



**TABLE OF CONTENTS**

	<b>Page No.</b>
<b>I. SUMMARY .....</b>	<b>2</b>
<b>II. STATEMENT OF THE CASE.....</b>	<b>3</b>
<b>III. FINDINGS OF FACT.....</b>	<b>6</b>
A. Subject Property .....	6
B. Surrounding Area .....	7
C. Zoning and Land Use History .....	14
D. Proposed Development.....	14
E. Development Plan .....	19
F. Master Plan.....	25
G. Environmental Issues and Storm Water Management.....	45
H. Public Facilities.....	46
1. Transportation: Roadway Capacity.....	46
2. Transportation: Access and Circulation .....	51
3. Water and Sewer .....	59
4. Schools .....	59
I. Community Participation .....	60
<b>IV. SUMMARY OF HEARINGS.....</b>	<b>61</b>
A. Applicant’s Case in Chief.....	61
B. Technical Staff.....	80
C. Community Participation.....	81
D. People’s Counsel .....	91
E. Applicant’s Rebuttal.....	94
<b>V. ZONING ISSUES .....</b>	<b>96</b>
A. The Development Plan .....	97
B. Public Interest.....	114
<b>VI. CONCLUSIONS.....</b>	<b>115</b>
<b>VII. RECOMMENDATION .....</b>	<b>116</b>

## I. SUMMARY

The present application seeks to rezone approximately 2.5 acres of land on Arlington Road in Bethesda from the C-4 Zone (limited commercial) to the PD-44 Zone (Planned Development, 44 dwelling units per acre). The site is currently occupied by a United States Postal Service facility, which operates as a carrier annex (where mail is brought for sorting and distribution) and retail post office. The Applicant, Keating Development Company acting on behalf of the Postal Service, proposes to demolish the existing building and replace it with a larger building to accommodate an expanded Postal Service facility on the ground level, four stories of multi-family residential dwellings above, and two levels of underground parking.

The Planning Board and Technical Staff recommended approval of the requested rezoning in its original form. The Hearing Examiner recommended a remand to give the Applicant the opportunity to modify its proposal, to conform the building more closely to the Sector Plan's recommendations and improve its compatibility with the adjoining Capital Crescent Trail and nearby homes. The District Council remanded the application to the Hearing Examiner, and the plans have now been revised to provide for a larger open space between the above-ground part of the building and the Trail and adjacent residences, and to drop the building farther into the ground, reducing visual impacts on the Trail and residences. The number of dwelling units has been decreased slightly, from 111 to 105. The amount of commercial space remains unchanged. Additional evidence has also been submitted concerning the potential traffic impacts of a traffic light proposed for the new southern entrance to the site. Based on the revisions to the plans and additional evidence submitted, the Hearing Examiner now recommends approval of the application.

This application is opposed by the Montgomery County Civic Federation, long-time Montgomery County land planner Malcolm Rivkin and the People's Counsel, all of whom argue that it is inconsistent with the *Bethesda CBD Sector Plan* and would exacerbate existing traffic problems on Arlington Road in Bethesda. The Hearing Examiner disagrees with their interpretations of substantial

compliance with the sector plan, and finds their concerns about traffic problems to be outweighed by substantial, probative evidence to the contrary from the Applicant and Technical Staff at the Maryland-National Capital Park & Planning Commission.

## II. STATEMENT OF THE CASE

Application No. G-861, filed on November 15, 2006 by Applicant Keating Development Company, requests reclassification from the C-4 Zone (limited commercial) to the PD-44 Zone (Planned Development, 44 dwelling units per acre) of 2.5 acres of land located at 7001 Arlington Road, Bethesda, Maryland, in the 7th election district. The property is identified as Parcels N826, P828 and P795 on Tax map HN122.

The application was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission ("MNCPPC") who, in a report dated March 15, 2007, recommended *approval*. See Ex. 36. The Montgomery County Planning Board ("Planning Board") considered the application on March 29, 2007 and recommended *approval* by a vote of 3 to 1, finding that "the application is consistent with the purpose clause and all applicable standards for the PD-44 Zone; the development plan is compatible with existing and proposed uses in the surrounding area; and the PD-44 Zone conforms to the recommendations of [the] 1994 Bethesda CBD Sector Plan." Ex. 39. The Planning Board's recommendation letter states that one Board member expressed concern about compatibility, and questioned whether Arlington Road would function in a reasonable manner with the combined post office and residential uses. Then-Commissioner Wellington believed "that the development plan does not adequately address potential safety issues with regard to ingress and egress for both uses at this location." See *id.* at 1-2.

It appears that to some degree, the Chair of the Planning Board shared Commissioner Wellington's concerns. The Planning Board's recommendation letter closes with the following paragraph (Ex. 39 at 2):

Because of the potential conflicts in traffic and vehicular movement for this project and in terms of its relationship to the existing and future development

along Arlington Road, the Chairman recommends that the District Council view the presentations, including the development plan, as illustrative rather than binding so that the potential vehicular movement related issues can be thoroughly examined and resolved at site plan.

This recommendation from the Planning Board Chairman is problematic. The Hearing Examiner has no doubt that the Planning Board is well-equipped to thoroughly examine and resolve issues such as access and circulation during a site plan review. In the Hearing Examiner's view, however, in a case involving a development plan the Zoning Ordinance requires the District Council to make an affirmative finding about access and circulation at the zoning stage, and does not offer an option to delegate that responsibility to the Planning Board.

Pursuant to Code § 59-D-1.1, development in the PD Zone is permitted "in accordance with a plan approved by the district council at the time the land is classified in" the zone. A site plan "that conforms to all non-illustrative elements of the approved development plan" must later be approved by the Planning Board. Code § 59-D-1.2. To approve a development plan, the Council must make five findings, set out in § 59-D-1.61, including substantial compliance with the master plan; compliance with the purposes, standards and regulations of the zone; compatibility with adjacent development; compliance with environmental standards; and "[t]hat the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient." The zones that require a development plan, including the PD Zone, do not have the specific development standards found in most zones, such as building height and setback requirements. In the absence of such standards, the development plan provides the basis for the District Council to make the necessary findings and to assess compatibility, one of its most fundamental obligations in a rezoning case. As a result, the Hearing Examiner concludes that the District Council does not have the discretion to consider the Development Plan submitted in this case to be entirely illustrative.

The Chair's recommendation also is problematic because its reference to "potential conflicts in traffic and vehicular movement" suggests the Chair believed either that the development plan was not adequate in the form presented to the Planning Board, or that the evidence was not

sufficient to determine whether access and circulation would be acceptable. This detracts from the substantial weight normally given to Planning Board recommendations.

At the Hearing Examiner's request, Transportation Planning Staff at the MNCPPC submitted a supplemental memorandum on April 30, 2007, providing a more detailed analysis of traffic circulation and safety than was included in the original Staff Report. See Ex. 43. Staff also submitted additional information, in response to questions from the Hearing Examiner, in emails dated May 1 and July 31, 2007. See Exs. 45 and 80.

Following two days of hearings in May and August, 2007 and after receiving post-hearing submissions, the Hearing Examiner issued a report and recommendation on December 24, 2007. On January 22, 2008, the District Council remanded the application to the Hearing Examiner with the following instructions:

to reopen the record, to provide the Applicant with the opportunity to revise its plans to better accommodate the recommendations of the Sector Plan and compatibility with the Capital Crescent Trail and the adjoining residential neighborhood, to provide more specific evidence regarding how the proposed traffic signal would affect conditions on this stretch of Arlington Road, particularly on Saturdays and Sundays, and to provide evidence as to whether the owner of the Bradley Shopping Center would be willing to cooperate in obtaining approval for and installing a traffic signal. On remand, the Hearing Examiner shall also further consider the question raised by the People's Counsel as to whether Section 59-C-7.15(b) requires a 100-foot setback from the rear property line abutting the Capital Crescent Trail.

Resolution No. 16-431.

On April 16, 2008, the Applicant submitted a new Development Plan and supporting documentation proposing a building with 105 dwelling units instead of 111, a significantly larger setback from the Capital Crescent Trail and a lower building profile as seen from the Trail. The new submissions were reviewed by Technical Staff, who submitted a memorandum on June 23, 2008 in response to a request from the Hearing Examiner for comment on salient issues to be considered on remand. See Ex. 112. Staff concluded that the revised plans significantly improved the designed of the site, and that the project as presently proposed is "even more compatible with surrounding

development and in substantial compliance with the various sector plan recommendations.” Ex. 112. The Planning Board did not consider the Applicant’s revised plans.

The Hearing Examiner convened a public hearing after proper notice on July 21, 2008, at which evidence and testimony were presented in support of and in opposition to the proposed rezoning. The record was held open until August 15, 2008 and later extended to August 28 for post-hearing submissions by the parties.

Due to the lengthy period of time that has elapsed since the District Council last took up this matter, this report and recommendation repeats the background information from the original Hearing Examiner’s report as well as describing the new evidence and arguments introduced on remand.

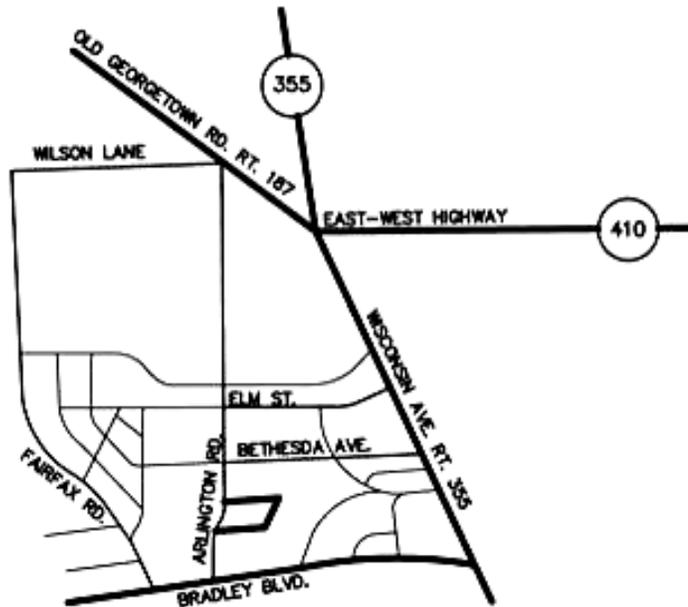
### **III. FINDINGS OF FACT**

For the convenience of the reader, the findings of fact are grouped by subject matter. Any conflicts in the evidence are resolved under the preponderance of the evidence test.

#### **A. Subject Property**

The subject property consists of approximately 2.5 acres of land located at 7001 Arlington Road, Bethesda, in a C-4 Zone, between Bethesda Avenue to the north and Bradley Boulevard to the south. The site is roughly a parallelogram in shape, with about 277 feet of frontage on Arlington Road, and approximate depths of 487 feet along its northern property line and 423 feet along its southern property line. The site is nearly entirely paved, and is developed with a United States Postal Service (“Postal Service”) facility, a large parking lot and an entrance driveway. The elevation rises about ten feet from the southwest corner of the site to the northeast corner. Vegetation is limited to a small lawn area with ornamental trees on the west side of the building, and several areas on the north and east sides of the parking lot with scrub vegetation. The site has no forest, streams, wetlands or specimen and significant trees.

The general shape and location of the subject property are shown on the map that follows, excerpted from Ex. 94(a).



### B. Surrounding Area

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 a floating zone case than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account areas that would be most directly affected by the proposed development.

In the present case, Technical Staff described the surrounding area as bounded by Hampden Lane to the north, Woodmont Avenue to the east, Bradley Boulevard to the south and Fairfax Road to the west. See Ex. 36 at 2. The Applicant’s land planner defined a similar surrounding area, but excluded residential uses by adding the Trail as a boundary to the southeast and drawing the western boundary line east of Fairfax and Clarendon Roads. See Ex. 35(a). The Applicant’s planner acknowledged that homes in the nearby Sacks residential neighborhood are visually impacted by activity on the subject site, and that he had taken that neighborhood into consideration in assessing compatibility. The Hearing Examiner finds Staff’s suggestion more reflective of the area most impacted, but in need of clarification to the east due to the sharp angle of Woodmont Avenue.

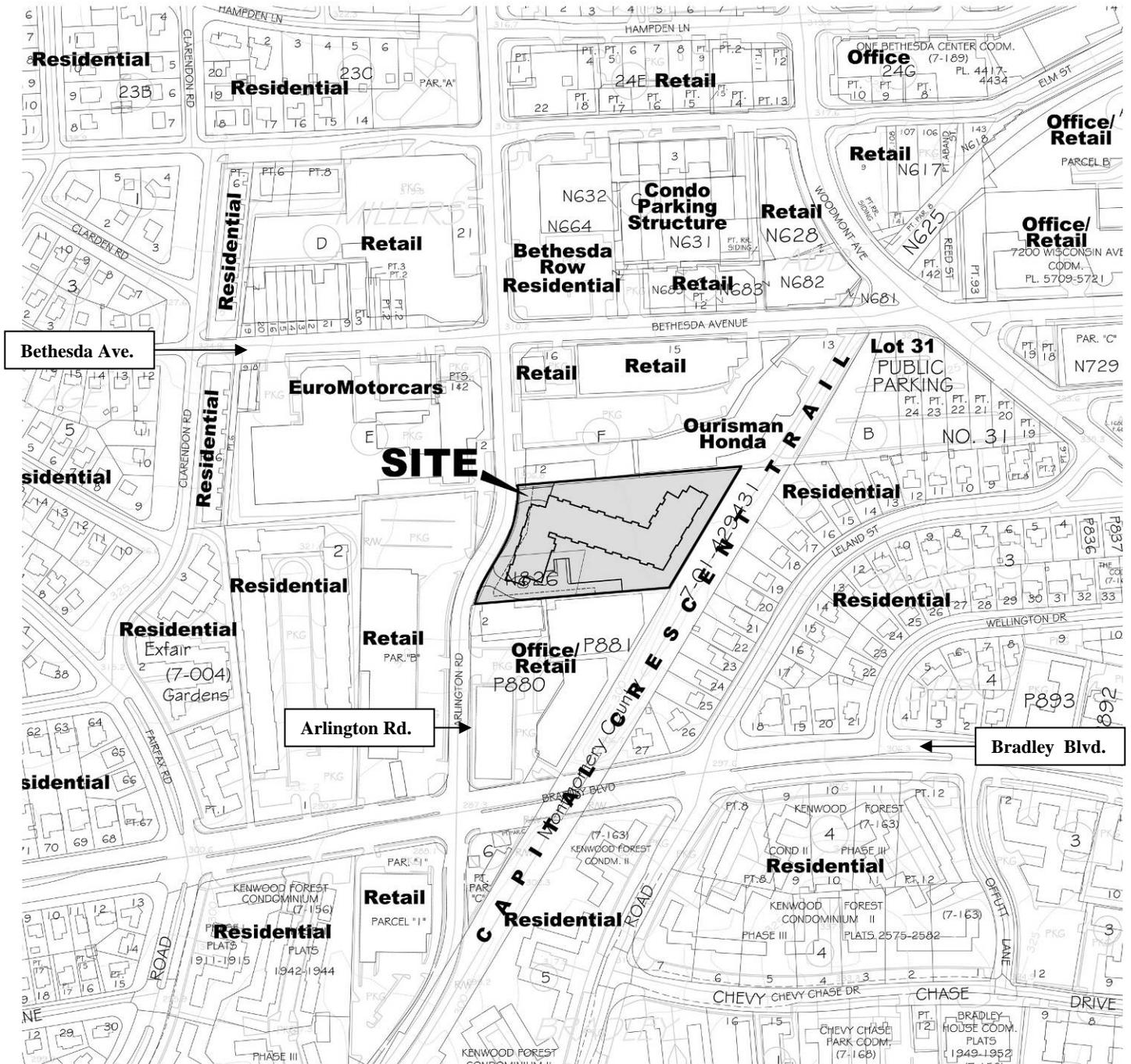
Accordingly, the Hearing Examiner designates a surrounding area roughly bounded by Hampden Lane to the North, Woodmont Avenue and the Sacks neighborhood to the east, Bradley Boulevard to the south and Fairfax Road/Clarendon Road to the west.

The surrounding area is predominantly commercial in nature, containing a mix of uses. To the north and south, the subject property abuts commercial properties in the C-2 Zone: a Goodyear Tire and Auto Facility and an Ourisman Honda auto dealership to the north, and to the south an office/retail complex with a one-story building and a five-story parking garage closest to the subject site, plus two five-story buildings containing offices and retail. Farther north are additional retail and mixed-use developments along Bethesda Avenue and Elm Street. To the east, the subject property abuts the Capital Crescent Trail (the "Trail"), a 90-foot-wide public right-of-way containing a paved walking/biking trail, which Technical Staff from the Park Development Division at MNCPPC describes as "a much used and cherished recreational amenity." See Memorandum dated March 13, 2007, Attachment 8 to Staff Report. In the vicinity of the subject site, the Trail consists of a 10-foot-wide asphalt path and a three-foot-wide, parallel, stone edge path, as well as a landscaped seating area with benches and a water fountain. On the east side of the Trail is a community of single-family, detached homes known as the Sacks neighborhood, classified under the R-60 Zone. The Applicant's land planner described this community as "a unique pocket of detached single-family dwellings surrounded by denser commercial and residential uses in an urban, mixed-use extension of the Bethesda Central Business District." Ex. 35(a) at 2. Roughly 600 feet east of the subject site is the boundary of the Bethesda Central Business District, and the Bethesda Metro Station is about 1,800 feet from the site.

To the west, across Arlington Road from the subject site, is the Bradley Shopping Center in the C-2 Zone, which contains a variety of retail establishments including a hardware store, a variety store, a drug store and a delicatessen. Diagonally to the northwest is the Euro Motorcars car dealership, and beyond it to the north is additional retail. Farther west along, Clarendon Road, is a row of multi-family and other residential uses.

The relationship of the subject property to land uses in the surrounding area may be seen on the map below.

**Surrounding Area Map, Excerpted from Ex. 15**



Photographs of the site and its immediate surroundings follow.



Capital  
Crescent  
Trail

Existing Postal  
Service Facility

Arlington Road

Context Photo – View South, Ex. 50

**Existing USPS Entrance, from Ex. 51**



**View of Existing Postal Facility and Adjacent Parking Garage to the South, from Ex. 51**



**Winter View South at Trail, from Ex. 52**



**Summer View South at Trail, from Ex. 52**



**Winter View North at Trail, from Ex. 52**



**Summer View of Existing Trail Seating Area, from Ex. 52**



**Winter View South at Trail Next to Ourisman Honda Location, from Ex. 52****C. Zoning and Land Use History**

The subject property was classified under the I-2 Zone (Heavy Industrial) in the 1958 County-wide comprehensive rezoning. The record does not reflect precisely when the property was rezoned to the C-2 Zone, but the C-2 zoning was confirmed by Sectional Map Amendment in 1972 (SMA F-736) and 1994 (SMA G-711). See Staff Report at 4.

**D. Proposed Development**

The Applicant proposes to redevelop the subject site with a mix of uses in a single building: an expanded Postal Service facility on the ground level, four stories of multi-family residential dwellings above it, and two levels of underground parking. The new postal facility would have 7,000 square feet of retail space fronting on Arlington Road (a substantial increase over the current 1,000-square-foot retail space) and 23,000 square feet of Postal Service work space. The residential component would have a maximum of 105 multi-family units, including 12.5 percent Moderately Priced Dwelling Units ("MPDUs"). The maximum building height along Arlington Road would be 63.5 feet. The Postal Service work space, parking and loading area would all be underground, beneath the residential units, and therefore the associated trips and activity levels would not be visible to site

residents, Trail users or residents of the Sacks neighborhood. Testimony indicates that construction materials and methods would be used to buffer building residents from noise and vibrations from USPS truck traffic. The exterior wall of the garage would extend nearly to the Trail property line but would be almost fully underground. The visible floors of the building would be set back 60 feet from the Trail, creating a significant area for landscaped open space bordering the Trail.

The front of the proposed building is shown at the edge of a wide, pedestrian-friendly, urban sidewalk. The Postal Service facility would have a single story with an 18-foot clearance, to conform to Postal Service design requirements. The full 18 feet would be above ground along Arlington Road, but it would be almost entirely underground at the east end of the site, due to a change in elevation. It would be more visible at the southeast end of the site, due an additional change in grade from north to south. The first story would be at grade or slightly underground at the northeast corner of the building. It would be about two feet above ground for 90 percent of the eastern property line, and would become more visible as the ground level slopes further down, starting about 30 feet north of the southern property line. The wall of the first story would rise above grade to a height of about 15 feet at the southeast corner of the property. See Tr. July 21 at 105-111. Turning around the corner to the south side of the building, the first story would become more fully visible, because the property to the south sits lower than the elevation of the Trail. The parking garage on the adjacent property does not extend all the way to the corner of the subject property, but stops some 50 to 60 feet from the Trail. At that location, the first floor wall of the proposed building would be about 26 feet above ground. The view of that portion of the wall would be at least partially obscured by vegetation and by the adjacent parking garage, which does extend all the way to the Trail farther south. The Applicant's engineer described this as very similar to the current condition on that part of the site, which has a visible brick wall facing the south. This relationship is best seen on page two of the attached Appendix, which displays an artist's rendering of the proposed development superimposed on an aerial photograph of the site and its surroundings.

The first-story Postal Service facility would serve as a platform for the four-story residential portion of the building and extensive terraces. The residential portion of the building would cover a roughly Z-shaped portion of the postal facility roof, with two short wings parallel to Arlington Road and the Trail, and a longer wing connected on the diagonal. The rest of the postal facility roof would be covered by landscaped terraces intended to comply with the PD Zone requirement that 50 percent of the site be occupied by green area. The terraces would be common space for building residents, and would be accessible from the first floor of the residential building. As described by the Applicant's land planner, the northern terrace would take advantage of daylight and serve as a repose from the summer heat, while the southern one would get direct sun and be "a wonderful outdoor room all year long." See Ex. 35(a) at 3. Staircases would provide access for building residents from the terraces to the residential lobby, the street and the Trail, although these access points would be closed to the public. The main entrance to the residential portion of the building would be at ground level, at the southern end of the site's Arlington Road frontage. The general concept may be seen on the artist's rendering on page two of the Appendix. The improvements that would be installed on the roof of the postal facility are shown in more detail on page three of the Appendix.

The relationship of the proposed building to the Trail and nearby residences is depicted on the two exhibits shown on pages four and five of the attached Appendix, a shadow study and a sight line study. These exhibits provide a building cross section that shows the various elements of the building and their distances from the property line. The walls of the four residential stories are specified to be 60 feet from the property line, not counting patios or terraces. The Applicant's engineer explained that within that 60-foot open space, about the first 20 feet from the residential stories would be patios or terraces and a six to eight-foot walkway. The next 40 feet or so would slope down from the terraces to the Trail. Soil would be piled on top of the street level story of the building, with a depth varying from about one foot at the edge of the trail to about six feet along the edge of the terraces. The Applicant's engineer described this as more than enough soil for plantings. Thus, the immediate view from the Trail would be a sloping, landscaped area extending 60 feet back from the Trail,

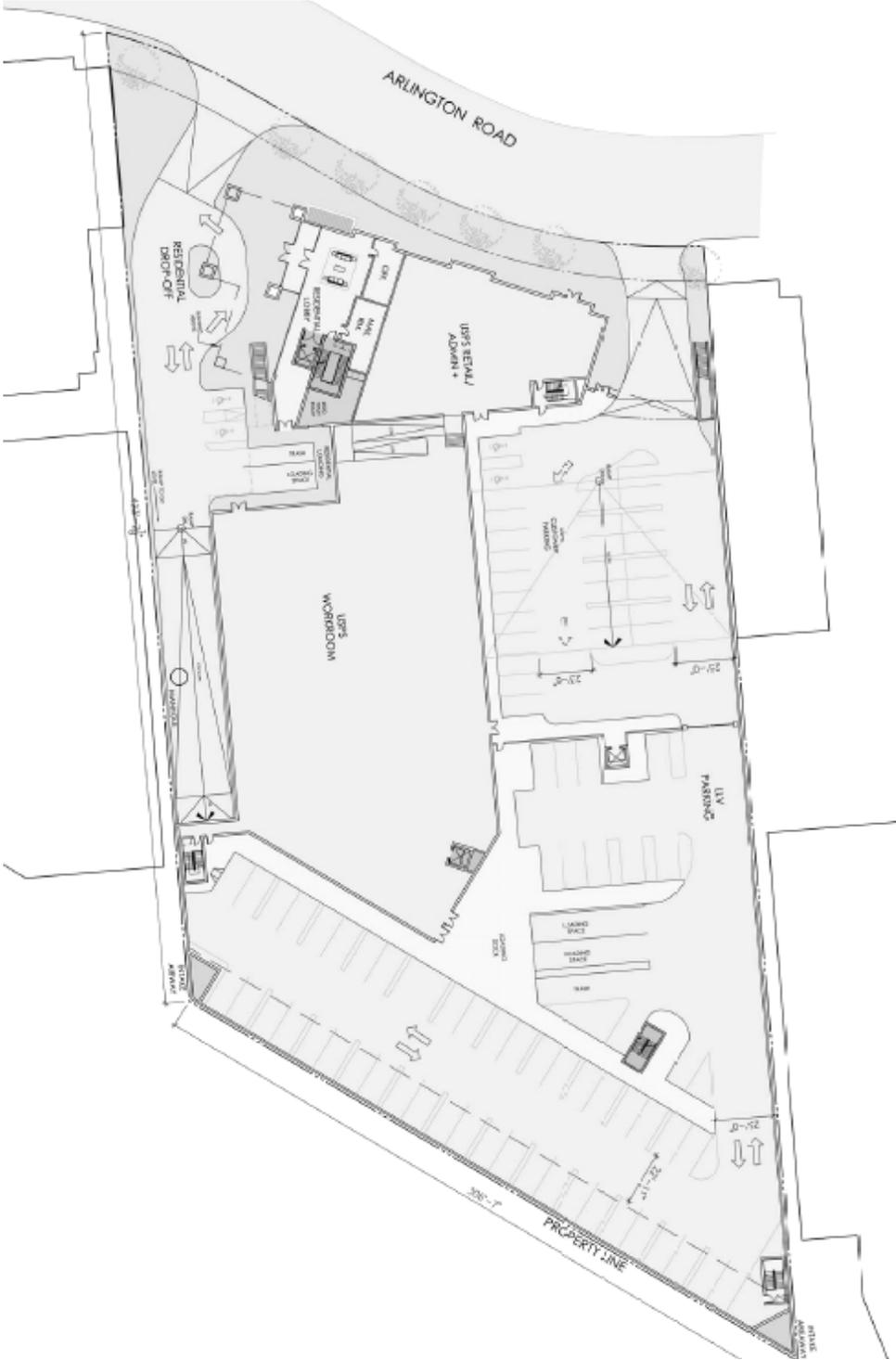
bordered by a very low wall along most of the property line, potentially with a four foot, non-opaque fence on top of the wall. The Applicant's architect testified that this would allow the visual plane to extend past the Trail, through the greenery. Beyond the sloping area would be terraces or patios at an elevation approximately eight feet above the Trail, and 20 feet farther back, the four-story residential building. See testimony of Mr. Irish and Mr. Dalaya. As shown on the shadow study, the building as currently proposed would have no shadow impact on the Trail, even during the time of its longest shadow, at the winter solstice. See Appendix; Tr. July 21 at 22-23.

