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## I. STATEMENT OF THE CASE

Application No. G-851, filed on July 5, 2006 by Applicant Wildwood Medical Center, L.L.C., requests reclassification from the R-90 Zone to the O-M Zone of 3.5 acres of land located at 10401 Old Georgetown Road in Bethesda, Maryland, on property known as Lot N541, Parcel B, Wildwood Manor Shopping Center, in the 7th Election District. The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits binding limitations with respect to land use, development standards and staging. Such limitations are shown on a Schematic Development Plan that is submitted with the application, and must be repeated in covenants to be filed in the county land records.

The application was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission (“MNCPPC”), who recommended *approval* in a report dated July 7, 2007.<sup>1</sup> See Ex. 42. The Montgomery County Planning Board (“Planning Board”) considered the application on July 19, 2007 and, by a vote of 5 to 0, recommended *approval*, finding that “the application complies with the purposes of the O-M zone to provide locations for moderate intensity office buildings in areas outside a Central Business District and that the application will not have an adverse impact on neighborhoods adjacent to the subject site.” Ex. 44. The Planning Board objected to certain items listed as binding elements on the Schematic Development Plan, and recommended that five of the proposed binding elements be designated as “Design elements for consideration at site plan.” See *id.* In response to the Planning Board’s recommendation, the Applicant submitted two alternative Schematic Development Plans, one with all of the binding elements originally proposed, and one that followed the Planning Board’s recommendation.

A public hearing was convened on July 30, 2007, after proper notice, at which time evidence and testimony were presented in support of the application and in opposition to the version of the Schematic Development Plan that follows the Planning Board’s recommendation. Following additional revisions during and after the Hearing Examiner’s hearing, the District Council now has before it three SDPs, which variously designate only one design criterion, four design criteria or five

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<sup>1</sup> The Staff Report is liberally quoted and paraphrased in Part II.

design criteria, with the rest as binding elements. If the rezoning is granted, the Applicant is willing to proceed with whichever of the Schematic Development Plans the District Council considers more appropriate. The Hearing Examiner recommends approval of the SDP with four design criteria, Exhibit 65(a). The record initially closed on September 4, 2007. It was reopened to receive the final revised plan on November 2, 2007, which was submitted together with a letter from counsel for the Wildwood Manor Citizens' Association (the "WMCA") voicing support for the newly submitted SDP, identified as Exhibit 65(a). See Ex. 66. The WMCA had earlier supported the SDP with only one binding element. The record was held open until November 8, 2007, to admit revised covenants reflecting the binding elements listed on Exhibit 65(a), and closed that day.

## II. FINDINGS OF FACT

For the convenience of the reader, the findings of fact are grouped by subject matter.

Any conflicts in the evidence are resolved under the preponderance of the evidence test.

### A. Subject Property

The subject property consists of 3.5 acres of land located on the east side of Old Georgetown Road (MD 187) in Bethesda, between Rock Spring Drive to the north and Democracy Boulevard to the south, about 1,200 feet south of the MD 187/I-270 interchange. Its general location may be seen on the vicinity map below, excerpted from Exhibit 65(a).



The property is currently developed with a three-story, 35,000-square-foot medical office building surrounded by surface parking, which operates pursuant to a special exception that was approved in the early 1960s. The property has approximately 340 feet of frontage on Old Georgetown Road, to which it has access via Medical Center Drive, a stub road that was built across an easement that the subject property enjoys on the adjoining property to the north.<sup>2</sup> The site's parking area interconnects with a filling station abutting the southwest corner of the site and, at three locations along its southern boundary, with the Wildwood Shopping Center (the "shopping center"). Both the gas station and the shopping center have direct access to Old Georgetown Road. The subject site abuts Berkshire Drive to the west, but has no vehicular connection to it.

The property slopes moderately down from the northwest corner to the southeast corner. It has no forested areas, wetlands, floodplains, rare or endangered species, critical habitats or historic features. It is landscaped with trees and shrubs near the building, within the parking area and along Old Georgetown Road. The general site layout and some of the surrounding uses may be seen in the aerial photograph below.

**Aerial Photo, Excerpted from Staff Report at 5**



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<sup>2</sup> The easement crosses land owned by the Homeowner's Association for an adjoining residential development to the north, which was once under common ownership with the subject site. The owner reserved the access easement for the subject site when the residential subdivision was created.

## B. Surrounding Area

The surrounding area must be identified in a floating zone case, such as the present case, so that compatibility can be properly evaluated. The “surrounding area” is defined less rigidly in a floating zone case than in evaluating an application for a Euclidean zone. In general, the surrounding area includes those areas that would be most directly affected by the proposed development. In the present case, Technical Staff defined the surrounding area as bounded generally by I-270 to the north, Dickens Avenue and Fleming Avenue to the east, Democracy Boulevard and Cheshire Drive to the south, and Rockledge Drive to the west. The Applicant’s land planner, Phil Perrine, suggesting a surrounding area including the single-family properties north of the site, the properties along the east side of Berkshire Drive, Cheshire Drive and properties along the west side of Old Georgetown Road. The Hearing Examiner finds Technical Staff’s recommended area too extensive and Mr. Perrine’s too restrictive, and therefore adopts a middle ground: the surrounding area shall include the homes between the subject site and I-270 to the north, the first long block of homes to the east and southeast between I-270 and Cheshire Drive, and the properties fronting on the west side of Old Georgetown Road from Democracy Boulevard to I-270.

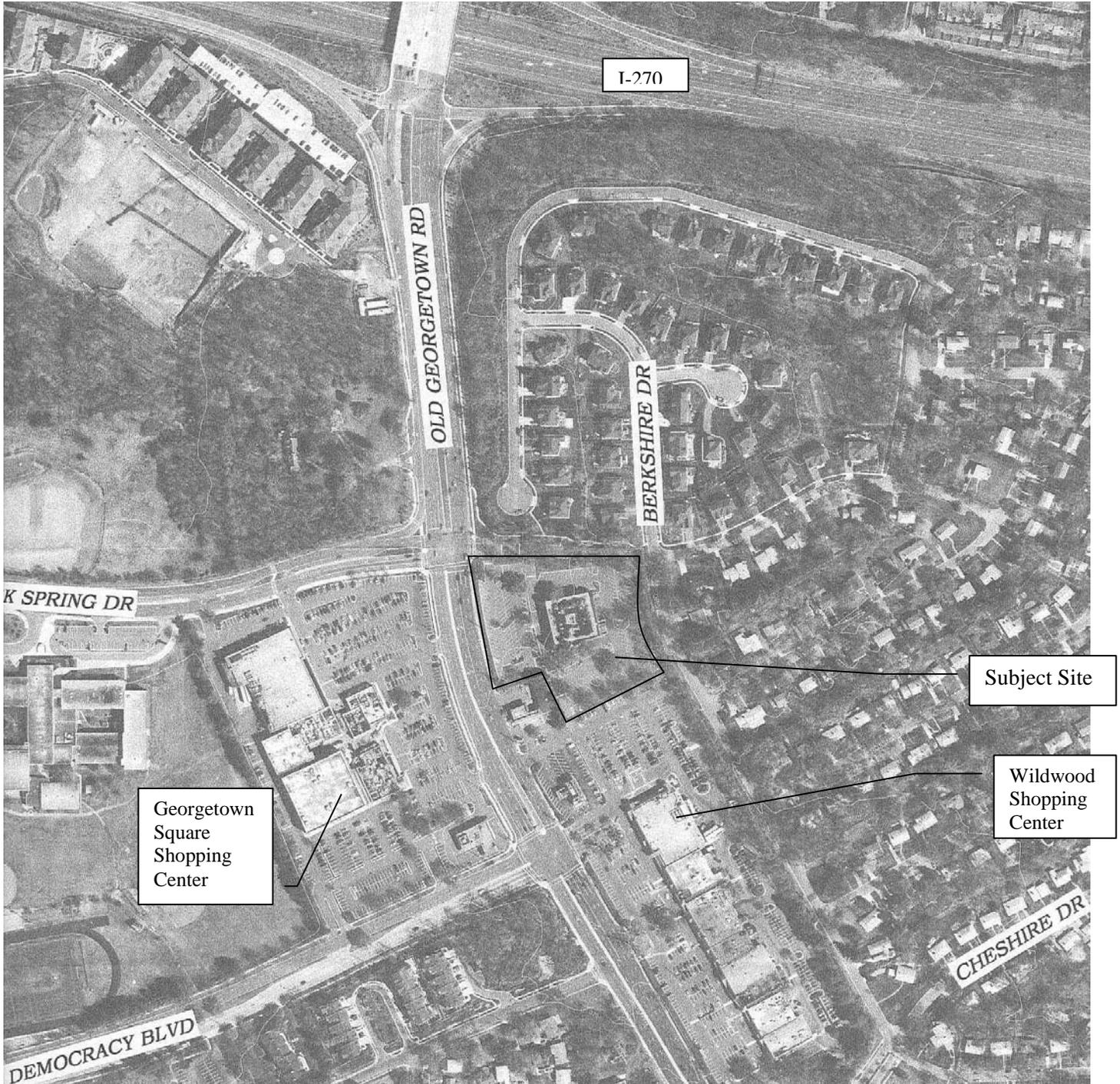
The surrounding area, as described above and shown in the aerial photograph on the next page, contains a mix of residential, institutional and retail and office uses. Immediately to the north and east, extending to I-270 to the north and Cheshire Drive to the south, are single-family detached homes in the R-90 and R-90/TDR Zone. Abutting to the south are the gas station and the shopping center, which contains a Balducci’s grocery store and a number of restaurants and specialty stores. The gas station and the shopping center itself are classified in the C-1 Zone, but the shopping center’s parking lot operates pursuant to a special exception under the R-90 Zone.<sup>3</sup> Confronting the subject site across Old Georgetown Road is Georgetown Square, a shopping center in the C-1 Zone with a Giant grocery store and a number of other restaurants and retailers. Behind Georgetown Square, just outside the defined surrounding area on property zoned R-90, is Walter Johnson High

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<sup>3</sup> Mr. Perrine testified that it was a common practice in the 1960s, when this shopping center was developed, for properties to be split-zoned, with the parking subject to a special exception.

School. Farther north on Old Georgetown Road is property known as the Davis tract, which was reclassified several years ago to the MXPD Zone and has been only partially developed. The northern part of the Davis tract, abutting I-270, contains multi-family residential dwellings with structured parking. The southern part is under development, and is approved for mixed housing, office, institutional and entertainment uses.

**Aerial Photograph of Surrounding Area, Ex. 50**



### **C. Zoning History**

The subject property was classified under the R-90 Zone in the 1954 comprehensive zoning of the area. In 1964, the Board of Appeals approved special exception number B-A 1631, allowing the construction of a medical office building on the property. The special exception was grandfathered with the adoption of a zoning text amendment in 1984, which limited medical office buildings in residential zones to no more than four medical practitioners. R-90 zoning was reaffirmed by Sectional Map Amendment in 1992 (G-706).

