

Resolution No.: 17-261  
Introduced: September 27, 2011  
Adopted: September 27, 2011

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

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By: District Council

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**SUBJECT:** APPLICATION NO. G-907 FOR AMENDMENT TO THE ZONING  
ORDINANCE MAP, Robert R. Harris, Esquire and Cindy Bar, Esquire,  
Attorneys for Applicant, EYA Development, LLC, OPINION AND  
RESOLUTION ON APPLICATION Tax Account No. 07-00421993

**OPINION**

Local Map Amendment (LMA) Application No. G-907 was filed on April 6, 2011, and it requests reclassification of 1.8121 acres (78,935 square feet) of land located at 5400 Butler Road, Bethesda, Maryland, from the existing I-1 Zone to the RT-15 Zone. The property, which consists of Parcel 513 on Tax Map HM 13, is situated between Little Falls Parkway and the Capital Crescent Trail, southwest of River Road. The land is owned by Peter B. Hoyt (tax account number 07-00421993), who contracted to sell the land to Applicant. Exhibit 4.

The application was filed under the Optional Method authorized by Zoning Ordinance §59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development that consists of thirty new townhomes, including twenty-five market-rate units and five moderately priced dwelling units (MPDUs). The proposal is set forth in a revised Schematic Development Plan (SDP), Exhibit 69, which contains an illustrative diagram and a specification of thirteen binding elements, as well as other information regarding the development.

Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) reviewed the plans, and in a report dated July 1, 2011, recommended approval (Exhibit 30). The Montgomery County Planning Board considered the application on July 14, 2011, and unanimously voted to recommend approval, as set forth in a memorandum dated July 20, 2011 (Exhibit 38). The Planning Board agreed with its Technical Staff that the application satisfied all of the criteria for reclassification to the RT-15 Zone. In doing so, the Planning Board also supported the binding elements that addressed concerns raised by members of the community. The Board noted that parking sufficiency would be addressed at site plan review.

A public hearing was duly noticed and convened on July 25, 2011, at which time the Applicant presented testimony from five witnesses in support of the application. Applicant also introduced a copy of its Easement Agreement with the Maryland-National Capital Park and Planning Commission (Exhibit 43(a)), allowing it access to Little Falls Parkway across parkland, and specified additional binding elements for its schematic development plan, negotiated with the community, bringing the total of proposed binding elements to thirteen.

Jim Humphrey testified on behalf of the Montgomery County Civic Federation (MCCF), which opposed the rezoning because it feels that the applicable Sector Plan calls for retention of industrial uses in the County, and that the proposed project would not meet all R-T Zone standards. The only other opposition came from Robert Dyer, a citizen who lives about a half a mile away from the site, outside the defined surrounding area. He opposed the proposal because of the easement over parkland and because he feels that the proposed development will be incompatible with nearby industrial and commercial sites.

The proposed development was supported by the testimony of Dan Dozier, on behalf of the Little Falls Watershed Alliance (LFWA), because eliminating the current industrial use will greatly improve water quality and reduce noise in the area. The proposed rezoning was conditionally supported by testimony from two witnesses on behalf of the Citizens Coordinating Committee on Friendship Heights (CCCFH). CCCFH had been opposed to the granting of an easement across public land to provide access to the proposed development, but that having been agreed to by the M-NCPPC, the group now supports the proposed rezoning if issues relating to the quantity of parking can be resolved.<sup>1</sup>

Jenny Sue Dunner testified on behalf of the Coalition for the Capital Crescent Trail (CCCT). Although her organization takes no position on rezoning applications, she noted that the proposal includes a connection with the Capital Crescent Trail which will result in fewer cars on the roads.

After the hearing was completed, the record was held open for filing, by the Applicant, of the executed covenants and the revised plans, including the agreed-to additional binding elements, and for responses thereto by Technical Staff and interested parties. The Applicant timely filed the proposed covenants and the revised plans on August 1, 2011 (Exhibits 60 - 62), and submitted them for review by Technical Staff. They were thereafter revised, following comments from the community (Exhibit 63) and Technical Staff (Exhibits 68(a) and (c)). The final SDP (Exhibit 69) was filed on August 11, 2011. The executed covenants (dated August 3, 2011) were filed on August 9, 2011. Exhibit 66(a). The record closed, as scheduled, on August 11, 2011.

The Hearing Examiner's Report and Recommendation was filed on September 8, 2011, and it is incorporated herein by reference. The Hearing Examiner recommended approval on

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<sup>1</sup> Two witnesses testified for CCCFH, Ann McDonald, an officer of the organization and Peter Salinger, a member. Their testimony differed as to the impact of the parking issues. Ms. McDonald stated that even if the parking issue could not be resolved at this stage, CCCFH would support the rezoning (Tr. 150-152), while Mr. Salinger, supported by CCCFH's attorney, testified that CCCFH's support was premised upon EYA resolving the parking concerns. Tr. 291-293.

grounds that Applicant's proposal would satisfy the requirements of the RT-15 Zone and its purpose clause; that the planned development will be compatible with the surrounding area; and that rezoning will be in the public interest. While the rezoning will result in the loss of an industrial use in the County, the benefits of the rezoning to nearby parkland and to water quality far outweigh the loss.

After a careful review of the entire record, the District Council finds that the application does meet the standards required for approval of the requested rezoning for the reasons set forth by the Hearing Examiner.

### **The Property, Surrounding Area and Zoning History**

The subject property is located about 1200 feet south of River Road, just outside the Westbard commercial area and in proximity to the Friendship Heights Central Business District and residential areas. The site is bordered on the north by Euro Motorcars dealership and repair shop, and on the west, south and east by parkland (with the Capital Crescent Trail just to the west and Little Falls Parkway 90 feet to the east).

