

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

IN THE MATTER OF: *
GEORGETOWN PROFESSIONAL ASSOCIATES, *
A MARYLAND LIMITED PARTNERSHIP *
a/k/a GEORGETOWN PROFESSIONAL *
ASSOCIATES, LLLP¹ *
Applicant *

Lowell E. Baier *
Patrick La Vay *
Shahriar Etemadi *

For the Application *

Jody S. Kline, Esquire *
Attorney for the Applicant *

Zoning Application No. H-118

Before: Martin L. Grossman, Hearing Examiner
Director, Office of Zoning and Administrative Hearings (OZAH)

HEARING EXAMINER’S REPORT AND RECOMMENDATION

¹ The Hearing Examiner notes that the name of the Applicant is misspelled in one place on the Application (Exhibit 3) as “Georgetown Professional Associations, Ltd Ptnshp.” As explained in Exhibit 33, the Applicant’s name on the deed to the subject site is “Georgetown Professional Associates, a Maryland Limited Partnership of Montgomery County, Maryland” (Exhibit 33(a)), but the entity’s name was amended on December 22, 2015, to “Georgetown Professional Associates, LLLP.” Exhibit 33(d). For simplicity, it will be referred to in this report as either the “Applicant” or as “Georgetown Professional Associates, LLLP.”

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I. CASE SUMMARY

Applicant:	Georgetown Professional Associates, LLLP
LMA No. & Date of Filing:	H-118, filed September 28, 2016
Zoning and Use Sought:	Zone Sought: EOFF-0.5, H-35, Employment Office Floating Zone Use Sought: Medical & Professional Office use in existing building
Current Zone and Use:	Current Zone: R-60, with Special Exception S-664 (granted 3/7/79) allowing a medical clinic for up to 18 physicians Current Use: Medical Office use in a townhouse style building
Location:	6300 Democracy Boulevard, in Bethesda – identified in Plat 12576 as Parcel A, Block T of the Georgetown Village Subdivision, situated on the south side of Democracy Boulevard, 800 feet west of Old Georgetown Road.
Acreage to be Rezoned:	Approximately 1.04 acres of land (45,220 square feet).
Density Permitted in EOFF Zone:	Per §59.5.4.5.A.2, Maximum FAR of 1.25 for a tract of 1.04 acres in a Pre-Existing R-60 Euclidean Zone
Density Planned:	FAR of 0.5 is the maximum under the proposed Floating Zone Plan, but the actual existing and planned density is 0.28 FAR (12,855 square feet of floor area). The Application retains the existing building, and does not seek any additional density.
Open Space Required:	10% Minimum (4,522 sq. ft.) per §§59.4.6.3.E.1 and 59.5.4.5.D.2.a
Open Space Planned:	10.9% (4,949 sq. ft.) Open Space Planned
Building Height Required:	35 feet, per compatibility standards under §4.1.8.B
Building Height Planned:	35 feet or less existing and planned
Parking Spaces Required:	Per §59.6.2.4.B, Min = 1/1,000 sq. ft. GFA (13 for 12.855 sq. ft.); Max = 4/1,000 sq. ft. GFA (52 for 12.855 sq. ft.)
Parking Spaces Planned:	57 spaces planned, but the excess spaces will be available to the public in accordance with §59.6.2.3.H.2.b
Environmental Issues:	The Site is not in a Special Protection Area. There is no forest on site, and there are no environmental issues
Consistency with Master Plan:	The existing building predated the 1992 <i>North Bethesda/Garrett Park Master Plan</i> , and that Plan did not recommend any changes to the site. The site is consistent with the general intent and objectives of the Master Plan.
Neighborhood Response:	There have been no submissions from the community, pro or con.
Traffic Issues:	There are no traffic issues. The substitution of some general offices for existing medical offices will likely reduce the number of trips generated by the use. Moreover, none of the studied intersections would exceed the North Bethesda Policy Area CLV standard of 1,550.
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval

II. STATEMENT OF THE CASE

Local Map Amendment (LMA) Application No. H-118, filed on September 28, 2016, by Applicant Georgetown Professional Associates, LLLP,² requests reclassification from the existing R-60 Residential Zone to the EOFF-0.5, H-35, Employment Office Floating Zone of Parcel A, Block T of the Georgetown Village Subdivision, as described in Plat 12576. The property is located at 6300 Democracy Boulevard, in Bethesda, Maryland, and consists of 1.04 acres of land (45,220 square feet) situated on the south side of Democracy Boulevard, 800 feet west of Old Georgetown Road. The current use on the site is a medical and dental office building, styled to look like townhouses, and it is subject to the 1992 North Bethesda/Garrett Park Master Plan. The use operates under Special Exception S-664, granted March 7, 1979, which allows a medical clinic for up to 18 physicians.

The property is owned by the Applicant (Exhibit 33(a)),³ and ownership of all the property is confirmed by state tax records under Tax ID No. 07-00423480. Exhibit 18. The Applicant seeks greater flexibility to house offices in addition to medical and dental types in the existing building because the number of individual medical practitioners available to fill small offices has diminished in recent years, leaving long periods of vacancies. Tr. 17-19. The Application would retain the existing building, and would merely change the nature of some of the tenants. The Applicant has committed to binding elements that would limit the use to medical and dental clinics and general offices, and would exclude businesses that regularly use commercial vehicles, such as painters and home improvement contractors. The binding elements would also prohibit vehicular access to Bells Mill Road, which is a residential street. Exhibits 23(a) and 33(f).

² See Footnote 1.

³ Because the Applicant itself is owned by two other entities, Baier Properties, Inc., and the Lowell E. Baier Revocable Trust (Exhibit 33), Lowell E. Baier, who has the authority to speak for both, has submitted a letter authorizing the rezoning application in two capacities, as President of Baier Properties, Inc., and as the Trustee of the Lowell E. Baier Revocable Trust. Exhibit 33(e).

A notice of the hearing (Exhibit 22) was mailed out and posted on OZAH's website on December 12, 2016, establishing a hearing date on January 20, 2017. The Applicant submitted updated plans and other supporting documentation, including modified binding elements, in December of 2016, consistent with suggestions made to the Applicant by the Planning Department. Exhibits 21 – 26 (and subparts).

Technical Staff of the Maryland-National Capital Park and Planning Commission ("Technical Staff") reviewed the substance of the application, and recommended approval in a report dated December 23, 2016 (Exhibit 28(a)). The Montgomery County Planning Board ("Planning Board") considered the applications on January 5, 2017, and the three members present unanimously recommended approval, as set forth in a letter to the Hearing Examiner dated January 10, 2017 (Exhibit 28). There has been no response from the community in this case, either for or against.

A public hearing was convened, as scheduled, on January 20, 2017, at which time the Applicant presented evidence and called three witnesses in support of the application. There was no opposition testimony. The record was held open after the hearing to give Applicant's counsel the opportunity to file additional materials by January 30, 2017, including, as listed in Exhibit 29:

1. Copy of the deed (because the exact title of the Applicant and owner was unclear in the record);
2. Letter authorizing the LMA application from Lowell Baier, principal owner of the Georgetown Professional Associates Limited Partnership, but also a trustee whose trust may own the partnership;
3. Revised and executed covenants naming the actual Applicant as the bound entity;
4. An executed affidavit of posting;
5. A Table from traffic expert Etemadi showing the ITE rates for General Offices and a Table showing projected trips if the occupancy of the building ends up being 75% medical and 25% general office

By emails dated January 26, 2017 (Exhibit 31), Technical Staff confirmed a correction to the table on page 9 of the staff report, which should have reported existing PM CLVs as 1,301 at the intersection of Democracy Boulevard and Old Georgetown Road, consistent with Mr. Etemadi's report (Exhibit 26(a)) and testimony. Tr. 63.

After requesting and receiving an extension to file additional documents (Exhibits 32 and 34), the Applicant filed the additional documents listed above on February 1, 2017 (Exhibits 33 and 33(a) – (h)). The record was held open until February 10, 2017, for any additional comments. No further comments were received, and the record closed, as scheduled, on February 10, 2017.

Based on the entire record of this case, the Hearing Examiner finds that the requirements for the requested rezoning have been met, and that the application should be granted.

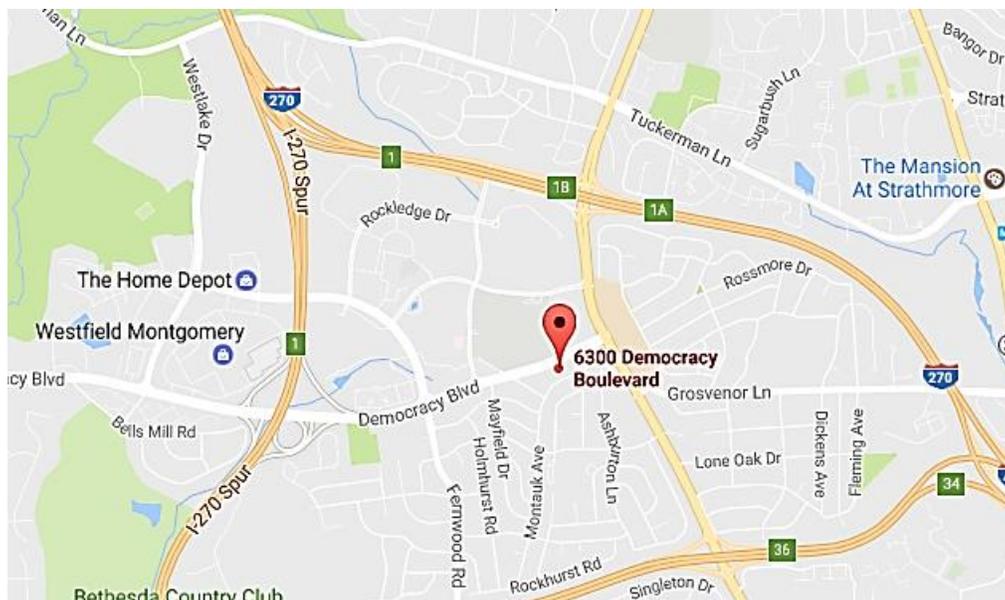
III. FACTUAL BACKGROUND

A. Subject Property

Technical Staff sets forth the location of the subject property as follows (Exhibit 28(a), p. 3):

The [1.04]-acre⁴ Property [45,220 square feet] is located on the south side of Democracy Boulevard, approximately 800 feet west of the intersection of Democracy Boulevard and Old Georgetown Road in Bethesda within the R-60 Zone. The Property is a through-lot, bounded by Democracy Boulevard to the north, Bells Mill Road to the south, Davis Public Library to the west, and a residential townhouse community to the east. Walter Johnson High School confronts the Property across Democracy Boulevard.

Staff also provided a vicinity map showing the subject site and nearby roads:



⁴ The Technical Staff listed the property as 1.03 acres, but as noted by the Planning Board (Exhibit 28), it is actually “1.04 (1.0381) acres,” so the Hearing Examiner has substituted the correctly rounded acreage figure.

Technical Staff describes the subject site as follows (Exhibit 28(a), p. 3):

The Property is improved with the 12,855-square foot Georgetown Professional Medical Clinic , which consists of individual office suites organized into a townhouse configuration, and an associated surface parking lot. A bicycle rack is located in the southeast corner of the parking lot. The south side of the Property, close to Bells Mills Road, contains an open space area with three benches, a picnic table, and trash receptacles. A planting bed with white pine trees separates the parking lot from the townhouse development on the abutting property to the east. Three signs along the Property's frontage on Democracy Boulevard identify the office park as the Democracy Medical Center. Two of the signs are freestanding and the third is a low brick monument sign.

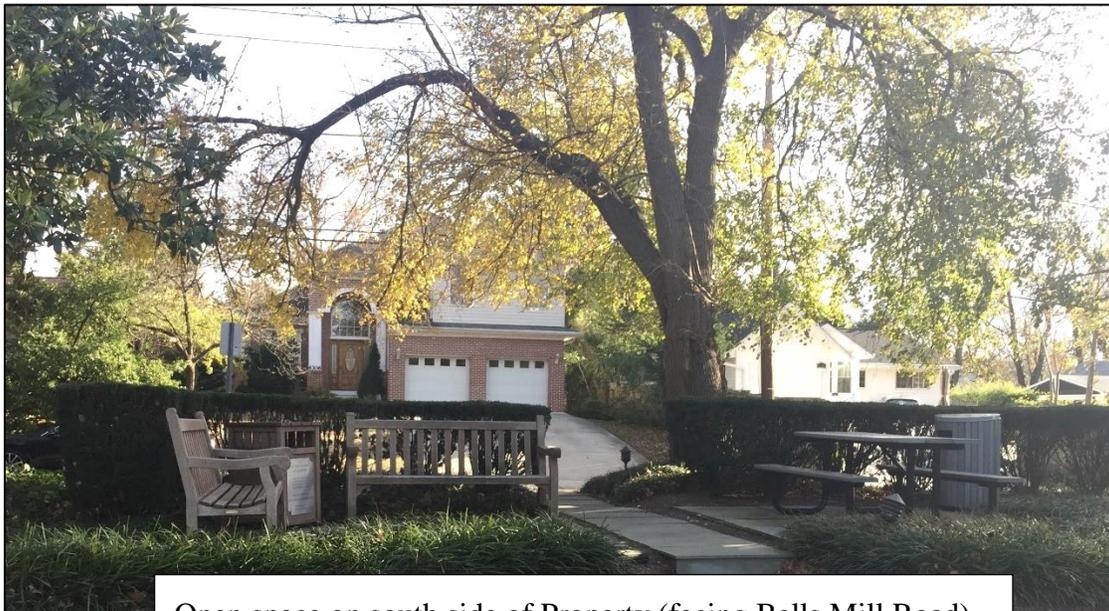
Two driveways from Democracy Boulevard provide access to the Property. The driveways are signed for a one-way circulation pattern with cars entering the Property from the western driveway and exiting the Property from the eastern driveway. A pedestrian connection is available from Bells Mill Road, but vehicular access is only available from Democracy Boulevard.

