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I. EXECUTIVE SUMMARY

Applicant:	Hampden Lane Associates, LLC (HLA)
LMA No. & Date of Filing:	G-842, filed November 1, 2005
DPA No. & Date of Filing:	06-2, filed November 1, 2005
Current Zone and Use:	Lots 1, 2, 4 and 5 in Block 24D of Edgemoor (4921, 4919, 4915 and 4913 Hampden Lane) are in the R-60 Zone. Lot 3, 4917 Hampden Lane, is in the TS-R Zone. Use: Residential and professional offices.
Zoning and Use Sought:	LMA G-842 is to rezone Part of Lot 1 and Lots 2,4 and 5 to the TS-R Zone. Intended Use: Multi-family Residential, with subsurface parking. DPA 06-2 is to amend LMAs G-721, 755 & 769, and DPAs 98-1, 98-2 & 00-2, in order to relocate the proposed DHCA/HOC project for transitional housing from Lot 3 (4917 Hampden Lane), which is already zoned TS-R, to Lot 5 (4913 Hampden Lane), which will be rezoned to TS-R if the Council grants LMA G-842.
Location:	Hampden Lane, about 1300 feet South of Bethesda Metro Station
Area to be Rezoned:	22,611 sq. ft. (Lot 3, 4917 Hampden Lane, is already in TS-R Zone)
Density Permitted in TS-R Zone:	2.5 FAR, 150 Dwelling Units per acre
Density Planned:	3.05 FAR, 60 Dwelling Units, including 9 MPDU's (15%) on 97,853 square feet of floor area
Public Use Space:	Proposed: 10.47% (Binding 10%)
Active & Passive Recreation Space:	Proposed: 25.56% (Binding 20%)
Parking Planned:	89 spaces, including 9 handicapped accessible
Height Planned:	71 feet (not including a 15 foot mechanical penthouse), stepped down to 33 feet at Arlington Road
Traffic & Environmental Issues:	None
Zoning Issues:	Compatibility; height and density; Sector Plan Compliance
Consistency with Master Plan:	Rezoning to the TS-R Zone is consistent with Bethesda CBD Sector Plan; however, the development plan differs from the height, density, roof-style and low-rise urban village concept of the Sector Plan
Neighborhood Response:	Opposed by residents of CityHomes of Edgemoor, townhouses immediately to the north of the subject site
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Remand to improve compatibility with immediate surroundings and compliance with the Sector Plan's "urban village" vision

II. STATEMENT OF THE CASE

Application No. G-842, filed on November 1, 2005 by Applicant, Hampden Lane Associates, LLC (HLA), requests reclassification of approximately half an acre of land on Hampden Lane in Bethesda (Lots 5,4, 2 and Part of 1, of Edgemoor Subdivision, Block 24D, located at 4913, 4915, 4919 and 4921 Hampden Lane) from the R-60 Zone to the TS-R Zone in order to construct a 60-unit multi-family dwelling.¹ DPA 06-2, also filed on November 1, 2005, by Applicant seeks to amend the development plans in LMA's G-721, G-755 and G-769 and DPA's 98-1, 98-2 and 00-2, to allow relocation of the planned Housing Opportunity Commission (HOC) transitional housing from its currently approved location at 4917 Hampden Lane (Lot 3 of Block 24D, Edgemoor) to 4913 Hampden Lane (Lot 5 of Block 24D, Edgemoor). This relocation is made possible by a land swap agreed to by the County and the Applicant in a "Development Agreement" entered into on June 9, 2005. DPA Exhibit 46.² This land swap consists of Applicant trading its Lot 5 to the County in exchange for Lot 3.

The land exchange would allow Applicant to assemble contiguous Lots 1 through 4 of Block 24D (4921, 4919, 4917 and 4915 Hampden Lane) into a single development tract large enough to satisfy the TS-R Zone's minimum area requirements. Lot 3, which is in the middle of the tract, had already been rezoned to TS-R in 1998, by LMA G-769, as part of a different development plan by another developer (24 West, Inc.). Lot 3 (also known as "Edgemoor IV")³ was conveyed by a successor to 24 West, Inc. (HSNK, LLC) to the County in April of 2004 to establish HOC's transitional housing, purportedly in satisfaction of the HSNK's MPDU requirements for Edgemoor I, II and III. DPA Exhibits 38 and 39. Lot 5, which would be the new location for the transitional housing under the

¹ Lot 3 (4917 Hampden Lane) is included in the Development Plan, but not the rezoning request because it is already in the TS-R Zone.

² There are two sets of Exhibits in this combined case, although some exhibits appear in both files. References to the LMA exhibits will be preceded by "LMA" and references to the DPA exhibits will be preceded by "DPA."

³ Edgemoor I, II and III are located on Montgomery Lane. Edgemoor I and II (on the south side of Montgomery Lane) became the "CityHomes of Edgemoor" and Edgemoor III (on the north side of Montgomery Lane) became the "Edgemoor Condominium" high-rise.

current plan, is still in the R-60 Zone (as are Lots 4, 2 and 1), so the re-zoning sought in LMA G-842 must occur in order for the development plan amendment sought in DPA 06-2 to make sense.

The building planned by Applicant for Lots 1 through 4 would step up from a height of 33 feet along Arlington Road to 71 feet (not including a 15 foot mechanical penthouse), in the middle of Hampden Lane, and it would include 9 moderately priced dwelling units (MPDUs) in its total of 60 units. As stated above, the HOC building now planned for Lot 5 had been slated to be located on Lot 3. Its design was modified in February of 2000 by DPA 00-2 (DPA Exhibit 45), which changed the proposed use from three townhouses to twelve transitional housing units and modified the proposed structure to a 38 foot tall, brick building. The design plans would remain unchanged.