### **D. Proposed Development**

The Applicant proposes to add a second office building south of the existing building and a smaller building, for use as a drive-through bank, along the site's Old Georgetown frontage. The new office building would be similar in size to the existing building, and its use would be restricted to non-medical offices to limit traffic impacts.<sup>4</sup> Parking for the new building would be provided in an underground garage. Vehicular access would continue to be provided via the existing entrance at the north end of the site, plus two connection points to the shopping center. The northern access road currently extends across the full depth of the property, and has three driveways into the subject site: one just a few feet from Old Georgetown Road, one leading to the main drive aisle, and one near the back of the site. In connection with the present proposal, the Applicant proposes to shorten the access road, retaining only the first two driveway entrances. The remainder of the easement area would be used to increase the landscaped area between the site and the homes to the north.

The first driveway entrance along the northern access road would lead to the drive-in bank. The second entrance would lead to a continuous drive traversing the property to its southern boundary. Both the existing building and the proposed office building are intended to front on this main drive, with parking at the rear. Walkways are proposed to connect the two office buildings with each other and existing sidewalks to the north and east. The Applicant's conceptual plan proposes to eliminate one row of parking along Old Georgetown Road and replace it with grass and street trees.

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<sup>4</sup> The Zoning Ordinance calls for more parking for medical office buildings than for general office buildings.

The plan also includes removing a row of parking along Berkshire Drive, at the east end of the site, and replacing it with grass, fencing, and plantings on an earthen berm, all designed to provide an expanded buffer area and better visual screening between the subject site and the neighboring residential community.

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan that specifies which elements of the plan are illustrative and which are binding, i.e. elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding must be set forth in a Declaration of Covenants to be filed in the county land records if the rezoning is approved. The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment.

The site notes, phasing and graphic portions of the submitted SDPs, which are the same for all three, are reproduced below and on the next page, followed by a discussion of the binding elements.

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**SITE NOTES:**

1. Site Area: 3.50 Acres (152,334 sf)
2. Existing Zoning: R-90
3. Proposed Zoning: O-M
4. Proposed Use: Bank and General Office
5. Boundary information is based on ALTA/ACSM Land
6. Title Survey by Ben Dyer Associates, Inc., December 1999.
7. Topographic information shown on this plan is based on a survey by Macris, Hendricks & Glascock, P.A. July 2005.

**DEVELOPMENT PROGRAM:**

The project is to be completed in two phases.

**Phase I**

Bank, drive-thru windows and front parking lot along Old Georgetown Road.

**Phase II**

New office building and parking lot modifications including parking garage



landscaping, stormwater management, lighting, rooftop mechanical equipment and off-site improvements proposed for the right-of-way of the adjacent Berkshire Drive. See Ex. 43(a). Several of these elements were specifically requested by the WMCA.

Technical Staff characterized four of the listed binding elements as “design elements that are more effectively addressed at site plan than at the rezoning stage,” and suggested that an alternative would be to identify those elements as “Design Elements” for consideration at site plan. See Staff Report at 6. The Planning Board recommended approval of the application, but “did not support identifying on the Schematic Development Plan proposed design, landscape and lighting restrictions as binding elements.” Ex. 44 at 2. The Board felt that “although these were important issues for the community, they could be more effectively addressed at site plan, than at the rezoning stage.” See *id.* The Board noted that it had received advice from Technical Staff – apparently at the Planning Board’s hearing, because this advice does not appear in the Staff Report – that under Section 59-H-2.53, the purpose of a schematic plan is to allow an applicant to restrict the development standards or use of the property to less than the maximum of the zone, and development restrictions of other kinds were not appropriate. For these reasons, the Board recommended designating the four elements identified by Staff as “Design elements for consideration at site plan.” See *id.*

In response to the Planning Board and Staff, the Applicant submitted an alternative SDP dated August 10, 2007, which re-designated the four elements Staff had identified as “design elements” as five elements, and placed them in a table with the heading “Design Criteria for Site Plan.” See Ex. 60(a).

Following additional revisions during and after the Hearing Examiner’s hearing, the District Council now has before it three SDPs. One is in the form originally negotiated between the Applicant and the WMCA, with 11 binding elements and one design criterion for site plan. See Ex. 61(b). The second is in the form preferred by the Planning Board and its Staff, with seven binding elements and five design criteria for site plan. See Ex. 61(a). The third is a hybrid, with eight binding elements and four design criteria. See Ex. 65(a). On the third plan, one of the five “design elements”

identified by Technical Staff is listed as a binding element, and the others as design criteria for site plan. If the rezoning is approved, the Applicant is willing to proceed with whichever of the three final SDPs the Council considers most appropriate.

The alternative SDPs require interpreting Section 59-H-2.53. The relevant portions of that section are reproduced below:

**59-H-2.53. Schematic development plan.**

In addition to the other requirements contained in this article, the application for the optional method must include a schematic development plan which adheres to the following requirements:

- (a) The schematic development plan must illustrate or specify how and to what extent the applicant will restrict the development standards or the use of the property to less than the maximum permitted in the requested zone, and whether and how development will be staged.
- (b) If the applicant proposes to stage development, the schematic development plan must illustrate or specify the binding development program stating the sequence or timing in which development is to occur. The development program must indicate the relationship, if any, between the program and the county's capital improvements program.
- (c) If the applicant proposes to limit the use of the property to less than the maximum uses permitted in the requested zone, such limitation must be specified in writing on the face of the schematic development plan.
- (d) The schematic development plan must consist of a written specification containing sufficient detail with respect to the proposed restrictions or limitations and, if relevant, a drawing of appropriate scale containing the following elements as applicable to the proposal:
  - (1) The location, height, and uses of buildings and structures.
  - (2) The location of parking areas.
  - (3) The location of points of access to the site.
  - (4) A natural resources inventory prepared in accordance with a technical manual adopted by the Planning Board, and in addition:
    - a. Other natural features, such as rock outcroppings and scenic views; and
    - b. Historic sites as indicated in the master plan for historic preservation.

- (e) Such drawing must differentiate between any elements that have been included for illustrative purposes and those elements intended to be binding.
- (f) The schematic development plan is subject to amendment in the manner of a development plan in accordance with section 59-D-1.7.
- (g) The schematic development plan approved by the district council must be certified and filed as provided in section 59-D-1.63.
- (h) The site plan required by Division 59-D-3 must conform to the schematic development plan approved by the District Council.
- (i) Compliance with binding elements. The binding elements approved by the district council are binding upon the applicants, successors, and assigns, unless amended in accordance with the provisions of Section 59-D-1.7.

The most fundamental rule of statutory construction was set forth by the Maryland Court of Appeals in *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006):

We have stated the rules governing statutory construction so often that only the most cursory repetition is necessary. Our goal is to ascertain and implement the legislative intent, and, if that intent is clear from the language of the statute, giving that language its plain and ordinary meaning, we need go no further. We do not stretch the language used by the Legislature in order to create an ambiguity where none would otherwise exist. If there is some ambiguity in the language of the statute, either inherently or in a particular application, we may then resort to other indicia to determine the likely legislative intent. [Citations omitted.]

\* \* \*

Thus, when legislative intent is clear from the plain and ordinary meaning of the language used in a statute, the statute must be given effect as written. However, any ambiguity in the language, either inherently or in a particular application, calls for going beyond the statutory language to determine legislative intent. In the present case, the Hearing Examiner finds inherent ambiguity in the application to individual cases of some of the key terms used in Section 59-H-23 -- “development standards” and “use”. “Development standards” refers most obviously to the requirements set forth in each zone with regard to elements such as building height, setbacks, lot coverage and floor area ratio. Counsel for the WMCA has suggested, however, that the term could refer in a more generic sense to any land use parameter that a developer might propose to limit. “Use” could refer strictly to the list of main uses permitted in each zone, or could refer more broadly to the way in which the

property is used, including elements such as points of access and accessory uses. The salient question is what specific restrictions the Council intended to authorize in stating that an SDP must show how an applicant proposes to restrict “the development standards or the use of the property to less than the maximum permitted in the requested zone.” Code § 59-H-2.53(a).

Legislative history is often the first place to turn in examining legislative intent. The original language of Section 59-H-5.23 was adopted in 1978, in Zoning Text Amendment (“ZTA”) 77020. See Ex. 47(c). That ZTA created an “Optional Method” of application “to allow an applicant to place limitations on the development standards and permitted uses otherwise allowed in certain floating zones, by submitting a binding development plan as part of the rezoning application.” Ex. 47(c) at 1. The ZTA as first introduced was very specific: it allowed applicants to propose restrictions only on density, permitted uses or building height. See Ex. 47(c). As revised at the District Council’s request and ultimately adopted, the ZTA had a broader scope. It stated that an SDP was “for the purpose of limiting a development standard or standards to less than the maximum permitted in the requested zone, and/or limiting the land use of the applicant’s subject property to one or more of the permitted uses in the zone.” Ex. 47(c) at 2.

The meaning of the term “development standards” as used in ZTA 77020 is explained in an April 28, 1978 memorandum from MNCPPC’s Development Review Division to the Planning Board. See Ex. 47(f). The memo states that the Council asked the Planning Board and Staff to refine the ZTA to make it applicable in only three floating zones, and to permit an applicant “to voluntarily limit one or more of the development standards of the requested zone as well as use rather than just the height, density and use.” See *id.* at 1. In the next sentence, the memo explained what “development standards” referred to: “Development standards is a section which appears in each zone of the Zoning Ordinance and lists the requirements regarding density, building height, setbacks, percent of lot coverage and percent of green space. Staff is of the opinion that this direct reference will more closely integrate the amendment into the Zoning Ordinance. “ See *id.* In the Hearing Examiner’s view, this demonstrates the Council’s intent, in using the term “development standards,” to permit developers to propose restrictions related to the parameters that are set in the zone requested.

On October 2, 1979, ZTA 79005 amended Section 59-H-2.52 to add a requirement for a recorded covenant, but did not change the language describing the types of restrictions permitted.

On February 17, 1981, the Council introduced another ZTA to expand the optional method to all zones that do not require a development plan.<sup>5</sup> Following the public hearing on this ZTA, the Hearing Examiner's office recommended that the entire section of the Zoning Ordinance establishing the optional method of application be clarified and reorganized. The Hearing Examiner's re-draft was adopted on October 20, 1981, putting in place the current language that describes the type of restrictions an applicant may offer. See Ex. 47(h).

The current language differs from the original in how it employs the word "use." The original text permitted an applicant to submit an SDP "limiting the land use of the applicant's subject property to one or more of the permitted uses in the zone." See Ex. 47(a). The current language permits an applicant to submit an SDP that "proposes to limit the use of the property to less than the maximum uses permitted in the requested zone." The legislative history sheds no light on the reason for this change, other than that it was suggested by the Hearing Examiner's office. The original language seems to refer specifically to the main use of the property, consistent with the Zoning Ordinance's definition of "use" in Section 59-A-2.1:

Except as otherwise provided, the principal purpose for which a lot or the main building thereon is designed, arranged, or intended, and for which it is or may be used, occupied, or maintained.