The subject site can be seen in the following aerial and ground photos supplied by Technical Staff (Exhibit 28(a), pp. 4-5):





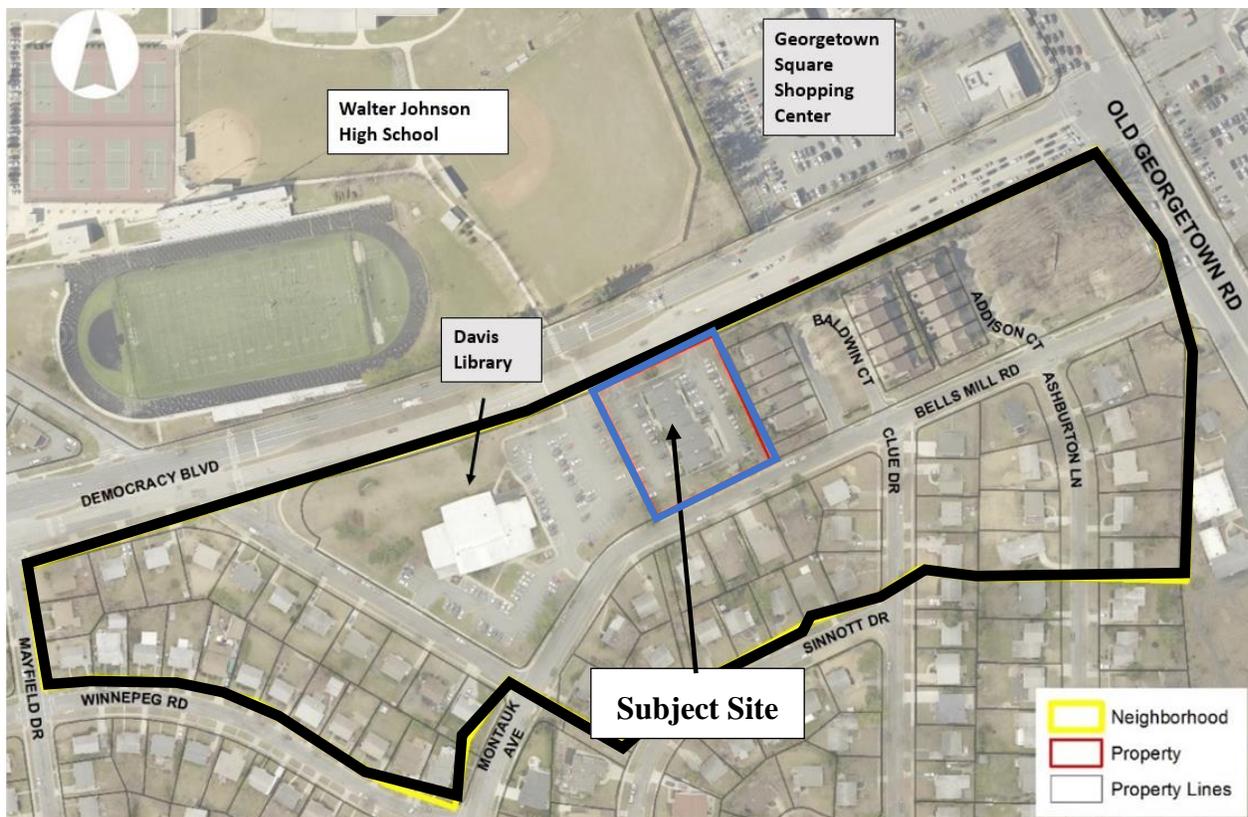
View from Democracy Boulevard (facing northwest)



Open space on south side of Property (facing Bells Mill Road)

B. Surrounding Area

The surrounding area must be identified in a Floating Zone case so that compatibility can be evaluated properly. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. The surrounding area, as defined by Technical Staff (Exhibit 28(a), p. 5), “is generally bound by Sinnott Drive and Winnepeg Road to the south, Old Georgetown Road to the east, Democracy Boulevard to the north, and Mayfield Drive to the west.” The Staff-defined neighborhood is depicted in an aerial photo supplied by Staff:



The Applicant’s civil engineer, Patrick La Vay, testified that he would have defined the surrounding neighborhood a bit more broadly, but the Applicant accepted Staff’s definition. Tr. 26-30. The Hearing Examiner agrees with the Applicant that the surrounding neighborhood should have extended to the north and the east to at least include the confronting properties across Democracy Boulevard and that road’s intersection with Old Georgetown Road, both of which are in

the area that might be most directly affected by the proposed use. Thus, the Hearing Examiner finds that the entire aerial photo depicted above is the properly defined surrounding area.

Nevertheless, this distinction will make no difference to the outcome of this case because no structural changes to the site are being proposed by the Applicant, and the broadening of the use to include some professional offices other than medical offices will actually reduce the number of vehicle trips to the site. Tr. 47-48.

Technical Staff notes that, “The Neighborhood is predominantly residential with detached houses and townhouses in the R-60 Zone. A townhouse development abuts the Property to the east. The east side of the Property abuts the rear yards of five townhouses. Davis Public Library abuts the Property to the west.” Exhibit 28(a), p. 5. As can be seen from the above map, Walter Johnson High School confronts the Property across Democracy Boulevard, and the Georgetown Square Shopping Center, which abuts the high school, is diagonally across Democracy Boulevard from the subject site.

C. Zoning History

Technical Staff reports the following zoning history (Exhibit 28(a), p. 6):

The subject site has been in the R-60 Zone for many years, and the 1992 North Bethesda/Garrett Park Master Plan most recently confirmed the site’s R-60 zoning. The Board of Appeals granted the Applicant Special Exception S-664 for a medical clinic on the site with up to 18 physicians on March 7, 1979 (Exhibit 8). The special exception included the following conditions (among others):

1. Hours of operation shall be limited to 7:00 a.m. until 7:00 p.m. on weekdays, 7:00 a.m. until 1:00 p.m. on Saturdays, and other hours for emergencies only.
2. Access to Bells Mill Road shall not be permitted.
3. Petitioner shall not operate a pharmacy or laboratory on the premises.

Presumably, the special exception will be abandoned and revoked if this rezoning is approved since general offices and medical clinics and permitted uses in the EOF Zones. §59.3.1.6.

D. Proposed Development

Local Map Amendment Application H-118 proposes to reclassify the 1.04-acre property located at 6300 Democracy Boulevard, in Bethesda, Maryland, from the existing R-60 Residential Zone to the EOFF-0.5, H-35, Employment Office Floating Zone. This rezoning would allow the Applicant greater flexibility to rent out some non-medical office space in addition to the existing medical and dental office space, a change necessitated by the difficulty in finding individual medical practitioners to fill small offices in recent years, leaving long periods of vacancies. Tr. 17-19.

Technical Staff described the proposed changes to the use in its report (Exhibit 28(a), p. 6):

The Applicant plans to retain the existing buildings on the Property, which consist of office suites organized into a townhouse configuration. The existing Special Exception restricts use of the office complex to medical practitioners, but the Applicant is requesting the Employment Floating Zone (EOFF-0.5, H-35) to allow other types of businesses to lease office space. The Applicant states that changes in health care delivery and the flux in the health care industry has resulted in fewer medical practitioners seeking individual practice space. Instead, medical practitioners are more likely to associate with large medical practices, or with one of the many “emergency clinic” operations that are being established in the County. As a result of these changes, the Georgetown Professional Medical Clinic has vacancies for the first time since its inception in 1980. The Applicant asserts that the vacancies are not due to the location or condition of the buildings, but rather to the marketplace dynamics for medical office space. For that reason, the Applicant wishes to change the zoning of the Property from residential (R-60, in which the clinic exists by special exception) to the EOFF Zone to allow the flexibility to rent vacant space to other types of office users.

No changes to the buildings are proposed, but Staff worked with the Applicant to make minor improvements to the Property, including the addition of a lead-in sidewalk, parking lot islands, and supplemental landscaping [Exhibit 21(c)]. These improvements will be implemented through site plan approval.

* * *

In order to allow the needed flexibility, while simultaneously protecting the neighborhood against more intrusive office occupants and cut-through traffic, the Applicant worked out the following binding elements in conjunction with Technical Staff:

1. Pursuant to the provisions of Section 59.5.4.3.B (“Land Uses”), the Applicant voluntarily restricts uses to be allowed on the Property to:

- a. Medical and Dental Clinics; and
 - b. Offices, excluding businesses that regularly use commercial vehicles such as painters and home improvement contractors.
2. Vehicular access to Bells Mill Road is prohibited

These binding elements are reflected in the final Floating Zone Plan (Exhibit 23(a)), discussed below, and in the Applicant's Declaration of Covenants (Exhibit 33(f)) to be filed in the County's land records.

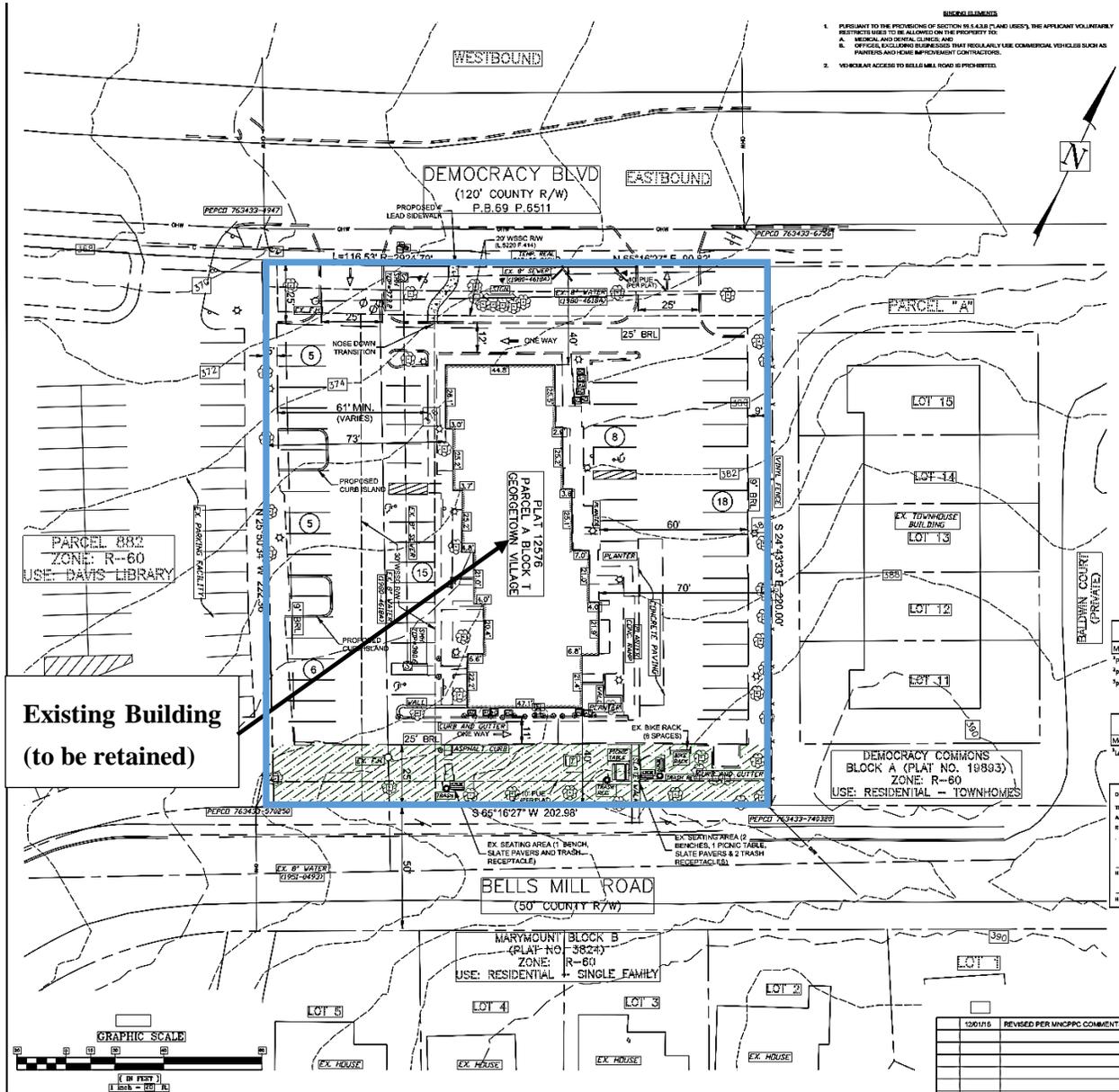
E. Floating Zone Plan

Under Zoning Ordinance §59-7.2.1.B.2.g., every application for rezoning to a Floating Zone must be accompanied by a "Floating Zone Plan" (FZP) that contains the following information:

- i. building location, density, massing, height, and anticipated use;*
- ii. locations of open spaces and preliminary stormwater management strategy;*
- iii. pedestrian, bicycle, and vehicular circulation, parking, and loading;*
- iv. any binding element on the application. An applicant who proposes a binding element must submit an unexecuted covenant suitable for filing in the land records reflecting any restriction on the development standards, development program, or use that will be applicable to the property if the District Council approves the application; and*
- v. the following additional information:*
 - (a) current and proposed zone;*
 - (b) a plan certified by a licensed professional, showing existing site conditions and vicinity within 100 feet, including total tract area; existing topography; watershed in which the site is located; Special Protection or Primary Management areas; any floodplain, wetland, or perennial or intermittent stream, and any associated buffers; whether or not rare, threatened, or endangered species were observed on the property; whether or not the property is on the Locational Atlas and Index of Historic Sites; the aerial extent of forest and tree cover on the property; and date(s) field work was conducted;*
 - (c) existing or approved adjacent land uses, buildings, and rights-of-way;*
 - (d) a Traffic Study under the Planning Board's LATR Guidelines if the incremental increase in vehicular peak-hour trips between the density of the base zoning and the density of the requested floating zone meets the minimum applicability requirement in the LATR Guidelines; and*
 - (e) general phasing of structures, uses, rights-of-way, sidewalks, dedications, and future preliminary and site plan applications;*

The Applicant has met these requirements by filing its amended Floating Zone Plan (FZP) in Exhibit 23(a) and related documents (Exhibits 10-12, 14, 15, 21(b) and (c), and 26(a)).

The FZP (Exhibit 23(a)) is reproduced below, followed by the landscape plan (Exhibit 21(c)):



- REQUIRED ELEMENTS**
1. PURSUANT TO THE PROVISIONS OF SECTION 64.433 PLAND USES, THE APPLICANT VOLUNTARILY REPRESENTS AND WARRANTS THAT THE PROPOSED PROJECT IS TO BE ALLOWED ON THE PROPERTY FOR:
 - A. MEDICAL AND DENTAL CLINICS AND
 - B. OFFICES EXCLUDING BUSINESSES THAT REGULARLY USE COMMERCIAL VEHICLES SUCH AS FLEETS AND HOME IMPROVEMENT CONTRACTORS.
 2. VEHICULAR ACCESS TO BELLS MILL ROAD IS PROHIBITED.