The 1.81-acre site is generally rectangular in shape and has an approximately 50 percent increase in slope from east to west, with the sharp grade differential of around 20 feet occurring largely at the western property line where the site adjoins the Capital Crescent Trail (*i.e.*, the trail is elevated above the site). The subject property is currently zoned I-1 and is developed with the BETCO plant, which distributes cinder blocks. BETCO has been at this location for a number of years, but has recently expressed an intention to relocate. The existing plant consists of multiple buildings and is largely comprised of impervious surfaces. The impervious surfaces encroach into the adjacent parkland in many areas. Exhibit 30, pp. 3-4.

Currently, the only vehicular access to the site is from a private extension of Butler Road, to the north. Tr. 218. The site abuts parkland, and M-NCPPC agreed to an easement over that parkland so that the proposed townhouse residents will be able to access Little Falls Parkway.<sup>2</sup> Exhibits 42-44. A portion of the site is in a stream valley buffer, but there is no forest on site, nor any specimen trees. The site is currently almost entirely impervious, and its soil contains some contaminants, which lead to it being described as a "brownfield site."<sup>3</sup>

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

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<sup>2</sup> The process for obtaining the Easement Agreement was rather involved. First, it had to be conceptually approved by the Montgomery County Planning Board, which occurred after a public hearing on January 20, 2011 (Exhibit 43). Then the full M-NCPPC had to approve the easement, which occurred on February 16, 2011 (Exhibit 42). On June 16, 2011, after a public hearing, the Planning Board approved the draft Easement Agreement (Exhibit 43). Next, the federal National Capital Planning Commission had to give its approval, which occurred on July 7, 2011 (Exhibit 44). Finally, an Easement Agreement must be executed. Although the final version of the Easement Agreement has been filed (Exhibit 43(a)), it cannot be executed unless and until the rezoning is approved because it requires Applicant to make a substantial payment to M-NCPPC upon execution. Tr. 154-155.

<sup>3</sup> Public Law 107-118, the "Small Business Liability Relief and Brownfields Revitalization Act," signed into law January 11, 2002, defines a "brownfield site" as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."

areas that would be most directly affected by the project. Technical Staff proposed to define the surrounding area as bordered by River Road to the north, the residential homes on the east side of Little Falls Parkway to the east, parkland down to Massachusetts Avenue on the south, and Westbard Avenue to the west. Exhibit 30, p. 5. Applicant's land planner proposed to define the surrounding area with slightly different boundaries, but he indicated that these differences were not significant and would not affect the compatibility analysis. Tr. 236. The Hearing Examiner accepted Technical Staff's surrounding area definition, as does the District Council.

Technical Staff described the surrounding area as follows (Exhibit 30, p. 5):

The land use and zoning pattern of the surrounding area is diverse. The Westbard commercial area is to the west of the site. Here, land uses are mixed, with higher density residential buildings and commercial shopping venues in place under C-0 zoning. Many industrial uses under the I-1 Zone line Butler Road to the north of the site. Parkland immediately surrounds the remaining three sides of the site, all within the R-60 Zone. An existing townhouse community, zoned R-T 12.5, is located further south of the site. One-family residential homes are further east, also in the R-60 Zone.

It is quite clear from both Technical Staff's description of the area and that of Applicant's land planner that the surrounding area is composed of a mixture of residential (multi-family, townhouse and single-family-detached), parkland, commercial and industrial uses.

The zoning history of the subject site was provided by Technical Staff (Exhibit 67). In 1958, when the County was comprehensively rezoned, the subject property was placed in the I-2 Zone. On October 19, 1982, following the recommendations of the 1982 Westbard Sector Plan, the subject property was rezoned from I-2 to I-1 through the G-368 sectional map amendment. The subject property is currently zoned I-1.

### **Proposed Development and Binding Elements**

The Applicant proposes to remove the existing industrial use (BETCO cinder block plant) and construct 30, three-story townhouses, consisting of twenty-five market-rate units and five moderately priced dwelling units (MPDUs). Applicant's vision for the project was discussed by its president, Bob Youngentob, who testified that EYA considers itself a smart growth developer which tries to place its developments in areas that benefit from existing infrastructure, where people have amenities that they can walk to, and therefore can place less reliance on their cars. Tr. 72.

Applicant's proposal calls for the primary access to the proposed townhouses to be off of Little Falls Parkway, and because Little Falls has a prohibition against commercial vehicles, there would be a secondary access off of Butler Road for commercial vehicles, trash pickup, delivery services, and the like. Tr. 76-78. The proposed location is close to the retail available in the Westbard area and even closer to the Capital Crescent Trail, which residents will be able to access by bicycle and foot via a public access easement to be constructed by the Applicant.

Each of the 25 market-rate townhomes will have a two-car garage, and the five MPDUs will each have a one-car garage. Two of the MPDUs will have an additional dedicated parking space on site, and at least eight additional surface parking spaces will be located on the property.