The current language employs the term "use" in a more quantitative sense, referring to "less than the maximum uses permitted in the requested zone." In this Hearing Examiner's view, this language permits a broader reading of the word "use" than just the main use of a site, allowing an SDP to restrict anything related to what uses are permitted on the site, including accessory uses, for example, or basic use issues such as site access.

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<sup>5</sup> Under Section 59-D-1.1, a rezoning application seeking zones such as the PD Zone, the MXPZ Zone and the TS-R and TS-M Zones *must* be accompanied by a development plan, which is binding on the applicant except to the extent that particular elements are described as illustrative. A rezoning to one of the zones for which a development plan is required cannot be granted unless the development plan is approved at the same time as the rezoning. See § 59-D-1.

For all these reasons, the Hearing Examiner interprets Section 59-H-2.53 to permit an applicant using the optional method to restrict (1) any element that is addressed in the “development standards” section of the zone, whether in a table or in text; (2) anything related to what uses are permitted on the site; and/or (3) the staging, or timing, that will be followed in constructing the project if it is approved. (The Hearing Examiner perceived no ambiguity in the use of the term “staging” in Section 59-H-2.53.) This interpretation is reached with due consideration to the basic underlying purpose of the optional method, which is to permit an applicant to impose limitations sufficient to support a finding of compatibility by the Council. See Ex. 47(f) at 2. Based on this interpretation, the Hearing Examiner finds that Exhibit 65(a), the final SDP that was submitted, appropriately categorizes the site plan binding elements and criteria. The eight Binding Elements specified on Exhibit 65(a) are shown below and on the next two pages, followed by the four Design Criteria for Site Plan.

**Schematic Development Plan Binding Elements, from Exhibit 65(a)**

CATEGORY	PERMITTED/REQUIRED	BINDING ELEMENT
LAND USE	See Section 59-C-4.2 for O-M Zone	<ol style="list-style-type: none"> <li>1. <u>Uses Permitted</u> <ol style="list-style-type: none"> <li>A. <u>Existing three story building</u> Offices, general and offices, professional and business.</li> <li>B. <u>Proposed three story building (not to exceed 30,000 square feet in gross floor area)</u> Offices, general and offices, professional and business <u>excluding</u> medical practitioners.</li> <li>C. <u>Proposed 3,460 square foot building</u> Offices, general and offices, professional and business <u>excluding</u> medical practitioners.</li> </ol> </li> <li>2. There will be no vehicular access between the Subject Property and Berkshire Drive.</li> <li>3. Roof top mechanical equipment on the proposed three story office building will be located as far westward on the building as is practicable (to reduce visibility from residences to the east) and will be screened in such a manner as to reduce visibility and the appearance of height.</li> </ol>

**Schematic Development Plan Binding Elements from Exhibit 65(a), cont.**

CATEGORY	PERMITTED/REQUIRED	BINDING ELEMENT
		<p>4. Running the entire length of the Subject Property between the easternmost property line of the Subject Property (the right-of-way for Berkshire Drive) and the paved area for vehicular circulation on the Subject Property, there will be a green space, at least 30 feet wide, as a buffer to screen the parking area, including the blocking of headlights of cars exiting the garage, and to screen the lower portions of the buildings. Within this green space the only land uses will be:</p>

CATEGORY	PERMITTED/REQUIRED	BINDING ELEMENT
BUILDING HEIGHT	See Section 59-C-4.311 (Not greater than 5 stories or 60 feet in height)	<p>(1) An approximately 6 foot high board-on-board fence;</p> <p>(2) Shade trees;</p> <p>(3) Evergreen plantings on both sides of the fence selected and located to block headlight glare.</p> <p>5. Not more than 3 stories or 42 feet in height as measured from the average elevation of finished ground surface along the front of the building (per Zoning Ordinance). The height of the new 3-story office building will be approximately the same height as that of the existing building, but in no event higher than 4 feet above the existing building.</p> <ul style="list-style-type: none"> <li>● No point along the east side of the new 3-story building shall exceed 56 feet measured from grade to the roof surface.</li> </ul>
BUILDING SETBACKS	See Section 59-C-4.313	<p>6. Bank Building</p> <ul style="list-style-type: none"> <li>● Not closer than 50 feet to Old Georgetown Road right-of-way</li> </ul> <p>Office Buildings</p> <ul style="list-style-type: none"> <li>● Not less than 16 feet to abutting property line (south)</li> <li>● Not less than 130 feet to rear (Berkshire Drive) property line</li> </ul>

**Schematic Development Plan Binding Elements from Exhibit 65(a), end**

CATEGORY	PERMITTED/REQUIRED	BINDING ELEMENT
FLOOR AREA RATIO	See Section 59-C-4.312 (1.5 FAR)	7. FAR shall not exceed 0.46
PHASING		8. The proposed 3-story office building may not be occupied and used until an intersection improvement is completed creating a second westbound lane approach on Wildwood Manor Drive at Old Georgetown Road or an alternative transportation network improvement approved by the Montgomery County Planning Board is completed and is in service.

**Schematic Development Plan Design Criteria from Exhibit 65(a)**

**DESIGN CRITERIA FOR SITE PLAN**

1. Development of the Subject Property will be in accordance with the conditions of approval of a stormwater management plan relating to certain features of “green building” technology for the proposed three story office building. If any of the major assumptions on which the stormwater management plan approval is predicated change due to unforeseen circumstances, the applicant must reapply to Montgomery County, Maryland for a new stormwater management plan approval.
2. New freestanding lighting fixtures will be the same as, or similar to existing lighting in terms of style, height, and wattage. Any lighting fixtures affixed to or associated with the three story buildings on the Subject Property will be designed, located and operated to provide adequate security lighting and to illuminate the parking and walkway areas, not the buildings themselves. The details of a lighting plan are to be determined at the time of site plan review following completion of the zoning phase.
3. In the unpaved portion of the right-of-way of Berkshire Drive, subject to obtaining necessary permits from Montgomery County, Maryland, the following conditions will exist:
  - A. An approximately four foot wide concrete sidewalk will be installed in the Berkshire Drive right-of-way. The sidewalk will be extended beyond the southern limits of the Subject Property to connect to an existing staircase that provides access to the Wildwood Shopping Center.
  - B. Street trees will be planted in the Berkshire Drive right-of-way, per Montgomery County specifications, between said sidewalk and the street curb.
  - C. Existing trees and shrubs within the Berkshire Drive right-of-way are to be preserved to the extent practicable.
4. Landscaping shown on the companion “Conceptual Landscaping and Lighting Plan” is intended to provide, among other things, a sightly, all season, green buffer along the common property line with Berkshire Drive which will complement Design Element #4 above. The landscaping shown is illustrative only. Final locations, sizes and species of landscape materials will be determined at the time of site plan review.

Exhibit 65(a) is consistent with the recommendations made by the Planning Board and its Staff, with one exception. The Planning Board and Technical Staff would prefer that Binding Element No. 4 above be included in the Design Criteria for Site Plan. See Ex. 65(a). The Hearing Examiner considers this an appropriate binding element because it combines a setback restriction (one of the development standards specified in the zone) with a use restriction, limiting what land use would be permitted within part of the setback area.

All parties agree that the other binding elements listed on Exhibit 65(a) are appropriately considered binding elements. They relate directly to the use of the site, development standards including building height, lot coverage and setbacks, and staging.

Although the four items listed on Exhibit 65(a) as design criteria are important to the WMCA, the Hearing Examiner does not consider them appropriate subjects of binding elements under Section 59-H-5.23. The first deals with stormwater management, which is not a topic that is addressed in the development standards for the zone, and does not relate to what uses are permitted on site. Moreover, this provision effectively restates what the law already requires – that if the proposed stormwater management system is materially changed, the applicant must submit a new concept stormwater management plan to the Department of Permitting Services for approval. The second design criterion addresses exterior lighting, which is neither a topic that is addressed in the development standards for the zone, nor directly related to what uses are permitted on the site. Lighting is commonly regulated in connection with special exceptions, but is not typically addressed in a rezoning case.

The third design criterion memorializes the applicant's offer to install improvements in the right-of-way for adjacent Berkshire Drive, including a sidewalk and street trees, subject to County approval. These improvements would take place off-site, so they clearly are not related to the use of the site or the applicable development standards. The fourth design criterion refers to a conceptual landscaping plan submitted by the Applicant in response to community concerns about visual buffering. Landscaping is neither addressed in the development standards for the zone, nor, at least in this case, related to what uses are permitted on the site.

All of the design criteria are elements that would be appropriately addressed at site plan. During the hearing, counsel for the WMCA argued that these elements should be included as binding elements to protect the neighboring community, which will, if the rezoning is granted, lose the protections of the existing special exception. As a WMCA representative testified at the hearing, the special exception enforcement process has helped to maintain good relations between the community and the property owner for some 40 years. After the submission of the final version of the SDP, however, counsel for the WMCA submitted a letter stating that Exhibit 65(a) satisfies the WMCA's concerns. See Ex. 66.

In sum, the Hearing Examiner recommends approval of the SDP identified as Exhibit 65(a). If the District Council prefers to interpret Section 59-H-2.53 more broadly, it should approve the SDP identified as Exhibit 61(b), which lists only the conceptual landscaping plan as a design criterion, and the rest as Binding Elements. The Binding Elements and Design Criteria portions of this SDP are reproduced below and on the next two pages.

**Schematic Development Plan Binding Elements, from Exhibit 61(b)**

CATEGORY	PERMITTED/REQUIRED	BINDING ELEMENT
LAND USE	See Section 59-C-4.2 for O-M Zone	1. <u>Uses Permitted</u>  A. <u>Existing three story building</u> Offices, general and offices, professional and business.  B. <u>Proposed three story building (not to exceed 30,000 square feet in gross floor area)</u> Offices, general and offices, professional and business <u>excluding</u> medical practitioners.  C. <u>Proposed 3,460 square foot building</u> Offices, general and offices, professional and business <u>excluding</u> medical practitioners.  2. There will be no vehicular access between the Subject Property and Berkshire Drive.

