Brenda Sandler also testified regarding her concern about the public school impact. She noted that the area schools are already at or above capacity. Tr. 242-243.

Technical Staff reported (Exhibit 27, p. 9):

The estimated student generation for this development is 3 elementary school students, 3 middle school students, and 2 high school students. The property is located in the service areas of Ashburton Elementary School, North Bethesda Middle School, and Walter Johnson High School. Enrollment at Ashburton Elementary School is projected to remain over capacity through 2017-18 school years. A feasibility study for an addition at the school is scheduled for FY 2013. Enrollment at North Bethesda Middle School also is projected to remain over capacity through the 2017-18 school years. A feasibility study for an addition at

the school is scheduled for FY 2013. Enrollment at Walter Johnson High School is projected to exceed capacity in the 2016-17 and 2017-18 school years. There are currently no plans for an addition at this school.

The current Subdivision Staging Policy, school test for FY 2012 requires a school facility payment at the elementary and middle school levels. The FY 2013 school test, that goes into effect on July 1, 2012, will require a school facility payment at the middle and high school levels.

Staff also noted that roads and schools will be further addressed per the subdivision staging policy in effect at the time the Planning Board considers Preliminary Plan Amendment for this site. Exhibit 27, p. 21.

Applicant's land planner, Victoria Bryant, testified that, based on the Technical Staff Report, Applicant will be making a school facilities fee payment, and the schools will accept the students. Tr. 171-173.

The Hearing Examiner found that school overcrowding is a legitimate community concern since the evidence of record indicates overcrowding in the area schools; however, the Planning Board will fully evaluate this situation at the Adequacy of Public Facilities (APF) and Site Plan reviews following the District Council's approval of SDPA 12-1. The District Council therefore finds that the evidence of adequate public facilities is sufficient at this stage to approve the SDPA in question.

(c) The Environment:

Environmental issues were discussed in Part III. E. of the Hearing Examiner's report. As mentioned there, a Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) has been approved for the subject property, and Environmental Planning Staff found no environmental issues warranting denial of this application. The subject site is not located within a Special Protection Area. The Technical Staff report notes that this project will require a Preliminary Plan Amendment, at which time the NRI/FSD approval and the Forest Conservation Plan exemption will be re-evaluated. Exhibit 27, p. 13. A stormwater management concept plan has not yet been approved for the site, but that step will be required at preliminary plan amendment. The only environmental issue raised in this case concerns stormwater management, and that concern was discussed extensively on pages 58-65 of the Hearing Examiner's report.

Stormwater management became an issue because of the documentation (Exhibit 43(a)) and testimony of Joseph Dias, who lives at 5917 Rudyard Drive, in Bethesda, just east of Farnham Drive. Tr. 175-211. According to Mr. Dias, stormwater runoff, a portion of which comes from the subject site, has caused significant stream bed and channel erosion adjacent to his home. Exhibit 43(a), p. 2. He states that the area where 44 new homes were built in late 1990s and the 3.5 acre subject site are "encapsulated" by County drains that flow downhill to the stream.

Mr. Dias notes that water runoff from the I-270/495 spur is also a source of his problem, and he is still fighting the County and the State Highway Administration (SHA) over the stormwater management issues; however, he feels it is important to slow down the flow in all cases. Tr. 197-198.

Mr. Dias's request is to require that all stormwater be retained on the subject site for the entire 3.5 acres under consideration. In his opinion, low impact development (LID) facilities such as green roofs, bio-retention, impervious runoff dispersion and permeable pavements are ways to reduce some water runoff, but they do not of themselves ensure that all stormwater will be retained on site. Tr. 183-185.

Applicant's civil engineer, Pearce Wroe, candidly admitted that some of the water runoff from the site does drain towards Mr. Dias's home. He testified there is a storm drain system that cuts across the shopping center, goes down near Chatsworth and Yorkshire, and finds its way over to the outfalls at Rudyard and Farnham. The drainage from the shopping center and the site flows to that outfall. He stated that about 100 to 120 acres of drainage outfalls at this specified storm drain location, and the site connects where it crosses the shopping center. Tr. 287-288. Moreover, the Department of Permitting Services (DPS) denied Applicant's request for an administrative waiver of the applicable stormwater management standards. Applicant then submitted an amended stormwater management concept plan (S-2830 Exhibit 35(a)), which is pending with DPS.

Mr. Wroe further testified that under the applicable regulations, for a redevelopment project, the standard is to do environmental site design (ESD) to the maximum extent practicable. The County asked Applicant to look for all reasonable opportunities to do environmental site design practices on the site. Applicant's engineering analysis determined that a green roof and three micro bio-retention facilities were the maximum extent practicable for stormwater management on site, given the site's limitations with the existing soils which don't infiltrate water very well. Tr. 288-290.