Staff in the Park Development Division at MNCPPC recommended that if the development goes forward, this area "should not appear as the back of the 7001 Arlington Road development, but instead be carefully designed by a landscape architect as a public amenity for the thousands of users of the Capital Crescent Trail." *Id.* The evidence indicates an intention on the Applicant's part to comply with this recommendation, with the details to be worked out during site plan review. See Development Plan, Ex. 122(e), General Note No. 10.

One of the most significant issues in this case has been the circulation plan, which needs to accommodate four traffic flows on a busy street: post office customers, Postal Service trucks of various sizes, Postal Service employees' private vehicles and building residents. The Applicant proposes to designate the existing driveway entrance, at the north end of the site's Arlington Road frontage, for Postal Service vehicles and post office customers, who would park in separate areas on the upper level of the parking garage. Postal customers would park near the front of the site, essentially at the same grade as Arlington Road, and the parking would move below grade farther back (east) on the site. The retail post office would be at ground level, accessible on foot from Arlington Road or underground from the customer parking area. The various uses and parking areas proposed at ground level are shown on the Street Level Plan on the next page.

The Applicant proposes a second driveway entrance at the south end of the site's Arlington Road frontage, to be designated for building residents and Postal Service employees. This entrance is shown with special paving and a circular drop-off area, in addition to the garage entrance.

Residents and employees would park in separate areas on the lower level of the parking structure. The preliminary parking count provides for 290 spaces, well above the 224 required under the Zoning Ordinance, but the Applicant may request a ten percent reduction from the standard parking requirements (under Code Section 59-E-3.33) due to the site's proximity to Metro. See Ex. 35(a) at 2.



### **E. Development Plan**

Pursuant to Code § 59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone. This development plan must contain several elements, including a land use plan showing site access, proposed buildings and structures, a preliminary classification of dwelling units by type and number of bedrooms, parking areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. Code §59-D-1.3. Once approved by the District Council, the development plan is binding on the Applicant except where particular elements are identified as illustrative or conceptual. The project is subject to site plan review by the Planning Board, and minor changes to the plan may be made at that time. The principal specifications on the development Plan – those that the District Council considers in evaluating compatibility and compliance with the zone, for example – may not be changed without further application to the Council to amend the development plan.

The principal component of the development plan in this case is a document entitled Development Plan, Exhibit 122(e), which is reproduced on pages 21 to 25 below. Additional elements of the Development Plan include aerial photographs (Exs. 50, 53 and 56), a zoning map indicating the relationship between the subject site and neighboring zoning and land uses (Ex. 8), a surrounding area map (Ex. 15) and a Natural Resources Inventory/Forest Stand Delineation (“NRI/FSD,” Ex. 11).

Exhibit 122(e) satisfies the requirements of Code § 59-D-1.3 by showing access points, the approximate location of the proposed building, preliminary classification of dwellings by number of bedrooms, parking areas, an intended right-of-way dedication for Arlington Road, and areas intended for common use but not public ownership (the terraces, the drop-off/pick-up area near the residential entrance, and the sidewalk area in front of the building). The site layout is shown on the next page.



As stated in the General Notes below, the building location and footprint shown on the plan are approximate. The intent of note 9 is to allow for minor shifts in the building location and footprint during the more detailed planning that takes place at preliminary plan and site plan review.

### **Development Plan General Notes, from Ex. 122(e)**

#### GENERAL NOTES:

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1. PROPERTY IS L. 18109, F. 206. SEE ID PLAT IN THIS SET FOR LEGAL DESCRIPTION.

2. THE HORIZONTAL DATUM IS BASED ON NAD83. THE VERTICAL DATUM IS BASED ON W.S.S.C BENCHMARK NO. 28, A BONNET BOLT ON FIRE HYDRANT, WITH AN ELEVATION OF 310.31. THE BENCH MARK IS SHOWN ON THE W.S.S.C PLAN, CONTRACT NO. 73 CT 5703-A, PAGE 6 OF 27.

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 PROPERTY IS COMPRISED OF N826, P828 AND P795 ON TAX MAP HN 122; WITH RESPECTIVE TAX ACCOUNT NUMBERS OF 00435988, 00435955 AND 00435990, AND IS CURRENTLY ZONED C-4 (COMMERCIAL) ACCORDING TO TAX ACCOUNT RECORDS.

5. BOUNDARY SURVEY WAS PREPARED BY VIKI, INC. DATED SEPTEMBER, 2006.

6. THIS SITE IS LOCATED IN THE LITTLE FALLS BRANCH 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. 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.

9. THE BUILDING LOCATION AND FOOTPRINT SHOWN ON THE DEVELOPMENT PLAN ARE APPROXIMATE. THE EXACT BUILDING LOCATION AND FOOTPRINT WILL BE DETERMINED AS PART OF SITE PLAN REVIEW AND APPROVAL.

10. THE APPLICANT WILL SUBMIT A FINAL LANDSCAPE PLAN FOR THE SITE AND ADJACENT AREA ALONG THE CAPITAL CRESCENT TRAIL WITH THE SITE PLAN SUBMISSION, AND WILL OBTAIN THE APPROVAL OF THE FINAL LANDSCAPE PLAN AS PART OF THE SITE PLAN APPROVAL BY THE MONTGOMERY COUNTY PLANNING BOARD.

11. THE FORM OF OWNERSHIP OF THE PROJECT HAS NOT YET BEEN DETERMINED. AS PART OF SITE PLAN REVIEW AND APPROVAL, DOCUMENTATION WILL BE SUBMITTED THAT CONFIRMS THAT THE PROPERTY OWNERSHIP WILL BE RESPONSIBLE FOR THE PERPETUAL MAINTENANCE OF LANDSCAPING AREAS ON THE PROPERTY AS SHOWN ON THE DEVELOPMENT PLAN.

The Development Plan specifies several textual binding elements, which are items that the Applicant wished to make definite, but were more readily expressed in text than in the graphics. These are shown on the next page.

**Textual Binding Elements, from Ex. 122(e)**

**TEXTUAL BINDING ELEMENTS:**

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1. THE BUILDING WILL HAVE A MAXIMUM HEIGHT OF 59.9', AS MEASURED FROM THE BUILDING HEIGHT MEASURE POINT IN THE CENTERLINE OF ARLINGTON ROAD, WHOSE ELEVATION IS 306.64, AS SHOWN ON THE DEVELOPMENT PLAN.
2. THE DEVELOPMENT WILL HAVE A MAXIMUM DENSITY OF 1.66 FAR.
3. THE MAXIMUM NUMBER OF MULTI-FAMILY DWELLING UNITS TO BE CONTAINED IN THE BUILDING SHALL NOT EXCEED 105.
4. THE BUILDING SHALL INCLUDE 12.5% OF THE FINAL PERMITTED UNIT COUNT AS MODERATELY PRICED DWELLING UNITS.
5. THE DEVELOPMENT WILL PROVIDE A MINIMUM OF 50% GREEN AREA ON SITE.
6. AS PART OF THE SITE PLAN PROCESS FOR THE 7001 ARLINGTON ROAD PROJECT, THE SIGNALIZATION PROPOSED IN THE DEVELOPMENT PLAN MUST BE APPROVED BY DPWT, INCLUDING LANE GEOMETRY AND THE PROVISION OF NECESSARY RIGHTS OF WAY OR EASEMENT ASSURANCES ON THE WEST SIDE OF ARLINGTON ROAD. PRIOR TO APPLICATION FOR THE BUILDING PERMIT FOR CONSTRUCTION OF THE BUILDING THE FINAL DESIGN FOR THE SIGNAL MUST BE APPROVED, PRIOR TO ISSUANCE OF THE BUILDING PERMIT THE SIGNAL MUST BE PERMITTED AND BONDED, AND PRIOR TO THE ISSUANCE OF OCCUPANCY PERMITS THE SIGNAL MUST BE OPERATIONAL.
7. THE RESIDENTIAL BUILDING WALLS, EXCLUSIVE OF ROOF OVERHANGS, CORNICES, BALCONIES, PATIOS, TERRACES, UNDERGROUND PARKING GARAGES, GARAGE STAIR ACCESS WAYS, AND SIMILAR APPURTENANCES, WILL HAVE A MINIMUM 60 FOOT SETBACK FROM THE EASTERN PROPERTY LINE.
8. ACCESS FROM THE SUBJECT SITE TO THE CAPITAL CRESCENT TRAIL WILL BE PROVIDED FOR RESIDENTS OF THE PROJECT VIA WALKWAYS FROM THE BUILDING TO THE CAPITAL CRESCENT TRAIL ACCESS POINT.
9. ANY FENCING ALONG THE EASTERN PROPERTY LINE WILL NOT BE SOLID IN ORDER TO ALLOW VIEWS FROM THE CAPITAL CRESCENT TRAIL TO THE SUBJECT SITE.

Remaining items from the Development Plan are reproduced on the next two pages.

Bedroom counts and parking calculations are preliminary, to be finalized during site plan review.

**Development Program and Open Space Calculation, from Ex. 122(e)**

**DEVELOPMENT PROGRAM**

PD44 Development Standards

Gross Tract Area	117,725 sf
Less prior dedication for Arlington Road	-6,922 sf
<u>Gross Area</u>	<u>110,803 sf</u>
Less proposed RW Dedication of Arlington Road	-4,176 sf
<u>Net Lot Area</u>	<u>106,627 sf</u>
<u>Residential Density</u>	
Maximum Density Permitted, (DUs per acre)	44.0 units/acre
Maximum Density Proposed, (DU's per acre)	38.9 units/acre
Dwelling Units Proposed	105 Multi-family
Residential GFA	165,000 sf
MPDU's Proposed	14 units (12.5% min)

PRELIMINARY UNIT COUNT DISTRIBUTION

	1 BR	1 BR +DEN	1 BR MPDU	2 BR	2 BR +DEN	2 BR MPDU	TOTAL
1ST	1	5	5	10	3	3	27
2ND	2	6	0	10	6	2	26
3RD	2	6	0	10	6	2	26
4TH	2	6	0	10	6	2	26
<b>TOTALS</b>	<b>7</b>	<b>23</b>	<b>5</b>	<b>40</b>	<b>21</b>	<b>9</b>	<b>105</b>

Non-Residential Density (Replacement USPS Postal Facility)

Retail Area	7,000 qsf
Office Area	23,000 qsf
<u>Total Non-Residential GFA</u>	<u>30,000 qsf</u>
<u>Total Proposed GFA</u>	<u>195,000 qsf</u>

**OPEN SPACE**

GREEN AREA- (BASED ON GROSS AREA)	<u>REQUIRED</u>	<u>PROPOSED</u>
	55,402 SF 50%	55,450 SF 50%

**Parking Information, from Ex. 122(e)**

**PARKING TABULATION**

\* THE PARKING TABULATION CHART IS ILLUSTRATIVE. PARKING FOR THE PROJECT WILL BE PROVIDED IN ACCORDANCE WITH MONTGOMERY COUNTY PARKING REQUIREMENTS WITH FINAL PARKING TABULATIONS/CALCULATIONS TO BE DETERMINED AS PART OF SITE PLAN APPROVAL BY THE MONTGOMERY COUNTY PLANNING BOARD.

\*\*FINAL BEDROOM MIX DETERMINED AT SITE PLAN.

RESIDENTIAL\*\*

7	1 BEDROOM UNITS @	1.250	SPACES/UNIT	8.750
23	1 BEDROOM +DEN UNITS @	1.250	SPACES/UNIT	28.750
5	1 BEDROOM MPDU UNITS @	0.625	SPACES/UNIT	3.125
40	2 BEDROOM UNITS @	1.50	SPACES/UNIT	60.000
21	2 BEDROOM +DEN UNITS @	1.50	SPACES/UNIT	31.500
9	2 BEDROOM MPDU UNITS @	0.750	SPACES/UNIT	6.750
105 UNITS		BASE RESIDENTIAL PARKING-		138.875
		SEC. 59-E-3.33, A CBD CREDIT OF 10% (RESIDENTIAL) -		13.887
REQUIRED PARKING SUBTOTAL (ROUNDED UP)				125

NON-RESIDENTIAL

7,000 SF RETAIL AREA	@ 5/1000 sf	35.00
23,000 SF WORKROOM (OFFICE)	@ 2.4/1000 sf	55.20
REQUIRED PARKING SUBTOTAL (ROUNDED UP)		91
TOTAL REQUIRED PARKING FOR SITE		216

**PARKING SUMMARY**

	REQUIRED*	PROVIDED
<u>TOTAL VEHICLE SPACES PROVIDED</u> SEE NOTE #8, THIS SHEET	216	287
<u>ACCESSIBLE SPACES (INCLUDING VAN SPACES)</u>	7	9
<u>VAN ACCESSIBLE SPACES</u>	2	3
<u>MOTORCYCLE SPACES</u> 2% OF PROVIDED VEHICLE SPACES, 20 MAXIMUM	6	6
<u>BICYCLE SPACES</u> 1 PER 20 VEHICLE SPACES PROVIDED, 20 MAXIMUM	15	15

**Development Phasing, from Ex. 122(e)**

**DEVELOPMENT PROGRAM**

THE PROJECT IS INTENDED TO BE DEVELOPED IN ONE PHASE. DEVELOPMENT OF THE ON SITE AMENITIES WILL OCCUR CONCURRENTLY WITH THE OCCUPANCY OF THE RESIDENTIAL UNITS, AND WILL BE COMPLETED PRIOR TO THE OCCUPANCY OF MORE THAN 75% OF THE UNITS, SUBJECT TO POSSIBLE DEFERRAL OF LANDSCAPING TO THE APPROPRIATE PLANTING SEASON.

## F. Master Plan

### 1. Relevant Sector Plan Provisions

The subject property lies within the Arlington Road District identified in the *Bethesda CBD Sector Plan, Approved and Adopted 1994* (the “Master Plan”). The Sector Plan described the Arlington Road District as the major community retail area for the Sector Plan and adjacent neighborhoods. See Sector Plan at 130. The plan stated that the area was characterized by low-rise structures, and that Woodmont Avenue was beginning to be redeveloped with new buildings that were oriented toward the street and had wide sidewalks, on-street parking and rear loading, helping to create a “main street” character. The Sector Plan identified several problems with vehicular circulation in and around the Bradley Shopping Center, including a substantial curve on Arlington Road that makes it hard to see cars exiting and entering the center, and pedestrians crossing illegally at mid-block. Moreover, the plan noted that because the pedestrian environment on Arlington Road does not encourage walking, many people drive and re-park when visiting shops in different parts of the district, compounding traffic congestion. See *id.* at 131.

The Sector Plan listed the following objectives for the Arlington Road District (p. 132):

1. Preserve and enhance the Arlington Road District as a community retail and service business area.
2. Concentrate redevelopment along Bethesda Avenue, with special focus at the intersection of Bethesda Avenue and Arlington Road as the center of the district.
3. Continue the “main street” shopping character along Bethesda Avenue, consistent with recent development.
4. Protect the surrounding residential areas from commercial intrusions by directing growth away from the edges and by providing lower densities, appropriate uses, and landscape buffers at the residential edges.
5. Improve traffic circulation, pedestrian safety, amenities, and convenience.
6. Provide additional housing and reduce the potential for additional employment away from the Metro Core.

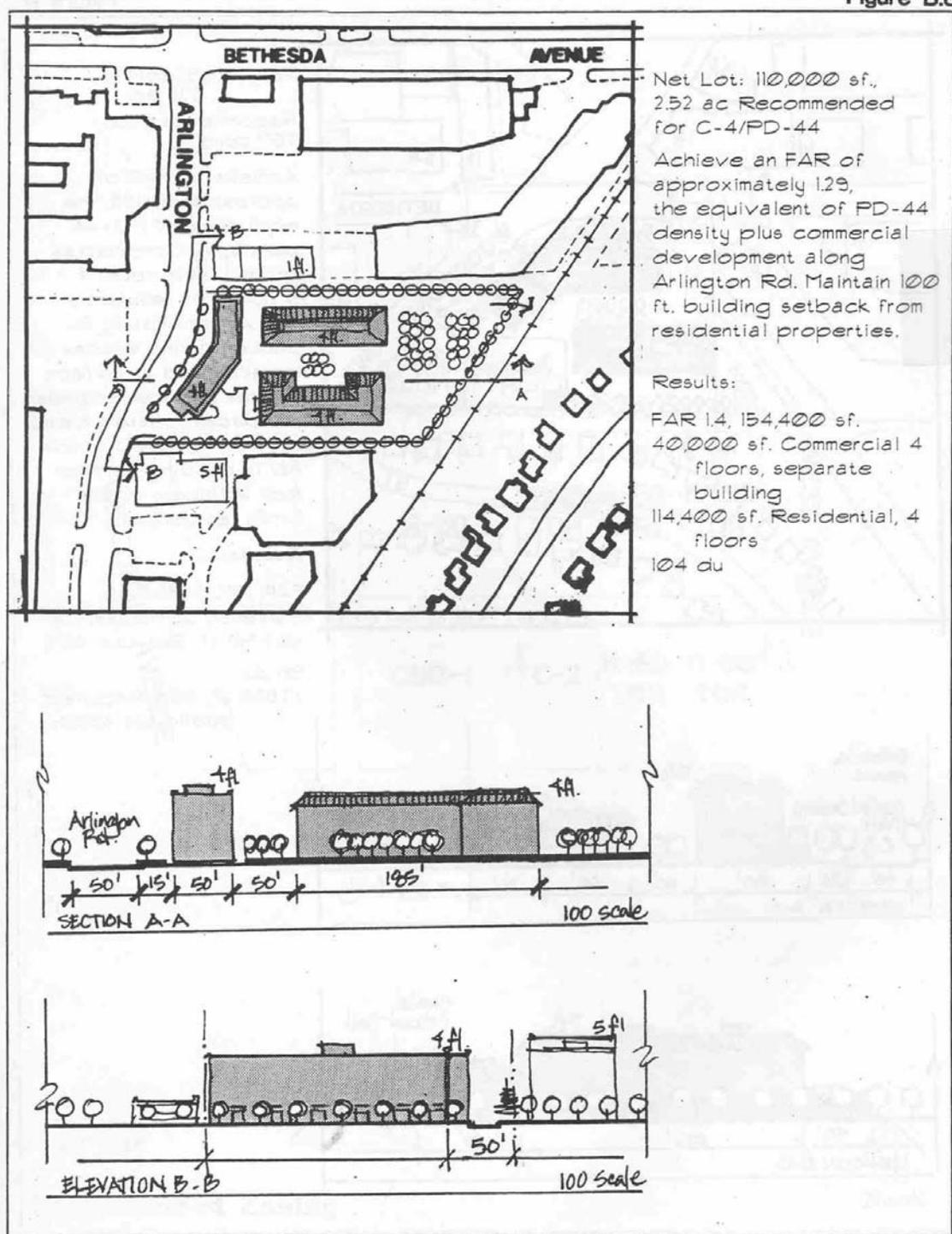
The Sector Plan recommended that “[w]hen the Euro Motorcars site redevelops, Arlington Road should be realigned to partially straighten the curve and improve sight distance. This improvement will increase safety and vehicular access to the Bradley Shopping Center.” Sector Plan at 132. The Euro Motorcars site has since been redeveloped, but the road realignment was not carried out, although a right-of-way dedication from the Euro Motorcars property was made. See Tr. May 7 at 133. The Sector Plan noted that an additional traffic signal might eventually be warranted in connection with the Bradley Shopping Center, “perhaps in conjunction with a pedestrian crossing and the curve-straightening that would occur with redevelopment of the Euro Motorcars site.” Sector Plan at 132. It also recommended enhanced pedestrian amenities to encourage pedestrian activity.

The Sector Plan provides the following specific recommendations for the subject property (p. 134):

The Plan recommends rezoning the post office site with a base zone of C-4, limited to standard method development of .25 FAR. If the U.S. Postal Service does not need the site for continued postal use, the site could be redeveloped with a neighborhood-serving commercial use up to .25 FAR. Alternatively, the site could be redeveloped for multi-family housing, with neighborhood-serving retail along Arlington Road. The PD-44 Zone, allowing up to 105 dwelling units and 40,000 square feet of commercial space, would be an appropriate zone. Residential use would provide a transition from commercial uses for the Sacks subdivision of single-family houses to the east, helping maintain the viability of the neighborhood. Residents from both communities could use the Capital Crescent Trail. (See Arlington Road Post Office Site Illustrative in Appendix B.)

The illustrative drawing referenced on page 134 is shown on the next page.

### Arlington Road Post Office Site Illustrative, Sector Plan Appendix B<sup>1</sup> at 15



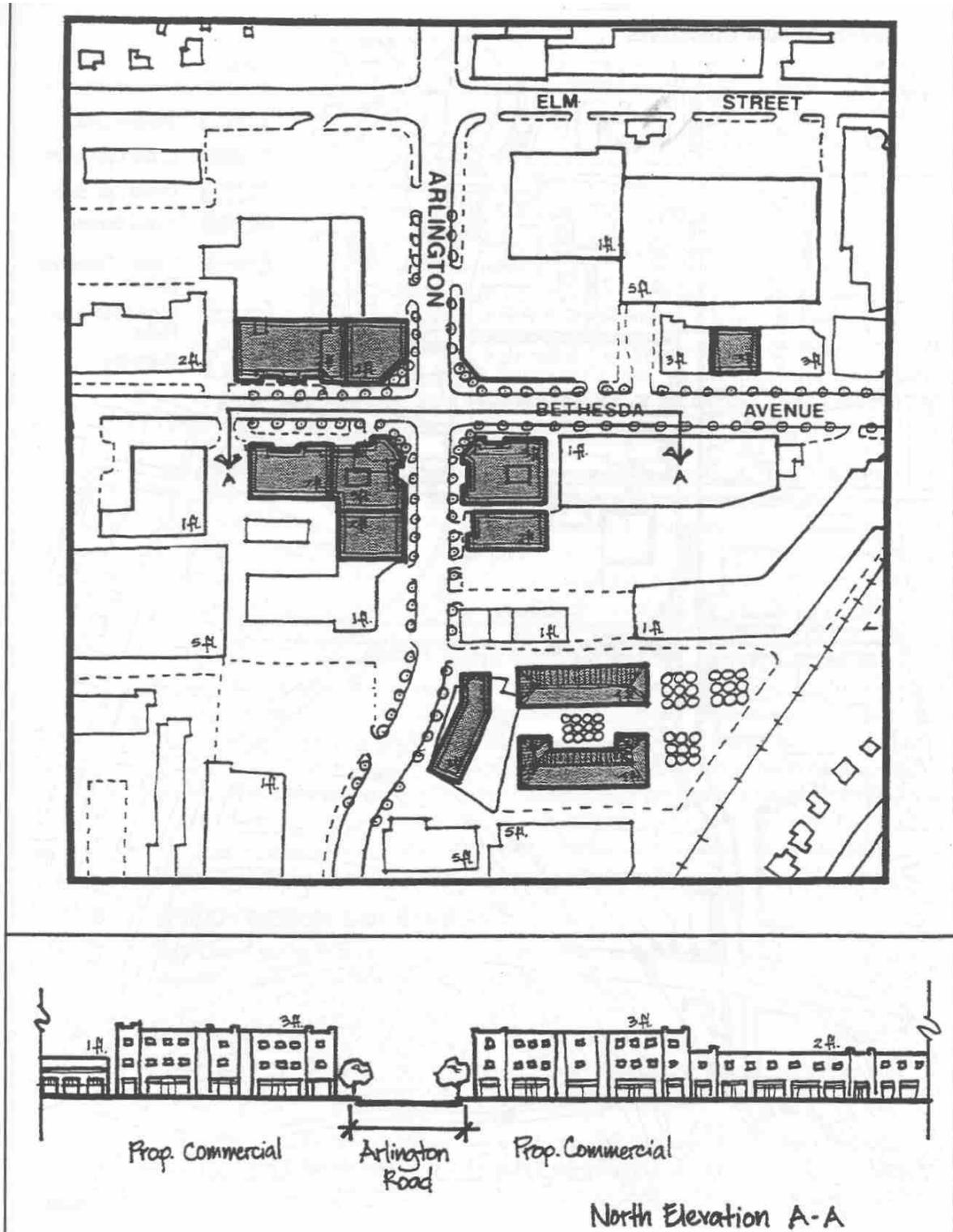
BETHESDA CBD SECTOR PLAN

APPROVED & ADOPTED JULY 1994

<sup>1</sup> The appendices to the Sector Plan were bound in a separate "Technical Appendix" that was approved and adopted in July 1994, with the rest of the Sector Plan, and contains the District Council's adopting resolution. The Hearing Examiner hereby takes official notice of the Sector Plan, including the Technical Appendix.

The main volume of the Sector Plan contains an illustrative drawing for a larger portion of the district, which shows the same base layout for the subject site as the drawing in Appendix B.

