

Resolution No.: 17-471  
Introduced: June 12, 2012  
Adopted: June 12, 2012

**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-892 FOR AMENDMENT TO THE ZONING  
ORDINANCE MAP (REMAND), Robert R. Harris, Esquire and Cindy Bar,  
Esquire, Attorneys for Applicant, Chelsea Residential Associates, LLC,  
OPINION AND RESOLUTION ON APPLICATION  
Tax Account No. 13-03381404

**OPINION**

Local Map Amendment (LMA) Application No. G-892, originally filed on January 4, 2011, initially requested reclassification of 5.25 acres of land located at 630 Ellsworth Drive, Silver Spring, Maryland, from the existing R-60 Zone to the RT-15 Zone and, after remand, now requests rezoning from the R-60 Zone to the R-T 12.5 Zone. The property described as Lot 58, Evanswood Section 1, is situated on the south side of Springvale Road between Ellsworth Drive and Pershing Drive. The land is owned by the Chelsea School (Tax Account Number 13-03381404), a private educational institution which desires to relocate its facilities and has entered into a contract of sale with the Applicant. Exhibit 45, p. 3; 5/26/11 T. 71. The Applicant applied under the optional method of development, which requires the applicant to submit a Schematic Development Plan (SDP) containing illustrative as well as binding elements restricting the development of the property.

By Resolution 17-286, adopted on October 18, 2012, the District Council remanded the original application, finding that while the R-T Zone was appropriate for the property, the Applicant had failed to meet its burden of proof that the RT-15 application complied with the Master Plan or was compatible with the surrounding neighborhood. Specifically, the Council concluded that:

Zoning Application No. G-892, requesting reclassification of 5.25 acres of land, described as Lot 58, Evanswood Section 1, and located at 630 Ellsworth Drive, Silver Spring, Maryland, from the existing R-60 Zone to the RT-15 Zone, is hereby remanded to the Hearing Examiner for revision of the Schematic Development Plan (SDP) and consideration by the Planning Board of the intended

size of the environmental setting of the Riggs-Thompson House historic resource, given the language in Appendix D of the North Silver Spring Master Plan. The SDP should be reconfigured to propose residential townhouse (RT) development with less density and less massing so that it will be more compatible with the character of the transition from the Central Business District to the residential community north of Cedar Street and more consistent with the 2000 North and West Silver Spring Master Plan. The revised SDP should also resolve issues relating to the alignment of the private road to comply with the environmental setting of the historic site as set forth in the Master Plan and its Appendix D.

Resolution 17-286, p. 15.

Pursuant to the Council's action, the Hearing Examiner issued a Remand Order dated November 8, 2012 (Exhibit 274), limiting the issues on remand to the following:

1. The submission of a revised schematic development plan for development in an RT Zone with less density and massing to be more consistent with the character of the transition from the Central Business District to the existing R-60 Zone north of Cedar Street and the recommendations of the 2000 North and West Silver Spring Master Plan. Because it will be a revised plan, this may require review of whether the development meets the required zoning and environmental regulations normally reviewed to the extent the revised plan differs from the plan originally submitted.
2. Reconsideration by the Planning Board of the environmental setting intended by the Master Plan for the Riggs-Thompson House.
3. Resolution of the issues surrounding the alignment of the private road providing access to the property. The issues regarding the road alignments include, without limitation, the relationship between the private road and the environmental setting, the compatibility of alignment (and the resulting traffic patterns) with the surrounding area, and consistency of the alignment with the Master Plan.

The Hearing Examiner also excluded from consideration on remand whether (1) the application fulfills the purposes of the R-T Zone, and (2) whether public facilities are available to serve the development (including Local Area Transportation Review and Policy Area Mobility Reviews). Exhibit 274.

