

HEARING EXAMINER'S REPORT AND DECISION

TABLE OF CONTENTS

I. STATEMENT OF THE CASE AND DESCRIPTION OF PROCEEDINGS.....	3
II. FACTUAL BACKGROUND.....	5
A. THE SUBJECT PROPERTY	5
B. SURROUNDING AREA	7
C. PROPOSED USE	8
1. Conditional Use Plan	9
2. Landscaping Plan.....	10
3. Parking	15
4. Lighting and Signage.....	16
5. Operations	16
E. COMMUNITY RESPONSE	16
III. FINDINGS OF FACT AND CONCLUSIONS OF LAW	17
A. NECESSARY FINDINGS (SECTION 59.7.3.1.E).....	18
1. Substantial Conformance with the Master Plan.....	19
2. Compatibility with the Surrounding Area	20
2. Adequate Public Services and Facilities	32
3. No Undue Harm from Non-Inherent Adverse Effects	33
B. DEVELOPMENT STANDARDS OF THE ZONE (ARTICLE 59.4).....	36
C. USE STANDARDS FOR TOWNHOUSE LIVING, §59.3.3.1.D.2.B.....	37
1. Accessibility Standards	37
2. Locational Requirements	37
D. GENERAL DEVELOPMENT STANDARDS (ARTICLE 59.6)	51
1. Parking, Queuing and Loading	52
2. Open Space and Recreation	52
3. Site Landscaping and Screening	52
4. Outdoor Lighting.....	53
5. Signage.....	53
IV. Conclusion and Decision	53

I. STATEMENT OF THE CASE AND DESCRIPTION OF PROCEEDINGS

The Applicant, CM Muncaster Mill, LLC (Applicant or CM Muncaster), filed an application seeking approval of a conditional use for a Townhouse Living project on September 19, 2023. It proposes to develop 43 “Design for Life” townhomes, seven of which will be Moderately Priced Dwelling Units (MPDUs) under Zoning Ordinance §59.3.3.1.D.2.b. The subject property is zoned R-200 and is located at 7100 and 7106 Muncaster Mill Road, further described as Part of Lots 13 and 14 in the Cashell Estates Subdivision. Exhibit 1.

OZAH initially scheduled a public hearing for January 12, 2024. Exhibit 24. On December 6, 2023, CM Muncaster requested a postponement of that hearing. Exhibit 25. The next day, OZAH issued a written notice rescheduling the hearing for January 29, 2024.

Staff of the Montgomery County Planning Department (Planning Staff or Staff) issued a report recommending approval of the project on December 22, 2023, subject to the following conditions of approval (Exhibit 30, p. 3):

1. The use is limited to Townhouse Living and must meet all the Use Standards as defined in Section 59.3.3.1.b. with a maximum of 43 dwelling units.
2. A Preliminary Plan will be required prior to implementation of the Conditional Use, and it will include consideration of the following:
 - a. As part of the Preliminary Plan, the Applicant will provide a public access easement to accommodate non-vehicular bike and pedestrian movement along a paved trail to the northwest corner of the Subject Property to support to [sic] option of a future connection to Redland Road.
 - b. As part of the Preliminary Plan, the Applicant will provide a public access easements accommodate future connectivity to the adjacent property to the southeast via alleys A and B as well as along sidewalks parallel to Alleys A and B.
 - c. As part of Preliminary Plan, the Applicant will upgrade the existing sidepath along Muncaster Mill Road to 11 ft. in width with a minimum 6-foot-wide street buffer.

- d. As part of the Preliminary Plan process, all proposed intersections must provide cross-walks and ramps across all four legs of the intersection.
- e. As part of the Preliminary Plan process, the Applicant will continue to explore options with Planning Staff to extend a paved trail connection to Redland Road.
- f. The Applicant must enter into a Public Access Easement (PAE) at the time of Preliminary Plan (or Plat approval).

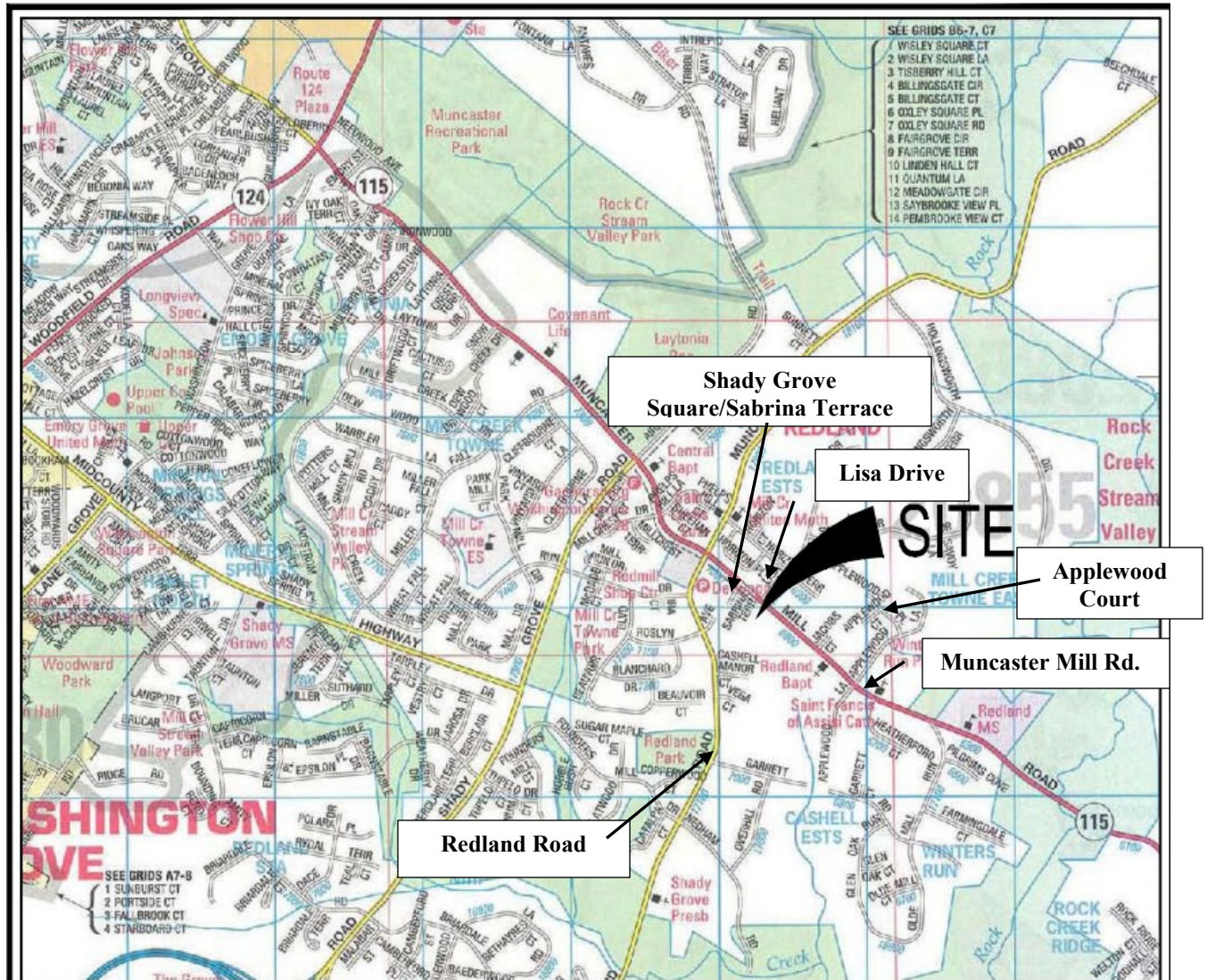
The public hearing proceeded as rescheduled on January 29, 2024, and the Applicant called four witnesses, a principal of the Applicant and three expert witnesses. Five individuals appeared to oppose the application. The record was held open until March 1, 2024 to allow the applicant to file revisions to the conditional use plan showing perimeter fencing and screening, to submit information relating to a gap study the Applicant performed at the neighboring townhouse development, and to submit information on the impact of the use on a line of mature trees located on the neighboring townhouse community. T. 182. The Applicant timely submitted the information requested on February 16, 2024. Exhibit 45. The Hearing Examiner asked the Applicant an additional question on ownership, maintenance, and insurance for the proposed public park. Those in opposition timely filed responses to these materials on March 1, 2024 and the record closed on that date.

This case tests the flexibility of the locational requirements for the Design for Life conditional use. The Hearing Examiner finds that the publicly accessible open space does not constitute the “public recreational or park facility” as used in the Zoning Ordinance. Based on the evidence in this record, she also finds that the Applicant has failed to meet its burden of proof that access and egress onto Muncaster Mill Road will be safe. Finally, the paucity of information on the parameters of the park, operations, and the impact on the project and the surrounding area does not permit the Hearing Examiner to make other required findings. For these reasons, the Hearing Examiner denies this application.

II. FACTUAL BACKGROUND

A. The Subject Property

The general location of the site is depicted on a vicinity map shown on the conditional use plan (Exhibit 45(d)), below):



Planning Staff advises that the property consists of three unrecorded lots totaling 4.46 acres in the R-200 Zone. Exhibit 30, pp. 1, 5-6. Existing improvements include two single-family detached houses and garages, along with sheds. The property slopes downward from the western corner to the east. There are no streams, forests, or wetlands on the property. *Id.*, p. 6. An aerial

photograph of the property, from the Staff Report, is shown below, outlined in red (Exhibit 30, p. 6, on the next page).



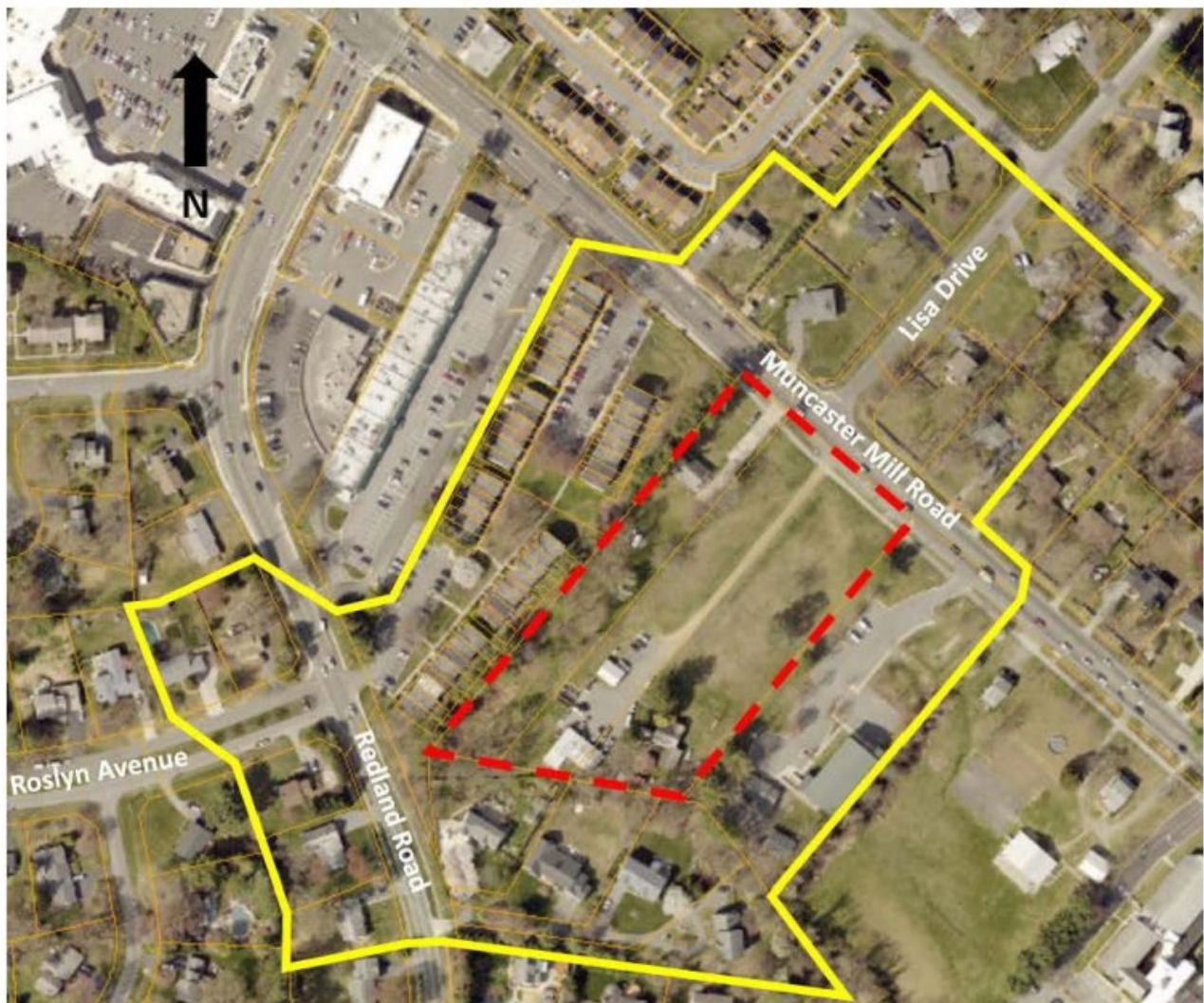
Gospel Baptist Church abuts the subject property to the east. A townhome development (Shady Grove Square) abuts the property along its northwestern property line. There are tall, mature evergreens on Shady Grove Square's property close to the common property line. CM Muncaster's submitted photographs of the site that show these trees (Exhibit 21(a), below):



B. Surrounding Area

The compatibility of a proposed use is measured by its relationship to the properties directly impacted. Those properties directly impacted are defined by the “surrounding area.” The surrounding area is first delineated and then “characterized” to determine whether the proposed use will adversely affect that character.

