

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

IN THE MATTER OF:
GREEN ACRES METRO, L.P,
Applicant

Evan Goldman
William R. Landfair
Peter A. Fillat
Joseph Plumpe
Anne (Nancy) Randall
Charles A. Irish, Jr

For the Application

Patricia A. Harris, Esquire
Attorney for the Applicant

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Zoning Application No. G-860

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER’S REPORT AND RECOMMENDATION

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I. EXECUTIVE SUMMARY

Applicant:	Green Acres Metro, L.P
LMA No. & Date of Filing:	G-860, filed November 15, 2006
Current Zone and Use:	Zone: C-2 Use: a two-story retail commercial shopping center
Zoning and Use Sought:	TS-M Zone Use: a mix of office, retail & multi-family residential uses, and structured parking in two buildings (11 story and 13 story)
Location:	11520, 11560 and 11564, Rockville Pike, North Bethesda, on the west side of Rockville Pike, between Nicholson Lane and Marinelli Road in the White Flint Sector of the North Bethesda-Garrett Park Master Plan
Area to be Rezoned:	163,909 sq. ft. Net Lot; 201,822 sq. ft. gross tract (4.63 acres)
Density Permitted in TS-M Zone:	3.0 FAR
Density Planned:	2.22 FAR, 247 Dwelling Units, including 38 MPDUs (15.38%) on 246,223 square feet of floor area; 201,822 sq. ft. of commercial (85,936 square feet of office space, and 115,886 square feet of retail space). Total Floor Area: 448,045 sq.ft.
Public Use Space:	Proposed: 10% (Binding 10%)
Active & Passive Recreation Space:	Proposed: 25% (Binding 25%)
Parking Planned:	1,093 spaces (292 resident spaces; 801 office/retail spaces)
Height Planned:	11 stories for Building 1 (north building); 13 stories for Building 2 (south building)
Traffic & Environmental Issues:	Applicant will use the Growth Policy Alternative Review Procedure for Metro Station Policy Areas; a final Forest Conservation Plan, a Tree Save Plan and a Stormwater Management Plan will be required
Zoning Issues:	None, except the Planning Board's recommendation regarding height and density described below
Consistency with Master Plan:	Rezoning to the TS-M Zone is consistent with the recommendation of the White Flint Sector Plan of the 1992 North Bethesda Garrett Park Master Plan
Neighborhood Response:	No opposition
Planning Board Recommends:	Approval, but would like density and height restrictions removed in favor of the greater height and density that may be available under a not-yet-approved sector plan amendment
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval

II. STATEMENT OF THE CASE

Application No. G-860, filed on November 15, 2006 by the property owner, Green Acres Metro, L.P, requests reclassification of approximately 4.633 acres of land in the White Flint area from the C-2 Zone (General Commercial) to the TS-M Zone (Transit Station-Mixed). The subject site is described as Part of Lot 3, Lot 4, and Lot 5 of Green Acres Subdivision, and is located at 11520, 11560, and 11564, Rockville Pike, North Bethesda. This site is on the west side of Rockville Pike, between Nicholson Lane and Marinelli Road in the White Flint Sector of the North Bethesda-Garrett Park Master Plan. The tax account numbers for the site are 04-00048923, 04-00048934 and 04-001999131.

The site will be developed with a mixed-use development consisting of office, retail and multi-family residential. There will be approximately 246,223 square feet of residential space and 201,822 square feet of commercial space, in two buildings, one eleven stories tall and the other thirteen stories tall. The residential component of the project consists of 247 dwelling units, including approximately 38 moderately priced dwelling units (MPDUs). The planned MPDUs constitute 15 percent of the total number of proposed residential units, which allows up to a 22 percent bonus density under Section 25A-5(c) of the Montgomery County Code. The actual number of MPDUs will be determined at site plan, based on the amount of bonus density actually achieved. All MPDUs will be constructed on-site. Parking will be provided in underground garages to accommodate approximately 1,093 vehicles. Traffic impact issues will be satisfied using the Growth Policy's Alternative Review Procedure for Metro Station Policy Areas, and the proposed development will be subject to preliminary plan and site plan approval by the Planning Board.

The application for rezoning was reviewed by the Technical Staff, and in a report dated September 18, 2007, Staff recommended approval of the application (Exhibit 77).¹ The Planning Board considered the application on October 25, 2007 and, by a vote of 5 to 0, recommended approval, but

¹ The Technical Staff Report is quoted and paraphrased frequently herein.

added the additional recommendation “that the binding elements 1 and 3 of the Development Plan be revised to eliminate the density restriction of 2.22 FAR (floor area ratio)² and the height restriction of 11 and 13 floors, respectively.” Exhibit 78. The Planning Board stated its rationale for the additional recommendation in its October 25, 2007 memorandum to the Council (Exhibit 78):

The Planning Board recommended that the binding elements be revised to allow the applicant to seek at the time of subdivision the maximum density and maximum height permitted by the then applicable sector plan.

* * *

The White Flint Sector of the North Bethesda Garrett Park Master Plan is now under revision and because of the site’s proximity to the White Flint Metro Station and for other reasons the site may have greater potential for development than recommended in the current sector plan. The Board anticipates that the development density for the site under the revised sector plan will be closer to the 3.0 FAR limit of the TS-M zone, than the 2.4 FAR limit of the current Sector Plan.

The Board’s recommendations will allow the applicant to seek the maximum density recommended in the sector plan at the time of subdivision and in order to accommodate the increase in density, also allow for the maximum heights recommended in the sector plan at the time of subdivision.

A public hearing was noticed for November 5, 2007 (Exhibit 70), and it proceeded as scheduled. Six witnesses were called by the Applicant, and there was no opposition testimony. The record was held open until November 9, 2007, to allow the Applicant the opportunity to file some additional documentation, including a revised Development Plan with minor corrections discussed at the hearing (Exhibit 95(a)). The record closed as scheduled.

There is no real issue as to whether the site is appropriate for rezoning to TS-M; it clearly is. A few words should be said about the Planning Board’s suggestion to modify the binding elements. The Hearing Examiner concludes, as did the Applicant (Tr. 5-6), that this development must be governed by the density limits of the Sector Plan that is currently in force, not by a revision that is under review but has not yet been approved. If a revised sector plan is in effect when this case goes to site plan review

² FAR “is determined by dividing the gross floor area of all buildings on a lot by the area of that lot.” Zoning Ordinance §59-A-2.1.

and subdivision, then an application for a development plan amendment can be filed by the Applicant to allow appropriate modifications to the binding elements to conform to the revised sector plan.³

Applicant's development plan has been endorsed by the Washington Smart Growth Alliance⁴ as a "Smart Growth Project" and an "excellent example of redeveloping older suburban strip centers and creation [of] great walkable places." Exhibit 82.

III. FACTUAL BACKGROUND

A. Zoning and Area Planning History

The zoning and area planning history of the subject site was set forth in the Technical Staff report (Exhibit 77, pp. 4-5):

The subject property was first identified for transit-related development in the 1970 North Bethesda Garrett Park Master Plan. The Master Plan recognized that the Metro station would be a major determinant of future development in the area and encouraged a mixture of office, retail, and residential uses on sites within convenient walking distance of the Metro station. The Metro station impact area was again studied in the 1978 White Flint Sector Plan. The same development policies were carried forward for properties within the Metro station impact area. Because regional commercial uses were judged to be a more suitable land use for properties along Rockville Pike, the subject property was reclassified from the C-1 zone to the C-2 zone by comprehensive rezoning following adoption of the Sector Plan.

The 1992 North Bethesda-Garrett Park Master Plan recommended a more intense mixed-use development pattern for the White Flint Metro Station impact area. The subject property was identified as a key transit-related site appropriate for a mix of residential and employment uses at a 2.4 FAR. Although the property was confirmed in the C-2 zone by the 1992 Master Plan, the property was identified as appropriate for development under the standards of the TS-M zone.

B. Subject Property

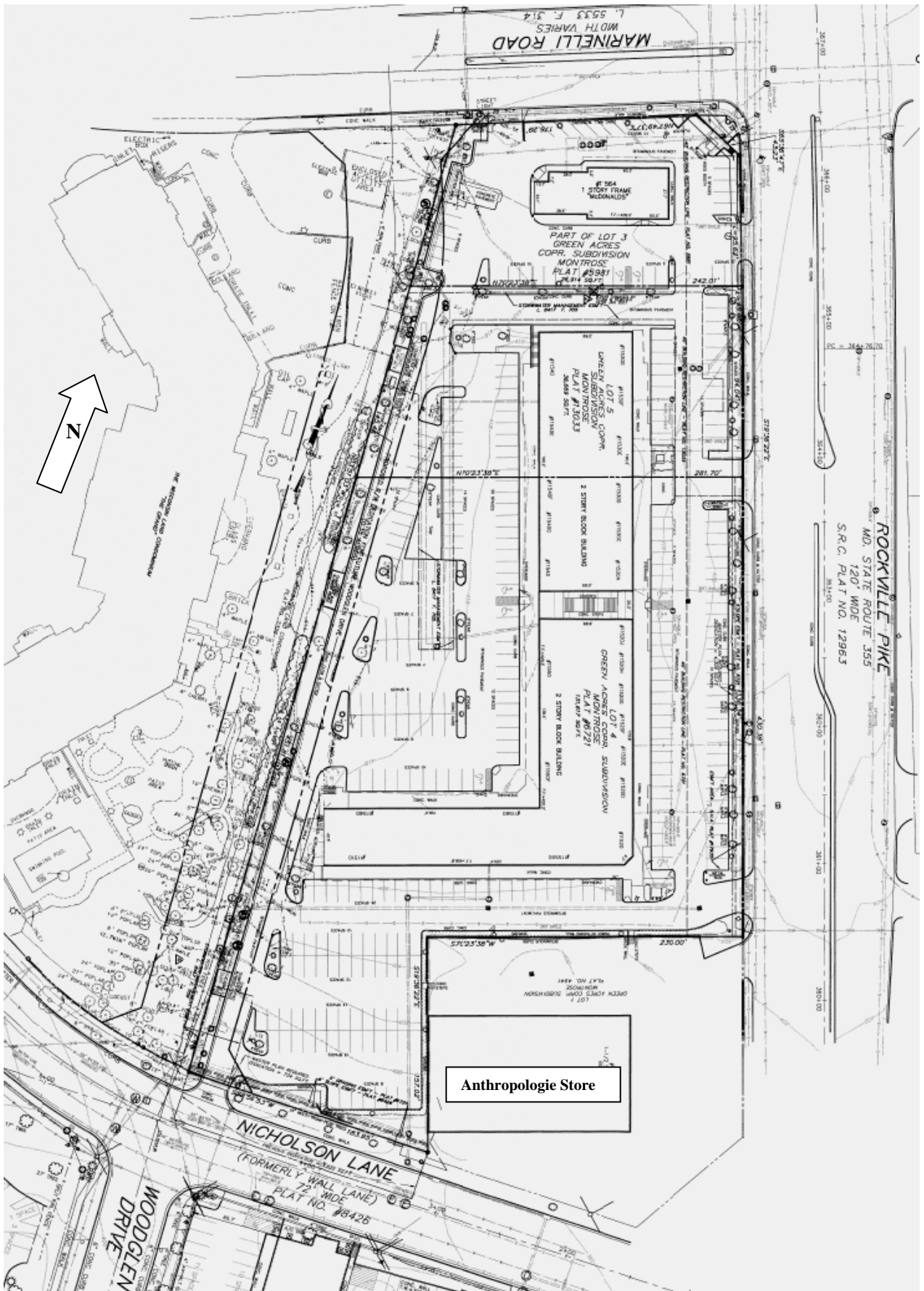
The subject property is comprised of three lots currently being used by a McDonald's restaurant and a variety of retail stores housed in a 60,000 square-foot, two-story shopping center. The remainder

³ Zoning Ordinance §59-D-1.3(h) requires that the Development Plan show the height of proposed buildings; however, Applicant designed these buildings so that some height and density could be added on the same footprint if the Sector Plan changed before Site Plan. They would still be consistent and compatible with the surrounding area. Tr. 47-49.

⁴ Washington Smart Growth Alliance is a joint effort of the Greater Washington Board of Trade, the Chesapeake Bay Foundation, Enterprise Community partners, the Metropolitan Washington Builders' Council, the Coalition for Smarter Growth and the Urban Land Institute of Washington.

of the site is devoted to at-grade parking for customers of the shopping center. Part of Lot 3 is located at the southwestern corner of the Rockville Pike and Marinelli Road intersection; Lot 4 has frontage along both Rockville Pike and Nicholson Lane; and Lot 5 is located in the center of the property on Rockville Pike. The property is within the White Flint Sector Plan area of the North Bethesda Garrett Park Master Plan, and its center is approximately 800 feet from the White Flint Metro Station. The combined property is almost trapezoidal in shape, with a notch missing from its southeastern corner, as depicted below in an aerial photo (Exhibit 90) and in the NRI/FSD on the next page (Exhibit 48):





The gross tract area, including both land previously dedicated to public right-of-way (6,622 square feet) and land that is proposed for dedication (31,291 square feet), is approximately 201,822 square feet (4.633 acres).⁵ The proposed net lot area is approximately 3.76 acres (163,909 square feet).

According to Applicant's Land Use Report (Exhibit 43), the topography of the Property reflects a gradual rise in grade from an elevation of 396 feet in the southwest corner of the site to an elevation of 420 feet in the center of the site before decreasing to an elevation of 406 feet along the frontage with Rockville Pike. The site is primarily impervious and lacks significant vegetation, although a Tree Save Plan will be required as part of the Final Forest Conservation Plan Applicant will have to submit for site plan review, since specimen or significant trees will be impacted by the construction. Technical Staff reports that the property is not located within a Special Protection Area or a Primary Management Area, and there are no steep slopes, wetlands, streams, or erodible soils. Exhibit 77, Attachment 5.

C. Surrounding Area and Adjacent Development

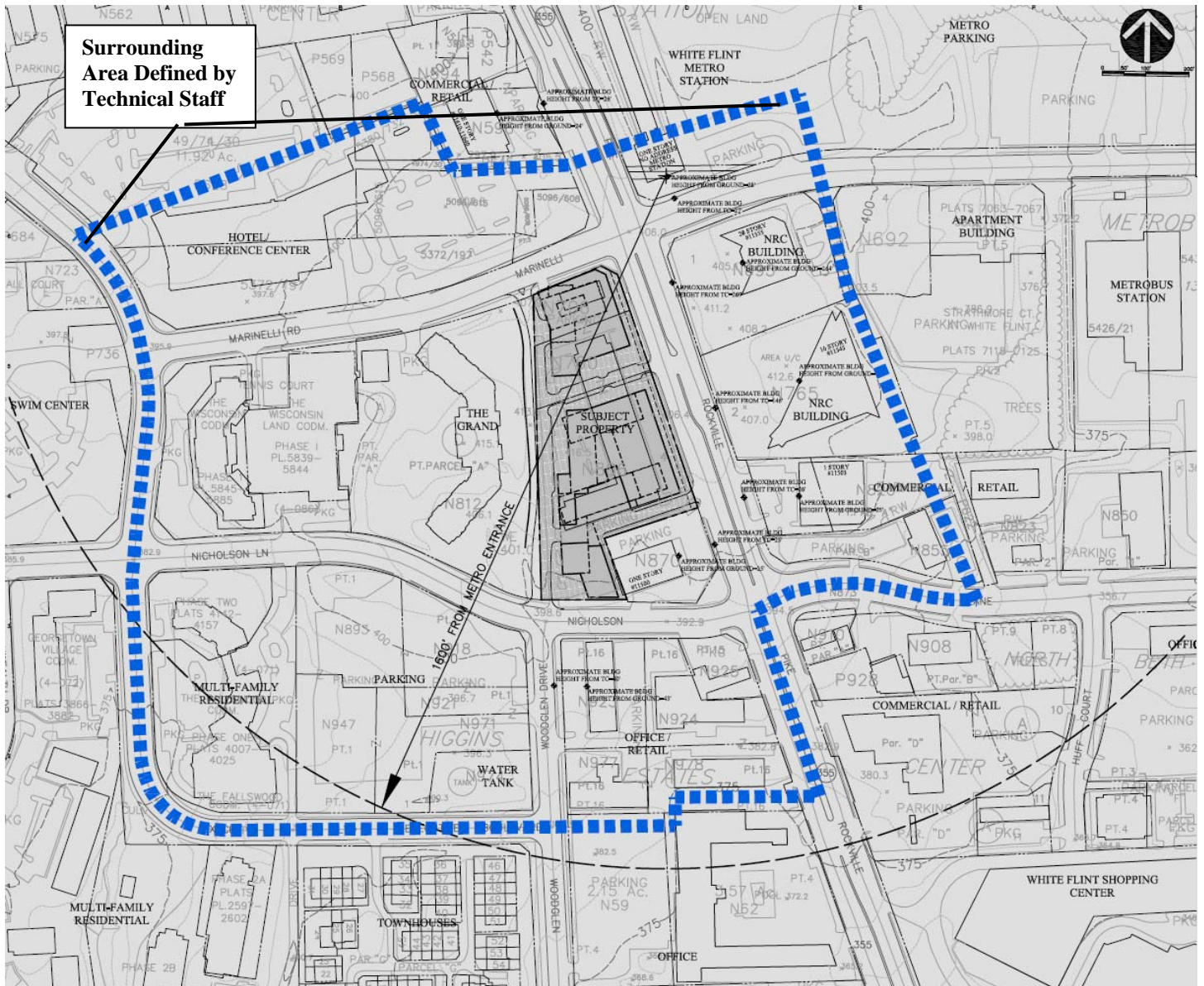
The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The "surrounding area" is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding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

⁵ The application (Exhibit 1) specified a gross tract area of 201,815 square feet, 7 square feet less than the gross tract area of 201,822 specified in the development plan (Exhibit 95(a)). The Hearing Examiner questioned Applicant as to whether this difference violated Zoning Ordinance §59-H-2.24, which provides, "After acceptance for filing, an application for a map amendment shall not be modified or amended so as to increase the area proposed to be reclassified . . ." Applicant produced testimony from Charles Irish, Jr., a civil engineer, explaining that the boundaries of the area proposed for rezoning had not changed. The initial figure was based on record information, the subdivision plats and deeds for the subject property. Subsequently, a detailed survey of the property produced a figure for this same area that was seven square feet larger. Mr. Irish characterized this change as a "refinement," not a change in the area to be rezoned. Tr. 115-116. The Hearing examiner agrees. The difference of 7 square feet with regard to a tract of 201,822 square feet is, to put it mildly, de minimis. It is in the nature of a rounding error, not an increase in the area being discussed. Even more to the point, the testimony produced by Applicant establishes that the boundaries of the site requested for rezoning have remained unchanged, so the statutory requirement has been literally satisfied.

development. In the present case, Technical Staff recommends (*Technical Staff report, Exhibit 77, pp. 5-6*) designating the surrounding area as:

- (1) across Rockville Pike to the east to include the Nuclear Regulatory buildings and the White Flint Metro Station,
- (2) west to Executive Boulevard to include the TS-M zoned high-rise residential buildings,
- (3) south to Executive Boulevard Extended to include the existing commercial buildings, and
- (4) north of Marinelli Road to include the Montgomery County Conference Center and Marriott Hotel.