On November 21, 2012, the Applicant submitted a revised SDP and amended its application to request rezoning from the R-60 to the R-T 12.5 Zone. Exhibit 276. A public hearings on the remanded (i.e., RT 12.5) rezoning request was convened on March 23, 2012, March 26, 2012, and March 30, 2012, at which time the Applicant presented testimony from five witnesses, including the Applicant's expert witnesses, in support of the application. Twelve individuals testified in opposition to the application. Some of these individuals appeared on

behalf of civic and community organizations, including the Seven Oaks-Evanswood Community Association (SOECA), and Montgomery Preservation Inc.<sup>1</sup>

The Hearing Examiner's Report and Recommendation on the revised RT-12.5 application was filed on May 16, 2012, and is incorporated herein by reference. The Hearing Examiner found that (1) the density and massing of the development would be compatible with the surrounding land uses; (2) the Applicant adequately demonstrated the alignment of the internal private road would operate compatibly with the neighborhood and in a manner consistent with the Master Plan, (3) the density and massing proposed was consistent with the Master Plan; and (4) the environmental setting shown on the revised SDP was also consistent with the Master Plan.

After a careful review of the entire record, the District Council finds that the application be approved for the reasons stated in the Hearing Examiner's Report and Recommendation.

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

The property, surrounding area and zoning history were all described in detail both in the Hearing Examiner's Report and Recommendation in the pre-remand case and in District Council's Opinion in Resolution 17-286. The subject property is located immediately north of the boundary of the Silver Spring Central Business District, separated by a row of single-family detached homes, designated for non-resident professional office special exceptions by the 2000 North and West Silver Spring Master Plan.

Key characteristics of the property relevant to the remand include (1) a 6% grade which rises from the western boundary along Ellsworth Drive to the eastern boundary fronting Pershing Drive (a increase of approximately 40 feet) (Exhibit 45, p. 3, (2) existing mature trees on the property, clustered primarily in the southwestern corner, but also located along Springvale Road (Exhibit 151), and (3) adjoining the southern property line are a row of single-family detached homes which are recommended to be special exceptions for non-resident professional offices in the master plan, but some of which are still owner-occupied Exhibit 45, p. 3.. The rear yards of the homes along the north side of Cedar Street are adjacent to the southern boundary line of the subject property. Exhibit 45. Ellsworth Park is located immediately to the west of the property and is split-zoned R-60 and RT 12.5.

The "surrounding area" was determined in the first (i.e., RT-15) application, and is bounded by Fenton Street to the south, Wayne Avenue to the east, Dale Drive to the north, and Colesville Road to the west. Resolution 17-286, p. 4. Both the Council and the Hearing Examiner concluded in the original application that the surrounding area is characterized by wide variety of multi-family residential, civic, commercial, and low-density residential uses which

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<sup>1</sup> In addition to those organizations represented at the public hearing, six community associations submitted letters into the record opposing the application, including the Woodside Park Civic Association, Park Hills Civic Association, the Lyttonsville Community Civic Association, the East Silver Spring Citizens Association (ESSCA), and the Woodside Station Homeowners Association. Exhibits 283, 284, 294, 329, 330. Seven letters were received in support of the Application. Exhibits 289, 290, 312, 317, 331, 332, 333.

transition gradually from Fenton Street to Cedar Street, with an abrupt transition at Cedar Street to smaller single-family detached homes in the R-60 Zone. These smaller single-family detached homes characterize the neighborhood north to Dale Drive. Resolution 17-286.

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

On remand, the Applicant still proposes to remove the existing school buildings and certain non-contributing additions to the Riggs-Thompson House and renovate it as a single-family dwelling, but now proposes to construct 63 townhouses, resulting in an overall density of 12.19 dwelling units per acre. Of these units, 8 (or 12.5%) will be Moderately Price Dwelling Units (MPDUs). The changes to the SDP to address the Council's directive on remand are summarized below:

1. The total number of units has been reduced from 77 to 64 dwelling units; the prior SDP showed 10 MPDUs, this SDP shows 8 MPDUs. The total density per acre is approximately 12.19 units/acre, a 17% reduction in the density from the original SDP. 3/23/12 T. 56.
2. The strings of town house units have been reduced from rows of 8 and 6 units to 7 and 5 units in this SDP. The strings north of the private street were 132 feet long in the prior application; they now total 120 feet in length.
3. The courtyards (or landscaped areas) between the townhouse strings have been widened from 36 feet (in SDP prior to remand) to 40 feet.
4. One townhouse row has been removed from the southeast corner of the original SDP. There are now five rather than six rows of townhouses south of the private street, increasing the setback from the Riggs Thompson House from 28 feet (before remand) to 92 feet.
5. The current SDP shows 54% open space and they are binding themselves to 50%, compared to the 47 or 48% green space in the prior plan.
6. The private road intersects with Springvale (as opposed to Pershing Drive as shown in the initial SDP) and avoids the environmental setting. 3/23/12 T. 59.

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 346(a)) sets forth the 10 binding elements for the development as follows:

**BINDING ELEMENTS**

1. The maximum number of units will be 64 (63 townhomes and 1 single family detached).
2. The Applicant, its successors and assigns will record a public access easement allowing public use of the designated public green space along Ellsworth Drive, Springvale Road and Pershing Drive, with the specific size, configuration and location of this easement subject to final site plan approval.
3. The project will provide green area of at least 50% of the net tract area. The townhouses will be located in a manner that will provide green areas along Pershing Drive and Ellsworth Drive and a linear green area along Springvale Road, all generally consistent with the schematic development plan with the specific size, configuration and location subject to final site plan approval.
4. The applicant, its successors or assigns, will preserve the Riggs-Thompson House.
5. The Applicant, its successors and assigns shall abide by the existing traffic restrictions on Springvale Road, Ellsworth Drive and Pershing Drive so long as those restrictions remain in effect.
6. The maximum building height will be 35 feet.
7. The project will provide a minimum of two parking spaces per unit plus additional spaces for guest parking.
8. The historic setting for the Riggs-Thompson House will remain at a minimum of 37,056 square feet.
9. The setback along Springvale Road shall be a minimum of 25 feet, and, subject to site plan approval, will include a double row of trees.
10. The internal private road will be restricted to use by residents and visitors of Chelsea Court and will include design features to avoid cut through traffic such as limited roadway width, on-street parking, special paving at each of the two (2) ingress/egress points, signage prohibiting cut through traffic, and other control measures to be finalized at the time of site plan approval.
11. The townhouse units confronting Springvale Road will be designed to have their fronts facing Springvale Road.
12. The internal private Road shall include signage and channelization measures to prohibit left turning movements from the private street onto Springvale Road, subject to approval by MCDOT, as part of the site plan approval process.

13. At the time of record plat, the Applicant will record a restrictive covenant for the open space area around the 37,056 square foot environmental setting for the Riggs Thompson House, generally consistent with the area shown on the Schematic Development Plan. The covenant will ensure that the area around the environmental setting will remain as open space in perpetuity but will enable Applicant to complete all work approved by the Planning Board as part of the site plan approval. Following completion of those improvements, the covenant will require advice from the Historic Preservation Commission to the Planning Board for any site plan amendment to the area subject to the covenant.
14. The homeowners association documents for the project will provide authorization for police enforcement of all traffic restrictions and related signage regarding entry to and exist from the site and, upon site plan approval, Applicant will request an Executive Order (formal traffic order) for County police enforcement of entry and exit restrictions.
15. At the time of site plan, the Applicant will propose for Planning Board approval, a double row of trees along Springvale Road and landscaping combined with decorative walls at the ends of the alleys facing Springvale Road to screen the view down those alleys.

Applicant has also filed an executed copy of the Declaration of Covenants in the record of this case as Exhibit 345(e), and it contains the binding elements listed above, 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.

The graphic portion (*i.e.*, site layout) of the revised SDP (Exhibit 346(a)) is illustrative (except as specified in the binding elements). The plan shows 63 townhouses in strings of 5-7 units each (with the exception of a three-unit string along Ellsworth Drive), aligned perpendicular to Springvale Road, as well as preservation of the Riggs-Thompson House as a single-family detached dwelling.

