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## I. STATEMENT OF THE CASE

On May 10, 2013, Petitioner, The Heights School, Inc., filed Petition CBA-2197-C seeking modifications to existing special exception (CBA-2197 and 2197-B) which permits Petitioner to operate a private educational institution pursuant to Zoning Code Section 59-G-2.19. The Heights School is an existing private school that offers a traditional liberal arts education to boys from third through twelfth grade. The property consists of 19.8 acres, located at 10400 Seven Locks Road, Potomac, Maryland, in the R-90 Zone. The subject property is identified as Parcel I, Block J, in the Inverness Forest Subdivision, and it bears the Tax Account Number 02860804. In summary form, the proposed modification includes a 15-year Campus Master Plan which calls for the construction and replacement of multiple structures, adding a 159-parking space garage and a 112,464 square foot increase in gross floor area; increasing the number of students from a currently permitted level of 460 to 650 (a 41.3 percent rise); increasing the faculty/staff from a currently permitted level of 57 to 95 (a 66.7 percent rise);<sup>2</sup> describing additional activities; and extending the hours of operation.

Because this case involves a special exception that was granted prior to the new Zoning Ordinance that went into effect on October 30, 2014, and involves a modification request filed prior to the effective date of the new Zoning Ordinance, it will be governed by the terms of the old Zoning Ordinance in effect on October 29, 2014, pursuant to §59-7.7.1.B. of the new Zoning Ordinance.

The case was originally noticed for a public hearing by the Office of Zoning and Administrative Hearings to take place on October 3, 2013 (Exhibit 14(b)). At the Petitioner's request (Exhibit 18), the hearing was postponed until December 16, 2013 (Exhibit 19). On October 17, 2013, Petitioner requested a further postponement of the hearing (Exhibit 19). After consultation with the

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<sup>2</sup> We use the qualifier "currently permitted level" with respect to both student enrollment and the size of the faculty/staff because the current enrollment of 529 students exceeds the level permitted, and the current number of faculty/staff of 74 also exceeds the level permitted under the current special exception.

Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) (Exhibit 26), the hearing was postponed indefinitely on December 2, 2013. Exhibit 27.

Petitioner submitted a number of modified plans and other materials, and on November 10, 2014, a notice of Petitioner's motion to amend the petition was issued, as well as a notice to reschedule the hearing to January 27, 2015. Exhibit 65. Additional proposed amendments were noticed on January 8, 2015. Exhibit 71.

On January 8, 2015, the M-NCPPC Technical Staff filed its Report (Exhibit 72)<sup>3</sup>, which recommended approval of the Modification Petition, with extensive conditions. Technical Staff also issued a report, dated January 2, 2015, recommending approval, with conditions, of Petitioner's proposed Final Forest Conservation Plan Amendment (FFCPA).<sup>4</sup> Exhibit 79. On January 22, 2015, the Planning Board unanimously approved the FFCPA (Exhibit 82), and recommended approval of the proposed special exception modification, with "generally" the same conditions as suggested by Technical Staff (Exhibit 78), although the Planning Board also expressed the wish that the parties would meet and try to reach "some common ground" before the OZAH hearing.

A number of letters in opposition were filed during the lead-up to the OZAH hearing (Exhibits 28, 29, 31, 33, 66, 68, 73, 86 and 87). The opposition generally breaks down into two groups – those who live south of the site in the "Potomac Pond Homes" (*See e.g.*, Exhibit 68) and those who live west of the subject site, along Democracy Lane (*See e.g.*, Exhibit 33).

The hearing scheduled for January 27, 2015, had to be postponed in accordance with OZAH's weather policy when the Montgomery Public Schools closed for the day due to inclement weather. It was rescheduled for February 19, 2015 (and if need be, February 26, 2015) by a notice

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<sup>3</sup> The Technical Staff Report, Exhibit 72, as corrected in Exhibit 81, is frequently quoted and paraphrased herein.

<sup>4</sup> On January 21, 2015, Technical Staff submitted a memorandum (Exhibit 81) containing corrections to both the Technical Staff report regarding the special exception (Exhibit 72) and the Technical Staff regarding forest conservation (Exhibit 79). The corrections to Exhibit 72 were entered in ink in the OZAH file copy.

mailed on January 28, 2015. Exhibit 91. An additional notice of a motion to amend (Exhibit 95) was issued on February 9, 2015, to alert the community to revised plans filed by Petitioner on January 30, 2015 (Exhibit 93) and a revised Traffic Impact Study (TIS) filed by Petitioner on February 5, 2015 (Exhibit 94(a)). On February 19, 2015, the day scheduled for the hearing, Technical Staff forwarded comments on the revised TIS and amended plans. Exhibit 97.

The Hearing went forward as scheduled on February 19, 2015, and the Hearing Examiner distributed Technical Staff's new comments (Exhibit 97) to all parties present. There was no objection to the petition amendment noticed on February 9, 2015, and it was granted. Petitioner called five witnesses, and four neighbors testified in opposition. All hearing participants were given until March 2, 2015, for additional submissions requested at the hearing, including responses to the email from Technical Staff received on the day of the hearing (Exhibit 97). All participants were, in addition, given until March 9, 2015, to respond to comments received by March 2, 2015, and the record was held open until March 9, 2015 to receive these additional submissions.

On February 27, 2015, Larry Freeman, President of the Board of the Potomac Pond Homeowners Association (PPHA), filed a letter (Exhibit 114) expressing his views. The letter attached photos of the site (Exhibits 114(a) – (c)) and six opposition letters from neighbors (Exhibits 114(d)(1) – (d)(6)). On March 2, 2015, Petitioner filed a letter (Exhibit 115) responding to issues raised at the hearing and attaching additional documents (Exhibits 115(a) – (f)), as well as a photograph of the site (Exhibit 115(f)(i)), three Board of Appeals Resolutions in other private educational institution cases (Exhibits 115(g) – (i)) and three revised site and landscaping plans (Exhibits 115(j), (k)(i) and (k)(ii)).

Eugene Feinberg made an additional submission on behalf of PPHA on March 9, 2015 (Exhibit 117), responding to Petitioner's submissions filed on March 2, 2015, and adding recommended conditions. Petitioner replied on March 9, 2015 with final comments (Exhibit 118),

and Technical Staff emailed in its final comments on the same date (Exhibit 119). The record closed on March 9, 2015, as scheduled. However, in response to an inquiry from the Hearing Examiner, Technical Staff reevaluated its proposed conditions on March 17, 2015 (Exhibits 121 and 121(a)). On the same day, the Hearing Examiner reopened the record to give the parties 10 days to respond to the new materials from the Technical Staff (Exhibit 123). Responses were received from Mr. Feinberg on March 26 (Exhibit 124) and Petitioner on March 27 (Exhibit 125). The record closed again on March 27, 2015.

The appropriate scope of the hearing on a petition for modification of a special exception is spelled out in 2004 Zoning Ordinance § 59-G-1.3(c)(4). That subsection provides:

*(4) The public hearing must be limited to consideration of the proposed modifications noted in the Board's notice of public hearing and to (1) discussion of those aspects of the special exception use that are directly related to those proposals, and (2) as limited by paragraph (a) below, the underlying special exception, if the modification proposes an expansion of the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less.*

*(A) After the close of the record of the proceedings, the Board must make a determination on the issues presented. The Board may reaffirm, amend, add to, delete or modify the existing terms and/or conditions of the special exception. The Board may require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26, if (1) the proposed modification expands the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less, and (2) the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.*

Petitioner's plans include a net expansion of the total floor area by 49,526 square feet, which exceeds the statutory threshold of 7,500 square feet, and the expansion of the facilities (including a new garage, school buildings and a theater), when considered in combination with the underlying special exception, may change the special exception such that substantial effects on the surrounding neighborhood could reasonably be expected. The extent to which these changes may

result in adverse impacts on the neighborhood and whether these impacts can be sufficiently ameliorated by appropriate conditions will be discussed in this report. The degree to which proposed operational changes (*e.g.*, changes in enrollment, faculty, staff, hours of operations and parking management) may adversely affect the neighborhood and what steps can be taken to reduce those impacts will also be analyzed below. All of the proposed changes have been duly noticed and discussed at the hearing in this case.

As will be discussed below, Petitioner has demonstrated compliance with all the developmental standards, and the new facilities have been designed to be compatible with the residential neighborhood. Proposed screening and other measures should successfully avoid any adverse effects on the community from the new facilities. On the other hand, the level of ongoing school-year activity not previously approved by the Board of Appeals and the proposed increase in operational activity are strongly opposed by neighbors living to the west and south of the school.

The central question in this case is easy to state – what are the appropriate limits and conditions to impose so that the activities of The Heights School do not create undue adverse effects on the school’s neighbors? As will be seen in the rest of this report, the answer to this issue is much more difficult to formulate than the question. After careful consideration of Petitioner’s requests, as well as the concerns of the neighborhood and the analysis of Technical Staff, the Hearing Examiner recommends approval of the proposed physical modifications and their phasing, as well as most of the ongoing and proposed operational limits, largely as conditioned by Technical Staff, but with some significant changes in those recommended conditions. The details are discussed below.

## **II. FACTUAL BACKGROUND**

### **A. History of The Heights School and the Existing Special Exception Operations**

Technical Staff listed a history of the special exception in its report (Exhibit 72, pp. 10-11):

The Heights School was founded in 1969, and was originally located in the District of Columbia. It moved its operations to the Seven Locks Road site beginning in 1978. The special exception history for the Seven Locks Road site begins with a Montessori school.

#### May 1967

The Inverness School was located on 38 acres.  
A Montessori school for children from age three to third grade.  
208 students (an increase from 164) and 20-24 employees.  
Hours from 9-3, five days per week.  
Summer day camp.  
30 parking spaces plus additional for visitors.  
Three buses and three station wagons were provided.  
Property to be fenced to prevent students from trespassing.

#### Unknown date

No documentation found – information based on subsequent approvals  
McLean School – Inverness Campus assumes operation on 38 acres.  
Grades 1 to 9, 208 students, 200 summer day campers.

#### May 1978

The Heights School seeks permission to assume operation on 25 of the 38 acres.  
Retain approval for 208 students, begin with grades 3 to 7, about 100 students, for the first year or two.  
30% of students will take shuttle buses, 60% will carpool, 10% will drive with parents.  
McLean School will continue day camp operation for three years.

#### May 1980

Acreage given as 24.89637 acres.  
Requests student enrollment increase from 208 to 350 and to build additional facilities. Summer camp for 200 boys.  
Move all students from DC campus to Seven Locks campus. Include full high school (grades 3-12).  
Hours from 8:30 to 4:00.  
Occasional meetings or activities in the evenings or on weekends—no more than one evening activity per week with a maximum of 30-40 people.  
Transportation via private cars, carpools, future feeder bus. Parking for 63 cars—25 for students. Parking lot lights not to exceed 12 feet in height.

#### April 1989

Request reduction in acreage; sell 5.0788 acres to Saddlebrook Development Corp.  
New total is 19.818 acres.

#### September 1994

Request permission to construct a temporary two-room classroom structure beside gym.  
Student enrollment allowed is 350. September 1994 enrollment expected at 240.

### August 1996

Request increase from 350 to 400 students.

Add facilities in two phases: a lower school classroom building; a library/all purpose room; an outdoor pool; a half size practice field; a maintenance building; four tennis courts and a pavilion; a “signature” building for the high school, administration, a chapel, a dining hall and an activities center; a baseball field; expand the practice field to a full field; removal of two modular classrooms.

Phase 3 to include an expanded gymnasium.

AP classes require smaller classes-wait lists at all levels.

Tennis courts not to be covered or lighted.

### March 2000

Increase students from 400 to 460 and staff from 55 to 57. Enrollment is 425.

Add two basketball courts, delete baseball field, modify tennis courts, expand gym.

Modify traffic circulation. Increase parking to 117. Lights to be similar to existing, not to exceed 12 feet tall. No lighting of basketball or tennis courts. Add screening plants along northern property.

School bus and van service provided to 70 students. Carpooling encouraged.

Reorganize recruitment and admissions to prevent future over-enrollment.

### 2001-2014

There were multiple filings with the Board of Appeals including annual reports, minor modifications and a variance to increase tennis court fence height; modify the Signature Building and Gymnasium; add 20-foot netting at the baseball field; install a modular building; and add dugouts at the baseball field.

The school’s current operations are described in Petitioner’s Second Amended Statement of Operations (Exhibit 93(e), pp. 4-6):

The grades are divided into three divisions: the Lower School with grades 3-5, the Middle School with grades 6-8, and the Upper School with grades 9-12. . . .

The Lower School is housed in the area of the campus affectionately known as the Valley, with its two Log House Buildings and plenty of space to roam and play. The lovely forested character of this portion of the campus supports a vibrant natural history program, [and] supplies the setting for many outdoor games and activities . . .

The Middle School occupies the western-most wing of the Ex. Signature Academic & Administration Building, as well as the mid-section of same completed in 1983. Significant developments at these grade levels include an increase in the variety and rigor of academic classes, an increase in the number of school-based athletic teams and the need for additional areas to study, conduct classes and informally gather.

The Upper School currently occupies the eastern-most wing of the Ex. Signature Academic Building completed in 2007. In addition to classroom instruction, this structure houses a variety of spaces . . . dedicated to student-centered activities such as college counseling, scientific experimentation, computer learning and art

instruction. Small conference/meeting rooms and an increased number of faculty and office spaces are also included. There has been in the Upper School tremendous growth in interscholastic athletic teams and extracurricular activities, particularly for music, drama and clubs.

\* \* \*

The academic year for The Heights School runs from early September to early June. The academic or instructional portion of the school day currently starts at 8:20 AM and ends at 3:05 PM. Some students are dropped off as early as 7:30 AM, and facilities personnel arrive on the campus at 7:00 AM.

With the variety of athletic and extracurricular activities in which students in all three divisions participate, it is normal for the campus to be active beyond the 3:05 PM academic/instructional dismissal time. After-school athletic games, primarily confined to Upper School teams, span the entire school year. Typically, these events are completed by 6:30 PM, with the exception being basketball games which occur primarily in the period from 6:00 - 9:00 PM. Afternoon athletic games and most basketball games draw from 20 to 40 visitors – a few basketball games every year attract larger crowds due to intra scholastic rivalries.

A variety of other events, typical for most schools, occur during the school year. These include two Admissions Open Houses, Parent-Teacher Conferences, a Parent Lecture Series, a family Christmas Party, a Spring Play, an Alumni Reunion, a Garden Party, an Auction, Graduation ceremonies and various other social and family gatherings. Most of these events occur on weekday or weekend evenings, and generally conclude by 10:00 – 11:00 PM. Attendance at these events can be quite variable. Many of these events attract less than sixty people, and can therefore be accommodated with existing campus parking (especially if they occur when school is not in session). The School has been and continues to be sensitive to the impact of campus events on the roads and surrounding neighborhoods. The events which attract larger number of participants are divided between those when visitors linger on campus for more than two hours, and those when visitors will either stay for less than two hours or enter and exit the campus at different times or intervals.

The former type of event includes the family Christmas Party and the Garden Party. The latter type of event includes the Open Houses and Parent-Teacher Conferences. Both these particular events have “rolling attendance,” with visitors arriving and leaving at spaced-out intervals. For any larger event, the School engages off-duty police officers to direct the flow of traffic on Seven Locks Road.

On occasion, there are times when visitors use the shoulder of Seven Locks Road to the north and south of the School’s entrance for parking. The shoulder is wide and parked cars are well out of the flow of traffic. Over the past several years the School has received no complaints from neighbors regarding event parking or traffic-related issues.

No outside groups lease or rent any of the School’s facilities. Neighborhood civic groups, however, are permitted to conduct occasional evening meetings in available classrooms without any user fee.

The School's mission and character draws families from throughout the metropolitan Washington DC area, from places as far flung as Purcellville VA to Fort Washington MD. The current demographic makeup of the student body is as follows: MD students make up 68%; VA students account for 30%; and students from the District of Columbia make up 2%.

Details as to how students travel to and from school are contained in the Transportation Management Plan statement. A significant percentage of students travel to and from school in carpools, and another large number of students use five (5) buses (including a school shuttle and afternoon activities bus) for their transportation.

### **B. The Subject Property and Surrounding Neighborhood**

The Heights School is located at 10400 Seven Locks Road, Potomac, in the R-90 Zone. The subject property is identified as Parcel I, Block J, in the Inverness Forest Subdivision, and consists of 19.818 acres. The site is in the Potomac Subregion Master Plan area, and it is located between Seven Locks Road on the east and residences fronting on Democracy lane on the west. It is also bordered by residential areas to the north and south and is approximately half way between Bells Mill Road to the north and Democracy Boulevard to the south, each about a quarter of a mile away.

The site is depicted in an aerial photograph supplied by Technical Staff (Exhibit 72, p, 5):



Technical Staff describes the subject site as follows (Exhibit 72, p. 7):

. . . The property is roughly square in outline, and slopes upward from its south corner on Seven Locks Road toward the center of the campus. From Seven Locks Road, the view of the school is dominated by a baseball diamond, a soccer/lacrosse field and tennis courts, with a forested slope and the entrance driveway between. From the road, the gymnasium is the most visible building, as it is sited behind and above the playing fields. The driveway begins at Seven Locks Road, curving north and west to climb upward, with forest on the left and tennis courts on the right. A seven-car parking lot and bleachers are located just beyond the tennis courts. The drive splits into a loop, with the entrance drive continuing straight uphill to the west and the exit loop, to the left, also uphill. The entrance drive is forested on both sides for a short distance, then parking appears on the left and the Signature Building appears directly ahead.

The Signature Building (containing classrooms, administration, library, chapel, dining and comprised of three wings), two log houses (classrooms), a maintenance building, two portable classrooms and a gym are the main structures on the site. Outdoor athletic facilities include a baseball field, a rectangular field used for soccer and lacrosse, basketball courts and tennis courts. The parking is centrally located, with classroom buildings to the west and the gym, maintenance building and two portable classrooms to the south. Several undefined play areas are located between the parking lot and the western edge of the property.

A replacement for the gym was approved with the prior Special Exception Modification, reviewed by the Planning Board in 2000. It has not yet been built.

Some views of the campus are attached to the Staff Report (Exhibit 72) as Attachment 1. A few are reproduced below:

Signature Buildings (new wing)



Middle section of Signature Building (1999 – to remain)



Log House (to remain)



Middle school wing of signature building (to be replaced with a new 2-story wing)



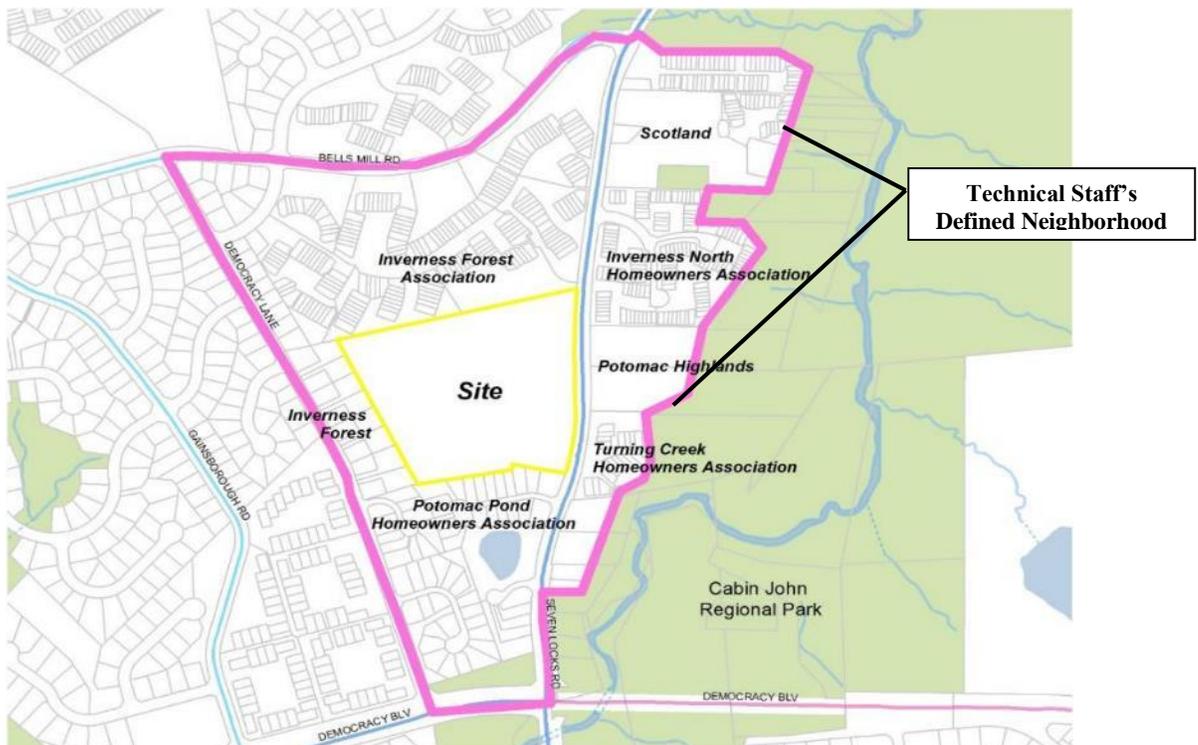
Log House (to remain)



As can be seen in the aerial photo shown on page 11, above, much of the subject site is forested. A Final Forest Conservation Plan (FFCP) has been in effect since March 27, 2000, placing segments of the campus on the west, northwest, northeast and southwest sides of the campus in a Category I Forest Conservation Easement. The location of the forest conservation easements is noted on the Special Exception Site Plan (Exhibit 115(j)), which will be discussed later in this report. An amendment to the FFCP was approved by the Planning Board on January 22, 2015 (Exhibit 82), and the modifications are explained in a staff report on that subject (Exhibit 79). The existing forest currently provides, and will continue to provide, significant buffering for the campus. There are two entrance/exits to the campus, both of which are on Seven Locks Road, spaced about 100 feet apart. They will remain under the proposed site plan. The entrances and the forested areas can be seen in Figure 13 of the Transportation Impact Study (Exhibit 63(e), p. 26):



Technical Staff defines the neighborhood as “bounded on the north by Bells Mill Road, on the east by Cabin John Regional Park, on the south by Democracy Boulevard, and on the west by Democracy Lane.” Exhibit 72, p. 11. It is shown below in a map from page 12 of the Staff report:



The Hearing Examiner accepts Staff's definition of the neighborhood as comprising the area most affected by the presence of the school, including traffic, noise and activity. The neighborhood is comprised of single-family, detached and attached houses in the R-90, RT-6 and RT-12.5 zones. Exhibit 72, p. 11.

### **C. The Master Plan**

The subject property is included under the *Potomac Subregion Master Plan*, approved and adopted in 2002. The Heights School is located in the Potomac Community Planning Area designated by the Master Plan (*see Map 2, on p. 5 of the Master Plan*), and is within the Cabin John Creek watershed. The Master Plan describes the Potomac Planning Area as "more developed than the other three community areas" and as containing "large areas of older, well-established residential communities." *Plan p. 41*. The Master Plan continues to recommend the R-90 Zone for the site (fold-out Map B), and the land use map (fold-out Map C) characterizes the site as a school/education facility.

The Master Plan text does not specifically reference the site, but does provide a general "Special Exception Policy" (pp. 35-36). Relevant recommendations include "Limit[ing] the impacts of special exceptions in established neighborhoods" and making "[e]fforts . . . to enhance or augment screening and buffering as viewed from abutting residential areas . . ." (pp. 35-36). It is also worthy of note that the Council, in adopting the final version of the Master Plan, eliminated language in the October 2001 Planning Board Draft (p. 34) which would have required special exceptions for new or expanded private educational institutions to be "limited to those that serve the local area." Instead, the Council substituted the following language in the final, approved Plan (p. 36):

There are a number of private educational institutions in the planning area and concerns have been raised about parking and traffic problems caused by queuing for drop-off and pick-up. The Council is considering amendments to the special exceptions provisions in the Zoning Ordinance to address these issues.

The Technical Staff report (Exhibit 72) contains an extensive analysis of the Master Plan's recommendations, as they apply to the subject site (Exhibit 72, pp. 12-17), and some of those points will be discussed herein in connection with specific issues in the case. More generally, in addition to the above-quoted references to parking and traffic problems caused by private schools and the impacts of special exceptions in established neighborhoods, the Master Plan has guidelines for the design and review of special exception uses (Master Plan, p. 36):

- a. Adhere to Zoning Ordinance requirements to examine compatibility with the architecture of the adjoining neighborhood. The Council is considering amendments to strengthen this section of the Zoning Ordinance.
- b. Parking should be located and landscaped to minimize commercial appearance. In situations where side or rear yard parking is not available, front yard parking should be allowed only if it can be adequately landscaped and screened.
- c. Efforts should be made to enhance or augment screening and buffering as viewed from abutting residential areas and major roadways.

Technical Staff's recommendations in the subject case are largely premised on these guidelines and on the Master Plan's advocacy of environmental stewardship. Master Plan, p. 33.

Technical Staff praises Petitioner for proposing modifications that "include replacing outdated structures with more energy efficient buildings . . . , as well as stormwater improvements that will reduce some of the existing impacts of the current campus." Exhibit 72, p. 13. However, Staff also suggests some changes to Petitioner's proposals based on the Master Plan's "Design Principles" (Plan pp. 33-34), set forth below:

\* \* \*

To create environmentally sustainable development:

- Design and locate parking lots and structures to minimize impervious surfaces.
- Adequately shade parking facilities and include shade tree planting areas within parking lots.
- Provide storm water management according to current standards and retrofit projects for currently untreated sites. Incorporate alternative techniques that increase filtration and enhance natural hydrology, such as small bioretention areas, rooftop gardens, disconnection of impervious cover, alternative pavers, soil amendments and conditioning, or other landscaping techniques.

Provide facilities that promote transit use, walking and biking as alternatives to car trips.

- Provide incentives to minimize car trips such as fringe parking lots and shuttle services to Metro.

The steps Technical Staff recommends to comply with the Master Plan's Design Principles are as follows (Exhibit 72, p. 14):

- Implement stormwater improvements at the earliest opportunity. Increase the partial compensation being provided to the greatest extent practicable at each phase of development.
- To promote transit and carpooling, implement the TMP by or before the beginning of the 2015-2016 school year.
- To promote walking and biking, install the lead-in sidewalk and bike racks by the beginning of the 2015-2016 school year.
- To minimize impervious surfaces created by parking lots, convert some surface parking area to planting areas during garage construction. Sufficient area should be converted to meet the requirements of 59-E-2.83, Parking and loading facilities for special exception uses in residential zones.
- Provide shade trees throughout and adjacent to the existing parking lots and driveways to provide canopy coverage of at least 30 percent of paved areas within 15 years, which is the minimum required by 59-E-2.83.

Petitioner takes issue with Staff's recommended timing for lead-in sidewalks (Tr. 262-273) and with Staff's recommendations for converting some surface parking areas into planting areas during garage construction and for providing shade trees throughout and adjacent to the existing parking lots and driveways. Tr. 217-221. These issues will be discussed below, as will other issues Staff discussed in connection with Master Plan goals that relate directly to compatibility with the community.

As will be seen below, The Heights School's Transportation Management Plan (TMP, Exhibit 93(g)), should avoid any queuing from drop-off and pick-up points onto the public roads. When ongoing construction or special events are anticipated to generate the need for more parking spaces, the Supplemental TISs (Exhibits 94(a) and 106)) demonstrate that satellite parking and bussing can be used. The sufficiency of these arrangements will be discussed in Parts II. E. and IV of this report, and the recommended conditions should alleviate any traffic and parking problems.