The Surrounding Area, as defined by Technical Staff, is shown below in the Surrounding Area Map (Exhibit 84):



Applicant's land use expert, William Landfair, testified that Applicant accepted Technical Staff's definition of the surrounding area. Tr. 34. The Hearing Examiner also accepts this definition because it appropriately designates the area that will be most affected by the development. The surrounding area can also be seen on the aerial photo, Exhibit 90:



As described by Technical Staff, “the land use and zoning pattern of the surrounding area reflects a mix of retail, office, multi-family residential, and transit-related uses.” Exhibit 77, p. 6. Staff also notes the proximity of the White Flint Metro Station, located at the northeast corner of

Marinelli Road and Rockville Pike, well within walking distance of the subject property. The rest of the surrounding area was also well described by Technical Staff (Exhibit 77, p. 6):

Located immediately east of the subject property across Rockville Pike are two high-rise office buildings that house the Nuclear Regulatory Commission and several retail commercial uses. The entire block facing the subject property across Rockville Pike is recommended for future development under the TS-M zone. A 9.7-acre site immediately west of the property is developed with two 18 story high-rise residential buildings known as The Grand and The Wisconsin. The 9.7 acre site is classified in the TS-R zone. The Montgomery County Conference Center and a 225-room hotel are located to the north immediately across Marinelli Road from the subject site and zoned TS-M. “Anthropologie”, a single-story retail commercial use, is located immediately south of the subject property. This C-2 zoned site is proposed for future development under the TS-M zone. Two automobile service stations zoned C-2 are located immediately south and southeast of the property at the intersection of Rockville Pike and Nicholson Lane. Farther south on the west-side of Rockville are the two Rockwall Office buildings recommended for future development under the TS-M zone.

This description is similar to that contained in Applicant’s Land Use Report (Exhibit 43, pp. 2-4) and in William Landfair’s testimony (Tr. 35).

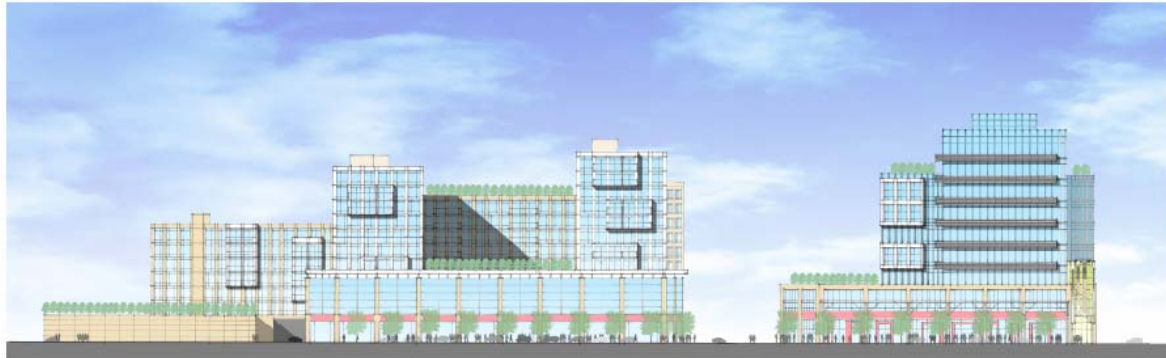
D. Proposed Development

1. Development Concept and Applicant’s Vision for the Project

The Applicant seeks to reclassify the subject site to the TS-M Zone so that it can construct a mixed-use project, including two buildings with 246,223 square feet of residential space to house 247 dwelling units, and 201,822 square feet of commercial space (115,886 square feet of retail and 85,936 square feet of office space). The dwelling units would include up to 38 (15%) moderately priced dwelling units (MPDUs), depending on the level of bonus density achieved at site plan. Beneath the two buildings will be an underground garage to accommodate 801 shared office/retail spaces and 292 residential spaces. The project includes a right-of-way dedication of 31,291 square feet, plus land previously dedicated to public right-of-way (6,622 square feet).

Applicant also plans streetscape improvements, plazas, upgraded pedestrian and vehicular circulation and green rooftop terraces. Woodglen Drive would be extended and improved to connect

Nicholson Lane with Marinelli Road. Applicant's vision of the two buildings (one 11 story and one 13 story) is shown in the following illustrative elevations (Exhibits 87(dd) and (ee)), looking from various perspectives. The first two are viewed from Rockville Pike and Woodglen Drive:



E4 EAST ELEVATION - ROCKVILLE PIKE REF: FILE



E1 WEST ELEVATION - WOODGLEN DRIVE REF: FILE



A4 NORTH ELEVATION - G1 - MARINELLI ROAD REF: FILE



E4 NORTH ELEVATION - G2 REF: FILE

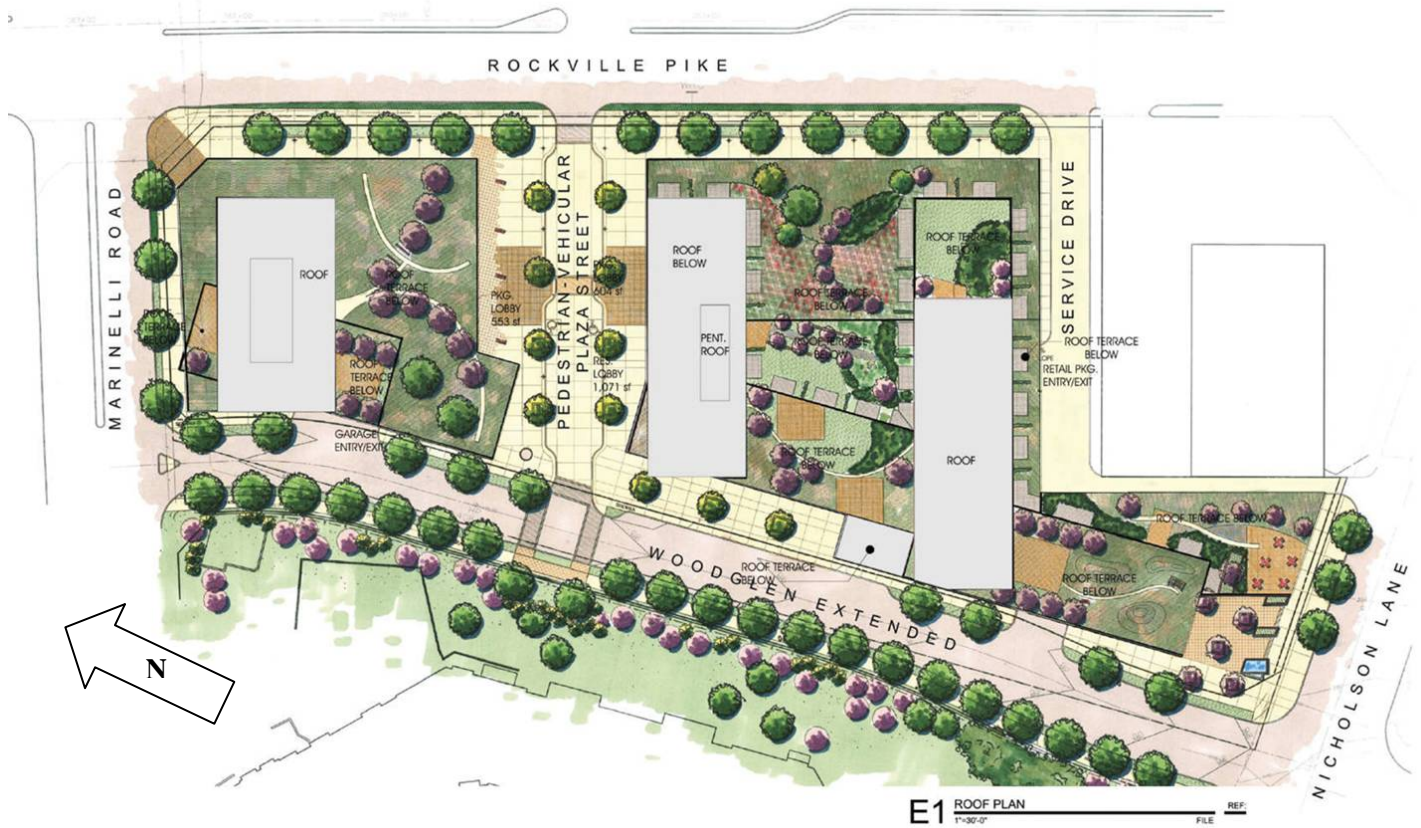


A1 SOUTH ELEVATION - G1 REF: FILE



E1 SOUTH ELEVATION - G2 - NICHOLSON LANE REF: FILE

Applicant’s land use planner noted that, while one of the buildings will be 11 stories and the other 13 stories in height, they will actually be perceived as being very close in height because the floor to ceiling ratios are just a little different between the buildings. Tr. 44. The illustrative Roof Plan (Exhibit 86) is shown below. It gives a good sense of Applicant’s plan for the green rooftop terraces, as well as ground level plazas and landscaping:



As can be seen from the above plan, a private street, or pedestrian plaza, will divide the site into halves, with a northern half being primarily office and retail, and the southern portion being primarily residential and retail. A third street, along the southern property line, will provide service access, including two garage entrances. Tr. 79-80. A third garage entrance will be located on Woodglen, near the northern end of the proposed office building. Tr. 85.

According to the developer, Holladay Corporation, the objective of the current development proposal is to increase density and build a mixed-use project appropriate in scale to its location across the street from the Metro. Tr. 18. This would take advantage of retail opportunities in the White Flint area, and serve as a connector site between the LCOR development to the northeast and the White Flint Crossing development to the south. The project was designed as a “two-sided building,” which takes into account the Woodglen side to the west, as well as the Rockville Pike side to the east. It has also been designed as a “green” building, using “smart growth” principals. Tr. 19. As a result, it has been endorsed as a smart growth project by the Smart Growth Alliance (Exhibit 82).

Applicant’s architect, Peter Fillat, testified that the intent is to make Rockville Pike “a boulevard type of space.” Tr. 80-81. A 35-foot setback will create an edge, consistent with what Technical Staff asked Applicant to do, and the buildings will face the street and create a nice pedestrian environment. Pedestrians coming from the Metro stop will be encouraged to cross the street into the subject site. Woodglen Drive extended is anticipated to be different from Rockville Pike, more of a neighborhood street. The buildings will also face that street, and they will create a smaller sidewalk, which ranges from 15 feet to 25 feet, with the goal of creating a smaller street with neighborhood retail most people living in the community would walk to. There will also be a bicycle path along the opposite side of the street.

Applicant also described its approach to the design of the project in its Land Use Plan (Exhibit 43, pp. 6-7):

The Project's design is established by its immediate context: the dense traffic of Rockville Pike, the contemporary character of the existing Metro Station entry pavilion, and the modernity of the adjacent NRC buildings. To create a hierarchical response to the existing development at this location, the Project proposes a combination of building typologies including an office tower and a residential building that spans across a driveway located on the southern portion of the Property. Each building will provide ground-floor retail space in order to respond to the strongly reinforced street presence of Rockville Pike, which should evolve into a grand boulevard. The office

tower will be located at the corner of Rockville Pike and Marinelli Road to reinforce the significance of this primary intersection and the residential building will define the western edge of the site and reinforce the neighborhood character of Nicholson Lane and Woodglen Drive extended. The architecture of the proposed structures will reflect a sense of permanence, consisting primarily of cast stone and masonry, with fenestration designed to respond to solar orientation. In addition, the facades will transition in appearance as one moves from the intensity of Rockville Pike to the primary intersection to the neighborhood streets.

The Applicant has carefully considered the design and scale of the Project with the surrounding neighbors in mind and has balanced these considerations with the objectives of the Master Plan and the County's housing policy. The current uses in the Sector Plan Area are primarily segregated on distinct parcels with very little interaction occurring between the uses on any given property, resulting in a discontinuity in the existing urban fabric. The redevelopment of the Property will result in a coherent mixed-use Project that will help establish a new sense of order in the existing urban context. The Property will have a similar density to those surrounding properties developed or approved for development since the 1992 adoption of the Master Plan. In combination with other contiguous redevelopment projects, the Project will contribute the critical mass of residents, employees and pedestrians necessary for a vibrant urban center. In an effort to maximize use of the Metro, the office uses are located closest to the Metro entrance, at the corner of Rockville Pike and Marinelli Road.

Technical Staff concluded that development of the subject property under the standards of the TS-M zone would be compatible with the scale and density of existing and planned land use for the surrounding area. Exhibit 77, p. 6. Both Staff and the Planning Board characterized the project as “a well-designed, mixed-use development.” Exhibits 77 and 78, p. 1. As will be discussed more fully below, the Hearing Examiner also finds that Applicant’s development concept and vision for the project constitute a coherent and well-conceived plan for the development of the subject site, in accordance with the standards set forth in the Zoning Ordinance and the objectives of the applicable Master Plan.

2. Development Plan & Binding Elements in LMA G-860

Pursuant to Code § 59-D-1.1, development in the TS-M Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the TS-M Zone. Under Code §59-D-1.3, this development plan must contain several elements:

- (a) A natural resources inventory;
- (b) A surrounding area map, showing the relationship to the site and use of the adjacent land;

- (c) A land use plan showing site access; locations and uses of all buildings and structures; a preliminary classification of dwelling units; locations of parking areas, including number of parking spaces; location of land to be dedicated to public use; location of land intended for common or quasi-public use but not intended to be in public ownership; and a preliminary forest conservation plan;
- (d) A development program stating the sequence of proposed development;
- (e) The relationship, if any, to the County's capital improvements program;
- (f)&(g) [Inapplicable to the TS-M Zone];
- (h) A diagram showing general build and height of principal buildings, their relationship to each other and adjacent areas; and
- (i) [Inapplicable because the property does not lie within a special protection area]

The Development Plan and the Land Use Plan that constitutes one of its primary parts are binding on the Applicant except where particular elements are identified as illustrative or conceptual. Illustrative elements may be changed during site plan review by the Planning Board, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment.