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the "optional method" of application. The optional method requires submission of a schematic development plan (SDP) that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding on the SDP must be set forth in a Declaration of Covenants to be filed in the county land records if the rezoning is approved. The Applicant's final SDP (Exhibit 69), which was revised after the hearing and approved by Technical Staff (Exhibits 68(a) and (c)), sets forth the thirteen binding elements and one non-binding element, for the development as follows:

### **BINDING ELEMENTS**

1. Density will be limited to no more than 30 townhouses, of which no more than 5 will be MPDU's.
2. Green space will be a minimum of 30% of the gross tract area.
3. Building height will be limited to 35 feet.
4. The impervious area of the site will be reduced significantly from the current condition with the final reduction determined at Site Plan.
5. Market rate units will provide garage parking spaces for at least 2 cars, moderately priced dwelling units will provide garage parking spaces for at least 1 car, and at least 2 of the MPDU units will also have a dedicated second parking space. A minimum of eight (8) additional non-driveway parking spaces will be provided on the site.
6. Subject to approval of the Maryland National Capital Park and Planning Commission ("M-NCPPC"), Applicant will install "no parking" signs along that portion of Little Falls Parkway that confronts the site. Applicant also will include in its HOA documents a confirmation that parking is prohibited on and along Little Falls Parkway.
7. Prior to Site Plan approval for the project, Applicant shall execute, and thereafter comply with all terms and conditions of the easement agreement with M-NCPPC, (the "Easement Agreement"), set forth as Exhibit 43A in the record of Case No. G-907, approved by vote of the M-NCPPC on June 16, 2011.
8. Access to the site will be provided via an easement and bridge connection to Little Falls Parkway pursuant to the Easement Agreement with M-NCPPC (the "Easement"), limited to passenger vehicles, bicycles and pedestrians traveling to and from the townhouse dwelling units, and for pedestrians and bicycles traveling to or from the

Capital Crescent Trail. Vehicular use of the Easement is not permitted by trucks or vehicles prohibited from using Little Falls Parkway by Commission Rules or Regulations. The Easement will not be open to vehicular use until one or more townhouse units on the site are available for sale.

9. Truck ingress to and egress from the site will be solely via a connection to Butler Road, with such connection having a traffic control mechanism(s) restricting through traffic from Butler Road to Little Falls Parkway and Little Falls Parkway to Butler Road, so as to prevent cut-through traffic by any vehicle use not associated with the development.

10. Development of the site will include a public access easement, to be constructed by the Applicant and maintained by the Applicant or the successor Homeowners Association for the site, to enable pedestrians and bicyclists to traverse the site for access from Little Falls Parkway to and from the Capital Crescent Trail ("CCT"). Such easement will be a minimum of 5 feet in width through the development site. Development will include, subject to M-NCPPC approval, construction of a connection to the CCT designed to accommodate bicycles and pedestrians in a manner similar to the pedestrian/bicycle connection between the CCT and Bradley Boulevard in Bethesda.

11. Development of the site will include, at the Applicant's cost, removal of the paving and debris materials from the existing industrial use on the site along Little Falls Branch, on the land of M-NCPPC, that is currently paved or otherwise encroached upon, and the replanting of this area with trees/shrubs, which will assist in screening the site from Little Falls Parkway, as approved by M-NCPPC.

12. The Applicant's consideration for the Easement to Little Falls Parkway will be governed by the Easement Agreement between the Applicant and M-NCPPC to implement certain public amenity projects to enhance the surrounding community and parkland which may include but are not limited to, stream restoration, non-native species management, trail renovations/maintenance and/or traffic calming measures as prescribed in the Easement Agreement between the Applicant and M-NCPPC.

13. Consistent with the Easement Agreement with M-NCPPC, in addition to the CCT public access easement, the development also will include a green landscape easement, granted to M-NCPPC, as an aesthetic green space that can be viewed by users of the park and trail. Such easement areas shall be at least equal in gross area to the gross area of the Easement granted by M-NCPPC for access to Little Falls Parkway. To the extent feasible and practical, at the sole discretion of the Applicant, the easement shall be concentrated in the area along the southern property line, adjacent to Little Falls Parkway.

### NON-BINDING ELEMENT

Applicant will cooperate with the Capital Crescent Trail Coalition and other civic organizations to urge the appropriate governmental agencies to use the money required to be paid by Applicant pursuant to PAMR and some portion of funds Applicant is paying as consideration for the Easement Agreement for constructing improvements to the Capital Crescent Trail in the vicinity of River Road to facilitate and promote bicycling.

Applicant has also filed an executed copy of the Declaration of Covenants in the record of this case as Exhibit 66(a), and it contains the specified binding elements, as required. The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a schematic development plan amendment.

The graphic portion (*i.e.*, site layout) of the revised SDP (Exhibit 69), is illustrative (except as specified in the binding elements). The plan shows 30 townhouses (five of which are MPDUs), arranged along the southern, western and eastern sides of the site, with a central driveway (an upside down "T"), giving access to all of the units and connecting to Little Falls Parkway on the east. Trucks will not be permitted to use the Little Falls Parkway access, but the SDP shows access to Butler Road on the north for trucks and delivery vehicles. In addition to the 13 binding elements and one non-binding element listed above, the SDP also contains General Notes and a Development Program Table.

As mentioned earlier, the subject site is adjacent to parkland on three sides, with Little Falls Parkway to the east and the Capital Crescent Trail to the west. Prior to the hearing, M-NCPPC agreed to an easement over the parkland to the east of the site so that the proposed townhouse residents will be able to access Little Falls Parkway. Exhibits 42-44. Development of the site will also include a public access easement, to be constructed by the Applicant and maintained by the Applicant or the successor Homeowners Association for the site, to enable pedestrians and bicyclists to traverse the site for access from Little Falls Parkway to and from the Capital Crescent Trail. *See* Binding Element 10.