The Planning Staff recommended the following the boundaries of the surrounding area in its report (Exhibit 30, p. 5, shown below):



CM Muncaster’s expert in landscape architecture and land planning, Mr. Scott Wolford, testified that the surrounding area should be larger and include the retail shopping center to the

northwest because residents will use that shopping center. T. 31. Those are the places where residents will be going to obtain neighborhood commercial services. T. 32. He would also have included the townhouse community north of Muncaster Mill up to Horizon Terrace to the northwest. In his opinion, there are no substance differences between Staff's defined neighborhood and the Applicant's. T. 33.

The Hearing Examiner agrees with Staff's delineation of the surrounding area. She does not adopt Mr. Welford's because the direct impacts of this use are too attenuated at a local shopping center to differentiate between impacts from this development and those caused by the general public.

Staff characterized the surrounding area as (Exhibit 30, p. 4):

The neighborhood as defined is comprised of moderate-density residential development, high-density residential development, and a religious assembly use. The properties to the north, east, and south are zoned R-200 and the properties to the west are zoned RT-12.5. The properties to the north and south are single family detached houses, the property to the east is a Religious Assembly use and the properties to the west are townhouses.

Staff advises that there are no special exceptions or conditional uses in the surrounding area. *Id.* Mr. Welford testified that his larger surrounding area did not change the character identified by Staff. The Hearing Examiner disagrees because the addition of a commercial shopping center deviates significantly from Staff's characterization. The Hearing Examiner finds that the area is characterized by a mix of moderate and high-density residential properties in the R-200 and RT-12.5 Zone with an institutional use immediately to the east.

C. Proposed Use

The Applicant seeks a conditional use to develop a "Townhouse Living" project consisting of 43 townhomes, seven of which will be Moderately Priced Dwelling Units (MPDUs). The Zoning Ordinance requires all the units conform to the "Design for Life" accessibility standards (*i.e.*, Level II Accessibility standards) defined in Section 59-107 of the County Code.

Mr. Christopher Malm, Vice President and CFO of Craftmark Homes, testified that Craftmark is a privately owned, family-run development and home building company that has been in business in the D.C. metro area for over 33 years. Their products include single-family detached homes, townhouses, and two-over-two condominiums. T. 13.

According to Mr. Malm, the forty-three townhomes will have rear-loaded garages. Access is from an internal street that connects to Muncaster Mill Road, with alleys that branch off from the internal street to the garages. T. 14.

Mr. Malm testified that there are two main communal areas. There is an open lawn space with bench seating in the center of the project, surrounded by sidewalks for pedestrian connectivity. The second is toward the rear of the project and includes a lawn space with bench seating, a multi-use play area and pergola. Both spaces will be planted with a significant number of trees.

Mr. Malm described the “Design for Life” program that dictated the design of the townhomes. According to him, the program was meant to increase the supply of County’s supply of housing that is accessible and useable for individuals with disabilities and need mobility aids like wheelchairs. T. 14-15. The program requires a property with minimal slopes, zero-step front door entrances, and many interior accessibility features, such as larger kitchens for wheelchair functionality. T. 15. All the townhomes will have private elevators. *Id.* The MPDUs will have the same accessibility features as the market rate units but will be slightly smaller (2,000 square feet versus market rate units of 2,500 square feet). T. 24. Mr. Malm provide an architectural rendering of a model townhome (the “Seneca”) that it has used elsewhere (Exhibit 12(a), on the next page.

1. Conditional Use Plan

The proposed conditional use plan (Exhibit 45(d), on page 11) shows the 43 rear-loaded, 3-story townhomes facing Muncaster Mill Road, an internal access street, and open space that will include a includes a multi-age play area. It also shows a pathway that could connect through Shady



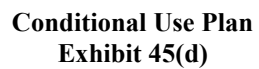
Grove Square to Redland Road. Staff requested the Applicant to provide this pathway because the only full-service bus is located on Redland Road. The bus stop on Muncaster Mill Road is for Ride-On Bus Route 53, located about 80 feet northwest of the property. The bus 53 route is limited service only and runs Monday through Friday during rush hour at 50-minute intervals. Staff asked the Applicant to explore a pathway connection to the Redland Road stop because (Exhibit 30, p. 15):

Without this link, riders from the Application must walk an additional 1/3 mile, or 6 minutes, to access the stop, a significant hurdle for all users, particularly those with mobility impairments. Bus Riders from the community may instead be forced to rely on the 53 line only, which provides a stop along Muncaster Mill Road fronting the Subject Property, which only operates peak weekday hours, with a limited frequency of every 50 minutes, or for individuals with mobility challenges, rely on more expensive and inconvenient dial-a-ride services...

2. Landscaping Plan

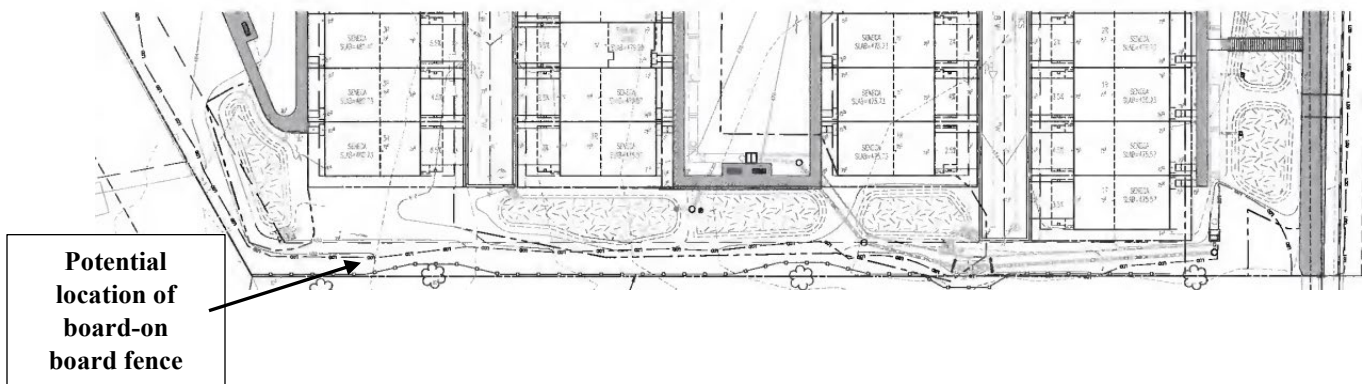
a. Perimeter Screening

Excerpts from the proposed Landscape Plan (Exhibit 45(d)) are shown on pages 13-14. The plan shows a Forest Conservation Easement (FCE) along the southern side of the property,



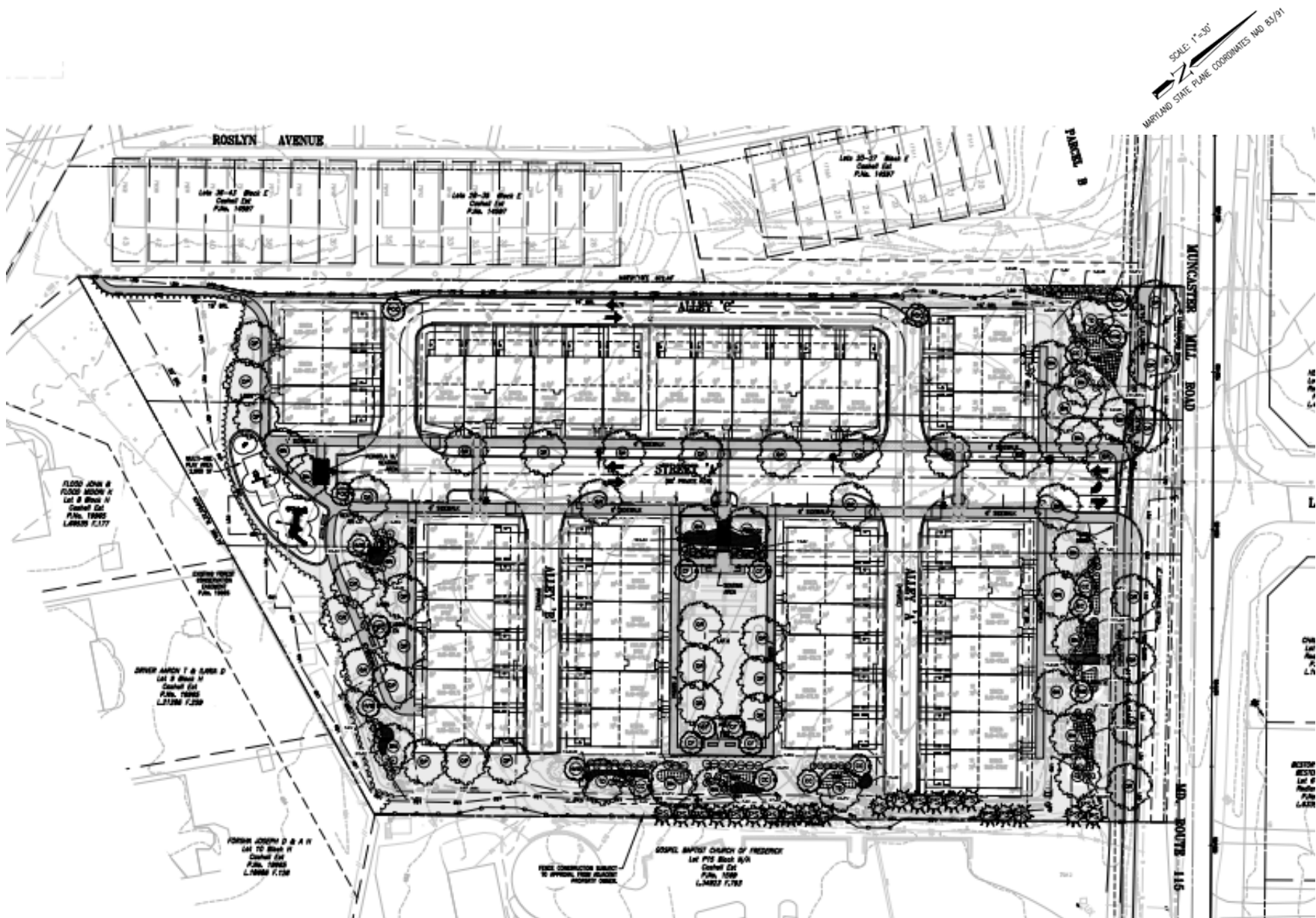
adjacent to an existing off-site FCE. T. 12. A mix of Willow Oak, Red Oak, birch trees will be located between the play area and townhomes, as well as landscaping in some stormwater management facilities. Exhibit 45(d). The same mix of trees will continue along part of the eastern side of the property, adjacent to the church, with additional plantings in the stormwater management facilities there. *Id.* At the request of the church, the Applicant has agreed to install a board-on-board fence along the common property line. Subject to approval by the church, some of the fence may be on the church's property and some on the Applicant's property.