**Schematic Development Plan Binding Elements from Exhibit 61(b), cont.**

CATEGORY	PERMITTED/REQUIRED	BINDING ELEMENT
		<p>3. Development of the Subject Property will be in accordance with the conditions of approval of a stormwater management plan relating to certain features of “green building” technology for the proposed three story office building. If any of the major assumptions on which the stormwater management plan approval is predicated change due to unforeseen circumstances, the applicant must reapply to Montgomery County, Maryland for a new stormwater management plan approval.</p>

CATEGORY	PERMITTED/REQUIRED	BINDING ELEMENT
		<p>4. New freestanding lighting fixtures will be the same as or similar to existing lighting in terms of style, height and wattage. Any lighting fixtures affixed to or associated with the three story buildings on the Subject Property will be designed, located and operated to provide adequate security lighting and to illuminate the parking and walkway areas, not the buildings themselves. The details of a lighting plan are to be determined at the time of site plan review following completion of the zoning phase.</p> <p>5. In the unpaved portion of the right-of-way of Berkshire Drive, subject to obtaining necessary permits from Montgomery County, Maryland, the following conditions will exist:</p> <ul style="list-style-type: none"> <li>A. An approximately four foot wide concrete sidewalk will be installed in the Berkshire Drive right-of-way. The sidewalk will be extended beyond the southern limits of the Subject Property to connect to an existing staircase that provides access to the Wildwood Shopping Center.</li> <li>B. Street trees will be planted in the Berkshire Drive right-of-way, per Montgomery County specifications, between said sidewalk and the street curb.</li> <li>C. Existing trees and shrubs within the Berkshire Drive right-of-way are to be preserved to the extent practicable.</li> </ul>

Schematic Development Plan Binding Elements from Exhibit 61(b), cont.

CATEGORY	PERMITTED/REQUIRED	BINDING ELEMENT
BUILDING HEIGHT	See Section 59-C-4.311 (Not greater than 5 stories or 60 feet in height)	<p>6. Running the entire length of the Subject Property between the easternmost property line of the Subject Property (the right-of-way for Berkshire Drive) and the paved area for vehicular circulation on the Subject Property, there will be a green space, at least 30 feet wide, as a buffer to screen the parking area, including the blocking of headlights of cars exiting the garage, and to screen the lower portions of the buildings. Within this green space will be located:</p> <ul style="list-style-type: none"> <li>(1) An approximately 6 foot high board-on-board fence;</li> <li>(2) Shade trees;</li> <li>(3) Evergreen plantings on both sides of the fence selected and located to block headlight glare.</li> </ul> <p>7. Roof top mechanical equipment on the proposed three story office building will be located as far westward on the building as is practicable (to reduce visibility from residences to the east) and will be screened in such a manner as to reduce visibility and the appearance of height.</p> <p>8. Not more than 3 stories or 42 feet in height as measured from the average elevation of finished ground surface along the front of the building (per Zoning Ordinance). The height of the new 3-story building will be approximately the same height as that of the existing building, but in no event higher than 4 feet above the existing building.</p> <ul style="list-style-type: none"> <li>• No point along the east side of the new 3-story building shall exceed 56 feet measured from grade to the roof surface.</li> </ul>

**Schematic Development Plan Binding Elements from Exhibit 61(b), end**

<b>BINDING ELEMENTS (CONTINUED)</b>		
<b>CATEGORY</b>	<b>PERMITTED/REQUIRED</b>	<b>BINDING ELEMENT</b>
BUILDING SETBACKS	See Section 59-C-4.313	<p>9. Bank Building</p> <ul style="list-style-type: none"> <li>● Not closer than 50 feet to Old Georgetown Road right-of-way</li> </ul> <p>Office Buildings</p> <ul style="list-style-type: none"> <li>● Not less than 16 feet to abutting property line (south)</li> <li>● Not less than 130 feet to rear (Berkshire Drive) property line</li> </ul>
FLOOR AREA RATIO	See Section 59-C-4.312 (1.5 FAR)	10. FAR shall not exceed 0.46
PHASING		11. The proposed 3-story office building may not be occupied and used until an intersection improvement is completed creating a second westbound lane approach on Wildwood Manor Drive at Old Georgetown Road, or an alternative transportation network improvement approved by the Montgomery County Planning Board is completed and in service.

**Schematic Development Plan Design Criteria for Site Plan, from Exhibit 61(b)**

**DESIGN CRITERIA FOR SITE PLAN**

LANDSCAPING	See Section 59-E-2.7, et. seq. (Information not required to be shown on schematic development plan)	Landscaping shown on the companion "Conceptual Landscaping and Lighting Plan" is intended to provide, among other things, a slightly, all season, green buffer along the common property line with Berkshire Drive which will complement the Binding Elements set forth in paragraph 6 above. The landscaping shown is illustrative only. Final locations, sizes and species of landscape materials will be determined at the time of site plan review.
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If the District Council wishes to follow more closely the Planning Board's recommendation, it should approve the SDP identified as Exhibit 61(a), which adds the provision

limiting permitted land uses within the Berkshire Drive setback to the design criteria. The Binding Elements and Design Criteria portions of this SDP are reproduced below and on the next two pages.

**Schematic Development Plan Binding Elements, from Exhibit 61(a)**

CATEGORY	PERMITTED/REQUIRED	BINDING ELEMENT
LAND USE	See Section 59-C-4.2 for O-M Zone	<ol style="list-style-type: none"> <li>1. <u>Uses Permitted</u> <ol style="list-style-type: none"> <li>A. <u>Existing three story building</u> Offices, general and offices, professional and business.</li> <li>B. <u>Proposed three story building</u> (not to exceed 30,000 square feet in gross floor area) Offices, general and offices, professional and business <u>excluding</u> medical practitioners.</li> <li>C. <u>Proposed 3,460 square foot building</u> Offices, general and offices, professional and business <u>excluding</u> medical practitioners.</li> </ol> </li> <li>2. There will be no vehicular access between the Subject Property and Berkshire Drive.</li> <li>3. Roof top mechanical equipment on the proposed three story office building will be located as far westward on the building as is practicable (to reduce visibility from residences to the east) and will be screened in such a manner as to reduce visibility and the appearance of height.</li> </ol>
BUILDING HEIGHT	See Section 59-C-4.311 (Not greater than 5 stories or 60 feet in height)	<ol style="list-style-type: none"> <li>4. Not more than 3 stories or 42 feet in height as measured from the average elevation of finished ground surface along the front of the building (per Zoning Ordinance). The height of the new 3-story office building will be approximately the same height as that of the existing building, but in no event higher than 4 feet above the existing building.                     <ul style="list-style-type: none"> <li>● No point along the east side of the new 3-story building shall exceed 56 feet measured from grade to the roof surface.</li> </ul> </li> </ol>

## Schematic Development Plan Binding Elements from Exhibit 61(a), end

CATEGORY	PERMITTED/REQUIRED	BINDING ELEMENT
BUILDING SETBACKS	See Section 59-C-4.313	5. Bank Building <ul style="list-style-type: none"> <li>● Not closer than 50 feet to Old Georgetown Road right-of-way</li> </ul> Office Buildings <ul style="list-style-type: none"> <li>● Not less than 16 feet to abutting property line (south)</li> <li>● Not less than 130 feet to rear (Berkshire Drive) property line</li> </ul>
FLOOR AREA RATIO	See Section 59-C-4.312 (1.5 FAR)	6. FAR shall not exceed 0.46
PHASING		7. The proposed 3-story office building may not be occupied and used until an intersection improvement is completed creating a second westbound lane approach on Wildwood Manor Drive at Old Georgetown Road or an alternative transportation network improvement approved by the Montgomery County Planning Board is completed and is in service.

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**Schematic Development Plan Design Criteria for Site Plan, from Exhibit 61(a)****DESIGN CRITERIA FOR SITE PLAN**

1. Development of the Subject Property will be in accordance with the conditions of approval of a stormwater management plan relating to certain features of “green building” technology for the proposed three story office building. If any of the major assumptions on which the stormwater management plan approval is predicated change due to unforeseen circumstances, the applicant must reapply to Montgomery County, Maryland for a new stormwater management plan approval.
2. New freestanding lighting fixtures will be the same as, or similar to existing lighting in terms of style, height, and wattage. Any lighting fixtures affixed to or associated with the three story buildings on the Subject Property will be designed, located and operated to provide adequate security lighting and to illuminate the parking and walkway areas, not the buildings themselves. The details of a lighting plan are to be determined at the time of site plan review following completion of the zoning phase.
3. In the unpaved portion of the right-of-way of Berkshire Drive, subject to obtaining necessary permits from Montgomery County, Maryland, the following conditions will exist:
  - A. An approximately four foot wide concrete sidewalk will be installed in the Berkshire Drive right-of-way. The sidewalk will be extended beyond the southern limits of the Subject Property to connect to an existing staircase that provides access to the Wildwood Shopping Center.
  - B. Street trees will be planted in the Berkshire Drive right-of-way, per Montgomery County specifications, between said sidewalk and the street curb.
  - C. Existing trees and shrubs within the Berkshire Drive right-of-way are to be preserved to the extent practicable.
4. Running the entire length of the Subject Property between the easternmost property line of the Subject Property (the right-of-way for Berkshire Drive) and the paved area for vehicular circulation on the Subject Property, there will be a green space, at least 30 feet wide, as a buffer to screen the parking area, including the blocking of headlights of cars exiting the garage, and to screen the lower portions of the buildings. Within this green space will be located:
  - (1) An approximately 6 foot high board-on-board fence;
  - (2) Shade trees;
  - (3) Evergreen plantings on both sides of the fence selected and located to block headlight glare.
5. Landscaping shown on the companion “Conceptual Landscaping and Lighting Plan” is intended to provide, among other things, a slightly, all season, green buffer along the common property line with Berkshire Drive which will complement Design Element #4 above. The landscaping shown is illustrative only. Final locations, sizes and species of landscape materials will be determined at the time of site plan review.

### **E. Master Plan**

The subject property is located within the area covered by the *North Bethesda-Garrett Park Master Plan, Approved and Adopted 1992* (the "Master Plan"). The Master Plan made no specific recommendations for the subject site, although it confirmed the existing R-90 zoning. Technical Staff identified the following pertinent general land use and zoning recommendations (Staff Report at 13):

1. Focus future development on land located nearest to Metro stops, new transit stations and areas served by existing transportation infrastructure.
2. Encourage a mixture of land uses in redeveloping areas to promote variety and vitality.
3. Encourage a land use pattern that provides opportunities for housing and employment.

Staff also identified the following guidelines in the Master Plan, intended to protect residential areas while meeting important social needs (Staff Report at 13):

1. Avoid excessive concentration of special exceptions and other non-residential land uses along major highway corridors.
2. Avoid over-concentration of commercial service or office-type special exception uses in residential areas.

Staff notes that the Master Plan emphasizes the utility of floating zones if the proposed development would be compatible with surrounding land uses.

Technical Staff made the following Master Plan findings to support its favorable recommendation for the present application (see June 21, 2007 Memorandum from Community-Based Planning Staff, attached to Staff Report):

- The site is located in area well-served by existing transportation, with immediate access to the I-270 spur and close access to Bethesda and North Bethesda.
- The proposal would add office space in an area of residential and retail uses, promoting variety and vitality. [The subject site, of course, already has one office

building, but the surrounding area is generally dominated by retail and residential uses, so this project would increase the proportion of office uses.]