Binding Element Nos. 2, 3, 9, and 15 relate to the green area on the site. Binding Element No. 3 binds the Applicant to provide 50% green space on the property, a portion of which (set forth in Element No. 2) will be permanently devoted to public access space. Binding Element No. 13 requires the Applicant to record a restrictive covenant on the green space surrounding the environmental setting of the Riggs-Thompson House mandating that improvements to the green space will be done as an amendment to the Applicant's site plan with advice from the Historic Preservation Commission. Binding Element Nos. 10, 12 and 14 impose requirements relating to the private road, which include signage limiting access to residents, design improvements to discourage cut-through traffic, and homeowners' association authorization for County enforcement of the private traffic restrictions. Exhibit 346(a).

## Standard for Review

A floating zone, such as the RT-12.5 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 RT Zone may be applied if a proposal meets any one of three alternative criteria: (1) it is in an area designated for RT 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 RT 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. Pursuant to Resolution No. 17-286, the District Council found in the original application that RT zoning is appropriate for the subject property, for the reasons set forth therein. These will not, therefore, be repeated here.

Technical Staff, the Planning Board and the Hearing Examiner all found that the Applicant’s proposal complies with all of the development standards and special regulations of the RT-12.5 Zone. Exhibits 282, 304. In the original (i.e., RT-15) application, the Applicant had requested a waiver of minimum 30-foot setback along the southern property line. 5/26/11 T. 244-246. The application on remand meets this setback, and therefore, no waiver is requested or necessary. 3/23/12 T. 119.

Those opposing the application on remand objected to the density of the development proposed on remand partially because it would remove many of the existing mature trees on the site which currently screen the neighborhood from views of the Central Business District and other uses, such as Colesville Towers, within the surrounding area. 3/26/12 T. 277-283, 298-301. Technical Staff reported that the Applicant could meet the requirements of the forest conservation law at the R-T 15 density, although a variance would have been required because of the size of some of the trees on the property and because of their association with the historic site. Exhibit 282, p. 14. The Applicant did not submit a revised Preliminary Forest Conservation Plan for the R-T 12.5 SDP. Technical Staff advises, however, that, “[n]ow with the revised schematic development plan which includes greater setbacks, less density, more green space and less overall disturbance, it appears the forest conservation requirements would be easier to meet.” With regard to the variance, Staff stated, “the increased setbacks and lower density will facilitate the preservation of subject trees, particularly those along the south boundary of the site and those near the Riggs-Thompson house.” Exhibit 282, p. 14. Based on this evidence, the Hearing Examiner agreed that the proposed development is able to comply with the forest conservation law, subject to further review later in the development process.

Section 59-C-1.722 also requires townhouse rows to be staggered so that a maximum of only three townhouses in the same row should have the same frontage. Technical Staff advised that this requirement may be addressed at the time of site plan. Exhibit 282, p. 8. The Applicant testified that this requirement can be met through the use of architectural elements such as recessed entrances and porches. 3/23/12 T. 63. Based on this evidence, the District Council concludes that the Applicant has sufficiently proven that this standard may be met, as did the Hearing Examiner.

### **Compatibility**

An application for a floating zone reclassification must be evaluated for compatibility with land uses in the surrounding area. Regarding the original application, the District Council found that, “[t]he SDP should be reconfigured to propose residential townhouse (RT) development with less density and less massing so that it will be more compatible with the character of the transition from the Central Business District to the residential community north of Cedar Street and more consistent with the 2000 North and West Silver Spring Master Plan.” Exhibit 267, p. 15. The Council agreed with the Hearing Examiner that a straight line application of the “tent effect” adopted in the Silver Spring Central Business District Sector Plan was not appropriate at this location because of the abrupt change in the neighborhood at Cedar Street from more intense residential, commercial and civic uses in the Central Business District to single-family residential homes in the R-60 Zone. Resolution 17-286, p. 10. The limited issues relating to compatibility within the scope of the remand include the density of the project, its massing, and the impact of the internal private street on the surrounding neighborhood.