Revised plans show the proposed location of the fence along the common property line with the church (Exhibit 45(c)(iii), below):



CM Muncaster also proposes a privacy fence and retaining wall along a portion of its common property line with Shady Grove Square in the location shown on the next page 15. Both fences will be of similar design (Exhibit 45(d)).

CM Muncaster has proffered additional screening on Shady Grove Square’s property to “fill in existing gaps in the tree line.” Exhibit 45(e). Alternatively, the Applicant is willing to pay Shady Grove the amount equal to its cost to install the trees. Exhibit 45.

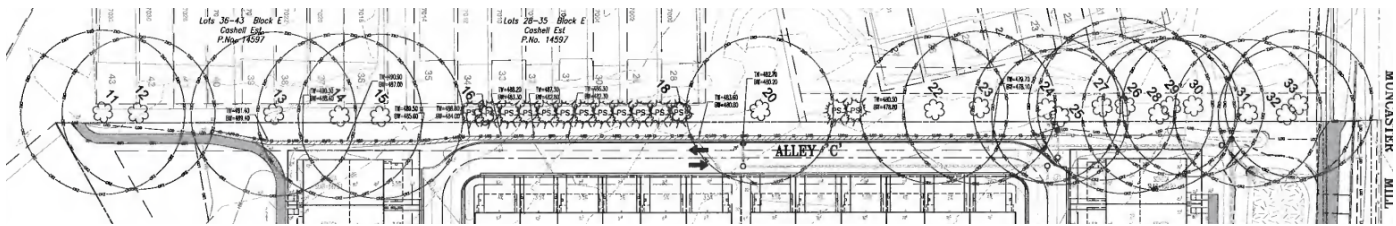


Revised Landscape Plan
Exhibit 45(d)

PLANT SCHEDULE LANDSCAPE

<u>CODE</u>	<u>QTY</u>	<u>BOTANICAL / COMMON NAME</u>	<u>CONT</u>	<u>SIZE</u>	<u>SPACING</u>
SHADE TREES					
BN	9	BETULA NIGRA 'HERITAGE' / HERITAGE RIVER BIRCH	B & B	2 1/2" - 3" CAL.	
QP	10	QUERCUS PHELLOS / WILLOW OAK	B & B	3" CAL	
QR	28	QUERCUS RUBRA / NORTHERN RED OAK	B & B	3" CAL	
ORNAMENTAL TREES					
CF	6	CORNUS FLORIDA / FLOWERING DOGWOOD	B & B	6'-8" HT.	
POC	4	PRUNUS X 'OKAME' / OKAME FLOWERING CHERRY	B & B	6'-8" HT.	
EVERGREEN TREES					
PS	23	PINUS STROBUS / EASTERN WHITE PINE	B & B / CONT.		6'-8" HT

Key to Landscape Plan Exhibit 45(d)



Revised Landscaping Along Northwestern Property Line with Fence and Increased Setback Exhibit 45(e)

b. Open Space and Amenities

According to the conditional use plan, 33% of the site will be common open space. Exhibit 45(d). The Applicant proposes to record a public access easement some of the open space so the general public may visit. The publicly accessible open space will be maintained and insured by the Homeowners Association. The Staff Report did not describe the park but noted there would be a public access easement. Exhibit 30, p. 9. Prior to the public hearing, the exact size of the publicly accessible space had not been defined. At the public hearing, the Applicant's expert in civil engineering, Mr. Phillip Hughes, testified that Montgomery County requires the multi-age play area to be a minimum of 2,500 square feet. The play area shown on the conditional use plan meets that requirement. It connects to a pathway with seating through the forest conservation area, so it will function as an area larger than 5,000 square feet. T. 73. The interior lawn space between the units, southeast on the property, is approximately 5,000 square feet and is mostly passive recreation space.

T. 72-75. In addition to the 2,500 square foot multi-age play, there are approximately 11,000 square feet of passive recreation area that will be subject to a public access easement. T. 75. Submissions post-hearing enlarge the area to be 0.82 acres, an increase over the hearing testimony.¹ Post-hearing, the Applicant submitted a plan showing the boundaries of the open space and a graphic of the play area (Exhibits 42(d) and (e)):



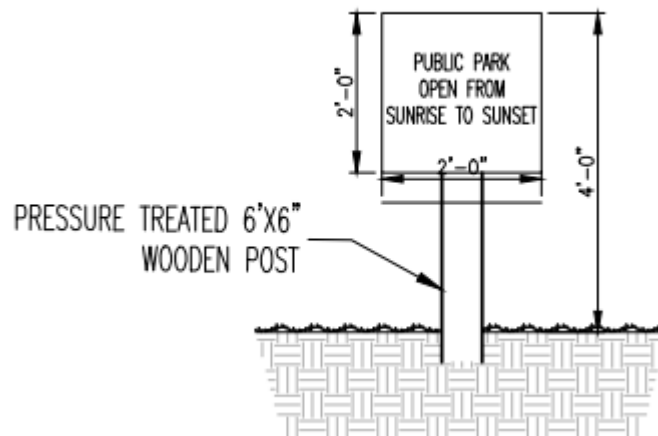
**Depiction of Multi-Age
Play Area (Ex. 45(d))**

¹ An 11,000 square-foot passive lawn area and an approximately 5,000 square foot area of playgrounds and paths equals 16,000 square feet or 0.37 acres ($16,000/43,560=0.367$). The boundaries of the publicly accessible open space were not presented at the public hearing, generating questions about its size exact alignment.

Each unit will have two parking spaces in the rear-loaded garages and driveways, one of which is handicapped accessible. There are 10 parking spaces to serve those visiting residents and the publicly accessible open space located along the spine street (Internal Street A). Exhibits 45(d),

4. Lighting and Signage

The proposed lighting for the subject site is depicted on the Lighting Plan (Exhibits 45(d)). The entrance of the location sign is shown on the conditional use plan, but no design was submitted. At the suggestion of the Hearing Examiner, the Applicant proffered a sign to inform people of the park. It submitted a graphic of a 2-foot by 2-foot sign after the public hearing (Exhibit 45(d), shown below):



5. Operations

The evidence regarding operation of the conditional use is that (1) deliveries will be private and unrestricted, and (2) it will be managed by an HOA. T. 18. The publicly accessible recreation area will be managed by the HOA.

E. Community Response

Several individuals opposed this application. Dr. Carol Kosary believes that the limited use standards are designed to get residents out of their homes and into the larger community. She believes that the locational requirements for the use should be measured from that perspective. The

distance from the Metro Station should be measured by the path that an individual must take using the “built infrastructure” (*i.e.*, roads, sidewalks, pathways, etc.) to get there. She does not agree that the bus route on Muncaster Mill satisfies the requirement that bus service must “be available” on an abutting road because that line offers only limited service, from Monday through Friday during rush hours. She does not believe that the publicly accessible open space on the subject property substitutes for the “park” required by the limited use standards. She also believed that the trees on Shady Grove Square’s property would be harmed by the proposed development because the Limits of Disturbance extended almost to the property line, generating impacts on the CRZs of up to over 40%. T. 120-122.

Mr. Tracy McAbee, who is property manager for Shady Grove Square, also expressed concern about the health of the mature trees on their property. He believes that the trees are so high and so old that he doesn’t know how they will sustain any construction around them without either falling on the existing townhomes or the adjacent property. T. 154.

Other individuals testified that traffic along the abutting section of Muncaster Mill Road was very dangerous. They described it as “dangerous and scary” and a “nightmare”. T. 131, 156. Several testified that they had trouble exiting and accessing their homes on minor roads that intersect with Muncaster Mill Road. Some attributed this to a “blind” spot along at Sabrina Terrace. Many testified that motorists use a middle turn lane on Muncaster Mill as a through lane to get to the light at the intersection of Redland Road/Muncaster Mill.. All reported frequent accidents at different intersections along that portion of Muncaster Mill. T. 128-136, 138-144, 146-147. The Hearing Examiner sets these out in more detail later in this decision, along with the Applicant’s responses.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific to a particular type of

use, as set forth in Article 59.3 of the Zoning Ordinance, and general (*i.e.*, applicable to all conditional uses), as set forth in Division 59.7.3 of the Zoning Ordinance. The specific standards applied in this case are those for a Townhouse Living-“Design for Life” conditional use, under Zoning Ordinance §59.3.3.1.D.2.b.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (*Zoning Ordinance*, §7.1.1.), the Hearing Examiner concludes that the Applicant has failed to meet its burden of proof that all standards for approval have been met.

A. Necessary Findings (Section 59.7.3.1.E)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E. of the Zoning Ordinance. Standards pertinent to this approval, and the Hearing Examiner’s findings for each standard, are set forth below. The major topics of discussion are further divided under the following headings:

1. Substantial Conformance with the Master Plan;
2. Adequate Public Services and Facilities;
3. No Undue Harm from Non-Inherent Adverse Effects; and
4. Compatibility with the Neighborhood

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

- a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;***

Conclusion: Planning Staff advises that there are no previous approvals governing this site. Exhibit 30, p. 10. Therefore, this subsection is inapplicable.

- b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;***

Conclusion: This subsection requires an analysis of the standards of the Townhouse Medium Density (TMD) Zone (under the optional method)² contained in Article 59-4; the use standards for a Townhouse Living-“Design for Life” conditional use contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively).

1. Substantial Conformance with the Master Plan

c. substantially conforms with the recommendations of the applicable master plan;

Development of the property is guided by the *2004 Upper Rock Creek Area Master Plan* (Plan or Master Plan). Staff found the application conformed to the Plan because it expresses the need for additional housing, affordable housing, and accessible housing. Exhibit 30, p. 11. Applicant’s land planner, Scott Welford, testified that the Master Plan contains no site-specific recommendations for the subject property. He said that the Master Plan (at p. 35) stresses the need for the provision of affordable housing and assistance to those with diverse housing needs, such as the elderly, the physically disabled, and those with mental illness. T. 42-43. Mr. Welford adopted the statements in the Applicant’s Land Planning Report (Exhibit 35) and opined the application conforms to the recommendations of Thrive 2050, the most recent General Plan amendment, to provide additional housing. Finally, he believes it meets the County’s policy to provide additional housing for underserved populations. T. 45.

Conclusion: The Plan endorses the provision of accessible and affordable housing (*Plan*, p. 35):

The ability to offer housing of varying types and prices to residents in a wide range of socioeconomic strata is a key component in measuring Montgomery County’s overall quality of life. The 1993 *General Plan Refinement* set out as its Housing Goal that the County “encourage and maintain a wide choice and neighborhoods for people of all incomes, ages, lifestyles, and physical capabilities at appropriate densities and locations.” This Plan endorses that goal, as well as the objectives

² Although the subject site is in the R-200 zone, Zoning Ordinance Section 59.3.3.1.2.b., the provision which permits townhouse living as a conditional use, requires that “the density limitations and development standards of the TMD zone under optional method (59.4.4.12.C) apply [to this type of development] in spite of any other limitations in this Chapter.”

designed to achieve that goal, which include providing choice in design and construction, encouraging housing near employment centers, maintaining the quality and safety of neighborhoods, and encouraging adequate supplies of affordable housing.

The proposed development will provide 7 MPDUs and all units will be accessible to those with disabilities. The Hearing Examiner finds that it meets these general goals of the Master Plan and Thrive.