The application for rezoning was reviewed by the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) who, in a report dated February 16, 2006, recommended approval of both the LMA and the DPA (Exhibits LMA 26, DPA 32).⁴ The Montgomery County Planning Board (“Planning Board”) considered the application on March 2, 2006 and, by a vote of 5 to 0, also recommended approval, as stated in a memorandum dated March 9, 2006 (Exhibits LMA 39, DPA 49). In that same memorandum, the Planning Board also recommended amending DPA 00-2 by modifying note # 2 on that amended development plan “to indicate that recreation for the 12-unit transitional housing will not be provided in the Edgemoor high-rise building” and by “removing note #3 regarding off-site parking.” The Planning Board made these recommendations with the express understanding that it would consider parking and recreation needs for the transitional housing development at site plan review.

These additional recommendations from the Planning Board reflected the agreement between the County and HSNK, LLC, mentioned above. Todd Brown, Esquire, an attorney for HSNK, LLC, wrote to the County Attorney’s office, the Planning Board and the Hearing Examiner (DPA Exhibits

⁴ The Technical Staff Report is quoted and paraphrased frequently herein.

33, 38 and 39) to assert HSNK's position that its transfer of title to Lot 3 to the County in April of 2004 completely satisfied all its MPDU requirements and that it was not required to provide any parking or recreation for the transitional housing (Edgemoor IV) in its Edgemoor Condominium high-rise (Edgemoor III).⁵ Neither the County nor the present Applicant have stated any opposition to HSNK's position, and the Planning Board's recommendation appears to support it.

The County's Department of Housing and Community Affairs (DHCA) supported the proposed LMA and DPA in a letter to the Hearing Examiner (DPA Exhibit 40), stating that the development would provide "an overall residential context for the HOC [transitional housing] project." Jim Humphrey, Chairman of the Land Use Committees of the Montgomery County Civic Federation and the Edgemoor Citizen's Association, testified before the Planning Board (DPA Exhibits 35 and 36) generally in support of the rezoning and the DPA; however, he objected to exceeding the 65 foot height limit recommended by the Sector Plan.⁶

A public hearing was noticed for March 17, 2006 (LMA Exhibit 23), and it proceeded as scheduled. There was no opposition testimony at that initial hearing date, and no member of the community participated. When Applicant put on its case, the Hearing Examiner noted that the proposed development plan had not been reviewed by the "Alternative Review Committee" (ARC), as is required by Zoning Ordinance §59-D-1.61(a) where, as here, a developer seeks approval of a height or density exceeding that recommended in an applicable Master Plan, based on the inclusion of MPDUs. 3/17/06 Tr. 5-9, 123-126. Therefore, after Applicant's witnesses testified, the hearing was suspended until April 18, 2006, to give the ARC an opportunity to make its findings and the Planning Board the opportunity to submit a revised recommendation based on those findings. LMA Exhibit 43.

⁵ Mr. Brown also appeared at the hearing and asserted the same position.

⁶ Mr. Humphrey also raised some other concerns which are not before the Hearing Examiner in the instant case. He objected to the manner and timing of the County's acceptance of the transfer of Lot 3 on Hampden Lane from the developer of the Montgomery Lane properties in lieu of that developer's MPDU requirements. Mr. Humphrey also objected to the County accepting merely the conveyance of the land to fulfill that developer's MPDU requirements.

The Planning Board was not able to complete this review by April 18, 2006. Nevertheless, the hearing proceeded, and a number of neighbors, including David O'Bryon, president of the homeowners association for the CityHomes of Edgemoor, testified in opposition to the proposed development based on (i) Applicant's failure to follow the Bethesda CBD Sector Plan's recommendations; (ii) their concern that the proposed building's height and bulk were not compatible with the "urban village concept;" and (iii) their concern that the new structure would block their air and sunlight. Because the Hearing Examiner had still not received the Planning Board's revised review, the hearing was suspended again, this time until May 22, 2006.

On April 27, 2006, Technical Staff filed a Supplemental Report (LMA Exhibit 52), advising the Planning Board that the ARC had made a finding that the bonus density and additional height were needed "to make the project profitable." Attached to the Technical Staff's Supplemental Report was a copy of the ARC's memorandum of April 12, 2006, recommending that the Planning Board approve the project with the additional height and density requested by Applicant. On May 11, 2006, the Planning Board met to consider the ARC findings in connection with this project. As reflected in the Planning Board's Memo of May 11, 2006 (LMA Exhibit 55), it voted unanimously to recommend approval of G-842 with a maximum height of 71 feet and a density of 3.05 FAR (*i.e.*, the additional height and density sought by the Applicant).

During the hiatus before the hearing resumed on May 22, 2006, the Hearing Examiner wrote three letters to the Applicant (April 21, April 27 and May 2, 2006), asking for photographs of the current site and all adjoining and confronting properties; raising questions regarding compatibility and Sector Plan compliance; and suggesting changes in DPA 06-2's development plan to clarify what was proposed and to respond to concerns raised by HSNK, LLC. A revised DPA 06-2 Development Plan (DPA Exhibit 57(c)) was submitted on May 16, 2006, in response thereto. No objections to the revised form of the amended development plan in DPA 06-2 have been raised.