With the proposed buffering, the new buildings and other physical modifications to the site should have virtually no adverse impact on the abutting residential community. The question is

whether the proposed enrollment increase and after-school and weekend activities are consistent with the above-quoted Master Plan recommendation to “Limit the impacts of special exceptions in established neighborhoods.” As will be discussed in Parts II. E. and IV of this report, some limitations and conditions are needed to comply with the Master Plan’s recommendation.

The Master Plan recommends the continuation of the R-90 Zone for the subject site, and a private educational institution is permitted by special exception in the R-90 Zone. The Heights School use has been permitted on the site since 1978. It is fair to say that the modified use, as limited and conditioned by the Hearing Examiner’s recommendations, would be consistent with the applicable Master Plan.

#### **D. Proposed Modifications**

This part of the report is divided into three sections:

1. Physical Changes to the Campus;
2. Traffic Impact Studies (TIS) and the Transportation Management Plan (TMP); and
3. Operations, including Increases in Student Enrollment, Faculty and Staff.

##### **1. Physical Changes to the Campus:**

The proposed physical changes to the campus would include the following:

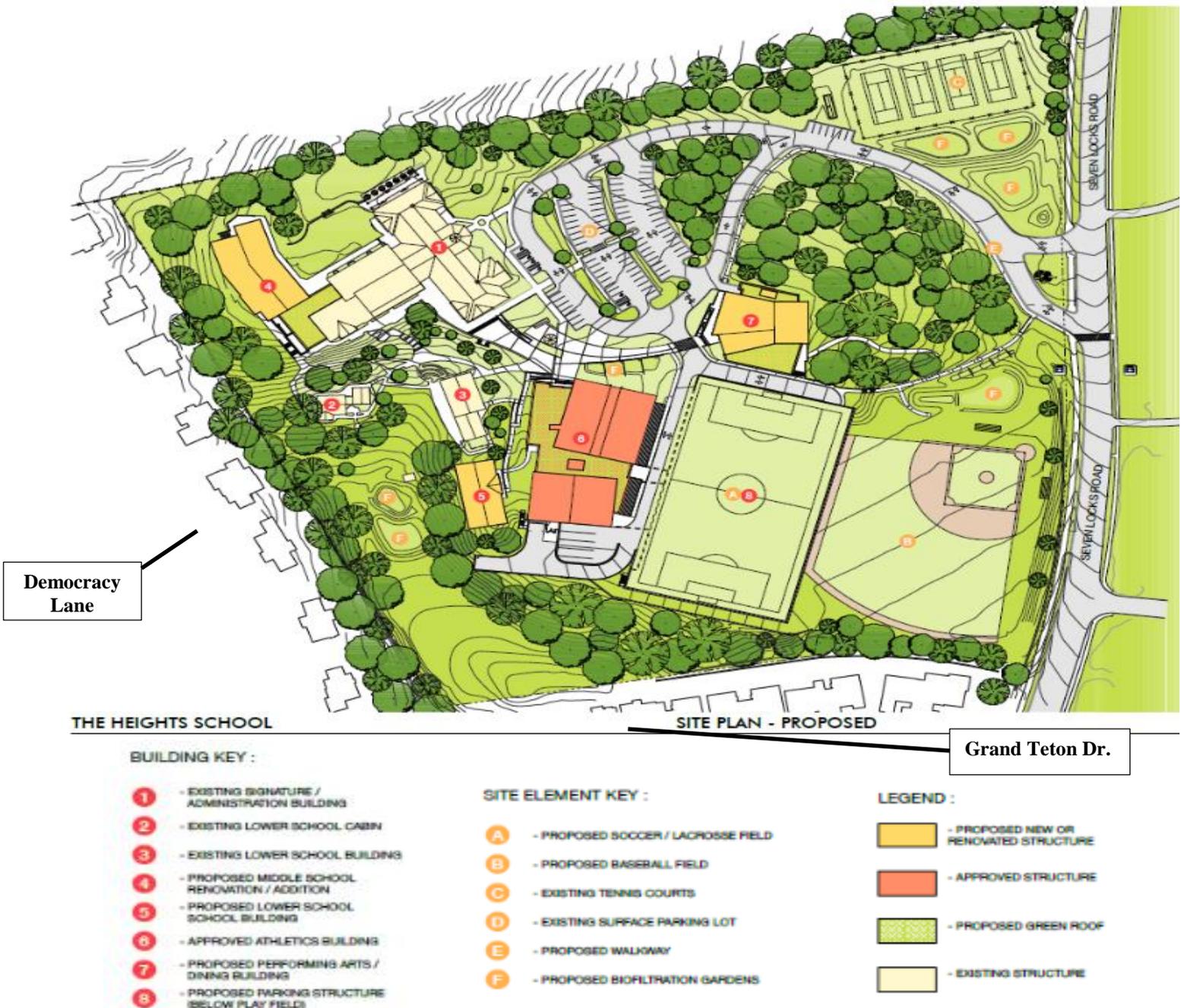
1. Reconstruction of the athletic fields: The field abutting Seven Locks Road will accommodate a baseball field; the upper field will be devoted to soccer and lacrosse;
2. Construction of a subterranean parking garage under the upper field; the garage will be a single level structure containing 159 parking spaces and will be accessed from a ramp leading from the upper level of the campus in front of the existing main academic building;
3. Construction of a new theater, music, and dining hall: The new structure will be three levels, with music, band and choral halls on the first floor; a 464 seat auditorium on the second floor; and the School’s dining hall on the ground floor level;
4. A New Lower School Building: containing 8,500 square feet of floor area in a two story structure;
5. An expansion of the middle school building consisting of two stories will provide the space necessary for additional classrooms and faculty offices;
6. Various plantings, fencing and stormwater management facilities necessary to meet applicable regulations and to insulate the neighbors from adverse effects; and
7. Temporary changes which may be necessary during construction, such as use of the tennis courts for parking.

These physical changes would take place over approximately 15 years, with the phasing of construction to be determined by a number of factors, including the availability of financing. The disagreement between Technical Staff and Petitioner regarding phasing will be discussed below.

First, we reproduce the proposed 15-year Heights School, rendered Master Plan (Exhibit 104), followed by proposed elevations of the buildings to be constructed:

**a. Heights School Master Plan, Elevations and Site Plan:**

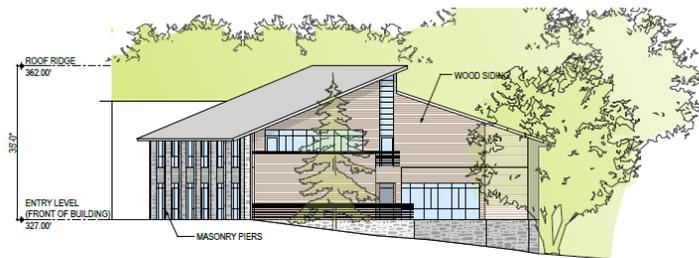
The Heights School 15-year, rendered, Master Plan (Exhibit 104) is reproduced below:



Attached to the rendered Campus Master Plan are elevations of the proposed buildings and the garage floor plan, which are shown below:



MIDDLE SCHOOL WEST ELEVATION  
scale : 1/16" = 1'-0" (@ 11x17)



MIDDLE SCHOOL NORTH ELEVATION  
scale : 1/16" = 1'-0" (@ 11x17)

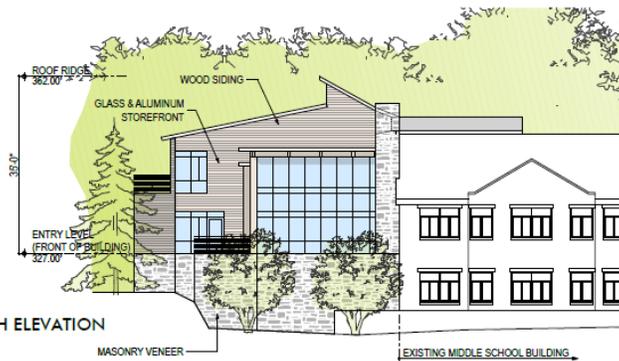
THE HEIGHTS SCHOOL

MIDDLE SCHOOL ELEVATIONS - PROPOSED

cox graae + spack architects



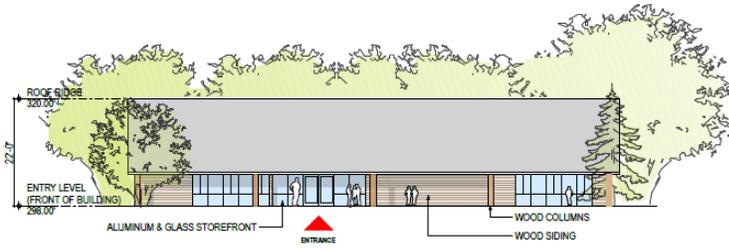
MIDDLE SCHOOL EAST ELEVATION  
scale : 1/16" = 1'-0" (@ 11x17)



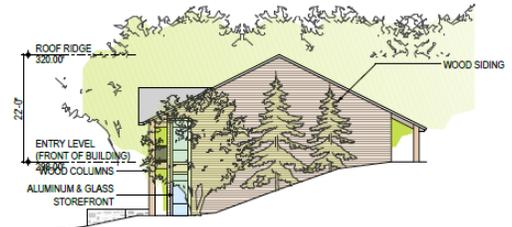
MIDDLE SCHOOL SOUTH ELEVATION  
scale : 1/16" = 1'-0" (@ 11x17)

THE HEIGHTS SCHOOL

MIDDLE SCHOOL ELEVATIONS - PROPOSED



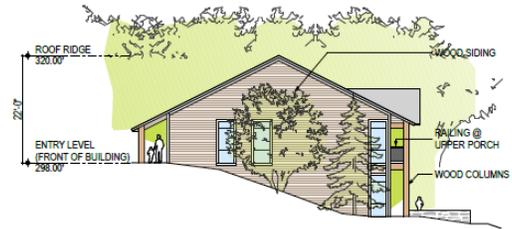
**LOWER SCHOOL EAST ELEVATION**  
 scale : 1/16" = 1'-0" (@ 11x17)



**LOWER SCHOOL SOUTH ELEVATION**  
 scale : 1/16" = 1'-0" (@ 11x17)



**LOWER SCHOOL WEST ELEVATION**  
 scale : 1/16" = 1'-0" (@ 11x17)

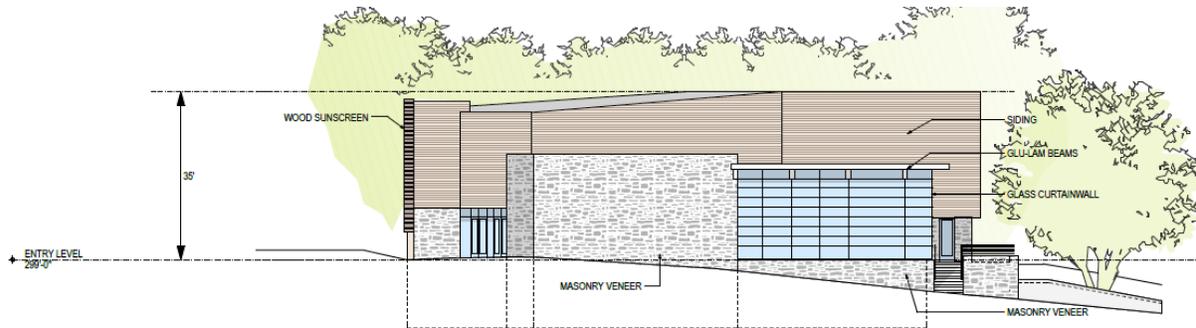


**LOWER SCHOOL NORTH ELEVATION**  
 scale : 1/16" = 1'-0" (@ 11x17)

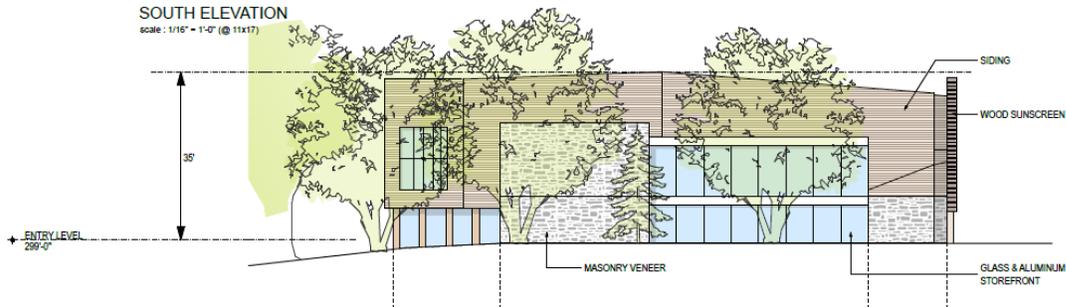
THE HEIGHTS SCHOOL

LOWER SCHOOL ELEVATIONS - PROPOSED

cox graae + spack architects 



**SOUTH ELEVATION**  
 scale : 1/16" = 1'-0" (@ 11x17)



**NORTH ELEVATION**  
 scale : 1/16" = 1'-0" (@ 11x17)

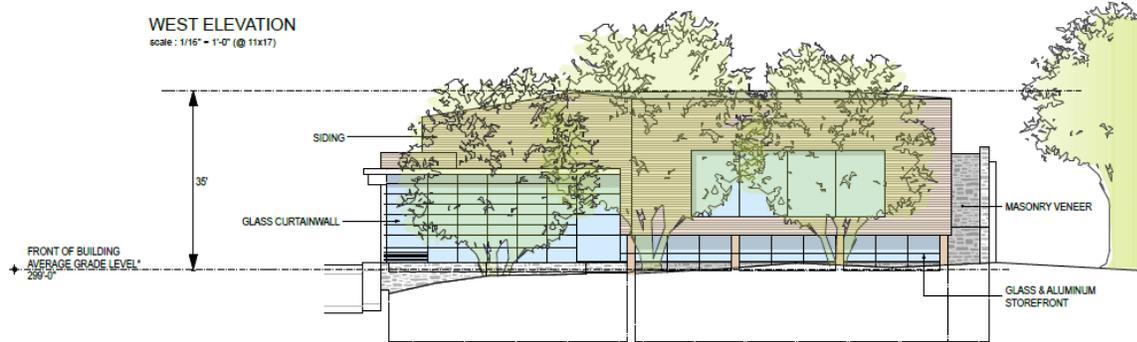
THE HEIGHTS SCHOOL

THEATER BUILDING ELEVATIONS - PROPOSED

cox graae + spack architects 



**WEST ELEVATION**  
scale : 1/16" = 1'-0" (@ 11x17)



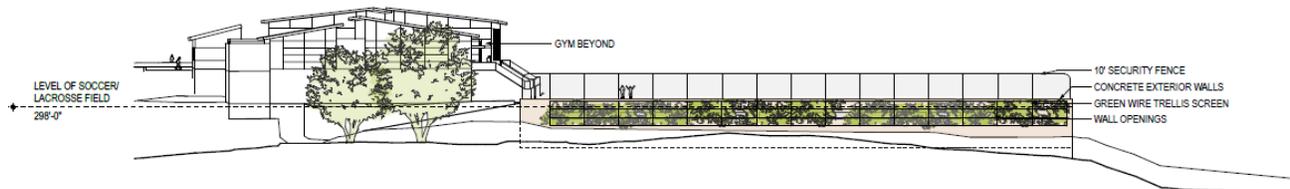
**EAST ELEVATION**  
scale : 1/16" = 1'-0" (@ 11x17)  
\*FRONT OF BUILDING IS EAST ELEVATION FACING SEVEN LOCKS ROAD

THE HEIGHTS SCHOOL

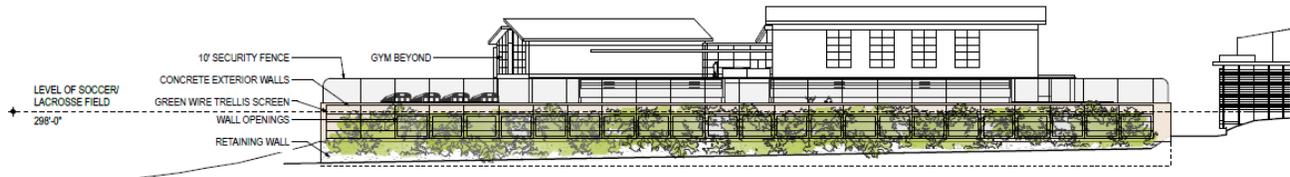
THEATER BUILDING ELEVATIONS - PROPOSED

cox graae + spack architects

02 June 2014



**SOUTH ELEVATION**  
scale : 1/32" = 1'-0" (@ 11x17)



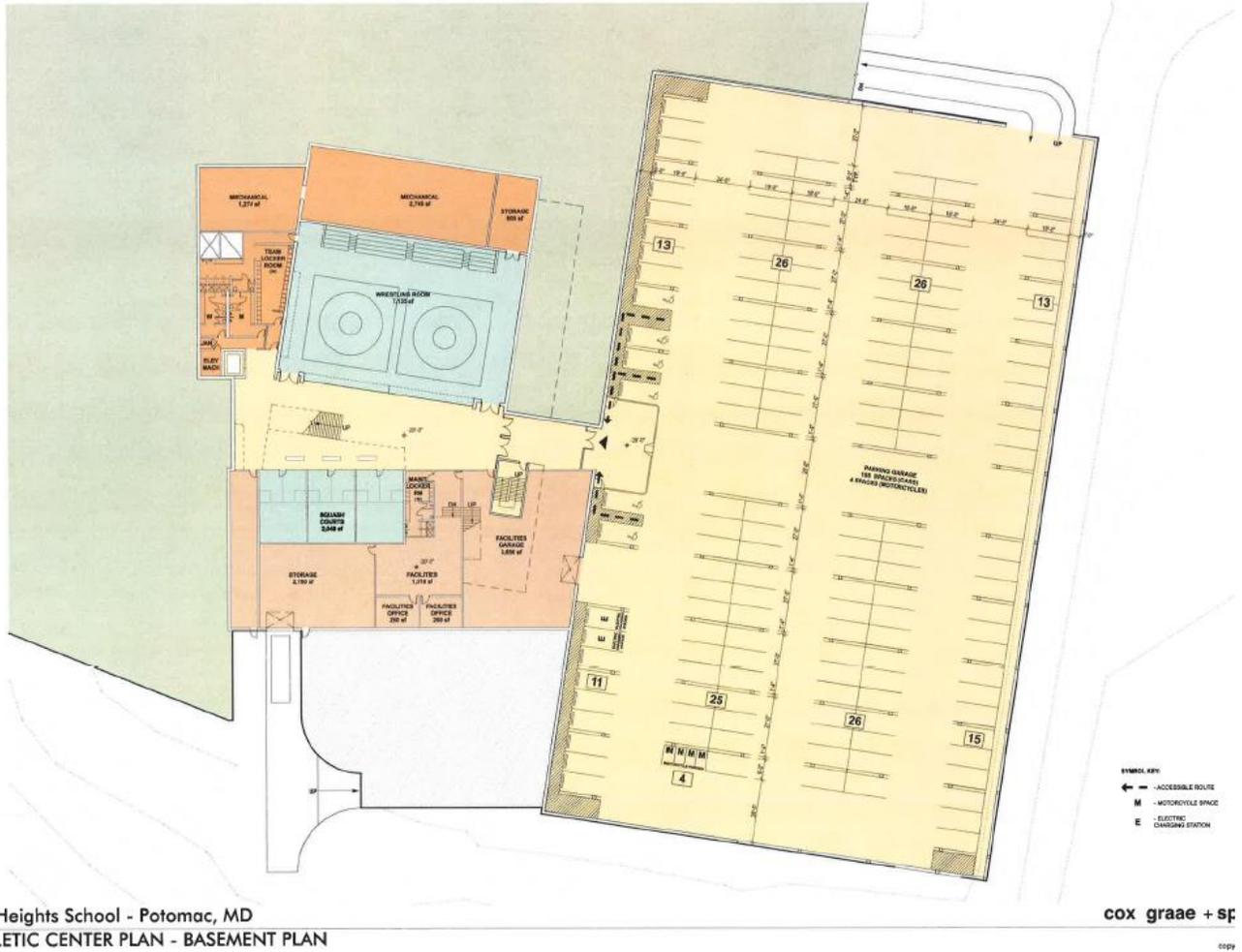
**EAST ELEVATION**  
scale : 1/32" = 1'-0" (@ 11x17)

THE HEIGHTS SCHOOL

GARAGE BUILDING ELEVATIONS - PROPOSED

cox graae + spack architects

14 March 2014



Heights School - Potomac, MD  
LETIC CENTER PLAN - BASEMENT PLAN

Technical Staff also listed all of the proposed additions, removals and replacements of structures in a chart which indicates the effects on gross floor area of these changes (Exhibit 72, pp. 7-8):

	Structure	Existing GSF	Remov e	New	Total GSF	Existing uses	Proposed uses
Lower School	Log House # 1	2,563	0	0	2,563	Classrooms/ related	No change
	Log House # 2	5,082	0	0	5,082	Classrooms/ related	No change
	New Lower School Bldg	0	0	8,654	8,654	N/A	Classrooms/ related
Mi ddl	West wing of Signature Bldg	7,042	7,042	20,183	20,183	Classrooms/ related	Classrooms/ related

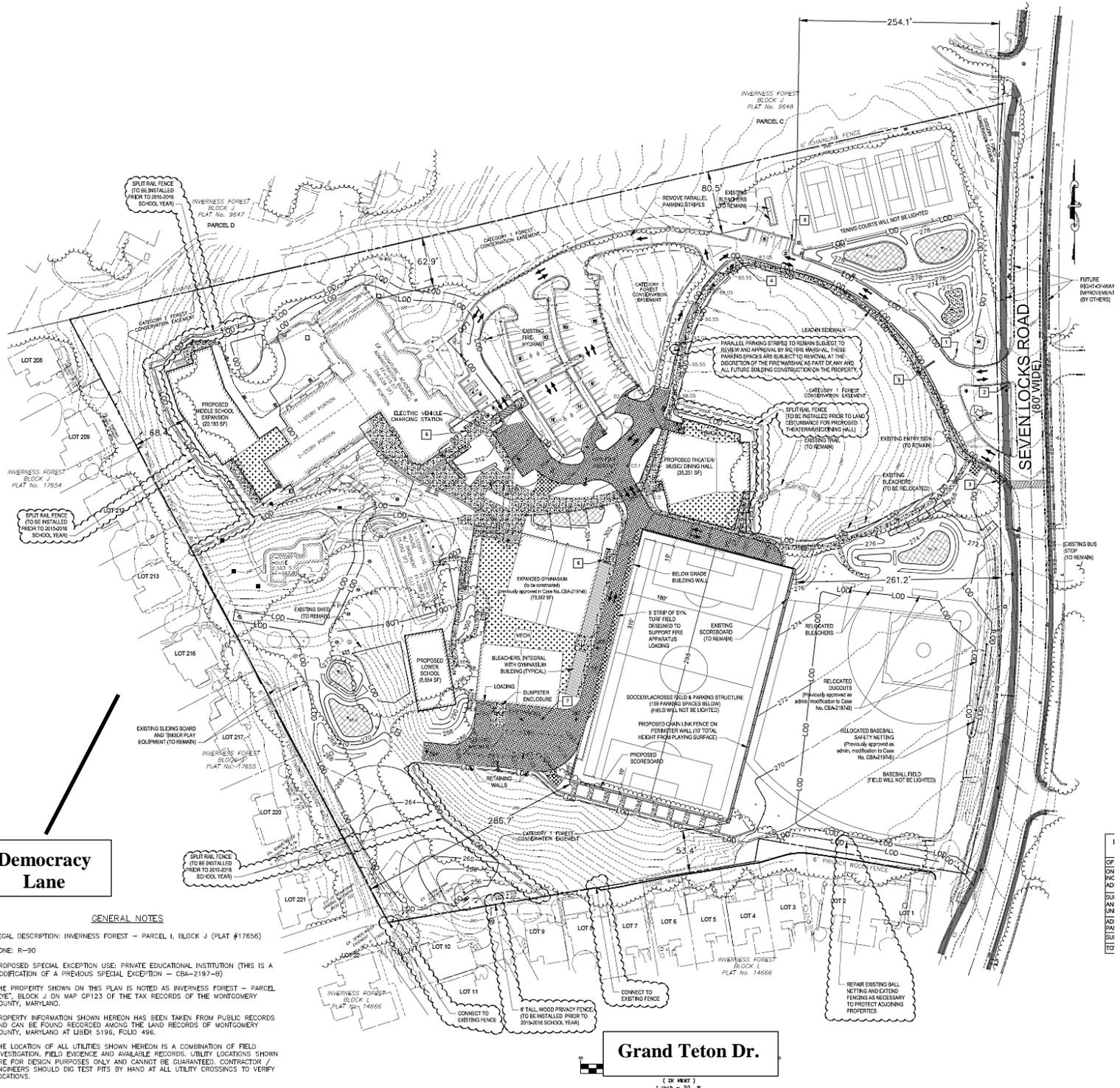
	Structure	Existing GSF	Remov e	New	Total GSF	Existing uses	Proposed uses
	Middle wing of Signature Bldg	19,913	0	0	19,913	Classrooms/ library/related	No change
Upper School	East wing of Signature Bldg	36,125	0	0	36,125	Classrooms/ admin/ related	No change
Other Facilities	<i>Gymnasium (previously approved)</i>	<i>10,644</i>	<i>10,644</i>	<i>73,582</i>	<i>73,582</i>	<i>Phys ed/ related</i>	<i>Phys ed/ facilities maintenance</i>
	Portable #1	1,499	1,499	0	0	Classrooms	--
	Portable #2	4,225	4,225	0	0	Classrooms	--
	Maintenance building	1,796	1,796	0	0	Facilities management	--
	New theater, music, dining hall	0	0	35,251	35,251	--	Theatrical arts /campus dining hall
	Parking garage under field			159 spaces	159 spaces	--	159 parking spaces
	<b>TOTAL</b>	<b>88,889</b>	<b>25,206</b>	<b>137,670</b>	<b>201,353</b>		

Petitioner's plans include a net expansion of the total approved gross floor area by 49,526 square feet (not counting the parking garage).<sup>5</sup> This figure results from the fact that currently existing gross floor area is 88,889 square feet, and the gymnasium expansion from 10,644 square feet to 73,582 square feet (a net gain of 62,938 square feet) has been previously approved. Thus, the total of currently approved gross floor area is 151,827 square feet. If the Board approves Petitioner's current proposal, the total gross floor area will be 201,353, a net increase of 49,526 square feet over the currently approved floor area of 151,827 square feet.