2. Compatibility with the Surrounding Area

There are two standards that require the Hearing Examiner to determine whether the development will be compatible with the surrounding area. Since different types of impacts affect the project's compatibility with the neighborhood and surrounding uses, the Hearing Examiner separates her analysis by these different compatibility measures. Relevant Zoning Ordinance provisions include Section 59.7.3.1.E.1.d, which requires the development to be:

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;

The second compatibility requirement is Section 59.7.3.1.E.2:

2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

a. Use, Scale and Screening (Testimony and Evidence)

Planning Staff concluded that (Exhibit 30, p. 12):

The proposed townhouses are compatible with the residential character of the surrounding neighborhood, and the open space at the western end of the site provides an appropriate buffer to the adjacent single-family residential uses. The architectural styles will be like single-family residential uses. Also, the Applicant is proposing townhouses and the properties to the west are townhouses. Landscaping along Muncaster Mill will provide screening for the roadway, and building materials will be in keeping with nearby residential properties.

* * *

The Applicant is proposing residential townhouses with this project. The proposed townhouses will be similar in nature to the existing townhouse [sic] to the west of the project that are zoned RT 12.5 which have a maximum height of 35 feet. The proposed townhouses are slightly taller than the existing neighboring townhouses at

40 feet maximum, but the grade elevation is lower to accommodate for the additional height. The surrounding R-200 zone would allow for the surrounding houses to have a maximum height 40-45 feet based on the lot sizes. Also, the Applicant has the proposed townhouses closer to the existing townhouses and further away from the existing single-family detached houses on abutting lots.

Mr. Wolford adopted Planning Staff's recommendation. T. 45. He opined that the "substantial" amount of landscaping adjacent to the church, both in the stormwater management facilities, and that required by the Zoning Ordinance, would provide a compatible buffer along that property. T. 40. The south side will be buffered by the play area, open lawn, and pedestrian trails. There is a forest conservation area along the south side will provide additional buffer for the three single-family detached lots to the south. T. 41. After the public hearing, the Applicant submitted revised landscaping plans, that increased the setback from Shady Grove Square and showed fencing the common property boundary there. It also shows along the common boundary with Gospel Baptist Church. Exhibit 45(d).

b. Environmental

As originally proposed, the limits of disturbance for construction would have encroached upon the Critical Root Zones (CRZs) of a stand of very tall, mature trees on Shady Grove Square's property, shown earlier.

The data table (Exhibit 15(c), on the next page) of the original Preliminary Forest Conservation Plan (PFCP) showed that the CRZs of half of the trees on Shady Grove Square's property would be impacted by more than 40%. Dr. Kosary testified that ten of the twenty trees on Shady Grove Square's property will be impacted over more than 40% of their Critical Root Zones (CRZ). T. 122. According to her, the CRZ is the zone in which the majority of the tree's roots live. Approximately 85% of the roots will be found in the top 24% of soil. Of those, most of the roots that supply nutrients and water to the tree are found in the uppermost layer, just below the soil surface. The impact on the trees labeled "safe" on the plan ranges from 35% to 46% of the CRZ. T. 121.

SPECIMEN, CHAMPION, & HISTORIC TREES						
TAG	COMMON NAME	SCIENTIFIC NAME	DBH	CONDITION OF SPECIMEN TREE	CRZ IMPACTED	STATUS
1 ^{*2}	Eastern White Pine	<i>Pinus strobus</i>	28.0'	Fair	32%	SAVE (IMPACTED)
2 ^{*2}	Eastern White Pine	<i>Pinus strobus</i>	22.0'	Poor	33%	SAVE (IMPACTED)
3 ¹	Canada Hemlock	<i>Tsuga canadensis</i>	34.5'	Poor	100	REMOVE
4 ^{*2}	Eastern White Pine	<i>Pinus strobus</i>	26.0'	Fair	32%	SAVE (IMPACTED)
5 ^{*2}	Eastern White Pine	<i>Pinus strobus</i>	35.0'	Fair	29%	SAVE (IMPACTED)
6 ¹	Norway Spruce	<i>Picea abies</i>	38.0'	Poor	100%	REMOVE
7 ¹	Norway Spruce	<i>Picea abies</i>	25.0'	Fair	100%	REMOVE
8 ¹	Red Maple	<i>Acer rubrum</i>	39.0'	Poor	92%	REMOVE
9	Black Cherry	<i>Prunus serotina</i>	33.0'	Poor	32%	SAVE (IMPACTED)
10 [*]	Northern Red Oak	<i>Quercus rubra</i>	36.0'	Poor	3%	SAVE
11 [*]	Eastern White Pine	<i>Pinus strobus</i>	29.0'	Fair	8%	SAVE
12 [*]	Eastern White Pine	<i>Pinus strobus</i>	27.0'	Fair	11%	SAVE
13 [*]	Eastern White Pine	<i>Pinus strobus</i>	29.0'	Fair	35%	SAVE (IMPACTED)
14 [*]	Eastern White Pine	<i>Pinus strobus</i>	29.0'	Fair	45%	SAVE (IMPACTED)
15 [*]	Eastern White Pine	<i>Pinus strobus</i>	29.0'	Fair	45%	SAVE (IMPACTED)
16 [*]	Eastern White Pine	<i>Pinus strobus</i>	32.0'	Poor	45%	SAVE (IMPACTED)
17 ¹	Red Maple	<i>Acer rubrum</i>	29.0'	Fair	100%	REMOVE
18 [*]	Eastern White Pine	<i>Pinus strobus</i>	26.0'	Poor	42%	SAVE (IMPACTED)
19 ¹	Red Maple	<i>Acer rubrum</i>	43.0'	Poor	83%	REMOVE
20 [*]	Eastern White Pine	<i>Pinus strobus</i>	26.0'	Good	40%	SAVE (IMPACTED)
21 ¹	Red Maple	<i>Acer rubrum</i>	26.0'	Good	75%	REMOVE
22 [*]	Eastern White Pine	<i>Pinus strobus</i>	26.0'	Fair	40%	SAVE (IMPACTED)
23 [*]	Eastern White Pine	<i>Pinus strobus</i>	27.0'	Poor	38%	SAVE (IMPACTED)
24 [*]	Eastern White Pine	<i>Pinus strobus</i>	26.0'	Fair	39%	SAVE (IMPACTED)
25 [*]	Eastern White Pine	<i>Pinus strobus</i>	24.0'	Poor	46%	SAVE (IMPACTED)
26 [*]	Eastern White Pine	<i>Pinus strobus</i>	31.0'	Fair	39%	SAVE (IMPACTED)
27 [*]	Eastern White Pine	<i>Pinus strobus</i>	26.0'	Poor	37%	SAVE (IMPACTED)
28 [*]	Eastern White Pine	<i>Pinus strobus</i>	27.0'	Poor	44%	SAVE (IMPACTED)
29 [*]	Eastern White Pine	<i>Pinus strobus</i>	24.0'	Poor	36%	SAVE (IMPACTED)
30 [*]	Eastern White Pine	<i>Pinus strobus</i>	25.0'	Fair	36%	SAVE (IMPACTED)
31 [*]	Eastern White Pine	<i>Pinus strobus</i>	26.0'	Poor	43%	SAVE (IMPACTED)
32 [*]	Eastern White Pine	<i>Pinus strobus</i>	24.0'	Fair	44%	SAVE (IMPACTED)
33 [*]	Eastern White Pine	<i>Pinus strobus</i>	26.0'	Fair	35%	SAVE (IMPACTED)
34 ¹	Tulip Poplar	<i>Liriodendron tulipifera</i>	33.5'	Poor	100%	REMOVE

**Tree Data from PFCP Originally
Submitted (Ex. 15(c))**

Dr. Kosary testified that construction damages trees. While most assume that is from trenching, the biggest damage is due to soil compaction caused by heavy construction vehicles and piling excavated dirt over the CRZs. A generic rule of thumb is that 20% of the root system of a tree can be damaged before the tree shows signs of injury. If 40% or more of the root system is damaged, the tree is probably going to die. T. 122. What many people don't realize is that death

from construction activity will take several years before it is visible, so people don't understand the cause and effect. T. 122. She believes that, if the application is approved, the trees on Shady Grove Square's property will begin to die and create quite an issue for their neighbors. T. 122.

The property manager for Shady Grove Square, Mr. Tracy McAbee, also expressed his concern for the trees on Shady Grove's property. He must go to the property when either the county or his tree experts are removing or trimming those trees. They are extremely high, very old high trees. T. 154. He believes that if someone starts digging around those trees, they will start weakening and falling either on Shady Grove Square's property or the subject property. He stated that the trees are so high and so old that he doesn't know how they will sustain any construction around them without falling. T. 154.

Ms. Taylor disagreed with the PFCP's assessment that only two of the Shady Grove Square trees are healthy. She stated that the HOA had their arborist come in and check the health of the trees in summer, 2023, because they were worried about them falling on one of the homes. The arborist told them most of the trees were healthy. The HOA had the unhealthy trees removed. She does not know why the PFCP lists most of the trees on the Shady Grove HOA property as unhealthy. T. 186.

At the public hearing, Mr. Scott Welford, who qualified as an expert in landscape architecture as well as land planning, testified that, with tree-save measures, the trees would be in "better health" after construction than they are today. They have probably not been properly pruned. There's probably a lot of compaction over the top of the root zone. T. 183.

Post-hearing, the Applicant submitted a revised conditional use plan, landscape plan, and PFCP. The conditional use plan moved the Limits of Disturbance approximately 3-5 feet further from Shady Grove Square's property, reducing the CRZ impacts to 35% or less for all the trees.

Exhibit 45. It also submitted a report by a certified arborist stating that, if listed tree save measures were implemented, the likelihood of survival was “quite likely.” Exhibit 45(b).

c. Traffic Safety

Several individuals testified that conditions along Muncaster Mill Road, and particularly surrounding Lisa Drive (opposite the Shady Grove Square townhomes) were dangerous. One reason is that drivers use a middle turn lane on Muncaster Mill Road to speed straight to reach the left-turn lane at the Redland Road/Muncaster Mill Road intersection. Ms. Alicia Taylor, who lives on Sabrina Terrace in Shady Grove Square, testified that pulling out of Sabrina Terrace takes much longer than the amount of time estimated by the Applicant’s gap study. T. 128. She usually must wait until the light at Redland turns red to safely turn left onto Muncaster Mill Road. T. 129. It’s dangerous because people use the center turn lane for through traffic to get to the light at Redland. It is a fight to make a left turn from Sabrina Terrace onto Muncaster Mill Road. Last week, they had a “road rage” incident near there. Someone was traveling past Lisa Drive using the center turning lane as a through lane because they wanted to go faster to get to the left turn lane at Redland Road. That is a daily occurrence for them. When she leaves to take her children to school at 8:45 a.m., she must wait for the light at Redland Road to turn red so no one’s coming over Muncaster Mill Road from Redland Road to make the turn safely. She questions whether the Applicant’s gap study is accurate. T. 129-130.

Mr. Andrew Einsmann echoed Ms. Taylor’s testimony. According to him, the Redland/Muncaster Mill intersection is already a failed intersection. He has lived and owned property on Applewood Court for 20 years. The County tried to alleviate rush hour traffic with the ICC, but there are times when that is a 20-minute wait going north on Muncaster Mill already. Any cars added to existing traffic will exacerbate existing congestion. His daughter tried to ride the Route 53 bus. He doesn’t consider that reliable or accessible because it’s only available during rush

hour. He agrees with Ms. Taylor that the Sabrina Terrace/Muncaster Mill intersection is a blind intersection. It's almost four-way traffic because to make a left from the middle lane is so difficult and people use it as a through lane. He believes that the turn lane to this project will also be dangerous because people are going either to the right to merge or speed past people in the center lane or to the left due to the double turn lane at Muncaster Mill/Redland. T. 139. People fly down a hill to get to the intersection. T. 140.

Mr. Einsmann testified that he can't get out of his street between the hours of 6:00 p.m. and 8:00 p.m. in the evening unless someone lets him out. People constantly block the intersection making the left turn in because they don't obey the laws against blocked intersections. This occurs even earlier with the school buses. These begin when they drop off children on Muncaster Mill and last until at least 7:00 pm. When school is not in session, there's a small reprieve and the back-up doesn't start until 5:00 or 5:30 pm. When school is in session, the road backs up completely. T. 141.