The hearing resumed, as scheduled, on May 22, 2006. The Applicant recalled three witnesses to state Applicant's position in response to questions raised by the Hearing Examiner and to introduce photos of the area that had been requested by the Hearing Examiner. The representative of the CityHomes of Edgemoor, David O'Bryon, testified in opposition to the ARC process, as did a nearby neighbor, Brent Polkes, and Jim Humphrey (Chairman of the Land Use Committee of the Montgomery County Civic Federation). The hearing in this case concluded on May 22, 2006, and the record closed on that date as required by Zoning Ordinance §59-D-1.7(d)(2).

The major issue in this case is not whether the site is appropriate for rezoning to TS-R (it clearly is) or whether Lot 5 should be swapped for Lot 3 (it surely should be), but whether the proposed development plan would produce a building consistent with the vision of the Sector Plan and compatible with its immediate neighbors. The Hearing Examiner finds that the current development plan falls short, and that the case should be remanded to give Applicant an opportunity to revise the structure proposed in the development plan.

III. FACTUAL BACKGROUND

A. Zoning History

The zoning history of the subject site is a little complicated. Technical Staff reports the following zoning history for the subject property (LMA Exhibit 26):

Comprehensive Zoning

- a. SMA G-711: R-60 Zone Confirmed; Adopted 10/11/1994
- b. SMA G-20: R-60 Zone Confirmed; Adopted 10/10/1978
- c. 1958 County-wide Comprehensive Zoning: R-60 Confirmed
- d. 1954 Regional District Zoning: R-60 enacted and mapped.

Special Exceptions and Zoning Cases

- a. BAS 727A: Non-Residential Professional Office; 10/11/1984
- b. BAS 1578: Non-Residential Professional Office; 1988
- c. BAS 2171 Non-Residential Professional Office; 08/07/1995
- d. G-769: Rezoned Lot 3 to the TS-R Zone; Adopted 10/20/1998

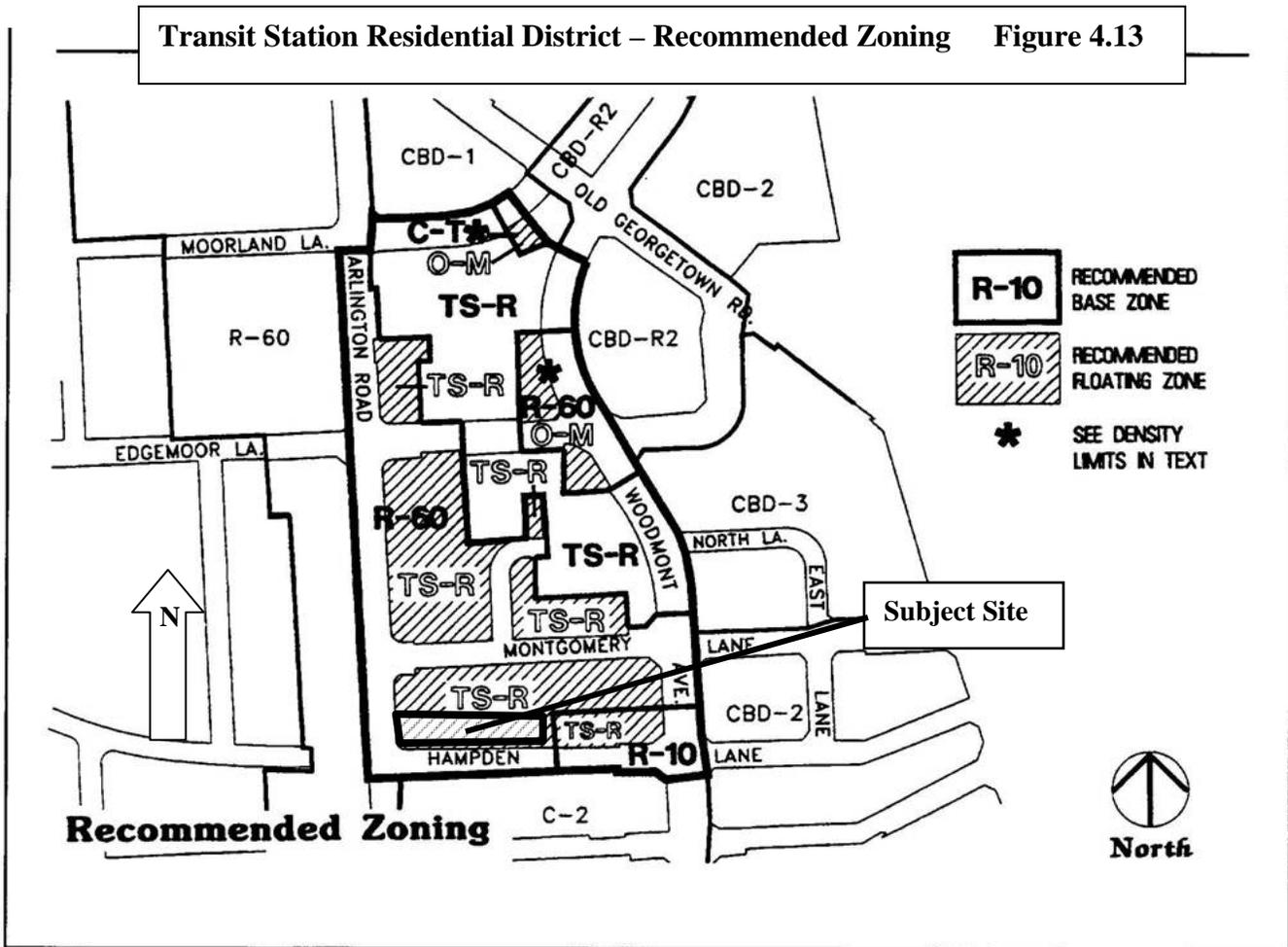
To complete the picture regarding zoning on the subject site, the list should have also included DPA 00-2 (2/1/2000), in which the development plan covering Lot 3 of the subject site was amended to allow the 12-unit transitional housing envisioned today. Moreover, in order to fully understand this case, it is necessary to mention the local map amendments and development plan amendments that affected the development, on Montgomery Lane, of Edgemoor I, II and III, because their development plans would be amended by DPA 06-2. This results from the inclusion of the HOC project on Hampden Lane in the development plans for Montgomery Lane. The following chronology helps to clarify this confusing detail.