Binding Element 7 requires Applicant to execute the Little Falls Parkway Easement Agreement (Exhibit 43(a)), prior to site plan approval and to thereafter carry out its terms. Those terms include various "public amenity projects," such as a stream restoration plan, a non-native invasive species management program and a trail renovation project. Binding Element 8 limits the use of that access to passenger vehicles, bicycles and pedestrians traveling to and from the townhouse dwelling units, and to pedestrians and bicycles traveling to or from the Capital Crescent Trail. Truck ingress to and egress from the site will be solely via a connection to Butler Road, pursuant to Binding Element 9, with such connection having traffic control mechanisms restricting through traffic between Butler Road and Little Falls Parkway, so as to prevent cut-through traffic by any vehicle use not associated with the development.

Binding Element 5 specifies that each market rate unit will provide garage parking spaces for at least 2 cars, and each MPDU will provide garage parking spaces for at least 1 car. Moreover, at least 2 of the MPDUs will also have a dedicated second parking space, and a minimum of eight (8) additional non-driveway parking spaces will be provided on the site, as shown on the SDP. Thus, assuming a 30 unit development with five MPDUs, the total parking for the site will consist of at least 65 parking spaces (25 X 2 = 50 Market rate garage spaces + 5 MPDU garage spaces + 2 MPDU dedicated spaces + 8 guest spaces). This figure exceeds the number of spaces required for the site by Zoning Ordinance §59-E-3.7, which calls for two spaces per unit (*i.e.*, a total of 60 spaces). The SDP parking table refers to 63 spaces being provided, rather than 65, because Technical Staff has not yet approved the location of the two additional dedicated spaces for the MPDU units.

Nevertheless, the Citizens Coordinating Committee on Friendship Heights (CCCFH) expressed concern that the eight guest spaces proposed by Applicant would not be sufficient. Since there are rarely any parking spaces available on nearby Butler Road, CCCFH fears visitors would end up parking on adjacent parkland. Tr. 133-153; 285-299.

Applicant addressed this concern in two ways. It agreed to a binding element (#6), which specifies that, subject to approval of the Maryland National Capital Park and Planning Commission, Applicant will install “no parking” signs along the portion of Little Falls Parkway that confronts the site. Applicant also will include in its HOA documents a confirmation that parking is prohibited on and along Little Falls Parkway.

In addition, Applicant observed the following, in General Note 15 on the SDP:

15. IN ADDITION TO THE PARKING SPACES PROVIDED FOR IN BINDING ELEMENT #5, NUMEROUS ADDITIONAL PARKING SPACES WILL BE AVAILABLE IN THE MARKET RATE TOWNHOUSE DRIVEWAYS. WHILE THE ACTUAL NUMBER WILL BE ESTABLISHED AT SITE PLAN, THIS ILLUSTRATIVE LAYOUT PROVIDES FOR 10 STANDARD SPACES (8.5'x18') AND 39 COMPACT SPACES (7.5'x16.5'), FOR A TOTAL OF 49 ADDITIONAL GUEST PARKING SPACES.

Although these additional spaces are not part of the binding elements, the fact that the planned driveways may well provide many additional parking spaces should make it much more likely that CCCFH's fears about overflow parking on the site will not become a reality.<sup>4</sup> As noted by the Planning Board in its letter of July 20, 2011 (Exhibit 38), the parking sufficiency issues will be addressed at site plan review. Given that Applicant's plan surpasses the minimum parking required by the Zoning Ordinance, and in fact the available driveway spaces may result in a total far exceeding that minimum, the District Council agrees with the Planning Board and the Hearing Examiner that the details of the parking provided should be left to site plan review.

Applicant's transportation planner testified that sight distances at the possible locations for the proposed access to Little Falls Parkway were adequate, and that the proposed access

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<sup>4</sup> Applicant produced a Parking Exhibit (Exhibit 60(e)) which indicates the possible locations of the additional driveway parking spaces. Applicant also suggested that Butler Road might provide additional spaces (Tr. 172-173), but as testified to by Ann McDonald of CCCFH (Tr. 148-149), parking on Butler Road is very scarce and cannot be relied upon to satisfy the parking needs of the proposed development.



points to the site would be safe, adequate and efficient. Tr. 315. He further testified that the internal circulation would be safe and adequate for vehicles and pedestrians, and would be sufficient for access by fire trucks. Tr. 315-316. There is no contradictory expert evidence on the point, and the District Council therefore finds that the record supports the finding that the planned access locations and circulation are not unsafe.

### **Standard for Review**

A floating zone, such as the RT-15 Zone, is a flexible device. 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 and compatible with the surrounding development, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967). The Council must also find that the rezoning will be in the public interest as part of the coordinated and systematic development of the regional district, as required by the *Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110*.

### **Requirements and Purpose of the Zone**

Under the “purpose clause” set forth in Zoning Code §59-C-1.721, the R-T Zone may be applied if a proposal meets any one of three alternative criteria: (1) it is in an area designated for R-T Zone densities (implying a master plan designation); (2) it is in an area that is appropriate for residential development at densities that are allowed in the R-T Zones; or (3) it is in an area where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.

The Westbard Sector Plan, at p. 52, recommended that the site be reclassified from I-2 to I-1 to reduce the industrial impact on the parkland and the neighbors, but it also specified that the site would be appropriate for townhouse development in the RT-10 Zone, if access to Little Falls Parkway could be achieved. On the other hand, it did not specifically designate the subject site for the RT-15 Zone, and thus the Purpose Clause arguably cannot be satisfied under the designation criterion.<sup>5</sup> However, there are three alternative methods of satisfying the Purpose Clause, and an Applicant is required to satisfy only one of them. Accordingly, the Purpose Clause may also be satisfied by development in areas “*appropriate for residential development at densities allowed in the R-T Zones*” or in areas “*where there is a need for buffer or*

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<sup>5</sup> Applicant argues that its proposal does satisfy the “designated” prong of the statutory test because the Sector Plan recommends a townhouse development, and the RT-15 Zone did not exist in 1982 when the Sector Plan was adopted. Tr. 246-248. Technical Staff agreed with Applicant for the same reasons. Exhibit 30, pp. 1, 12 and 14. While this interpretation is arguable because the language of the statute could be read as applying the term “designated” to any “*residential development at densities allowed in the R-T Zones*,” not just to the specific density mentioned in the Sector Plan, the District Council agrees with the Hearing Examiner that a better interpretation of the term “designated” is that it is referring to the particular RT-Zone density recommended, while the term “appropriate” is referring to any of the densities allowed in the RT Zones. Under Applicant’s interpretation, a Master Plan recommending RT-6 could be considered as designating an RT-15 Zone, and that is a wide disparity in potential densities and impacts on the neighbors. As discussed in the above text, this difference in interpretation of an ambiguous statute does not affect the outcome of the case because the statutory test may be satisfied by meeting any one of the three alternative criteria.

*transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses."*

The evidence in this case supports Applicant's contention that the subject site satisfies both the "appropriateness" and the "transitional" criteria. In this regard, Applicant's land use planner, William Landfair, testified that the development is appropriate at this location for a number of reasons. First of all, the Sector Plan indicated that the site would be appropriate for townhouses. Although the Sector Plan recommended the RT-10 density, Mr. Landfair opined that the specific category of RT-15 is more appropriate, given the site's proximity to Bethesda and Friendship Heights, and given the changes in land planning that have taken place since the original approval of the Sector Plan in 1982. Tr. 243-244.

At the time the Sector Plan was written, the urban row home on compact sites was not a common building type, particularly in places like Montgomery County, and the concept of developing more compact and more sustainable communities in close-in locations was not the prevailing approach. In fact, the RT-15 Zone did not even exist at the time of the Sector Plan's adoption. It was added later in recognition of the changes in urban design and land use concepts.

Since the adoption of the sector plan, the Westbard area has become more urban in character, taking advantage of the development of transit oriented urban destinations in Bethesda and Friendship Heights. The property is adjacent to and will have access from the Capital Crescent Trail. In fact, this trail used to be a railroad serving nearby industrial uses, but now it is a major recreational corridor allowing residents to walk, run and bicycle into Bethesda. Tr. 242-245.

In addition, the RT-15 zone permits a more appropriate density than that allowed by the RT-10 zone or the RT-12.5 Zone because the latter are more suburban in character and require greater open space and setbacks. Given the orientation of the property, surrounded on three sides by parkland, the large setbacks of the other RT zones are simply not needed. Given the size of the property, the RT-10 zone would only yield 18 units, and not require any MPDUs. The RT-15 proposal is providing five MPDUs, which is a large public benefit in an area where there are relatively few MPDUs. Tr. 245.

Mr. Landfair further testified that the proposed development would serve as a transitional use between commercial, industrial, or high density apartment uses, and low density one-family uses. Tr. 246-248. Mr. Landfair also used a comparative density exhibit prepared by Technical Staff (Exhibit 53) to support his opinion that the proposed development would be transitional, as well as compatible with its surroundings. He noted that the proposed development would have a total density of 16.7 units to the acre, while the residential densities transition from the higher densities further to the west, to the lower single-family densities to the east. A multi-family building, which is located in Westbard, has an approximate density of 137 dwelling units to the acre, while a nearby townhouse community further to the south has a density of just under 13 dwelling units to the acre. The single-family residential neighborhood to the east has a density just under five (5) dwelling units to the acre. In his opinion, given these surrounding densities,

as well as the proximity of commercial and industrial uses nearby, the proposed density of 16.7 dwelling units to the acre will provide an appropriate transition.<sup>6</sup> Tr. 238-241.

Technical Staff agreed with Mr. Landfair's analysis. As stated by Technical Staff (Exhibit 30, pp. 15-16),

The subject property is an appropriate site for townhouse development given its location and proposed density. . . .

In looking at the existing and approved developments in the surrounding area, it is readily apparent that residential densities of the area transition from higher density to the west to lower density one-family residential neighborhoods to the east. West of the subject property, within the Westbard commercial area, an existing multifamily building has a density of 137 dwellings per acre in addition to the numerous commercial venues located in the area. South of the site, an existing townhouse community has a density of 13 dwellings per acre. The one-family detached residential neighborhoods to the east have a density of approximately five dwellings per acre.

The density proposed for the subject property fits within a transitional framework for the area given the surrounding densities. At 16.8 dwellings per acre, the proposed density provides a transition from the high density apartment building, commercial establishments, and industrial facilities to the west to the low density one-family neighborhood to the east. Additional factors, such as the site being in close proximity to multiple amenities, help lead to the conclusion that the proposed density is appropriate for the area. Given the nature of the surrounding area, the proposed townhouse development is appropriate for the subject property

The Planning Board concurred as well, stating (Exhibit 38, p. 1),

. . . The application also meets the transitional standard, as the property is located between commercial, industrial, and high-density residential uses and one-family detached homes. Lastly, the proposed density is appropriate given the existing residential densities in the area. The redevelopment of the site will clean up a brownfield site that encroaches onto neighboring parkland, provide substantially more open space than exists today, provide a pedestrian/bicyclist connection between Little Falls Parkway and the Capitol Crescent Trail, and add to housing choice in the area. For these reasons, the Planning Board finds the R-T 15 Zone to be appropriate at this location.

Based on this record, the District Council agrees with the Hearing Examiner's finding that the purpose clause of the RT-15 Zone has been satisfied.

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<sup>6</sup> As noted by the Hearing Examiner, 30 dwelling units on 1.8121 acres results in a density of 16.56 dwelling units per acre.

The intent clause of the R-T Zones, found in Zoning Ordinance §59-C-1.721, will also be fulfilled. The first part of that clause notes that it is the intent of the R-T Zones “to provide the maximum amount of freedom possible in the design of townhouses and their grouping and layout within the areas classified in that zone. . . .” That intent is carried out here with a row design that is a bit longer than usually found in order to design a layout that will fit within the available space. The intent clause also seeks “to provide in such developments the amenities normally associated with less dense zoning categories . . .,” which is accomplished here by access to parkland and to the Capital Crescent trail. The clause continues with the goal of providing “the greatest possible amount of freedom in types of ownership of townhouses and townhouse developments . . . .” In this development, there will be both market rate units and MPDUs, thus fulfilling the statutory goal. Finally, the intent clause seeks “to prevent detrimental effects to the use or development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole.” As discussed below, this development will not only prevent detrimental effects on adjacent properties, it will remedy the detriments of the current industrial use and will improve the healthful environment.

Having addressed the purpose and intent of the RT-15 Zone, we now turn to the statutory requirements of the Zone. Applicant’s proposal complies with all of the development standards and special regulations of the RT-15 Zone, save two which the Zoning Ordinance permits to be varied under specified circumstances.

The first is the requirement of Zoning Ordinance §59-C-1.732(a) for a 30-foot setback from land classified in a one-family detached zone. Applicant proposes a 20-foot setback from the neighboring parkland on the east, south and west, which is classified in the R-60 Zone (*i.e.*, a one-family detached zone). Zoning Ordinance §59-C-1.732(a), Note 1, permits a reduction of the setback if “. . . a more desirable form of development can be demonstrated by the applicant to the satisfaction of the planning board . . . .”

Technical Staff recommended approval of the reduced setback (Exhibit 30, p. 10):

. . . A reduction of the setback to 20 feet is recommended for optimum design since the reduced setback allows a site layout where the townhomes are open to the interior of the community and front to the proposed streets. The reduction also is sensible because, although zoned one-family detached, the surrounding land is parkland and is undeveloped.

The Planning Board unanimously recommended approval of the rezoning “for the reasons stated in the Staff Report.” Exhibit 38, p. 1.

The District Council agrees with the Hearing Examiner’s observation, based on the unrefuted evidence at this stage, that the proposed reduction in the setback will cause no harm in this case, and will result in “a more desirable form of development.” However, the final decision on this matter is expressly left to the Planning Board under the language of the above-quoted footnote 1, and the design and layout of the proposed development will be evaluated by the Planning Board at site plan review.

The second variance from the development standards pertains to the row requirements of Zoning Code §59-C-1.722. That provision specifies that the maximum number of townhouses in a group is eight; and three continuous, attached townhouses are the maximum number permitted with the same front building line. It also provides that variations in the building line must be at least 2 feet. However, Zoning Ordinance §59-C-1.74(d)(2) provides that the row design requirements of §59-C-1.722 may be waived if necessary to accommodate increased density because of the inclusion of MPDUs. Applicant's General Note #13 indicates that it is seeking to apply this waiver provision to allow one of the rows of townhouses to include nine units (*i.e.*, one over the limit of eight) and to eliminate the two-foot variation every three units. The Technical Staff report supported the waiver regarding the row of nine units, but did not address the two-foot variation issue. Exhibit 30, p. 10.

The evidence at this stage supports the granting of such a waiver of the row requirements, but this kind of design detail is a matter best determined at site plan review by the Planning Board. In accordance with the recommendation of the Hearing Examiner, the Council notes that the Planning Board, at site plan review, may determine it is appropriate to reduce the setback requirements of Zoning Ordinance §59-C-1.732(a), as permitted by footnote one to that section, and to waive the row requirements of Zoning Ordinance §59-C-1.722, as permitted by §59-C-1.74(d)(2)).

In sum, the District Council finds that the subject application meets the purpose and requirements of the RT-15 Zone.

### **Compatibility**

An application for a floating zone reclassification must be evaluated for compatibility with land uses in the surrounding area. There was some disagreement on this issue at the hearing.

The Applicant's land planner, William Landfair, opined that the proposed townhouse development, at RT-15 density, will be compatible with the surrounding area, which has a very diverse mix of uses, with single-family residential uses to the east, and multi-family, retail, industrial and office uses to the north and west. He believes that this plan will provide a compatible transition between those uses, as indicated by the gradual decrease in residential densities from west to east in the surrounding area. Mr. Landfair also argued that townhouses are inherently compatible with other single-family uses because they are allowed in all single-family zones with MPDU options and cluster methods of development. Finally, the specific design features, notably the binding elements that have been agreed to, will help to ensure maximum compatibility. Tr. 238-241;251-252.

The opposition disagreed with Mr. Landfair's assessment. Jim Humphrey of the Montgomery County Civic Federation (MCCF) testified that placing a residential development on this site perpetuated the undesirable planning practice of interspersing more multi-family residential units with industrial uses, and thus the development would be incompatible with the surrounding area. Tr. 275. Citizen Robert Dyer opined that the project would not be compatible because it would intrude into parkland which is scarce in this area. Tr. 35-36.

Both Technical Staff and the Planning Board found the proposed development to be compatible with its surroundings. As stated by Technical Staff (Exhibit 30, pp. 16-17):

The proposed townhouse community is compatible with adjacent development in the surrounding area. Both townhomes and detached homes are by nature one-family residential dwellings, which in itself lends to a presumption of de facto compatibility. Furthermore, given the transitional nature of the surrounding area and the characteristics of the specific proposal, which provides comparable building heights and parkland buffers on three sides, any intrusiveness that could threaten the integrity of adjacent uses is minimized.

In addition, as demonstrated by Technical Staff's density comparison exhibit (Exhibit 53), "the density proposed for the subject property fits within a transitional framework for the area given the surrounding densities." Exhibit 30, p. 15.

The Planning Board observed that the binding elements in this case also contribute to the compatibility of the proposed development. As the Board stated in its memorandum of July 20, 2011 (Exhibit 38, p. 3):

. . . With the appropriate textual binding elements reflecting the compatibility of the proposed development, the Board finds the proposal compatible with the surrounding area and considers the R-T 15 Zone suitable at this location.

The Hearing Examiner agreed with the compatibility finding of Technical Staff and the Planning Board, as does the District Council. The District Council also agrees with the Hearing Examiner's observation that townhouses are not always compatible with other single-family uses. Compatibility depends on the height, bulk, density, proximity and buffering of the townhouses when compared to any nearby single-family uses. Nevertheless, the evidence in this case is that the proposed townhouse development will be compatible with other single-family uses in the surrounding area. The proposed townhouses will be no taller than 35 feet pursuant to Binding Element No. 3. There are no residences to the north, and the development will be surrounded by parkland on the south, east and west. There are other townhouses and multifamily developments to the west and northwest, and the single-family detached units to the east are buffered not only by parkland but by distance.

While there is a legitimate question, raised by MCCF, about locating a residential use next to an industrial zone, only one unit (Number 21) will be adjacent to the industrial zone to the north, and it will be separated by the access way to the Capital Crescent Trail and will undoubtedly be screened after review at site plan.

Based on this record, the District Council agrees with the findings made by Technical Staff, the Planning Board and the Hearing Examiner that the proposed reclassification to the RT-15 Zone and the proposed development would be compatible with development in the surrounding area.

## Public Interest

The Applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. When evaluating the public interest, the District Council normally considers Master Plan or Sector Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment, and factors such as provision of affordable housing, location near public transportation, and other public amenities.

As mentioned above, the *1982 Westbard Sector Plan* does not specifically recommend the RT-15 Zone. However, compliance with Sector Plan recommendations is not mandatory in this case because the R-T Zones do not require it; rather, the courts have held that the Master Plan or Sector Plan should be treated only as a guide in rezoning cases like this one. As stated in *Trail v. Terrapin Run*, 403 Md. 523, 527, 943 A.2d 1192, 1195 (2008),

We also acknowledge our statement in *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 530, 814 A.2d 469, 478 (2002) (citing *Richmarr*, 117 Md. App. at 635-51, 701 A.2d at 893-901, [1997] that:

We repeatedly have noted that [master] plans, which are the result of work done by planning commissions and adopted by ultimate zoning bodies, are advisory in nature and have no force of law absent statutes or local ordinances linking planning and zoning. . . .<sup>7</sup>

The Sector Plan and the recommendations of the Planning Board and Technical Staff were considered, at length, in Part III.G. of the Hearing Examiner's report. Although the Sector Plan does not specifically recommend the RT-15 sought by Applicant, the requested rezoning is consistent with most of its objectives (with the notable exception of preserving industrially zoned land), and more importantly, is consistent with its specific recommendation for a townhouse development on the site if access to Little Falls Parkway could be attained. The Planning Board and its Technical Staff support the proposed rezoning, believing that the development will be compatible with surrounding uses and compliant with the purposes and standards of the RT-15 Zone.

While MCCF has a point about the Sector Plan's recommendation to retain industrially zoned land in the County, as a matter of statutory interpretation, usually the specific provision governs the general. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992). Although the Sector Plan recommended efforts to retain industrially zoned land in general, it specifically noted that the subject site was appropriate for townhouse development if a connection to Little Falls Parkway could be established. That condition precedent has been met.

Moreover, this particular site, located in the middle of parkland, adjacent to the Capital Crescent Trail and near to residential areas, would seem an odd place to attempt to retain industrially zoned land. It is clear from the language of the Sector Plan that it recommended the

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<sup>7</sup> Because the proposed RT-15 Zone does not require conformance or consistency with the Sector Plan, this case is not affected by legislation aimed at modifying *Terrapin Run's* interpretation of the words, "conformance" and "consistency." See Smart, Green, and Growing - Smart and Sustainable Growth Act of 2009, effective July 1, 2009.

I-1 Zone for the Site to reduce in the severity of the previous I-2 Zone's impact on nearby parkland and residences, and its authors felt that the options for residential zoning were limited at the time in the absence of access to Little Falls Parkway. As stated on p. 52 of the Sector Plan,

The options available are limited. The current use is allowed only in the I-2 Zone. The depth of the abutting parkland is thin, making the block plant quite visible; its appearance is somewhat out of place with nearby residences. Rubble from the plant appears to have been discarded down the stream banks. Noise from the plant has been reported by nearby residents, although investigation by County authorities has revealed no violation of the Noise Ordinance. Moreover, retention of the I-2 zoning classification leaves open the possibility of the property being converted to more objectionable uses allowed in that zone. A change to the I-1 Zone would permit the plant to continue in use but be converted only to office, warehouse, light manufacturing, or similar use. Under other circumstances, the abutting park suggests townhouse residential as an appropriate use. However, the fact that the only access is through an industrial street clearly rules out that possibility unless access to Little Falls Parkway were to be authorized.

Recommendations — The I-2 Zone should be changed to I-1 so that any redevelopment would be to some less intensive and more desirable use. Meanwhile, in order to reduce the effect of noise and to improve the appearance from nearby areas and the Parkway, acoustical fencing should be installed in the area abutting the parkland.

If access can be gained off Little Falls Parkway, an appropriate zoning classification would be RT-10.

The District Council thus reads the Sector Plan the same way that Technical Staff, the Planning Board and the Hearing Examiner did – as a recommendation for townhouse zoning if access could be gained off Little Falls Parkway, not as a recommendation for the I-1 Zone now that access to Little Falls Parkway has been achieved. The general recommendation about preserving industrially zoned land is subsidiary to the specific recommendation for residential zoning. Perhaps more importantly, the townhouse zone makes more sense in this setting, in the middle of parkland, adjacent to the Capital Crescent Trail and near to residential areas. It also will fulfill other objectives of the Sector Plan to reduce impervious areas, improve stormwater management, reduce pollution of the waterways, reduce noise pollution and to provide a pedestrian path connecting Little Falls Parkway with the interior of the sector.

Given this record, the District Council finds that although the proposed development would not comport exactly with the RT-10 zone recommendation for the site, it would accomplish the goals and objectives of the Sector Plan for this area.

The impact on public facilities was discussed in Part. III. H. of the Hearing Examiner's report. As stated there regarding school capacity, the Bethesda-Chevy Chase cluster is currently over capacity, but the Council has budgeted money in its Capital Improvements Program with the express intent of avoiding a residential development moratorium. Attachment to Council



Resolution 17-141, Part II. The net effect is that overcrowding will be kept below 120% of capacity, and Applicant will have to pay a school facilities payment at all three levels.

The evidence also supports the conclusion that the impact on local traffic and transportation facilities from this development would be minimal and will clearly meet Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR) standards. In addition, the proposed development would have no adverse effect on utilities or other public services.

The potential for any adverse environmental impact was discussed at length in Part III. I. of the Hearing Examiner's report. As noted there, a forest conservation plan will be required at subdivision to provide for afforestation and to avoid damage to nearby off-site specimen trees, and removal of the brownfield will be supervised by the Maryland Department of the Environment. A stormwater management concept plan will be submitted to the Department of Permitting Services, and it will be reviewed at subdivision. Concerns about the negative effect of losing some parkland to the access easement agreement are more than balanced by the many positive effects on the environment inherent in this project, including removal of a brownfield, significant reduction in imperviousness of the site, new stormwater management, improved water quality, reduction in truck traffic and noise, access to the Capital Crescent Trail, and a variety of public amenity projects. Neither Technical Staff nor the Planning Board noted any adverse effect on the environment.

In addition to the public amenities referenced above, the proposed development will provide five MPDUs in Bethesda, and a residential location with access to public transportation and the Capital Crescent Trail, which should reduce the use of vehicles.

Technical Staff concluded that the proposed development would be in the public interest, stating (Exhibit 30, p. 17):

The applicant proposes a townhouse development, including an affordable housing component, next to existing parkland. A connection to nearby parks is integrated into the townhouse community. Environmental improvements to the site will be provided in the form of updated stormwater management facilities and the removal of encroachments into adjacent parkland. The redevelopment of the site will eliminate an industrial brownfield and replace it with a residential development of appropriate density that fits within the character of the surrounding area and adds to the housing diversity of Bethesda. Additional housing at this location will also provide support for the many businesses near the site in the Westbard commercial area. For these reasons, the application bears a sufficient relationship to the public interest to justify its approval.

The Planning Board indicated that it "was persuaded by the reasoning in the Staff Report that the proposal meets the purpose clause of the R-T 15 Zone and that the proposal is in the public interest." Exhibit 38, p. 3.

The Hearing Examiner found that this proposal will eliminate existing adverse impacts on the community, improve the environment, provide a transition from commercial and industrial development for the nearby single-family detached homes, add affordable housing in the area and establish a residential community with easy pedestrian and bicycle access to the Bethesda CBD and other points.

For all of these reasons, the District Council concludes, based on the preponderance of the evidence, that the proposed reclassification and development would have no adverse effects on public facilities or the environment, and that approval of the requested zoning reclassification would be in the public interest.

### **Conclusion**

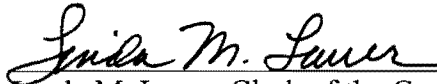
Based on the foregoing analysis and the Hearing Examiner's report, which is incorporated herein, and after a thorough review of the entire record, the District Council concludes that the application satisfies the requirements of the RT-15 Zone and its purpose clause; that the application proposes a form of development that would be compatible with land uses in the surrounding area; and that the requested reclassification to the RT-15 Zone bears sufficient relationship to the public interest to justify its approval. For these reasons and because approval of the instant zoning application will aid in the accomplishment of a coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District, the application will be approved 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:

Zoning Application No. G-907, requesting reclassification of 1.8121 acres (78,935 square feet) of land, known as Parcel 513 on Tax Map HM 13, and located at 5400 Butler Road, Bethesda, Maryland, from the existing I-1 Zone to the RT-15 Zone, is hereby **approved** in the amount requested and subject to the specifications and requirements of the revised Schematic Development Plan, Exhibit 69; provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance, and that the revised Declaration of Covenants (Exhibit 66(a)) is filed in the County land records in accordance with § 59-H-2.54 of the Zoning Ordinance and proof thereof submitted to the Hearing Examiner within the same timeframe. The Planning Board is authorized to determine, at site plan review, whether it is appropriate to reduce the setback requirements of Zoning Ordinance §59-C-1.732(a), as permitted by footnote one to that section, and to waive the row requirements of Zoning Ordinance §59-C-1.722, as permitted by §59-C-1.74(d)(2)).

This is a correct copy of Council action.

  
Linda M. Lauer, Clerk of the Council