According to Mr. Wroe, the target management rate for the stormwater runoff was around two inches of rainfall. Applicant would provide for only a little more than one inch of rainfall, not for the entire two inches of rainfall, because there aren't feasible or practical opportunities to discharge all the water. The regulations require Applicant to explore all reasonable opportunities for environmental site design to the maximum extent practicable or technically feasible. On the redevelopment sites, it gets very difficult and complicated to reach the target threshold because of the existing utilities, the existing storm drain on site and the density of the site. Tr. 189-190.

In Mr. Wroe's opinion, the onsite management will improve stormwater management that exists on this site today by reducing impervious area and providing stormwater retention where there presently is none. He does not see any way in which it would worsen the situation, and it is certainly positive to reduce the flow off of this property. Tr. 288-290.

Applicant's attorneys argue that what is being requested by Mr. Dias (*i.e.*, that all stormwater runoff be retained on site) would impose conditions on the current proposal above and beyond what the law requires in order to address a problem that is much larger than anything created by this project. Tr. 202-208.

The Hearing Examiner found that Mr. Dias raised a legitimate concern, especially since it is conceded by Applicant's expert engineer that not all of the runoff from the site will be retained on site, and that some of it will end up in the area of Mr. Dias's property. However, there is nothing in the record contradicting Mr. Wroe's testimony that the onsite facilities will improve stormwater management that exists on this site today by reducing impervious area and providing

stormwater retention where there presently is none. He does not see any way in which it would worsen the situation. Tr. 288-290.

The Hearing Examiner recommended two special exception conditions to ensure that the development would not make Mr. Dias's stormwater runoff problem any worse than it already is and that the Planning Board would have flexibility to require improvements to the situation. Conditions 13 and 15, which have been imposed by the Board of Appeals, will provide some protection to Mr. Dias, while not impinging on the prerogatives of the two agencies (DPS and the Planning Board) charged with evaluating stormwater management issues in cases such as this one.

Based on the entire record, the District Council finds no environmental concerns warranting denial of the subject SDPA.

3. Positive Factors:

Another public interest consideration is that the proposed residential building will provide "productivity housing" in Bethesda. Thirty-five percent of the units (*i.e.*, 21 units) will be made available for tenants at "productivity housing" rates, as provided for in Chapter 25B, Article IV, of the County Code, and applicable regulations.

Productivity housing is defined by Code Sec. 25B-17(j) as "a project to build dwelling units for sale or rent at one location where at least 35 percent of the dwelling units are sold or rented to households with incomes below the area-wide median income." This change from the original plan to build a general office building on the site would make the development more supportive of the Master Plan's goal of "increas[ing] the variety of housing stock, including affordable housing." Master Plan, p. 33. It also places this affordable housing adjacent to shopping centers and medical offices, which tends to reduce vehicular traffic.

In sum, the District Council finds that the proposed use will not adversely affect surrounding development, will be consistent with the goals of the Master Plan, will provide a useful service to the community and will not adversely affect public facilities or the environment. The District Council therefore concludes that its approval would be in the public interest and appropriate for the comprehensive and systematic development of the County.

Conclusions

Based on the foregoing analysis and after a thorough review of the entire record, the District Council reaches the following conclusions with respect to SDPA 12-1:

1. That the requested SDPA complies with the purpose clause and the development standards of the O-M Zone;
2. That the requested SDPA will be compatible with existing and planned land uses in the surrounding area; and
3. That the requested SDPA bears sufficient relationship to the public interest to justify its approval.

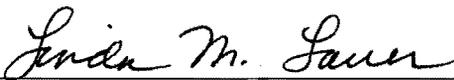
For these reasons and because granting the instant SDPA application would aid in the accomplishment of a coordinated, comprehensive, adjusted and systematic development of the Maryland-Washington Regional District, the application will be granted in the manner set forth below.

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:

Schematic Development Plan Amendment SDPA 12-1, seeking to amend the Schematic Development Plan and Covenants approved by the Council on November 27, 2007, in Local Map Amendment G-851, for a total of 3.47 acres (151,220 square feet) of land consisting of Lot N-541, Wildwood Manor Shopping Center Subdivision, located at 10401 Old Georgetown Road, Bethesda, Maryland, **is approved** subject to the specifications and requirements of the Schematic Development Plan Amendment, Exhibit 56(a); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan Amendment within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance; and that the Declaration of Covenants (Exhibit 56(b)) is filed in the County land records in accordance with §59-H-2.54 of the Zoning Ordinance, and proof thereof is submitted to the Hearing Examiner within the same time frame.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council