Ms. Taylor testified that the State had installed bollards at Lisa Drive to stop drivers from using the middle turn lane as a through lane. The SHA removed the bollards when Muncaster Mill Road was resurfaced last year. T. 162. SHA has stated that the bollards would be reinstalled, but they haven't done so yet. She testified that she spoke with SHA representatives the morning of the hearing and was told that the bollards had to be fabricated, but SHA was "working on it." T. 164. Ms. Taylor submitted a video from December, 2023, of an accident in which a crash can be heard from her townhouse in Shady Grove Square. Exhibits 46(b). Ms. Taylor states, "These types of accidents are very common and are not reported to the police or the police do not issue a police report." Exhibit 46. Ms. Taylor also submitted a Public Information Act response from the Maryland State Police stating, "According to our Analytics & Data Management, there were 15 collisions in 2023 on Muncaster Mill Road between Redland Road and Bowie Mill." Exhibit 46(a).

Ms. Kristy Helms lives directly across from the subject property. She testified that she has the “worse time” getting out of her house, especially when she tries to go southbound onto Muncaster Mill Road. She agrees that people use the middle turn lane to get to the double-left turns on Muncaster Mill Road. In the evenings, she uses the turn lane to try to get to her own house and she typically must sit in the middle lane at least once a week. She’s scared to death that she’s going to get hit head on. She believes that, if the townhomes are approved, a light should be placed at Lisa Drive and the intersection with the townhouses because someone is going to get killed. T. 147.

In the past, she witnessed a woman try to pull out of Lisa Drive to make a left onto southbound Muncaster. Someone was driving in the middle lane and hit the front of the car, spinning her around. This was because the other driver was using the turn lane illegally to get to the light. T. 146. She and the other driver got into a loud fight but would not let Ms. Helms call the police. T. 146.

Mr. Tracy McAbee, the property manager for the Shady Grove Square, testified that he travels to the project described access and egress to Shady Grove Square as a “nightmare”. He visits during the week between 9:00 a.m. and 4:00 p.m. at least twice a month. T. 156.

Mr. Joe Callogero, the Applicant’s expert in transportation engineering, testified that his firm performed a gap study and stop sign delay study at Sabrina Terrace where it accessed Muncaster Mill Road. The stop sign delay study calculates how long it takes a vehicle to leave the stop sign when accessing Muncaster Mill Road from Shady Grove Square. Their study concluded that it takes an average of approximately 10 seconds per vehicle to enter the road during the morning peak hour. In the evening, the average increased to 30 seconds per vehicle. T. 84.

Mr. Callogero submitted the data supporting the gap study after the public hearing. Exhibit 45(a). At the request of the Hearing Examiner, he also submitted crash data and a speed study.

The GAP study contains the following AASHTO (American Highway Transportation Officials) standard for acceptable gaps:

- Left turn from a minor street – 8.0 seconds (7.5 seconds + 0.5 seconds for multi-lane approaches)
- Right turn from minor street – 6.5 seconds

The study considered delays occurring during one hour in the morning and evening for one day. The number of gaps observed in the study is shown below (Exhibit 45(a):

Gap Study (Traffic Peak Hour 7:15 AM to 8:15 AM)

➤ **Eastbound**

6 to 7 Second Gaps	11
8 to 29 Second Gaps	59
>29 Second Gaps	20

➤ **Combined Westbound and Eastbound**

6 to 7 Second Gaps	6
8 to 29 Second Gaps	14

Gap Study (Traffic Peak Hour 4:45 PM to 5:45 PM)

➤ **Eastbound**

6 to 7 Second Gaps	13
8 to 29 Second Gaps	47
>29 Second Gaps	9

➤ **Combined Westbound and Eastbound**

6 to 7 Second Gaps	2
8 to 29 Second Gaps	7

The study concludes that “there are more than adequate gaps available for the right turn maneuvers as well as the left turn maneuver by utilizing the two-way left turn lane, which is allowed per The Maryland Vehicle Law Annotated Book (2023-2024 Edition.” Exhibit 45(a), p. 3.

The crash data submitted by the Applicant covers reported accidents within 400 feet in both directions at Lisa Drive. This data shows that there were 15 crashes within that area in the last 9 years. Twelve occurred during the day, 3 were injury related, and 4 were intersection related. The

report notes that 12 crashes were with other vehicles while 3 were single vehicle crashes, and “overall, the highest Collision Type was “Same Direction---Rear End with 8.” Exhibit 45(a).

The Traffic Report submitted post-hearing then concludes (apparently) that traffic safety is at acceptable levels because the only “crash pattern” is rear end collisions (*Id.*):

Based on this information, it does not appear that there is a Crash Pattern except for the Rear End Crashes. A Crash Pattern is a type of Crash that continues to occur over a period of time which allows the Traffic Engineer to determine if the Crashes are based on road factors or more human behavior. In this case, typically, Rear End Crashes can most be contributed to Human Factors such as Aggressive Driving (following too closely for example) or Driver inattention (Distracted Driving) and not the road condition itself.

The Traffic Report also notes that location is not within a “high-injury” network or targeted for a “Vision Zero” project. *Id.* At the public Hearing, Mr. Calleggero discounted the effectiveness of bollards. In his opinion, the only thing that could remedy the problem of drivers using the middle turn lane as a through lane would be to install a median and change the access to right-in, right-out. This means that proceeding north would require someone to turn right out of the driveway and do a U-turn at a break in the median. There are driveways up and down the Muncaster Mill corridor that require access. It would be up to the State Highway Administration to undertake those improvements. At present, it looks like they wouldn’t do such a thing, but we don’t know if they have been monitoring accidents. T. 160. The problem really is people driving irresponsibly and in violation of the law. T. 160. In his opinion, SHA will look at accident history when they issue their access permit. T. 160.

c. Conclusion

i. Use, Scale, and Screening

The Hearing Examiner found that the surrounding area was a mix of moderate and high-density residential properties in the R-200 and RT-12.5 Zone with an institutional use immediately to the southeast. The Hearing Examiner concludes that this residential use, albeit at a somewhat

higher density than surrounding uses, does fit within this characterization, particularly as the higher height of the proposed townhomes is off-set by the grade.

The Hearing Examiner agrees with the Applicant that the revised conditional use site plan is sufficiently screened from adjacent uses via the forest conservation easement area to the south, the landscaping and board on board fences proposed along the property boundaries, and the proffer of supplemental planting on Shady Grove Square's property should they decide to accept it.

ii. Environment

The Hearing Examiner finds that the Applicant has adequately addressed the potential for harm to the mature trees on the Shady Grove Square property by moving the Limits of Disturbance line further 3-5 feet further from the common property line. The only evidence in the record regarding the *revised* landscape plan is the opinion of a certified arborist that survival of these trees is "quite likely". Exhibit 45(b).

iii. Traffic Safety

Of more concern to the Hearing Examiner project's impact on traffic safety. Traffic safety is a traditional element used to determine the compatibility of a proposed development with the surrounding area. *Gotach Ctr. for Health v. Bd. of Cty. Comm'rs*, 60 Md. App. 477, 483 A.2d 786 (1984).

After a careful review of all the evidence and testimony, the Hearing Examiner is not persuaded that additional traffic at this location will be safe. The Hearing Examiner finds the testimony and demeanor of those in opposition very credible because it was very consistent, documented, and earnest. She also finds that the individuals who testified are truly scared by the existing conditions, and their concerns are not merely a matter of convenience, as is sometimes the case. It's undisputed that 15 reported accidents have occurred within 400 feet of Lisa Drive in the last nine years. There were 15 *just last year* in the general corridor. Different members of the

opposition consistently testified to accidents that go unreported, and Ms. Taylor submitted a video of the sound of crash (post-hearing) outside her house.

The record shows that the cause of the accidents include (1) driver's negligence, (2) drivers using the turn lane in the middle of Muncaster Mill Road as a through lane to get to the light at Redland Road, and (2) drivers failing to yield to traffic using the merge lane provided for traffic turning right from Redland Road onto Muncaster Mill Road. The merge lane ends at Sabrina Court. T. 131.

The stop sign delay study and the gap study submitted by the Applicant is not as reassuring to the Hearing Examiner as it could be. This is because both cover only a one a.m. hour in the peak period and one p.m. hour for only one day. The entire delay study captured only 7 trips—4 in the morning and 3 in the evening. While it's true that the *average* evening delay was 30 seconds, the *maximum* delay was 77 seconds. The remaining two trips exited in between 4 and 8 seconds. This large difference in delay could be simply because the trips exiting that day turned right instead of left. The 77-second delay is more consistent with Ms. Taylor's testimony that she must wait for the light at Redland Road to turn before she makes a left.

The gap study does not fully explain how it reached its conclusion that there are adequate gaps to accommodate egress. In the evening peak hour, it includes gaps of 6-7 seconds. While these may be right turns onto Muncaster Road, conforming to the AASHTO standards, there are significantly fewer 8-second combined gaps (gaps in both lanes) for vehicles turning left. There are only 7 combined eastbound/westbound (or south and north) gaps in the evening. While 6-7 second gaps may be *theoretically* appropriate here because cars turning left need only cross one lane to get to the middle turn lane, sitting in the middle turn lane is the action consistently described as dangerous. Even if these observations are misplaced, the Hearing Examiner doesn't find the single-day study persuasive because of the crash data.

The credible testimony from those using the road every day demonstrates that there are crashes that go unreported, even crashes with property damage, that do not contribute to the statistics. The Applicant argues that it is up to SHA to determine whether to install safety improvements and defers the safety analysis to the access permit process. However, the record here shows that that SHA *did* install safety improvements (bollards at Lisa Drive) and may reinstall them at some point. Whether they are as effective as other safety measure is not the question—the fact that SHA installed them at all is an indicator that they considered the situation unsafe at some level.

The Applicant attempts to address this by arguing that the predominate crash pattern is rear end collisions. According to its traffic expert, this type of crash pattern shows there is there is nothing wrong with the configuration of the intersection. He attributes the cause to driver negligence and violation of the traffic laws over which the Applicant has no control. That's not the standard for approval of a conditional use. The standard requires a finding that access/egress will be safe at this location.³ This record does not provide enough evidence for the Hearing Examiner to make that finding.

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;

Conclusion: Staff did not identify any special exceptions or conditional uses in the defined surrounding area and the Hearing Examiner has no evidence to the contrary. This standard is not applicable.

³ There are several conditional use and rezoning cases where an applicant has worked with State Highway or MCDOT to mitigate congestion and safety concerns. See, e.g., *Hearing Examiner's Report and Decision*, CU 20-08, Application of Martha B. Gudelsky Early Development Center, Inc., pp. 33-34 (November 24, 2020);

2. Adequate Public Services and Facilities

f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or

ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and

Conclusion: The Hearing Examiner is not required to make a finding regarding the adequacy of public services and facilities (APFO) in this case because development will require a preliminary plan of subdivision. Staff correctly notes that adequacy of the surrounding public facilities, including the road network, transit, and pedestrian facilities, is determined by the Planning Board's Local Area Transportation Review (LATR) Guidelines. The LATR Guidelines exempt projects that are estimated to be under 50 person trips from doing a full traffic study.

As required, the Applicant submitted a traffic statement to justify why the use would generate fewer than 50 person trips. Exhibit 6. Staff found that the development did not require a traffic study. Nothing in the record contradicts the traffic statement, and the Hearing Examiner finds that the project conforms to the LATR Guidelines.

The Staff Report confirms that other facilities, such as schools and utilities, are adequate to serve the use. Exhibit 30, p. 16.