- The proposed development “supports and augments a land use pattern that provides opportunities for housing and employment.”
- The subject site is already used for and confronts commercial uses, so intensified use of this site avoids excessive over-concentration of non-residential land uses along major highway corridors or over-concentration of commercial or office-type uses in residential areas.
- With the landscaping proposed along Old Georgetown Road, Berkshire Road and the main interior road, as well as lighting with cut-off fixtures to minimize off-site impacts, the proposed development would be compatible with surrounding land uses. [Staff’s conclusion in this regard is based largely on elements that the Planning Board and the Hearing Examiner recommend as Design Criteria for Site Plan. The Hearing Examiner relies solely on binding elements in assessing compatibility, because other elements are not assured at this stage.]

The Applicant’s land planner, Phil Perrine, opined that the proposed development would conform to the Master Plan’s recommendations for the area. He noted that the site is at the intersection of several major transportation routes – Democracy Boulevard, Old Georgetown Road, and their intersections with I-270 and I-495. He also observed that the proposed development would add a mix of uses to the site, which currently has only medical offices; would provide new employment opportunities close to transportation infrastructure and existing and planned housing; and would bring in new employees who would enhance the vitality of the shopping center. See Ex. 27(b) at 7.

#### **F. Development Standards for the Zone**

As shown in the table below, the proposed development would be consistent with applicable development standards.

**Development Standards for O-M Zone, Section 59-C-2.41, and  
Applicable Parking Requirements under Sections 59-E-2.73, 59-E-2.81 and 59-E-3.7  
Adapted from Staff Report pp. 10-11**

Standard	Required	Proposed
Maximum lot coverage	60%	15.7 %
Maximum building height	5 stories or 60 ft.	3 stories or 42 ft.*
Minimum green area	10%	30%
Maximum Floor Area Ratio (FAR)	1.5 FAR	0.46 FAR*
Setbacks From any street right-of-way shown on a master plan	15 ft.	Bank bldg: min. 50 ft. from Old Georgetown Rd.*  Office bldgs: min. 130 ft. from Berkshire Drive*
From any lot line adjoining residentially zoned property not recommended for commercial or industrial zoning on a master plan	1 ft. for each 3 ft. in bldg height, or 14 ft.	Office bldgs: min. 16 ft. from abutting property line to south <sup>6*</sup>
Parking	Phase 1 (existing bldg. plus bank): 193 spaces <sup>7</sup> Phase 2 (three bldgs.): 274 spaces <sup>8</sup>	142 surface spaces <u>134</u> garage spaces 276 spaces total
Parking setbacks Adjoining residentially zoned property not recommended for commercial or industrial zoning in master plan, not used for off-street parking and not in a public right-of-way with a width of 120 feet or more, applicable front, side, or rear setback applies.  Adjoining road with right-of-way or 120 ft. or more  Adjoining parking area under different ownership	From Berkshire Drive: 30 ft.  From side lot line adjoining Medical Center Drive easement: 8 ft.  10-ft. landscape strip  5-ft. landscape strip	30 ft.*  8 ft.  30 ft. landscape strip shown  Min. 10-ft. landscape strip shown

\* Denotes binding element

<sup>6</sup> The abutting property to the south is occupied by a large shopping center parking lot, but it remains residentially zoned, and is not recommended for commercial or industrial zoning in the Master Plan. If the abutting property were not residentially zoned, no minimum setback would be required.

<sup>7</sup> Based on five spaces per 1,000 square feet for medical office, and 2.7 spaces per 1,000 square feet for bank.

<sup>8</sup> Adding 2.7 spaces per 1,000 square feet for new office building.

## **G. Public Facilities**

Under the County's Adequate Public Facilities Ordinance (Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, schools, water and sewage facilities, and police, fire and health services will be adequate to support the proposed development, and whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that the County Council sets in the Growth Policy and biennially in the two-year AGP Policy Element.<sup>9</sup> While the final test under the APFO is carried out at subdivision, the District Council must first make its own public facilities evaluation in a rezoning case, because the Council bears the responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of the Council's review and the opportunity for a broader review than may be available to the Planning Board at subdivision. The District Council is charged at the zoning stage with determining whether the proposed development would have an adverse impact on public facilities and, if so, whether that impact would be mitigated by improvements reasonably probable of fruition in the foreseeable future.

### **1. Transportation**

Under the 2003-05 AGP Policy Element, which remained in effect at the time of this hearing and this report, subdivision applications are subject to only one transportation test, Local Area Transportation Review ("LATR").<sup>10</sup> The Planning Board recognizes its LATR Guidelines as the standard to be used by applicants in the preparation of reports to the Hearing Examiner for zoning cases. LATR Guidelines at 1. LATR involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the peak hours of

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<sup>9</sup> See *2003-05 Annual Growth Policy – Policy Element, Resolution No. 15-375*, adopted October 28, 2003. The Hearing Examiner hereby takes official notice of the 2003-05 AGP Policy Element, which is still in effect.

the morning and evening peak periods (6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.). The “peak hour” is the 60-minute segment within each three-hour peak period that has the highest level of traffic at the location being studied.

The methodology prescribed under the LATR Guidelines is an analysis of Critical Lane Volume (“CLV”). CLV analysis counts conflicting movements at an intersection, such as left turns v. through movements, as a means of assessing whether the intersection is performing at an acceptable level or is experiencing unacceptable levels of congestion. The County Council has established congestion standards for each policy area in the County, which set the maximum CLV an intersection may have before it is considered to have unacceptable congestion. The congestion standards range from a CLV of 1,400 in rural areas to a CLV of 1,800 in Metro policy areas. See LATR Guidelines at 3. A development proposal will be considered to pass LATR if a traffic study acceptable to Technical Staff demonstrates that either the intersections studied will have CLVs below the relevant congestion standard with the proposed development in place (including the effect of any proposed traffic mitigation), or the proposed development would not make conditions worse at an intersection that already has a CLV exceeding the congestion standard. See *id.*

The Applicant performed a traffic study as required in this case, taking into account existing roads, programmed roads and available or programmed mass transportation, as well as existing traffic, traffic anticipated from nearby development that is approved but unbuilt (“background” traffic), and trips expected to be generated by the proposed development. Technical Staff required the Applicant to study the intersection of Old Georgetown Road with the eastbound and westbound ramps of I-270; the three-way intersection of Old Georgetown Road with Rock Spring Drive to the west and the access road into the subject site to the east<sup>11</sup>; and the three-way intersection of Old Georgetown Road with Democracy Boulevard to the west and the main entrance to the Wildwood Shopping Center to the east.

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<sup>10</sup> See 2003-05 AGP Policy Element at 6-7; *Local Area Transportation Review Guidelines Approved and Adopted July 2004* (“LATR Guidelines”) at 1. The Hearing Examiner hereby takes official notice of the LATR Guidelines.

<sup>11</sup> This road is referred to as Wildwood Manor Drive in parts of the traffic study, and elsewhere as Medical Center Drive. It is referred to in this report as Medical Center Drive.

The traffic study found that all of the studied intersections currently operate within the North Bethesda Policy Area congestion standard, which establishes a CLV of 1,550 as the acceptable maximum. See Ex. 27(a) at 1. The study further found that all of the studied intersections would continue to operate within the congestion standard with the addition of background traffic. See *id.* at 2. Traffic expected from the proposed project was analyzed separately for Phase 1, representing the addition of the new bank building, and Phase 1/Phase 2, representing the addition of the bank building and the new office building.

For traffic generation purposes, Technical Staff permitted the Applicant to treat the bank as though it were an extension of the shopping center, rather than a free-standing building. See Ex. 16(a) at 12. The Applicant's traffic expert, Craig Hedberg, explained that he expects many of the bank's customers to visit the bank either before or after visiting the shopping center, so their bank visits would not generate any off-site traffic. See Tr. at 149. Mr. Hedberg added that many trips to this drive-in bank would also be made by drivers who are already on the road, stop at the bank, and continue along Old Georgetown Road without additional intersection impacts (except, the Hearing Examiner notes, impacts on the site entrances and exits). See *id.* He opined that if Staff had rejected his rationale and required him to study the bank as a separate use, the traffic would have been greater. He could not estimate the magnitude, however, because of the significant number of pass-by trips. See Tr. at 149. The traffic study concluded that Phase 1 of the proposed project would not cause any of the studied intersections to reach a CLV exceeding the congestion threshold. See Ex. 27(a) at 3. It would bring CLV to 1,540 in the afternoon at Old Georgetown Road/Rock Spring Drive/Medical Center Drive, quite close to the congestion standard.

Traffic generation expected in connection with the new office building was estimated based on MNCPPC trip rates. See Ex. 16(a) at 12. The traffic study found that with the construction of the second office building, CLVs at the studied intersections would remain within the congestion standard with the exception of the intersection of Old Georgetown Road with Rock Spring Drive and Medical Center Drive, which would exceed the congestion standard in the afternoon peak hour by 38 critical movements. See *id.* at 3. To mitigate this adverse traffic impact, the Applicant proposes to

construct an additional exit lane on Medical Center Drive heading onto Old Georgetown Road. This would divide outgoing traffic into one lane for left-turn and through movements, and another lane for right turns, separating the conflicting movements into their own lane and reducing CLV in the afternoon peak hour to 1509, which is lower than both the existing level and the background level. See Ex. 27(a) at 4. Mr. Perrine testified that there is room for an additional lane within the existing easement. See Tr. at 91.

Transportation Planning Staff at the MNCPPC recommended that development on the site be limited to the uses described, i.e., the existing medical office building, a 3,450-square-foot bank with drive-through windows, and a 30,000-square-foot general office building. Staff also recommended that the Applicant be required to construct the additional exit lane before release of any building permit for the Phase 1 office building.<sup>12</sup> See Staff Report at 16. In addition, Transportation Staff calls for a requirement at site plan to add bicycle racks, lead-in sidewalks and internal driveway crosswalks. See *id.* at 16-17.

The WMCA took issue with the scope of the traffic study, arguing that it should have included one additional intersection to the south, the intersection of Old Georgetown Road and Cheshire Drive. The scope of the study followed the LATR Guidelines, which require a development that is expected to generate fewer than 250 peak hour trips to study one signalized intersection in each direction from the site. See LATR Guidelines at 13. (The entire proposed project was projected to add a total of 87 trips in the afternoon peak hour and 49 in the morning peak hour. See Ex. 16(a) at 13, 18. The study examined the site entrance, plus the first signalized intersection to the south (Democracy Boulevard/shopping center entrance/Old Georgetown Road) and the first signalized intersection to the north, at the eastbound and westbound ramps to I-270.<sup>13</sup>

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<sup>12</sup> This differs from the submitted binding element on phasing, which states that the Phase 2 office building “may not be occupied or used” before the additional lane (or another traffic improvement approved by the Planning Board) has been constructed. See Ex. 65(a).