The land use plan for the present zoning application, Exhibit 95(a), is titled "Development Plan" and will be referred to by that name in this report. The binding elements are printed on the development plan, and they are as follows:

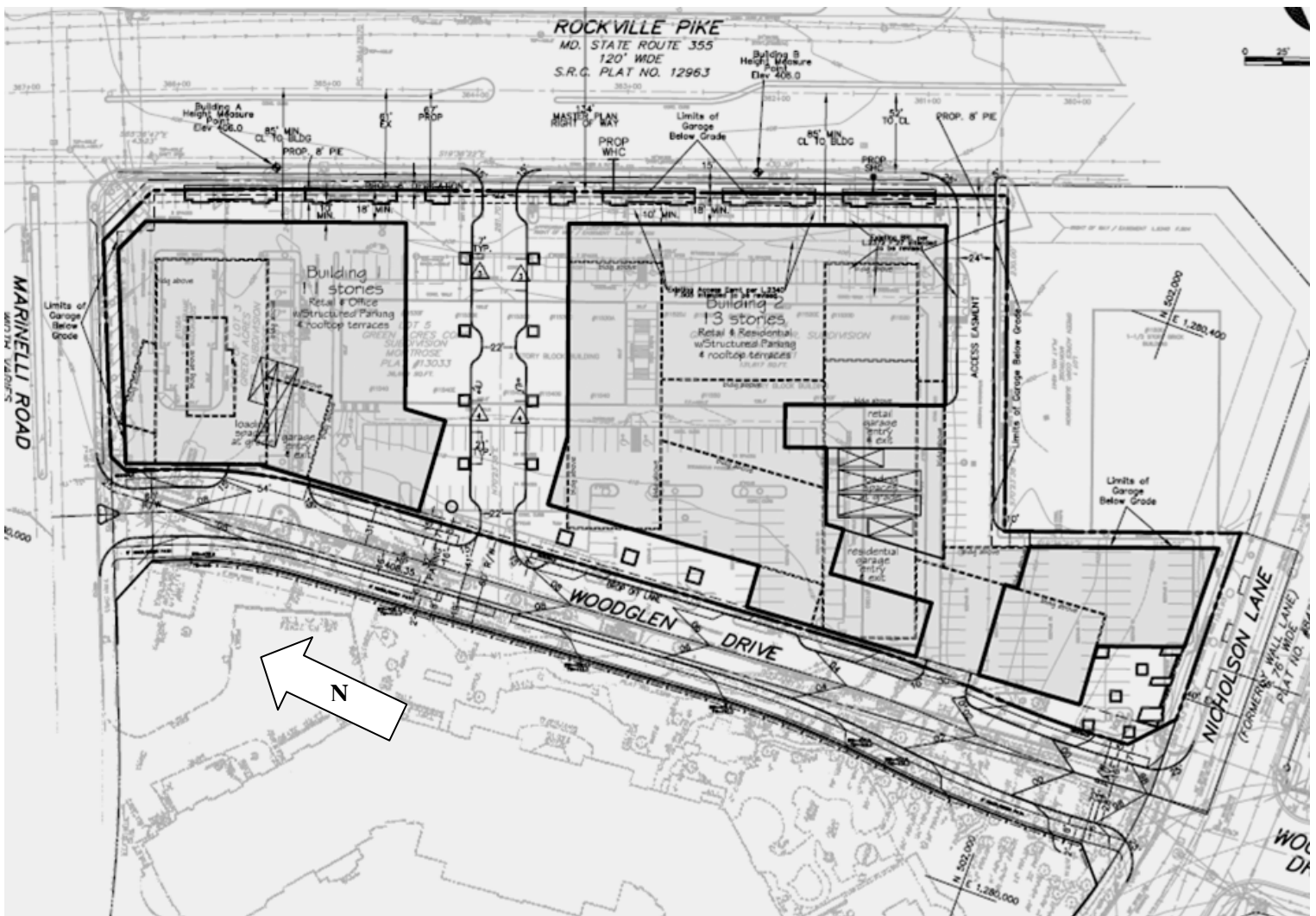
BINDING ELEMENTS:

1. Development on the property shall be limited to 2.22 FAR (448,045 square feet) with no more than 1.0 FAR. (201,822 square feet) of non-residential density.
2. The Applicant shall provide up to 15% of the total number of residential units as MPDUs depending on the amount of the density bonus achieved by the Applicant pursuant to Chapter 25A of the Montgomery County Code, as amended 2004.
3. The total number, mix and location of the residential units, including the MPDUs, shall be determined at site plan. All MPDUs shall be provided on-site. The following maximum height limitations shall apply to the development: (i) up to eleven (11) stories for Building I located on the northern portion of the Property; and (ii) up to thirteen (13) stories for Building 2 located on the southern portion of the Property. The final determination of the height, in feet, of each of the buildings referenced on the development plan shall be made at site plan.
4. A dedication agreement between the Applicant and Forest City regarding the ultimate alignment and right-of-way of Woodglen Road Extended between Nicholson Lane and Marinelli Road shall be provided prior to site plan approval.

- 5. A minimum of 10% public use space and 25% active or passive recreation space will be provided with final areas to be determined at site plan.
- 6. All necessary releases of the Building Restriction Line and Access Agreement that binds a portion of the Landow Property for the benefit of the Holladay Property and binds a portion of the Holladay Property for the benefit of the Landow Property shall be provided prior to site plan approval.

A copy of the Development Plan (Exhibit 95(a)) is reproduced below and on the following pages.

To make its details more visible, the site layout diagram is shown separately below. It depicts the proposed locations of all structures, as well as additional information regarding the planned development.



Development Plan, Site Layout (Exhibit 95 (a))

In addition to the site layout diagram and the binding elements, the development plan contains the following “General Notes” and a variety of tables reproduced on succeeding pages:

GENERAL NOTES:

1. PROPERTY COMPRISED OF LOTS 4 & 5, MONTROSE, PLAT NOs. 6721 & 13033 & *p/o* LOT 3, MONTROSE, PLAT NO. 5981.
2. THE HORIZONTAL DATUM IS MARYLAND STATE GRID NORTH (NAD83/91) PER THE FOLLOWING NGS CONTROL STATIONS: STATION 19928 - WSSC BRASS DISK IN CL OF ROUTE 355 NORTH 502303.917, EAST 1280457.672 STATION 20661 - USCGS BRASS DISK ON W SIDE OF ROUTE 355 NORTH 501323.049, EAST 1280739.066
3. THE SUBJECT PROPERTY LIES WITHIN ZONE C (AREA OF MINIMAL FLOODING) AS SHOWN ON FLOOD INSURANCE RATE MAP (FIRM) COMMUNITY PANEL NUMBER 240049 0175C, FOR MONTGOMERY COUNTY, MD, AUGUST 1, 1984.
4. THE SUBJECT PROPERTY IS LOCATED ON TAX ASSESSMENT MAP NUMBER HQ12 AND IS CURRENTLY ZONED C2 ACCORDING TO MNCP&PC RECORDS.
5. BOUNDARY SURVEY WAS PREPARED BY VIKA, INC. DATED SEPTEMBER, 2004.
6. THIS SITE IS LOCATED IN THE ROCK CREEK WATERSHED AND IS CLASSIFIED AS USE 1.
7. THE PROJECT IS PROPOSED TO BE SERVED BY PUBLIC WATER AND SEWER SYSTEMS AND IS CURRENTLY IN WATER AND SEWER SERVICE CATEGORIES W-1 & S-1, RESPECTIVELY.
8. BACKGROUND DATA FOR FCD SITE FROM LOIEDERMAN ASSOCIATES PLAN, DATED MARCH, 2001. BALANCE OF IMAGERY FOR HOLLADAY CORPORATION SITE WAS FIELD-SURVEYED BY VIKA, INC.
9. CHANGES TO THIS PLAN DUE TO FINAL ENGINEERING REQUIRED AS A RESULT OF PUBLIC AGENCY REVIEW, SUBSEQUENT TO APPROVAL OF THE CERTIFIED SITE PLAN, ARE ALLOWED AND DO NOT REQUIRE AMENDMENTS TO THIS PLAN BY THE PLANNING BOARD.
10. THE NUMBER OF PRIVATE PARKING SPACES WILL BE SET AT SITE PLAN, SUBJECT TO FINAL BEDROOM MIX, UNIT COUNT AND TOTAL FAR, AND WILL COMPLY WITH MONTGOMERY COUNTY PARKING REQUIREMENTS.
11. THE TOTAL NUMBER OF RESIDENTIAL UNITS ON THE PROPERTY (INCLUDING THE NUMBER AND PERCENTAGE OF MPDU_s) MAY INCREASE FROM THE PROPOSED MAXIMUM OF 247 UNITS UP TO A MAXIMUM OF 275 UNITS AS A RESULT OF THE CONVERSION OF COMMERCIAL TO RESIDENTIAL USE.
12. ALL COMPONENTS OF THE DEVELOPMENT PLAN EXCEPT FOR THE BINDING ELEMENTS ARE ILLUSTRATIVE OR CONCEPTUAL IN NATURE AND WILL BE FINALLY DETERMINED IN CONNECTION WITH THE APPROVAL OF THE SITE PLAN.

PROPOSED DEVELOPMENT TABULATION

	BUILDING 1	BUILDING 2	TOTAL
EXISTING LOT AREA			195,200
PLUS PREVIOUS DEDICATION AREA FOR NICHOLSON LANE			6,622
GROSS TRACT AREA (SF)			201,822
LESS PROPOSED DEDICATION PER SECTOR PLAN (SF)			31,291
PROPOSED NET LOT AREA (SF)			163,909
PERMITTED GROSS FLOOR AREA (SF) ⁽¹⁾			484,372
PROPOSED GROSS FLOOR AREA ⁽²⁾			
NON-RESIDENTIAL GFA (SF)	148,091	53,731	201,822
RESIDENTIAL GFA (SF)	-	246,223	246,223
PROPOSED TOTAL GFA (SF)	148,091	299,954	448,045
PROPOSED TOTAL FAR			2.22

⁽¹⁾ While the Zoning Ordinance allows up to a 3.0 FAR in the TS-M Zone, the White Flint Sector Plan recommends a maximum of 2.0 FAR, with the 2.4 FAR permitted when the increase over 2.0 is 50% MPDUs.

⁽²⁾ Non residential GFA shall not exceed 1.0. Residential GFA can be increased by as much as 10% and/or to a maximum of 275 units.

OPEN SPACE TABULATION

OPEN SPACE TABULATION

	% OF NET LOT AREA	SQ. FT
PUBLIC USE SPACE		
(BASED ON TOTAL NET LOT AREA)		
REQUIRED	10%	16,391
PROVIDED	10%	16,391
ACTIVE PASSIVE RECREATION AREA		
(BASED ON RESIDENTIAL AREA OF SITE)		
RESIDENTIAL PORTION/AREA OF SITE		112,133
REQUIRED	25%	28,034
PROVIDED	25%	28,034

*A minimum of 10 percent of the site will be devoted exclusively to public use space & an additional 25% (at a minimum) will be devoted to active and passive recreational space.

HEIGHT TABULATION

	BUILDING 1	BUILDING 2
PROPOSED MAXIMUM # OF STORIES ABOVE GRADE	11	13

MPDU CALCULATION

		Holladay Proposal TSM W/MPDU Bonus
Gross Tract Area (SF)	LA	201,822
Base FAR	FAR	2.00
Residential Base FAR	RFAR	1.00
Commercial Base FAR ^(a)	CFAR	1.00
Base GFA (SF)	GFA	403,644 GFA=LA*FAR
Residential Base GFA	RGFA	201,822
Commercial Base GFA	CGFA	201,822
Bonus FAR ^(b)	BFAR	22%
Bonus GFA (SF)	BGFA	44,401 RGFA*BFAR
Total GFA (SF)	TFA	448,045 GFA+BGFA
Total FAR	TFAR	2.22 TGFA/LA
Residential Total GFA (SF)	RTFA	246,223 (LA*RFAR)+BGFA
Commercial Total GFA (SF)	CTFA	201,822 TGFA-RTFA
Avg Residential GSF/Unit	UNTSF	1,000
Total Residential Units	UNITS	247
Market Res GSF/Unit	MKTSF	1,014
Total Market Res Units	MKT	209 UNITS-MPDU
Affordable Res GSF/Unit	AFFSF	900
Total Aff Res Units (Inc. MPDU)	AFF	38
MPDU Requirement	%MPDU	15.0%
MPDU's	MPDU	38 UNITS*MPDU%
Total Aff Units (NIC MPDU)		NA
Percentage of Affordable Units		15.38%

PARKING SUMMARY

PARKING TABULATION	
SUMMARY OF PARKING	
REQUIRED PARKING	1,412
RESIDENTIAL	292
SHARED OFFICE/RETAIL	1,120
REQUIRED PARKING BASED ON MIXED USE CALCULATION	1,234
RESIDENTIAL	292
SHARED OFFICE/RETAIL	942
REDUCTION, VIA PROXIMITY TO METRO	-141
PROVIDED PARKING	1,093*
*Subject to approval of parking waiver to be provided by the Planning Board at the time of Site Plan based on proximity to Metro, pursuant to Zoning Ordinance Section 59-E-3.32	

MIXED USE PARKING CALCULATION

⁽⁴⁾ - See the Mixed Use Parking Calculation, this sheet.

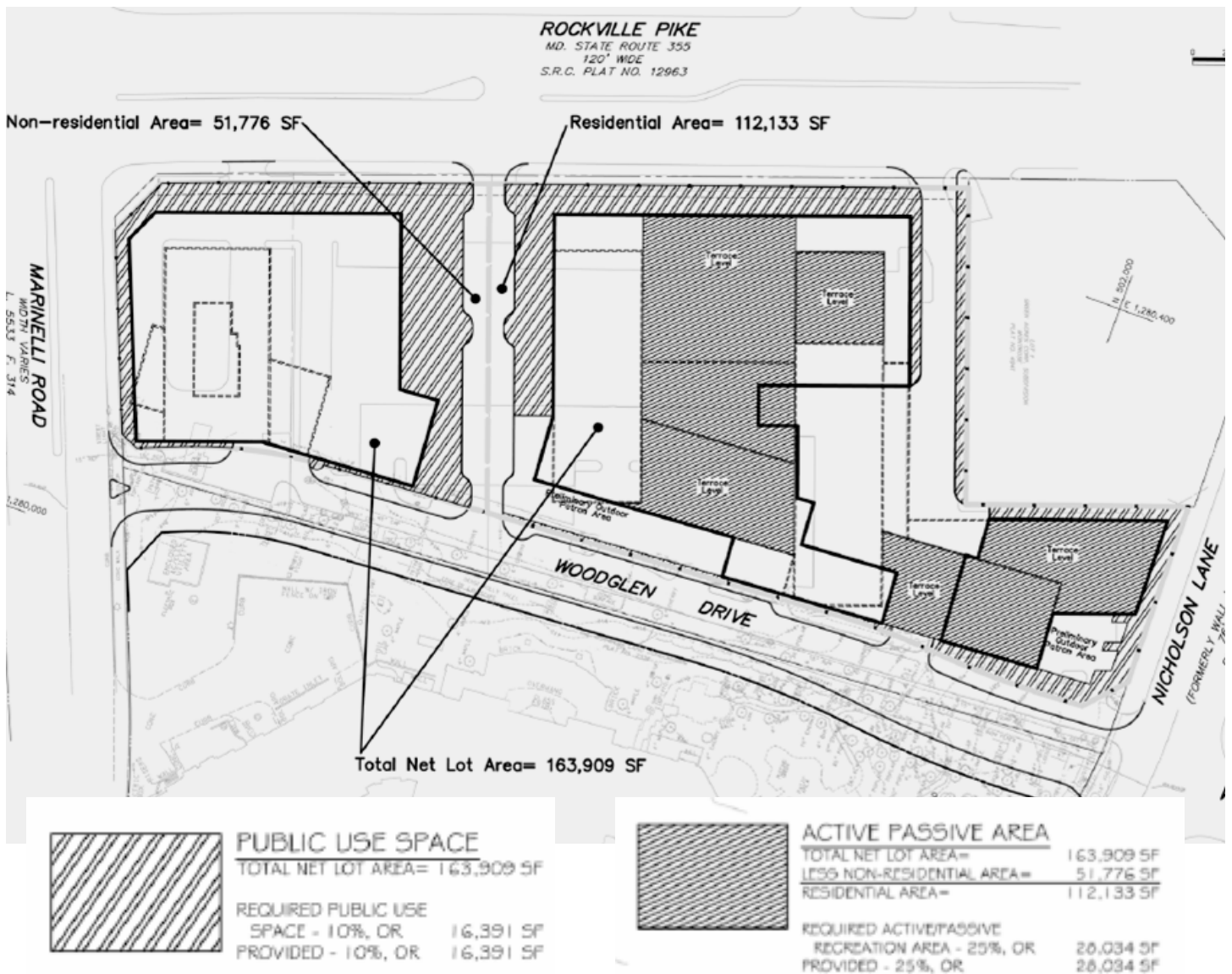
	WEEKDAY		WEEKEND		NIGHT TIME	NORMAL (NC MIXED USE) REQUIREMENTS
	6 AM - 6 PM	6 PM - MID	6 AM - 6 PM	6 PM - MID	MID - 6 AM	
	OFFICE/INDUSTRIAL	198	20	20	10	
GENERAL RETAIL	258	387	430	301	22	430
HOTEL	0	0	0	0	0	0
RESTAURANT	246	492	492	492	49	492
THEATER/REC SPACE	0	0	0	0	0	0
MEETING CENTER	0	0	0	0	0	0
MULTI-FAMILY	146	292	292	292	292	292
PERSONAL LIVING QUARTERS	0	0	0	0	0	0
ALL OTHER	0	0	0	0	0	0
	648	1,191	1,234	1,095	373	1,412

PARKING TABULATIONS

RESIDENTIAL PARKING TABULATION			
UNIT TYPE	GSF OR # OF UNITS	REQUIRED PARKING RATIO	REQUIRED SPACES
EFFICIENCY UNIT	29	1.00	29.00
EFFICIENCY MPDU UNIT	7	0.50	3.50
ONE BEDROOM UNIT	126	1.25	157.50
ONE BEDROOM MPDU UNIT	19	0.63	11.88
TWO BEDROOM UNIT	54	1.50	81.00
TWO BEDROOM MPDU UNIT	12	0.75	9.00
SUBTOTAL (ROUNDED UP)	247		292.00
TYPE OF USE	GSF OR # OF UNITS	REQUIRED PARKING RATIO	REQUIRED SPACES
RETAIL PARKING TABULATION			
RETAIL	85,884	0.005	429.42
SUBTOTAL (ROUNDED UP)			430
RESTAURANT PARKING TABULATION			
INDOOR PATRON AREA @ 50% x RESTAURANT SF	15,000	0.025	375.00
OUTDOOR PATRON AREA	7,800	0.015	117.00
SUBTOTAL (ROUNDED UP)			492
OFFICE PARKING TABULATION			
OFFICE AREA ⁽³⁾	85,938	0.0023	197.66
SUBTOTAL (ROUNDED UP)			198
SUMMARY OF REQUIRED PARKING			
		REQUIRED SPACES	PROVIDED SPACES
RESIDENTIAL		292	292
SHARED OFFICE/RETAIL ⁽⁴⁾		1,120	801
COMBINED PARKING REQUIREMENT		1,412	1,093

⁽³⁾ - The project is located within 800 feet of a METRO station entrance.