3. No Undue Harm from Non-Inherent Adverse Effects

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;*
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

Staff listed the inherent effects of Design for Life townhomes in its Staff Report along with its finding on whether the project had any non-inherent effects (Exhibit 30, p. 17):

The following are physical and operational characteristics necessarily associated with a Townhouse Use:

- Outdoor amenity space for use by residents and visitors: As noted, the proposed townhouse community includes an onsite park which includes a playground and will be available to the public. Significant traffic to the proposed park is not anticipated due to the proximity to larger park facilities including Redland Local Park, Mill Creek Towne Local Park and Laytonia Recreational Park. Furthermore, the proposed park will be screened from adjacent residential detached houses by the proposed Forest Conservation Easement.
- Street lighting: As shown on the photometric plan, in conformance with the requirements of Sections 59.6.4.4, the lighting for the project will fall to 0.0 footcandles before the property lines abutting the residential uses.
- Traffic to and from the site: The Applicant's traffic statement confirms that the project is anticipated to result in a minimal amount of traffic.
- Trash and delivery trucks: the Property will only be served by regular trash and recycling pick-up and delivery trucks such as FedEx and UPS trucks.

The Applicant repeats these verbatim in its Land Use Report. Exhibit 35, p. 11.

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use on nearby properties and the general neighborhood. Inherent adverse effects are "adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations."

Zoning Ordinance, §1.4.2. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* Non-inherent adverse effects are a sufficient basis to deny a conditional use, alone or in combination with inherent effects, if the harm caused by the adverse effects would be “undue.”

The Hearing Examiner must assess whether any of the potential harms listed in this provision will occur, and if so, whether they will result, at least in part, from non-inherent adverse effects. If the answer is “yes” to both questions, the Hearing Examiner must then determine whether any of these purported harms are “undue” within the meaning of the Zoning Ordinance.

In the only other case that implemented a Design for Life conditional use, Staff and the Hearing Examiner identified the following inherent characteristics (*Hearing Examiner’s Report and Decision*, CU 16-11, Application of Garrett Gateway Partners LLC, p. 41 (December 2, 2016)):

- Increase in traffic;
- Increase in impervious surface;
- Increase in population density;
- Increase in light glare;
- Townhouse buildings meeting Level II Accessibility Standards;
- Additional parking; and
- Increase in local activity and noise consistent with a residential community.

The Hearing Examiner sees no reason to change the list of inherent effects for this case. There is a notable difference between Staff and the Applicant’s list in this case and the characteristics identified in the former case. Staff and the Applicant describe “open space” as, “outdoor amenity space for use by residents and visitors,” to capture what it now calls the “On-Site Park. Exhibit 45. The approved conditional use case identified as inherent “local activity and noise *consistent with a residential community*.” (Emphasis supplied). While the former Design for Life Project did have the required common open space, it *did not* invite the public to use the

common open space as a park. The Hearing Examiner finds that the operation of a “park” on the property is a non-inherent operational characteristic for a Design for Life conditional use.

The record reveals virtually no information about the expected impact of the park. Unfortunately, none of those at the hearing were able to see the exact parameters of the park when they had the opportunity to cross-examine. Post-hearing, the size of the park then “morphed” from 0.37 acres into 0.82 acres and an exact delineation was provided.

Typical evidence considered analyzing the impact of the park would include anticipated usage, whether the 10 parking spaces reserved for both park users and visitors to residents will be adequate, whether noise levels emanating from the park will be excessive, etc. Staff advises that *peak* hour traffic will be low because people will be more likely to use the larger parks in the area, but there is no information on traffic at other times. This is particularly important considering the evidence on traffic safety in this case. When the Hearing Examiner questioned the Applicant on whether 10 parking spaces were sufficient, the Applicant’s representative replied that there are M-NCPPC parks that have no off-street parking. T. 198. That may be so, but those parks could be in urban or residential areas with either ample on-street or public parking. The mere fact that there are parks without off-street parking does not help the Hearing Examiner to determine whether parking at this location is sufficient. This is particularly true because the record demonstrates the site does not have direct access to a full-service bus stop.

The Applicant also added a sign announcing that it exists. The Hearing Examiner suggested the sign at the hearing as a means of generating park attendance or “connectivity” with the surrounding community. Her post-hearing review of the traffic safety evidence, however, raises concerns that it could end up being a safety hazard because it would be a driver distraction. There’s no evidence to say that the sign could not cause a safety hazard. In short, there is simply not enough information in the record to determine whether the addition of a public “park” to a townhouse

community will or will not have an adverse impact on the surrounding area. For this reasons, the Applicant has failed to meet its burden of proof that the publicly accessible, privately owned open space will have no undue impact on the surrounding areas.

B. Development Standards of the Zone (Article 59.4)

To approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the applicable zone, as specified in Article 59.4 of the Zoning Ordinance. In this case, the applicable zone is the Townhouse Medium Density (TMD) Zone (under the optional method).⁴

Staff provided a table in the Staff report comparing the minimum development standards of the TMC Zone (under the optional method) and the project (Exhibit 30, p. 10, shown on the next page.

Table 1: Development and Parking Standards using TMD Standards as required for this Conditional Use

Development Standard Section 59.4.4.12.C	Permitted/ Required	Existing/Proposed
Minimum Lot Area	800 sq. ft.	1,300 sq. ft.
Minimum Lot Width at Front Building Line	n/a	n/a
Minimum Lot Width at Front Lot Line	14 ft.	20 ft.
Maximum Density	12.10 units/acre	10.4 units/acres
Maximum Lot Coverage	n/a	n/a
Minimum Front Setback	4 ft.	5 ft.
Minimum Side Setback	n/a	5 ft.
Minimum Sum of Side Setbacks	n/a	n/a
Minimum Rear Setback	4 ft.	4 ft.
Maximum Height	40 ft.	40 ft.
Vehicle Parking Requirement (Section 59.6.2.4.B)	2 spaces/dwelling unit (43X2+86 spaces)	86 spaces

Conclusion: Having no evidence to the contrary, the Hearing Examiner finds that the development standards comply with the TMD Zone under the optional method.

⁴ Although the subject site is in the R-200 zone, Zoning Ordinance Section 59.3.3.1.2.b., the provision which permits townhouse living as a conditional use, requires that “the density limitations and development standards of the TMD zone under optional method (59.4.4.12.C) apply [to this type of development] in spite of any other limitations in this Chapter.”

C. Use Standards for Townhouse Living, §59.3.3.1.D.2.b.

The specific use standards for approval of a residential care facility are set out in Section 59.3.3.1.D.2.b. of the Zoning Ordinance.

1. Accessibility Standards

i. All buildings and structures must meet or exceed the Level II Accessibility Standards established by Section 52-18T and detailed in Section 52-18U.

The Applicant's Land Use Report states (Exhibit 35, p. 7):

All units will meet or exceed the Level II Accessibility Standards established by Section 52-18T, detailed in Section 59-18U, prior to the issuance of building permits. Verification of compliance will be provided to the Montgomery County Department of Permitting Services inspectors prior to issuance of Use & Occupancy Permits.

Staff agreed with the Applicant's position. Exhibit 30, p. 8.

Conclusion: Having no evidence to the contrary, the Hearing Examiner finds that the proposed development would meet the required accessibility standards.

2. Locational Requirements

a. General Purpose

Much of the controversy in this case surrounds whether the subject property meets locational requirements for the Design for Life conditional use. These are in Section 59.3.3.1.D.2.b of the Zoning Ordinance:

- b. Where Townhouse Living is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:

* * *

- ii. Public bus service must be available on a road abutting the site
- iii. A Metro Station must be within 2 miles of the site.
- iv. Public recreation or park facilities must be within 1,000 feet of the site.

The Applicant argues that it meets the letter of the law for all three of these locational criteria. Those in opposition argue that the three criteria should be interpreted considering the District Council's purpose in authorizing this use. Dr. Kosary testified that "Design for Life" is part of a

Montgomery County property tax incentive program legislatively adopted by the Council effective July 1, 2014.⁵ According to her, the intent was to encourage construction of new homes, or retrofitting of existing homes, to make them more universally accessible to the disabled. T. 112. A common misperception is that the program is focused on individuals who are in some way permanently impaired. The concept, however, encompasses design features that serve all ages and stages of life, such as small children, people who want to age in place, persons that may be temporarily impaired, or persons just visiting with a small child and large stroller. T. 112.

The focus of the program is to make home interiors more accessible to all ages and stages of life. The conditional use supplements that by adding features encouraging exterior accessibility to enhance the ability of residents to access life outside their homes. T. 112. The conditional use tries to build inclusive accessible communities as well as accessible living spaces. Id.

Dr. Kosary believes that the limited use standards are designed to get residents out of their homes and into the surrounding community. This includes the requirement for accessible parking spaces and locational requirements for the townhomes, such as proximity to a Metro station and a public recreation or park facility. T. 113.

Dr. Kosary relies on a Zoning Text Amendment that the Council introduced in 2020 (ZTA 20-03) to clarify the support her arguments on how proximity should be measured. According to her, the ZTA was met with strong opposition from the community and ultimately expired. T. 114. A memorandum from Planning Staff to the Planning Board recommending approval of the ZTA states (Exhibit):

ZTA 20-03 would amend the standards for allowing townhouse dwelling units as a conditional use. ZTA 20-03 would: 1) eliminate the requirement for public bus service abutting the site; 2) increase allowed distance from recreational facilities from 1,000 feet to 1,500 feet; 3) clarify that the distance to a Metro Station is measured as

⁵ Dr. Kosary is on the Board of the Greater Shady Grove Civic Alliance but testified as an individual in this case. T. 111.

a radius; and 4) require an access aisle for one of every 4 parking spaces (currently a minimum of one parking space for each dwelling units.)

The sponsor's overall rationale for amending these provisions is to provide more opportunities where accessibility dwellings can be located in the County. Although adjacency to a public bus service provides ease of access for those who might not, at some point, be able to drive, there are also a number of additional local and regional transportation resources available for seniors and persons with disabilities that are readily accessible (MetroAccess and other paratransit door-to-door services, rideshares, etc.).

b. Evidence and Testimony on Distance to Metro Station

The parties disagree on how to measure the distance to the nearest Metrorail Station, in this case, the Shady Grove Metro. The Applicant believes that the distance should be measured "as the crow flies" (*i.e.*, a direct line from the station to the subject property). Planning Staff determined that the subject property was 1.92 miles from the Shady Grove Metro. In response to a question from the Hearing Examiner, Planning Staff confirmed they use the straight-line method, stating (Exhibit 36):

Distances in the Zoning Ordinance are measured in a straight line ("as the crow flies" from one property line to the other property line... In this case, I [Staff] actually measured in a straight line from a few feet inside the Property for this application and measured to the entrance to the tunnel where a person would walk into the station from the outside. If you measure to the actual Metro property line, it measures 1.72 miles.

Mr. Wolford testified that, in his experience, when there's no specific recommendation as to how to measure distance, it's always property line to property line. T. 50. To Mr. Wolford's knowledge, Staff used the digital online map to measure distance. T. 50. There is one instance in the Zoning Ordinance that specifies where distance should be measured differently. That is Section 59.7.4.3.B, "Transit Proximity".⁶ While this section does not apply to this case, it's an example of

⁶ Larger projects in some non-residential zones are required to provide "public benefits". Public benefits are measured by points assigned to each benefit provided. "Transit proximity" to an existing or master-planned Metrorail or MARC station may qualify as a public benefits. The number of points for proximity is based on the project's distance from the transit stop. Under that section, distance to a transit stop is measured "from the nearest transit station entrance or bus stop entrance." *Zoning Ordinance*, §59.4.7.3.B.

when distance is measured differently. T. 102. When the Zoning Ordinance does not contain a specific method of measurement, staff and industry measure in a straight line. T. 103. Nothing in the legislative history of ZTA 15-02 specifies how to measure distance and nothing in the Zoning Ordinance states how it should be measured. T. 104.