**Arlington Road District Illustrative, Sector Plan Fig. 4.39, p. 136**



The Sector Plan provides urban design guidelines for the district, including several for Arlington Road and Bethesda Avenue that are set forth in relevant part below:

- a. Develop low-rise commercial or mixed-use buildings with store-front retail located directly adjacent to the public sidewalk.
- b. Develop interconnected vehicular circulation routes between parcels, where feasible, to improve local vehicular access and reduce congestion. Provide outside parking and service areas in the rear of properties.
- c. Expand pedestrian connections between parcels to promote walking and reduce the number of vehicular shopping trips.
- d. Set corner buildings back . . .
- e. Provide pedestrian access to the public parking garage . . .
- f. Redevelop Bethesda Avenue west of Arlington Road as a Main Street . . .
- g. Provide landscape buffers between the multi-family residences along Clarendon Road . . .
- h. Limit heights, if the post office site is redeveloped for housing, to four stories stepping down to three stories along the east side of the site to ensure compatibility with the Sacks single-family neighborhood. Provide vehicular access to Arlington Road from the south-west corner of the site and provide pedestrian and bicycle access to the Capital Crescent Trail on the east.

The Sector Plan contains a specific section on “Other Public Facilities,” which provides the following detailed information and recommendations related to the subject site:

The Bethesda CBD [Central Business District] is currently served by two post offices. The post office at 7400 Wisconsin Avenue, near Metro Plaza, is on the Master Plan for Historic Preservation and is a community landmark. It is a retail, public-service facility. The site, while centrally located and convenient for Metro users, is accessible by car from one-way streets only. It has limited customer parking in the rear, and no on-street parking.

The post office at 7001 Arlington Road [the subject site] is designed as a carrier annex where mail is sorted for delivery. This location’s retail facilities are limited. Although there is a large off-street parking lot, most of it is used by mail trucks and access is difficult because of the curve in Arlington Road.

The 110,758-square-foot site is privately owned. However, the U.S. Postal Service owns the 16,000-square-foot building and has a ground lease that expires in 1999, with options to renew that extend until 2015 – beyond the life of the Plan.

The Postal Service will implement a corporate automation plan in 1995, which may reduce the numbers of employees on the site. But it is also possible that the Service might choose to expand the building if automation suggests a consolidation or extension of distribution functions on the site. Given the high land values and the difficulty of finding a site in Bethesda, the Postal Service considers the site attractive because of the possibility it provides for expansion and extensive parking.

### **Recommendation**

Although the Postal Service does not currently believe it necessary to expand retail service substantially on this site, an increase in jobs and housing in the Bethesda Sector Plan area would increase postal service demand. The site has the potential to be redeveloped for uses which could include a retail post office.

If the Postal Service does not renew the lease, the site could be developed for a combination of retail use along the Arlington Road frontage and multi-family residential uses for the remainder of the site. (See Section 4.12.) Residential use would not be compatible with continued function as a carrier annex on any portion of the site because of the hours of operation.

## **2. Applicant's Argument**

The Applicant's land planner, William Landfair, opined that the proposed development satisfies the Sector Plan's general objectives for the Arlington Road District. He contends that the larger, improved post office, with a "significantly enhanced public face on Arlington Road" and better access, would help preserve the district as a community retail and service business area. See Ex. 35(a) at 6. Mr. Landfair opined that the proposed development would help protect the surrounding residential area by constructing a residential use that is "fully consistent with the recommendations in the Sector Plan and is compatible with the adjacent residential across the Capital Crescent Trail because of the design and setback." Id. He stated that the proposed development would provide good traffic circulation and good pedestrian safety, amenities and convenience for several reasons: the driveways would be wider than the current driveway; residential and Postal Service employee parking would be separated from the post office customer and Postal Service vehicle parking, for better circulation and management of different uses; the new post office location would provide direct access both from the widened Arlington Road sidewalk and from the customer parking area, improving safety and convenience for pedestrians; sidewalk links would be provided at the north and south ends

of the site frontage; and residents would have pedestrian access to the Trail. Finally, Mr. Landfair stated that the proposed development would further the Sector Plan's goal of increasing housing and reducing the potential for employment away from the Metro Core by constructing 105 multi-family units on site, including 12.5% MPDUs. *See id.*

In assessing the recommendations for the subject site on page 134 of the Sector Plan, Mr. Landfair acknowledged that the Sector Plan did not contemplate the purchase of the site by the Post Office and its redevelopment with a mix of housing and Postal Service use. He argued, however, that the Sector Plan did contemplate a mix of residential uses and "neighborhood serving retail uses" for the site. *See Ex. 35(a) at 7.* In his view, the post office is an important neighborhood-serving community resource and a "suitable complement" for the proposed residential development. *See id.* Mr. Landfair noted that for economic reasons, the full residential complement proposed here is necessary to retain the Postal Service at this location. *See id.*

Mr. Landfair noted that the Sector Plan recommended a maximum of 105 dwelling units, as currently proposed. Mr. Landfair opined that the Sector Plan's recommended FAR of 0.25 for commercial use does not apply to this project. He nonetheless calculated the FAR for the Postal Service portion of the project to be 0.25, comparing the 30,000 square feet to the gross tract area. *See Tr. Aug. 1 at 111.*

Turning to the Sector Plan's urban design guidelines, Mr. Landfair opined that the post office component of the proposed development would satisfy the recommendation for mixed-use buildings with store-front retail adjacent to the sidewalk. *See id. at 7.* He testified that the proposed development would expand pedestrian connections between parcels by providing access to the Trail for site residents, and direct access to the post office for pedestrians on Arlington Road. In response to the opposition contention that Trail access should be open to the public, Mr. Landfair opined that public access through the terrace is neither required by the Sector Plan nor appropriate, for security reasons. He observed that the illustrative design in Appendix B of the Sector Plan (shown on page 28 above) has an arrow leading from the rear of the property to the Trail, but the arrow only goes one

way, from the site to the Trail – not from the Trail to the site. This suggests to him that the planners considered Trail access for residents of the subject site to be important, but did not foresee two-way access. In his view, if the drafters of the Sector Plan intended to recommend public access from the Trail to the subject site, they would have done so more clearly, for instance with dashed lines or a two-way arrow. See Tr. Aug. 1 at 153-54.

Considerable discussion took place at the remand hearing about the access points to the Trail that are currently available to the public. After the remand hearing, the Applicant submitted a drawing that shows that access is available at Bradley Boulevard, approximately 450 feet south of the subject site; at Bethesda Avenue, about 400 feet north of the subject site; and through the abutting commercial site, at a point about 215 feet south of the subject site. See Ex. 122(g). The access point at Bethesda Avenue is at the same grade as the sidewalk, but the other two access points require the use of stairs. See Ex. 128(a). In both cases, the stairs have a groove or ramp in the middle that allows people to walk up or down the steps while holding a bicycle beside them. See *id.*

Mr. Landfair acknowledged that the proposed development would not be fully consistent with the urban design guideline specific to the subject property, which states that if the site is redeveloped for housing, the eastern side of the building should step down to three stories to ensure compatibility with the nearby Sacks neighborhood. See *id.* . He conceded that the Sector Plan did not specify what it meant by “stepping down” to three stories, but opined that the motivation was to ensure a transition that would be appropriate in comparison with the scale of the single-family neighborhood. See *id.* at 93-94. Both Mr. Landfair and the Applicant’s architect, Manoj Dalaya, opined that setting the entire above-ground building back 60 feet from the property line would serve the Sector Plan’s goal of protecting the Sacks neighborhood better than stepping down the height with a smaller setback. Mr. Landfair maintained that with the proposed setback, the building would have a lower sight line than would a three-story building located closer to the property line. He suggested that the height recommendation was based on the 42-foot height limit in the surrounding C-2 Zone. This application,

however, requests a floating zone with no height limitation.<sup>2</sup> Mr. Dalaya pointed out that the building now proposed for the subject site would be set back at a greater than one-to-one ratio from the nearby houses, meaning that the visible stories would be at least as far from the nearest single-family home as the height of the building. Tr. July 21, 2008 at 20-21. Mr. Landfair noted that there are adjacent five-story buildings, so the building proposed here would be consistent.

Neither the Applicant's written submissions nor Mr. Landfair's initial testimony addressed the Sector Plan's recommendations for the subject site on page 221 of the Sector Plan, which stated explicitly that continued use as a carrier annex would be incompatible with a residential use on the site. After that provision was cited by a community member and the People's Counsel, Mr. Landfair testified that when the Sector Plan was adopted in 1994, no one imagined a scenario in which a redevelopment would combine the post office with residential development. He suggested that Staff at the time was concerned about an inherent conflict between the two, because a carrier annex has long hours of operation and its current configuration involves large surface parking areas and significant above-ground truck activity. The proposed building, he explained, would move all of the USPS truck activity underground, and would completely separate the residential and USPS parts of the building. Mr. Dalaya testified that construction materials and methods would be chosen to prevent the noise and vibrations from USPS trucks, including tractor trailers, from penetrating into the residential units.

On cross-examination, Mr. Landfair acknowledged that the Sector Plan employed the CBD zones, which are mixed use zones, suggesting that mixed use development was envisioned in the Sector Plan area. See Tr. Aug. 1 at 151-152. He maintained, however, that the drafters could not possibly imagine all scenarios, and they lacked the foresight or imagination to put a post office together with a residential use compatibly. Today, he observed, Bethesda has many mixed-use projects with residential development above commercial uses such as bars and restaurants. He

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<sup>2</sup> Mr. Landfair's testimony also referred to a one-to-one height-to-setback ratio requirement which, as discussed in Part V, the Hearing Examiner considers inapplicable.

maintained that a post office is at least as compatible with residential use as a bar or restaurant. With the separation shown on the Development Plan and modern construction methods, he believes the noise from the Postal Service operation can be attenuated and the two uses made fully compatible.

Mr. Landfair stressed that the Sector Plan provides only “guidelines,” which are often “interpreted in a flexible manner in order to achieve the overall goals of the plan without sacrificing other important purposes.” See Ex. 35(a) at 8. He argued that on the subject site, many difficult site constraints must be accommodated, as well as the competing requirements of the Postal Service and residential needs. The site is a narrow infill site, making it challenging to satisfy the PD Zone’s demanding 50-percent green area requirement, a requirement Mr. Landfair described as rarely seen in urban areas. Mr. Landfair notes that other urban, multi-family zones have appreciably lower open or public use space requirements: 30% in the TS-R Zone and 20% in the CBD Zones. To satisfy the PD Zone’s 50% requirement, the design of the residential stories had to go up, instead of out. Combined with the Postal Service’s need for an 18-foot ceiling clearance, Mr. Landfair explained, this required a total of five stories above grade along Arlington Road. He noted that other projects have been approved with green area on rooftops, including a PD-Zone project on the property of Georgetown Preparatory School on Rockville Pike. See Tr. Aug. 1 at 114.

Mr. Landfair argued that several factors ensure compatibility in this case: the Z-shaped layout of the residential stories reduces the massing along Arlington Road; the building would be over 500 feet from residences on Clarendon Road and 200 feet from residences on Leland Street; and the building would be compatible with the four-to-five-story commercial complex to the south,<sup>3</sup> a five-story building planned at the corner of Woodmont and Bethesda Avenues (on “Lot 31”) and the five-story Bethesda Row project at the corner of Bethesda Avenue and Arlington Road. See Ex. 35(a) at 9.

The Applicant notes that the Bethesda Row project, about 400 feet north of the subject site on Arlington Road (on a former Giant grocery store site), was subject to the same 42-foot height

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<sup>3</sup> Mr. Landfair focused on the five-story garage on the back part of the adjacent parcel, not the one-story building on the front part.

limitation in the Sector Plan as the subject site. However, Mr. Landfair relates that the project was approved for five stories “because the District Council determined that the goal of providing a mix of retail and residential uses in the Arlington Road District was more important than the height recommendation in the Sector Plan.” See *id.* The Applicant submits that the same is true of the present proposal.

Mr. Landfair notes changes that have taken place since the adoption of the Sector Plan, primary among them the ongoing construction of the five-story, mixed use retail/residential Bethesda Row project, which will have a maximum height of 65 feet. See *id.* He noted that the corner of Woodmont and Bethesda Avenues has become an important center of the Arlington Road District, with many restaurants, retail uses and theaters, some with office space on the upper stories, creating a vibrant urban center. On the south side of this intersection, Lots 31 and 31A have been rezoned to the TS-M Zone, to be redeveloped with a mixed use retail/residential project including 245 dwelling units, 40,000 square feet of retail space and an underground parking garage. The buildings are intended to be five stories west of Woodmont Avenue, stepping down to three stories at the rear of the site, and nine stories east of Woodmont Avenue, stepping down to five stories. In Mr. Landfair’s view, it is not unusual for development to differ from the Sector Plan’s expectations. He recommends viewing the plan as a guideline, not a document requiring rigid adherence at the expense of other important objectives. See *id.* at 10.

### **3. Technical Staff Findings**

Technical Staff confirmed that the Sector Plan did not anticipate the Postal Service’s decision to stay in place and enter into a joint development agreement to provide multi-family housing over a new postal facility. See Staff Report at 5. Staff acknowledged that the development proposed here does not step down to three stories along the eastern property line, as recommended in the Sector Plan, and would have four stories above a platform created by the postal facility and parking. The Staff Report reached the following conclusions (Staff Report at 5):

Because of the distance from the Sacks community, the intervening 100-foot width of the Trail, and buffer areas, staff does not find four floors

incompatible with the neighborhood. The design of the east end of the project, the articulation of the terraces, and the plantings provided at the edge of the property are sufficient to buffer the view of the project from the Trail and the Sacks community. In addition, staff suggested that the below grade garage and the structure be pulled back from the property line, so trees can be planted in the ground and eventually provide a tall backdrop to the project. Working with Parks staff, the applicant may also provide large-scale deciduous trees on the trail side of the property line

It should be noted that the commercial garage and office building southeast of this property, and the Honda dealership to the northeast, present 50 to 60 feet of unscreened structure at the property line with the trail, which in staff's view is much more visually disruptive than the proposed project.

Staff expanded on these conclusions in its post-remand comments, stating that the larger setback now proposed "provides less of a building impact than would the step down provision, and therefore, fully complies with the intent of the step down recommendation." See Ex. 112 at 3. Staff found that the changes to the plan would allow site landscaping to gradually rise up from the Trail, without the four- to six-foot planting walls in the earlier proposal, which would enhance the view of the project from the Trail and the Sacks community and fulfill the Sector Plan's intent of ensuring compatibility. See *id.* Staff notes that the Sector Plan "did not (and could not) envision what type of design could become acceptable over a decade later." See *id.* In Staff's view, the changes the Applicant has made are "more than sufficient to meet the intent of the sector plan regarding compatibility." See *id.* at 4.

Staff suggests that the Sector Plan language rejecting the combination of a carrier annex and residential use on the same site was based on an assumption that the USPS would continue to use a surface parking lot. See *id.* Staff then concluded that under current conditions, the proposed mixed use project is acceptable:

[I]n the fourteen years since the Plan was created, the desire and planning preference for the combination of uses in mixed use projects has been greatly expanded beyond that which would have been considered acceptable, with residential uses now being built over active retail, offices, fire stations, and post offices. Since the Postal Service has chosen to retain the carrier annex on the property, and the proposed plan separates the Post Office uses from the residential uses by means of the landscaped deck and underground parking facilities, staff does not consider the combination of these uses as being incompatible. Furthermore, staff does not see this as a substantial issue in such a

quickly urbanizing area, and the additional housing supports Objective 6 for the Arlington Road District.

Ex. 112 at 4.

Staff found the Applicant's proposal to provide a pedestrian connection from the site to the Trail only for site residents to be acceptable, noting that other users may access the Trail through the commercial complex to the south and from Bradley Boulevard and Bethesda Avenue. See Staff Report at 6; Ex. 112 at 4. Staff considers the proposed Trail access to be compatible with Sector Plan recommendations and an important part of a comprehensive pedestrian circulation network. See Ex. 112 at 4.

Staff considers the proposal for less commercial square footage than recommended in the Sector Plan to be acceptable, noting that the Sector Plan was adopted 14 years ago and conditions change over time. Staff made the following observations regarding what it means to substantially comply with a 14-year-old sector plan:

It is not rational to require a development to duplicate every element of a recommendation made that long ago. The spirit of the Plan intent is the important factor and that spirit intended a mixed use building in this urbanizing area close to the Metro with access to the Capital Crescent Trail, with attractive landscaping treatment, that is visually buffered from the homes on the far side of the Trail. Staff believes that the proposed development satisfies that intent.

Ex. 112 at 4-5.

#### **4. Opposition Analysis**

Three parties to this case argued that the requested reclassification should be denied due to inconsistency with the Sector Plan: Malcolm Rivkin, who has worked as a professional land planner in Montgomery County for many years, has been designated an expert in land planning in past rezoning cases, currently teaches land use management at the University of Maryland University College and was Chair of the Citizens' Advisory Committee for the Sector Plan; Jim Humphrey, Land Use Chair for the Montgomery County Civic Federation (the "Civic Federation"); and Martin Klauber, People's Counsel for Montgomery County.

Mr. Rivkin argued that the proposed rezoning is totally contrary to the Sector Plan. In his view, the Sector Plan recommended, if the Postal Service no longer needed the site, either limiting the site to standard method development under the C-4 Zone with an FAR of 0.25, or combining multi-family development with neighborhood-serving retail. He maintained that nothing in the Sector Plan recommends keeping the post office function while adding multi-family units and an underground garage. See Ex. 71; Tr. May 7 at 185. Mr. Rivkin notes that a postal station has a traffic pattern and traffic flow that is totally different from neighborhood-serving retail. He opined that the postal facility generates traffic, activity and noise all day long, which is not compatible with a residential use. See Tr. Aug. 1 at 118-119. He also testified that the Sector Plan's statement that these two uses would be incompatible on the same site was based on the heavy truck traffic. See Tr. July 21 at 120.

Neither Mr. Rivkin nor Mr. Humphrey was persuaded by Mr. Dalaya's testimony that construction methods and materials can buffer building residents from the effects of heavy truck traffic below them. At their request, the Applicant submitted photographs depicting several examples of buildings with garage entries and loading docks directly underneath dwelling units. See Ex. 128(c). Mr. Rivkin was unimpressed, noting that there was no evidence that those buildings have 60 to 70 trucks going in and out every day or tractor trailer traffic. While this is true, it is equally true that the only evidence Mr. Rivkin and Mr. Humphrey presented that USPS truck traffic would be disturbing to building residents was their own common-sense expectation that tractor trailers and large trucks would cause objectionable noise and vibration, particularly when backing into the loading area using a back-up signal or horn. The applicant presented expert testimony and factual evidence that there would be less than ten tractor trailers per day, that most of the trucks would be the size of sport utility vehicles and minivans, that the truck drive aisle would not run under residential units, and that the building construction would protect residents from noise and vibration.

Having weighed the evidence, the Hearing Examiner finds the Applicant's written information and expert testimony more persuasive than unsupported allegations by opposition parties.

Mr. Rivkin stated that there are about 1,000 dwelling units in the process of being approved in the Sector Plan area, which he believes is enough to satisfy the Sector Plan's housing objectives. See Tr. Aug. 1 at 118. He opined, therefore, that there is no housing need sufficient to justify permitting a violation of the Sector Plan. See *id.* at 118.

With regard to the contentious issue of whether the Sector Plan recommended pedestrian and bicycle access from the subject site to the Trail for site residents only or for the general public, Mr. Rivkin maintained that the only possible reading of the language is to recommend access for the general public. See Tr. May 7 at 197-98.

Mr. Humphrey argued on behalf of the Civic Federation that the introductory phrase in the Sector Plan's specific recommendations for the subject site, "If the U.S. Postal Service does not need the site for continued postal use," establishes a condition on which all of the redevelopment recommendations are predicated. See Tr. May 7 at 202; Ex. 72. This condition, he maintained, has not been met because the Postal Service plans to continue operating at this location. He further argued that proposed development is inconsistent with the Sector Plan's statement that residential development "would not be compatible with continued function as a carrier annex on any portion of the site because of the hours of operation." See Tr. Aug. 1 at 121. In Mr. Humphrey's view, this language was based on the dozens of Postal Service employees and trucks going in and out during the peak periods.

Both Mr. Humphrey and Mr. Rivkin argued that far from being unfamiliar with mixed use projects and how construction techniques can be employed to separate uses, the drafters of the Sector Plan understood how to create successful, mixed-use projects, and simply made a determination that the combination of a carrier annex and residential use on the subject site would not work well. Mr. Humphrey noted that when the Sector Plan was being written in 1994, five successful mixed-use projects had already been approved and built in downtown Bethesda and a sixth, *The Metropolitan*, had been approved but construction was not complete. He described *The Metropolitan* as an award-

winning example of mixed use that includes a public parking lot, underground parking, first floor retail with residential above, a rooftop pool, a daycare center and a county government service center.

Mr. Humphrey contended that the Planning Board's recommendation in this case is inadequate because it failed to address the critical Sector Plan recommendation to partially straighten the curve in this stretch of Arlington Road, to improve sight distances for drivers. *See id.* He noted that the road-straightening recommendation appears in the Sector Plan in five locations, and when the Euro Motorworks site was redeveloped several years ago, land was set aside in the right-of-way on the western side of the road to allow for straightening, but the straightening was not done. Mr. Humphrey argued that the southern site entrance the Applicant has proposed was recommended in the Sector Plan in the context of a set of recommendations that included straightening the road, and should not be implemented separately.

Mr. Humphrey argued for the Civic Federation that the proposed development would not further the Sector Plan's goal of improving traffic circulation, pedestrian safety, amenities and convenience, given the lack of access to the green space or the Trail entrance for anyone other than site residents.<sup>4</sup>

The People's Council argued that the present application should be denied for failure to satisfy the Sector Plan, citing case law to support the proposition that a master plan can be more than a guide, *see Boyd Civic Assoc. v. Montgomery County*, 301 Md. 683 (1987), *Cecil County v. Gastor*, 285 Md. 233 (1979). Mr. Klauber argued that "of all the zones in our zoning ordinance, the PD Zone is the one zone that is tied tightest to a sector or master plan." Tr. Aug. 1 at 127. He maintained that the Development Plan proposed here is inconsistent with the Sector Plan in terms of the number of stories on the building, the proposed combination of postal and residential use and the lack of public access from the site to the Trail. *See id.*, citing Sector Plan at 131, second and third paragraphs, and 132.

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<sup>4</sup> During the original hearing, Mr. Humphrey also cited the uncertainty of the traffic light, because there had been no agreement with the Bradley Shopping Center. The owner of the shopping center has since submitted a letter indicating its agreement to the proposed light.

In support of his argument that the Sector Plan calls for public access to the Trail from the subject site, Mr. Klauber cited page 134 of the Sector Plan, "Residents from both communities could use the Capital Crescent Trail. (See Arlington Road Post Office Site illustrative in Appendix B.)" Page 15 of Appendix B contains an illustrative drawing of potential mixed use on the subject site, with an arrow suggesting access from the site to the Trail.

### **5. Hearing Examiner's Analysis**

In this case, the District Council must consider Sector Plan compliance in two contexts: the development plan findings in 59-D-1.61 and the requirements of the PD Zone. Section 59-D-1.61 requires that approval of the Development Plan be accompanied by a finding 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." Pursuant to Section 59-C-7.11, it is the purpose of the PD zone "to implement the general plan for the Maryland-Washington Regional District and the area master plans by permitting unified development consistent with densities proposed by master plans. . . . it is intended that the zoning category be utilized to implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories." The purpose clause also states that this zone "is in the nature of a special exception, and shall be approved or disapproved upon findings that the application is or is not proper for the comprehensive and systematic development of the county, is or is not capable of accomplishing the purposes of this zone and is or is not in substantial compliance with the duly approved and adopted general plan and master plans." Code § 59-C-7.11. Thus, the required development plan findings call for a finding of "substantial compliance" with the use and density indicated by the Sector Plan, while the purpose clause for the zone calls for broader findings that the proposed development would be in substantial compliance with the Sector Plan as a whole, and would implement the Sector Plan more closely than may be possible under other zoning categories.

The development proposed in this case is consistent with some elements of the Sector Plan and inconsistent with others. The question before the District Council is whether the consistencies constitute “substantial compliance,” or whether the inconsistencies result in a development plan that fails to comply with the essential elements of the Sector Plan.<sup>5</sup>

The Hearing Examiner considers the proposed development generally consistent with the Sector Plan’s suggestion that one acceptable use for this site would be a combination of multi-family dwellings and neighborhood-serving retail. Mr. Landfair considers a post office the epitome of neighborhood-serving retail, while Mr. Rivkin argues that a post office has a totally different traffic pattern from neighborhood-serving retail. The Sector Plan lists food stores, hair care and dry cleaning as examples of “neighborhood retail establishments.” See Sector Plan at 25. This suggests that the drafters of the Sector Plan had in mind retail uses that serve a variety of residents’ daily needs. Based on the Hearing Examiner’s general experience, the three examples given do not necessarily have similar traffic patterns; food stores tend to have very long hours, opening early and closing late, while hair care establishments often open later in the morning and stay open in the evening, and dry cleaning businesses have fairly long hours, to be available to commuters during the morning and evening peak hours. Based on the preponderance of the evidence, the Hearing Examiner concludes that the retail post office portion of the proposed development can be considered neighborhood-serving retail. Thus, the proposed development would satisfy the Sector Plan’s recommendation for “multi-family housing, with neighborhood-serving retail along Arlington Road.” See Sector Plan at 134.

The proposed development would fly in the face of the Sector Plan’s specific statement that residential use “would not be compatible with continued function as a carrier annex on any portion of the site because of the hours of operation,” and its recommendation for “retail use along the Arlington Road frontage and multi-family residential uses for the remainder of the site.” See Sector Plan at 221. The consensus among the parties is that this comment was based on the heavy USPS

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<sup>5</sup> Black’s Law Dictionary, a widely used source among lawyers, defines “substantial compliance” as “compliance with the essential elements.” Black’s Law Dictionary, Fifth Edition.

truck traffic associated with a carrier annex, which presumably operates over a long portion of the day, or at times when people expect to enjoy some peace and quiet. The Hearing Examiner is persuaded by the preponderance of the evidence that the proposed building design, which would separate the residential and USPS uses and move all of the truck traffic underground, coupled with construction materials and methods designed to isolate the impact of noise and vibrations, would allow the two uses proposed here to co-exist harmoniously. This conclusion is supported by the opinion of Technical Staff, expert testimony from the Applicant's consultants and written submissions, such as a drawing showing that only the loading dock and retail customer parking would be under residential units, not the main drive aisle for trucks (Ex. 128(b)).