Summary of Vehicle Parking Requirements¹
Per 59-6.2.4.B

Use	GFA	Metric	Reduced Parking Area		Parking Requirement		Parking Provided
			Baseline Min.	Baseline Max.	Min.	Max.	
Medical Office	12,855 SF	1,000 SF of GFA	1.00	4.00	13	52	57 ²

¹Per 6.2.8.B.2 Off-Street Loading Spaces not required for office and professional uses < 25,000 GFA

²Per 6.2.3.H.2.b all parking spaces in excess of the maximum will not be reserved and will be made available to the public.

³Per COMAR 05.02.02, 3 accessible parking spaces are required. Three marked accessible spaces exist on site.

Summary of Bicycle Parking Requirements
Per 59-6.2.4.C

Use	GFA	Metric	Baseline Min.	Parking Requirement	% Long Term	Long Term Requirement	Short Term Requirement	Long Term Provided	Short Term Provided
Medical Office	12,855 SF	5,000 SF of GFA	1.00	3	85%	3	1	3	8

¹Long term bicycle parking spaces will be provided in existing storage room inside building.

Existing Zone: R-60 (Residential - 60)
 Proposed Zone: EOFF-0.5 H-35 (Employment Office - Floating)
 Site Area: 1.0381 Acres or 45,220 SF
 Building Type (Section 5.5.4.A): Multi Use and/or General

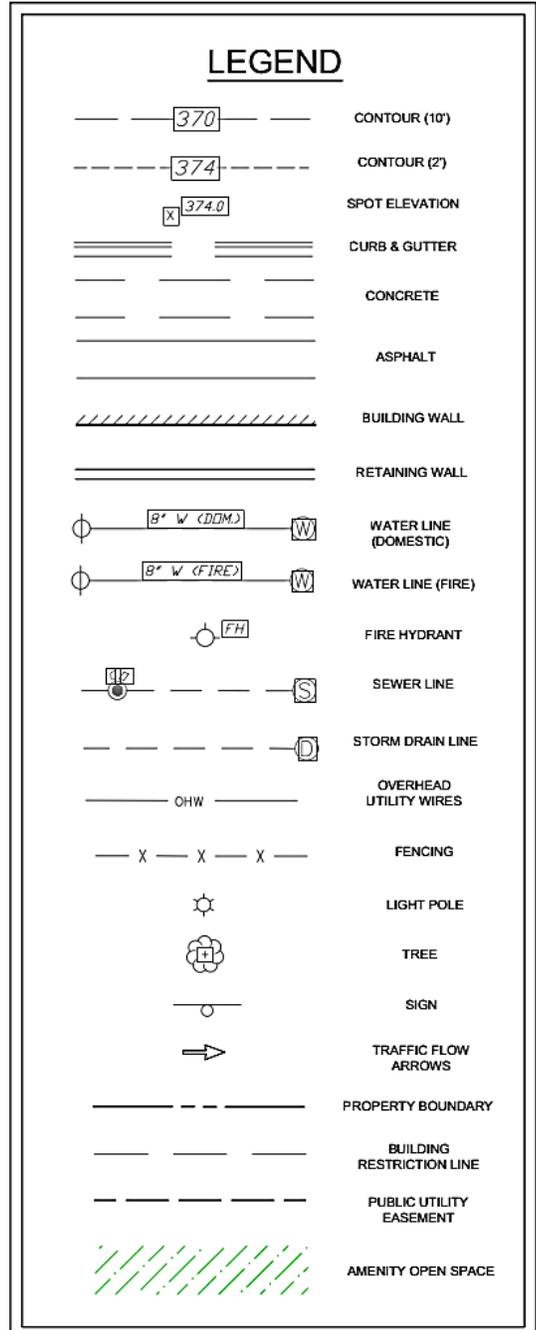
SITE NOTES

1. THE TOPOGRAPHY SHOWN WITHIN THE SUBJECT PROPERTY WAS PREPARED BY MHG (2015) AND SUPPLEMENTED WITH AVAILABLE UTILITY RECORDS. TOPOGRAPHY OUTSIDE OF THE PROPERTY WAS TAKEN FROM AVAILABLE GIS.
2. EXISTING UTILITIES SHOWN ARE BASED ON VISIBLE SURVEYED APPURTENANCES, ACCESSIBLE STRUCTURES AND PLANS OF RECORD.
3. BOUNDARY INFORMATION IS SHOWN BASED ON PLAT NO. 12576 AND SURROUNDING PLATS OF RECORD.
4. REFER TO ZONING DATA TABLE FOR DEVELOPMENT STANDARDS.
5. ALL EXISTING IMPROVEMENTS ARE TO REMAIN.
6. PRIOR SPECIAL EXCEPTION CASES: S664 & CBA2705.

EOFF Zone , Standard Method Development Standards

	EOFF-0.5 H-35 ZONE	PROVIDED
Open Space (min)	SEC. 5.4.5.D.2.a & 4.6.3.C.1	
Amenity Open Space >10,000 SF	10% or 4,522 SF	10.9% or 4,949 SF
Lot and Density	SEC. 5.4.5.A(2)	
Density, FAR	0.5 FAR or 22,610 SF	0.28 FAR or 12,855 SF ¹
Placement:		
Principal Building & Accessory Structure Setbacks (min)	SEC. 5.4.5.B(2)	
Front Setback	Established by Floating Zone Plan	40'
Side Setback (East)		70'
Side Setback (West)		73'
Rear Setback		n/a
Rear setback, Alley		n/a
Parking Setbacks for Surface Parking Lots - 10 or more spaces	SEC. 5.4.5.B(2)	
Front setback	Established by Floating Zone Plan	25'
Side setback		5'
Rear setback		n/a
Rear setback, alley		n/a
Parking area landscape requirements - 10 or more spaces	SEC. 6.2.9.C	
Parking Lot Tree canopy	25% or 5,723 SF	29.5% or 6,745 SF
Parking Lot Landscaped Areas	5% or 1,145 SF	5.44% or 1,245 SF
Parking Lot Perimeter Planting	10 FT ³	9 FT ⁴
Height (max)	SEC. 5.4.5.B(2)	
Principal Building	Established by Floating Zone Plan	35 ⁵
Accessory structure		20'
Form	SEC. 5.4.4.A	
Gallery/Awning	Allowed	n/a
Porch/Stoop	Allowed	n/a
Balcony	Allowed	n/a
Open Space Landscaping and Outdoor Lighting - Amenity Open Space	SEC. 6.3.8.A	
Permeable area (min)	10% or 452 SF	91.7% or 4,538 SF
Tree Canopy (min)	10% or 452 SF	58.5% or 2,894 SF

¹Source: Maryland Department of Assessments and Taxation
²Total area of surface parking facility is 22,892 SF
³The eastern parking area abuts a residential detached zone improved with a residential use. The western parking area abuts a residential detached zone improved with a institutional use, however it abuts another parking lot, therefore no perimeter planting area is required on the west side
⁴The existing perimeter planting area is only 9 feet wide due to property line constraints, therefore the Applicant has requested relief under Section 6.8.1.
⁵Exact existing building height unknown, but is less than 35 feet.



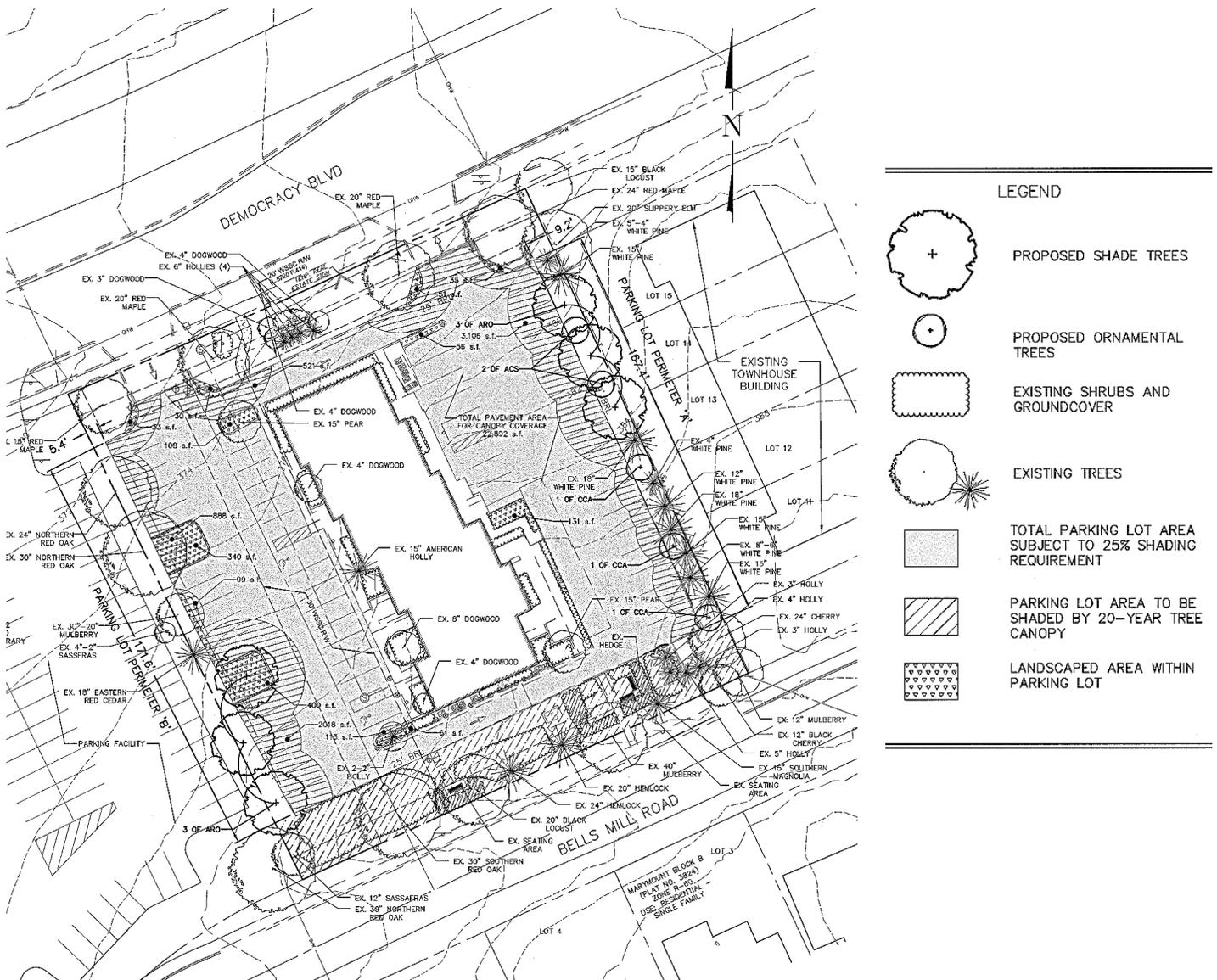
As previously mentioned, the FZP shows two binding elements –

BINDING ELEMENTS

1. PURSUANT TO THE PROVISIONS OF SECTION 59.5.4.3.B ("LAND USES"), THE APPLICANT VOLUNTARILY RESTRICTS USES TO BE ALLOWED ON THE PROPERTY TO:
 - A. MEDICAL AND DENTAL CLINICS; AND
 - B. OFFICES, EXCLUDING BUSINESSES THAT REGULARLY USE COMMERCIAL VEHICLES SUCH AS PAINTERS AND HOME IMPROVEMENT CONTRACTORS.
2. VEHICULAR ACCESS TO BELLS MILL ROAD IS PROHIBITED.

As can be seen from Tables on the FZP, there will be 57 vehicle parking spaces on the site and 11 bicycle spaces, which will meet statutory requirements for the number of parking spaces.

In addition to the FZP, the Applicant filed a Landscape Plan (Exhibit 21(c)) to demonstrate added landscaping that will be finalized by the Planning Department at site plan review. Tr. 10-11.



The Applicant plans to add six native shade trees and five native ornamental trees along the west and east sides of the subject site to enhance the tree canopy and improve the landscape buffers. Exhibit 28(a), p. 11.

**TREE CANOPY COVERAGE
FOR PARKING LOT AREA
(Zoning Ordinance Sec. 6.2.9.C.2)**

TREE SPECIES RECEIVING CREDIT FOR CANOPY COVERAGE		
BOTANICAL NAME	COMMON NAME	20 YEAR CANOPY (DIA. IN FT)*
Acer rubrum 'October Glory'	October Glory Red Maple	48
Cornus florida 'Appalachian Spring'	Appalachian Spring Dogwood	16
Ilex spp.	Tree Holly	12
Quercus rubra	Northern Red Oak	35
Morus spp.	Mulberry	22
Pinus strobus	Eastern White Pine	30

* 20-year canopy as shown in the Montgomery County Trees Technical Manual (September 1992), Appendix C, 'Plant Species Information: Montgomery County Maryland Landscape Tree Evaluation Criteria'. Canopy diameters not listed in the Technical Manual are taken from 'Manual of Woody Landscape Plants' by Michael A. Dirr.

LANDSCAPE PLANT LIST							
KEY	QFY	BOTANICAL NAME	COMMON NAME	CAL	HGT	ROOT	SPACING
SHADE TREES							
ARO	6	Acer rubrum 'October Glory'	October Glory Red Maple	2½-3"		8&B	As shown
ORNAMENTAL TREES							
ACS	2	Amelanchier canadensis 'Sprizant'	Spring Glory Serviceberry		6-7'	8&B	As shown
CCA	3	Cercis canadensis	Eastern Redbud		6-7'	8&B	As shown

**PARKING LOT LANDSCAPING REQUIREMENTS
2014 Montgomery County Zoning Ordinance
Section 6.2.9.C**

TABLE 1: Parking Lot Requirements for 10 or More Spaces

	REQUIRED/PERMITTED	PROVIDED
1. Landscaped Area		
a. Minimum Landscaped Island Area	100 s.f.	143 s.f.
Minimum Area of Parking Lot to be landscaped	5% of Parking area (1,145 s.f.)	5.4% (1,245 s.f.)
b. Maximum Parking Spaces between Islands	20	17
c. SWM Facility in Landscaped Area	Permitted	N/A
2. Tree Canopy		
a. Minimum Tree Canopy (Parking Area = 22,892 s.f.)	25% of Parking Area in 20 years	29.5%
20-year Tree Canopy Area	5,723 s.f.	6,745 s.f.
3. Perimeter Planting		
a. SEGMENT A = 167.4' Planting Area Abutting a Residential- Detached-zoned Property, Improved with a Residential Use		
i. Minimum Width	10'	9.2' *
ii. Fence Height	6'	Existing 6' Vinyl
iii. Canopy Trees	30' o.c. = 6 trees	3 trees**
iv. Understory Trees	2 per Canopy Tree = 12 trees	5 trees**
b. SEGMENT B = 171.6' Planting Area Abutting a Residential-Detached-zoned Property, Improved with a Civic Institutional/Commercial Use	Per Section 6.2.9.C.3.b.iv, the property abuts another parking lot and no perimeter planting area is required.	