After the hearing, CM Muncaster submitted an email from the Department of Permitting Services, stating that planning staff “accurately stated” the method DPS uses for measuring distance utilized for purposes of complying with Section 59.3.,3.1.2.b.ii. by plotting a straight line from property A’s to property B’s property line or “as the crow flies.” Exhibit 45(e), Attachment 2 (Emphasis in original). CM Muncaster also points to other sections of the Zoning Ordinance where the method of measurement is explicitly defined, arguing that the legislatures is presumed to know of the existing of other statutes.⁷ Exhibit 45(e), p. 6. They argue, “[I]n other words, when the County Council desires to adopt a specific measurement methodology, it is certain capable of doing so...It did not here.” *Id.*

Seeking more detailed input on how this distance requirement has been implemented in the past, the Hearing Examiner forwarded the decision approving the only other Design for Life project in the County to the Applicant. Exhibit 41. The Applicant acknowledged that the decision itself is silent on the methodology, but notes, “...Google Maps measures the fastest driving distance between 7009 Garrett Road and the Shady Grove Metrorail stations (15903 Somerville Drive) as 2.2 miles and the shortest walking distance as 2.0 miles.” Exhibit 45(e), p. 3., Ftn. 1.

Those in opposition believe that the purpose of the Design for Life program dictates that distance be measured by the distance it takes to reach a metro station by “built infrastructure” (*i.e.*, the distance needed to get to the station by roads, bike lanes, sidewalks, etc.) According to Dr. Kosary, “crows fly...Humans, however, do not.” T. 114. Utilizing this method, the site is about

⁷ CM Muncaster cites to *Clark v. State*, 473 Md. 607, 627 (2021). Exhibit 45(d), p. 6.

2.8 miles from the Shady Grove Metro station, which is located at 15903 Somerville Drive. Driving would require a left-hand turn on the side onto Muncaster Mill Road, a left-hand turn at the Muncaster Mill-Redland intersection onto Redland Road, and a right-hand turn at the Redland-Somerville intersection onto Somerville Drive, which takes you directly to the south Metro parking lot and into the station. Walking distance is slightly less because you can cut through the parking lot. She believes that walking should be discouraged because a great deal of Redland lacks sidewalks. T. 114.

The opposition also points to Zoning Text Amendment 20-03 to support their arguments relating to bus service and distance from the metro. The cover page of the ZTA states that it was introduced to “revise the distance standards from a Metro station and recreational facilities.” T. 113. According to Dr. Kosary, the amendments were to change the method of measuring distance to a radius. According to her, the ZTA met with strong resistance, however, and expired. T. 114. Regardless of how interpreted, she believes that locational criteria were designed to enhance accessibility to a resident’s life outside their home. T. 115.

b. Availability of Bus Service (Testimony and Evidence)

The parties also differ on the interpretation of this requirement. Those in opposition argue that the bus service available on the abutting road should be full-service rather than the limited (weekday rush hour) services.⁸ Dr. Kosary testified that the Applicant has attempted to obtain an easement through Shady Grove Square’s property to connect to the full-service bus on Redland Road, to which (she understands) Shady Grove Square has not agreed. She does not believe that Shady Grove Square will grant an easement because it would run through an area of their property that is wooded and provides screening to end units from Redland Road. The path would also run

⁸ As already noted, Staff acknowledge the present difficulty in accessing the full-service bus stop on Redland Road, particularly for those with mobility issues.

close to homes in Shady Grove Square.

She does not believe that the level of bus service provides the level of accessibility to public transportation intended for Design for Life townhouses. This site is extremely car dependent. T. 119. Mr. Andrew Einsmann agreed with Dr. Kosary. He testified that his daughter tried to ride the Route 53 bus. He doesn't consider that reliable or accessible because it's only available during rush hour. T. 139.

CM Muncaster believes that the application meets the standard because it meets the letter of the law--there is a public bus service available on a road abutting the property, even though the service is limited to weekday rush hours.

c. Evidence and Testimony on Proximity to a Public Park

After the public hearing, the Applicant characterizes the 2,500 square foot multi-age play area, pathways, and green lawn as "On-Site Park Facilities," and provided for the first time, the exact boundaries of the public access area. Exhibit 45(e), p. 6.

Planning staff and DPS Staff both concluded that the publicly accessible privately-owned open space proposed meets this requirement, although Staff refers to the 2,500 square foot playground. Exhibits 30, p. 9, Exhibit 45(e), Attachment 2. The Applicant points to the definition of "public amenity space" and "public open space" in other parts of the statute, equating them to "public recreation or park facilities" in this conditional use. Public amenity space is a requirement in the GR, NR, EOF, GRF, NRF, or EOFF Zones, and is defined as "an outdoor area providing recreational and natural amenities for the use and enjoyment of employees and visitors." Zoning Ordinance, §6.3.7.A. Public open space is required in an apartment, multi-use, or general building type in a Commercial/Residential, LSC, Commercial/Residential Floating, or LSCF zone. Id., §59.6.3.6.A.1. It is defined as "space devoted to public use or enjoyment that attracts public appreciation due to its location and amenities." Id., §59.6.3.6.A.2. It also believes size alone should

not determine whether the open space qualifies as a “public park” for the purpose of a Design for Life conditional uses, as there are public parks as small as .33 acres, like the

CM Muncaster also argues that “connectivity” with the surrounding area can work in two ways—residents can leave their homes to go outside the development or the public can be invited into the development. They believe that public use will be encouraged through pedestrian sidewalk connections, potential trail connections (*i.e.*, the pathway to Redland Road), and signage. This, it argues, ensures that the project will meet the goal of “connectivity” to the surrounding community. Exhibit 45(e), p. 6.

d. Conclusion on Locational Requirements

i. Governing Law

The principles of statutory construction are well-established by the Maryland Courts:

We have stated the controlling principles of statutory construction so often that only the briefest exposition is necessary. Our predominant mission is to ascertain and implement the legislative intent, which is to be derived, if [*491] possible, from the language of the statute (or Rule) itself. If the language is clear and unambiguous, our search for legislative intent ends and we apply the language as written and in a commonsense manner. We do not add words or ignore those that are there. If there is any ambiguity, we may then seek to fathom the legislative intent by looking at legislative history and applying the most relevant of the various canons that courts have created. *Downes v. Downes*, 388 Md. 561, 571, 880 A.2d 343, 349 (2005) (citations omitted); see *Drew v. First Guar. Mortg. Corp.*, 379 Md. 318, 327, 842 A.2d 1, 6 (2003) (ascertaining legislative intent is the principal goal of statutory interpretation). We examine the legislation as a whole, reviewing the language and context of the provisions at issue. As we recently emphasized:

We, however, do not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone. Rather, the plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute. We presume that the Legislature intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute's object and scope....In every case, the statute must be given a reasonable interpretation, not one that is absurd, illogical or incompatible with common sense. *CashCall, Inc. v. Md. Comm'r of Fin. Regulation*, 448 Md. 412, 431, 139 A.3d 990, 1002 (2016) (quoting *Gardiner v. State*, 420 Md. 1, 8-9, 20 A.3d 801, 806 (2011)).

Lamone v. Schlakman, 451 Md. 468, 490-91 (2017).

While weight may be given to an agency's interpretation of a statute, the weight given is dependent on several factors:

We are aware of, but find inapplicable here, the rule of statutory construction by which "[w]e give deference to a consistent and long-standing construction given a statute by an agency charged with administering it." *Stachowski v. Sysco Food Servs. of Baltimore, Inc.*, [402 Md. 506, 517, 937 A.2d 195 \(2007\)](#) (citing *Marriott Employees Fed. Credit Union v. Motor Vehicle Admin.*, 346 Md. 437, 445, 697 A.2d 455 (1997)). See also *Hope v. Baltimore County*, [288 Md. 656, 662 \(1980\)](#) (noting that "an administrative practice which has been followed by officials of the State for a long period of time has a very persuasive influence on the judicial construction of the statute"). Factors to be considered in determining the weight to be given to the Tax Court's interpretation include "the duration and consistency of the administrative practice, the degree to which the agency's construction was made known to the public . . . [and] the extent to which the agency engaged in a process of reasoned elaboration in formulating its interpretation and the nature of the process through which the agency arrived at its interpretation." *Stachowski*, [402 Md. at 517](#) (internal quotation marks omitted) (quoting *Marriott*, [346 Md. at 446](#)). When, however, the record does not reveal much, if anything, about the administrative practice of an agency, then this principle is not applicable. See *Montgomery County v. Deibler*, [423 Md. 54, 62-63 n.2, 31 A.3d 191 \(2011\)](#) (stating that a single workers' compensation commission order and conflicting trends in commission cases do not provide a strong enough record on which to apply the principle).

Green v. Church of Jesus Christ of Latter-Day Saints, 430 Md. 119, 133-34 (2013))

ii. Legislative History

The best evidence of the Council's intent regarding the locational requirements is language in a Council staff memorandum to the Planning Housing and Economic Development (PHED) Committee during adoption of ZTA 15-02. Exhibit 36(c). The memorandum considered whether one of the locational criteria should be a location within five miles of a hospital. The Legislative Analyst recommended *against* incorporating that standard (*Id.*, emphasis in original):

4) Are the location standards for a Design for Life conditional use appropriate?

There are 4 standards in ZT 15-02 that concern the general location of an approvable Design for Life project. Going from the largest geography unit to the smallest, those criteria are as follows:

- Within 5 miles of a hospital
- Within 2 miles of a Metrorail station
- Within 1,000 feet of a park
- Bus service on an abutting road

These criteria are general measures of urbanization. The 5 mile radius from a hospital is the broadest geographic area. All of the area within 2 miles of a Metrorail stations is also within 5 miles of a hospital., but not all areas within 5 miles of a hospital are within 2 miles of a Metrorail station. The other factors, within 1,000 feet of a park and bus service on an abutting road, restrict the area within 2 miles of a Metrorail station. These criteria assure that conditional use approvals go to land connected to the surrounding community.

Staff recommends deleting the hospital distance requirement.

iii. Opinion and Analysis

1. Distance to a Metro

The Hearing Examiner finds that the distance to a Metro station should be measured as a radius or “as the crow flies”. The only evidence on past interpretation is the method used in the single other Design For Life project. The Applicant provided information indicating that a radius, rather than “built infrastructure” was used to determine the distance. Since this interpretation was adopted in a public proceeding (the decision in CU 16-11) shortly after adoption of the ZTA, the Hearing Examiner gives it weight. Second, this proximity requirement is one of the broader measures and more indicative of “urbanization”, consistent with legislative history. The legislative history makes clear that the distance was to be a broader area that would be further restricted by the availability of public bus service and proximity to a park.

The adoption of the “built infrastructure” argument could result in arbitrary and erratic results. Infrastructure can and often is modified with new capital projects or private improvements. Simply redirection of traffic flow, installation of a U-turn or other road improvements could disqualify a property and make it non-conforming. The Hearing Examiner finds that such an arbitrary, illogical result violates the principles of statutory construction to which she must adhere.

2. *Availability of Bus Service on Road*

More difficult is the question of whether the application meets the requirement that public service “be available” on a road abutting the property. While it’s is unrefuted that a Ride-On Bus stops on Muncaster Mill Road, it is approximately 80 feet from the property with only very limited service. Planning Staff recognized the difficulty of reaching the nearest full-service bus stop, particularly for those with mobility issues.

The legislative history demonstrates that this criterion was designed to further restrict the locations within the 2-mile radius of metro stops and “assure conditional use approvals would go to land *connected* to the *surrounding* community.” (Emphasis supplied). In this case, the Hearing Examiner interprets the “surrounding community” to mean facilities and amenities *outside* the subject property, otherwise, a requirement to have available bus service would be superfluous.

The Hearing Examiner does not adopt the opposition’s interpretation. If she did so, she would have to read-in an additional requirement of “full-service” bus service to the existing language, contravening the principles of statutory construction mandated by Maryland courts. She declines to do so. While she agrees with Dr. Kosary that various factors in this case render the subject property “car-dependent” and relatively unconnected to the community, she will not read in a substantive restriction where it does not exist. If the District Council decides to clarify its goals for this conditional use or redefine the proximity requirements, it may do so by text amendment.

3. *Proximity to a Public recreation or park facilities.*

Perhaps the most contested issue is whether the development meets the locational requirement to be 1,000 feet from a “public recreation or park facility.” Those in opposition argue that this means a *publicly-owned* park or recreational facility—not a small privately-owned amenity

that is open to the public. The Hearing Examiner finds that the statute is ambiguous in this regard and looks to the legislative history for guidance.⁹

The Hearing Examiner finds that the privately-owned publicly accessible open space proposed does *not* equate to the “public recreational or park facility” referred to in ZTA 15-02 authorizing the Design for Life conditional use for several reasons.