While mixed-use development certainly existed when the Sector Plan was adopted, the evidence is undisputed that such development is more prominent today. Moreover, as Technical Staff suggested, the combinations of uses considered compatible has greatly expanded over time, particularly in rapidly urbanizing areas such as downtown Bethesda. See Ex. 112 at 4. Under these circumstances, hewing to the Sector Plan's specific finding about combining the post office with residential use, and its recommendation for separate uses in separate buildings, would appear to serve no purpose.

The Sector Plan recommended the same residential density proposed here, a maximum of 105 dwelling units. The question of commercial density is a bit trickier. The Sector Plan suggested that under a mixed-use residential/commercial scenario, an appropriate combination would be 105 dwelling units plus 40,000 square feet of commercial space. See Sector Plan at 134. The Applicant proposes that number of dwellings units plus 30,000 square feet of Postal Service space, 25 percent less than recommended. Technical Staff does not object to the decrease in commercial square footage, noting that as a master plan ages, its specific recommendations should be given less weight in favor of its more general intent. See Ex. 112 at 4-5. It appears that the Postal Service's ceiling requirement and extensive parking needs result in a building that is significantly larger than would normally result from the commercial density that was recommended in the Sector Plan.

However, with the changes made on remand, the Hearing Examiner finds that the density requested can be accommodated compatibly on the site.

The Sector Plan's urban design guidelines recommended that if the site were redeveloped for housing, building heights should be "four stories stepping down to three stories along the east side of the site to ensure compatibility with the Sacks single-family neighborhood." Sector Plan at 137. The building proposed here would depart from this recommendation, as it would effectively have six stories along Arlington Road (four stories of multi-family housing on top of an 18-foot postal facility, with a maximum height of 63 feet) and four and a half stories along the Trail (four stories of multi-family housing starting roughly six feet above the grade of the Trail). Technical Staff and the Applicant's land planner and architect all found that the proposed building, with the residential stories set back 60 feet from the property line, would have lesser impacts on the Trail and the Sacks neighborhood than a lower building set closer to the property line. Thus, the purpose of this guideline would be satisfied.

The Sector Plan's urban design guidelines also called for street-front, neighborhood-serving retail uses along Arlington Road, sitting right on the sidewalk, and improved pedestrian circulation. The development proposed here would clearly accomplish these goals for the subject site.

The Applicant and Technical Staff suggest that the proposed development should be permitted because there are five-story buildings immediately north and south of this site that sit closer to the Trail than the building shown on the Development Plan. The original Hearing Examiner's report and recommendation in this case noted an alternative argument from Mr. Smythe, who stated that the presence of five-story structures on either side of this site makes it all the more valuable to have a smaller building and deeper setback on the subject site, to let some sunshine in. By lowering the building and moving it farther back from the Trail, the Applicant has created exactly that effect – letting some sunshine and greenery in along a very urban part of the Trail.

On the issue of whether Trail access should be for site residents or the public, the Hearing Examiner is persuaded that the Sector Plan sought access for site residents only. The Sector

Plan recommends, in the same sentence, vehicular access to Arlington Road from the southwest corner of the site, and pedestrian and bicycle access to the Trail on the east. This language appears to focus on access for site residents, both vehicular and pedestrian/bicycle. Moreover, Mr. Landfair's point about the arrow on the Sector Plan drawing of this site pointing only in one direction is well taken. Technical Staff's support for residents-only Trail access lends additional support to this conclusion, as does the Applicant's concern that public access through the site would present security concerns and would involve costly ramps for handicapped-accessible access.

The Sector Plan recommended a mixed-use redevelopment of the subject site with neighborhood-serving retail and multi-family development, a pedestrian-oriented street front, a building height and setback that would be compatible with the Trail and the Sacks neighborhood, access to the Trail for residents, a new access point at the southwest corner of the site and attractive landscaping along the Trail. The development proposed here would be consistent with these recommendations, and would also provide funding for a mid-block traffic light recommended in the plan. In the Hearing Examiner's view, the failure to satisfy some of the specific recommendations for the site does not undermine the project's substantial compliance with the Sector Plan's essential goals.

### **G. Environmental Issues and Storm Water Management**

The subject site is not located in an area with special environmental protections, nor does it have natural features of any significance. Technical Staff states that at site plan review, the Applicant would be able to satisfy the small afforestation requirement applicable under the forest conservation law by planting approximately ten canopy trees.

The Applicant's engineer testified that stormwater management controls would be provided within the two-level parking garage, connecting to the existing storm drain system. He observed that the proposed redevelopment would reduce the amount of impervious area on the site, resulting in a lower peak rate of discharge even without the new stormwater management. Technical Staff stated that stormwater management regulations would be satisfied.

## H. Public Facilities

Under the County's Adequate Public Facilities Ordinance (Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, schools, water and sewage facilities, and police, fire and health services will be adequate to support the proposed development, and whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that the County Council sets in the Growth Policy and in the two-year AGP Policy Element.<sup>6</sup> While the final test under the APFO is carried out at subdivision, the District Council must first make its own public facilities evaluation in a rezoning case, because the Council bears the responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of the Council's review and the opportunity for a broader review than may be available to the Planning Board at subdivision. The District Council is charged at the zoning stage with determining whether the proposed development would have an adverse impact on public facilities and, if so, whether that impact would be mitigated by improvements reasonably probable of fruition in the foreseeable future. In the present case, the Council's transportation analysis requires a review of access and circulation in addition to roadway capacity.

### **1. Transportation: Roadway Capacity**

Pursuant to Section 59-H-2.4, the sufficiency of roadway capacity has been analyzed in the present case under the standards of the 2003-05 AGP Policy Element, which was in effect when the application was filed. Under the 2003-05 AGP Policy Element, subdivision applications are subject

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<sup>6</sup> See *2003-05 Annual Growth Policy – Policy Element, Resolution No. 15-375*, adopted October 28, 2003. The Hearing Examiner hereby takes official notice of the 2003-05 AGP Policy Element.

to only one transportation test, Local Area Transportation Review (“LATR”).<sup>7</sup> The Planning Board recognizes its LATR Guidelines as the standard to be used by applicants in the preparation of reports to the Hearing Examiner for zoning cases. LATR Guidelines at 1. LATR involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the peak hours of the morning and evening peak periods (6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.).

The Applicants performed a traffic study as required in this case, taking into account existing roads, programmed roads and available or programmed mass transportation, as well as existing traffic, traffic anticipated from nearby development that is approved but unbuilt (“background” traffic), and trips expected to be generated by the proposed development. Technical Staff directed the Applicant to study the effects of the proposed development on critical lane volumes (“CLVs”) at six nearby intersections: Bradley Boulevard and Fairfax Road, Bradley Boulevard and Arlington Road, Bradley Boulevard and Leland Street/Hillandale Road, Bethesda Avenue and Arlington Road, Bethesda Avenue and Woodmont Avenue, and Elm Street at Arlington Road. See Ex. 30(a) at 8. The Staff identified ten approved development projects that constitute the background traffic for this analysis. See *id.* at 17. These include Arlington East, with 180 dwelling units and 60,000 square feet of retail; Lot 31, with 250 dwelling units and 40,000 square feet of retail; and Bethesda Metro Center, with 285 dwelling units and 5,000 square feet of retail.

The Applicant’s traffic engineers expect the proposed development to generate a total of 125 new trips during the weekday morning peak hour and 157 new trips during the weekday evening peak hour.<sup>8</sup> See Ex. 30(a) at 18-19. These estimates are for “new” trips added to the roadway network, not counting the trips currently generated by the existing post office. The Applicant’s traffic engineers found that under standard traffic generation rates developed by the widely-recognized

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

<sup>8</sup> The traffic study was based on the original proposal for 111 dwelling units, so it may slightly overstate the trip generation.

Institute of Traffic Engineers (the "ITE"), the existing 18,600-square-foot post office should generate approximately 149 trips during the morning peak hour and 203 during the evening peak hour. *See id.* According to driveway counts taken at the site on October 4, 2006, however, the existing post office generates only 106 trips during the weekday morning peak hour and 141 during the weekday evening peak hour, possibly due to the use of transportation other than private vehicles.<sup>9</sup> *See id.* To provide a conservative analysis of the likely traffic impact, they used the ITE trip generation rates for existing trips, rather than the actual numbers. The ITE rates suggest that the combined residential use and 30,000-square-foot post office would generate a total of 274 trips in the morning peak hour and 360 in the evening peak hour. *See id.* at 18. Subtracting the estimated existing trips results in 125 new morning trips and 157 new evening trips:  $274 - 149 = 125$  morning peak hour trips and  $360 - 203 = 157$  evening peak hour trips. *See id.*

The traffic study concluded, and Technical Staff agreed, that with the proposed development and background development, all of the intersections studied would continue to operate with CLVs well below the applicable standard of 1,800 during the weekday peak periods. *See id.* at 20; Staff Report at 8-9. Accordingly, the proposed development satisfies LATR requirements.

The Applicant did additional traffic counts on a very busy Saturday in April.<sup>10</sup> Those counts showed a peak hour volume on Arlington Road in front of the post office of about 1,340, which was lower than the weekday peak hour street volume of 1,538 in the morning and 1,681 in the evening. *See Tr. May 7 at 140-41.* CLV at the existing post office driveway, on the other hand, was higher on Saturday, 588 compared to the weekday peak CLV of 581. These levels are still far below the study area standard of 1,800. *See Tr. May 7 at 141.*

According to data collected from the State Highway Administration by the Applicant's traffic engineers, during the three years 2003 through 2005, 24 accidents took place along Arlington

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<sup>9</sup> Traffic counts taken on a Saturday indicate 338 trips in the peak hour, but LATR uses only weekday data. *See Tr. May 7 at 141.*

<sup>10</sup> It was the start of the spring planting season, leading to heavy traffic at the hardware store in the Bradley Shopping Center, and it was the last Saturday for tax returns to be postmarked before the Tuesday deadline.

Road between Bethesda Avenue and Bradley Boulevard, including both intersections. See Tr. May 7 at 138. Five of the 24 accidents involved pedestrians, two in 2004 and three in 2005. All five took place on weekdays. Two of the pedestrian-related accidents took place about 210 feet north of Bradley Boulevard, essentially at the driveway for a CVS pharmacy located south of the post office, across from the middle driveway for the Bradley Shopping Center. One pedestrian-related accident took place at the intersection of Arlington Road and Bradley Boulevard, and two at the intersection of Arlington Road and Bethesda Avenue. None of the pedestrian-related accidents took place along the post office frontage. See *id.* at 138.

Technical Staff confirmed the five pedestrian-related accidents, which it described as a minimal accident rate relative to the number of pedestrians and vehicles moving through the area. See Ex. 43. With regard to all accidents, Staff stated that this stretch of Arlington Road has a far lower accident rate than the statewide average for roads carrying similar traffic loads, if the intersections are excluded. See *id.* Including accidents occurring within the two intersections at either end of the block results in an accident rate above the statewide average. See *id.* Technical Staff believes the accident rate excluding intersections is more applicable to this case, given that the site is located in the middle of a block. See *id.*

Several hearing participants testified that traffic gets congested along this stretch of Arlington Road, particularly during the peak hours, and often extends from Bethesda Avenue past the existing post office entrance in the northbound lanes. See testimony of Smythe, Edelman and Rivkin. The Applicant's principal traffic engineer, Martin Wells, acknowledged that LATR analysis has limitations, which led his firm to do additional types of analysis in a recent Bethesda case. In the present case, however, he observed that a substantial number of left turns took place in and out of the existing post office driveway during the weekday peak hours, indicating that while it may be challenging, it can be done. Based on his many years' experience as a traffic engineer, Mr. Wells opined that the additional density and traffic the proposed development would generate can be safely accommodated on Arlington Road because the sight distances are adequate, and the accident history

is good. In his view, the volume of trips generated would have only a marginal impact on Arlington Road. See Tr. May 7 at 182.

The Hearing Examiner consulted the LATR Guidelines for an indication of how much traffic back-up should be considered acceptable. The LATR Guidelines state that a queuing analysis may be required in a CBD or Metro Station policy area if Transportation Planning Staff believe that abnormally long queuing may be occurring, or if the CLV at an intersection exceeds 1,800. See LATR Guidelines at 21. The guidelines provide the following test for acceptable queuing (LATR Guidelines at 21):

The average queue length in the weekday peak hour should not extend more than 80 percent of the distance to an adjacent signalized intersection, provided the adjacent signalized intersections are greater than 300 feet apart. The 80 percent standard provides a margin of safety for peaking. If adjacent signalized intersections are closer together than 300 feet, the average queue length in the weekday peak hour should not extend more than 90 percent of the distance to the adjacent signalized intersection.

A queuing analysis was not required here because the CLVs at all intersections studied were far below 1,800, even with background traffic and the proposed development. Nonetheless, the Hearing Examiner finds this to be a useful yardstick. One of the Applicant's traffic experts testified that the distance from Bethesda Avenue to Bradley Boulevard is about 1,000 feet, and the location proposed for the southern driveway into the site is about half way between the two intersections. See Tr. July 21 at 68. Thus, to exceed the standard established in the LATR Guidelines, the average queue during the weekday peak hour would have to extend well past the subject site. See *id.* There is no evidence indicating this is the case, suggesting that while residents may find the back-ups bothersome, they are within norms that are considered acceptable in a CBD.

Mr. Rivkin contends that this section of Arlington Road is a dangerous roadway, in part because the Sector Plan's recommendations to partially straighten the curve in the road and create a new, internal access drive between the Euro Motorworks site and the Bradley Shopping Center parking lot have not been implemented. See Ex. 71; Tr. May 7 at 186-87. He testified that Euro Motorworks makes it a regular practice to park large vehicle carriers in the southbound lanes of

Arlington Road for loading and unloading, entirely blocking that lane. It is a mystery why this is permitted, but the Bethesda police have told Mr. Rivkin there is nothing they can do about it. Mr. Wells acknowledged this practice, noting that delivery trucks also stop in the northbound lanes of Arlington Road to make deliveries to CVS. He described these practices as an “operational headache,” but noted that because the road has two lanes in each direction, traffic can go around the blockages. Mr. Rivkin argued that the Applicant’s traffic analysis is deficient because it failed to take into account the effect of the vehicle carriers regularly blocking one lane. While this practice almost certainly causes congestion, it does not seem fair to require additional evidence from this Applicant due to the conduct of another private party who blocks the public road. Accordingly, the Hearing Examiner does not consider this a significant deficiency.

## **2. Transportation: Access and Circulation**

Considerable anecdotal evidence was presented about traffic safety on this stretch of Arlington Road. Visibility from the many driveway openings on this part of the road is limited by a hill and a curve, particularly for the southern driveway proposed on the subject site and for the Bradley Shopping Center, both of which are directly on the curve. Hearing participants testified that the curve makes it difficult for drivers who are trying to exit the post office or the shopping center to see oncoming traffic. Opposition witnesses question whether the proposed development would improve traffic circulation and pedestrian safety (one of the Sector Plan’s objectives for the Arlington Road District) or would make a bad situation worse.

At the Hearing Examiner’s request, Technical Staff reviewed the proposed access and circulation pattern before the first hearing. Staff found that the driveway designs are adequate, and that the separation of residential parking from post office customers and truck traffic is adequate and appropriate. See Ex. 43. Staff “could not find any reason to believe that the proposed design of the access points is inadequate or unsafe.” *Id.*

Mr. Wells testified that the new circulation pattern would be a big improvement over current conditions. He noted that currently, all traffic shares a single driveway and the loading docks are on the north side of the building, so large trucks backing into the loading docks partially block the drive aisle that leads to the customer parking area, the employee parking area and the parking area for smaller Postal Service trucks. In addition, the retail post office entrance is at the northeast corner of the building, so customers arriving by car can reach it by crossing the parking lot, but those arriving on foot must walk down the drive aisle and around the parking lot to reach the entrance. Under the proposed Development Plan, separate parking areas would be provided for each type of traffic, retail customers could reach the building without having to negotiate past any trucks, and pedestrians would have direct access from Arlington Road. Building residents would also have the convenience of a circular drop-off area at the residential entrance, avoiding the need for vehicles to stop on Arlington Road to drop off or pick up a passenger.

The northern driveway would be slightly wider than the existing one, but in essentially the same location, about 50 feet from the driveway entrance for the tire store to the north. The Montgomery County Department of Transportation (referred to in this report by its acronym at the time of the hearing and written submissions, "DPWT") normally prefers a 100-foot driveway spacing. Mr. Wells described this as a suburban standard that is very difficult to achieve in a CBD. Nonetheless, his firm carried out a queuing analysis to examine whether southbound traffic waiting to turn left into the post office would block cars trying to turn left to exit the Goodyear driveway. If more than two cars had to wait to make the left into the post office, the third car would prevent vehicles from turning left out of the Goodyear site. Based on traffic volumes on Arlington Road, Mr. Wells' analysis indicated that 95 percent of the time, the queue would contain only one car. See Tr. Aug. 1 at 27-31, 76. This analysis was submitted to DPWT, which approved a driveway spacing exception to permit the new post office driveway in the same location. See Exs. 79(a); 87.

The southern driveway presents a larger problem. After the Planning Board discussion raised questions about the safety and adequacy of the proposed access points, the Applicant carried

out a sight distance study. At the first hearing, the Applicant's civil engineer, Chuck Irish, testified that both driveways would satisfy Montgomery County standards for sight distance in both directions. This was based in part on an agreement the Applicant entered into with the adjoining property owner to the south. The agreement allows the Applicant to replace the front landscaping on the adjoining property with plants that will grow no taller than one foot high, and therefore will not interfere with sight distance from the proposed driveway. See Ex. 68.

At the second hearing, Mr. Irish amended his testimony, having learned that Arlington Road is not a business district road with a 200-foot sight distance requirement, as he initially thought, but rather an arterial road with a 325-foot sight distance requirement. See Tr. Aug. 1 at 17-18. Even with the lower landscaping, the southern driveway would have only 310 feet of sight distance to the left due to the curve in the road, so it would not meet the standard. To resolve this problem, the Applicant proposes to install a traffic signal, which would control the proposed southern entrance to the subject site and the main entrance to the Bradley Shopping Center. According to DPWT, as long as the new driveway has a "no right turn on red" designation, the normal sight distance requirement would not apply if there is a traffic signal in place. See Tr. Aug. 1 at 18-19; Ex. 79(a) at 2. Mr. Irish opined that with the proposed traffic signal, both entrances would have adequate sight distances and would be safe, adequate and efficient. See *id.* at 36, 38.

Installing a traffic signal on Arlington Road would require approval from DPWT. After the first hearing, the Applicants' traffic engineers carried out new, 12-hour traffic counts and prepared a traffic signal warrant study for submission to DPWT, to assess whether a traffic signal is warranted. The study results indicate that while the weekday numbers are not quite high enough to warrant a traffic signal, Saturday traffic at the Bradley Shopping Center satisfies four of the warrant criteria. See Tr. Aug. 1 at 73; Ex. 79(j). In a letter dated July 20, 2007, DPWT agreed that the warrant study shows the shopping center traffic meets the side street warrant criteria for a traffic signal, and identified other elements that would be part of a final approval decision (Ex. 79(a) at 1-2):

As you are aware, merely meeting warranting criteria is not in and of itself conclusive justification for the installation of a traffic signal. Other factors

at issue at this intersection that must be addressed before a final approval for signalization can be made include operational issues related to the removal of the [left-turn] restriction at [the existing shopping center driveway] given the shopping center driveway design. It is also likely that signal equipment on the west side of Arlington Road will need to be placed outside the existing public right-of-way. These are important factors in that the shopping center driveway is the approach that meets the criteria.

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. . . DPWT's final approval of the signalization proposal requires further detailed engineering layout and signal design, including the impact on the shopping center property, and procurement of necessary rights of way or easements, as is the County's standard process at the Site Plan/permit stage.

It should be noted that the County does not participate in the costs of signalization of private driveways with public roads, as access is for the sole benefit of the private property. Therefore, the participation of the shopping center property owner is critical to the final decision for signalization.

After the remand, the Applicant met with a representative of the shopping center, who submitted a letter stating its agreement to cooperate with the signal installation, provided that the Applicant pays the cost, and that the shopping center does not lose any parking spaces. DPWT concurred with the location of the proposed southern driveway, conditioned on final approval of signalization at the site plan/permit stage. See Ex. 79(a) at 2. DPWT suggested a binding element be added to the Development Plan, as follows:

As part of the Site Plan review process for the 7001 Arlington Road project, the signalization proposed in the Development Plan must be approved by DPWT, including lane geometry and the provision of necessary rights-of-way or easement assurances on the west side of Arlington Road. The final traffic signal design must be approved and bonded for construction prior to issuance of any building permits.

The Applicant has added a binding element to the Development Plan that was crafted with input from the principal hearing participants and the Hearing Examiner. It reads as follows:

6. AS PART OF THE SITE PLAN PROCESS FOR THE 7001 ARLINGTON ROAD PROJECT, THE SIGNALIZATION PROPOSED IN THE DEVELOPMENT PLAN MUST BE APPROVED BY DPWT, INCLUDING LANE GEOMETRY AND THE PROVISION OF NECESSARY RIGHTS OF WAY OR EASEMENT ASSURANCES ON THE WEST SIDE OF ARLINGTON ROAD. PRIOR TO APPLICATION FOR THE BUILDING PERMIT FOR CONSTRUCTION OF THE BUILDING THE FINAL DESIGN FOR THE SIGNAL MUST BE APPROVED, PRIOR TO ISSUANCE OF THE BUILDING PERMIT THE SIGNAL MUST BE PERMITTED AND BONDED, AND PRIOR TO THE ISSUANCE OF OCCUPANCY PERMITS THE SIGNAL MUST BE OPERATIONAL.

This binding element incorporates DPWT's recommendation, but adds two additional limitations. In addition to the signal being permitted and bonded before a building permit is issued, the Applicant has committed not to even apply for a building permit until the final design for the signal has been approved, and has agreed that occupancy permits must not be issued until the traffic signal is operational. This language was added (1) to place the onus on the Applicant not to apply for a building permit until the traffic signal has been approved; and (2) to ensure that the building will not be occupied and generating traffic from the southern driveway until the signal is actually operational. This binding element provides a very strong assurance that if the zoning is approved, the building will not be constructed unless the traffic signal receives final approval from DPWT, and it will not be occupied until the signal is in use. Any changes to those conditions would require a development plan amendment approved by the District Council.

The People's Counsel, Martin Klauber, questioned at the first hearing whether the proposed traffic signal would worsen traffic problems on Arlington Road, e.g. by causing additional back-ups during the weekday peak hours. See Tr. Aug. 1 at 128-29. Mr. Wells, an expert in traffic engineering and transportation planning, opined that the proposed traffic signal would improve traffic conditions along this stretch of Arlington Road by providing safe movements in and out of the shopping center and the new driveway on the subject site, and would create gaps in traffic that would make queues more manageable. See Tr. Aug. 1 at 77. As several witnesses pointed out, moreover, a traffic signal at the proposed location was recommended in the Sector Plan. Mr. Humphrey argued that the Sector Plan recommended the traffic signal in conjunction with straightening the curve in the road.

However, Mr. Irish, an expert in civil engineering, testified that one can be done without the other. See Tr. May 7 at 133.

In its remand order, the District Council stated an intent to give the Applicant the opportunity “to provide more specific evidence regarding how the proposed traffic signal would affect conditions on this stretch of Arlington Road, particularly on Saturdays and Sundays.” See Council Resolution No. 16-431. The Applicant chose not to make a written submission on this topic. In an effort to obtain an objective analysis of the traffic signal’s potential impact, the Hearing Examiner requested that Technical Staff address this issue in its post-remand comments. Transportation Staff assessed the potential negative effect of back-ups affecting nearby driveways, the accident risks from drivers coming around the curves and failing to see the traffic signal in time to slow down or stop, and the potential positive impacts of removing the danger of illegal left turns out of the Bradley Shopping Center and creating better pedestrians crossing conditions. See Ex. 112 at 6-7.

Transportation Staff estimated an average queue of five southbound vehicles waiting at the new traffic signal between the southern and northern driveways, where Staff estimates the two lanes have the capacity to store up to nine vehicles. See *id.* at 5. Staff estimated an average queue of four northbound vehicles waiting at the new signal between the southern site driveway and the middle driveway of the Bradley Shopping Center, where Staff estimates the two lanes have the capacity to store up to seven vehicles. See *id.* Staff explained that these estimates were based on traffic projections in the Applicant’s warrant study, the scaled distances between the proposed intersection and the nearest curb cuts, typical signal cycle and length and typical vehicle length. See *id.* at 6. Transportation Staff concluded that the available capacity exceeds the average number of vehicles expected in the queue. See *id.*

Transportation Staff acknowledged that traffic signals can lead to an increase in rear-end accidents if a light is not properly installed. However, when the sight distance is inadequate for approaching motorists to see a signal, Staff notes that advance warning signs are posted to warn motorists of a signal ahead. See *id.* at 6. Thus, Staff impliedly found that the traffic signal proposed

here can be installed safely, if warning signs are posted. Staff noted that the proposed signal would have the benefits of safely permitting full movements from the existing shopping center driveway, and of providing a safe pedestrian crossing at this location. See *id.*

At the remand hearing, traffic expert Christopher Kabatt reviewed Transportation Staff's analysis of the proposed signal's potential impacts and opined that Staff's conclusions were reasonable. See Tr. July 21 at 86, 98-100.

In response to questions from Mr. Humphrey, Mr. Kabatt stated that the distance from the existing northern driveway to the stop bar for the proposed traffic light is approximately 135 feet. Mr. Humphrey suggested that with five cars queued southbound at the new traffic light, taking up 125 feet of that 135-foot distance, cars would not be able to exit the post office's northern driveway and turn left to get in line. Mr. Kabatt replied that the signal would have to be appropriately timed to make sure that queues are accommodated. See Tr. July 21 at 80. He noted that if the cars waiting at the light are spread across two lanes, there might be room for a car to turn left out of the post office and get in the queue. See *id.* at 87. He also suggested that if there is a problem accommodating left turns out of the post office, DPWT could post a sign permitting only right turns out of the northern driveway. In his view, the majority of drivers do obey such signs. See *id.* at 81. This view was greeted with considerable skepticism by Mr. Humphrey, who pointed out that dozens of cars head westbound on Elm Street off of Arlington Road on weekday afternoons, despite posted do-not-enter signs.