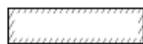
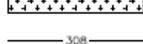
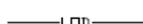
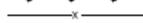
As pointed out by Technical Staff, the above tabulation "appears to represent a 126.5 percent increase in gross floor area (excluding the parking garage)," if one counts in the previously approved gymnasium, and a 32.6 percent increase from the currently existing and approved gross floor area, if

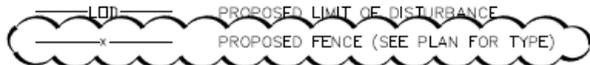
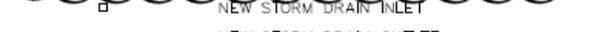
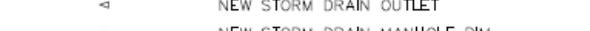
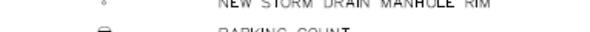
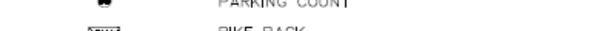
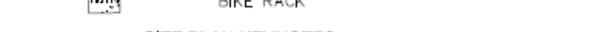
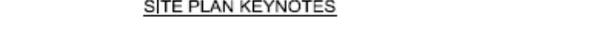
<sup>5</sup> The definition of Gross Floor Area in Zoning Ordinance §59-A-2.1 does not include parking areas.

one does not count the previously approved gym. It is a significant building program by any measure, but it will be gradual, over a 15 year period. The final site plan, after many iterations, is contained in Exhibit 115(j) (Sheet C-102, revised 2/27/15). It is reproduced below:



**SITE IMPROVEMENTS LEGEND**

-  NEW BUILDING OR RENOVATION
-  NEW ASPHALT PAVEMENT
-  NEW OR REDEVELOPED HARDSCAPE
-  FUTURE PUBLIC SIDEWALK OR BIKE PATH
-  NEW STORMWATER MANAGEMENT FACILITY (MICRO-BIoretention)
-  NEW STORMWATER MANAGEMENT FACILITY (SURFACE SAND FILTER)
-  4" THICK GREEN ROOF
-  308 NEW MINOR CONTOUR
-  310 NEW MAJOR CONTOUR
-  308 EXISTING MINOR CONTOUR
-  310 EXISTING MAJOR CONTOUR

-  LOD PROPOSED LIMIT OF DISTURBANCE
-  PROPOSED FENCE (SEE PLAN FOR TYPE)
-  NEW STORM DRAIN INLET
-  NEW STORM DRAIN OUTLET
-  NEW STORM DRAIN MANHOLE RIM
-  PARKING COUNT
-  BIKE RACK

**SITE PLAN KEYNOTES**

- 1 INBOUND: YIELD SIGN  
OUTBOUND: STOP SIGN & LEFT TURN ONLY (AT SEVEN LOCKS ROAD) - RELOCATE SIGN OUTSIDE NEW SIDEWALK
- 2 STOP SIGN
- 3 STOP SIGN - RELOCATE SIGN OUTSIDE NEW SIDEWALK
- 4 DO NOT ENTER SIGN
- 5 DO NOT BLOCK INTERSECTION SIGN AND STOP BAR
- 6 BIKE RACK (12 SPACES)
- 7 BUS PARKING
- 8 MOTORCYCLE PARKING

JRE  
IT-OF-WAY  
IMPROVEMENTS  
(OTHERS)

US

DEVELOPMENT STANDARDS R-90 ZONE		PERMITTED/REQUIRED	PROVIDED
MINIMUM LOT AREA		0.207 AC/ 9,000 SF	19.818 AC/ 863,296 SF
MINIMUM LOT AREA AT EXISTING STREET LINE			
	SEVEN LOCKS ROAD	25 FT	983.6 FT
MINIMUM LOT WIDTH AT BUILDING LINE		75 FT	971.4 FT
MINIMUM SET BACK FROM STREET			
	SEVEN LOCKS ROAD	30 FT	261.2 FT
MINIMUM SET BACK FROM ADJOINING LOT			
	ONE SIDE	8 FT	53.4 FT
	BOTH SIDES	25 FT	116.3 FT
	REAR	25 FT	68.4 FT
MAXIMUM BUILDING HEIGHT			
	WHEN MEASURED TO THE HIGHEST POINT OF ROOF SURFACE REGARDLESS OF ROOF TYPE	35 FT	35 FT
MAXIMUM BUILDING COVERAGE			
	TOTAL EXISTING AND NEW BUILDINGS	258,989 SF	157,050 SF
	PERCENT OF LOT AREA	30%	18%
MAXIMUM FRONT YARD SURFACE COVERAGE			
	TOTAL FRONT YARD SURFACE COVERAGE	87,812 SF	53,113 SF
	PERCENT OF COVERAGE	30%	18%

DEVELOPMENT STANDARDS R-90 ZONE	PERMITTED/REQUIRED	CURRENTLY PROVIDED	TO BE PROVIDED AT FULL BUILD-OUT
OFF STREET PARKING			
ONE SPACE FOR EACH EMPLOYEE INCLUDING TEACHERS AND ADMINISTRATORS	95	95	95
SUFFICIENT SPACES FOR THE SAFE AND CONVENIENT LOADING AND UNLOADING OF STUDENTS		4	8
ADDITIONAL FACILITIES FOR STUDENT PARKING		25	30
SURPLUS PARKING SPACES			124
TOTAL PARKING PROVIDED		124	257

DEVELOPMENT STANDARDS R-90 ZONE	PRE-GARAGE (124 TOTAL SPACES)		POST-GARAGE (257 TOTAL SPACES)	
	PERMITTED/REQUIRED	PROVIDED	PERMITTED/REQUIRED	PROVIDED
TOTAL HANDICAP	5	6	7	10
VAN ACCESSIBLE HANDICAP	1	2	2	4
MOTORCYCLE	2	2	5	6
CHARGING STATION		1	3	3
BICYCLE		24	13	24

**b. Phasing of Construction:**

One bone of contention between Petitioner and Technical Staff concerns the issue of phasing the proposed improvements. Petitioner seeks to have flexibility in the phasing of construction, but generally proposes to prioritize new building construction as follows:

1. New Lower School Building
2. New Middle School Building
3. New gymnasium
4. Parking structure and athletic field construction
5. Auditorium/music/dining hall building construction
6. Reorganization of existing parking lot and creation of a forecourt for the main academic building and walkway system

Petitioner's Headmaster, Alvaro de Vicente, testified that the order of construction would greatly depend on the availability of funding, and obtaining contributions to fund an underground garage first might be difficult. Tr. 47-49. Petitioner's architect, Joanna Schmickel, opined that ideally she would start with the lower school and then the middle school. The lower school would provide swing space to move the children from the middle school over to the lower school during construction of the middle school, which ideally would go second. These are swing spaces, so that other functions could be moved into the lower school during other construction. The athletic building and the play fields and the garage and the theater would be at the end of the sequence. Tr. 124-125.

Technical Staff disagrees with the proposed order of construction because Staff feels that, to avoid inadequate parking during construction, the garage must be constructed before the other buildings. Staff therefore proposed a Condition 13.b:

Construct the garage prior to any other proposed structures. Until the Use and Occupancy Certificate has been issued for the proposed garage, Use and Occupancy Certificates for other proposed structures on the site shall not be issued. Simultaneous Use and Occupancy Certificates may be issued.

In response, Petitioner proposed the following condition regarding the phasing of garage construction (Exhibit 84):

Construct the garage prior to any other proposed structure, unless additional offstreet parking locations are identified and secured by the School to adequately accommodate the daily parking demand of faculty and students. ~~Until the Use and Occupancy Certificate has been issued for the proposed garage, Use and Occupancy Certificates for other proposed structures on the site shall not be issued. Simultaneous Use and Occupancy Certificates may be issued.~~

Technical Staff agreed that the off-site parking arrangement would not create a traffic issue and was acceptable for special event and construction parking, but believes these off-site facilities "are not adequate for daily school operations on an ongoing basis." Exhibit 97. Petitioner's transportation planner took issue with Staff's opinion, testifying that all the day-to-day traffic and parking issues could be handled by bussing to and from the off-site parking lots, each located about a

half mile from the campus. If that did not prove sufficiently effective, the tennis courts on the north of the property could be turned into a temporary parking lot. Tr. 157-168.

Based on the testimony of Petitioner's architect referenced above, the Hearing Examiner finds that the logical phasing of construction does not place construction of the underground garage first in line. While Technical Staff's concern about the sufficiency of parking during construction is certainly a valid consideration, the Hearing Examiner finds, based on the testimony of Petitioner's transportation planner, that the off-site parking and bussing arrangements, potentially supplemented by temporary parking where the tennis courts are currently located, should be sufficient to handle the additional day-to-day and special event parking needs, and therefore he will recommend a modified version of Petitioner's alternate writing of Condition 13.b.

The other phasing issue in this case involves the date by which Petitioner must construct a lead-in sidewalk from Seven Locks Road to the sidewalk at the gymnasium. There is no dispute about Petitioner's obligation to construct the sidewalk in question, and Petitioner expressly includes it in its "Section 59-G Statement of Compliance" (Exhibit 63(g)): ". . . [T]he present application includes a proposed ADA compliant lead-in sidewalk to improve accessibility onto and around the campus." The dispute is solely over timing.

Technical Staff recommends a condition (7.a.) specifying that "Prior to the start of the 2015-2016 school year [, Petitioner must] Construct a lead-in sidewalk from Seven Locks Road to the sidewalk at the gymnasium." [Emphasis added.] Petitioner takes issue with Staff's recommended timing for lead-in sidewalk, and instead proposes the following timing condition (Exhibit 84):

Construction of the lead-in sidewalk from Seven Locks Road to the gymnasium must be completed before a Use and Occupancy Certificate for any of the building facilities approved under this application may be issued.

In support of this position, Petitioner's civil engineer, Aaron B. Smith, testified that there is currently no sidewalk along Seven Locks Road in this area to lead from, and there are no plans for the

County to build one until 2020, at the earliest. Exhibit No. 110. In his opinion, it doesn't make sense to construct a lead-in sidewalk, which is a fairly substantial project, to connect to a roadway (Seven Locks) that is currently unsafe for pedestrians. Instead, Petitioner proposes that the lead-in sidewalk would be built as part of future school construction and hopefully would coincide better with the proposed improvements on Seven Locks Road and actually provide a continuous, safe pedestrian path along Seven Locks Road and up into the property. Tr. 262-273.

In its original report, Technical Staff stated (Exhibit 72, p. 17):

The sidewalk will connect to an existing sidewalk on Seven Locks Road that leads to the existing bus stop on the southbound side of the road as well as to an existing crosswalk that connects to the bus stop on the northbound side of the road. These improvements were made several years ago at the request of The Heights School for the benefit of their students.

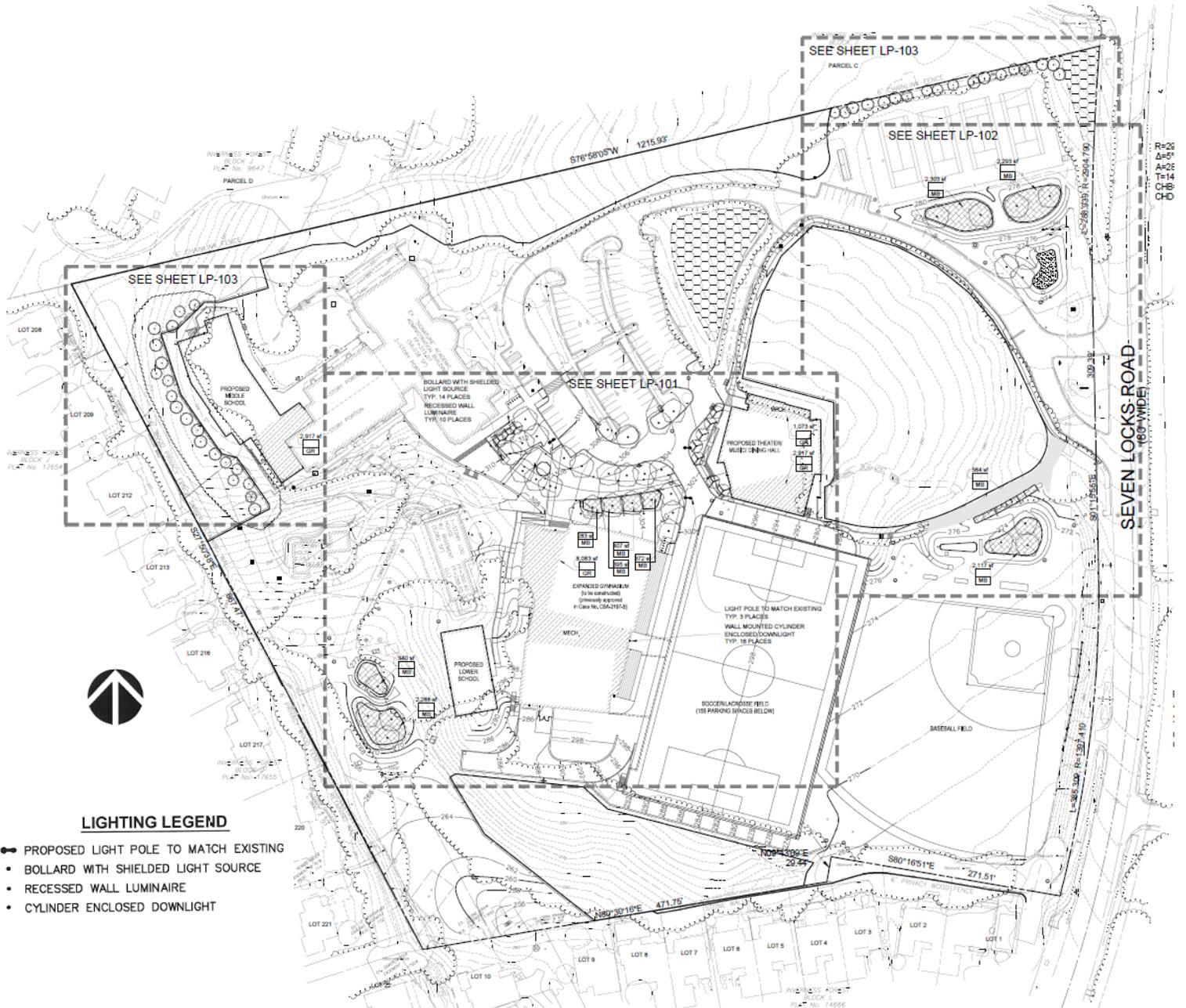
In its final submissions (Exhibits 121 and 121(a)), Technical Staff continues to recommend immediate construction of the lead-in sidewalk, stating its reason as, "No accessible pedestrian connection is provided between the Ride On stop at the school's entry on Seven Locks Road and the school facilities. The school requested that stop in 1993." Exhibit 121(a), p. 4.

While a lead-in sidewalk from Seven Locks Road certainly has advantages to pedestrians, the Hearing Examiner sees no compelling reason that it must be completed within the next four months, which is what Technical Staff's recommendation would require. Apparently, The Heights School has survived without it for decades, and there is no evidence in this case that a safety hazard has been created. It must be remembered that the proposed lead-in sidewalk is part of a 15-year campus Master Plan, and the fact that Petitioner has laid out a long-term plan should not mean that every pedestrian improvement must be done immediately. As the old saying goes, "We should not let the perfect be the enemy of the good." The "good" is that the improvements will include an ADA compliant lead-in sidewalk. The Hearing Examiner agrees with Petitioner that it is sufficient to

require that the sidewalk “be completed before a Use and Occupancy Certificate for any of the building facilities approved under this application may be issued.”

**c. Landscaping and Lighting:**

Petitioner’s overall Revised Landscape and Lighting Plan (Exhibit 115(k)(i)) is reproduced below:



PLANT SCHEDULE /

TREES	CODE	QTY	BOTANICAL NAME / COMMON NAME	CONT.	CAL.	SIZE
	IJ	2	ILEX OPACA 'JERSEY KNIGHT' / JERSEY KNIGHT HOLLY	B & B		6'-8' H
	IJ2	17	ILEX OPACA 'JERSEY PRINCESS' / JERSEY PRINCESS HOLLY	B & B		6'-8' H
	MG	19	MAGNOLIA GRANDIFLORA 'BRACKENS BROWN BEAUTY' / 'BRACKENS BROWN BEAUTY' SOUTHERN MAGNOLIA	B & B		6'-8' H
	OT	10	ORNAMENTAL TREE (20' DIAMETER CANOPY @ 20 YEARS ASSUMED)	B & B		6'-8' H
	ST	39	SHADE TREE (35' DIAMETER CANOPY @ 20 YEARS ASSUMED)	B & B	2" CAL	
GROUND COVERS	CODE	QTY	BOTANICAL NAME / COMMON NAME	CONT.		
	GR	12,072 SF	GREEN ROOF PLANTINGS	-		
	MB	11,962 SF	MICRO-BIORETENTION PLANTINGS (SHRUBS, PERENNIALS & GRASSES)	-		

The revised landscape plan shows additional plantings along the western and northern sides of the campus to provide additional screening. Petitioner’s final version of the landscape plan, reproduced above, now shows the planting of evergreen trees along the western forest conservation easement line as a way to screen some of the activity associated with the middle school, and that was a direct result of conversations with the community on January 19, 2015. Tr. 207-208. Technical Staff recommended not to put these plantings along the eastern boundary of the western forest conservation easement (*i.e.*, close to the school), but to put them along the western property line. Technical Staff stated their reasons in a March 9, 2015 email to the Hearing Examiner (Exhibit 119, p. 1):

... It is correct that staff was not aware of the community’s preference regarding the location of the screening plants. Staff’s recommendation to locate these plants at the property line was primarily based upon the experience of Potomac Ponds neighbors, where there is a wooded area between the screening plants and the property line. This creates an area without natural surveillance; the Potomac Ponds residents have experienced pranks, trespass and vandalism in an area that is similarly screened from view. Staff believes safety and compatibility issues are critical, so confirms the previous recommendation to locate screening plants near the property line. To create improved screening in the near term, staff recommends planting a larger number of evergreens in a staggered row. The evergreens should be planted at the earliest opportunity, and they should be regularly watered during the growing season.

... Given that the existing screening has created an area where students are (reportedly) not adequately supervised, staff recommends moving the screening toward the property lines. This also allows for the planting to be done sooner so that the plants are established before the existing screening plants are removed.

Petitioner's position regarding the placement of the additional screening trees was reported at the hearing by Aaron B. Smith, an expert in civil engineering. Tr. 205-217. The reason Petitioner would place the new screening closer to the new middle school as shown on the revised landscape plan, rather than at the property line, is that the school property actually drops to a lower elevation at the property line. In talking with the community, their preference actually was to have these screenings at a higher elevation to make them a more effective screen from their property. The revised plan shows these plantings at about elevation 312 to 318. At the property line, the elevation is down at 304 to 308, an 8 to 10 foot lower elevation along that stretch than where Petitioner proposes to place the new trees. Mr. Smith's approach was to take advantage of that elevation change. According to Mr. Smith, the addition of those evergreens would not violate any condition of the forest conservation plan because they will be native species. Tr. 205-217.

The Hearing Examiner finds that there is merit in both positions; however, given that the fundamental reason for the new screening trees on the western side of the site is to provide additional screening for the neighbors, the Hearing Examiner recommends the position outlined by Petitioner in its final Landscape and Lighting Plan (Exhibit 115(k)(i)) because it directly reflects the wishes of the neighbors expressed in the meeting they had with Petitioner, at the suggestion of the Planning Board.

Petitioner's architect, Joanna Schmickel, also addressed the issue of screening interim parking on the tennis courts. She noted that the Potomac Subregion Master Plan, at page 36, indicates that parking should be located and landscaped to minimize commercial appearance, and in the situations where the side or rear yard parking is not available, front yard parking should be allowed only if can be adequately screened and landscaped. In her opinion, the school does have adequate space to screen and landscape the temporary tennis court parking. She also feels the additional 50 spaces on the tennis court would provide an adequate parking during the construction,

and it would work quite well with the school's traffic circulation pattern. Tr. 130-133.

In addition to new trees, Petitioner's plans call for added fencing. Mr. Smith noted that a split rail fencing will clearly define the easement area, and though climbable, will also be a deterrent to students getting closer to the property line and closer to the neighbors. Revisions were made to add the split rail fence along the forest conservation easement in the northwest corner of the property, adjacent to the existing middle school. He also added the addition of split rail fence in the southwest corner, delineating the forest conservation easement area. He added a note in the southeast corner about balls going into the properties to the south, indicating that the school will repair existing ball netting and extend fencing as necessary to protect adjoining properties. The school is going to make operational changes and make the necessary repairs to the existing netting. If additional physical changes need to be made, that would be worked out. Tr. 194-205.

One of the issues raised by Eugene Feinberg on behalf of the Potomac Pond Homeowners Association (PPHA) was that new fencing along Seven Locks Road needed to be added to prevent students from intruding into the area south of the athletic field and into the southwest corner of The Heights School property. The proposed split rail fence only covers part of it. Exhibit 108 and Tr. 236-239.

The Hearing Examiner asked whether the school could provide fencing to complete the enclosure and discourage students from coming down from the upper level into the southwest corner and then coming south onto Grand Teton Drive and southwest onto Appalachian Terrace property. Petitioner's attorney, Soo Lee-Cho, promised to look into it. Mr. Smith stated that it is the only area on campus that doesn't currently have fencing. Ms. Lee-Cho said the school could provide a continuation of a wood fence in the unfenced area. The Hearing Examiner suggested that she discuss it with the school and come up with a proposal for fencing that area, and then submit it to Mr. Feinberg and to Technical Staff for feedback to resolve that issue. Tr. 240-246.

Petitioner responded in its submission of March 2, 2015 (Exhibit 115, p. 2):

1. Special Exception Site Plan (Sheet C-102) [*i.e.*, Exhibit 115(j)] dated February 27, 2015 includes the following changes:
  - a. Timing of installation of split rail fencing along forest conservation easement areas adjacent to residential neighbors specified as “prior to 2015-2016 school year”;
  - b. New 6’ tall wood privacy fence proposed by Petitioner along southern property line at southwest corner of site to close gap between existing fencing indicated on the plan and added to the legend;

The Hearing Examiner’s took that language to mean that Petitioner’s plans include completing the fence around the property. Yet, in his March 26, 2015 submission (Exhibit 124), Mr. Feinberg asserted that the revised Site Plan (Sheet C-102) was still “missing a fencing segment along its eastern side.” To ensure that Petitioner’s plans include the missing fence segment referred to at the hearing, the Hearing Examiner will recommend a condition that ensures completing the fencing so that the enclosure will discourage students from trespassing onto private property.

Another area of disagreement between Technical Staff and Petitioner concerns Staff’s recommendation for converting some surface parking areas into planting areas during garage construction and for providing shade trees throughout and adjacent to the existing parking lots and driveways. Staff bases this recommendation on the following language in the Master Plan, p. 34 : “Adequately shade parking facilities and include shade tree planting areas within parking lots.”

Petitioner argues that, under Zoning Ordinance §59-E-2.83(e), it is not required to plant shade trees throughout its surface parking facility because the requirement for maintaining shading over 30 percent of the paved area only applies for a cumulative enlargement of a surface parking facility that is greater than 50 percent of the total parking area approved before May 6th, 2002. The school's existing surface parking lot was approved in 2000, but the school is not proposing to increase surface parking by 50 percent as part of the proposed special exception. The increase in parking is going to be in an underground parking lot. So, Mr. Smith feels the school is not controlled by the cited code provision. He testified that in order to meet this requirement, the

school would have to remove permanent asphalt and would potentially lose parking spaces in order to create islands. He understood that Technical Staff was looking at the overall environmental sensitivity of the proposed development; however, the school has made a deliberate decision to build within existing footprints on existing impervious areas, put parking below grade as opposed to creating additional surface parking, and doing everything it can to preserve the environmental integrity of the property. In Mr. Smith's opinion, the environmental elements were met by the school's approach to the site plan, and the shading requirement of §59-E-2.83 does not apply. Tr. 217-221. See also Petitioner's post-hearing filing (Exhibit 125, p. 4).

Technical Staff's response to this argument was that their recommendation for shading of parking is based on the need for Master Plan consistency, not on §59-E-2.83. Staff therefore continues to recommend 30% shading of the existing surface parking area. Exhibits 121 and 121(a). Staff also added that the May 22, 2000 Landscape and Lighting Plan should remain in full force and effect for areas not being amended by this plan. In its original report, Staff noted that some of the shade trees included in past approvals have been lost and not replaced. Exhibit 72, p. 13.

The Hearing Examiner agrees with Technical Staff that adequate shading is a legitimate Master Plan and environmental concern, but this particular surface parking facility does not exist in a vacuum. Under Petitioner's plans, it will be practically surrounded by trees, with Category 1 Forest Conservation Easements directly to its north and east, and newly planted trees to its southwest. Under these conditions, adding additional shade trees within the parking lot does not appear to be either an environmental necessity or a Master Plan requirement. Perhaps more importantly, Petitioner makes a valid point that the requirement for shade trees on parking facilities in residential areas is specifically addressed in Zoning Ordinance §59-E-2.83, and the language of the Code exempts this facility from the 30% shading requirement. Master Plans are intended as general recommendations, not contraventions of specific statutory provisions. *Trail v. Terrapin*

*Run, LLC*, 403 Md. 523, 534, 943 A.2d 1192 (2008).<sup>6</sup> Given these factors, the Hearing Examiner concludes that Petitioner should not be required to meet the 30% shading requirement for its existing surface parking facility. However, any shade trees included in past approvals that have been lost should be replaced, unless their replacement would be inconsistent with the plans currently being approved.

In sum, the evidence supports the conclusion that there will be adequate landscaping and other buffering so that the proposed structural changes to The Heights School campus will not adversely affect the neighbors nor offend the applicable Master Plan.

The final item in this section is lighting on the subject site. Mr. Smith testified that the lighting being proposed meets the Zoning Ordinance requirements. A photometric study was done and confirmed that neither the existing light levels nor the proposed light levels would exceed 0.1 foot candles along the side and rear lot lines. Exhibit 34(e)(v). There is existing lighting along the frontage, having to do with Seven Locks Road, and there are small lights on the existing monument sign located there. There will be no lighting of any playing fields or tennis courts. Tr. 273-274.

Technical Staff agreed that the landscape and lighting plans submitted with the application confirm that lighting will not exceed 0.1 foot candles along the side and rear lot lines. Exhibit 72, pp. 36-37. Staff recommended conditions (11 and 12) requiring shielding of lights, a 12-foot limit

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<sup>6</sup> A few words should be said about the legal definition of the term “consistent with the . . . Master Plan,” as it is used in Zoning Ordinance §59-G-1.21(a)(3). The Maryland Court of Appeals held, in *Trail v. Terrapin Run*, 403 Md. 523, 548, 569 and 573-574; 943 A.2d 1192 (2008), that legislative words such as “conform to” a master plan and “consistent with” a master plan were intended to convey the concept of being generally “in harmony with” the master plan, unless the legislation specified otherwise. Subsequently, the Maryland legislature enacted the *Smart, Green, and Growing - Smart and Sustainable Growth Act of 2009*, effective July 1, 2009. That Act amended Md. Ann. Code Art. 66B, § 1.02, in an express attempt to legislatively overturn the *Terrapin Run* holding by specifically defining the term “consistent with,” as used in land use legislation. Essentially, the Act defines the term “consistent with” as a requirement that proposed legislation or regulation regarding land use further (or at least not impede) master plan policies and goals. On the other hand, it appears from the wording of the Act that the state legislature did not intend to apply its definition of “consistency” to cover actions on individual special exception applications, because it limited the definition of “action” to “the adoption of a local law or regulation” concerning special exceptions and specified other matters, not to the review of the special exception application itself. The Hearing Examiner therefore concludes that the 2009 legislation does not apply to the instant special exception modification application, and that we should still be guided by the holding in *Terrapin Run*.

on the height of light poles and that athletic fields remain unlighted. Petitioner did not object to these conditions (Exhibit 84), and they will be adopted by the Hearing Examiner.

