

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
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660

www.montgomerycountymd.gov/mc/council/hearing.html

IN THE MATTER OF:
HAMPDEN LANE, LLC
Applicant

Robert Sponseller
Malcolm Rivkin
James Hendricks
Howard Balick
Brian Alan Polkes
Sheryl Staren
For the Application

Timothy Dugan, Esquire

Attorney for the Application

John Carter
Karl Moritz
Daniel Hardy
Maryland-National Capital Park and
Planning Commission (M-NCPPC)

Joseph Lavorgna
Montgomery County Public Schools
Neither in Support of nor in Opposition
to the Application

Arthur Blitz, representing David Fairweather
Julie Davis Linda Skalet
Ken Doggett Steven Skalet
Alfred Goldberg Jon Weintraub
Gail Quigley

In Opposition to the Application

Norman G. Knopf, Esquire

Attorney for Bethesda Civic
Association, Steven and Linda Skalet,
Julie Davis, John Metz, Jon Weintraub

Before: Françoise M. Carrier, Hearing Examiner

Zoning Application No. G-819

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. SUMMARY

The Applicant in this case seeks reclassification to the TS-R (Transit Station – Residential) Zone to build a residential high-rise on Woodmont Avenue in the Bethesda CBD. The proposed building would be a maximum of 100 feet tall, with nine stories and somewhere between 40 and 65 units.

This case comes to the Council in an unusual posture, because the TS-R Zone specifies that building height is to be determined by the Planning Board during the site plan review process. As a result, the development plan in this case provides only basic parameters as binding elements. The site layout, building location, building footprint and setbacks are described only in conceptual terms.

The Planning Board recommended approval of the requested rezoning on grounds that it substantially complies with the relevant sector plan, would be compatible with the surrounding area and would serve the public interest. Technical Staff recommended denial of the rezoning on grounds that it would *not* be consistent with the sector plan's recommendations.

The proposed rezoning is supported by several residents of a townhouse development located adjacent to the subject property, by several residents of nearby high-rises, and by two regional organizations that favor transit-oriented development. The rezoning is strongly opposed by residents of a high-rise across the street from the subject property, who were represented by counsel in this proceeding, and by a local community group whose members include that high-rise.

This report sets forth much of the voluminous evidence presented in this case, both because the Opposition raised numerous issues that warrant attention, and because the Hearing Examiner considers this a close case. Evidence that could be considered substantial and probative was presented both in favor of and in opposition to the requested zoning. Much of this evidence is summarized in this report, to permit the members of the District Council to make their own assessment.

After a careful and thorough review of all the evidence of record, the Hearing Examiner recommends that that proposed rezoning be approved on grounds that it would satisfy the

requirements of the zone, it would be compatible with land uses in the surrounding area and, although it would not fully comply with the Sector Plan, on balance, it would serve the public interest.

II. STATEMENT OF THE CASE

Application No. G-819, filed on February 3, 2004 by Applicant Hampden Lane, LLC, requests reclassification from the R-10 and R-60 Zones to the TS-R Zone of 30,891 square feet of land in the Edgemoor subdivision (7th Election District) comprised of part of Lots 5 and 6, Block 24B; part of Lots 8 and 9, Block 24D; 313 square feet of right-of-way owned by Montgomery County that was formerly part of Lot 6, Block 24B; and 815 square feet of right-of-way owned by Montgomery County that was formerly part of Lots 8 and 9, Block 24D.¹ The site is located at 4802 and 4804 Montgomery Lane and 4901 and 4905 Hampden Lane, Bethesda and is depicted on an identification plat submitted as Exhibit 23(a).

The application was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission ("M-NCPPC") who, in a report dated May 7, 2004, recommended *deferral or denial*. The Montgomery County Planning Board ("Planning Board") considered the application on May 13, 2004 and, by a vote of 4 to 1, recommended *approval*, stating that the Planning Board strongly supports this project. A public hearing was convened on June 15, 2004 and continued on June 16, June 22 and September 21, 2004. Evidence and testimony were presented both in support of and in opposition to the application. The record was held open for one

¹ The Applicant owns approximately 29,763 square feet of the area proposed for rezoning. This includes 7,217 square feet of land that is already dedicated for roadway use. Based on past practice, the Planning Board can be expected to include the past dedication in the tract area used to calculate permitted density. As noted in the text above, the area proposed for rezoning also includes 1,128 square feet of land that is owned by Montgomery County, having been acquired by eminent domain in the past. This property was previously part of the lots and blocks at issue here. The Applicant hopes to buy this property back from the County, then immediately re-dedicate it for public use in connection with its development of the site. The purpose of this transaction is to give the Applicant a larger tract area for density purposes. Technical Staff testified that while a buy-back and dedication is unusual, it is not unprecedented as a means of increasing permitted density. The Applicant and Montgomery County entered into a Memorandum of Understanding Agency Authorization (Exhibit 26(a)) on April 6, 2004, which authorizes the Applicant to seek rezoning for the County-owned land included in this application, and at least impliedly authorizes the Applicant to seek rezoning for the dedication parcels, to the extent such authorization may be necessary. The Memorandum of Understanding states explicitly that it "shall not affect, in any manner whatsoever, any public action, review or approval process involving the County. . . ." Ex. 26(a) at 3.

week to receive the final transcript, and closed on September 28, 2004. It was later reopened to receive two corrected exhibits, and closed immediately on January 5, 2004.

III. FINDINGS OF FACT

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

A. Subject Property

The subject property is located in the Bethesda Central Business District ("CBD"), on the west side of Woodmont Avenue. It occupies the entire block between Hampden Lane and Montgomery Lane. The property is currently developed with two single-family detached residential buildings facing Montgomery Lane in the R-60 Zone, which are used for offices; a three-story multi-family building facing Hampden Lane in the R-10 Zone, which contains apartments, an upholsterer and offices; and a gravel parking area filling the middle portion of the site.

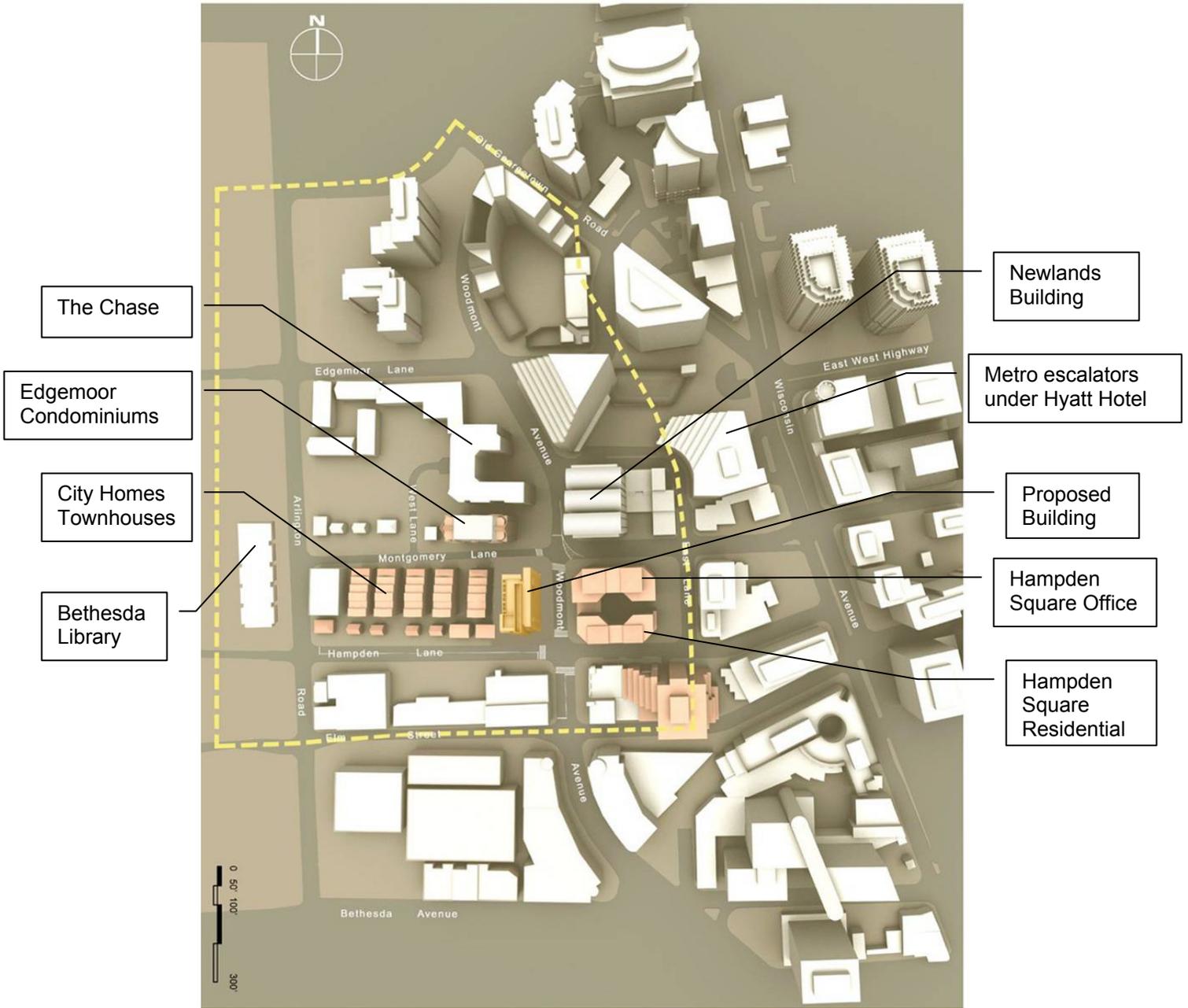
The subject property has street frontage on three sides. To the east it fronts on Woodmont Avenue, an arterial road with four to five lanes providing access for north-south traffic in the CBD. Sections of Woodmont Avenue operate in a one-way direction southbound adjacent to the subject property. To the south, the subject property fronts on Hampden Lane, a business district street with two travel lanes providing for east-west travel between Arlington Road and Woodmont Avenue. The right-of-way on Hampden Lane varies, but is recommended in the Sector Plan to be 60 feet. To the north, the subject property fronts on Montgomery Lane, a narrow business district street that is recommended in the Sector Plan for a 52-foot right-of-way. Travel on Montgomery Lane is primarily two-way east-west, except for a stretch between Woodmont Avenue and a small side street called West Lane, where travel is permitted only in a westbound direction.

B. Surrounding Area

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the description of the surrounding area takes into account those areas that would be most directly affected by the proposed development and any special study areas that may be defined by the applicable master plan. In the present case, the Hearing Examiner accepts the recommendation of Technical Staff (see Staff Report, Ex. 38 at 3) and designates as the surrounding area that area bounded roughly by East Lane on the east, Moorland Lane on the north, Elm Street on the south and properties fronting on Arlington Road on the west. This area includes the Transit Station Residential District (“TS-R District”) defined in the *Bethesda CBD Sector Plan, Approved and Adopted July 1994* (the “Sector Plan”) and a portion of the Metro Core District defined in the Sector Plan. The general location of the subject property and land uses in the surrounding area may be seen on the vicinity map on the next page, which was produced by the Applicant’s architect and has been annotated by the Hearing Examiner, based on detailed hearing testimony, to identify particular uses.

The surrounding area as described above contains a mix of uses and zones. Confronting the subject property to the east, across Woodmont Avenue, is Hampden Square, a mixed-use project in the CBD-2 Zone that has two components: a high-rise office building with a height of 143 feet, which occupies the northern part of the site, and a high-rise residential building with a height of 100 feet, which occupies the southern part of the site. Like the subject property, Hampden Square occupies the entire block between Montgomery Lane and Hampden Lane. Confronting the subject property to the south, across Hampden Lane, is a two-story commercial building in the C-2 Zone occupied by Community Auto Service. Abutting the subject property to the west is a luxury townhouse development known as City Homes of Edgemoor (“City Homes Townhouses”) in the TS-R Zone. The City Home Townhouses consist of five rows of four-story townhouses, 55 to 60 feet in height, which face interior mews (attractively landscaped and paved open spaces).

Surrounding Area Map, Ex. 45(i)



Confronting the subject property directly to the north, across Montgomery Lane, is a small open area. Immediately west of that open area, in the TS-R Zone and partially confronting the subject property, is a high-rise, luxury condominium building known as the Edgemoor Condominiums, which has 10 stories and stands 100 feet high. The footprint of the Edgemoor Condominiums, roughly 175 feet long by 75 feet wide, is similar to the potential building dimensions shown on the illustrative site plan in the present case, which are about 160 feet long by 74 feet wide, but the

buildings would stand perpendicular to one another.² The Edgemoor Condominiums and the City Homes Townhouses were constructed as related developments, and both have traditional brick architecture with many attractive architectural details. Hampden Square is more modern in its design, but has a similar red brick exterior.

Beyond the adjacent and confronting properties, other important structures in the surrounding area include the Chase apartment building, a 120-foot high-rise that sits about 40 feet north of the Edgemoor Condominiums on Woodmont Avenue in the TS-R Zone. Additional residential high-rises (the Chase II and the Christopher) are located at the far north end of the surrounding area, also on the east side of Woodmont Avenue and in the TS-R Zone. Across Woodmont Avenue from the Edgemoor Condominiums and the Chase is the Newlands Building, a modern high-rise office building in the CBD-2 Zone that has three sections topped with barrel vaults, which vary in height from 173 feet to approximately 220 feet. Farther north on the east side of Woodmont Avenue in the CBD Zones are other buildings over 200 feet in height, which are within the Metro Core District, the tallest height district in Bethesda. These include the Hyatt Hotel and the Clark building. Immediately outside the surrounding area, about 750 feet northeast of the subject property, is the Bethesda Metro Station.

Southwest of the subject property on Hampden Lane are additional low-rise, retail/commercial buildings in the C-2 Zone, with uses such as a gym and a laundry. The buildings on the north side of Hampden Lane contain offices and may include some apartments. On the other side of the subject property, on Edgemoor Lane west of the Edgemoor Condominiums, are single-family residential buildings, mostly in the R-60 Zone, that are primarily used as offices. Arlington Road within the surrounding area is developed with low-rise residential, office and institutional uses. These include the Bethesda Library, townhouses and the "Edgemoor on Arlington Road," a 12-unit condominium building in the TS-R Zone with a height of 42 feet. Beyond the surrounding area to the west is the Edgemoor neighborhood of single-family detached homes in the R-60 Zone.

² As will be discussed in more detail in a later section, the Applicant in this case has made no binding commitments regarding the building footprint or dimensions, so all such information is illustrative only.

Photograph of Subject Property as Seen from Balcony of Edgemoor Condominiums, Ex. 50(a), page 2

Woodmont Avenue



City Homes Townhouses

Photo of Edgemoor Condominiums, Confronting Subject Property, Excerpted from Ex. 45(n)



Photograph of City Homes Townhouses, Adjacent to West Side of Site, Ex. 64(d)



Da

Photograph of Mews between City Homes Townhouses Building Rows



Photograph of Mews between City Homes Townhouses Building Rows



C. Zoning History

The subject property was classified under the R-10 and R-60 Zones in the 1954 Regional District Zoning. This zoning was reaffirmed in the 1958 Countywide Comprehensive Zoning, and by Sectional Map Amendment in 1977 (SMA G-20) and 1994 (SMA G-711).

D. Proposed Development

The Applicant proposes to construct a high-rise, multi-family residential building. The Applicant's plans are largely conceptual at this point, with few elements specified as binding. Accordingly, the physical descriptions provided in this report should be considered illustrative. The Applicant's evidence and testimony established that if the reclassification is granted, key elements such as height, setbacks and architectural style will be determined during the Planning Board's site plan review process. As a consequence, the only descriptive elements the District Council should rely on in considering this application are the following:

Binding Elements, per Ex. 96(a)

Area to be rezoned	30,819 square feet
Net lot area	22,546 sq. ft.
Floor area ratio (FAR)	up to 3.05, including MPDU bonus
Number of dwelling units	40 – 65
Gross floor area	no more than 94,218 sq. ft.
Public use space	not less than 10% of net lot area, 2,255 sq. ft.
Active/Passive Recreation Space	Not less than 20% of net lot area or 4,510 sq. ft., with portion on the ground determined by Planning Board
Building coverage	Maximum 60%
Building height	Not greater than 100 feet
Streetscape	Substantial compliance with Sector Plan guidelines
Parking	Resident parking will be underground, with small number of surface parking spaces for drop-off and visitor parking
Ancillary commercial uses or restaurants	None
MPDUs	Up to 15%; some MPDUs on site, not necessarily all
Dedications	Right-of-way dedications to be provided as shown on Development Plan

The development plan shows additional elements that are binding only if the building is approved for a height of 100 feet. These should be considered illustrative for zoning purposes, because in the TS-R Zone, height is determined during site plan review, not at zoning. See Part III.E. below for further detail.

The area proposed for rezoning in this case (which is the tract area the Applicant proposes to use to calculate permitted density) is 30,891 square feet, or .71 acres.³ See Ex. 97(a)

³ See note 1, above, for a breakdown of the area proposed for rezoning.

and Ex. 6, “Area Tabulation” portion.⁴ With this acreage, a 40-unit building would represent about 56 dwelling units per acre, and 65 units would be about 91 units per acre. The project would include at least the minimum number of moderately priced dwelling units (“MPDUs”) required under county law (12.7 percent), and is expected to include up to 15 percent MPDUs. The Applicant has committed to putting some MPDUs on site, but not necessarily all.

The proposed development would satisfy the zoning ordinance requirements to designate 10 percent of the site to public use space and 20 percent to active and passive recreation space. The latter would likely be provided in part on the ground outside the building, and in part on the rooftop and in interior spaces including a fitness center and a lobby/community room.

Under the current conceptual plan, residents would access the building by car from Montgomery Lane and descend into an underground parking garage. This access plan, however, is just conceptual, and is one of any number of possible alternatives. An exact parking configuration has not been provided, but the conceptual plans show 78 parking spaces on two and half floors, for 58 dwelling units.⁵ The binding elements provide for resident parking underground, with “a small number” of surface-level parking spaces on site on site, probably two or three, in front of the main entrance. These would serve dual roles as drop-off/pick-up spaces and visitor parking spaces.

The Applicant submitted conceptual plans for discussion purposes that illustrate a building with nine stories, a height of 100 feet, and 46 percent building coverage. This should be considered an example of how development of the subject property under the proposed zoning might look. Additional evidence about this conceptual plan, including several exhibits that were designed to demonstrate the visual compatibility of the proposed building with the surrounding area, are provided in Appendix I to this Report. Such information has been separated from the body of this report to emphasize its conceptual, non-binding nature.

⁴ Exhibit 6 should be reviewed with caution, as some of the figures in the graphic portion of the exhibit are slightly inconsistent with figures in the “Area Tabulation” table at the bottom of the exhibit. Applicant’s counsel represented that the figures in the Area Tabulation table are correct. The total discrepancy is seven square feet, which is immaterial at the zoning stage. The Planning Board and its staff will need to verify these figures during site plan review to determine the maximum permitted density precisely.

⁵ The Applicant would be required to satisfy the parking standards for multi-family uses in the Zoning Ordinance. The number of parking spaces required cannot be determined until the number of units is set.

E. Development Plan and Binding Elements

Pursuant to Code § 59-D-1.11, development under the TS-R Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the TS-R Zone. This development plan must contain several elements, including a land use plan showing site access, proposed buildings and structures, a preliminary classification of dwelling units by type and number of bedrooms, parking areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. Code §59-D-1.3. As a general matter, the Development Plan is binding on the Applicant except where particular elements are identified as illustrative or conceptual, and only minor changes may be made during site plan review. The Zoning Ordinance specifies that in the TS-R Zone, building height is to be determined not at the zoning stage, but during site plan review. Code § 59-C-8.51. Thus, building height can only be conceptual at this stage.

In the present case, the proposed development consists of a single building on a small parcel of land. The Applicant seeks to take advantage of the maximum density permitted in the zone in terms of Floor Area Ratio (“FAR”), including the maximum of 2.05 normally permitted plus bonus FAR of 0.55 to compensate for MPDUs. The Applicant proposes to achieve this FAR level by building a 100-foot building that would, as a binding element, cover no more than 60 percent of the site.⁶ The remainder of the site would be used for exterior features such as grassy areas, walkways, landscaping, a drop-off/pick-up/visitor parking area, a garage entrance and a service entrance.

If the Planning Board were to impose a lower height limit on the Applicant at site plan, in recognition of the 65-foot height limit recommended in the Sector Plan, for example, or to ameliorate adverse effects on the light and air available to nearby buildings, the evidence indicates that the Applicant would not be able to achieve the maximum permitted FAR without expanding the footprint (linear dimensions) of the building. Accordingly, if the Planning Board’s ability to exercise meaningful authority over the development during site plan review is to be preserved, the footprint of

⁶ The building shown on the conceptual site plan occupies only about 46 percent of the site.

the building cannot be established definitively at the zoning stage. As a result, the Development Plan in this case provides a mostly conceptual image of the proposed building.

The binding elements are summarized above on page 13. The Development Plan also contains several parameters that will apply *only* if the building is approved for a height of 100 feet. These parameters were the subject of a negotiated agreement between the Applicant and the City Homes Townhouses. See letter dated May 4, 2004 from Triumph Development to Brent Polkes, attached to Staff Report. They include locating the residential entrance on Montgomery Lane and the service entrance on Hampden Lane, reducing the height to from nine stories to seven on the west side of the building, and establishing minimum setbacks of 14 feet from the eastern property line (Woodmont Avenue) and 18 feet from the western property line (facing the City Homes Townhouses).

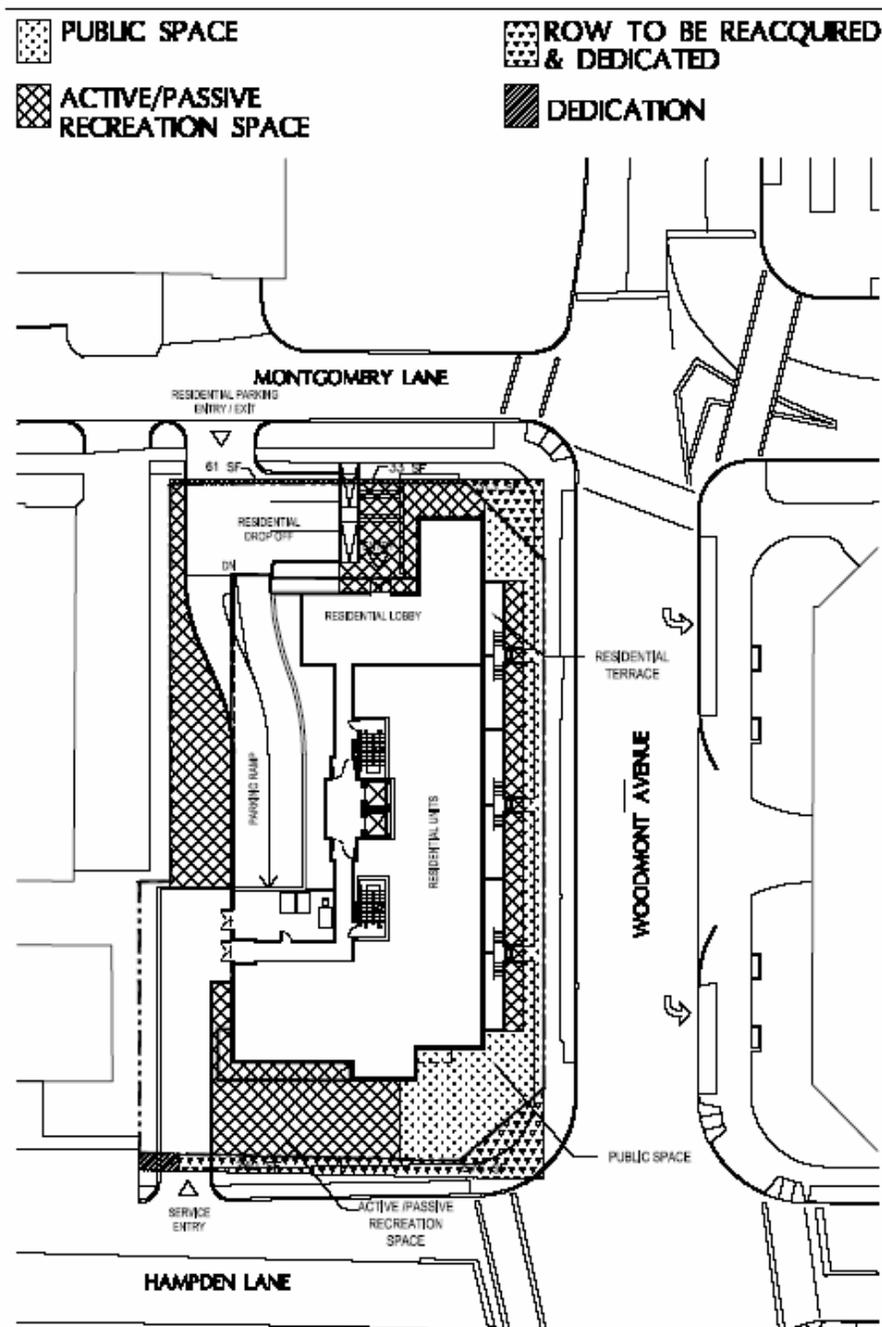
After submitting its recommendation in this case, the Planning Board provided an additional letter, which listed four binding elements that the Applicant agreed, during the Planning Board's hearing on this case, to add to its application. See Ex. 47. These four binding elements are:

1. Maximum building height of 100 feet.
2. Minimum building setback from the westernmost projection of the proposed building, of
 - a. 48 feet from the adjacent townhouses; and
 - b. 18 feet from the western property line.
3. Maximum lot coverage of 40 percent to 60 percent.
4. Maximum floor area ratio of 3.05, including moderately priced dwelling units.

Mr. Carter testified that from Technical Staff's perspective, other binding elements addressing site design would be neither necessary nor useful. As shown in Part III.E above, the Applicant has proposed additional binding elements. Some of these relate to use and density, prohibiting commercial uses and specifying a range of 40 to 65 dwelling units. Other binding elements that address site design quite specifically emerged from discussions with residents of the City Homes Townhouses, and are contingent on approval of a 100-foot building height. Because of that contingency, they do not interfere directly with the Planning Board's discretion to require a lower height, although they do complicate the analysis.

The principal component of the development plan in this case is a document entitled "Development Plan," Exhibit 96(a), which contains a conceptual drawing of the proposed site plan as well as notes and written binding elements. Additional items required for a development plan have been submitted in the form of vicinity maps (e.g. Exs. 5 and 45(i)) and a conceptual parking layout (Ex. 41(c)). The graphic portion of the Development Plan is reproduced below, and the textual portions are shown on the following three pages.

Site Layout (illustrative), excerpted from Ex. 96(a)



Notes and Binding Elements Page One, excerpted from Ex. 96(a)

G-819
4901 Hampden Lane
Applicant's Notes and Binding Elements
June 17, 2004

1) Notes.

- a) The Development Plan depicts how the development would be developed in accordance with the provisions of the Zoning Ordinance applicable to the TS-R Zone. The Development Plan reflects the proposed development as it is presently envisioned.
- b) The objective is to develop a high-density, high-rise, multi-family residential building in the TS-R Zone.
- c) Proposed density, height,¹ and other development details are as provided on this plan.
- d) More specific development or design details will pertain to such matters as:
 - i) building footprint
 - ii) the location of:
 - (1) underground parking access along the westerly façade
 - (2) service access along the westerly façade
 - (3) surface parking
 - iii) landscaping

Such other design details will be refined and finalized during subsequent subdivision and site plan proceedings.
- e) Preliminary Mix of Units by Type

Description of Preliminary Mix of Units By Type and Number (Section 59-D-1.3(c)(3))	Number
Studio	6
One Bedroom/Den	4
Two Bedroom/Den	26
Three Bedroom/Den	22
Total Preliminary Mix	58

¹ The term "height" pertains to the definition of height in the Zoning Ordinance, under Section 59-A-2.1, and all of the other provisions pertaining to height provided in the Zoning Ordinance, including, without limitation, the exceptions to the height limitations under Section 59-B-1.

Notes and Binding Elements Page Two, excerpted from Ex. 96(a)

G-819
June 17, 2004

2) Binding Elements

- a) The development envelope will be governed by the height, setback and other on-site development constraints, as provided on the following tabulation.

Item	Description	Minimum Allowed/ Required Under the TS-R Zone	Proposed/Provided
1.	Zoning (Existing: R10, R60)	N/A	TS-R
2.	Area to be rezoned and basis for the development density	18,000SF	30,891SF
3.	Net Lot Area	N/A	22,546SF
4.	Floor Area Ratio	No minimum. Maximum 2.5FAR	2.50 (Not to exceed.)
5.	Bonus FAR for MPDU's	Up to 22%	0.55 (Not to exceed.)
6.	Total	N/A	3.05 (Not to exceed.)
7.	Number of dwelling units	150 maximum under Zoning; substantial compliance with Sector Plan: 45-100 units per acre.	Between 40-65 Units
8.	Gross Floor Area	N/A	No more than 94,218SF
9.	Public Use Space	10% of Net Lot Area: 2,255SF	Not less than 10% of Net Lot Area: 2,255SF
10.	Active/Passive Recreation Space ²	20% Of Net Lot Area 4,510SF	No less than 20% Of Net Lot Area: 4,510SF The area to be provided on the ground will be determined by the Planning Board.
11.	Building Coverage	No minimum or maximum required for the TS-R Zone	Maximum of 60%.
12.	Building Height	No minimum or maximum required for the TS-R Zone	Not greater than 100 feet ³ .

² Active/Passive recreation space will be provided through a combination of the following: exterior (on the ground) amenity space, interior amenity space and roof top amenity space.

Notes and Binding Elements Page Three, excerpted from Ex. 96(a)

G-819
June 17, 2004

3) Additional Binding Elements:

- a) The streetscape will be in substantial compliance with the Sector Plan guidelines.
- b) Except for a small number of surface parking spaces for drop off and visitor parking, residential parking will be located underground.
- c) No ancillary commercial uses and no restaurants are included in the Development Plan.
- d) The proposed development will include MPDUs on site. Up to 15% of the total dwelling units will be MPDUs.
- e) Provided that the building height is approved for 100 feet, the Applicant will do the following, as binding elements:
 - (1) Woodmont Avenue side building setback: No less than 14 feet from the easterly property line.
 - (2) West side building setback: No less than 18 feet from the westerly property line.
 - (3) While the building's overall height will be nine stories, on the west façade, the closest plane of the elevation facing the town homes (west elevation) will end at seven stories. The plane of the eighth and ninth floors, along the same west façade, will be set back from the plane established by the lower seven floors.
 - (4) Residential vehicular access will be from Montgomery Lane.
 - (5) Services vehicular access will be from Hampden Lane.
 - (6) Work with affected residents of Montgomery Lane with the objective of developing the property, while mitigating the impact of construction traffic, noise, employee parking, street closures and other relevant issues.

[End of Text.]

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³ To reiterate for emphasis, the term "height" pertains to the definition of height in the Zoning Ordinance, under Section 59-A-2.1, and all of the other provisions pertaining to height provided in the Zoning Ordinance, including, without limitation, the exceptions to the height limitations under Section 59-B-1.

The Hearing Examiner notes that the percentages of public use space and active/passive recreation space listed in the binding elements are the same percentages required under the development standards for the TS-R Zone. The binding elements serve to underscore those requirements and bind the Applicant to them, in the event that the requirements are made less stringent in the future.

F. Master Plan

Master plan compliance lies at the heart of this hotly contested case. The subject property is located in the TS-R District of the *Bethesda CBD Sector Plan, Approved and Adopted July 1994* (“Sector Plan”), as defined in Figure 3.1, Master Plan at 38. The Planning Board found that the proposed development would be consistent with the Sector Plan, and recommended approval of the rezoning. See Ex. 42. Technical Staff opined that the proposed 100-foot high-rise would be consistent with all of the recommendations in the Sector Plan except those pertaining to building height and the low-rise/high-density character recommended for the area. As a result, Technical Staff recommended denial. See Ex. 38 at 6.