Mr. Kabatt observed that there are other locations in the Bethesda CBD with three traffic signals within 1,000 feet, such as Montgomery Avenue between Wisconsin Avenue and Pearl Street, and farther up Arlington Road near Old Georgetown Road. He could not think of a mid-block traffic light in Bethesda where there is only a driveway on one side, not a street, but in his post-hearing submission he noted that a traffic signal is provided at the entrance to the public parking garage on Woodmont Avenue in Bethesda, which is about 240 feet south of Battery Lane. See Ex. 122(b). Mr. Klauber noted, in his post-hearing submission, that the Applicant did not cite any examples of a mid-block signal serving a private driveway. The distinction between a public driveway and a private one is

clearly the reason that the Applicant will have to pay for the signal installation if this project goes forward, but the Hearing Examiner fails to see any meaning in that distinction from a traffic safety perspective.

The Applicant's decision not to submit its own analysis of the potential impacts of the proposed signal leaves the evidence on this question a bit thin. Nonetheless, the Hearing Examiner finds that Technical Staff's analysis, with Mr. Kabatt's concurrence, is more persuasive than the unsupported allegations by opposition participants that the signal would cause more problems than it solves.

Mr. Klauber and Mr. Humphrey argued that the Applicant should not be permitted to rely on the proposed traffic signal because it is not "reasonably probable of fruition in the foreseeable future," a standard that is commonly applied in the Maryland courts. See *Montgomery County v. Greater Colesville Citizens Association*, 70 Md. App. 374 (1987). They considered it uncertain because there had been no comment on the traffic signal from the owner of the Bradley Shopping Center, and because of the need for later approval from DPWT. The uncertainty about cooperation by the shopping center has now been resolved, although final approval still rests with DPWT.

The traffic signal is not a certainty, but in the Hearing Examiner's estimation, the preponderance of the evidence indicates that it is reasonably probable of fruition in the foreseeable future. County planners have recommended it, DPWT has agreed that the traffic volumes warrant a signal, and the Applicant is prepared to pay the full cost. The binding element does not guarantee that the traffic signal will be built, but it does guarantee that, if the rezoning is granted, the proposed building will not be constructed unless the traffic signal receives final DPWT approval, nor will it be occupied unless the traffic signal is put into operation or the Applicant comes back to the District Council for a development plan amendment.

### **3. Water and Sewer**

The subject property is in Water Service Category W-1 and Sewer Service Category S-1, and will continue to be served by existing water and sewer mains.

### **4. Schools**

Montgomery County Public Schools ("MCPS") reports that the subject property is in the Bethesda Elementary School, Westland Middle School and Bethesda-Chevy Chase High School service areas. See Ex. 83. Based on 105 dwelling units and average yield factors derived from a 2005 MNCPPC survey, Montgomery County Public Schools ("MCPS") expects the proposed development to generate approximately five elementary, four middle and four high school students. See Ex. 121. As measured by MCPS program capacity, enrollment at Bethesda Elementary School currently exceeds capacity by about 63 students or 16 percent, and is projected to exceed capacity in the future; enrollment at Westland Middle School currently exceeds capacity but an addition was scheduled to open in August 2008; and enrollment at Bethesda-Chevy Chase High School currently exceeds capacity but an addition is scheduled to open in August 2009. See *id.*

The Planning Board is required under the Growth Policy to determine, for each fiscal year, whether each school cluster has adequate capacity under the Growth Policy test to permit approval of additional subdivisions. The results of the Planning Board's school capacity evaluation for Fiscal Year 2009 indicate that eight school clusters, including the Bethesda-Chevy Chase cluster, exceed 105 percent of program capacity at the elementary level.<sup>11</sup> As a result, any subdivisions approved during FY2009 in the Bethesda-Chevy Chase cluster will be required to make a school facilities payment. The record does not indicate whether the Bethesda-Chevy Chase cluster would pass the applicable test under the Growth Policy in effect when these applications were filed, because the Planning Board no longer applies that test.

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<sup>11</sup> The Hearing Examiner hereby takes official notice of the Planning Board's letter of July 8, 2008 to the Council President and the County Executive.

Case law permits the District Council to deny a rezoning based on even minor increases in school overcrowding, on the theory that if a cup is full, even one more drop can cause it to overflow. See *Malmar Associates v. Board of County Commissioners for Prince George's County*, 260 Md. 292, 307, 272 A.2d 6 (1971). However, in light of the small number of students the proposed development is expected to generate, the Hearing Examiner does not consider denial to be justified on that basis.

### **I. Community Participation**

Concerns raised by hearing participants Jim Humphrey and Malcolm Rivkin are addressed in the Sector Plan and Transportation sections above. Additional, brief testimony was provided by two individuals, both of whom participated before the remand only. Robert Smythe, Vice President of the neighborhood association for the Sacks community, did not oppose the proposed rezoning but expressed concern that the development could exacerbate existing traffic problems and further block sunlight from the Trail. Mr. Smythe recommended lower density on the site and strict adherence to the Sector Plan's recommendations, especially with regard to building height. Phyllis Edelman, representing the Citizens Coordinating Committee for Friendship Heights, supported the testimony of Mr. Smythe and Mr. Rivkin and raised additional concerns about traffic congestion and safety on Arlington Road. See Part IV. for more detail. We have no information about whether Mr. Smythe and Ms. Edelman consider the revised plans more acceptable.

The record contains one letter in opposition to the proposed rezoning, from Walter J. Behr, Mayor of the Town of Somerset. See Ex. 40. Mayor Behr states, based on a unanimous vote of the Town of Somerset Council, that the Town is strongly opposed to the proposed rezoning. They fear that traffic conditions on Arlington Road, which are already severe, would be made worse by adding more postal traffic, as well delivery and residential traffic. Mayor Behr observed that this area will suffer detrimental impacts from the commercial and residential construction underway on the former Arlington Road Giant site, as well as the multi-story development planned at the intersection of

Woodmont and Bethesda Avenues. In his view, all of the development at these three sites is being reviewed with little apparent consideration for its impact on traffic and the environment. He believes that these developments will “have an immediate deleterious effect on the Capital Crescent Trail and open space currently enjoyed by residents while causing additional air pollution from congested roads and traffic delays,” and that there is no reason to permit this zoning change to take place. See Ex. 40.

#### **IV. SUMMARY OF HEARINGS**

This section summarizes the testimony provided in both the original hearings and the remand hearings. Testimony that was particular to the pre-remand plans has been omitted, except in the case of community members who testified only at the original hearings.

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

1. Frank Poli, Applicant’s representative. Tr. May 7, 2007 at 9-17; Tr. Aug. 1, 2007 at 10-11; 23-24.

###### **a. Testimony at Original Hearing**

Mr. Poli is Vice President for the Washington area at Keating Development Company. He testified that Keating has been providing real estate development and construction services to the Postal Service for over 16 years, and has worked on projects in several locations including Philadelphia, Annapolis and Arlington, Virginia. The company’s portfolio is broad and includes large, mixed-use commercial development, multi-family residential and other courthouses and office buildings generally associated with post offices. See Tr. May 7 at 10.

Mr. Poli stated that the Postal Service initially had a ground lease on the subject property, but acquired title to the land in the 1980s. The Postal Service has always used the site as the annex facility for the Bethesda area. The present proposal is part of Keating’s efforts to help the Postal Service review its real estate needs and identify properties where a need to upgrade their facilities can be combined with other development. See *id.* Mr. Poli noted that Keating recently did a post office project in Clarendon, Virginia, creating a mixed-use development with 181

residential units, 65,000 square feet of office space, 20,000 square feet of retail space, a 40,000-square foot post office space and a four-level, below-grade garage. Mr. Rivkin visited the Clarendon site after the initial hearing and submitted a statement describing it as very different from the present proposal. He noted that the Clarendon site occupies a super-block that is bordered or bisected by eighteen travel lines, with none of the traffic constraints or safety problems of the subject site, and that the residential portion of that project is located in a separate building, across the street from the new post office and its distribution facility. The Applicant made no effort to refute this contention, even after Mr. Rivkin repeated part of it at the remand hearing, so it is taken as true.

Mr. Poli testified that the post office operation is not expected to change with the proposed redevelopment. The facility would continue to operate as a post office annex, but the additional space would bring it into line with current post office standards. He stated that the post office would continue to serve the same geographic area, and its volume would increase only with normal population increases. The larger square footage would increase operational efficiency, and would provide space for mailboxes and a slightly larger retail area. See Tr. Aug. 1 at 23. Mr. Poli did not know whether the number of employees is expected to increase. See *id.* at 24.

Mr. Poli testified that the Applicant met early on with representatives of the adjacent Sacks community regarding the concept for the development, and again six weeks before the first hearing day in 2007. He described the Sacks community as generally favorably disposed towards the project, based on the proposal to put much of the postal operation below grade and make better use of the site. See Tr. May 7 at 11-12.

Mr. Poli explained that if the project goes forward, instead of owning the entire site, the Postal Service will likely be a condominium unit owner. He noted that the ultimate ownership configuration had not been finally determined, but the Applicant will ensure that landscaping is maintained on site in perpetuity. See Tr. Aug. 1 at 11.

2. Manoj Dalaya, architect. Tr. May 7, 2007 at 17-62; July 21, 2008 at 6-38, 130-34.

a. Testimony at Original Hearing

Mr. Dalaya was designated an expert in architecture. His firm was responsible for analyzing the subject site, reviewing the applicable guidelines and designing the residential component of the project. He described the current site layout and adjoining land uses, referring to an aerial photograph and a series of photographs of the site and its surroundings. Mr. Dalaya described the proposed building, noting that the idea of the terraces was to cover the parking and contain its noise. This, he explained, was partly in response to concerns voiced by members of the Sacks community that the parking lot for the adjacent Honda facility creates a lot of noise. *Id.* at 29-30.

Responding to direction in the Sector Plan to break down the scale and massing of building facades on Arlington Road, Mr. Dalaya stated that the building would have a minimum 15-foot setback from the road, and would have bays to break down the scale. He noted that the Applicant plans to install specialty pavers, benches and street trees per Sector Plan guidelines. *Id.* at 30. Mr. Dalaya explained the proposed parking and access system. He observed that with the new development, the post office would have about the same number of parking spaces for retail customers as it has now.

Mr. Dalaya stated that because of the post office retail component, the proposed plan would comply with the Sector Plan's recommendation for a mixed-use facility. He noted that the street front would have a series of bay windows or shopping windows that highlight activity on the street. Mr. Dalaya opined that the proposed project would be architecturally compatible with the surrounding area, given the proposed setback. He noted that the adjacent buildings to the north and south on Arlington Road both are closer to the Trail than the building proposed here.

Mr. Dalaya opined that the proposed development would comply with the requirement that 50 percent of the site be dedicated to green space. He defined green space as "the landscape area that will support vegetation." Tr. May 7 at 45. Mr. Dalaya also cited the definition of green space in the Zoning Ordinance, which refers to a portion of a tract of land that

provides light and air, or scenic, recreational or similar amenities, and must generally be available for entry and use by the occupants of the building or area involved. The definition contains language stating that green space may include a limited area with landscaping or screening “for the benefit of the occupants or those in neighboring areas,” but Mr. Dalaya testified that the Planning Board and its staff agreed with his interpretation that green space does not need to be accessible, physically or visually, to anyone other than residents of the proposed building. *See id.* at 46. He noted, moreover, that the green space proposed on the second-floor terrace would be a visual amenity for office occupants on the south side of the building.

On cross-examination by a community member, Mr. Dalaya conceded that between the subject site and the office building to the south is a smaller, one-story building with an entrance off of Arlington Road. He stated that he considers it a connector to the abutting five-story office building, so his team did not think of it as a separate structure. *See id.* at 53. When asked whether the northern entrance has been designed to accommodate a semi-trailer, Mr. Dalaya stated that the entrance was designed to fit the Postal Service’s loading trucks, which require a 14-foot clearance. *See id.* at 54.

#### b. Testimony at Post-Remand Hearing

Mr. Dalaya used an overlay of the new building footprint on the old footprint to outline the changes that were made to the development plan following the remand. He testified that the east façade of the residential portion of the building was pulled an additional 30 feet from the property line, so that it now sits 60 feet from the property line. In addition, the building as a whole was lowered into the ground by four feet, so that where the wall of the underground garage emerges above ground, two feet from the property line with the Trail, that wall will be a two-foot “knee wall” instead of a six-foot wall. This, Mr. Dalaya explained, would allow the ground plane of the Trail to extend visually, through the trees, with a gradual incline all the way to the building. He acknowledged that the visual field would be affected by a fence proposed along the property line, at a height no greater than four feet, but stated that the fence would be open in design, not solid or

opaque. Mr. Dalaya noted that the number of units decreased from 111 to 105, but the size of the building is only slightly smaller than before.

Mr. Dalaya used an aerial photograph of the area with the proposed site layout superimposed on it to support his opinion that the proposed development would create a welcome respite along the Trail, with a 60-foot buffer zone, compared to the Honda dealership to the north, which has a building sitting on the property line with the Trail, and the office development to the south, which has a four-story garage facing the trail. He also noted that the nearest plane of the proposed building to a single-family home is 200 feet away from the home.

Mr. Dalaya noted that the Trail at this location is at an elevation of 315 feet above sea level, while the elevation of Arlington Road is about 323 feet. The east side of the building would be at the same elevation as Arlington Road, about eight feet higher than the Trail. Thus, the ground would slope up from the Trail to the building, rising eight feet over a distance of 60 feet on the ground.

Mr. Dalaya stated that setting the entire building back 60 feet from the property line would create a greater than one-to-one relationship between the houses and the building setback, meaning that, as measured at a 45-degree angle from the plane of the houses, the building's setback from the houses would be at least as great as its height. See Tr. July 21, 2008 at 20-21. Using a revised shadow study, he noted that the building as currently proposed would have no shadow impact on the Trail, even during the time of its longest shadow, at the winter solstice. See *id.* at 22-23. Mr. Dalaya stated that the open space has been redistributed in a way that reduces somewhat the interior open space and increases the ground-level space adjacent to the Trail. In his view, the Applicant has fully complied with the Council's directives on remand.

On the north side, Mr. Dalaya noted, the proposed building would face a garage on the Honda dealership site, and on the south side it would face a parking garage. He opined that the proposed development would be compatible with the Trail, the nearby homes, and the other nearby land uses.

Mr. Dalaya was asked whether building residents, particularly those on the lowest residential level, would feel vibrations or hear noise when tractor trailers go in and out of the post office part of the parking facility. He stated that the garage would be built of solid concrete, which has more mass than the combination of steel and concrete that is often used, and would be designed to isolate sound. Mr. Dalaya added that the top level of the terrace, and the soil and vegetation on top of that, would further dampen the noise and isolate the residential use completely from the parking garage use. He explained that there would be “expansion joints” running around the building that would isolate vibrations, and prevent them from translating and telegraphing through the more sensitive column areas. Mr. Dalaya added that isolating the residential units from noise and vibration is of great concern to the developer, because he has to sell the units. Mr. Dalaya stated that many buildings are designed with truck loading areas underneath the building. He was not able to cite specific examples with as many as 70 trucks per day, as estimated for the post office site.

3. Charles Irish, engineer. Tr. May 7, 2007 at 62-134; Tr. Aug. 1, 2007 at 12-22; 32-33; 36-38; Tr. July 21, 2008 at 38-68.

a. Testimony at Original Hearing

Mr. Irish was designated an expert in civil engineering. He described the gross tract area, which includes a previous dedication area, and the net tract area after an additional seven-foot dedication that is proposed along Arlington Road to comply with the Sector Plan’s right-of-way recommendation. He described the property as a parallelogram with a roughly two-percent slope from east to west (elevation ranges between 316 and 314 along the Trail and between 308 and 306 along Arlington Road). See *id.* at 70. Mr. Irish observed that the site has no significant natural features.

Mr. Irish testified that all necessary utilities are available on or within close proximity to the site, with no burden to public facilities. He also described the proposed stormwater management. See *id.* at 72.

Mr. Irish stated that the proposed building has been designed to take advantage of the natural topography and avoid excessive grading. For example, one of the underground parking levels comes in at grade and gets deeper as it goes to the back of the site, which avoids digger deeper than necessary.

Mr. Irish described the proposed access points and parking arrangements. See Tr. Aug. 1 at 13-14. He stated that the sidewalk across both driveways would be reconstructed with a pedestrian crosswalk, brick pavers and pedestrian streetscape, to make the pedestrian movements as visually dominant as possible. See Tr. May 7 at 80. He testified that the Applicant intends to improve the sidewalk along the site's Arlington Road frontage to Bethesda streetscape standards, with a tree panel and nine feet of sidewalk. See Tr. May 7. at 95.

Mr. Irish noted that the proposed traffic signal is consistent with the Sector Plan's recommendation for a mid-block traffic signal to serve the subject site and the Bradley Shopping Center, and that the Sector Plan calls for vehicular access to the subject site from its southwest corner, which would be accomplished by the southern entrance the Applicant has proposed. See Tr. Aug. 1 at 15, citing Sector Plan at 137.

Mr. Irish described access and circulation patterns on this stretch of Arlington Road, using an aerial photograph marked to show driveway movements. See Tr. May 7 at 79-87; Ex. 66. He stated that sight distance is normally considered at the preliminary plan stage of a development, but when it became a question during and after the Planning Board's review, his firm conducted a sight distance analysis, which he submitted at the hearing. Mr. Irish stated at the first hearing that the sight distance would be adequate at both proposed entrances, in both directions.

At the second hearing, Mr. Irish modified his earlier testimony, which was based on faulty information concerning the classification of Arlington Road; Mr. Irish was initially under the misimpression that Arlington Road was a business district road, with a 200-foot sight distance requirement, when in fact it is an arterial road, requiring 325 feet of sight distance. See Tr. Aug. 1 at 17-18. The southern entrance would have 310 feet of sight distance to the left. However, according to

DPWT, the 325-foot requirement would not apply if a traffic signal is approved and it includes a “No Right Turn on Red” designation at the new site driveway. See Tr. Aug. 1 at 18-19; Ex. 79(a). Mr. Irish opined that with the proposed traffic signal, both entrances would have adequate sight distance and would be safe, adequate and efficient. See Tr. Aug. 1 at 36, 38. He noted DPWT’s agreement that the weekend volumes warrant a traffic signal, although operational issues would need to be addressed as part of the final design and permitting.

Mr. Irish explained the Development Plan’s compliance with the green area requirement of the PD Zone, referring to Exhibit 69. The portions of the site designated as “green area” consist of the second-floor terraces, a strip of land along the Arlington Road frontage, a small area near the southern site entrance, and a landscaping strip along the eastern property line, abutting the Trail. Mr. Irish stated that Technical Staff accepted these areas as green area, to be refined at site plan. Mr. Irish reviewed elements of the “green area” definition in the Zoning Ordinance, and stated that the green area proposed here would provide amenities to a number of people. The terraces would be for building occupants, the area along the east side of the building would be an amenity for people walking on the Trail, and the space between the curb and the building along Arlington Road would benefit users of the building as well as members of the public walking along the road. Mr. Irish stressed that the proposed development would greatly improve the aesthetic appeal of the site for residents of the abutting Sacks neighborhood. Currently, the view of the site from the Sacks neighborhood is the parking area for Postal Service vehicles. With the proposed plan, Mr. Irish stated, that neighborhood would have a green screen and the site would provide a lot more green than it does now.

Mr. Humphrey questioned Mr. Irish concerning the Sector Plan’s recommendation to straighten the curve on Arlington Road, asking whether the Applicant had made any effort to impress upon DPWT the importance of fulfilling that recommendation. Mr. Irish stated his understanding that MNCPPC considered that recommendation when the Euro Motorworks development just north of the subject site, on the other side of Arlington Road, was approved. At that time, he explained, the decision was made not to straighten out the curve. Mr. Irish was not aware of Euro Motorworks having

set aside land in the right-of-way, although he acknowledged that there is some space that could be used to straighten the curve. Mr. Irish noted that straightening the curve would move the road farther from the subject site, so it would not affect the proposed plan. He contended that although the mid-block pedestrian signal and the road straightening are both recommended in the Sector Plan, one can be done without the other. See Tr. May 7 at 133.

Mr. Irish stated that the Sector Plan recommendation for pedestrian and bicycle access to the Trail from the subject site is for site residents, not the general public. Mr. Irish also observed that bringing the general public through the terraces, which are designed to be private spaces, would not make sense in terms of safety, security and the nature of the use. He emphasized that the PD Zone requires green area, not public use space. See *id.* at 104.

b. Testimony at Post-Remand Hearing

Mr. Irish testified that he has met with trustees of the Bradley Shopping Center, who indicated willingness to cooperate in having a signal installed at their northern entrance, across from the subject site's southern entrance. Their primary concern was that the Applicant pay for the signal, and that the installation not result in removing any of their parking spaces. Mr. Irish is confident that a signal can be installed without removing any parking spaces.

Mr. Irish described what the 60-foot open space between the proposed building and the Trail would look like: about the first 20 feet would be patios and a six- to eight-foot walkway. The next 40 feet or so would slope down from the building to the Trail. Soil would be piled on top of the street level story of the building, which would extend, two feet above the grade of the Trail, almost to the property line. The depth of the soil would vary from about one foot at the edge of the Trail to about six feet along the edge of the walkway near the building, providing more than enough soil for plantings. Mr. Irish indicated that the landscaping details would be determined during site plan review.

Mr. Irish stated that many buildings in the Bethesda CDB have underground garages, some of which have one or two stories above-grade, and some of which are framed with building space occupied by residences or retail space. On many of those sites, he noted, the projects have

only a 20 percent public use space requirement, and buildings go all the way to the property line. In the present case, he stated, the only visible part of the garage would be its entrance, and the development is subject to a 50-percent green area requirement, so it is much more open above grade than is typical in a CBD.

When asked by Mr. Humphrey how much of the street level story would be visible from the sides, Mr. Irish noted that it would transition from grade-level at Arlington Road to nearly-underground at the property line. He took some measurements and concluded that next to the location of the tire store to the north, the street level story would be about 11 feet above ground. On the south side, Mr. Irish calculated that at the point where the southern driveway entrance would disappear underground, the street level story would be about 26 feet above ground. At that location, the building to the south is a one-story restaurant, which Mr. Irish described as a narrow building adjacent to a four-story office building. East of the restaurant is an open area, and farther east a multi-level parking garage.

Mr. Irish noted that along the Trail, the street level would be at grade or slightly underground at the northeast corner of the building, would be about two feet above ground for 90 percent of the eastern façade, and would become more visible as the ground level slopes further down, starting about 30 feet north of the southern property line. The southeast corner of the proposed building, he explained, would be above ground, and would be visible from the south at a height of about 26 feet. He described this as very similar to the current condition on that part of the site, which has a visible brick wall facing the parking garage on the property to the south. Mr. Irish acknowledged that the parking garage would only partially block the view of the new brick wall, because it does not extend all the way to the southeast corner of the subject site.

4. Martin Wells, transportation planner. Tr. May 7, 2007 at 134-150, 180-183; Tr. Aug. 1, 2007 at 24-32; 34-36; 39-45.

Mr. Wells was designated an expert in traffic engineering and transportation planning. See Tr. May 7 at 135. He noted that Arlington Road is designated as an arterial in the Sector Plan,

has two lanes in each direction and has a posted speed limit of 30 miles per hour, with on-street parking prohibited. Mr. Wells noted the curved alignment of the road, and confirmed Mr. Irish's testimony about the existing driveways and turning restrictions. He described some accident history, emphasizing that none of the five pedestrian-related accidents took place along the post office site. See Tr. May 7 at 139.

Mr. Wells described his firm's preparation of a traffic study in this case, as discussed in Part III.H. He concluded that the new circulation plan would be a great improvement, and opined that it would be safe, adequate and efficient.

In response to a question from Mr. Humphrey, Mr. Wells agreed that delivery trucks sometimes stop in the northbound travel lanes on Arlington Road in front of CVS, and that large vehicle carriers for Euro Motor Works regularly stop on the southbound side of the road. See Tr. May 7 at 151-52. He described these practices as an "operational headache," although with two lanes in each direction, traffic can go around the stopped vehicles.

Mr. Wells testified at the second 2007 hearing date concerning the source of his assumption that traffic at the northern entrance would increase with the proposed development, which contrasts with the information that was provided to DPWT to the effect that traffic at the northern entrance would be reduced. He noted that his firm's traffic counts found a peak hour total of 106 vehicles entering or leaving the site during the morning peak hour and 141 during the afternoon peak hour. See Tr. Aug. 1 at 24. Based on ITE generation rates, he would have expected those counts to be 149 in the morning and 203 in the afternoon. For whatever reason, he concluded, this post office generates fewer vehicular trips than the average post office. Adopting a conservative approach, his firm used the ITE generation rates to estimate future traffic generation from the proposed development, rather than extrapolating from the driveway traffic counts. Because the proposal involves removing one of the three streams of traffic that currently uses the northern entrance, they assigned two thirds of the estimated trips to the northern entrance and one third, representing postal employees, to the southern entrance. See *id.* at 25-26. This approach resulted in an estimate of 162

trips at the northern driveway during the morning peak hour and 219 trips during the evening peak hour. These numbers are larger than both the actual driveway counts and the ITE trip generation estimate based on the current size of the post office facility, so to take a conservative approach, those are the numbers Mr. Wells' firm used. See *id.* at 26.

Mr. Wells opined moreover, that actual traffic probably would decrease at the northern driveway with the proposed development. The number of households served would not change, and some of the traffic currently using that entrance would move to the new entrance at the south end of the site, so the net result would probably be a decrease. See Tr. Aug. 1 at 34. [Mr. Wells did not specifically opine as to whether any increase in trips due to the larger retail operation would be larger or smaller than the decrease attributable to moving the employee trips to the southern entrance.] Mr. Wells noted that DPWT's letter approving the location of the northern driveway also reserves the right to prohibit movements from that driveway if operational problems develop. Mr. Wells interprets this to mean that left turns into the northern entrance could be prohibited. He does not believe that DPWT would prohibit all use of the driveway. See *id.* at 35-36.

Mr. Wells stated that his firm conducted new 12-hour counts after the first hearing date, to support a traffic signal warrant study. The warrant study concluded that four of the warrant criteria are met on Saturday, due to traffic using the shopping center driveway. See Tr. Aug. 1 at 73. The warrant criteria are not met on weekdays, although Mr. Wells stated that the numbers are close. Mr. Wells opined that constructing a traffic signal at this location would be consistent with the Sector Plan and would enhance traffic flow on Arlington Road. He noted that the signal would provide safe movements in and out of the southern driveway and the shopping center, and would create gaps in traffic that would make queues more manageable. Mr. Wells also explained a queuing analysis for the northern driveway, which would remain in its current location.

5. Christopher Kabatt, transportation engineer. Tr. Aug. 1, 2007 at 45-58; Tr. July 21, 2008 at 69-100.

a. Testimony at Original Hearing

Mr. Kabatt was designated an expert in traffic engineering and transportation planning. He described the submission that was made to DPWT in connection with the signal warrant analysis for the southern driveway and the queuing analysis for the northern driveway. He pointed out that an appendix to that submission includes both existing traffic counts and projections for the northern driveway. See Tr. Aug. 1 at 47-50; Ex. 79(j), Appendix B, Tables B2, B3, B15, B25a and B25b. Mr. Kabatt conceded, however, that the submission did not include the numbers Mr. Wells provided in his testimony for peak-hour projections. He agreed to consolidate the data relevant to assessing trip rates at the northern driveway into a more concise, clearer document following the hearing, to be submitted into the record and provided to DPWT for comment. See Ex. 84, submitted on August 8, 2007.

b. Testimony at Post-Remand Hearing

Mr. Kabatt reviewed a queuing analysis for the proposed traffic light that Technical Staff provided in its June 23, 2008 memorandum on remand issues.<sup>12</sup> He noted that Staff expects an average of five vehicles to queue between the southern and northern site driveways heading south, where there is room to store nine vehicles in the two lanes, and an average of four vehicles northbound, between the middle driveway of the Bradley Shopping Center and the southern site driveway, where there is room to store seven vehicles in two lanes. Mr. Kabatt explained that the per-vehicle space typically required for queuing is 25 feet, which covers the vehicle and some space in between. Thus, a five-vehicle queue would take up about 125 feet and four vehicles about 100 feet. See Tr. July 21, 2008 at 71. He considers all of the Staff's transportation conclusions in the June 23 memorandum to be reasonable. See *id.* at 86, 98-100.

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<sup>12</sup> Mr. Kabatt referred to a May 28, 2008 memorandum from Transportation Staff at MNCPPC. Tr. July 21 at 70. No memorandum of that date was submitted into the record, but the findings Mr. Kabatt described were in the general Technical Staff memorandum dated June 23. See Ex. 112.

Mr. Kabatt stated that the distance between Bethesda Avenue and Bradley Boulevard is roughly 1,000 feet, and the proposed traffic light would be about in the middle. Thus, there would be about 500 feet between the proposed signal and the next signalized intersection in each direction. Based on the Staff's estimate of how many cars can be expected to be waiting at this light, Mr. Kabatt concludes that the queues are within the norms and would not back up more than 80 percent of the distance between the signalized intersections (a standard established in the LATR Guidelines).

Mr. Kabatt reiterated his firm's earlier conclusions that the proposed signal is recommended in the Sector Plan, justified by the weekend signal warrant analysis, and would provide protected crossing for pedestrians. He added that Technical Staff made similar findings.

In response to questioning by the People's Counsel, Mr. Kabatt stated that his firm did Saturday traffic counts at the subject site in April and May, 2007, but did not make any observations about cars waiting to exit the post office and turn left on Arlington Road. Their focus, Mr. Kabatt explained, was on Arlington Road itself.

Mr. Kabatt noted that he projects 85 vehicles turning left out of the northern post office driveway during the peak hour on Saturday, and 59 during the peak hour on weekday afternoons.

In response to questioning by Mr. Rivkin, Mr. Kabatt acknowledged that this traffic analysis did not take into account that Euro Motorcars has been permitted to load and unload cars onto and off of car trailers that park on Arlington Road two times a day. In his view, that practice is a law enforcement problem.

Mr. Kabatt noted that in the signal warrant study and the queuing analysis his firm prepared for the northern driveway, they had used ITE trip generation rates to estimate trips from the proposed development on weekends, and observed rates from the existing facility on weekdays. In each instance they used the higher rates -- ITE rates were higher on weekends, and the observed rates were higher during the week. Mr. Kabatt did not know whether ITE's rates are based on post offices with a carrier annex, but stated that they are based on surveys at actual post offices, and

include employees coming to work, post office trucks making deliveries and tractor trailers that distribute the mail.<sup>13</sup> See *id.* at 94.

6. William R. Landfair, land planner. Tr. Aug. 1, 2007 at 78-114, 142-155; Tr. July 21, 2008 at 101-128.

a. Testimony at Original Hearing

Mr. Landfair was designated an expert in land planning. He briefly described the site, its current improvements and the surrounding area. Mr. Landfair agreed with Technical Staff's description of the surrounding area, which contains a mixture of primarily commercial land uses. Neither Mr. Landfair nor Technical Staff included the Sacks neighborhood in the defined "surrounding area." Mr. Landfair agreed that including those homes in the surrounding area would be legitimate in evaluating the impacts of the proposed rezoning, because of the visual impact on homes at the western edge of that community. He stated that whether or not the neighborhood is formally included in the surrounding area, he considered it in assessing compatibility. See Tr. Aug. 1 at 82.

Mr. Landfair described the overall theme of the Sector Plan as providing a variety of housing options within the CBD and in close proximity to Metro. See Tr. Aug. 1 at 83. Mr. Landfair described the Sector Plan's specific recommendations for the Arlington Road District and opined that the proposed development would satisfy them. He testified that retaining and improving the post office would enhance Arlington Road as a community retail and service area by providing a much improved public façade along Arlington Road as well as greater convenience and accessibility for customers. Mr. Landfair also testified that the proposed use would protect the Sacks community by providing a residential use, consistent with the Sector Plan's recommendation. See Tr. Aug. 1 at 83-84.

Mr. Landfair concluded that the proposed development would provide improved traffic circulation, pedestrian safety, amenity and convenience, most significantly by installing a traffic signal

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<sup>13</sup> In a post-hearing submission, the Applicant's traffic experts outlined the description of a post office used by the ITE, which includes retail service windows, post office boxes, offices, sorting and distributing facilities for mail and vehicle storage areas. See Ex. 122(b). The trip rates include employees, patrons and post office vehicles. The Applicant's experts conclude that this description matches the carrier annex facility on Arlington Road, and therefore the ITE trip generation rates are appropriate. See *id.*

and crosswalk, consistent with the Sector Plan. He noted the testimony of Mr. Wells and Mr. Irish that the traffic signal would enhance traffic movement and allow both the proposed development and the Bradley Shopping Center to operate in a safe, adequate and efficient manner. Mr. Landfair observed that the traffic signal is not warranted by the traffic anticipated from the subject site, but rather by the shopping center traffic. Nonetheless, approval of this application would result in installing one of the major vehicle and pedestrian improvements desired for this area. See Tr. Aug. 1 at 85.

Mr. Landfair opined that the post office retail space would be fully consistent with the Sector Plan's urban design guidelines, which recommend mixed-use buildings with store front retail adjacent to the sidewalk. Mr. Landfair stated that the building would be set back 25 feet from the curb, providing a much wider urban sidewalk, and that the sidewalk would incorporate typical Bethesda streetscape elements.

Mr. Landfair pointed out three cases in which developers were permitted to build without strict compliance with Sector Plan recommendations: the Edgemoor Condominiums building on Montgomery lane, the Arlington East project on Bethesda Avenue, and the Lot 31 project at the intersection of Bethesda Avenue and Woodmont Avenue. He takes these as indications that there have been changes over time, and the area has not developed precisely as the Sector Plan anticipated. The Hearing Examiner notes that these three examples are all distinguishable from the present case, which must stand or fall on its own merits.<sup>14</sup>

Mr. Landfair concluded that the proposed plan would comply with the development standards for the PD Zone: the site is recommended in the Sector Plan for residential development at

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<sup>14</sup> The Edgemoor Condominium building was permitted to be built to a height of 100 feet, despite a Sector Plan recommended maximum height of 65 feet, in part based on representations made during the zoning hearing of very high density and on-site MPDUs, which the District Council considered desirable at that location. See Hearing Examiner's Report, LMA No. G-763, 1998. The plan was changed at site plan to a much lower density than previously proposed, with no MPDUs on site. In the Arlington East case, the ultimate height of the building was the result of a settlement following protracted litigation, with important public policy issues at stake. In the Lot 31 case, the District Council approved rezoning to the TS-M Zone for the entire site requested, although a small portion of the site was not specifically recommended for the TS-M Zone, on a finding that the rezoning substantially complied with the Sector Plan's principal objectives for all portions of the site. See Hearing Examiner's report in LMA No. G-850, 2006.

a density of more than two acres; it has more than enough land area; all of the proposed uses are permitted; the proposed density is consistent with the recommended density of 44 dwelling units per acre; the building would be set back about 120 feet from adjoining residentially zoned land (this testimony was not revised after remand, but the current distance is greater); the plan would satisfy the 50-percent green area requirement; and the development would be consistent with the purpose clause for the zone. See *id.* at 99-101.

Mr. Landfair noted that the purpose clause begins with compatibility, which he had already discussed. He opined that the proposed development provides for greater efficiency and a more compatible land use than would be allowed under the existing zoning; would help promote social and community interaction for people who live and work in the area by incorporating the post office within the residential use and providing more housing near the CBD, transit, retail opportunities and places of employment; would help provide a more balanced mixture of residential and commercial uses by creating a good balance of residential with an important community resource; and would expand the housing types in the area by creating a desirable housing alternative on Arlington Road. Mr. Landfair noted that preserving and taking advantage of trees is not really relevant on this site, which currently has virtually nothing green, but that the proposed development would greatly expand the green area and offer a much improved streetscape, including landscaping and other amenities. He observed that the proposed development would help minimize reliance on cars by preserving one of only two post offices in or near the CBD, and by creating new residences in close proximity to many retail establishments, employment opportunities and transit. He noted that the project would enhance safety, convenience and amenity for site residents by preserving and improving the convenience of the post office, creating a synergistic relationship.

In response to questions from Mr. Humphrey, Mr. Landfair stated that he was not aware of the Sector Plan's recommendation for a height of three to five stories on the Lot 31 property, which was improved at five stories, nor was he aware that the height approved in the Arlington East case

was the result of a zoning text amendment adopted to allow a height greater than the limit in the zone. See *id.* at 108-109.

b. Testimony at Post-Remand Hearing

Mr. Landfair testified that the pre-remand development proposal was consistent with the Sector Plan and compatible with the neighborhood, and that the revised plan has substantially improved compatibility.

Mr. Landfair stated that about seven to eight feet of the wall of the street-level story for the proposed building would be visible at the southeast corner of the site. This contradicted earlier testimony by Mr. Irish, who stated that the wall of the street-level story would be about 26 feet above grade at that location. There ensued a rather confusing dialogue between Mr. Irish, Mr. Landfair and the Hearing Examiner during which Mr. Irish elaborated on his earlier testimony. The Hearing Examiner finds that Mr. Irish was better able to explain the relationship of the building to its immediate surroundings, and concludes, from his testimony, that the wall of the street-level story would be visible from the south, including, perhaps, to Trail users coming from the south, at a height of approximately 26 feet where it passes the closest corner of the adjacent garage. It would then become less visible due to the slope of the land, with about 15 feet of the wall visible at the southeast corner, as measured from the elevation of the adjoining property to the south, which is lower than the elevation of the Trail. It would moreover, be at least partially obscured, as Mr. Landfair noted, by the wall of the parking garage to the south and intervening trees. See Tr. July 21 at 105-111.

Mr. Landfair noted that along the part of the southern property line closer to Arlington Road, where the building wall would slope down toward the garage entrance, the grade of the subject property is roughly the same as the grade of the adjoining property, so not as much of the wall would be visible. See *id.* at 111. He opined that the proposed building would be compatible with the developments to the north and south. He stated that it would improve current conditions by creating streetscape along Arlington Road and significant green area at the rear of the site and on the terrace. Moreover, the operational aspects of the post office would no longer be visible.

Mr. Landfair opined that the impacts that were the basis for former concerns about compatibility no longer exist: the 60-foot setback for the residential stories would create a much gentler transition from the terrace to the Trail and greater opportunities for landscaping, the proposed building would not cast any shadows on the Trail, and the visible portion of the wall along the Trail has been reduced from six feet in height to two. See Tr. July 21 at 113, 116-17.

Mr. Landfair opined that the proposed development would be consistent with the Sector Plan's density recommendations, noting that the number of residential units had been reduced from 111 to 105. He stated that the development would achieve the intent of the Sector Plan's three-story height recommendation on the east by providing a setback area with landscaping and screening, and a compatible relationship to the Trail and nearby houses. Mr. Landfair contested the interpretation of some opposition parties that the mix of uses proposed in this case would violate the Sector Plan. He argued that when the Sector Plan was adopted, a mix of uses was not contemplated, but since then, a number of mixed use projects have been developed, making the concept more acceptable. Mr. Landfair suggested that the Sector Plan's statement rejecting the idea of combining the post office on the same site with residential uses may have been based on an expectation that the post office would continue to have surface parking, which, combined with the hours of operation, would be inconsistent with residential use. He emphasized that the form of the building proposed here would isolate the residential units from the impacts of the post office, creating a separation that results in a compatible relationship. See *id.* at 115. Mr. Landfair suggested that 14 years ago, neither the planning department nor the post office could contemplate the two proposed uses on the same site, but now, with more mixed-use developments around, it is much easier to imagine. He acknowledged the Sector Plan drawings suggesting separate buildings on the site, but concluded that the development proposed in this case is the best possible way to combine these uses. See *id.* at 128.

Mr. Landfair maintained that the proposed project is very much in the public interest as it would substantially conform to the Sector Plan, it would result in substantial improvements to the Arlington Road streetscape and the existing site conditions, It would retain a community-serving use

with enhanced operations and reduced adverse impacts, it would provide a much-needed increase in residential units, it would provide 50 percent green area, it would help promote public transportation and it would have 12.5 percent MPDUs. *See id.* at 117.

Mr. Landfair voiced agreement with Technical Staff's position that all properties within the Sector Plan area are either within or in close proximity to the CBD, so the 100-foot setback requirement under the PD Zone does not apply.

### **B. Technical Staff**

Shariar Etemadi of the MNCPPC Transportation Planning Staff testified before the remand. He confirmed that the proposed development satisfies LATR. *See Tr.* May 7, 2007 at 154. He noted that DPWT usually requires a sight distance analysis at site plan, so Staff did not require that in connection with the zoning application. Mr. Etemadi stated that Staff had concluded that the access points and circulation would be safe based on meeting the minimum design standards for the driveways. He asserted that sight distances will certainly be evaluated during preliminary plan and site plan review, and if the minimum required sight distances are not met, the access points will not be permitted. *See id.* at 152. If an access point fails to meet the sight distance requirement, Mr. Etemadi explained, the developer must either redesign the access point or do without it. *See id.*

Mr. Etemadi agreed with Mr. Wells' description of relevant accident data. He noted that he had looked at the pedestrian counts available – nine weekend hours and three weekday hours – and converted those counts into a broader estimate. Mr. Etemadi estimated that over the three-year period for which Mr. Wells collected traffic data, almost two million people crossed this stretch of Arlington Road, including at the Bethesda Avenue and Bradley Boulevard intersections. *See Tr.* May 7 at 157-58; Ex. 45. Comparing this to the five reported accidents during that time involving pedestrians, Mr. Etemadi opined that this is a very good safety record. *See id.* at 158. In his view, it is not necessary to consider sight distance at this stage because if there is a problem, DPWT will catch it at a later stage. *See id.* at 159.

Mr. Etemadi opined that combining two streams of traffic at each of the proposed driveways would not create safety problems. See Tr. May 7 at 164-65. If necessary, he suggested that bollards could be installed to separate the inbound and outbound traffic. Mr. Etemadi also observed that it makes sense to pair the Postal Service employees with building residents, because employees will arrive in the morning and leave at the end of the day, rather than having customers constantly going in and out.

### **C. Community Participation**

1. Robert Smythe, Tr. May 7, 2007 at 169-179.

Mr. Smythe and his wife have been homeowners in the Sacks subdivision for more than 30 years. Mr. Smythe is also Vice President of the neighborhood association, and although he did not testify officially on behalf of the association, he stated "I think I know the views of my neighbors." Tr. May 7 at 169. Mr. Smythe has not opposed the present application, but has some concern that the development could exacerbate existing problems. He testified before the remand.

Mr. Smythe's first concern is with traffic. In his experience, traffic has gotten much worse on Arlington Road in the last ten years. He finds that traffic routinely backs up to the north in the mornings, from Bethesda Avenue past the current post office entrance, making it difficult to exit the post office during the morning rush hour. Coming from the south, Mr. Smythe finds that one has to sit through a couple of light changes to get past Bethesda Avenue. In addition, he notes that this stretch of Arlington Road has a hill and a curve, making it very difficult for a driver trying to leave the Bradley Shopping Center to see oncoming traffic. Mr. Smythe acknowledges that the Applicant did not create this problem, but he is concerned that adding residents who are trying to get in and out at the same time as post office customers will make the situation worse. See Tr. May 7 at 171. He is also concerned that moving the post office building closer to the street would make it harder for people to see traffic. Mr. Smythe feels that a traffic light would help, but only if it has a left turn signal and a pedestrian crosswalk. See *id.* at 172, 177-78. He stressed, however, that it is "difficult for us to feel

comfortable about any development, even the best design. . . because the traffic situation has gone from tolerable to poor to really intolerable for part of the day, particularly the evening rush hour. . . and frankly, Saturday it isn't a whole lot better." Tr. May 7 at 179.

Mr. Smythe acknowledges that the existing post office site is not aesthetically pleasing, and the present proposal would be aesthetically attractive. He is concerned about density, however, and his community has asked the developer not to build to four stories right up to the Trail, or even to their ten-foot setback, but to step the building down to three stories along the Trail. Mr. Smythe recommends strict adherence to the Sector Plan standards. In his view, the Trail was not meant to be a narrow green strip through a canyon of buildings. There are already two tall buildings backing onto the Trail on either side of the subject site, so Mr. Smythe believes it "would be nice to see some sunlight in the afternoon as we see it now along the Trail," which would require stepping down the building more than was shown on the plans he reviewed before the May 7, 2007 hearing. See Tr. May 7 at 174.

Mr. Smythe would also like to have public access, or at least access for residents of his subdivision, to cross through the subject property to get to the post office.

2. Malcolm Rivkin, Tr. May 7, 2007 at 184-189, 196-99; Tr. Aug. 1, 2007 at 121-124; Tr. July 21, 2008 at 126-27; 135-37. See also Exs. 71, 86, 89, 93, 96, 100 and 119.

a. Testimony at Original Hearing

Mr. Rivkin resides on Fairfax Road in Bethesda. He was chair of the advisory committee for the Sector Plan, teaches land use management at the University of Maryland University College, and has many years' experience as a land planner. His specific opinions regarding Sector Plan compliance are outlined in Part III.F, and his traffic concerns in Part III.H. In sum, Mr. Rivkin argues that the Applicant proposes a combination of uses that is contrary to the Sector Plan, and that unsafe traffic conditions on Arlington Road make additional development unwarranted. If the present application is approved, he predicts "substantial land use and traffic disasters for this part of Bethesda." Tr. May 7 at 188, Ex. 71.

In a closing statement, Mr. Rivkin identified what he called three fatal flaws in the application. The first is that Euro Motorcars' car trailers often occupy one southbound lane of Arlington Road across from the existing post office entrance, which was not considered in the Applicant's traffic study. He described it as a daily practice for Euro Motorcars to unload cars on Arlington Road or Bethesda Avenue, blocking traffic. See Tr. Aug. 1 at 117. Secondly, Mr. Rivkin stated that the Applicant's traffic study failed to take into account the impact on Arlington Road of the "no left turn" sign at the Bradley Shopping Center driveways. Thirdly, Mr. Rivkin contended that the proposed uses are contrary to the Sector Plan, which recommends redevelopment of the site for mixed residential and commercial use only if the Postal Service does not need it. See *id.* at 117. He noted, moreover, that there are about 1,000 dwelling units in the process of being approved within the Sector Plan area, which he thinks is enough to satisfy the Sector Plan's housing objectives. See *id.* He stressed that a violation of the Sector Plan is not warranted to fill up the housing quota.

b. Testimony at Post-Remand Hearing

Mr. Rivkin is a professional planner and a faculty member at the Graduate School of Environmental Management at the University of Maryland, teaching on-line land use management. He stated that he teaches his students that an adopted plan has major input from the decision makers and citizens, and should be sacrosanct unless it is amended with the same input from decision makers and citizens.

Mr. Rivkin was Vice-Chairman of the Planning Board years ago, and was Chairman of the Citizen's Advisory Committee for the Sector Plan. He noted that when the Sector Plan came before the Planning Board, it was adopted in record time because the advisory committee, made up of neighborhood residents, business people, developers and institutional people, had very complete consensus. In Mr. Rivkin's view, the present application is a gross violation of the Sector Plan, and the rezoning should not be permitted without a plan amendment comparable to the Woodmont Triangle Amendment. He cited the recent case at Metro Center, where a developer proposed a project plan

that conflicted with the Sector Plan, as an example of holding the Sector Plan intact in the face of development pressure.

Mr. Rivkin contended that mixed use development was one of the Sector Plan's objectives, but the drafters did not consider mixed post office/residential use on the subject site because of the trucks. He noted that as a carrier annex, the Arlington Road facility is significantly different from a typical, retail-style post office. Semi-trailer trucks bring the mail, which is sorted onto individual delivery trucks. Mr. Rivkin counted 73 trucks parked on the subject site in one aerial photograph submitted by the Applicant, and 59 in another.

Mr. Rivkin argued that if the proposed development proceeds, it will exacerbate the current dangerous traffic bottleneck that is created by Euro Motors' practice of blocking one lane on Arlington Road for considerable periods of time during the day. Mr. Rivkin noted that he has called the police many times to request that they enforce the "No Stopping" sign on Arlington Road, but they refuse to do it. He observed with dismay that nothing in the record of this case suggests that the Applicant or its representatives have tried to change this private use of the public right-of-way.

3. Phyllis Edelman, Tr. May 7, 2007 at 189-196.

Ms. Edelman lives in Bethesda, off of River Road, within the area served by the subject post office. She testified as a representative of the Citizens Coordinating Committee for Friendship Heights, a community group that covers about 15 associations and incorporated towns and villages just south of Bradley Boulevard. See Tr. May 7 at 189. She read only parts of her prepared remarks, because Msrs. Smythe and Rivkin had already said much of what she had to say.

Ms. Edelman suggested looking at a bigger picture of traffic issues because Arlington Road is heavily used during the morning and evening commuting periods for traffic coming from areas south of the Beltway and from Old Georgetown Road and Rockville Pike. One traffic flow problem that drivers experience on Arlington Road is that there are no left-turn signals at either Bethesda Avenue or Bradley Boulevard for northbound vehicles, so traffic tends to back up whenever someone has to wait to turn left at one of those intersections. Quite often, she finds that she has to wait through two cycles

of the traffic lights both at Bradley Boulevard and again at Bethesda Avenue. See *id.* at 190. Traffic is further delayed by vehicles turning out of the post office or one of the retail locations. Ms. Edelman contends that frustrated drivers turn to residential streets to avoid the congestion on Arlington Road, creating spillover traffic in residential areas, with its attendant noise and pollution. Moreover, Ms. Edelman maintains that Arlington Road is not carrying the amount of traffic it should, because drivers avoid it. Ms. Edelman confirmed that during rush hour, traffic backs up from Bethesda Avenue past the existing post office entrance. See *id.* at 191-192. She described this as a daily occurrence.

Ms. Edelman expressed skepticism at the Applicant's contention that the southern driveway entrance has a sight distance of 200 feet to the south. In her experience, the curve in the road makes it difficult for northbound traffic to see cars exiting the post office site in time to stop. Between the right and left turns and all the curb cuts, she considers Arlington Road to be dangerous both for vehicles and for pedestrians, and questions how an additional entrance/egress will make it any safer for pedestrians. See *id.* at 193.

4. Jim Humphrey, Tr. May 7, 2007 at 199-206; Tr. Aug. 1, 2007 at 124-130; Tr. July 21 at 137-143. See also Exs. 72, 88, 99, 120, 125 and 131.

a. Testimony at Original Hearing

Mr. Humphrey testified on behalf of the Montgomery County Civic Federation (the "Civic Federation"), as chair of its Planning and Land Use Committee and with the unanimous approval of its Executive Committee. See Tr. May 7 at 200. The Civic Federation asserts that "in this rezoning case, the Planning Board has not met its responsibility for development plan review and recommendation as assigned by law, by providing insufficient and conflicting information on issues that the County Council must consider in acting upon the application." *Id.* The Civic Federation maintains that the Planning Board is tasked with considering whether the proposed rezoning "substantially complies with the use and density indicated by the master plan" and "whether the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate and efficient." *Id.* In the Civic

Federation's view, the Planning Board has not provided adequate information to permit affirmative findings with regard to Sector Plan compliance or circulation and access. See *id.* at 198.

The Civic Federation asserts that the Sector Plan envisioned redevelopment of the subject site only if it is no longer needed for Postal Service use, so the proposal here is not consistent with the Sector Plan's use recommendation. The Civic Federation further asserts that three of the four Planning Board members who were present for the consideration of this case expressed concerns about impacts of the proposed development on vehicular and/or pedestrian safety. See Tr. May 7 at 202-203; Ex. 72. According to a transcript that Mr. Humphrey prepared during the Planning Board's hearing, Commissioner Wellington noted her concern about vehicle and pedestrian safety aspects of the plan, stating that drivers heading north on this stretch of Arlington Road fear read-ending someone or being rear-ended; Commissioner Robinson echoed Ms. Wellington's concerns; and Commissioner Perdue stated that she would not want to get to preliminary plan and have people say this will not be good for pedestrians but too bad, that's how it got rezoned. See Tr. May 7 at 203. Mr. Humphrey reported that Applicant's counsel, Cindy Bar, told the Planning Board that DPWT had already asked the Applicant to do more work on the vehicle and pedestrian safety aspects of the plan, and that the Applicant is aware that there is more work to do and intends to do it as the project moves forward. See *id.* at 201. The Civic Federation finds that the concerns stated by three Commissioners and DPWT are contrary to the Planning Board's recommendation to approve the rezoning and the development plan. See *id.* at 201.

Mr. Humphrey expressed the Civic Federation's view that the Planning Board's recommendation is also inadequate because it fails to address the Sector Plan recommendation to straighten out the curve in Arlington Road. He noted that the Sector Plan references this recommendation in five different places: the land use and zoning chapter, p. 132; the transportation plan, p. 173; and three illustrations, pages 173, 178 and 179. In the Civic Federation's view, the Planning Board's recommendation that the District Council consider the development plan illustrative,

so that potential circulation issues can be resolved at site plan, is not sufficient for the District Council to make the required finding under Section 59-D-1.61(c). See *id.* at 202.

In a closing statement, Mr. Humphrey accused the Applicant's witnesses of harvesting only the portions of the Sector Plan and the Zoning Ordinance that support their application. In his view, the proposed development plan fails to comply with the Sector Plan in several respects. See Tr. Aug. 1. at 119-120. First, he argued that the proposed southern driveway was proposed in the Sector Plan in the context of a set of recommendations that included straightening the curve in the road and installing a mid-block traffic signal and pedestrian crossing.

Second, Mr. Humphrey argued that the Sector Plan's call to improve traffic circulation, pedestrian safety, amenities and convenience is not satisfied. He cites the lack of access to the green area for anyone but residents of the new building, the lack of access from the Trail to the post office, and uncertainty as to whether a traffic signal will be installed, since there has been no agreement with the owner of the Bradley Shopping Center. See *id.* at 120-21.

Third, Mr. Humphrey pointed out language in the Sector Plan that had not previously been addressed in the record. On page 221, the Sector Plan includes a "community facilities" section that discusses the subject property and states, among other things, that residential development "would not be compatible with continued function as a carrier annex on any portion of the site because of the hours of operation." See *id.* at 121, citing Sector Plan at 221. Mr. Humphrey stated that the hours of operation include dozens of employees arriving during the morning rush hour and dozens of mail delivery trucks leaving the site during the same period, with those trucks returning and employees departing during the evening rush hour. He believes that is the basis for the quoted text.

Fourth, Mr. Humphrey suggested that the 1,000 housing units being developed in Bethesda could lead to increases in traffic from both postal employees and retail customers.

Fifth, Mr. Humphrey voiced the Civic Federation's concern about the entire green area requirement being satisfied on the roof over the parking structures. He noted that the first clause of the "green area" definition in the Zoning Ordinance describes it as "[a]n area of land associated with

and located on the same tract of land as a major building or group of buildings.” Tr. Aug. 1 at 122-23, citing Code § 59-A-2.1. Mr. Humphrey argued that the environmental purposes of the green area requirement would not be met by this development plan, especially because the building is not intended to have a green roof and stormwater run-off would go right into the storm sewers, instead of being absorbed by a green area on the ground.

Sixth, Mr. Humphrey cited the decision in *Manian v. County Council*, 171 Md. App. 38; 908 A.2d 665 (Md. Ct. Spec. App. 2005), in which the court examined the five findings required to approve a development plan under Code § 59-D-1.61 and noted that three of them, subparagraphs (a), (c) and (e), are worded in the present tense, while the other two are worded in the conditional. See Tr. Aug. 1 at 123. Mr. Humphrey argued that based on this, the District Council’s finding under Code § 59-D-1.61(a) must be in the present tense, i.e. that the proposed development substantially complies with the Sector Plan and does not conflict with other county plans or policies. The Civic Federation contends that the proposed development does not comply with the Sector Plan.

With regard to Code § 59-D-1.61(c), which requires a finding that points of external access are safe, adequate and efficient, the Civic Federation maintains that the Council must find that the access points *are* safe, adequate and efficient as proposed, not that they may be made so at some point in the future by revisions during site plan review or by the potential installation of a traffic signal. See Tr. Aug. 1 at 124; Ex. 72. The Civic Federation considers this to be the most important finding in this case, arguing that the Council cannot find that the access points on the Development Plan are safe, adequate and efficient because of the concerns voiced by three members of the Planning Board and the acknowledgement by Applicant’s counsel that they have more work to do.

The Hearing Examiner notes that in *Manian*, the key provision was § 59-D-1.61(b), which requires a finding that a development “would comply” with the standards and requirements of the zone. The court relied on the conditional nature of the word “would,” as well as the County’s longstanding administrative practice, to conclude that some details, such as whether proposed public use space and open space actually meet the relevant definitions, may be left to site plan review rather

than being decided at zoning. See *Manian*, 171 Md. App. at 48-50. The court did not draw any implications from the use of present tense in the other subparagraphs of § 59-D-1.61, although one could infer that the court would interpret those sections to require a more definitive finding at zoning, leaving less to site plan review. See *id.* The County's longstanding administrative practice, however, would support a similar interpretation for all five findings: the District Council makes a decision based on the evidence available at the zoning stage, while the Planning Board conducts a more detailed review at site plan, including final findings and any minor changes to the plans that are deemed necessary or appropriate.

In the Hearing Examiner's view, while the various paragraphs of Section 59-D-1.61 use different tenses, the responsibility they give the District Council is essentially the same. The Council must make a determination, based on the evidence of record, as to whether the submitted development plan proposes a form of development which, if implemented as proposed, will satisfy the five findings. The Hearing Examiner agrees with the Civic Federation that the District Council's findings must be based on elements shown at zoning, not potential improvements that might be made during site plan review. As three Planning Board members and the Applicant's counsel acknowledged during the Planning Board's consideration of this case, and as the Planning Board Chair acknowledged in the Board's recommendation letter, the proposal that was brought before the Planning Board suggested a level of uncertainty as to whether site access and circulation would be safe, adequate and efficient. Since that time, the Applicant has made additional submissions and representations which might have alleviated the concerns expressed during the Planning Board's meeting and in its recommendation letter. These additional items of evidence must be taken into consideration at this juncture. The Civic Federation argues that the traffic light the Applicant has committed to install as a binding element of its plan is too conditional to be relied upon. As discussed in Part III.H., the Hearing Examiner finds the Applicant's reliance on this binding element acceptable.

b. Testimony at Post-Remand Hearing

Mr. Humphrey spoke once more on behalf of the Montgomery County Civic Federation. His primary focus was non-compliance with the Sector Plan, as well with the purpose of the PD Zone.

Mr. Humphrey noted that the Sector Plan offered two recommendations for redevelopment of the subject site: either commercial use in the C-4 Zone with 0.25 FAR, or multi-family housing with neighborhood-serving retail along Arlington Road under the PD-44 Zone, with 105 dwelling units and 40,000 square feet of commercial space. He quoted the Sector Plan as stating that residential use on the subject site would provide a transition from commercial uses for the Sacks subdivision east of the Trail, to help maintain the viability of that neighborhood.

Mr. Humphrey considers the present proposal essentially no different from the earlier one, because in his view, it still does not conform to either of the Sector Plan's recommendations for the site. He calculated that the proposed building would still occupy approximately 80 percent of the net lot area, extending practically to the property line on the east side, most of the northern side and the eastern half of the southern side. Mr. Humphrey argued that residential on top of commercial, as opposed to between the commercial uses and the property line, as suggested in the Sector Plan, would not provide a transition between the Sacks neighborhood and nearby commercial uses. See Tr. July 21 at 139.

Mr. Humphrey maintained that the parking area and the numbers of trucks and employees are significantly greater than one would normally expect with 30,000 square feet of commercial space, due to the post office's needs. He declared that the number of employees was the rationale for the Sector Plan's statement that residential use on the subject site would not be compatible with continued operation of a carrier annex on any part of the site. See *id.* at 140.

Turning to the PD Zone, Mr. Humphrey argued that the Development Plan's failure to conform to the Sector Plan is also a failure to satisfy the purpose of the PD Zone, which includes substantial compliance with the Sector Plan. He further argued that the present proposal would not satisfy the purpose of the PD Zone "to achieve a maximum of safety, convenience, and amenity for

both the residents of each development and the residents of neighboring areas, and, furthermore, to assure compatibility and coordination of each development with existing and proposed surrounding land uses.” Tr. July 21 at 140-41, quoting 50-C-7.11.

In sum, Mr. Humphrey made three central points (see Tr. July 21 at 141-42):

1. The Applicant does not propose commercial use along Arlington Road and residential use on the east side of the site, to provide a transition between the commercial and the Sacks neighborhood.

2. The proposed building would be a five-story, mixed-use building virtually centered on the site, with the first story occupying approximately 80 percent of the site, rather than the Sector Plan’s concept of separate buildings housing separate uses, with four stories along Arlington Road and three along the Trail.

3. The Applicant’s proposal to combine the post office carrier annex with multi-family housing conflicts with the Sector Plan’s specific finding that the two uses could not be compatibly combined on the site.

Mr. Humphrey added his support for Mr. Rivkin’s position that the Applicant should be obligated to provide public access between the Trail and Arlington Road through the subject site. He noted that the County has an important public policy favoring the development of Bethesda and other transit centers as walkable, bikeable communities. In his view, creating a mid-block connection to the Trail through the subject site would provide an important pedestrian connection and encourage use of the pedestrian network.

## **D. People’s Counsel**

### **a. Participation in Original Hearing**

Martin Klauber, the People’s Counsel for Montgomery County, participated in the questioning of witness and offered a closing statement. As outlined in Part III.F., Mr. Klauber argued that the present application should be denied for failure to satisfy the Sector Plan. He cited case law in

support of the proposition that a master plan recommendation can be more than a guide, and stated that “of all the zones in our zoning ordinance, the PD Zone is the one zone that is tied tightest to a sector or master plan.” Tr. Aug. 1 at 127. Mr. Klauber maintained that the proposed Development Plan is inconsistent with the Sector Plan in terms of the number of stories, the proposed combination of postal and residential use and the lack of public access from the site to the Trail. See *id.*, citing Sector Plan at 131, second and third paragraphs, and 132.

Mr. Klauber linked the Sector Plan to the purpose of the PD Zone, which includes encouraging open space, not only as setbacks and yards surrounding structures and related walkways, but also for the general benefit of the community and the public at large. He noted that the purpose clause encourages comprehensive pedestrian networks and linkages among residential areas, open spaces and recreational areas, which could be satisfied by public access to the Trail, but has not been. See Tr. Aug. 1 at 132-33. Mr. Klauber notes that the nearest public access to the Trail from Arlington Road is “up a rather steep hill at Bradley on the overpass, or off of Bethesda Avenue.” *Id.* at 133. He queries why a mid-block Trail connection is not equally logical as a mid-block traffic signal.

As Mr. Klauber noted, the purposes of the PD Zone include achieving “a maximum of safety, convenience and amenity for both the residents of the development and the residents of neighboring areas.” Tr. Aug. 1 at 133, citing Code § 59-C-7.11, eighth paragraph. In his view, that clause relates to the proposed mid-block traffic signal. Mr. Klauber identified two weaknesses in the proposal to install a mid-block traffic light, both of which changed after the remand. First, before the remand the record contained no examination of how the traffic light would affect traffic on Arlington Road. Evidence has now been submitted on that point, although Mr. Klauber disagrees with its conclusions. Second, Mr. Klauber maintained that the proposed traffic light may not be relied on because it is not reasonably probable of fruition in the foreseeable future. See *id.* at 133. He emphasized language in the DPWT Traffic Signal Letter stating that merely meeting the warrant

criteria is not conclusive justification for a traffic signal, and the need for consent from the owner of the Bradley Shopping Center. The shopping center has now agreed to cooperate in installing the signal.

b. Participation in Post-Remand Hearing

Mr. Klauber delivered a closing statement at the remand hearing, during which he reviewed elements of the PD Zone purpose clause which, in his view, require public access to the Trail through the subject site:

- First paragraph, last five lines: “[i]t is intended that the zoning category be utilized to implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories.”
- Second paragraph: “. . . that development be so designed and constructed as to facilitate and encourage a maximum of social and community interaction and activity among those who live and work within an area . . .”
- Fifth paragraph: “. . . to encourage and provide for open space not only for use as setbacks and yards surrounding structures and related walkways, but also conveniently located with respect to points of residential and commercial concentration so as to function for the general benefit of the community and public at large as places for relaxation, recreation and social activity . . .”
- Sixth paragraph: “It is also the purpose of this zone to encourage and provide for the development of comprehensive, pedestrian circulation networks, separated from vehicular roadways, which constitute a system of linkages among residential areas, open spaces, recreational areas, commercial and employment areas and public facilities . . .”
- Eighth paragraph: “It is further the purpose of this zone to achieve a maximum of safety, convenience and amenity for both the residents of each development and the residents of neighboring areas . . .”

- Ninth paragraph: “this zone is in the nature of a special exception, and shall be approved or disapproved upon findings that the application is or is not proper for the comprehensive and systematic development of the county, is or is not capable of accomplishing the purposes of this zone and is or is not in substantial compliance with the duly approved and adopted general plan and master plans.”

Mr. Klauber correctly cited sections of the proposed clause that could be interpreted to suggest Trail access for the public. For the reasons stated in Part V, the Hearing Examiner has reviewed these provisions and concludes that the proposed development satisfies each of them, without public access to the Trail.

Mr. Klauber argued that based on the language quote above from the ninth paragraph of the purpose clause, the Sector Plan is not a mere guide in the context of the PD Zone. See Tr. July 21 at 167. He described Mr. Rivkin’s testimony as “oral legislative history” about how the proposed mixed use of the subject site compares to the Sector Plan’s recommendations, and noted that this was the only legislative history presented in the case to explain the mixed use recommendation. See *id.* at 168. Mr. Klauber argued that the present application should be denied for failure to satisfy the public interest and the purpose clause for the zone.

## **E. Applicant’s Rebuttal**

### **a. Original Hearing**

Applicant’s counsel argued that in their closing statements, Mssrs. Klauber and Humphrey both raised new issues that should properly have been part of the evidentiary presentations, allowing a substantive response by the Applicant, rather than being raised in closing statements with the Applicant limited to a response by counsel. Ms. Bar requested leave to present rebuttal evidence on the Sector Plan’s recommendations for the use of the subject site, to more fully address the language cited during closing statements about the post office/residential use combination. Counsel specifically declined to present rebuttal testimony on any other issues such as

transportation or access. See Tr. Aug. 1 at 137. The Hearing Examiner noted that the Applicant's presentation should have addressed all directly relevant portions of the Sector Plan, including page 221, rather than focusing on sections that more readily support its case. Nonetheless, the Hearing Examiner granted the request to present rebuttal evidence concerning the Sector Plan's use recommendation, both in the interest of fundamental fairness and to provide the District Council with the most complete record possible on which to base a fair and reasoned decision. See Tr. Aug. 1 at 137-39.

Mr. Landfair's rebuttal testimony addressing why the proposed combination of uses should be considered in compliance with the Sector Plan, and why the plan's Trail access recommendation referred to access for site residents only, is outlined in Part III.F.

Mr. Poli also testified on rebuttal. He noted that his company recently completed a mixed use project in Arlington, Virginia with 320,000 square feet, which combines a 40,000-square-foot regional postal facility larger than the Arlington Road facility with 181 residential units, 60,000 square feet of office space and 20,000 square feet of retail space. See Tr. Aug. 1 at 149. He described the site as located in the heart of the Clarendon district, two blocks from a Metro station, fronting on Washington Boulevard in an active, urban environment. Mr. Poli noted that the postal facility in that case has a full-size loading dock, more vehicles than in this case, and three times the number of employee parking spaces than in this case. In response to a question from the Hearing Examiner, Mr. Poli explained that a "carrier annex" is generally "a zone or neighborhood regional facility" where mail that has been sorted at the main postal facility is brought, to be picked up by the mail carriers that deliver it locally. Mail is brought in for carrier pick-up by local delivery trucks, and outgoing mail is picked up in trailers. As noted earlier, Mr. Rivkin pointed out that the Clarendon development is different from the present case in many ways, not least of them that the residential uses and the post office are in separate buildings.

### b. Post-Remand Hearing

Mr. Irish testified that mid-block access already exists from Arlington Road to the Trail through the commercial property that is adjacent to the subject site to the south. See Tr. July 21 at 144. He could not say whether the owners of that property “allow” the public to cross their land for this purpose, but stated that it is an open, paved site, so there is no physical barrier to such access. He stated that he would seriously doubt this access is ADA-compliant, because getting to and from the Trail involves stairs.

Applicant’s counsel, Cindy Bar, was sworn as a witness for the limited purpose of testifying to public use of this access point. See Tr. July 21 at 145-46. She testified that she often rides her bicycle along the Trail, and that there is a staircase leading from the property south of the subject site to the Trail. She described it as a double stairway, with ramps in the middle for bicycles. Ms. Bar described the property south of the subject site as a mixed-use site, with office buildings and a CVS pharmacy. She has used the stairway on this property to get to the Trail, and has seen other people do so as well.

Mr. Landfair repeated his opinion that the Sector Plan recommended Trail access from the subject site for site residents, not for the general public. See Tr. July 21 at 151. He rejected Mr. Klauber’s suggestion that the Sector Plan’s recommendation for a mid-block traffic signal on Arlington Road south of Bethesda Avenue, as part of a relocated main entrance to the Bradley Shopping Center, indicates that the Trail access was supposed to be for the public.

## V. ZONING ISSUES

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

setbacks, and building height. In the State of Maryland, a property owner seeking to reclassify his or her property from one Euclidean zone to another bears a heavy burden to prove either a change in circumstances or a mistake in the original zoning. See *Stratakis v. Beauchamp*, 268 Md. 643, 652-53 (1973).

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular type of use, with land use 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 clause and requirements for the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

PD (Planned Development) zones are a special variety of floating zone with performance specifications integrated into the requirements of the zone. These zones allow considerable design flexibility if the performance specifications are satisfied. The applicant is not bound to rigid design specifications, but may propose site-tailored specifications, within the parameters established for the zone, for elements such as setbacks, building heights and types of buildings. These specifications are set forth on a development plan to facilitate appropriate zoning oversight by the District Council. Pursuant to Code §59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone. Once it is approved, the development plan provides the design specifications for the site, much as the Zoning Ordinance provides design specifications for more rigidly applied zones. Accordingly, the evaluation of zoning issues must begin with the Development Plan and proceed to the requirements of the zone itself.

#### **A. The Development Plan**

Before approving a development plan, the District Council must make five specific findings set forth in Code § 59-D-1.61. These findings relate to consistency with the master plan

and the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas. The required findings are set forth below in the order in which they appear in the Zoning Code, together with the grounds for the Hearing Examiner's conclusion that the evidence in this case supports the required findings.

- (a) ***That the zone applied for is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies. However, to permit the construction of all MPDUs required under Chapter 25A, including any bonus density units, on-site, a development plan may exceed, in proportion to the MPDUs to be built on site, including any bonus density units, any applicable residential density or building height limit established in a master plan or sector plan if a majority of an Alternative Review Committee composed of the Director of the Department of Housing and Community Affairs, the Executive Director of the Housing Opportunities Commission, and the Director of Park and Planning, or their respective designees, find that a development that includes all required MPDUs on site, including any bonus density units, would not be financially feasible within the constraints of any applicable density or height limit. If the Committee finds that the development would not be financially feasible, the Planning Board must recommend to the District Council which if any of the following measures authorized by Chapter 59 or Chapter 50 should be approved to assure the construction of all required MPDUs on site: . . .***

In the present case, both the Planning Board and Technical Staff found that the proposed development substantially conforms to the use and density recommended in the *Bethesda CBD Sector Plan, Approved and Adopted 1994*. For the reasons outlined in Part III.F., the Hearing Examiner agrees.

Section 59-D-1.61(a) requires a finding by the Alternative Review Committee before a zoning application can be approved with a height or density exceeding applicable master plan recommendations, if the excess height or density is needed to accommodate MPDUs. Here, the Applicant proposes a building height and density that exceed the recommendations of the Sector Plan, but the basis for this request is to accommodate the needs of the Postal Service, not

MPDUs. The Hearing Examiner agrees with Technical Staff that in these circumstances, a finding by the Alternative Review Committee is not necessary. See Ex. 46.

The evidence supports the conclusion that the Development Plan does not conflict with any other county plans or policies, or the capital improvement program. It would further county housing policy by creating additional housing options near the Bethesda Metro, including about thirteen affordable units, and (as discussed in Part III.H above) would be consistent with the applicable Growth Policy.

***(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.***

### **1. Purposes of the Zone**

The purpose clause for the PD Zone, found in Code §59-C-7.11, is set forth in full below, with relevant analysis and conclusions for each paragraph following.

It is the purpose of this zone to implement the general plan for the Maryland-Washington Regional District and the area master plans by permitting unified development consistent with densities proposed by master plans. It is intended that this zone provide a means of regulating development which can achieve flexibility of design, the integration of mutually compatible uses and optimum land planning with greater efficiency, convenience and amenity than the procedures and regulations under which it is permitted as a right under conventional zoning categories. In so doing, it is intended that the zoning category be utilized to implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories.

It is further the purpose of this zone that development be so designed and constructed as to facilitate and encourage a maximum of social and community interaction and activity among those who live and work within an area and to encourage the creation of a distinctive visual character and identity for each development. It is intended that development in this zone produce a balance and coordinated mixture of residential and convenience commercial uses, as well as other commercial and industrial uses shown on the area master plan, and related public and private facilities.

It is furthermore the purpose of this zone to provide and encourage a broad range of housing types, comprising owner and rental occupancy units, and one-family, multiple-family and other structural types.

Additionally, it is the purpose of this zone to preserve and take the greatest possible aesthetic advantage of trees and, in order to do so, minimize the amount of grading necessary for construction of a development.

It is further the purpose of this zone to encourage and provide for open space not only for use as setbacks and yards surrounding structures and related walkways, but also conveniently located with respect to points of residential and commercial concentration so as to function for the general benefit of the community and public at large as places for relaxation, recreation and social activity; and, furthermore, open space should be so situated as part of the plan and design of each development as to achieve the physical and aesthetic integration of the uses and activities within each development.

It is also the purpose of this zone to encourage and provide for the development of comprehensive, pedestrian circulation networks, separated from vehicular roadways, which constitute a system of linkages among residential areas, open spaces, recreational areas, commercial and employment areas and public facilities, and thereby minimize reliance upon the automobile as a means of transportation.

Since many of the purposes of the zone can best be realized with developments of a large scale in terms of area of land and numbers of dwelling units which offer opportunities for a wider range of related residential and nonresidential uses, it is therefore the purpose of this zone to encourage development on such a scale.

It is further the purpose of this zone to achieve a maximum of safety, convenience and amenity for both the residents of each development and the residents of neighboring areas, and, furthermore, to assure compatibility and coordination of each development with existing and proposed surrounding land uses.

This zone is in the nature of a special exception, and shall be approved or disapproved upon findings that the application is or is not proper for the comprehensive and systematic development of the county, is or is not capable of accomplishing the purposes of this zone and is or is not in substantial compliance with the duly approved and adopted general plan and master plans. In order to enable the council to evaluate the accomplishment of the purposes set forth herein, a special set of plans is required for each planned development, and the district council and the planning board are empowered to approve such plans if they find them to be capable of accomplishing the above purposes and in compliance with the requirements of this zone.

1<sup>st</sup> paragraph: Master Plan implementation. The first paragraph establishes consistency with the master plan as an important factor in applying the zone. Moreover, the density category indicated on the applicable master plan has special status in a PD Zone. If the District Council desires to grant reclassification to a PD Zone with a density category *higher* than

that indicated on the applicable master plan, such action requires the affirmative vote of at least six members of the District Council. Code §59-D-1.62. In this case, the Applicants seek a density category that was recommended in the Master Plan, so a supermajority vote is not necessary.

For the reasons stated in Part III.F. above, the Hearing Examiner concludes that the proposed development is in substantial compliance with the Sector Plan, and would implement the Sector Plan's goals more fully than other zoning categories such as the C-4 Zone.

Second paragraph: social and community interaction, distinctive visual character, balanced mix of uses. The proposed development would encourage social and community interaction by creating a large, common terrace area where building residents would have the opportunity to come together. The Development Plan also provides for access from the site to the Trail and the many amenities of downtown Bethesda, which would provide opportunities for site residents to interact with other community members taking part in downtown activities or using the Trail. The store-front post office and second-story terraces would give the building a distinctive visual character, and the continued post office function with new residential units would add to the diverse blend of residential, commercial, private and public uses in Bethesda.

Third paragraph: broad range of housing types. This development would increase the stock of multi-family housing available in downtown Bethesda and create a new housing option on Arlington Road.

Fourth and fifth paragraphs: trees, grading and open space. The subject site is virtually bereft of trees or other vegetation. The proposed Development Plan would create a sizeable green buffer along a very urban stretch of the Trail. It would also have a large, outdoor terrace at the second floor level that would be a significant green amenity for building residents. As the Hearing Examiner has observed in other PD Zone cases, the language encouraging open space that benefits the community at large applies more readily to large sites, where significant open spaces may be available as quasi-public areas, than to a small, infill site such as the one at issue here, where shared public space is less practical. In this case, the large, second-floor terrace

would be a visual amenity for people on the upper floors of nearby office buildings, expanding the green space in their view shed considerably, and the 60-foot landscaped area on the ground would be a visual amenity for Trail users.

Sixth paragraph: pedestrian networks. This paragraph also applies more readily to a large site with multiple buildings. Nonetheless, the Development Plan here provides pedestrian and vehicular linkages from Arlington Road to the post office and the main residential entrance, as well as pathways linking the residences to the large, landscaped terrace, Arlington Road and the Capital Crescent Trail. All of this, as well as the site's location in downtown Bethesda, near countless shops, restaurants and other activities accessible within a short walk, would encourage pedestrian activity. The Development Plan would further encourage pedestrian activity by improving the sidewalk along the site frontage, improving pedestrian access to the post office and installing a traffic light that would give pedestrians crossing Arlington Road a better sense of security. The traffic light could even be a deciding factor for some people as to whether they drive from the post office to the Bradley Shopping Center, or leave their cars in place and walk the short distance across the street. The People's Counsel suggested that allowing public access to the Trail through the subject site is necessary to comply with this element of the purpose clause. The Hearing Examiner agrees with Technical Staff, however, that a pedestrian/bicycle connection to the Trail for site residents would be a significant pedestrian linkage, as would the proposed traffic light. Moreover, it would be difficult to reconcile public access through this site with the eighth paragraph of the purpose clause, which calls for "a maximum of safety" for site residents, among other things.

Seventh paragraph: scale. The PD Zone encourages, but does not require, development on a large scale.

Eighth paragraph, first part: maximum safety, convenience and amenity. The evidence demonstrates that the proposed development would provide a high degree of safety, convenience and amenity for site residents, with a convenient downtown location, and on-site amenities including a landscaped terrace. It would also provide convenience and amenities for area

residents generally, by greatly improving pedestrian and vehicular access to the post office; by replacing a view of a large surface parking lot from the Trail and nearby residences with a landscaped buffer area and a building that fits in with its surroundings; and by moving the noise and bustle of the post office underground, sheltering the Trail and the Sacks neighborhood from its impacts.

Eighth paragraph, second part: compatibility. The evidence supports a finding that the proposed development would be compatible with the surrounding area. The combination of uses would be compatible, with the retail post office complementing existing retail uses on Arlington Road, and the multi-family use acting, as suggested in the Sector Plan, as a good transition use between the Sacks neighborhood and the surrounding commercial center. Although residential use would not be in a separate building, it would still serve as a buffer because all of the commercial activity on site would be either on Arlington Road, away from the Sacks neighborhood, or underground, with only the residential activity directly visible and audible.

The visual appearance of the subject site would be greatly improved by putting the large Postal Service parking and loading area underground. The density and resulting activity levels would be compatible with the mix of urban land uses in the surrounding area. The site design would also make the building and density compatible with the Trail and nearby homes. With a 60-foot setback for the residential stories and the underground stories more fully underground, the proposed building would be a compatible addition to the scenery bordering this section of the Trail. It would let in some sun, between two large structures that sit right on the Trail, and would provide a green buffer area with space for extensive plantings. The building height would be similar to some adjacent and nearby buildings, and the setback would prevent the building from looming over the Trail and residences. While the final decision on the traffic light will be made at a later stage, the preponderance of the evidence in this record supports a finding that the proposed development would not be incompatible due to adverse traffic impacts, but rather would bring improvements via the proposed traffic light.

Ninth paragraph: three findings. The purpose clause states that the PD Zone “is in the nature of a special exception,” and shall be approved or disapproved based on three findings:

- (1) the application is or is not proper for the comprehensive and systematic development of the county;
- (2) the application is or is not capable of accomplishing the purposes of this zone; and
- (3) the application is or is not in substantial compliance with the duly approved and adopted general plan and master plans.

On the Hearing Examiner’s reading, this element of the purpose clause does not add new requirements, but reminds the District Council of its responsibility to carefully consider whether the PD Zone would be appropriate in the location for which it is requested and would be in substantial compliance with the applicable master plan. The conclusions drawn earlier in this section govern the findings to be made here. Based on the preponderance of the evidence and for the reasons stated above, the Hearing Examiner concludes that present application is proper for the comprehensive and systematic development of the County and in substantial compliance with the Sector Plan, and would accomplish the purposes of the zone.

## **2. Standards and Regulations of the Zone**

The standards and regulations of the PD-44 Zone are summarized below, together with the grounds for the Hearing Examiner’s conclusion that the proposed development would satisfy the applicable requirements.

Section 59-C-7.121, Master Plan Density. Pursuant to Code §59-C-7.121, “no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher.” The subject property is recommended in the Sector Plan for residential development at a density of up to 44 units per acre, so this requirement is satisfied.

Section 59-C-7.122, Minimum Area. Code §59-C-7.122 specifies several criteria, any one of which may be satisfied to qualify land for reclassification to the PD Zone. The subject application satisfies the first of these criteria, which states the following:

That it contains sufficient gross area to construct 50 or more dwelling units under the density category to be granted.

The subject property contains sufficient gross area to permit the construction of 111 dwelling units.

Section 59-C-7.131, Residential Uses. All types of residential uses are permitted, but parameters are established for the unit mix. A PD-44 development with less than 200 units may, as proposed here, consist of 100 percent multi-family units.

Section 59-C-7.132, Commercial Uses. Commercial uses indicated on the applicable master plan are permitted in the PD Zone. The Hearing Examiner will follow Technical Staff and the Applicant in addressing the proposed postal service facility as a commercial use, which is clearly considered appropriate in the Sector Plan as an existing, community-serving use.

Section 59-C-7.133, Other Uses. No uses are proposed other than the postal service facility and residential use.

Section 59-C-7.14, Density of Residential Development. The Zoning Ordinance provides the following direction for the District Council in considering a request for the PD Zone (§ 59-C-7.14(b)):

The District Council must determine whether the density category applied for is appropriate, taking into consideration and being guided by the general plan, the area master or sector plan, the capital improvements program, the purposes of the planned development zone, the requirement to provide [MPDUs], and such other information as may be relevant.

The Zoning Ordinance classifies the density category applied for, PD-44, as a high-density planned development zone, which may be appropriate in an urban area. It is, moreover, the density recommended for the subject site in the Sector Plan. For reasons discussed above with regard to compatibility, the Hearing Examiner considers the PD-44 category appropriate for this site. The Development Plan proposes a maximum density of 38.9 dwelling units per acre.

Section 59-C-7.15, Compatibility. This section requires that a proposed development be compatible internally and with adjacent uses. It also establishes minimum parameters for setbacks and building height that are designed to promote compatibility. As discussed in Part

V.A.(b)(1) above, the Hearing Examiner finds that the proposed development would be compatible with existing development in the surrounding area. The specific setback and building height provisions are detailed below.

Section 59-C-7.15(b) reads as follows:

(b) In order to assist in accomplishing compatibility for sites that are not within, or in close proximity to a central business district or transit station development area, the following requirements apply where a planned development zone adjoins land for which the area master plan recommends a one-family detached zone:

(1) No building other than a one-family detached residence can be constructed within 100 feet of such adjoining land; and

(2) No building can be constructed to a height greater than its distance from such adjoining land.

The subject site adjoins the Trail, which is shown on relevant Sector Plan maps with the same R-60 zoning as the adjacent Sacks neighborhood. Accordingly, one could interpret this section to require a 100-foot setback from the Trail, which is not consistent with the submitted Development Plan. One could also interpret this section to prohibit any building that is taller than its distance from the Trail, which is also almost, but not quite, consistent with the submitted Development Plan. At the start of this case and through the original public hearing process, the Applicant presented its case with an assumption that Section 59-C-7.15(b) requires a 100-foot setback not from the Trail, but from the nearest residential property line. After the hearing, having reviewed this language more closely, the Hearing Examiner offered an opportunity for comment on the applicability of this section. The Applicant then argued that this section does not apply to the subject site because of its location.

The Applicant argues that Section 59-C-7.15(b) does not apply to the subject site because by its terms, it is intended “to assist in accomplishing compatibility *for sites that are not within, or in close proximity to a central business district*” (emphasis added). See Ex. 101. The

Applicant maintains that the subject property is in close proximity to the Bethesda CBD, as it sits within 600 feet of the CBD boundary. The People's Counsel argues that "close proximity" requires more than just "proximity," that word having been modified by "close," which implies nearness or adjacency. See Ex. 102. He finds it to be evident that the subject property is not within "close proximity" to the CBD. Mr. Humphrey similarly argues that in this context "close proximity" mean "adjacent." See Ex. 99. Technical Staff finds that all properties within the Sector Plan area are either within or in close proximity to the CBD. See Ex. 112 at 5. The Hearing Examiner finds that on this point, Technical Staff and the Applicant have the better argument. The language of Section 59-C-7.15(b) applies to all potential applications of the PD Zone, anywhere in the County. Viewed in the context of the County as a whole, a site that is a few hundred feet from a CBD can readily be considered in close proximity to it. In the Hearing Examiner's view, this language is intended to distinguish areas that are quite close to a CBD, where residents should expect commercial uses nearby, from areas with no CBD in sight, where residents may expect a higher degree of privacy, quiet and residential setting. Accordingly, the Hearing Examiner is persuaded that Section 59-C-7.15(b) does not apply to the subject site.

If this section were considered applicable, the Applicant argues that it should be interpreted to apply to the nearest residential property, not to the property line of the Trail, which is a public right-of-way not intended to be used for residential purposes. The Applicant cites one PD rezoning case in Bethesda and four in the Wheaton CBD where townhouse projects were not required to be set back 100 feet from adjoining public roads – which, like the Trail, carry the zoning of the least intense adjacent use – but from single-family properties on the other side of those roads. See Ex. 101 at 2-3. In each case, the public street was included as part of the 100-foot setback. The Applicant argues that under this interpretation, the proposed building would comply with Section 59-C-7.15 because the above-ground, residential portion of the building would be set back 30 feet from the property line, which is 112 feet from the nearest residential property line.

Whether this contention is accurate or not depends on whether the outer wall of the underground parking garage is part of the building setback calculation.

The garage wall would be approximately two feet from the property line (and therefore less than 100 feet from the nearest residential property line) with as much as 15 feet of wall above ground at the southeast corner of the site. Applicant's counsel argues that this outer wall is exempt from setback requirements under Section 59-B-2.1 of the Zoning Ordinance, which states that building line and yard requirements do not apply to "retaining walls where changes in street grade, width or alignment have made such structures necessary".<sup>15</sup> See Ex. 101. Having determined that the section does not apply to this site, the Hearing Examiner has not conducted the research that would be necessary to definitively interpret this section. Based on a simple reading of the language, however, the Hearing Examiner questions whether a building wall is considered a retaining wall for this purpose.

Section 59-C-7.16, Green Area. The PD-44 Zone requires a minimum of 50 percent green area. The Development Plan depicts green area satisfying this requirement, consisting of the second-story terrace (about 60% of the green area) the sidewalk along Arlington Road (about 9%), and the buffer area along the Trail (about 11%). The Applicant argues, and Technical Staff agrees, that the second-floor terrace qualifies as "green area" even though it would sit on the roof of a building – the postal facility. Mr. Humphrey argues that "green area" should be located at ground level, rather than allowing the same piece of ground to qualify both as part of a building footprint and as "green area." The Zoning Ordinance defines "green area" as follows:

**Green area:** An area of land associated with and located on the same tract of land as a major building or group of buildings, or a prescribed portion of the land area encompassed by a development plan, diagrammatic plan or site plan, to which it provides light and air, or scenic, recreational or similar amenities. This space must generally be available for entry and use by the occupants of the building or area involved, but may include a limited proportion of space so located and treated as to enhance the amenity of the development by providing landscaping

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<sup>15</sup> Counsel also made an argument before the remand relating to an exemption for walls 6 ½ feet or less in height, but the evidence now suggests that the wall would be visible at a greater height, at least at one corner, so this argument should be disregarded.

features or screening for the benefit of the occupants or those in neighboring areas, or a general appearance of openness. Green area may include but is not limited to lawns, decorative plantings, sidewalks and walkways, active and passive recreational areas including children's playgrounds, public plazas, fountains, swimming pools, wooded areas, and watercourses. Green area does not include parking lots or vehicular surfaces, accessory buildings other than swimming pools, or areas of open space so located, small, or circumscribed by buildings, parking or drainage areas as to have no substantial value for the purposes stated in this paragraph.

The Planning Board and its staff, as well as the Applicant's land planner, interpret this definition to include areas on rooftops. Mr. Landfair described the definition of "green area" as very broad, including "almost anything you can think of short of parking spaces, driveways." See Tr. Aug. 1 at 113. Technical Staff explained that although the definition begins with "An area of land," it goes on to cite examples of what is and is not included in green area, and does not explicitly exclude rooftop terraces. See Ex. 80. Staff viewed the landscaped terrace in this case as providing benefits to site residents as well as neighboring areas, and considered it within the scope of the "green area" definition. See *id.* Staff notes that the District Council approved a development plan amendment (DPA 06-1) on April 24, 2007 that provided for nearly half the green area on the penthouse level.

Mr. Humphrey added a new twist to his green area argument after the remand hearing. In a post-hearing submission, he maintained that about 5,000 square feet of the green area identified on the Development Plan, roughly nine percent of the total, would sit on top of the underground garage. See Ex. 125. In his view, green area in the PD Zone cannot be located on top of an underground garage. Mr. Humphrey based this prong of his argument on two sections of the Zoning Ordinance that provide expressly, one for the CP Zone (commercial, office park ) and one for the LSC Zone (Life Sciences Center), that areas above underground parking may be counted as green area. See Code Sections 59-C-4.338 and 59-C-5.473. As Mr. Humphrey correctly noted, Maryland's highest court has held that "where the legislature in a statute expressly authorizes a particular action under certain circumstances, the statute ordinarily should be construed as not allowing the action under other circumstances." *Mossburg v. Montgomery County*,

329 Md. 494, 505, 620 A.2d 1144 (Md. 2006). One could argue, by analogy, that the District Council's adoption of provisions in two zones that specifically permit the roofs of underground garages to be counted as green area implies that in all other zones, such rooftops may not be used for green area.

In response to this argument, counsel for the Applicant chose not to examine legislative history, case law, or any other potential legal support for a contrary position. Instead, she stated that the Hearing Examiner and the District Council previously found that green area can be located as proposed in this case, and that Mr. Humphrey's interpretation "would undermine the integrity of the entire Ordinance, and be completely inconsistent with the Planning Board and Council's application of the green space [sic] requirements in all other cases." See Ex. 128. The findings in the Hearing Examiner's earlier report and recommendation and in the Council Resolution were based on the information in the record at that time. New evidence requires a new assessment and fresh findings. Moreover, far from undermining the integrity of the entire Zoning Ordinance, Mr. Humphrey's interpretation would lead to a holistic view of the Ordinance, based on an assumption that when the District Council adopts a provision for one zone, it is aware of potential implications for other zones.

The Hearing Examiner is puzzled by the two provisions Mr. Humphrey cites. They seem unnecessary, since the language of the green area definition, ambiguous though it is, seems clearly to allow virtually any at-grade, non-vehicular open space to be counted as green area. Thus, the two provisions Mr. Humphrey cites seem to merely reinforce a right that has already been granted. If they are to be interpreted as Mr. Humphrey suggests, one would have to start with the premise that the definition of green area was somehow meant to exclude areas on top of underground garages.

The Hearing Examiner turned to legislative history to assist in determining the intent behind the green area definition. The definition has not been materially changed since its adoption in 1962. It was originally adopted in conjunction with creating a new zone for apartment buildings.

See Ordinance No. 4-124, Feb. 13, 1962. The new zone was created in response to conditions at a number of apartment projects in the County, where “[p]oor site development and massive buildings with inadequate setbacks and distances between buildings have resulted in unnecessary destruction of topographic features, restricted light, traffic congestion, inadequate interior roadways of great problem to emergency vehicles and fire departments . . . and inadequate yard areas for recreation for apartment tenants.” See *id.* The Ordinance Opinion made the following observations with regard to the need for more green area:

Particularly important has been the lack of recreational ground area. Even where “green areas” were theoretically available by a paper analysis of building lot coverage in relation to recreation area and parking area, such “green areas” have so [sic] been sliced up and divided into small strips, spots and dots that they were unusable for the benefit and enjoyment of the apartment dwellers.

This zone, by requiring site review, a percentage of “green area”, as well as a maximum allowable percentage of building coverage, remedies these deficiencies to provide a safe, healthful environment for apartment dwellers.

This language suggests that in adopting the green area definition, the Council was attempting to solve a problem – inadequate outdoor recreational space for apartment dwellers. The references to “inadequate yard areas for recreation” and a lack of “recreational ground area” could be seen, particularly in combination with the phrase, “An area of land” at the beginning of the green area definition, to suggest that green area was intended to be on the ground. It appears that the Council assumed that green area would be on the ground, which was not surprising in the Montgomery County of 1962, where space was not yet tight enough for anyone to think of putting recreation areas on rooftops. It is not clear, however, that the Council intended to prohibit green area from being located on a roof, whether the roof of an underground parking garage or of a building. The fundamental intent of the definition and the green area requirement was to provide useful outdoor recreation space for apartment dwellers, and that goal can be satisfied with a well-designed rooftop recreation area as well as on the ground.

The green area definition is rife with ambiguities, and should be updated and clarified. The Planning Board has long been the agency charged with determining how terms such as “green area,” “open space” and “public use space” will be applied. According to the Planning Board’s interpretation, which the District Council has accepted in at least one rezoning case, the entire green area requirement or any portion of it could be satisfied on a rooftop, if the Planning Board and its Staff consider it appropriate in a given case. In the present case, 60 percent of the green area would be on a second-story roof. While the Planning Board has not reviewed the present plan, it recommended approval of the earlier plan, which placed an even higher percentage of green area on the roof. In the Hearing Examiner’s view, if the County is to continue permitting green area to be located on rooftops, the phrase “An area of land” should be removed from the definition, and the language should specify parameters for how much of the green area requirement may be satisfied on a rooftop. The question of how much open land is required on the ground in urban zones and how much is acceptable on a rooftop deserves the considered attention of the Council, rather than a case-by-case determination.

The Hearing Examiner finds sufficient support in the legislative history to conclude that permitting green area on top of a roof, whether an underground garage roof or a building roof, is consistent with the fundamental intent of the green area definition. Moreover, this interpretation has been applied consistently by the Planning Board, and the District Council accepted it in a recent rezoning case. Nevertheless, I implore the District Council to revise and update the definition to reflect its intent more clearly.

Section 59-C-7.17, Dedication of Land for Public Use. This section requires that land necessary for public streets, parks, schools and other public uses must be dedicated to public use, with such dedications shown on all required development plans and site plans. The Development Plan shows the sole dedication, consisting of additional right-of-way along Arlington Road.

Section 59-C-7.18, Parking Facilities. Off-street parking must be provided in accordance with the requirements of Article 59-E of the Zoning Ordinance. As shown on page 26

above, the Development Plan provides for more than the required number of spaces. Technical Staff confirms that the Zoning Ordinance requirement for parking would be met.

The final two elements of finding (b), the maximum safety, convenience and amenity of the residents, and compatibility, have already been addressed.

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

For the reasons discussed in Part III.H. above, the Hearing Examiner concludes that the evidence supports a finding that, with full implementation of the proposed binding element, the proposed internal vehicular and pedestrian circulation systems and points of external access would be 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.***

The proposed development would tend to minimize grading by taking advantage of the site topography to put part of the building underground. The site is virtually bereft of trees or other natural features, and the minimal forest conservation requirement would be easily satisfied. The Applicant's engineer testified persuasively that quantity and quality stormwater management controls to be placed in the parking garage would satisfy applicable requirements and improve the present situation.

**(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.***

The Applicant has not provided any draft documents of this nature. However, the Applicant's hearing representative, Frank Poli, testified that if this development goes forward, the

ultimate ownership configuration will ensure that landscaping is maintained on site in perpetuity. See Tr. Aug. 1 at 11.

### **B. Public Interest**

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

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

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities or the environment.

The Planning Board and Technical Staff concluded that the proposed development would substantially comply with the recommendations and objectives of the *Bethesda CBD Sector Plan*. For the reasons stated in Part III.F, the Hearing Examiner agrees.

For the reasons stated in Part III.H., the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed development would have no adverse effects on traffic conditions, in light of the Applicant's commitment not to even seek a building permit until the proposed mid-block traffic signal has received final approval from DPWT. The evidence indicates that utilities are readily available, and that forest conservation and stormwater management regulations would be satisfied. With regard to public schools, for the reasons stated in Part III.H. above, the Hearing Examiner finds that the expected minor addition to overcrowding at Bethesda Elementary School does not warrant denial of the requested rezoning.

Having carefully weighed the totality of the evidence, the Hearing Examiner concludes that approval of the present application in its current form would be in the public interest.

## **VI. CONCLUSIONS**

Based on the foregoing analysis and after a thorough review of the entire record, I reach the conclusions specified below.

### **A. Development Plan**

1. The submitted Development Plan is in substantial compliance with the Sector Plan.
2. The Development Plan complies with the purposes, standards and regulations of the PD-44 Zone and provides for a form of development that will be compatible with adjacent development.
3. The Development Plan proposes internal vehicular and pedestrian circulation systems and points of external access that will be safe, adequate and efficient, provided that the written binding elements are fully implemented.
4. By its design, the proposed development will tend to prevent erosion of the soil. The site is virtually bereft of trees or other natural features, and the minimal forest conservation requirements under Chapter 22A will be easily met. The preponderance of the evidence supports a finding that requirements for water resource protection under Chapter 19 will be satisfied.
5. No documents have been submitted to show the ownership and method of perpetual maintenance of areas intended to be used for recreational or other common or quasi-public purposes, but the binding testimony of the Applicant's representative establishes that if the project goes forward, the ultimate ownership configuration will ensure perpetual maintenance of common areas.

### **B. Zoning Request**

Application of the PD-44 Zone at the proposed location is proper for the comprehensive and systematic development of the County because the proposed development, as shown on the submitted Development Plan:

1. Will serve the public interest;
2. Will be in substantial compliance with the applicable master plan; and
3. Will satisfy the purposes, standards and regulations of the zone.

## VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-861, requesting reclassification from the C-4 Zone to the PD-44 Zone of 2.5 acres of land located at 7001 Arlington Road, Bethesda, Maryland, in the 7th Election District, be **granted** in the amount requested, subject to the specifications and requirements of the final submitted Development Plan, Exhibit 122(e); 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, Exhibit 122(e), within 10 days of approval, in accordance with § 59-D-1.64 of the Zoning Ordinance.

Dated: October 13, 2008

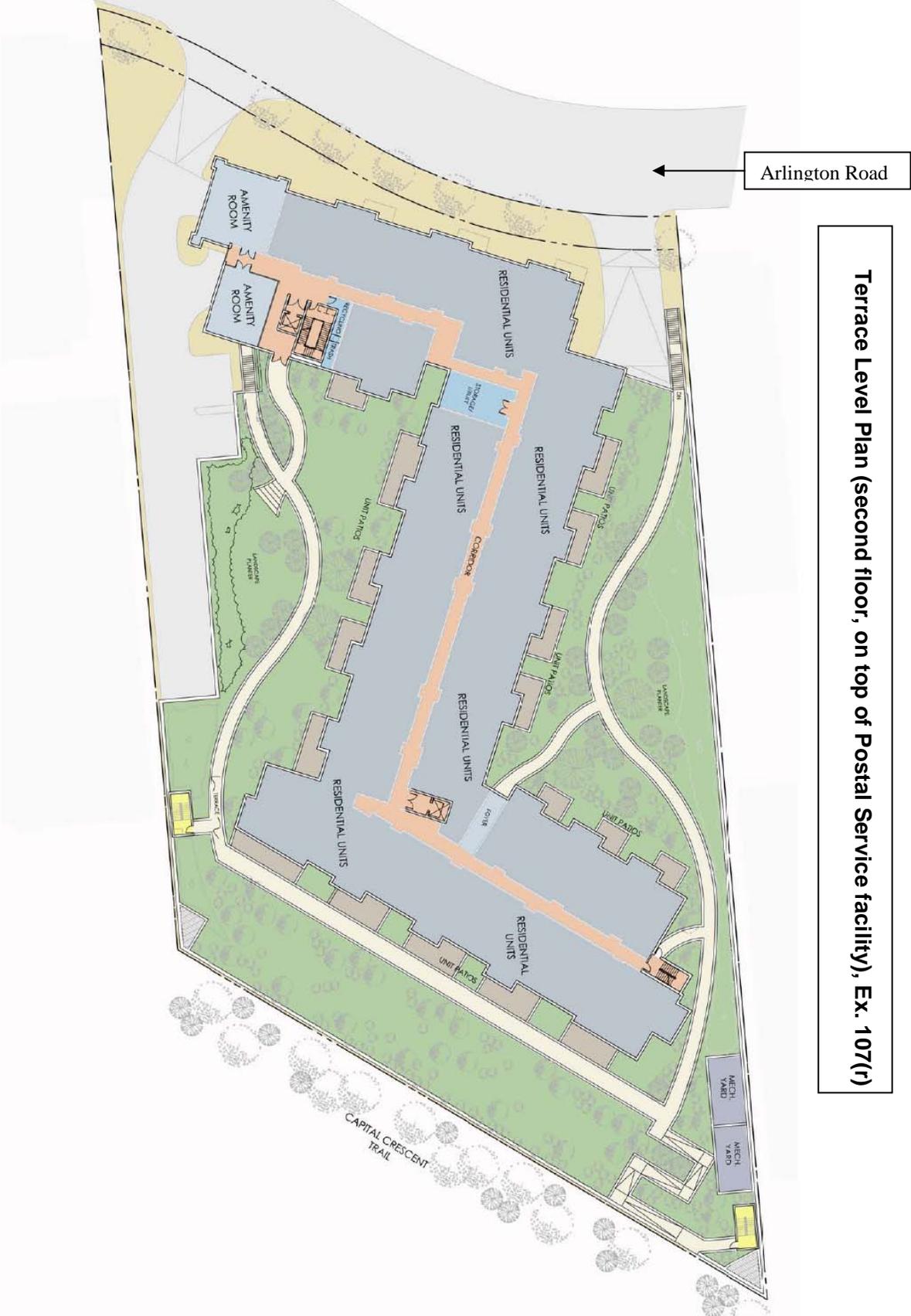
Respectfully submitted,

Françoise M. Carrier  
Hearing Examiner

## Appendix



Aerial Photograph with Artist's Rendering of Proposed Development, Ex. 107(I)



**Terrace Level Plan (second floor, on top of Postal Service facility), Ex. 107(r)**