* Waiver requested for existing perimeter planting width below the required minimum.

** Mature existing trees within the parking lot perimeter prevent the installation of the required number of trees.

F. Master Plan

The 2014 Zoning Ordinance has three different approaches that must be satisfied in analyzing rezoning applications in light of applicable master plans. First, the new Zoning Ordinance establishes “Necessary Findings” by the Council for approval of rezoning applications, one of which – Section 59.7.2.1.E.2.a. – specifies that the District Council must find that the Floating Zone Plan will “substantially conform with the recommendations of the applicable master plan, general plan, and other applicable County plans.”⁵

Another provision in the 2014 Zoning Ordinance – Section 59-5.1.2.A.1. – provides, *inter alia*, that:

- . . . The intent of the Floating zones is to:
 - A. Implement comprehensive planning objectives by:
 - 1. furthering the goals of the general plan, applicable master plan, and functional master plans; . . .

Finally, in Section 59.5.1.3, the new Zoning Ordinance differentiates between Floating Zones that are recommended for a subject site in the applicable master plan and those that are not. If the proposed Floating Zone is specifically recommended for a site in the master plan, then Section 59.5.1.3.B. provides that “there are no prerequisites for an application.” In contrast, if the proposed Floating Zone is not recommended in the master plan, then Section 59.5.1.3.C. requires

⁵ A few words should be said about the legal definition of the term “substantially conform with the recommendations of the applicable master plan,” as it is used in Zoning Ordinance §59-7.2.1.E.2.a. The Maryland Court of Appeals held, in the case of *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, however, the Maryland legislature enacted the *Smart, Green, and Growing - Smart and Sustainable Growth Act of 2009*, effective July 1, 2009. That Act amended Md. Land Use Article, §§1-301 to 1-304, in an express attempt to legislatively overturn the *Terrapin Run* holding by 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 regulations 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 rezoning or 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 specific rezoning or special exception applications. Maryland Code, Land Use Article, § 1-301. The Hearing Examiner therefore concludes that the 2009 legislation does not apply to the instant rezoning application, and that we should still be guided by the holding in *Terrapin Run*.

that certain density standards be met, and if the subject site has a residential base zone, other requirements must be met as well.

The present section of this report addresses the goals of the applicable *1992 North Bethesda/Garrett Park Master Plan*, and the Applicant's conformance thereto. Compliance with the specific requirements of Sections 59.5.1.2. and 3 will be further discussed in Part V of this report, which reviews the Council findings called for in the Zoning Ordinance.

The subject site is mentioned on pages 82-83 of the *1992 North Bethesda/Garrett Park Master Plan*, in connection with the property directly to its east, which was vacant at the time:

DAVIS-DEMOCRACY

This property [i.e., the property immediately to the east of the subject site] extends to 3.42 acres and is located in the southwest corner of Democracy Boulevard and Old Georgetown Road, immediately north of the Ashburton and Marymount subdivisions. The existing zoning is R-60 and the property is presently vacant.

To the east and north of the [property to the east of the subject] site are the Wildwood and Georgetown Square shopping centers, both zoned C-1 (Convenience Commercial). To the west is located a 2½ story special exception medical office with 12 suites. Bells Mill Road forms the southern boundary of the site. [Underlining added to note the reference to the subject site.]

The property [to the east of the subject site] has approximately 700 feet of frontage along Democracy Boulevard and 204 feet of frontage along Old Georgetown Road. The site is partially wooded with some very large specimen oak trees.

Uses considered for this [property immediately to the east of the subject] site included a park, residential townhouse, commercial townhouse, and retail. The location of the property adjacent to a major intersection, the proximity to a single-family subdivision, special exception and retail uses, the shallow depth of the site, and the possibility of additional right-of-way on Democracy Boulevard were all considered. The property [immediately to the east of the subject] site was considered unsuitable for single-family detached homes, while the provision of park facilities and additional retail facilities was considered more appropriate within Rock Spring Park. Accordingly, this Plan confirms the existing R-60 zoning on this property. The property is suitable for development under the R-60 (Cluster) option, with access from Bells Mill Road.

The Master Plan (at pages 33-34) also lists its general objectives, of which its Land Use and Community Facilities objectives are reproduced below:

A. LAND USE

1. Protect and reinforce the integrity of existing residential neighborhoods.
2. Direct future development to land nearest to Metro stops and new transit stations, and to areas best served by transportation infrastructure.
3. Preserve and increase the variety housing stock, including affordable housing.
4. Encourage a mixture of land uses in redeveloping areas to promote variety and vitality.
5. Encourage a land use pattern that provides opportunities for housing and employment.
6. Maintain and enhance the areas regional employment centers.
7. Preserve and enhance a spectrum of retail facilities ranging from regional to neighborhood shopping.
8. Preserve and expand green areas and greenways, including institutional open space, for environmental protection, wildlife sanctuary, recreation and visual relief.

* * *

E. COMMUNITY FACILITIES

1. Provide public facilities to meet the recreational, social and human service needs of the community, particularly the elderly and handicapped.

* * *

The Master Plan expands on its “Green Corridors” policy (at pages 250-251):

8.4 GREEN CORRIDORS

To ensure the identity and integrity of residential areas along major roadways, and to strengthen community identity by creating attractive transportation corridors, the Plan proposes a Green Corridors policy that addresses the visual effects of roadways and abutting properties. The Green Corridors policy is recommended to protect and enhance the residential character of the Planning Area. The policy applies to the following roadways, which differ widely from one another in character:

Old Georgetown Road . . .

Democracy Boulevard . . .

The following is the Green Corridors policy for the North Bethesda-Garrett Park Planning Area.

1. Maintain and enhance planting of vegetation along roadsides and in medians of major highway corridors.

Design guidelines include: placing a landscaped buffer between the curb and relocated sidewalks, placing trees in medians and along curbs, screening of front yard parking, and relocating utility poles to allow for optimum tree planting and sidewalks. Visibility for highway safety must also be considered.

Protection and enhancement projects will require coordination between the Maryland State Highway Administration and the Montgomery County Department of Transportation, as well as local property owners and civic associations.

2. The Board of Appeals should require full adherence to the following guidelines for special exceptions in Green Corridors.
 - Require screening for parking, even when less than six parking spaces are involved.
 - Retain green space, particularly when it provides trees that screen buildings.
 - Screen existing buildings with plant material.
 - Additions to existing buildings should be compatible with the existing residential architecture and adjoining neighborhoods. Visibility of buildings to residents of nearby communities should be taken into account. Additions should be as unobtrusive as possible, and should be landscaped to provide screening.

Technical Staff concluded that “. . . the Floating Zone Plan substantially conforms with the recommendations of the *North Bethesda/Garrett Park Master Plan*.” Exhibit 28(a), p. 10. Staff’s rationale is discussed on page 8 of its report:

The Property falls within the boundary of the 1992 *North Bethesda/Garrett Park Master Plan*. At the time of the Master Plan, the Property was already developed with the medical office park. The Master Plan did not recommend any changes and therefore confirmed continued use of the Property for medical offices.

The Master Plan designates Democracy Boulevard as a Green Corridor (pg. 250). The Green Corridors policy addresses the visual effects of roadways and abutting properties to protect and enhance the residential character of the Planning Area. The section of Democracy Boulevard near the Property is lined with a mix of residential, institutional, and commercial uses. The existing townhouse style office park on the Property has a residential appearance that blends well with the neighboring townhouse community to the east. The Property’s planting bed facing Democracy Boulevard contains several mature trees and an attractive planting bed with ornamental trees, shrubs and seasonal flowers. The Property contributes to the existing Green Corridor on this section of Democracy Boulevard.

The Hearing Examiner agrees with Technical Staff’s observations, but would go even further. Not only does the subject site conform to the Master Plan’s Green Corridors policy for the reasons stated by Staff, it also meets the Plan’s general objectives of protecting the integrity of

nearby residential neighborhoods and providing facilities to meet the human services needs of the community by maintaining medical facilities near to residential neighborhoods, and continuing to house them in a residential-appearing, townhouse style building.

Based on this record, the Hearing Examiner concludes that the proposed rezoning substantially conforms with the applicable recommendations of the *1992 North Bethesda/Garrett Park Master Plan*, and furthers its goals.

G. Public Facilities

Under the County's Adequate Public Facilities Ordinance ("APFO," Code §50-35(k)), an assessment must be made at subdivision as to whether the transportation infrastructure, area schools, water and sewage facilities, and other services will be adequate to support a proposed development, and in turn, whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process.⁶

The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that are set by the County Council every four years in the Subdivision Staging Policy (SSP). While the final test under the APFO is ordinarily carried out at subdivision review, there is no requirement for subdivision in this case because there will be no significant changes to the site. Nevertheless, the District Council must make its own evaluation as to the adequacy of public facilities in a rezoning case, as spelled out for traffic issues in Zoning Ordinance §59.7.2.1.E.2.e, quoted immediately below, and for other public facilities in §59.5.1.2.A.2, which will be discussed at the end of this section.

For a Floating zone application the District Council must find that the floating zone plan will: . . .

e. generate traffic that does not exceed the critical lane volume or volume/capacity ratio standard as applicable under the Planning Board's

⁶ The Council adopted a new 2016-2020 Subdivision Staging Policy that applies to preliminary plans filed on or after January 1, 2017. See Subdivision Staging Policy 2016-2020, Res. No 18-671, adopted 11-15-16, eff. 1-1-17.

LATR Guidelines, or, if traffic exceeds the applicable standard, that the applicant demonstrate an ability to mitigate such adverse impacts . . .”

The threshold question is whether to apply the old (2012-2016) Subdivision Staging Policy to evaluate the adequacy of transportation facilities in this case or the new (2016-2020) Subdivision Staging Policy. The Hearing Examiner concluded that in cases like this one, where a rezoning application was filed in 2016 and subdivision would not be needed, the 2012-2016 Subdivision Staging Policy would apply, not the 2016-2020 Subdivision Staging Policy, which by its own terms, applies to applications for subdivision filed on or after January 1, 2017. Moreover, the above-quoted provision of the Zoning Ordinance requires evaluation of traffic under the LATR Guidelines, and as of the close of the record in this case, the Planning Board had not issued LATR Guidelines for the new Subdivision Staging Policy. The Applicant’s counsel and Applicant’s transportation planner, Shahriar Etemadi, agreed with the Hearing Examiner’s approach, and Mr. Etemadi noted that the end result would be the same in any case. Tr. 48-52.

The principal tool used by the County to evaluate the ability of transportation facilities to handle a proposed development is the Local Area Transportation Review (“LATR”). LATR generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion during the peak hour of the morning and evening peak periods. An LATR traffic study is not required unless a proposed development would generate 30 or more peak-hour automobile trips. For developments that will generate fewer than 30 peak-hour trips, only a traffic statement need be filed.⁷ Moreover, in cases where a renovation will produce fewer trips than the present use, only a traffic statement is called for. As stated in the Planning Department’s *LATR and TPAR Guidelines* (2013), p. 17,

. . . If the proposal generates less than 30 trips or is a renovation of an existing development and will generate no net increase in trips, a traffic exemption statement is required instead of a traffic study.

⁷ Planning Department’s *LATR and TPAR Guidelines* (2013), p. 6.

An LATR traffic study is not required for any expansion that generates five or fewer additional peak hour trips if use and occupancy permits for at least 75 percent of the originally approved development were issued more than 12 years before the LATR traffic study exemption request.

In the subject case, a full traffic study was not required under the LATR Guidelines because the total trips generated by the proposed development will not exceed the current number of trips generated, and will likely be lower because the general office use that is proposed for some of the office units generates fewer trips than medical office use, according to both LATR Guidelines and the Institute of Transportation Engineers (ITE) Trip Generation Manual, 9th Edition. *See* the reports and testimony of Applicant’s transportation expert, Shahriar Etemadi (Exhibits 26(a), 33(h) and Tr. 54-60). Technical Staff agreed, as well (Exhibit 28(a), p. 9):

Non-medical office uses that replace existing medical or dental tenants will reduce the number of peak-hour trips to and from the Property because trip-generation rates for general office use are lower than the rates for medical office/clinic use.

Mr. Etemadi predicted the following trip generation (Exhibit 33(h)):⁸

Comparison of Different Office Trip Rates

Land Use (12,855 Square Feet)	AM				PM			
	Trip Rate/1000 Sq.Ft.	In	Out	Total	Trip Rate/1000 Sq.Ft.	In	Out	Total
LATR General Office	1.38	16	2	18	2.24	5	24	29
ITE General Office	1.56	18	2	20	1.49	3	16	19
ITE Medical Office	2.39	24	7	31	3.57	13	33	46

Regardless of whether or not the LATR Guidelines would require a full traffic study, the standard under Zoning Ordinance §59.7.2.1.E.2.e. still requires a finding as to whether the proposed development would “generate traffic that does not exceed the critical lane volume [CLV] or volume/capacity ratio standard. . .” Technical Staff therefore looked at projected CLVs at nearby

⁸ The Medical Office Trip Rate figures were taken from the ITE manual because the LATR Guidelines do not supply trip generation rates for medical offices.

intersections (Exhibit 28(a), pp. 9-10). The worst-case trip generation scenario would produce the following Critical Lane Volumes (CLVs) at the studied intersections:

- Existing: The current traffic condition with traffic counts collected on October 2015.
- Background: The existing condition plus the trips generated from approved but un-built nearby developments.
- Total: The background condition plus the additional site-generated trips based on proposed change in land use.