#### **A. Density and Massing**

The Applicant maintains that the reduced density on remand is compatible with the surrounding area because of the high quality of the green space surrounding the perimeter of the property, the building orientation, revisions increasing the width between and reducing the length of the townhouse strings, landscaping and screening, and the use of architectural elements which simulate single-family homes. According to the Applicant’s land planner, these units will appeal to a lifestyle which “lives to the front” for individuals who do not want the maintenance of a typical single-family detached homes. 3/23/12 T. 149. Technical Staff, the Planning Board, and the Hearing Examiner found this approach sufficient to make the development compatible with the surrounding community. Exhibits 282, 304. In particular, the Hearing Examiner found that the development compatible with adjacent homes because (1) the Ellsworth side of the property faced a public park and had smaller clusters (i.e., 3-5 units), (2) the strings are located perpendicular to Springvale Road and will have functional fronts, (3) the Riggs-Thompson House and a significant amount of open space will buffer the Pershing Drive frontage. Hearing Examiner’s Report and Recommendation, pp. 59-60.

The Applicant also submitted comparables of other RT-15 and RT-12.5-zoned developments near Central Business Districts to support the proposed density of 12.19 dwelling units per acre. 3/23/12 T. 130-135.

Those opposing the Application argue the massing and density are incompatible with the surrounding area, comparing the site layout to World War II “barracks”. Exhibit 314(b). They believe that RT-8 Zoning would be more compatible because it would reduce the length of the townhouse strings into smaller clusters of units. 3/26/12 T. 344-346. They also assert that comparable developments should come only from within the Master Plan area, and submitted several comparables of developments within the area, which were less than 12.5 dwelling units per acre. They further argue that RT-12.5 was not appropriate because comparable developments at a similar density within the planning area were located either on major roads or abutting commercial uses. 3/26/12 T. 154-161.

The Applicant presented evidence that some of the developed densities of the comparable developments cited by the opponents were actually higher than the opponents reported. Because the Applicant’s calculations were taken from the original site plans, rather than M-NCPPC’s website, the Hearing Examiner found that the Applicant’s density calculations were better evidence, as does the District Council. Based on these, the proposed development, at 12.19 units per acre, is well within the densities of other townhouse developments within the planning area, which range between 9.7 to 12.38 dwelling units per acre. The Hearing Examiner found the significant green space surrounding the townhomes sufficient to mitigate the fact that the development is not on a major road, and that other much larger densities within the defined neighborhood justify the higher density on this site. For the reasons set forth, the District Council agrees and so finds.

With regard to massing, the Applicant asserts that revisions to the SDP result in a significant improvement in massing over the original application. The strings are now five to seven units in length as opposed to six to eight units per string; the total length of the northern string has been reduced by 12 feet. Each “courtyard” has been widened by four feet, the townhouse string closest to the Riggs-Thompson House has been removed, there is a significant amount of open space surrounding the historic house, and the strings no longer encroach into the setback at the southern property line. 3/23/12 T. 56-59. Exhibit 327(e). It further states space created by breaking up the townhouse strings with thin bands of open area will result in space which has no useable benefit due to the 6% grade and lack of sunlight. 3/23/12 T. 260. In addition, as described, the site layout avoids having one large string of townhouses confront existing single-family homes.

SOECA and those opposing the application contend that the site layout is still too densely massed on one portion of the site. They argue that, without the green area surrounding the Riggs-Thompson House, the density of the project is 16.36 acres. They also argue that the changes in massing from the original application are nominal because the combined length of the north and south strings is only two feet shorter and the width of the units along Springvale Road have increased. 3/26/12 T. 152-154.