The legislative history demonstrates that the Council viewed this requirement as a *restriction* on the 2-mile proximity from a Metro station. The PHED Committee memorandum states, “[t]he other factors, within 1,000 feet of a park and bus service on an abutting road, *restrict* the area within 2 miles of a Metrorail station.” (Emphasis supplied). If any amount of common open space, which is required by the TMD Zone, could qualify as a public park simply by permitting public access, it would properties eligible and not further *restrict* the locations available within the 2-mile radius. The interpretation violates the statutory construction principles long established by the Maryland courts because it, in fact, would “read out” the entire requirement. If any project meets this requirement simply by making its required common open space publicly accessible, regardless of the extent of connectivity, the only two criteria an application would need to meet are proximity to a Metro station and the availability of bus service.

One might argue that properties within the two-mile radius of Metro are still restricted because they are limited to those allowing public access. The Applicant argues that “connectivity” can be achieved by inviting the surrounding community *into* the Design for Life townhomes rather than having them go out to the surrounding community.

The Hearing Examiner rejects this contention that the legislative intent can be met simply by recording a public assessment on required open space because that along does not assure the

⁹ Even were the statute unambiguous, the case law cited, *supra*, permits the Hearing Examiner to look at the legislative history as a “check” on reading a statute in a manner to result in an interpretation inconsistent with the legislative intent.

Council's primary goal--"connectivity" to the surrounding community--will be met. The record here simply does not support a finding that the reverse "connectivity" will occur at this location or that it's been well thought out. On one hand, the Applicant touts the "connectivity" of the open space with the surrounding community, but then argues that the open space will have little adverse impact because the number of visitors will be so low. Staff advises that traffic to the park will be "low" because people in the area will use other, larger parks, such as Redland Local Park, Mille Creek Towne Local Park and Laytonia Recreational Park. Exhibit 30, p. 17. There is no easy direct access from a full-service bus stop. The likelihood of a pathway to the Redland bus stop is highly speculative. Without full-service bus access, visitors will have to use sidewalks along a very busy road, or cars. Using cars, however, brings us to the number of parking spaces. The only evidence that these will be sufficient to accommodate public access to the park is the Applicant's blanket assertion that it will be. If it is enough for both visitors to residents and visitors to the park, but park attendance would have to be relatively low. While some parks may not have on-site parking, they may have on-street or public parking available for visitors or may have better pedestrian connections. The Hearing Examiner did suggest that the Applicant place a sign for the park at its entrance to encourage visits, but having reviewed the traffic testimony, she is not sure whether the sign would become a dangerous distraction for motorists and there is no evidence regarding this. Nor is she sure that the 2' x 2' sign proposed will be enough to let the community know that the park is there. Nor does the depiction of playground equipment reassure the Hearing Examiner that the use will attract those living outside the community from other, larger, parks nearby.¹⁰ The way this case has proceeded leads the Hearing Examiner to believe that some of these connectivity issues were an afterthought rather than a force driving the application.

¹⁰ If the Board of Appeals recommends approval of this conditional use application, the Hearing Examiner recommends a condition requiring the play equipment to be wheel-chair accessible.

The parties agree that the District Council's intent in authorizing the Design for Life conditional use is to connect residents to the surrounding community. If interpreted to permit privately-owned public accessible open space, without more, to meet the requirement, the goal is not assured.

Both Planning staff and DPS Staff both concluded that the publicly accessible privately-owned open space proposed meets this proximity requirement. However, both agency's determinations were conclusory statements without any reference to the legislative intent behind the Design for Life program. Nor were they tested in a public process. Exhibits 30, p. 9,. Exhibit 45(e), Attachment 2. Given the lack of public debate and lack of rationale, under the Maryland Court's statutory construction mandates, the Hearing Examiner does not give them great weight.

Nor does the definition of "public amenity space" and "public open space" in the Zoning Ordinance support the Applicant's argument. To reiterate the Applicant's argument regarding distance to a Metro station, if the Council had wanted to incorporate these definitions into the Design for Life program, it would have done so.

Finally, this interpretation does not contravene Thrive 2050's encouragement of private parks. Thrive expresses is a broad policy that came well after the District Council adopted the Design for Life conditional use. As a general matter, that policy expressed in Thrive does not shed light on the legislative interpretation of the Zoning Ordinance in this instance. Nor does this interpretation mean that private parks can't be encouraged. If the District Council wishes to implement a policy encouraging privately-owned, publicly accessible open space to qualify as the "park" for Design for Life townhomes, it may adopt a Zoning Text Amendment clarifying their intent.

In short, the Hearing Examiner is reluctant, based on this record, to interpret the Zoning Ordinance in a way that could significantly expand the potential locations for Design for Life

conditional uses *without* any guarantee that this this would further the Council's goal. Without more, such an interpretation is illogical. She is further reluctant to do so as part of conditional use case with limited public participation, at least without more in the record that the District Council originally intended to do so or that it would achieve significant "connectivity" with the surrounding community. The District Council is free, of course, to use its judgement to legislate what it believes is the appropriate solution to achieve its goals.¹¹

v. A grading plan must demonstrate that the post construction site will have a slope less than 5%.

Staff advises that the applicant has submitted a grading plan meeting this requirement.

Exhibit 30, p. 9.

Conclusion: Having no evidence contradicting Staff's conclusion, the Hearing Examiner finds that this requirement has been met.

vi. The minimum tract size is 2 acres.

Conclusion: Staff advises that the site is 4.46 acres. Exhibit 30, p. 9. This is confirmed by the certified conditional use plan. Exhibit 45(d). Having no evidence to the contrary, the Hearing Examiner finds that this criterion has been met.

vii. The density limitations and development standards of the TMD zone under optional method (Section 4.4.12.C) apply in spite of any other limitation in this Chapter.

Conclusion: Planning Staff has verified that the use meets the density limits and development standards of the TMD zone, as shown in the next section. Exhibit 30, p. 9. This standard has been met.

viii. Reducing the number of required parking spaces through a parking waiver under Section 6.2.10 is prohibited.

¹¹ The Hearing Examiner does not rely on the expired bill ZTA 20-03, as there is no indication in the record why it was allowed to expire.

Conclusion: Staff confirms that the application provides the full number of parking spaces required.

Exhibit 30, p. 9. The Hearing Examiner finds that the application meets this standard.

ix. A minimum of one parking space for each dwelling unit must satisfy the dimensional standards for handicapped-accessible vehicle parking and a minimum 8 foot wide access aisle required by the State.

Conclusion: Mr. Wolford testified that each dwelling unit will have two parking spaces, one of which will be handicapped accessible, as confirmed by Staff. T. 38; Exhibit 30, p. 9.

x. As a condition of approval, any property owner of the conditional use project must be prohibited from seeking a tax credit under Section 52-18U or Section 52-93(e). This prohibition does not apply to additional accessibility features that are installed post-occupancy and for which a property tax credit is requested.

Conclusion: As the Hearing Examiner denies this application, she does not include such a condition.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, open space, screening, landscaping, lighting, and signs. Section 59.7.3.1.E.1.b. of the Zoning Ordinances states that the requirements of these sections need be satisfied only “to the extent the Hearing Examiner finds necessary to ensure compatibility.” The applicable requirements, and whether the use meets these requirements, are discussed below. The following Divisions must be addressed in this case: Division 6.2 Parking, Queuing and Loading; Division 6.3 Open Space and Recreation; Division 6.4 General Landscaping and Outdoor Lighting; Division 6.5 Screening Requirements; and Division 6.7 Signs. The proposed use and Zone do not require the review of Division 6.1 for Site Access or Division 6.6 Outdoor Storage.¹²

¹² Division 6.1 (Site Access) need not be addressed because Zoning Ordinance §59.6.1.2 provides that it only applies to “development in the Residential Multi-Unit, Commercial/ Residential, Employment, Industrial, and Floating zones . . .” The subject site is not in any of the listed zones. Division 6.6 (Outdoor Storage) does not apply because no outdoor storage is proposed in this case.

1. Parking, Queuing and Loading

Conclusion: As already discussed, Staff determined that the number of parking spaces meets the requirement, and that the number of accessible spaces are provided. Having no evidence to the contrary, the Hearing Examiner finds that the project provides the required number of accessible and non-accessible parking spaces.

2. Open Space and Recreation

Conclusion: At least 20 percent of a development under the TMD optional method must be common open space. According to the revised conditional use plan, 33% of the site will be common open space. Exhibit 45(d).

Section 59.6.3.5.B. also provides locational and dimensional standards for the open space. Staff didn't provide an analysis of whether these requirements are met. The Applicant's Land Planning Report states "all open space will conform to" the standards above. The Hearing Examiner can't make a finding on this and does not pursue it given that she denies the conditional use.

3. Site Landscaping and Screening

Division 6.4 of the Zoning Ordinance sets minimum standards for site landscaping, which are intended to "preserve property values, preserve and strengthen the character of communities, and improve water and air quality." §59.6.4.1. Staff stated (Exhibit 30, p. 11):

The property to the east is zoned R-200 but is improved with a religious assembly use, however, the Applicant is providing additional screening along the property boundary per the landscape plans. The Applicant is proposing a Forest Conservation Easement (FCE) adjacent to the existing FCE on abutting properties as well as providing additional screening per the landscape plan.

Conclusion: The Hearing Examiner understands this to mean that the application complies with the screening requirements of the Zoning Ordinance. As she denies the application, she need not make a finding on this.

4. Outdoor Lighting

Permissible lighting levels for a conditional use are specified in Zoning Ordinance

§59.6.4.4.E., which provides,

Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.

The proposed fixtures must also meet the design requirements and fixture height limits specified in Zoning Ordinance §59.6.4.4.B.

The Applicant submitted a photometric plan to demonstrate that illumination at the property boundaries will meet this requirement. Exhibit 11. There is no evidence in this record to refute Applicant's photometric study. Therefore, the Hearing Examiner finds that the proposed lighting for the conditional use will meet the Zoning Ordinance standards and will not cause undue harm to neighboring properties due to illumination.

5. Signage

Permitted signage is prescribed in Zoning Ordinance §59.6.7.8.B. for Subdivisions in residential zones. The conditional use plan shows the location of an entry sign, but not the proposed dimensions or design. As the Zoning Ordinance regulates permissible dimensions by Zone, the Hearing Examiner can't make a finding on whether it meets the sign requirements. However, the Applicant would be able to file for a variance of the dimensional requirements with the sign review board.

IV. Conclusion and Decision

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of CM Muncaster LLC (CU 24-07) for a conditional use under Section 59.3.3.1.D.2.b. of the Zoning Ordinance to construct a "Design for Life" Townhouse Living Community, at 7100 and 7106 Muncaster Mill Road, Maryland, is hereby ***DENIED***.

Issued this 7th day of March, 2024.



Lynn Robeson Hannan
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any party of record may file a written request to appeal the Hearing Examiner's Decision by requesting oral argument before the Board of Appeals, within 10 days issuance of the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

The Board of Appeals will consider your request for oral argument at a Worksession. Agendas for the Board's Worksessions can be found on the Board's website and in the Board's office. You can also call or email the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the Worksession.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600, emailing BOA@montgomerycountymd.gov, or visiting the Board's website: <http://www.montgomerycountymd.gov/boa/>.

Additional procedures are specified in Zoning Ordinance §59.7.3.1.f.1. Contact information for the Board of Appeals is:

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600
<http://www.montgomerycountymd.gov/boa/>

BOA@montgomerycountymd.gov

NOTIFICATION OF DECISION SENT TO:

Scott Wallace, Esquire
Attorney for the Applicant
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Carol Kosary, Ph.D.
Alicia Taylor
Andrew Einsmann
Kristy Helms
Tracy McAbee
Mark Beall, Planning Department
Patrick Butler, Planning Department