Studied Intersection	Traffic Condition					
	Existing		Background		Total	
	AM	PM	AM	PM	AM	PM
Democracy Boulevard at Old Georgetown Road	1,277	1,301 ⁹	1,342	1,488	1,342	1,488
Democracy Boulevard at Rockledge Drive	703	645	710	676	710	676

Technical Staff concluded (Exhibit 28(a), p. 9), “The proposal will not create unacceptable intersection congestion levels, as it will not generate traffic that exceeds the North Bethesda Policy Area CLV standard (1,550), therefore, no LATR mitigation is required.”

In addition to LATR, the County employs Transportation Policy Area Review (TPAR) to compensate the public for the cost of transportation improvements necessitated by proposed developments. As to Transportation Policy Area Review (TPAR), Staff stated (Exhibit 28(a), p. 10):

For the Policy Area Review, the Property is located in the North Bethesda Policy Area. Although this policy area has inadequate transit capacity, the Applicant will not be required to make any Transportation Policy Area Review (TPAR) mitigation payment because the application will not increase the square footage of the existing building.

Based on this record, the Hearing Examiner finds that transportation facilities are adequate and will not be adversely affected by the proposed development.

⁹ The figure of 1,301 is a corrected figure, as Technical Staff agreed with Mr. Etemadi that the original figure in the table on page 9 of the staff report was a typographical error. Exhibit 31.

The new Zoning Ordinance revisits the issue of public facilities in Section 59.5.1.2.A.2., which provides that:

The intent of the Floating zones is to: A. Implement comprehensive planning objectives by: . . . 2. ensuring that the proposed uses are in balance with and supported by the existing and planned infrastructure in the general plan, applicable master plan, functional master plan staging, and applicable public facilities requirements; . . . [Emphasis added.]

Thus, the new Zoning Ordinance requires an analysis at rezoning of the adequacy of non-transportation facilities, as well as transportation facilities. Of course, since the proposed use is for office facilities, not residences, it will not generate any demand for additional school facilities. With regard to other listed public facilities and services, the 2012-2016 Subdivision Staging Policy provides, at p. 21, that we “. . . must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated.”¹⁰ There is no evidence of inadequacy in this case, and therefore police stations, firehouses and health clinics will be considered sufficient.

Applicant’s civil engineer, Patrick La Vay, testified that the existing building on the site is connected to adequate public facilities for water and sewer, power and communications. He further testified that, given the limited land disturbance, there is no requirement to upgrade stormwater management on the site. Tr. 41 and 44. Technical Staff agreed, stating that “The proposed use of the Property for offices is supported by the existing infrastructure and public facilities.” Exhibit 28(a), p. 11.

Based on this record, the Hearing Examiner finds that the proposed use will be served by adequate public services and facilities.

H. Environment

Under the new Zoning Ordinance, an Applicant for rezoning is not required to submit an

¹⁰ The identical language can be found on page 14 of the 2016-2020 Subdivision Staging Policy.

approved Natural Resource Inventory / Forest Stand Delineation (NRI/FSD) with its rezoning application;¹¹ however, as required by the new Zoning Ordinance, Applicant filed an “Existing Conditions Plan” (Exhibit 21(b)), certified by a professional and showing the existing conditions on the site and in the vicinity within 100 feet. As demonstrated by this plan, and accepted by Technical Staff (Exhibit 28(a), p. 10), “There are no forests, wetlands, or other environmental features on the Property.” Staff added (Exhibit 28(a), p. 13), “The Property does not contain any stream, floodplain, wetland, environmental buffers, or any slopes greater than 25% or slopes greater than 15% where erodible soils are present.” The Plan also indicates that the site is not in a Special Protection or Primary Management area, and has no rare, threatened, or endangered species.

As mentioned in the previous section, Applicant’s civil engineer testified that, given the limited land disturbance, there is no requirement to upgrade stormwater management on the site. Tr. 41 and 44. Technical Staff did not find it necessary to address stormwater management in its report, but did note that the environment would be protected in that “The Applicant plans to add six native shade trees and five native ornamental trees along the west and east sides of the Property to enhance the tree canopy and improve the landscape buffers.” Exhibit 28(a), p. 11.

Based on this record, the Hearing Examiner is satisfied that the proposed use raises no new environmental concerns, and any impacts will be further evaluated at site plan review.

I. Community Concerns

There has been no formal input from the community in this case. However, Technical Staff reported that “The Applicant indicated to Staff that there was neighborhood concern about potential office users that would generate regular truck traffic, such as contractors.” Exhibit 28(a), pp. 6-7. Staff therefore recommended modifying Applicant’s initially proposed binding element

¹¹ Compare Section 59-D-1.3(a) of the old Zoning Ordinance with Section 59.7.2.1.B.2.g.v.(b) of the new Zoning Ordinance, which calls for “a plan certified by a licensed professional, showing existing site conditions and vicinity within 100 feet . . .,” including a variety of environmental information. The approval process for an NRI/FSD is pushed back to site plan review by the Planning Department under the new Zoning Ordinance.

to exclude businesses that generate truck traffic that could be disruptive to neighbors. “In addition, to protect the neighborhood from cut-through traffic, Staff worked with the Applicant to carry forward one of the conditions of approval from special exception (S-664) as a binding element that prohibits vehicular access from Bells Mill Road.” Exhibit 28(a), p. 7.

The Hearing Examiner is confident that the revised binding elements will allow the Applicant the flexibility it needs, while protecting the neighborhood from intrusive businesses and cut-through traffic.

IV. SUMMARY OF THE HEARING

A public hearing was convened, as scheduled, on January 20, 2017. The Applicant presented evidence and called three witnesses in support of the application— Lowell E. Baier, the Applicant’s owner; Patrick La Vay, a civil engineer; and Shahriar Etemadi, a transportation planner. There was no opposition testimony.

At the inception of the hearing, the Hearing Examiner asked the Applicant to clarify the name of the Applicant, which was listed in different forms in documents submitted by the Applicant (*e.g.*, the application (Exhibit 3) lists the Applicant’s name as “Georgetown Professional Associations, Ltd Ptnshp.,” while the original declaration of covenants (Exhibit 25(a)) listed the Applicant’s name as “Georgetown Medical Associates Limited Partnership.” Tr. 6-7. The Applicant’s counsel indicated that the Applicant is the owner of the property and that he would file corrected documents establishing that fact. The Hearing Examiner stated that he would keep the record open to allow the Applicant to do so. Tr. 7-9.¹²

Applicant’s counsel also indicated that the Applicant accepts the findings of the Technical Staff as part of its proof in the record. Tr. 9.

¹² The Applicant did file corrected documents on February 1, 2017. As explained in Exhibit 33, the Applicant’s name on the deed to the subject site is “Georgetown Professional Associates, a Maryland Limited Partnership of Montgomery County, Maryland” (Exhibit 33(a)), but the entity’s name was amended on December 22, 2015, to “Georgetown Professional Associates, LLLP.” Exhibit 33(d).

1. Lowell E. Baier (Tr. 13-24):

Lowell E. Baier testified that his company, Baier Properties, was formed in August of 1965 and he has been developing primarily commercial property (*e.g.*, Wintergreen Plaza), ever since.

Tr. 14.

Mr. Baier obtained a special exception to establish a medical clinic on the subject site in 1979. He was careful to have his architect design the property to get a residential townhouse look that would fit the neighborhood but also give a very professional presence to the patients and the doctors that utilize the place. There are no changes planned to the physical structures. Tr. 16-17.

Mr. Baier testified that most of the original doctors stayed there throughout the term of their careers, but now,

The economic structure of doctors has changed. That building was designed essentially for sole practitioners or a two-man firm, or woman firm. And the changes in the law have changed the economics of the solo practitioner and today it's big groups that they're all forced to join, et cetera, and so that's made re-leasing of the project really difficult because not many docs are sole practitioners today. [Tr. 17.]

He no longer has full occupancy. Recent departures have left offices vacant for 12, 17 and 20 months, and his leasing agents have informed him that this is going to be a continuing problem of trying to find sole or small practitioners to occupy the space. Tr. 18-19. So, this application is an effort to broaden the use of the office space while retaining the character of the existing project. He is satisfied that the proposed Binding Elements would allow this change. Tr. 19-20.

Mr. Baier noted that the property is in a trust, and that he is the sole trustee, so the Hearing Examiner explained that the record should be clarified by the Applicant so that the actual owners are shown and it is documented that they consent to the rezoning. Applicant's counsel promised to do so. Tr. 20-22.

Mr. Baier further testified that he is not aware of any concerns or objections to the proposed rezoning and that he is prepared to forfeit his special exception if the rezoning is granted

because it will become unnecessary. Tr. 23. He agreed that the situation that caused him to file for rezoning here is a change in the market, and this zone is a cure to that problem. Tr. 23-24.

2. Patrick La Vay (Tr. 10-11; 25-44):

Patrick La Vay testified as an expert in civil engineering. At the beginning of the hearing, in response to a question by the Hearing Examiner, he indicated that the current landscape plan filed by the Applicant (Exhibit 21(c)) does reflect all of Technical Staff's suggested enhancements to the landscaping of the site. Tr. 10-11.

Although Mr. La Vay accepts Technical Staff's definition of the neighborhood, in his opinion, the neighborhood should have been more broadly defined, for example extending further to the north to take in some of the non-residential uses across Democracy Boulevard. Tr. 26-29.

Mr. La Vay described the subject property (Tr. 31-32):

So the property, as I mentioned, is basically a square. The buildings are directly in the middle of the property surrounded by parking on the western and eastern sides. On the north side there are two access points to Old Georgetown Road. It's actually -- one is an entrance and one is an exit so there's circular movement through the site. On the southern end of the property there is an amenities space that's heavily landscaped and also has some features, benches, picnic tables, trash receptacles, things like that which is an amenity space of the office users. As I said, there are approximately, I believe, 61 existing parking spaces on the site on both the -- combined on the east and west sides of the property. Property abounded on the east side by some residential townhomes in the Democracy Commons subdivision. On the north side, as mentioned, is Democracy Boulevard. To the west is the Davis Library which also contains a museum use inside for children. It's like sort of a science technology education or engineering mathematics use inside the library and then to the south is Bells Mill Road, which there's no access to the property from Bells Mill.

He noted that there is no vehicular access to Bells Mill Road to the south of the site. Tr. 32. To the east of the side of the site, there's a space between the actual townhome lots and Mr. Baier's property. It is a common space owned by the association of the townhomes. On that piece there is an existing six foot vinyl fence on their property. On Mr. Baier's property, there are a number of existing evergreen trees and some other understory plantings, forming a landscaped buffer. Tr. 33.

Mr. La Vay further testified that there is a permanent monument sign in the center of the property on the north side that faces Democracy Boulevard, and there's a dumpster area in the southeastern corner and an enclosure that will not be changed by this application. Tr. 34. There will be no change to the physical building itself. There will be some subtle changes to the parking area. The zoning standards require a certain amount of shading of vehicular parking areas, and so two new islands will be added with shade trees placed in them. As a result, a few parking spaces will be removed, but that's the only proposed change in the parking. There will be 57 parking spaces. The Zone specifies a minimum of 13 spaces, and maximum of 52, but the zone allows you to exceed the maximum as long as they're accessible to the public and not reserved for any particular tenant, which is the case here. Tr. 35-36.

Mr. La Vay then discussed the amenity opens pace on the southern end of the site (Tr. 38):

On the east side of that area there is a -- one area that has a picnic table, a bench and some trash receptacles. And then on the west side of that amenity area there's another area with a seating area, a bench -- with a bench and a trash receptacle. Both areas have a hardscape of nice slate pavers and then in between the two it's nicely landscaped with shade trees and ground covers and such. And so once we pointed that out to staff that there was, you know, quite a bit of available seating area existing and some of the -- you know, sent some photos of what's there, they agreed that that area would qualify as amenity open space and we ended up leaving it the way it is.

Mr. La Vay also opined that from a civil engineering standpoint, there's nothing that would indicate any conflict between this proposal and the master plan. Tr. 39. He further testified that the EOF zone the Applicant requested would allow a .5 FAR which is 22,610 square feet. The FAR provided -- which again is existing and not being changed by this application -- is 0.28 or approximately 12,855 square feet. So it's more or less one half of the allowed FAR by the requested zoning. The site also meets the requirement for this zone that there must be frontage on a non-residential street, since Democracy Boulevard is considered a non-residential street. Tr. 40.

Mr. La Vay testified that the existing building on the site is connected to adequate public

facilities for water and sewer, power and communications. He further testified that, given the limited land disturbance, there is no requirement to upgrade stormwater management on the site. “[T]he amount of land disturbing activity that's proposed by this, which really boils down to the new parking islands, is less than the threshold that would trigger compliance with the new storm water management plan.” Tr. 41 and 44.

Mr. La Vay stated that there is a defined pedestrian route to a grocery store within the area prescribed in the zoning ordinance and there are no tree removals proposed, only additions. There is no area on the site meeting the definition of forest, and the site is not a special protection or a primary management area. In Mr. La Vay’s professional opinion, the proposal meets all of the development standards of the EOFF zone, and there is nothing, from a civil engineering perspective, that would be a reason not to grant the requested rezoning. Tr. 42-44.

4. Shahriar Etemadi (Tr. 45-68):

Shahriar Etemadi testified as an expert in transportation planning and traffic engineering. He stated that medical establishments and offices generate more trips than general offices, but they require more parking spaces than general offices. This is because with medical offices, you have a lot of patients who are coming in and out all day long, as opposed to general offices where the employees go there and park their cars all day long and come back. In Mr. Etemadi’s opinion, this proposal to rezone to allow a broader type of uses will actually reduce the amount of traffic. Tr. 46-47.

As stated by Mr. Etemadi (Tr. 47-48):

We looked at the worst case scenario for trip generation where if every space was occupied by medical profession which generates more trips, obviously if in the future some of these offices are converted to general offices like lawyers or civil engineers, the trip generation will be reduced. So in the future there will be less traffic if there is -- any of these offices are converted to general offices. For parking, we have plenty of parking here. More than we need. Actually, we have more parking than is required for maximum number of parking. So no matter how

much you're converting these offices to a general office, still there are parking [spaces] sufficient to accommodate all of that.

[The Hearing Examiner asked why Mr. Etemadi filed a supplemental traffic statement (Exhibit 26(a)). Applicant's counsel noted that while a normal traffic statement would have sufficed under the old Zoning Ordinance, under the new Zoning Ordinance, the Applicant had to demonstrate that the projected traffic that would not exceed the critical lane volume under the Planning Board's LATR Guidelines. Applicant's counsel also agreed with the Hearing Examiner that in cases like this one, where a rezoning application was filed in 2016 and subdivision would not be needed, the 2012-2016 Subdivision Staging Policy would apply, not the 2016-2020 Subdivision Staging Policy, which applies to applications for subdivision filed on or after January 1, 2017.¹³ Tr. 48-52.]

