

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
CLARKSBURG VILLAGE CENTER, LLC**

Applicant

David D. Flanagan
Kate Kubit

For the Application

Robert R. Harris, Esquire
Attorney for the Applicant

James Laduca
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Debra Megan Thompson
Lisa Winstel

Community Members Supporting the Application

NNP II-Clarksburg LLC (“Newland”)
Developer of Clarksburg Town Center¹

Opposed to the Application

Stephen Z. Kaufman, Esquire
Todd D. Brown, Esquire
Attorneys for the Opposition

DPA 11-1
(Amending LMA Nos. G-735 and
784, and DPAs 04-3 and 5-1)

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER’S REPORT AND RECOMMENDATION ON REMAND

¹ NNP II-Clarksburg LLC (also known as “Newland”), the developer of Clarksburg Town Center, did not appear at either hearing, and therefore would not ordinarily be included in this case caption. However, Newland filed opposition letters (Exhibits 27 and 65), and the Hearing Examiner felt that Newland should be treated as a party to ensure that the record contained a fair exchange of views from those potentially most affected by the outcome.

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I. EXECUTIVE SUMMARY

Applicant:	Clarksburg Village Center, LLC
DPA No. & Date of Filing:	DPA 11-1, filed July 19, 2010
Location:	Clarksburg, on a block defined by Arora Hills Drive on the north, Newcut Road on the east, Snowden Farm Parkway on the south, and Little Seneca Parkway on the west.
Zone:	Planned Development (PD-4)
Existing Development Plan:	G-784 Development Plan, with the following binding element: “No building permits shall be issued for retail/commercial uses until 90,000 square feet of retail uses within the Clarksburg Town Center have been established” A similar “general note” is contained in the G-735 Dev. Plan.
Development Plan Sought:	DPA-11-1, which has one new and one modified binding element: · This property will be developed with 109,000 square feet maximum of commercial/retail use and 100 age-restricted residential units. · Building permits for the commercial/retail buildings will not proceed until the earlier of either the issuance of building permits for 90,000 square feet of retail within the Clarksburg Town Center, or May 1, 2012.
Current v. Proposed Use:	No change in the use or density is proposed. Those factors are controlled by the Council’s actions in LMAs G-735 and G-784, and DPAs 04-3 and 5-1. DPA 11-1 seeks only clarifying language regarding unified development on the subject site (the first binding element); and the permission to proceed with commercial/retail buildings after May 1, 2012, or after Clarksburg Town Center gets building permits for 90,000 square feet of retail (the second binding element), which ever occurs first.
Applicable Master Plan:	June 1994 Clarksburg Master Plan & Hyattstown Special Study Area, as amended on June 28, 2011, by Resolution No. 17-188.
Gross Tract Area:	17.4 acres
Neighborhood Response:	The proposed DPA is strongly supported by the neighborhood
Opposition:	The only opposition is by NNP II-Clarksburg LLC (also known as “Newland”), the developer of the nearby Clarksburg Town Center.
Planning Board Recommends:	Denial until the Master Plan was modified; then Approval
Technical Staff Recommends:	Denial until the Master Plan was modified, which it was
Hearing Examiner Recommends:	Approval

II. STATEMENT OF THE CASE

Applicant, Clarksburg Village Center LLC, filed Development Plan Amendment 11-1, on July 19, 2010, seeking to amend the development plans approved by the Council on April 10, 2001, as part of LMAs G-735 and G-784, and previously modified in DPA 04-3 (approved by the Council on December 14, 2004) and DPA 05-1 (approved by the Council on June 24, 2008).

The subject property consists of 17.4 acres located in Clarksburg, on a block defined by Arora Hills Drive on the north, Newcut Road on the east, Snowden Farm Parkway on the south, and Little Seneca Parkway on the west. It is in the PD-4 Zone, and is listed under Tax Account Number 02-03588946.

This case revolves around the following binding element in the Development Plan approved ten years ago in LMA G-784, which currently governs the timing (also referred to as “the staging”) of retail/commercial development in the subject site, Clarksburg Village Center (Exhibit 3):

No building permits shall be issued for retail/commercial uses until 90,000 square feet of retail uses within the Clarksburg Town Center have been established.² [Emphasis added.]

Thus, the existing binding element delays the development of retail/commercial uses in the subject site, Clarksburg Village Center, until there is a specified amount of retail/commercial development in the nearby Clarksburg Town Center. This staging requirement was reflected in the June 1994 Clarksburg Master Plan & Hyattstown Special Study Area, as it existed when this case was first reviewed by the Hearing Examiner and the Council in November of 2010 and in March of 2011, respectively. This staging requirement was later modified by an amendment to the Master Plan approved by the Council on June 28, 2011, by Res. No. 17-188. That modification and its

² A similar, but not identical, “general note” is contained in the Development Plan approved concurrently in LMA G-735:

Development of the commercial space will follow the development of approximately 90,000 sf of retail uses in Clarksburg Town Center, in conformance with the 1994 Master Plan.

impact on this case will be discussed in more detail below. Essentially, the amendment to the Master Plan removes an impediment to granting the proposed DPA 11-1.

Though the history is a bit complex, the relief requested in this DPA application is quite simple – a limited release from the staging restrictions placed on its commercial/retail development to better serve the residents of Clarksburg Village, and some language to indicate that development on this site is unified under one owner, the Applicant (a fact already recognized by the Council in DPA 05-1). DPA 11-1 seeks to accomplish this end by proposing one new binding element for the clarification and a modification of an existing binding element to partially lift the staging restriction. No change in the use, density or design is proposed. 11/29/10 Tr. 9.

The two proposed binding elements are:

- This property will be developed with 109,000 square feet maximum of commercial/retail use and 100 age-restricted residential units.
- Building permits for the commercial/retail buildings will not proceed until the earlier of either the issuance of building permits for 90,000 square feet of retail within the Clarksburg Town Center, or May 1, 2012.

The proposed DPA is supported strongly by the Clarksburg Civic Association (Exhibit 40), the Gateway Commons Homeowners Association (Exhibit 32(b)) and by the residents of Arora Hills and Clarksburg Village, who currently have no convenient retail nearby. 11/29/10 Tr. 42-69 and Exhibits 31, 32, 37 and 39.³ It is opposed by NNP II-Clarksburg LLC (also known as “Newland”), the developer of the nearby Clarksburg Town Center (Exhibits 27, 45 and 65). Newland opposes because it believes that preventing competing retail from Clarksburg Village Center will help ensure successful establishment of Newland’s own retail in the Clarksburg Town Center. Newland bases its

³ Some of these submissions consist of a petition and unsigned e-mails. As explained at the hearing, in order to ensure fairness in the process, the Hearing Examiner does not give any weight to unsigned submissions from sources other than County agencies or entities responding to direct inquires from the Hearing Examiner. 11/29/10 Tr. 95-97.

argument primarily on the language in the 1994 Clarksburg Master Plan & Hyattstown Special Study Area, which will be discussed later in this report.

Based on Master Plan language which existed prior to its amendment, both Technical Staff and the Planning Board initially recommended against approval of DPA 11-1, until the Master Plan could be amended. Exhibits 19 and 21. As is evident from their pre-hearing memoranda (Technical Staff memo of November 8, 2010, and Planning Board memo of November 24, 2010), both Staff and the Planning Board favor the relief requested by the Applicant, but they felt constrained by the pre-existing Master Plan language. The Planning Board's initial vote to recommend denial of the DPA application prior to amendment of the Master Plan was two to one. The Planning Board majority suggested, as an alternative, a limited amendment to the Master Plan, followed by consideration of the DPA.

The initial hearing in this case was duly noticed for November 29, 2010 (Exhibit 18), and the hearing proceeded as scheduled. Applicants called two witnesses at the hearing, David Flannigan, President of Elm Street Development, developer of the Clarksburg Village, and Kate Kubit, a vice president of Elm Street. Four area residents testified in support of the DPA. There were no opposition witnesses; however, during the hearing (11/29/10 Tr. 54-58), a letter of opposition (with attachments) was filed by attorneys for NNP II-Clarksburg LLC (also known as "Newland"), the developer of Clarksburg Town Center. Exhibit 27. At the beginning of the hearing, the Hearing Examiner announced that he would take official notice of the record in LMA G-735, LMA G-784, and DPAs 04-3 and 05-1, to the extent necessary for his report. 11/29/10 Tr. 5-6. No objections were raised.

The record had to be reopened to receive an Affidavit of Posting and corrected documents, and it closed, prior to the first Council review, on January 21, 2011. On January 31, 2011, the

Hearing Examiner filed his first Report and Recommendation to the Council, recommending approval of the development plan amendment and that the Council direct the Planning Board to prepare a limited Master Plan amendment of the 1994 Clarksburg Master Plan & Hyattstown Special Study Area for the sole purpose of modifying the commercial/retail staging plan, to remove the restriction on the timing of commercial/retail development in the Clarksburg Village Center (referred to in the Master Plan as the Newcut Road Neighborhood Center).

On February 15, 2011, the Council amended the Planning Department's work program to include an amendment to the Clarksburg Master Plan's staging provisions. The intent of this direction to the Planning Department was to correct the Master Plan's staging language which was delaying retail development in Clarksburg Village, as indicated by its legislative staff. Exhibit 69 . By Resolution 17-69 of March 1, 2011 (Exhibit 57), the District Council took official notice of its instructions to the Planning Department, and therefore remanded DPA 11-1 to the Hearing Examiner with explicit directions to:

- a) open the record for new testimony on any Clarksburg Master Plan Amendment that may be approved; and
- b) amend his report and recommendation in a manner that considers the new record.

The Planning Department subsequently recommended a modification of the Master Plan's staging provisions, and the Planning Board endorsed that recommendation to the Council. Exhibit 71. By Resolution 17-188, adopted June 28, 2011 (Exhibit 59), the District Council approved the Planning Board's Draft Limited Amendment to the Clarksburg Master Plan & Hyattstown Special Study Area, dated May 2011. The revisions to the 1994 Clarksburg Master Plan & Hyattstown Special Study Area changed the staging requirements of the Master Plan to allow retail development in the Newcut Road and Cabin Branch neighborhoods on approval of a Preliminary Plan for 90,000 square feet of retail uses in the Clarksburg Town Center, rather than requiring retail development in

the Newcut Road and Cabin Branch neighborhoods to await the actual development of retail use in the Town Center. Since that Preliminary Plan for 90,000 square feet of retail uses in the Clarksburg Town Center had already been approved (Exhibit 73), the effect of the Master Plan Amendment was to remove the staging impediment to allowing retail development in Clarksburg Village Center, as requested in the subject DPA 11-1.

Based on that amendment to the Clarksburg Master Plan, Françoise Carrier, the Chair of the Planning Board, by letter dated August 18, 2011 (Exhibit 62), advised the Hearing Examiner that further review by the Planning Board was unnecessary because adoption of the Master Plan Amendment resolved the only objection that the Planning Board had to DPA 11-1 in its November 18, 2010 review. She noted that the Board has already stated “it would serve the public interest to permit development of retail uses in Clarksburg Village without waiting for the Town Center Development to which the Master Plan gave top priority,” subject only to master plan staging issues.

On September 6, 2011, the Hearing Examiner issued an Order and Notice (Exhibit 64) reopening the record and setting the hearing on remand for October 14, 2011, with instructions that all previous testimony and exhibits will remain in the record. On October 3, 2011, Stephen Kaufman, Newland’s counsel, submitted a letter (Exhibit 65) reasserting Newland’s objections to DPA 11-1.