Technical Staff, the Planning Board, and the Hearing Examiner found that the revisions to the SDP do significantly mitigate the massing of the project so that it is compatible with the surrounding community. Exhibits 282, 304. The Hearing Examiner found that, while the combined length of the rows is only two feet less than shown in the original SDP, the shortened length of the rows north of the private street is significant. This is because it reduces the mass

from the only perspective where the townhouse strings actually confront single-family detached homes (i.e., along Pershing Road). The strings south of the private road are now screened by the only single-family home on the site (i.e., the Riggs-Thompson House), and are buffered by new, significant setbacks from both the road and the house itself. The Hearing Examiner also found that the small increase in the width of the fronts along Springvale not a major detriment as the fronts are not dissimilar in width from single-family detached homes. Thus, the widening of the courtyards does function to break up the massing of the units despite the increase in townhouse widths along Springvale Road.

With these changes in massing, the District Council finds, as did the Hearing Examiner, the Planning Board, and Technical Staff, that the building orientation, architectural elements (including varied rooflines and functional fronts) and landscaping and decorative walls to screen the private alleys from Springvale Road achieve compatibility with the surrounding neighborhood.

## **B. Private Road**

In its original application, the Applicant proposed six alternatives for alignment of the private road, several of which had unresolved environmental or traffic impacts. One of the alignments would have circumvented the existing traffic restrictions, thereby creating the potential for cut-through traffic. The District Council remanded the case, in part finding that the Applicant had failed to show that the different alignments would not adversely impact the neighborhood. Resolution 17-286, p. 15.

On remand, the Applicant proposes a single alignment which has received conceptual approval from Technical Staff, the Planning Board, and the Montgomery County Department of Transportation. Exhibits 282, 304, 335. This alignment has one access point on Ellsworth and one on Springvale Road, but further east than the alternative shown in the original application. Evidence in the record reveals that the Planning Board and Technical Staff prefer this dual access to public streets to promote “connectivity” to the existing street network, or in another words, to permit multiple access routes to destinations in the area. Record evidence also shows that dual access is preferred by emergency services for fire and safety purposes. Exhibits 282, 304.

The Applicant acknowledges that the dual connection of the private street creates an opportunity to circumvent the existing traffic restrictions on neighborhood streets. It proposes several measures to prevent potential cut-through traffic, including signage restricting access to residents, narrowing the width of the road, using specialty pavers to denote private property, and channelizing the access point at Springvale Lane to prevent left turns. 3/23/12 T. 78-111. Those opposing the application question the effectiveness of these measures primarily because, in their opinion, they are unenforceable and because the Applicant is permitted to have a single access under the County regulations. 3/23/12 T. 196-247.

The District Council finds, as did the Hearing Examiner, that the proposed signage and channelization of the private road will effectively prevent cut-through traffic because of the significant evidence in the record, both in the original case and on remand, that existing signage

and traffic restrictions have been effective since implemented in the 1990's. The effectiveness of the existing restrictions is also demonstrated by the low traffic volumes evidenced in the first hearing and again in this hearing with respect to Springvale Road. In contrast, the evidence that people will disobey the signs is anecdotal and speculative in comparison with testimony from the opposition, and the Applicant's expert traffic engineer, that volumes in the area have been significantly reduced by the traffic restrictions currently in place.

The Applicant has also proposed a binding element requiring it to seek an Executive Order, pursuant to *Montgomery County Code*, §31-2, permitting the County police to enforce the private signage on the property, which also persuades the Council that the dual access of the private street will not be incompatible with the surrounding area.

### **The 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. Compliance with the Master Plan recommendations, however, is not mandatory in this case because the RT Zones do not require it; rather, the courts have held that the Master 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 (2008):

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

The subject property lies within the area covered by the 2000 North and West Silver Spring Master Plan. When remanding the original application, the District Council found that RT zoning was appropriate at this location, and would further some goals of the Master Plan, such as creating pedestrian connections, street improvements, and providing public open space. It remanded the case because the Applicant did not provide sufficient evidence that the proposed development conformed to the land use recommendations of the Plan for the transition from the Silver Spring Central Business District at this location, specifically, that the transition be by "use, not by structure type". The Plan recommended the transition to be by single-family homes designated for non-resident professional office special exceptions.