Mr. Etemadi noted (Tr. 51):

[T]his application was submitted before January 1st, 2017. That's why we went by the old rules. But if the subdivision plan is submitted after -- well, anytime after January 1st, 2017 and we applied the new rules but still we come up with the same conclusion here. So even if we -- at that time we apply all of those new rules, we are still in a position to say that this application is going to pass and there will be no issue.

According to Mr. Etemadi, a full traffic study was not needed because the subject use, as modified, would not add any new trips to the area roadways. Tr. 53-54. Mr. Etemadi testified that the reduced trip rates for general offices would lower the number of trips if the rezoning is approved.

[I]n the a.m., for a medical office we are going to have 2.39 trips per 1,000 square feet for medical office. For general office, we're going to have 1.25 trips per 1,000 square feet. . . . In the p.m., . . . for a medical office, again, we are going to have 3.53 trips per 1,000 square feet. For general office, in the p.m. we have 2.08 trips per 1,000 square feet. So you can see in the a.m. and p.m. if any of these offices are converted to general office there will be a significant decline in the number of trips. Tr. 55.

¹³ The Council adopted a new 2016-2020 Subdivision Staging Policy that applies to preliminary plans filed on or after January 1, 2017. See Subdivision Staging Policy 2016-2020, Res. No 18-671, adopted 11-15-16, eff. 1-1-17.

When Mr. Etemadi projected the possible occupancy of 25 percent general office and 75 percent medical office, the number of trips for the a.m. dropped by four, and in the p.m. it dropped by five trips. For general offices, he used the trip numbers from the LATR Guidelines, as he is required to do when those figures are available in the LATR Guidelines. For medical offices, there are no trip rates available in the LATR guidelines, and therefore he got that number from the Institute of Transportation Engineers Trip Generation Manual. Tr. 55-58.

Mr. Etemadi testified that the critical lane volume analysis indicates that both studied intersections are operating well below the congestion standard of 1550 for this area. In Mr. Etemadi's opinion, because this application is not going to increase any traffic and potentially will reduce the traffic in the future, this application passes both tests of LATR and TPAR. Tr. 60. He also noted a typographical error in the Staff report, in that the figure in the table on page 9 of the staff report for existing PM traffic at Democracy Boulevard at Old Georgetown Road should have read a CLV of 1,301. Tr. 63.

Mr. Etemadi further testified that the site circulation and access to the site are safe, adequate and efficient for the use that is proposed (Tr. 66-68):

In fact, this is probably the most efficient and safest access and circulation that we could have for this site for two reasons. One, we have only right in and right out traffic coming in and out in a circle pattern counter-clockwise which is the safest way to get in and out. There is no conflict within the site for traffic to move in different directions because everybody is going in the same direction. And then we actually looked at the -- relating to the access points, we looked at the last three years [of] available accident data and there [have] been no accidents at this location.
...

And so it shows that the access is very safe. Also, the access points have a very clear site distance where people can get in and out with a clear site of the traffic coming toward them. So, as I said, I think this is very, very safe and efficient traffic access and circulation . . . and I think not having vehicular access to Bells Mills Road in fact enhances the traffic circulation and access.

Finally, Mr. Etemadi opined that it will be in the public interest to grant the rezoning to allow the broader scope of uses which will allow a potential reduction in trip generation. Tr. 68.

V. ZONING ISSUES

Zoning involves two basic types of classifications, Euclidean Zones and Floating Zones. The term “Euclidean” zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development, such as permitted uses, lot sizes, setbacks, and building height.

A Floating Zone is a more flexible device that allows a legislative body to establish types of zoning districts for specified uses, without attaching those districts to particular pieces of property unless and until a local map amendment application is approved. Applications for a Floating Zone can be filed by individual land owners, and approving an application for a Floating Zone attaches that zone and its regulations to that land owner’s individual piece of property, without applying that Floating Zone to a larger zoning district. To approve such a rezoning, the Council must find that the proposal will meet the standards set forth in the Zoning Ordinance, and that it will be consistent with a coordinated and systematic development of the regional district, as required by the 2012 Maryland Land Use Article, Code Ann. § 21-101(a)(4)(i).¹⁴

Montgomery County has many Floating Zones, including the Employment Office Floating (EOFF) Zones. The specific zone sought in this case is the EOFF-0.5, H-35 Zone, which would allow a Floor Area Ratio (FAR) of up to 0.5 and a height of up to 35 feet. Other development standards must be met, but generally the details of site-specific issues such as building location, stormwater control, vehicular and pedestrian routes, landscaping and screening are addressed by the Planning Board, after rezoning, at site plan review, per §§59.7.1.3, 59.7.2.1.G.2 and 59.7.3.4 of the Zoning Ordinance. The Council has a broader discretionary role in determining whether to

¹⁴ Effective October 1, 2012, the Regional District Act, Article 28, Md. Code Ann., was re-codified, without a change in substance, into a new “Land Use Article.” Section §21-101(a)(4)(i) of the Land Use Article contains the rough equivalent of the previous language in Article 28, Md. Code Ann., § 7-110.

approve a rezoning; however, the new Zoning Ordinance still requires a structured and detailed analysis for the Council’s review of rezoning applications, as follows:

Zoning Ordinance §59.7.2.1.E. establishes a set of “Necessary Findings” the Council must make for any Floating Zone application:

Section 59.7.2.1.E. Necessary Findings

- 1. A Floating zone application that satisfies Article 59-5 may not be sufficient to require approval of the application.*
- 2. For a Floating zone application the District Council must find that the floating zone plan will:

 - a. substantially conform with the recommendations of the applicable master plan, general plan, and other applicable County plans;*
 - b. further the public interest;*
 - c. satisfy the intent and standards of the proposed zone and, to the extent the Hearing Examiner finds it necessary to ensure compatibility, meet other applicable requirements of this Chapter;*
 - d. be compatible with existing and approved adjacent development;*
 - e. generate traffic that does not exceed the critical lane volume or volume/capacity ratio standard as applicable under the Planning Board’s LATR Guidelines, or, if traffic exceeds the applicable standard, that the applicant demonstrate an ability to mitigate such adverse impacts; and*
 - f. when applying a non-Residential Floating zone to a property previously under a Residential Detached zone, not adversely affect the character of the surrounding neighborhood.**

As is apparent, Finding 2.c. of these “Necessary Findings” incorporates requirements spelled out elsewhere in the Code—specifically under sections that establish “the intent and standards” of the Zone. Those general standards are found in Zoning Ordinance Sections 59.5.1.2., 5.1.3. and 5.1.4. Specific standards for Employment Office Floating Zones are spelled out in Sections 59.5.4.1., 5.4.2., 5.4.3., 5.4.4. and 5.4.5. This report will first address the general “Necessary Findings” set forth above, and will then review the specific standards which must be met to rezone to an EOFF-0.5, H-35 Zone.

When the reclassification sought by an applicant is recommended by the Planning Board, approval of the rezoning by the Council requires an affirmative vote of 5 Council members; however, when the Planning Board does not recommend the reclassification sought (or if approval

would be contrary to the recommendation of the municipality in which the property is located), the Zoning Ordinance requires an affirmative vote of 6 members of the Council for approval. Zoning Ordinance §59.7.2.1.F.2. The Planning Board did recommend approval of the rezoning in this case, and no municipality has made a recommendation, so a simple majority of 5 members of the Council is required for approval.

A. The “Necessary Findings” Required by Zoning Ordinance §59.7.2.1.E.2.

For a Floating zone application the District Council must find that the floating zone plan will:

a. substantially conform with the recommendations of the applicable master plan, general plan, and other applicable County plans;

Conclusion: The subject site is located in the area covered by the *1992 North Bethesda/Garrett Park Master Plan*. For the reasons set forth at some length in Part III.F. of this report, the Hearing Examiner finds that the proposed Floating Zone Plan will substantially conform with the recommendations of the applicable master plan, general plan, and other applicable County plans.

b. further the public interest;

Conclusion: As stated by Technical Staff (Exhibit 28(a), p. 10):

Approval of this Local Map Amendment furthers the public interest by prolonging the viability of an existing development that is already well integrated into the community, and keep[ing] it economically viable now and into the future. The utility and function of the building will be preserved with minimal costs and without the impacts associated with new construction.

The Hearing Examiner agrees. There is no downside to the community in the subject proposal. If some of the office space currently used for medical offices is rented out as general office space, the evidence demonstrates that it will reduce the amount of traffic burdening the local roads. Tr. 55-63; Exhibit 28(a), p. 9. Moreover, the community will be protected by the Binding Elements from general office use that would bring commercial vehicles to the site and will be protected from cut-through traffic onto Bells Mill Road. Based on this undisputed evidence, the Hearing Examiner finds that the proposed development will further the public interest.

c. satisfy the intent and standards of the proposed zone and, to the extent the Hearing Examiner finds it necessary to ensure compatibility, meet other applicable requirements of this Chapter;

Conclusion: For the reasons set forth below in Parts V.B., V.C., V.D. and V.E. of this report, the Hearing Examiner finds that the proposed Floating Zone Plan will satisfy the intent and standards of the proposed zone, and to the extent necessary to ensure compatibility, it will meet the other applicable requirements of the Zoning Ordinance.

d. be compatible with existing and approved adjacent development;

Conclusion: The Applicant did not produce expert evidence from a land planner regarding compatibility; however, Technical Staff did address this issue (Exhibit 28(a), pp. 12, 15-16):

The compatibility of the existing development with the surrounding neighborhood was established by the special exception approval process and the Property has maintained that compatibility during the medical clinic's thirty plus years of operation on the Property. The height, density, and setbacks of the established building will remain the same under the proposed Floating Zone, so the building's existing relationship with the neighborhood will remain the same. Supplemental landscaping will be added to enhance compatibility, and negative impacts to the neighborhood will be minimized by restrictions on the types of office users allowed to rent space in the building.

* * *

The compatibility of the existing buildings and site design with the adjacent development was established by the approval of the original special exception. No change is proposed to the existing buildings. Landscape improvements will enhance compatibility with the surrounding neighborhood. The replacement of medical offices with other types of offices will have negligible, if any, impact on the adjacent residential community. Further, traffic to and from the site will be reduced to the extent that non-medical offices replace medical offices.

In addition to these observations by Staff, the Hearing Examiner notes that the design of the existing building, which has the appearance of townhouses, is consistent with the residential appearance of much of the surrounding neighborhood. It will remain unchanged by this proposal. Based on this undisputed evidence, the Hearing Examiner finds that the proposed development will be compatible with existing and approved adjacent development.

e. generate traffic that does not exceed the critical lane volume or volume/capacity ratio standard as applicable under the Planning Board's LATR Guidelines, or, if traffic exceeds the applicable standard, that the applicant demonstrate an ability to mitigate such adverse impacts; and

Conclusion: For the reasons set forth in Part III.G. of this report, the Hearing Examiner finds that the proposed development will not generate traffic that exceeds the critical lane volume or volume/capacity ratio standard as applicable under the Planning Board's LATR Guidelines.

f. when applying a non-Residential Floating zone to a property previously under a Residential Detached zone, not adversely affect the character of the surrounding neighborhood.

Conclusion: This provision is largely addressed by the preceding comments regarding compatibility. Technical Staff added (Exhibit 28(a), p. 16):

The Applicant is requesting to apply a non-Residential Floating Zone (EOFF) to a property classified as R-60, a Residential Detached Zone. However, the Property is already used for medical offices through a special exception approval. The conversion of medical to non-medical offices will not adversely affect the character of the Property or the surrounding neighborhood. The residential style architecture of the existing buildings will be retained as will the buffers between the use and the surrounding residential properties, ensuring that character will remain intact. Further, supplemental landscaping will be added to enhance the buffer between this Property and the adjacent townhouse community.

The Hearing Examiner agrees with these observations, and finds that the proposed use will not adversely affect the character of the surrounding neighborhood, which includes single-family townhouses, single-family detached homes, a library, a school and a shopping center.

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

The next step in the review process is a determination of whether the proposed development will satisfy the intent and standards of the EOFF-0.5, H-35 Floating Zone. These standards are set forth in **Zoning Ordinance §59.5.1.2:**

The Residential Floating, Commercial/Residential Floating, Employment Floating, and Industrial Floating zones are intended to provide an alternative to development under the restrictions of the Euclidean zones mapped by Sectional Map Amendment (the Agricultural, Rural Residential, Residential,

Commercial/Residential, Employment, Industrial, and Overlay zones). To obtain a Floating zone, an applicant must obtain approval of a Local Map Amendment under Section 7.2.1. The intent of the Floating zones is to:

- A. Implement comprehensive planning objectives by:***
 - 1. furthering the goals of the general plan, applicable master plan, and functional master plans;*
 - 2. ensuring that the proposed uses are in balance with and supported by the existing and planned infrastructure in the general plan, applicable master plan, functional master plan staging, and applicable public facilities requirements; and*
 - 3. allowing design flexibility to integrate development into circulation networks, land use patterns, and natural features within and connected to the property; and*
- B. Encourage the appropriate use of land by:***
 - 1. providing flexible applicability to respond to changing economic, demographic, and planning trends that occur between comprehensive District or Sectional Map Amendments;*
 - 2. allowing various uses, building types, and densities as determined by a property's size and base zone to serve a diverse and evolving population; and*
 - 3. ensuring that development satisfies basic sustainability requirements including:*
 - a. locational criteria,*
 - b. connections to circulation networks,*
 - c. density and use limitations,*
 - d. open space standards,*
 - e. environmental protection and mitigation; and*
- C. Ensure protection of established neighborhoods by:***
 - 1. establishing compatible relationships between new development and existing neighborhoods through limits on applicability, density, and uses;*
 - 2. providing development standards and general compatibility standards to protect the character of adjacent neighborhoods; and*
 - 3. allowing design flexibility to provide mitigation of any negative impacts found to be caused by the new use.*

Section 59.5.1.2.A - Implement comprehensive planning objectives . . .

Conclusion: The first test listed under this section essentially asks whether the proposal will comport with the goals of the general plan and the applicable master plan. The standard set forth in §59.5.1.2.A.1. is, of course, repetitive of the previously discussed Master Plan standards, and for the reasons set forth in Part III.F. of this report, the Hearing Examiner finds that the proposed Floating Zone Plan will further the goals of the general plan, master plan, and functional master plan.