The project will be developed in one phase, and as pledged in Binding Element No. 5, will provide the required minimum of 10 percent public use space (16,391 square feet, on ground level) and 25 percent active or passive recreation space (28,034 square feet),⁶ with final areas to be determined at site plan. Most of the active/passive recreational space is in roof-top terraces. The following diagram (Exhibit 79(b)) demonstrates the proposed active and passive recreational area and the proposed public use space.



⁶ Pursuant to Zoning Ordinance §59-C-8.43(b), the 25% active/passive recreational space (28,034 square feet) is based only on the portion of the net lot area devoted to residential purposes (112,133 square feet).

A number of additional matters discussed at the hearing warrant mention:

a. MPDUs, Density and the Sector Plan's 50% Provision:

The Master Plan (p. 56) permits an FAR of up to 2.4, but the amount above 2.0 must be all residential, and 50% of it must be affordable housing. As shown on the Development Plan, the total floor area ratio (FAR) of this project will be 2.22, based on the 4.63 acre gross tract area. The FAR is calculated as follows:

The Gross Tract Area is 201,822 square feet. Multiplying that gross tract area by the 2.4 FAR permitted in the Sector Plan would yield a Permitted Gross Floor Area (GFA) of 484,372 square feet. Applicant proposes a GFA of only 448,045 square feet, with a combined commercial and residential FAR of 2.22. It is composed of 201,822 square feet of Commercial GFA (*i.e.*, a commercial FAR of 1), plus 246,223 square feet of Residential GFA (*i.e.*, a residential FAR of 1.22).

The residential FAR exceeds 1 by 22%, which is the bonus density permitted under Montgomery County Code §25A-5(c), for the 15%, on-site MPDUs (38 of 247 dwelling units). Thus, the increase in FAR above 2.0 is entirely residential, as required by the Master Plan.

The 50% requirement on page 56 of the Master Plan is more difficult to understand. Technical Staff does not directly address this issue in its report; however, it approved the density and number of MPDUs proposed by Applicant. Applicant produced testimony that Staff interpreted this provision as applying to residential developments; not mixed use developments. Tr. 150-153.

Applicant's counsel argued that Applicant's residential portion doesn't go above a 2.0 FAR. Rather it goes above the 1.0 FAR to a 1.22 FAR (based on the 22% MPDU bonus), and thus the 50% requirement does not apply. Applicant relied in part upon the White Flint Crossing case (LMA G-830), which used the same reasoning to reach an ultimate density of 2.29 FAR in that case. She also correctly noted that the Zoning Ordinance (§59-C-8.42(c)) provides that the maximum density

permitted in the TS-M Zone may be increased to accommodate the construction of moderately priced dwelling units in accordance with Chapter 25A. Her argument is that no matter how one interprets the Sector Plan, it is trumped by the Zoning Ordinance and the MPDU law (Chapter 25A of the Code), since the Sector Plan is merely a recommendation. Applicant also does not have to go through the Alternative Review Committee because it is not exceeding the Sector Plan's overall recommendation on density of 2.4 FAR. Tr. 146-149.

The Hearing Examiner agrees with these observations and arguments. Moreover, if one applies the 50% provision to this case, it appears that the proposed development is compliant. Twenty-two per cent of the 247 dwelling units (the amount the residential FAR exceeds the 2.0 base FAR cap) equals 55 dwelling units. Since there will be 38 MPDUs, the extra 0.22 of residential FAR is composed of more than 50% affordable housing, which is the Master Plan criterion.

In sum, the Hearing Examiner finds that the proposed development complies with the Master Plan's density recommendations, as well as the Zoning Ordinance's requirements pertaining thereto.

b. The Side Agreements Regarding Easements and Right-of-Way Dedication:

Planning for this development was complicated by the fact that the neighbor to the south (the Anthropologie Store owned by Rockville Seasons Limited Partnership, an affiliate of Landow and Company) has an access easement and a Building Restriction Line (BRL) covenant on the subject site. Moreover, the agreement of the neighbor to the west, Forest City, which operates the adjacent "The Grand" apartments, is needed to jointly dedicate sufficient right-of-way to allow for the extension and reconfiguring of Woodglen Drive.

Both of these issues have been worked out in negotiations between the Applicant and its neighbors. See Exhibit 68 and Attachment 11 to Exhibit 77. These agreements will have to be finalized prior to site plan approval, although Applicant's engineer, Charles Irish, Jr., testified that even if these

deals fell through, the development could go forward substantially as planned. Tr. 180-184.

Nevertheless, Binding Elements numbered 4 and 6 require Applicant to resolve these matters prior to site plan approval. Technical Staff described the Landow property issue as follows (Exhibit 77, p.8):

The G-860 application references a Building Restriction Line Covenant and an Access Easement, recorded among the land records of Montgomery County at Liber 2372, folio 2340, folio 505, respectively. The Building Restriction and Covenant binds a portion of the Landow property, located immediately south of the subject property, for the benefit of the Holladay Property and, at the same time, binds a portion of the Holladay Property for the benefit of the Landow Property. Similarly, the Access Easement provides for a twenty-foot wide access lane across the Holladay Property for the benefit of the Landow Property and also provides a twenty-foot wide access lane across the Landow Property for the benefit of the Holladay Property. Extinguishment of the Building Restriction Line Covenant and Access Easement is required for the future development of the two properties.

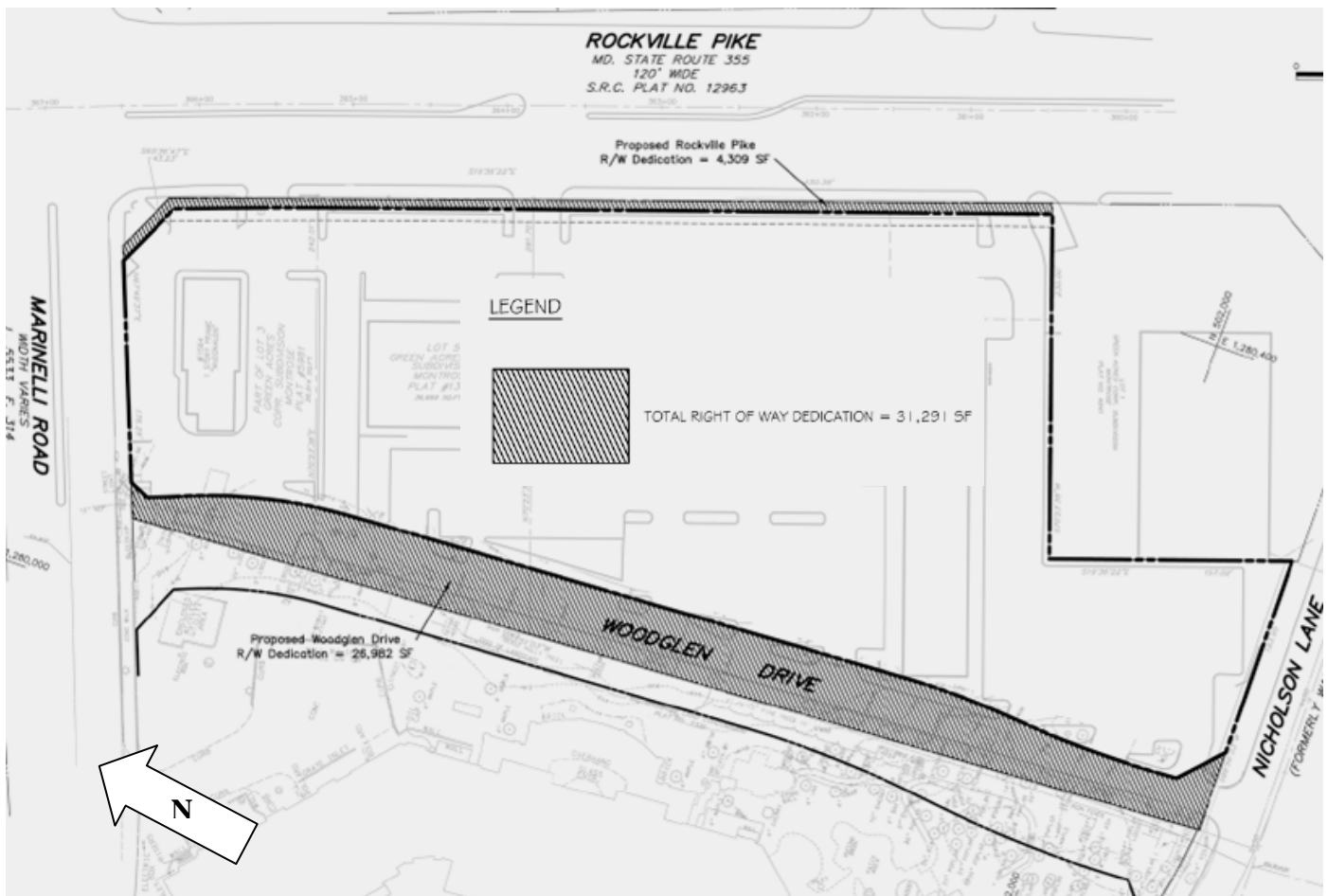
Accordingly, the two parties have finalized a written agreement that will require a Reciprocal Easement Agreement to be executed, which will provide access to the Landow Property via the proposed 24-foot right-of-way on the Holladay Property shown on the Development Plan. The parties have also agreed to record in the land records a release of the existing building Restriction Line Covenant and Access Agreement. The recordation of these releases will extinguish all rights previously associated with the Building Restriction Line Covenant and Access Agreement. The Development Plan includes a binding element that requires all necessary releases of the Building Restriction Line Covenant and Access Agreement to be finalized at the time of site plan review.

The Development Plan (Exhibit 95(a)), shows both the existing access easement and the Building Restriction Line, as well as the proposed access easement to replace them. The Hearing Examiner feels that the parties' agreement is sufficient to allow the rezoning at this time. The property is certainly appropriate for the TS-M Zone, and if there are later changes to the parties' agreement, the development plan can be modified by a development plan amendment.

The same is true of the dedication agreement between Applicant and Forest City regarding Woodglen Drive. Mr. Irish described that understanding in his testimony. The adjacent property to the west, a rental apartment building known as "The Grand," is part of a 9.7 acre site that is zoned TS-R, with two residential towers owned by Forest City, The Grand and The Wisconsin, the latter of which is a

condominium building. In the final approval of that site, Forest City was required to dedicate land for the extension of Woodglen. Applicant negotiated with Forest City to minimize Forest City's share of the dedication to the right-of-way. Initially 70 percent of the right-of-way would have come from Forest City's property, but Applicant has agreed to reduce that down to about 42 percent, with the balance of it coming from the subject site. Forest City has agreed to this. The Department of Public Works and Transportation (DPWT), has conceptually approved this plan. See Greg Leck's letter of September 6, 2007 (Exhibit 77, Attachment 9). The agreement will be finalized by site plan, resulting in the dedication at subdivision, as reflected in Binding Element No. 4. Tr. 139-141.

The proposed 31,291 square feet of right-of-way dedication by Applicant (26,982 square feet along Woodglen and 4,309 square feet along Rockville Pike) is shown on the following diagram (Exhibit 73(b)):



c. Parking Spaces to Be Provided:

Applicant proposes to supply 1,093 parking spaces, 292 for the residential users and 801 for the commercial users (shared office/retail). These figures are a bit different from those mentioned in the Technical Staff report (a total of 1,099 spaces) because the Hearing Examiner noticed some small mathematical and typographical errors, which were corrected in the final development plan (Exhibit 95(a)). The correct parking tabulations are shown on page 22 of this report.

The number of residential parking spaces to be provided (292) is the amount specified in Zoning Ordinance §59-E-3.7 for the proposed dwelling units;⁷ however, the number of commercial spaces to be provided is reduced by two factors, the mixed-use nature of the development and the proximity to a Metro stop. The number of required spaces in a mixed-use facility is calculated in accordance with a matrix established in Zoning Ordinance §59-E-3.1.

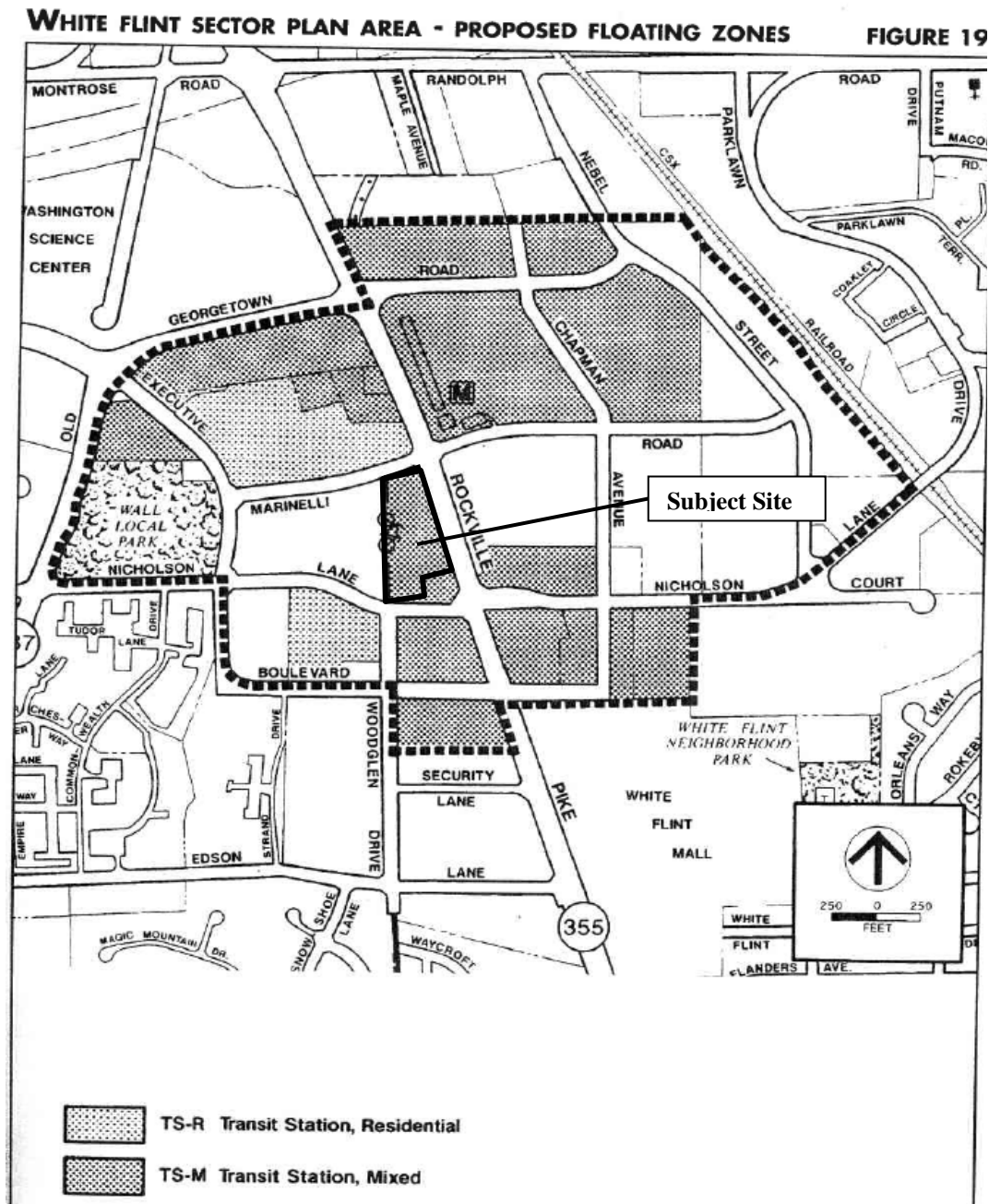
Based on that calculation, the highest parking requirement of all the proposed uses would be 1,234 parking spaces. That then becomes the base parking requirement for the entire mixed-use development, as shown in the tabulations on page 22 of this report. The commercial portion of that figure (942 spaces) may be further reduced by 15%, if the Planning Board elects to do so at site plan in accordance with Zoning Ordinance §59-E-3.32(a), because the development is within 1,600 feet of a Metro station. That leaves the number of required commercial spaces at 801. When combined with the 292 residential spaces, Applicant would be required to supply a total of 1,093 spaces. The revised Development Plan (Exhibit 95(a)) so reflects.