Other questions relating to conformity with the Master Plan included whether the existing environmental setting, created for the current property owner, should be expanded. Extensive testimony was presented on the legislative history of the designation, leading the Council to remand the case for more evidence on this issue.

Finally, the District Council also found that insufficient evidence had been presented on whether the alignment of the private road would undermine the Master Plan's recommendations

against creating a significant amount of cut-through traffic through the community. Resolution 17-286, p. 15.

#### **A. Land Use**

In its Resolution remanding this case, the District Council found that, “The SDP should be reconfigured to propose residential townhouse (RT) development with less density and less massing so that it will be more compatible with the character of the transition from the Central Business District to the residential community north of Cedar Street and more consistent with the 2000 North and West Silver Spring Master Plan.” Resolution 17-286, p. 15.

The Applicant argues that the techniques previously described (i.e., building orientation, varied architectural elements, and significant green space along the perimeter) along with the changes to the length of rows and width of the courtyards, the additional green space surrounding the historic house, and moving out of the buffer along the southern property line, result in general compliance with the Master Plan guidelines for this location.

Those opposing the application disagree vehemently, describing the townhouse strings as “barracks” which are massed at an effective density of 16.36 acres if one ignores the green areas on the site, as already described.

The Council has already determined that R-T Zoning is appropriate at this location, so some level of deviation from traditional detached structures must be presumed. The District Council agrees with the Hearing Examiner, Technical Staff and the Planning Board that the careful site layout, along with the use of varied architectural elements, landscaping and screening, and the reductions in massing sufficiently suggest and compatibly relate to traditional single-family detached homes to comply substantially with the Master Plan.

These townhomes will be, in some respects, different from traditional single-family detached homes. These residents may wish to “live to the front” of the home, without backyards and with large green areas that do not require maintenance by the individual owner typically associated with detached homes. The District Council finds that the potentially incompatible aspects (such as headlights from the private alleys) are effectively mitigated by building orientation, site design, landscaping, and the use of architectural elements. The District Council also finds that other aspects of the development such as provision of public open space, sidewalks, and streetscape, further other goals of the Master Plan.

#### **B. The Environmental Setting of the Riggs-Thompson House**

The size of the environmental setting designated by the Master Plan after the Chelsea School leaves the property remains a matter of great debate on remand. The controversy continues to stem from competing language in the body of the Plan stated only that the environmental setting should be 37,056 square feet. An appendix (Appendix D) to the Plan sets forth a dual recommendation:

The environmental setting is 37,056 square feet as shown in the shaded area below pending approval of the Chelsea School special exception by the Board of Appeals. *In the event that the Chelsea School plan is not approved, the designated environmental setting is the entire 1.4-acre parcel (P73) on which the house is located. An important goal of the Chelsea School plan is the integration of the Riggs-Thompson House into the campus.* Appropriate access to the house should be provided. Exhibit 139, Appendix D (emphasis supplied).<sup>2</sup>

As a result, those opposing the application continue to assert that the Plan intended the environmental setting to be the original 1.4 acre parcel (P73) on which the house was located. 3/23/12 T. 320-348; 3/26/12 T. 3-156.

The District Council found that the evidence presented prior to remand supported a finding that the environmental setting should be the 1.4-acre parcel and remanded the application to the Planning Board for additional consideration on the Master Plan's intent. Resolution 17-286, pp. 13, 15.

On remand, the Applicant, Technical Staff, and the Planning Board continue to maintain that language in the body of the plan stating that the environmental setting consists of 37,056 square feet should "trump" language in an Appendix to the Plan. Exhibits 282, 304, 3/30/12 T. 65-71. In addition, however, Technical Staff has provided new information regarding the timing of the special exception approval in relation to the Master Plan. Staff advises that the Board of Appeals approved the special exception before the Master Plan was adopted. Thus, Technical Staff and the Planning Board concluded that the Council was aware that no dual recommendation was necessary and therefore no need to take a "leap" that the setting should be changed for the future. Exhibit 282, pp. 8-10, Exhibit 304.