The Applicant’s land planner, Malcolm Rivkin, who has a lifetime of experience in Montgomery County land planning, concluded that the proposed development would be consistent with all of the recommendations in the Sector Plan except those regarding height. He opined that the rezoning should be approved because the Sector Plan’s low-rise/high-density concept is dead, given the type of development that has taken place in the area since the Sector Plan’s adoption in 1994. See Ex. 9.

The Opposition’s land planner, Kenneth Doggett, in private practice after 20+ years as a planner for Fairfax County, opined that the proposed development would be inconsistent with all of the Sector Plan’s recommendations – use, density and the low-rise, high-density concept.

Thus, we have before us four different interpretations of the same document. In an effort to simplify a complex issue, the basic features of these interpretations have been summarized in the table below.

SUMMARY TABLE: MASTER PLAN INTERPRETATIONS

Sector Plan	Planning Board	Technical Staff	Applicant's Planner	Opposition's Planner
Recommended Land Use	High Rise or Apartments	High-density, Multi-family Residential	High-density Residential	Low-rise, High-density Residential
Proposal Complies?	Yes	Yes	Yes	No
Density, units/acre	45 – 100 except Arlington Road	45 – 100 except Arlington Road, higher densities preferred near Metro	45 – 100 except Arlington Road	45 – 100 except Arlington Road, higher densities required near Metro
Proposal Complies?	Yes	Yes	Yes	No
FAR Density	Max. 3.05	Max. 3.05	Max. 3.05	Max. 3.05, appropriate only with high unit density
Proposal Complies?	Yes	Yes	Yes	No
Type of Development/Height	High-density residential, no height limit	Low-rise, high-density residential, maximum height 65 feet	Type and height guidelines irrelevant; superceded by events	Low-rise, high-density residential, maximum height 65 feet
Proposal Complies?	Yes	No	Yes	No
Urban Design Guidelines Compliance?	Not specifically addressed.	Complies with streetscape guidelines.	Complies with streetscape guidelines and steps down from buildings to east.	Fails to step down from building to north; does not adequately step down from building to east.

The discussion that follows outlines the relevant elements of the Sector Plan in the context of the various interpretations summarized above.

1. Basic Goals of the Sector Plan

The Applicant's land planner, Mr. Rivkin, began his report by reviewing the Sector Plan's goals for the Bethesda CBD as a whole, concluding that the only one the proposed development would not satisfy directly is number four, pertaining to employment. (None of the other

participants commented on the overall goals, so only Mr. Rivkin's views are presented.) The Sector

Plan goals are stated on pages 3-4 of the Plan and reproduced below:

1. DOWNTOWN

Realize the vision of Bethesda as a diverse and lively downtown for Bethesda-Chevy chase. Continue well-designed redevelopment within the metro Core and reinforce the physical character and varied activities of districts radiating out from the core so that each district has a distinct identity yet is linked into a coherent whole.

2. URBAN FORM

Encourage infill development that complements the underlying physical form of Bethesda. Create a high-quality built and pedestrian environment, including a network of pathways and open spaces. Enhance Bethesda's commercial and residential districts with improvements appropriate to the character of each.

3. HOUSING AND NEIGHBORHOODS

Encourage and maintain a wide range of housing types and neighborhoods in and around Bethesda for people of all incomes, ages, lifestyles, and physical capabilities, in keeping with County goals. Provide an adequate supply of housing, including affordable units, to reinforce Bethesda as a place to live as well as work. Protect adjacent neighborhoods from commercial intrusion, undue traffic, and environmental degradation.

4. EMPLOYMENT

Provide opportunities for additional jobs in this major down-County employment center, in keeping with County policy to concentrate growth in the urban ring near Metro stations and to increase the County's revenue base.

5. COMMUNITY CHARACTER

Enhance Bethesda as an appealing environment for working, shopping, and entertainment. Strengthen its attraction as a destination for visitors while ensuring that residents find a sense of community. Reinforce a unique sense of place through the themes of Bethesda as a 'garden' and 'cultural district.'

6. CIRCULATION

Provide a safe and functional transportation system to serve the current and recommended land uses. Achieve a significant shift of travel from drive-alone auto use to transit, car-pooling, and other alternatives. Enhance the pleasure, safety, and convenience of walking and bicycling.

Mr. Rivkin noted that the proposed development would “create a signature residential building where the Metro Core meets the TS-R District.” Ex. 9 at 9. It would provide a logical step-down in height from confronting buildings in the Core, and provide landscaping to help make Woodmont Avenue a comfortable pedestrian environment and continue the pedestrian-friendly appearance of Montgomery Lane. See *id.* He opined that the project would create residential density consistent with Sector Plan recommendations for locations near Metro, and would be an excellent example of transit-oriented development. *Id.* at 9-10. He noted that the proposed building would be the same height as the Edgemoor Condominiums but would appear somewhat lower because of topography. Mr. Rivkin’s report also stated that all MPDUs would be provided on site, contributing to the area’s economic diversity, but we learned at the hearing that the Applicant has not made that commitment.

2. TS-R District Recommendations

The Sector Plan’s basic vision for the TS-R District is set forth below (Sector Plan at 5):

The Plan recommends creation of a high-density, low-rise ‘urban village’ that steps down in height from 6 floors along Woodmont Avenue to 3 floors along Arlington Road, and provides from 45 to up to about 100 dwelling units per acre. The Plan retains and revises the TS-R (Transit Station-Residential) Zone to achieve this vision.

The urban village concept was described in detail, with written objectives, extensive written recommendations, urban design guidelines and several maps and drawings. Pertinent elements of the Sector Plan are discussed below.

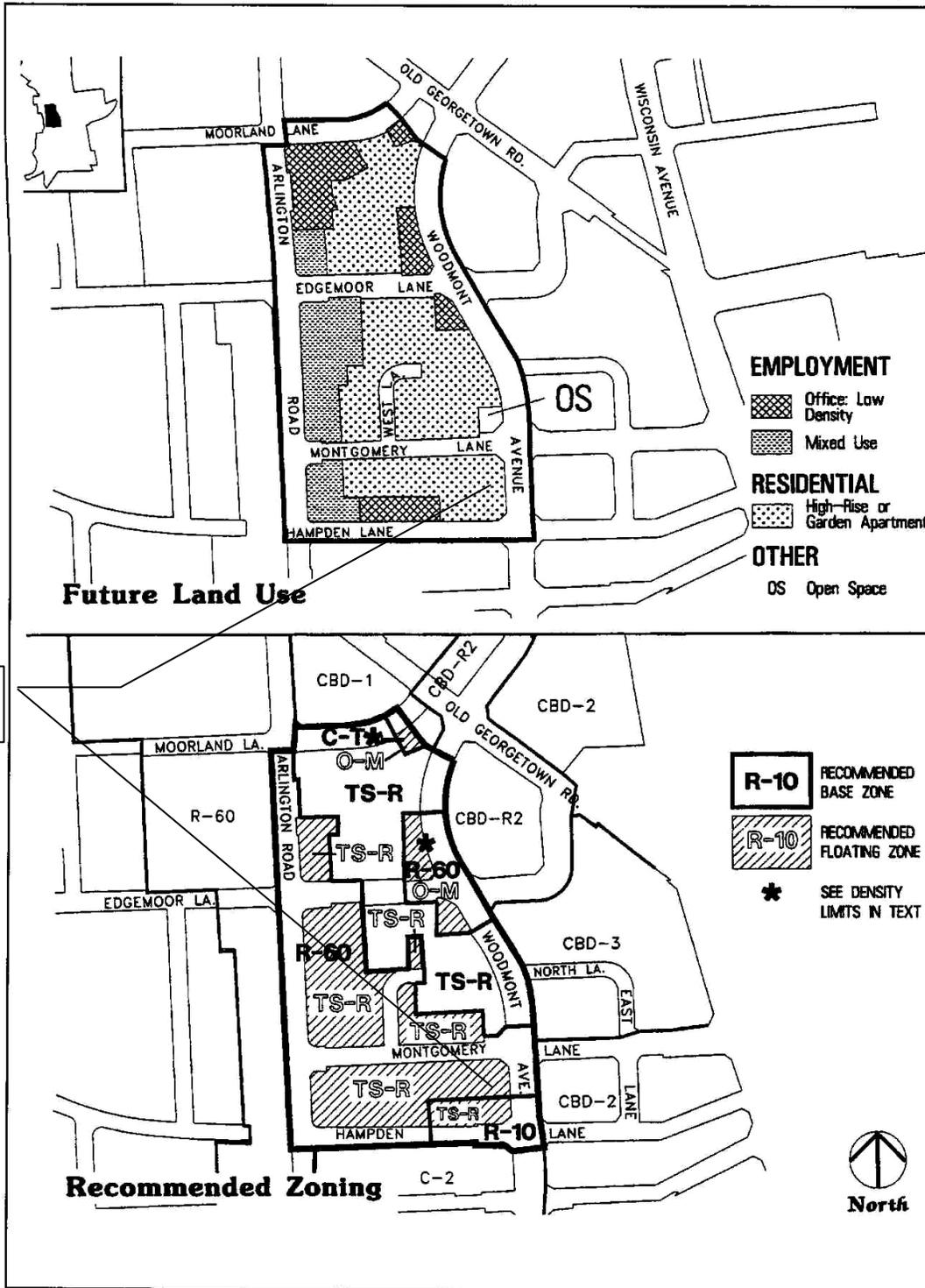
a. Use and Density Recommendations

In identifying the use and density recommended by the Sector Plan for the subject property, the Planning Board focused on Figure 4.13 of the Plan, which is found on page 81 of the Sector Plan and is reproduced below.

Sector Plan Figure 4.13, Transit Station Residential District

TRANSIT STATION RESIDENTIAL DISTRICT

FIGURE 4.13



The Future Land Use map at the top of Figure 4.13 divides the TS-R District into three categories of land use: employment, residential and "other." It identifies residential uses collectively as "High-Rise or Garden Apartment." The Planning Board interprets this language to mean that both

high-rises and garden apartments are recommended uses under the Sector Plan. The Recommended Zoning map at the bottom of Figure 4.13 identifies the subject property as appropriate for the TS-R Zone, and refers the reader to the text for density limits. The text recommends a minimum of 45 dwelling units per acre everywhere in the TS-R District except on lots facing Arlington Road, and states that higher densities with 2.5 FAR and “about 100 dwelling units per acre” would be allowed elsewhere in the district. See Sector Plan at 82. On the basis of Figure 4.13 and the textual recommendations for density, the Planning Board concluded that the 100-foot high-rise proposed here would comply with the use and density indicated in the Sector Plan. See Planning Board Recommendation, Ex. 42 at 2.

Technical Staff also found that the proposed development would conform to the use recommended in the Sector Plan, but interpreted the recommended use differently. The Staff Report states that the Sector Plan “designates this area for multi-family residential land uses or Transit-Station Residential. . . the reservation of this area for high-density housing is an important objective of the Sector Plan.” Ex. 38 at 7. John Carter, who testified on behalf of Staff at the hearing, suggested that the basic distinction is between residential and non-residential uses. Tr. June 16 at 141. He allowed that because the text and Figure 4.13 refer to apartments, the recommended land use could be considered multi-family residential rather than just residential. *Id.* at 151. He did not support characterizing the recommended use more specifically as either high-rises (as suggested by the Planning Board) or garden apartments (as suggested by the Opposition).

The Opposition’s land planner, Mr. Doggett, disagreed with both the Planning Board and Technical Staff regarding the “use” recommended in the Sector Plan. In Mr. Doggett’s view (based on his experience in writing master plans for Fairfax County), the caption on Figure 4.13 means that there will be a high rise element in the future because one already exists, but the use proposed for the future is garden apartments. To support his view, Mr. Doggett points to Figure 4.15 (p. 84), which depicts “before” and “after” images of Montgomery Lane. Each of the two drawings depicts a single high-rise building in the background, which appears to be the Chase. Future development, including on the subject property, is pictured as low-rise, high-density structures. Tr.

June 22 at 36. Moreover, Mr. Doggett stated that the theme of low-rise, high-density residential uses runs through the whole Sector Plan, and he opined that this should be considered the “use” recommended in the Sector Plan. *Id.* at 55.

As noted above, Staff found that the proposed development would be consistent with the high-density, multi-family land use recommended in the Sector Plan. Staff found that the proposed building would also conform to the Sector Plan’s density recommendations, because it would have a FAR of 3.05 (the maximum provided for in the zone, plus an MPDU density bonus) and approximately 100 dwelling units per acre, at the top end of the recommended range.

The Hearing Examiner notes that given the wide range of 40 to 65 units proposed in this case, the final development would not necessarily produce a unit density even close to 100 d.u./acre. The Applicant desires to achieve the maximum FAR, but has reserved a flexibility with regard to the number of units that could produce anywhere between 56 and 91 units per acre.

Mr. Carter testified that the range of densities recommended in the Sector Plan should be seen as a step-down or “tenting” concept similar to the height recommendations in various parts of the CBD. Higher densities would be desirable close to Metro, with lower densities further south and east, closer to Arlington Road and nearby single-family neighborhoods. Tr. June 16 at 113. Mr. Carter opined that a location like the subject site, half a block from Metro, should certainly be developed at the higher end of the density range. *Id.* at 114. He recited from memory the square footage of the area sought to be rezoned in this case, which is the basis for density calculations – 30,891 square feet, or .71 of an acre. *Id.* at 114-115. He acknowledged that if the building were constructed with only 40 units, the unit density would be a little low. However, the building would still achieve the maximum FAR, which is another important measure of density. *Id.* at 115.

Mr. Carter agreed that more units would be better in terms of increasing Metro ridership, but stated that it’s more complicated than just the number of units. Tr. at 116-117. If the building has fewer units but the units are larger, there may be more people living in each unit, resulting in the same number of new residents in close proximity to Metro. In response to questioning by Opposition counsel, Mr. Carter conceded that Technical Staff does not have actual occupancy data

indicating whether large, two- or three-bedroom luxury condominiums in fact have more people living in them, or whether the additional bedrooms are more often used as a den or extra room. He noted, however, that parking requirements increase with the number of bedrooms, suggesting an assumption in the Zoning Ordinance that more bedrooms translates into more residents. Tr. June 16 at 118-119.

The Opposition's land planner, Mr. Doggett, agreed with Mr. Carter that the intent of the Sector Plan was to encourage densities at the top of the recommended range near Metro, and lower densities closer to Arlington Road. He pointed out, however, that the Sector Plan links the upper end of the FAR range (2.5) with the upper end of the unit density range, and suggested that this means the maximum FAR should be permitted only if the maximum unit density is provided. Tr. June 22 at 52-53; see Sector Plan at 82. In his view, 40 units is not a reasonable density under the Sector Plan for a site so close to Metro. *Id.* at 51.

b. Height and Type of Development

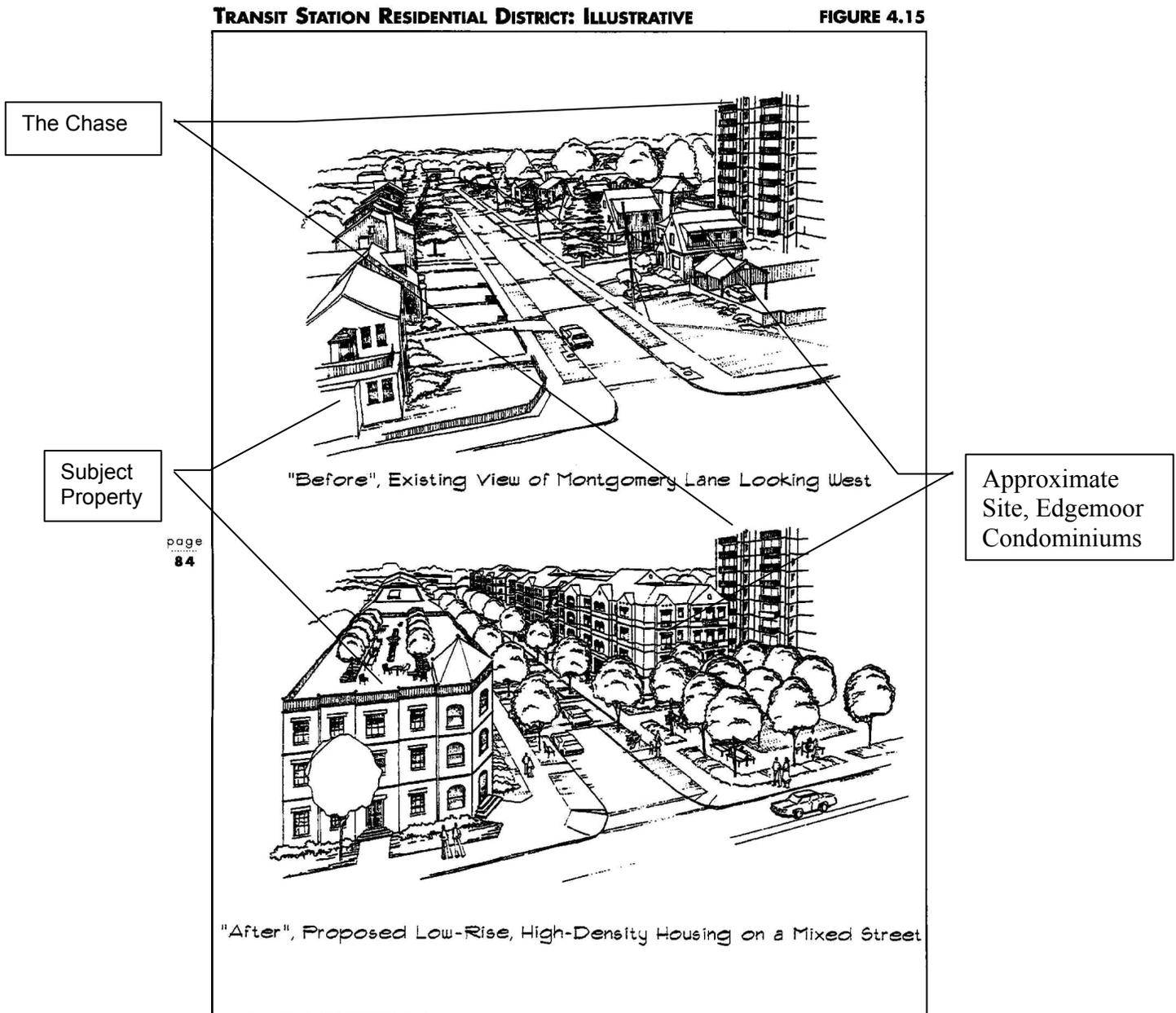
Technical Staff found that the proposed development would conflict with "specific guidelines for building height and low-rise/high-density character" set forth in the text of the Sector Plan (pages 39 and 82) and an illustrative drawing (Figure 4.15). Staff Report, Ex. 38 at 6.

On page 82, the Sector Plan describes the preferred form of development for residential uses in the TS-R District as a low-rise, high-density "urban village." The type of housing "should appear to be townhouses but actually be three to six-floor buildings with apartments at each level." The Plan recommends a minimum density of 45 units per acre "everywhere except on lots facing Arlington Road, where there would be no minimum density in order to allow townhouse development at lower densities." The Plan "anticipates that some projects will incorporate higher densities, and the full 2.5 FAR (about 100 dwelling units per acre) would be allowed."

The Sector Plan notes that the TS-R Zone was amended to provide more flexibility in site design, facilitating implementation of the low-rise, high-density concept. Revisions include a lower minimum parcel size to make assemblage easier, and a reduced green space requirement to permit "lower building heights, a more spread out building, and, therefore, a less expensive structure since construction of such low-rise development can be less costly than high-rise." Sector Plan at 82.

In addition to the text on page 82, Technical Staff relied on the illustrative drawing below (Figure 4.15, p. 84), which compares existing development along Montgomery Lane at the time the Sector Plan was prepared with proposed future development. Each of the two views depicts Montgomery Lane looking west from Woodmont Avenue.

Sector Plan Figure 4.15, Transit Station Residential District: Illustrative



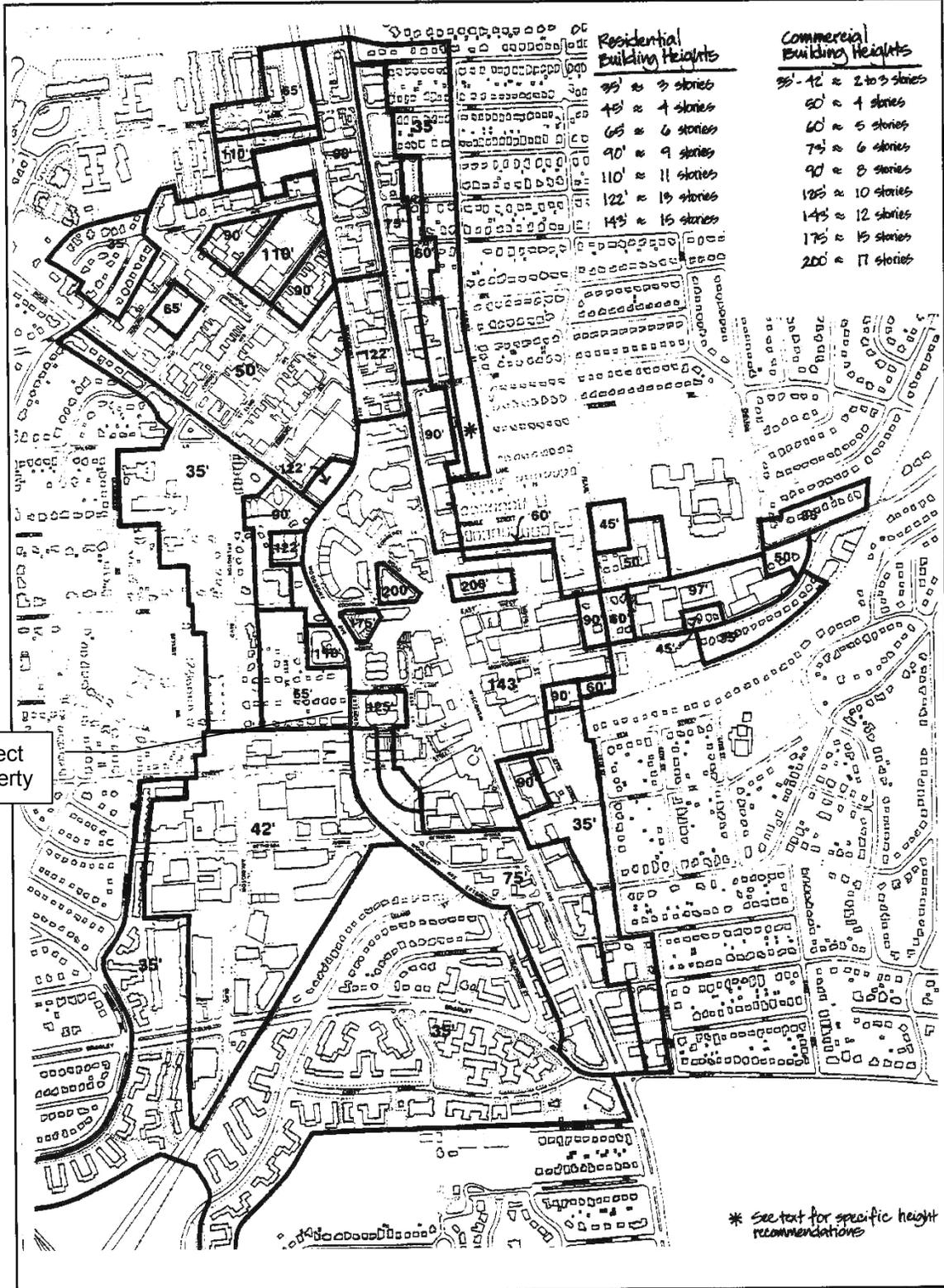
Technical Staff also relied on Figure 3.2 of the Sector Plan, reproduced below, which assigns recommended building height limits to various areas within the Bethesda CBD. The subject

property is in an area recommended for a maximum height of 65 feet, which corresponds to six stories, the maximum recommended for the TS-R District in the text.

Sector Plan Figure 3.2, Building Height Limits

BUILDING HEIGHT LIMITS

FIGURE 3.2



Based on the textual recommendations, Figure 4.15 and Figure 3.2, Technical Staff concluded that the 100-foot high-rise proposed for the subject property would not conform to the specific guidelines for building height and low-rise/high-density character contained in the Sector Plan, and the application should be denied.

The Planning Board, in contrast, relied on Figure 4.13 to support its conclusion that the 100-foot height proposed for the subject site would be consistent with the Sector Plan. See Ex. 42 at 2. The Planning Board characterized the height limits in Figure 3.2 as “a general guide that is superceded by specific references in the text of the Sector Plan.” *Id.* The Planning Board reiterated its conclusion that Figure 4.13 recommends high-rise residential development for the subject site, and noted, accordingly, that “the Sector Plan does not limit the type of development permissible on the subject property to low-rise or even mid-rise housing, and the proposed development at nine stories and 100 feet is consistent with the recommendations of the Sector Plan.” *Id.*

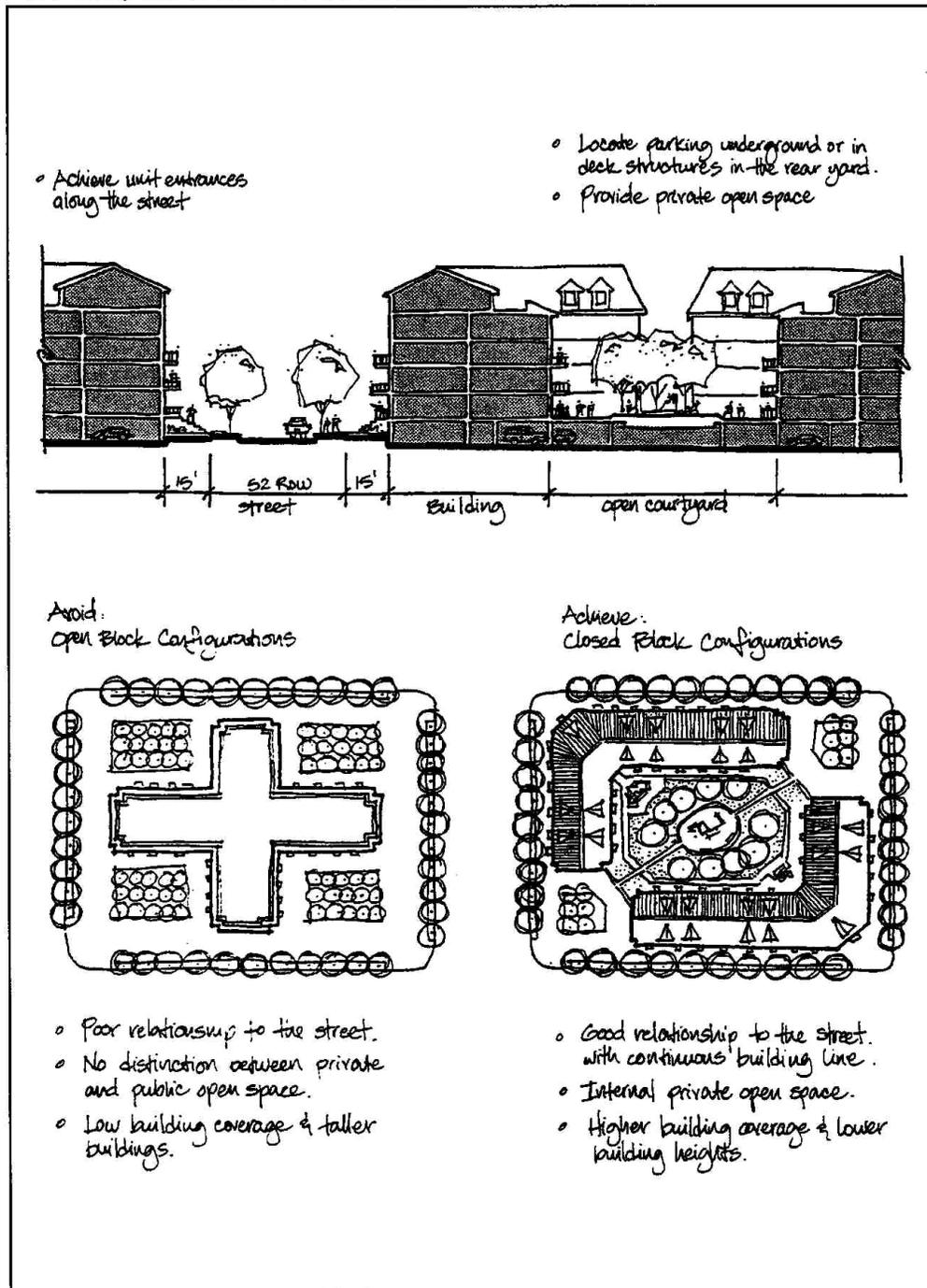
The Planning Board also observed that under the TS-R Zone, building height is to be determined during site plan review. See *id.*; see also Code § 59-C-8.51. The Board noted that “the review of the building height and setback would be carefully considered during the site plan review process . . . the Planning Board will take into consideration the size of the parcel, the relationship of the building to surrounding uses, and the need to preserve light and air for the residents of the development and the residents of the surrounding properties in accordance with the provisions in the TS-R Zone.” *Id.*

The Opposition pointed to an additional element of the Sector Plan’s recommendations for the TS-R District, which addressed how buildings should be situated relative to streets and open space. The recommended development pattern included “closed block” configurations, with buildings situated close to the sidewalks and creating semi-enclosed, interior courtyards. The Sector Plan noted that the “advantage of the closed block configuration is that it creates a consolidated amount of more usable open space.” Sector Plan at 82. The concept of closed block configurations was illustrated in Figure 4.14, which is reproduced below.

Figure 4.14, Low-Rise, High-Density Housing Prototype (Sector Plan at 83)

LOW-RISE, HIGH-DENSITY HOUSING PROTOTYPE

FIGURE 4.14



page
83

The Opposition contends that the development proposed here would be the opposite of the low-rise, high-density, closed block design recommended in the Sector Plan. It would create a tall building with significant setbacks, low building coverage and no distinction between private and public open space.

c. Urban Design Guidelines

The Sector Plan includes Urban Design Guidelines for the T-S R District (p. 85) as set forth below. These guidelines address, among other things, setbacks, sidewalks and streetscape. Technical Staff concluded that the proposed development would conform to the Sector Plan's guidelines for pathways and streets.⁷

URBAN DESIGN GUIDELINES

1. Permit projects with a minimum lot size of 18,000 square feet to encourage smaller-scale projects. Projects should not leave isolated parcels.
2. Encourage low-rise buildings to fill out the parcel.
3. Maintain low-rise building heights which step down to three floors along Arlington Road. Heights of up to six floors are preferred near Woodmont Avenue to achieve the desired urban form.
4. Provide 25-foot building setbacks from the curb (15 feet from the Sector Plan right-of-way) along Arlington Road. Setbacks in the remaining portion of the TS-R District will be decided on a case-by-case basis as redevelopment proceeds through the Planning Board approval process.
5. Design roof tops to achieve a residential image by using hip roofs, gables, turrets, and other types of pitched roof lines. The varied roof line is desirable to improve character and reduce the sense of bulk.
6. Locate front unit entrances along the street when residences are provided on the first floor to encourage street life.
7. Locate required parking either underground or in rear decks, so as not to be seen from surrounding streets.

The Staff Report noted that the proposed development would continue the urban design character of Montgomery Lane that has been established in the Sector Plan and recent development approvals. Ex. 38 at 7. They note that the setbacks, sidewalks and streetscape proposed along Montgomery Lane would match adjacent development. During the hearing, Mr. Carter testified that the height guideline was based on a "tenting" or "stepping down" concept that is carried through in the height recommendations for the entire Bethesda CBD. Tr. June 16 at 99. As shown on Figure 3.2 and described in the text on page 40, the Sector Plan recommended the highest

⁷ The Planning Board did not address compliance with the urban design guidelines.

height limits at the Bethesda Metro Core, with heights decreasing from north to south and from west to east “to achieve desirable and compatible transitions to adjacent areas”. Sector Plan at 40.

The Opposition’s land planner, Mr. Doggett, opined that based on the Sector Plan, one would expect the building proposed for the subjects site to be shorter than the Edgemoor Condominiums. That particular step-down is important because two buildings of the same height, close together, create a canyon effect that is not very appealing. He added that one would also expect the proposed building to be shorter than Hampden Square across the street, which has a 100-foot residential component and a 143-foot commercial component. Mr. Doggett does not consider that a step-down, presumably because there would be no step-down from the residential half of the Hampden Square building.

d. Objectives

The Opposition contends that the proposed development would not satisfy all of the objectives identified for the TS-R District on page 80 of the Sector Plan, which are set forth below:

OBJECTIVES

1. Provide incentives for and remove barriers to achieving high-density housing in the TS-R District.
2. Increase flexibility in the TS-R Zone to allow the district to achieve a low-rise, high-density “urban village” pattern.
3. Retain residential scale along Arlington Road.

The Opposition maintains that while the proposed development would create high-density housing, it would not contribute to a low-rise, high-density urban village pattern.

3. Ongoing Validity of Sector Plan

The Applicant’s land planner believes that the low-rise, high-density urban village that the Sector Plan proposed for the TS-R District has not been built and never will be, so new development should not be required to conform to that concept. Technical Staff testified that until it is formally amended, the Sector Plan stands and should be given its full status. The Opposition’s land planner believes that the Sector Plan is very much alive and should continue to be respected. The principal arguments on this issue are described below.

a. Applicant's Planner: The Urban Village is Dead

The Applicant's land planner, Mr. Rivkin, argues that the Sector Plan's concept of a low-rise, high-density urban village in the TS-R District is dead, having been killed by subsequent development incompatible with that vision. As discussed in Part III.H. below, in 1998 Mr. Rivkin opposed the rezoning that permitted the Edgemoor Condominiums to go forward, because he believed that at a height of 100 feet, the building would be inconsistent with the recommendations of the Sector Plan. Today, however, Mr. Rivkin believes that changed conditions justify approving the present re-zoning.

The first change Mr. Rivkin points to is that housing production in downtown Bethesda has been below the levels anticipated in the Sector Plan, despite dozens of sites recommended for housing. Ex. 9 at 12. The Sector Plan expected about 2,700 dwelling units in the CBD at build-out. In the ten years after the Sector Plan was adopted, about 1,350 units have been completed or begun.

Second, Mr. Rivkin observes that while some housing has been built in the TS-R District, "the vision of a low-rise, high-density precinct has proved to be infeasible and has not materialized." *Id.* Mr. Rivkin notes that the Sector Plan calls for a minimum unit density of 45 du/acre in the TS-R District, except along Arlington Road, and encourages a full FAR 2.5 density with up to 100 units/acre. (He does not appear to share Mr. Carter's interpretation that the density recommendations were to mimic the stepping-down recommendations for height, with higher densities closer to Metro and lower densities further west.) Reviewing the development that has actually taken place, Mr. Rivkin observes that the City Homes Townhouses abutting the subject property to the west have a density of 26 dwelling units per acre, well below the recommended minimum. He acknowledges that the City Homes Townhouses were permitted in conjunction with the Edgemoor Condominiums (see Part III.H. below), and that the developer at the time borrowed density from the City Homes site to increase the permitted density for the Edgemoor Condominiums. See Ex. 9 at 17, n.8. *The developer did not actually build the Edgemoor Condominiums with the high density that was proposed during rezoning, but it nonetheless carried out the relatively low-density City Homes project.* The project abutting the City Homes Townhouses to the west is the recently completed Edgemoor at

Arlington Road, a three-story condominium building fronting on Arlington Road. That building has a townhouse-type density of about 26 units per acre, which the Sector Plan considered appropriate on Arlington Road. See Ex. 9 at 14. Another development at Arlington Road and Edgemoor Lane is the Villages of Bethesda, a townhouse cluster with a density of about 23 d.u./acre, again appropriate for Arlington Road but well below the density recommended elsewhere in the TS-R District. The only high-density project that has been built in the TS-R District since adoption of the Sector Plan is the Edgemoor Condominiums, with a density of about 100 d.u./acre. This building, however, is a 100-foot high-rise.

Mr. Rivkin concludes that the urban village concept promoted in the Sector Plan has not materialized for several reasons: (i) mid-to-low density townhouses have been in high demand and can be designed to fit available TS-R sites, with off-street parking; (ii) the availability of developable property has been limited, and only smaller assemblies have been practicable, making it more difficult to assemble parcels large enough for the urban village concept; and (iii) no developer other than the present Applicant and the developer of the Edgemoor Condominiums “has devoted the necessary resources to highly-skilled architects who can design high-density, high-rise projects compatible with the Bethesda community.” Ex. 9 at 17. He concludes that, given the developable properties remaining, including the subject site, the Sector Plan’s vision no longer merits serious consideration.

Third, Mr. Rivkin notes that on certain sites in the CBD where proposed projects met the use and density objectives of the Sector Plan, and the Zoning Ordinance provided flexibility with regard to height, the County has permitted building heights to exceed Sector Plan recommendations. *Id.* This line of argument will be discussed in Part III.H. below.

b. Opposition’s Planner: the Sector Plan is Alive and Vital

The Opposition’s land planner, Mr. Doggett, disagreed with Mr. Rivkin’s contention that the Sector Plan is dead. He feels that the City Homes townhouses adjacent to the subject property are consistent with the Sector Plan in their height and character, although they have a lower density than called for in the Sector Plan. Their scale, as compared to a 65-foot building along Woodmont

and then the taller buildings across the street, is consistent with the urban village concept, and their broad sidewalk has an urban village look. They would have been more consistent with the Sector Plan if they had greater unit density and the long side of the buildings facing the road, but “the same effect is actually got the way it is with rather pleasant spaces in between.” Tr. June 22 at 32. Mr. Doggett noted that the three-story buildings along Arlington Road are consistent with the Sector Plan’s vision. Even the Edgemoor condominium building conforms in terms of its architecture and urban design qualities – it uses the same brick, the same colorful skyline, the same textures envisioned in the Sector Plan. *Id.* at 30.

Mr. Doggett stated that no master plan is ever achieved 100 percent, but that doesn’t mean the whole concept is abandoned. He correctly noted Mr. Carter’s testimony that he has no present intention of revising the Sector Plan with regard to the TS-R District, although Staff is working on other parts of the Plan. Mr. Doggett observed that there is plenty of vacant space in the TS-R District, and opined that if the urban village concept is abandoned the result will be chaos, with no controls at all. *Id.* at 31. Mr. Doggett concluded that if the County wants to make a change in this area, it should do so by amending the Sector Plan rather than by permitting a single building without considering what will be built around it. *Id.* at 78.

G. Building Height: 65 Feet v 100 Feet

The hearing in this case included a great deal of discussion, both by the Applicant and by Opposition witnesses, comparing the potential effect of a new building on the subject property as proposed, at 100 feet in height, and at the six-story, 65-foot height discussed in the Sector Plan. The Applicant proposes to build a tall, thin building with no more than 60 percent lot coverage, leaving small open-space areas on the ground around the building. The Applicant maintains that these open space areas would provide a significant benefit to neighboring uses by increasing the space between buildings and making room for a well-landscaped setting for the building. If the Applicant were to build the same density in terms of FAR, but limit the height to 65 feet, the linear dimensions, or “footprint” of

the proposed building would have to increase. The record does not describe with any specificity what such a building would look like, but it clearly would cover more of the site and have smaller setbacks.⁸

Several residents of the adjacent City Homes Townhouses support the proposed rezoning because they believe – based on advice from a professional land planner whom they hired to evaluate the situation – that they would be better off with a taller building that sits 18 feet from their joint property line, rather than a shorter building that could come nearly all the way to the property line. A letter from the City Homes Townhouses Board of Directors indicates that the Applicant described the proposed building to them as having 48 percent lot coverage,⁹ and suggested that a 65-foot building would cover 70 percent of the lot. See Ex. 61. The Opposition’s land planning expert stated that in his view, the City Homes Townhouses would be better off with an adjacent building 65 feet high, which is only five to ten feet higher than the townhouses, even if that means sacrificing setback space. Tr. June 22 at 67-68. He pointed out that even if the proposed building extended literally to the property line, the townhouses would still have the separation of their 30-foot-wide driveway, and they would not have an adjacent building that looms over them from above.

One Opposition witness, Julie Davis, presented the photograph reproduced below, which shows the skyline in the area of the subject property as seen from the roof of the Bethesda Avenue parking garage. Ms. Davis offered this photograph to show the step-down in heights, north to south from the Newlands building to the two parts of Hampden Square, and east to west from Metro Center and the Newlands building to the Edgemoor Condominiums. The Edgemoor Condominiums also step down from the height of the Chase to the north, but the angle of the photographs does not show that. Ms. Davis contends that the building proposed here would not continue the stepping down pattern, because it would be the same height as the Edgemoor Condominiums and the residential portion of Hampden Square.

⁸ The Applicant provided a computer simulation of what a 65-foot building might look like on the subject property, Exhibit 45(r), but the simulation was so clearly designed to maximize the visual obtrusiveness of the structure that the Hearing Examiner considers it more prejudicial than probative, and therefore has neither relied on it nor included it in this report.

⁹ The binding elements would permit lot coverage of up to 60 percent.

Skyline Photograph from Roof of Bethesda Avenue Garage, Ex. 56(a)



The Applicant points out that the proposed building would represent a step down from the office portion of Hampden Square, and would appear to be somewhat lower than the Edgemoor Condominiums because of topography.

The Opposition argues that residents of the upper floors of the Edgemoor Condominiums would lose their views to the south, which currently take in the Bethesda streetscape and extend all the way to the National Cathedral on the horizon. The photographs reproduced on the next page were taken from the upper floors of the Edgemoor Condominiums, looking south.

Because of the overlap between the east end of the Edgemoor Condominiums site and the west end of the subject property, the east end of the Edgemoor Condominiums would directly face the north side of the proposed building. As a result, east end units would receive the heaviest impact in terms of blocked air, light and views. Some units wrap around the east end of the building, with windows at the corners of the building and along the east face. Opposition witnesses testified that these residents look directly at the Chase to the north and much taller buildings to the east and northeast, so their only open views are to the south and southeast. They are very concerned that a 100-foot building on the subject property would close them in on their only open side, taking away most of their desirable views.

View from Upper Floor of Edgemoor Condominium, Ex. 50(a) at 7



Horizon View from Upper Floor of Edgemoor Condominium, Ex. 64(a)



This view was supported by the Opposition's land planner, who described the height and closeness of the Chase building to the Edgemoor Condominiums as oppressive. He stated that the proposed building would eliminate a great deal of the skyline on the south side of the building because of the angle. He also observed that even for residents on the sixth and lower floors, a 65-foot building would be more compatible because it would have less of the oppressive "canyonization" effect of two tall buildings standing close together. He described this as more than the direct effects of light and shadows, but also a psychological feeling of enclosure. A shorter building would preserve greater access to light, air and views of the sky.

The photographs below and on the next page show the view from the upper floors of the Edgemoor Condominiums to the north and the northeast.

View from Edgemoor Condominiums to the Chase, Ex. 64(e)



View from Edgemoor Condominiums to the Newlands Building and Northeast, Ex. 64(c)

The Applicant contends that the proposed building would not adversely affect the Edgemoor Condominiums because it would be so compatible with the surrounding area. The Applicant's land planner, Mr. Rivkin, testified that the proposed building might "restrict" some views from the Edgemoor Condominiums but would not completely block the view to the south. Tr. June 15 at 225-26. He noted that the proposed building would be perpendicular to the Edgemoor Condominiums, rather than broadside, and would occupy only a "small band" of space. The Applicant's architect, Mr. Sponseller, testified simply that the proposed building would not have a detrimental effect on views from the upper floors of the Edgemoor Condominiums. Tr. June 15 at 169-170. The Hearing Examiner finds the more nuanced testimony from Mr. Rivkin and Mr. Doggett to be more plausible. None of the numerous exhibits in this case show how the proposed high-rise would appear from the Edgemoor Condominiums. As a result, it is difficult to know precisely the

degree to which views would be diminished. At a minimum, however, units at the east end of the building with south-facing windows would find their views blocked or sharply restricted. It may be that the proposed building would block only a “small band” of space for units farther west along the Edgemoor Condominiums façade, but for units at the east end of the building that small band could be most of the viewshed.

Mr. Doggett noted that the proposed high-rise would also create a sense of enclosure for pedestrians on Woodmont Avenue, and would present residents of Hampden Square, across Woodmont Avenue, with another 100-foot building as their primary view. Mr. Rivkin opined that construction of the proposed building would improve the view from Hampden Square, which currently looks out on a big parking lot, a couple of old houses that were nicely transformed into offices, and an older and rather tired garden apartment.

The Zoning Ordinance specifies that in the TS-R Zone, the maximum height for any building shall be determined during site plan review. Code §59-C-8.51. In approving height limits, the Planning Board is directed to:

. . . take into consideration the size of the lot or parcel, the relationship of the building or buildings to surrounding uses, the need to preserve light and air for the residents of the development and residents of surrounding properties and any other factors relevant to the height of the building.

The Opposition contends that the building proposed here would block significantly more light and air at 100 feet than at 65 feet, causing them much greater detriment. The Applicant maintains that because the building would have a smaller footprint at 100 feet, it would not block substantially more light and air than a shorter, squatter building. Appendix I includes two exhibits that were prepared by the Applicant’s architect to simulate the shadows that a building on the subject property would cast at various times of day. These computer simulations compare the shadows expected from a conceptual idea of a 100-foot building with those from a conceptual idea of 65-foot building with a larger footprint; the record does not indicate with any precision how the footprints of each of these possible buildings was established.

In addition to direct impacts on existing buildings, the Opposition is concerned that approval of the subject application would make additional approvals of tall buildings in the TS-R

District more likely. Notwithstanding Mr. Rivkin's contention that little land is available, the Opposition testified that there are several parcels that could be consolidated, including on Montgomery and Hampen Lanes, and developers are busy assembling them. Tr. June 16 at 48, 60-61.

H. Edgemoor Condominiums and other Approvals Departing from Sector Plan

The history of zoning reclassifications and site plan approvals in the Bethesda CBD demonstrates a long tradition of departing from the recommendations of the Sector Plan.

1. City Homes Townhouses

In early 1996, little more than a year after the Sector Plan was adopted, the District Council approved Application G-721, which reclassified from the R-60 Zone to the TS-R Zone about half an acre of land that became the western half of the City Homes Townhouses site.¹⁰ This property abutted the corner lot at Arlington Road and Montgomery Lane. The applicant sought to build 17 townhouses with English basements and underground parking. The hearing examiner in that case recognized that with a total density of 35 dwelling units per acre, the project did not strictly conform to the Sector Plan recommendation for a minimum density of 45 d.u./acre except on Arlington Road. However, the hearing examiner found that the proposal conformed to the Sector Plan's land use and zoning recommendations, and that a "minor deviation" from the recommended density was justified by the site's proximity to Arlington Road and its large dwelling units, which approximated the scale and bulk of a higher density project. Later that year, Development Plan Amendment No. 96-4 authorized the developer of the G-721 site to reduce the number of units to 18 townhouses, with ground-level garages and no English basements.

In the early part of 1998, the Council approved Application G-755, reclassifying the rest of the City Homes site from R-60 to TS-R.¹¹ The project was to be part of the same development as the G-721 property, with a shared homeowner's association. The hearing examiner in this case noted that the density was below the level recommended in the Sector Plan – this time it was only 27 d.u./acre, because the developer had discovered that underground parking was prohibitively

¹⁰ The Hearing Examiner takes official notice of the December 29, 1995 hearing examiner report in G-721.

expensive. The hearing examiner's report does not suggest any discussion of unit types other than townhouses, which might have permitted increased density without the need for underground parking, or might have spread the cost of parking among a greater number of units. The project was considered compatible with other Sector Plan objectives, and deviating from the density recommendation was found justified by proximity to Arlington Road (although this site was several lots away from Arlington Road) and a bulk and scale similar to higher density uses.

2. The Edgemoor Rezoning

Towards the end of 1998, the District Council approved four related cases, two rezonings and two development plan amendments, which, together, allowed the Edgemoor Condominiums to be built. See Hearing Examiner's Reports and Council Resolution, Exs. 68(a) and (b). Application G-763 reclassified the Edgemoor Condominiums site from R-60 to TS-R to allow the construction of a ten-story, 100-foot high-rise. Application G-769 resulted in reclassifying a very small parcel on Hampden Lane from R-60 to TS-R to allow the construction of between one and three townhouse units. DPA 98-1 and DPA 98-2 transferred unused density from the sites of G-755 and G-721, respectively, to allow increased density for G-763.

The plan for the Edgemoor Condominiums was described at zoning as a 10-story building with between 147 and 149 rental units, including 20 MPDUs, and 188 underground parking spaces. It was to be set back 45 feet from the Chase. The overall density for the combined "project," consisting of the already-approved and partially-built City Homes Townhouses, the Edgemoor Condominiums and the proposed Hampden Lane townhouses, was 110.6 d.u./acre. See Ex. 68(a) at 8. (The density on the Edgemoor Condominiums site itself, which measures about half an acre, would have been nearly 300 d.u./acre.) The overall density exceeded the maximum of 100 d.u./acre recommended in the Sector Plan, although the hearing examiner pointed out that it was well within the upper limit of 150 d.u./acre established in the development standards for the TS-R Zone. He noted that densities below the Sector Plan minimum had been approved in G-721 and G-755.

¹¹ The Hearing Examiner hereby takes official notice of the hearing examiner report in G-755, dated February 18, 1998.

Technical Staff recommended denial or deferral of G-763 and its companion cases for a number of reasons, including building height. The Planning Board recommended denial based solely on failure to conform to the Sector Plan's height recommendations. The Planning Board was concerned that a high-rise at this location would set a precedent that would undermine implementation of the height limit at other locations. The hearing examiner noted that the Sector Plan's building height recommendations had not been rigidly applied in other cases. *Id.* at 13. The 175-foot Newlands Building, then under construction, is located in an area with a 143-foot height limit; Hampden Square, with a 143-foot high building, is located in a area recommended for a 125-foot height limit; and the 94-foot Bethesda Theater residential building, then approved but not built, is in an area with a 90-foot limit.

The hearing examiner went on to state, in this 1998 report, that the urban village concept of six-story buildings with structured parking "has not materialized because market conditions make it uneconomical . . . Persuasive evidence of record indicates that structured parking can only be economically provided in taller buildings." *Id.* He concluded that deviation from the height limit recommended in the Sector Plan was justified because (a) the Edgemoor Condominiums property is located at the northeastern edge of the 65-foot height limit area, adjacent to areas with much taller buildings; (b) the property is located within the same block as a taller building (the Chase); (c) the building would have little impact on surrounding uses because of the highly urbanized character of the area; and (d) the proposed height would provide for a compatible and transitional use for lower scale buildings to the west. Ex. 68(a) at 26. The hearing examiner noted that the "location of the site adjacent to the CBD and taller office and apartment buildings and between lower-rise residential areas make this property unique so it will not be a precedent for the wholesale disregard of the sector plan's height limits for this area." *Id.*

The hearing examiner emphasized that an application for the TS-R Zone is not required to be in substantial compliance with the Sector Plan's height recommendations, only with its use and density recommendations. *Id.* The TS-R Zone explicitly gives the Planning Board the authority to approve building heights at site plan, based on site-specific factors. See Code §59-C-

8.51, Ex. 68(a) at 27. As the hearing examiner noted, the Planning Board would have the authority to require a reduction in height if it found problems related to light, air or relationship to other buildings.

Ultimately, the Hearing Examiner found that the rezoning should be approved because the proposed development was consistent with the Sector Plan's recommendation for residential use, the deviation from the recommended height was justified on the merits, the requirements of the TS-R Zone were satisfied and the development would be compatible with adjacent land uses. He noted that Technical Staff's concerns about inadequate setbacks and ground-level recreation space could be evaluated again at the site plan stage, where building height, setbacks and open space would be subject to further review. He described approval of the proposed development as "a trade off to permit the sector plan's zoning, density and parking objectives to be achieved. In order to achieve these objectives, a tall building must be located on the site. The exact height of the building is a site plan issue." Ex. 68(a) at 30.

The only opposition to G-769 and its companion cases, other than Technical Staff and the Planning Board, was a letter submitted by Malcolm Rivkin, who in the present case served as an expert witness for the Applicant. See Ex. 51. In 1998, Mr. Rivkin recommended denial of G-769 and its companions because of their inconsistency with the Sector Plan. Today, Mr. Rivkin says that the Sector Plan's urban village concept is dead and should not stand in the way of a rezoning that will provide high-density housing. He argues that strict adherence to the height limits recommended in the Sector Plan would impede the achievement of other goals.¹² Mr. Rivkin suggests that approving the proposed development would help the County recover some of the recommended density that has not been developed elsewhere in the TS-R District. See Ex. 9 at 21-22.

The Edgemoor Condominiums as built departed in significant ways from the proposal that was presented at zoning. Instead of about 150 rental units including 20 on-site MPDUs, the building contains 54 condominium units and no MPDUs. Thus, the Edgemoor Condominiums did not

¹² Mr. Rivkin's written report quotes former Planning Board Chairman Hussman, who commented in the 2001 Bethesda Triangle case that the Sector Plan height recommendations made it impossible for developers to achieve the density bonuses that were supposed to be available in exchange for higher numbers of MPDUs on site. See Ex. 9 at 21. This comment is only indirectly applicable to the present case, where the Applicant has not made a commitment to providing all MPDUs on site.

contribute to Bethesda either the high density level or the MPDUs that were part of the District Council's consideration in granting the zoning.

3. Other Cases

In addition to the cases already noted, the Applicant cites the Bethesda Triangle case, where the Planning Board approved a height of 125 feet at site plan in a location recommended in the Sector Plan for no more than 110 feet. See Ex. 9 at 20. The table below provides summary information about five projects that have been approved in the Bethesda CBD with heights above the limits recommended in the Sector Plan. The drawing on the next page, Exhibit 72, is a copy of the Sector Plan's Building Height Limits map (Figure 3.2) that has been annotated by the Applicant's counsel and land planner to identify these five projects.

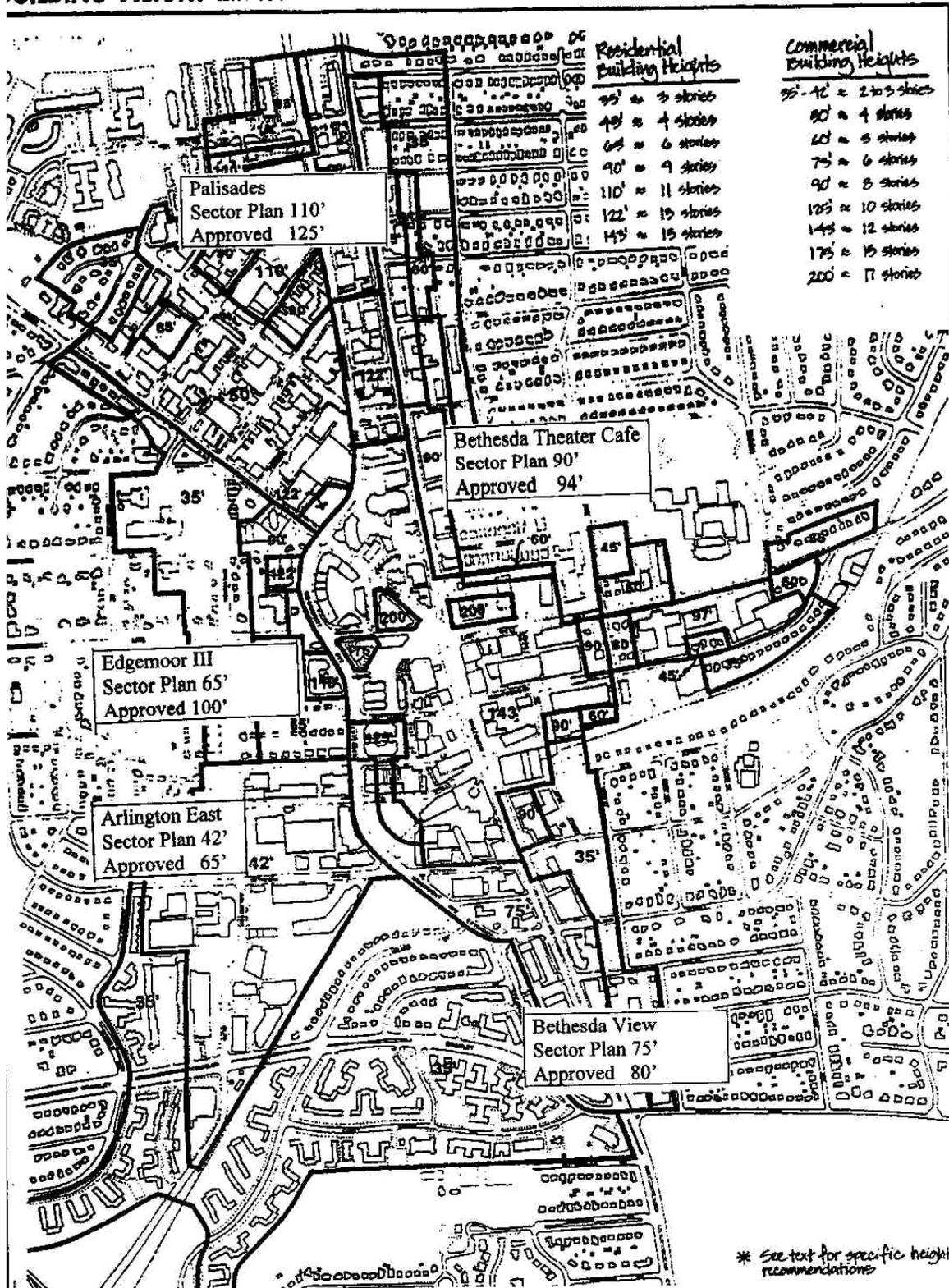
Projects Approved at Heights Above Sector Plan Recommendations (locations identified on Exhibit 72)

Project	Location	Sector Plan Height Guideline	Actual Height	Project Plan/Site Plan Approval Date
Bethesda Theater Café/Residential	Wisconsin Ave. between Middleton Lane and Cheltenham Dr.	90 feet	94 feet	11-24-97
Edgemoor Condominiums	Woodmont Ave. and Montgomery Lane	65 feet	100 feet	7-21-99
Palisades (aka Bethesda Triangle)	Woodmont Ave. and Rugby Rd. between Cordell and Del Ray	110 feet	125 feet	5-20-01
Arlington East	Arlington Rd. between Elm St. and Bethesda Ave.	42 feet	65 feet	2-19-04
Bethesda View	Bradley Blvd. and Wisconsin Ave.	75 feet	80 feet	5-6-04

The Opposition puts less weight on these examples, and particularly the Federal Realty building (Arlington East), which was approved after several years of intense dispute and litigation. That project was approved partly because the building was reduced from its originally proposed height of 90 feet and because at 65 feet, it would screen the single-family residential community west of Arlington Road from the view of a parking garage on Bethesda Avenue. The Opposition also notes that the Bethesda Theater Café involved a very minor deviation, the Edgemoor Condominiums were approved based on several unusual factors, and the Palisades is outside the TS-

R District. The Hearing Examiner notes, in addition, that the Bethesda View project involved a very minor deviation from the height recommendation.

Annotated Building Height Limits Map, Ex. 72



I. Public Facilities

In evaluating the compatibility of a proposed development and whether it would serve the public interest, the District Council must consider whether the development would be adequately served by and/or would have an adverse effect on public facilities. Under the County's Adequate Public Facilities Ordinance (Code §50-35(k)), the Planning Board has the responsibility, during subdivision review, to assess the adequacy of transportation, schools, water and sewage facilities, and police, fire and health services to support the proposed development. This assessment is guided by parameters that the County Council sets each year in the Annual Growth Policy ("AGP") and biennially in the two-year AGP Policy Element.¹³ While the final test under the APFO is carried out at subdivision, evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of this stage of the process and the opportunity for a more comprehensive review than may be available at subdivision. The District Council is charged at the zoning stage with determining whether the proposed development would have an adverse impact on public facilities and, if so, whether that impact would be mitigated by improvements reasonably probable of fruition in the foreseeable future.

1. Transportation: Road Capacity

Under the 2003-05 AGP Policy Element, as of July 1, 2004 subdivision applications are subject to only one transportation test, Local Area Transportation Review ("LATR").¹⁴ The Planning Board recognizes its LATR Guidelines as the standard to be used by applicants in the preparation of reports to the Hearing Examiner for zoning cases. LATR Guidelines at 1. LATR generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the peak hours of the morning and evening peak periods. Under the LATR Guidelines in effect when this case was filed in February 2004, an LATR study was not required unless a proposed development would generate 50 or more peak-hour trips during the

¹³ See *2003-05 Annual Growth Policy – Policy Element, Resolution No. 15-375*, adopted October 28, 2003. The Hearing Examiner hereby takes official notice of the 2003-05 AGP Policy Element.

¹⁴ See 2003-05 AGP Policy Element at 6-7; *Local Area Transportation Review Guidelines Approved and Adopted July 2004* ("LATR Guidelines") at 1. The Hearing Examiner takes official notice of the LATR Guidelines.

morning or evening peak traffic hour.¹⁵ Under the current LATR Guidelines, adopted in July 2004, the threshold for an LATR traffic study has been lowered from 50 peak-hour trips to 30.¹⁶ Where traffic generation is not expected to reach the specific threshold, the development considered too small to have a measurable traffic impact on a specific local area. LATR Guidelines at 5; 1998 LATR Guidelines at 2.

In the present case, Technical Staff estimated that the proposed development would generate less than 50 peak hour trips. Accordingly, under the 1998 LATR Guidelines, no transportation study was required. Neither Technical Staff nor the Applicant addressed the Policy Area Transportation Review (“PATR”) requirements that were applicable on the date the present application was filed, perhaps because PATR is no longer required.

The Hearing Examiner finds it somewhat inconsistent to apply the 1998 threshold for an LATR study while operating under the 2004 abolishment of PATR. This distinction appears to be without consequence, however, because under the trip generation rates established for the Bethesda CBD in the current LATR Guidelines, a 65-unit residential high-rise is expected to generate approximately 20 trips, well under either threshold. See LATR Guidelines at 54; Ex. 76(c) at 1-2. A 65-unit apartment building classified as garden or “mid-rise” apartments rather than high-rise might require an LATR study, because the estimated trip generation is 29.25 trips, which could round up to 30 trips. See LATR Guidelines at 54; Tr. Sept. 21 at 119-120. Moreover, even at 100 feet in height the project proposed for this site might not be classified as a high-rise for this purpose – the LATR guidelines define “high-rise” as a building with ten or more stories, while the Applicant here proposes a nine-story building that would reach 100 feet because of tall ceilings. In any event, it appears that the project would be able to proceed through subdivision without a traffic study, at least if the Applicant finalizes the number of units at a number below 65.

Mr. Carter, representing Technical Staff and the Planning Board, testified that the Planning Board recently approved a decision that the Bethesda CBD should proceed to “Stage II” of a

¹⁵ See *Local Area Transportation Review Guidelines Approved and Adopted April 1998* (“1998 LATR Guidelines”) at 2. The Hearing Examiner hereby takes official notice of the 1998 LATR Guidelines.

¹⁶ See LATR Guidelines at 5.

multi-step development program contained in the Sector Plan. Technical Staff's recommendation to move to Stage II was contained in a memorandum that the Applicant submitted into this record after the hearing.¹⁷ See Memorandum dated April 2, 2004 from Daniel K. Hardy, Transportation Planning, via John Carter, Chief, Community-Based Planning Division, to Planning Board ("Stage II Memo"), Ex. 76(c). The Sector Plan recommended six near-term objectives for the Bethesda CBD, which were described as Stage I. The Sector Plan "limited Stage I development to 5,000 jobs above the 1993 level, and indicated that long-term growth would add another 11,400 jobs to the Stage I total." Stage II Memo at 2. Technical Staff noted in the Stage II Memo that all of the Stage I objectives had been met, including the completion of a Comprehensive LATR. Other objectives included reaching Stage I ceiling capacity, establishing a transportation management organization, maintaining a constrained long-term parking policy, increasing the percentage of employees using non-auto transport to 32 percent¹⁸, and implementing or programming transportation facilities recommended during Stage I. See Stage II Memo at 3-6.

The Comprehensive LATR took a broader approach to analyzing the likely effects of development projects than LATR studies performed at subdivision. The Comprehensive LATR drew two key conclusions (Stage II Memo at 7):

- The existing and forecasted areawide transportation level of service meets an acceptable AGP standard.
- Reasonable transportation demand management objectives and intersection improvements can be implemented to achieve Stage II development except at three locations in the Bethesda-Chevy Chase Policy Area (Wisconsin Avenue at Jones Bridge Road, Connecticut Avenue at Jones Bridge Road and Connecticut Avenue at East-West Highway).

¹⁷ This material was accepted over the objection of the Opposition, who felt that permitting the Applicant to present additional evidence after deficiencies were identified during the hearing was unfair. In an effort to respond to that objection without excluding relevant evidence, the Hearing Examiner granted the Opposition's request for an additional hearing date, at which the Opposition had the opportunity to question Technical Staff about traffic conditions in the Bethesda CBD and the likely impact of the present project.

¹⁸ The Stage II Memo notes that the use of a commuter survey to assess employee use of non-auto transport has been controversial, and has been criticized because the sampling process was not random. In addition, other readily available data such as peak period traffic volume and transit utilization counts have remained essentially constant during the past few years, so they do not corroborate the survey results. However, several factors complicate the analysis. In early 2001, the County Council considered several alternative means for assessing non-auto travel for this purpose, and determined that the annual commuter survey remained the most cost-effective. See Stage II Memo at 5.

Because of the three intersections where solutions to high congestion levels have not been identified, Technical Staff recommended that a new ceiling of 5,000 jobs be established for Stage II. This represents about half of the Stage II commercial development envisioned in the Sector Plan. Technical Staff did not recommend a housing ceiling for Stage II, because “housing in the Bethesda CBD tends to generate primarily off-peak direction travel at the three intersections of concern,” all of which are located outside the CBD to the north or east. Stage II Memo at 7. Most residential traffic leaving the CBD tends to travel to the south and west during the morning peak hour, returning to the CBD in the evening without reaching the three problem intersections.

The Applicant submitted into the record a letter from the Chairman of the Planning Board to the President of the County Council which reports that the Planning Board has endorsed Technical Staff’s recommendation to move to Stage II with a cap of 5,000 new jobs, but no cap on housing units. See Ex. 78, third page. The Applicant argues that the Planning Board’s decision to move to Stage II, with no ceiling on residential development, provides a strong indication that traffic conditions in the Bethesda CBD can accommodate the project proposed here. See Ex. 76(c) at 3.

The Opposition contends that the Applicant has not demonstrated a lack of adverse traffic impacts sufficiently to pass public facilities review at the zoning stage. Their argument is two-fold: (1) because the size of the project exempts it from LATR, no traffic study will be required at subdivision, so the zoning stage is the only opportunity to obtain such a study; and (2) the Stage II Memo was driven by policy, not by actual improvements in traffic conditions, and it does not constitute a sound basis for concluding that the Bethesda CBD has sufficient traffic capacity to accommodate the proposed development.

The Opposition sought to discredit the Stage II Memo through cross-examination of its principal author, Daniel Hardy of the MNCPPC. Mr. Hardy acknowledged that when the Stage II Memo was written, the Planning Board was looking for documentation to support moving from Stage I to Stage II, “which would have the effect of allowing the board to continue approving development.” Tr. Sept. 21 at 98. Without a move to Stage II, the CBD was in danger of running out of development capacity, meaning that the Planning Board could find itself unable to approve any more development.

Opposition counsel asked Mr. Hardy to review the Montgomery County Annual Development Approval and Congestion Report (“ADAC Report”, Ex. 90), which the County Council requested as an aid in prioritizing transportation funding needs. He acknowledged that the ADAC Report identifies ten intersections in the combined Bethesda - Chevy Chase Policy Area (all outside the Bethesda CBD) that have unacceptable levels of congestion, and agreed that adding traffic to those intersections would likely make conditions worse, depending on the direction of travel. *Id.* at 93-95, 97. Nonetheless, failing intersections do not necessarily prevent the policy area from going to Stage II. *Id.* at 99-100. The Sector Plan provides that Stage II can begin when area-wide transportation levels meet acceptable AGP standards, and intersection improvements likely to be needed during Stage II have been identified. Mr. Hardy conceded that under this formula, it is theoretically possible for the area as a whole to meet AGP standards, even if a major road like Wisconsin Avenue is immovable from congestion, as long as other major roads are moving. *Id.* at 102-103.

Mr. Hardy acknowledged that for small projects, those generating less than 30 trips under the current LATR Guidelines, when the development gets to subdivision review there is essentially no discussion of traffic. *Id.* at 117-18. He reiterated that Staff did not propose a Stage II ceiling for residential development because the vehicle trips generated by housing in the Bethesda CBD would generally be heading against the peak traffic flow at the three intersections of concern identified in the Stage II Memo.

Under questioning by Applicant’s counsel, Mr. Hardy confirmed that the Staff Report in this case recommended limiting the proposed development to less than 65 units to satisfy LATR. He acknowledged that the limit for acceptable CLV in the Bethesda CBD is 1,800, and confirmed findings in the ADAC Report that CLV counts are well below that level at three intersections along Woodmont Avenue -- Elm Street, Montgomery Lane and Cordell. Tr. Sept. 21 at 125-26. Moreover, the ADAC Report found no intersections in the Bethesda CBD that are currently operating above the acceptable CLV limit. Mr. Hardy agreed that for a small project in the CBD, Technical Staff would not be looking

at intersections near the Beltway to measure traffic impacts, in part because of the difficulty of measuring the traffic impacts of a small development on conditions so far away.

2. Transportation: Circulation Patterns and Traffic Safety

The binding elements specify that resident parking would be provided underground, with a small number of surface parking spaces for drop-off and visitor parking. The Development Plan does not provide any definite information concerning how vehicles would access or move around the site. Accordingly, evaluation of circulation patterns and traffic safety should be based only on the general parameters established in the binding elements,

Nonetheless, a considerable amount of time and attention during was devoted during the hearing to considering the adequacy of the conceptual circulation pattern shown on the Development Plan. Under the conceptual site plan, residents would access the proposed building by car from Montgomery Lane and descend into an underground parking garage. The only surface-level parking on site would be a very limited number of spaces, probably about three, in front of the main entrance. These would be considered drop-off/pick-up spaces and visitor parking. The site would have a service bay at the rear of the building, accessed via Hampden Lane. The Applicant submitted an engineer's certification that both driveways would satisfy county sight distance standards. See Exs. 45(g) and (h).

The Opposition contends that the parking and circulation on the Montgomery Lane side would be unsafe because of insufficient visitor parking and constrained turn-around space. The Applicant's civil engineer, James Hendricks, testified that there is little or no room for cars to stop on Montgomery Lane to drop off or pick up passengers. As a result, cars would pull into the drop-off area for this purpose. If all three parking spaces in the drop-off area were being used by visitors, Mr. Hendricks suggested that a car would stop in the entrance area of the site to drop off passengers, and might have to descend into the parking garage to turn around and exit onto Montgomery Lane. Given the limited space available, turning around without going into the garage would require a lot of turning movements. The other option would be backing out onto Montgomery Lane. Mr. Hendricks stated that he is not a traffic safety expert, but he expects the effect of that maneuver would be similar to a

car backing out of a residential driveway onto a street. He had not studied that question, but conceded that “it might not be the best of situations.” Tr. June 15 at 273.

The Opposition’s land planner, Mr. Doggett, considers the Montgomery Lane entrance somewhat unsafe because of the limited turnaround area and the probability that drivers would back out onto Montgomery Lane to leave the site. Tr. June 16 at 78. He conceded on cross-examination that depending on traffic flows and whether the drop-off spaces were occupied, a driver dropping off a passenger would not necessarily back out onto Montgomery Lane. He maintained, however, that with the activity one could expect at the site, it might be difficult to execute the maneuvers necessary to turn around and exit the site facing forward. *Id.* at 105-107.

Technical Staff did not opine as to whether the vehicular access and internal circulation pattern proposed, either as described in the binding elements or as shown on the conceptual site plan, would be safe, adequate and efficient.

3. Utilities

The Staff Report and written submissions by the Applicant indicate that water and sewer lines abut the subject property, local service is deemed adequate and the impacts from rezoning would be negligible. See Staff Report at 5; Ex. 12. No specific information was provided concerning other utilities such as electric, telephone and gas, but in light of the site’s location in downtown Bethesda, such services are undoubtedly readily available.

4. Schools

The subject property is located in the Bethesda-Chevy Chase cluster and would be served by Bethesda Elementary School, Westland Middle School and Bethesda-Chevy Chase High School. Based on average yield factors for high-rise, multi-family housing with 65 units, Montgomery County Public Schools (“MCPS”) expects the proposed development to generate approximately five elementary school students, two middle school students and one high school student. See letter dated March 30, 2004 from Joseph J. Lavorgna to Bill Landfair, attached to Ex. 76(d). According to MCPS capacity calculations, enrollment is expected to exceed capacity for the entire six-year forecast

period at Bethesda Elementary School, and for most of the six-year forecast period at Westland Middle School (which currently has six portable classrooms) and Bethesda-Chevy Chase High School. *See id.* The FY 2005-2010 Capital Improvements Program (CIP) includes a six-room addition to Westland Middle School, scheduled to open in August 2008. This addition will provide relief from overcrowding. The CIP also includes a five-room addition to Bethesda-Chevy Chase High School, scheduled to open in August 2009, which will provide relief from overcrowding. *See id.*

The school capacity test under the AGP finds capacity adequate in all clusters for purposes of subdivision review in FY 2005. *See id.*; letter dated June 25, 2004 from Derick P. Berlage to Steve Silverman, attached to Ex. 79. The Applicant contends that based on this finding, school capacity in the Bethesda-Chevy Chase cluster should be considered adequate to accommodate the proposed development.

The Opposition argues that the evidence is not sufficient to establish that the proposed development would not have an adverse impact on the public schools. Opposition counsel questioned Joseph Lavorgna of MCPS and Karl Moritz of MNCPPC about enrollment projections and capacity calculations. Mr. Lavorgna explained that the number of students expected from a particular development is calculated based on rates developed by the MNCPPC. These include a single rate for all high-rise residential buildings, regardless of how many stories a building contains, how many bedrooms the units contain and how many units are MPDUs. Tr. Sept. 21 at 45-46, 49. Any building with more than four stories is considered a high-rise for this purpose.

Mr. Moritz explained that for purposes of the AGP, school capacity is assessed on a cluster basis, not by individual school. Accordingly, if one elementary school is over capacity but another elementary school in the same cluster is under capacity, the cluster as a whole will have adequate capacity under the AGP. Capacity for each school is calculated for AGP purposes by multiplying the number of existing classrooms (excluding portables), plus the number of classrooms that are fully funded in the first five years of the CIP, by a standard capacity figure. That figure is 25 students per classroom in grades 1 through 6, and 22.5 per classroom in grades 7 and up.

Mr. Mortiz further explained, and Mr. Lavorgna confirmed, that MCPS calculates capacity in individual schools based on programming, i.e., how each classroom is actually used. For example, a classroom that is used to teach English as a Second Language, to teach children with special educational needs, or for foreign language classes at the high school level probably would not have 25 students in it at one time. The AGP methodology for calculating school capacity results in higher capacity numbers than the MCPS methodology. MCPS compared its capacity calculations to AGP capacity calculations in 2003 and found that MCPS program capacity was about 92 percent of AGP capacity at the elementary and middle school levels, and about 94 percent at the high school level. Thus, if an elementary school were considered to have a capacity of 100 students for AGP purposes, on average the capacity calculated by MCPS would be 92 students. Tr. Sept. 21 at 19.

In response to questioning about how the County Council chose the current AGP capacity measurement, Mr. Moritz stated that one concern about using a program capacity measure was that it could result in schools coming under pressure to make programming changes to avoid a moratorium, or it could allow school programming decisions to cause a moratorium. *Id.* at 34. Mr. Lavorgna recalled as one rationale for the AGP method that programming changes from year to year, and the AGP methodology that was adopted would result in more stable numbers over time.

Mr. Moritz acknowledged that the purpose of the AGP test is to determine, for each fiscal year, whether any clusters should be place moratorium. It was not developed to test school capacity for any individual development proposal. *Id.* at 41.

Mr. Lavorgna testified that when a school is a little bit over capacity, they deal with it by changing the scheduling and adding portable classrooms. The AGP establishes a moratorium when projected enrollment reaches 110 percent of capacity because at that point, MCPS cannot build fast enough to keep up with the growth; a moratorium is necessary until the situation is corrected through either a boundary change or a capital improvement. *Id.* at 72-76. Mr. Lavorgna acknowledged that it is not uncommon for MCPS's enrollment projections to be too low or too high. *Id.* at 78. They aim for every school to have enrollment within five percent of the projections. BCC High School, for instance,

had 43 more students than projected as of September 2003.¹⁹ In a school with 1,500 students, five percent would be 75, so the deviation was within the five percent goal. Of the seven elementary schools in the BCC cluster, five came in under projections in September 2003, two came in over and the cluster as a whole was under the projections.²⁰

With regard to CIP funding, Mr. Lavorgna acknowledged that projects listed in the CIP are not always constructed in the year in which they are listed. *Id.* at 61. Projects may get delayed if county or state funding does not come through on schedule, but Mr. Lavorgna could not recall any instance when money was not appropriated for a project that has been listed as funded in the CIP.

J. Environment and Stormwater Management

The proposed development is exempt from forest conservation requirements because the property is less than one acre and the project would not result in clearing more than 30,000 square feet of existing forest. See Ex. 11. Technical Staff reports that a Natural Resources Inventory/Forest Stand Delineation plan has been approved.

The Environmental Staff Report attached to the main Staff Report states that the subject property lies within an urban watershed management area, where the County Stream Protection Strategy calls for cost-effective stormwater quality controls on sites within the watershed. Tr. June 15 at 274. Although stormwater management is not part of the binding elements of this application, the Applicant's engineer testified that on-site stormwater management would likely be provided through a structural filtering device located beneath the service drive and connected to the public storm drainage system. The Applicant's engineer testified that groundwater recharge likely would not be required for this site, since it is a redevelopment project, not bare land. Similarly, he does not expect any stream channel protection (quantity control) measures to be required, due to the size of the property and limited rate of runoff. The Applicant would require approval of its stormwater management plan by the Department of Permitting Services.

¹⁹ September 2004 data was not yet available at the time of the hearing.

²⁰ Mr. Lavorgna obtained these statistics from a report that MCPS prepares on deviations from projected enrollment, which was placed in the record as Exhibit 88.

K. Community Participation

The Staff Report noted that concerns raised by community members opposed to the present application include limiting views from the upper floors of the Edgemoor Condominiums and exceeding the height expected on the subject site by occupants of the adjacent City Homes Townhouses. Ex. 38 at 6. Staff noted that other community members support the present application for several reasons -- the high-rise configuration reduces lot coverage and increases green space and setbacks; the property's location at the eastern edge of the TS-R District is as far as it can be from the Edgemoor and Battery Lane single-family neighborhoods; and the proposed development includes 15 percent MPDUs on site. *Id.* at 6-7. The Hearing Examiner notes that at present, the Applicant has not made a binding commitment with regard to either the percentage of MPDUs to be provided or how many would be on site; the binding elements specify that the project would include *up to* 15 percent MPDUs, and that some (but not necessarily all) would be on site.

Three community members testified in support of the present application. Two are residents of the adjacent City Homes Townhouses, including a representative of the City Homes Board of Directors. They described how the owners of the end units abutting the subject property hired a planner to advise them regarding this project and, based on his advice, negotiated a memorandum of understanding with the Applicant that set down certain changes the Applicant would make to the building design in exchange for support for the project. These changes are incorporated in the binding elements for this application, but are contingent on approval of the 100 foot height the Applicant seeks. Both sets of comments were submitted in writing as well. See Exs. 60 and 61. The third community member who testified in support, Howard Balick, is a resident of the Edgemoor Condominiums who lives on the sixth floor, facing Montgomery Lane. He testified that not all the residents of the Edgemoor Condominiums oppose the subject application. He and his wife believe that the proposed building would add to the visual vitality of downtown Bethesda, and they welcome it. See *also* Balick letter at Ex. 63.

The record contains seven letters in support of the subject application. The most detailed is from the Washington Regional Network for Livable Communities ("WRN"), which

“advocates transportation investments, land use policies and community designs that enhance existing communities and the environment of the Washington, D.C. region.” Ex. 43. WRN’s goal is a network of walkable communities linked by quality transit and surrounded by greenbelts, with the District of Columbia as the economic and cultural hub of the region. WRN finds that the density proposed in this case is generally consistent with the site’s location near Metro, and that the height is appropriate in an urban center. WRN would support increased density to improve some of the weaknesses it identifies in the proposed project, and suggests reduced parking as a way to save space, potentially reducing building height and costs. WRN would also encourage the addition of convenience retail or professional office uses to enliven the street, serve area residents and help create pedestrian connections between Old Georgetown Road and Bethesda Avenue.

WRN describes the relationship of the proposed building to the street as “polite,” with landscaped edges “euphemistically called ‘active and passive recreation space’.” Ex. 43 at 2. WRN offered several suggestions to make the building one that would engage and enhance the public realm, noting that it is difficult to really assess the building with the few details provided thus far. WRN’s suggestions include adding live/work space, professional offices or convenience retail on the ground floor, perhaps extending closer to the street; making sure that the ground floor architecture creates a good urban building rather than “a suburban fortress misplaced on an urban street”; and making the undefined “common space” or “public space” a useful amenity. WRN closes with the following advice:

We realize it may seem premature to be discussing streetscape details when there are larger zoning issues in question, but WRN recognizes that if the higher densities appropriate for transit-oriented development do not create attractive, convenient, safe, and fun public spaces, then it will become more and more difficult to counter the opposition to TOD [transit-oriented development] and smart growth policies.

Ex. 45 at 2.

WRN’s letter was endorsed by the Coalition for Smarter Growth, a network of regional environmental, transit and civic organizations supporting transit, transit-oriented development and new urbanist walkable communities. See Ex. 44.

Two letters in support are from residents or owners of units of the Edgemoor Condominiums who believe the proposed building would be a positive addition to the Bethesda streetscape. One noted that when he purchased his unit he fully expected other buildings of similar size to be built nearby, and other buyers should have had the same expectations. See undated letter from Christopher S. Abell, owner of unit 501, Ex. 32. The other writer mentioned the streetscape proposed on the subject site as a welcome green space addition. See letter dated April 22, 2004 from Dr. Bernard Yanowitz, resident of unit 703.

Johanna Neuman, a resident of Hampden Square, writes that the architecture shown on the plans, the premium on green spaces and pedestrian access, and the deep setback from Woodmont Avenue “suggest the potential for a stunning addition to the neighborhood.” Ex. 29. She dislikes the Edgemoor Condominiums, and feels that a shorter, squatter building on the subject site would rob the area of much needed greenery and pedestrian access. Julie Canard, also a Hampden Square resident, faces the subject site. She believes that the upscale design of the proposed building would add a new, welcome dimension to Bethesda. She objects to the Edgemoor Condominiums, which took up every inch of land possible, and welcomes a building of the same height but with green space and walkways. She also notes that as a realtor, she is aware of a tremendous need for large, luxury condominiums in the heart of Bethesda. See Ex. 37. Don McGlynn lives one block from the subject property on Hampden Lane. See Ex. 30. He writes that the design of the proposed building would bring a breath of fresh air to Bethesda, and its height would allow more green space to be added to Montgomery Lane and Woodmont Avenue. He echoed the comments of other writers in saying that approving the proposed project would be smart growth, giving many new residents the chance to enjoy the pleasures of living in Bethesda, one of the most vibrant areas to live in the Washington D.C. region.

The Opposition represented by counsel in this case is comprised of the Bethesda Civic Coalition (representing homeowners at the Edgemoor Condominiums, Hampden Square and townhouses on Arlington Road) and several owners of units in the Edgemoor Condominiums that face Montgomery Lane. Six community members testified in opposition to the subject application, all of

whom are residents or owners of units of the Edgemoor Condominiums. Two spoke on behalf of themselves and the Bethesda Civic Coalition, and most also wrote letters in opposition. See Exs. 57, 58, 59 and 62. Their arguments and evidence have been outlined in the preceding sections by subject matter. Testimony of individual witnesses is summarized in Part IV below.

Two letters were received in opposition to the subject application from David Fairweather, owner and resident of Unit 1003 in the Edgemoor condominiums, on the penthouse level. See Exs. 25 (a) and (b). Mr. Fairweather also arranged for his testimony to be provided at the hearing by his counsel, Arthur Blitz, and provided a set of photographs taken from his home, which he had also presented to the Planning Board. See Ex. 50. One of these photographs is included in Part III.B. above, and another is reproduced in Part III.G. Mr. Fairweather argues that the present application should be denied because the proposed height would violated the Sector Plan's urban village concept. He suggests that if this concept is going to be ignored, the County should go through a public process to amend the Sector Plan. He also suggests that the Applicant have its highly-skilled architects design a project within the Sector Plan requirements, including the use of light shafts, interior gardens and skylights to meet their marketing and density requirements.

Two additional letters in opposition were received from individuals who did not testify in person. Judith D. Heimlich and her husband are residents of the Edgemoor Condominiums who purchased a unit facing Montgomery Lane, at greater cost, with the expectation that the decreasing heights called for in the Sector Plan would preserve their southern exposure and airy, light-filled view. See Ex. 52. They are concerned that the proposed building would adversely affect their view, the glass walls would intrude on their privacy, and the building's sterile, ultra-modern design would be incompatible with the surrounding area. Diane Oakley resides on the 8th Floor of the Edgemoor Condominiums. See Ex. 53. She objects to the proposed height because it exceeds the 65 feet recommended in the Sector Plan. She is also concerned that the all-glass, see-through design in the current drawings would represent a leap of commercialization on the residential side of Woodmont Avenue, and that without the protections of interior uniformity that a commercial building can impose, residents' individual decorating tastes would become an unwanted part of the local cityscape.

IV. SUMMARY OF TESTIMONY

A. Applicant's Case in Chief

1. Robert Sponseller, architect

Mr. Sponseller was designated an expert in architecture. He first described the location of the subject property and the neighborhood, including adjacent uses and other development in the immediate vicinity. Mr. Sponseller described the types of uses and the height and bulk of nearby buildings compared to the building proposed in this case. He identified and described a series of exhibits with various simulations of the proposed building: (1) five computer renderings of aerial views designed to show, in three dimensions, what the proposed building would look like in the fabric of the neighborhood – “to show the harmonious fit of the building in its context” [Tr. June 15 at 35; see Ex. 45(j)]; (2) a comparison of the elevation of the proposed building with existing building elevations in the immediate vicinity [Ex. 45(k)]; (3) a series of photographs with a digital rendering of the proposed building added to the scene; and (4) a series of computer simulations of the shadows that would be cast by the proposed 100-foot building or by a building on the same site with a 65-foot height and a larger footprint [Tr. June 15 at 64-66; see Exs. 45(l) and (m)].

Mr. Sponseller reviewed a color rendering of the illustrative site plan [Ex. 45(q)], pointing out access points, and a diagram identifying potential locations for public use space and active/passive recreation space [Ex. 41(c)]. He noted that the outdoor public use space and active/passive recreation space would be identified separately for purposes of complying with regulatory requirements, but on the ground they would consist of a single, unified area of grass and landscaping. The project would be required to have a minimum of ten percent public use space on the ground, outside the building. The requirement for 20 percent active/passive recreation space may be met all or in part inside the building, in the form of common space for residents, or on the rooftop – it need not be outside or accessible to the public. The final location of public use and active/passive recreation space would be determined at site plan.

Mr. Sponseller stated that the proposed building would contain approximately 94,218 square feet of gross floor area, with an FAR of 3.05. This reflects the 2.5 FAR normally permitted in the zone, plus an assumed 22 percent density bonus for 15 percent MPDUs.

Mr. Sponseller testified that the proposed development would be in substantial compliance with the use and density recommendations of the Sector Plan, although his testimony in this regard should be considered lay testimony, as his expert designation was limited to the field of architecture. He stated that the Sector Plan recommends high density, multi-family residential use for the subject property, as proposed by the Applicant. It recommends 45 to 100 dwelling units per acre, although the TS-R Zone permits up to 150 units per acre. Mr. Sponseller described the Applicant's proposal as providing 92 dwelling units per acre, including MPDUs. The Hearing Examiner notes that this figure presumes construction of the maximum of 65 units. With only 40 units, the project would have a density of approximately 57 d.u./acre.

Mr. Sponseller testified that proposed development would satisfy the purposes, standards and regulations of the TS-R Zone. His testimony in this regard should, again, be considered lay testimony. Mr. Sponseller stated that the subject property is 750 feet from a Metro station, well within the 1,500-foot distance specified as part of the intent of the TS-R Zone. He noted that there are multi-family residential buildings adjacent or confronting on two sides, satisfying the language stating that the zone is intended for locations where multi-family uses exist or are recommended by the sector plan. He stated that the design of the proposed project takes into account the intent of the TS-R Zone to facilitate and encourage innovative and creative design, and the development of a compatible and desirable pattern of land uses.

Mr. Sponseller opined that the proposed development would satisfy the first two purposes of the TS-R Zone, to promote the effective use of transit and to promote residential uses within walking distance of a transit station, because of its location within easy walking distance of Metro. It would take advantage of the zone's purpose to provide the maximum amount of freedom possible in building design by creating a taller building with a larger amount of open space, and by breaking up the massing of the building to improve compatibility with neighboring developments. He

noted that providing MPDUs on site would serve the purpose of the TS-R Zone to provide housing for persons of all economic levels. Neither the mix of MPDUs nor the number to be included on-site has been finalized.

Mr. Sponseller testified that the proposed project would satisfy the development standards of the TS-R Zone, including minimum site area, maximum density and minimum open space. He noted that the TS-R Zone does not have a height limit, and specifies that height is to be established during site plan review, and must assure preservation of adequate light and air for surrounding developments. Mr. Sponseller opined that because of the setbacks and open space planned around the building, adequate light and air would be preserved. In support of this statement, he presented a series of "shadow studies," Exs. 45(l) and 45(m), which compare computer simulations of the shadows that would be cast by the proposed 100-foot building or by a building on the same site with a 65-foot height and larger footprint. He opined that in some respects, a taller building with a smaller footprint would actually provide better light and air conditions for surrounding buildings than a shorter, squatter building.

Mr. Sponseller stated that resident parking would be located below grade, underneath the site. A tall, narrow building would leave sufficient open space to create two or three parking spaces near the front entrance for visitors and for passenger/package drop-off. This would help avoid tying up the street with cars coming to the site. Mr. Sponseller opined that this parking area would be occupied by visitors during certain weekend and evening periods, and therefore not available for dropping off passengers and parcels, but would be available most of the day.

On cross-examination, Mr. Sponseller confirmed that the binding elements of the plan call for between 40 and 65 dwelling units, but do not provide any specifics about the unit mix. Fifteen percent of the units would be MPDUs [note: the binding elements say *up to* 15 percent]. Their intended location is not a binding element of the project, but they are expected to be located in English basements and on the ground floor. The English basement units would be along the Woodmont Avenue frontage, with glass exposure at the front of the unit, an eight-foot-wide patio and

steps leading to the ground plane four feet up. At that point there would be about ten feet of greenery, then the public sidewalk.

Under further cross-examination, Mr. Sponseller confirmed that the conceptual parking plan, Exhibit 41(c), shows 78 parking spaces. That would require two and half floors of parking. He was unable to say at the hearing whether more parking spaces would be required if all of the units had three bedrooms, because the calculation is somewhat complicated. He stated that the Applicant would provide the number of spaces required under the Zoning Ordinance, which, in his view, would be sufficient. Based on his firm's experience, he believes that approximately 1.2 spaces per unit is adequate for a residential building, particularly near Metro. Mr. Sponseller described the proposed building as middle-to high-end, but declined to estimate the range of sales prices that would be charged, either on a gross or a square-foot basis.

Under cross-examination about density, Mr. Sponseller confirmed that regardless of the number of units in the final design, the building would have the same FAR – 3.05. He did not know what unit mix Technical Staff relied upon in concluding that the project would not have an adverse impact on the school system.

Mr. Sponseller reviewed the location and size of each of the small open space and recreation areas shown on the illustrative site plan. He described that plan as an illustrative example of what the site might look like if all of the open space were provided on the ground, instead of inside the building or on the roof. The exhibit shows an active/passive recreation area on the west side of the site, between the building wall and the property line, which measures 18 feet at its widest point and narrows to five feet wide along Montgomery Lane. This area would be located between the rear wall of the proposed building and a low retaining wall. In response to a question about what kind of recreation would be expected to take place in this space, Mr. Sponseller noted that a garden qualifies as passive recreation space. Some active recreation area must also be provided, but that can include walkways or sidewalks on the property.

A second area shown as open space for illustrative purposes is located along Montgomery Lane, near the building entrance. Mr. Sponseller stated that the portion of that open

space shown as potential passive/active recreation area measures about 20 feet by 20 feet, and is contiguous with public space on the corner of Montgomery Lane and Woodmont Avenue. Similarly, an open space area shown along Hampden Lane would be partly passive/active recreation area and partly public space. Mr. Sponseller acknowledged that some of the recreation area along Hampden Lane would be under a building overhang. The entire potential open space area along Hampden Lane, including recreation and public space, is roughly 90 feet long and 20 feet deep.

Under cross-examination about the photo simulations discussed on direct, Exhibits 45(n), (o) and (p), Mr. Sponseller explained that the reason the Edgemoor condominium building looks much taller than the proposed building in Exhibit 45(n) is architectural perspective – the way optics work, a building that is closer to the viewer will appear taller than a building that is farther away, even if that is not the case in reality. He conceded that he did not have a photo simulation showing what the view would be for a person standing on Montgomery Lane directly between the proposed building and the Edgemoor condominiums.

Mr. Sponseller agreed that it would be possible to construct a building with a height of 65 feet but the same FAR and density as the proposed building. Tr. June 15 at 151. Such a building would not have the same amount of exterior open space and public use space on the ground, but those requirements could be met by using interior space and roof space. *Id.* at 153-54. He acknowledged that the proposed building would be the same height as the 10-story Edgemoor condominiums, 100 feet, but would have only nine stories, plus a half-level partially below ground containing English basement units. He explained that this is due to higher ceilings planned in the proposed building. Mr. Sponseller conceded that if the proposed building were built in the same manner as the Edgemoor condominiums, it could have the same number of floors in a shorter building. Lacking exact information on the ceiling heights at the Edgemoor, Mr. Sponseller estimated that each story of the proposed building as conceptually designed is about six to eight inches taller than the stories in the Edgemoor. *Id.* at 154.

Under cross-examination concerning architectural compatibility, Mr. Sponseller testified that on three sides of the building, the walls would be mostly glass. He acknowledged that from

across the street, one would be able to see into the dwellings at night if the lights were on. However, the building would have a drapery track and presumably the drapes would often be closed at night. In addition, the building would have recessed lights that put the light principally down into the room rather than out the windows, and lighting would be at residential levels, not like a retail storefront. He conceded that nothing in the condominium documents would require residents to keep their drapes closed at night.

Mr. Sponseller testified on cross-examination that he does not believe the 100-foot building proposed would be detrimental to the views from the upper floors of the Edgemoor condominiums, although it would be visible from that vantage point, because the building would be opposite the open space on the Edgemoor property. Tr. June 15 at 169-170.

In response to questioning by the Hearing Examiner, Mr. Sponseller testified that if the height of the proposed building were reduced to 65 feet, the building footprint would have to be made larger to maintain the FAR at the same level. He acknowledged that the height could be reduced without substantially changing the building footprint if the FAR were reduced. It would still be possible to create the same number of dwelling units as in the taller structure, but Mr. Sponseller feels that with the square footage per unit that would result, they would not be viable, market rate units in the downtown Bethesda market. Under the current conceptual plan, the building would have a total of 58 units: eight MPDUs on the lower level, four units on each of the top two levels where the building is set back further to reduce visual mass, and six units on each of the other seven floors. Twenty-two of the dwellings would be three-bedroom units. To limit the height to 65 feet, assuming ten feet per story, the building would likely have six stories instead of nine and a half. For 58 units, that would require almost ten units per story compared to six, creating a dramatically different unit. It would be easier to fit 40 units in a building with a similar footprint to the one proposed and keep it at 65 feet. Mr. Sponseller testified that that Applicant probably would not be interested in doing that, because the return on investment would be lower with a shorter building.

2. Malcolm Rivkin, land planner

Mr. Rivkin was designated an expert in land planning. He confirmed that the conceptual orientation and access points for the proposed building have changed since his written report was submitted, that he has reviewed the changes and that they do not affect the findings and conclusions set forth in his report. Mr. Rivkin opined that the proposed development would satisfy the intent and purposes of the TS-R Zone, as well as its development standards. He also opined that the proposed development would be consistent with the goals and objectives of the Sector Plan, including its use and density recommendations. Mr. Rivkin pointed out six major goals listed on page 3 of the Sector Plan, which describe a vision of the downtown urban form as it relates to housing, the creation of neighborhoods, employment, community character and circulation. Mr. Rivkin noted that the Edgemoor condominium building is 100 feet tall, as permitted pursuant to a local map amendment application approved by the County Council. Mr. Rivkin concluded, on direct, that the proposed development would be compatible with adjacent land uses.

Mr. Rivkin provided considerably more detailed testimony on cross-examination. He conceded that when the 100-foot height proposed for the Edgemoor Condominiums was before the County Council in 1998, he opposed the application on grounds that the height was inconsistent with the Sector Plan. Mr. Rivkin wrote a letter to that effect in 1998, which is included in the record in this case as Exhibit 51. Mr. Rivkin explained that in 1998, the Sector Plan had been in effect for only four years and no significant changes had occurred in the area. A high-rise building did not make sense at that time because the Sector Plan recommended high density, *low-rise* development. However, conditions in the area have changed significantly since then – the high density development anticipated by the Sector Plan was not built, and instead the majority of the units built in the TS-R District were townhouses, with a far lower density. The Sector Plan envisioned European-style high density housing, with garden apartments in buildings of four to six stories, very close together, on large lots with very little green space. What has actually been developed is very attractive and very expensive but, with the exception of the Edgemoor Condominiums, very low density.

Mr. Rivkin noted that a supplement to the Sector Plan suggests close to 300 dwelling units could be built in the TS-R District under the low-rise, high density concept. As it turns out, only about 50 units have been built in the area, apart from the Edgemoor Condominiums. Even the Edgemoor Condominiums were built with a much smaller number of units than what was approved by the County Council. Tr. June 15 at 234. Mr. Rivkin opined that “a great deal will be lost, unless this building can be built.” Tr. June 15 at 197. He places a high priority on having “fairly dense development” on sites near Metro stations, saying “730 feet from Metro almost mandates that you take advantage of that opportunity.” *Id.*

Mr. Rivkin described the Sector Plan as a guide, which should “be understood to change somewhat over time.” *Id.* His view of the role of a master or sector plan is encapsulated in the introductory statement that appears on page VII of the Sector Plan, entitled “Notice to Readers,” which notes that area master plans are intended to be updated and revised about every ten years, and that with changes in circumstances “the specifics of a master plan may become less relevant as time goes on.” Sector Plan at VII. Mr. Rivkin acknowledged that where a zoning case requires development plan approval, the Zoning Ordinance requires a finding of substantial compliance with the use and density indicated by the sector plan. Code § 59-D-1.61(a). He opined that the proposed development would comply with the use and density recommended in the Sector Plan – height is a different element. Tr. June 15 at 206-07.

Mr. Rivkin noted that the subject property currently has a huge parking area with a great many curb cuts and a lot of automobile activity, and the proposed building would represent a great improvement. He emphasized that a height of 100 feet would allow the building to have adequate setbacks and ground-level open space to “respect the handsome townhouses” adjacent to the west. *Id.* at 199. In Mr. Rivkin’s view, a shorter, squatter building with a larger footprint would not provide an adequate setback from the adjacent townhouses and would make it extremely awkward to provide public amenity space.

Mr. Rivkin testified that if the building were constructed with only 40 units, this would be within the density range recommended in the Sector Plan and at least twice the density of most

buildings in the area, at either 65 or 100 feet tall. He stressed, however, that a 65-foot building would be incompatible with the neighborhood from an urban design standpoint. *Id.* at 210. A 65-foot building would occupy more of the site, with less green space around it, so the townhouses would face a closer building. Mr. Rivkin did not know how much the footprint would change with a 65-foot height – his opinion regarding compatibility was based on a general sense that the shorter building would have a larger footprint and less space around it. See Tr. June 15 at 224-225.

Mr. Rivkin acknowledged that as an element of implementing the Sector Plan's urban village concept, which called for buildings close to one another and to the street, the development standards for the TS-R Zone were amended to reduce the green space and open space requirements from a total of 50 percent of a site to 30 percent – a substantial reduction. He stressed, however, that the Sector Plan's concept is completely different from what has actually happened. Instead of high-density, tightly packed buildings facing Montgomery Lane, the townhouses that were built west of the subject property are perpendicular to the street with significant setbacks and green space. In addition, the Edgemoor Condominiums and additional townhouses along Arlington Road and Edgemoor Lane failed to follow the urban village model. Mr. Rivkin opined that it would be very difficult to assemble enough land for a major building, like those anticipated in the urban village concept, on the undeveloped land currently remaining in the TS-R District.

Under cross-examination concerning the likely effect of the proposed building on the views from units on the upper floors of the Edgemoor condominium building, Mr. Rivkin opined that the proposed building would affect some views, but would not totally block the view to the south. Tr. June 15 at 225-26. Mr. Rivkin opined that proposed building would improve the view for residents of Hampden Square, across Woodmont Avenue. Mr. Rivkin has not explored exactly what residents of Hampden Square can see, but he stated that some units might see only the new building, while others would retain their view west of the subject property.

Mr. Rivkin acknowledged that the Edgemoor condominium building adjoins another high-rise residential building to the north, the Chase. He noted, however, that the Chase is much closer to the Edgemoor condominiums than the building proposed here would be. Mr. Rivkin did not

know the exact width of Montgomery Lane; his opinion regarding the distance between buildings was apparently based on a general sense of the area. *Id.* at 243.

Mr. Rivkin clarified, under continued cross-examination, that although his written report concluded that all adequate public facilities requirements would be met, he was relying on the engineers and does not, in fact, reach any conclusion about the adequacy of stormwater management or the need for a traffic study. *Id.* at 251. With regard to potential school impacts, he testified that Montgomery County Public Schools provided him with a pupil generation rate that they use for all high-rise residential buildings. That rate does not distinguish among buildings based on the number of bedrooms in each unit. Mr. Rivkin did not possess any detailed knowledge about current capacity at the schools that would serve the proposed development. It is his understanding that any capacity problems would be resolved under the capital improvements program.

Mr. Rivkin summarized the basis for his compatibility finding by stating that the main elements he considered were the green space on the conceptual site plans, the density and the location 730 feet from Metro.

3. James Hendricks, engineer

Mr. Hendricks was designated an expert in civil engineering. He testified about grading and stormwater management. With regard to potential traffic impacts, Mr. Hendricks testified that Technical Staff informed him that no traffic study would be required. The Applicant would be required to dedicate a small rectangle at the west end of the subject property as right-of-way for Hampden Lane, and a one-foot strip along the northern property line as right-of-way for Montgomery Lane. No dedication would be required for Woodmont Avenue. Mr. Hendricks stated that both driveways entering the subject property would comply with county standards for sight distance.

On cross-examination, Mr. Hendricks confirmed that the proposed development would require subdivision approval. He agreed that county standards for a business district street, such as Montgomery Lane, call for an 80-foot right-of-way, which is considerably more than the existing 52-foot right-of-way. He noted, however, that the Sector Plan calls for a 52-foot right-of-way on Montgomery Lane, and that trumps the standard width. The paved width of Montgomery Lane is 20

feet wide, and there are no plans to widen it. Mr. Hendricks first testified that Montgomery Lane is a one-way street with a single travel lane. When presented with a photograph showing a yellow line down the middle of the street, Mr. Hendricks agreed that the Montgomery Lane is a two-way street up to a certain point, then changes to one-way westward. A travel lane normally occupies 10 to 12 feet and a parallel parking space requires six feet in width, so there should be room for one lane of parking and one travel lane. Mr. Hendricks opined that cars would not stop in front of the driveway to the subject property to drop people off, but would pull into the drop-off area. If all three parking spaces in the drop-off area were full, Mr. Hendricks suggested that a car would stop in the entrance area of the site to drop off passengers, and might have to descend into the parking garage to turn around and exit onto Montgomery Lane. Given the limited space available, turning around without going into the garage would require a lot of turning movements. If no parking were permitted in the drop-off area, that area would be adequate to allow cars to turn around after dropping off passengers.

On continued cross-examination, Mr. Hendricks acknowledged that the Environmental Staff Report attached to the main Staff Report, Exhibit 38, states that the subject property lies within a sub-watershed that has been designated an urban watershed management area, where the County Stream Protection Strategy calls for cost-effective stormwater quality controls on sites within the watershed. *Id.* at 274. Mr. Hendricks reviewed the binding elements for the subject application and conceded that they did not include any commitments related to stormwater quality controls. He testified that determining the details of stormwater quality controls would require specific study. He suggested that the quality controls probably would address the two-year storm conditions rather than 10-year or 100-year, but he was not sure.

Mr. Hendricks was unable to answer the question whether the excavation necessary to dig out the basement and parking garage would involve blasting to get through rock; he was not aware of the substrate composition on the site.

B. MNCPPC Technical Staff

The Opposition requested the testimony of John Carter of the MNCPPC, as well as three county employees who testified on a supplemental hearing date on schools and traffic issues.

Testimony of the four county employee witnesses, primarily in response to questioning by Opposition counsel, is summarized in this section.

1. John Carter, Chief, Community-Based Planning

Mr. Carter was the principal author of the Staff Report in the present case, which recommended deferral or denial of the application for two reasons. First, the proposed building would be inconsistent with the specific height guidelines stated in the Sector Plan. Tr. June 16 at 91. Second, the building would not comply with Sector Plan guidelines for low-rise, high-density development. Mr. Carter noted that the proposed development would comply with other provisions of the Sector Plan designed to promote high-density residential uses at sites like this, half a block from a Metro station. *Id.* The development would have no issues with regard to utilities, roads or schools. It would achieve the desired land use and density, both in units and in FAR, and would satisfy all the provisions of the TS-R Zone itself, including development standards. The project also would satisfy MPDU and open space requirements. Thus, Staff's recommendation of denial or deferral rested on inconsistency with the Sector Plan's suggested height limit and low-rise, high-density guidelines.

Mr. Carter testified that the Planning Board disagreed with Technical Staff and recommended approval of the application, citing four main points. First, the development would comply with the use and density recommended in the Sector Plan, as shown on Figure 4.13. Although the text called for low-rise, high-density uses, the Planning Board saw that the future land use plan in Figure 4.13 said "high rise or garden apartments" for the area including the subject site, and chose to rely on that. Tr. June 16 at 93. The Board saw that the density of 100 units per acre was appropriate, so with regard to the use "they felt there was some room to interpret the master plan as saying high rise for this site." *Id.*

Second, the Board had no concern about the height, again referring back to Figure 4.13. Third, the Board found that the proposed development would comply with the purposes, standards and regulations of the TS-R Zone and would be compatible with adjacent development. The Board was not concerned about height from a compatibility perspective because of the site's distance from the neighborhood of single-family detached homes west of Arlington Road, and the

Board was less concerned about the relationship to the townhouses. They thought if the building were a bit higher, there would be more green space and open space. *Id.* at 94. Finally, the Planning Board relied on the Zoning Ordinance, which says that height shall be determined during site plan review. The Board wanted to keep its options open and determine the final height at site plan.

Mr. Carter testified that the Planning Board did not see this recommendation of approval as a sign that other sites would be approved at the same height, particularly sites closer to Arlington Road, nor did they make a determination that the 100-foot height would definitely be approved at site plan in this case. *Id.* at 95. Their letter of recommendation specifically states that building height and setbacks would be carefully considered during site plan review.

When questioned about the zoning case for the Edgemoor Condominiums, Mr. Carter acknowledged that Technical Staff recommended denial in that case, as well, although there were more reasons. In that case, in addition to inconsistencies with Sector Plan guidelines, Staff felt the proposed building would be too close to the Chase, and did not have enough open space or public use space. The “public use space” was not really public space, it was for the residents. In terms of height, Technical Staff’s position was the same as in this case. The Sector Plan called for 65 feet in a low-rise building, and the developer wanted a 100-foot high rise.

In reviewing the Sector Plan drawing that the Planning Board relied on, Figure 4.13, Mr. Carter concluded that one cannot tell whether “high rise” referred just to existing high rises that had already been built, or was intended to suggest that additional high rises were desirable. He confirmed that the text of the Sector Plan calls for low-rise development in the area of the subject property, as does a map on page 39 of the Sector Plan. He acknowledged that the Staff Report in the present case did not mention Figure 4.13, but relied instead on the text and illustrations of the low-rise concept. In response to questioning by the Hearing Examiner, Mr. Carter explained that the difference between low-rise and high-rise is not pre-determined at a set number of feet. In considering the proposed height, Staff used a combination of the urban village sketch and the map on page 39, which divides the area into height districts. *Id.*

Mr. Carter stated that the urban village concept laid out in the Sector Plan called for residential buildings three to six stories high. Lots of attention was paid to having attractive, safe, well-lit streets and sidewalks, with buildings fairly close to the sidewalks so people look out on them. There was less concern about open space. The Sector Plan was trying to avoid having towers in park settings with a whole lot of open space. The plan proposed in this case is not a tower in a park. *Id.* at 107-108. The Staff and the Planning Board agree that how much open space should be provided and where, within the general boundaries set up on the development plan, should be determined during site plan review.

Mr. Carter further testified that the Sector Plan sought high density close to Metro to have more people available to use Metro. The “high density” the Sector Plan sought was in relation to the number of units per acre, not the FAR. *Id.* at 111. The Sector Plan was looking for about 100 dwelling units per acre. Mr. Carter acknowledged that the Sector Plan recommended between 45 and 100 units per acre, which is a big range. He described that as part of the tenting concept. The County doesn’t want to waste land in this area, so they look for a minimum number of units, if possible, to get pretty good density near the Metro. Properties like this, close to Metro, certainly should have the higher densities. *Id.* at 114. Demonstrating his familiarity with the parcel, Mr. Carter testified that the subject property measures 30,891 square feet in gross lot area and 22,546 square feet in net lot area. *Id.* at 114-115. Density is measured using the gross lot area, which comes to about seven tenths of an acre, 0.71 acres. *Id.* at 115. At that size, 40 units would be a bit on the low side for density at this location. In general, the more units the better, but it’s more complicated than that – FAR also plays a role. You may have a smaller number of units, but still meet the FAR recommendations. If units are larger, you may have more people living in each unit. You could generate the same number of residents with a larger number of small, high-end units or a smaller number of large, low-end units. In addition, a proposed range often fluctuates during the development process based on market conditions. In this case, there is no breakdown of unit types at this stage. This was not discussed at the Planning Board meeting where this case was considered, and Staff did not do an in-depth analysis of it.

In response to further questioning, Mr. Carter did not offer an opinion about whether a larger apartment in a luxury condominium building generally has more residents, or just more space. He said the only thing that comes close to assessing that is the parking standards, which require more spaces for units with more bedrooms, but do not require three times as many parking spaces for a three-bedroom unit as for a one-bedroom. *Id.* at 118-19. Mr. Carter conceded that on the subject parcel, located as close as it is to Metro, a density approaching 100 units per acre would be preferable, but the guidelines say between 45 and 100, and Staff would consider anything in that range to satisfy the Sector Plan with regard to density. With regard to height, Staff would consider anything up to a six-story building as satisfying the Sector Plan.

With regard to assessing compatibility in the absence of detailed binding elements about appearance, Mr. Carter testified that what a building looks like is less important to compatibility than its size, shape, location on the site and access points. Setbacks are particularly important. The Planning Board and Technical Staff were very interested in setbacks in this case, particularly with regard to the adjacent townhouses. They don't look very much at the architecture of a building, especially at the zoning stage. *Id.* at 127. He noted that the Staff Report in this case lists several elements that would be considered in any future review, such as setbacks, driveway locations, on-site parking spaces and trees. Mr. Carter reported that Staff had sufficient information in this case to make a compatibility determination based on the illustrative concept.

Mr. Carter testified that the question of stormwater management did not receive a lot of attention in this case. It appeared from the layout that it would be possible to provide what was necessary on site or through other mechanisms. Mr. Carter acknowledged that the subject property lies in the Little Falls watershed, which is not in the best of shape. In such a situation, stormwater management may be required on site, or the developer may be given a waiver in exchange for financial contributions used to improve stream quality. At zoning, Staff just tries to make sure there is enough room on site to go either way, so the determination can be made later as to what works best.

With regard to potential impact on schools, Mr. Carter agreed that the exact number of units and bedrooms that would be created by this project is uncertain. The schools make their

estimates based on the average number of students generated by high rises in the planning area. They apply that average to the upper end of the range of units anticipated to reach an estimate for a project. The Applicant's estimate of one third three-bedroom units seems like a large proportion of three-bedroom units in a high rise, but they don't base their student-generation estimates on number of bedrooms.

Mr. Carter confirmed his testimony that there were no traffic issues in this case. A traffic study was not conducted because the number of trips expected would be below the threshold that triggers LATR. At zoning, Staff does not look any farther if the number of trips is below the threshold.

Mr. Carter was unable to provide any detailed information about traffic conditions at particular intersections in Bethesda. He described what changes had occurred to allow development in the Bethesda CBD to pass into "Stage II".

In response to questioning about Mr. Rivkin's contention that the Sector Plan vision for the TS-R District is dead, Mr. Carter testified that in Technical Staff's view, the Sector Plan remains valid until it is changed. Tr. June 16 at 140. He agreed that the Edgemoor Condominiums were inconsistent with the Sector Plan, as were the high rises that existed before the plan was adopted. Mr. Carter did not agree, however, that the City Homes Townhouses abutting to the west were inconsistent with the Sector Plan. They did not provide the density in terms of number of units that the Sector Plan called for, but in terms of FAR they were better. Those are very large, four-story townhouses. The Sector Plan sketches showed garden apartments, but the townhouses are similar in terms of the size of the structures. *Id.*

With regard to whether the proposed development would be consistent with the use recommended in the Sector Plan, Mr. Carter testified that in his view, "use" in this context refers to residential v. non-residential, not types of structures. *Id.* at 140-41.

Mr. Carter testified that Technical Staff considered it possible and practical for a developer to build a structure on the subject property no higher than 65 feet, and still achieve the density recommendations of the Sector Plan. *Id.* at 142. The Planning Board, however, wanted to

make that decision at the time of site plan review, when the members would have the opportunity to weigh factors such as number of units vs. building footprint and setbacks. The Board felt that this weighing process was more appropriate for site plan review than for the zoning stage. They did, however, recommend setting the maximum height at 100 feet.

When asked by the Hearing Examiner whether the setbacks proposed by the Applicant would hamper the Planning Board's discretion during site plan review, Mr. Carter stated that from Technical Staff's perspective, the most important setback is the one from the adjacent townhouses. The Planning Board recommended a minimum setback number on that side of the project which should be respected. Establishing setbacks on the other three sides at the zoning stage would not necessarily be helpful. If the height is truly to be adjusted at site plan, there needs to be some room to do that. *Id.* at 145-46. The Board recommended a small number of binding elements, which were discussed at some length during the Board's hearing, and those are the ones the Board feels are appropriate. Mr. Carter was doubtful that any other binding elements would be useful. *Id.* at 157-58. He clarified that the Planning Board's recommendation of 40-60 percent lot coverage means a minimum of 40 percent and a maximum of 60 percent of the net tract area. *Id.* at 160. Mr. Carter also noted that the Staff and the Board are aware of compatibility issues in addition to the adjacent townhouses, such as the Edgemoor Condominiums and the small multi-family buildings southwest of the property, but those are either farther away from the subject site or smaller in terms of the number of units affected. As a result, they did not feel binding elements were called for at the zoning stage.

2. Karl Moritz, MNCPPC

Mr. Moritz is Acting Chief of the Research and Technology Center, Montgomery County Department of Park & Planning. His duties include preparing data on schools for the AGP. Under questioning by Opposition counsel, Mr. Moritz identified and confirmed the accuracy of two exhibits. The first was a letter from the Chairman of the Planning Board to the President of the County Council dated June 25, 2004 stating that for purposes of reviewing subdivisions in fiscal year 2005, the Planning Board has determined that the County's public schools in all clusters, at every level, meet the AGP definition of adequate. See Ex. 79. The second was a memorandum dated June

10, 2004 from Mr. Moritz to the Planning Board regarding school data and school capacity. See attachment to Ex. 74. That memorandum presented Technical Staff's endorsement of the findings that there are no clusters where subdivisions should be subject to either the school facilities payment or a moratorium due to inadequate school capacity. Tr. Sept. 21 at 11.

Mr. Moritz explained that for purposes of the AGP, school capacity is assessed on cluster basis, not by individual school. He described the differences between capacity calculations under the AGP, which uses a standard capacity figure for all classrooms, and MCPS's methodology, which takes actual programming into account. MCPS compared its capacity calculations to the AGP capacity calculations in 2003 and found that MDPS program capacity was about 92 percent of AGP capacity at the elementary and middle school levels, and about 94 percent at the high school level. Thus, if an elementary school were considered to have a capacity of 100 students for AGP purposes, on average the capacity calculated by MCPS would be 92 students. *Id.* at 19.

Mr. Moritz also noted that the State of Maryland has a school capacity measurement known as "state rated" capacity, which tends to be lower than both the MCPS capacity and the AGP capacity. On average, state rated capacity is about 85 percent of AGP capacity. This and other methodologies for measuring school capacity were discussed in the Staff Draft of the AGP Policy Elements that was prepared in May 2003. See Ex. 87. That document described various ways of measuring school capacity, some of which would have resulted in some school clusters failing the adequacy test. One of the options (option 6) would have eliminated the practice of allowing one middle school to "borrow" capacity from another middle school. Eliminating this practice would have resulted in the BCC cluster, which serves the subject property, failing the adequacy test in 2004. *Id.* at 22-23. For FY 2005, the BCC cluster passed the adequacy test without any need for borrowing.

The idea of borrowing capacity is that if a school district boundary could theoretically be changed to transfer students from an overcrowded cluster to an adjacent cluster with available capacity, the cluster with a capacity problem should not be placed in moratorium. The change need not actually be made to avoid a moratorium; the potential to make such a change is enough. *Id.* at 28. Mr. Moritz stated that the school system does boundary changes regularly, but typically they are not

done solely as a result of an AGP moratorium. Mr. Moritz testified that he has advised the Planning Board that the practice of “borrowing” capacity makes it difficult for any cluster to fail the AGP capacity test. *Id.* at 36. Currently, borrowing is allowed only at the high school level.

In response to questioning about how the County Council chose the current AGP capacity measurement, Mr. Moritz stated that one concern that was expressed about using a program capacity measure was that it could result in schools coming under pressure to make programming changes to avoid a moratorium, or it could allow school programming decisions to cause a moratorium. *Id.* at 34.

Under the FY 2003-05 AGP Policy Element, a subdivision can be approved with no special payment as long as the elementary and middle school enrollment is estimated to be less than 105 percent of the school capacity and high school enrollment is estimated to be less than 100 percent of school capacity, per the AGP definition. If enrollment is expected to reach 105 percent of school capacity at the elementary or middle school level, subdivisions can be approved provided the developer makes a schools facility payment. If enrollment is expected to reach or exceed 110 percent of capacity, new subdivisions cannot be approved. *Id.* at 26-28.

Finally, Mr. Moritz acknowledged that the purpose of the AGP test is to determine, for each fiscal year, whether any clusters should be place moratorium. The AGP schools capacity test was not developed to test school capacity for any individual development proposal. The Planning Board makes a determination for each fiscal year as to whether each cluster has adequate capacity. Depending on the outcome of that determination, either no subdivisions will be approved during that fiscal year, all will be subject to a special schools facility payment, or school capacity will be considered adequate for all subdivisions approved in that fiscal year, without any payment. *Id.* at 41.

3. Joseph Lavorgna, Montgomery County Public Schools (“MCPS”)

Mr. Lavorgna is the Director of Planning and Capital Programming for MCPS. He testified concerning a letter that he wrote to Technical Staff in March, 2004 about the present application, which provided enrollment projections for the proposed development based on average yield factors for comparable housing. See Ex. 76(d). Mr. Lavorgna explained that these average

yield factors are obtained from the MNCPPC. They estimate the number of students a development will generate based, in part, on the type of housing. There is a single yield factor for all high-rise buildings, regardless of how many stories a building contains, how many bedrooms the units contain and how many units are MPDUs. Tr. Sept. 21 at 45-46, 49. Any building with more than four stories is considered a high-rise. Mr. Lavorgna is an engineer by training, not a demographer, and stated that he could not comfortably answer the question whether units with more bedrooms would be expected to generate a higher number of students. *Id.* at 48-49. He observed that it is not a simple question to answer because many factors affect the number of students that come from a unit.

Mr. Lavorgna provided additional detail on how MCPS calculates school capacity. Tr. Sept. 21 at 64-66. He explained that for elementary schools, program capacity is based on the number of grade 1 through 5 classrooms times 25, plus the number of kindergarten classrooms times either 22 (for full-day programs) or 44 (for half-day programs). A figure is added for special education classrooms, which have capacity between 6 and 13 students, and for pre-K or Head Start programs. Capacity in secondary schools (middle and high school) is based on the number of classrooms multiplied by 25, with that product multiplied by 90 percent. The ten percent reduction is based on the fact that secondary school students change classrooms during the day, and it is very difficult to schedule classrooms so that every room is used during every period of the school day. Capacity is added for special education classrooms based on the same range as in elementary schools. Portable classrooms are not counted in calculating capacity.

Mr. Lavorgna noted that Bethesda Elementary School is expected to have enrollment exceeding capacity for the entire six-year forecast period, 2005 to 2010. Westland Middle School is expected to be over capacity, but has funding in the CIP for an expansion. That expansion would add six classrooms. MCPS would calculate the additional capacity by multiplying the six classrooms by 25, then reducing that product by ten percent. This would add a total of 135 seats. Westland currently is over capacity by 52 students, so an increase of 135 seats would leave net excess capacity of 50 to 60 seats. *Id.* at 52-53. Mr. Lavorgna also noted that BCC high school is expected to be over capacity for most of the six-year forecast period, but is proposed for a five-room addition in 2009.

With regard to funding for CIP projects, Mr. Lavorgna explained that although items are identified in the CIP as funded, the actual appropriations take place only one fiscal year at a time. Each year, the Council must adopt a capital budget that appropriates money to fund the projects identified in each year of the CIP. Once a project is listed in the CIP as funded, county practice is that the project will be built when its year comes up in the CIP. Projects may get delayed or accelerated by a year, but Mr. Lavorgna could not recall any instance when money was not appropriated for a project that has been listed as funded in the CIP.

Mr. Lavorgna acknowledged that some school funding comes from the State of Maryland, and testified that there is no guarantee of state funding for every project in the county CIP. There have been rare instances when the State did not provide funding for a project in the year when it was requested. The County Council has the option in such cases of advancing the funding itself and requesting state reimbursement later, or delaying the project. Projects are more frequently delayed because the County does not have the funding to make the appropriation. *Id.* at 60-61. The fact that a project is listed in the CIP for a particular fiscal year does not guarantee that it will take place in that year.

Mr. Lavorgna confirmed that the AGP methodology for calculating school capacity results in higher capacity numbers than the MCPS methodology and discussed the development of the AGP methodology and its impact. He also discussed MCPS's enrollment projections, which strive to be correct within a margin of error of five percent for each school.

As for current conditions, Mr. Lavorgna confirmed that Bethesda Elementary School had 47 seats available as of September 2003, and was expected to be over capacity by the fall of 2007. Westland Middle School had a deficit as of September 2003 that was expected to continue until the 2007-2008 school year. BCC had a deficit that was expected to last until the 2008-2009 school year, when an addition is programmed. *Id.* at 84.

4. Daniel Hardy, MNCPPC

Mr. Hardy is a transportation supervisor in the county-wide planning division of the MNCPPC. Tr. Sept. 21 at 85. Most of his experience is in master planning, although he works on

development projects as well. He agreed that the basic principle for review of traffic impacts from a development project, within the LATR guidelines, is to make sure the development would not make traffic worse at any affected intersection. *Id.* at 87.

Opposition Counsel asked Mr. Hardy to review the Stage II Memo, of which he was the primary author, which analyzed the traffic situation in the Bethesda-Chevy Chase Policy Area. The Sector Plan had divided development in the Bethesda CBD into stages, in part due to concern about traffic capacity. A specified number of jobs and housing units could be approved in each stage. Mr. Hardy testified that the Planning Board was looking for documentation to support moving from Stage I to Stage II, "which would have the effect of allowing the board to continue approving development." *Id.* at 98. Without a move to Stage II, the CBD was in danger of running out of development capacity, meaning that the Planning Board could find itself unable to approve any more development. When questioned about inconsistency between the principle that new subdivisions should not worsen traffic congestion and the Stage II Memo, which supported a move that would inevitably add traffic to congested intersections, Mr. Hardy noted that the principle of not making traffic congestion worse applies to LATR, which is limited in scope compared to the Comprehensive LATR performed in connection with the Stage II Memo. *Id.* at 98-99. Moreover, at the time of subdivision review, applicants have several methods for determining how to mitigate impacts that would worsen traffic.

Mr. Hardy acknowledged that the Stage II Memo identified five intersections that are operating at unacceptable levels of congestion currently and are expected to still be operating at unacceptable levels of congestion at the end of Stage II. Some of these intersections still fail the congestion test after scheduled capital improvements. *Id.* at 89-91. Opposition counsel also asked Mr. Hardy to review the Montgomery County Annual Development Approval and Congestion Report ("ADAC Report", Ex. 90), which the County Council requested to assist its members in prioritizing transportation funding needs. He acknowledged that the ADAC Report identifies ten intersections in the combined Bethesda - Chevy Chase Policy Area with unacceptable levels of congestion, and that adding traffic to those intersections would likely make conditions worse, depending on the direction of travel. *Id.* at 93-95, 97. Nonetheless, failing intersections do not necessarily prevent the policy area

from going to Stage II. *Id.* at 99-100. The Sector Plan provides that Stage II can begin when area-wide transportation levels meet acceptable AGP standards, and intersection improvements likely to be needed during Stage II have been identified. Whether area-wide transportation levels meet AGP standards depends on an average congestion index, which is based on ratios of roadway volume to capacity. The calculation uses weighted averages that give more weight to major roads., Mr. Hardy conceded that under this formula, a major road like Wisconsin Avenue could be immovable from congestion, and yet if other major roads are moving, the average could still satisfy AGP standards. *Id.* at 102-103.

Mr. Hardy testified that in the Stage II Memo, he did not propose establishing a Stage II ceiling for residential development because the vehicle trips generated by housing in the Bethesda CBD would generally be heading against the peak traffic flow at the three intersections of concern in Bethesda (Rockville Pike at Jones Bridge Road, Connecticut Avenue at Jones Bridge Road and Connecticut Avenue at East-West Highway). He acknowledged that the ADAC Report identified a number of failing intersections in addition to the three noted in the Stage II Memo, but he explained that for most of the failing intersections, Staff believes “there are improvements that could be made within the bounds of the current master plan.” *Id.* at 104. For the three that the Stage II Memo discussed in detail, Staff believes that no solution exists without additional policy guidance in the form of a Sector Plan amendment.

Mr. Hardy testified about the limited geographic scope of LATR studies.. For a development that is expected to produce less than 100 trips, the developer generally is require to analyze impacts on the first signalized intersection in each direction traveling away from the subject property. Technical Staff has the discretion to require an applicant to study more than one signalized intersection in each direction because of traffic conditions or the nature of the project, but generally the study goes no farther than one signalized intersection in each direction. *Id.* at 112-114. He also acknowledged that for small projects, those generating less than 30 trips under the current LATR Guidelines, when the development gets to subdivision review there is essentially no discussion of traffic. *Id.* at 117-18.

Mr. Hardy confirmed that the LATR Guidelines include a page that defines “high-rise” as a building with ten or more stories, and garden apartment or “mid-rise” as one to nine stories. The estimated trip generation rate for a high-rise is lower than for the other categories. Under the trip generation rates provided for the Bethesda CBD, a garden apartment building with 65 units would generate 29.25 units. Mr. Hardy was not aware whether that number normally would be rounded up, but he agreed that if it were rounded to 30, a traffic study would be required for subdivision review. Tr. Sept. 21 at 120.

Under questioning by Applicant’s counsel, Mr. Hardy confirmed that the Staff Report in this case recommended limiting the proposed development to less than 65 units to satisfy LATR. He acknowledged that the limit for acceptable CLV in the Bethesda CBD is 1,800, and confirmed findings in the ADAC Report that CLV counts are well below that level at three intersections along Woodmont Avenue -- at Elm Street, Montgomery Lane and Cordell. Tr. Sept. 21 at 125-26. Moreover, the ADAC Report found no intersections in the Bethesda CBD that are currently operating above the acceptable CLV limit. Mr. Hardy agreed that for a small project in the CBD, Technical Staff would not be looking at intersections near the Beltway to measure traffic impacts, in part because of the difficulty of measuring the impacts of a small development on traffic conditions several miles away.

C. Opposition’s Case in Chief

1. Kenneth Doggett, land planner

Mr. Doggett has more than 20 years’ experience as a planner for Fairfax County, Virginia, and has worked as a private consultant in urban design and architecture for several years. He was designated an expert in land planning and urban design. Mr. Doggett described the field of urban design as “a bridge between land planning and architecture.” Tr. June 22 at 19.

Mr. Doggett described the urban village concept in the Sector Plan as a low-rise, high-density recommendation that came about together with the amendment of the TS-R Zone to reduce the open space/green space requirement from 50 to 30 percent. He cited page 82 of the Sector Plan, which calls for a reduced green space requirement that would allow a lower building height and more spread-out buildings, and therefore less expensive structures. *Id.* at 21. The concept called for

buildings with three to six floors, with apartments at each level and architectural treatment of the façade to give the appearance of townhouses. It was “intended to provide a denser street activity effect rather than the deep setback emphasizing isolated buildings.” *Id.* The maps on pages 83 and 84 provide supporting descriptions.

Mr. Doggett testified that the Sector Plan calls for a maximum height in the TS-R District of 65 feet or six stories. See Tr. June 22 at 22, Sector Plan at 39. It also includes some urban design back-ups such as varied rooflines, gables and strong pedestrian linkages. As an example of the latter, Mr. Doggett cited Montgomery Lane, which has a narrow right-of-way of 52 feet and pavement only 20 feet wide, contributing to the compressed feeling you get in an urban village rather than an area where buildings are set in open green space. The Sector Plan also calls for a step-down in building heights from Woodmont Avenue to Arlington Road (east to west) and from Bethesda Metro Center to points south, “to achieve desirable and compatible transitions to adjacent areas.” Tr. June 22 at 25, Sector Plan at 40. Later, the Sector Plan follows that up with the urban design guidelines that call for low-rise building heights stepping down from six stories at Woodmont Avenue to three along Arlington Road.

Mr. Doggett opined that the project proposed in this case would not be consistent with the Sector Plan because it is not a low-rise building and it would exceed the 65-foot height limit. Normally, based on the Sector Plan one would expect the building proposed here to be shorter than the Edgemoor Condominium to the north, and to conform to the Sector Plan’s 65-foot height limit. One reason to seek step-downs is that two buildings of the same height, close together, create a canyon effect that is not very appealing. One would also expect the proposed building to be shorter than the Hampden Square building across the street, which has a 100-foot residential component and a 120-foot commercial component. [Note: the commercial portion of Hampden Square actually measures 143 feet in height.] Mr. Doggett does not consider that a step-down. Moreover, larger setbacks tend to decrease consistency with the Sector Plan.

With regard to the impact on residents of the Edgemoor condominium building, Mr. Doggett described the height and closeness of the Chase building as oppressive. He stated that the

proposed building would eliminate an awful lot of the skyline on the other side of the building because of the angle.

Mr. Doggett disagreed with Mr. Rivkin's contention that the Sector Plan is dead. He feels that the City Homes townhouses adjacent to the subject property are consistent with the Sector Plan, as are the three-story buildings along Arlington Road. Even the Edgemoor condominium building conforms in terms of its architecture and urban design qualities – it uses the same brick, the same colorful skyline, the same textures envisioned in the Sector Plan. *Id.* at 30. No plan is ever achieved 100 percent, but that doesn't mean the whole concept is abandoned. Mr. Carter clearly indicated that he has no intention of revising the Sector Plan with regard to the TS-R District any time soon, although Staff is working on other parts of the plan. This implies that Technical Staff still support the urban village concept. Mr. Doggett observed that there is plenty of vacant space, and if you give up on the urban village concept you'll have chaos in this area, with no controls at all. *Id.* at 31. If the County wants to make a change in this area, it should be done by amending the Sector Plan rather than by permitting a single building without considering what goes around it. *Id.* at 78.

Mr. Doggett reviewed Figure 4.13 of the Sector Plan (p. 81), the "Future Land Use" map, and explained why he disagreed with the Planning Boards's interpretation.

Mr. Doggett disagreed with Mr. Rivkin's contention that six-story buildings can be expensive to build and therefore are not practical. He noted that the Applicant's architect mentioned two sets of six-story buildings he was recently involved in building in Washington, D.C., and Mr. Doggett himself is aware of three six-story buildings constructed fairly recently in Washington. Based on this sampling, he concludes that a six-story height limit does not seem to be a deterrent to development. Tr. June 22 at 37-38.

With regard to density, Mr. Doggett testified that the Sector Plan was concerned primarily with density of units per acre rather than FAR. He found that 40 units on just over half an acre is not a very high density at 800 feet from Metro Center, and agreed with the Applicant's witnesses that the same number of units or more could be put into a building 65 feet tall. Using general figures for average unit sizes and building configurations, Mr. Doggett provided a rough

estimate of how many units could be constructed in a six-story building at normal unit sizes.²¹ He began with the net lot area of 22,546 square feet and deducted ten percent for required public use space, arriving at a building footprint estimate of about 20,000 square feet (assuming that active and passive recreation space would be provided on the roof and in interior space). He multiplied this by six stories to estimate the full interior square footage at 120,000 square feet, then deducted 20 percent for corridors, stairs and common areas and came down to about 90-96,000 square feet. Assuming the minimum of 40 units provided for in this application, 96,000 square feet would allow room for 40 two-bedroom units at 2,000 square feet each, with 16,000 square feet left over. That would leave space to add to the recreation areas or provide additional roadway setbacks. Mr. Doggett concluded from this analysis that 40 units would not be cramped for space in a 65-foot building. Tr. June 22 at 45-46. The same analysis holds true for a combination of 10 one-bedroom units, 20 two-bedroom units and 10 three-bedroom units, which add to the same square footage as 40 two-bedroom units, based on the standard unit sizes Mr. Doggett employed. *Id.* at 46.

Mr. Doggett also addressed the implications of the maximum 60 percent building coverage provided for in the binding elements for the present case. He testified that a commitment to 40 percent open space places a big restriction on how the building could be built. With that constraint, Mr. Doggett was doubtful that 40 units could be built at a height of 65 feet. *Id.* at 47. Even without firm setbacks in the binding elements, the building coverage element would make it very difficult to design a building that would be consistent with the urban village concept. *Id.* at 48.

Mr. Doggett opined that the density proposed here would not be consistent with the Sector Plan. The Plan recommends densities of 45 to 100 units per acre in the TS-R District. Mr. Doggett believes the Sector Plan intended to encourage the lower end of that density range in the

²¹ Mr. Doggett used what he described as standard unit sizes of 1,200 square feet for a one-bedroom unit; 2,000 square feet for a generously sized two-bedroom unit; and 2,800 square feet for a three-bedroom unit. Tr. June 22 at 42. It should be noted that Mr. Doggett was qualified as an expert in land planning and urban design, not architecture, and his testimony concerning interior building configurations was based more on a knowledge of architecture than on principles of land planning or urban design. Accordingly, his testimony in this regard does not carry the full weight of expert testimony. Nonetheless, the Hearing Examiner found Mr. Doggett to be a very credible witness with a broad knowledge base. Accordingly, although this portion of his testimony is considered that of an educated lay person rather than an expert, it carries considerable weight.

portion of the TS-R District with lower heights, i.e. along Arlington Road, and the higher end of that density range on sites closer to Metro. At the subject site, he does not consider 40 units a reasonable density under the Sector Plan. *Id.* at 51. Mr. Doggett drew attention to language in the Sector Plan that anticipates some projects would incorporate a full 2.5 FAR density and links that FAR with the full unit density of 100 units per acre. *Id.* at 52-53; see Sector Plan at 82.

Mr. Doggett observed that a diversity of unit sizes would promote the purpose of the TS-R Zone to encourage Metro ridership better than a building with all three-bedroom units. *Id.* at 53-54. Similarly, a building with more units would better serve county policy of increasing Metro ridership. *Id.* at 76. Mr. Doggett opined that the theme of low-rise, high-density residential uses runs through the whole Sector Plan, and that this should be considered the recommended “use.” *Id.* at 55. Mr. Doggett expressed puzzlement at Mr. Carter’s testimony that the recommended use was simply “residential.” He noted that both the Friendship Heights Sector Plan and the Chevy Chase Neighborhood Retail Preservation Overlay Zone make distinctions between different types of retail and commercial uses, rather than simply recommending “retail” or “commercial.” *Id.* at 56.

Mr. Doggett noted that the Sector Plan describes the idea of compatibility as coordinating a “harmonious and systematic development,” and preventing detrimental effects on neighboring properties. Tr. June 22 at 60. To assess the potential impact of the proposed building on the Edgemoor Condominiums, Mr. Doggett visited the fifth, sixth, ninth and tenth floors of the latter. From the ninth and tenth floors, the long view was a nice canopy of trees, with the National Cathedral in the distance. The proposed building would cut off most of that view. For residents on the fifth or sixth floors, a 65-foot building on the subject site would be much better than a 100-foot building because it would have less of the oppressive “canyonization” effect that the Chase building already has on the north side. The impact is more than the simple effect on light and shadow, it’s a psychological feeling of enclosure. Even on the lower floors, a shorter building would be preferable because it would preserve more access to light, air and views of the sky, as opposed to just a sheer wall rising up. *Id.* at 63. In addition, the “nose” projecting to the north (on the conceptual illustrations)

would intrude unnecessarily – the drop-off area could be framed with a ground-level or lower-level structure rather than something that protrudes for 100 feet. *Id.* at 75.

The proposed building would not have as much claustrophobic effect on the Hampden Square building across Woodmont Avenue because the road is much wider than Montgomery Lane. Still, it would be one 100-foot building looking at another 100-foot building as its major view, and there would be a sense of enclosure for pedestrians walking down Woodmont.

Mr. Doggett testified that he made an additional site visit to examine the relationship between the City Homes townhouses adjacent to the subject property and the proposed building, because he was surprised by the testimony of townhouse residents on the first hearing day. He opined that even if a taller building gained the townhouses an additional 18 feet of separation between the two buildings, they would be better off with a 65-foot building as their neighbor, which would be only five to ten feet taller than the townhouses. *Id.* at 67-68. He noted that the proposed building could be moved further south on the site, opening up more space between it and the Edgemoor Condominiums, without adverse effect on the townhouses. That would move the proposed building closer to the three-story buildings abutting the site along Hampden Lane, but those are older buildings that are likely to redevelop in the foreseeable future as Bethesda modernizes. In addition to reducing adverse effects on the Edgemoor Condominiums, moving the proposed building further south on the site would allow more space for drop-offs and pick-ups near the entrance. As presently configured, Mr. Doggett considers the entrance/drop-off configuration somewhat unsafe because of the limited area for turning around. *Id.* at 78.

Mr. Doggett had mixed comments on the Applicant's proposal to put MPDUs in English basement units. He conceded that the Applicant had done as well as could be done with the English basement concept, but he noted that in his view, the better planning approach would be to make the MPDUs indistinguishable as far as possible from the market rate units. With all the MPDUs in the basement, that goal would not be achieved. Moreover, English basements tend to afford little privacy, especially with an active sidewalk, because there is a tendency for passerby to look into the units, and

they are subjected to street noise and activity. He observed that newer buildings tend not to have English basements, even in Washington, where they are prevalent in some older neighborhoods.

On cross-examination, Mr. Doggett acknowledged that as built, the Edgemoor Condominiums have a density of roughly 100 units per acre, and the City Homes Townhouses across Montgomery Lane have a density of about 27 units per acre. Tr. June 22 at 82-83. He agreed that although the density approved for the Edgemoor during the zoning proceeding was much higher than the recommended maximum in the Sector Plan, as built the Edgemoor condominiums' density complies with the Sector Plan without the density transfer that was part of its approval.

On further cross-examination, Mr. Doggett acknowledged that he was only roughly aware of the exact heights of buildings near the subject property. *Id.* at 85-88. He correctly identified the Chase as 120 feet tall, and cited the three height levels provided for the Newlands building in testimony by the Applicant's witnesses, which ranged from 170 to 200 feet. He estimated the height of the commercial portion of Hampden Square at 120 feet, rather than the actual 143 feet, although he noted that the commercial portion of the building steps down in height – it is not uniformly 143 feet high. Mr. Doggett correctly identified the height of the residential portion of Hampden Square at 100 feet. He conceded that at 100 feet, the proposed building would step down from the Newlands building and part of Hampden Square, but maintained that it should also step down from the Edgemoor Condominiums. *Id.* at 89.

Mr. Doggett was presented on cross-examination with evidence that on several occasions since the adoption of the Sector Plan, the Planning Board has approved the construction of buildings in the TS-R District at heights greater than those recommended in the Sector Plan. He was not familiar with the details of these cases or why the heights were approved and so was at a disadvantage in considering them, but testified that their existence did not really affect his opinion as to the weight that the Planning Board and the District Council should accord the Sector Plan recommendations. *Id.* at 98-103.

On re-direct, Mr. Doggett testified that in his opinion, if a driver pulled into the subject site to drop off a passenger and the drop-off spaces were all occupied, chances are they would back

out onto Montgomery Lane. *Id.* at 107. He was presented with evidence that in one of the cases of a building being approved in the TS-R District at a height greater than the Sector Plan recommendation, Technical Staff identified a justification for the additional height to screen the view of a large parking garage. Mr. Doggett testified that there are no special circumstances in the present case that would allow a 100-foot building on the subject site. *Id.* at 108.

2. Julie Davis

Ms. Davis resides in Chevy Chase and owns unit 605 of the Edgemoor Condominiums, which she and her husband intend to use as their residence when they retire. For the time being, the unit is rented. Their unit is on the sixth floor and its major views are to the southeast. As a result, they would look directly at the proposed building, whether its height is 100 feet or 65 feet. However, the taller building would impede their access to light and air in a way that a building of roughly the same height as their windows would not. Tr. June 16 at 15. Ms. Davis described in some detail how carefully she researched the zoning and development plans for the area before buying her unit. She has been very involved in planning and zoning in Friendship Heights over the years and was serving on a Planning Board task force while she was considering buying her unit. In addition to reading the Sector Plan, she discussed it with Planning Board staff and made sure there had been no significant changes to the 65-foot height limit recommended in the Sector Plan. One of the principal attractions in buying their unit was its exposure to light and air. Based on the Sector Plan and her research, she saw no reason to believe she would be hemmed in by a taller building popping up to the south. Ms. Davis emphasized that citizens should be able to rely on the integrity of the master plan process. *Id.* at 55-57.

Ms. Davis was represented by counsel in these proceedings, and testified on behalf of herself and the Bethesda Civic Coalition. The coalition consists of residents and owners of apartments and townhouses in the Edgemoor Condominiums, Hampden Square and the Villages of Bethesda (the townhouses on Arlington Road at Edgemoor Lane).

The Bethesda Civic Coalition's principal concern in this case is the proposed 100-foot height of the building, which they find to be incompatible with neighboring development and contrary

to the Sector Plan. With regard to compatibility, Ms. Davis noted that the Zoning Ordinance directs the Planning Board, in approving height limitations in the TS-R Zone, to take into consideration the relationship of the proposed development to surrounding uses, as well as the need to preserve light and air for nearby residents. Ms. Davis maintains that the proposed building would loom over the adjacent townhouse community, and would block light and air to the townhouses, Hampden Square and the Edgemoor Condominiums. She feels that the 100-foot height of the Edgemoor Condominiums does not justify a 100-foot building on the subject site, and maintains that a developer could achieve the same number of units and FAR sought in this case without taking the building up to 100 feet.

With regard to Sector Plan compliance, Ms. Davis first addressed the finding required under Code § 59-D-1.61(a), that the proposed Development Plan is consistent with the use and density proposed in the Sector Plan. Ms. Davis pointed out that the Sector Plan's major objectives for residential development in the TS-R District, as set forth on page 80 of the plan, are (1) to achieve high density housing; (2) to increase flexibility to allow for a high-density, low-rise "urban village" pattern of development; and (3) to retain a residential scale of development along Arlington Road. Sector Plan at 80; Tr. June 16 at 23. The Sector Plan noted that the TS-R District was already partially developed, including several high-rise residential buildings – The Chase, The Christopher and The Chase II. Figure 4.13, which shows future land use in the TS-R District, has a single category of residential uses, described as "High-Rise or Garden Apartment." Sector Plan at 81. The Planning Board's recommendation in this case relied heavily on Figure 4.13 to support its position that the Applicant's 100-foot high-rise would be consistent with the Sector Plan. Ms. Davis argues that Figure 4.13 does not specifically recommend high-rise development for the subject property – at most, it recommends high rise OR garden apartment uses for the entire residential area in the TS-R District. Ms. Davis noted that Technical Staff did not even mention Figure 4.13 in their Staff Report, suggesting that they found it unimportant. The Staff Report states instead, in three separate places, that the proposed project would violate the 65-foot height limit recommended in the Sector Plan

Ms. Davis contends that in rejecting the recommendation of its own staff, the Planning Board over-emphasized Figure 4.13 and ignored the plain language of the Sector Plan, which

describes the Plan's preferred form of development for the TS-R District, a low-rise, high-density "urban village." Tr. June 16 at 27-28. Ms. Davis reviewed the Sector Plan's detailed recommendations for the urban village concept, including textual recommendations, a prototype for development (Figure 4.14) and "before" and the "after" illustrations (Figure 4.15). The latter shows the subject property occupied, virtually from lot line to lot line, by a three-story apartment building. Ms. Davis points to this as the Sector Plan's use and density recommendations for the subject property. She also notes the Urban Design Guidelines for the TS-R District, which recommend low-rise building heights up to six floors near Woodmont Avenue, stepping down to three floors along Arlington Road. See Sector Plan at 85; Tr. June 16 at 29. Ms. Davis contends that the tall, narrow building proposed in the present case doesn't even come close to what the Sector Plan recommends.

Ms. Davis rejects the Applicant's contention, voiced in particular in Mr. Rivkin's report, that the 100-foot height of the Edgemoor Condominiums sets a precedent that justifies the present application. She notes that the County Council approved the Edgemoor re-zoning over the objections of the Planning Board and its staff. This approval was granted based on representations in the application that the 100-foot building would include approximately 150 rental units, with 20 MPDUs on site and 188 structured parking spaces under the building. As actually constructed, the Edgemoor contains 54 condominium units, no MPDUs and slightly more than 100 parking spaces. Ms. Davis contends that the Council approved the Edgemoor on the belief that it would add significantly to the number of units available in the immediate vicinity of the Bethesda Metro Station, but it did not. Ms. Davis reviewed salient points from the hearing examiner's report in that case, including the factors the hearing examiner relied on in finding a deviation from the Sector Plan justified. Tr. June 16 at 38.

Ms. Davis stated that the Applicant in the present case is willing to commit to a minimum of 40 and a maximum of 65 units. The Applicant seeks the ability to build a 100-foot glass tower, which would interfere with the light, air and views of neighboring residents and create as few as 40 dwelling units. Ms. Davis contends that "[n]owhere in the [present application] is there any explanation as to why the County should approve a 100-foot height for a few luxury dwelling units." Tr. June 16 at 33-34. The height of the Edgemoor Condominiums was justified, in part, by a location

adjacent to and across the street from much taller buildings. At 100 feet, it represented a step down from the 145-foot Metro building, the 175-foot Newlands building and the 120-foot Chase building. The hearing examiner described this is an important transition for lower buildings to the west. See Tr. June 16 at 36, citing Edgemoor Hearing Examiner's Report at 16. The present project, in contrast, would not provide any step-down in height from the Edgemoor Condominiums. [Note: Ms. Davis testified that it would not step down east-to-west, either, but this appears to be incorrect. See Tr. June 16 at 37.]

Ms. Davis presented several photographs showing the Bethesda skyline, which she used to support her contention that the Edgemoor Condominiums provided a substantial step-down in heights, which the building proposed here would not do. She also noted that the Edgemoor rezoning was not opposed by adjacent property owners; the only opposition was from Mr. Rivkin, and one nearby property owner submitted a letter in support.

Ms. Davis contends that a high density project can be achieved on the subject property without building to a height of 100 feet. She stated that the Applicant has admitted that he can produce the number of dwelling units and the FAR he seeks in a lower building. Some of the active and passive recreation space would have to be internal rather than external, but that was envisioned in the Sector Plan. Ms. Davis rejects the notion in Mr. Rivkin's report that this is the last best chance for the County to get the kind of density and housing it needs near the Bethesda Metro. She argues that the County would get very few housing units out of this project, and they would be large, two- and three-bedroom units, middle to high end, probably high end. They would not be the kind of affordable housing the County is looking for. Ms. Davis pointed out that there is substantial additional land in the Bethesda CBD and the TS-R District that could be developed for high density housing in the urban village model espoused by the Sector Plan – developers don't need 100-foot towers to get the density. Tr. June 16 at 45-46.

Ms. Davis dismissed the notion that the Sector Plan is dead. She pointed out that the County Council has directed the Planning Board to begin proceedings to amend the Sector Plan with respect to the Woodmont Triangle, but has not given any such direction with regard to the TS-R

District. Tr. June 16 at 47. Moreover, the only changes since the adoption of the Sector Plan that were inconsistent with the plan were approved in a single zoning action – the Edgemoor Condominiums and the townhouses abutting the subject property to the west. The condominiums and townhouses built and planned along Arlington Road are fairly low density, but this is consistent with the residential scale recommended for Arlington Road in the Sector Plan. *Id.* at 52-53. Thus, Ms. Davis concludes that the urban village concept is alive and well.

Ms. Davis testified that personally, her primary concern is the potential effect of the present case as a precedent for future zoning actions in the immediate vicinity. She rejected Mr. Rivkin's contention that granting the present application would have little precedential effect because the lots remaining in the TS-R District are too small to permit development under the TS-R Zone. She argued that lots can be assembled to create a combined parcel large enough to develop, as was done for the Edgemoor Condominiums, the City Homes Townhouses and even the subject property, which consisted of four lots under common ownership. Tr. June 16 at 48. Ms. Davis contends that developers are very busy assembling lots in Bethesda, including on Montgomery Lane. Immediately west of the Edgemoor Condominiums on Montgomery Lane are several lots occupied by single-family residential buildings that are used for offices. Ms. Davis recently learned from Technical Staff that those lots are being assembled for TS-R rezoning. Ms. Davis is also concerned about the future of a row of small buildings on Hampden Lane near Woodmont Avenue. If the present application is approved and the building is constructed at 100 feet, that becomes part of the surrounding neighborhood for future cases. *Id.* at 60-61.

Ms. Davis stated that the binding elements in this case are inadequate. They provide no specifications about the mix of unit types, no assurances as to the amount or location or parking, no building footprint, no commitment about stormwater management, no commitment about the location of all of the recreation space. The absence of such binding elements make it difficult for the Council to evaluate the project in its totality. Moreover, the binding elements provide for at least one MPDU on site, but not necessarily all, and the testimony indicated that they would be relegated to the basement, close to the public sidewalk. *Id.* at

On cross-examination, Ms. Davis acknowledged that in an area of the Bethesda CBD where the Sector Plan recommends a maximum height of 42 feet, the Planning Board recently granted site plan approval for a 65-foot building (the Federal Realty building). She noted that the building in question was the subject of intense dispute, including litigation, for several years. It was originally approved at a height of 90 feet, prior to litigation. When it came back to the Planning Board, some of the nearby residential communities withdrew their opposition in exchange for concessions. The single-family community west of Arlington Road, in particular, did not mind a 65-foot building at that location because it would block their view of the parking garage on Bethesda Avenue.

On further cross-examination, Ms. Davis acknowledged the list in Mr. Rivkin's report of other projects in the Bethesda CBD that have been approved at heights above the Sector Plan recommendation. She noted, however, that one of these was a very minor, six-foot deviation, another was the Edgemoor Condominiums with its unusual circumstances, and the third was a 15-foot deviation outside the TS-R District.

3. Alfred Goldberg

Mr. Goldberg owns and resides in a unit on the sixth floor of the Edgemoor condominium building. He testified that he chose a sixth-floor unit, recognizing that the upper-floor units were more expensive, because it would be higher than the townhouses to be built across the street. Mr. Goldberg's unit will lose much of its southern view even if a 65-foot building is constructed on the subject property, but if the building is 100 feet high, the unit will be entirely gone. Tr. June 16 at 77. He argued that the Edgemoor Condominiums are consistent with the Sector Plan requirement for a step-down in heights from north to south and east to west, but the proposed building would not be.

Mr. Goldberg also offered his opinion that the glass tower discussed during the hearing would not be architecturally compatible with other buildings in the neighborhood. He added that if the proposed building is constructed at 100 feet, other developers will seek 100-foot heights and the area will end up with all the buildings at the same height.

4. Gail Quigley

Ms. Quigley owns and resides in a unit on the third floor of the Edgemoor Condominiums building. She testified that the surrounding architecture in her neighborhood is traditional with brick exteriors and the design currently presented for the proposed building would be completely incompatible. She stated that she and her husband purchased their apartment at great cost because it faced Montgomery Lane, in the urban village milieu, instead of facing the Chase high-rise. They realized that the subject property might be developed with higher density housing, but never dreamed that would mean an ultra-modern high-rise exceeding 65 feet. A 100-foot building would totally cut off their light and their view of the sky, and would change the ambiance in the neighborhood. The Quigleys are concerned about the impact on their property value.

5. Linda Skalet

Ms. Skalet lives on the 9th floor of the Edgemoor Condominiums. Her unit starts on the north side of the building, goes all the way across the east end of the building, then wraps around to the south. To the north, she sees the Chase apartment building 30 feet away. To the east she sees the Newlands building. To the southeast she sees the beautiful cityscape that the Sector Plan created in downtown Bethesda, with buildings decreasing in height from east to west and from north to south, each one "occupying its own respectful position in an interlocking geometric composition." Tr. June 16 at 187. To the south, Ms. Skalet sees another wonderful view, out to the horizon, where the tree line is punctuated by radio towers, the spires of the National Cathedral and the tall buildings of Friendship Heights. Looking down Woodmont Avenue she sees across the tops of buildings to Bethesda Avenue, where the urban village concept has developed into a wonderful urban neighborhood of stores and restaurants, with lots of people on the street. If the building proposed in this case is erected, it will block her whole view to the southeast and most of her view to the south.

Ms. Skalet also objects to the design of the building as presented thus far. She finds that a modernist, metal and glass tower would make an aggressive architectural statement in a neighborhood with predominantly traditional, brick buildings. Moreover, glass walls would not respect the privacy of the new building or the Edgemoor Condominiums. The two buildings would be much

too close together for that high degree of exposure. The Newlands building, across Woodmont Avenue from the Edgemoor condominiums, already is a bad neighbor in this regard. During the day, the glass walls reflects the silhouette of the Edgemoor Condominiums and are very nice. At night, however, many of the offices have lights on and curtains open. Cleaning crews are the only activity at night, but it is like looking into a fish bowl. The proposed building, with part of the north façade projecting into her southeast view, would leave her looking right into the residents' living areas or at their varied curtains.

Ms. Skalet is an art historian with a PhD from Johns Hopkins University and more than 30 years' experience as an art history professor, including teaching the history of architecture and particularly urban architecture. Tr. June 16 at 193. She teaches her students that one thing all truly great urban environments share is a plan that is adopted, implemented and preserved as a blueprint for the future. She stated that New York City, which has a great deal of experience with skyscrapers, would never permit two 100-foot buildings facing each other across a street with 20 feet of pavement. She also stated that she has lived in this area since 1971 and watched Bethesda grow from a little town to a city, with an awkward urban adolescence, and saw it flower after the 1994 Sector Plan. Ms. Skalet implored the County Council to respect the Sector Plan and continue the development of Bethesda's urban village. *Id.* at 196.

6. Jon Weintraub

Mr. Weintraub resides in Unit 506 of the Edgemoor condominiums and is a member of the Condominium Association. He spoke on behalf of himself and the Bethesda Civic Coalition. Mr. Weintraub voiced a concern that the binding elements appear to make a tall building the only option. He echoed Ms. Skalet's concerns about looking into other peoples' homes or staring at their varied curtains. He finds the glass architecture proposed totally out of place at this location.

Mr. Weintraub primarily focused his comments on parking and schools. He stated that the Edgemoor Condominiums have 54 dwelling units with 101 parking spaces, 10 of which are set aside for persons with disabilities. Tr. June 16 at 199. This represents a ratio of more than 1.8 parking spaces per unit. When Mr. Weintraub bought a second parking space in 2002, the price was

about \$30,000. Most residents of higher end communities expect to have parking available for more than one car. Residents in his building who don't have a second space sometimes cause problems by parking randomly in other people's spaces. The four drop-off spaces in front of his building are almost always occupied, regardless of the number of tickets the police issue.

The proposed building is described as 58 units with 75 parking spaces, a ratio of 1.2 spaces per unit. Mr. Weintraub described this as woefully inadequate. It fails to recognize the demand for more than one space and would put pressure on the area, adding to the traffic circling the block and double-parking. In particular, any MPDU residents with more than one car in a family would presumably be unable to afford a second space.

With regard to schools, Mr. Weintraub provided information that he obtained on-line from the MCPS web site. Class sizes are now 24 to 1 at Bethesda Elementary School and Westland Middle School, and 27 to 1 at Bethesda Chevy Chase High School. Westland is over capacity and expected to remain over capacity through 2010. Bethesda Elementary is expected to be over capacity from 2006 to 2010. BCC is expected to be over capacity for the next three years. Moreover, each of these schools has been renovated in the last seven years.

Mr. Weintraub also testified about property values, noting that he and his wife paid more for a unit on the south side of the building, thinking that the Sector Plan would protect their substantial investment in the property. They are concerned about losing light and air if the proposed building goes up, and seeing their property value decrease. Mr. Weintraub suggested that the Applicant could make some response to the step-down recommendation in the Sector Plan simply by using nine-foot ceilings – this would lower the building by about ten feet and make it shorter than the Edgemoor Condominiums.

7. Steve Skalet

Mr. Skalet, husband of Linda Skalet, above, identified a series of photographs [Exs. 64(a) through (e)] that were taken (by Mr. Doggett) from the ninth and tenth floors of the Edgemoor Condominiums, on the southeast side. Tr. June 16 at 230-31. Some of the photographs show views down Woodmont Avenue and beyond, to locations two to three miles away in Washington, D.C., with

expanses of open sky. Mr. Skalet stated that the proposed building would directly cut off the Woodmont Avenue streetscape and all the view that follows. Everyone on the east side of the building would have their views obscured. One photo shows the Newlands building, which is higher than the Edgemoor Condominiums and cuts off a lot of the sky. Another photo shows the Chase building, quite a bit higher than the Edgemoor and very close, to the point that residents have to keep the shutters closed or put something on the windows because people can be clearly seen. Mr. Skalet emphasized that for Edgemoor Condominium residents in units that wrap around the east end of the building, the main open view is to the southeast, which would be blocked by the proposed building. Those units have only one window that looks directly south, so that view is limited.

Comparing the zoning approval for the Edgemoor Condominiums to the present case, Mr. Skalet stated that at the time of the Edgemoor rezoning, there was really no citizen force in Bethesda because of the small residential base. Most of the uses at that time were businesses, who had no objection to the Edgemoor high rise. There was support for the building, which was supposed to be a landmark for Bethesda, which lacked buildings of architectural significance. Mr. Skalet noted that today, there is a much larger residential presence in downtown Bethesda and therefore more interest in the present case. He quoted from the hearing examiner's report in the Edgemoor rezoning regarding the factors that made that case unique and justified the rezoning, noting that despite suggestions that it should not serve as a precedent for the area, it does.

Mr. Skalet observed that if the Edgemoor Condominiums did not exist, no one would even entertain the idea of a 100-foot building on the subject property. Drawing on 30 years' experience as a real estate lawyer, Mr. Skalet stated that once the Edgemoor Condominiums were built to a height of 10 stories, the owners of the subject property decided they should be able to get a tremendous amount of money for their property. So the property sold for a very high price, which the developer can only justify by building a very tall building or luxury building. If the building proposed now is approved, that will also be a precedent because the remaining lot owners will expect very high prices for their properties, which can only be justified by developments that violate the Sector Plan.

Mr. Skalet contends that none of the factors that argued in favor of the Edgemoor rezoning are present in the case at hand – no small lot, no step down, no borrowed density. Moreover, the Edgemoor Condominiums were approved for a much higher density than the 56 units per acre the Applicant here proposes (Mr. Skalet calculated 56 d.u./acre by dividing the minimum of 40 units proposed here by the size of the site, .71 acres). Tr. June 16 at 245-46. A density of 56 units per acre could easily be built consistent with the Sector Plan concept, unless you want to build very large, luxury units.

8. Arthur Blitz, counsel for David Fairweather

Mr. Blitz stated that Mr. Fairweather had engaged his services to present testimony on behalf of Mr. Fairweather, who is owner and resident of Unit 1003 in the Edgemoor Condominiums, on the penthouse level. Mr. Fairweather is a real estate broker by profession. He opposes the proposed development because he believes a building height of 100 feet, plus an additional 14 feet for the mechanical room, is unacceptable in light of the Sector Plan, the impact on light and air for neighboring properties, and the limited parking proposed for the new building. Mr. Fairweather believes that the proposed building would have an adverse impact on the view enjoyed by residents of the Edgemoor Condominiums, with a corresponding adverse effect on property values. The building would cast a shadow over Mr. Fairweather's property at many times of the year, in sharp contrast to the light and air that residents of his building currently enjoy.

In purchasing his unit, Mr. Fairweather relied on the Sector Plan, and in particular the 65-foot height limit and urban village concept. Mr. Fairweather notes that the proposed building would exceed the Sector Plan recommendation by more than 50 percent and would not step down in height in a north/south direction, as called for in the Sector Plan. He maintains that the developer can obtain the desired FAR and density without exceeding the 65-foot height recommended in the Sector Plan, and can have the same number of units in a low-rise, high-density building. Mr. Fairweather's testimony points out that a recent City Line project at Tenley Circle in the District of Columbia had 2,300 registered buyers for only 204 condominium units in a building under seven stories tall. Moreover, the City Homes Townhouses abutting the subject property have seen resale prices as high

as \$1.8 million. Mr. Fairweather concludes that the urban village concept is alive and well in D.C. and on Montgomery Lane, and is a community plan that residents would like to see strengthened. He argues that under these circumstances, it would be arbitrary and capricious for the County to accommodate a design that violates the Sector Plan.

Mr. Fairweather also notes that the amount of parking planned for the proposed building, 75 spaces for 58 dwelling units, would be inadequate. This is a lower ratio of spaces to units than at the Edgemoor Condominiums, where property owners have experienced problems with parking for residents, guests and staff. Mr. Blitz submitted for the record a copy of a letter from the Edgemoor Condominiums owners to the property manager talking about problems with guest parking. See Ex. 50(b). Insufficient parking would present a strong likelihood of illegal parking along Montgomery Lane becoming the norm, creating a potentially dangerous situation.

D. Community Support

1. Sheryl Staren

Ms. Staren is a resident of the City Homes Townhouses adjacent to the subject property. She testified that the owners of the six townhouses that face the subject property formed a group called "Concerned Families of City Homes" when they first learned of the proposed development, and they engaged the services of Larry Ponsford, an architect and urban planner. Based on his advice and various possible development scenarios that he envisioned, the group decided that they would experience less adverse impact from a taller building with a smaller footprint than they would from a shorter, squatter building. Concerned Families met with the Applicant and prepared a list of their concerns, which are embodied in a memorandum of understanding signed by the Applicant and Concerned Families of City Homes. Tr. June 16 at 166. In that agreement, the Applicant agreed, among other things, to located the residential entrance to the building on Montgomery Lane and the service entrance on Hampden Lane, to situate the building closer to Woodmont Avenue, and to reduce the building height as it moves from east to west. See *id.*

2. Brian Alan Polkes

Mr. Polkes resides in the City Homes Townhouses and spoke on behalf of the Board of Directors, which represents all 29 City Homes homeowners. The Board supports the construction of the nine-story building outlined in the memorandum of understanding between the Applicant and Concerned Families of City Homes. Prior to making a recommendation to the homeowners, the Board or its representatives met on several occasions with various community groups, Technical Staff and Larry Ponsford, the architect/planner hired by Concerned Families. The Board concluded that a nine-story building with more green space would best serve the interests of the residents of City Homes. At either 65 feet or 100 feet, the new building would affect the townhouses from the standpoint of light, air and privacy. However, the 100-foot building would occupy only 48 percent of the site, compared to 70 percent for the shorter building. They concluded that the taller building would be less invasive and more aesthetically pleasing, and therefore more compatible with their homes. Tr. June 16 at 171.

Mr. Polkes stated that the City Homes Board was not concerned with future impacts that might occur due to subsequent development in the TS-R District; they deal with the reality of the present project, which is going to be built and will change their lives forever. He recalled a resident of the Edgemoor Condominiums testifying in front of the Planning Board that when he stands on his balcony, he can have a conversation in normal conversational tones with his neighbor in the Chase, which is only 20 feet away. The residents of City Homes adjacent to the subject property were aware that they could end up with a similar situation if a building were erected on the subject property lot line to lot line. That was the driving force that led them to prefer a taller building with a smaller footprint.

3. Howard Balick

Mr. Balick and his wife are the owners and residents of Unit 601 at the Edgemoor Condominiums, and their unit faces south across Montgomery Lane. Mr. Balick testified that not all of the owners in his building oppose the proposed project. He and his wife welcome it, and feel that a 100-foot glass tower would add to the visual vitality of the Bethesda CBD. Tr. June 16 at 203.

V. ZONING ISSUES

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

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, i.e., it satisfies the purpose clause for the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

The TS-R Zone is among the floating zones that provide for design specifications as part of a development plan. An applicant is afforded considerable design flexibility if development standards for the zone are satisfied. Pursuant to Code §59-D-1.11, development under the TS-R Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the TS-R Zone. If approved, the development plan will provide basic design parameters for the site, much as the Zoning Ordinance provides design specifications for more rigidly applied zones. Normally, a development plan is expected to contain sufficient precision to fix the land use, height, density and bulk of the proposed development, which are basic components of compatibility, and to provide design specifications that govern all post-zoning reviews. In the TS-R Zone, however, the function of the development plan is altered somewhat by the provision that classifies building height as an element to be determined during site plan review, rather than at zoning. See Code §59-C-8.51.

In the case at hand, which involves a single building on a small parcel of land, building height is inextricably linked to setbacks and density. If the setbacks are made larger, the building

height must increase in order to maintain the same density. Conversely, if the setbacks are decreased, a lower building height can achieve the same density. Thus, if the setbacks shown on the conceptual site plan were fixed as binding elements, the Planning Board would effectively be unable to require the applicant to limit the height to something less than 100 feet without also requiring a reduction in density. As a result, to preserve the Planning Board's ability to exercise meaningful authority over the development during site plan review, the Development Plan in this case provides only a conceptual site plan and a series of binding elements in text form. Setbacks are provided as binding elements ***only if the 100-foot height is approved.***

Building height and setbacks often play an important role in the evaluation of a proposed floating zone reclassification because they have a dramatic impact on the character of the development and its compatibility with surrounding uses. In the absence of these parameters, the District Council cannot review the Development Plan in the way that it normally would in a development plan case – as a binding, if approximate, representation of how the building would sit on the site and how much space it would occupy. Instead, all the relevant zoning factors – compatibility, master plan compliance, and the public interest – must be evaluated on a more conceptual level, based on reasonably possible development scenarios under the provisions of the TS-R Zone. This review is somewhat analogous to the review the Council undertakes when an applicant seeks reclassification to a zone that does not require a development plan, such as an RT Zone, and chooses the standard method of application. In those cases, the applicant does not submit a site plan at all, and the Council's consideration consists of reviewing the uses that would be permitted and the development regulations for the zone. Here, the Council is presented with an application for a residential building with the following binding elements:

- 40 to 65 dwelling units, including up to 15 percent MPDUs with some MPDUs on site;
- density of no more than 3.05 FAR;
- a height of up to 100 feet;
- a maximum of 60 percent building coverage;

- at least 10 percent public use space;
- at least 20 percent active/passive recreation space, with the amount on the ground determined by the Planning Board;
- underground parking for residents with a small number of surface parking spaces for drop-off and visitor parking;
- streetscape in substantial compliance with the Sector Plan guidelines; and
- right-of-way dedications as called for in the Sector Plan.

Because the Development Plan establishes the fixed elements of the application, evaluation of zoning issues will begin with the development plan and proceed to the requirements of the zone itself.

A. The Development Plan

Before approving a development plan, the District Council must make five specific findings set forth in Code § 59-D-1.61. These findings relate to consistency with the master plan and the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas. The required findings are set forth below in the order in which they appear in the Zoning Code, together with the Hearing Examiner's analysis.

- (a) ***That the zone applied for is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies.***

As set forth in detail in Part III.F above, the Planning Board, Technical Staff and Mr. Rivkin each found that the TS-R Zone and the proposed development would be in substantial compliance with the use and density indicated in the Sector Plan, although they applied different definitions of the recommended use. Mr. Doggett identified yet a fourth interpretation of the

recommended use, and based on that, found that the proposal would not comply with the use and density recommended in the Sector Plan.

After a careful review of all of the evidence pertaining to the Sector Plan, as detailed in Part III.F above, the Hearing Examiner agrees with Technical Staff's view that the Sector Plan recommended multi-family residential use for the subject property, which is fully consistent with the present application. The Hearing Examiner also agrees with Technical Staff that while densities toward the higher end of the recommended density range (45 to 100 d.u./acre) would be desirable at a location so close to Metro, any level of unit density within that range should be considered in substantial compliance with the Sector Plan. Here, the Applicant proposes a unit density of between 56 and 91 d.u. acre, which is within the range recommended in the Sector Plan.

Technical Staff noted that FAR is another important measure of density, and that compliance with the Sector Plan is more than just a simple question of unit density. The Sector Plan specifically recommended a minimum density of 45 units per acre everywhere in the TS-R District (as defined in Figure 3.1, Master Plan at 38) except along Arlington Road, and "anticipates that some projects will incorporate higher densities, and the full 2.5 FAR (about 100 dwelling units per acre) would be allowed." Sector Plan at 82. The quoted language clearly reflects an expectation that the maximum FAR and a unit density of 100 d.u./acre would go hand in hand – the Sector Plan did not anticipate a use such as one of the possible outcomes here, namely a building with a full 2.5 FAR (plus MPDU bonus) but only 40 dwelling units, for a unit density of 56 d.u./acre. Nonetheless, the Hearing Examiner agrees with Technical Staff that the 2.5 FAR and any unit density between 45 and 100 d.u./acre can be considered in substantial compliance with the Sector Plan. The Plan did not explicitly state that 2.5 FAR should not be permitted with less than about 100 d.u./acre, and *substantial* compliance is just that – compliance with the essential requirements, not with every detail. The Hearing Examiner agrees with Technical Staff and Mr. Doggett that 64 or 65 units would be more appropriate at this location than 40, because that would produce not only 2.5 FAR (plus MPDU bonus) but also a unit density of about 90 d.u./acre. This would represent not just substantial, but full compliance with the Sector Plan's density recommendations.

Based on the preponderance of the evidence, the Hearing Examiner concludes that the proposed Development Plan would be in substantial compliance with the use and density indicated in the Sector Plan and would not conflict with any other applicable county plan or policy. Compliance with the Sector Plan as a whole will be discussed in a later section.

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

1. Intent and Purposes of the Zone

The TS-R and TS-M Zones are intended to be used as follows, per Section 59-C-8.21:

- (a) Both the TS-R and TS-M zones are intended to be used in transit station development areas as defined in section 59-A-2.1, and the TS-R zone may also be used in areas adjacent to central business districts, within 1,500 feet of a metro transit station.
- (b) The TS-R zone is intended for locations where multiple-family residential development already exists or where such development is recommended by an approved and adopted master plan.
- (c) The TS-M zone is intended. . . .
- (d) In order to facilitate and encourage innovative and creative design and the development of the most compatible and desirable pattern of land uses, some of the specific restrictions which regulate, in some other zoning categories, the *height, bulk and arrangement of buildings and location of the various land uses are eliminated* and the requirement substituted that all development be in accordance with a plan of development meeting the requirements of this division. [emphasis added]

The subject property is located less than 750 feet from the Bethesda Metro Station, in an area designated in the Sector Plan as the Transit Station Residential District (defined in Figure 3.1, Master Plan at 38). The Hearing Examiner agrees with Technical Staff and Mr. Rivkin that the proposed reclassification would be consistent with the intent of the TS-R Zone.

The purpose clause for the TS-R Zone, found in Code §59-C-8.22, is set forth in full below, with relevant analysis and conclusions following:

- (a) To promote the effective use of the transit station development areas and access thereto;

- (b) To provide residential uses and certain compatible non-residential uses within walking distance of the transit stations;
- (c) To provide a range of densities that will afford planning choices to match the diverse characteristics of the several transit station development areas within the county; and
- (d) To provide the maximum amount of freedom possible in the design of buildings and their grouping and layout within the areas classified in this zone; to stimulate the coordinated, harmonious and systematic development of the area within the zone, the area surrounding the zone and the regional district as a whole; to prevent detrimental effects to the use or development of adjacent properties or the surrounding neighborhood; to provide housing for persons of all economic levels; and to promote the health, safety, morals and welfare of the present and future inhabitants of the regional district and the county as a whole.

The Hearing Examiner agrees with the Planning Board, Technical Staff and Mr. Rivkin that the proposed rezoning and development would promote the effective use of and access to the TS-R District by doing exactly what the second paragraph of the purpose clause states – providing a residential use within walking distance of Metro. As Staff notes, the sidewalk and streetscape improvements that would be part of this development would improve pedestrian connections to the Bethesda Metro station. The purpose clause calls for a range of densities near Metro stations, to allow for development appropriate to each Metro area. The range of densities provided for in this case, 56 to 91 units per acre, would add a second high-density project in the TS-R District, which has mostly been developed with projects of more moderate density. The range of 40 to 65 units in a building of the size proposed would match the characteristics of downtown Bethesda by providing a level of housing consistent with what the evidence suggests is a strong market demand.

Paragraph (d) of the purpose clause sets forth a purpose to “stimulate the coordinated, harmonious and systematic development of the area” and “prevent detrimental effects to the use or development of adjacent properties or the surrounding neighborhood.” These elements effectively make compatibility of the rezoning with the surrounding area an element of the purpose clause. Accordingly, compatibility will be discussed at this juncture.

Assessing compatibility is one of the most difficult aspects of this case. The Opposition argues that compatibility cannot be determined on this record, because so much of the application is

conceptual in nature. Opposition counsel finds it problematic for the District Council to assess compatibility when another agency is responsible for establishing building height – an important component of compatibility – at a later stage of review. The undersigned agrees that the unusual structure of the zone makes the analysis of compatibility more complicated. However, compatibility can still be fully and appropriately assessed based on the parameters contained in the binding elements. The approach taken in this report is to assume construction to the maximum height of 100 feet, for purposes of compatibility analysis, because a building of that height would likely have the greatest impact on the surrounding area.

The Opposition cited numerous Maryland cases addressing the burden that rests on an applicant for rezoning to demonstrate compatibility of the proposed development. See Ex. 93 at 3-5. The Opposition suggests that the decision maker in a floating zone case must review building location and style, lot coverage, green area and setbacks before construction may proceed, citing *Bigenho v. Montgomery County*, 248 Md. 386, 391, 237 A.2d 53, 57 (1968), quoted in *Wheaton Moose Lodge No. 1775 v. Montgomery County*, 41 Md. App. 401, 405, 397 A.2d 589, 593 (1966). See Ex. 93 at 4. A fair reading of the decision in *Bigenho* reveals, however, that the court described the listed elements as items that a decision maker *could consider relevant*, not items that must be analyzed in every case. The Hearing Examiner finds the Opposition's argument that the evidence in this case is insufficient, as a matter of law, to support approval to be entirely unpersuasive.

In this unusually complex case, evidence that could be considered substantial and probative has been presented both for and against a finding of compatibility. This evidence is summarized below, followed by the Hearing Examiner's analysis.

The Planning Board opined that the proposed high-density residential building, with a maximum building height of 100 feet, would be "compatible with adjacent development" because of the high-density character of the development and the proposed setbacks and green space. See Ex. 42. The setbacks the Planning Board refers to are those listed in the binding elements to which the Applicant agreed before the Board – a minimum of 48 feet from the City Homes Townhouses and 18 feet from the western property line (these amount to the same thing, because 18 feet to the property

line plus the 30-foot width of the townhouses' driveway adds up to 48 feet). Technical Staff opined that the proposed development would be compatible with the City Homes Townhouses because of the setback and green space planned along the western boundary. See Ex. 38 at 13.

Mr. Rivkin stated that the Applicant has paid "extraordinary" attention to fitting the proposed building into the existing neighborhood, and opined that the proposed development would be "highly" compatible with adjacent development. He stressed that in use, density and urban design, the project would be a valued addition to the CBD. Mr. Rivkin testified, moreover, that a 65-foot building would be incompatible with the neighborhood from an urban design standpoint because it would occupy more of the site, with less green space and less space between it and the adjacent City Homes Townhouses.

Mr. Rivkin did not know how much the footprint would change with a 65-foot height – his opinion regarding compatibility was based on a general sense that the shorter building would have a larger footprint and less space around it. Mr. Rivkin conceded on cross-examination that he was not aware of details such as the 30-foot width of the driveway that separates the City Homes Townhouses from their shared property line with the subject property. The cross-examination suggested that his opinions were based on a broad review of the subject property and its surroundings, rather than detailed examination, but neither his expertise nor his credibility was impeached to any meaningful degree.

Mr. Doggett testified that the proposed development would be incompatible with the Edgemoor Condominiums because it would have a substantial detrimental effect on the viewshed, and because two 100-foot high-rises across the narrow width of Montgomery Lane would create an undesirable "canyonization" effect.²² He described this as more than the simple effect on light and shadow, but also a psychological feeling of enclosure. He opined that even on the lower floors, a shorter building would be preferable because it would preserve more access to light, air and views of the sky, as opposed to just a sheer wall rising up.

²² The Hearing Examiner notes that the two buildings would be perpendicular, rather than parallel, and only a portion of the Edgemoor Condominium's façade would overlap with the proposed building. These factors suggest that any "canyonization" effect would exist only over a small area.

With regard to the City Homes Townhouses, Mr. Doggett registered surprise at the residents' support for the proposed project. He opined that even if a taller building gained the townhouses an additional 18 feet of separation, residents would be better off with a 65-foot building as their neighbor. The shorter building would be only five to ten feet taller than the townhouses, preserving access to light and air, and would be separated from them at least by the 30-foot width of the City Homes driveway.

Like Mr. Rivkin, Mr. Doggett conceded on cross-examination that he was only roughly familiar with details such as the exact heights of buildings in the surrounding area. This concession did not, in the Hearing Examiner's view, have any meaningful bearing on his expertise or his credibility.

The Hearing Examiner notes that the evidence pertaining directly to compatibility focused on the City Homes Townhouses and, in Mr. Doggett's case, the Edgemoor Condominiums. Compatibility with the adjacent uses is an important consideration, but broader compatibility issues affecting the surrounding area as a whole must also be considered. In this case in particular, the broader compatibility issues play an important role. Accordingly, the discussion below addresses compatibility with both adjacent uses and the surrounding area generally.

The nature of the use proposed here -- multi-family residential -- is clearly compatible with the residential uses in the adjoining buildings. The use is also compatible with non-residential uses, which would benefit from a larger pool of residents to provide customers, employees, etc. With regard to the Edgemoor Condominiums, compatibility of the proposed structure is equally clear. The shape of the subject property dictates that any building of significant size must face Woodmont Avenue, perpendicular to the Edgemoor Condominiums. This avoids the compatibility problems that presently exist between the Chase building and the Edgemoor Condominiums, which run parallel to one another with very little space in between. The proposed building and the Edgemoor Condominiums would be roughly the same height, with similar footprints. Because of its orientation on the site, the proposed building would extend the line of high rises down Woodmont Avenue in a fashion quite harmonious with the Edgemoor Condominiums. The Opposition alleges that the proposed building would be detrimental to use, enjoyment and property values of units in the

Edgemoor Condominiums because of the impact on the views. The parties presented extensive evidence, as summarized in Part III.G. above, about potential impact on the views. It is difficult to know precisely the degree to which views would be diminished. Based on the preponderance of the evidence, the undersigned finds that at a minimum, some units at the east end of the building with south-facing windows would find their views blocked or sharply restricted. For the building as a whole, however, the proposed development would likely have no material detrimental impact, and certainly not enough to outweigh the general compatibility of the structures and uses.

Compatibility with the City Homes Townhouses presents a more difficult question that, in the view of the undersigned, turns on the broader question of surrounding area compatibility. Despite the adherence of the City Homes residents to their land planner's view that a tall building with bigger setbacks would be in their best interests, the Hearing Examiner finds Mr. Doggett's view more persuasive. Mr. Doggett opined that an additional 18 feet of setback – which is all that the Applicants promised – is a poor bargain for 35 feet more in height. A 65-foot building would be about 10 feet taller than the townhouses, while a 100-foot building would loom over them, blocking out much more air and light. However, the District Council does not have the luxury of choosing between various development options; it must evaluate the application before it.

At 100 feet, the proposed building would be considerably higher than the City Homes Townhouses, but photographs and testimony suggest that the townhouses' bulk would keep them from being visually overwhelmed by the proposed building. Moreover, the City Homes Townhouses are part of a neighborhood containing buildings of widely varying age, height and bulk, including very small, single-family residential buildings, townhouses of different sizes, multi-family housing in high-rise and low-rise buildings, and buildings both large and small containing office, commercial and retail uses. In many cases, completely different types of structures are juxtaposed against one another, much the way the City Homes Townhouses confront the Edgemoor Condominiums and, right next to that building, small two-to-three-story residential structures that have not yet been redeveloped. With the Edgemoor Condominiums right across the street, it is difficult to say that the proposed building would introduce a noticeable incompatibility.

It should be acknowledged that if the Edgemoor Condominiums did not exist, or the building were not a high-rise, the present application would be unlikely to succeed. The Hearing Examiner in the Edgemoor rezoning took pains to state that the decision did not establish a precedent for other high-rises in the TS-R District, because the height was justified by a series of factors specific to that case. Nonetheless, the physical presence of a 100-foot high-rise at that location affects the character of the TS-R District and the surrounding area, and this compatibility analysis.

Numerous photos and drawings of current conditions demonstrate that even if the Sector Plan has not been implemented in all its particulars, it has led to a pleasing skyline of tall buildings at the Metro Core, with buildings decreasing in height, bulk and density from east to west and north to south. At 100 feet, the proposed building would not provide a step-down in height from the Edgemoor Condominiums, which, in the view of this Hearing Examiner, is the application's chief drawback. It would, however, provide a step-down in height from the non-residential portion of Hampden Square (directly across Woodmont Avenue) and buildings to the northeast.

A binding element commits the Applicant to substantial compliance with the streetscape guidelines contained in the Sector Plan, which is a very important element of compatibility. Streetscape improvements would continue the attractive streetscape on Montgomery Lane and provided a much improved pedestrian environment on Woodmont Avenue.

The Hearing Examiner considers the squared-off, glass and steel design shown in the conceptual drawings to be a stark contrast to the prevailing brick architecture in the immediate vicinity of the site, but architectural compatibility is an issue for site plan review, not zoning. Moreover, a shorter building – somewhere between 65 and 80 feet, for example – would be more compatible with the City Homes Townhouses and provide all the desired step-downs, but as noted, that choice is not before us. In the complex, multi-hued urban fabric of downtown Bethesda, the Hearing Examiner must conclude that a building with the parameters presented here would fit compatibly into its surroundings.

As discussed in more detail in Part V.B.2. below, the preponderance of the evidence supports a finding that the proposed development would be compatible with land uses and development in the surrounding area from the standpoint of traffic and school impacts.

Several Opposition witnesses testified eloquently about their reliance on the Sector Plan, arguing that a 100-foot building should not be imposed on them contrary to their expectations. The heavy degree of reliance they espouse is surprising, given that they reside in a building which was, itself, approved and built at a height of 100 feet, substantially exceeding Sector Plan guidelines. That fact should have been evidence enough that Sector Plan guidelines are not always followed.

2. Standards and Regulations of the Zone

The standards and regulations of the TS-R Zone are summarized below, together with the grounds for the Hearing Examiner's conclusion that the proposed development would satisfy each of these requirements.

Section 59-C-8.24, Location. This section repeats Section 59-C-8.21(a), which is discussed in Part V.A.(b)1. above.

Section 59-C-8.25, Public facilities and amenities.

A development must conform to the facilities and amenities recommended by the approved and adopted master or sector plan, including and granting such easements or making such dedications to the public as may be shown thereon or are deemed necessary by the Planning Board to provide for safe and efficient circulation, adequate public open space and recreation, and insure compatibility of the development with the surrounding area, and assure the ability of the area to accommodate the uses proposed by the application.

Property to be dedicated for roadway right-of-way is indicated on the site layout on the Development Plan. This element is not identified as illustrative, and therefore should be considered binding. In addition, the textual binding elements specify that the development would substantially comply with the Sector Plan's streetscape recommendations.

The Opposition attempts to read paragraph 59-C-8.25 to import into the standards for the TS-R Zone a general compatibility requirement and a public facilities requirement, by isolating the language "insure compatibility of the development with the surrounding area, and assure the ability of the area to accommodate the uses proposed by the application." The paragraph is, admittedly, somewhat difficult to parse. In the view of the Hearing Examiner, however, the quoted language cannot be separated from the beginning of the clause to which it belongs – "including and granting such easements or making such dedications to the public as . . . deemed necessary to . . . insure

compatibility of the development with the surrounding area, and assure the ability of the area to accommodate the uses proposed by the application.” This paragraph pertains to easements and dedications, which the Applicant has bound itself to provide as necessary.

Section 59-C-8.3 Land use. No use is allowed except as indicated in the use table . . .

The proposed multi-family dwellings are a permitted use in the TS-R Zone.

Section 59-C-8.4 Development standards.

As shown in the table below, excerpted from the Staff Report with slight modification, the proposed development would be consistent with development standards for the TS-R Zone.

**Development Standards and Special Requirements for TS-R Zone
Code §§ 59-C-8.4 and 8.5**

Development Standards	Permitted/ Required	Proposed
Minimum tract area (area to be rezoned)	20,000 sq. ft.	30,891 square feet
Maximum density of dwelling units per acre		
a. Floor area ratio	2.5	Not to exceed 2.5*
b. FAR with bonus for MPDUs	3.05	Not to exceed 3.05*
b. Dwelling units per acre	150 units/acre	56 – 91 units/acre*
c. Gross floor area	94,218 sq. ft.	Not to exceed 94,218 sq. ft.*
Open space		
a. Minimum percentage of net area devoted to public use space	10%	Not less than 10%
b. Minimum percentage of net lot area devoted to active and passive recreation space.	20%	Not less than 20%. Area to be provided on the ground to be determined by Planning Board.
c. Total minimum open space	30%	Not less than 30%
d. Maximum building coverage	None	No more than 60%
Special Requirements ²³		
a. Maximum building height	None	100 feet
b. Parking to be located so as to have minimal impact on adjoining residential properties		All parking to be underground except for small pick-up/drop-off area/visitor parking.
Minimum parking (per § 59-E-3.7)	75 spaces	No binding element

* Denotes binding elements.

The Opposition argues that if the number of parking spaces does no more than satisfy the requirements of the Zoning Ordinance, parking will be inadequate for residents and visitors, further

²³ Additional special requirements in Section 59-C-8.5 address interior streets, which are not proposed for this small site, and ancillary commercial uses, which also are not proposed.

straining existing parking shortages in Bethesda. The Edgemoor Condominiums have far less parking than residents desire, leading to second parking spaces selling for large sums of money, and residents sometimes parking illegally in spaces that belong to others. See Memorandum re: parking from Edgemoor Condominium's management, Ex. 50(b). The Opposition argues that the minimum number of spaces required under the Zoning Ordinance is not enough to serve the actual needs of urban apartment dwellers today.

Section 59-C-8.51, Building height limit.

The maximum height permitted for any building shall be determined in the process of site plan review. In approving height limits the planning board shall take into consideration the size of the lot or parcel, the relationship of the building or buildings to surrounding uses, the need to preserve light and air for the residents of the development and residents of surrounding properties and any other factors relevant to height of the building.

No findings necessary at zoning.

Section 59-C-8.52, Off-street parking. Parking shall be so located as to have a minimal impact on any adjoining residential properties.

The binding elements specify that residential parking would be underground, which would tend to minimize impacts on adjoining residential properties by eliminating the sight and sounds of above-ground parking.

Section 59-C-8.52, Streets. Interior streets may be private or public . . .

No interior streets are proposed in this application.

Section 59-C-8.54, Ancillary commercial uses. Ancillary commercial uses . . . may be permitted as follows . . .

No commercial uses are proposed in this application.

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

This application provides only an illustrative example of the type of internal vehicular and pedestrian circulation system and points of external access that are anticipated for this project. If the driveways are located as shown on the conceptual site plan, the evidence demonstrates that sight distances would comply with County standards. The evidence suggests that the configuration of the

garage entrance and the drop-off/visitor parking area would require careful attention to avoid potential traffic safety problems such as drivers executing multiple turning movements in front of a busy garage entrance, or backing out into traffic. This will undoubtedly be the subject of detailed discussion during the site plan review process.

The Opposition's concerns are based partly on an expectation that the amount of parking required by the Zoning Ordinance would not be enough, leading to chronic parking shortages. Anecdotal evidence suggests that the Zoning Ordinance requirements may not be adequate, but those are the standards currently applied, and the record does not suggest any justification to impose a higher parking standard – at least not at the zoning stage. Moreover, keeping parking availability tight is one of the strategies described in the Stage II Memo as a means of persuading people to use public transit.

Based on the preponderance of the evidence, the Hearing Examiner concludes that the evidence is sufficient to find that the proposed development would have safe, adequate and efficient internal vehicular and pedestrian circulation system and points of external access.

3. Maximum Safety, Convenience, and Amenity of the Residents

With regard to serving the safety, convenience and amenity of residents of the proposed building, Technical Staff notes that the setback and streetscape provisions along Montgomery and Hampden Lanes would improve the pedestrian connection between Arlington Road and Woodmont Avenue, and that the setbacks, linear open space, streetscape, small urban park and bus stop along Woodmont Avenue would improve the pedestrian connections between the Woodmont Triangle and the Arlington Road District. See Ex. 38 at 13. The Hearing Examiner notes that the setbacks, open space and (very small) urban park discussed in the record are all conceptual – no specifics have been established. Nonetheless, the maximum 60 percent building coverage assures some degree of setbacks, and the binding elements specify substantial compliance with the extensive streetscape guidelines provided in the Sector Plan.

As Mr. Rivkin noted, the building would be extremely accessible to Metro, shopping, entertainment and outdoor recreation. The record as a whole supports Mr. Rivkin's testimony that amenities in the form of landscaping and streetscaping would be a high priority for the project.

Based on these findings, the Hearing Examiner concludes that the proposed development would provide for the maximum safety, convenience, and amenity of the residents of the development.

4. Compatibility

As discussed in detail in Part V.A.(b)1. above, the Hearing Examiner concludes that the proposed development would be compatible with land uses in the surrounding area.

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

The subject property is located in a highly urbanized area and has few natural features. Technical Staff reports that two existing trees on the site would be removed, but that efforts will be made to preserve trees in the public right-of-way. The application is exempt from forest conservation requirements because of the site's small size and lack of existing forest cover. As noted earlier, if this site is developed, the developer will be required to conform to county requirements for stormwater management. Technical Staff expects such requirements to be met through a structural filtering device to be placed under the service drive. Based on these factors, the undersigned concludes that this paragraph is satisfied.

- (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***

Condominium association documents that have been submitted in draft form adequately and sufficiently demonstrate the intended ownership and perpetual maintenance of common areas. See Ex. 13.

B. Public Interest

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

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

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

1. Master Plan, Planning Board and Technical Staff Recommendations

As discussed above, the Hearing Examiner agrees with the Planning Board and Technical Staff that the subject application would be in substantial compliance with the use and density recommended in the *Bethesda CBD Sector Plan*. As to compliance with the Sector Plan as a whole, however, the Hearing Examiner must part company with the Planning Board and agree with Technical Staff that the proposed development, based on the parameters established in the binding elements, would not be in substantial compliance with the Sector Plan’s vision for the TS-R District.

The Planning Board went to great lengths to devise an interpretation of the Sector Plan that would be consistent with the proposed development. A chief feature of this interpretation was a single drawing, Figure 4.13, which includes a Future Land Use map that identifies residential uses collectively as “High-Rise or Garden Apartment.” The Planning Board relied on this drawing to support conclusions that high-rise apartments were a recommended use, and that this recommendation superceded height guidelines contained elsewhere in the Sector Plan. The Hearing Examiner finds this

reliance to be misplaced. The Hearing Examiner finds Mr. Doggett's interpretation of Figure 4.13 to be the most persuasive. Mr. Doggett opined that in the phrase "High-Rise or Garden Apartment," the former referred to the Chase high-rise that already existed, and the latter referred to the form of residential land use recommended for the future.

As Technical Staff and Mr. Doggett explained, the Sector Plan included extensive recommendations and guidelines for the TS-R District. Taken as a whole, these recommendations and guidelines clearly establish a vision for the TS-R District centered on a low-rise, high-density urban village, with buildings set close to one another and to the streets, using closed block configurations with mostly interior and rooftop open spaces, and a maximum height of 65 feet. The proposed 100-foot high-rise, with its 60 percent cap on building coverage, would not contribute to the achievement of this vision.

Nonetheless, the Sector Plan is a guide, and compliance with its recommendations is not mandatory unless the Zoning Ordinance makes it so. See *Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 701 A.2d 879 (1997). The provisions of the TS-R Zone do not require compliance with the Sector Plan, and the master plan finding required for approval of a development plan under Section 59-D-1.61 requires only substantial compliance with the **use and density** indicated in the Sector Plan. Under these circumstances, whether or not to reject a requested reclassification due to lack of Sector Plan compliance becomes a policy issue more than a legal question.

Normally, a reclassification that is not recommended for the subject property by an approved and adopted master or sector plan requires a supermajority of six affirmative votes of members of the District Council. See Code § 59-H-8.2. However, because the Planning Board recommended approval of the reclassification sought in this case, approval by the District Council requires only five affirmative votes. See *id.*

Technical Staff argues that the Sector Plan remains valid until amended and its vision should be followed. Mr. Doggett agrees, and maintains that much of the development in the TS-R District thus far has supported the urban village concept. He notes that although their unit density is low, the height and bulk of the City Homes Townhouses are fairly consistent with the Sector Plan's

vision and their broad sidewalk has an urban village look. He observes that development along Arlington Road, while relatively low in density, is consistent with the Sector Plan's recommendation for lower heights and density on that street, which confronts a neighborhood of single-family detached homes. He goes so far as to suggest that even the Edgemoor Condominiums conform to the Sector Plan in terms of architecture and urban design qualities, using the brick, colorful skyline and textures it envisions.

Mr. Rivkin, in contrast, argues that the Sector Plan's concept of a low-rise, high-density urban village is dead. He notes that housing production in downtown Bethesda has been below levels anticipated in the Sector Plan, and that the only high-density residential project built in the TS-R District since the Sector Plan's adoption is the Edgemoor Condominiums, which violate the Plan's height guidelines; all of the other residential development in the district has been at lower densities. Mr. Rivkin concludes that the urban village concept has proven infeasible in the Bethesda marketplace and will not materialize.

The Hearing Examiner is persuaded by Technical Staff and Mr. Doggett that the Sector Plan still has a pulse. Although some conditions have changed since the Plan's adoption, and several projects have been approved with deviations from its density and/or height recommendations, enough of the general concept for the TS-R District remains possible of accomplishment to justify adherence to it in the appropriate case.

In the present case, the undersigned finds that because the proposed reclassification and development would be compatible with the surrounding area, would be in substantial compliance with the use and density recommended in the Sector Plan, and would contribute needed residential density in downtown Bethesda, failure to *fully* conform to the Sector Plan is not sufficient grounds to deny the application.

2. Impact on Public Facilities: Roadways

As discussed in detail in Part III.I. above, the Applicant contends that the proposed project would not have an adverse impact on area roadways because it would generate a very small number of trips, below the threshold that requires preparation of an LATR study. The Applicant also

relies on Technical Staff's Stage II Memo, Ex. 76(c), a recent comprehensive traffic study prepared for the Bethesda-Chevy Chase policy area which found that (i) no intersections in the Bethesda CBD have traffic exceeding the applicable congestion standards; and (ii) measures have been identified to resolve excessive congestion at all intersections in the Bethesda-Chevy Chase policy area save three, all of which are located north of the Bethesda CBD and are unlikely to be noticeably affected by residential traffic originating in downtown Bethesda. The Stage II Memo, which has been endorsed by the Planning Board, concluded that the Bethesda CBD should proceed to Stage II development with a cap on new employment uses, but that traffic conditions did not warrant any cap on residential development. Moreover, Technical Staff's ADAC Report (Annual Development Approval and Congestion Report, Ex. 90) found that three intersections along Woodmont Avenue – at Elm Street, Montgomery Lane and Cordell Avenue – are currently operating at levels well below the applicable congestion standard.

The Opposition argues that the present zoning application should fail because the Applicant did not prepare a traffic study specific to the subject development. See Ex. 93. This argument is buttressed by citations to case law and a 2002 Report and Recommendation by a Montgomery County Hearing Examiner Philip Tierney in zoning application No. G-775, Chevy Chase Land Company. See *id.* On this Hearing Examiner's reading, however, the cited authorities do not support the Opposition's arguments.

It is certainly true that rezoning denials based on an applicant's failure to show that anticipated traffic would be compatible with the surrounding area have been upheld. See *Montgomery County v. Laughlin*, 255 Md. 724, 259 A.2d 293 (1969); *Tauber v. Montgomery County*, 244 Md. 332, 223 A.2d 615 (1966); *Montgomery County v. Greater Colesville Citizens Association, Inc.*, 70 Md. App. 374, 521 A.2d 770 (1987). However, the case law merely identifies the applicant's burden to demonstrate a lack of adverse traffic impacts – it does not prescribe particular types of evidence that must be presented.

Hearing examiner reports do not carry the weight of judicial opinions and are not binding on unrelated cases. To the extent that such reports may be considered instructive, however,

the undersigned notes that the Hearing Examiner's report in G-775 does not, as suggested by the Opposition, state "categorically" that a compatibility finding cannot be made in a floating zone case if the applicant has failed to provide a complete traffic study. The report states, rather, that the District Council is **permitted** to consider evidence beyond LATR, and that evidence on traffic safety is linked to a determination of compatibility.

The Opposition further relies on *Trainer v. Lipchin*, 269 Md. 667, 309 A.2d 471 (1973), for the proposition that zoning approval may be denied based on the public interest if the evidence shows that a development would make existing traffic congestion "slightly worse." In so doing, the Opposition has mischaracterized the holding of that case by removing it from its proper context. The case involved a Euclidian zone, not a floating zone, and the court upheld denial of a rezoning on grounds that traffic *and* other evidence was insufficient to demonstrate that a mistake had been made in the previous comprehensive zoning. There was no discussion of compatibility or the public interest.

The Opposition contends that rezoning should not be approved if the applicant's only evidence concerning traffic is a statement that the development is expected to generate too few peak-hour trips to require an LATR traffic study. The Hearing Examiner is aware of several cases in which the District Council has approved reclassifications under just such circumstances, relying on the Planning Board's judgment, contained in the LATR Guidelines, that developments below a certain size do not have a material impact on traffic conditions. It cannot be denied that, cumulatively, several small projects in a given geographic area could have a material impact on traffic conditions. Moreover, the only direction to zoning applicants to rely on LATR standards in presenting a zoning case comes from the Planning Board (see LATR Guidelines), not the District Council. Nonetheless, the District Council has often accepted LATR data as sufficient evidence on traffic. The District Council has and should consider additional data related to traffic if presented – LATR need not be the only format for relevant traffic information in support of an application, and opposition parties cannot fairly be prevented from presenting contrary evidence. In the present case, however, we need not decide whether reliance on a finding that traffic would be below the LATR threshold is adequate to support a rezoning, for that is not the posture of the case.

The Applicant in this case presented fairly slim evidence concerning traffic impacts. It did not, however, rely solely on the statement that it would generate too few peak hour trips to require an LATR study. The Applicant presented additional evidence, in the form of the Stage II Memo, the ADAC Report and related testimony, to demonstrate the adequacy of area roadways to support the proposed development. The Opposition presented *no evidence whatsoever* to suggest that there is significant congestion in the area of the subject site or the Bethesda CBD in general, or that the proposed development would have actual adverse impacts on traffic. The Opposition's efforts to discredit the findings of the Stage II Memo and the ADAC Report were unavailing. These reports are not specific to the subject property or the proposed rezoning, but they do provide valuable and timely information on traffic conditions in the relevant area. Weighing the totality of the evidence, the Hearing Examiner finds the Applicant has adequately demonstrated that the proposed development would not have adverse impacts on area traffic.

3. Impact on Public Facilities: Schools

With regard to potential impact on public schools, the Applicant has presented a letter from Montgomery County Public Schools ("MCPS") concerning school capacity, as well as evidence that under the Annual Growth Policy, school capacity is considered adequate in the relevant cluster for FY 2005. With the maximum of 65 units, the proposed development is expected to generate approximately five elementary school students, two middle school students and one high school student. MCPS reports that enrollment is expected to exceed capacity for the entire six-year forecast period in the relevant elementary school. See attachment to Ex. 76(d). Excess enrollment projected in the applicable middle and high schools is expected to be resolved by expansions identified in the FY 2005-2010 Capital Improvements Program. See *id.*

The Opposition argues that the estimate provided for the number of students that would be generated is flawed, because it fails to take into account how many stories a building contains, how many bedrooms the units contain and how many units are MPDUs. Mr. Lavorgna of MCPS explained that it is his agency's standard procedure to use a single student generation rate for all high-rise

residential buildings. The Hearing Examiner notes that the Opposition presented no evidence that the standard generation rate used by MCPS is an inaccurate predictor.

The Opposition argues that AGP capacity calculations should not be relied upon in individual zoning cases because they overestimate school capacity. Cross-examination of Mr. Lavorigna of MCPS and Mr. Hardy of Technical Staff established that MCPS calculates capacity school-by-school, based on school programming and actual classroom usage, while capacity calculations under the AGP are done on a cluster-wide basis and assume the same number of children in each classroom. The AGP methodology results in higher capacity numbers than the MCPS methodology; MCPS calculated in 2003 that program capacity was about 92 percent of AGP capacity at the elementary and middle school levels, and about 94 percent at the high school level. This gap explains why the Bethesda-Chevy Chase cluster is considered to have adequate school capacity to support additional residential subdivisions in FY 2005, while MCPS calculations show inadequate capacity in the Bethesda Elementary School (which was renovated very recently), with no capital improvements planned.

The Opposition also argues that AGP capacity calculations should not be relied upon in individual zoning cases because they are not intended for that purpose. As explained by Mr. Moritz of Technical Staff, the AGP methodology was developed to provide a broad measure of whether school capacity on a cluster-wide basis justifies a moratorium on residential building in a given fiscal year. The evidence indicates that the County Council adopted the AGP practice of assigning the same number of students to each classroom, instead of using actual program data about how classrooms are used, for at least two reasons – to avoid having schools come under pressure to make programming changes either to avoid or to cause a moratorium, and to have more stable numbers over time. This suggests that the AGP methodology may be better suited to its intended purpose than to determining whether an individual development project would have an adverse impact on schools. Moreover, the AGP methodology as established in the FY 2003-05 Policy Element by its own terms pertains to subdivision applications, not zoning applications. Nonetheless, the methodology behind the AGP capacity calculations reflects the County Council's judgment on the appropriate measurement of

the adequacy of school capacity to support residential development. Accordingly, the results of that calculation provide relevant information and should be considered, together with whatever additional evidence is available.

The Opposition acknowledges that due to its size, the proposed development would generate only a very small number of students, even at the elementary school level. They argue, however, that the proposed rezoning should be denied because adding even a small number of students to an overcrowded school has an adverse impact. They rely for support on *Malmar Associates v. Board of County Commissioners for Prince George's County*, 260 Md. 292, 272 A.2d 6 (1971), in which the court upheld the denial of a density increase based on evidence of school overcrowding. The court in that case made the oft-quoted statement that even a small number of students can cause an adverse impact because "if the cup is already completely full, even one additional drop will make it overflow." 260 Md. at 307. The Opposition fails to recognize that while *Malmar* permits a legislative body to block a development based on even a small addition to an overcrowded school, it does not *require* such a decision. In the present case, the District Council bears the responsibility to decide whether the proposed reclassification should be denied because it would add five students to an elementary school that is over-capacity and is expected to remain so. Based on the small number of students involved and the Council's past decisions in zoning matters, the undersigned does not consider the potential impact on public schools sufficient to justify denial of the application.

As noted by Mr. Rivkin, the proposed development would serve the public interest in increasing the housing stock in the County, which is suffering from increasing housing shortages. See Ex. 9 at 3.

Accordingly, having carefully weighed the totality of the evidence, the Hearing Examiner concludes that approval of the requested zoning reclassification would be in the public interest.

VI. CONCLUSIONS

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

A. Development Plan

1. The requested reclassification to the TS-R Zone is in substantial compliance with the use and density recommended by the *Bethesda CBD Sector Plan*. It does not conflict with the county capital improvements program or any other county plan or policy.

2. The Development Plan would comply with the purposes, standards, and regulations of the TS-R Zone, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.

3. The Development Plan proposes conceptual internal vehicular and pedestrian circulation systems and points of external access that would be safe, adequate and efficient.

4. By its design, by minimizing grading and by other means including environmental restoration and reclamation, the proposed development would tend to prevent erosion of the soil and preserve natural vegetation and other natural features of the site. The application is exempt from forest conservation requirements under Chapter 22A. Requirements for water resource protection under Chapter 19 would be satisfied.

5. The submitted documentation of the intended ownership and method of perpetual maintenance of areas to be used for recreational or other common or quasi-public purposes is adequate and sufficient.

B. Zoning Request

Application of the TS-R Zone at the proposed location would be proper for the comprehensive and systematic development of the County because the proposed development would be compatible with land uses in the surrounding area, would satisfy the purposes, standards and regulations of the zone, and would serve the public interest.

VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-819, requesting reclassification from the R-10 and R-60 Zones to the TS-R Zone of 22,546 square feet of land comprised of part of Lot 5, Block 24B, Edgemoor subdivision, located at 4802 Montgomery Lane, Bethesda; part of Lot 6, Block

24B, Edgemoor subdivision, located at 4804 Montgomery Lane, Bethesda; part of Lot 8, Block 24B, Edgemoor subdivision, located at 4905 Hampden Lane, Bethesda; and part of Lot 9, Block 24D, Edgemoor subdivision, located at 4901 Hampden Lane, Bethesda, all in the 7th Election District, be **approved** in the amount requested and subject to the specifications and requirements of the final Development Plan, Ex. 96(a); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Development Plan approved by the District Council within 10 days of approval, in accordance with § 59-D-1.64 of the Zoning Ordinance.

Dated: January 7, 2005

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner

Appendix I

Conceptual Example of Development on the Subject Property under the TS-R Zone

The Applicant submitted conceptual plans for discussion purposes, which illustrate a building with nine stories, a height of 100 feet and about 46 percent building coverage. The building is shown with a north-south orientation along Woodmont Avenue and a design made mostly of glass and steel. A potential unit mix was suggested for discussion with 58 units: six studio apartments, four one-bedroom units, 26 two-bedroom units and 22 three-bedroom units.²⁴ See Ex. 96(a).

The conceptual plans show a service bay at the rear of the building, accessed via Hampden Lane, and an entrance into the underground residential parking garage from Montgomery Lane. If the final plans include only these two access points, the numerous existing curb cuts would be reduced in number and would be eliminated along Woodmont Avenue. The conceptual plan shows a well-landscaped street front on Woodmont Avenue, the principal orientation of the building. As presently designed, the building would have English basement units facing Woodmont Avenue, some or all of which would be MPDUs.

The Applicant describes the relatively modest building coverage shown on the conceptual site plan as one its most important features. The 46 percent building coverage shown would allow ample room for landscaping and streetscape. The Applicant's architect offered several exhibits that were designed to demonstrate the visual compatibility of the proposed building by simulating how it would look in the "architectural fabric" of the surrounding area. The two images on the following page are photographs of the area of the subject property that have been digitally altered to show how the proposed building would look in its surroundings.

²⁴ These numbers work out to about 37 percent three-bedroom units, 45 percent two-bedroom units, 7 percent one-bedroom units and 10 percent studios.

**Street View Showing Current Conceptual Design
Looking Toward Northeast from Shopping Center on Hampden Lane, Ex. 45(o)**



**Street View Showing Current Conceptual Design
Looking Toward Northeast on Arlington Road, Ex. 45(p)**



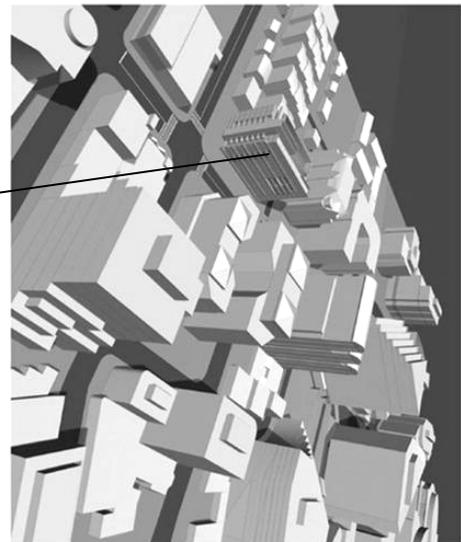
The exhibit reproduced below shows computer simulations of how the current concept of the proposed building would appear in its surroundings. Each of the six views is labeled to show

the direction in which the viewer is looking. The Hearing Examiner has marked the location of the proposed building based on identifications provided during the hearing.

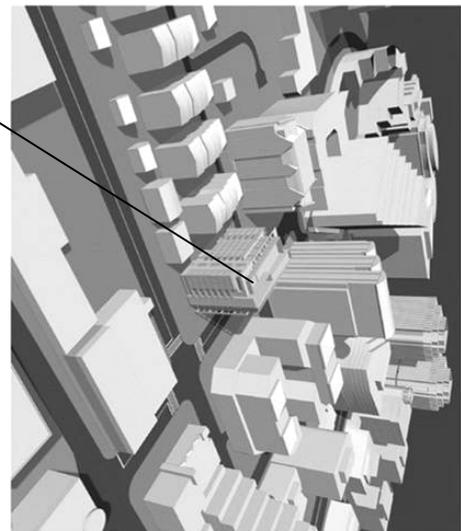
Aerial View Simulations, Ex. 45(j)



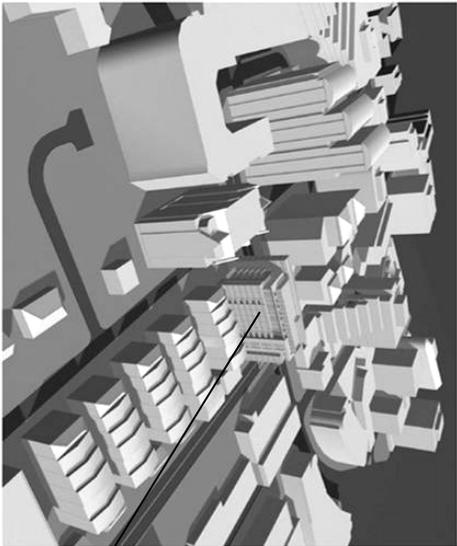
1. LOOKING TOWARD WEST



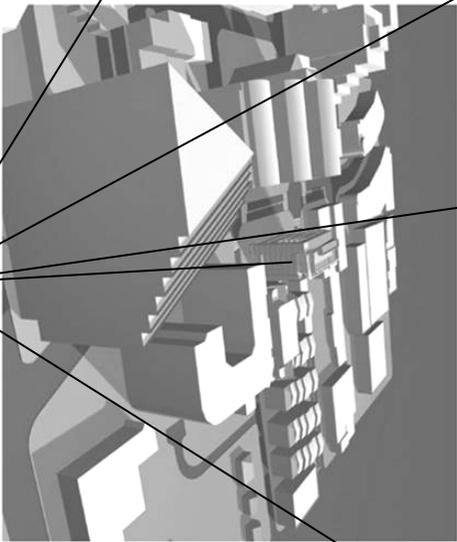
2. LOOKING TOWARD NORTHWEST



3. LOOKING TOWARD NORTHEAST

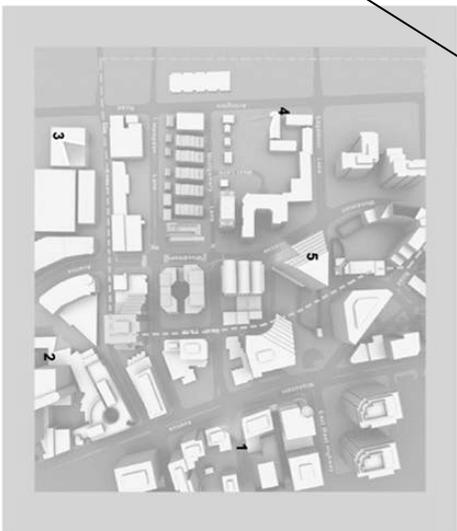


4. LOOKING TOWARD SOUTHEAST



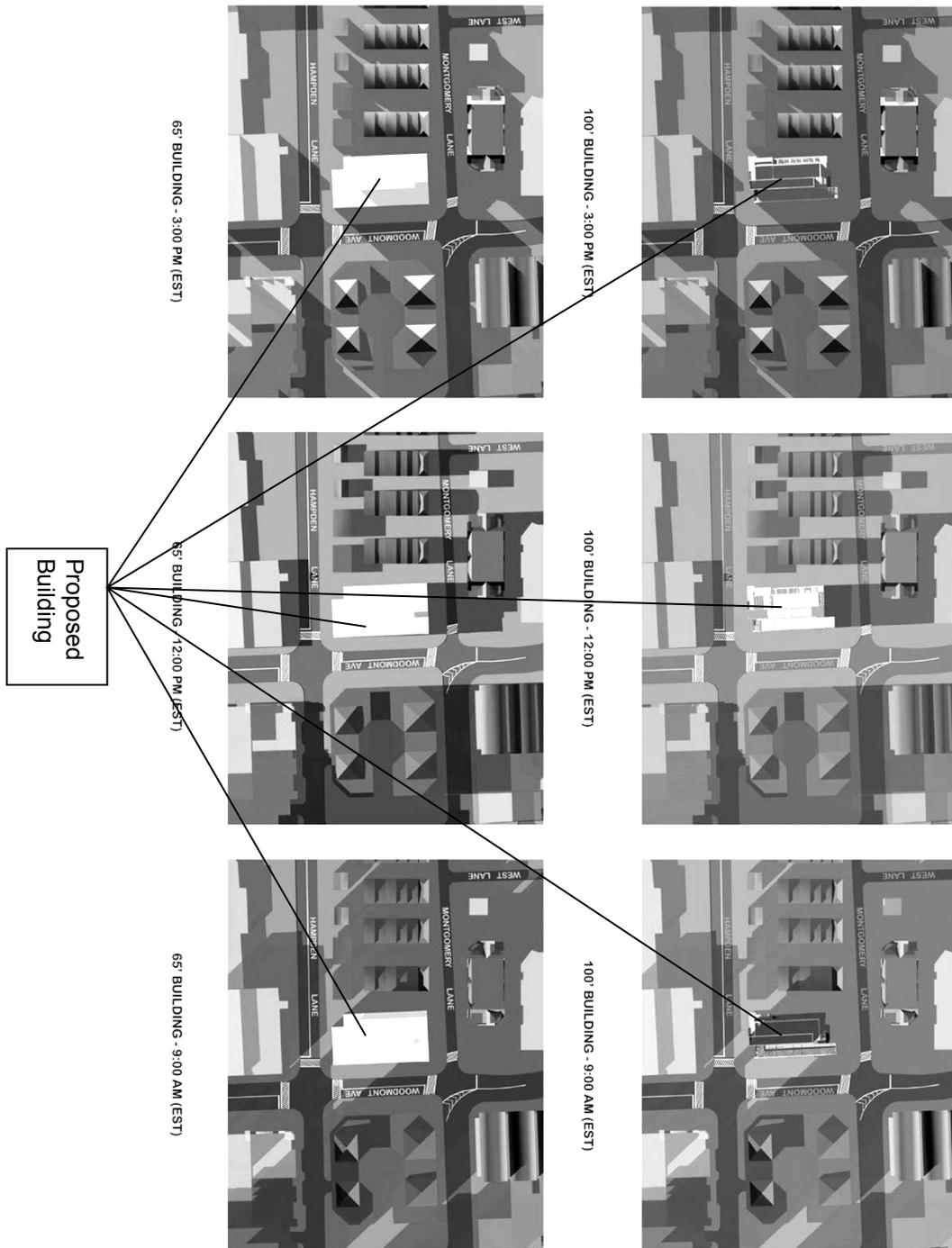
5. LOOKING TOWARD SOUTH

Proposed Building



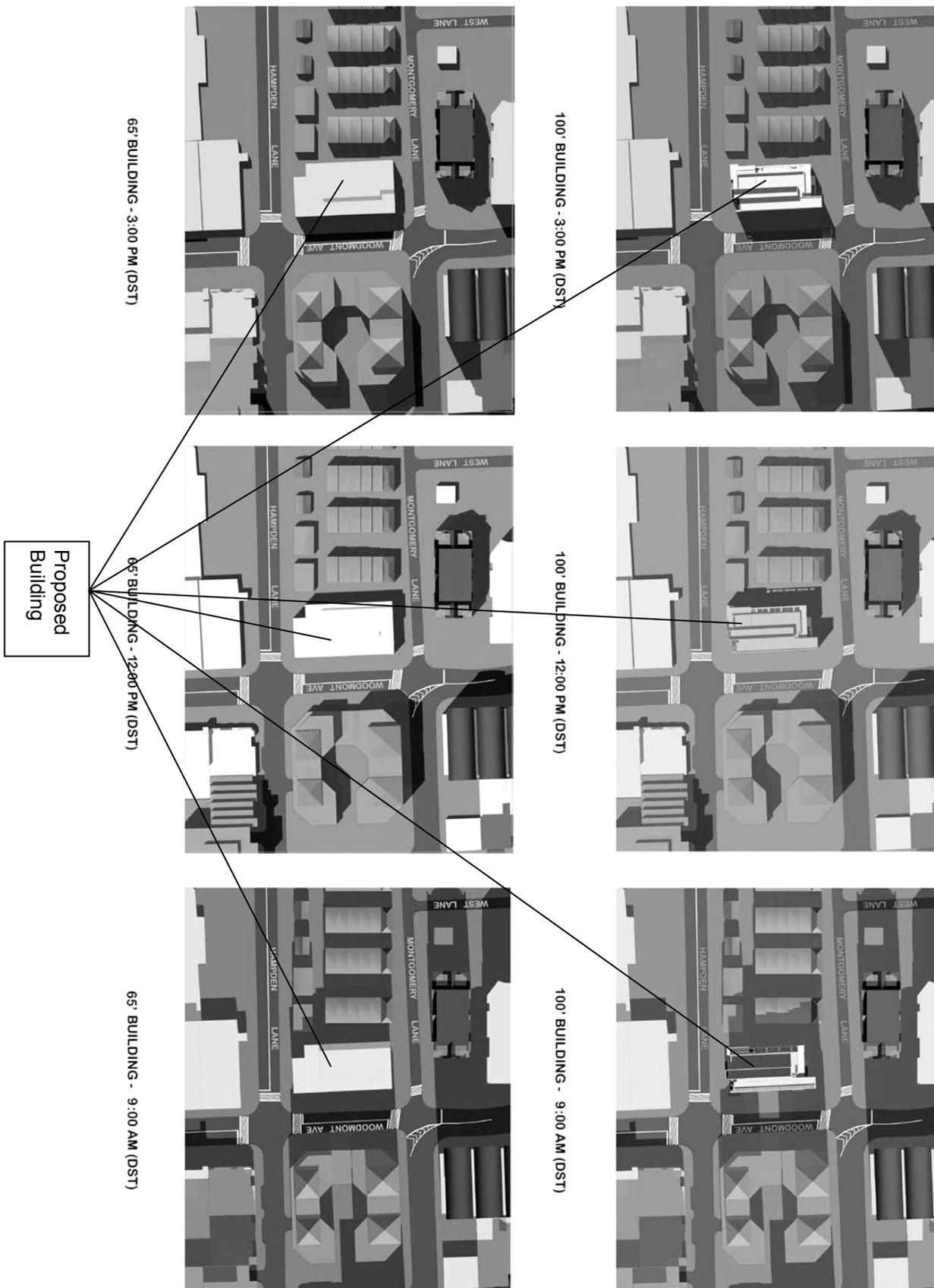
KEY MAP

Below and on the next page are two exhibits that were prepared by the Applicant's architect to simulate the shadows that a building on the subject property would cast at various times of day. These computer simulations compare the shadows expected from a 100-foot building with those from a 65-foot building with a larger footprint; the record does not indicate with any precision how the footprints of these possible buildings were estimated for these exhibits. The Hearing Examiner has marked the location of the proposed building based on hearing testimony.



Shadow Studies – Winter Solstice, Ex. 45(I)

Shadow Studies – Summer Solstice, Ex. 45(m)



END OF APPENDIX