3. Conformance with the Master Plan

The subject site is located within the area studied in the *North Bethesda Garrett Park Master Plan*, approved and adopted in 1992. Pages 51 through 62 of the Master Plan address the White Flint

⁷ The Code specifies that in the TS-M Zone and certain other zones, the parking requirement for each moderately priced dwelling unit is one-half of the number of spaces required for market-priced units.

area, and that portion of the Master Plan is referred to as the White Flint Sector Plan.⁸ Thus, the terms Master Plan and Sector Plan are often used interchangeably. The key point in the Sector Plan is the fact that it recommends the subject site for the TS-M Zone sought in this case, as demonstrated by Figure 19 on page 55 of the Master Plan, which is reproduced below:



⁸ The White Flint Sector is also discussed at pp. 126 to 131 of the Master Plan, in connection with Urban Design and at pp. 285 and 291 regarding extending Woodglenn Drive, which it recommends.

Page 35 of the Master Plan lists its overall “Land Use and Zoning Objectives:”

- *Focus future development on land nearest to Metro stops, new transit stations, and areas served by existing transportation infrastructure.*
- *Preserve and increase the variety of housing stock, including affordable housing.*
- *Encourage a mixture of land uses in redeveloping areas to promote variety and vitality.*
- *Encourage a land use pattern that provides opportunities for housing and employment*

The objectives for the White Flint Sector Plan area on page 51 of the Master Plan:

- *Develop White Flint as the main urban center of North Bethesda.*
- *Capitalize on the public investment in the Metro system and encourage its use rather than continued reliance on the automobile.*
- *Promote mixed-use development near the Metro station to ensure the 24-hour vitality of the area.*
- *Include a significant transit serviceable residential component within the Sector Plan area.*
- *Develop policies to ensure a lively pedestrian environment.*

Applicant’s land use planner, William Landfair, testified that the proposed development would satisfy all these goals. The project will provide significant density and tall buildings, near the center of the area, contributing to the urban core that the Master Plan seeks. It will be a mixed-use development near the Metro Station with a transit serviceable residential component. Mr. Landfair observed that the development will create “a certain synergy” through the mixture of uses, adding vitality to the area that is now lacking. Applicant will make improvements along the entire perimeter of this property, particularly along Rockville Pike and Woodglenn extended, which will improve the circulation pattern for pedestrians and vehicles in the area and relieve some of the congestion on Rockville Pike.

Moreover, streetscape treatments that are recommended in the Sector Plan are incorporated into the development plan. The proposed development will provide new housing stock, both market rate and affordable, and will also provide employment opportunities with the office and retail uses

proposed on the site. All of this is in close proximity to the Metro station, so as Mr. Landfair points out, the application is fully consistent with the objectives of the Master Plan. Tr. 41-44.

Consistent with the Master Plan (pp. 285 and 291), the Development Plan also calls for the extension of Woodglen Drive, which will become the western boundary of the project and will connect Marinelli to the North and Nicholson to the South with a vehicular, pedestrian and bicycle route. Mr. Landfair noted that this will provide an important north/south connector, which will greatly improve circulation in the area for both vehicles and pedestrians, and will also assist in getting people more conveniently to the Metro station, all of which are goals of the Master Plan. Tr. 35-36.

The density recommendations of the Sector Plan were discussed in pages 24 to 25 of this report, and the Hearing Examiner concluded that the proposed development is consistent with those recommendations. One other provision of the Sector Plan requires further mention, and that is the requirement on page 56 of the Master Plan that calls for a parcel greater than six acres for properties to be approved for a density of over 1.0 FAR.

Mr. Landfair opined that the Master Plan is referencing commercial development exceeding 1.0 FAR, not a mixed-use project. In this case, the proposed commercial portion of the project would not exceed 1.0 FAR. He indicated that Technical Staff sees it that way as well. Moreover, even if one disagreed, the application is in substantial conformance with all of the other standards and recommendations in the plan. He noted that G-830, an application for TS-M located just two blocks to the south of the property, on the west side of Rockville Pike, called for a mixed-use development (White Flint Crossing) of just under 6 acres, and it was approved. Tr. 36-40.

Technical Staff and the Planning Board concluded that “[t]he project is in substantial compliance with the zoning, land use, and density recommendations of the North Bethesda-Garrett Park Master Plan . . .” The Hearing Examiner agrees and so finds.

4. Public Facilities (Transportation, School Capacity and Water & Sewer Service)

The County's Growth Policy (GP) and the Adequate Public Facilities Ordinance (APFO) require a review of the availability of adequate public facilities for any proposed development.

Applicant provided testimony and exhibits with regard to transportation, schools, water and sewer service and other utilities.

a. Transportation:

Technical Staff outlined the road network serving the property (Exhibit 77, pp. 10-11):

(1) Rockville Pike, a six lane divided highway within a 134-foot right-of-way, east of the property, (2) Nicholson Lane, a four lane arterial road within an 80-foot right-of-way that passes the site immediately to the south, and (3) Marinelli Road, a four lane road within an 80-foot right-of-way that passes the site immediately to the north. Nicholson Lane and Marinelli Road run perpendicular to and intersect with Rockville Pike. Woodglen Drive Extended is designated in the Master Plan as a two-lane business district street. Woodglen Drive Extended will be constructed by the applicant and connect Nicholson Lane and Marinelli Road in an alignment that runs north and south immediately west of the site

The proposed development is entirely within a Metro Station Policy Area. The 2003-2005 Growth Policy which was in effect when this application was filed (Exhibit 93(b)), and the 2004 Local Area Transportation Review (LATR) Guidelines (Exhibit 93(a)) allow the LATR requirements to be satisfied for this type of case using the "Alternate Review Procedure for Metro Station Policy Areas." On November 13, 2007, the Council adopted a new Growth Policy in Resolution 16-376.⁹ It also provides for the Alternate Review Procedure for Metro Station Policy Areas (*Growth Policy*, ¶ TAI),

⁹ The applicability of the new Growth Policy to this case is unclear. Changes to laws affecting land use in Maryland, unlike most other kinds of enactments, are retrospective in effect unless the legislative body provides otherwise. *Layton v. Howard County Board of Appeals*, 399 Md. 36, 51, 922 A.2d 57, 5856 (2007). The Council linked the effective date of the new Growth Policy to the filing date of the subdivision application under review and to whether it had been approved by the Planning Board prior to adoption of the new Growth Policy. Subdivision applications filed before January 1, 2007, are covered by the old Growth Policy, while those filed after that date, but not approved prior to November 13, 2007, are governed by the new Growth Policy. *Growth Policy*, ¶ API. Although the rezoning application in this case was filed on November 15, 2006, the record does not reveal whether an application for subdivision was also filed. The Council has scheduled a public hearing for January 29, 2008, on the issue of the applicability of the new Growth Policy to rezoning and special exception applications. In any event, the outcome is irrelevant to this case, because the Growth Policy has not changed materially with regard to applications using the Alternate Review Procedure for Metro Station Policy Areas, as is discussed above.

and specifies that it may be used for developments planned entirely within a Metro Station Policy Area, not only in lieu of the usual LATR requirements but also in lieu of the new Policy Area Mobility Review (PAMR) requirements. Thus, whether the new Growth Policy or the old Growth Policy applies in this case, Applicant's transportation facility requirements will be satisfied under the Alternate Review Procedure.

Technical Staff describe this procedure (Exhibit 77, pp. 11-13):

Under the alternative review procedure, an applicant for a subdivision that is built completely within a Metro Station Policy Area is not required to submit a traffic study at the rezoning stage if the applicant agrees to meet specific trip reduction goals established by the Planning Board, participate in programs operated by a transportation management organization, pay an ongoing annual contribution or tax to fund operating expenses of the transportation management organization, and pay the applicable development impact tax.

Applicant's transportation planner, Anne (Nancy) Randle described the process in her testimony. Tr. 158-175. According to Ms. Randle, a project is analyzed as if it were on a vacant piece of property, and it is required to reduce the maximum number of potential trips that would otherwise be generated from the proposed uses by 50 percent. At the time of zoning, a mitigation plan is submitted, showing that it is reasonable and probable that Applicant will meet the required 50 percent mitigation. At the time of preliminary plan, a standard local area review transportation study will be done. That will identify the road improvements that need to be done in the corridor, and those road improvements are then made with the increase in taxes that are associated with the fees levied upon these projects. The reduction is accomplished through various transportation demand management programs. Part of the trip reduction goes to the Metro ridership, and with a mixed-use project, there is also the synergy between those uses. *i.e.*, people may live, work, shop and dine in the same place. Additional transportation demand management programs are implemented as well.

There is an increased tax over any other project that would go through the normal LATR

process in that same zone, and Applicant must also participate in the North Bethesda Transportation Management Organization (TMO). According to Ms. Randle, that was the procedure followed in the nearby “LCOR” project. Ms. Randle filed a “Trip Reduction” report (*i.e.*, a mitigation plan) applying this procedure to the subject case (Exhibits 76(a) and 94). She concluded that it is reasonably probable that the Applicant will meet it's APO test at subdivision. Technical Staff accepted Applicant’s Trip Reduction report and described the measures Applicant will be required to take (Ex. 77, pp. 12-13):

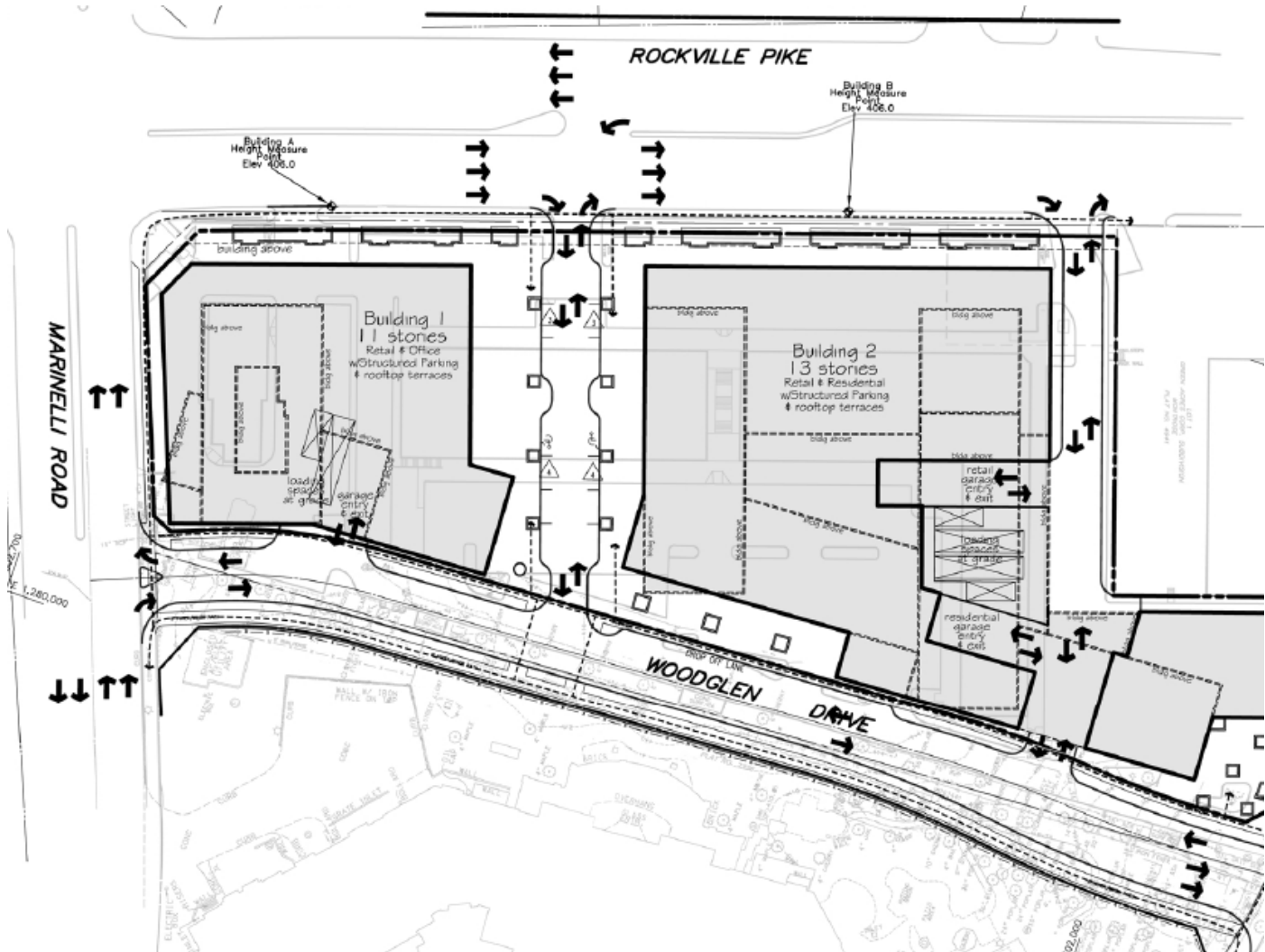
Transportation staff recommends that the applicants’ development impact payment required under the alternative review procedure be used to fund intersection improvements to reduce the traffic volumes at the congested intersections. These issues will be addressed at preliminary plan.

Transportation staff also identified trip reduction requirements that must be satisfied under the Alternative Review Procedure. Important among these requirements are measures to: (1) enhance the ridesharing program that is typically part of the North Bethesda Transportation Management Organization; (2) require that interim traffic reduction efforts be monitored quarterly for two years and the final goals be measured and reported on a bi-annual basis thereafter; (3) require a financial penalty or other measure in the event that the trip reduction goals are not achieved by established dates; and (4) provide a bond/security instrument to fund the traffic mitigation plan if the applicant or successors fail to achieve or maintain trip reduction goals.

The table below from Transportation Staff’s supplemental report of October 18, 2007, shows Applicant’s projected trip increases and the mitigation measures (Exhibit 77, Attachment 7):

Line No.	Trip Reduction Measures	Weekday Peak-Hour Vehicular Trips	
		Morning	Evening
1	Net Increase in Trips	209	588
2	Required Number of Mitigated Trips	105	294
Number of Site-Generated Vehicular Trips Reduced associated with the proposed mitigating measures			
3	Metrorail & Bus Transit Trips	-133	-160
4	Internal Pedestrian Site Trips	- 38	-117
5	Bike Lockers & Racks	- 9	- 9
6	Information Kiosk(s)	- 9	- 9
7	Net Number of Trips Reduced	189	295
8	% Trips Mitigated (Line #7/Line #1)	90.4%	50.2%

Circulation and access for the proposed development is shown on the following Circulation Plan (Exhibit 73(f)):



Applicant also demonstrated that sight distances at the proposed access points would satisfy all requirements with a sight-distance diagram (Exhibit 91). According to Ms. Randle, the traffic circulation and entry access points will be safe and efficient, in terms of both pedestrians and vehicular traffic. Tr. 175-176.

Technical Staff agreed that the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient, but noted that Transportation Planning Staff will require certain enhanced traffic calming measures at site plan and more detail regarding

pedestrian crosswalks, pedestrian pushbuttons, refuge islands, handicapped ramps, bike lockers and delivery schedules. Staff notes that these issues need not be finalized at rezoning, but they must be addressed at the subdivision and site plan stages. Exhibit 77, 19.

Based on the entire record, the Hearing Examiner finds that transportation facilities will be adequate for this project and that access and circulation will be safe, adequate and efficient for both vehicular and pedestrian traffic.

b. School Capacity:

The subject property is located in the Walter Johnson cluster. Bruce H. Crispell, Director of the Division of Long-range Planning, Montgomery County Public School's (MCPS), stated in a letter dated February 1, 2007 (Attachment 8 to Exhibit 77):

This rezoning would result in 220 high-rise units.¹⁰ Based on average yield factors derived from the Maryland National Capital Park and Planning Commission 2005 Census Update Survey, the impact of this project is estimated to be approximately ten (10) elementary, nine (9) middle, and eight (8) high school students. This property is located within the Luxmanor Elementary School attendance area, Tilden Middle School attendance area, and Walter Johnson High School attendance area.

Enrollment at Luxmanor Elementary School currently exceeds capacity. However, an addition is scheduled to open in August 2008, resulting in space available beginning in 2008. Enrollment at Tilden Middle School is currently within capacity and is projected to stay within capacity. Enrollment at Walter Johnson High School currently exceeds capacity. However, modernization of the school is scheduled for completion in August 2009, resulting in spaces available beginning in 2009. . . .

The current Growth Policy schools test finds capacity adequate in the Walter Johnson cluster.

The current development plan calls for 247 residential units, not the 220 mentioned by Mr. Crispell. His projection of the number of resulting students is therefore probably a little low. Nevertheless, the Growth Policy schools test finds capacity to be adequate,¹¹ and MCPS's own projection is that adequate capacity will be available at all school levels by 2009. Applicant produced

¹⁰ The current plan is for 247 residential units.

¹¹ Mr. Crispell's letter finds capacity adequate under the old Growth Policy, and Tables 3 and 4 attached to the new Growth Policy demonstrate that capacity is projected to be adequate in the Walter Johnson cluster under both the 120% of MCPS program capacity test and the 105% of MCPS program capacity test.

testimony at the hearing that construction of the subject buildings will not be completed until the Spring of 2011 or Fall of 2012. Tr. 72-73. Thus, the additional school capacity will be available when the new students begin moving in. There is no evidence in the record to the contrary.