<sup>13</sup> The ramps are signalized separately, and the traffic study originally examined only the eastbound ramp. At the request of the State Highway Administration, it was expanded to cover both ramps, which are located across Old Georgetown Road from one another. See Ex. 27(a) at 1.

The WMCA maintains that the Applicant should have been required to study the Old Georgetown Road/Cheshire Drive intersection because the shopping center has an entrance on Cheshire Drive, and residents of the neighborhoods east of the shopping center use that entrance to get to the shopping center and the subject site. Donald Sylvain, the WMCA's representative at the hearing, testified that he met with Ed Axler from Transportation Planning Staff at the MNCPPC during the pendency of this case, and it appeared that Mr. Axler was not aware of the Cheshire Drive entrance to the shopping center. Mr. Sylvain recalls Mr. Axler stating that one could carry out a license plate survey to see how many cars come to the subject site using the Cheshire Drive entrance to the shopping center, which Mr. Sylvain took to mean that Mr. Axler felt it would be appropriate for the Applicant to study Cheshire Drive and Old Georgetown Road. See Tr. at 161. There is nothing in the record from Technical Staff, however, to support this interpretation, and Technical Staff recommended approval of the application.

Based on testimony from Mr. Hedberg and Mr. Sylvain, there is indisputably a serious congestion problem on Cheshire Drive approaching Old Georgetown Road. A short distance from Old Georgetown Road, Cheshire Drive intersects Grosvenor Lane to the south and the access drive into the shopping center to the north. The intersection has a four-way stop sign. The testimony indicated that traffic on Cheshire Drive waiting to turn onto Old Georgetown Road often fills all the space between the stop sign and Old Georgetown Road, particularly during the peak periods. With that space full, no one can proceed through the stop sign towards Old Georgetown Road, so traffic tends to back up on Grosvenor Lane and Cheshire Drive, resulting in lengthy waits to get through the stop sign and onto Old Georgetown Road. Mr. Sylvain testified that he comes through the intersection at least once a week during the morning peak period, and finds that it is not uncommon to wait through two cycles of the traffic light at Old Georgetown Road to make a turn. See Tr. at 159.

Mr. Hedberg testified that he sees no nexus between the proposed project and the intersection of Cheshire Drive and Old Georgetown Road. Based on the trip assignments he used in the traffic study, he estimates that less than ten percent of trips to the subject site would come from the south, which means less than five trips in the peak hour. See Tr. at 113. Mr. Hedberg agreed that

one could do a license plate survey to determine how many current trips to the site originate from neighborhoods that might use the Cheshire Drive entrance to the shopping center to get to the subject site, but he stated that this level of detail “is simply not practiced.” See Tr. at 128.

The only data Mr. Hedberg had about the intersection of Old Georgetown Road and Cheshire Drive is a somewhat out-of-date CLV calculation from March, 2006. See Ex. 56. That document indicates that the intersection had a CLV of 1,073 in the morning peak hour and 1,146 in the evening peak hour. See *id.* To drive the CLV above the congestion standard, a new development would have to contribute more than 400 critical movements. Mr. Hedberg testified that on a three-lane road, that would require over 1,000 vehicles. See Tr. at 137. His traffic study showed that background traffic would contribute only 170 critical movements at the intersection of Old Georgetown Road and Democracy Boulevard, and 250 critical movements at the intersection of Old Georgetown Road and Rock Spring Drive, where most of the new development is centered. Both of these numbers are far below 400. Given that the proposed project is expected to generate well under 100 trips during the peak hour at full build-out, it seems very unlikely that, even with background traffic, it could result in a failing intersection at Old Georgetown Road and Cheshire Drive. Even if the intersection were found to be failing, Mr. Hedberg asserted that the proposed project would likely make only a de minimus contribution to the critical movements, and therefore the Applicant would not be required to perform any mitigation; if a developer is already making one roadway improvement, Mr. Hedberg explained, the project is allowed up to four critical lane movements at another intersection without having to make improvements there. See *id.* at 133.

## **2. Utilities**

Technical Staff reports that adequate water service is available from existing public water mains, but some sewer pipes may need to be replaced with larger-diameter pipes to serve the proposed development. See Staff Report at 14. The Applicant’s civil engineer testified that the Washington Suburban Sanitary Commission has put the Applicant on notice that sewer constraints may develop in the area that would require developers to replace a sewer pipe, or contribute to the cost of its replacement. He noted that this determination would be made while on-site water and

sewer plans are being prepared. Mr. Hendricks observed that the subject site is the W-1/S-1 categories, which means that WSSC is responsible for providing public water and sewer to the site unless a moratorium is imposed.

The highly developed character of the surrounding area and the testimony of the Applicant's engineer support a conclusion that other utilities such as electric, gas and telephone are readily available.

#### **H. Environment and Stormwater Management**

A Natural Resources Inventory/Forest Stand Delineation approved by MNCPPC is in the record and shows no forest or specimen trees on site. Accordingly, a tree save plan is not required. See Staff Report at 19. The site has no steep slopes, wetlands or streams. See *id.* The proposed development is exempt from the County's Forest Conservation Law because it is a modification of a developed property, no forest will be cleared, and neither a special protection area water quality plan nor a new Preliminary Plan of Subdivision is required. See *id.*

The Department of Permitting Services ("DPS") has approved a concept stormwater management plan for the proposed redevelopment. The Applicant's engineering expert, James Hendricks, testified that DPS waived quantity control (also called channel protection) because the site currently has significant impervious area, and the development proposed in this application would decrease impervious area. He noted that quality control would be provided via underground storm filters that clean the first flush of water coming off the site, and possibly a green roof on the new office building. Mr. Hendricks acknowledged that if assumptions based on using a green roof should change, a new concept stormwater management plan would be required, and quality control requirements could be met with larger underground filters.

#### **I. Community Participation**

The adjoining residential community was represented in these proceedings by the Wildwood Manor Community Association, whose concerns are addressed in the discussion of binding

elements in Part II.D above and in Part II.G, regarding transportation. The testimony of WMCA representative Donald Sylvain is summarized in Part III below.

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

#### **A. Applicant's Case in Chief**

1. Phil Perrine, land planner. Tr. at 9 – 92.

Mr. Perrine was designated an expert in land planning. He first described the area of the subject site, using an aerial photograph from April 2006. Mr. Perrine testified that for the area that is relevant to his testimony, the photograph remains a good representation of existing conditions. He outlined the land use history of the subject property, which has been the site of a medical office building operating under a special exception since 1964. The site is developed with a brick medical office building, three stories in height when viewed from the front (Old Georgetown Road) and four stories from the rear (Berkshire Drive). It has about 248 surface parking spaces, about 25 fairly mature trees, street lighting along the drive, and no forested areas. Mr. Perrine noted that vehicular access to the site is available from Old Georgetown Road via a small access road, from a filling station adjacent to the subject site, and from three points along the southern boundary of the site, which connects to the Wildwood Shopping Center. The access road to Old Georgetown Road does not connect through to Berkshire Drive and the adjacent residential neighborhoods – it is a stub road that lies partly on the subject site and partly on abutting, privately land owned that is covered by an easement providing for access to the subject site.<sup>14</sup>

Mr. Perrine described zoning and land uses in the surrounding area. He stated that the Master Plan confirmed the existing R-90 zoning for the subject property, and its land use plan showed the existing commercial use. It also contains some language about using floating zones to achieve compatibility.

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<sup>14</sup> The easement was granted to the subject property as part of the development of the subject site and the shopping center, which were originally owned by one family and were developed before the houses to the north.

Mr. Perrine considers the surrounding neighborhood to extend from I-270 on the north to Democracy Boulevard and Cheshire Drive on the south, the properties fronting on the west side of Old Georgetown Road to the west, and Florentine Drive on the east. He noted that Technical Staff's surrounding area extended to Rockledge Drive on the west and Rossmoor on the east, and testified that he basically agrees with Staff, although he thinks the area he identified is the most important. When asked whether the different surrounding area descriptions have any implications, Mr. Perrine noted that the O-M Zone is appropriate in areas that are not primarily made up of single-family detached homes, so the only important thing is that the surrounding area is not predominantly single-family detached.

Mr. Perrine described the changes proposed in connection with the present application. The existing medical center building would remain. A new, smaller building would be constructed along the property's Old Georgetown Road frontage, just north of the gas station, for use as a drive-through bank. This would remove an entire parking bay along the road, replacing it with a landscaping strip. In addition, a second office building would be constructed in the southern portion of the site, similar in size, shape and character to the existing medical office building. The surface parking area that would be lost to the new office building would be replaced with underground parking beneath the new building. Like the existing office building, the new office building would have three stories when viewed from the west and four stories when viewed from the east – three stories of office space with one level of parking visible as the bottom story. Mr. Perrine noted that the proposed SDP would also remove an entire bay of parking along Berkshire Drive on the east side of the site.

The northern end of the site currently has two driveway entrances from the access road. Mr. Perrine notes that the proposed SDP eliminates the driveway entrance farther from Old Georgetown Road. This would open up a green space opportunity and direct traffic to the drive aisle running along the front of the current and proposed office buildings. The character of that aisle as a street would be reinforced with the continuation of a sidewalk along it, as well as street lamps and street trees.

Mr. Perrine observed that the existing sidewalk along Old Georgetown Road would be moved farther back from the road, and a green panel about 13 feet wide would be installed between the curb and the sidewalk. He noted that an additional sidewalk is proposed along Berkshire Drive, connecting to a staircase that leads up to the Wildwood Shopping Center, which sits at a higher grade. The staircase is located south of the Applicant's property line, but the Applicant has offered, as a result of discussions with the local community association, to extend the sidewalk beyond its property line to the staircase. The Applicant has also offered to implement a landscaping scheme that would include a six-foot board fence along the east side of the property, with evergreen and deciduous trees on both side of the fence to screen the new building as much as possible.

Mr. Perrine reviewed each of the proposed binding elements. He noted that the binding elements limit the size and location of the new office building in several ways: square footage, FAR, setbacks and height. He noted that an FAR of 0.5, roughly what is proposed here, is typical for a suburban office building on a flat site with surface parking. To triple that density, going to the limit of the O-M Zone, would require more structured parking. Mr. Perrine opined that with all of the binding elements limiting the new office building, there are few places on the site that it could fit, other than where it is shown on the SDP.

Turning to the purpose clause for the O-M Zone, Mr. Perrine described the present proposal as moderate intensity office, with a number of attributes designed to minimize impacts on the neighborhood nearby. He noted that the surrounding area is not predominantly one-family residential, but contains a mix of uses including commercial, multi-family, institutional and single-family detached. Mr. Perrine declared that the building and parking would satisfy all applicable development standards. He opined that the new office building would be compatible with its surroundings because it would be similar in scale, height and mass to the existing office building, and that the proposed bank would provide better community services. He noted that the proposed plan would provide a sidewalk along Berkshire Drive, move the Old Georgetown Road sidewalk farther from the street, and provide well-organized internal circulation.<sup>15</sup> In addition, the proposed redevelopment would provide stormwater

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<sup>15</sup> The sidewalks are not specified as binding elements.

management controls where none currently exist, since the site was developed before such regulations were adopted.