Based on this evidence and the photometric study referenced above, the Hearing Examiner concludes that the new lights will not result in lighting in excess of 0.1 footcandles at the side and rear property lines; nor will it allow direct lighting to intrude into adjacent residential properties.

**d. Signage:**

Mr. Smith indicated that there is an existing monument sign on the site, and it is referenced on the Special Exception Site Plan (Exhibit 115(j)). According to Mr. Smith, the sign will be maintained without any changes. Tr. 273-274. Technical Staff confirms that the existing sign will be maintained without change. Exhibit 72, p. 36. All other signs proposed for the site on the Site Plan appear to be traffic and parking control signs, and nobody has raised any issues with regard to any existing sign. Since Technical Staff and the opposition apparently found the existing monument sign to be acceptable, there is no evidence upon which to base a contrary conclusion. The Hearing Examiner will recommend a condition requiring that the monument sign not be changed without permission of the Board of Appeals.

**e. Environmental Controls:**

Technical Staff included the following general discussion of the environment in its report (Exhibit 72, p. 21):

The Special Exception modification meets the requirements of the Environmental Guidelines, the Forest Conservation Law and Stormwater Management regulations.

**Environmental Guidelines**

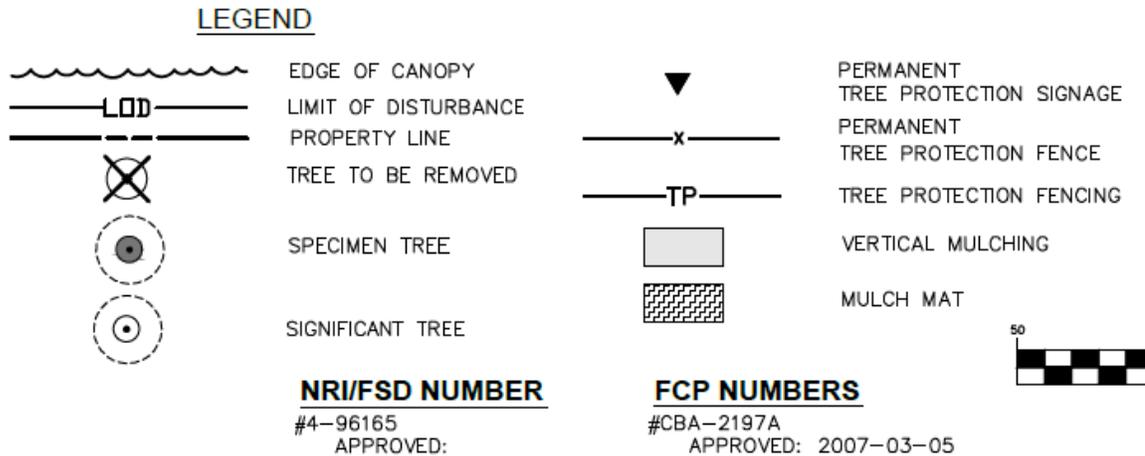
The site is located within the Cabin John Creek watershed, a Use I/IP watershed. The Countywide Stream Protection Strategy rates the tributaries in this watershed as in fair overall condition. This Property is not located within a Special Protection Area or Primary Management Area. There are no streams, floodplains, wetlands, or environmental buffers on or affecting the site.

Staff then evaluated forest conservation and stormwater management (Exhibit 72, p. 21, 29-30). In its discussion of the Master Plan, Staff made additional recommendations “for environmentally sustainable development,” (Exhibit 72, pp. 13-14), some of which are reflected in proposed conditions that have been discussed in this report in connection with phasing and landscaping. We turn now to forest conservation.

*i. Forest Conservation:*

The Final Forest Conservation Plan Amendment (Exhibit 46(a)(ii)(1)) is shown below:





With regard to forest conservation, Technical Staff states (Exhibit 72, p. 21):

**Forest Conservation**

This Property is subject to the Chapter 22A Montgomery County Forest Conservation Law and has an approved Final Forest Conservation Plan (FFCP) dated March 27, 2000. The site is subject to the forest conservation law because it is a special exception on a tract of land greater than 40,000 square feet. The Subject Property totals 19.8 acres and is identified as Parcel I, Block J. The Applicant has submitted an amendment to the FFCP which will satisfy all required elements under Chapter 22A. Forest conservation is fully detailed in a separate Staff Report in conjunction with this Item.

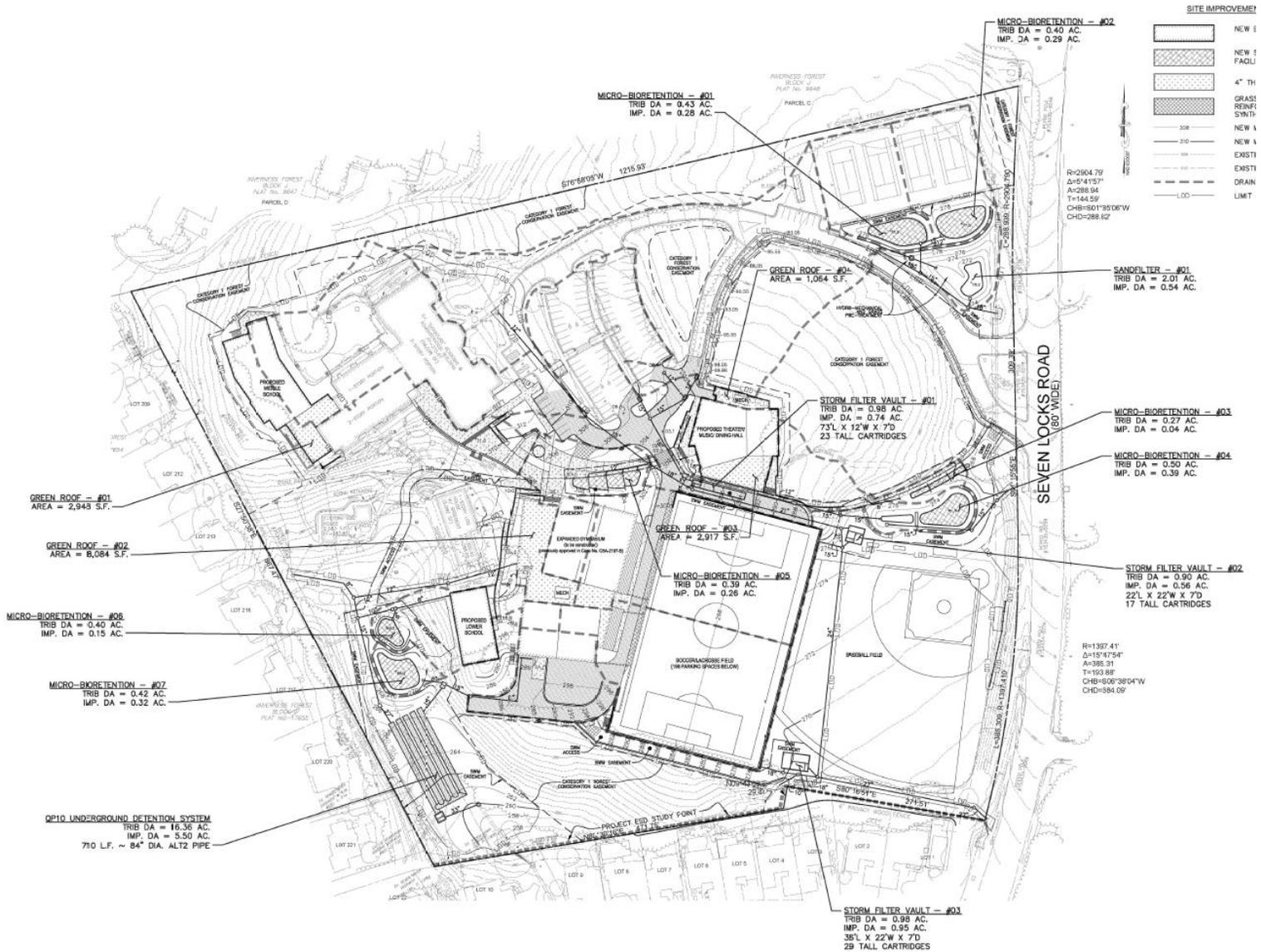
Subsequent to Technical Staff’s report, the Planning Board, on January 22, 2015 (Exhibit 82), unanimously approved the Final Forest Conservation Plan Amendment proposed by Petitioner (Exhibit 46(a)), with conditions as provided in the Forest Conservation Plan staff report (Exhibit 79).

Given the approval of the Final Forest Conservation Plan Amendment by both Technical Staff and the Planning Board, and the absence of any contrary evidence, the Hearing Examiner finds that Petitioner is in compliance with forest conservation requirements. A condition requiring adherence to the Final Forest Conservation Plan Amendment is recommended in Part V of this report.

**ii. Stormwater Management:**

As noted by Technical Staff, currently parts of The Heights School campus have little or no stormwater management, so “the addition of stormwater facilities is anticipated to have some

positive impact on the watershed.” Exhibit 72, p. 16. Petitioner filed a stormwater management concept plan-SW MCP (Exhibit 34(e)(iii)), which was approved by the Department of Permitting Services (DPS) on February 27, 2014 (Exhibit 34(c)). The SW MCP is reproduced below:



The Plan shows the proposed locations of a number of micro-bioretention facilities, green roofs and other stormwater management devices. The SW MCP was supplemented on October 24, 2014, with four exhibits that demonstrated the sequencing of stormwater management improvements depending on the order in which buildings are constructed (Exhibit 63(d)(i) – (iv)).

Petitioner's civil engineer, Aaron Smith, testified that the subject site is not in a special protection area, so a water quality plan is not required, but an approved stormwater management concept has been approved by DPS. It includes the construction of seven new micro bioretention areas, a new sand filter, a new underground storage and green roofs on three of the four new proposed buildings. Additionally, the school will be required to restore and stabilize the existing downstream outfall to Cabin John Creek, which is actually on the other side of Seven Locks Road.

There is a drainage divide that runs down the middle of the property. There are two outfall points from the property, one in the southwest corner which drains down to the Potomac Pond, and the other one goes out to the public storm drain on Seven Locks Road. This plan will decrease the amount of stormwater that will be experienced by the neighbors in both the 10 and 100 year storm events for both the Potomac Pond and the Seven Locks public storm drain. With the ultimate build out, there would be more area draining towards Seven Locks Road and less area draining towards to Potomac Pond, a slight change in drainage area. The net result is that in both cases there's a decrease in the flow to the Potomac Pond area. The Democracy Lane area to the west actually drains towards the school property. The proposal will comply with all the environmental site design requirements that are practicable. Even though the subject site is not susceptible to all of the prescribed measures for environmental site design (ESD), the net result of what will be done will be a decrease of the storm drainage off of the site. At the request of Technical Staff, Mr. Smith prepared four different SWM exhibits showing how stormwater would be handled depending on which buildings were built first (Exhibits 63(d)(i) –(iv)). Tr. 225-231.

As stated by Technical Staff (Exhibit 72, p. 13),

To create environmentally sustainable development, significant improvements in stormwater treatment will be provided. The proposed facilities, including green roofs, micro-bioretention facilities, a biofilter, and structural vaults, will provide partial compensation for areas that currently have little or no stormwater management.

Staff also noted that the SWMCP addresses the concerns of the neighbors to the south, and the DPS approval is to be amended at each phase of development, including interim stages, with detailed computation reviews at that time. Exhibit 72, pp. 29-30.

Given the approval of the SWMCP by DPS and the uncontradicted testimony of civil engineer Aaron Smith that the proposed stormwater management facilities would result in a net decrease in stormwater flow off of the site, the Hearing Examiner finds that Petitioner is in compliance with stormwater management requirements for this special exception.

Based on this record, the Hearing Examiner finds that the changes proposed by Petitioner will not be detrimental to the environment.

## **2. Traffic Impact Studies (TIS) and the Transportation Management Plan (TMP):**

Petitioner's transportation planner and traffic engineer, Nicole A. White, evaluated the traffic and parking situation in and around the subject site. Ms. White's first Traffic Impact Study (TIS) was dated May 8, 2013, and was filed in this case as Exhibit 11. That study was supplemented on August 20, 2013, and the supplement was attached to the transportation management plan (TMP), Exhibit No. 70(b), as required by Park and Planning. A new TIS was done on June 26, 2014 (Exhibit 41), but both it and its predecessor, Exhibit 11, were superseded by the October 17, 2014 Revised TIS (Exhibit 63(e)). In addition, a supplemental TIS, dated February 5, 2015 (Exhibit 94(a)) and a further supplemental TIS, dated February 18, 2015 (Exhibit 106) were filed. According to Ms. White, the still-active TISs are the August 20, 2013 supplement, the October 17, 2014 Revised TIS (Exhibit 63(e)), and the supplements contained in Exhibits 94(a) and 106. Tr. 169-172.

### **a. Traffic Impact Studies (TIS):**

Ms. White testified that the transportation impact studies (TISs) of The Heights School were prepared in accordance with local area transportation review (LATR) guidelines. Per Technical Staff, seven area intersections were studied, and Ms. White found that, after approved improvements

to the intersection at Seven Locks and Tuckerman, all the studied intersections will meet LATR and operate within the threshold capacity level, which is 1450 for critical lane volume (CLV). She further testified that her TIS was evaluated by Technical Staff, the Montgomery County Department of Transportation and the Montgomery County Department of Fire and Rescue Services, and they all support the transportation elements of the plan. Tr. 141-147.

Technical Staff agreed that Petitioner’s proposal would comport with LATR and TPAR requirements. Although Staff took issue with the daily use of satellite parking until the garage is built, it clearly agreed that there would be adequate public facilities to handle the increase in activity from the proposed special exception modification. As stated by Technical Staff (Ex. 72, pp. 19-20):

As conditioned, the subject Special Exception Modification for the proposed increase in student enrollment cap from 460 to 650 students and associated increase in faculty and staff from a cap of 57 to 95 faculty and staff will satisfy the LATR and TPAR requirements of the Adequate Public Facilities (APF) review. . . .

. . . [The] Site Trip Generation table below . . . shows that the proposed development would generate a total of 147 new peak-hour trips during weekday morning peak period and 22 new peak-hour trips during weekday evening peak period. The School has a dismissal time before the evening peak hour, so two PM peak hours are reported. The School would still generate peak hour trips during the Commuter PM peak hour due to afterschool events related to sports, concerts, or other activities.

**Site Trip Generation**

Trip Generation Estimates	Student Enrollment	AM Peak Hour			School PM Peak Hour			Commuter PM Peak Hour		
		In	Out	Total	In	Out	Total	In	Out	Total
Existing Peak Trips (2011-12)	486	269	168	437	121	170	291	28	38	66
Additional Site Trips (34% increase)	650	91	57	147	41	57	98	9	13	22
<b>Total Future Trips</b>		<b>360</b>	<b>225</b>	<b>584</b>	<b>162</b>	<b>227</b>	<b>389</b>	<b>37</b>	<b>51</b>	<b>88</b>

Local Area Transportation Review (LATR)

A traffic study dated October 17, 2014, was submitted to determine the impact of the proposed development on the area transportation system. Five local intersections were identified as critical intersections for analysis to determine whether they meet the applicable congestion standard as well as the two driveway locations. All intersections are located in the Potomac Policy Area with a Critical Lane Volume (CLV) standard of 1,450. The proposed development trips were added to the existing and the background traffic (trips generated from approved but unbuilt developments) to determine the total future traffic. The total future traffic was assigned to the critical intersections to evaluate the total future CLVs. The result of CLV calculation is shown in the Summary of Critical Lane Volume Calculations table below.

### Summary of Critical Lane Volume (CLV) Calculations

Intersection	CLV Standard	Existing Traffic			Background Traffic		Total Future Traffic		
		AM Peak	School PM Peak	PM Peak	AM Peak	PM Peak	AM Peak	School PM Peak	PM Peak
Seven Locks Road & Tuckerman Road	1,450	1,514	1,073	1,090	1,323	1,063	1,339	1,044	1,066
Seven Locks Road & Bell Mills Road	1,450	1,073	818	818	1,074	824	1,103	828	828
Seven Locks Road & School Driveway North	1,450	794	602	910	801	926	842	638	990
Seven Locks Road & School Driveway South	1,450	1,011	850	1,023	1,012	1,023	1,244	622	1,045
Seven Locks Road & Democracy Boulevard	1,450	883	1,028	1,152	755	1,130	778	1,039	1,133
Seven Locks Road & Bradley Boulevard	1,450	1,310	1,197	1,352	1,312	1,200	1,335	1,372	1,204
Democracy Boulevard & Westlake Drive	1,450	829	678	951	870	1,032	888	744	1,032

As shown in the table, all intersections analyzed except for one are currently operating at acceptable CLV congestion standards. The intersection of Seven Locks Road and Tuckerman Road currently operates at an unacceptable CLV. However, as part of the approval for Westfield Shoppingtown Montgomery Mall (Preliminary Plan No. 12005018A) they are conditioned to provide funding to improve this intersection. The improvement is to reconfigure the eastbound right-turn lane on Tuckerman Road and make it a combined through/right-turn lane. The Westfield Shoppingtown Montgomery Mall has fully committed to fund this improvement and the construction will be done by Montgomery County Department of Transportation.

After the improvement at Seven Locks and Tuckerman Road is assumed, all intersections will operate at an acceptable CLV under the background development condition, and under the total future traffic condition with the proposed use on the Subject Property. [Emphasis added.]

#### Transportation Policy Area Review (TPAR)

The Property is located in the Potomac East Policy Area. According to the 2012-2016 Subdivision Staging Policy (SSP), the Potomac Area is inadequate under the transit test and adequate under roadway test; therefore, a TPAR payment of 25 percent of the Impact Tax is required.

#### Transportation Summary

The Special Exception has been evaluated by staff, the Montgomery County Department of Transportation (MCDOT), and the Montgomery County Department of Fire and Rescue Services, all of which support the transportation elements of the Plan. Staff finds the existing access to the site, as shown on the Special Exception Site Plan, to be adequate to serve the traffic generated by the development. Staff also finds that the internal walkways and right-of-way dedication on Seven Locks Road for future pedestrian/bicycle improvements to be constructed by MCDOT as shown on the Special Exception will provide adequate movement of pedestrian traffic.

Ms. White submitted a supplemental memorandum to Technical Staff on February 5, 2015 (Exhibit 94(a)) to evaluate the idea of using one or two satellite locations near the school to manage parking demand. The study looked at two potential off-site parking lot locations – the Pauline Betz Addie Tennis Center at 7801 Democracy Boulevard and the East Gate Swim and Tennis Club at 10200 Gainsborough Road. Ms. White conducted additional analysis to determine the impacts at the Seven Locks, Democracy Boulevard intersection, and she found that all intersections would operate acceptably. Technical Staff agreed (Exhibit 97). At the request of Staff, Ms. White did another supplemental TIS on February 18, 2015 (the day before the hearing), and she determined that LATR would still be met, even with the simultaneous operation of both off-site lots and a later dismissal time to cover more after-school activities. Exhibit 106. Tr. 148-156.

The use of the off-site lots was discussed on pages 27-28 of this report in connection with phasing issues. According to Ms. White, the proximity of the off-site locations to the school allows a shuttle bus to make frequent continuous loops, and the off-site parking is therefore a practical solution to manage parking demand in conjunction with the transportation management plan. The school start time is 8:20, and the shuttle could run starting an hour or so before that, probably with about 4 trips per hour. Logistically, that can all be worked out and managed so that it works successfully. There would be a slight decrease in traffic at the entrance to the school, so it might benefit the neighborhood. There are 20 to 30 parking spaces in each of those external lots. There is also a shuttle to and from the Grosvenor Metro station, which is more distant. Tr. 157-163.

**b. The Transportation Management Plan (TMP):**

Technical Staff stated in its report (Exhibit 72, p. 2, Condition 7.e), and Petitioner agreed (Exhibit 84), that it would adhere to a Transportation Management Plan (TMP) to:

- Manage the circulation of traffic at the School's driveway at Seven Locks Road;
- Manage on-site traffic circulation to effectively direct student drop-off and pick-up areas and coordinate on-site parking by faculty, staff, and students;

- Minimize the volume of traffic entering and exiting the campus through parking management and promoting, encouraging, and expanding existing transportation options and programs such as carpooling, use of public and private bus service, and walking and biking; and,
- Designate a staff member as Transportation Coordinator with the responsibility of coordination with faculty, staff and families in the implementation of measures deployed under the Transportation Management Plan.

The TMP is dated December 30, 2014, and copies are in the record as Exhibits 70(b) and 93(g). Specified measures include Traffic Management at Main Driveway, On-Site Circulation and Parking Management, Special Event Parking, Trip Mitigation Strategies, and Goal and Reporting Requirements. In addition, the August 20, 2013 Supplemental TIS, which is attached to the TMP, depicts site access and circulation, and describes queuing, as well as drop-off and pick-up operations, depicted below from Figure 2, on page 5 of the Supplemental TIS:

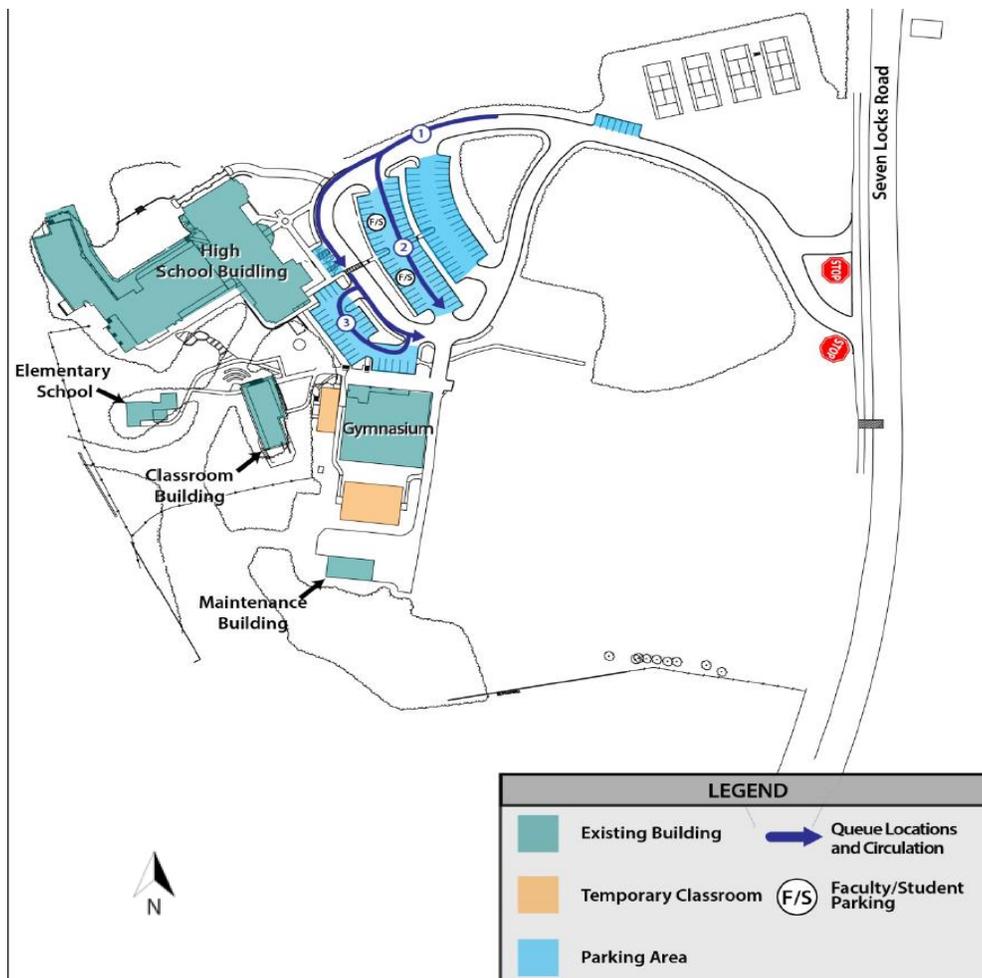


Figure 2: Drop-off/Pick-up Queue Locations and Circulation

As shown above, there are three drop-off/pick-up locations within the campus where vehicles queue. The first is along the main driveway around to the Gymnasium; the second is located in the parking aisle of the faculty/student surface lot; and the third is within the smaller surface lot south of the main building. According to Ms. White, all the queuing during drop-off and pick-up would occur on the premises. There will not be any backup onto Seven Locks Road because there is adequate space on the premises, considering the circulation of the driveway, to accommodate all the cars during both pick-up and drop-off, including all projected activity as well. Tr. 172-173. In Ms. White's professional opinion, the measures outlined in the TMP and the additional off-site parking options are likely to ensure that parking, access and circulation on the school site will function in an adequate manner even if the garage is not constructed first. Tr. 173-175.

Ms. White suggested that temporary parking provisions in the Transportation Management Plan (TMP) should have options. It could be expanded shuttle service; or it could be a robust carpool program; or it could be a number of these measures. The school would monitor the situation on an annual basis and see what is working best. This monitoring plan would be submitted annually to Park and Planning, to the County and also to a neighborhood liaison committee. Tr. 163-164.

Ms. White testified that it may not be necessary to use the tennis court for additional temporary parking, given the availability of both off-site lots (Exhibit 125(b)). There are about 124 on-site parking spaces, not including the tennis courts and off-site parking. Considering the requirement for future faculty and staff, which is 95 spaces; the projected requirement for student drivers, which is 40 spaces; and visitor spaces, as suggested by Technical Staff at 7 spaces, the total required would be 142 spaces. The difference between the 142 required and the 124 available spaces is 18 spaces. It is thus a question of how to accommodate an 18-space need. The two

satellite parking sites would provide more than enough extra parking to meet the 142 spaces needed until the garage is built. Tr. 165-168.

Finally, Ms. White opined that the traffic from all of the increases in staff, faculty and enrollment would not adversely impact conditions from an efficiency, operations or safety perspective. In her opinion, this private educational institute, as modified in accordance with what the petitioner requests, will not create a nuisance because of traffic. She further opined that the proposed modification would comply with the specific provisions of the Zoning Ordinance regarding traffic patterns and congestion in the neighborhood. The summer program is not involved because Petitioner is not requesting any increase in the summer program. Moreover, the site will be served by adequate public facilities, including public roads, and Petitioner has met the APF requirements. Tr. 177-183.

**c. The Fire Lane Establishment Orders:**

The final transportation issue involves carrying out the fire marshal's requirements to ensure proper access of fire-fighting equipment to the site. There has been some confusion about what is required at this juncture, in that there is a Fire Lane Establishment Order dated September 24, 2014 (Attachment 6 to Exhibit 72) and an "Interim" the Fire Lane Establishment Order issued on January 6, 2015, with an effective date of February 24, 2015 (Exhibit 120), presumably to be in effect until the campus renovations are completed.<sup>7</sup>

Technical Staff's final proposed conditions include the following terms:

4. Bring the site into compliance with all requirements of the Fire Lane Establishment Order signed October 21, 2014 (the Order requires compliance within 30 days). That Order may be amended by Montgomery County Fire and Rescue Services provided the amendments do not conflict with other conditions of the Special Exception approval.

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<sup>7</sup> There are also a number of other exhibits referencing the Fire Lane Establishment Orders (*e.g.*, Exhibits 34, 51, 52 and 115), but only the most recent one (Exhibit 120) needs to be addressed at this juncture.