Therefore, the Hearing Examiner concludes that MCPS will be able to handle the increased demand projected from the subject development. Technical Staff notes that the adequacy of schools to accommodate the project will be reviewed again at the subdivision stage. Exhibit 77, p. 10.

c. Water and Sewer Service and Other Utilities:

Technical Staff reports that the subject site is served by public water and sewer systems, and is currently in Water Service Category W-1 and Sewer Service Category S-1. Exhibit 77, p. 10.

Applicant's civil engineer, Charles Irish, Jr. testified that the property is well served by public utilities – gas, electric, telephone, sewer, water and storm drains in the adjacent public roadways. Utilities exist in all three existing roads. Rockville Pike has gas, electric, telephone, 16-inch water main, 24-inch water main, eight-inch sewer and an 18-inch storm drain. Nicholson Lane also has gas, electric and telephone, as well as a 66-inch water main, a 48-inch water main, and a 15-inch storm. Marinelli has gas, electric, telephone, 10-inch water, eight-inch sanitary sewer, and at the corner of Rockville Pike, has a 24-inch storm drain. The development will make service connections to all of these utilities. If upgrades are needed, they will be provided by the Applicant. In Mr. Irish's opinion, the proposed zoning and development plan will not over-burden public facilities, or adversely impact the subject property or the surrounding area. Tr. 120 and 138. Technical Staff observes that “[i]t seems probable that the existing water and sewer mains are adequate to accommodate the proposed development,” but additional information will have to be submitted at subdivision. Exhibit 77, p. 10.

Based on the entire record, the Hearing Examiner finds that, although more detail will obviously have to be produced at subdivision, Applicant has sufficiently demonstrated the adequacy of public facilities at the rezoning stage.

5. Environmental Issues

The existing site is almost entirely impervious. Although there are plant strips along Rockville Pike and along the common property line in the rear, the net result is over 88 percent impervious today. Applicant's civil engineer testified that he expects it will be probably about 64 percent impervious after development, depending on how much of the green roof can be achieved Tr. 119-120. This is clearly a significant improvement.

Environmental Staff noted that the site is not located in a Special Protection Area or Primary Management Area. It has no steep slopes or erodible soils, and there are no wetlands or streams on the site. Technical Staff did not raise any environmental issues except for the required Tree Save Plan, which will be discussed below. Exhibit 77, p. 4 and Attachment 5.

a. Forest Conservation:

An approved Natural Resource Inventory/Forest Stand Delineation (Exhibit 48) and a Preliminary Forest Conservation Plan (Exhibit 49) have been submitted. A Tree Save Plan will be required as part of the Final Forest Conservation submission since specimen or significant trees both on-site and off-site will be impacted by construction activities for Woodglen Road Extended. Exhibit 77, p.1. By situating Woodglen as far to the east as possible, Applicant will be able to preserve most of the trees next to the adjacent "The Grand" property, to the west. Tr. 136-137.

b. Stormwater Management and Sediment Control:

The site is located in the Lower Mainstream Bethesda subwatershed of the Lower Rock Creek watershed. Environmental Staff reports that the Countywide Stream Protection Strategy (CSPS) "recommends supporting cost-effective stormwater quality controls on redevelopment sites, such as the subject site." Attachment 5 to Exhibit 77. An approved stormwater management plan is required at the time of the approval of the Preliminary Plan.

Applicant's engineer, Charles Irish, Jr., testified (Tr. 120-124) that there is a small, outdated stormwater management structure in the southwest corner of the site. For any project that disturbs more than 5,000 square feet in Montgomery County, a developer is required to obtain a sediment control permit and provide stormwater management. The stormwater management will typically require, on a new project, that the developer address ground water recharge, stormwater quality control, and quantity control (now called channel protection volume or CPV). Because this project is a redevelopment project, the County does not require a developer to provide ground water recharge. Quantity control (CPV) is required only if the discharge exceeds two and a half cubic feet per second.

Mr. Irish noted that this site has three different drainage outfall points, so depending on the amount of green roof ultimately provided, it may be that none of those outfalls will exceed two and a half CFS, in which case no channel protection volume control would be required. Thus, stormwater management to be provided will be primarily quality control. This would be accomplished mostly through the extensive green roof.

The illustrative Roof Plan (Exhibit 86), which is reproduced on page 14 of this report, shows approximately 69 percent of the roof area proposed for green. Mr. Irish believes that the amount of green roof may, in and of itself, meet the County's criteria for stormwater management. In addition to that, however, Applicant is considering providing a cistern that would capture some of the runoff from the non-planted surfaces and store it for non-potable irrigation water on the site. Mr. Irish is "relatively certain" that with both of those, Applicant would meet the County criteria for quality control. In the event that something else was required, a structural filter would be placed in the upper level of the parking garage.

A sediment control plan is also required. According to Mr. Irish, one will be prepared and submitted to the County's Department of Permitting Services prior to construction on the property. A concept plan for the stormwater management will be submitted to the Department of Permitting

Services (DPS) prior to submittal of the preliminary plan of subdivision, and must be approved by DPS prior to the Planning Board's action on the preliminary plan.

Although Applicant has not yet submitted its stormwater management concept plan to DPS, Technical Staff did not raise this as a point of concern. This reflects the nature of this proposed development (*i.e.*, redevelopment of a highly impervious site with less impervious, green-roofed buildings) and the location of this site (*i.e.*, not next to any single-family developments and not in a Special Protection Area). Given these factors and the fact that stormwater management will be reviewed at subdivision, the Hearing Examiner is satisfied that the environment and the neighbors will be adequately protected.

Technical Staff reported no environmental issues warranting denial of this application, and the Hearing Examiner finds none.

IV. SUMMARY OF THE HEARING

The hearing in this case took place on November 5, 2007. Applicant called six witnesses, Evan Goldman, William R. Landfair, Peter A. Fillat, Joseph Plumpe, Nancy Randall and Charles A. Irish, Jr. There was no opposition, and no other witnesses testified.

1. Evan Goldman (Tr. 15-30; 47-48; 72-73; 99-105; 150-153):

Evan Goldman testified that he is a real estate developer employed by Holladay Corporation as a vice president in development and acquisitions. Holladay is a real estate developing company that has been in existence since 1952 and has been involved in a number of area developments. For the past 15 years, it has been doing mostly in-fill urban multi-family and mixed use projects, such as the subject case.

The Applicant, Green Acres Metro, Limited Partnership, is an affiliate of the Holladay Corporation. Green Acres owns the subject site, and Mr. Goldman has been working on this project since 2004. The property was purchased in 1986 and redeveloped the existing 60,000 square foot shopping center. The objective of the current development proposal is to increase density and build a larger mixed use project more appropriate in scale to something that's across the street from the Metro. This would take advantage of retail opportunities in the White Flint area, one of the best retail corridors in the entire Metro area, and serve as a connector site between the LCOR development to the northeast and the White Flint Crossing development to the south.

According to Mr. Goldman, Applicant has designed the project as a two-sided building, which takes into account the Woodglen side to the west, as well as the Rockville Pike side to the east. It has also been designed as a “green” building, using “smart growth” principals. As a result it has been endorsed as a smart growth project by the Smart Growth Alliance (Exhibit 82).

Mr. Goldman discussed his outreach to the neighbors (Luxmanor HOA, Garrett Park Estates, Fallstone HOA, the Grand and the Wisconsin), all of which he characterized as very positive. He also referenced sample condominium documents (Exhibit 41) in an effort to show the method of perpetual maintenance of areas intended for recreational or other common purposes.

Mr. Goldman testified that the southern neighbor, the “Anthropologie” store, has a 20-foot drive aisle access easement and a building restriction line (BRL) in the southeast section of the subject site. The property owner, Landow Company, has agreed in principal to extinguish both of these restrictions in exchange for an access and easement agreement, which Applicant has agreed to. Both the existing easement and the BRL are shown on the development plan, as is the negotiated access easement along the southern property line. Tr. 25-27. Applicant has also negotiated an understanding with its western neighbor, Forest City, to work out the contours of the dedication along Woodglen that

will be needed to enlarge and extend Woodglen Drive. [Applicant's counsel indicated that Technical Staff determined that the final agreements would need to be executed prior to preliminary plan and site plan.] Tr. 28-30.

Mr. Goldman stated that Applicant designed these buildings so that some additional height could be added on the same footprint if the Sector Plan changed before Site Plan. Tr. 47-48.

Mr. Goldman further testified that there won't be any work begun on the buildings until the fall of 2009, at the earliest. Construction will probably take about two and a half to three years. So it will be the spring of 2011 or fall of 2012 before the buildings are complete. From today, it is about five years, at a minimum, until this project would deliver. The breakdown of units is such that they are, in general, studios, one-bedrooms, and some two-bedrooms, which in the developer's experience in multi-family, does not result in many resident children. Even if there were the number of school children estimated in Mr. Crispell's letter, the buildings would be completed after additional school capacity has been added. Tr. 72-73.

Mr. Goldman indicated that there are 18 areas of the development plan that have been modified at the request of Technical Staff since the Applicant first brought this plan to Staff almost three years ago. For example, they flipped the location of the two buildings to bring the office building closer to the Metro stop; the setback from Rockville Pike was increased to 35 feet; Applicant worked with its neighbor, Nathan Landow, to eliminate the access easement on the southeastern side; the Woodglen Drive extension was added and then redesigned with a curve to better preserve the western neighbor's landscaping; retail was added on the Woodglen side; a right in, right out exit was added to the intersection of Woodglen and Marinelli Road; the curb cuts along Rockville Pike were reduced in number; and the building was redesigned to convert some of the office space to residential in order to be right at the 1.0 FAR cap. Tr. 99-105.

Mr. Goldman also testified as to the meaning of Sector Plan language regarding density and MPDUs. The issue of how to calculate the MPDUs came up over the course of about four meetings with Technical Staff. The only reason they could give for the Sector Plan requirement of 50 percent MPDUs for any density increase between FAR 2.0 and 2.4 was that the drafters weren't thinking of the mixed use issue. If you take a 2.0 of residential and give a 22 percent bonus, that is equivalent to a 2.4 FAR. The problem is when you start adding in mixed use components, it no longer works and doesn't apply, and Technical Staff doesn't know how to interpret it. So Staff ultimately relied on the standard 22 percent bonus for 15% MPDUs, the way Applicant had done it, which is the way White Flint Crossing did it as well. Tr. 150-153.

2. William Landfair (Tr. 31-74; 100-101):

William Landfair testified as an expert in land use planning. He helped assemble the subject application and reviewed the master plan and the zoning ordinance, in particular to determine compatibility of the proposed development in the surrounding area. Mr. Landfair described the subject site and the surrounding area, and introduced Exhibit 84 depicting it. He noted that his definition of the surrounding area was consistent with what Technical Staff described in their report.

The area contains a mixture of residential, primarily multi-family, retail and office uses, of relatively high density. To the north of the subject property, directly opposite Marinelli Road, is the Montgomery County Hotel and Conference Center. To the east across Rockville Pike are two NRC buildings. To the southeast is a two-story retail building located in the C-2 zone. The hotel and conference center, and the NRC buildings, are located in the TS-M zone. To the southeast, at the corner of Nicholson Lane and Rockville Pike, are two service stations located in the C-2 zone. Further to the south are several office buildings located in the C-2 zone, but recommended in the Master Plan for the TS-M zone. To the west are two high-rise multi-family buildings in the TS-R zone, the Grand and the Wisconsin.

Mr. Landfair further testified that the overall theme of the Master Plan is to provide for new employment opportunities and diverse housing stock in proximity to the existing transportation infrastructure of the area. He opined that the proposed development promoted new housing stock, both market rate as well as affordable housing, and also provided for employment opportunities with the office and retail uses proposed on the site. All of this is in close proximity to the Metro station, so in Mr. Landfair's opinion, the application is fully consistent with the theme of the Master Plan.

The development plan also calls for the extension of Woodglen Drive, which will become the western boundary of the project, and would connect with Marinelli to the North and Nicholson to the South. This will provide an important north/south connector, which will greatly improve circulation in the area for both vehicles and pedestrians, and also will assist in getting people more conveniently to the Metro station, as called for in the Master Plan. Tr. 35-36.

Mr. Landfair also addressed the provision on page 56 of the Master Plan that calls for a minimum of six acres for properties to be approved with over a 1.0 FAR. Tr. 36-40. He believes the Master Plan is referencing commercial development exceeding 1 FAR, not a mixed-use project. In this case, the proposed commercial portion of the project would not exceed 1.0 FAR. He indicated that Technical Staff sees it that way as well. Moreover, even if one disagreed, the application is in substantial conformance with all of the other standards and recommendations in the plan. He noted that G-830, an application for TS-M located just two blocks to the south of the property, on the west side of Rockville Pike, called for a mixed-use development (White Flint Crossing) of just under 6 acres, and it was approved.

Mr. Landfair recounted the recommendations in the Sector Plan, noting Applicant's compliance, and he pointed out that the Sector Plan makes specific reference to this property as being suitable for the TS-M Zone. Tr. 43. The Sector Plan notes that future development should be

focused on higher density near the Metro stops, in an area served by existing transportation infrastructure. It discusses increasing the variety of housing stock, including affordable housing; encourages a mixture of land uses in redeveloping areas, to promote variety and vitality for an area; encourages land use that provides opportunities for housing and employment; envisions developing the White Flint area as the main urban center of North Bethesda, capitalizing on the public investment in the Metro system; promotes mixed use development; and advocates developing a lively pedestrian environment.

Mr. Landfair testified that the proposed development would satisfy all these goals. The project will provide significant mixed-use density and tall buildings, near the Metro station, contributing to the urban core that the Master Plan seeks. Mr. Landfair observed that this mixed use development will create “a certain synergy” through the mixture of uses, adding vitality to the area that is now lacking. Applicant will make improvements along the entire perimeter of this property, particularly along Rockville Pike and Woodglen extended, which will improve the circulation pattern for pedestrians and vehicles in the area and relieve some of the congestion on Rockville Pike. Streetscape treatments that are recommended in the Sector Plan are incorporated into the development plan. Tr. 41-44.

Although one of the buildings will be 11 stories and the other 13 stories in height, they will actually be perceived as being very close in height because the floor to ceiling ratios are just a little different between the buildings. Tr. 44. In addition to extending Woodglen Drive, Applicant will create a private street between the two buildings, with on-street parking, running east-west from Rockville Pike to Woodglen Drive. Tr. 45.

According to Mr. Landfair, the overall theme of the proposed Sector Plan amendment is to encourage more urban character for White Flint than what might be achieved under the current Sector Plan recommendations today. Depending upon what that final density is, Applicant believes it could

accommodate additional density on this site. If the buildings were increased in height pursuant to the suggestion of the Planning Board, they would still be consistent and compatible with the surrounding area. Tr. 48-50.

Mr. Landfair noted that the TS-M Zone is intended to be used in a Transit Station Development Area, which is defined in the Zoning Ordinance §59-A-2.1 as an area near a metro transit station which is not located within a central business district, and which has been designated as a Transit Station Development Area by a master plan or sector plan. That is the case here. The TS-M zone is intended for locations where substantial commercial or office uses already exist, or where such uses are recommended in the plan. This site also meets that criterion. Tr. 51.

Mr. Landfair summarized the purposes of the TS-M Zone found in Zoning Ordinance §59-C-8.23: They are designed to promote the optimum use of transit facilities by establishing orderly development on land in close proximity to those transit facilities; by providing for the needs of workers, visitors and residents in these transit station development areas; by providing for the incidental shopping needs of riders, visitors and residents in the area; by minimizing automobile transportation to the extent possible; by providing amenities which might otherwise be lacking in the area; and to prevent detrimental effects and impacts on adjacent properties and surrounding properties in the area.

This development will place a mixed use development with commercial uses and a variety of housing options directly opposite the Metro station. It has a significant open space, a plaza, which will help to promote interactions among the visitors, the residents and the workers of the area, to create needed vitality. The project includes retail and office space that can serve the needs of the workers and residents in the area. It will be provide quality outdoor amenities, to provide the sense of place, and the project is at a scale that is compatible with the surrounding area. The amenities include enhanced streetscaping, an upgraded pedestrian network, improved linkages to

the Metro station, due in part to Woodglen Drive extended, a bike path along Woodglen, a plaza, 10% public use space, and 25 % active/passive space for the benefit of all the residents of the development, some of which is in rooftop terrace space. These green roofs, while they have obvious benefits for the development itself, are quite attractive to look at, and so have some benefit to nearby developments which look down upon them. The Anthropologie building that is located immediately to the south is a one-story retail use, but it is recommended in the Sector Plan for TS-M zoning, so it's conceivable that that site will be redeveloped in the future with a much taller building. Tr. 52-57.

Mr. Landfair testified that the development will also comply with Zoning Ordinance §59-C-8.24 in its location; §59-C-8.25, in the amenities provided; and §59-C-8.3 in the land uses planned. Tr. 56-58. He then addressed the requirements of Zoning Ordinance §59-D-1.61, and testified that Applicant had complied therewith. Tr. 61-63. He asserted that the proposal does not conflict with the general plan, capital improvement plan, or other applicable County plans and policies. The Master Plan specifically recommends the TS-M zone for this property. The Master Plan also recommends mixed-use development, and that what is proposed in the development plan. The development plan is consistent with all the recommendations of the Master Plan, and it promotes County housing policies, the residential development at Metro, and provides affordable housing that is sorely needed, 38 affordable housing units.