LMA's G-721 and G-755 involved the development on Montgomery Lane that ultimately became the CityHomes of Edgemoor Townhouse development (Edgemoor I and II). Those LMA's reclassified that property on Montgomery Lane from the R-60 Zone to the TS-R Zone in two parts, G-721 in January 1996 and G-755 in March 1998. Lot 3 of the subject site, on Hampden Lane, was rezoned from R-60 to TS-R, and added to the Development Plan for LMA's G-721 and G-755 on October 20, 1998 by LMA G-769 and DPA's 98-1 and 98-2. At that time, Lot 3 was approved for up to three townhouse units. On February 1, 2000, the Council approved DPA 00-2, which changed the use proposed for Lot 3 to the 38 foot tall, 12 unit, HOC transitional housing structure currently planned. The present applications seek to move the proposed location of that same building to the east, from Lot 3 to Lot 5 on Hampden Lane. They also seek to rezone the remainder of the subject site on Hampden Lane from R-60 to TS-R.

B. Subject Property

The subject site (*i.e.*, the combined HLA Property and HOC Property) consists of five lots located on the north side of Hampden Lane, bordered by Arlington Road to the west, garden apartments and Woodmont Avenue to the east, and developments on Montgomery Lane (the Edgemoor at Arlington and the CityHomes of Edgemoor) to the north. Combined, the lots have 66 feet of frontage

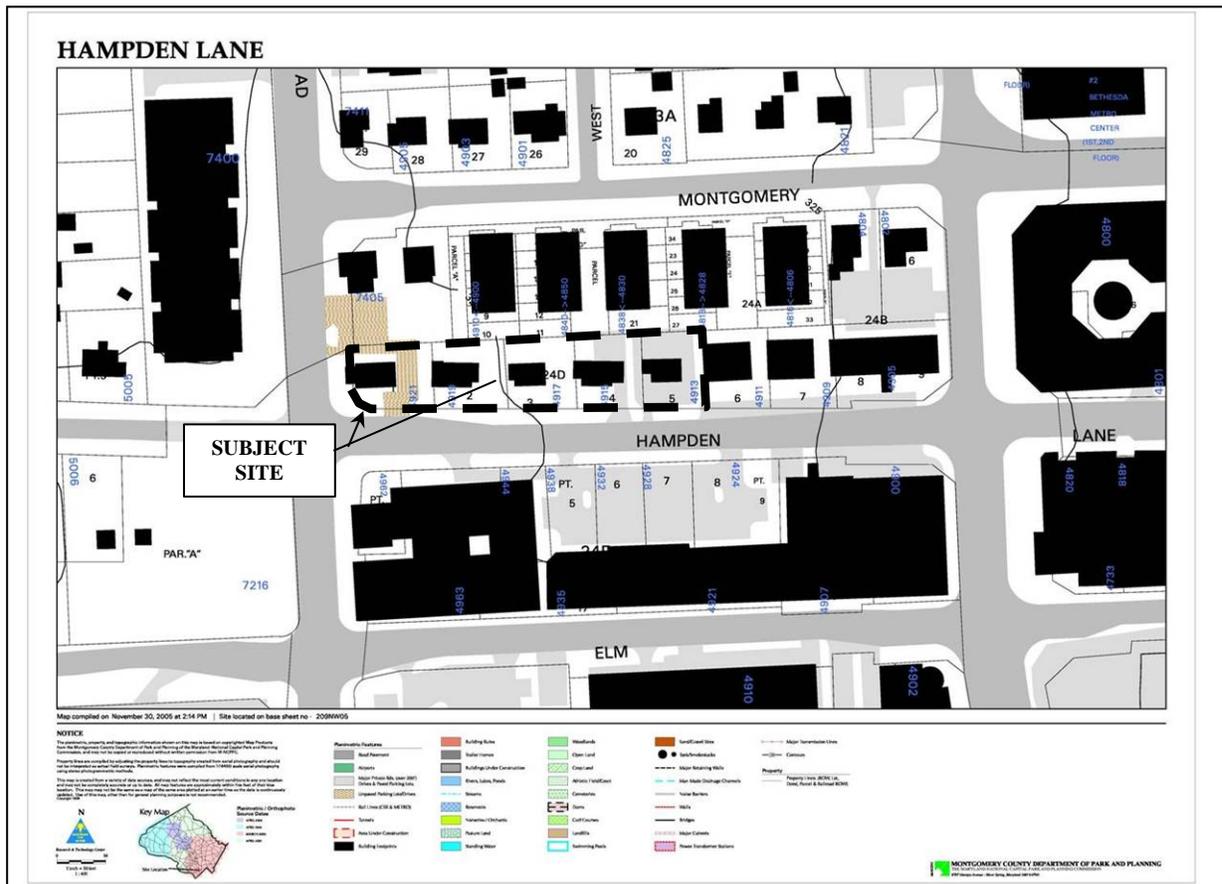
along Arlington Road and about 350 feet along Hampden Lane. All are within the Transit Station Residential District described in the Bethesda CBD Sector Plan (p. 81), as shown below:



The HLA Property is comprised of four lots – Part of Lot 1 located at the northeast corner of Hampden Lane and Arlington Road, and moving in an easterly direction, Lot 2, Part of Lot 3 and Lot 4, except for a five-foot wide portion of Lot 4 (running along the entire easterly property line), which will be included in the HOC Property. The HLA Property is essentially a narrow long rectangle, with a gross tract area of 32,107 square feet. The HOC Property consists of Lot 5 and the five-foot wide portion of Lot 4, for a gross tract area of 5,694 square feet. Lot 5 has 65 feet of

frontage along Hampden Lane. The HLA Property slopes gradually upward 12 feet from Arlington Road toward the east, while the HOC Property is generally flat. There are no historic structures or sites located on any of the properties, and each of the five lots is improved with a single family detached residential building, currently being used as non-residential professional offices. The subject site is located about 1,300 feet from the Bethesda Metro Station.⁷ *Land Use Report, LMA Exhibit 25(a), pp. 1-2, and Technical Staff report (LMA Exhibit 26, pp. 3-5).*

The location of the subject property is shown on the following diagram from the Technical Staff report:

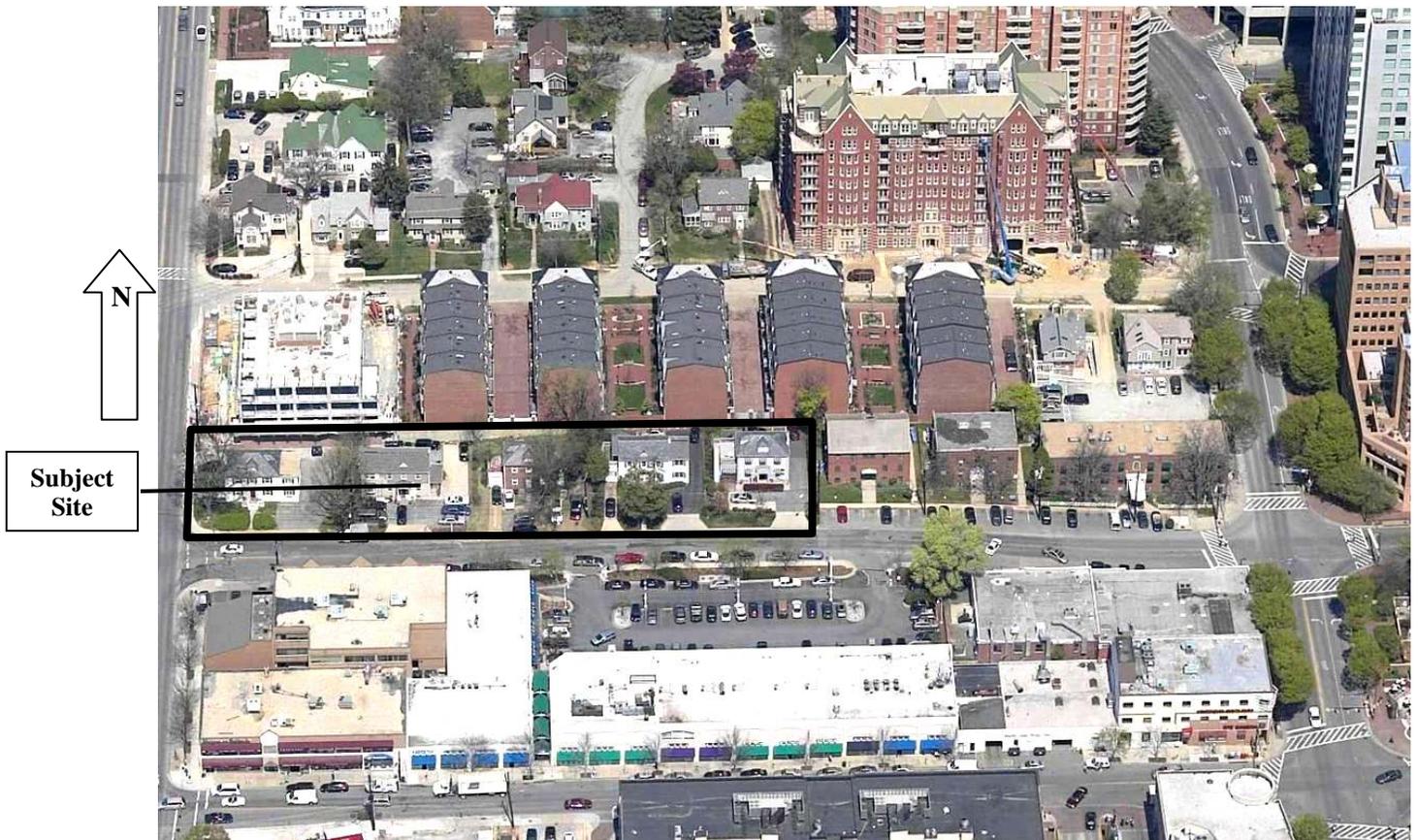


⁷ The precise distance to the Metro Station was an issue in this case. Applicant’s Land Use Report and the testimony of its Land Use Expert, William Landfair, put the distance at 1,000 feet. 3/17/06 Tr. 63. Technical Staff indicated that the subject site is “within 1500 feet of the Bethesda Metro station .” LMA Exhibit 26, p. 4. Applicant’s assertion that the subject site is 1,000 feet from the Metro station was challenged by the opposition. 4/18/06 Tr. 19-20. The Hearing Examiner’s own measurement puts the distance to the Metro Station closer to 1300 feet, but the Hearing Examiner does not feel that these differences are material to the outcome of this case.