- a. For the full buildout of the site as shown on the site plan:
  - i. Confirm that the October 21, 2014 Fire Lane Establishment Order remains in effect for final campus buildout. If a new Order has been approved for buildout, a copy should be filed with the Hearing Examiner.
  - ii. Sheet C-102 should match the approved Fire Lane Establishment Order for final campus buildout.
- b. For Interim conditions:
  - i. Implement the Interim Order within 30 days, as required.
  - ii. Amend final drawings to reflect the modified endcap shown on the Feb 24, 2015 Fire Lane Establishment Order
  - iii. Show new parking location for two full size buses during the interim conditions during which the Feb 24, 2015 will remain in effect.

\* \* \*

21. The applicant must comply with the conditions of Fire Access Plans dated July 25, 2013 and April 8, 2014. Those conditions may be amended by Montgomery County Fire and Rescue Services provided the amendments do not conflict with other conditions of the Special Exception approval.

Petitioner responded as follows to Technical Staff's recommendations (Exhibit 125, pp. 4-5):

- 4) Fire lane order – requirement to impose a “future condition” fire lane order to the School site now.
  - Ms. Saville's issues/concerns relating to the fire lane order is something that Petitioner does not fully understand. Frankly, the reason Petitioner sought an amendment to the original fire lane order issued on October 21, 2014 by the Fire Marshal's office is because it didn't make any sense to have an ACTIVE fire lane order (which must be implemented within 30 days of issuance) based on a site plan showing “future site conditions.” The recently issued interim order shows existing conditions on the site for implementation within 30 days of issuance, which includes retention of some parallel parking spaces in the School's egress driveway.
  - An approved fire lane order for the “future proposed Campus Master Plan site condition” is not normally a requirement for special exception modification approval. However, one was issued in this case in error and Petitioner simply acted to correct it.
  - The Fire Marshal's office has authority to issue fire lane orders irrespective of whether a site is going through the special exception process or not. Since a previous fire lane order could not be found for the School, it is not surprising that the Fire Marshal's office acted to issue one in this instance. The School agrees it

- should have one in place to meet life/safety requirements and will be moving forward with implementing the interim fire lane order recently issued forthwith.
- With that said, however, there is no reason that an approved fire lane order for the School's "future condition" Campus Master Plan must be in place now, nor is there any need for the special exception site plan to necessarily reflect the "future condition" fire lane order since the Fire Marshal's office will review existing fire lane orders at each building permit submittal and can reevaluate whether to keep or change the order at any given time, irrespective of what's shown on a special exception site plan.

It appears to the Hearing Examiner the fire lane issue has become unduly complicated. The Hearing Examiner will recommend a condition requiring the Petitioner to fully comply with the "Interim" Fire Lane Establishment Order (Exhibit 120) unless and until the Fire Department changes it. For obvious safety reasons, the Fire Department should not have get the Board of Appeals approval to impose any changes needed for fire safety. If any such changes are mandated, the Petitioner should comply and advise the Board of Appeals in writing of the changes.

Based on this record, the Hearing Examiner finds there are adequate transportation facilities for the safe and efficient operation of The Heights School both during and after completion of the proposed improvements, and that the proposed modifications will not put an undue burden on the neighborhood or its road network.

### **3. Operations, including Increases in Student Enrollment, Faculty and Staff:**

The most significant operational changes requested by Petitioner are an increase in the number of students from a currently permitted level of 460 to 650 (a 41.3 percent rise) and an increase in the number of faculty/staff from a currently permitted level of 57 to 95 (a 66.7 percent rise). The term "currently permitted level" is used with respect to both student enrollment and the size of the faculty/staff because the actual current enrollment of 529 students exceeds the level of 460 permitted by previous Board of Appeals resolutions, and the current number of faculty/staff of 74 also exceeds the level of 57 permitted under the current special exception.

Petitioner has a somewhat convoluted explanation of why it exceeded the previous caps on student enrollment and faculty and staff. Mr. Philip McGovern, the school's Chief Financial Officer, testified as to the financial difficulties and miscalculations that led to these exceedances, but he did not have an explanation as to why the school didn't just ask the Board of Appeals for permission to raise the caps. Tr. 31-43 and Exhibit 98. Ms. Lee-Cho stated that it took considerable time to put together the long-term master plan for the school, so that accounted for part of the delay. Tr. 41-43. In any event, this is not an enforcement proceeding, so the real issue in this case is whether the requested new levels meet the criteria for a private educational institution special exception, not whether the school is currently in violation, which it indisputably is.

Technical Staff analyzed the viability of the proposed student enrollment by comparing the proposed student density of 32.8 students per acre (650 students on a 19.8 acre campus) with the student density of other private schools in the area, showing their results in a chart on pages 39 to 40 of their report (Exhibit 72). It is reproduced below:

Case # and Name	Students	Acres	Students per acre	Faculty /Staff	Notes
S-1456-B Concord Hill School 6050 Wisconsin Avenue, Chevy Chase	100	0.86	116.3		Community Council meets twice annually; limited outdoor areas
S-2500 Primary Montessori Day School 14138 Travilah Road, Potomac	150	1.95	76.9	18	TMP; Ages 2 to 3 <sup>rd</sup> grade
S-2822 The Siena School 1300 Forest Glen Road, Silver Spring	225	2.7	83.3	55	TMP; 7 am to 7:30 pm; adjacent to park
S-2345 The French International School 7108 Bradley Blvd and 7108 Oak Forest Lane, Bethesda	200	2.9	69.0		Limited outdoor play area
S-2250 O.G. Ltd./Flower Hill Country Day	242	4.7	51.5		Open play area

Case # and Name	Students	Acres	Students per acre	Faculty /Staff	Notes
8515 Emory Grove Road, Gaithersburg					
S-2405 Chelsea School 711 Pershing Drive, Silver Spring	200	4.87	41.1	79	Site now being redeveloped
S-2287 Circle, Inc (Seneca Academy) 15601 Germantown Road, Darnestown	208	6.45	32.2	24	Play equipment and blacktop
S-688-E The Barnesville School, Inc. 21830 Peach Tree Road, Barnesville	252 + 30 extended daycare	10.718	26.3	28	Ballfields
S-411-A French School 9600 Forest Road, Bethesda	850	12.54	67.8		Community Liaison Council; ballfields and track
CBA-2904 Green Acres School, Inc. 11701 Danville Drive, Rockville	320	13.86	23.1		Ballfield
CBA-268 The German School 8617 Chateau Drive, Potomac	650	16.93	38.4	102	MOU with neighbors; TMP; student driving limited to top 2 grades
CBA-2197-C The Heights School 10400 Seven Locks Road, Potomac	650	19.818	32.8	95	Ballfields; TMP
CBA-1174 Holton-Arms School 7303 River Road, Potomac	665 + 20 daycare	21	32.6		Ballfields; courts; 300 parking spaces
S-687-B The Bullis School 10601 Falls Road, Potomac	900	24.86	36.2		Ballfields; track; TMP; yearly status report
S-285-E The Norwood School, Inc. 8821 River Road, Bethesda	600	38.1	15.7	200	TMP, 6 bus minimum, Community Liaison Council
CBA-1261 Barrie School 13500 Layhill Road, Silver Spring	716	44.86	16.0	85	Ballfields; pool; 214 parking spaces

In general, Technical Staff found that ((Exhibit 72, p. 39):

smaller sites have much higher ratios of students per acre; The Heights School is a larger site with density roughly in the middle of that size group. Larger sites appear to have more variability relating to site constraints, athletic facilities and parking. Schools on all sizes of sites have Transportation Management Plans, Community Liaison Councils, and provide regular reports to the Board of Appeals. Based on a review of

aerial photographs, the site constraints for The Heights School appear to be more extensive than for other schools of similar students per acre density. This observation is consistent with reports from the neighbors that the majority of activity is concentrated in a relatively small area which is located in close proximity to their homes.

Technical Staff concluded (Exhibit 72, pp. 40-41):

The review of other schools in the area confirms staff's belief that it may be possible to accommodate up to 650 students on this site, but that it isn't a certainty. As discussed elsewhere, staff recommends initiating a TMP, creating a Community Liaison Council, restricting certain play areas, and limiting increases in student, faculty and staff populations to incrementally coincide with or follow the provision of necessary facilities, starting with the parking garage.

The Hearing Examiner agrees with Technical Staff's analysis, finding that the proposed student density falls in the middle of the pack, and the additional suggestions of Staff, including the TMP which has already been discussed, the proposed Community Liaison Council, and other restrictions proposed in conditions should result in a level of activity that remains compatible with the community. The Hearing Examiner will also recommend that the school be required to report student enrollment and faculty/staff levels for the upcoming school year to the Board of Appeals in June of each year to ensure that exceedances are avoided in the future.

The Heights School's Headmaster, Alvaro de Vicente, testified that although the school is seeking an enrollment up to the 650 students, the ideal enrollment would be about the 625 students to grow the younger grades and balance the number of students without losing the school's personal approach to each student. The petition for a cap of 650 is to allow for natural fluctuation from year to year, depending on the application pool that the school gets. Programmatically, the increase in student enrollment would allow the school to improve the curriculum, by offering more electives which would enrich the experience. Moreover, it would allow more variety in the extra-curricular activities, including athletics and the arts. According to Mr. de Vicente, only a small number of additional students beyond the current 529 can be accommodated with the existing facilities. Tr. 44-47.

The Heights School is not seeking to add activities, *per se*, and the specified hours of operation largely reflect what is already ongoing at the school. As stated by Technical Staff (Exhibit 72, p. 9),

The school day currently runs from 8:20 am to 3:05 pm. Facilities personnel arrive on campus at 7:00 am, and students begin to arrive at 7:30. After school athletic games are normally completed by 6:30 pm, except basketball games which usually occur from 6:00 pm to 9:00 pm. Other events, such as Open Houses, Parent-Teacher Conferences, a family Christmas Party, a Spring Play, and graduation ceremonies, occur on weekday or weekend evenings. They generally conclude by 10 pm to 11 pm.

The Heights School has been operating a summer program for “a maximum of 200 boys at any one time” since 1980. Hours are from 9:00 am to 3:00 pm, Monday through Friday. No change is proposed.

Technical Staff suggested ending regular school hours at 6:30 p.m., but Mr. de Vicente would like the authority to run generally till 9:00 p.m. to give flexibility because there are going to be times when sporting events run beyond. There are also very small group activities, such as a mothers’ reading book club or a dads’ meeting, that will go past 6:30. These are not official school activities. Approximately 50 events per year last past 6:30. There are a small number of activities that last until 11 p.m. The alumni reunion mass and dinner is the only weekday evening activity that lasts until 11 p.m. There are about 12 weekend school activities that last until 11 p.m., as specified in the second amended statement of operations (Exhibit 93(e)). Tr. 52-58. Given these facts and the concerns of the neighbors to the west of the school about activities going until 11 p.m. (Exhibits 31 and 33), the Hearing Examiner sees no reason to allow up to 50 activities a year extending until 11 p.m., as recommended in Staff’s proposed Condition 6; rather, he recommends a limit of 15 such activities per year. Instead of expanding the regular operation hours to 9:00 p.m. as requested by Mr. de Vicente, the Hearing Examiner adopts the modification to Condition 5 suggested by Petitioner in Exhibit 84, which would allow some specified school activities to continue until 9 p.m. Summer hours would remain limited to between 9:00 a.m. and 3:00 p.m.

Other proposals to address the neighbors’ concerns about student activities will be discussed in the next section of this report.

## **E. Compatibility, Community Concerns and the Community Liaison Council (CLC):**

### **1. Compatibility:**

The first question regarding compatibility is whether the proposed structural changes to the campus will be architecturally compatible with the neighborhood. Petitioner's "Section 59-G Statement of Compliance" (Exhibit 63(g)) addresses compatibility as follows:

. . . the proposed structural changes on the School's campus will be compatible both with the existing structures and with the neighborhood in scale, bulk, height, materials and textures. The conceptual elevation sketches for all of the new buildings show them to be well related to the surrounding areas, nicely landscaped, divided into distinct planes and textures, and extensively fenestrated. None of the proposed new buildings and expansions exceed the 35 foot (to the tallest point of roof surface) height limit applicable in the R-90 zone. In addition, as shown on the Special Exception Site Plan, the present application includes a proposed ADA compliant lead-in sidewalk to improve accessibility onto and around the campus.

\* \* \*

The exterior architecture of the School's existing and proposed buildings, including the Middle School renovation/addition and new Lower School building, are proposed to be similar in style to the gabled roof designs of the single-family homes that is predominant in the area. The proposed Theatre/Dining Hall will retain a gable-element, but will be designed with a more modern sensibility befitting the building's core purpose and function, which is as a performing arts center.

This description was buttressed by the testimony of Petitioner's architect, Joanna Schmickel, at the hearing. Ms. Schmickel testified that to make the massing of the lower school building feel like a residential building, it will have a sloped roof and gable ends, and it has materials that would be consistent with a residential building, such as siding and some stone in side walls. Those are all materials that would be very comfortable in a residential area, and it is sited in such a way that it would feel comfortable in a residential area. All the construction that is being proposed, the middle school and the lower school, will be designed to feel residential, although that is a little harder to do for the performing arts center because of the volume. Its proposed size has been pared down to assure compatibility with the surroundings. Tr. 103-114.

Technical Staff agreed, finding "the proposed buildings to be compatible in appearance with

the surrounding residential uses.” Exhibit 72, p. 36. Although the neighbors to the west of the school, on Democracy Lane, expressed concern about the proposed two-story replacement of the middle school (Exhibits 28, 29, 31 and 33), there is no expert evidence to contradict the testimony of Petitioner’s architect that it would be compatible with the neighborhood, an opinion endorsed by Technical Staff, as noted above. Moreover, two story buildings are common in residential neighborhoods, and this building will be heavily screened by trees, so there is nothing about the height of the building that militates against its approval.

Based on this record, the Hearing Examiner finds that the new structures proposed by Petitioner will be architecturally compatible with the surrounding neighborhood.

## **2. Community Concerns**

Concerns of the surrounding neighborhood were expressed both in letters and in testimony at the hearing. A number of letters in opposition were filed during the lead-up to the OZAH hearing (Exhibits 28, 29, 31, 33, 66, 68, 73, 86 and 87). The opposition generally breaks down into two groups – those who live south of the site in the “Potomac Pond Homes” (See *e.g.*, Exhibit 68) and those who live west of the subject site, along Democracy Lane (See *e.g.*, Exhibit 33); however, only those living in the Potomac Pond Homes area appeared to testify at the hearing. Tr. 232-261.

The Democracy Lane neighbors raised concerns about the proposed height of the middle school (discussed above at pp. 55-56); the increase in student enrollment (discussed above at pp. 50-53); the school activities going on to 11 p.m. (discussed above at p. 54); possible stormwater runoff (discussed above at pp. 39-42); and possible effects on their property values. As to this final point, there is no evidence in this case that the proposed changes will have any adverse effects on nearby property values. In order to mitigate impacts on the nearby homes, Technical Staff proposed a number of conditions, most of which have been adopted by the Hearing Examiner, some in modified form based on the evidence adduced at the hearing.

The Potomac Pond Homeowners Association (PPHA) spelled out its concerns and suggestions in numerous filings. Exhibit 68(a), filed by Larry Freeman, President of the Board of the PPHA, both describes the community and states the Association's views.

. . . Potomac Pond is a community just to the south of Heights School that consists of 38 homes on three cul-de-sacs.

- 21 homes on Grand Teton Drive (off of Seven Locks Road); the back and/or side yards of about a dozen of these homes abut the south boundary of The Heights School property.
- 12 homes on Appalachian Terrace (off of Democracy Lane); the back and side yard of one of these homes abuts the south boundary of The Heights School property.
- 5 homes on Matterhorn Court (off of Seven Locks Road).
- Property connecting the above homes including a 1 acre pond, lawns, walkways, wooded areas and a small pond-side sitting area are owned & maintained in common by the 38 homeowners.

Note also that part of The Heights School's Storm Water Drainage System empties in our pond (located between Grand Teton Drive and Matterhorn Court), which in turn empties into the County Storm Water Drainage System.

With the exception of specific issues relating to homeowners immediately bordering the School our residents and the Home Owners Association itself have had reasonable relationships with The Heights School over the years, but we do have concerns about how the proposed expansion will result in expanding additional issues that impact us, including but not limited to noise levels, traffic on Seven Locks Road, foot traffic by students through our properties, storm water overflow into our Storm Water Drainage System, baseballs and other hard balls being hit or thrown over the fence, and perhaps most importantly, the incidents of deliberate destructive, even dangerous pranks. . . .

The PPHA indicated in pre-hearing Exhibit 68(a) that it would prefer if the modification petition were denied, and it also made a number of suggestions in the event that it is granted. However, since Exhibit 68(a) predated both the Technical Staff report and the OZAH hearing, it is more useful to consider the suggestions made at and after the hearing by the PPHA's representative, Eugene Feinberg. Mr. Freeman could not attend because of a prolonged illness.

Eugene Feinberg testified that PPHA and he "take severe issue with any growth in student population until the school provides physical infrastructure, practices and policies needed to prevent their students from depriving our homeowners of their rights to privacy and safety." Tr. 233.

Mr. Feinberg gave examples of problems, some of which he admitted have been mitigated by statements made at the hearing – hard balls and rocks hit or thrown over the fence that bounds the south side of the school's athletic field threaten homes that immediately abut that boundary. Students that trespass on PPHA properties, invade their privacy, are often noisy and over the years have caused residents to give up the walkway through the woods west of the pond because of its misuse. Intrusive noise levels come from the school grounds, mainly on weekdays but sometimes on weeknights or weekends. Parking and traffic delays on Seven Locks Road impede the only means of access to many PPHA's homes, although The Heights School has a policeman to control traffic coming in and out of The Heights School during rush hour. These problems have been ongoing for many years. Often they've been brought to the school's attention. In most instances when culpability has been clear, the school has paid to repair the physical property damage. In other cases, the school indicated that it took some sort of disciplinary action. However, the problems still have persisted. Tr. 233-235.

Mr. Feinberg stated that at the proposed level of 650 students, the ratio of students per acre substantially exceeds by a factor of five or more than of any other K through 12 private school in Montgomery County that has a baseball field. The Hearing Examiner notes that restricting the student-density comparison to schools “with baseball fields” is not consistent with the specific criteria in Zoning Ordinance §59-G-2.19(a)(4)a., which speak only to student density per acre, with or without baseball fields. The Hearing Examiner therefore has relied on Technical Staff's comparison of student densities, as forth in pages 51 to 53 of this report. That comparison demonstrates that the proposed student density of 32.8 students per acre is quite ordinary, and is certainly well below the 87 student per acre maximum set forth in that section.

Mr. Feinberg feels that the school has had a past record that has not been satisfactory in resolving long-standing issues with its neighbors, and granting The Heights School's expansion

petition would significantly exacerbate the situation. He and the PPHA therefore request that The Heights School's expansion petition be denied until the above issues have been satisfactorily resolved. Tr. 235-236.

Mr. Feinberg urged that at a minimum, the Board impose the conditions recommended by the Planning Commission. Furthermore, he urged that the following additional conditions be imposed (Tr. 236-239 and Exhibit 108):

1. That the school's census not be permitted to grow until new supporting infrastructure is in place. . . .
2. That new fencing along Seven Locks Road be added to prevent students from intruding into the area south of the athletic field and into the southwest corner of The Heights School property. Unless the school can block that southwest corner from the lower school from students coming down, there is no physical blockage to prevent them from coming up onto Grand Teton Drive or onto Appalachian Terrace through the back way. The proposed split rail fence only covers part of it.
3. That new construction of the extended gymnasium and theater adopt modern, soundproofing techniques.
4. That the school be required to avoid local, on-street parking by formally arranging for overload parking with shuttle bus services required.
5. Most importantly, that the school be required to provide a security officer to patrol the outer boundaries of the school during high egress periods and after the conclusion of high attendance athletic and other special events.
6. That the school's order of construction be formalized and that construction of the theater and parking garage occur concurrently.
7. That the school implement a periodic notification and violation policy applicable to student intrusions into both the category one conservation easement area, that area down in south central, and PPHA property.

Mr. Feinberg stated that he was encouraged by the fact that the Community Liaison Council will meet every six months and will give all the neighbors a chance to sit down with the school, and air whatever issues have come up in the preceding six months, with reports back to the County. Tr. 257-258. Mr. Feinberg's testimony was supported by two other residents of the Potomac Ponds community, Yun Chow Whang, who testified about damage to his property from balls, rocks and other student activity (Tr. 246-248), and Stephen Sawmelle, who testified as to his fear that an increase in enrollment would lead to more noise and disruption to his daily life. Tr. 249-257.

At the hearing, The Heights School's Headmaster, Mr. de Vicente, testified as to issues

raised by the neighbors during a meeting with them on January 19, 2014 (Tr. 59-77). First he summarized the concerns raised:

1. The noise level on the west side of campus behind the middle school in the morning before classes begin, during the morning break and during lunchtime;
2. The views of the proposed middle school building;
3. Trespassing by students in the afternoon down the south side of the campus; and
4. The athletic, lacrosse and baseballs going over to the neighbors' yard.

Mr. de Vicente thought the meeting was very positive, and he addressed each concern (Tr. 60-74):

1. The noise problem is created by the sixth and the seventh grades, who use that part of the building. The new middle school building will reduce the noise level by bringing some activity indoors. Mr. de Vicente addressed the boys at an assembly about being good citizens, and that includes being good neighbors. He also told them not to wander off the property, climb the fence and walk into the neighbors' back yards. The middle school head is going to be meeting with the faculty of the sixth and seventh grade on a regular basis to monitor the noise issue. Also, as part of his weekly administrative council meeting, as of two weeks ago, he added a standing item of neighbor relations so that there is a way to bring those things up and deal with them in the school-wide manner if need be.
2. Mr. de Vicente proposes to screen the middle school building with evergreens and a split-rail fence to address both the noise issue and also the views of the new middle school building from the neighbors' west side properties.
3. The security trespassing question is in the southwest where there is no fence. It's the only spot in the whole campus that doesn't have that fence, and he would be happy to add it.
4. The problem of the balls going over must be during practices or playing around because during the actual games, the diamond is on the southwest corner of the field and the field has a very long left field. Mr. de Vicente talked to the athletic director after the neighbors meeting which Mr. Reghi attended, and the athletic director has talked with the coaches, lacrosse and baseball, about shifting the way practice is held so as to avoid the balls going over. The coaches are to communicate with the athletic director immediately if any balls do go over so that the situation can be rectified. He would add the netting if the operational fix does not work since the netting would be an expense and an eyesore.

In addition to the filings and testimony already discussed, on February 27, 2015, Larry Freeman, President of the Board of the Potomac Pond Homeowners Association (PPHA), filed a letter (Exhibit 114) further expressing his views. The letter attached photos of the site (Exhibits 114(a) – (c)) and six new opposition letters from neighbors (Exhibits 114(d)(1) – (d)(6)). The

Hearing Examiner will not consider the additional opposition letters contained in Exhibit 114(d) because they were filed after the hearing; it would be unfair to allow this new evidence in without giving the Petitioner the opportunity to respond at the hearing; and these new submissions are not responsive to the reasons the record was left open – to give the hearing participants the opportunity to respond to the late-filed supplemental comments from the Technical Staff. There was ample opportunity for the residents of the community to submit letters prior to the hearing and/or testify at the hearing, but apparently some chose not to. In any event, many of their concerns have already been addressed in the evidence that was admitted.

The Hearing Examiner will consider Mr. Freeman's additional submission (Exhibits 114 and 114(a) – (c)) because he was already a party of record in the case, and he made his views known in detail prior to the hearing, which his illness prevented him from attending (Exhibit 68(a)). Mr. Freeman's additional submission suggests that more netting and split rail fencing will not solve the baseball intrusion and student trespassing problems. Instead, he suggests that the school assign a staff member to monitor the southern border at close of the school day and during other highly attended outdoor events.

Mr. Freeman may be right, and it was agreed at the hearing that Petitioner would attempt some operational changes to handle the errant baseball problem before adding more netting, and would close the gap in fencing that currently exists. If that does not work, they have agreed to make additional changes to solve the problem. Tr. 73-74. If either problem persists (*i.e.*, errant baseballs and trespassers), the PPHA should bring it up at a Community Liaison Council meeting, and seek the school's agreement to take other measures, such as assignment of a staff member to monitor the southern border at close of the school day and during other highly attended outdoor events. Failing that, PPHA can report the problem to the Board of Appeals, which will retain jurisdiction to review developments in this case, if it follows the Hearing Examiner's recommendation to that effect.

Eugene Feinberg made an additional submission on behalf of PPHA on March 9, 2015 (Exhibit 117) in response to Petitioner's submissions filed on March 2, 2015. He supplemented that submission on March 29, 2015 (Exhibit 124). Those two submissions seek to ensure that the plans reflect completion of the split rail fence around the site and to obtain the additional condition suggested by Mr. Freeman – a staff border monitor. The Hearing Examiner addressed the question of whether the plans sufficiently reflect the complete split-rail fence on page 34 of this report, indicating that he would ensure that Petitioner's plans include the missing fence segment referred to at the hearing by recommending a condition to that effect to discourage students from trespassing onto private property. The border monitor issue is addressed in the paragraph just before this one.

The Hearing Examiner is satisfied that the issues raised by the Opposition have been addressed either at the hearing or by conditions recommended in this case. He recommends that the Board retain jurisdiction to monitor developments on the site as the building program progresses, based on submissions from the Community Liaison Council, which will be discussed below.

### **3. The Proposed Community Liaison Council (CLC):**

Finally, Technical Staff recommended creation of a Community Liaison Council, which is Staff's proposed Condition 7.f., as modified in Exhibit 121, p. 2. A Community Liaison Council (CLC), is a group consisting of representatives of the school and the community who meet regularly to discuss issues of mutual interest and report back to the Board of Appeals. CLCs, which have been widely used in the County, are designed to facilitate discussions between institutions such as The Heights School and its neighbors on issues of mutual concern. Petitioner has agreed to the creation of a CLC (Exhibit 84), and the community seems to love the idea. Tr. 257-258. The Hearing Examiner agrees that a CLC would be a useful tool in this case, and has recommended the following condition in Part V of this report:

Petitioner must establish a Community Liaison Council (CLC) to address operational impacts, construction schedules, staging areas, faculty, staff and student populations,

parking arrangements, and to answer questions and receive community input, if any. The CLC shall consist of school representatives, representatives of neighboring civic associations and homeowners associations, and adjacent and confronting property owners who wish to attend. The Heights School must provide a calendar of events on their website to allow neighbors to have reasonable notice of campus events and CLC meetings. Meetings must be held at least twice per calendar year. Petitioner must provide minutes of the meetings to the CLC members and the Board of Appeals within 30 days after each meeting. Petitioner must provide the CLC with direct contact information for the Assistant Headmaster and must provide regular reports to the CLC of trespassing incidents, if any.

Based on this record, the Hearing Examiner finds that the proposed facilities have been designed to be compatible with the residential neighborhood and that Petitioner's activities can be sufficiently controlled by conditions to minimize adverse effects on the community. Proposed screening and various operational controls will be used to accomplish this end. Following a summary of the hearing, the legal standards will be discussed in Part IV of this report, followed by the Hearing Examiner's recommendations in Part V.

### **III. SUMMARY OF THE HEARING**

The hearing was held on February 19, 2015. As a preliminary matter, to avoid even the appearance of a conflict of interest, the Hearing Examiner disclosed that his wife is a teacher at the Norwood School, which, like The Heights School, is a private educational institution in the County. No objection to the Hearing Examiner serving in this matter was raised by any party. Tr. 9. The Hearing Examiner noted that corrections to Technical Staff report (Exhibit 72) were made in Exhibit No. 81, and those corrections were entered in ink into the OZAH file. The Hearing Examiner then asked whether there was any objection to the petition amendment noticed on February 9, 2015; hearing none, the amendment was granted. Tr. 10. The Hearing Examiner also distributed to all parties present copies of the Technical Staff's comments received on the morning of the hearing (Ex. 97), noting that the parties would be given an opportunity to comment in response. Tr. 10-11.

Petitioner called five witnesses, and four neighbors who live to the south of the subject site testified in opposition, including a representative of the Potomac Pond Homeowners Association (PPHA). None of the neighbors who live to the west of the site, along Democracy Lane, appeared at the hearing.

All participants were given until March 2, 2015, for additional submissions requested at the hearing, including responses to the email from Technical Staff received on the day of the hearing (Exhibit 97). All participants were, in addition, given until March 9, 2015, to respond to comments received by March 2, 2015. The record was held open until March 9, 2015 to receive these additional submissions.

#### **A. Petitioner's Case**

Petitioner, represented by Soo Lee-Cho, Esq., opened by stating that the current modification request includes both physical and operational aspects of the special exception over the next 15 years. The last major modification occurred in 1996, with an amendment in 2000. Petitioner is asking for an increase in enrollment and faculty, but many of the other operational aspects described in the Statement of Operations, including evening and weekend activities, sporting events, and the summer camp were generally approved back in 1980, without specifying details. Petitioner is not asking for a change, *per se*, to the activities they believe have been previously approved. Tr. 26-29.

Petitioner called the five witnesses at the hearing – Mr. Phil McGovern, Chief Financial Officer of The Heights School; Mr. Alvaro de Vicente, Headmaster of The Heights School; Ms. Joanna Schmickel, an expert in Architecture; Ms. Nicole A. White, a traffic engineer and expert in transportation planning; and Mr. Aaron B. Smith, an expert in civil engineering.

##### 1. Philip McGovern (Tr. 31-43):

Mr. Philip McGovern testified that he is the Chief Financial Officer of The Heights School

and has been employed at the school since October 1, 2002. The Heights School is an independent all-boys school “with a Catholic spirit.” It is not an archdiocesan school, and the property is not owned by the Catholic church. It consists of a lower school, third through fifth grade; a middle school, sixth through eighth grade; and upper school, ninth through twelfth grade. Tr. 32-33.

Mr. McGovern further testified that the school student body target is the lower and middle income family, especially those with large families. He then gave his explanation of the current over-enrollment situation at The Heights School. Before the collapse of the economy beginning in 2007, the school had several years of very strong enrollment, not exceeding the 460 enrollment cap, fundraising was going very well, and all indications that the school was very strong and was building an endowment for the school. During that time, the school borrowed 20 million dollars from Chevy Chase Bank to build a new academic building. Then the economy collapsed. [In his October 21, 2014 letter to the Hearing Examiner (Exhibit 98), Mr. McGovern asserted that the school had thought that the economic downturn would cause enrollment to drop, so it over-accepted applicants to keep enrollment up. To the school’s surprise, enrollment did not drop.] Tuition income dropped after the economic downturn, even though enrollment did not decline, because people needed financial aid to send their kids to the school. It was not the school’s intent to be in defiance of County rules, but the school did not want to compromise its mission by firing faculty and dismissing the students who couldn't pay their tuition.

When Capital One Bank bought Chevy Chase Bank, it reappraised the property values, and found the school in default of its loan even though the school was making all payments. The school determined that, to survive, it needed to continue to keep the number of kids it had enrolled, create a Master Plan for the campus and mitigate traffic impacts. The school accepts that it did the wrong thing in exceeding its enrollment and staffing caps, but had thought it would be temporary until the unanticipated loan default occurred. It is therefore now pursuing a permanent solution. Tr. 33-41.

Mr. McGovern did not have an explanation as to why the school didn't just ask the Board of Appeals for permission to raise the caps, but Ms. Lee-Cho stated that it took considerable time to put together the long-term master plan for the school. Tr. 41-43.

2. Alvaro de Vicente (Tr. 44--87):

Mr. Alvaro de Vicente testified that he is the Headmaster of The Heights School. This is his 13th year as headmaster at the school and probably 20th as an employee of the school. The Heights School is seeking an enrollment up to the 650 students. The ideal enrollment would be about the 625 students to grow the younger grades and balance the number of students without losing the school's personal approach to each student. The petition for a cap of 650 is to allow for natural fluctuation from year to year depending on the application pool that the school gets.

Programmatically, the increase in student enrollment would allow the school to improve the curriculum, by offering more electives which would enrich the experience. Moreover, it would allow more variety in the extra-curricular activities, including athletics and the arts. Tr. 44-47.

Only a small number of additional students beyond the current 529 can be accommodated with the existing facilities. The construction plan is very long-term because the school doesn't have the funding to realize any of the plans, so it would entail a very significant, major fundraising effort. Also, the facilities are not the only need; there is also a need to raise funds for faculty compensation and financial aid. He feels that the building that should be constructed first is going to depend on donor intent. If the school gets a very generous donor who desperately wants the auditorium, Mr. de Vicente would want the flexibility to build that first to obtain the donation. It could be very hard to fundraise for an underground parking garage. Tr. 47-49.

Mr. de Vicente is agreeable to utilizing off-site parking, and there are a couple locations nearby that could be used for that purpose. The use of off-site parking worked very well during the 2006/2007 school year which is the school year when the signature building was being constructed. The staging for that construction was the on-site parking lot. So, during that school year, there was

zero parking on campus and the school used off-site parking and shuttle buses in the morning and the afternoon. He is comfortable with the transportation management plan (TMP), Exhibit 93(g), that has been developed as part of this application and believes it will be workable and effective for the school. It is not safe to park along Seven Locks Road. Tr. 49-52.

The school requested hours of operation ending at 9:00 p.m., and Technical Staff suggested 6:30 p.m. Mr. de Vicente would like 9:00 p.m. to give flexibility because there are going to be times when sporting events run beyond. There are also very small group activities, such as a mothers' reading book club or a dads' meeting, that will go past 6:30. These are not official school activities. Approximately 50 events per year last past 6:30. There are a small number of activities that last to 11 p.m.. The alumni reunion mass and dinner is the only weekday evening activity that last until 11 p.m. There are about 12 weekend school activities that last until 11 p.m., as specified in the second amended statement of operations (Exhibit 93(e)). Tr. 52-58.

According to Mr. de Vicente, four main issues were brought up by the neighbors at the meeting with them on January 19, 2014 (Tr. 59):

1. The noise level on the west side of campus behind the middle school in the morning before classes begin, during break time in the morning around 10:30 and also lunchtime;
2. The views of the proposed middle school building;
3. Trespassing by students in the afternoon down the south side of the campus; and
4. The athletic, lacrosse and baseballs going over to the neighbors' yard.

Mr. de Vicente thought the meeting was very positive, and he addressed each concern (Tr. 60-74):

1. The noise problem is created by the sixth and the seventh grades, which use that part of the building. The new middle school building will reduce the noise level by bringing some activity indoors.<sup>8</sup> Mr. de Vicente addressed the boys at an assembly about being good citizens, and that includes being good neighbors. He also told them not to wander off the property, climb the fence and walk into the neighbors' back yards. The middle school head is going to be meeting with the faculty of the sixth and seventh grade on a regular basis to monitor the noise issue. Also, as part of his weekly administrative council meeting, as of two weeks ago, he added a standing item of neighbor relations so that there is a way to bring those things up and deal with them in the school-wide manner if need be.

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<sup>8</sup> Technical Staff proposed a Condition 23 under which these lockers for the students will be indoors in the new building. Exhibit 72, as corrected by Exhibit 81.

2. Mr. de Vicente proposes to screen the middle school building with evergreens and a split-rail fence to address both the noise issue and also the views of the new middle school building from the neighbors' west side properties.
3. The security trespassing question is in the southwest where there is no fence. It's the only spot in the whole campus that doesn't have that fence, and he would be happy to add it.
4. The problem of the balls going over must be during practices or playing around because during the actual games, the diamond is on the southwest corner of the field and the field has a very long left field. Mr. de Vicente talked to the athletic director after the neighbors meeting which Mr. Reghi attended, and the athletic director has talked with the coaches, lacrosse and baseball, about shifting the way practice is held so as to avoid the balls going over. The coaches are to communicate with the athletic director immediately if any balls do go over so that the situation can be rectified. He would add the netting if the operational fix does not work, since the netting would be an expense and an eyesore.

[The Hearing Examiner asked Mr. Feinberg to get in touch with Mr. Reghi to determine if he agreed to that plan.]

3. Joanna Schmickel (Tr. 87-141):

Ms. Joanna Schmickel testified as an expert in Architecture. She described the campus and buildings thereon. She noted that the existing middle school is a one story building built in the 1960s and is not adequate for educating for today's needs. It is an existing building that would be improved. There are also two log homes, one is of the same era, maybe even earlier and the other one newer. Both of these buildings house the lower school. The upper school is in the signature building, and it connects over to the middle school. There is a gymnasium on the campus, which is a metal frame building, very industrial, and does not provide an awful lot of amenities. There are several portable buildings. One is a facilities building where the facility maintenance folks keep all of their equipment. There are two that are actually used as part of the academic program. Also on campus are a few play fields, an upper play field, a soccer field, and a lower play field for baseball. They have a few basketball courts. The basketball courts are in the center of the site. In the northeast corner of the site are tennis courts. The topography of the site is very lovely, but a bit

challenging to build on. There is a valley along the west side, and the campus slopes into the valley. There is some contour leading off to the east side so the campus, and the signature building and the gymnasium are at the high point of this site. The updated, illustrative campus master plan and elevations were marked as Exhibit No. 104. Tr. 87-98.

Ms. Schmickel reviewed the campus Master Plan. The surface lot is reduced from about 130 existing spaces to about 98 spaces in final master plan. The signature building is to remain and then the middle school at the back of the site on the northeast, northwest corner is replaced in its current location. The footprint has very moderate adjustments. It is, however, a two-story building and it will allow for expansion of classes, more classes which will allow for some of the middle school classes that are currently in the upper school to move over to their own school. There are some larger gathering spaces there that do not exist in the current middle school. The building will meet all ADA requirements, all accessibility requirements. It very much does not now, and the lockers will be brought inside, which will also move some of that noise inside. In the central area of the valley a lower school will be added, approximately 8,500 square feet, two floors. Both of these buildings are two floors, and their massing and materials are such that they do have a residential feel. There's going to be some wood siding and stone and materials to provide that residential feel. So the lower school is item number five on the plan. Number six is the athletic building that has been previously approved but it is now shown here taking the space that's the existing gymnasium as well as some of the existing modular, portable buildings outside of the gymnasium. To the east of the athletic building is the new play field. It is on a structured parking garage. The parking is below that. The additional parking will be used primarily for events, and the school does not require the number of spaces to be provide, 159 spaces in this structured parking, in addition to the remaining 98 on the surface lot, to total about 257 parking spaces. That's not necessary for the school's day to day activity but it is going to be very helpful when they have an event at the gymnasium or an event like a graduation or something of that size. There's an upper field that goes

over top of the parking and then a lower field. These are basically in the same location as their two fields now. They do step downhill now, but they'll be updated and graded differently. The basketball courts in the center of the campus will be replaced by the performing arts and dining building. The garage is to be underneath the new play field, adjacent to the new auditorium. There will be a connection below ground from the garage to the new auditorium and to the new athletic building. Tennis courts will remain in their current location on the northeast corner of the site. Tr. 99-102.

Ms. Schmickel further testified that she is working to make the massing of the lower school building feel like a residential building. In this case, it has a sloped roof and gable ends, and it has materials that would be consistent with a residential building, such as siding and some stone in side walls. Those are all materials that would be very comfortable in a residential area, and it is sited in such a way that it would feel comfortable in a residential area. All the construction that is being proposed, the middle school and the lower school will be designed to feel residential, although that is a little harder to do for the performing arts center because of the volume. Its proposed size has been pared down to assure compatibility with the surroundings. Tr. 103-114.

The 159 parking spaces planned for the garage is more than actually needed. If everything is built out on this campus only 135 spaces would actually be required. The school is required to have one space per faculty or employee and one per student driver. Right now, based on the number of enrolled student drivers (35) and the number of faculty/staff drivers (74), 109 spaces are required, and the school has 130. The future enrollment of 650 would project to 95 faculty/staff drivers and 40 student drivers, and zoning requirement would be for 135 total spaces. Under the proposed plan, there would be 98 surface parking spots and 159 below the play field in the structured parking, totaling 257 spaces. That will give the school the additional parking that is required to support their events. This includes five ADA accessible spaces and four motorcycle spaces. Tr. 114-119.

One interim alternative that was mentioned by the Technical Staff was to create more spaces during construction of the garage where the current tennis courts are located. The school doesn't want to lose its tennis courts long term, but you could get an additional 50 spaces there. Tr. 120-123. [Ms. Lee-Cho indicated that the school did not want to lose the tennis courts for a long time because they are part of the school program. They would want to recoup that as soon as possible. But it's just also the garage is a very expensive endeavor, and to have that be required to go first is essentially saying that the school can't realize this master plan for a very long time. Tr. 126-129.]

As to phasing, Ms. Schmickel opined that ideally she would start with the lower school and then the middle school. The lower school would provide swing space to move the kids from the middle school over to the lower school during construction of the middle school, which ideally would go second. These are swing spaces so that other functions could be moved into the lower school during other construction. The athletic building and the play fields and the garage and the theater would be at the end of the sequence. Tr. 124-125.

Ms. Schmickel addressed the issue of screening interim parking on the tennis courts. In the Potomac Subregion Master Plan, on page 36, it indicates that parking should be located and landscaped to minimize commercial appearance, and in the situations where the side or rear yard parking is not available, front yard parking should be allowed only if can be adequately screened and landscaped. In her opinion, the school does have adequate space to screen and landscape this parking. She also feels the additional 50 spaces on the tennis court would provide adequate parking during the construction, and circulation-wise it would work quite well with the school's traffic pattern. Tr. 130-133.

Ms. Schmickel further testified that, in her professional opinion, The Heights School's master plan and special exception modification proposed will be consistent with the general plan and development of the district including the Potomac sub-region master plan adopted by the county. She further opined that it would comply with all the general and specific zoning ordinance requirements for this type of special exception. Tr. 133-141.

4. Nicole A. White (Tr. 141-194):

Ms. Nicole A. White testified as an expert in traffic engineering and transportation planning. She prepared a transportation impact study (TIS) of The Heights School in accordance with local area transportation review (LATR) guidelines. Per Technical Staff, seven area intersections were studied, and she found that, after approved improvements to the intersection at Seven Locks and Tuckerman, all the studied intersections will meet LATR and operate within the threshold capacity level which is 1450 for critical lane volume. The report was evaluated by Technical Staff, the Montgomery County Department of Transportation and the Montgomery County Department of Fire and Rescue Services, and they all support the transportation elements of the plan. Tr. 141-147.

Ms. White further testified that after she submitted the transportation impact study, the idea of using one or two satellite locations near the school was brought up as a measure to manage parking demand, and she submitted a supplemental memorandum to Technical Staff on February 5, 2015 (Exhibit 94(a)). The study looked at two potential off-site parking lot locations – the Pauline Betz Addie Tennis Center at 7801 Democracy Boulevard and the East Gate Swim and Tennis Club at 10200 Gainsborough Road. Ms. White conducted additional analysis to determine the impacts at the Seven Locks, Democracy Boulevard intersection and found still that all intersections would operate acceptably. Michael Garcia, a transportation planner for Technical Staff, was supportive of her memorandum and the location of both facilities, which are each approximately a half mile from the school. But he asked for the study to include simultaneous operation of both off-site lots and later dismissal time to cover more after-school activities. She updated her TIS supplement on February 18, 2015 (the day before the hearing) with a further supplemental transportation impact study to include that information. Exhibit 106. Tr. 148-156.

Ms. White disagrees with Ms. Saville's conclusion that the off-site lots would not work well for daily use. According to Ms. White, the proximity of the locations to the school allows a shuttle bus to make frequent continuous loops, and the off-site parking is therefore a practical solution to

manage parking demand in conjunction with the transportation management plan. The school start time is 8:20, and the shuttle could run starting an hour or so before that, probably with about 4 trips per hour. Logistically, that can all be worked out and managed so that it works successfully. There would be a slight decrease in traffic at the entrance to the school, so it might benefit the neighborhood. There are 20 to 30 parking spaces in each of those external lots. There is also a shuttle to and from the Grosvenor Metro station, which is more distant. Tr. 157-163.

[Ms. Lee-Cho suggested that the tennis courts provide an option if the off-site parking becomes more difficult to manage. Then, the on-site conversion of the tennis courts may be a better option. Tr. 163.] Ms. White suggested that the Transportation Management Plan (TMP) should have options. It could be expanded shuttle service, it could be a robust carpool program, it could be a number of these measures. The school would monitor the situation on an annual basis and see what is working best. This monitoring plan would be submitted annually to Park and Planning, to the County and also to a neighborhood liaison committee. Tr. 163-164.

The Hearing Examiner raised a question of whether or not the school even needs the tennis court for additional parking if the off-site lots are available. Ms. White responded that it may not be necessary. In the simplest of calculations, there would be about 124 spaces, not including the tennis courts and not including off-site parking. If you consider the requirement for future faculty and staff, which is 95 spaces; the projected requirement for student drivers, which is 40 spaces; and visitor spaces, as suggested by planning staff of seven spaces, then the total required would be 142 spaces. The difference between the 142 required and the 124 available spaces is 18 spaces. So it's just a matter of how do we accommodate an 18 space need. [Ms. Lee-Cho added that once the fire lane order is addressed, there will be 124 surface spaces, not counting the tennis courts and off-site parking.] Thus, the two satellite parking sites would provide more than enough extra parking to meet the 142 spaces needed until the garage is built. Tr. 165-168.

Ms. White further testified that the TIS consists of the October 17, 2014 Study (Exhibit 63(e)); an August 20, 2013 supplemental required by Park and Planning to be an attachment to the

transportation management plan (TMP), Exhibit No. 70(b); a supplemental TIS dated February 5, 2015 (Exhibit 94(a)); and the further supplemental TIS, dated February 18, 2015, and submitted at the hearing as Exhibit 106. Tr. 169-172.

According to Ms. White, all the queueing during drop-off and pick-up would occur on the premises. There will not be any backup onto Seven Locks Road because there is adequate space on the premises considering the circulation of the driveway to accommodate all the cars during both pick-up and drop-off, including all projected activity as well. There will be a payment to the County under TPAR. Tr. 172-173.

Ms. White further testified that the transportation management plan (TMP), Exhibit 93(g), is a plan to manage traffic and parking demand and look for opportunities to get people in other modes of transportation. It also manages on-site traffic circulation to effectively direct students during drop-off and pick-up times of the day. It addresses carpool programs and other programs for special event parking as well. In her professional opinion, the measures outlined in the TMP and the additional off-site parking options are likely to ensure that parking, access and circulation on the school site will function in an adequate manner such that construction of the garage first is not necessary. Tr. 173-175.

Ms. White opined that the traffic from all of the increases in staff, faculty and enrollment would not adversely impact conditions from an efficiency, operations or safety perspective. In her opinion, this private educational institute, as modified in accordance with what the petitioner requests, will not create a nuisance because of traffic. She further opined that the proposed modification would comply with the specific provisions of the Zoning Ordinance regarding traffic patterns and congestion in the neighborhood. [The summer program is not involved because Petitioner is not requesting any increase in the summer program, according to Ms. Lee-Cho.] Moreover, the site will be served by adequate public facilities including public roads, and Petitioner has met the APF requirements. Tr. 177-183.

On cross-examination, Ms. White testified that she was aware of the limited pedestrian facilities off of the campus. But that doesn't have an impact, *per se*, on the students getting to the campus from the satellite parking, for example. She had not considered the safety of the shuttle making a left turn across Democracy Boulevard to get to the external parking. After checking the map, Ms. White testified that there is a traffic signal at Westlake and Democracy as well as a break in the island before that. The shuttle could proceed to the light to make a U-turn or make a U-turn at the earlier break. Neither would create a problem from a transportation management standpoint. Tr. 183-194.

5. Aaron B. Smith (Tr. 194-231; 262-307):

Mr. Aaron B. Smith testified as an expert in civil engineering. He described changes in the special exception site plan (Exhibit 93(a)) in response to comments made in his meeting with the community and at the last Planning Board meeting. Specifically, revisions were made to add the split rail fence along the forest conservation easement in the northwest corner of the property, adjacent to the existing middle school. He also added the installation of a split rail fence in the southwest corner, delineating the forest conservation easement area. He added a note in the southeast corner about balls going into the properties to the south, indicating that the school will repair existing ball netting and extend fencing as necessary to protect adjoining properties. The school is going to make the operational changes and make the necessary repairs to the existing netting out there, and then if additional changes need to be made, that would be worked out. Tr. 194-200.

Mr. Smith also added the requirement for a split rail fence around the proposed location of the theater building. That fence wouldn't be installed until the time of the theater building construction. The only other item noted as changed on the special exception site plan is that the parallel parking spaces on the existing exit drive are going to remain per an interim approval with the fire marshal. [Ms. Lee-Cho promised to provide documentation of the fire marshal's approval.] According to Mr. Smith, the fire marshal's office approved this interim condition, and if and when

the school moves forward with any sort of building permit, it would be reevaluated at that time to determine whether it could continue to operate with the interim approval which would allow those parking spaces to remain or whether they would have to remove those parking spaces and go to the final condition approval, which designates that as a fire lane and does not allow parallel parking spaces. In the event that those future spaces are required to be removed, that would be part of the assessment on whether to go to the off-site parking option. Tr. 200-205.

The only other change, which is noted on the landscape plan (Exhibit 93(c)(4)), not on the special exception site plan, is the plan for screening trees. That plan now shows the plantings of evergreen trees along the forest conservation easement line as a way to screen some of the activity associated with the middle school, and that was a direct result of conversations with the community on January 19, 2015. Ms. Saville's comment, as Ms. Lee-Cho stated, was actually not to put these plantings along the eastern boundary of the easement closer to the school but to put them along the property line. The reason the Petitioner would place them as shown on the revised landscape plan is that the school property actually drops to a lower elevation at the property line. In talking with the community, their preference actually was to have these screenings at a higher elevation to make them a more effective screen from their property. Right now, the plan shows these plantings at about elevation 312 to 318. At the property line, the elevation is down at 304 to 308. So that is maybe eight to 10 feet of elevation difference along that stretch, and his approach was to take advantage of that elevation change. The addition of those evergreens would not violate any condition of the forest conservation plan because they will be native species. The split rail fencing will clearly define the easement area, and though climbable, will also be a deterrent for kids getting into it and getting closer to the property line and closer to the neighbors. Tr. 205-217.

What was not addressed on this plan was Technical Staff's recommendation to add shading of paved areas. Section 59-E-2.83 addresses parking and loading facilities for special exception uses in residential zones. It requires that trees be planted and maintained throughout the parking facility to ensure that at least 30 percent of the paved area, including driveways, are shaded. This

only applies for any cumulative enlargement of a surface parking facility that is greater than 50 percent of the total parking area approved before May 6th, 2002. The school's existing surface parking lot was approved in 2000, but the school is not proposing to increase surface parking by 50 percent as part of the proposed special exception. The increase in parking is going to be in an underground parking lot. So, Mr. Smith feels the school is not controlled by the cited code provision. He agreed that it wouldn't necessarily be a bad thing to do, but it would be a significant cost to the school and it would be difficult. Moreover, in order to meet this requirement, the school would be undertaking to take out permanent asphalt and would potentially lose parking spaces in order to create islands that would allow for the plantings necessary to meet the shading requirements. Technical Staff was looking at the overall environmental sensitivity of the proposed development; however, the school has made a deliberate decision to build within existing footprints on existing impervious areas, put parking below grade as opposed to creating additional surface parking, doing everything they can to preserve the environmental integrity of their property and it's part of the school's mission. So, in his opinion, the environmental elements were met by the approach to the site plan, and this Code provision doesn't apply. Tr. 217-221.

Mr. Smith further testified that the Planning Board approved an Amended Final Forest Conservation Plan (AFFCP) and tree variance. Under the AFFCP, the school is required to plant 15 native canopy trees on site for the loss of specimen trees, prior to pulling their first sediment control permit. The school must record their category one easements by deed, and then once recorded they need to be delineated with permanent markers and signage. In this case, some areas will be delineated by split rail fence. They need to submit a certificate of compliance to use an off-site forest mitigation bank. Then again, they have to delineate the area adjacent to the middle school with split rail fence and also the area adjacent to the proposed theater building. They're required to remove all debris, equipment and structures from conservation easement areas. In the northwest corner of the property within the easement areas, where the neighbors have complained about the noise, there are two structures, a pavilion and some benches that are used by the students. Those

will be removed immediately to meet the requirements of the forest conservation plan, but also to help with some of the noise issues that the neighbors are experiencing. Petitioner will submit a revised forest conservation plan indicating location of the 15 new trees and the location of the split rail fencing. Tr. 223-224.

According to Mr. Smith, the subject site is not in a special protection area so a water quality plan is not required, but an approved stormwater management concept has been approved by DPS. It includes the construction of seven new micro bioretention areas, a new sand filter, a new underground storage and green roof on three of the four new proposed buildings. Additionally, the school will be required to restore and stabilize the existing downstream outfall to Cabin John Creek, which is actually on the other side of Seven Locks Road. There is a drainage divide that runs down the middle of the property. There are two outfall points from the property, one in the southwest corner which drains down to the Potomac Pond, and the other one goes out to the public storm drain on Seven Locks Road. This plan will decrease the amount of stormwater that will be experienced by the neighbors in both the 10 and 100 year storm events for both the Potomac Pond and the Seven Locks public storm drain. With the ultimate build out of this, there would be more area draining towards Seven Locks Road and less area draining towards to Potomac Pond, a slight change in drainage area. The net result is that in both cases there's a decrease. The Democracy Lane area to the west actually drains towards the school property. The proposal will comply with all the environmental site design requirements. Even though they're not able to do all of the ESD measures on site, the net result will be a decrease of the storm drainage off of the site. At the request of Technical Staff, he prepared four different SWM exhibits showing how stormwater would be handled depending on which buildings were built first (Exhibits 63(d)(i) –(iv)). Tr. 225-231.

Mr. Smith further testified about the timing of the construction of the lead-in sidewalk to the school. The future development of Seven Locks Road proposes to add sidewalks and bike lanes on Seven Locks Road. That plan (P501303) is not currently funded. He introduced a segment of the current five year CIP planning forecast for the Seven Locks bike lane and safety improvements

(Exhibit No. 110). The County's forecasted funding for this project through fiscal year 2020 is funded only for some planning design and that's still five years from now in fiscal year 2020. The County's design engineer for the proposed improvements indicated to Mr. Smith that basically this design has been only developed to a conceptual level, and that there's really no detailed design available for it. Those design plans are reflected on the special exception site plan as a shaded sidewalk shown along Seven Locks Road between the school and Democracy Boulevard. Phase two provides a dual bike way and pedestrian path on Seven Locks road from Tuckerman to Democracy Boulevard. The ADA compliant lead-in sidewalk for the school would be the connection, starting at Seven Locks and running up along the south side of the entrance drive adjacent to the existing conservation easement area and wrapping up into the center of the property. Technical Staff's recommendation was to require construction of the lead-in sidewalk prior to the start of the 2015-2016 school year regardless of whether any buildings as part of the campus master plan was being constructed and regardless of the timing of the improvements on Seven Locks Road. Mr. Smith testified that the Petitioner proposes that the lead-in sidewalk would be tied to the construction of any of the buildings on campus. It is his opinion that it doesn't make sense to construct a sidewalk, which is a fairly substantial project, to connect to a roadway (Seven Locks) that is unsafe for pedestrians. The idea is that the sidewalk would be built as part of future construction and hopefully would coincide time-wise better with the proposed improvements on Seven Locks Road and actually provide a continuous, safe pedestrian path along Seven Locks Road and up into the property. [Ms. Lee-Cho proposes a condition which provides that "construction of the lead-in sidewalk from Seven Locks Road to the Gymnasium must be completed before a use and occupancy certificate for any of the building facilities approved under this application may be issued." ] Tr. 262-273.

Mr. Smith indicated that there is an existing monument sign on the site. It is being maintained without any changes. The lighting being proposed meets the Zoning Ordinance requirements. A photometric study was done and confirmed compliance. It does not exceed the

existing light levels out there, and the proposed light levels would not exceed 0.1 foot candles along the side and rear lot lines. There is existing lighting along the frontage having to do with Seven Locks Road and there are small lights on the existing monument sign that's there. Additionally, there will be no lighting of any play fields or tennis courts. Tr. 273-274.

Mr. Smith further testified that the proposed student density per acre is well below the permitted density per acre, and the existing uses on site are not changing and the locations of those uses are not changing and the school's been in this location for 35 years. The areas, the athletic facilities and fields are going to be in the same locations they have been for that period of time. [Ms. Lee-Cho stated that the Petitioner would rely on the Technical Staff land use analysis on the question of the impacts of the proposed density on the neighborhood.] Mr. Smith opined that the proposed changes to the site were designed so that all outdoor sports and recreation facilities will be located, landscaped or otherwise buffered so that the activities associated with the facilities will not constitute an intrusion into adjacent residential properties. The facilities will be designed and sited to protect adjacent properties from noise, spill light, stray balls, and other objectionable impacts by providing appropriate screening measures such as sufficient setbacks, evergreen landscaping, solid fences and walls. Tr. 275-280.

Some buffer may have been approved under previous reviews along the northern boundary of the tennis courts in the northeast corner. The Technical Staff report references a previously approved landscape and lighting plan. Mr. Smith has not been able to find a copy of the previously approved landscape and lighting plan. There are existing trees in that location now that no one's planning on removing, but Staff references a buffer that's no longer there. The configuration of the tennis courts is actually different than what's shown on the plans that he looked at. He doesn't believe additional buffering is required. There's a 10 foot fence there around the tennis courts and there are some existing plantings in that location. Mr. Smith also testified that there are adequate public facilities for the site. Tr. 280-282.

Ms. Saville of Technical Staff asks in her email (Exhibit 97) about two full-sized bus parking spaces and where they might have gone. Mr. Smith stated that the original special exception plan removed the parallel parking spaces along the exit drive through the center of the property. Included in those parallel parking spaces are bus parking spaces and so she's asking under the old exhibit what happens to those bus spaces. His response is that under the new approved fire access plan, those bus spaces remain because this is no longer a designated fire lane there. There is a suggestion that if the parallel spaces are kept in an interim condition that it be shown on a separate sheet. Mr. Smith stated that he currently shows the parallel spaces on the special exception site plan with a note that indicates, "to be removed if required by the fire marshal." He does not feel that it is necessary to have a separate sheet showing that, since it's addressed by the note. Tr. 292-293.

[The Hearing Examiner asked whether other private school special exceptions in the County allow hours till 11 PM, and Ms. Lee-Cho said she would research that as well as whether there were any other steps that could reduce noise and trespassing. Tr. 295-298. Ms. Lee-Cho then discussed her redline condition suggestions from Exhibit 84. On Condition 5, she suggested that if the redline was removed completely and instead go back to the original language, the only change you would have to make is to the first line. Instead of 6:30 p.m., 9:00 p.m. She agreed that the number of meetings till 11 PM could be reduced to 15 from 50. On the question of shading the parking lot, she stated that if that section of the Zoning Ordinance was interpreted the way Technical Staff did, there is no incentive to do structured parking. It undermines the whole intent of that section having grandfathered old surface lots and triggering the new requirements only if you expanded by more than 50 percent. As to Condition 8, she would strike the recommended plantings around the tennis courts from her redline and just say, on the west property line to the middle school and near the south property line adjacent to the gym and the ball fields. She would also say the plantings should be near the west property line but adjacent to the middle school. She will clear up some confusion with Technical Staff about plantings along the south property line. She summarized the disparity between Technical Staff and the Petitioner basically in three areas – the garage phasing issue, the

lead-in sidewalk issue timing and the shading of the paved areas. Those are the major bones of contention on the conditions of approval. Tr. 299-312.]

### **B. Community Opposition**

Four neighbors testified in opposition – Eugene Feinberg, on behalf of the Potomac Pond Homeowners Association (PPHA), Stephen Sawmelle, Yun Chow Whang and Sandy Kursban, all of whom live to the south of the subject site. None of the neighbors who live to the west of the site, along Democracy Lane, appeared at the hearing.

1. Eugene Feinberg, on behalf of the PPHA (Tr. 232-246; 257-258):

Eugene Feinberg testified on behalf of the Potomac Pond Homeowners Association (PPHA) and himself. He has been a Potomac Pond homeowner, living at 8104 Appalachian Terrace, Potomac, Maryland, since 1987 and he has been a resident of Montgomery County since 1965. PPHA is an association of the owners of the 38 homes immediately south of The Heights School. Those homes and those on Democracy Lane are on property that The Heights School or its predecessor sold 20 or 30 years ago. PPHA and Mr. Feinberg “take severe issue with any growth in student population until the school provides physical infrastructure, practices and policies needed to prevent their students from depriving our homeowners of their rights to privacy and safety.” Tr. 233.

Mr. Feinberg gave examples of problems, some of which he admitted have been mitigated by statements made at the hearing – hard balls and rocks hit or thrown over the fence that bounds the south side of the school's athletic field threaten homes that immediately abut that boundary. It often appears that these acts are deliberately targeted to do damage, those that involve rocks. Students that trespass on PPHA properties, invade their privacy, are often noisy and over the years have caused residents to give up the walkway through the woods west of the pond because of its misuse. When he walked his dogs he saw many students, well dressed, polite, quiet at the times, walking up through Steve Sawmelle's property at the end of his block. Intrusive noise levels

coming from the school grounds, mainly on weekdays but sometimes on weeknights or weekends. Parking and traffic delays on Seven Locks Road impede the only means of access to 26 of PPHA's homes, particularly when trying to make a left turn. The Heights School has a policeman to control traffic coming in and out of The Heights School during rush hour, but PPHA does not. Making a left turn out of either Grand Teton Drive or Matterhorn is a dangerous process. These problems have been ongoing for many years. Often they've been brought to the school's attention. In most instances when culpability has been clear the school has paid to repair the physical property damage. In others, they indicated they took some sort of disciplinary action. However, the problems still have persisted. While there have been some good words from the headmaster about alerting the students and everything else, after the fact action is not the same as prevention. The headmaster's words at the hearing are the first step towards prevention, but they do not remedy the ongoing concern that it might happen again and with even greater consequences. Tr. 233-235.

Mr. Feinberg stated that at the proposed level of 650 students, the ratio of students per acre substantially exceeds by a factor of five or more than of any other K through 12 private school in Montgomery County that has a baseball field. He noted that the school's current enrollment of 529 students already exceeds the county approved level of 460. He feels that further increased density could only invite increased trouble. He observed that if The Heights School is otherwise in financial need, an alternative solution would be moving to another area. He feels that the school has had a past record that has not been satisfactory in resolving long-standing issues with its neighbors, and granting The Heights School's expansion petition would significantly exacerbate the situation. He and the PPHA therefore request that The Heights School's expansion petition be denied until the above issues have been satisfactorily resolved. Tr. 235-236.

Mr. Feinberg urged that at a minimum, the Board impose the conditions recommended by the Planning Commission. Furthermore, since past experience clearly indicates that the remedies recently offered by the school will scarcely discourage the more rambunctious of the school's students from misbehavior, he urges that the following additional conditions be imposed:

1. That the school's census not be permitted to grow until new supporting infrastructure is in place. For example, a sidewalk segment along Seven Locks Road between The Heights School's vehicle outlet and Grand Teton Drive, therefore enabling students to safely access Democracy Boulevard via the existing sidewalks. There are sidewalks in front of our property from Grand Teton all the way to Democracy Boulevard.
2. That new fencing along Seven Locks Road be added to prevent students from intruding into the area south of the athletic field and into the southwest corner of The Heights School property. Unless the school can block that southwest corner from the lower school from students coming down, there is no physical blockage to prevent them from coming up onto Grand Teton Drive or onto Appalachian Terrace through the back way. The proposed split rail fence only covers part of it.<sup>9</sup>
3. That new construction of the extended gymnasium and theater adopt modern, soundproofing techniques.
4. That the school be required to avoid local, on-street parking by formally arranging for overload parking with shuttle bus services required.
5. Most importantly, that the school be required to provide a security officer to patrol the outer boundaries of the school during high egress periods and after the conclusion of high attendance athletic and other special events.
6. That the school's order of construction be formalized and that construction of the theater and parking garage occur concurrently.
7. That the school implement a periodic notification and violation policy applicable to student intrusions into both the category one conservation easement area, that area down in south central, and PPHA property.

Mr. Feinberg's statement was accepted as Exhibit 108. Tr. 236-239.

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<sup>9</sup> The Hearing Examiner notes that the paragraph beginning at the bottom of Tr. 237 and continuing on Tr. 238 was incorrectly attributed to the Hearing Examiner. It was actually stated by Mr. Feinberg. A corrected CD was submitted by the reporter, and an ink correction was made on the transcript hard copy.

[The Hearing Examiner asked whether the school could provide fencing to complete the enclosure and discourage students from coming down from the upper level into the southwest corner and then coming south onto Grand Teton Drive and southwest onto Appalachian Terrace property. Ms. Lee-Cho promised to look into it. Mr. Smith stated that it's the only area on campus that doesn't currently have fencing.] Mr. Feinberg added that he is also concerned about the safety of students walking along the shoulder of Seven Locks Road. He suggested some sort of a barrier fence that has a gate controlled by the school for emergency purposes or for maintenance purposes that would prevent students from coming down from the gymnasium area into the southwest corner of the site. [Ms. Lee-Cho said the school could provide a continuation of a wood fence in the unfenced area. The Hearing Examiner suggested that she discuss it with the school and come up with a proposal for fencing that area, and then submit it to Mr. Feinberg and to Technical Staff for feedback to resolve that issue.] Tr. 240-246.

Mr. Feinberg stated that he was encouraged by the fact that the Community Liaison Council will meet every six months and will give all the neighbors, including the Courts of Democracy and Inverness and the new development when it goes in on the other side, a chance to sit down with the school, and air whatever issues have come up in the preceding six months, with reports back to the County. Tr. 257-258.

2. Yun Chow Whang (Tr. 246-248):

Yun Chow Whang testified that he lives at 8003 Grand Teton Drive, Potomac, Maryland. Mr. Whang stated that there was property damage to houses on the south side of the school, on Grand Teton Drive, by the student body of Heights School from soccer balls and baseballs. A soccer ball damaged his house 1986 or 1987. It broke a bedroom window and caused roof leak in the living room. In the year 2000, students set fire on the backyard wooden fence at 8001 Grand Teton Drive. In the spring of 2003, a student threw rocks at three houses (8003, 8007 and 8013 of

Grand Teton Drive), breaking patio door glass. Mr. Whang supports Mr. Feinberg's recommendations.

3. Stephen Sawmelle (Tr. 249-257):

Stephen Sawmelle testified that he and his wife, Sandy Kursban, live at 8113 Appalachian Terrace, Potomac, Maryland, in the Potomac Pond community. He directly overlooks the south boundary of the school. He has lived in the community for three years and has a very realistic view of what day to day life would be like if The Heights School increased its student level to the numbers requested in an expansion. A large percentage of Potomac Pond residents are, like his wife and him, in their retirement years. Many are at home during much of the work week, and he fears that if the number of students were to increase by the large percentage requested by Heights school, the dramatic increase in enrollment would result in a level of noise extremely disruptive to his daily life. The southwest corner, which wasn't named by Heights as a noise area, is his area of concern for noise. Also the noise from evening and weekend activities could add yet more anxiety to his life at home. In the spring and fall especially, if the increase were to occur, he would need to close all his windows. Sitting out on his deck would be possible only at certain times. He has zero confidence that the school would even adhere to an increased cap based on the recent disclosure of their enrollment violation. With many more students, he fears that his quality of life would plummet. [The Hearing Examiner stated that were he to recommend approval of the expanded enrollment and faculty, it would be with an annual reporting requirement to the Board as to what their enrollment and faculty/staff levels were so that there wouldn't be any danger of exceeding the caps.] Tr. 249-252

Mr. Sawmelle is not opposed to the new facilities, *per se*, but is worried about construction noise. He agrees with Mr. Feinberg's recommendations and would like to see the continuation of the wooden fence so that there's not that intrusion onto his property. He also liked the idea the headmaster talked about talking to the students about noise and keeping noise down, and believes

that the periodic meetings with the school will be helpful. His statement was received as Exhibit 109. Mr. Sawmelle, admitted the school was there when he moved in, but stated that it's perfectly livable the way the situation is now even with the sounds, and it's only a din during the early morning starting around 8:00 and then during lunch or during breaks. Yet, he fears what increased numbers will bring. The Hearing Examiner noted that he did not have evidence that a 20 percent increase in enrollment would measurably increase the noise level. Mr. Sawmelle responded that the southwest corner is where the kids congregate, and his sense is that there would be appreciably more noise if more kids were congregating and running up and down the hill. Tr. 252-257.

4. Sandy Kursban (Tr. 258-261):

Sandy Kursban testified that she lives at 8113 Appalachian Terrace, Potomac, Maryland. She wanted to read a statement on behalf of a neighbor, Linda Newman, but was informed that it was already in the record as Exhibit 100. Ms. Kursban elected not to give any further testimony. Tr. 259-261.

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The Zoning Ordinance establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards.

Petitions to modify the terms or conditions of a special exception are authorized by §59-G-1.3(c)(4) of the Zoning Ordinance. As mentioned in Part I of this report, Petitioner's plans include a net expansion of the total floor area by 49,526 square feet, which exceeds the statutory

threshold of 7,500 square feet, and the expansion of the facilities (including a new garage, school buildings and a theater), when considered in combination with the underlying special exception, may change the special exception such that substantial effects on the surrounding neighborhood could reasonably be expected. The extent to which these changes may result in adverse impacts on the neighborhood and how these impacts can be sufficiently ameliorated by appropriate conditions has been discussed in this report. The degree to which proposed operational changes (*e.g.*, changes in enrollment, faculty, staff, hours of operations and parking management) may adversely affect the neighborhood and what steps can be taken to reduce those impacts have also been extensively analyzed.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed physical modifications to the site and operational changes, taken in combination with Petitioner’s transportation management plan, screening and other proposals, will successfully avoid any adverse effects on the community and will meet the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

#### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. *“Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.”* Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. *“Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of*

*the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.” Id.*

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a private educational institution use.

Technical Staff suggested that the inherent adverse effects associated with private educational institutions include (Exhibit 72, p. 26.):

1. a significant number of students, faculty and staff;
2. buildings and facilities for academic and athletic programs;
3. parking;
4. traffic;
5. noise;
6. lighting; and
7. signage.

To this list, the Hearing Examiner would add the following inherent characteristics:

8. outdoor areas for children to play;
9. early and long hours of operation;
10. deliveries of supplies and trash pick-up; and
11. drop-off and pick-up areas for students who attend the school or summer camp.

Characteristics of the proposed modifications that are consistent with the identified characteristics will be considered inherent adverse effects. Physical and operational characteristics of the proposed modification that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

### **B. Applying the Standard to the Requested Modifications**

Petitioner contends, in its Section 59-G Statement of Compliance (Exhibit 93(f), p. 2),

. . . that there are no non-inherent characteristics implicated by the subject petition that in and of themselves constitute a non-inherent adverse effect. Like any property, there are a variety of factors and characteristics related to the site that constrain where buildings can be located and activities related to the special exception use can occur. For instance, the property contains mature forest areas that are subject to pre-existing forest conservation easements required by the County and stormwater management facilities also under easement as required by the County. There are modifications being proposed to some of the easement areas in conjunction with this application, but for the most part they must remain in place, which serves to constrain where the School can propose construction of additional facilities.

Technical Staff disagrees, stating that “The Heights School property has several physical constraints that limit the area that can be used for structures, parking, and athletics; staff considers these constraints to be non-inherent.” Exhibit 72, p. 26. Staff further explains (pp. 26-27):

. . . There are stormwater and forest conservation easements on the property, and steeply sloping land on the south and west sides of the campus. These characteristics limit the available space on the campus for structures, playing fields and many other academic or athletic uses.

On the south, between the playing fields and the Potomac Pond properties, some slopes exceed 40 percent. Baseballs and other hardballs fall down onto houses and into yards from the playing fields above. The recommended fencing and netting for these non-inherent effects is described in the previous section.

On the west, between the maintenance building and a stormwater facility, slopes exceed 30 percent. This area is unsuitable for buildings or playing fields, resulting in concentrated uses elsewhere. Further north on this side of the campus, there is a narrow area, approximately 80 feet wide, close to the neighboring properties, with a concentration of school buildings and adjacent play areas. Students have lockers on the porches on the side of the building, and amenities such as a pond, a gazebo and a covered bench are located here. This concentration of uses and proximity to houses results in excessive noise and activity impacts on the neighbors.

Noise and activity, such as the sound of students playing during recess, is an inherent adverse effect. In circumstances where the particular configuration of the site results in excessive noise impacts to the neighboring properties, staff considers the excessive noise to become a non-inherent impact.

As noted in the previous section, the neighbors to the west, nearest the middle school, report that the noise levels at their properties are excessive. Recommendations are included in that section. Staff would add a recommendation that when the middle school building is replaced, it be designed with lockers located indoors.

Enrollment of students is inherent to a private educational institution, but enrollment levels that are out of scale with the available facilities or the neighborhood should be considered to be non-inherent. Staff believes that requiring the school not to increase enrollment, faculty and staff levels faster than it can accommodate the increased population on campus is appropriate to avoid transforming an inherent adverse effect into a non-inherent one. The current parking facilities are out of scale and insufficient for the current student, faculty and staff levels (described below). Staff recommends:

- A Transportation Management Plan to mitigate current parking deficiencies (as provided)
- Offsite parking and shuttles for events (as provided)
- Garage construction **prior** to enrollment, faculty and staff increases.

The applicant prioritizes the new lower and middle school buildings before the construction of the parking and gym, without reference to student, faculty and staff increases. The proposed TMP is anticipated to correct current parking deficiencies and increase safety at current populations, but the proposed parking garage is necessary for increasing student, faculty and staff populations. Without all three provisions above, staff believes the site facilities will be inadequate and the proposed increase in student, faculty and staff levels should be considered as a non-inherent basis for denial.

The existing and proposed facilities on the site cannot meet the stormwater management requirements of the site; only partial compensation is provided in the Stormwater Management Concept request, with a fee in lieu required for the uncompensated amount. This non-inherent effect is due to the topography of the site and the multitude of academic and athletic facilities connected by impervious surfaces—i.e., roads and walkways. The campus master plan is anticipated to take 15 years to implement, and includes the construction of four major buildings as well as a parking garage. Future construction will be subject to the stormwater management regulations in place at the time of permitting, which may or may not be the same as current regulations. It is possible that future stormwater regulations will be more limiting, and that the full campus buildout, as proposed, will have to be scaled back. Therefore, enrollment should be phased and limited to the level that can be accommodated by the facilities in place at the time. The ultimate requested levels of 650 students and 95 faculty and staff members should occur after the facilities are in place.

Summer programs can have non-inherent adverse effects in some instances. The proposed level of 200 boys at any one time (as approved in 1980) has been in place since before The Heights School purchased the property in 1978. Proposed hours are 9:00 am to 3:00 pm, Monday through Friday. Staff does not recommend any mitigation for continuation of the summer programs. [Emphasis added.]

The Hearing Examiner, for the most part, agrees with Staff's analysis, but not with all of its proposed remedies. There are certainly unusual site conditions and operational characteristics that

are not inherent in, nor typical of, private educational institutions, as detailed above by Technical Staff. Moreover, as mentioned above, Zoning Ordinance §59-G-1.2.1 requires that we examine the combined effects of inherent and non-inherent characteristics.

The Hearing Examiner is satisfied that these issues can be sufficiently managed by the conditions proposed in part V of this report. The noise issues will be managed by moving the lockers indoors, adding additional screening and operational changes, as set forth on pp. 31-33 and 60 of this report; the intruding baseball issues will be handled by operational changes, and if need be, physical ones, as outlined on pp. 60-61 of this report; the trespassing issues will be managed by additional fencing and operational changes, subject to further improvements as needed, as outlined on pp. 34 and 61 of this report; the parking limitations can be sufficiently handled by the TMP, off-site parking, shuttle busses and parking on the tennis court area, if need be, without the necessity of making the underground parking garage the first item of new construction, as set forth on pp. 26-29 and 45-48 of this report; and the stormwater management on the site will improve the current conditions and will be updated as needed, as indicated on pp. 39-42 of this report. Perhaps most importantly, all of these problems will be subject to ongoing review in CLC meetings and reports to the Board of Appeals. There has been no complaint about the operation of The Heights School summer program, and the Hearing Examiner agrees with Technical Staff in not recommending any changes in the summer programs

In sum, although The Heights School has non-inherent site and operational characteristics, they can be sufficiently remedied, as outlined above, and should not result in denial of this modification petition. The Hearing Examiner's recommended conditions to address the identified problems are contained in Part V of this report, and they generally track Technical Staff's final recommended conditions (Exhibit 121), except as noted elsewhere in this report.

### C. General Standards

The general standards for special exceptions are found in Zoning Code Section 59-G-1.21(a). The Hearing Examiner finds that, with the recommended conditions and limitation, the general standards would be satisfied in this case, as outlined below.

#### **Sec. 59-G-1.21. General conditions:**

(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is a permissible special exception in the zone.*

Conclusion: Private educational institutions are permitted by special exception in the R-90 Zone involved in the subject case.

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed modifications, as limited and conditioned, would comply with the standards and requirements for private educational institutions set forth in Code §59-G-2.19, as discussed in Part IV.D., below.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property is included under the *Potomac Subregion Master Plan*, approved and adopted in 2002. The Master Plan recommends the continuation of the R-90 Zone for the subject site, and a private educational institution is permitted by special exception in the R-90 Zone. This particular use has been located at the subject site since 1978. For the reasons discussed in Part II. C. of this report, the modified use, as limited and conditioned by the Hearing Examiner's recommendations, would be consistent with the applicable Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: As discussed in Parts II. D. 1. and II.E. of this report, the proposed physical modifications to the campus would be in harmony with the general character of the neighborhood. The Hearing Examiner agrees with Technical Staff's statement on this point (Exhibit 72, p. 28):

With the conditions recommended elsewhere in this report, the proposal will be in harmony with the general character of the neighborhood considering population density, design, scale, and bulk of any new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The proposed physical modifications to the campus would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, for all the reasons stated in Parts II. D. and E. of this report; however, as observed by Technical Staff (Exhibit 72, p. 28), "Neighbors indicate that excessive noise from the school is detrimental to the use,

peaceful enjoyment, and economic value of their properties, and that expansion of the school and its operation will exacerbate these negative effects.” As mitigation, Staff recommended conditions which have been generally adopted by the Hearing Examiner, with some modifications, spelled out in Part V of this report.

*(6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: As discussed in Part II.D.1.c. of this report, photometric studies demonstrate that the new lights will not create light spillage onto surrounding properties. In general, the proposed physical and operational modifications would not cause objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, as long as the proposed limits and conditions spelled out in Part V of this report are followed.

*(7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff does not mention any other special exceptions in the area, and the subject modification petition will not create an additional special exception. However, for the reasons set forth in the preceding paragraphs, the modifications proposed in the subject case would increase the intensity and scope of the subject special exception use sufficiently to affect the area adversely, absent the limitations and conditions recommended by the Hearing Examiner in Part V of this report. The proposed changes would not alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed modification, as conditioned, would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. One of the recommended conditions would require Petitioner to carry out the Fire Department's current Fire Lane Establishment Order (Exhibit 120) unless and until the Fire Department changes it.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

(A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*

(B) *If the special exception:*  
 (i) *does not require approval of a new preliminary plan of subdivision; and*  
 (ii) *the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact; then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception modifications sought in this case would not require approval of a preliminary plan of subdivision; nor does the current APF determination take into account the additional impact of the proposed expansions to the special exception's

impact. Therefore, under the terms of the Code provision, the public facilities review for the modification petition must be done by the Board of Appeals.

The likely traffic impacts have been extensively studied in this case, as outlined in Part II.D.2. of this report, as have the stormwater management issues in Part II.D.1.e. of this report. Technical Staff reports that “The property is served by adequate public schools, police protection, water and sewer . . .[and] that the proposal will be served by adequate public facilities.” Exhibit 72, pp. 29-30. Based on this record, the Hearing Examiner finds that the evidence supports the conclusion that there are adequate public facilities available to the site.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Petitioner’s transportation expert, Nicole A. White, opined that the traffic from all of the increases in staff, faculty and enrollment would not adversely impact conditions from an efficiency, operations or safety perspective. Tr. 177-183. The Hearing Examiner concludes that with the implementation of the TMP and with the limitations and conditions recommended in Part V of this report, the proposed use and modifications would not reduce the safety of pedestrian or vehicular traffic.

#### **D. Specific Standards: Educational Institutions, Private**

The specific standards for a private educational institution are found in Code § 59-G-2.19. The Hearing Examiner finds that, with the recommended conditions and limitations, the specific standards for this special exception would be satisfied in this case, as outlined below.

#### **Sec. 59-G-2.19. Educational institutions, private.**

- (a) *Generally. A lot, tract or parcel of land may be allowed to be used for a private educational institution if the board finds that:*

*(1) the private educational institutional use will not constitute a nuisance because of traffic, number of students, noise, type of physical activity, or any other element which is incompatible with the environment and character of the surrounding neighborhood;*

*Conclusion:* For the reasons set forth in Parts II.D., II. E., IV.B. IV.C. of this report, the Hearing Examiner finds that, with the limits and conditions recommended in Part V of this report, the proposed modifications will not constitute a nuisance because of traffic, number of students, noise, or type of physical activity.

*(2) except for buildings and additions completed, or for which a building permit has been obtained before (date of adoption [April 2, 2002]), the private educational institution must be in a building architecturally compatible with other buildings in the surrounding neighborhood, and, if the private educational institution will be located on a lot, tract, or parcel of land of 2 acres or less, in either an undeveloped area or an area substantially developed with single-family homes, the exterior architecture of the building must be similar to a single-family home design, and at least comparable to any existing homes in the immediate neighborhood;*

*Conclusion:* As set forth in Part II.E., on pp. 55-56 of this report, the evidence in this record supports the conclusion that the proposed buildings on the campus will be compatible both with the existing structures and with the neighborhood.

*(3) the private educational institution will not, in and of itself or in combination with other existing uses, affect adversely or change the present character or future development of the surrounding residential community; and*

*Conclusion:* The use, as modified, will not adversely affect or change the present character or future development of the surrounding neighborhood, if the limitations and conditions recommended by the Hearing Examiner are followed, as set forth in Part V of this report.

(4) *the private educational institution must conform with the following standards in addition to the general development standards as specified in Section G-1.23:*

- a. *Density—The allowable number of pupils per acre permitted to occupy the premises at any one time must be specified by the Board considering the following factors:*
  1. *Traffic patterns, including:*
    - a) *Impact of increased traffic on residential streets;*
    - b) *Proximity to arterial roads and major highways;*
    - c) *Provision of measures for Transportation Demand Management as defined in Section 42A-21 of the Montgomery County Code;*
    - d) *Adequacy of drop-off and pick-up areas for all programs and events, including on-site stacking space and traffic control to effectively deter queues of waiting vehicles from spilling over onto adjacent streets; and*
  2. *Noise or type of physical activity;*
  3. *Character, percentage, and density of existing development and zoning in the community;*
  4. *Topography of the land to be used for the special exception; and*
  5. *Density greater than 87 pupils per acre may be permitted only if the Board finds that (i) the program of instruction, special characteristics of students, or other circumstances justify reduced space and facility requirements; (ii) the additional density will not adversely affect adjacent properties; (iii) additional traffic generated by the additional density will not adversely affect the surrounding streets.*
- b. *Buffer—All outdoor sports and recreation facilities must be located, landscaped or otherwise buffered so that the activities associated with the facilities will not constitute an intrusion into adjacent residential properties. The facility must be designed and sited to protect adjacent properties from noise, spill light, stray balls and other objectionable impacts by providing appropriate screening measures, such as sufficient setbacks, evergreen landscaping, solid fences and walls.*

*Conclusion:* As observed by Technical Staff (Exhibit 72, p. 39), the proposed special exception cap on student population of 650 students, would result in a density of 32.8 students per acre (19.8 acres). That density is less than half the density of 87 students per acre which may be permitted without a special finding under this section. Moreover,

as discussed in Parts II. D. and E. of this report, additional screening and fencing will be added, regulations in the TMP will reduce traffic impacts, operational changes will be made to reduce adverse effects on the neighborhood and a Community Liaison Council will regularly monitor impacts on the community. Based on these facts, the Hearing Examiner finds that the proposed modification will comport with the standards set forth in this section, as long as the limitations and conditions recommended by the Hearing Examiner in Part V of this report are followed.

- (b) *If a Private Educational Institution operates or allows its facilities by lease or other arrangement to be used for: (i) tutoring and college entrance exam preparatory courses, (ii) art education programs, (iii) artistic performances, (iv) indoor and outdoor recreation programs, or (v) summer day camps, the Board must find, in addition to the other required findings for the grant of a Private Education Institution special exception, that the activities in combination with other activities of the institution, will not have an adverse effect on the surrounding neighborhood due to traffic, noise, lighting, or parking, or the intensity, frequency, or duration of activities. In evaluating traffic impacts on the community, the Board must take into consideration the total cumulative number of expected car trips generated by the regular academic program and the after school or summer programs, whether or not the traffic exceeds the capacity of the road. A transportation management plan that identifies measures for reducing demand for road capacity must be approved by the Board.*

*The Board may limit the number of participants and frequency of events authorized in this section.*

*Conclusion:* As noted by Technical Staff (Exhibit 72, p. 41),

The Heights School provides art education programs, artistic performances, indoor and outdoor recreation programs, and summer day camps. A Transportation Management Program is proposed. Measures include busing, Metro shuttles, carpools, a Transportation Coordinator, Kids Ride Free, Commuter Connections, Special Event offsite parking with shuttles, an off-duty police officer to manage traffic at Seven Locks Road, and an annual audited report.

Based on the steps outlined in response to §59-G-2.19(a)(4), above, the Hearing Examiner finds that the combined activities of The Heights School will not have an

adverse effect on the surrounding neighborhood due to traffic, noise, lighting, or parking, or the intensity, frequency, or duration of activities, as long as the limitations and conditions recommended by the Hearing Examiner in Part V of this report are followed.

(c) *Programs Existing before April 22, 2002.*

(1) *Where previously approved by the Board, a private educational institution may continue the operation of (i) tutoring and college entrance exam preparatory courses, (ii) art education programs, (iii) artistic performances, (iv) indoor and outdoor recreation programs, or (v) summer day camps, whether such programs include students or non-students of the school, if the number of participants and frequency of events for programs authorized in 59-G-2.19(b) are established in the Board's approval.*

(2) *Where not previously approved by the Board, such programs may continue until April 22, 2004. Before April 22, 2004, the underlying special exception must be modified to operate such programs, whether such programs include students or non-students of the school. The Board may establish a limit on the number of participants and frequency of events for authorized programs.*

*Conclusion:* Petitioner's proposals include the continuation of existing programs and activities that have not been formally approved by the Board, as outlined in Parts II. D. and E. of this Report. There will also eventually be activities taking place in new Theatre/Dining Hall. All activities on site will be regulated by its TMP and its Second Amended Statement of Operations, and will be limited and conditioned as recommended in Part V of this report.

(d) *Site plan.*

(1) *In addition to submitting such other information as may be required, an Petitioner shall submit with his application a site plan of proposed development. Such plan shall show the size and shape of the subject property, the location thereon of all buildings and structures, the area devoted to parking and recreation facilities, all access roads and drives, the topography and existing major vegetation features, the proposed grading, landscaping and screening plans and such other features necessary for the evaluation of the plan.*

(2) *No special exception, building permit or certificate of occupancy shall be granted or issued except in accordance with a site plan of development approved by the board. In reviewing a proposed site plan of development the board may condition its approval thereof on such amendments to the plan as shall be determined necessary by the board to assure a compatible development which will have no adverse effect on the surrounding community, and which will meet all requirements of this chapter. Any departure from a site plan of development as finally approved by the board shall be cause for revocation of the special exception, building permit or certificate of occupancy, in the manner provided by law.*

*Conclusion:* The subject case involves a modification petition, not a new special exception.

Petitioner has submitted a comprehensive set of plans, discussed in Part II.D.1. of this report, which are more than sufficient to allow evaluation of the proposed modifications. As stated above, the proposed physical changes to the campus will be compatible with the community.

(e) *Exemptions. The requirements of Section G-2.19 do not apply to the use of any lot, lots or tract of land for any private educational institution, or parochial school, which is located in a building or on premises owned or leased by any church or religious organization, the government of the United States, the State of Maryland or any agency thereof, Montgomery County or any incorporated village or town within Montgomery County. This exemption does not apply to any private educational institution which received approval by the Board of Appeals to operate a private educational institution special exception in a building or on a lot, lots or tract of land that was not owned or leased by any church or religious organization at the time the Board of Appeal's decision was issued.*

*Conclusion:* This subsection is not applicable. Although Petitioner's CFO, Philip McGovern, testified that The Heights School operates "with a Catholic spirit," it is not an archdiocesan school, and the property is not owned by the Catholic Church. Tr. 32-33.

(f) *Nonconforming uses. Nothing in this chapter shall prevent any existing private educational institution which obtained a special exception prior to the effective date of this chapter, from continuing its use to the full extent authorized under the resolution granting the respective special exception, subject, however, to division 59-G-4 of this chapter.*

*Conclusion:* This subsection is not applicable.

(g) *Public Buildings.*

(1) *A special exception is not required for any private educational institution that is located in a building or on premises that have been used for a public school or that are owned or leased by Montgomery County.*

(2) *However, site plan review under Division 59-D-3 is required for:*

(i) *construction of a private educational institution on vacant land owned or leased by Montgomery County; or*

(ii) *any cumulative increase that is greater than 15% or 7,500 square feet, whichever is less, in the gross floor area, as it existed on February 1, 2000, of a private educational institution located in a building that has been used for a public school or that is owned or leased by Montgomery County. Site plan review is not required for: (i) an increase in floor area of a private educational institution located in a building that has been used for a public school or that is owned or leased by Montgomery County if a request for review under mandatory referral was submitted to the Planning Board on or before February 1, 2000, or (ii) any portable classroom used by a private educational institution that is located on property owned or leased by Montgomery County and that is in place for less than one year.*

*Conclusion:* This subsection is not applicable.

(h) *Applications filed before May 6, 2002. Any application filed before May 6, 2002 for a private educational institution special exception or modification of a private educational institutional special exception must comply with the requirements of Article 59-G and Article 59-E in effect at the time the special exception was filed.*

*Conclusion:* This subsection is not applicable.

## **E. Additional Applicable Standards**

### **59-G § 1.23. General development standards**

(a) **Development Standards.** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The following Table from Technical Staff Report (Exhibit 72, pp. 30-31) demonstrates compliance with all development standards.

R-90 Development Standards	Required	Provided
Lot area and width; minimum net lot area	9,000 sf	19.818 acres (863,296 sf)
Minimum lot width at front building line	75 feet	971.4 feet
Minimum lot width at street line	25 feet	983.6 feet
Minimum setback from street	30 feet	261.2 feet
Setback from adjoining lot		
- One side	8 feet	53.4 feet
- Both sides	25 feet	116.3 feet
- Rear	25 feet	68.4 feet
Maximum building height	35 feet	35 feet
Maximum percentage of net lot area that may be covered by buildings, including accessory buildings	30 percent	18 percent
Maximum percentage of the area of the front yard that can be covered by surfaced area...	30 percent	18 percent
Parking setbacks (59-E-2.83(b))		
- Front	30 feet	254.1 feet
- Side (117 spaces) (2X side setback)	16 feet	80.5 and 53.4 feet
- Side (255 spaces) (2X side setback + 10 feet)	26 feet	same
- Rear	25 feet	186.7 feet

(b) **Parking requirements.** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: Zoning Ordinance §59-E-3.7 requires that private educational institutions provide

“[o]ne parking space for each employee, including teachers and administrators, plus sufficient off-street parking space for the safe and convenient loading and unloading of students, plus additional facilities for all student parking.” Technical Staff provided an extensive analysis of parking issues on campus, both during construction of the 15-year plan and after completion (Exhibit 72, pp. 31-35).

Turning first to the required number of parking spaces, Petitioner’s transportation planner, Nicole White, testified that there are about 124 on-site parking spaces, not including the tennis courts and off-site parking. Considering the requirement for future faculty and staff, which is 95 spaces; the projected requirement for student drivers, which is 40 spaces; and visitor spaces, as suggested by Technical Staff at 7 spaces, the total required would be 142 spaces. The difference between the 142

required and the 124 available spaces is 18 spaces. It is thus a question of how to accommodate an 18-space need. The two satellite parking sites would provide more than enough extra parking to meet the 142 spaces needed until the garage is built. Tr. 165-168.

Technical Staff viewed the numbers differently. As it stated (Exhibit 72, pp. 34-35):

The requested modification includes the construction of a garage under the rectangular field which will provide an additional 159 spaces. The current small lot west of the main lot is proposed for reconfiguration into a courtyard area (which will also provide necessary stormwater management facilities); that will reduce the surface parking to 96 spaces. At final buildout, a total of 255 spaces is proposed.

	Observed 2014	Changes by August 2015	Surface reconfigured	Garage	Totals: garage plus surface reconfiguration
Spaces	130	117	96	159	255
Handicapped	4	5 req.	4	6	10 (7 req.)
Visitor	0	4*	4*	3*	7*
Charging	0	2 req.	1	2	3
Bus	10	10 (2 moved)			3 (or 4) (long)
Motorcycle (2% req)	0	3 req.	2	4	6
Bicycle (1 per 20 req)	0	6 req.	12? (5 reg.)	0 (8 req)	24 (13 req.)
*Estimated demand based upon staff observations of cars parking in drive aisles/fire lanes near the main entry of the Signature Building.					

At buildout, with 255 spaces and 95 faculty and staff members, there will be 160 spaces remaining for students and visitors. Together with the parking provisions included in the applicant's Transportation Management Plan, staff finds the total number of parking spaces to be adequate. Should it be necessary to reconfigure the existing parking lot to provide the necessary 30 percent shade tree canopy coverage, up to ten spaces may be removed. [Emphasis added.]

Management and staging are needed for the existing and interim parking conditions. As noted above, the current parking is unsafe. The proposed Transportation Management Plan is crafted to provide an expeditious remedy for the existing safety issues.

The Campus Master Plan is described as a 15-year plan. Should student, faculty and staff levels increase prior to the construction of the garage, the safety issues may recur. Even if the existing campus population remains as it is today, parking pressure will increase when the number of spaces is reduced to bring the site into compliance. . . .

To remedy the temporary on-site parking shortages, Technical Staff recommended that the Transportation Management Plan be fully implemented by the beginning of the 2015-2016 school year, and that the parking garage be constructed before other intended campus improvements. The Hearing Examiner agrees about the immediate implementation of the TMP, but for the reasons set forth on pages 26-29 and 42-48 of this report, he disagrees with the phasing requirements recommended by Technical Staff. The Hearing Examiner finds that Petitioner has demonstrated that the off-site parking lots, supplemented if need be with parking in the tennis court area, would provide sufficient parking until the underground garage is constructed at a later time.

The Hearing Examiner concludes that Petitioner's proposed parking arrangements, both interim and final, are compliant with the requirements of Zoning Ordinance §59-E-3.7. If problems crop up with the interim parking arrangements, they can be reported to the Board through the TMP and CLC process, and rectified.

Staff also pointed out that, in addition to the required number of spaces, the Zoning Ordinance §59-E-2.83 contains requirements for setbacks and shading of surface parking areas in residential zones. There is no dispute that the existing and proposed surface parking will meet applicable setbacks (Exhibit 72, p. 33); however, Technical Staff and Petitioner do not agree on the applicability of shading requirements. This issue was discussed at pp. 34-36 of this report, and the Hearing Examiner concluded that the tree shading requirements do not legally apply to the surface lots in question and should not be imposed based on general Master Plan language, given the specific conditions on this site, including the extensive and nearby forest on the campus.

- (c) **Minimum frontage.** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*
- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
  - (2) *Sand, gravel or clay pits, rock or stone quarries.*
  - (3) *Sawmill.*
  - (4) *Cemetery, animal.*
  - (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
  - (6) *Riding stables.*
  - (7) *Heliport and helistop.*

Conclusion: This section is not applicable.

- (d) **Forest conservation.** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: The Planning Board, on January 22, 2015 (Exhibit 82), unanimously approved the Final Forest Conservation Plan Amendment proposed by Petitioner (Exhibit 46(a)), with conditions as provided in the Forest Conservation Plan staff report (Exhibit 79). As discussed in Part II.D.1.e. of this report, the Hearing Examiner finds that the subject site is governed by an approved forest conservation plan, as amended, and that the proposed special exception modification will be consistent with that plan. A condition requiring adherence to the Final Forest Conservation Plan Amendment is recommended in Part V of this report.

- (e) **Water quality plan.** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: The subject site is not in a special protection area (Exhibit 72, p. 21), and therefore a water quality plan is not required. As noted in in Part II.D.1.e. of this report, Petitioner filed a stormwater management concept plan-SWMCP (Exhibit 34(e)(iii)), which was approved by the Department of Permitting Services (DPS) on February 27, 2014 (Exhibit 34(c)). Currently, parts of The Heights School campus have little or no stormwater management, so “the addition of stormwater facilities is anticipated to have some positive impact on the watershed.” Exhibit 72, p. 16. Petitioner’s civil engineer, Aaron Smith, testified that the net result of the stormwater control measures will be a decrease of the storm drainage off of the site. Tr. 225-231.

(f) ***Signs.*** *The display of a sign must comply with Article 59-F.*

Conclusion: According to Petitioner’s engineer, Aaron Smith, the monument sign at the site entrance will be maintained without any changes. Tr. 273-274. Technical Staff confirmed that a monumental sign is currently located at the driveway entrance on Seven Locks Road, and no changes are proposed. Exhibit 72, p. 36. The Hearing Examiner will recommend a condition requiring that the monument sign not be changed without permission of the Board of Appeals.

(g) ***Building compatibility in residential zones.*** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: The compatibility of the proposed structures with their surroundings is discussed above in connection with the requirements of Zoning Code Sections 59-G-1.21(a)(4) and 59-G-2.19(a)(2). For the reasons set forth in response to those sections and in Part II.E., on pp. 55-56 of this report, the Hearing Examiner concludes that the structures

planned in this case will be compatible based on the nature of the building materials, the low elevations of the buildings, the landscape buffer and the distance from all residences.

(h) ***Lighting in residential zones.*** *All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: As set forth in Part II. D. 1. c. of this report, based on the evidence and the photometric studies, the Hearing Examiner concludes that the proposed modifications will not result in lighting in excess of 0.1 footcandles at the side and rear property lines; nor will they allow direct lighting to intrude into adjacent residential properties. Technical Staff recommended conditions (11 and 12) requiring shielding of lights, a 12-foot limit on the height of light poles and that athletic fields remain unlighted. Petitioner did not object to these conditions (Exhibit 84), and they will be adopted by the Hearing Examiner.

***59-G-1.26. Exterior appearance in residential zones.***

*A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.*

Conclusion: The compatibility of the proposed structures with their surroundings is discussed above in connection with the requirements of Zoning Code Sections 59-G-1.21(a)(4) and 59-G-2.19(a)(2). For the reasons set forth in response to those sections and in

Part II.E., on pp. 55-56 of this report, the Hearing Examiner concludes that the structures planned in this case will be compatible based on the nature of the building materials, the low elevations of the buildings, the landscape buffer and the distance from all residences.

Based on the testimony and evidence of record, I conclude that, with the limits and conditions recommended in Part V of this report, the changes proposed by Petitioner will meet the specific and general requirements for the proposed use.

## **V. RECOMMENDATIONS**

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition CBA-2197-C, which seeks to modify the existing special exception (CBA-2197 and CBA-2197-A and B) for a private educational institution operated by The Heights School, Inc., at 10400 Seven Locks Road, Potomac, Maryland, be GRANTED, subject to the following conditions, derived from those suggested by the Technical Staff (Exhibit 121), with some of the modifications sought by Petitioner (Exhibit 84), and others included by the Hearing Examiner, based on the hearing:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report. All terms and conditions of the previously approved special exception shall remain in full force and effect, except as modified by the Board as a result of this Modification Petition.
2. Physical improvements are limited to those shown on the final plans submitted by Petitioner, especially the site, landscape and lighting plans, with modifications as indicated herein.
3. Petitioner must bring the accessible parking spaces into compliance with applicable regulations.
4. Petitioner must bring the site into full compliance with all requirements of the "Interim" Fire Lane Establishment Order effective February 24, 2015 (Exhibit 120) unless and until the Fire Department changes it. If any such changes are mandated, the Petitioner should comply immediately and advise the Board of Appeals in writing of the changes.
5. Regular hours of operation for any onsite activity are permitted to begin at 7:00 a.m. for staff/faculty arrival and 8:00 a.m. for student arrival, and continue until to 6:30 pm during the

academic year. Students arriving before 8:00 am may be accommodated indoors. Small group, indoor gatherings or meetings involving faculty, parents or other adults, as well as seasonal indoor basketball games may occur until 9:00 p.m. Hours of operation may run from 9:00 am to 3:00 pm during the summer.

6. Evening and weekend activities extending until 10 p.m.-11 p.m. must be limited to 15 per academic year.
7. Prior to the start of the 2015-2016 school year, Petitioner must:
  - a. Report to the Board of Appeals student enrollment and faculty/staff levels for the upcoming school year, and must do so by June 30 of each succeeding school year.
  - b. Exclude student play from the Category 1 Conservation Easement area on the west side of the middle school; notify staff and students and post signs on the fence.
  - c. Make operational changes aimed at preventing baseballs and other balls generated by athletic activities from entering the properties to the south of the school. If the operational fixes do not accomplish this end by the second CLC meeting, then Petitioner must install a ball-restricting net, suitable for the types of balls used on the adjacent fields, on the south side of the soccer/lacrosse and baseball fields to reduce balls entering the properties to the south of the school.
  - d. Repair or replace the school's fencing along the south property line in the vicinity of the playing fields and complete the fencing around the school so that the enclosure will discourage students from trespassing onto private property.
  - e. Implement the Transportation Management Plan to address constrained parking on the site. Petitioner must submit an annual TMP report to the Board of Appeals. In order to accommodate the faculty and student parking in site, the School must achieve a minimum 65% non-auto mode share in the morning for the entire student population. This consists of walking/biking, transit, shuttles, and carpooling with two or more students in a car. Achieving the non-auto mode share criterion for the student population will be measured once per year and on a normal school day during a full five-day school week.
  - f. Establish a Community Liaison Council (CLC) to address operational impacts, construction schedules, staging areas, faculty, staff and student populations, parking arrangements, and to answer questions and receive community input, if any. The CLC shall consist of school representatives, representatives of neighboring civic associations and homeowners associations, and adjacent and confronting property owners who wish to attend. The Heights School must provide a calendar of events on their website to allow neighbors to have reasonable notice of campus events and CLC meetings. Meetings must be held at least twice per calendar year. Petitioner must provide minutes of the meetings to the CLC members and the Board of Appeals within 30 days after each meeting. Petitioner must provide the CLC with direct contact information for the Assistant Headmaster and must provide regular reports to the CLC of trespassing incidents, if any.
8. During the first available planting season, Petitioner must install all necessary screening plants on the west side of the subject site, adjacent to the middle school, and near south property line adjacent to gym and ball fields. Drainage defects causing pooling along the western property line, if any, must also be corrected. Any shade trees included in past approvals that have been lost must be replaced, unless their replacement would be inconsistent with the plans currently being approved.

9. Petitioner must provide a “green screen” on both the east and south sides of the proposed garage.
10. No vehicles destined to the school are permitted to be stacked or queued on Seven Locks Road or adjacent roads during morning drop-off or afternoon pick-up periods.
11. The heights of light poles must not exceed 12 feet. Lighting along the property lines must not exceed 0.1 foot-candles.
12. Ball fields, tennis courts, and other outdoor sports facilities must not be used after sunset and must not be lighted. Tennis courts must not be covered.
13. Phasing conditions:
  - a. During detailed design of each phase, Petitioner must make all efforts to protect the environment to the extent possible.<sup>10</sup>
  - b. Petitioner must construct the garage prior to any other proposed structures, unless additional off-street parking locations are identified and secured by the School to adequately accommodate the daily parking demand of faculty and students. Petitioner must report to the Board of Appeals, in its annual TMP report, whether it is using off-site parking; how it is being done; and how well that system is functioning.
  - c. During construction of the garage, Petitioner must bring the existing surface parking lot into compliance with Article 59-E in regard to bike racks, motorcycle spaces and electric vehicle charging stations.
  - d. Upon receipt of the Use and Occupancy Certificate for the garage, Petitioner must post signs designating a minimum of four visitor parking spaces near the Signature Building, and a minimum of three designated near the gym entry in the garage.
  - e. The 2014-2015 student (529) and faculty/staff (74) levels will be the maximum populations permitted until either 1) the Use and Occupancy Certificate for the proposed garage has been issued, or 2) the School has secured additional off-street parking locations that will adequately accommodate the daily parking demand of any additional faculty and students. Summer programs are limited to 200 students at any one time.
  - f. The total student enrollment is limited to the maximum number of students that the school is able to appropriately manage with the facilities, parking, faculty and staff available at the time.
  - g. Construction of the lead-in sidewalk from Seven Locks Road to the gymnasium must be completed before a Use and Occupancy Certificate for any of the building facilities approved under this application may be issued.
14. Petitioner must enforce restrictions on faculty, staff and students which prohibit them from parking on Seven Locks Road or neighborhood streets during normal school days, including during construction phases.

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<sup>10</sup> The Hearing Examiner notes that Technical Staff recommended requiring “all efforts to attain the highest levels of sustainability.” I realize that the term “sustainability” has taken on a connotation in recent years beyond what is conveyed by the definition of the verb “sustain.” I prefer to just say what is really intended by the term “sustainability,” which is to say that the structure or activity will not harm the environment.

15. During construction of the parking garage only, the tennis courts may be used for temporary parking. Parking setbacks must be met, and screening must be in place.
16. The Petitioner must comply with all conditions of the Final Forest Conservation Plan, as amended.
17. Copies of the Final Forest Conservation Plan and Category 1 Conservation Easement documents must be kept at The Heights School and given to school maintenance staff and the school's landscaping company to assure compliance with the conditions of the Forest Conservation Plan.
18. Subject to the phasing requirement of Condition 13(f), student enrollment must not exceed 650 students, and faculty/staff levels must not exceed 95, at any time during an academic school year. Summer program enrollment is limited to 200 students at any one time.
19. The Petitioner must comply with the conditions of the Montgomery County Department of Permitting Services (MCDPS) stormwater management concept approval letter dated February 27, 2014 (Exhibit 34(c)). Those conditions may be amended by MCDPS, provided that any such amendments must be approved by the Board of Appeals, if they conflict with other conditions of the Special Exception approval.
20. Petitioner must coordinate the Cabin John Creek storm drain outfall improvements with the M-NCPPC Park Development Division, 301-495-2535.
21. Petitioner must comply with the conditions of Fire Access Plans approved by the Fire Department. Those conditions may be amended by Montgomery County Fire and Rescue Services as needed for safety. If any such changes are mandated, the Petitioner should comply immediately and advise the Board of Appeals in writing of the changes.
22. The following corrections to the submitted drawings are required:
  - a. On sheet C-101, Existing conditions plan, eight accessible spaces are shown. Four exist on site. At least five are required. When corrections are made on the property, show corrections on the sheet.
  - b. Sheet C-102 corrections incomplete:
    - i. 6 accessible spaces shown on table pre-garage not shown on drawing
    - ii. Show any changes required by the Interim Fire Lane Establishment Order.
    - iii. The parking table is corrected for bicycle spaces. Corrections still needed for large bus spaces, small bus spaces, visitor spaces.
    - iv. Patterned area on north side of gym beside the parking lot is not labeled.
    - v. Green screens on the garage are not shown.
  - c. Sheet C-104 corrected and sealed.
  - d. On sheets LP-100 to LP-102, screening plants have been added around tennis courts. Show screening plants on west property line adjacent to the middle school, and near south property line adjacent to the gym and ball fields. Show in plan and detail the 'green screens' to be located on the east and south sides of the parking garage. Show the on-site planting requirements from the Forest Conservation Plan Amendment.

23. When the middle school building is replaced, it must be designed with student lockers located indoors.
24. Petitioner must not make any changes to the monument sign at the school entrance without prior authorization from the Board of Appeals.
25. The Board shall retain jurisdiction over this case to determine, based on an annual review, whether school activities are creating an excessive adverse impact on the neighborhood. If the other operational measures and additional fencing do not succeed in eliminating student trespassing, as determined at CLC meetings, then the Board should consider adding, by administrative modification, a requirement of border monitors where students enter adjoining properties.
26. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: April 22, 2015

Respectfully submitted,



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Martin L. Grossman  
Hearing Examiner