When asked the difference between high intensity and medium intensity offices, Mr. Perrine said that anything with an FAR less than 0.5 should be considered moderate in intensity. At the same time, he added, the number of people coming and going could make the use of property with a moderate FAR more intense, and a building with high FAR and lower levels of activity could be considered less intense. See Tr. at 73. Mr. Perrine suggested that where the purpose clause refers to areas appropriate for high intensity uses, it might mean an area totally surrounded by commercial uses. At the subject site, with residential neighborhoods in close proximity, Mr. Perrine considers high intensity uses inappropriate.

Mr. Perrine opined that the proposed development would be consistent with the Master Plan, which indicates R-90 zoning for the subject site, acknowledging its existing use. He noted that the Master Plan acknowledges the value of floating zones to implement some of its goals, which include encouraging opportunities for housing and employment and improving pedestrian facilities, both of which the subject redevelopment would include.

On cross-examination, Mr. Perrine confirmed that the subject site sits at a higher elevation than the residential community on the other side of Berkshire Drive. He explained that at the southern property line the site is about eight feet higher than Berkshire Drive, and that the existing office building and the location for the proposed new office building sit about five feet higher than the southern edge of the property.

Mr. Perrine agreed that residents of the neighboring community probably can see the top stories of the existing office building, and it would be similar for the new building. There followed a lengthy discussion about approximately how tall the proposed office building would be, relative to the height of the existing office building. The discussion was hampered by the fact that Mr. Perrine did not know the actual height of the existing office building, only that it was three stories, and given its age, each floor probably has a height of 10 to 11 feet. Mr. Perrine noted that the front of the new building would be about eight feet lower than the front of the new building, due to topography. He

estimated 14 feet per floor due to modern construction methods and code requirements. The Applicant had proffered a binding element limiting the height of the new building to 42 feet. Mr. Perrine acknowledged that this could be as much as ten feet taller than the existing building, but he opined that given the distance of over 200 feet to the nearest homes, the lower grade of the homes, intervening trees and proposed fencing, a ten-foot difference in height between the two office buildings would not be very significant.

Under continued cross-examination, Mr. Perrine acknowledged that vehicular access to the Wildwood Shopping Center is available not only from Old Georgetown Road but also from Cheshire Lane, a side street that runs along the southern end of the shopping center. The shopping center has a driveway opening onto Cheshire Lane just a short distance from its intersection with Old Georgetown Road, which has two lanes for vehicles accessing Old Georgetown Road, one for left turns and one for left and right turns combined. Mr. Perrine agreed that the Cheshire Lane entrance to the shopping center could be used to access the subject site, by driving through the shopping center parking lot, despite the speed bumps. He acknowledged that Cheshire Drive forms the southern limit of the “surrounding neighborhoods” that both he and Technical Staff considered for this site.

Later in the hearing, during further discussion of building height, Mr. Perrine testified that the driveway in front of the proposed office building would be higher, topographically, than the driveway behind the building. See Tr. at 182. The small parking area immediately behind the proposed building would be at a slightly higher elevation than the parking area that is going under the building. As a result, part of the rear of the building would have three and a half stories above-ground, while the part above the garage entrance would have three building stories above ground plus the ten feet to drive under the building. Mr. Perrine observed that the proposed building would be partly hidden by the berm, landscaping and fencing proposed along Berkshire Drive.

2. James W. Hendricks, civil engineer. Tr. at 92-102.

Mr. Hendricks was designated an expert in civil engineering. He testified that existing sewer and water lines will continue to serve the subject property, and that there currently are no

constraints on that service. Mr. Hendricks noted that WSSC has put the Applicant on notice that sewer constraints may develop in the area that would require developers to replace a sewer pipe, or contribute to the cost of its replacement. He noted that this determination would be made while on-site water and sewer plans are being prepared. Mr. Hendricks observed that the subject site is the W-1/S-1 categories, which means that WSSC is responsible for providing public water and sewer to the site, unless a moratorium is imposed, which happens from time to time.

Mr. Hendricks testified that DPS has approved a concept stormwater management plan. He noted that quantity control (also called channel protection) was waived because the site currently has significant impervious area, and the development proposed in this application would decrease impervious area. He noted that quality control would be provided via underground storm filters and possibly a green roof on the new office building. Mr. Hendricks acknowledged that if assumptions based on a green roof should change, a new concept stormwater management plan would be required.

Mr. Hendricks testified that the proposed development is exempt from the County's forest conservation law because it represents a modification of a developed property that has no existing forest, and it is not in a special protection area. He opined that public facilities in the area are adequate to support the proposed development.

On cross-examination, Mr. Hendricks explained that a green roof involves installing soil and plants on the roof of a building to gather rainwater and hold it, while it gets cleaned up by the plants and evaporates into the atmosphere. He noted that if a green roof does not come to pass on this site, quality control requirements could be met with larger underground filters.

3. Craig Hedberg, transportation planner. Tr. at 106-157.

Mr. Hedberg was designated an expert in transportation planning and traffic engineering. He described the scope of the traffic study, the steps he took in compliance with the LATR Guidelines and his conclusions that while the drive-through bank could be built without adversely affecting congestion at local intersections, the new office building would cause the intersection of Old Georgetown Road with Rock Spring Drive and Medical Center Way to exceed the

congestion standard. See Tr. at 108. To offset that traffic impact, the Applicant proposes to provide a second westbound lane on Medical Center Way, approaching Old Georgetown Road. This would provide for a separate right-turn lane, leaving one lane for through and left-turn movements, and would bring the CLV below the congestion standard. Mr. Hedberg concluded that the bank can be built without any roadway improvements, and that with the proposed new turn lane, the transportation network will be adequate to support the entire proposed development.

On cross-examination, Mr. Hedberg explained that Technical Staff directed him to assess the first signalized intersection on Old Georgetown Road in each direction, which meant Democracy Boulevard to the south, and the eastbound off-ramp for the I-270 spur to the north. Later, the SGA requested that the Applicant also study the westbound off-ramp for the I-270 spur, slightly farther north, which they did, finding no adverse impact. The intersection of Old Georgetown Road and Cheshire Drive, which is the second signalized intersection to the south, was not included in the CLV analysis. Mr. Hedberg acknowledged that the northernmost intersection covered in his study is probably farther from the site than the Cheshire Drive/Old Georgetown Road intersection, but he emphasized that distance is not the criterion used. LATR calls for analyzing a certain number of signalized intersections, depending on the number of trips the project would generate.

Counsel for the WMCA asked Mr. Hedberg what cars are likely to use the Cheshire/Old Georgetown intersection to reach the subject site through the Wildwood Shopping Center. See Tr. at 113. He replied that the trip assignments in his traffic study assume that less than ten percent of site trips would come from Old Georgetown Road south of Democracy Boulevard. That comes out to approximately five trips. Trip assignments are based on a table in the LATR Guidelines that breaks down work trips generated for "super districts," of which there are about 18 in the County. The general patterns of work trips north, south, east and west are derived from the super district trip percentages. For the Rockville/North Bethesda super district, 12.8 percent of trips to non-residential locations, generally offices, are expected to come from within the super district. 14.4 percent are expected to come from the Gaithersburg area. Mr. Hedberg used his judgment to aggregate these percentages with traffic percentages from other super districts and distribute the trips on the local road

network. He indicated that Technical Staff reviewed his work and concurred. See *id.* at 121. Mr. Hedberg's estimates indicate that the predominant traffic attracted to the subject site would be from the north, west and east, from Old Georgetown Road and I-270. See *id.* at 114. The estimates use major roads, and do not try to break down the numbers coming from individual intersecting streets such as Cheshire Drive. See *id.* at 118.

Mr. Hedberg agreed that there is a well-populated residential area east of the Cheshire Drive/Old Georgetown Road intersection, and that residents of that area might very well enter the Wildwood Shopping Center from Cheshire Drive and drive through the shopping center to reach the subject site. See *id.* at 129. He agreed that one could do a license plate survey to see how many of the trips coming to the subject site now originate from the neighborhood to the east, and therefore might use the Cheshire Drive entrance into the shopping center. See *id.* at 128. That level of detail, however, "is simply not practiced." *Id.* Mr. Hedberg stressed that only five peak-hour trips are expected to come from the south, based on the super-district modeling.

Mr. Hedberg agreed that if he were required to study the Cheshire Drive/Old Georgetown intersection, and the study showed that with the proposed development, that intersection would have an unacceptable level of congestion, the Applicant would be required to make or contribute to improvements at that intersection, unless the Applicant's traffic was expected to make only a de minimus contribution to the intersection traffic. See *id.* at 131-133. If a developer is already making one roadway improvement, the project will be allowed up to four critical lane movements at another intersection without having to make an improvement there. See *id.* at 133.

Mr. Hedberg testified that the LATR Guidelines specify that they are to be used by applicants in preparing reports to the Board for special exception cases. He described LATR as "the test that the County has adopted to be used in this type of case." *Id.* at 135-36.

On re-direct, Mr. Hedberg described some 2006 data he has about the intersection of Cheshire Drive and Old Georgetown Road, using it to explain why he believes that even with background traffic and traffic from the proposed development, Cheshire Drive and Old Georgetown Road would operate below the maximum congestion standard. See *id.* at 138.

Mr. Hedberg opined that the problems experienced at Cheshire Drive and Old Georgetown are caused by the four-way stop sign at the intersection of Cheshire Drive and Grosvenor Lane, which is so close to Old Georgetown Road that the stop sign prevents a continuous flow of traffic. There is a limited area for traffic heading onto Old Georgetown Road to wait between the stop sign and the traffic light, so cars have to wait farther east on Cheshire Drive, potentially blocking Grosvenor Road. Mr. Hedberg suggested that if someone were to make improvements at that intersection, they might widen Cheshire Drive east of Grosvenor Lane, adding a westbound lane to allow more cars to get through. He was quick to add that he is not advocating such a step, and doesn't know whether the right-of-way would be available. See *id.* at 142-43. He added that creating a dedicated right-turn lane at that location should have a positive effect, but there would still be delays because of the stop sign.

Mr. Hedberg emphasized on re-cross examination that he sees no nexus between the project proposed in this case and the intersection of Cheshire Drive and Old Georgetown Road. Because of the small number of trips anticipated to come from the south on Old Georgetown Road, he believes that any contribution this project would make to the CLV at that intersection would be de minimus, and therefore no roadway improvement would be required to comply with LATR, even if the intersection failed the congestion standard.

