

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

**IN THE MATTER OF:**  
**KEYSTONE REAL ESTATE INVESTMENTS, LLC.**  
Applicant

Richard Koch  
Phil Perrine  
Glen Cook  
Stephen Tawes  
Dan Pino

For the Application

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Attorney for the Applicant

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In Support of the Petition

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Joseph Parello  
Community Participant in the Hearing

Conditionally in Support of the Petition

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Zoning Application No. G-875

Before: Martin L. Grossman, Hearing Examiner

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

**TABLE OF CONTENTS**

	<b>Page No.</b>
I. EXECUTIVE SUMMARY .....	3
II. STATEMENT OF THE CASE .....	4
III. FACTUAL BACKGROUND .....	6
A. SUBJECT PROPERTY .....	6
B. SURROUNDING AREA AND ADJACENT DEVELOPMENT .....	7
C. ZONING HISTORY .....	10
D. PROPOSED DEVELOPMENT .....	11
1. <i>Development Concept</i> .....	11
2. <i>Development Plan &amp; Binding Elements</i> .....	12
3. <i>Conformance with the Master Plan</i> .....	19
4. <i>Public Facilities (Traffic Impact, School Capacity and Water &amp; Sewer Service)</i> .....	21
a. Traffic Impact.....	21
b. School Capacity.....	24
c. Water and Sewer Service.....	25
5. <i>Environmental Issues</i> .....	26
E. NEIGHBORHOOD CONCERNS .....	27
IV. SUMMARY OF THE HEARING .....	28
V. FINDINGS OF FACT AND CONCLUSIONS OF LAW .....	42
A. STANDARDS FOR COUNCIL REVIEW .....	42
B. REQUIRED FINDINGS .....	43
1. <i>County Plans and Policies</i> .....	43
a. The Alternative Review Committee (ARC): .....	44
b. The Applicable Master Plan or Sector Plan .....	47
c. The General Plan and the County Capital Improvements Program .....	48
d. Other County Policies (GP and APFO).....	48
2. <i>Zone Requirements, Safety, Convenience and Amenity of Residents and Compatibility</i> ...51	51
a. Compliance with Zone Purposes, Standards and Regulations.....	51
b. Safety, Convenience and Amenity of Residents .....	59
c. Compatibility with Adjacent Development .....	60
3. <i>Internal Vehicular and Pedestrian Circulation Systems and Site Access</i> .....	60
4. <i>Erosion, Preserving Vegetation, Forest Conservation and Water Resources</i> .....	60
5. <i>Ownership and Perpetual Maintenance</i> .....	61
6. <i>The Public Interest</i> .....	62
C. CONCLUSION.....	63
VI. RECOMMENDATION .....	63

**I. EXECUTIVE SUMMARY**

Applicant:	Keystone Real Estate Investments, LLC.
LMA No. & Date of Filing:	G-875, filed October 26, 2007
Zoning and Use Sought:	Zone: PD-35 Use: 156 residential units, including 3 single-family detached units, 36 single-family attached units and a 117 unit multi-family, 4-story building, which will have 20 MPDUs
Current Zone and Use:	Zone: R-90 Current Use: Eastern portion is undeveloped land; western portion contains a vehicle storage area and forest
Location:	At Yellowstone Way, on the south side of Redland Road between the CSX Railroad tracks and Crabbs Branch Way, in Derwood.
Acreage to be Rezoned:	Approximately 4.26 acres
Right-of-Way to be Dedicated:	Approximately 0.54 acres of land will be dedicated to public use along the site's frontages on Redland Road and Chieftain Avenue
Base Density in PD-35 Zone:	35 per acre x 4.26 acres = 149 Dwelling Units
Density Proposed by Applicant :	156 DUs ( <i>i.e.</i> , 5% bonus density), with 13% ( <i>i.e.</i> 20) MPDUs
Green Space Required/Planned:	50% required (2.13 acres) / 50% planned (2.13 acres)
Parking Required/Planned:	193 spaces required / 227 spaces planned
ARC Review Issue:	All parties, Technical Staff and the Hearing Examiner concluded that a review of this application by the Alternative Review Committee (ARC) was not required
Environmental Issues:	Development is not within a Special Protection Area or Primary Management Area. A Preliminary Forest Conservation Plan has been approved by the Planning Board, and a stormwater concept plan submitted by Applicant will be reviewed at subdivision.
Consistency with Master Plan:	Project is consistent with the 2006 Shady Grove Sector Plan
Neighborhood Response:	There is no opposition to this project. The Shady Grove Advisory Committee has indicated its support for the proposed rezoning and development plan to Technical Staff (Exhibit 33, p. 28). It raised some issues with Staff about traffic control and stormwater management, to be addressed at subdivision. One community resident testified to the need for 3 single-family detached homes along Chieftain Avenue, to which Applicant has agreed.
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval

## II. STATEMENT OF THE CASE

Application No. G-875, filed on October 26, 2007, by Applicant Keystone Real Estate Investments, LLC,<sup>1</sup> requests reclassification of a 4.26-acre parcel of mostly unimproved land (the “Thomas Somerville Site” in the 2006 Shady Grove Sector Plan) from the R-90 Zone to the PD-35 Zone. The Applicant proposes to develop the property with 156 residential units, including 3 single-family detached units, 36 single-family attached units and a 117 unit, multi-family, four-story building, which will have 20 Moderately Priced Dwelling Units (MPDUs). The property is known as Parcel P146 Derwood (or Parcel P146 Shady Grove Metro), and it is located at Yellowstone Way, on the south side of Redland Road between the CSX Railroad tracks and Crabbs Branch Way, in Derwood, Maryland.

The application for rezoning was reviewed by the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) who, in a report dated March 10, 2008, recommended approval (Exhibit 33).<sup>2</sup> The Montgomery County Planning Board (“Planning Board”) considered the application on March 20, 2008 and, by a vote of 3 to 0, also recommended approval, as stated in a memorandum dated March 25, 2008 (Exhibit 35).<sup>3</sup>

A public hearing was noticed for April 4, 2008 (Exhibit 24), and it proceeded as scheduled. There was no opposition testimony. One member of the community, Joseph Parelo,<sup>4</sup> testified in support of the petition, as long as Applicant agreed to specify that three single-family detached homes would be located along Chieftain Avenue, which Applicant agreed to do. Tr. 11-15.

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<sup>1</sup> Keystone Real Estate Investments, LLC, is the authorized representative, for this zoning application, of the contract purchaser of the property, BREF-KREI P146. Exhibit 51.

<sup>2</sup> The Technical Staff Report is quoted and paraphrased frequently herein.

<sup>3</sup> In that same memorandum, the Planning Board noted that it would review the orientation of the single-family houses on Chieftain Avenue at site plan, and a note was added to the revised development plan to so indicate. The Planning Board also mentioned that, at subdivision, it would carefully review some traffic safety issues raised by the community.

<sup>4</sup> Mr. Parelo indicated that he is an officer of both the Shady Grove Sector Plan Advisory Committee and the Greater Shady Grove Alliance, but he testified on his own behalf. Tr. 6.

According to Technical Staff, the Shady Grove Advisory Committee indicated its support for the proposed rezoning and development plan (Exhibit 33, p. 28), but it did not formally participate in the hearing.<sup>5</sup>

The record was initially held open until April 11, 2008, to allow Applicants time to file minor revisions to the Development Plan agreed to at the hearing,<sup>6</sup> as well as an affidavit of posting, an affidavit relating to perpetual maintenance of the common areas and other materials requested by the Hearing Examiner. The initial affidavit relating to perpetual maintenance of the common areas (Exhibit 49(a)) revealed the existence of Applicant's parent company, BREOF-KREI P146 LLC, for the first time, so the record was reopened to allow the filing of disclosure statements for that entity and others related to it, as well as a revised affidavit relating to perpetual maintenance of the common areas. Exhibits 52 and 53. The record was reopened one last time, on May 15, 2008, to receive the revised development plan in hard copy.<sup>7</sup> Exhibits 54(a) and (b). The record closed again the same day because no substantive changes were made in the development plan. Exhibit 55.

This is a very straight-forward and non-controversial case. Both the requested Zone and the design of the proposed development are consistent with the applicable master plan (the Shady Grove Sector Plan, approved and adopted in 2006). Both the Technical Staff and the Planning Board found that the proposed development would satisfy all the standards of the PD-35 Zone, and the Hearing Examiner agrees. The only issue which arose in this case related to the legal interpretation of language in Zoning Ordinance §59-D-1.61(a), which calls for review by an Alternative Review

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<sup>5</sup> The Advisory Committee also raised some issues with Staff about traffic control and stormwater management, which will be addressed at subdivision.

<sup>6</sup> These revisions changed only the text in notes on the plan, not the site layout. The changes consisted of adding the word "three" before the words "single family detached units" in Additional Note 5, at the request of a community member, Joseph Parello, and specifying the land to be dedicated in the Development Standards box, at the request of the Hearing Examiner.

<sup>7</sup> An electronic copy had been supplied while the record was open, but Applicant had inadvertently failed to file the hard copy.

Committee (ARC) in certain cases, a review which was not done in this case. After considering this issue, the Hearing Examiner agreed with Applicant, Technical Staff and the People's Counsel that this was not a case in which an ARC review was required. The basis for this decision is spelled out in Part V.B.1.a. of this report. The evidence in this case supporting the requested rezoning and the proposed development plan is uncontested, and the Hearing Examiner recommends their approval.

### III. FACTUAL BACKGROUND

#### A. Subject Property

The 4.26-acre subject property is a trapezoidal parcel located between Redland Road to the north and Chieftain Avenue to the south, with frontages on both streets. Exhibit 33, p.5. The property is bisected into northeastern and southwestern segments by Yellowstone Way, a 60-foot wide secondary residential street, as shown on the following aerial photo from the Technical Staff report (p. 5):



As can be seen in the photo, the segment of the property on the east side of Yellowstone Way (approximately 1.3 acres) is unimproved and contains a few trees, brush and grassy area. It was described by Applicant's landscape architect and site designer, Steve Tawes, as "a mown field." Tr. 77. The segment west of Yellowstone Way (totaling approximately 3.0 acres) contains a paved vehicle storage area and approximately 1.56 acres of low quality forest. Tr. 78.

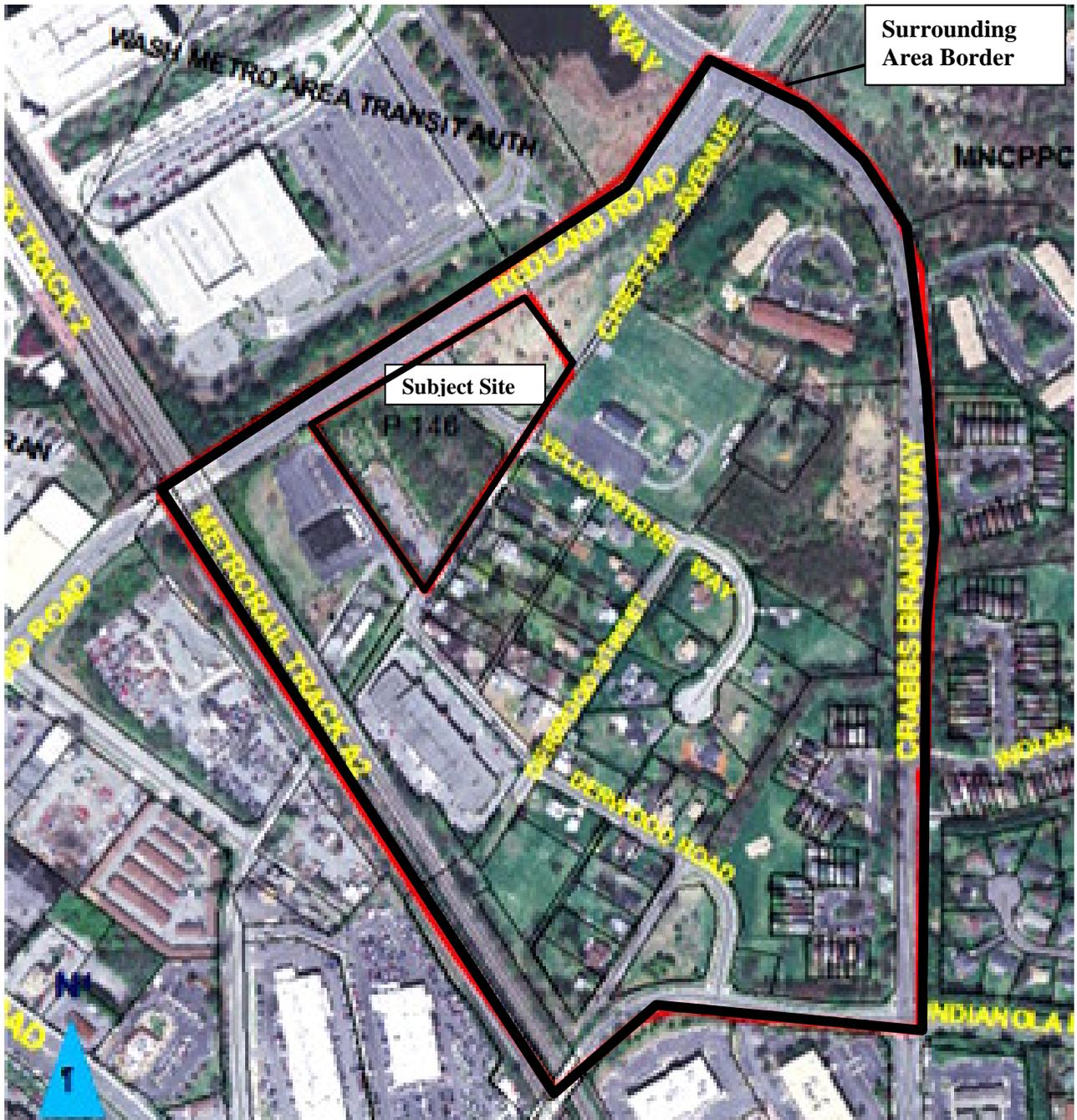
Mr. Tawes testified that the site has a very gentle slope (3 to 8%) from the southwest down to the northeast. The drainage is actually towards the Crabbs Branch regional stormwater management facility, to the northeast. Tr. 78.

### **B. Surrounding Area and Adjacent Development**

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The "surrounding area" is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. In the present case, Technical Staff recommends designating the surrounding area as bounded on the north by Redland Road, on the east by Crabbs Branch Way, on the south by Indianola Drive and on the west by the CSX Railway Tracks. This designation was based on description of the "Metro East—Old Derwood" area in the 2006 Shady Grove Master Plan (p. 31, Density Distribution Map).

Applicant's land use planner, Phil Perrine, agreed with this definition (Tr. 53-54), and it is shown on the following page in an aerial photo from page 7 of the Technical Staff report. The Hearing Examiner also accepts this designation. Although it could be argued that the boundaries should include properties fronting on the north side of Redland Road, neither Technical Staff nor Applicant's land planning expert chose to include that area. When the Hearing Examiner questioned Mr. Perrine about this omission, he stated that, while he normally would include properties directly

across the street, “this old Derwood neighborhood description in the sector plan stops at Redland Road. In terms of land use, . . . there is a Metro station and all the facilities over there but there's no residential or anything over there or any kind of private development.” Tr. 54. The surrounding area, as defined above, is depicted below:



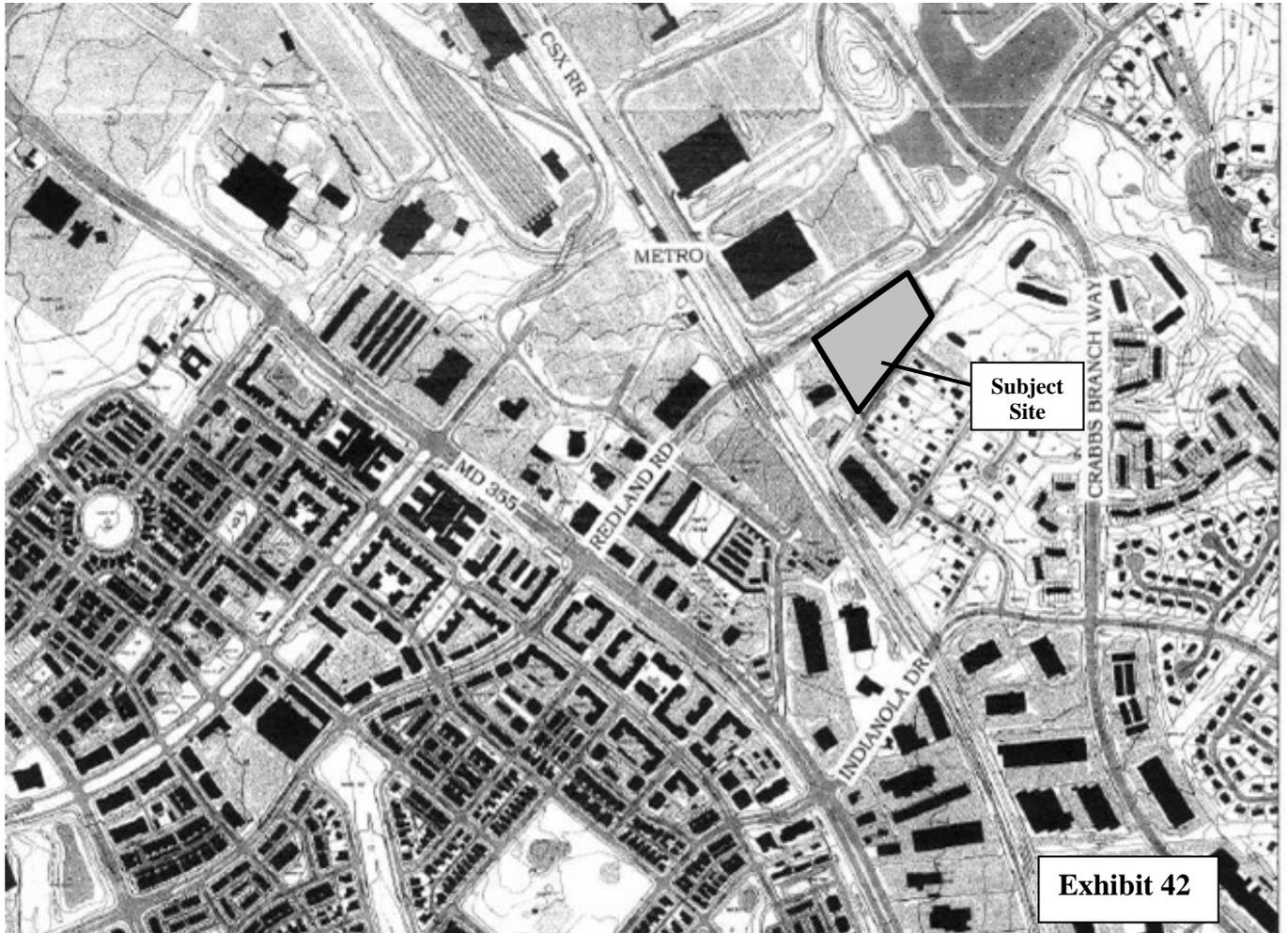
The surrounding area was well described by Technical Staff (Exhibit 33, pp. 6-7):

The land use within the neighborhood boundaries is predominantly residential with single-family detached residences and townhomes. The area also contains a site that is approved for proposed residential development (Baldwin Landing) for 52 single-family detached and townhomes, The area also includes a vehicle emission inspection station and an office building. Outside of the neighborhood boundaries, to the north, is located a large multi-level parking garage that serves the Shady Grove Metro Station located farther northwest. West of the neighborhood across the CSX tracks, a mixture of industrial and commercial uses exist. The areas to the east and south outside of the neighborhood boundaries consist of single-family detached dwellings, townhomes and garden apartments.

Immediately north of the subject site across the Redland Road is the Metro parking facility with a multi-level structure and surface parking lot in the TOMX-TDR Zone. To the east, the property abuts a vacant parcel of land owned by Montgomery County in the R-90 Zone. To the south across Chieftain Avenue, confronting the subject property, are single-family homes and the Derwood Bible Church property. The church property is approved for a residential development [*i.e.*, Baldwin Landing] of 52 single-family-detached dwellings and townhomes under the R-90/TDR Zone. To the west, the property abuts the State Highway Vehicle Emissions Inspection Program Station in the R-90 Zone.

Views of the area beyond the immediate vicinity are shown below and on the following page:





### C. Zoning History

According to Technical Staff, the subject property was placed in the R-R Zone when the zone was enacted and mapped in the 1954 Regional District Zoning. The 1958 Countywide Comprehensive Zoning confirmed the R-R zoning of the site (The R-R Zone was renamed R-200 in 1973). The 1971 Sectional Map Amendment (SMA) for Gaithersburg Vicinity (F-657) reclassified the subject property to I-1, and the 1977 Shady Grove Sector Plan confirmed the I-1 Zone for the property. The 2006 Shady Grove Sector Plan recommended a base zone of R-90 and development under the PD-35 Zone by Local Map Amendment. The 2006 Shady Grove SMA implemented the Sector Plan's recommendation for rezoning the property's base zone to R-90.

### D. Proposed Development

#### 1. Development Concept

Applicant proposes to construct a 156-unit residential development, including 117 multi-family units in one four-story building, 36 townhouse units and 3 single-family detached units. Walkways provide for the connection within the development to public sidewalks, roadways and public facilities, and to the Shady Grove Metro Station via Redland Road. Revised Land Planning Report, Exhibit 27(a). There will be a large courtyard running from the multi-family building to Chieftain Avenue, another courtyard (or “tot lot”) surrounded by the multifamily building and a pocket park on the north side of the site, adjacent to Chieftain Avenue. Tr. 61. The following two drawings (Exhibits 37 and 38) demonstrate Applicant’s concept of the streetscape for the proposed development:





The development includes 20 (*i.e.*, 13%) Moderately Priced Units (MPDUs), all of which will be located within the multi-family building. The orientation of the three single-family detached units on Chieftain, all of which are three stories tall, will be decided at Site plan, per the wishes of the Planning Board. Exhibit 35 and Note 5 of the “Additional Notes” on the Development Plan, Exhibit 54(a). The townhouse units will be three stories tall in the front and four stories tall in the rear. Tr. 17. The design, with the single family units located along Chieftain, is intended to serve as a transition from the single-family homes in the historic Derwood neighborhood across Chieftain, to the larger multifamily building along Redland Road. Tr. 57.

## **2. Development Plan & Binding Elements**

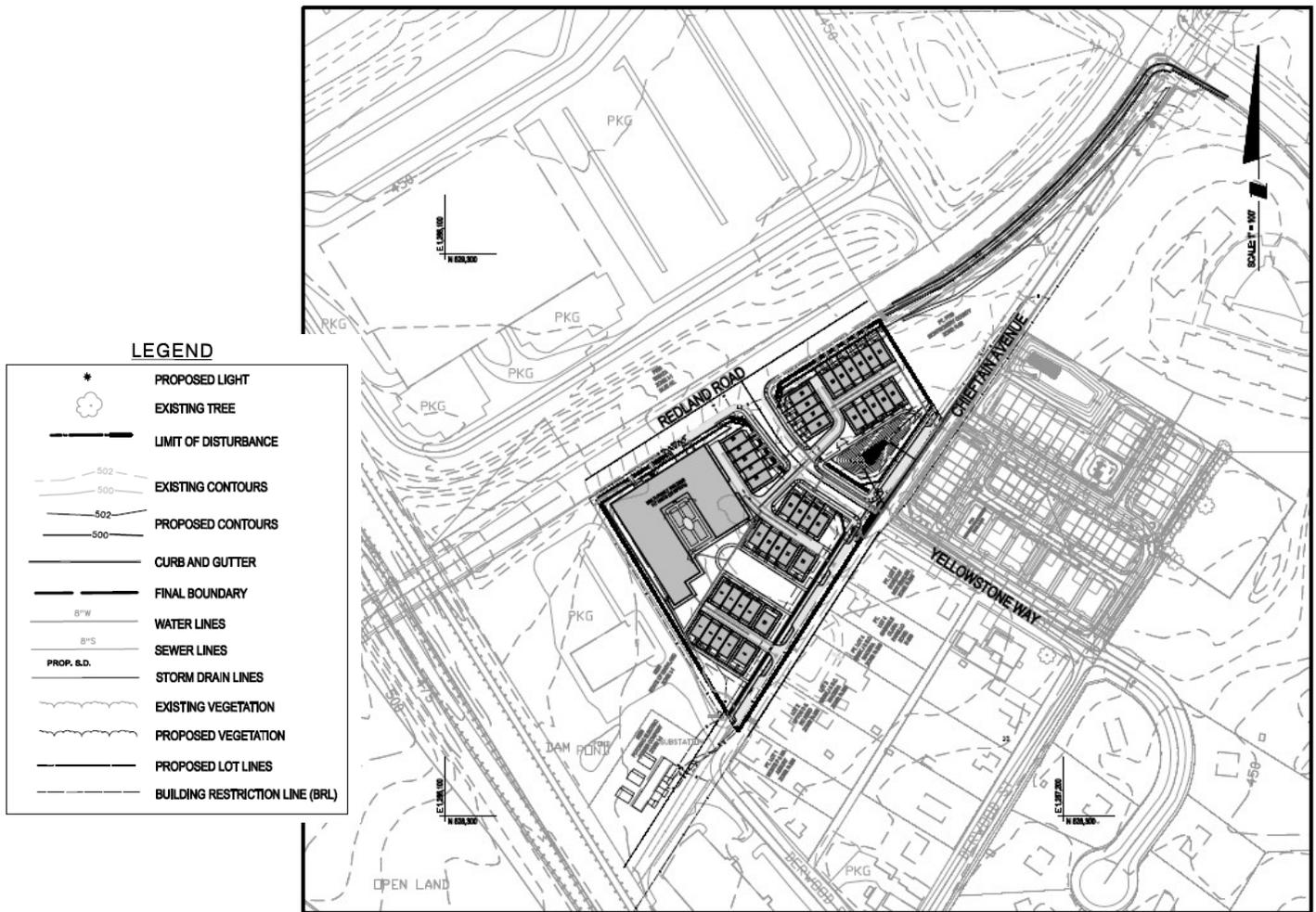
Pursuant to Code § 59-D-1.11, development under the PD-35 Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD-35 Zone. Under Code §59-D-1.3, this development plan must contain several elements:

- (a) A natural resources inventory;
- (b) A surrounding area map, showing the relationship to the site and use of the adjacent land;
- (c) A land use plan showing site access; locations and uses of all buildings and structures; a preliminary classification of dwelling units; locations of parking areas, including number of parking spaces; location of land to be dedicated to public use; location of land intended for common or quasi-public use but not intended to be in public ownership; and a preliminary forest conservation plan;
- (d) A development program stating the sequence of proposed development;
- (e) The relationship, if any, to the County's capital improvements program;
- (f)&(g) [Inapplicable to the PD-35 Zone];
- (h) The density category applied for, as required in subsection 59-C-7.14(a), and where commercial facilities are included (which is not the case here), an economic analysis supporting their inclusion; and
- (i) [Inapplicable to this case since the site is not within a special protection area].

The Development Plan in this case fulfills these requirements. The Development Plan and the Land Use Plan that constitutes one of its primary parts are binding on the Applicant except where particular elements are identified as illustrative or conceptual. Illustrative and conceptual elements may be changed during site plan review by the Planning Board, but the binding elements (*i.e.*, those that the District Council will consider in evaluating compatibility and compliance with the zone) cannot be changed without a separate application to the District Council for a development plan amendment.

The Land Use plan for the present zoning application, Exhibits 54(a) and (b), is titled "Development Plan" and will be referred to by that name in this report. Exhibit 54(a), the first page of the Development Plan, shows a site layout and all of the textual development data and notes. The second page of the plan, Exhibit 54(b), shows the site layout in greater detail. Copies of both parts of the Development Plan are reproduced on the following pages.

The proposed Development Plan indicates that the project will be constructed in one phase, that structures shown on the development plan are conceptual and that final lot layouts and setbacks will be determined at site plan review. Technical Staff reports that the proposed development is not dependent on any capital improvements being provided by the County. Exhibit 33, p. 8.



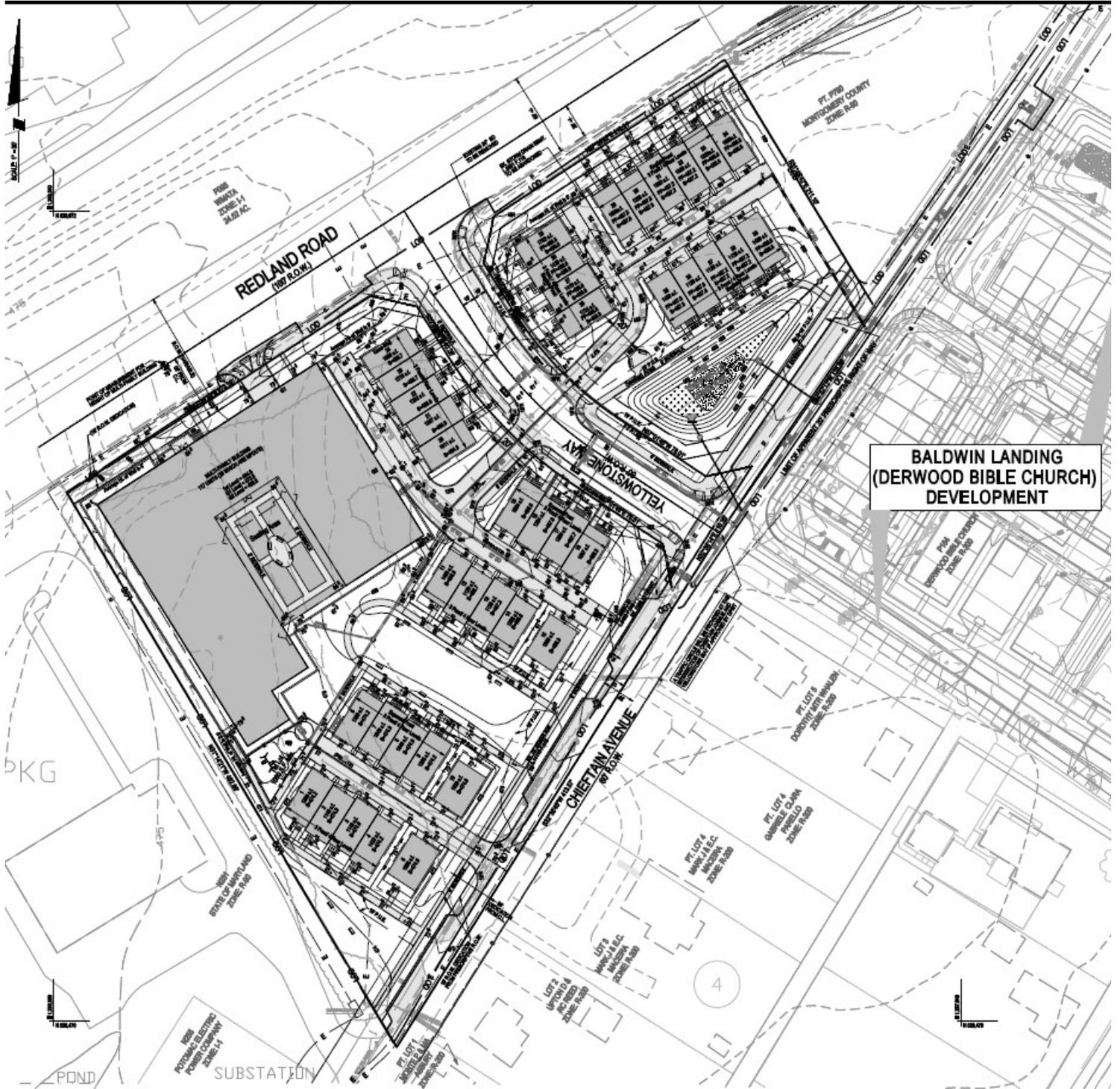
## DEVELOPMENT DATA

### GENERAL NOTES

1. Existing 2' contour interval topography prepared by Loiederman Soltesz Associates, Inc. - September, 2007
2. Boundary information by Loiederman Soltesz Associates, Inc., July 2007.
3. The subject property is located within WSSC grid 221 NW 08.
4. Soils information from Map 13 of the Montgomery County Soil Survey conducted by the USDA Soil Conservation.
5. This project lies within the Shady Grove Sector Plan Area.
6. There are no designated historic sites associated with these parcels.
7. Existing Water & Sewer Service Categories: W1/ S1.
8. Grid coordinates are per Maryland State Plane Datum (NAD 83/91).
9. The property is located in the Upper Rock Creek watershed.
10. No floodplain exists on site.
11. The NRI-FSD # 420080030 was approved on August 8, 2007, for this site.

### ADDITIONAL NOTES:

1. The proposed lot locations, shapes, dimensions, setbacks, and areas are approximate. Final lot layout and setbacks will be determined at Site Plan. Final computations and information on lots, parcels, and areas will be provided on the record plat.
2. All buildings are conceptual.
3. All retaining walls are conceptual. Structural design of retaining walls by others.
4. A traffic circle will be provided at the intersection of Chieftain Avenue and Yellowstone Way if approved by DPWT at time of preliminary plan.
5. The orientation of the front of the three single family detached units is to be reviewed at Site Plan.
6. Area dedicated to public use is shown on the development plan itself.



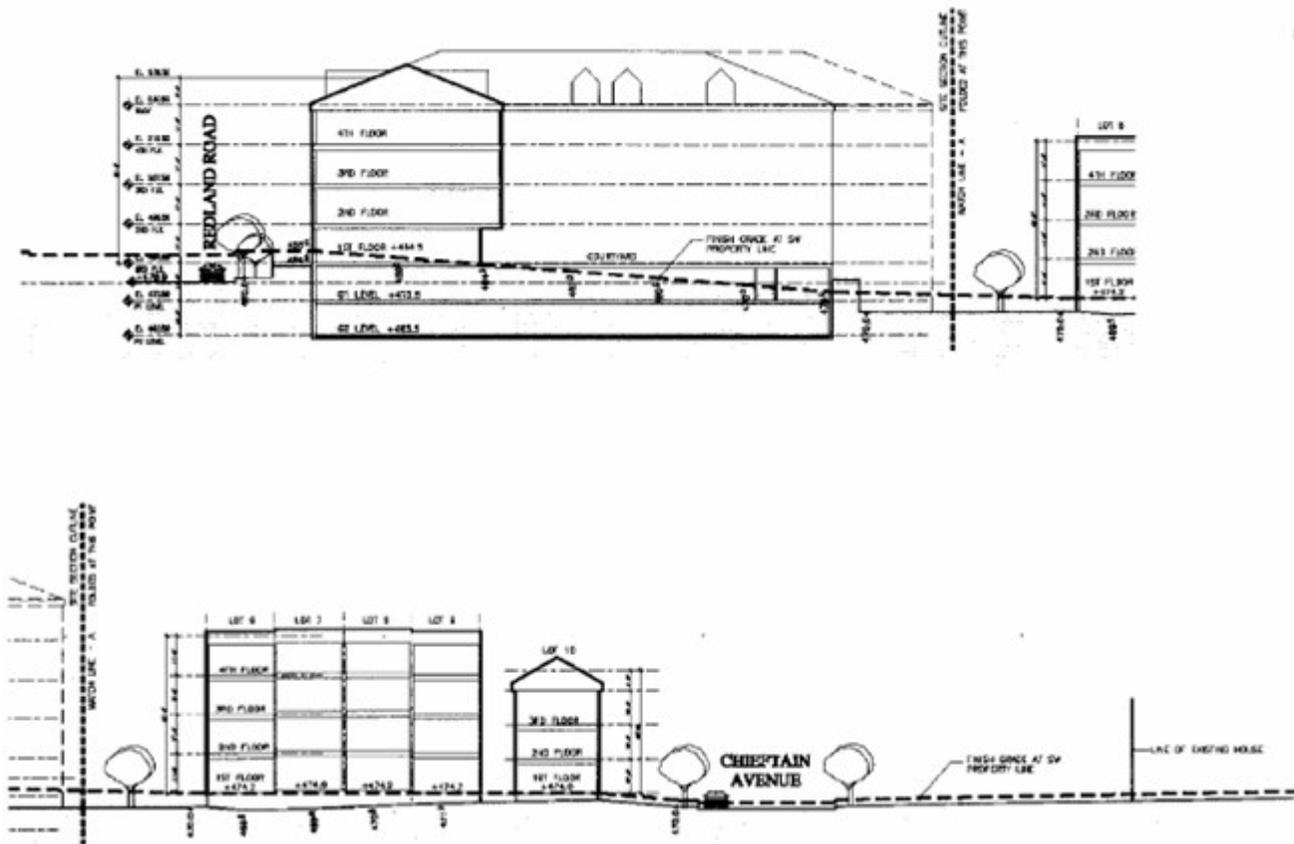
**BALDWIN LANDING  
(DERWOOD BIBLE CHURCH)  
DEVELOPMENT**

PARCEL P146 SHADY GROVE METRO DEVELOPMENT STANDARDS		
This plan is being developed using PD-35 standards		
	Required/Allowed Zoning Ordinance Development Standards for PD-35	Proposed
<b>Site Area:</b>		
Gross Tract Area:	N/A	4.26
Net Useable Area:	N/A	3.72
Street dedication:	N/A	0.54
Redland Road	NA	0.12
Chieftan Avenue	NA	0.42
M-NCP&PC Park Dedication:	N/A	0
<b>Street Dedication</b>		
Redland Road	100' R.O.W. (50' from C.L.)	100' R.O.W. (50' from C.L.) 10' additional dedication
Yellowstone Way	60' R.O.W.	60' R.O.W. No additional dedication
Chieftan Avenue	60' R.O.W. (30' from C.L.)	60' R.O.W. (30' from C.L.), 30' additional dedication from boundary. 10' additional dedication from prescriptive R.O.W.
<b>Existing Zone</b>		
	-	R-90
<b>Proposed Zone</b>		
	-	PD-35
<b>Density of Development: PD-35 Zone</b>		
Market Rate Units	35 du/ac. x 4.26 = 149 du	149 du
MPDU bonus of 5% (optional)	7 du	7 du
Total Units	156 du	156 du
<b>MPDU's</b>		
Using bonus density of 5% (optional)	156 x 13% = 20 du	20 du In Multi-Fam. Bldg.
<b>Phasing:</b>		
	All units will be developed in one phase.	
<b>Unit Types:</b>		
One Family Detached	NA	3
Townhouse	NA	36
Multi-Family Building	NA	117
Total Number of Units		156
<b>Building Height (Max.):</b>		
One Family Detached along Chieftan Avenue	NA	40' / 3 stories*
Townhouse	NA	55' / 4 stories*
Multi Family Building		65' / 4 stories*
<b>Min. Setbacks:</b>		
<b>One Family Detached</b>		
Setback from Street:	NA	20'
Rear Setback:	NA	4'
Side Setback:	NA	4'
<b>Townhouse</b>		
Setback from Street:	NA	10'
Front Setback from Lot Line:	NA	4'
Rear Setback:	NA	4'
Side Setback(End Unit):	NA	4'
<b>Multi-Family Building</b>		
Setback from Street:	NA	10'
Setback from Adjacent Property:	NA	10'
Rear Setback:	NA	0'
Side Setback:	NA	0'
<b>Green Area:</b>		
	50%	50%
<b>Parking:</b>		
One Family Detached: (2 sp. / du)	3 x 2 = 6 spaces	6 spaces
Townhouse: (2 sp. / du)	36 x 2 = 72 spaces	72 spaces
<b>Multi-Family Building**</b>		
Studio (1 sp. / du)	33 x 1 = 33 spaces	33 spaces
1 Bedroom (1.25 sp. / du)	41 x 1.25 = 51 spaces	51 spaces
2 Bedrooms (1.5 sp. / du)	43 x 1.5 = 65 spaces	65 spaces
Section 59-E-3.33 credits at 15%	34	TBD
Total Parking Spaces	193 spaces	227 spaces
* Height in stories is per recommendations of Shady Grove Sector Plan		
** Mix of Multi-Family Units is subject to change, but will not exceed 117 units		

The above diagrams and text show the proposed locations of all structures, as well as additional information regarding the planned development. Below is an “Illustrative Layout Plan,” (Exhibit 28(c)), which is a rendered version of the development plan, showing Applicant’s concept of the development, with landscaping:







### 3. Conformance with the Master Plan

The subject site is located in the area analyzed in the 2006 Shady Grove Sector Plan. The Sector Plan, at p. 41, specifically addresses the subject site (known as the Thomas Somerville Site in the Sector Plan) with the following recommendations:

#### Thomas Somerville Site

This vacant site, approximately 4.2 acres, is divided into two parcels by Yellowstone Way. The eastern parcel is approximately 1.2 acres and the western parcel is three acres. This Plan recommends:

- Rezoning the site from I-1 to R-90 and permit PD-35 zoning to allow residential development at 35 dwelling units per acre.
- Building heights along Redland Road should be no higher than four stories.
- Single-family detached or duplex units should front Chieftain Avenue as a transition to the R-200 Old Derwood community and should be no higher than three stories.
- Parking for the larger parcel should be structured or located underground within the development.

Applicant's land planner, Phil Perrine, testified that the application carries out these recommendations (Tr. 52, 57). Moreover, the proposed development provides for a mixed use residential development focused on the Metro station, in accordance with the Sector Plan language

on page 11. It makes the best use of the Metro proximity, and it would provide protection for old Derwood by rezoning this industrial land along Redland Road to a residential zone, as suggested on page 13 in the Sector Plan. The development would provide transition from Derwood and integrate with it, which was the purpose of the three single-family homes to be provided along Chieftain Avenue. It also would transform the Shady Grove area into a more Metro transit oriented development community, with higher density residential and sidewalks to access the Metro. Mr. Perrine noted that the style of development is consistent with the Sector Plan – very much a Metro transit-oriented development, with four-story apartments along Redland Road.

Community-Based Planning Technical Staff supports approval of the rezoning request. Exhibit 33, p. 8. They also noted that the Sector Plan’s general comments for the Old Derwood neighborhood include the following recommendations, which have been followed by Applicant:

- Relocate non-residential uses within the Old Derwood community to more appropriate industrial areas.
- Permit four-story, multi-family development fronting Redland Road with building setbacks to match those along Redland Road in the King Farm.
- Maintain the existing interconnected street pattern and deter non-local traffic through the neighborhood with traffic circles at the intersection of Yellowstone Way and Chieftain Avenue, and at Derwood and Squire Court.
- Provide new sidewalks along all new development and extend such sidewalks where feasible into the existing community to improve pedestrian safety.
- Create a pedestrian pathway connection from Yellowstone Way to Crabbs Branch Way via a public easement on common green space to improve pedestrian access to Metro.
- Provide adequate recreation areas to meet residents’ needs within the neighborhood, eliminating the need to cross major roads.
- Maintain the existing historic resources and develop an interpretive program that celebrates Derwood’s history.
- Ensure that all new development and redevelopment are compatible with existing residential development and historic resources.

The Hearing Examiner agrees with both Technical Staff and Applicant’s land use expert that the proposed development not only satisfies the use and density recommendations of the Sector Plan, but it also carries out the specific design recommendations and goals of the Sector Plan.

#### **4. Public Facilities (Traffic Impact, School Capacity and Water & Sewer Service)**

Zoning Ordinance §59-H-2.4(f), as amended recently by Zoning Text Amendment 07-17,<sup>8</sup> requires Applicant to produce “[s]ufficient information to demonstrate a reasonable probability that available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application is submitted.” In this case, the application was submitted on October 26, 2007, so the new Growth Policy adopted in November of 2007 will not apply to the rezoning determination; however, the new Growth Policy will be applied at subdivision.

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

##### **a. Traffic Impact**

Applicant’s expert in traffic engineering, Glenn Cook, did a traffic impact study for the subject development (Exhibit 20), following normal Local Area Transportation Review (LATR) procedures with Transportation Planning Technical Staff. Their scoping agreement identified the intersections to analyze and the background traffic which will be produced by previously approved developments that must be included in the analysis.

Mr. Cook determined the existing conditions; conducted turning-movement counts at the intersections Staff requested; made projections of the approved developments that they provided; projected traffic; assigned it to the road network; and then made projections for the trips that would be generated by the proposed application under its original configuration of 8 single family units, 47 townhouse units, and 106 condos or garden apartments.

Mr. Cook addressed a question raised by the Hearing Examiner as to the traffic impact of the

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<sup>8</sup> Ordinance No: 16-14, effective March 17, 2008.

change from the original plan for 8 single family units, 47 townhouse units, and 106 condos or garden apartments to the new development mix of 3 single families, 36 townhouses, and 117 multi-families. He opined that the new plan would generate less traffic than what was depicted in the traffic study for the original plan. According to Mr. Cook, under the traffic study based on the earlier development totals, the use would have generated 76 trips for the morning peak hour and 99 trips during the evening peak hour. With the new development mix that the plan currently reflects, the use would generate 71 trips during the morning peak hour and 90 trips during the evening peak hour. Tr. 43. At the Hearing Examiner's request Mr. Cook also filed a supplement to his traffic study (Exhibits 50(a) and (b)) demonstrating that the current configuration would generate less traffic than was projected in his original traffic study (Exhibit 20).<sup>9</sup>

Mr. Cook conducted an intersection capacity analysis for all the study area intersections. In the Shady Grove Metro area, the congestion standard was 1,800 critical lane volume (CLV), and it remains so under the new Growth policy. He found that all the intersections would be operating below that congestion standard of 1,800. Based on the study, he concluded that this project would not have a negative impact on the road system or create congested streets. The surrounding transportation network is adequate to support the proposed development. Tr. 44.

Technical Staff accepted Mr. Cook's Traffic Study and agreed with his conclusions that the changed configuration would not adversely impact the studied intersections and that LATR was satisfied. Exhibit 33, pp. 24-25. The projected trip generation from the development and the impact on the critical lane volumes of the studied intersections are shown in the following tables from the Technical Staff report (Exhibit 33, p. 24):

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<sup>9</sup> Although the numbers in his new projection – 70 in the AM peak hour and 89 in the PM peak hour (Exhibits 50(a) and (b)) differ slightly from those in his testimony – 71 in the AM peak hour and 90 in the PM peak hour, and from those listed in the Technical Staff report – 72 in the AM peak hour and 92 in the PM peak hour (Exhibit 33, p. 24), all three sources project that the new configuration will produce fewer trips during the morning and evening peak hours than the original configuration (76 in the AM peak hour and 99 in the PM peak hour), so the differences are immaterial.

Land Use	Number of Units	Weekday Peak Hour	
		Morning	Evening
Single-Family Detached Units	3	3	3
Townhouses	39	19	33
Multi-Family Apartments	117	50	56
Total Trips	159	72	92

Intersection	Weekday Peak Hour	Traffic Condition		
		Existing	Background	Total Future
1. Redland Road & Sommerville Road	Morning	741	767	777
	Evening	765	780	790
2. Redland Road & Yellowstone Way	Morning	565	586	645
	Evening	698	734	805
3. Redland Road & Crabbs Branch Way	Morning	1,515	1,633*	1,641*
	Evening	1,682	1,432*	1,436*
4. Derwood Road & Indianola Drive	Morning	655	660	675
	Evening	644	650	663
7 Frederick Road (MD 355) & Indianola Drive - Watkins Pond Boulevard	Morning	1,462	1,482	1,485
	Evening	1,248	1,264	1,267

\* At the intersection of Redland Road and Crabbs Branch Way, the background and total future CLV values were calculated with the improvements in the DPWT's Capital Improvement Program (CIP) Project No. 500010, "Redland Road from Crabbs Branch Way to Needwood Road". At this intersection, the improvements include a separate right-turn lane on northbound Crabbs Branch Way and a combined right-turn/second through lane on eastbound Redland Road that was converted from the existing separate right-turn lane. The CIP project is funded for construction through 2010 with construction anticipated to start in June 2008 and finish a year later. Refer to the attached project information.

As mentioned above, the new Growth Policy does not apply to this rezoning application, but will apply at subdivision. That new Growth Policy created a new transportation test called Policy Area Mobility Review (PAMR). According to Mr. Cook, the PAMR requirements at subdivision would require mitigation of 5 percent of the new trips generated by the development. How that will be done will be decided later, at subdivision.

Mr. Cook also opined that the circulation pattern shown in the site plan would be safe,

adequate, and efficient for the proposed use. Tr. 45. Yellowstone Way runs between Redland Road and Chieftain Avenue, and Mr. Cook described it as the spine road that runs through the site. The eastern end of the property, which is where the townhouses will be, is served by a single access point along Yellowstone Way. The property on the west side of Yellowstone is served by an access along Yellowstone Way, an access along Chieftain Avenue and a right-in/right-out access along Redland Road, which feeds directly into the multifamily building garage.

Yellowstone Way at Redland Road is one lane in and one lane out. Under this plan, Applicant will widen it so it will have two lanes coming out, one for left turns, one for right turns. With this improvement, the right turns will now be able to move freely and not be held up by the left turns. Looking at the peak hour volume, Mr. Cook believes that the intersection would not meet the minimum volume requirement for signalization, so a signal may not be warranted there under the current development plans; however, this project will go to subdivision, at which time this issue and other access issues raised by Technical Staff will be explored.

Based on the foregoing, the Hearing Examiner finds that Applicant has demonstrated a reasonable probability that available public transportation facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.

b. School Capacity

The subject property is located within the Magruder Cluster. In a letter dated February 15, 2008, Bruce H. Crispell, Director of Planning and Capital Programming for Montgomery County Public Schools (MCPS), reported to Technical Staff that the proposed development of 153 dwelling units is estimated to generate 14 elementary, 10 middle and 8 high school students. Mr. Crispell indicated that Enrollment at all levels in this cluster “is currently within capacity and is projected to stay within capacity.” (Letter attached to Exhibit 33).

Technical Staff noted that MCPS had reviewed an earlier version of the Development Plan that proposed 115 multi-family units, 33 townhouses and 5 single-family detached dwellings (*i.e.*, a total of 153 dwelling units). The Development Plan has since been revised to a total of 156 dwelling units with a slightly different mix of units (117 multi-family units, 36 townhouses and 3 single-family detached dwellings). Staff opined that the change would not impact the MCPS's findings of adequate capacity. Exhibit 33, p. 26. The Hearing Examiner agrees and so finds.

c. Water and Sewer Service

Applicant's civil engineer, Dan Pino, testified that the existing water supply is in the Chieftain water line, which Applicant will tap. There is also an existing eight-inch line in Redland Road. The proposed water line will connect the water supplies in Redland and Chieftain, and it will serve the site. As to sewer service, there is a small stretch of eight-inch sewer on the east side of the site at Chieftain Avenue, and there is an outfall where most of the site drains. There is also an existing, eight-inch, sewer in Crabbs Branch. Applicant will take the sewerage from the site down Chieftain, to the existing sewer in Crabbs Branch.

The Washington Suburban Sanitary Commission (WSSC) indicated, in a message to Technical Staff, that the proposed rezoning "will not impact the WSSC's systems or facilities." Attachment to Exhibit 33. The WSSC further noted that "[w]ater and sewer service to the property has been conceptually approved with a slightly different mix of units."

Given WSSC's statements, the Hearing Examiner finds that Applicant has demonstrated a reasonable probability that available water and sewer facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.

## 5. Environmental Issues

Technical Staff reports that the subject site is not within a Special Protection Area or Primary Management Area, and there are no streams, wetlands, steep slopes associated with erodible soils, or areas of floodplain. Exhibit 33, p. 18. There are 1.56 acres of low quality forest. Tr. 78.

Applicant has submitted an approved Natural Resources Inventory and Forest Stand Delineation (Exhibit 9), a Stormwater Water Management Concept Plan (Exhibit 15), and a Preliminary Forest Conservation Plan (Exhibit 10), which has been approved, in modified form, by the Planning Board. Tr. 85-86.

### a. Forest Conservation

According to Environmental Planning Technical Staff, the site is subject to the Montgomery County Forest Conservation law. As mentioned, there are 1.56 acres of forest on site; however, there are no specimen trees at this location. The forest “has a low priority retention rating primarily due to the predominance of invasive vines including a large variety of non native trees. The existing trees are in fair to poor health, also a contributing factor in the stand’s retention rating.” Exhibit 33, p. 26.

Environmental Planning staff supports a Board finding that onsite forest retention to the 20% minimum standard is not possible on this site because Master Plan objectives and regulatory standards do not support it. However, Staff recommends that all planning and design options be examined in subsequent reviews to determine if any forest can be saved, and how reforestation to the conservation threshold level can be provided on site. Applicant reports that it has a reforestation requirement of 1.88 acres, and the location of this reforestation will be determined in conjunction with Technical Staff. Tr. 85-86. These issues will be explored at site plan, where a Final Forest Conservation Plan will have to be reviewed and approved by the Planning Board.

### b. Stormwater Management

Applicant’s civil engineer, Dan Pino, testified that the Department of Permitting Services

(DPS) indicates it will grant Applicant a waiver of quantity control requirements because of the proximity of the site to the Crabbs Branch regional facility shown in blue on Exhibit 42. The waiver is justified, according to Mr. Pino, because the site will add an insignificant amount of water to the tributary downstream of the Crabbs Branch regional facility, which was built by Montgomery County and sized to accommodate the development and all the surrounding property close to it. Thus, there is no need for a quantity-handling facility on the subject site. Stormwater from the site will be piped along Chieftain, in an underground pipe, up to Crabbs Branch. Tr. 89-92.

Water quality control will be provided by a surface sand filter on the site, east of Yellowstone and slightly north of Chieftain. Water recharge will be provided by the sidewalk pavement, which will collect the water in small cavities and recharge the ground water. Based on discussions with DPS, Applicant expects to have an approval letter shortly. Tr. 92.

Environmental Planning Technical Staff notes that the final determination of stormwater management will be made later (*i.e.*, at subdivision). Technical Staff reported no environmental issues warranting denial of this application.

### **E. Neighborhood Concerns**

There is no opposition to this project. The Shady Grove Advisory Committee has indicated its support for the proposed rezoning and development plan (Exhibit 33, p. 28). It raised some issues with Technical Staff about traffic control and stormwater management, and they will be addressed at subdivision. One community resident (Joseph Parello) testified to the need for three single-family detached homes along Chieftain Avenue (Tr. 11-12), to which Applicant has agreed. Tr. 22. The final development plan amended Note 5 of the “Additional Notes” to indicate that there would be “three” single-family detached homes in the project. Exhibit 54(a).

#### IV. SUMMARY OF THE HEARING

Applicants called five witnesses at the hearing, Richard Koch, managing member of Applicant, Keystone Real Estate Investments, LLC; Glenn Cook, an expert in traffic engineering; Phil Perrine, an expert in land planning; Steve Tawes, a landscape architect and site designer; and Dan Pino, a civil engineer. Joseph Parello, a neighbor, testified as to his conditional support of the petition, and the People's Counsel participated in support of the petition.

1. Richard Koch:

Richard Koch testified that he is the managing member of Keystone Real Estate Investments, LLC, which partners with institutional investors to buy real estate in Montgomery County for redevelopment, predominantly of multi-family housing sites. He found the site to be an attractive, multi-family opportunity, and with the sector plan requirement to create some compatibility with the old historic neighborhood and single family homes, he saw greater opportunity to create a mixed housing community. What Applicant did was to plan three single-family homes along Chieftain Avenue, directly across from four single-family homes, with a similar setback from the road and a similar distance between the new units and those across the street.

Applicant also sought to gradually increase the height of the buildings as one goes back from Chieftain, a design known as "tenting." The single-family detached homes are three stories. The fronts of the townhouses would be three stories and the backs of them four stories. Behind them is the multi-family building, which is four stories tall. Because of the grade, the requirement of the sector plan is that they be no taller than four stories. So, from the street and from the sidewalk, the townhouses actually appear as three stories tall, which is a more pedestrian friendly dimension, and allows the architect to eliminate the decks at the back of the units, which sometimes can be unsightly.

Mr. Koch testified that Applicant is amenable to amending the development plan to note that three single-family houses will be placed along Chieftain, with the orientation to be determined at the time of site plan, as specified in the revised development plan. The only change is to note number 5, to which the word “three” will be inserted before single-family detached units.

According to Mr. Koch, Applicant will not be providing workforce housing because the legislation does not allow you to volunteer to provide workforce housing, and the requirement doesn't kick in until you have a zone that provides or allows 40 dwelling units per acre or greater. The density here would be 35 dwelling units per acre, plus a 5% bonus density.

Applicant does not believe it needs to go to the alternative review committee (ARC) to get permission to add a 5 percent bonus density because the PD Zone itself (§59-C-7.14(c) ) provides for the opportunity to increase density above the base density, using bonus density that is allowed for MPDUs in Chapter 25-A. A review by ARC is not needed because the Sector Plan contemplated the increased density when it called for the PD-35 Zone which expressly permits it. If Applicant needed to increase height or change one of the development standards that's in the PD zone and in the sector plan, then ARC review would be required because those changes are not provided for within the sector plan or the zoning ordinance. Some zones don't allow the increase in density for MPDUs unless the alternative review committee approved it. The PD Zone is different from that.

[Mr. Klauber opined that neither the height nor density in the sector plan has been exceeded. He also objected that procedural due process was violated “by any action by the ARC committee whatsoever ... The ARC committee is illegal. It is unconstitutional. It violates every tenet of procedural due process that was ever enacted for the public and I have a continuing objection to the ARC committee being in existence and acting. The County Council has before it something to rectify this gross error and I would certainly request that the Hearing Examiner, if the Hearing

Examiner believes the ARC committee is appropriate, delay consideration of this until the ARC committee goes away, thank goodness.” Tr. 30-31.]

[Applicant’s attorney, Mr. Kline, noted that the bonus density was not needed to make the project work. It was added because Technical Staff wanted more units and the MPDUs close to a Metro station. That’s why Applicant was encouraged to do this. Tr. 35.]

Mr. Koch added (Tr. 35-36):

. . . the purpose of the Alternative Review Committee is to make a decision on whether or not the developer has a financial hardship in providing MPDUs and, therefore, needs to have relief from a provision of the sector plan.

I’m not asking for any relief from any provision of the sector plan. I’m volunteering to provide more affordable housing units because the suggestion has been made to me that would be a nice thing close to Metro. I will immediately withdraw my request for the 5 percent bonus density if this continues. This makes absolutely no sense.

I’m not suggesting I’m having a hardship. I’ve said we will provide the additional 5 percent. 59-C-7. -- 59-D-1.61 only kicks in if I’m requesting some relief from the sector plan. I am not. I am not asking that I be provided relief in order to provide these MPDUs or even the base density for MPDUs. I’m not saying I need any relief from the green space. I’m not saying anything like that.

## 2. Glenn Cook (Tr. 40-50):

Glenn Cook testified as an expert in traffic engineering. He stated that he did a traffic impact study for the subject development (Exhibit 20), following normal procedures with the Park and Planning Commission Staff. Their scoping agreement identified the intersections to analyze and the background approved developments that must be included in the analysis.

He determined the existing conditions; conducted turning movement counts at the intersections Staff requested; made projections of the approved developments that they provided; projected traffic; assigned it to the road network; and then made projections for the proposed application.

Mr. Cook addressed a question raised by the Hearing Examiner as to the traffic impact of the change from the original plan for 8 single family units, 47 townhouse units, and 106 condos or

garden apartments to the new development mix of 3 single families, 36 townhouses, and 117 multi-families. He opined that the new plan would generate less traffic than what was depicted in the traffic study for the original plan. According to Mr. Cook, under the traffic study based on the earlier development totals, the use would have generated 76 trips for the morning peak hour and 99 trips during the evening peak hour. With the new development mix that the plan currently reflects, the use would generate 71 trips during the morning peak hour and 90 trips during the evening peak hour.

Mr. Cook stated that he conducted intersection capacity analysis for all the study area intersections. In the Shady Grove Metro area, the congestion standard was 1,800 critical lane volume (CLV), and it remains so under the new Growth policy. He found that all the intersections would be operating below that congestion standard of 1,800. Based on the study, he concluded that this project would not have a negative impact on the road system or create congested streets. The surrounding transportation network is adequate to support the proposed development.

Mr. Cook also opined that the circulation pattern shown in the site plan would be safe, adequate, and efficient for the proposed use. He described that access points: Yellowstone Way runs between Redland Road and Chieftain Avenue, and that would be the spine road that runs through the site. The site is bisected by Yellowstone Way. Therefore, half the big unit will be on one side of the roadway. The other half would be on the other. The eastern end of the property, which is where the townhouses will be, will be served by a single access point along Yellowstone Way. The property on the west side of Yellowstone is served by an access along Yellowstone Way, an access along Chieftain Avenue and a right-in/right-out access along Redland Road, which feeds directly into the multifamily building garage.

Yellowstone Way at Redland Road is one lane in and one lane out. Under this plan, Applicant will widen it so it will have two lanes coming out, one for left turns, one for right turns.

With this improvement, the right turns will now be able to move freely and not be held up by the left turn. Looking at the peak hour volume, the intersection would not meet the minimum volume requirement for signalization, so it does not look like a signal would be warranted there under the current development plans. This project will go to subdivision, at which time the issue will be explored.

According to Mr. Cook, the PAMR requirements at subdivision would require mitigation of 5 percent of the new trips generated by the development. How that will be done will be decided later. Nothing that Applicant would do to satisfy that part of the Growth Policy should affect the site.

3. Phil Perrine (Tr. 50-73):

Phil Perrine testified as an expert in land planning. Mr. Perrine opined that the application definitely implements the Shady Grove Sector Plan in this case; provides for mixed use residential focused on the Metro station and in accordance with the Sector Plan language on page 11. It makes the best use of the Metro proximity, and on page 13 in the Master Plan, it suggests that it would provide protection for old Derwood by rezoning this industrial land along Redland to a residential zone. On page 41, there are some design guidelines and Applicant has followed all those design guidelines for this property, known as the Somerville Site in the Sector Plan. There's a transition that's proposed, a transformation of the Shady Grove area to become a more Metro transit oriented development community, higher density residential and mixed use. This is one of the early projects in that transformation, so it's a very important application in that respect.

The Sector Plan, at p. 41, recommends rezoning the site from I-1 to R-90 and permitting PD-35 zoning to allow residential development at 35 dwelling units per acre; restricting building heights along Redland to no higher than four stories; providing single family detached or duplex units, to transition to the existing R-200; and providing structural underground parking for the larger parcels.

The proposed development complies with all these recommendations.

Mr. Perrine described the area using an area map of Derwood (Exhibit 42). MD 355 runs diagonally through the map, and the CSX Railroad is shown, with the Metro station located near it. Redland Road runs from the lower left-hand side to the upper right-hand side, and Crabbs Branch Way is off to the right-hand side. The site location is indicated. The Metro station garages are across the street from the subject property, which is about 300 feet east of the CSX Railroad.

Mr. Perrine agreed with the Technical Staff's description of the surrounding area as being Redland Road to the west, the CSX Railroad, Indianola Drive to the south, and Crabbs Branch Way to the east. That's been identified in the Sector Plan as the old Derwood area, Metro east. This old Derwood neighborhood description in the Sector Plan stops at Redland Road. There is a Metro station and all the facilities across Redland, but there's no residential or any kind of private development. The Master Plan does describe a future full interchange at Yellowstone and Redland Road, but it doesn't talk about a signal at that intersection.

Mr. Perrine testified that the property is zoned R-90 right now. It was originally R-200 property, and after the 1971 Gaithersburg Master Plan, it was recommended for I-1 and in fact zoned I-1, reconfirmed back in '78 as I-1 after the first Shady Grove Master Plan. But then in the 2006 Sector Plan, it was down-zoned from I-1 to R-90 with the recommendation for PD-35.

To the south and slightly east across Chieftain Drive is R-200 property, in old Derwood. The property to the east is R-90/TD-R. This is the Derwood Bible Church property, and Baldwin Landing is the proposed development there. In fact, it was approved by the Planning Board. To the west and a little bit to the south there is some I-1 property along the railroad, and MX-2/TD-R properties that were along the Metro property and PD-2 further east along Crabbs Branch Way, with garden apartments.

Mr. Perrine noted that what's being proposed, in terms of community design and the style of

development, is consistent with the Sector Plan – very much a Metro transit-oriented development, with four story apartments along Redland Road. It also creates a transition and integrates with the old Derwood, and that was the purpose of the three single-family homes. Single-family homes along Chieftain Way are provided, and sidewalks have been proposed to make it easier for the new as well as the old residents to make their way as pedestrians up to Redland Road.

Mr. Perrine testified that the PD-35 Zone has a whole bundle of development standards including allowing development at a greater density than 35 dwelling units per acre. Some sector plans and master plans have a specific limitation in addition to the zoning classification they recommend, but that's not the case here. Technical Staff found the proposal in accordance with the Sector Plan. In Mr. Perrine's opinion, the designation of PD-35, as opposed to saying a maximum of 35 dwelling units per acre in the Sector Plan, should be interpreted that the Sector Plan really wasn't trying to limit it to specifically 35 dwelling units per acre, but rather the whole bundle that the PD-35 Zone allowed and, therefore, the ARC review provision does not apply. The PD-35 Zone allows for MPDUs, and it says quite clearly that they are in addition to the base number of units. So, the MPDUs are permitted within the PD-35 Zone without triggering an Alternate Review Committee review. The ARC review was set up for situations where the plan, in order to accommodate MPDUs, exceeded a very clear sector or master plan limitation.

Mr. Perrine pointed out that recreation areas will be provided, including a courtyard that runs from Chieftain back to the multi-family building; a parcel at the northwest corner of Chieftain and Yellowstone that is like a pocket park, complimenting a similar corner on the Baldwin Landing property; and a tot lot in front of the multi-family building.

Mr. Perrine further testified that the proposed development complies with the purpose clause of the PD-35 Zone. It conforms to the Sector Plan's recommendation of PD-35 and by providing a mix of apartments, towns, and single family units all in one block, combining optimal land planning

and efficiency. Sidewalks and the grid system of streets are provided in accordance with the Sector Plan. There are various open spaces on the site, and a recreation/athletic facility within the multi-family building.

The purpose clause calls for an encouragement of social and community interaction. This plan has buildings, homes fronting the street, fronting sidewalks, and an innovative sidewalk system integrated with the existing community, so there will be a high level of community and social interaction both within this project and between the project and the existing community of Derwood.

There is a range of housing proposed – multi-family, townhouse and single family, all within the limitations of the PD Zone. There's the preservation and the greatest possible aesthetic advantage taken of trees and existing features here, minimizing grading. There's not much on this site at present, and because of the four-story height limit in the PD-35 Zone, there is not much that could be retained.

The slope of the property is fairly dramatic, but it is accommodated by having this four-story, multi-family building facing Redland Road with parking beneath it, and by having the townhouse buildings with four stories to the rear and three in the front along the street. Currently, there is no development on the site east of Yellowstone, and to its west, there is a small parking area and a tree stand.

The development will be of sufficient scale to get a variety of unit types with a maximum of safety, convenience and amenities for residents, assuring compatibility and coordination with existing uses. Finally, the plan will support the comprehensive and systematic development of the county by conforming to the Master Plan.

There are a number of development standards within the PD Zone:

C-7.121, the Master Plan designates this PD-35.

C-7.122 requires a minimum area to produce 50 units or more. Applicant does that with 156 units.

C-7.131 permits residential units, and all of the unit types are permitted. There is no minimum percentage in the PD-35 Zone, except the over-four-story percentage. There should be 50 percent over four stories, but the Sector Plan limits this property to no more than four stories. There are no commercial uses proposed.

C-7.14 specifies the various density categories. PD-35 is a high density category.

C-7.15 has to do with compatibility. It requires that only a single family detached home be constructed within 100 feet of any adjoining single-family detached zone. The subject site does not adjoin any single-family detached property. The site is across the street from some but does not adjoin them.

C-7.16 requires a 50 percent green area, and the subject site will be right at the 50 percent green area.

C-7.17 requires identification of dedications to rights-of-way. Applicant is dedicating about 0.12 acres for Redland Road and about .42 acres for Chieftain, as specified on the development plan.

C-7.18 specifies that parking must be in accord with parking requirements. The 227 spaces to be provided will be compliant.

Section D-1.61, specifies development plan requirements. The Council must find that the development plan complies with the Sector Plan density and use, and Mr. Perrine opined that it does and that it complies with the purpose standards and the regulations of the zone. He also believes it will not conflict with the Capital Improvements Program or other county plans or policies.

Mr. Perrine further opined that the townhouses and the single-family homes planned along the edge of Chieftain ensure the compatibility with the single families that are across that street in old Derwood. The design previously discussed will provide for the maximum of safety, convenience, and amenity, and it will be compatible with adjacent development.

Mr. Perrine agrees with Mr. Cook that the internal vehicular and pedestrian system and

points of external access are all safe, adequate, and efficient. Another requirement is to minimize grading and prevent erosion of soil. The building is set up to take maximum advantage of the topography of the property. It is Mr. Perrine's understanding that the developer of the property, should it remain as a rental project, would assume perpetual maintenance of all common areas.

4. Steve Tawes (Tr. 74-86):

Steve Tawes testified as an expert in landscape architecture and site planning. He stated that the site overall is 4.26 acres. It's an unusual site in that Yellowstone Way bisects the property, with a tiny sliver of the property within Chieftain Avenue. It's been dedicated in prior years. So, the northeastern part of the property is a "mown field." The southern part of the property east of Redland Road is partially wooded. It had once been cleared, and over time 1.56 acres of forest have evolved. It's not a very good quality, and there would not be a substantial value in saving it.

The site has a very gentle slope (3 to 8%) from the southwest down to the northeast. Overall there's about a 10 foot fall from the southeastern part of the site to the northeast. The parcel west of Yellowstone Way is about 3 acres. The small parcel to the east is about 1.3 acres, to give a total overall of 4.26 acres. The drainage is actually towards the Crabbs Branch regional stormwater management facility to the northeast, as shown in blue on Exhibit 42. The drainage is from the southwest towards Yellowstone, and there's a small culvert that goes underneath of Yellowstone. The flow is from the southwest of the site going in a northeasterly direction.

The uniqueness of the site is that it's bisected by Yellowstone, three acres on the southern part, 1.2 acres on the northern part. Applicant is dedicating an additional 10 feet along Redland Road. Yellowstone is an existing right-of-way of 60 feet. Applicant is not dedicating any more than has previously been dedicated there, and on Chieftain, Applicant is dedicating 30 feet from the center line of the property.

The current mix for the project for the dwelling units, based on the density, is 117 multi-

family, which includes 20 MPDUs, 36 townhomes and three single-family dwelling units, for a total of 156. The parking garage is on two levels. The total number of parking spaces in the multi-family building is 149. There will be on-street parking on both Yellowstone and Chieftain in the current plan for the improvement of both of those streets along both sides. Currently there is a maximum building height of four stories along Redland Road, and the multi-family building is 65 feet. Townhomes are at 55 feet and four stories maximum, and the single-family is 40 feet, three stories maximum.

The PD Zone allows you flexibility regarding zoning setbacks. Applicant provided a 20-foot setback for single families, 10 feet for townhomes, and the multi-family is at zero to be consistent with the alignment that is set by the King Farm development along Redland Road. One of the Master Plan considerations is to provide frontage that's typical to the multi-family residences in King Farm along Redland Boulevard.

It is a requirement for the PD Zone to maintain 50 percent green area. That green area, based on the gross area, is 2.13 acres. The green area is comprised of lawn area and sidewalk at 1.82 acres. The courtyard green area is .13 acres and the storm water management area is .18, for a total of 2.13 acres of green area.

The forest conservation for this project was developed as per the preliminary forest conservation plan that was approved prior to the recommendation for the zoning by Park and Planning staff and the Planning Commission. The requirement has a 20 percent conservation threshold. There is a 1.56 acre forest that has been determined and approved by Park and Planning. However, the current proposal does not save the forest, so therefore Applicant has a reforestation requirement, and the replacement requirement is 25 percent. Applicant's total of reforestation requirement is a total of 1.88 acres of reforestation. Applicant will work with staff at the time of site plan to do the reforestation on-site to the extent possible, and where not, it will be off site. The

Planning Board approved a preliminary forest conservation plan, and the final forest conservation plan will be approved at site plan.

Mr. Tawes opined that the improvements shown on the development plan meet the development standards of the PD-35 Zone and will achieve the maximum of safety, convenience, and amenities for the residents and people in the surrounding area. It is also a compatible form of development of the surrounding area. The stormwater flow will cause a very low coefficient of erodability, so it will not have any impact on surroundings.

5. Dan Pino (Tr. 87-96):

Dan Pino testified as an expert in civil engineering. He stated that the typical requirements for stormwater management are quantity control and quality control. As far as quantity control, the Department of Permitting Services indicates it will grant Applicant a waiver because of the proximity of the site to the Crabbs Branch regional facility shown in blue on Exhibit Number 42. That justifies a waiver because, if you take the runoff from this site and then combine it with the peak runoff coming from the facility, it's just an insignificant amount of water adding to the tributary downstream of the Crabbs Branch regional facility, which was built by Montgomery County and sized to accommodate the development and all the surrounding property that's close to it. So, there's no need for a quantity handling facility on the subject site. Stormwater from the site will be piped along Chieftain in an underground pipe up to Crabbs Branch.

As to quality control, Mr. Pino met with the reviewer and Mr. Rick Brush of DPS and came to an understanding of how Applicant will provide water quality management to the site. Water quality control needs to do two things. One, you need to provide recharge of the ground water and two, you need to clean the water. The recharge will be provided. The sidewalks will collect the water in small cavities and recharge the ground water. There will also be a surface sand filter on the site, east of Yellowstone and slightly north of Chieftain. Between those two items, they will provide

the required water quality management for the site. Applicant expects to have an approval letter from DPS within the next couple of weeks.

In Mr. Pino's opinion, it is reasonably probable that this project will not unduly burden the public facilities in terms of storm water management.

Exhibit 45 shows the water and sewer service and storm drains. The existing water is in the Chieftain water line, which Applicant will tap. There's also an existing 8 inch line out in Redland Road. The proposed water line will connect the water service in Redland to the water service in Chieftain, and it will serve the site. As far as sewer goes, there is a small stretch of 8 inch sewer on the east side of the site at Chieftain Avenue, and there's also an outfall where most of the site drains. There's an existing 8 inch sewer in Crabbs Branch. Applicant will take the sewerage from the site down Chieftain to the existing sewer in Crabbs Branch. Applicant submitted a preliminary sketch to WSSC, which they approved. They have deemed that there is adequate water and sewer capacity.

### **B. Community Witness**

#### Joseph Parelo (Tr. 6, 11-15)

Joseph Parelo testified that he lives at 15821 Derwood Road, about a block and a half away from the subject site, and has lived there since 1996. He is an officer of both the Shady Grove Sector Plan Advisory Committee and the Greater Shady Grove Alliance, but he testified on his own behalf.

Mr. Parelo stated that the development is slated to have three single-family detached homes on Chieftain Avenue, and he feels that three is the minimum number of single-family homes needed for compatibility with Derwood. They would be a compliment to the Baldwin Landing project, which will have anywhere from six to seven. Derwood was founded in 1880, and the development

will actually be a good compliment to the neighborhood. He would prefer if the single-family homes faced Chieftain, but would not restrict Applicant to that.

Mr. Parello also pointed out the location of his home on Derwood Road and a couple of historic sites on Chieftain Avenue.

### **C. People's Counsel**

People's Counsel, Martin Klauber, did not call any witnesses, but he participated in the hearing in support of the petition. ". . . the Office of the People's Counsel recommends the approval of this requested reclassification." Tr. 97. Mr. Klauber also stated that he did not feel that a review by the Alternative Review Committee would be appropriate in this case, and that he objected to having such a review. Tr. 97.

On this topic, Mr. Klauber stated that neither the height nor density in the sector plan has been exceeded. He also objected that procedural due process was violated "by any action by the ARC committee whatsoever . . . The ARC committee is illegal. It is unconstitutional. It violates every tenet of procedural due process that was ever enacted for the public and I have a continuing objection to the ARC committee being in existence and acting. The County Council has before it something to rectify this gross error and I would certainly request that the Hearing Examiner, if the Hearing Examiner believes the ARC committee is appropriate, delay consideration of this until the ARC committee goes away, thank goodness." Tr. 30-31.

Mr. Klauber added (Tr. 97):

I agree with Mr. Koch's statement and Mr. Perrine's testimony that MPDUs [are] allowed in the PD-35 zone without the ARC committee review. I urge the Hearing Examiner to reach the same conclusion. It would be both unfortunate and sad if MPDUs voluntarily proposed by an applicant had to be withdrawn.

## V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Standards for Council Review

Section 59-D-1.61 of the Zoning Ordinance requires the District Council, before it approves any application for re-zoning, to consider whether the application, including the development plan, fulfils the “purposes and requirements” set forth in Code Section 59-C for the new zone. In making this determination, the law expressly requires the District Council to make five specific findings, “in addition to any other findings which may be necessary and appropriate to the evaluation of the proposed reclassification.” Therefore, these findings are an essential part of the Hearing Examiner’s Report and Recommendation.

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

(a) *[That t]he zone applied for substantially complies with the use and density indicated by the master plan or sector plan, and does not conflict with the general plan, the county capital improvements program, or other applicable county plans and policies. . . .<sup>10</sup>*

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

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

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

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

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<sup>10</sup> The remaining language of this provision addresses additional height and density requested because of the inclusion of on-site MPDUs. That language will be quoted and discussed below in connection with its impact on this case.

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

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

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

## **B. Required Findings**

### *1. County Plans and Policies*

The first required finding is:

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

*(1) exceeding an applicable height limit, lower than the maximum height in the zone, that was recommended in a master plan or sector plan,*

*(2) exceeding an applicable residential density limit, lower than the maximum density in the zone, that was recommended in a master plan or sector plan, or*

*(3) locating any required public use space off-site.*

a. The Alternative Review Committee (ARC):

The Planning Board's review of this case did not include an evaluation by the Alternative Review Committee (ARC), even though there will be a 5% bonus density allowed in this case due to the inclusion of 13% MPDUs on site. The Hearing Examiner therefore raised the question of whether a review by the ARC was required in this case.<sup>11</sup> Applicant and the People's Counsel joined in the argument that an ARC review is not required in this case because:

1. Zoning Ordinance §59-D-1.61(a) was not intended to apply to a situation where the Applicant is not seeking added height or density, but rather is agreeing to add 5% bonus density to increase the density and number of MPDUs near a Metro Station at the suggestion of Technical Staff. It therefore does not make sense to ask them to prove financial need. Applicant indicated that if required to go through the ARC process, it would prefer to withdraw the 5% bonus density from their plans. Tr. 35-36.
2. The Shady Grove Sector Plan calls for the PD-35 Zone (page 41), and the PD-35 Zone allows for bonus density to add MPDUs. Zoning Ordinance §59-C-7.14(c). Thus, the Master Plan allows the density requested, and no ARC review is required. The recommended height is not being exceeded.
3. The Technical Staff has found that "[t]he Development Plan substantially complies with the use and density requirements of the Sector Plan." Exhibit 33, p. 17. Also, Staff found "The density requested for this development will not exceed the density permitted." Exhibit 33, p. 14.

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<sup>11</sup> A zoning text amendment has been proposed to eliminate the ARC requirement (ZTA 08-07, introduced April 29, 2008), but it has not yet been acted upon by the Council. The Hearing Examiner takes official notice of the pendency of the ZTA, which was mentioned at the hearing. Tr. 30-31.

The People's Counsel argued that neither the height nor density in the Sector Plan has been exceeded and that the ARC review process is unfair and even unconstitutional. In Mr. Klauber's words, procedural due process would be violated "by any action by the ARC committee whatsoever ... The ARC committee is illegal. It is unconstitutional. It violates every tenet of procedural due process that was ever enacted for the public and I have a continuing objection to the ARC committee being in existence and acting. The County Council has before it something to rectify this gross error and I would certainly request that the Hearing Examiner, if the Hearing Examiner believes the ARC committee is appropriate, delay consideration of this until the ARC committee goes away, thank goodness." Tr. 30-31.

Although the Council may be considering doing away with the ARC, the current law still provides for an ARC review in appropriate cases. The task, therefore, is to determine whether the Council intended to cover a case such as this one when it enacted the ARC provision. The applicable rule of statutory construction was set forth by the Maryland Court of Appeals in *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006),

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

The clear intent of the Council in framing this language was to encourage provision of MPDUs even if that meant exceeding the use and density recommendations of the applicable master or sector plan. To enable this result, the Council's language would permit a developer to obtain bonus height and/or density upon a showing that additional MPDUs would not be financially feasible without the additional height or density. Thus, the ARC procedures were intended to apply when an Applicant seeks bonus height or density. Here the Applicant is not pressing for bonus

density or height, and is not claiming a financial need for either. Tr. 35-36. The bonus density in this case is being sought at the behest of Technical Staff to provide more MPDUs near a Metro site. In fact, Applicant's agent, Richard Koch, indicated that he would withdraw any request for bonus density rather than going back to the Planning Board for an ARC review. As stated by Mr. Koch (Tr. 35-36):

. . . the purpose of the Alternative Review Committee is to make a decision on whether or not the developer has a financial hardship in providing MPDUs and, therefore, needs to have relief from a provision of the sector plan.

I'm not asking for any relief from any provision of the sector plan. I'm volunteering to provide more affordable housing units because the suggestion has been made to me that would be a nice thing close to Metro. I will immediately withdraw my request for the 5 percent bonus density if this continues. This makes absolutely no sense.

I'm not suggesting I'm having a hardship. I've said we will provide the additional 5 percent. 59-C-7. -- 59-D-1.61 only kicks in if I'm requesting some relief from the sector plan. I am not. I am not asking that I be provided relief in order to provide these MPDUs or even the base density for MPDUs. I'm not saying I need any relief from the green space. I'm not saying anything like that.

To interpret Zoning Ordinance §59-D-1.61(a) as requiring an ARC review in these circumstances would lead to an absurd result – discouraging the additional MPDUs, which would clearly be opposite to the intent of the Council in adding the ARC proviso to that section. The case law counsels against such a statutory construction:

. . . absurd results in the interpretive analysis of a statute are to be shunned. This Court stated in *D & Y, Inc. v. Winston*, 320 Md. 534, 538, 578 A.2d 1177, 1179 (1990), that "construction of a statute which is unreasonable, illogical, unjust, or inconsistent with common sense should be avoided." (citations omitted). See also *Blandon v. State*, 304 Md. 316, 319, 498 A.2d 1195, 1196 (1985) ("Rules of statutory construction require us to avoid construing a statute in a way which would lead to absurd results."); *Erwin and Shafer, Inc. v. Pabst Brewing Co.*, 304 Md. 302, 311, 498 A.2d 1188, 1192 (1985) ("A court must shun a construction of a statute which will lead to absurd consequences.").

*Mayor & Council of Rockville v. Rylyns Enters.*, 372 Md. 514, 550, 814 A.2d 469, 490 (2002)

After considering the statutory language, the facts of this case, the parties' arguments and the case law, the Hearing Examiner concludes that, in framing the language of §59-D-1.61(a), the Council did not intend to impose an ARC review requirement in this type of case. It should also be noted that the small increase in density sought in this case, which will bring the density up to 36.75 d.u./acre, is diminimus, and does not vitiate substantial compliance with the Sector Plan's density recommendation. It also does not violate the PD-35 Zone's density requirements, because the Zone expressly recognizes that density may be increased when MPDUs are provided. Zoning Ordinance §59-C-7.14(c).<sup>12</sup>

b. The Applicable Master Plan or Sector Plan

The subject site is located in the area analyzed in the 2006 Shady Grove Sector Plan. The Sector Plan, at p. 41, specifically addresses the subject site (known as the Thomas Somerville Site in the Sector Plan) with the following recommendations:

**Thomas Somerville Site**

This vacant site, approximately 4.2 acres, is divided into two parcels by Yellowstone Way. The eastern parcel is approximately 1.2 acres and the western parcel is three acres. This Plan recommends:

- Rezoning the site from I-1 to R-90 and permit PD-35 zoning to allow residential development at 35 dwelling units per acre.
- Building heights along Redland Road should be no higher than four stories.
- Single-family detached or duplex units should front Chieftain Avenue as a transition to the R-200 Old Derwood community and should be no higher than three stories.
- Parking for the larger parcel should be structured or located underground within the development.

Applicant's land planner and Technical Staff concluded that the proposed development would be consistent with the Sector Plan's recommendations, both the specific ones quoted above and more general statements in the Sector Plan. Tr. 52 and 57, and Exhibit 33, pp. 8-9. The

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<sup>12</sup> Given the Hearing Examiner's interpretation of the statutory language, it is unnecessary to reach the constitutional arguments raised by the People's Counsel.

development would make the best use of the Metro proximity, and it would provide protection for old Derwood by rezoning this industrial land along Redland Road to a residential zone, as suggested on page 13 in the Sector Plan. The development would provide transition from Derwood and integrate with it.

For all these reasons, as explained in greater detail in Part III.D.3. of this report, Applicant's Development Plan is in substantial compliance with the Sector Plan's use and density recommendations, as "Finding (a)" requires.

c. The General Plan and the County Capital Improvements Program

The General Plan "encourages housing plans that foster transit serviceability and proximity of affordable housing to transit." General Plan Refinement, Approved and Adopted 1993, p. 53. This Application places 156 housing units, including affordable housing, close to a Metro station, thus satisfying the General Plan. Applicant's land use expert, Phil Perrine, testified that this project would not conflict with the County's Capital Improvements Program or other applicable County plans and policies. Tr. 73. As is shown below, this testimony is supported by other evidence in this case, and the Hearing Examiner finds, based on all the evidence, that the proposed development is consistent with County policies.

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

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

evidence concerning adequacy of public facilities is relevant to the District Council's determination in a rezoning case, as spelled out in Zoning Ordinance §59-H-2.4(f).

As mentioned elsewhere in this report, that section was amended recently by Zoning Text Amendment 07-17.<sup>13</sup> The amended provision requires Applicant to produce “[s]ufficient information to demonstrate a reasonable probability that available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application is submitted.” In this case, the application was submitted on October 26, 2007, so the new Growth Policy adopted in November of 2007 will not apply to the rezoning determination; however, the new Growth Policy will be applied at subdivision.

Under both the 2003-05 Growth Policy Element (p.14) and the 2007-2009 Growth Policy, Resolution 16-376, adopted 11/13/07, pp. 22-23, “[t]he Planning Board and staff must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated.” There is no such evidence in this case. We therefore turn to the remaining three public facilities, transportation, schools and water and sewer service.

### 1. Transportation

As discussed at length in Part III.D.4(a) of this report, Applicant's expert in traffic engineering, Glenn Cook, did a traffic impact study for the subject development (Exhibit 20), following normal Local Area Transportation Review (LATR) procedures in conjunction with Transportation Planning Technical Staff. Mr. Cook conducted an intersection capacity analysis for all the study-area intersections. In the Shady Grove Metro area, the congestion standard was 1,800 critical lane volume (CLV), and it remains so under the new Growth policy. He found that all the

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<sup>13</sup> Ordinance No: 16-14, effective March 17, 2008.

intersections would be operating below that congestion standard of 1,800. Based on the study, he concluded that this project would not have a negative impact on the road system or create congested streets. The surrounding transportation network is adequate to support the proposed development.

Tr. 44.

Technical Staff accepted Mr. Cook's traffic study and agreed with his conclusions that the changed configuration would not adversely impact the studied intersections and that LATR was satisfied. Exhibit 33, pp. 24-25. Policy Area Mobility Review (PAMR) was created by the new Growth Policy and therefore does not apply to this zoning application.

Based on the foregoing, the Hearing Examiner finds that Applicant has demonstrated a reasonable probability that available public transportation facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.

## 2. School Capacity:

As discussed in Part III.D.4.b. of this report, the subject property is located within the Magruder Cluster. Enrollment at all levels in this cluster "is currently within capacity and is projected to stay within capacity." MCPS letter attached to Exhibit 33. According to MCPS, the number of anticipated school children from the new development (14 elementary, 10 middle and 8 high school students) will not over-extend that capacity. Thus, the evidence demonstrates a reasonable probability that available public school facilities will be adequate to serve the proposed development.

## 3. Water and Sewer Service:

Under both the 2003-05 Growth Policy Element (p.14) and the 2007-2009 Growth Policy, Resolution 16-376, adopted 11/13/07, p. 22, "applications must be considered adequately served by water and sewerage if the subdivision is located in an area in which water and sewer service is

presently available, is under construction, is designated by the County Council for extension of service within the first two years of a current approved Comprehensive Water Supply and Sewerage Systems Plan (i.e., categories I, II, and III).”

As discussed in Part III.D.4.c. of this report, Applicant’s civil engineer, Dan Pino, testified that water and sewer services are available to the site. The Washington Suburban Sanitary Commission (WSSC) indicated in a message to Technical Staff the proposed rezoning “will not impact the WSSC’s systems or facilities.” Attachment to Exhibit 33. The WSSC further noted that “[w]ater and sewer service to the property has been conceptually approved with a slightly different mix of units.”

Given WSSC’s statements, the Hearing Examiner finds that Applicant has demonstrated a reasonable probability that available water and sewer facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.

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

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

The second required finding is:

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

a. Compliance with Zone Purposes, Standards and Regulations

The requirements for the PD-35 Zone are found in Code §59-C-7.1. The PD-35 Zone is a “floating zone,” which is a 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 and regulations of 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-specific criteria, within the parameters established for the zone, for elements such as setbacks, building heights and types of buildings. These specifications must be spelled out on a development plan, however, to assure appropriate zoning oversight by the District Council. 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.

*i. Purposes of the PD-35 Zone*

The purpose clause for the PD-35 Zone (as well as the other PD Zones) is found in Code §59-C-7.11. It is set forth in full below, with relevant analysis and conclusions 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.*

As discussed in Parts III.D.3 and V.B.1.b, above, the proposed development will be in substantial compliance with the 2006 Shady Grove Sector Plan. Accordingly, the requested

reclassification will comply with the first element of the purpose clause by allowing implementation of applicable Master Plan objectives.

Applicant's land planning expert, Phil Perrine, testified (Tr. 65-68) that the proposed development complies with the purpose clause of the PD-35 Zone by providing a mix of apartments, townhouses and single family units all in one block, combining optimal land planning and efficiency. Sidewalks and the grid system of streets are provided in accordance with the Sector Plan. There are various open spaces on the site, and a recreation/athletic facility within the multi-family building. Mr. Perrine pointed out that recreation areas will be provided, including a courtyard that runs from Chieftain back to the multi-family building; a parcel at the northwest corner of Chieftain and Yellowstone that is like a pocket park, complimenting a similar corner on the confronting Baldwin Landing property; and a "tot lot" in front of the multi-family building. These features can be seen on Applicant's "Illustrative Layout Plan," (Exhibit 28(c)), which is reproduced on page 17 of this report, and in Applicant's two renderings (Exhibits 37 and 38), shown on pages 11 and 12 of this report.

The purpose clause calls for an encouragement of social and community interaction. Mr. Perrine observed that the development plan has buildings and homes fronting sidewalks, and a sidewalk system integrated with the existing community, so there will be a high level of community and social interaction both within this project and between the project and the existing community of Derwood.

There will be a range of housing – multi-family, townhouse and single-family, all within the limitations of the PD Zone. Mr. Perrine opined that the proposal takes the greatest possible aesthetic advantage of trees and existing features, and minimized grading. The slope of the property is accommodated by having a four-story, multi-family building facing Redland Road, with parking beneath it, and by having the townhouse buildings with four stories to the rear and three in the front

along the street. Currently, there is no development on the site east of Yellowstone, and to its west, there is a small parking area and a tree stand.

Mr. Perrine noted that the development will be of sufficient scale to get a variety of unit types with a maximum of safety, convenience and amenities for residents, assuring compatibility and coordination with existing uses. Finally, the plan will support the comprehensive and systematic development of the county by conforming to the Master Plan.

Technical Staff also opined that the development plan would satisfy the zone's purpose clause (Exhibit 33, p. 11):

Reclassification of the subject property from the R-90 zone to the PD-35 zone satisfies the design, housing, amenity, circulation, and other purposes of the PD zone. Staff finds that development of the site under the PD-35 zone is proper for the comprehensive and systematic development of the County, will accomplish the purposes of the zone, and will be in substantial compliance with the General Plan and the applicable master plan.

Development of the property under the PD-35 zone will provide a range of dwelling types to satisfy the intended purpose of the zone within the immediate neighborhood, which is adjacent to the Shady Grove Metro Station. The proposed development provides for a unified form of development at an overall density and mixture of unit types that are generally consistent with the recommendations of the Shady Grove Sector Plan. The proposed development also encourages maximum social and community interaction through pedestrian and vehicular linkages and as such, it would provide for the safety, convenience and amenity of residents and assure compatibility with the surrounding residential, commercial, industrial and transit oriented uses.

The Hearing Examiner agrees. The subject development will provide the kind of housing mix and general-benefit open space recommended by the Purpose Clause, as well as pedestrian interconnectivity and compatibility with its surroundings.

With regard to compatibility with neighboring properties, Technical Staff stated its opinion that "[t]he proposed development is compatible with existing and future land uses in the area in terms of use, density and bulk. The Applicant has placed specific maximum height limits for the

proposed multi-family building and the townhomes to ensure that compatibility exists between the uses being proposed and other uses, existing or proposed, adjacent to the proposed development.” Exhibit 33, p. 15. Mr. Perrine noted that the townhouses and the single-family homes planned along the edge of Chieftain Avenue ensure the compatibility with the single-family homes that are across that street in old Derwood. Tr. 72. Based on this record, the Hearing Examiner finds that the proposed development would be compatible with the neighborhood.

In sum, the proposed development is consistent with the intent and purposes of the PD-35 Zone. We next look to the “standards and regulations” of the PD-35 Zone.

*ii. Standards and Regulations of the PD-35 Zone*

The standards and regulations of the PD-35 Zone are spelled out in Code Sections 59-C-7.12 through 7.18.

Section 59-C-7.121, Master Plan

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 applicable Master Plan, the 2006 Shady Grove Sector Plan, recommends that the subject property be developed under the PD-35 Zone, which permits 35 dwelling units per acre (or more if MPDUs are included on site). Accordingly, this provision is satisfied in this case.

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. Alternative criterion (a) requires that the site “contain sufficient gross area to construct 50 or more dwelling units under the density category to be granted.” As noted above, the subject property is recommended for the PD-35 Zone by the Master

Plan, and contains 4.26 acres. Thus, the base density permitted equals 35 X 4.26, which results in a base density of 149 dwelling units. This figure clearly exceeds the 50 dwelling-unit minimum under this requirement. Moreover, the development will actually have a total of 156 units because it is allowed a 7 unit bonus based on its inclusion of 20 MPDUs.

#### Section 59-C-7.13 and 7.131, Residential Uses Permitted

Pursuant to Code §59-C-7.131, all types of residential uses are permitted in the PD-35 Zone, but it also specifies that a minimum of 50% of the units should be over four stories tall. However, footnote 1 to this section permits the District Council to “waive the percentage requirements for one-family and multiple-family dwelling units, if it finds that a proposed development . . . (b) achieves goals, policies or recommendations stated in an approved and adopted master or sector plan.” Here, the Sector Plan limits building heights along Redland Road to no more than four stories, and units on Chieftain Avenue to no more than three stores. Sector Plan, p. 41. Therefore, waiver of the over-four-story minimum requirement is appropriate in this case. The development plan calls for a four-story building on Redland Road and three-story homes on Chieftain, consistent with the Sector Plan.

#### Section 59-C-7.132 and 7.133, Commercial and Other Uses Permitted

There are no non-residential uses proposed here.

#### Section 59-C-7.14, Density of Residential Development

The Sector Plan recommends the PD-35 Zone (at p. 41), which is high-density category permitting a maximum of 35 dwelling units per acre. As noted above, the base density permitted for the acreage in question is 149 units. However, Code §59-C-7.14(c) permits a bonus density if the number of MPDUs provided exceeds 12.5% MPDUs. The subject Development Plan calls for 13 % MPDUs and a bonus density of 7 units (5%), for a total of 156 units. Technical Staff reports that “[t]he density requested for this development will not exceed the density permitted.” Exhibit 33, p.

14. The Hearing Examiner finds that Applicant's density calculation is consistent with the bonus density permitted under Montgomery County Code §25A-5(c).

Section 59-C-7.15, Compatibility

The Technical Staff opines that the proposed development will be compatible with other uses existing or proposed in the vicinity of the planned development, and the Hearing Examiner agrees for the reasons set forth above in the discussion of the Zone's Purpose Clause. The section also requires that only a single-family detached home be constructed within 100 feet of any adjoining single-family detached zone. The subject site is across the street from some single-family detached homes, but does not adjoin any single-family detached property, so this provision does not apply.

Section 59-C-7.16, Green Area

This section of the Ordinance requires 50% green space for the PD-35 Zone, and the Development Plan satisfies that requirement.

Section 59-C-7.17, Dedication of Land for Public Use

The Applicant's Development Plan (Exhibit 54(a)) indicates that a total of approximately 0.54 acres of land will be newly dedicated to public use along the property's frontages on Redland Road (about 0.12 acres) and Chieftain Avenue (about .42 acres). Technical Staff states, "The application satisfies all public use dedication requirements." Exhibit 33, p. 15. The Hearing Examiner so finds.

Section 59-C-7.18, Parking Facilities

This section requires that off-street parking be provided in accordance with Zoning Ordinance Article 59-E. Technical Staff reviewed the parking requirements and determined that "a total of 193 parking spaces are required." Exhibit 33, p. 16. The following table from the Technical Staff Report (p. 16) shows the breakdown of the parking spaces:

Unit Type	Number of units	Required spaces per DU	Required No of spaces	Proposed No. of Spaces
Townhomes	36	2 sp/du	72	72 Garage/Driveway
Single-family Detached	3	2 sp/du	6	6 Garage
Multi-family: studio	33	1.0 sp/du	33	33 parking Garage
One Bedroom	41	1.25 sp/du	51	51 Parking garage
Two Bedroom	43	1.50 sp/du	65	65 parking garage
Total			227	227
15% Metro Reduction			-34	To be determined
			193	227

Although a total of 227 off-street parking spaces are required by Zoning Ordinance §59-E-3.7, and the Development Plan (Exhibit 54(a) indicates that number will be provided, Technical Staff calculates that a 15 percent reduction may apply due to the location of the property within 1,600 feet of a Metro Station (§59-E-3.33(a)). If the amount of parking is reduced by 15% at site plan, then the required parking would be reduced to 193 spaces. Technical Staff determined that “[t]he proposed off-street parking is consistent with zoning ordinance requirements,” and the Hearing Examiner so finds. Exhibit 33, p. 16.

In sum, the Hearing Examiner concludes that the proposed rezoning and the Development Plan will be consistent with the purpose clause and all applicable standards for the PD-35 Zone.

b. Safety, Convenience and Amenity of Residents

The next part of “Finding (b)” required by Section 59-D-1.61 is a determination that the proposed development would provide the “maximum safety, convenience, and amenity of the residents.” Since this required finding is practically identical with one of the purpose clause requirements for the PD-35 Zone, it has been discussed in that context in this report. The Hearing

Examiner finds that Applicant has provided the maximum in safety, convenience and amenities for the future residents of this development.

c. Compatibility with Adjacent Development

The final required determination under “Finding (b)” is that the proposed development be compatible with adjacent development. For the reasons discussed above in connection with the Purpose Clause of the PD-35 Zone, the Hearing Examiner concludes that the proposed residential dwelling units will be compatible with other uses existing or proposed in the vicinity of the planned development.

3. Internal Vehicular and Pedestrian Circulation Systems and Site Access

The third required finding is:

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

As discussed in Part III.D.4(a) of this report, Applicant’s traffic engineer, Glenn Cook, opined that the circulation pattern shown in the site plan would be safe, adequate, and efficient for the proposed use. Tr. 45. Technical Staff agreed, stating that “[t]he Development Plan also provides an efficient and coordinated vehicular and pedestrian circulation system [and that] review and analysis of the subject proposal by the Transportation Planning staff reveals that the proposed access to the site, as shown on the Development Plan, is safe and adequate.” Exhibit 33, p. 17.

Accordingly, the Hearing Examiner finds that the proposed circulation systems and site access would be safe, adequate and efficient.

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

The fourth required finding is:

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

As discussed in Part III.D.5. of this report, the subject site is not within a Special Protection Area or Primary Management Area, and there are no streams, wetlands, steep slopes associated with erodible soils, or areas of floodplain. Exhibit 33, p. 18. There are 1.56 acres of low quality forest. Tr. 78. Applicant has submitted an approved Natural Resources Inventory and Forest Stand Delineation (Exhibit 9), a Stormwater Water Management Concept Plan (Exhibit 15), and a Preliminary Forest Conservation Plan (Exhibit 10), which has been approved in modified form by the Planning Board. Tr. 85-86. Technical Staff reported no environmental issues warranting denial of this application. Moreover, as mentioned in the discussion of the Purpose Clause, above, the project design has minimized grading.

In sum, the Hearing Examiner finds that Applicant has demonstrated the environmental controls required by “Finding (d).”

##### 5. Ownership and Perpetual Maintenance

The fifth required finding is:

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

Applicant submitted an affidavit from Richard Koch, Applicant’s Managing Member, identifying Applicant’s parent company, BREOF-KREI P146 LLC, as the contract purchaser of the subject site; affirming that Applicant is BREOF-KREI P146 LLC’s authorized agent; and indicating that BREOF-KREI P146 LLC will be responsible for maintenance of the recreational and other common areas until ownership is transferred, at which time documents will be created with

provisions assuring continued perpetual maintenance of such areas by the new owner or homeowners association. Exhibit 52(c).

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

#### 6. The Public Interest

The final finding which is required under Maryland law is that the proposed rezoning will be in the public interest. When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment and public benefits such as provision of affordable housing.

The issue of Master Plan conformance was considered in Part III.D.3. of this report. As outlined therein, Applicant's proposal is consistent with the recommendations, goals and objectives of the 2006 Shady Grove Sector Plan. The Planning Board and its Technical Staff supported the proposed rezoning, and there has been no opposition to this project. The impact on public facilities was discussed in Part. III. D.4. of this report. The evidence indicates that transportation, schools and water and sewer services would not be adversely affected by the proposed development.

The proposed project will bring an attractive residential development within walking distance of a Metro Station, and will provide affordable housing and streetscape improvements.

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

### C. Conclusion

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

1. The proposed development satisfies the intent, purpose and standards of the PD-35 Zone, and meets the requirements set forth in Section 59-D-1.61 of the Zoning Ordinance;
2. The application proposes a development that would be compatible with development in the surrounding area; and
3. The requested reclassification to the PD-35 Zone has been shown to be in the public interest.

### VI. RECOMMENDATION

I therefore recommend that Zoning Application No. G-875, requesting reclassification from the R-90 Zone to the PD-35 Zone, of a 4.26-acre parcel of land, known as Parcel P146 Shady Grove Metro, and located at Yellowstone Way, on the south side of Redland Road between the CSX Railroad tracks and Crabbs Branch Way in Derwood, Maryland, be approved in the amount requested and subject to the specifications and requirements of the revised Development Plan, Exhibits 54(a) and (b), provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Development Plan approved by the District Council within 10 days of approval, as required under Code §59-D-1.64.

Dated: June 3, 2008

Respectfully submitted,

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Martin L. Grossman  
Hearing Examiner