Sections 59.5.1.2.A.2 and A.3, address the adequacy of public facilities and the design flexibility of the planned development. For the reasons set forth in Part III.G. of this report, it is clear that the proposed use is supported by existing infrastructure, and the essence of this application is to allow greater flexibility in the use. As observed by Technical Staff (Exhibit 28(a), p. 11), “The existing office park is well integrated into the existing circulation network and land use pattern.”

Conclusion: Based on this record, the Hearing Examiner finds that the proposed development will satisfy the intent standards for the EOFF-0.5, H-35 Zone, as set forth in §59.5.1.2.A.

Section 59.5.1.2.B - Encourage the appropriate use of land . . .

The second portion of the intent provision (Section §59.5.1.2.B.) asks whether the proposal will encourage an appropriate, flexible and sustainable use of the land that will serve the community even in changing circumstances. Technical Staff found that the proposal would encourage an appropriate use of the land, stating (Exhibit 28(a), p. 11):

This Application responds to current trends in the medical industry that compel medical practitioners to join larger practices or emergency clinics instead of establishing individual practices. This trend has led to vacancies in smaller medical office spaces such as those in the Georgetown Professional Medical Clinic. Permitting other types of users to occupy this office space allows the existing development to evolve with the changing demand for office space.

The Property has an existing, attractive open space that satisfies all the requirements for amenity open space under Section 6.3.7. The Applicant plans to add six native shade trees and five native ornamental trees along the west and east sides of the Property to enhance the tree canopy and improve the landscape buffers

Conclusion: Based on this undisputed evidence, the Hearing Examiner finds that the proposed development will satisfy the intent standards for the EOFF-0.5, H-35 Zone, as set forth in §59.5.1.2.B., and will encourage the appropriate and flexible use of the land.

Section 59.5.1.2.C - Ensure protection of established neighborhoods . . .

The third prong of the intent provision (Section §59.5.1.2.C.) seeks to ensure protection of established neighborhoods by requiring design flexibility and compatibility with existing developments. Once again, the requirements of this section are repetitive of the general compatibility findings required by Section 59.7.2.1.E.2.d. As previously mentioned, the proposed development will be compatible with the surrounding area, in that it would continue to operate in the same residential-appearing building that has existed on the site for decades, and would even add more landscaping. As stated by Technical Staff (Exhibit 28(a), p. 12):

The compatibility of the existing development with the surrounding neighborhood was established by the special exception approval process and the Property has maintained that compatibility during the medical clinic's thirty plus years of operation on the Property. The height, density, and setbacks of the established building will remain the same under the proposed Floating Zone, so the building's existing relationship with the neighborhood will remain the same. Supplemental landscaping will be added to enhance compatibility, and negative impacts to the neighborhood will be minimized by restrictions on the types of office users allowed to rent space in the building

Conclusion: As was stated with regard to the compatibility findings required in §59.7.2.1.E.2.d, above, the Hearing Examiner finds that the proposed development will be compatible with existing and approved adjacent development. The standards set forth in §59.5.1.2.C. have been satisfied.

C. The Applicability of the Zone as set forth in Section 59.5.1.3.

Section 59.5.1.3. of the new Zoning Ordinance sets up a series of tests to determine whether the requested Floating Zone may be applied to the site in question. Each subsection is listed separately below, followed by the Hearing Examiner's finding on each:

Section 59.5.1.3. A. A Floating zone must not be approved for property that is in an Agricultural or Rural Residential zone.

Conclusion: Subsection "A" is not applicable since the subject site is in a Residential zone, not in either an Agricultural or a Rural Residential zone.

Section 59.5.1.3. B. If a Floating zone is recommended in a master plan, there are no prerequisites for an application. For properties with a master plan recommendation for a Floating zone for which an application can no longer be made as of October 30, 2014, the following table identifies the equivalent Floating zones for which an applicant may apply:

* * *

Conclusion: Subsection “B” is not applicable since the *1992 North Bethesda/Garrett Park Master Plan* neither recommends nor opposes a Floating Zone on the subject site. It is silent on the issue.

Section 59.5.1.3.C. If a Floating zone is not recommended in a master plan, the following apply:

1. The maximum allowed density is based on the base zone and on the size of the tract as stated in Division 5.2 through Division 5.5. Any density bonus requested under Chapter 25A may be added to the density allowed under Division 5.2 through Division 5.5 and included in the units per acre or FAR of the zone requested.

Conclusion: Subsection “C” is applicable since the *1992 North Bethesda/Garrett Park Master Plan* does not expressly recommend a Floating Zone on the subject site. Subsection “C.1.” requires the maximum density to be calculated in accordance with Section 59.5.4.5, which is done in the next part of this report. As will be shown there, the proposed use will be within the maximum density allowed. No density bonus has been requested in this case.

2. Residential Base Zone

* * *

c. When requesting a Commercial Residential Floating (CRF) zone, Commercial Residential Town Floating (CRTF) zone, or any Employment Floating zone (NRF, GRF, EOFF, LSCF) for a property with a Residential base zone:

- i. The property must front on a nonresidential street or must confront or abut a property that is in a Commercial/Residential, Employment, or Industrial zone; and***
- ii. The application must satisfy a minimum of 2 prerequisites for each of the categories under Section 5.1.3.D.***

Conclusion: Subsection “C.2.” is applicable since the site is in a Residential Base Zone (R-60).

The application satisfies Subsection C.2.c.i. because it fronts on Democracy Boulevard, a

nonresidential street. As stated by Technical Staff (Exhibit 28(a), p. 12): “This segment of Democracy Boulevard is classified as a major highway, so the Property fronts on a nonresidential street.” The application satisfies Subsection C.2.c.ii. because, as determined by Technical Staff (Exhibit 28(a), p. 12), “[it] satisfies at least two prerequisites for each of the required categories under Section 5.1.3.D. [set out in a Table below].” Actually, as set forth by Technical Staff and quoted on the next page, the application satisfies seven of the listed prerequisites.

3. Non-Residential Base Zone

When requesting a Floating zone for a property with a non-Residential base zone there are no prerequisites for an application.

* * *

Conclusion: Subsection “C.3” is not applicable since the site is in a Residential Base Zone.

Section 59.5.1.3.D. Prerequisites

D. Prerequisites

Category	Prerequisite Choices
Transit & Infrastructure	At least 75% of the site is within ¼ mile of a Level 3, ½ mile of a Level 2, or ¾ mile of a Level 1 transit station/stop.
	The site has frontage on and vehicular, bicycle, and pedestrian access to at least 2 roads, at least one of which is nonresidential.
	The site is served by existing water and sewer infrastructure that will not require either an upgrade to the service line or installation of a pump station due to the proposed development.
	All signalized intersections within ¼ mile of the site boundary are operating below the applicable congestion standard.
	The project is age-restricted or senior housing, or if proposing development that may generate students, the site must not be in an area that is under moratorium due to school capacity or result in a school utilization rate greater than 120% because of the proposed development. For any site within 2 school clusters, only the portions of the site that satisfy this requirement can proceed.
Vicinity & Facilities	The site is in a transitional location between property in an existing Residential Multi-Unit, Residential Townhouse, or non-Residential zone and property in a Residential Multi-Unit, Residential Townhouse, or Residential Detached zone.
	The site is adjacent to a bicyclist route that provides access to commercial services within 3 miles.
	The site is adjacent to a route that provides access to an existing or master-planned school within ½ mile.
	The site is adjacent to a pedestrian route that provides access to existing public park and recreation facilities that satisfy a minimum of 30% of the recreation demand under the Planning Board’s Recreation Guidelines, as amended, within ¾ mile.
Environment & Resources	The site is adjacent to a pedestrian route that provides access to an existing grocery store or County-permitted farmer’s market within ¼ mile.
	The limits of disturbance for the development will not overlap any stream, floodplain, wetland, or environmental buffer or any slopes greater than 25% or slopes greater than 15% where erodible soils are present.
	The site does not contain any forest or, if forest is present, the limits of disturbance for the development will not reduce the forest cover to less than an area of 10,000 square feet and width of 35 feet at any point.
	The site does not contain any rare, threatened, or endangered species or critical habitats listed by the Maryland Department of Natural Resources.
	The site is on land containing contaminated soils and is developed in conjunction with an environmental Voluntary Cleanup Program under the Maryland Department of Environmental Protection.
	The site is currently developed with more than 75% impermeable surfaces, including paving and roofed-structures, and does not currently provide stormwater management meeting the standards applicable on the date of filing.

Technical Staff lists the Section 59.5.1.3.D. Prerequisites that are satisfied by this application (Exhibit 28(a), pp. 12-13):

- **Transit and Infrastructure**

1. *At least 75% of the site is within ¼ mile of a Level 3, ½ mile of a Level 2, or ¾ mile of a Level 1 transit station/stop.*

The Property is within ¼ mile of the Master Planned bus rapid transit (BRT) station at Democracy Boulevard and Rockledge Drive, which is a level two station.

2. *The site is served by existing water and sewer infrastructure that will not require either an upgrade to the service line or installation of a pump station due to the proposed development.*

The Property is served by existing water and sewer infrastructure, and the proposed zoning change will not put additional pressure on the infrastructure.

3. *All signalized intersections within ¼ mile of the site boundary are operating below the applicable congestion standard.*

Two signalized intersections are located within ¼ mile of the Property, Democracy Boulevard and Old Georgetown Road (MD187), and Rockledge Drive and Old Georgetown Road. Both intersections operate within the congestion standard of 1,550 for the North Bethesda Policy Area.

- **Vicinity and Facilities**

1. *The site is adjacent to a route that provides access to an existing or master-planned school within ½ mile.*

Walter Johnson High School is located directly across the street from the Property on Democracy Boulevard.

2. *The site is adjacent to a pedestrian route that provides access to an existing grocery store or County-permitted farmer's market within ¼ mile.*

Giant Food is located in the Wildwood Shopping Center, within ¼ mile of the Property.

- **Environment and Resources**

1. *The limits of disturbance for the development will not overlap any stream, floodplain, wetland, or environmental buffer or any slopes greater than 25% or slopes greater than 15% where erodible soils are present.*

The Property does not contain any stream, floodplain, wetland, environmental buffers, or any slopes greater than 25% or slopes greater than 15% where erodible soils are present.

2. *The site does not contain any forest or, if forest is present, the limits of disturbance for the development will not reduce the forest cover to less than an area of 10,000 square feet and width of 35 feet at any point.*

The Property does not contain any forest.

Conclusion: Based on this undisputed record, the Hearing Examiner finds that the subject Floating Zone application meets all the tests set forth in Section 59.5.1.3 for applying the requested EOFF-0.5, H-35 Zone to the site in question. Section 59.5.1.4 notes that an application for a Floating Zone must be approved as a Local Map Amendment under Section 59.7.2.1. As discussed in Part V.A. of this report, the application does meet the requirements set forth under Section 59.7.2.1. Section 59.5.1.5 is inapplicable to the zone sought in this case.

D. The Employment Office Floating Zones, their Purpose & Uses, set forth in Division 5.4

Zoning Ordinance Division 59.4 lists the Employment Office Floating Zones, specifies their purpose, designates the allowed uses and building types and sets forth the applicable development standards. The development standards are discussed in the next part of this report, Part V.E.

Division 5.4. Employment Floating Zones

Section 5.4.1. Zones

A. There are 4 categories of Employment Floating zones.

B. Employment Floating zones are mapped using the zone's initials followed by the maximum allowed total density and maximum allowed height as limited by Division 5.4. Zones are established at density increments of 0.25 FAR and height increments of 5 feet.

1. *General Retail – Floating* (GRF# H#)
2. *Neighborhood Retail – Floating* (NRF# H#)
3. ***Employment Office – Floating*** (EOFF# H#)
4. *Life Sciences Center – Floating* (LSCF# H#)

Conclusion: The Zone sought in this case the EOFF-0.5, H-35 Employment Office Floating Zone.

Section 5.4.2. Purpose

The purpose of the Employment Floating zones is to:

- A. allow development of commercial centers and communities, at a range of densities and heights flexible enough to respond to various settings.***
- B. allow limited residential development and flexibility in uses for a site; and***
- C. provide development that is compatible with adjacent development.***

Conclusion: Technical Staff found that the proposed rezoning would satisfy the purpose of the Employment Office Floating Zone because (Exhibit 28(a), p. 13):

The proposed EOFF Zone would allow flexibility in the types of office users allowed, helping to ensure the viability of the existing office park that is already well integrated into the community and compatible with the adjacent development.

Staff's finding is undisputed in the record, and the Hearing Examiner finds that the proposed rezoning would satisfy the purpose of the Employment Office Floating Zone for the reasons stated by Staff.

Section 5.4.3. Land Uses

- A. The following land uses are allowed in the Employment Floating zones:***
 - 1. In the GRF zones, only the uses allowed in the GR zone are allowed.***
 - 2. In the NRF zones, only the uses allowed in the NR zone are allowed.***
 - 3. In the EOFF zones, only the uses allowed in the EOF zone are allowed.***
 - 4. In the LSCF zones, only the uses allowed in the LSC zone are allowed.***
- B. An applicant may voluntarily prohibit specific uses or establish binding elements that restrict specific uses to support the necessary findings of approval under Section 7.2.1.***

Conclusion: The only land uses proposed for this site are a medical clinic and general office uses. Both of those uses are permitted in the EOF Euclidean Zone per Zoning Ordinance §59.3.1.6. By the terms of the above-quoted Section 59.5.4.3.A.3., the proposed uses are therefore permitted in the EOFF Floating Zones, as confirmed by Technical Staff. Exhibit 28(a), p. 14. As permitted by Section 59.5.4.3.B., quoted above, the Applicant has voluntarily agreed to binding elements restricting the nature of the office use and prohibiting vehicular access to Bells Mill Road, both of which will improve compatibility of the use. The Hearing Examiner so finds.

Section 5.4.4. Building Types Allowed

- A. Any building type is allowed in the Employment Floating zones.**
- B. An applicant may voluntarily prohibit specific building types or establish binding elements that restrict specific building types to support the necessary findings of approval under Section 7.2.1.**

Conclusion: Since Section 59.5.4.4.A. permits any building type, the existing building, which will be retained, is compliant with this provision, and the Hearing Examiner so finds.

E. Development Standards for the Zone as set forth in Section 59.5.4.5.

Development Standards for the EOFF-0.5, H-35 Zone are spelled out in Zoning Ordinance §59.5.4.5., which is set forth below:

Section 5.4.5. Development Standards

- A. Density**
 - 1. If a Floating zone is recommended in a master plan, density must not exceed that recommendation.**

Conclusion: Since the EOFF-0.5, H-35 Floating Zone is not specifically recommended in the Master Plan for this site, Section 59.5.4.5.A.1., is not applicable.

- 2. If a Floating zone is not recommended in a master plan, the following density limits apply:**

Density Allowed			
Pre-Existing Euclidean Zone	Maximum Total Density Allowed in FAR Based on Size of Tract in Acres		
	Less than 0.5 acres	0.5 acres - 3.00 acres	Greater than 3 acres
RE-2, RE-2c, RE-1, R-200	0.75 FAR	1.0 FAR	1.25 FAR
R-90, R-60 , R-40, TLD, TMD, THD	1.0	1.25	1.5
*	*	*	*

- 3. An applicant may limit density below the maximum allowed by Section 5.4.5.A to support the necessary findings of approval under Section 7.2.1.**

Conclusion: As noted by Technical Staff (Exhibit 28(a), p. 12),

If a Floating Zone is not recommended in a master plan, as is the case with this Application, the maximum allowed density for an Employment Floating Zone is based on the existing zone and on the size of the tract as stated in Section 5.4.5. The table in Section 5.4.5 indicates that the maximum allowed density for an Employment Floating Zone on a 1.04-acre property currently zoned R-60 is 1.25 FAR. The Applicant requests a maximum density of 0.5 FAR.

The Hearing Examiner confirmed the accuracy of Staff's assertion by reference to the above-displayed table from Section 59.5.4.5.A.2. As demonstrated therein, the maximum density allowed for this site would be an FAR of 1.25, and the Applicant's Floating Zone Plan (FZP) has restricted the allowed density to an FAR of 0.5, as an applicant may do pursuant to Section 59.5.4.5.A.3., quoted above. The actual density on the site is even lower, at an FAR of 0.28. Exhibit 23(a). The Hearing Examiner therefore finds that the Applicant has met the required density standards.

B. Setback and Height

- 1. If a Floating zone is recommended in a master plan, height must not exceed that recommendation.***
- 2. Setbacks from the site boundary and maximum height are established by the floating zone plan. All other setbacks are established by the site plan approval process under Section 7.3.4.***
- 3. Height must satisfy the compatibility standards for the applicable building type under Section 4.1.8.B.***

Conclusion: Since the Floating Zone is not expressly recommended in the Master Plan, Subsection 59.5.4.5.B.1. is not applicable. Applying Subsections 59.5.4.5.B.2. and 3., setbacks from the site boundary and maximum height are established by the Floating Zone Plan. All other setbacks are established by the site plan approval process under Section 7.3.4. Also, height must satisfy the compatibility standards for the applicable building type under Section 4.1.8.B. The FZP in this case (Exhibit 23(a)), establishes the applicable setbacks and sets the height at 35 feet. As noted by Technical Staff (Exhibit 28(a), p. 15, note 1), "The height satisfies the compatibility standards

under Section 4.1.8.B. [because the] maximum height of the proposed zone (35') is the same as the maximum height for a detached house in the R-60 Zone.” The Hearing Examiner agrees, and finds that the proposed maximum height of 35 feet is compatible with the surrounding neighborhood. The applicable development standards for Lot Size, Density, Setbacks and Height, as well as the Applicant’s compliance therewith, are set forth by Technical Staff in the top half of the Table on page 15 of their report (Exhibit 28(a), p. 15):

Section 5.4.5. Development Standards [Top Half of Table]

	Required / Allowed	Proposed/ Existing
Lot Size	n/a	1.04 acres
Density	0.5 FAR	0.28 FAR
Setbacks		
Front (Democracy Blvd.)	Established by floating zone plan	40'
Side		70'
Rear (Bells Mill Rd.)		40'
Height		35' ¹
*	*	*

¹ The height satisfies the compatibility standards under Section 4.1.8.B. The maximum height of the proposed zone (35') is the same as the maximum height for a detached house in the R-60 Zone.

C. Lot Size

Minimum lot sizes are established by the site plan approval process under Section 7.3.4.

Conclusion: There is no plan to change the existing lot size in this case, but any concerns in this regard would normally be addressed at Site Plan Review, as required by this section.

D. General Requirements

- 1. Parking, recreation facilities, screening, and landscaping must be provided under Article 59-6 as required for the Euclidean zone that establishes uses under Section 5.4.3.**
- 2. Open Space**
 - a. If public benefits are not required under Section 5.4.4.E, open space must be provided under Section 4.6.3 (for standard method) as required for the Euclidean zone that establishes uses under Section 5.4.3.**
 - b. If public benefits are required under Section 5.4.4.E, open space must be provided under Section 4.6.4.B.1 (for optional method) as required**

for the Euclidean zone that establishes uses under Section 5.4.3.

3. The floating zone plan may provide for additional parking, open space, recreation facilities, screening, or landscaping or further restrict lighting to allow the District Council to make the necessary findings of approval under Section 7.2.1.

The applicable development standards for Amenity Open Space, Parking, Parking Lot Landscaping, Screening and Public Benefits, as well as the Applicant's compliance therewith, are set forth by Technical Staff in the bottom half of the Table on page 15 of their report (Exhibit 28(a), p. 15):

Section 5.4.5. Development Standards [Bottom Half of Table]

	Required / Allowed		Proposed/ Existing
*	*		*
Amenity Open Space	10% or 4,522 SF		10.9% or 4,949 SF
Parking (Medical/ Dental Clinics)			
Vehicle spaces (Section 6.2.4.B)	Min	Max	57 ²
	13	52	
Bicycle spaces (Section 6.2.4.C)	3 (85% long term)		3 long-term, 8 short-term ³
Parking lot landscaping (Section 6.2.9)			
Tree canopy	25% or 5,723 SF		29.5% or 6,745 SF
Landscaped area	5% or 1,145 SF		5.44% or 1,245 SF
Perimeter planting (required on northern and eastern side of parking lot)	10'		25' (north) 9' (east) ⁴
Screening (Division 6.5)	Not required per Section 6.5.3.A.4		n/a
Public Benefits	Not required		n/a ⁵

² Per Section 6.2.3.H.2.b, the Applicant indicates that all parking spaces in excess of the maximum will not be reserved and will be made available to the public.

³ The Floating Zone Plan indicates that long term spaces will be provided in an existing storage room inside the building. The 8 existing short-term bicycle parking spaces do not meet the design requirements under Section 6.2.6.B.

⁴ The existing perimeter planting area is only nine feet wide and the Applicant will need to request a parking waiver under Section 6.2.1. at the time of site plan review.

⁵ The Application included public benefits based on the existing development, but public benefits are not required because the development is less than 1 FAR.

Conclusion: As indicated in the FZP (Exhibit 23(a)), and in the above Table, the Applicant plans to provide 57 vehicle parking spaces. Zoning Ordinance §59.6.2.4.B. provides both a minimum and a maximum number of parking spaces for medical clinics in the EOFF Zones, based on gross floor area (GFA). The minimum is 1 space per 1,000 square feet of GFA, and the maximum is 4 spaces per 1,000 square feet of GFA. Since there are 12,855 square feet of GFA in the building, the limits in the Zoning Ordinance translate, as indicated in Staff's Table above, to a minimum of 13 parking spaces and a maximum of 52 parking spaces. Although the proposal for 57 spaces exceeds that maximum, that is permissible under Zoning Ordinance §59.6.2.3.H.2.b. where, as here, the excess spaces will be available to the public. Therefore, the Hearing Examiner finds that the application is compliant with the Zoning Ordinance standards for the number of vehicular parking spaces.

Zoning Ordinance §59.6.2.4.C. requires that, in addition to vehicular parking spaces, the Applicant must provide bicycle spaces. For medical clinics in the EOFF Zones, that means at least one bicycle space for every 5,000 square feet of GFA (85% of which must be long term), which yields a requirement for at least 3 bicycle spaces, all of which must be long term. As indicated in the FZP (Exhibit 23(a)), and in Technical Staff's Table, above, the Applicant will provide the required 3 long term spaces in an existing storage room, and 8 short-term spaces. Based on this record, the Hearing Examiner finds that the application is compliant with the Zoning Ordinance standards for the number of bicycle parking spaces.

Technical Staff's Table also describes the Parking Lot's tree canopy, landscaping and screening, as called for in Zoning Ordinance §§59.6.2.9 and 59.6.5.3.A.4. Staff notes (footnote 4 to its Table) that the perimeter planting is compliant with the Zoning Ordinance, except on the eastern side where it is 9 feet wide, which is one foot less than the 10-foot width required. Although Staff indicates that a waiver of that provision will be needed at Site Plan, the Hearing

Examiner concludes that no such waiver is needed at the rezoning stage because the Hearing Examiner finds that the proposed nine-foot wide planting area on the east side of the lot is compliant with the applicable screening provision “to the extent . . . necessary to ensure compatibility,” which is the rezoning standard under Zoning Ordinance §59.7.2.1.E.2.c.

Finally, the required amount of amenity open space must be determined. Under Zoning Ordinance §59.5.4.5.D.2, the amount of open space required depends on whether Zoning Ordinance §59.5.4.5.E. mandates the provision of public benefits in this case. Technical Staff concluded that “. . . public benefits are not required because the development is less than 1 FAR.” Exhibit 28(a), p. 15, footnote 5 to the Table. This conclusion is based on the ambiguous language of Zoning Ordinance §59.5.4.5.E.1.a., which provides, “*Development above the greater of 1.0 FAR or 10,000 square feet of gross floor area in the EOFF zone requires public benefits.*” Even though the GFA of the building in this case exceeds 10,000 square feet, Staff concluded that this provision does not require a showing of public benefits because the FAR of the development is under the threshold of 1.0. While the Hearing Examiner recognizes that this provision could easily be interpreted as requiring a showing of public benefits when *either* the FAR criterion *or* the GFA criterion is exceeded, he will accept Technical Staff’s interpretation of the Planning Department’s own regulations, since an agency’s interpretation of its controlling regulations should be given considerable weight. As the Maryland Court of Appeals stated in *Watkins v. Secretary, Dept. of Public Safety and Correctional Services*, 377 Md. 34, 46, 831 A.2d 1079, 1086 (2003), “We must respect the expertise of the agency and accord deference to its interpretation of a statute that it administers.”

Since a showing of public benefits is not required, Zoning Ordinance §59.5.4.5.D.2. provides that “. . . *open space must be provided under Section 4.6.3 (for standard method) as required for the Euclidean zone that establishes uses under Section 5.4.3.*” Turning to the

referenced Section 59.4.6.3., we find the following table for the EOF Zone in Subsection 59.4.6.3.E.1.:

E. EOF Zone, Standard Method Development Standards

1. Site	Detached House	Duplex - Side	Duplex - Over	Townhouse	Apartment	Multi Use	General
Open Space (min)							
Open space, tract ≤ 10,000 SF	n/a	n/a	n/a	10%	0%	0%	0%
Open space, tract > 10,000 SF	n/a	n/a	n/a	10%	10%	10%	10%
Specifications for all Open Space							
a.	In a development with townhouse, apartment, multi use, or general building types, open space is calculated on the area of the site minus any area for detached house and duplex lots.						
b.	Open space for the townhouse building type is common open space (see Section 6.3.5), and for other building types is amenity open space (see Section 6.3.7).						

As is apparent from this Table, the amount of open space required is at least 10% of the area of the subject tract. Since the tract area is 45,220 square feet, the minimum required amount of open space required is 4,522 square feet. That requirement is met by the existing open space at the southern end of the site, adjacent to Bells Mill Road. That area measures 4,949 square feet (10.9% of the tract), according to the FZP (Exhibit 23(a)), as confirmed by Technical Staff in is Development Standards Table (Exhibit 28(a), p. 15). Applicant’s engineer, Patrick La Vay, testified regarding the amenity open space on the southern end of the site (Tr. 38):

On the east side of that area there is a -- one area that has a picnic table, a bench and some trash receptacles. And then on the west side of that amenity area there's another area with a seating area, a bench -- with a bench and a trash receptacle. Both areas have a hardscape of nice slate pavers and then in between the two it's nicely landscaped with shade trees and ground covers and such. And so once we pointed that out to staff that there was, you know, quite a bit of available seating area existing and some of the -- you know, sent some photos of what's there, they agreed that that area would qualify as amenity open space and we ended up leaving it the way it is.

Based on this record, the Hearing Examiner finds that the Applicant will provide the amount of open space required by the Zoning Ordinance.

Conclusion: Based on this undisputed record, the Hearing Examiner finds that the subject Floating Zone application meets all the development standards set forth in Section 59.5.4.5. of the Zoning Ordinance.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, the Hearing Examiner concludes that the proposed reclassification and development will meet the standards set forth in the Zoning Ordinance, and that it will be consistent with a coordinated and systematic development of the regional district, as required by the Maryland Land Use Article, Code Ann. § 21-101(a)(4)(i) (2012). More specifically, the evidence demonstrates compliance with Zoning Ordinance §59.7.2.1.E., which spells out the general requirements for approval of a rezoning to a Floating Zone, and with Sections 59.5.1.2., 59.5.1.3., 59.5.1.4., 59.5.4.1., 59.5.4.2., 59.5.4.3., 59.5.4.4. and 59.5.4.5, which together detail the intent, purposes, and standards of the proposed EOFF-0.5, H-35 Employment Office Floating Zone.

VII. RECOMMENDATION

I, therefore, recommend that Local Map Amendment Application No. H-118, requesting reclassification from the existing R-60 Zone to the EOFF-0.5, H-35 Employment Office Floating Zone, of Parcel A, Block T of the Georgetown Village Subdivision, as described in Plat 12576, located at 6300 Democracy Boulevard, in Bethesda, Maryland, and consisting of 1.04 acres of land (45,220 square feet), be **approved** in the amount requested and subject to the specifications and requirements of the Floating Zone Plan, Exhibit 23(a); provided that the Applicant files an executed covenant reflecting the binding elements in the land records and submits to the Hearing Examiner for certification a true copy of the Floating Zone Plan approved by the District Council within 10 days of approval, in accordance with §§59.7.2.1.H.1.a. and b. of the Zoning Ordinance.

Issued: February 15, 2017

Respectfully submitted,



Martin L. Grossman
Hearing Examiner