The following photographs show the five lots that comprise the subject site as it currently exists, viewed from Hampden Lane (LMA Exhibits 59-10, 8, 5, 3 and 2):



Viewed from the air, in this photo from the Technical Staff report, the subject site and its surroundings can be plainly seen.

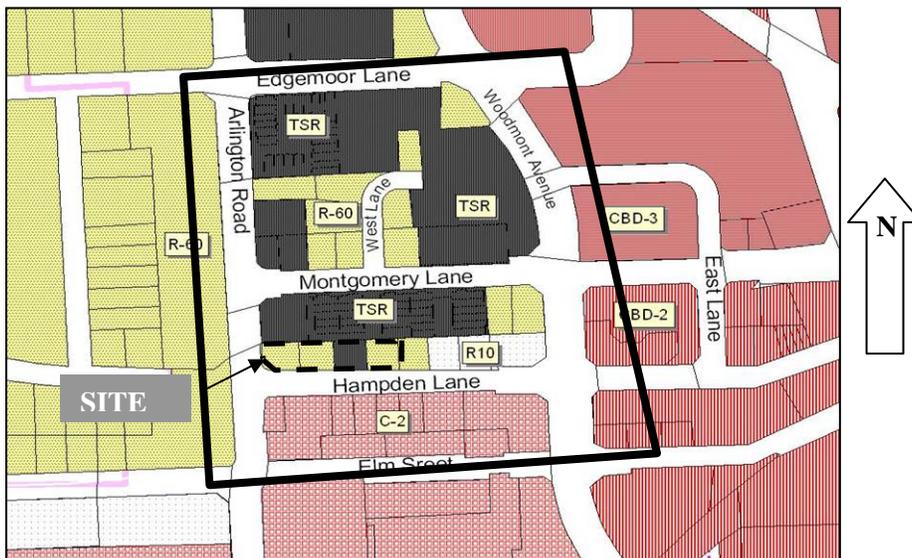


C. Surrounding Area And Adjacent Development

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. In the present case, Technical Staff recommends (*Technical Staff report, LMA Exhibit 26, pp. 5*) designating the surrounding area as:

. . . roughly between East Lane to the east and Moreland Lane to the north, and Elm Street to the south, including properties fronting along Arlington Road to the West. This area is the same one that is described by the Hearing Examiner and Technical Staff in another case for Lot 3, the parcel already zoned TS-R.

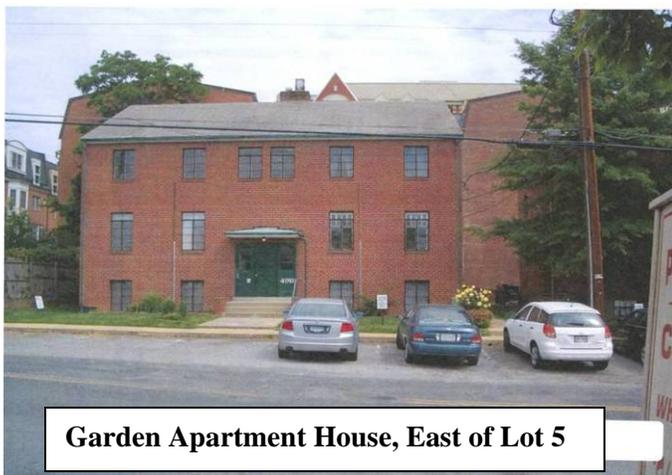
The Hearing Examiner would recommend narrowing that definition a bit to the north and the east, because the true impact of the proposed building will be on those living immediately around it. The Hearing Examiner would define Edgemoor Lane as the northern boundary of the Surrounding Area and Woodmont Avenue, including the properties fronting thereon, as the eastern boundary. Elm Street should be the southern boundary, and Arlington Road, including properties fronting thereon, should be the western boundary. These boundaries also coincide with the area analyzed in the traffic statement, LMA Exhibit 42. The Surrounding Area is shown below:



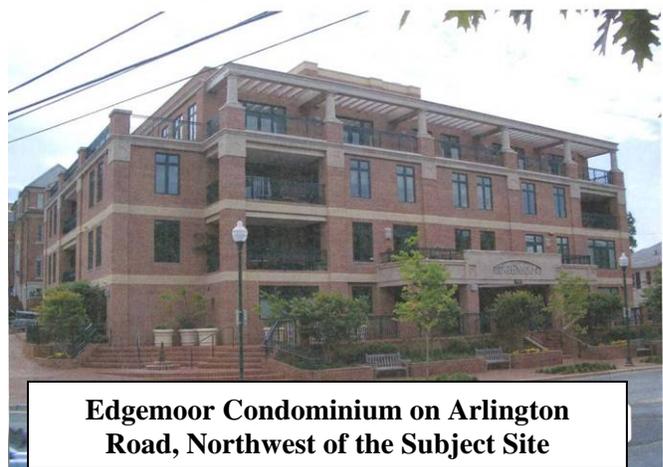
The Surrounding Area is well described in Applicant's Land Use Report, DPA Exhibit 28, p.2:

The HLA Property and the HOC Property are located in the southern portion of the Transit Station Residential District as delineated by the Sector Plan. In general, the Transit Station Residential District is composed of either newly developed multi-family or townhouse structures developed after the adoption of the Sector Plan, or preexisting single-family homes, many of which are used for commercial purposes, and garden apartments. Immediately to the north of both the HLA Property and the HOC Property is the City Homes townhouse development (LMA G-721 and G-755 and DPA 98-1 and 98-2), consisting of a total of 29 townhouses, developed in five rows, which run in a perpendicular direction from Montgomery Avenue south to the HLA and HOC northern Property lines. The townhouses are approximately 50 feet in height (to roof peak) and . . . are built "face on line" with the southern facade of all of rows of townhouses (except the easterly most row which does not abut the HLA or HOC Property) built on the common HLA Property line and/or HOC Property line. The distance between each row of townhouses is approximately 30 to 40 feet. The HLA Property is also bounded to the north along Arlington Road by the Edgemoor at Arlington (LMA G-778). The Edgemoor project involves a 46-foot high (as measured from the top of the terrace which varies in height from zero feet up to seven feet), 36,700 square foot building providing 12 dwelling units. Like the City Homes townhouse development, the southern facade of the Edgemoor was also constructed "face on line". Arlington Road borders the Property directly to the west, with the Bethesda Public Library located directly on the other side of Arlington Road. Across Hampden Lane to the south of the HLA Property and the HOC Property is the Shoppes of Bethesda shopping center. The shopping center employs a traditional shopping center style, with the front portion of the site devoted to surface parking and the "L" shaped row of shops located back beyond the parking lot. The shopping center is zoned C-2 and located within the Arlington Road District, as designated by the Sector Plan. Directly to the east of the HOC Property are two post World War II garden apartment styled buildings. Adjacent to these apartment buildings and located at the northwest corner of Hampden Lane and Woodmont Avenue is another similarly styled apartment building, with ground floor retail. The garden style apartments are currently located on property zoned R-10, but are recommended for the TS-R Zone in the Sector Plan.

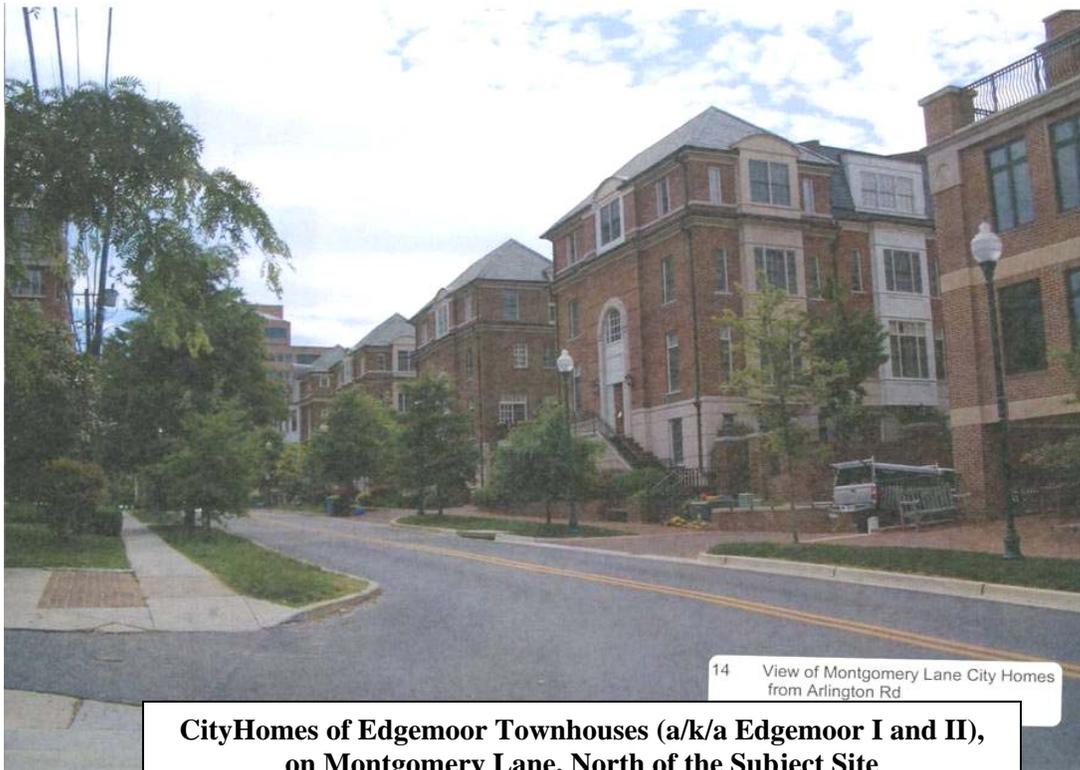
The properties immediately adjacent to the subject site are shown in the following photos from LMA Exhibits 59-1, 13 and 14, and in an aerial map from the Technical Staff report:



Garden Apartment House, East of Lot 5



Edgemoor Condominium on Arlington Road, Northwest of the Subject Site



14 View of Montgomery Lane City Homes from Arlington Rd

CityHomes of Edgemoor Townhouses (a/k/a Edgemoor I and II), on Montgomery Lane, North of the Subject Site



The Bethesda Library, across Arlington Road from the subject site, is a low-rise brick building, as evidenced by the following photo from the official Montgomery County website. The Hearing Examiner takes official notice of the photo, since Applicant did not provide a picture of confronting properties from ground level:



Although not depicted herein from ground level, the Shoppes of Bethesda shopping center, directly across Hampden Lane from the subject site, contains a parking lot and low rise structures.