Those opposing the application presented evidence that there was testimony before the Historic Preservation Commission and the Planning Board that the smaller environmental setting applied only if the Chelsea School occupied the property and suggesting that the it should revert to the original 1.4-acre parcel (P73) if the property if the Chelsea School special exception was not approved or the property was developed with some other use. 3/26/12 T. 103-104, Exhibit 324(c). They also provided a work session transcript wherein the Planning Board instructed Staff to draft language to this effect. They assert that the Planning Board was unaware of the change to the Plan moving the dual recommendation to an appendix to the Plan. 3/23/12 T. 336, 342-346. According to the opposition, the PHED Committee was presented with a memorandum on the Plan explaining the Plan's alternative recommendation. Exhibit 324(p). Those in opposition feel it important to revert to the 1.4-acre parcel as an environmental setting because of concerns that the HOA is not equipped with the expertise or interest in protecting the historic house. 3/23/12 T. 115-123/ 3/26/12 T. 142-150.

The Hearing Examiner found that the revised SDP continues to meet the legislative intent underlying the Plan's designation. The Hearing Examiner found that the Plan intended to permit

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<sup>2</sup> A complete summary of the arguments on this matter prior to remand is set forth in Council Resolution 17-286, pp. 12-15.

some flexibility to the owner to fulfill its development plans because those plans provided significant protection for the historic resource. The evidence shows that the Chelsea School special exception plan incorporated the Riggs-Thompson House into an “academic quad” including a significant green area. The SDP on remand surrounds the historic house with almost 1.5 acres of green area, a portion of which (i.e., 37,056 square feet) will be the environmental setting and the bulk of the remainder will be permanently dedicated to public access. Exhibit 346(a). Technical Staff found that this combined area provided a better setting for the Riggs-Thompson House because it opened the house up to significant views from the neighboring streets. Exhibit 291(e). In response to the opposition’s concerns regarding HOA ownership, the Applicant submitted a binding element requiring any improvements to the public access space after the initial site plan approval to be accomplished by amendment to the site plan, with advice of the Historic Preservation Commission. Exhibit 346(a). Based upon this evidence, the District Council finds that the proposed SDP complies with the Master Plan.

### **C. The Private Road**

The final issue on Master Plan compliance is whether the proposed private road substantially complies with the Plan’s goal to minimize neighborhood cut-through traffic. For the same reasons it found that the alignment of the private road will be compatible with the neighborhood, the District Council finds that the proposed alignment of the private road substantially complies with the Master Plan.

### **Conclusion**

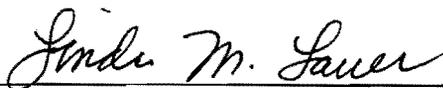
Based on the foregoing analysis and the Hearing Examiner’s Report and Recommendation dated May 16, 2012, which is incorporated herein, and after a thorough review of the entire record, the District Council concludes that the application, as described in the final version of the SDP, satisfies the requirements of the RT-12.5 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-12.5 Zone is sufficiently related to the public interest to justify its approval. For these reasons and because approval of the instant zoning application, as presently described, will aid in the accomplishment of a coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District, the application will be approved.

**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-892 (Remand), requesting reclassification of 5.25 acres of land, described as Lot 58, Evanswood Section 1, and located at 630 Ellsworth Drive, Silver Spring, Maryland, from the existing R-60 Zone to the RT-12.5 Zone, is hereby **approved** subject to the specifications and requirements of the revised Schematic Development Plan (Exhibit 346(a)), provided that the Applicant submits to the Hearing Examiner for certification a reproducible and three copies of the Schematic Development Plan approved by the District Council within 10 days of approval, in accordance with Section 59-D-1.64 of the Zoning Ordinance, and that the revised Declaration of Covenants (Exhibit 345(e)) are recorded in the County land records in accordance with Section 59-H-2.54 of the Zoning Ordinance and proof thereof submitted to the Hearing Examiner within the same time frame.

This is a correct copy of Council action.



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Linda M. Lauer, Clerk of the Council