The hearing on remand proceeded on October 14, 2011, as scheduled. Robert Harris, counsel for the Applicant appeared and introduced a number of exhibits. No additional witnesses were called, and no one appeared on behalf of Newland. The record was held open until October 28, 2011, to give Applicant time to file a copy of the approved Preliminary Plan for 90,000 square feet of retail uses in the Clarksburg Town Center, and to give interested parties ten days to comment. Applicant filed the Preliminary Plan in question on October 18, 2011 (Exhibit 73), and the record

closed, as scheduled, on October 28, 2011, with no further comment by any party.

Because this application does not request changes in use or density, this report will not contain the usual detailed diagrams and descriptions of the proposed use; rather, the previous Council findings on these issues in LMAs G-735 (Resolution No. 14-834) and G-784 (Resolution No. 14- 835), and DPAs 04-3 (Resolution No. 15-849) and 05-1 (Resolution No. 16-635), are hereby incorporated by reference. Except with regard to the timing of retail/commercial development issue, these findings establish that:

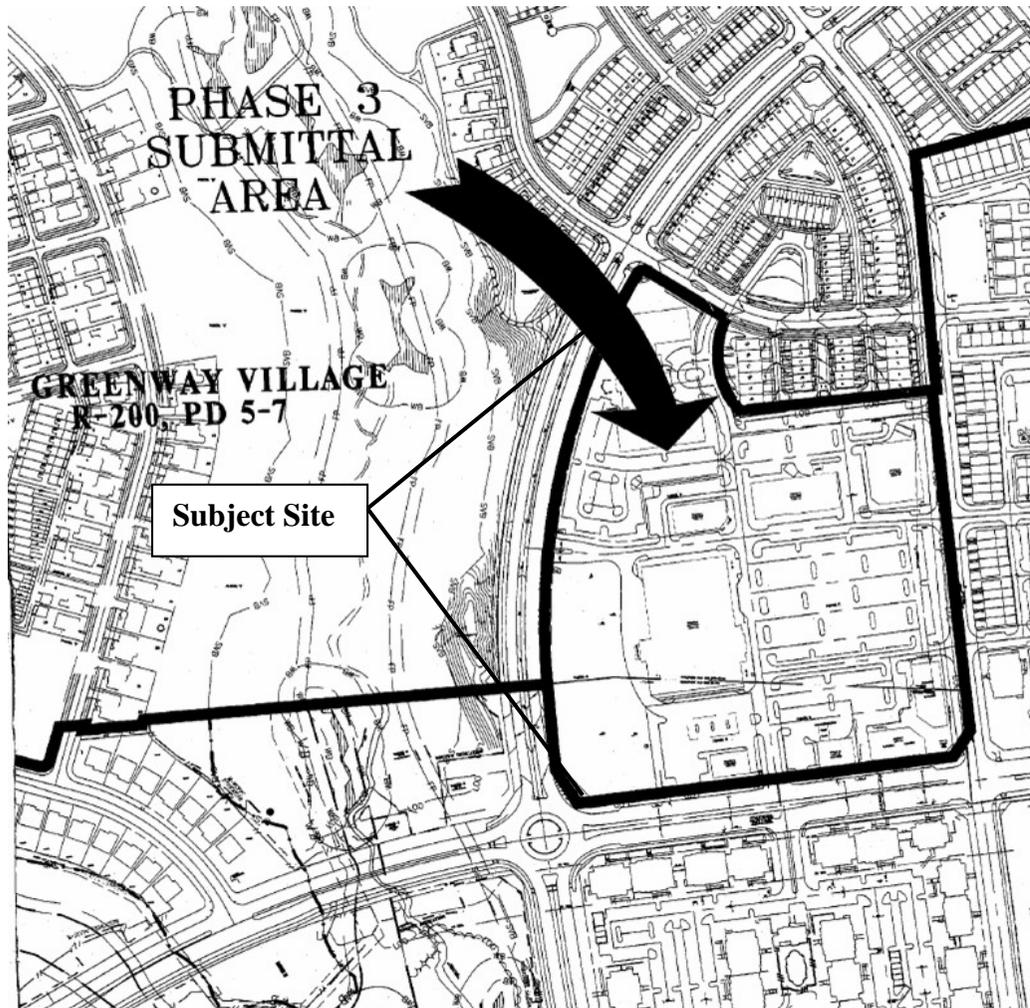
1. The proposed development satisfies the intent, purpose and standards of the PD-4 Zone, and meets the requirements set forth in Section 59-D-1.61 of the Zoning Ordinance;
2. The proposed development would be compatible with development in the surrounding area; and
3. The zoning use and density, previously approved, is in the public interest.

The remaining issue regarding the staging of retail/commercial development will be analyzed below. For reasons which will be discussed fully in this report, the Hearing Examiner concludes that DPA 11-1 can and should be granted by the Council at this stage. The one issue that legitimately concerned Technical Staff and the Planning Board prior to the remand (*i.e.*, the pre-amendment Master Plan language regarding staging) has now been eliminated by the amendment to the Master Plan.

III. FACTUAL BACKGROUND

A. The Subject Site and its Zoning History

The subject site consists of 17.4 acres located in the “Newcut Village” area of Clarksburg. Newcut Village is composed of Greenway Village (also known as Arora Hills) and Clarksburg Village. The subject site (Clarksburg Village Center) is bordered by Arora Hills Drive on the north, Newcut Road on the east, Snowden Farm Parkway on the south, and Little Seneca Parkway on the west, and it is shown on the next page in an excerpt from the local area map (Exhibit 9(a)):

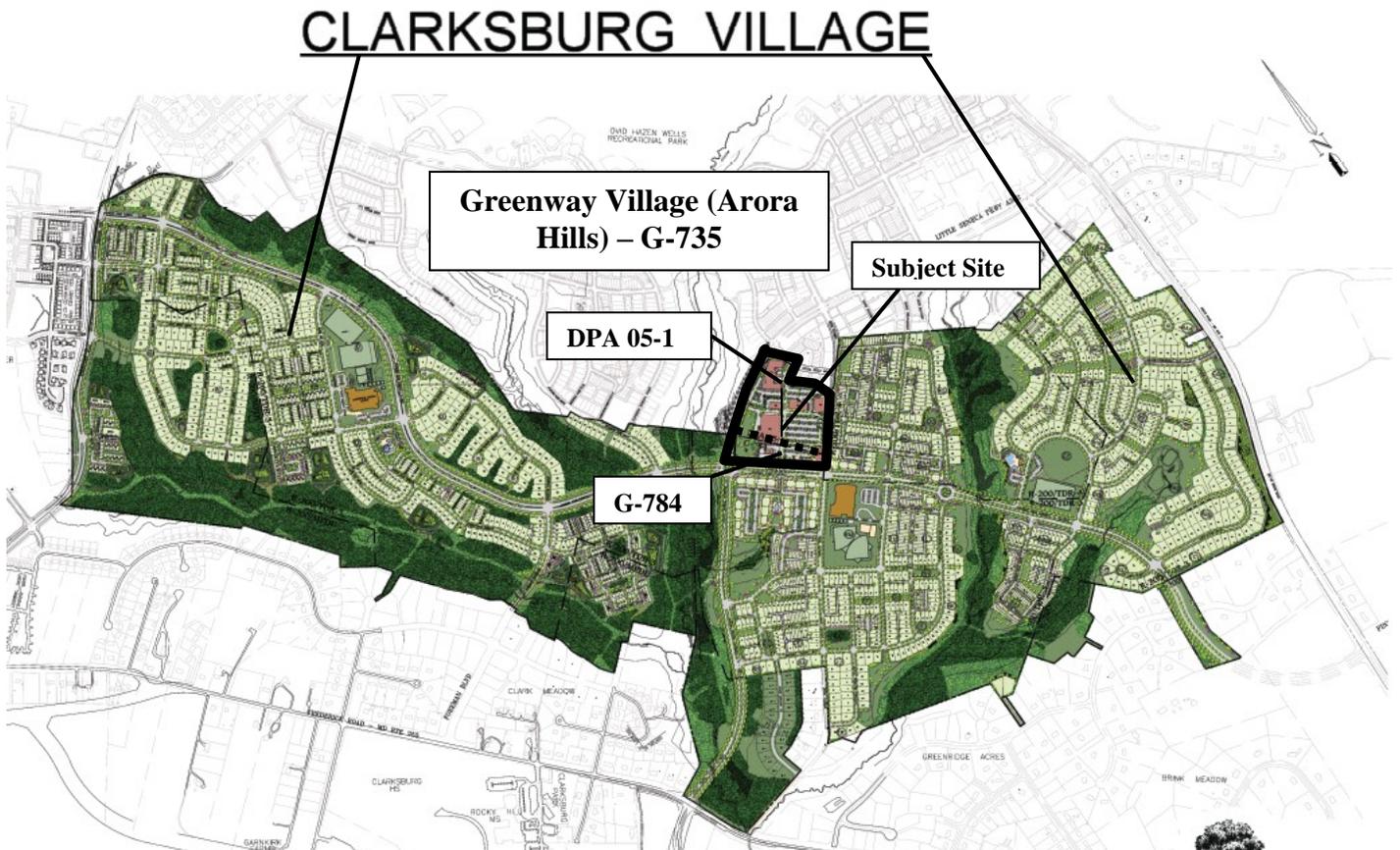


Although the site of DPA 11-1 is only the 17.4 acre area designated as Clarksburg Village Center, portions of that site were subsumed in LMAs G-735 and G-784, and in DPA 05-1. On April 10, 2001, the Council approved LMAs G-735 (Greenway Village), which rezoned approximately 374 acres of land in Clarksburg to the PD-4 Zone.⁴ This large tract is located south of the Ovid Hazen Wells Recreational Park, east of Stringtown Road (which separates it from the Clarksburg Town Center), west of Ridge Road, and due north of Clarksburg Village. LMA G-735 approved the construction of a new development, Greenway Village (also known as Arora Hills), with 1,330 dwelling units and a commercial center containing 89,000 square feet of retail/commercial uses.

⁴ Prior to these rezonings, the overall tract had been classified under the R-200 Zone by the 1958 Countywide comprehensive zoning, and on October 25, 1994, it had been rezoned from the R-200 Zone to the R-200/TDR-3 Zone by Sectional Map Amendment G-710.

At the same time, LMA G-784 approved the rezoning of a 4 acre portion of the Clarksburg Village Center site for development in the PD-4 Zone. The small area that was rezoned in G-784 is located on the southern portion of the 17.4 acre DPA 11-1 subject site, and is designated for 20,000 square feet of commercial/retail development. The subject site is bordered on its north by Greenway Village and on its east, south and west by the new residential development of Clarksburg Village, which consists of about 690 acres, scheduled for 2,653 dwelling units, north and east of MD Rt. 355.

The following map (Exhibit 23) depicts all of Clarksburg Village in colors, with Greenway Village (uncolored) to its north (together, they are Newcut Village). The subject site (Clarksburg Village Center) is bordered in black, with a dashed line setting off the divide between G-784 and DPA 05-1:



The two zoning reclassifications (G-735 and G-784), taken together, approved a total of 109,000 square feet of commercial space within the subject site. LMA G-735 was later modified by two development plan amendments, DPA 04-3 and DPA 05-1.

On December 14, 2004, the Council approved DPA 04-3, which allowed an additional 2,000 square feet of indoor community (*i.e.*, non-commercial) space in Greenway Village, but it contains the following General Note addressing commercial space:

14. Development of the 90,000 s.f. commercial space that was previously approved with this plan is now being developed with the retail uses in Clarksburg Village.

Since there is nothing in the Council resolution which approved DPA 04-3 (Resolution No. 15-849) discussing the development of commercial space, it is clear that the Council was not addressing the timing of commercial development when it approved that DPA, including its General Note 14. Rather, that general note merely signifies that the 90,000 square feet of commercial space designated to support Greenway Village was being developed in conjunction with the 20,000 square feet of retail space designated to support Clarksburg Village.

DPA 05-1 also approved a change to the development plan in LMA G-735. That change, approved by the Council on June 24, 2008, in Resolution No. 16-635, permitted the developer to add a 100 unit, age-restricted, multifamily building on the northwest quadrant of the 17.4 acre subject site. By the time the Council approved DPA 05-1, the developer of Clarksburg Village had purchased Greenway Village's portion of the subject site (*i.e.*, the planned commercial area), so the entire area of Clarksburg Village Center, destined for 109,000 square feet of commercial development (as well as the senior housing approved in DPA 05-1), is under single ownership of the Applicant, Clarksburg Village Center, LLC. DPA 05-1 contains a General Note 14 identical to the one included in DPA 04-3.

Neither the amount nor the location of commercial/retail development in Clarksburg Village Center is disputed by any party. In fact, on April 15, 2010, the Montgomery County Planning Board voted to approve a Preliminary Plan Amendment and a Site Plan for Clarksburg Village that included the subject 109,000 square feet of retail and the 100 multi-family dwelling units. Exhibit 66. It is only the timing of the commercial/retail development of Clarksburg Village Center which is at issue in this case.

B. Surrounding Area and Adjacent Development

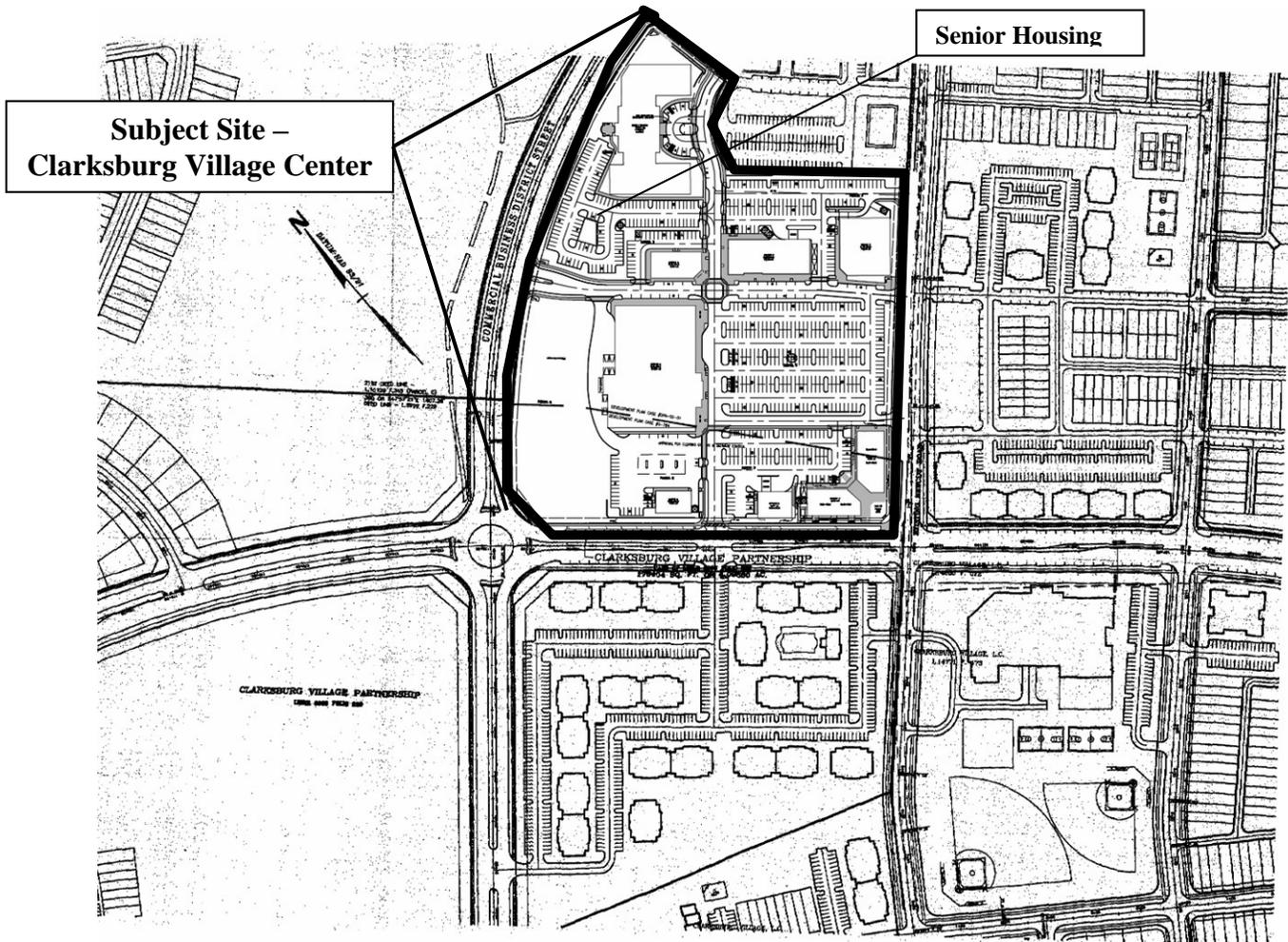
The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development.

Because the proposed commercial/retail development is intended to serve all of Newcut Village (*i.e.*, Arora Hills and Clarksburg Village), it is fair to consider this whole development as the surrounding area. Directly southeast of the site is a proposed elementary school, and to the west, across Little Seneca Parkway, is the Greenway Trail. Other than that, the site is surrounded by existing and planned residential development, consisting of single-family detached homes, townhouses, two-over-two units and multi-family buildings.

C. Proposed Development Plan Amendment

DPA 11-1 consists of a site layout, four proposed general notes and two proposed textual binding elements. They are reproduced on the following page. The previous general notes and binding elements have been crossed out on DPA 11-1 because they have been superseded by site planning and other developments, as will be set forth in detail on the following pages.

The 17.4 acre subject site consists of the northwest quadrant of the site layout contained on DPA 11-1 (Exhibit 51(a)):



The proposed textual binding elements and general notes on DPA 11-1 are:

Binding Elements:

- This property will be developed with 109,000 square feet maximum of commercial/retail use and 100 age-restricted residential units.
- Building permits for the commercial/retail buildings will not proceed until the earlier of either the issuance of building permits for 90,000 square feet of retail within the Clarksborg Town Center, or May 1, 2012.

Proposed General Notes:

- This is an amendment to the original Development Plan approved in Local Map Amendment G-784.
- This amendment clarifies that the Village Center, including both the commercial/retail and the age restricted housing is being developed as part of Clarksburg Village.
- Building footprint and design, pedestrian features, open space components and parking area are approximate and reflect approval of Site Plan Application No. 820100040, approved April 15, 2010.
- Site Plan Application No. 820100040 incorporates the binding elements for the age restricted housing component in DPA 05-01.

The previous General Notes and Binding Elements were crossed out on the proposed development plan for the reasons set forth in Exhibit 53(a), which is reproduced below:

CLARKSBURG VILLAGE CENTER, LC

ORIGINAL STATEMENT	REASON FOR SUGGESTED DELETION
GENERAL NOTES (BINDING ELEMENT):	
1. TRACT AREA: 4.09560 ACRES.	This no longer applies. The tract area of the Clarksburg Village Retail (current covered by Development Plans G-735 and G-784) is approximately 16.8 acres.
2. EXISTING ZONE: R-200/TDR	The existing zone is now PD-4.
3. PROPOSED ZONING: PD-4.	The existing zone is now PD-4.
4. THIS PROPERTY WILL BE DEVELOPED IN ONE PHASE.	This property will be developed in one phase, as required by site plan 820100040, approved April 15, 2010.
5. THIS PROPERTY IS TO BE DEVELOPED WITH 20,000 S.F. MAX. OF COMMERCIAL SERVICES.	This property is to be developed with 109,000 square feet maximum commercial services and no more than 100 elderly units, as required by site plan 820100040, approved April 15, 2010.
6. THIS LAYOUT MAY BE SUBJECT TO CHANGE TO INCLUDE SURFACE STORM WATER MANAGEMENT STRUCTURES, IF NEEDED.	The layout is finalized per site plan 820100040, approved April 15, 2010.
7. NO BUILDING PERMITS SHALL BE ISSUED FOR RETAIL / COMMERCIAL USES UNTIL 90,000 SQUARE FEET OF	This is a suggested change in this DPA. See updated binding elements of pending Development Plan Amendment 11-1, which

<p>RETAIL USES WITHIN CLARKSBURG TOWN CENTER HAVE BEEN ESTABLISHED.</p>	<p>states, "Building permits for the commercial/retail buildings will not proceed until the earlier of the issuance of building permits for 90,000 square feet of retail the Clarksburg Town Center retail, or May 1, 2012."</p>
<p>PARKING COMPUTATION (ILLUSTRATIVE ONLY):</p> <p style="text-align: center;">————— GFA —————</p> <p>————— PARKING REQUIRED ————— PARKING PROVIDED</p> <p>COMMERCIAL SERVICES ————— 20,000 S.F.</p> <p>————— 111 SPACES* ————— 111 SPACES*</p> <p>* PER THE MONTGOMERY COUNTRY ZONING ORDINANCE.</p>	<p>Parking computations and configuration are as required by site plan 820100040, approved April 15, 2010.</p>
<p>* THE GREEN SPACE CALCULATION IS 76665.6 S.F. OR 43%</p>	<p>Green space calculations are as required by site plan 820100040, approved April 15, 2010.</p>
<p>RELATIONSHIP OF DEVELOPMENT PROGRAM TO THE COUNTY CIP: (BINDING ELEMENT):</p>	
<p>ROADS: THIS DEVELOPMENT IS NOT DEPENDANT ON ANY ROAD PROJECT CONTAINED WITHIN THE COUNTY'S CIP. HOWEVER, WIDENING OF MD 27 TO FOUR LANES MAY BE NECESSARY. FUNDED AS A DEVELOPER PARTICIPATION PROJECT PRIOR TO FULL DEVELOPMENT OF THE PROPERTY, DEPENDANT UPON BACKGROUND CONDITIONS AT THE TIME OF SUBDIVISION APPROVAL.</p>	<p>These road improvements are included as part of approved preliminary plan 12001030E preliminary plan opinion dated July 8, 2010.</p>
<p>SEWER SERVICE: DEVELOPMENT OF THIS PROPERTY WILL BE PRECEDED BY THE CONSTRUCTION OF THE FOLLOWING CIP PROJECTS WHICH ARE NOT YET UNDER CONSTRUCTION.</p> <p style="text-align: center;">————— LITTLE SENECA WWPS EXPANSION FM, PART 3, S 84.41</p> <p style="text-align: center;">————— CRYSTAL ROCK WPS, S 84.50</p>	<p>All sewer service installed prior to construction of Phase I of Clarksburg Village.</p>

<p>CLARKSBURG HEIGHTS OUTFALL SEWER, PART I, S 84.24 GLENRIDGE ACRES OUTFALL SEWER, PART I, S 84.44 CLARKSBURG AREA STAGE 2 TRUNK SEWER, S 84.48 CLARKSBURG TOWN CENTER OUTFALL SEWER, S 84.51 CLARKSBURG AREA STAGE 3, S- 84.55</p>	
<p>ROAD IMPROVEMENTS NECESSARY FOR DEVELOPMENT OF PROPERTIES IN THE NEWCUT ROAD NEIGHBORHOOD (INCLUDING G-784) TO PROCEED: (BINDING ELEMENT):</p>	
<p>1. THE APPLICANT TO PARTICIPATE IN WIDENING MD 27 TO SIX TRAVEL LANES FROM OBSERVATION DRIVE IN GERMANTOWN THROUGH THE BRINK ROAD INTERSECTION, AND TO FOUR LANES THROUGH THE MD 305 INTERSECTION; CONTINUE TWO NORTHBOUND TRAVEL LANES THROUGH THE SKYLARK ROAD INTERSECTION.</p>	<p>These road improvements are included as part of approved preliminary plan 12001030E preliminary plan opinion dated July 8, 2010.</p>
<p>2. THE APPLICANT TO PARTICIPATE IN CONSTRUCTING RELOCATED NEWCUT ROAD (A 302) BETWEEN MD 27 WESTERLY TO THE A 305 INTERSECTION, WHERE THE RELOCATION CONTINUES TO MD 355.</p>	<p>This road improvement is included as part of the approved Preliminary Plan 12001030E Preliminary Plan Opinion dated July 8, 2010.</p>
<p>3. THE APPLICANT TO PARTICIPATE IN CONSTRUCTING A 305 WEST FROM MD 27 TO RELOCATED NEWCUT ROAD (A 302) WHERE A-305 THEN CONTINUES WEST TO STRINGTOWN ROAD.</p>	<p>This portion of the A-305 roadway is already built and/or under construction. These road improvements are included as part of approved preliminary plan 12001030E preliminary plan opinion dated July 8, 2010.</p>
<p>4. THE APPLICANT TO PARTICIPATE IN CONSTRUCTING A SECOND LEFT TURN LANE FROM NORTHBOUND MD 355 TO WESTBOUND MD 27.</p>	<p>These road improvements are included as part of approved preliminary plan 12001030E preliminary plan opinion dated July 8, 2010. The construction of these turn lanes is complete.</p>
<p>5. THE APPLICANT TO PARTICIPATE</p>	<p>These road improvements are included as part of</p>

<p>IN CONSTRUCTING ADDITIONAL TURN/APPROACH LANES ON MD 27 AND BRINK ROAD AT THE MD 27/BRINK ROAD INTERSECTION.</p>	<p>approved preliminary plan 12001030E preliminary plan opinion dated July 8, 2010. The construction of these turn lanes is complete.</p>
<p>6. THE APPLICANT TO PARTICIPATE IN PROVIDING A SEPARATE LEFT TURN LANE FROM SOUTHBOUND MD 355 TO EASTBOUND BRINK ROAD AND SEPARATE LEFT TURN LANE FROM WESTBOUND BRINK ROAD TO SOUTHBOUND MD 355.</p>	<p>These road improvements are included as part of approved preliminary plan 12001030E preliminary plan opinion dated July 8, 2010.</p>
<p>THE ROAD IMPROVEMENTS NECESSARY TO BE CONSTRUCTED IN CONNECTION WITH EACH PHASE OF DEVELOPMENT WILL BE DETERMINED AT PRELIMINARY PLAN OF SUBDIVISION; TO BE COORDINATED WITH SURROUNDING DEVELOPMENT AND ROADWAYS, INCLUDING THOSE EXISTING, PLANNED, PROGRAMMED AND UNDER CONSTRUCTION. THE METHOD OF THE APPLICANT'S PARTICIPATION MAY BE A ROAD CLUB, DEVELOPMENT DISTRICT OR SOME OTHER MECHANISM. THE ORDER OF IMPROVEMENTS, METHOD AND DEGREE OF PARTICIPATION ARE TO BE DETERMINED AT PRELIMINARY PLAN OF SUBDIVISION.</p>	<p>These road improvements and associated phasing requirements are included as part of approved preliminary plan 12001030E preliminary plan opinion dated July 8, 2010.</p>

Pursuant to Code § 59-D-1.11, development in the PD-4 Zone is permitted only in accordance with a development plan that is approved by the District Council, pursuant to Code §-D-1.7. In the present case, we are examining a proposed amendment to the development plan, rather than a rezoning application. The standards for review are similar, where, as here, a public hearing is required, because Zoning Ordinance §59-D-1.7(d)(2) directs OZAH to compile the record “in the same manner as the record is compiled for a local map amendment application.”

However, this is an unusual case because the only requested changes concern restrictions on the timing of commercial/retail development, not its use, density, size or design. The Council has already approved the zoning, use, density and size, as well as the development plan for the site. The

Hearing Examiner hereby takes official notice of the records in LMA G-735, LMA G-784, and DPAs 04-3 and 05-1. Those approvals continue in effect, and findings made by the Council in LMAs G-735 and G-784, as well as DPAs 04-3 and 05-1, justifying the PD-4 Zone and the proposed density, use, size and design, are incorporated herein by reference. Therefore, no evidence regarding the use, density, size or design was produced or evaluated in this case. The merits of the proposed DPA 11-1 will be evaluated in Part V of this report based on the issues related to the staging of commercial/ retail development permitted in Clarksburg Village Center.

Given the pre-existing findings regarding density, use, size and design, the Council need only examine the changes to the proposed binding elements and general notes.

The first proposed binding element merely clarifies that which was previously approved in earlier Council resolutions – that the site would be developed with up to 109,000 square feet of commercial/retail use and with 100 age-restricted residential units.

The second proposed binding element provides the operative change to the existing restriction in the timing of commercial/retail development on the site by allowing the Applicant to proceed with commercial/retail buildings after May 1, 2012, or after Clarksburg Town Center gets building permits for 90,000 square feet of retail, which ever occurs first. The Planning Board reports, in its letter of November 24, 2010 (Exhibit 21), “To date there has been no retail development in the Clarksburg Town Center.”

Applicant proposes to cross out the previous general notes, as shown in the table reproduced on pages 15 to 18, above, because the contents of those general notes has been superseded by approved preliminary plans or site plans.

According to the Applicant, the amended development plan will result in the development of Clarksburg Village Center with retail and elderly housing as shown in the rendered site plan (Exhibit 24) reproduced on the next page. 11/29/10 Tr. 17.

CLARKSBURG VILLAGE PHASE 3
RETAIL & ELDERLY HOUSING
APRIL 2010



D. The Master Plan

The subject site is within the area covered by the Clarksburg Master Plan & Hyattstown Special Study Area, approved and adopted in June 1994, and amended on June 28, 2011, by Resolution No. 17-188. Exhibit 59.

The Master Plan expressly recommends, at page 62, that there be 109,000 square feet of retail development to serve the Newcut Road Neighborhood, and that it be located in the neighborhood center (*i.e.*, the subject site). As stated by Technical Staff (Exhibit 19. p. 3), “[t]he Clarksburg Master Plan makes clear the importance of a neighborhood retail core to serve the Newcut Community including Clarksburg Village and Arora Hills [*i.e.*, the neighborhood of the subject site]. . . . However, the Clarksburg Master Plan [*prior to its amendment on June 28, 2011, by Resolution No. 17-188*] also clearly prioritize[d] the Town Center as the first retail center to be established in the planning area, and contains several specific and consistent provisions pertaining to the timing of retail development for the planned implementation of Clarksburg.” It is this language in the pre-amendment Master Plan that accounts for the initially negative recommendations by Technical Staff and the Planning Board regarding this DPA, despite the conclusion by both of those bodies that commercial development on the subject site is needed without delay to serve the community.

By Resolution 17-188, adopted June 28, 2011 (Exhibit 59), the District Council approved the Planning Board’s Draft Limited Amendment to the Clarksburg Master Plan & Hyattstown Special Study Area, dated May 2011. The revisions to the 1994 Clarksburg Master Plan & Hyattstown Special Study Area changed the staging requirements of the Master Plan to allow retail development in the Newcut Road and Cabin Branch neighborhoods on approval of a Preliminary Plan for 90,000 square feet of retail uses in the Clarksburg Town Center, rather than requiring retail

development in the Newcut Road and Cabin Branch neighborhoods to await the actual development of retail use in the Town Center.

Since that Preliminary Plan for 90,000 square feet of retail uses in the Clarksburg Town Center had already been approved (Exhibit 73), the effect of the Master Plan Amendment was to remove the staging impediment to allowing retail development in Clarksburg Village Center, as requested in the subject DPA 11-1.

The first “Plan Objective” listed in the Master Plan under “*Land Use Plan Recommendations by Geographic Area*” (MP, p. 42.) is to “*Create a Town Center which will be a strong central focus for the entire Study Area.*” On page 46 of the Master Plan, it states, “*This Plan recognizes that retail uses are critical to the validity of the Town Center.*”

The Master Plan also contains a section, beginning on page 186, entitled “*Staging Recommendations.*” There are seven “*guiding staging principals, which are integral components of this Master Plan . . .*” MP, pp. 187-192. These staging principals “*provide a general framework and guidance for the future staging or timing of private development and the provision of public facilities in Clarksburg . . .*” MP, p. 187.

Staging “*Principle #4: Development of a Strong Community Identity*” specifies (MP, pp. 189-190),

- ***The Town Center:*** *Encourage the early development of the Town Center to create a strong sense of community identity and to provide a model for later development in other areas.*”

*

*

*

- ***Coordinated Residential and Commercial Development:*** *Provide for sufficient residential units to support Town Center retail and commercial activities.*

This Plan recognizes that retail uses are critical to the validity of a community and can play a significant role in reinforcing the Town Center as a central

focus for the entire Clarksburg area. Once a sufficient critical mass of housing units are in place to support a retail center (retailers indicate that approximately 3,500 to 4,000 dwelling units are needed to support a retail development that includes a grocery store)⁵, this Plan recommends that early retail development priority be given to the Town Center. Retail development in the Newcut Road and Cabin Branch neighborhoods should follow the development approval with a Preliminary Plan of approximately 90,000 square feet of retail uses in the Town Center. [Emphasis included to indicate words added by the June 28, 2011 amendment.]

Beginning on page 192 of the Master Plan is a section entitled, “*The Staging Sequence for Private Development.*” Stage 3 of the development is discussed on page 196 of the Plan. Prior to the amendment of the Plan, it provided, in relevant part,

. . . Retail/commercial development in the Newcut Road and Cabin Branch Neighborhoods will be deferred, however, until 90,000 square feet of retail uses have been established in Clarksburg’s Town Center.

It now reads:

. . . Retail/commercial development in the Newcut Road and Cabin Branch Neighborhoods will be deferred, however, until 90,000 square feet of retail uses have been approved with a Preliminary Plan in Clarksburg’s Town Center. [Emphasis included to indicate words added by the June 28, 2011 amendment. The word “established” was deleted]

Similarly worded statements were also included under “*Implementing Mechanisms,*” on the same page of the Master Plan, and they were similarly amended.

There was evidence introduced at the initial hearing that the staging restriction in question was not a central part of the Master Plan process, but rather was added in at the very end at the urging of counsel for Newland. 11/29/10 Tr. 31-37; 69-73. That point has been mooted by the amendments to the Master Plan.

Newland argues in its letter of October 3, 2011(Exhibit 65), that DPA 11-1 “conflicts with the Master Plan vision for the Town Center as a central focal point for the area.” To the extent that

⁵ David Flanagan, President of Elm Street Development, testified that, according to Park and Planning’s figures, there are currently 5,000 houses on the ground in Clarksburg. 11/29/10 Tr. 24. It is therefore in the mid-stages of development and still has no retail. 11/29/10 Tr. 30. The Harris Teeter grocery chain has expressed an interest in building a supermarket in the Clarksburg Village Center. Exhibit 30.

staging had been a focus of the Master Plan as originally adopted, it is clear that the intent of these Master Plan amendments was to remove the staging impediment which had prevented retail development in the Clarksburg Village Center. This conclusion is buttressed by a number of documents in evidence, in addition to the language changes themselves.

The first is the February 14, 2011, memorandum to the Council by Marlene Michaelson, Senior Legislative Analyst, recommending an amendment to the Planning Department work program related to the Clarksburg Master Plan retail staging provisions (Exhibit 69). As stated by Ms. Michaelson,

. . . [while the intent of the Master Plan staging provisions] was to encourage a focus on Town Center, it appears to have had the inadvertent effect of potentially delaying the development of a grocery store in Clarksburg. Although a Town Center property owner had originally planned to develop a grocery store, they have no immediate plans to move ahead, while other property owners outside Town Center have expressed an interest in building a grocery store. The amendment would not remove the staging provision from the Master Plan, but would simply add an exception to allow a grocery store (and potentially ancillary uses) outside Town Center to proceed before 90,000 square feet of retail is developed in Town Center. There is currently no grocery store in Clarksburg, and a strong demand for one, and this amendment would allow one to be built outside Town Center.

In its February 15, 2011 session, the Council did, in fact, amend the Planning Department's work program to address this issue, as indicated in the Council's remand resolution to the Hearing Examiner. In that remand resolution, the Council took official notice of its February 15 action. Resolution 17-69 of March 1, 2011 (Exhibit 57).

The Planning Board's Technical Staff report of March 24, 2011, recommends approval of amendments to the Master Plan to allow retail development in the Clarksburg Village Center "to proceed without delay." Exhibit 67. On May 10, 2011, the Planning Board transmitted the Draft Limited Amendment to the Clarksburg Master Plan to the Council. Exhibit 71 (Attachment). The purpose of the amendment is clearly stated on page 8 of the Planning Board submission:

This Amendment allows retail uses in the Newcut Road/Clarksburg Village Center and the Cabin Branch Village Center to proceed before 90,000 square feet of retail are built in the Town Center. . . . [Emphasis added.]

In a memorandum dated May 26, 2011, County Executive Isiah Leggett recommended approval of the Draft Limited Amendment to the Clarksburg Master Plan (Exhibit 71 (Attachment)), and the Council approved the Planning Board's Draft Limited Amendment at a public hearing on June 28, 2011, in Resolution 17-188 (Exhibit 59).

The evidence is thus overwhelming that, even if Newland had been correct about the original vision of the Clarksburg Master Plan, that vision was modified by the Limited Amendment to the Master Plan recommended by the Planning Board and approved by the Council.

Newland has presented no evidence to support its contention that, at this juncture, the proposed DPA undermines "the Master Plan vision." On the contrary, the entire record supports the conclusion that the Master Plan was amended to allow the very retail development proposed in DPA 11-1, without further delay.

Françoise Carrier, the Chair of the Planning Board, by letter dated August 18, 2011 (Exhibit 62), advised the Hearing Examiner that further review of DPA 11-1 by the Planning Board was unnecessary because adoption of the Master Plan Amendment resolved the only objection that the Planning Board had to DPA 11-1 in its November 18, 2010 review. She noted that the Board has already stated "it would serve the public interest to permit development of retail uses in Clarksburg Village without waiting for the Town Center Development to which the Master Plan gave top priority," subject only to Master Plan staging requirements which were addressed in the Master Plan amendment.

Based on this record, the Hearing Examiner finds that DPA 11-1 is consistent with the vision and specific provisions of the amended Clarksburg Master Plan & Hyattstown Special Study Area.

E. The Concerns of the Community

The proposed DPA is supported strongly by the Clarksburg Civic Association (Exhibit 40), the Gateway Commons Homeowners Association (Exhibit 32(b)) and by the residents of Arora Hills and Clarksburg Village, who currently have no convenient retail nearby. 11/29/10 Tr. 42-69 and Exhibits 31, 32, 37 and 39.⁶ It is opposed by NNP II-Clarksburg LLC (also known as “Newland”), the developer of the nearby Clarksburg Town Center (Exhibits 27, 45 and 65). No residents of the Clarksburg community have opposed DPA 11-1. Four area residents testified in support of the DPA at the hearing. The frustration of the residents was exemplified by the testimony of Margaret Clinton, who moved to her current house in Clarksburg Village in April of 2008. She stated (11/29/10 Tr. 51-52),

Since then, we've been driving 12 miles round trip to the closest grocery store, which is a very overcrowded Giant. It's the Neelsville one. If we want to do more specialty shopping, we have to drive 22 miles round trip to Whole Foods, or 24 miles round trip to the closest Harris Teeter.”

* * *

Not only is this a burden on our family, but it's also not environmentally friendly and contributes to the traffic problems on 270 and 355, especially after 3:00 p.m., when it can take 30 minutes or more to make it back the six miles to Clarksburg from Milestone.

We cannot wait for Newland to begin work on their retail center. We please ask that you allow Elm Street to continue the excellent work they have done for Clarksburg, and complete our retail center as soon as possible.

The same sense of frustration was communicated in the letters filed by residents and civic associations in this case, identified above.

⁶ Some of these submissions consist of a petition and unsigned e-mails. As explained at the hearing, in order to ensure fairness in the process, the Hearing Examiner does not give any weight to unsigned submissions from sources other than County agencies or entities responding to direct inquires from the Hearing Examiner. 11/29/10 Tr. 95-97.

IV. SUMMARY OF THE HEARINGS

Two hearings were held in this case, the initial hearing on November 29, 2011, and the post-remand hearing on October 14, 2011. Applicants called two witnesses at the initial hearing, David Flanagan, President of Elm Street Development, the developer of the Clarksburg Village, and Kate Kubit, a vice president of Elm Street. Four area residents testified in support of the DPA – James Laduca, Margaret Clinton, Debra Megan Thompson and Lisa Winstel. There were no additional witnesses called by Applicant at the post-remand hearing, but Applicant’s counsel introduced additional exhibits. No opposition witnesses appeared during either hearing; however, letters of opposition were filed by attorneys for NNP II-Clarksburg LLC (also known as “Newland”), the developer of Clarksburg Town Center (Exhibits 27 and 65).

At the beginning of the initial hearing, the Hearing Examiner announced that he would take official notice of the record in LMA G-735, LMA G-784, and DPAs 04-3 and 05-1, to the extent necessary for his report. 11/29/10 Tr. 5-6. No objections were raised. The Hearing Examiner noted at the post-remand hearing that all the previous testimony and exhibits would continue to be part of the record. 10/14/11 Tr. 7.

A. Applicant’s Case in Chief

1. David D. Flanagan (11/29/10 Tr. 12-42; 69-92; 112):

David Flanagan testified that he is the President of Elm Street Development, developer of the Clarksburg Village. The owners of Elm Street own the Applicant, Clarksburg Village Center, LLC. He began working on it 26 years ago. Mr. Flanagan stated that in the 1994 Clarksburg Master Plan (p. 41), Clarksburg was divided in to various neighborhoods, and two centers were designed to provide typical neighborhood retail services, the Town Center and the subject Clarksburg Village

Center, then known as the Newcut Center. According to Mr. Flanagan, the Town Center, was to be more of a regional, much bigger retail center, that would also have public uses. 11/29/10 Tr. 15.

Initially, it was located partially on Applicant 's property and partially on Greenway Village property. That is why there are two PD zoning cases for the subject retail center. Subsequently, Applicant bought the northern half of the retail center from the developers of Greenway Village, and have now combined it into one land parcel (*i.e.*, the 17.4 acre subject site).

Mr. Flanagan used Exhibit 23 to describe Newcut Village, which includes both Clarksburg Village and Greenway Village. It is surrounded by Ovid Hazen Wells Recreation Park on the north, Route 27 on the east, Stringtown Road on the west and Little Seneca Creek and MD Rt. 355 on the South.

The Master Plan called for a retail center, the Newcut Village Retail Center (now the Clarksburg Village Center), which is composed of two parts, the four acre portion rezoned in G-784 in the southern part of the subject site, and the approximately 12 acre portion that was rezoned as part of G-735 in the northern part of the site. According to Mr. Flanagan, the Newcut Village Retail Center was intended by the Master Plan, as

Smaller in size, more local retail, and so it has envisioned a drug store, a grocery store, a gas station, two banks, fast food, dry cleaners, that type of retail use.

The master plan calls for a slightly different kind of uses for the bigger Town Center, more regional, more specialty retail, retail that takes more population to support, and more specialized retail, less pure service retail that we have in our center and then the other center that's planned for on the other side of I-270. [11/29/10 Tr. 22.]

Mr. Flanagan further testified that the Master Plan, beginning at p. 185 described the staging it recommended for developing the Clarksburg area over the 20 or 30 years it takes to build a new town. Newcut was placed in Stage Three of the Master Plan. Stage One was already built. Stage Two was going to go first, which included Clarksburg Town Center. Stage Three is all of the rest of the land on the east side of I-270.

In 2001, about seven years after the Master Plan was adopted, the staging criteria were met so that the County could release development in Stage Three. That is when Applicant was able to start development of its project. Approximately 1,700 houses have been built and are now occupied in Newcut Village. According to Park and Planning, roughly 5,000 houses now exist in Clarksburg, including the 1,700 in Newcut Village.

Mr. Flanagan recited the staging principles set out in the Master Plan. There is a specific recommendation addressing retail development (Master Plan , p. 190), which gave “early retail development priority” to the Town Center, and specifically, “Retail development in the Newcut Road and Cabin Branch neighborhoods should follow the development of approximately 90,000 square feet of retail uses in the Town Center.”

Mr. Flanagan feels that (11/29/10 Tr. 29-30):

enough time and enough construction has occurred now, where we're no longer in the early stages of development of Clarksburg. So the outline that was envisioned when the Clarksburg master plan was done is already, has already failed. We're past the early development of Clarksburg.

This was designed to encourage retail and Town Center to go first, but we're past that. We're now, we're in the teenage years of this child that we started in Clarksburg and still no retail. So, while it was designed to give Town Center a head start and try to encourage it, . . . -- the best, earliest we can open now with what we're proposing is 2013, which is going to be 19 years after the master plan was adopted. And we think that that's, these conditions have never anticipated that kind of time frame.

Mr. Flanagan pointed out that, with 5,000 houses on the ground, Clarksburg is in the mid-stages of development and still has no retail.

According to Mr. Flanagan, this retail staging recommendation didn't appear in the master plan draft until the very end, right before the spring/summer that the actual final master plan was adopted. He produced a portion of the Planning Board draft of the master plan (Exhibit 25), which does not have the language in question. A form of the language first appeared in the Technical Appendix to the Master Plan dated June of 1994, at page 141, which quoted a letter, dated April 19,

1994, from the Planning Commission to the County Council's PHED Committee discussing staging. In that letter, in the middle of page 141, it says that the Planning Board approved the following modifications being made to this option, and the first bullet point is "Defer retail/ commercial development in the Newcut Road Neighborhood until Clarksburg's Town Center concept has been established." 11/29/10 Tr. 33. The Council approved the Master Plan one month later, on May 23, 1994.

Mr. Flanagan further testified that the Master Plan is recommended a mix of uses, including retail in the Newcut neighborhood, specifying the type of units, the amount of retail, the number of units, and the public amenities that were to be included. Retail within the Newcut Road neighborhood was considered crucial, as one of the two neighborhood retail centers selected, and it was, "the entire plan was designed around the retail center." 11/29/10 Tr. 35. That goal was part of the plan from the beginning.

[At that point, the following colloquy occurred between the Hearing Examiner and Applicant's counsel (11/29/10 Tr. 35-36):

MR. GROSSMAN: But, Mr. Harris, how does it influence me or what's the point of whether or not something was added in at the beginning or the end? I'm not quite sure I follow your point on that.

MR. HARRIS: Sure. A question arose at the Planning Board hearing as to how central to the master plan the recommendation was with respect to the timing of retail in Clarksburg. And it's our contention that something that is put into the plan after all the public hearings are done, after the Planning Board draft -- that's not in the staff draft, that's not in the Planning Board draft, not in any of the public hearing documents and appears one month before the plan is adopted, hardly can be a central component to the master plan.

MR. GROSSMAN: So that your argument is that, to the extent that the master plan recommendations should be followed, this should be less imposing?

MR. HARRIS: Exactly.]

According to Mr. Flanagan, this retail timing restriction was added on towards the end of the process based on written statements from the current owner of the Town Center. 11/29/10 Tr. 36-37.

Using Exhibits 28 and 29, Mr. Flanagan explained how retail timing restriction was added . 11/29/10 Tr. 69- 72. He testified (11/29/10 Tr. 72):

The last two pages of Exhibit 29 are where there's a Linowes and Blocher fax which suggests that language be put in to not allow retail uses in Newcut or Cabin Branch neighborhoods until the Clarksburg Town concept has been established. So yes, it did come from the attorney of Town Center.

[The fax in question contains the following proposed language, under the heading, "Community service:"

To assure vitality of the Town Center retail and civic uses, retail/commercial /development in the New Cut Road and Cabin Branch neighborhoods should be deferred until the Clarksburg Town Center concept has been established.]

According to Mr. Flanagan, that language morphed into the 90,000 square foot language that's in the Master Plan. 11/29/10 Tr. 73.

Mr. Flanagan argued that Applicant is not being allowed to implement the full vision of the Master Plan for this development because of this one line in the Master Plan. 11/29/10 Tr. 76-77. [Applicant's counsel suggested that the Council, in putting in the 90,000 square foot number, was trying to limit the impact of what Mr. Kaufman suggested in his letter, because Mr. Kaufman's language, theoretically, would have allowed the Town Center to "establish" all 300,000 square feet of retail/commercial that has been approved for the Town Center; however, there is no documentary evidence of that he could locate. 11/29/10 Tr. 79-82.]

[Mr. Harris also noted that even if the Master Plan is amended, the binding element in G-784 would still have to be changed in order to allow the retail development to proceed in Clarksburg Village. Moreover, he has no confidence that a Master Plan Amendment will be started anytime soon, and no confidence that it would be done within that period of time. 11/29/10 Tr. 84.]

Mr. Flanagan further testified that ultimately, the number of homes planned for Clarksburg would support the three grocery stores. 11/29/10 Tr. 87. He introduced a letter from Harris Teeter (Exhibit 30) indicating an interest in building a grocery store in Clarksburg Village. 11/29/10 Tr. 88-89.

According to Mr. Flanagan, Applicant has agreed to about a 45 million dollar road package, and the infrastructure and roads adjacent to the proposed retail center are under construction now. 11/29/10 Tr. 89. He stated (11/29/10 Tr. 89-91):

Well, we're frustrated in that the Town Center now, through Linowes and Blocher, even in its most recent letter, is still reaching out for somebody, some method of financing to make roads occur before they will build retail.

We, on the other hand, are building roads. We are not conditioning our retail on a development district. We are, right now, have agreed to about a \$45 million dollar road package, and we are under construction with a lot of it now. And so we are not, we have no conditions that we are looking for governmental bail outs or whatever that the Town Center is now reaching on.

We are under construction of the roads that are adjacent to our proposed retail center. So we don't have that as a requirement or excuse to move forward. And we're very frustrated with their now tying roads and financing of roads to moving forward with retail.

* * *

We've reached the point now where the number one complaint we have from all our residents and all our surveys is lack of retail. We have in the petition we're going to show you, all the folks who signed up for, to support our zoning change, now some of them are saying, we're going to leave and we're going to move out because there is no retail and it's not convenient. . . . it's a market requirement for us to have the retail before we can build the apartments. And we are ready, willing, and able to start the apartments concurrent with the retail.

When asked by the Hearing Examiner where the date May 1, 2012, came from, Mr. Flanagan indicated that Applicant tried to come up with a date that was more than reasonable to give Town Center every possibility to move forward, after all these years. It's also the time frame in which Applicant thinks everything that it needs – the roads, the grading, all the approvals – would be in

place and still give the Town Center another year and a half to move forward, if they have any desire to move forward. 11/29/10 Tr. 112.

2. Kate Kubit (11/29/10 Tr. 92-112; 114; 126-131):

Kate Kubit testified that she is the vice president of Elm Street. Since 2006, she has been working on the Clarksburg Village project, and one of her roles is to be the main point of contact with the residents in the community. She outlined those contacts (11/29/10 Tr. 92-93), and also indicated that “overwhelmingly at these meetings, citizen feedback and support has been to get retail to Clarksburg and the sooner the better.” 11/29/10 Tr. 98. She also introduced a petition “signed by over 464 residents” in favor of the retail development (Exhibit 31). [The Hearing Examiner advised that generally speaking, OZAH does not accept unsigned input from people who do not appear to testify. 11/29/10 Tr. 95.]

Ms. Kubit also introduced a series of letters and e-mails in support of the rapid installation of retail in the subject site, 24 of which were unsigned (Exhibit 32) and three of which were signed (Exhibits 32(a), (b) and (c). 11/29/10 Tr. 99-101. Ms. Kubit outlined the concerns of the residents arising from the lack of nearby retail— including travel time, traffic, the environment, convenience, property values and worries about safety of the elderly and the very young. 11/29/10 Tr. 102-105.

According to Ms. Kubit, the main component of the development plan (DPA 11-1) “is just changing up the general notes and the binding elements from the original development plan. A lot of the previous development plan notes and things of that nature are no longer relevant because they've been translated into conditions of approval, site plans, and other agreements that we have with the County.” 11/29/10 Tr. 107. It is only the northwest quadrant of the development plan in which the retail in question will be located. The property would be developed with 109,000 square feet maximum of commercial retail use, and 100 age-restricted residential units, the latter having been

approved in DPA 05-1. The southeast quadrant is a proposed elementary school. The northeast quadrant and the southwest quadrant are approved residential development. 11/29/10 Tr. 108-110.

[The Hearing Examiner requested that Applicant file a document referencing how each general note crossed out on DPA 11-1 has been superseded, and the reason therefor. 11/29/10 Tr. 113-125.]⁷

Ms. Kubit introduced a rendered version of subject site (Exhibit 24), showing the northwest portion of the site layout on DPA 11-1. Applicant's counsel explained that the site plan for this specific quadrant was already approved by the Planning Board. "So it is, effectively, ready to go upon amendment of a binding element." 11/29/10 Tr. 126-128. Ms. Kubit then outlined which parts of the development have already been built and which are under construction. 11/29/10 Tr. 128-131.

Applicant's counsel reiterated that a Master Plan amendment should not be required here, and that it would be unlikely to get through in the time frame promised (ten months) because the Council does not want a piecemeal amendment and the Planning Board "would have to bump a master plan amendment for the Burtonsville area that the County Council has told them they want done." 11/29/10 Tr. 132-133.

Applicant's counsel argued for approval of DPA 11-1 (11/29/10 Tr. 133-134):

. . . under the development plan provisions of 59-D, there is a master plan component there, but what it says is that the Council has to find that the proposed development substantially complies with the use and density indicated in the master plan. It doesn't say time, it says use and density, very specifically.

And, in fact, they made the finding in 2001 when they approved each of these two development plans, that the development proposed here, this exact amount of development, is substantially in conformance with the master plan. And so no further finding, in terms of that conformity, is required, in my mind. It's been made. We're simply trying to implement what was then approved.

And as far as master plan conformity, while we are talking about this provision that came in at the 11th hour about the timing of retail up there, there is also, as

⁷ Applicant later did so in Exhibit 43(d), filed December 3, 2010, and corrected in Exhibit 53(a).

Mr. Flanagan testified, the element that Newcut neighborhood was intended to be a complete community of itself, a mix of uses with neighborhood retail there. That is, I maintain, an equally important objective of the master plan.

And we're now well into the development of that community and yet, no retail. And so, frankly, I maintain that to the extent they would not allow retail to go forward now, they would be, the County would effectively be violating the master plan recommendation. And that retail component, again, was approved in this development plan, in this preliminary plan, and in this site plan. So it has all those approvals pending.

Applicant's counsel also argued that this development only complies with the standards of the PD Zone if it has the amenity of retail being sought here. 11/29/10 Tr. 135.

Applicant's counsel stated (11/29/10 Tr. 144-145):

Mr. Dreyfuss on the Planning Board also noted that he hadn't seen, he was not aware of, nor am I, for that matter, a master plan that gave an absolute monopoly, a priority to a single property owner for all of the retail in a planning area over someone else, and subjected all others to, you know, a second class status with no time limit on it. And again, I don't know of one. There may be one, but I sure don't know of it.

And in fact, you know, I believe that they could not interpret it that way. I think to do so would effectively be an inverse condemnation of the second property owner's property. If your property is zoned, has preliminary plan approval, site plan approval, et cetera, to develop for one single use, and you're not allowed to use it for that one single use, then your property rights have effectively been taken. There is absolutely no use this person can do with this property now.

And while I wouldn't call it a taking or an inverse condemnation in year one or year two, because the courts have held many times that temporary restrictions in terms of the use of your land, typically related to the adequacy of public facilities, that they are okay.

But I know of no court that has ever said that kind of a situation, or even worse, this particular situation can exist for 16 years and counting, and be told in the 16th and a half year, no not now either, and we don't know when.

B. Community Witnesses

1. James Laduca (11/29/10 Tr. 42-51):

James Laduca testified that he has lived in the Arora Hills neighborhood of Clarksburg for over four years now, having moved into the neighborhood in October of 2006. When his family moved in, they were aware of the Clarksburg Town Center retail as well as the Newcut retail being

planned, but he is frustrated that, after four years, there is still no tangible progress towards the Newcut retail development. It would be within walking distance from his house. He stated that there is no shopping within 10 minutes by car, even for just typical grocery shopping.

Moreover, there does not appear to be any tangible progress on the Clarksburg Town Center. The Master Plan was drawn up in 1994, and a lot has changed in northern Montgomery County. He emphasized that the residents need the retail available soon. They end up spending their money in Frederick County, which means that Montgomery County is losing the local dollars.

Mr. Laduca repeatedly emphasized his frustration, and that of his neighbors, with the situation

“... part of a vital neighborhood and community is having shopping where we're not going to different counties or 15, 20, 25 minutes away to do basic necessities of getting gas, getting groceries, getting dinner.” 11/29/10 Tr. 44. He feels it is unacceptable that he still has to wait because of a pending condition on Clarksburg Town Center when other retail in Germantown or elsewhere in Montgomery County isn't being held up. “...it just doesn't seem relevant when it's a separate space. There is enough residents to support both.” 11/29/10 Tr. 45.

It doesn't seem relevant that one has to be built over the other when after five years of continuing arbitration and pending, if the Clarksburg Town Center site is held up for another four or five years. It just doesn't seem, I don't know, intelligent that you would have to wait for more retail until this one site is completed when we know that there is problems and arbitration that's still going on to fix that. {11/29/10 Tr. 45}

When questioned by the Hearing Examiner about the need for relying on the Master Plan, Mr. Laduca responded (11/29/10 Tr. 46-47):

Right, and I think the plan from where things go, how they are laid out, what kind of space, I mean, the master plan I don't think overall is flawed. It's not like they are saying, you know what, instead of this retail space, let's put a movie theater and blow out these houses and put a park. I think the plan in is fine. It's just, I think the provision on in what order and what time is where the flaw is.

And again, if it is, in theory, 10 years before Clarksburg Town Center gets built, I don't think that it makes sense for whatever the number was, you know, over 5,000 residents to still wait for a separate issue when these two neighborhoods, you know, I think deserve the retail. It shouldn't be held up by an existing outside condition where - as a whole, you're right.

If you need to follow the plan, that's what you're trying to do. You're still following the plan. It's just, to me, free market, residents want it. Retailers want to be there. People will shop. It will bring more tax revenue to the County. You know, we're worried about, how are we paying for all of these amenities in Clarksburg?

When asked about the possibility of getting the retail permitted though an amendment to the Master Plan, Mr. Laduca, asked for whatever route is faster.

2. Margaret Clinton (11/29/10 Tr. 51-54):

Margaret Clinton testified that she moved to her current house in Clarksburg Village in April of 2008. She stated (11/29/10 Tr. 51-52),

Since then, we've been driving 12 miles round trip to the closest grocery store, which is a very overcrowded Giant. It's the Neelsville one. If we want to do more specialty shopping, we have to drive 22 miles round trip to Whole Foods, or 24 miles round trip to the closest Harris Teeter."

* * *

Not only is this a burden on our family, but it's also not environmentally friendly and contributes to the traffic problems on 270 and 355, especially after 3:00 p.m., when it can take 30 minutes or more to make it back the six miles to Clarksburg from Milestone.

We cannot wait for Newland to begin work on their retail center. We please ask that you allow Elm Street to continue the excellent work they have done for Clarksburg, and complete our retail center as soon as possible.

When asked about the possibility of getting the retail permitted though an amendment to the Master Plan, she, like Mr. Laduca, asked for whatever route is faster.

3. Debra Megan Thompson (11/29/10 Tr. 59-64):

Debra Megan Thompson testified she has lived in Clarksburg Village for a little over a year and a half. She loves it, but all she wants is to be able to walk to the grocery store to get a gallon of milk. She added (11/29/10 Tr. 61):

But to actually show retail there would just bring so many more people to this great community, because there is nothing bad about it. The people, the environment is wonderful. The only thing missing is grocery stores, gas station, bank, CVS, something to get medicine for our kids, if we need it, you know, very quickly.

It's just unending how that can help a young mother, you know, with having that convenience, especially if a husband is working late, or whatever, and you don't want to have to throw two kids in the car for 20 minutes to get to a grocery store, you know, especially if they are sick.

4. Lisa Winstel (11/29/10 Tr. 64-69):

Lisa Winstel testified that she lives in the Arora Hills development. She stated (11/29/10 Tr. 65):

. . . the master plan can be reopened, between County Council and the Planning Board, that can happen, and it must happen. Very simply put, the conditions that were in place in 1994, what was thought to be a good process probably could have been had the environment stayed the same, and we all know it hasn't.

The planning disaster that happened, you know, it's past us now. It needs to be past us now. And the advantages that were handed to Newland are no longer appropriate.

No one developer, in this case, should have any advantage over any other. It needs to be a free market system. The developer who is ready and willing and able to bring that the community needs and deserves should be the developer who gets to go first.

The fact that Town Center was supposed to be the first development and have the first retail, that's great, and that's history now. And now we have to go, especially in these economic times, to something that's much more market driven. The developer who is ready first needs to have the opportunity to develop first.

Ms. Winstel testified that there has been no visible action on the part of the Town Center to provide the retail development so that the Village Center can proceed with its retail. She added (11/29/10 Tr. 67-68):

What instead we are seeing is lots of resistance to moving forward on the part of the developer. Plans being changed in minor ways, other activities that appear as if they are delaying tactics. That delay, I think the woman who spoke before me brought up, all the inconveniences that we are facing.

And I've talked with people at the State level about Routes 27 and 355 which are not part of the County jurisdiction there. There are horrifically overcrowded. And the plans to widen those roads are many years out, yet they are our only ways to get to any sort of retail.

I have a son, for example, who is asthmatic. There are many asthmatic kids. But occasionally he needs emergency medication. And the nearest 24-hour CVS is at Montgomery Village Avenue. If there is one accident on 27, I can't get there because then all of the traffic on 27 goes to 355. And we are looking at times, and I know this from experience, where even at 10 o'clock at night, it can be an hour to the nearest emergency 24-hour pharmacy.

In Montgomery County, Maryland, where I grew up, where I was raised, I find that absolutely unacceptable. We need to have much more of a free market approach. There is need, yet the resources, the retail can't respond to the need. They are being prohibited from serving us. And that is, that's a barrier that I don't think our government needs to be providing.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Standards for Council Review as Applied to this Limited DPA Application

Sections 59-D-1.61 and 59-D-1.7 of the Zoning Ordinance require the District Council, before it approves any application for re-zoning to a Planned Development (PD) Zone or an amendment to a previously approved development plan in a PD Zone, to consider whether the application, including the development plan, fulfills the “purposes and requirements” set forth in Code Section 59-C for the PD zone.⁸ In making this determination, the law expressly requires the District Council to make five specific findings, “in addition to any other findings which may be necessary and appropriate to the evaluation of the proposed reclassification.” Therefore, these findings are an essential part of the Hearing Examiner’s Report and Recommendation.

The five specific findings required by §59-D-1.61 the Zoning Code are:

- (a) *T[hat t]he proposed development plan substantially complies with the use and density indicated by the master plan or sector plan, and does not conflict with the general plan, the county capital improvements program, or*

⁸ The standards for review of a proposed development plan amendment are similar to those for a rezoning application, where, as here, a public hearing is required, because Zoning Ordinance §59-D-1.7(d)(2) directs OZAH to compile the record “in the same manner as the record is compiled for a local map amendment application.”

*other applicable county plans and policies. * * * [The remaining language of this provision addresses permitted exceptions to height and density restrictions not at issue in this case; it is therefore not quoted here.]*

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

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

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

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

Because the general requirement of the law – that the application must fulfill the “purposes and requirements” of the new zone – is subsumed in the language of the five specific required findings (especially in subsection (b)), a determination that the five findings have been satisfied would satisfy the Montgomery County Zoning Ordinance. However, in addition to these five findings, Maryland law also requires that the proposed rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to Montgomery County, all zoning power must be exercised:

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

In sum, there are six findings required (§59-D-1.61(a) through (e) and the public interest).

The opposition in this case suggests that Applicant has failed to make a showing sufficient to

satisfy the findings required in this case because the evidence does not address the use, density, orientation and design of the project in connection with the purpose clause of the PD-4 Zone and the applicable Master Plan. Exhibit 45, pp. 4-5. Applicant replies that it is not requesting any changes in the use, density, orientation and design of the project, only its timing with regard to retail development, and that the Council has already made the required findings on the non-timing issues. Exhibit 49.

Technical Staff echoed Applicant's position in the Staff report (Exhibit 19, p. 5):

The present DPA does not propose any change to the use or density already approved. No change is being proposed that would affect any of the standards or regulations of the PD zone. Therefore, staff finds that the proposed amendment that is the subject of the current DPA is consistent with and remains in compliance with the findings required to be made at the time of the original development plan approval **except with respect to timing.**

The Hearing Examiner agrees with the Applicant and Technical Staff. In this case, the only changes sought relate to the timing of commercial development, as previously discussed, not with the use or density. The Applicant addressed the issue of timing and its connection with the Master Plan on the record at the hearing; the opposition elected not to appear at either hearing. Instead, it sent letters (Exhibits 27, 45 and 65), which were received into the record.

Those letters contains a number of unsupported factual assertions to which the Hearing Examiner cannot give any weight – *e.g.*, the allegation that “the number of constructed residential units in Clarksburg today is just capable of supporting a single grocery-based retail center.” Exhibit 27, p. 2.” In a later submission, Newland speculates regarding the potential impact of the DPA. (Exhibit 65, p. 1):

If the DPA is approved and the Clarksburg Village retail is permitted to proceed, Newland believes the impacts on the Town Center retail could be significant. Not only will there be a competing Wegmans in Germantown, but also a competing grocer with convenient surface parking in Clarksburg just outside the Town Center (about 2 miles away). Under these conditions, Newland is concerned the ability to attract a grocer to the Town Center to anchor the retail may be delayed for many years. Without viable

retail, the ability to create a strong and vibrant Town Center and Community may also be compromised, leaving a major policy of the Master Plan unrealized.

Absent live testimony, subject to cross-examination, it would be unfair to the Applicant to credit the bald assertions made by Newland, or to give any weight to their beliefs and speculations unsupported by actual evidence.

There are no issues in this case regarding density, height, compatibility, safety, internal vehicular and pedestrian circulation, the environment, ownership or the like, for there is no proposal to change the use or density of the site. It is therefore unnecessary to address those issues in this report. In fact, to do so, in the absence of any changes in the relevant facts or law, would violate the doctrine of administrative *res judicata*.

The doctrine of administrative *res judicata*⁹ precludes re-examination in a later proceeding of issues earlier decided in the same case by an administrative body acting in a quasi-judicial capacity, absent good cause (*e.g.*, fraud, surprise, mistake, inadvertence or a new or different factual situation). *See, Schultze v. Montgomery County Planning Board*, 230 Md. 76, 185 A.2d 502 (1962) and *Woodlawn Area Citizens Assoc. v. Board of County Comm'rs*, 241 Md. 187, 194-197, 216 A.2d 149 (1966). In this case, the only changes requested concern restrictions on the timing of commercial/retail development, not its substance. The Council has already approved the zoning, use and density, as well as the development plan for the site. Those approvals continue in effect, and findings made by the Council in LMAs G-735 and G-784, as well as DPAs 04-3 and 05-1, justifying the PD-4 Zone and the proposed density and use, are incorporated herein by reference.

⁹ Some courts have noted that the term "*res judicata*" technically does not apply to administrative proceedings; rather, an administrative body may not change its position arbitrarily, and in the absence of a showing of fraud, surprise, mistake, inadvertence or a new or different factual situation, a change in a finding of the administrative body may be arbitrary. As stated in *Gaywood Community Asso. v. Metropolitan Transit Authority*, 246 Md. 93, 100, 227 A.2d 735, 739 (1967), "While the action of an administrative agency reversing itself or a predecessor agency may resemble *res judicata*, it is not, as the cases show, the same as the final decision of a proceeding on its merits by a court of competent jurisdiction."

Except as to the timing of commercial/retail development, these prior Council findings establish that:

1. The proposed development satisfies the intent, purpose and standards of the PD-4 Zone, and meets the requirements set forth in Section 59-D-1.61 of the Zoning Ordinance;
2. The proposed development would be compatible with development in the surrounding area; and
3. The zoning use and density, previously approved, is in the public interest.

The remaining issue, whether the proposed change in the timing of commercial/retail development in Clarksburg Village Center satisfies these standards, is discussed in the next section of this report.

B. Does the Proposed Change in the Timing of Retail/Commercial Development Satisfy the Required Findings

The central question in this case is whether the change in the timing of retail/commercial development in Clarksburg Village Center proposed by DPA 11-1 satisfies the applicable required findings. The only findings which are applicable to this issue, given the incorporated findings regarding use, density and compatibility, relate to Master Plan compliance and the public interest.

As discussed in Part III.D. of this report, the applicable Master Plan is the 1994 Clarksburg Master Plan & Hyattstown Special Study Area, as amended on June 28, 2011. While the Master Plan originally recommended staging retail/commercial development so that such development in Clarksburg Village must await establishment of 90,000 square feet of retail development in the Clarksburg Town Center, that requirement has been modified to effectively allow Clarksburg Village retail development at this time.

1. The Applicant's Argument v. the Opposition Argument:

Even before the Master Plan was amended to modify the staging requirements, Applicant's Statement in Support of its application (Exhibit 1(b)) explained its justification for DPA 11-1:

. . . When the Clarksburg Master Plan was adopted in 1994, it recommended that retail space within the Clarksburg Town Center proceed ahead of other retail centers within the greater Clarksburg area. The entire Clarksburg Master Plan was envisioned as a 20 year plan with the expectation that both the residential and the retail development it recommended would proceed within that period of time, or by approximately 2014. Much of the residential development has in fact proceeded and new units are being brought on line at an increasing pace. Nevertheless, despite the passage of 16 years, the retail portion of Clarksburg Town Center has not commenced for a variety of reasons. The subject Development Plan Amendment is intended to provide an additional two year period of time for the Town Center retail to proceed while at the same time providing an alternative opportunity for the Clarksburg Village retail to proceed by 2012 if that has not happened. The justification for this is the increasingly vocal support of Clarksburg residents for the provision of neighborhood retail somewhere within the Clarksburg community to meet the existing and future demand.

The opposition in this case (*i.e.*, Newland) argues that the proposed development of retail in the Clarksburg Village may be harmful to retail development of the Town Center and that it would be inconsistent with the vision of the Master Plan.¹⁰ Exhibits 45 and 65.

Applicant replied that Newland's interpretation ignores the plain language of the statutory provisions, which emphasizes "*substantial . . . compli[ance] with the use and density indicated by the master plan,*" and no change in the approved use and density is being proposed. Exhibit 49. Moreover, given the changed conditions on the ground 16 years after the Master Plan was adopted (*i.e.*, the existence of 5,000 residential units in Clarksburg), prohibiting retail development in Clarksburg Village Center would defeat the underlying goal of the Master Plan to provide retail to serve the residential development.

Technical Staff summarized the argument in support of DPA 11-1 (Exhibit 19, p. 4):

¹⁰ Newland also suggests in its letter of November 28, 2010 (Exhibit 27) that it is "premature" to amend the Master Plan or the retail staging policy before the Clarksburg Infrastructure Working Group makes its recommendations on April 1, 2011. Newland presented no evidence that the subject of the Working Group's efforts (*i.e.*, evaluating infrastructure and its financing) should have any bearing on retail development in Clarksburg Village (as distinguished from Clarksburg Town Center). Council Resolution 16-1544, which created the Working Group, did so in the context of its termination of the "Clarksburg Town Center Development District," an area which is west of Stringtown Road and therefore does not include the Newcut Road Neighborhood and Clarksburg Village Center, which are the subject of this DPA application. Moreover, the un rebutted evidence produced by the Applicant at the hearing established that it is willing and able to provide the infrastructure necessary to support the retail development in Clarksburg Village, and in fact is in the process of doing so. 11/29/10 Tr. 55-58 and 89. The Hearing Examiner therefore finds no evidence in this record which would support Newland's argument that consideration of the subject DPA should await the recommendations of the Working Group in question.

. . . The applicant further states that development of the Clarksburg Village/Arora Hills neighborhood center will not be to the exclusion of the town center core. According to the applicant, the project is a neighborhood center primarily geared to Clarksburg Village/Arora Hills residents and others in close proximity who would be able to walk to the site to access convenient services for their daily needs. By contrast, the applicant believes that the Town Center retail is envisioned as a larger scale, sub-regional core designed to serve all of Clarksburg and beyond. The applicant suggests that the Master Plan probably should have realized that larger, sub-regional retail facilities require a larger number of supporting households to be economically viable than do smaller, neighborhood convenience centers. Therefore, the applicant argues that the Clarksburg Village retail uses should be permitted to proceed.

2. Technical Staff and the Planning Board:

Technical Staff agreed with Applicant's argument that the retail is needed now in Clarksburg Village, but prior to the Master Plan amendments, felt that the restrictive Master Plan language had to be followed at the Preliminary Plan stage (Exhibit 19, p. 4):

Although staff fully recognizes the current need and demand for community and neighborhood serving retail in Clarksburg, the applicant's proposed amendment to the timing condition is contrary to these Master Plan recommendations. Moreover, the Board, in its Preliminary Plan Hearing held in April, 2010, clearly shared staff's concern about the timing of retail development in Clarksburg. As a result of their deliberation, a condition was added to the Preliminary Plan that . . . [required adherence to the Master Plan staging restriction].

* * *

In other words, if the DPA is approved by the Council, the applicant could still not go forward unless a Preliminary Plan amendment is approved. Since preliminary plans require master plan conformity, the Board would have to find either that the amendment is in conformity with the Master Plan or that the Master Plan would have to be amended before the applicant could proceed with the retail portion of his plan.

Technical Staff therefore suggested (Exhibit 19, p. 5):

If the County Council decides in favor of a Development Plan Amendment, the Council should require an amendment to the Clarksburg Master Plan.

The Planning Board also concluded that commercial development on the subject site is needed to serve the community without delay, but a two-to-one majority, felt constrained by the language in the Master Plan as it existed prior to its June 28, 2011 amendment. As stated by the Planning Board, in its letter of November 24, 2010 (Exhibit 21. p. 1):

- It would serve the public interest to permit development of retail uses in Clarksburg Village without waiting for the Town Center development to which the Master Plan gave top priority, but the requirement that a DPA must substantially comply with the applicable master plan is not satisfied. Accordingly, a minor master plan amendment should be undertaken to reconsider the retail phasing recommendations in the Clarksburg Master Plan.

The Planning Board suggested a remedy similar to that recommended by its Staff (Exhibit 21, p. 2):

- If the County Council agrees in principle that it would serve the public interest to permit development of retail uses in Clarksburg Village but that the present application is not in conformance with the Clarksburg Master Plan, the Council should direct the Planning Board to prepare a limited master plan amendment for the sole purpose of amending the staging plan in the Clarksburg Master Plan, to accommodate a different sequencing of commercial development.

The Planning Board's letter (Exhibit 21, p. 2) notes that:

Commissioner Dreyfuss, opposed the motion to recommend denial, voicing concern that people deserve to have the opportunity to shop for basic needs in their own communities. In his view, precluding one commercial/retail center development to promote another is not good policy. He spoke in favor of the Clarksburg Village Center moving forward with retail implementation, with some specification needed on a reasonable amount of time to allow retail development to proceed.¹¹

Of course, the concerns of Technical Staff and the Planning Board about compliance with the Master Plan have now been eliminated by the June 28, 2011 amendments to the Master Plan discussed in Part III. D. of this report. As stated by Françoise Carrier, the Chair of the Planning Board, by letter dated August 18, 2011 (Exhibit 62), “. . . adoption of the Master Plan Amendment resolves the only objection that the Planning Board had to DPA 11-1.”

3. The Hearing Examiner's Analysis:

In analyzing this case, the starting point should be the statutory requirements. The statutory requirement of §59-D-1.61(a), quoted above, clearly emphasizes “*substantial . . . compli[ance] with*

¹¹ In this connection, Applicant's counsel suggested that delaying Applicant's ability to carry out its development for 16 years, in favor of another nearby developer, could be considered as a taking by the County. 11/29/10 Tr. 144-145. In view of the proposed resolution of this case, the Hearing Examiner need not reach this issue.

the use and density indicated by the master plan,” not its timing in conjunction with development elsewhere.

The purpose clause of the PD-4 Zone, §59-C-7.11, does note that the zoning category is intended to implement the general plan and area master plans “in a manner and to a degree more closely compatible with said county plans and policies,” and now that the staging requirements of the Master Plan have been modified, DPA 11-1 is in compliance not only with the overall goals of the Master Plan, but also with its amended staging requirements, as discussed in Part III. D. of this report. In fact, the recent amendments to the Master Plan have effectively eviscerated Newland’s argument that DPA 11-1 would be non-compliant with the Master Plan and would undermine its purpose. As discussed above, Newland’s assertions that DPA 11-1 would harm retail development in the Town Center are unsupported by any evidence and ignore the plain meaning and intent of the recent Master Plan amendments.

In this case, it is clear that the Master Plan’s underlying goal is to provide timely retail development in Clarksburg so as to serve residential development. All of the evidence in this case establishes that this important goal is not being achieved, and approval of DPA 11-1 would help to rectify that situation. There are real people living the Newcut Road Neighborhood, and they have real needs, as evidenced by the testimony produced at the hearing in this case.

The language of the PD-4 Zone’s purpose clause (§59-C-7.11) supports the interpretation that the Zoning Ordinance encourages the provision of convenience retail in the PD-4 Zone:

. . . It is intended that development in this zone produce a balanced and coordinated mixture of residential and convenience commercial uses, as well as other commercial and industrial uses shown on the area master plan, and related public and private facilities. . . . [Emphasis added.]

The intent of the Master Plan was to encourage development in Clarksburg, not throttle it. The approval of DPA 11-1 will serve the public interest by providing the much needed retail to serve the residential community sooner, rather than later.

C. Conclusion

As demonstrated in Part V.B. of this report, all of the findings required by statute for the requested development plan amendment are appropriate in this case. The Technical Staff and the Planning Board both originally found that the proposed change was consistent with the overall goal of the Master Plan to provide commercial/retail to serve the growing residential communities in Clarksburg, but they felt that the Master Plan should be amended to eliminate its staging recommendation before this DPA is approved. That has now occurred, and the Chair of the Planning Board advised the Hearing Examiner that the one impediment to full Planning Board support of DPA 11-1 has now been removed. Exhibit 62.

Based on the foregoing analysis, and after a thorough review of the entire record, the Hearing Examiner concludes that the proposed DPA 11-1 would accomplish the goals of the Master Plan; that the terms of DPA 11-1 are consistent with the amended staging requirements of the Master Plan; that further delaying retail development in Clarksburg Village would be against the public interest; and that the proposed development plan amendment would be proper for the comprehensive and systematic development of the County.

VI. RECOMMENDATION

I therefore recommend that Development Plan Amendment DPA 11-1, amending the development plans approved by the Council on April 10, 2001, as part of LMAs G-735 and G-784, and previously modified in DPA 04-3 (approved by the Council on December 14, 2004) and DPA 05-1 (approved by the Council on June 24, 2008), for the property known as the Clarksburg Village Center, and located on a block defined by Arora Hills Drive on the north, Newcut Road on the east, Snowden Farm Parkway on the south, and Little Seneca Parkway on the west, in Clarksburg, Maryland, be approved in the manner requested and subject to the specifications and requirements of

the Development Plan Amendment, Exhibit 51(a), provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Development Plan Amendment approved by the District Council within 10 days of approval, as required under Code §59-D-1.64.

Dated: November 9, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Martin L. Grossman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Martin L. Grossman
Hearing Examiner