Mr. Landfair also detailed Applicant's compliance with the development standards of the zone, and noted that 35 foot setbacks will be provided to help promote a boulevard effect along Rockville Pike. Tr. 62-63. According to Mr. Landfair, there will be adequate public facilities, in that the property is served by the South Rockville Fire Company, Company 23, which is located approximately one mile north of the subject property on Rollins Avenue. This particular station will provide fire and emergency service to the project. With respect to the schools, the development

is located within the Walter Johnson school cluster area. Based on the current annual growth policy, there is adequate capacity at the elementary, middle school and high school levels to accommodate the proposed residential development. As noted in a letter from the School Board demographer, Bruce Crispell, a couple of schools were exceeding current capacity, but they had planned to add capacity. Mr. Landfair believes that the timing of these buildings will coincide with the increase in capacity sufficiently so that there will be adequate capacity not only by the school's test standard, but in actuality at the time. Tr. 70-71.

Mr. Landfair concluded that the proposed development would be in the public interest. It's promoting smart growth; it's promoting use of public transportation; it's providing needed affordable housing; it's sensitive to the surrounding area; and it will have a green roof. Tr. 73. Mr. Landfair testified as to the distance from the project to the Metro station. The office building is at the southwest corner of Marinelli and Rockville Pike. There is a pedestrian tunnel under Rockville Pike which connects to the Metro station. The entrance to that tunnel is directly opposite the site, on the north side of Marinelli Road. It is approximately 80 feet from the entrance to the subject office building to the tunnel entrance on the west side of Rockville Pike. The tunnel is approximately 130 feet, long so it will be a total of about 210 feet from the north office building entrance to the Metro station. It would be another 300 feet to the residential building entrance, which makes that total distance a little over 500 feet. Tr. 100-101.

3. Peter A. Fillat (Tr. 74-98):

Peter Fillat testified as an expert in architecture. He was asked to help design a mixed use project which consisted of residential/retail, parking and office space on this four-acre site at the corner of Rockville Pike and Marinelli Road. It's important for all of the functions to be able to survive "from an economical point of view, and also from a practicality and constructability point of view." Tr. 78. The retail space needs to be able to front the street, and be active and able for

people to use and see. The residential needs to create a nice place for people to live, and the office space must have a reasonable ratio of light and air for the office users. Probably around 1,000 cars will have to be able to get in and out and function properly. Tr. 77-78.

The site is occupied by a two-story retail center and a one-story McDonalds at the corner. Mr. Fillat looked for a way to add a substantial amount of density to the project and create a sense of place along Rockville Pike. He also planned to extend Woodglen, while maintaining the existing green space of the western neighbor, The Grand, and at the same time, allowing circulation to flow between Nicholson and Marinelli. A private street, or pedestrian plaza, will divide the site into halves, with a northern half being primarily office and retail, and the southern portion, which is primarily residential and retail. A third street along the southern property line will provide service access. Tr. 79-80.

According to Mr. Fillat, the idea behind Rockville Pike is to make it a boulevard type of space, and the buildings will face the street and create a nice pedestrian environment. Using a 35 foot setback will create an edge, consistent with what the Planning Department asked Applicant to do. Pedestrians coming from the Metro stop will be encouraged to cross the street into the subject site. Woodglen Drive extended is anticipated to be different from Rockville Pike, more of a neighborhood street. The buildings will also face that street, and they will create a smaller sidewalk, which ranges from 15 feet to 25 feet with the goal to create a smaller street that has neighborhood retail most of the people who live in the community would walk to. There will also be a bicycle path along the opposite side of the street. The entire parcel has parking underground. Tr. 80-81.

Mr. Fillat discussed the proposed buildings in some detail (Tr. 81-95), explaining how the buildings are stepped back at various levels to “create a nice pedestrian scale to the development.” Tr. 93. He noted that the project will be designed to “high performance building standards.” Tr. 96. A substantial amount of the roof will be considering a “living roof,” as shown on the Roof Plan (Exhibit 86). The balance of the roofs will be a highly reflective, low heat gain material. The

building will use high performance glazing, and sun-shading devices will be placed on the exterior facades to minimize heat gain in the building. The building itself will qualify for numerous LEEDS (leadership in energy and efficiency design) points, with a goal to qualify as a LEEDS certifiable project. Tr. 96-97.

In Mr. Fillat's opinion the proposed buildings will be compatible with surrounding development. Tr. 98.

4. Joseph J. Plumpe (Tr. 105-113):

Joseph Plumpe testified as an expert in landscape architecture. He is the project landscape architect, and he worked with the architect, the civil engineer and the client to develop an urban design solution for the site plan itself, and to deal with the streetscapes as well as the green roof elements of the design.

On the east part of the site is the main frontage of this property, which is Rockville Pike. There, a 35-foot pedestrian zone will be created, using animated streetscape design elements such as seating, planting and so forth, to accentuate the sidewalk in relationship with the building architecture, especially the ground floor retail. On the south side, is the neighboring property and Nicholson Lane at Woodglen Drive. There will be an urban plaza at the corner there, and potentially café eating areas, as well. There will be a small water element there, too, a water feature on the pedestrian level.

Along the back (western) part of the property, the streetscape design will be more residential, more pedestrian-scale. There will be less traffic on that street, and therefore it is more conducive to some neighborhood type retail type development.

Around the entire property there will be street trees. The landscaping on the roof is shown in Exhibit 86. The green roof will have intensive plant material of different types, as well as

different pavements. Trees will be selected that are not heavy headed, so the wind doesn't blow them down. The effort will be to promote walkability for the area.

5. Charles A. Irish, Jr. (Tr. 114-146; 181-184):

Charles Irish, Jr. testified as an expert in civil engineering. The Hearing Examiner pointed out at the beginning of the hearing that the application (Exhibit 1) specified a gross tract area of 201,815 square feet, 7 square feet less than the gross tract area of 201,822 specified in the development plan (now Exhibit 95(a)). Tr. 6. The Hearing Examiner questioned Applicant as to whether this difference violated Zoning Ordinance §59-H-2.24, which provides, “After acceptance for filing, an application for a map amendment shall not be modified or amended so as to increase the area proposed to be reclassified.” Tr. 6. Mr. Irish testified in response, explaining that the boundaries of the area proposed for rezoning had not changed. The initial figure was based on record information, the subdivision plats and deeds for the subject property. Subsequently, a detailed survey of the property produced a figure for this same area that was seven square feet larger. Mr. Irish characterized this change as a “refinement,” not a change in the area to be rezoned. Tr. 115-116.

Mr. Irish’s firm did a boundary and topographic survey of the property, a natural resources inventory, a preliminary forest conservation plan, the identification plat for the property, the actual development plan drawing, a circulation plan, a surrounding area uses plan, a plan for Woodglen Drive extended, a right-of-way dedication associated with the property, an illustrative roadway section, a public use space diagram, an active/passive recreation space exhibit, an engineering report and contributed to the initial project description text and pre-hearing submission.

Mr. Irish noted that there is a 10-foot grade change between the front and the rear of the existing two-story center. The site changes in grade from a high point in the middle, on the back, of about 420 feet above sea level, to about 396 feet down at the southwest corner, and along Rockville Pike, the frontage is about 406 feet. The site is almost entirely impervious. There is a plant strip along

Rockville Pike and along the common property line in the rear, and some individual parking islands. The net result is over 88 percent impervious today. He expects it will be probably about 64 percent impervious after development, depending on how much of the green roof can be achieved Tr. 119-120.

According to Mr. Irish, the property is well served by public utilities, gas, electric, telephone, sewer, water, storm drain in the adjacent public roadways. Utilities exist in all three existing roads. Rockville Pike has gas, electric, telephone, 16-inch water main, 24-inch water main, eight-inch sewer and an 18-inch storm drain. Nicholson Lane also has gas, electric and telephone, as well as a 66-inch water main, a 48-inch water main, and a 15-inch storm. Marinelli has gas, electric, telephone, 10-inch water, eight-inch sanitary sewer, and at the corner of Rockville Pike, has a 24-inch storm drain. The development will make service connections to all of these utilities. If upgrades are needed, they will be provided by the Applicant. In Mr. Irish's opinion, the proposed zoning and development plan will not over-burden public facilities, or adversely impact the subject property or the surrounding area.

There is also a small outdated stormwater management structure in the southwest corner of the site. For any project that disturbs more than 5,000 square feet in Montgomery County, you are required to obtain a sediment control permit and stormwater management. The stormwater management will typically require, on a new project, that you address ground water recharge, stormwater quality control, and quantity control (now called channel protection volume). Because this project is a redevelopment project, the County does not require you to provide ground water recharge, and they only require the quantity control or channel protection volume (CPV), if the discharge exceeds two and a half cubic feet per second. This site has three different drainage outfall points, so depending on the amount of green roof, it may be that none of those exceed the two and a half CFS, in which case no channel protection volume control would be required. So, primarily the stormwater management to be provided is quality control. This would be accomplished mostly through the extensive green roof.

Exhibit 86 shows approximately 69 percent of the roof area proposed for green. In the final design, mechanical equipment will take up portions of it. The target is to exceed the 69 percent. Mr. Irish believes that the amount of green roof may, in and of itself, meet the County's criteria for stormwater management. In addition to that, however, Applicant is considering providing a cistern that would capture some of the runoff from the non-planted surfaces and store it for non-potable irrigation water on the site. Mr. Irish is "relatively certain" that with both of those, Applicant would meet the County criteria for quality control. In the event that something else was required, a structural filter would be placed in the upper level of the parking garage.

A sediment control plan is also required. One will be prepared and submitted to the County's Department of Permitting Services prior to construction on the property. The conceptual plan will be filed with the site plan, and the formal plan will be filed as part of the permit drawings that would need to be approved prior to construction. A concept plan for the stormwater management will be submitted prior to submittal of preliminary plan, and approved prior to the Board action on the preliminary plan, and prior to submitting a site plan. Tr. 120-124.

Mr. Irish demonstrated the calculations of public use space and active and passive recreational space using Exhibit 79(b). The 10% public use space is at ground level. Active and passive recreational space includes the roof terraces available to all residents, and as required is 25 percent of the residential portion of the site. Tr. 124-129.

Mr. Irish discussed the access points and proposed circulation system, and opined that the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient. Using Exhibit 73(f), he demonstrated that Applicant is proposing to eliminate the McDonalds entrance off of Rockville Pike, while the other entrances remain in more or less the same location. On Rockville Pike, the plan will maintain the same movement at the current entrance, the left in, right in, right out, and then at the southern entrance on Rockville Pike, right in, right out as

well. That connects to the service alley that goes through to Woodglen. There will also be two garage entrances off of the service alley, one is primarily retail, one is primarily residential. There is also a garage entrance off of Woodglen at the northern end of the office building. The pedestrian plaza street connects through from Rockville Pike to Woodglen. Applicant designed the pedestrian plaza street as a more pedestrian-friendly, low volume street. Mr. Irish also used Exhibit 91 to show that the proposed design will provide or exceed required sight distances for the access points. Tr. 129-136.

Mr. Irish discussed how the proposed development plan would prevent erosion of the soil and preserve natural features of the site pursuant to Zoning Ordinance §59D-1.61(d). By situating Woodglen as far to the east as possible in the middle, Applicant will be able to preserve most of the trees next to the Grand property, to the west. Also, a tree protection plan will be prepared as part of the sediment control plan. Tr. 136-137.

Mr. Irish described the proposed dedication along Woodglen Drive. The adjacent property to the west, the rental apartment building, The Grand, is part of a 9.7 acre site that's zoned TS-R, with two residential towers owned by Forest City, The Grand and The Wisconsin, the latter of which is a condominium building. In their final approval, they were required to dedicate land for the extension of Woodglen, as it would affect their property. Applicant negotiated with them to minimize Forest City's share of the dedication to the right-of-way. Initially 70 percent of the right-of-way would have come from Forest City's property, but Applicant has agreed to reduce that down to about 42 percent, with the balance of it coming from the subject parcel. Forest City has agreed to this. DPWT, in Greg Leck's letter of September 6, 2007 (Exhibit 77, Attachment 9), has issued conceptual approval of this plan, which will be finalized by site plan, resulting in the dedication at subdivision, as reflected in binding element number four. Tr. 139-141. According to Mr. Irish, even if this deal and the one with the property owner to the south of the site (Landow) fell through, the development could go forward substantially as planned. Tr. 181-184.

Mr. Irish explained how typos in the development plan used at the hearing had resulted in slight misstatement of the parking requirements. The actual number of spaces provided will be 1093, and a revised development plan will be submitted so showing. The final count on parking spaces will be determined at site plan, since a waiver must be granted by the Planning Board [pursuant to Zoning Ordinance §59-E-3.32]. Tr. 142-145.

Mr. Irish opined that the proposed development plan does not conflict in any way with the County capital improvement program, and it does not involve the CIP at all. Tr. 145-146.

{Applicant's counsel then addressed a question raised by the Hearing Examiner: What is the meaning of the Sector Plan language [p. 56], that in order to go up in FAR above 2.0, you had to have the increase in density over FAR 2.0 be 50 percent MPDUs? Ms. Harris stated that based upon Staff's input, Applicant interpreted that language as addressing a 100 percent residential project going above a 2.0 FAR. Applicant's residential portion doesn't go above a 2.0 FAR. Here it's going above the 1.0 FAR to a 1.22 FAR [based on the 22% MPDU bonus].

Applicant relied in part upon the White Flint Crossing case (LMA G-830), which did the same thing to reach an ultimate density of 2.29 in that case. Ms. Harris noted that the zoning ordinance provides that the maximum density permitted in the TS-M Zone may be increased to accommodate the construction of moderately priced dwelling units in accordance with Chapter 25A. The maximum number of dwelling units or residential FAR may be increased in proportion to any MPDU density bonus provided on site. That's legislatively provided in the zoning ordinance and MPDU law, while the Sector Plan is merely a recommendation. Ms. Harris argued that Applicant would not have to go through the alternative review committee because it is not exceeding the Sector Plan's recommendation on density of 2.4 FAR.} Tr. 146-149.

6. Anne M. (Nancy) Randle (153-177; 185-186):

Anne (Nancy) Randle testified as an expert in transportation planning. She referenced her Trip Reduction report (Exhibit 76(a)), which addresses the suitability of the subject property for the proposed TS-M Zone. The 2003-2005 Annual Growth Policy and the Local Area Transportation Review (LATR), 2004 edition, allow the LATR requirements to be satisfied using what's referred to as the Alternate Review Procedure. What that means is that a project is analyzed as if it were on a vacant piece of property, and it is required to reduce the trips that would otherwise be generated by 50 percent. You find out what the maximum number of trips would be from each one of the proposed uses, and it's 50 percent off the top of those trips. The reduction is accomplished through various transportation demand management programs. This procedure applies only to projects that are located within the vicinity of a Metro station. Obviously, part of the trip reduction goes to the Metro ridership, and with a mixed-use project, there's also the synergy between those uses. *i.e.*, people may live, work, shop and dine in the same place. Additional transportation demand management programs are implemented as well. There is an increased tax over any other project that would go through the normal LATR process in that same zone, and Applicant must also participating in the North Bethesda TMO. Tr. 155-157.

Ms. Randle explained the basic framework for the Alternative Review Procedure. At the time of zoning, a mitigation plan is submitted, showing that it is reasonable and probable that Applicant will meet the required 50 percent mitigation. At the time of preliminary plan, a standard local area review transportation study will be done. That will identify the road improvements that need to be done in the corridor, and those road improvements are then made with the increase in taxes that are associated with the fees levied upon these projects. That was the procedure followed in the LCOR project.

Ms. Randle introduced portions of the LATR Guidelines (Exhibit 93(a)) and the AGP (Exhibit 93(b)) to establish the authorization to use the Alternative Review Procedure for Metro Station Policy Areas. She also introduced a final version of her traffic analysis (Exhibit 94), and explained how its figures were calculated. Her calculations are based on the assumption that the proposed project will have 247 dwelling units, 85,936 square feet of office space, and 115,886 square feet of retail space. Ms. Randle concluded that, consistent with the Technical Staff report, it is reasonably probable that the Applicant will meet its APO test at subdivision. Tr. 158-175.

According to Ms. Randle, the traffic circulation and entry access points will be safe and efficient, in terms of both pedestrians and vehicular traffic. Tr. 175-176.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 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 and regulations of the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

The TS-M Zone is among the floating zones that provide for design specifications as part of a development plan. An applicant is afforded considerable design flexibility if development standards

for the zone are satisfied. In exchange for that flexibility, development under the TS-M Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the TS-M Zone. See Code §59-D-1.11. If approved, the development plan will provide basic design parameters for the site, much as the Zoning Ordinance provides design specifications for more rigidly applied zones. Normally, a development plan is expected to contain sufficient precision to fix the land use, height, density and bulk of the proposed development, which are basic components of compatibility, and to provide design specifications that govern post-zoning reviews.

A. Standards for Council Review

Section 59-D-1.61 of the Zoning Ordinance requires the District Council, before it approves any application for reclassification to the TS-M Zone, to consider whether the application, including the development plan, fulfils the “purposes and requirements” set forth in Code Section 59-C for the new zone. In making this determination, the law expressly requires the District Council to make five specific findings, “in addition to any other findings which may be necessary and appropriate to the evaluation of the proposed reclassification.” Therefore, these findings are an essential part of the Hearing Examiner’s Report and Recommendation. They relate to consistency with the Master Plan and other County policies, compliance with the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas.

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

(a) [That t]he zone applied for substantially complies with the use and density indicated by the master plan or sector plan, and does not conflict with the general plan, the county capital improvements program, or other applicable county plans and policies. . . .¹²

¹² The remainder of this section concerns procedures utilized when an Applicant seeks to exceed the height or density recommended in the Master Plan in order to allow the inclusion of MPDUs on site. Although MPDUs will be located on site in this case, neither the height nor the density will exceed Master Plan recommendations.

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

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

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

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

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

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

In sum, there are six findings required (§59-D-1.61(a) through (e) and the public interest). The “Required Findings” in the next part of this report are organized in the order set forth in the statute to facilitate review.

B. Required Findings

1. County Plans and Policies

The first required finding is that:

The zone applied for substantially complies with the use and density indicated by the master plan or sector plan, and does not conflict with the general plan, the county capital improvements program, or other applicable county plans and policies. . . .

a. The Applicable Master Plan or Sector Plan

The subject site is located within the area governed by the *North Bethesda Garrett Park Master Plan*, approved and adopted in 1992, and within that Master Plan, the *White Flint Sector Plan*. For the reasons discussed extensively in Part III.D.3 of this report (pp. 28-32), the Hearing Examiner finds that the proposed development substantially complies with the use and density requirements of both the Sector Plan and the Master Plan, as well as their goals and objectives.

b. The General Plan and the County Capital Improvements Program

The General Plan “encourages housing plans that foster transit serviceability and proximity of affordable housing to transit.” General Plan Refinement, Approved and Adopted 1993, p. 53. This Application would place 247 housing units, including 38 MPDUs, about 500 feet from a Metro Station, thus satisfying that aspect of the General Plan.¹³ Of course, the General Plan is also reflected in the applicable Master and Sector Plans, which were discussed above.

¹³ Although it is about 800 feet from the center of the subject site to the Metro Station, it will be only about 210 feet from the north office building entrance to the Metro station. It would be another 300 feet to the residential building entrance, which makes that total distance a little over 500 feet. Tr. 100-101.

Applicant's civil engineer, Charles Irish, testified that this mixed-use project is not dependent upon the County's Capital Improvements Program. Tr. 145-146. The Hearing Examiner finds, based on all the evidence, that the proposed development is consistent with the General Plan and does not impact the County's Capital Improvements Program.

c. Other County Policies (Growth Policy and Adequate Public Facilities Ordinance)

Under the County's Adequate Public Facilities Ordinance ("APFO," Code §50-35(k)), the Planning Board has the responsibility, when it reviews a preliminary plan of subdivision, to assess whether the following public facilities will be adequate to support a proposed development: transportation, schools, water and sewage facilities, and police, fire and health services. The Planning Board's application of the APFO is limited by parameters that the County Council sets in its Growth Policy ("GP"). While the ultimate test under the APFO is carried out at subdivision review, evidence concerning adequacy of public facilities is relevant to the District Council's determination in a rezoning case as to whether the reclassification would serve the public interest.

Under both the Growth Policy in effect when this application was filed and the new Growth Policy adopted on November 13, 2007 in Resolution No. 16-376 (p.23), "[t]he Planning Board and staff must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated." There is no such evidence in this case. The remaining three public facilities – transportation, schools and water and sewer service – were discussed at length in Part III.D.4 of this report (pp. 32-38). For the reasons stated therein, the Hearing Examiner finds that the proposed development will not unduly burden the County's public facilities.

In sum, based on this record, the Hearing Examiner finds that the requested rezoning does not conflict with "other applicable County plans and policies."

2. Zone Requirements, Safety, Convenience and Amenity of Residents and Compatibility with Adjacent Development

The second required finding is:

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

a. Compliance with Zone Purposes, Standards and Regulations

The requirements for the TS-M Zone are found in Code §59-C-8. The TS-M Zone is a “floating zone,” intended generally to be used in Transit Station Development Areas. Sections 59-C-8.21(b) and (c) also specify that the TS-M Zone is intended for locations where multiple-family residential development or substantial commercial or office uses already exist or where such uses are recommended by an approved and adopted master plan. As discussed in Parts III.B, C and D of the report, that is the case here.

Section 59-C-8.21(d) provides:

In order to facilitate and encourage innovative and creative design and the development of the most compatible and desirable pattern of land uses, some of the specific restrictions which regulate, in some other zoning categories, the height, bulk and arrangement of buildings and the location of the various land uses are eliminated and the requirement substituted that all development be in accordance with a plan of development meeting the requirements of this division.

Applicant’s development plan is discussed at length in Parts III.D.1 and 2 of this report (pp. 12-28).

The Hearing Examiner finds the development plan to be consistent with the requirements of the Zoning Ordinance.

The purposes of the TS-M Zone are set forth in Code §59-C-8.23:

(a) *To promote the optimum use of the transit facilities by assuring the orderly development of land in transit station development areas and access, both vehicular and pedestrian, to metro stations;*

(b) *To provide for the needs of the workers and residents of transit station development areas;*

(c) To provide for the incidental shopping needs of the transit facility riders at metro stations having parking facilities for large numbers of riders;

(d) To minimize the necessity for automobile transportation by providing, in largely residential transit station areas, the retail commercial uses and professional services that contribute to the self-sufficiency of the community;

(e) To obtain amenities for the residents and workers in transit station areas not ordinarily obtainable in conventional zoning classifications; and

(f) To prevent detrimental effects to the use or development of adjacent properties of the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the county as a whole.

Applicant's land use planner, William Landfair, testified that the proposed rezoning and the development plan conform to the six purposes of the TS-M zone, as specified in the Zoning Ordinance. Tr. 52-57. As noted by Mr. Landfair, this development will place a mixed-use development with commercial uses and a variety of housing options directly opposite the Metro station. It has a significant open space, a plaza, which will help to promote interactions between the visitors, the residents and local workers, to create the vitality needed for this area. The project includes retail and office space that can serve the needs of the workers and residents in the area. It will provide quality outdoor amenities, to provide the sense of place, and the project is at a scale that is compatible with the surrounding area.

The amenities include enhanced streetscaping, an upgraded pedestrian network, improved linkages to the Metro station provided by the extension of Woodglen Drive, a bike path along Woodglen, a plaza, 10% public use space, and 25 % active/passive space for the benefit of all the residents of the development, some of which is in rooftop terrace space. These green roofs, while they have obvious benefits for the development itself, will also be quite attractive to look at, and so have some benefit to nearby developments which look down upon them.

Technical Staff concluded (Exhibit 77, p.14) that “[t]he application satisfies the intent and purposes of the TS-M zone for the following reasons.”

The property is located within the White Flint Transit Station Development Area, immediately across Rockville Pike from the entrance of the Metro station. Substantial commercial and office uses already exist in the area. The master plan anticipates a mixed-use development pattern, with emphasis on employment, retail and residential uses for sites in close proximity to the Metro station. The Development Plan is in compliance with the requirements of the TS-M zone and conforms to the master plan land use, density, and urban design recommendations for the site.

The project design incorporates transit-oriented development that provides significant residential development within walking distance of the Metro station that will optimize use of the transit facility. The project's mixed-use development and public amenities provide for the incidental needs of the transit facility workers and riders and for the self-sufficiency of the community. The project is designed at a scale compatible with the surrounding area and will not have detrimental effects on the use and development of adjacent properties. . . .

The proposed development will put 247 residential units, including 38 MPDUs, and a significant amount of retail and office space within easy walking distance of a Metro station. It will provide improvements to the streets and sidewalks to encourage walking and the use of the transit by future employees, shoppers and residents. Bikeway improvements and adjacent retail space will reduce the dependence on the automobile in the area. Based on the ample evidence in the record, the Hearing Examiner finds, as did Technical Staff and the Planning Board, that the proposed development satisfies the purposes of the TS-M Zone.

Zoning Ordinance §59-C-8.24 provides that the TS-M Zone is “permitted only in a Transit Station Development Area defined in section 59-A-2.1 and in accordance with an approved and adopted master plan or sector plan [with exceptions not relevant here].” The subject site is within a Transit Station Development Area as defined in Section 59-A-2.1 and is in accord with the Master Plan.

Zoning Ordinance §59-C-8.25 requires that a proposed development in the TS-M Zone conform to “the facilities and amenities” of the Sector Plan, include any required easements, provide for safe and efficient circulation and adequate open and recreation space, and insure compatibility with the surrounding area, as well as the ability of the area to accommodate the intended use. The required

easements are shown on the Development Plan, and are discussed extensively at pages 25-26 of this report. The other requirements mentioned in this provision are duplicated by the specific findings required of the Council, and they will be discussed below in the sections of this report addressing those findings.

Zoning Ordinance §59-C-8.3 specifies the uses permitted in the TS-M Zone. All of the uses proposed for the Mixed-Use Project (residential, office and specified retail) are permitted in the TS-M Zone.

The remaining requirements of the TS-M Zone are spelled out in Code Section 59-C-8.4, which prescribes development standards. Those standards are set forth below in a chart from page 17 of the Technical Staff report (Exhibit 77), juxtaposed against what Applicant will be providing:

	Development Standard	TS-M Requirement	Proposed
59-C-8.41	Minimum Area	40,000 sq. ft.	201,822 sq. ft.
59-C-8.42	Max. Floor Area	3.0 FAR	2.22 FAR
59-C-8.43	Open Space: (a) public use space as % of net lot area (b) recreational space as % of net lot area, when 50 or more dwelling units are provided Total minimum open space req.	10 % minimum 25 % minimum 10% minimum	10 % minimum 25 % minimum 10% minimum

As is evident from the chart, Applicant has met all the applicable development standards. The Hearing Examiner finds that Applicant’s development plans are in accordance with all of the purposes, standards and regulations of the TS-M Zone, as set forth in Article 59-C of the Code.

b. Safety, Convenience and Amenity of Residents

The next part of “Finding (b)” required by Section 59-D-1.61 is a determination that the proposed development would provide the “maximum safety, convenience, and amenity of the residents.” As stated by Technical Staff (Exhibit 77, p. 16),

The project design satisfies the master plan amenity objectives by providing streetscape improvements, public use space, passive and active recreational areas, plazas, and sidewalks. The project will contribute to the urban design vision for Rockville Pike. The developer will dedicate 75 feet of right-of-way from the existing centerline of Rockville Pike, and set back any building 10 feet from the right-of-way line, placing any new buildings a minimum of 85 feet from the existing centerline. The application implements the master plan recommendation for the provision of public facilities and amenities.

This issue has also been discussed above in conjunction with the requirements for the TS-M Zone and in Part III. D. of this report. The Hearing Examiner finds that Applicant has provided the maximum in safety, convenience and amenities for the future residents of this development.

c. Compatibility with Adjacent Development

The final required determination under “Finding (b)” is that the proposed development be compatible with adjacent development. The issue of compatibility was discussed in Parts III.D.1, 2 and 3 of this report in connection with the Applicant’s “vision” for the development, the Development Plan and Sector Plan compliance. As observed by Technical Staff (Exhibit 77, p. 16),

The scale, density, and land uses of the project ensure compatibility with the surrounding area. The 20-story Nuclear Regulatory Commission buildings face the property across Rockville Pike. Two 18-story residential buildings face the property immediately to the west. The C-2 zoned site that adjoins the property to the south is recommended for the TS-M zone in connection with any future development. The Montgomery County Conference Center and hotel to the north are classified in the TS-R zone. The project complies with the master plan land use and density recommendations for the site and compares favorably with existing and planned development for the area.

For all these reasons, the Hearing Examiner finds Applicant's Development Plan to be compatible with adjacent development.

3. Internal Vehicular and Pedestrian Circulation Systems and Site Access

The third required finding is:

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

This issue was discussed in Parts III.D.4 of this report (pp. 35-36). As noted there, Technical Staff agreed that the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient, but noted that Transportation Planning Staff will require certain enhanced traffic calming measures at site plan and more detail regarding pedestrian crosswalks, pedestrian pushbuttons, refuge islands, handicapped ramps, bike lockers and delivery schedules. Staff notes that these issues need not be finalized at rezoning, but they must be addressed at the subdivision and site plan stages. Exhibit 77, pp. 19-20.

Based on the entire record, the Hearing Examiner finds that the proposed internal vehicular and pedestrian circulation systems and points of external access will be safe, adequate and efficient for both vehicular and pedestrian traffic.

4. Preventing Erosion, Preserving Vegetation, Forest Conservation and Water Resources

The fourth required finding is:

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

As discussed in Part III.D.5 of this report (pp. 38-40), Environmental Staff noted that the site is not located in a Special Protection Area or Primary Management Area. It has no steep slopes or erodible soils, and there are no wetlands or streams on the site. The level of site imperviousness will be significantly reduced by the proposed development, and Technical Staff reported no environmental issues warranting denial of this application.

Applicant's engineer, Charles Irish, Jr., testified that by situating Woodglen as far to the east as possible, Applicant will be able to preserve most of the trees next to the adjacent "The Grand" property, to the west. Also, a tree protection plan will be prepared as part of the sediment control plan. Tr. 136-137. Technical Staff observed that the sediment control measures proposed by Applicant "are consistent with best management practices to prevent soil erosion, ensure sediment control, and preserve natural resources of the site." Exhibit 77, p. 20. These measures will be reviewed for adequacy at the time site plan review. A Tree Save Plan will be required as part of the Final Forest Conservation Plan, and a Stormwater Management Plan will have to be approved by DPS prior to subdivision.

For the reasons discussed here and in Part III.D.5 of this report, the Hearing Examiner finds that Applicant has demonstrated the environmental controls required by "Finding (d)."

5. Ownership and Perpetual Maintenance

The fifth required finding is:

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

Applicant, Green Acres Metro, L.P, is the owner of the subject site. Tr. 17. It had submitted sample condominium documents (Exhibits 39, 40 and 41) to respond to the question of how it would provide for perpetual maintenance of any areas intended to be used for recreational or other common

or quasi-public purposes. However, because part of the development will be nonresidential, and it is uncertain whether the residential units will be condominiums or apartments, Applicant supplemented the record with an affidavit (Exhibit 95(b)), giving assurances of perpetual maintenance in all areas intended to be used for recreational or other common or quasi-public purposes. If there is a condominium, perpetual maintenance will be provided for in recorded homeowner association documents. Otherwise, perpetual maintenance will be provided by Applicant through a management company.

The Hearing Examiner finds that Applicant has sufficiently demonstrated both ownership of the property and its commitment to perpetual maintenance of all recreational and other common or quasi-public areas.

6. The Public Interest

The Applicant must show that the proposed reclassification is sufficiently in the public interest to justify its approval. When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment and public benefits such as provision of affordable housing.

The issue of Master Plan conformance was considered in Part III.D.3. of this report. As outlined therein, Applicant's proposal is consistent with the recommendations, goals and objectives of the 1992 North Bethesda-Garrett Park Master Plan, and the White Flint Sector Plan contained therein.

The Planning Board and its Technical Staff supported the proposed rezoning. Technical Staff, in a report dated September 18, 2007, recommended approval of the application (Exhibit 77). The Planning Board considered the application on October 25, 2007 and, by a vote of 5 to 0, recommended approval, but added the additional recommendation "that the binding elements 1 and 3 of the

Development Plan be revised to eliminate the density restriction of 2.22 FAR and the height restriction of 11 and 13 floors, respectively.” Exhibit 78. Since the mentioned binding elements are linked to the density requirements of the current Sector Plan and to the requirement in Zoning Ordinance §59-D-1.3(h) that the Development Plan show the height of proposed buildings, both Applicant and the Hearing Examiner concluded that these binding elements should remain, as discussed in Part II of this report. If a revised sector plan is in effect when this case goes to site plan review and subdivision, then an application for a development plan amendment can be filed by the Applicant to allow appropriate modifications to the binding elements to conform to the revised sector plan.

The impact on public facilities was discussed in Part. III. D.4. of this report. The evidence indicates that transportation, schools and water and sewer services would not be adversely affected by the proposed development.

The proposed project will bring an attractive, mixed-use development within walking distance of a Metro Station, and will provide affordable housing and streetscape improvements. There has been no opposition to this project, and it has been endorsed by the Washington Smart Growth Alliance as a “Smart Growth Project” and an “excellent example of redeveloping older suburban strip centers and creation [of] great walkable places.” Exhibit 82.

For the reasons discussed at length in this report, the Hearing Examiner concludes that the proposed development would be in the public interest.

C. Conclusion

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

1. The proposed development satisfies the intent, purpose and standards of the TS-M Zone, and meets the requirements set forth in Section 59-D-1.61 of the Zoning Ordinance;

2. The application proposes a development that would be compatible with development in the surrounding area; and
3. The requested reclassification to the TS-M Zone has been shown to be in the public interest.

VI. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-860, requesting reclassification from the C-2 Zone to the TS-M Zone of approximately 4.633 acres of land described as Part of Lot 3, Lot 4, and Lot 5 of Green Acres Subdivision, and located at 11520, 11560, and 11564, Rockville Pike, North Bethesda, in the 4th Election District, be approved in the amount requested and subject to the specifications and requirements of the revised Development Plan, Exhibit 95(a), provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Development Plan approved by the District Council within 10 days of approval, as required under Code §59-D-1.64.

Dated: December 20, 2007

Respectfully submitted,

Martin L. Grossman
Hearing Examiner