### **B. Community Testimony**

Donald Sylvain testified on behalf of the WMCA, where he is a board member and block coordinator. See Tr. at 157. He began by stating that his organization has a 45-year record of good relations with the owners of the subject property and the shopping center. For many years, the subject site and the parking around the shopping center have been in the R-90 Zone, subject to special exceptions. Mr. Sylvain noted that the occasional use of special exception requirements has successfully achieved good relations and reasonable understandings between the owners of these properties and the nearby community. He conveyed the WMCA's strong request that all of the binding elements they have requested be included on the SDP, to preserve the controls that have helped maintain a positive relationship between the subject property and the community.

Mr. Sylvain voiced his dismay that the traffic study did not include the intersection of Grosvenor Lane, Cheshire Drive and the south driveway of the shopping center, which is “the community intersection that would be most affected by the proposed construction of the two business buildings, and that is heavily used on a daily basis by the community.” Tr. at 158-59. He described the intersection is a four-way stop located just 60 feet east of Old Georgetown Road.<sup>16</sup> Mr. Sylvain described it as a bottleneck, with congestion that can cause vehicles to back up on Grosvenor Lane and Cheshire Drive, unable to enter the intersection. Mr. Sylvain has seen as many as eight to ten cars back up on Grosvenor during a typical rush hour, and even sometimes outside rush hour. He stated that the cause of the congestion appears to be inadequate lanes between the intersection and Old Georgetown Road. See *id.* at 159. In his view, an additional lane dedicated to right turns on Old Georgetown Road would be a big help. See *id.* at 165.

Mr. Sylvain testified that because of the congestion, some vehicles use the shopping center as an alternative, including going through the subject property. He testified that traffic to and from the existing medical building on the subject site also uses the southern driveway of the shopping center, as will traffic generated by the proposed new buildings. Mr. Sylvain conceded that the problem intersection “may not be completely addressed through this rezoning application,” but asked for “serious cooperation by the applicant and the County to achieve subsequent relief.” Tr. at 159.

Mr. Sylvain described a meeting that took place between him and Ed Axler of MNCPPC Transportation Staff about the Grosvenor/Cheshire/Shopping Center intersection. During that meeting, it was apparent to Mr. Sylvain that Technical Staff had not required the Applicant to include that intersection in its traffic study because staff was not aware, until informed by Mr. Sylvain, that it represented an access point to the subject site. See Tr. at 160-61. As recounted by Mr.

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<sup>16</sup> Mr. Hedberg estimated the distance at 150 feet. Mr. Sylvain testified that his estimate was based on the number of vehicles that can fit in the space between the driveway and Old Georgetown Road. In his experience, ten cars would completely fill both lanes – fewer if there is a larger vehicle like a truck. See *id.* at 164. At 18 to 20 feet per car (a common rough estimate), this suggests a distance in the neighborhood of 100 feet. The Berkshire Drive sidewalk is a design criterion, not a binding element, on the SDP recommended by the Hearing Examiner.

Sylvain, Mr. Axler “seemed certain that it was valid to study it because he started talking about . . . tak[ing] license numbers to be able to judge that.” Tr. at 161.

Mr. Sylvain has lived at his current home since 1971, and observes the Grosvenor/Cheshire/Shopping Center intersection almost daily. In his opinion, residents of the 518 homes in the WMCA area who are going to any of the businesses in the shopping center or the existing medical buildings would almost universally turn in at the southern driveway. See *id* at 162.

On a different topic, Mr. Sylvain testified that homes in the Wildwood community can definitely see the existing office building when the leaves are off the trees. See *id.* at 166. From the closest residences, on Berkshire, they can see about two-thirds of the stories, even with the existing shrubbery. He noted that the lights on the building are also visible to the community at night, as well as lights from cars using the parking lot. For that reason, the community is very concerned about screening the view of cars exiting the proposed underground garage, which would come out facing the Wildwood community, and feels that the proposed binding elements are crucial.

Mr. Sylvain testified that the sidewalk along Berkshire Drive that is provided for in the binding elements would be a benefit to the community, and would resolve an existing pedestrian safety issue. Currently, that side of the street does not have a sidewalk.<sup>17</sup> See *id.* at 169.

#### IV. ZONING ISSUES

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

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that

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<sup>17</sup> The Berkshire Drive sidewalk is listed as a design criterion, not a binding element, on the SDP recommended for approval by the Hearing Examiner.

district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, i.e., it satisfies the purpose clause for the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

Montgomery County has many floating zones, including the O-M Zone. The O-M Zone contains development standards and a post-zoning review process that delegate to the Planning Board site specific issues such as exact building location, landscaping and screening. The application of the zone to the subject property involves an evaluation of eligibility under the purpose clause, compatibility with existing and planned land uses in the surrounding area, and relationship to the public interest.

#### **A. The Purpose Clause**

The purpose of the O-M Zone as stated in Code §59-C-4.31 is set forth below.

##### **59-C-4.310. Purpose.**

It is the purpose of the O-M zone to provide locations for moderate-intensity office buildings in areas outside of central business districts. It is intended that the O-M zone be located in areas where high-intensity uses are not appropriate, but where moderate intensity office buildings will not have an adverse impact on the adjoining neighborhood. This zone is not intended for use in areas which are predominantly one-family residential in character.

The fact that an application complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the application is, in fact, compatible with surrounding land uses and, in itself, shall not be sufficient to require the granting of any application.

The subject site is outside a central business district, in a mixed-use area that is not predominantly one-family residential in character. The surrounding area has a mix of single-family, multi-family and commercial uses, and the subject property is adjacent to one shopping center and across Old Georgetown Road from another.

Technical Staff opined that the proposed development would be in character with the prevailing development pattern on the site, which already has one commercial building and a significant amount of impervious area, and in the immediate area. See Staff Report at 12. Staff

observes that given its location relative to existing development in the immediate area, and the existing non-residential use of the site itself, the subject property is more appropriate for a bank and office uses, as restricted under the SDP, than for the single-family homes that would be permitted under the existing zoning. Staff notes that if the project goes forward, careful attention should be given at site plan to the height of the new office building and to providing adequate landscaping, setbacks, screening and buffering. See *id.* Staff concluded that the application complies with the purpose clause for the O-M Zone.

Mr. Perrine suggested that any development with an FAR less than 0.5 should be considered moderate in intensity. At the same time, he noted that intensity can also relate to the number of people coming and going on a site. Mr. Perrine considers the present proposal to be moderate-intensity office use, with a number of attributes designed to minimize neighborhood impacts. He stated that the purpose clause reference to “areas appropriate for high-intensity uses” may refer to areas totally surrounded by commercial uses, which is not the case for the subject site, which has residential neighborhoods nearby.

The Hearing Examiner agrees that the proposed development would be consistent with the purpose clause for the O-M Zone. The subject site is outside a central business district, in an area where the proximity of residential neighborhoods would make high-intensity uses inappropriate. The Applicant proposes an office building and a bank that would be relatively modest in size and would fit in well, in terms of the nature of the uses, with the existing office building, gas station and nearby shopping center. With the binding elements on Exhibit 65(a) (the SDP recommended for approval by the Hearing Examiner), the project would be unlikely to have an adverse impact on the adjoining neighborhood. As Mr. Perrine stated, the combination of building height, square footage, setbacks and FAR effectively limit the proposed office building to roughly the location and size shown on the SDP. The neighbors are assured that no vehicular access would be created between Medical Center Drive and Berkshire Drive, protecting the neighborhood from a potential influx of traffic from Old Georgetown Road. A 30-foot buffer along the Berkshire Drive side of the site, where the only permitted land uses would be fencing, shade trees and evergreen plantings, would provide visual

screening. The buffer might not hide the office buildings from view entirely, but would certainly mitigate their impact, including the potential impact of vehicle headlights at night. The visual impact of the buildings would be further mitigated by a distance of over 200 feet to the nearest homes, and a ten-foot drop in grade from the site to Berkshire Drive.

The traffic study established that the proposed project would not adversely affect local traffic conditions. Although treating the proposed bank as a stand-alone use rather than an expansion of the shopping center might have required the Applicant to put in its traffic improvement earlier, there is no evidence of record to undercut either Mr. Hedberg's reasoning on this point or Technical Staff's concurring opinion. Moreover, Mr. Hedberg's testimony demonstrated persuasively that although there is a clear problem on Cheshire Drive approaching Old Georgetown Road, any impact the present proposal might have on that traffic problem would be unlikely to be significant enough to justify making this Applicant responsible for fixing the problem. Accordingly, the Hearing Examiner concludes that on this record, obligating the Applicant to go back and study the Cheshire Drive/Old Georgetown Road intersection is not warranted.

For all of these reasons, the Hearing Examiner concludes that the proposed rezoning and development would be consistent with the purpose clause for the O-M Zone.

### **B. Compatibility**

An application for a floating zone reclassification must be evaluated for compatibility with existing and planned uses in the surrounding area. For the reasons stated in Part IV.A. above, the Hearing Examiner concludes that the proposed rezoning and development would be compatible with existing and planned uses in the surrounding area. An additional office building of moderate size and a small bank building would blend in well with the mixed character of the surrounding area and, with the parameters established in the binding elements of Exhibit 65(a), would not have an adverse impact on the adjoining neighborhood. Traffic impacts would be mitigated, resulting in no net adverse impact, and the community would obtain additional opportunities for services and employment.

### C. Public Interest

The applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

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

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities. Additional issues affecting the public interest may also be considered.

The Planning Board and Technical Staff opined that the proposed development would substantially comply with the Master Plan, and the Hearing Examiner agrees. As described in more detail in Part II.E. above, the proposed development would further many of the relevant goals in the Master Plan, including focusing development on areas with existing infrastructure, increasing variety and vitality among land uses, and encouraging a land use pattern that provides opportunities for housing and employment.

With regard to public facilities, the evidence indicates that the proposed rezoning and redevelopment would be adequately supported by and would have no adverse effect on local roadways and public utilities.

Accordingly, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification bears sufficient relationship to the public interest to warrant its approval.

## V. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I make the following conclusions:

1. The application satisfies the requirements of the purpose clause;
2. The application proposes a form of development that would be compatible with existing and planned land uses in the surrounding area;
3. The requested reclassification to the O-M Zone bears sufficient relationship to the public interest to justify its approval.

## VI. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-851, seeking reclassification from the R-90 Zone to the O-M Zone of 3.5 acres of land located at 10401 Old Georgetown Road in Bethesda, Maryland, in the 7th Election District, be **approved** in the amount requested and subject to the specifications and requirements of the approved Schematic Development Plan, Ex. 65(a); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan within 10 days of approval, in accordance with § 59-D-1.64 of the Zoning Ordinance, and provided that the Declaration of Covenants is filed in the county land records in accordance with § 59-H-2.54 of the Zoning Ordinance.

Dated: November 9, 2007

Respectfully submitted,

Françoise M. Carrier  
Hearing Examiner