D. Proposed Development

1. Development Concept

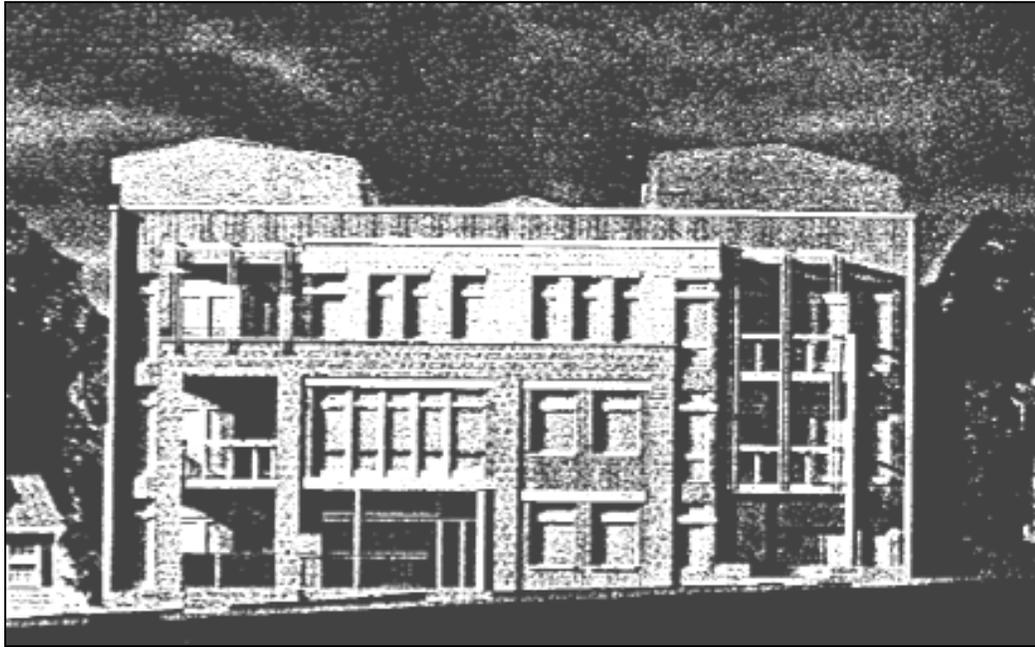
Applicant HLA wishes to construct a multi-family condominium building on the north side of Hampden Lane, in the Transit Station Residential District delineated by the Bethesda CBD Sector Plan. The building planned by Applicant would occupy Lots 1 through 4 of Block 24D (4915, 4917, 4919 and 4921 Hampden Lane), in the Edgemoor Subdivision. It would be a glass and

masonry structure, approximately 282 feet long, stepped up from a height of 33 feet along Arlington Road to a height of 71 feet (not including the 15 foot-tall mechanical penthouse) at the midpoint of the building on Hampton Lane,⁸ and it would include 9 moderately priced dwelling units (MPDUs) in its total of 60 units. Applicant's vision of the building can best be appreciated by viewing its revised Hampden Lane Elevation, LMA Exhibit 37, below:



In addition to HLA's planned structure, the HOC transitional housing building, which had been planned for Lot 3 of Block 24D, would be moved to Lot 5 (4913 Hampden Lane). Its design would not be modified, and if approved, would consist of a 38 foot tall, brick building, containing twelve transitional housing units. It is depicted in the Technical Staff report with the following Hampden Lane Elevation:

⁸ Applicant asserts that the official height of the proposed building would not exceed 65 feet if it were measured from a different location along the curb grade. 3/17/06 Tr. 91. Applicant points to the definition of height of a building in Zoning Ordinance §59-A-2.1), which specifies, "On corner lots exceeding 20,000 square feet in area, the height of the building may be measured from either adjoining curb grade." On the other hand, Applicant submitted the building for evaluation as a 71 foot tall structure at its maximum elevation (according to Applicant's counsel, Technical Staff so instructed), and that is the way Technical Staff and the Planning Board evaluated it. Therefore, the Hearing Examiner will use that height as the appropriate figure. Moreover, it should be observed that the height appreciated by those viewing the structure will be greater than 71 feet because the mechanical penthouse, which rises another 15 feet above the 71 foot mark (5/22/06 Tr. 51), is not included in that measurement under the exclusion contained in Zoning Ordinance §59-B-1.1.



In order to proceed with the construction of the HLA and HOC buildings, both a rezoning and a Development Plan Amendment will be required. The rezoning (LMA G-842) is needed because all of the properties, except for Lot 3 (4917 Hampden Lane) are zoned R-60. Thus, the Local Map Amendment involves the rezoning of 4913, 4915, 4919 and 4921 from R-60 to TS-R. The relocation of the HOC property from Lot 3 (4917 Hampden Lane), which is owned by Montgomery County, to Lot 5 (4913 Hampden Lane), is necessary to permit consolidation of the four remaining properties – Lots 1 through 4 (4915 through 4921 Hampden Lane) into a single record lot, developed with the HLA multi-family building.⁹ Although the HLA building will not extend onto Lot 5 (4913 Hampden Lane), that lot must be rezoned to TS-R to permit the HOC building to be constructed there. