

Resolution No.:	<u>19-492</u>
Introduced:	<u>June 9, 2020</u>
Adopted:	<u>June 9, 2020</u>

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

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By: District Council

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**SUBJECT:** APPLICATION NO. H-135 FOR AMENDMENT TO THE ZONING ORDINANCE MAP, Patricia Harris, Esquire, Attorney for the Applicant, ELP Bethesda at Rock Spring; OPINION AND RESOLUTION ON APPLICATION; Tax Account No. 04- 01567726.

**OPINION**

ELP Bethesda at Rock Spring LLC (ELP or Applicant) filed Local Map Amendment (LMA) Application No. H-135 on December 20, 2019. The application seeks to rezone approximately 33.64 (net) acres of property from the CR-1.5, C-0.75, R-0.75, H-150 to the CRF (Commercial Residential Floating Zone) 1.5, C-0.75, R-1.5, H-150. Exhibit 2. The subject property is located at 10400 Fernwood Road and is further described as Rock Spring Center Pt. Pars 6 & 12 (Tax Account No. 04-01567726).

Staff of the Montgomery County Planning Department (Planning Staff or Staff) recommended approval of the application and associated Preliminary Forest Conservation Plan (PFCP) on March 16, 2020. Exhibits 51, 52. The Planning Board recommended approval of the application and approved the PFCP at its public meeting on March 26, 2020. Exhibit 55. OZAH's public hearing proceeded as noticed on April 17, 2020. No one appeared in opposition to the application. The Hearing Examiner issued her report (HE Report) recommending approval on May 8, 2020.

On June 2, 2020, the Applicant submitted a revised Floating Zone Plan (FZP) (Exhibit 60) and draft covenants (Exhibit 61) to be approved by the Council. The public hearing included testimony and evidence that the use would be restricted to a continuing care retirement community (CCRC) for seniors, however, this had not been made a binding element in the FZP or the covenants. The revised documents correct that omission.

The Hearing Examiner reopened the record to receive the Applicant's submissions (Exhibits 59-61) and closed it immediately afterward. Exhibit 62. The Hearing Examiner issued a Supplemental Report and Recommendation (Supplemental HE Report) recommending approval

of the revised FZP on June 2, 2020. She found that there was ample evidence in the record that the Applicant intended to develop a CCRC restricted to senior housing under the FZP. The Hearing Examiner, Planning Board, and Planning Staff based their recommendations of approval on the fact that the property would be a CCRC. Exhibit 52, 55. The revised documents clarify that the use requested in the public record will be binding on subsequent approvals. The revisions made no substantive change to the Hearing Examiner's original findings.

To avoid unnecessary detail in this Opinion, the HE Report and Supplemental HE Report are incorporated herein by reference. Based on its review of the entire record, the District Council finds that the application meets the standards required for approval of the requested rezoning for the reasons set forth by the Hearing Examiner.

### **Subject Property**

The property currently serves as the headquarters for Marriott International. Improvements include a 775,000 square foot office building, surface parking, and an above-ground garage. It is part of the Rock Spring Office Park, located east of the eastern leg of the I-270 Spur. The Thomas Branch stream runs along the southern part of the property with associated wetlands and floodplains. An existing road traverses the environmental buffer, a portion of which provides access to the property adjacent to the south. The site has no forested areas but does have several specimen trees. Exhibit 52, p. 4.

### **Surrounding Area**

The "surrounding area" is identified and characterized in a Floating Zone application to measure whether the development proposed by the Floating Zone Plan (FZP) will be compatible with the properties directly impacted by the use. The boundaries of the surrounding area include those properties. Once delineated, the surrounding area is "characterized" to compare the compatibility of the development proposed by the Floating Zone with the character of the area.

The Hearing Examiner agreed with Planning Staff and the Applicant that the surrounding area is bounded by Rockledge Boulevard to the east, Rockledge Drive to the north, Westlake Drive to the west and Democracy Boulevard to the south. Staff characterized the area as primarily commercial in character, including office buildings, Westfield Montgomery Mall, a hotel, a Home Depot and a car dealership. One existing residential development confronts the property across Fernwood Road. Exhibit 52, p. 3. The Applicant's expert land planner characterized the existing land uses in the surrounding area as heavily suburban and commercial. There are several approved but not yet constructed residential developments in the surrounding area. In her opinion, land uses in the area are gradually evolving into the mixed use, connected community envisioned by the Rock Spring Sector Plan. T. 33-34.

The Hearing Examiner found that the existing surrounding area is heavily suburban and commercial but is gradually transitioning to the mixed-use concept envisioned by the Sector Plan as described later in this Report. Based on this record, the District Council agrees and so finds.

## Proposed Development

The Applicant proposes to redevelop the property with a CCRC containing up to 1,300 independent living units, 210 assisted living/memory care units, and 50 skilled nursing units in six buildings. Exhibit 60. Except for the marketing center, which is one story, the buildings will range in height between 7 and 13 stories. T. 39-40. ELP may develop up to 15,000 square feet of retail along Fernwood Road, although it is likely that the amount will be lower. T. 40. The project will provide the equivalent of 15% MPDUs, as required by the County Code. T. 9-10; Montgomery County Code, §25A-5(d)(1).<sup>1</sup> At full build-out, ELP expects to employ approximately 650 individuals. The development includes 1,800 parking spaces to serve residents and employees. T. 19, 41. ELP plans to retain part of the existing garage and add four-stories of living space above it. T. 25-26.

The FZP includes a “green necklace” around three sides of the property. T. 39. This consists of open space (a publicly accessible pathway) around the western and southern boundaries and a 1.5-acre civic park bordering Fernwood Road, also open to the public. *Id.* The compact urban design of the buildings enables the green boundary and streetscape improvements to Fernwood Road. T. 45. The project will be developed in three phases. T. 21-25.

There are four binding elements included on the FZP, which: (1) require the 1.5-acre public park, (2) require a minimum of 5,000 square feet of retail space, (3) require at least one other major public facility that meets Sector Plan guidance, to be determined at the Sketch Plan stage, and (4) restrict the use to a residential care facility defined by §59.3.3.2.E.2 of the Zoning Ordinance, which includes a CCRC. Exhibit 60.

## Criteria for Approval

Every application for rezoning to a Floating Zone must be accompanied by a Floating Zone Plan (FZP) that meets certain requirements. *Zoning Ordinance*, §59-7.2.1.B.2.g. The Applicant has filed an FZP meeting those requirements (Exhibit 60), which is described in the Hearing Examiner’s Report.

The Zoning Ordinance and State law govern the standards of approval for a floating zone application. Generally, these standards fall into five categories (1) conformity to the Master Plan, (2) compatibility with adjacent uses and the surrounding area, (3) the adequacy of public services to support the proposed development, (4) technical requirements regarding whether the property is eligible to apply for a Floating Zone, and (5) whether the FZP meets the development standards of the zone requested.

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<sup>1</sup> The exact location and method of providing these units will be determined later in the development process. At the public hearing, ELP advised that the Planning Department is considering changes to the current MPDU law (Montgomery County Code, §25A-5(d)(1)) for continuing care retirement communities. ELP will provide the requisite number of MPDUs in accord with the law in effect at later (*i.e.*, sketch or preliminary plan) phases. Changes being considered include, without limitation, provision of off-site units and fees in lieu of actual housing units. T. 10.

## Conformance with the Master Plan<sup>2</sup>

The 2017 *Approved and Adopted Rock Spring Sector Plan* (Sector Plan or Plan) guides the development of this property. Cognizant that the market for office park space was declining, the Plan tried to shed the area's more suburban past by implementing four "overarching" goals for land use and design, the environment and sustainability, public facilities, and transportation and connectivity. *Plan*, p. 20. The Plan envisioned a greater mix of land uses and amenities for businesses and residents. It recommended achieving a sustainable environment by creating a larger tree canopy and reducing reliance on vehicular transportation, which overlaps with the Plan's "connectivity" goal to create safer, "low-stress" pedestrian and bicycle connections. *Id.* The Sector Plan's vision for community facilities was to include more publically accessible green spaces. *Id.* The Plan's focused redevelopment along a "central spine" on Fernwood Road bordering the subject property and extending to Rock Spring Drive to the west. Located in the "Rock Spring Central/Mixed-Use Business Campus" sub-area, the Plan recommended the existing CR Zone for the property but noted that a floating zone may be appropriate for redevelopment of the site. The floating zone recommendation was to provide "options and flexibility for infill or redevelopment in the future should circumstances change for the office buildings." Exhibit 52, p. 9.

Staff concluded that the FZP conforms to the Plan's goals by adding a new residential use to the area, providing additional green space for both the pathway and the civic park, creating new activity along the Plan's central spine, and creating a safer and lower stress pedestrian and bicycle environment with improvements to Fernwood Road. Exhibit 52, p. 9. The Hearing Examiner found that the "residential use, streetscape improvements and "road diet" along Fernwood Road, and additional multi-modal connectivity will meet the Sector Plan's goal to achieve a well-integrated, mixed use community." *Hearing Examiner's Report*, pp. 15-16. Based on this uncontroverted evidence, the District Council agrees and so finds.

## Compatibility with Adjacent Uses and the Surrounding Area

Multiple standards for approval require the District Council to find that the FZP be compatible with adjacent uses and the surrounding area.<sup>3</sup> Based on Staff's report and testimony from the Applicant's land planner, the Hearing Examiner concluded that, "the overall FAR will

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<sup>2</sup> Section 59-7.2.1.E.2.a. of the Zoning Ordinance requires the District Council to find that the FZP "substantially conforms with the recommendations of the applicable master plan, general plan, and other applicable County plans." Section 59-7.2.1.E.2.b requires the FZP to be "in the public interest," which includes a review of conformity with County plans and policies and whether the development will be consistent with the coordinated and systematic development in the Regional District under State law. Section 59-7.2.1.E.2.c requires the application to further the intent of Floating Zones. The intent of Floating Zones incorporates compliance with the applicable master plan. *Zoning Ordinance*, §59-5.1.2.A.1.

<sup>3</sup> The FZP must further the intent of Floating Zones in general and the CRF Zone in particular. *Zoning Ordinance*, §§59-7.2.1.E.2.c; 59-5.1.2.C; 59-5.3.2. Floating zones are intended to (1) establish compatible relationships between new development and existing neighborhoods through limits on applicability, density, and uses, (2) provide development standards and general compatibility standards to protect the character of adjacent neighborhoods; and (3) allow design flexibility to mitigate any negative impacts found to be caused by the new use. *Id.*, §59-5.1.2.C. One purpose of the CRF Zone is to provide "provide mixed-use development that is compatible with adjacent development." *Id.*, §59-5.3.2.C. Similarly, Section 59-7.2.1.E.2.d of the Zoning Ordinance requires the Council to find that the FZP is "compatible with existing and approved adjacent development."

not change; only the commercial/residential FAR will change to add a new use to the surrounding area as called for by the Sector Plan.” *HE Report*, p. 17. The District Council finds that the public pathway and civic park surrounding much of the property meets the Plan’s goal to preserve and enhance green area and buffers the development from adjacent uses. The upgraded streetscape and multi-modal improvements to Fernwood Drive will be more compatible with the area as it develops into a mixed-use community. The bike path improvements to Fernwood Road and green walkway provide low-stress pedestrian and bicycle connections. The FZP uses the design flexibility of the CRF Zone to orient the buildings in a compact grid pattern, leaving space to provide the green area and the civic park. For these reasons, the District Council finds the Plan is compatible with adjacent uses and the surrounding area, as did the Hearing Examiner, the Planning Board and Planning Staff.

### **Adequacy of Public Facilities/Public Interest**

The District Council must also find that public facilities will be adequate to serve the FZP. While a more detailed review will occur later in the development process, a threshold analysis must be performed at the rezoning stage.<sup>4</sup>

The Applicant in this case submitted a traffic statement rather than a Traffic Study, as permitted under Planning Board’s Local Area Transportation Review (LATR) Guidelines when a development will generate fewer than 50 new weekday peak hour person trips. *Zoning Ordinance*, §59.7.2.1.E.2.e; *LATR Guidelines*, p. 8. The Traffic Statement (Exhibit 12) demonstrates that the proposed development will significantly reduce the number of weekday peak hour person trips generated by the existing office use. Having no evidence in this record to the contrary, the District Council agrees with the Hearing Examiner that the application complies with the LATR Guidelines.

Uncontroverted evidence establishes that other public facilities are adequate as well. The Applicant’s expert in civil engineering testified the existing gas, water, sewer, police and fire services are adequate to serve the proposed development. T. 62. The Applicant submitted a stormwater management strategy that has been reviewed and accepted by the Department of Permitting Services. T. 60-62. Based on this evidence, the District Council finds that public facilities will be adequate to serve the development proposed by the FZP.

### **The Intent and Standards of the Zone as set forth in Section 59.5.1.2.**

The District Council must determine whether the FZP fulfills the intent of the Floating

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<sup>4</sup>Section 59.7.2.1.E.2.e requires that an Applicant demonstrate that traffic generated from the proposed development “does not exceed the critical lane volume or volume/capacity ratio standard as applicable under the Planning Board’s LATR Guidelines, or, if traffic exceeds the applicable standard, that the applicant demonstrate an ability to mitigate such adverse impacts . . .” The adequacy of other facilities is part of the Council’s determination that an application will be “in the public interest...” and that it be “it will be consistent with a coordinated and systematic development of the Regional District” under State law. *Zoning Ordinance*, §59-7.2.1.E.1.b; *Md. Land Use Art.*, §21-101(a) and (b). The intent of the Floating Zones is to “implement comprehensive planning objectives by...ensuring that the proposed uses are in balance with and supported by the existing and planned infrastructure...” *Zoning Ordinance*, §59-7.2.1.E.1.b; 59-5.1.2.A.2.

Zones. Several of these have already been addressed.<sup>5</sup> The balance of those (from Section 59-5.1.2) are:

*Section 59-5.1.2.A.3. Implement comprehensive planning objectives by:*

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

The Hearing Examiner found it “obvious” that the project utilizes design flexibility to integrate the use with existing land use patterns and natural features. The compact grid pattern of the development preserves and enhances environmental features and non-vehicular transportation modes. Almost one-half acre of existing impervious area will be removed from the environmental buffer. Exhibit 52, pp. 12-13. The project will incorporate 8.5 acres of green space along the environmental buffers including a walking path open to the public and a 1.5 acre civic park open to the public. The streetscape improvements along Fernwood contribute to the central spine road envisioned by the Sector Plan. The District Council concurs with the findings of the Hearing Examiner.

*Section 5.1.2.B. Encourage the appropriate use of land by:*

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

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

*3. ensuring that development satisfies basic sustainability requirements, including open space standards and environmental protection and mitigation; and*

The Sector Plan itself recognizes the declining demand for commercial office space in an office park setting. *Sector Plan*, p. 5. Testimony and evidence before the Hearing Examiner demonstrate that there is a high demand for continuing care retirement communities within the area. The FZP affords the opportunity to repurpose the office park to serve a residential population without burdening school facilities. The project will also reduce the amount of impervious area by removing approximately ½ acre of an existing road on the south side of the property. The Planning Board has approved a PFCP for the project, demonstrating compliance with the County’s Forest Conservation law. The District Council finds that the FZP meets the intent of these purposes of a Floating Zone, as did the Hearing Examiner.

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<sup>5</sup> The intent of Floating Zones contained in Sections 59-5.1.2.A.1 and 2 and 59-5.1.2.C of the Zoning Ordinance has already been addressed in the Council’s findings relating to the compatibility of the FZP with surrounding uses and the adequacy of public facilities. The balance of the Floating Zone intent clauses are discussed here.

### **The Applicability of the Zone (Section 59.5.1.3.)**

Section 59.5.1.3. of the Zoning Ordinance sets up a series of threshold tests to determine whether a site may apply for a Floating Zone.<sup>6</sup> No prerequisites are required, however, if the floating zone is recommended by the Master Plan. *Zoning Ordinance*, §5.1.3.B.

The Hearing Examiner concluded that the Sector Plan recommended a floating zone for the property, as did Planning Staff. Based on this uncontroverted evidence, the District Council finds there are no prerequisites for application of a Floating Zone.

### **The Purpose of Commercial/Residential Floating Zones, Permitted Uses, and Permitted Building Types, Sections 59.5.3.2 through 59.5.3.4)**

Zoning Ordinance Division 59-5.3 specifies the purposes of the Commercial/Residential Floating Zone, and establishes the allowed uses, building types, and development standards.

Section 59.5.3.1. establishes the Commercial/Residential Floating Zone. Density must be expressed in increments of 0.25 FAR and height in increments of 5 feet. The Zone applied for here is the CRF 1.5, C-0.75, R-1.5, H-150 Zone, which meets those requirements.

**Purpose.** The District Council has already found that the FZP is compatible with adjacent development, one of the purposes of the Commercial/Residential Zones. *Zoning Ordinance*, §5.3.2.C. The remaining purposes are:

#### ***Section 5.3.2. Purpose***

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

- A. allow development of mixed-use centers and communities at a range of densities and heights flexible enough to respond to various settings;*
- B. allow flexibility in uses for a site...*

The cap on height and density does not change the density recommended by the Sector Plan. It only alters the mix of uses on the property to permit a residential continuing care retirement community, a new use in the area. The District Council concludes that the proposed FZP meets these purposes of the CRF Zone, as did the Hearing Examiner.

***Uses and Building Types Permitted (Section 59.5.3.3 and 59.5.3.4):*** The CRF Zone permits only the uses allowed in the CR (Commercial/Residential Zone) and permits any building type. *Zoning Ordinance*, §§5.3.3.3, 59.5.3.4. The FZP proposes a continuing care retirement community, which is a “residential care facility for over 16 persons” permitted in the CR Zone. *Zoning Ordinance*, §59.3.1.6. This use has been added as a binding element to the FZP. Exhibit 60. The FZP meets this standard.

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<sup>6</sup> Section 59-5.1.3.A prohibits placement of a Floating Zone on property currently in an Agricultural or Residential Zone. As this property is zoned CR, that section does not apply.

**Development Standards of the Zone (Section 5.3.5)**

**Density.** Where a floating zone is recommended in a Master Plan, the Master Plan recommendation for the property governs the permitted density. *Zoning Ordinance*, §59.5.3.5.A.1. The Sector Plan recommended a total FAR of 1.5 for this property, as reflected by the property's existing zoning. The FZP does not change this recommendation. The District Council finds that the FZP meets the density criteria of the Zoning Ordinance, as did the Hearing Examiner.

**Height and Setbacks.** If a floating zone is recommended in a Master Plan, height is determined by the Master Plan. *Id.* §59.5.3.5.B. The requested zone does not change the height of the existing rezoning recommended under the Sector Plan. Both Planning Staff and the Hearing Examiner concluded that the height proposed meets this criterion, as does the District Council.

Setbacks from the site perimeter are established by the FZP. Both Planning Staff and the Applicant have submitted testimony and evidence finding that the setbacks are compatible with the surrounding area and adjacent properties. The plan proposes a significant green area along three sides of the property and will provide streetscape improvements along Fernwood Drive. The District Council finds that the perimeter setbacks are compatible and appropriate.

**Lot size, parking, recreation and open space.** Lot sizes are not part of the District Council's review at the rezoning stage. *Id.*, §59.5.3.5. C. The FZP demonstrates the requisite amount of open space for the residential development. *Id.*, §59.5.3.5.D. The FZP also shows the required parking for the proposed use. Exhibit 60. Planning Staff and the Hearing Examiner concluded that the FZP meets all development criteria. Based on this undisputed evidence, the District Council agrees.

**Public Benefits.** Section 59.5.3.5.E of the Zoning Ordinance requires development above 0.5 FAR to provide public benefits. The Sector Plan recommends a hierarchy of public benefits for this area. Staff summarized the Plan's recommendations as follows (Exhibit 52, p. 10):

- Dedication of land for needed school site as the highest priority public benefit.
- Providing 15% MPDUs is the highest priority public amenity for new residential development, unless the Property is required to dedicate land for a school or athletic field.
- Other major public facilities including land for parks and school athletic fields, dedications for the North Bethesda Transitway, a library, a recreation center, County service center, public transportation or utility upgrade.
- Diversity of uses and activities.
- Connectivity and mobility.
- Reuse of existing building. (p. 81).

Two binding elements of the FZP address public benefits in conformance with the Sector Plan. One requires the Applicant to provide the 1.5-acre publicly accessible civic park. The other requires the ELP to provide at least one major public facility that conforms to the guidance in the Sector Plan. Exhibit 60. The details of the second public facility will be determined at the Sketch Plan stage of the development process. Exhibit 52. With these binding elements, the District



Council finds that the Zoning Ordinance requirements to provide public benefits in conformance with the Sector Plan have been met.

### Conclusion

Based on the foregoing analysis and after a thorough review of the entire record, including the Hearing Examiner's Report issued May 8, 2020 and her Supplemental Report and Recommendation issued June 2, 2020, the District Council concludes that the proposed reclassification and development will meet the standards set forth in the Zoning Ordinance, and that it will be consistent with the coordinated and systematic development of the Regional District under State law.

### 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:

Local Map Amendment Application No. H-135, requesting reclassification from the existing CR-1.5, C-0.75, R-0.75, H-150 to the CRF 1.5, C-0.75, R-1.5, H-150, for property located at 10400 Fernwood Road, Bethesda, Maryland (further described as Rock Spring Center Pt. Pars 6 & 12 (Tax Acct. No. 04- 01567726)) is hereby **approved** in the amount requested and subject to the specifications and requirements of the Floating Zone Plan, Exhibit 60, provided that the Applicant files an executed Declaration of Covenants (Exhibit 61) reflecting the binding elements in the land records and submits to the Hearing Examiner for certification a true copy of the Floating Zone Plan approved by the District Council within 10 days of approval, in accordance with §§59.7.2.1.H.1.a. and b. of the Zoning Ordinance.

This is a correct copy of Council action.

  
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Selena Mendy Singleton, Esq.  
Clerk of the Council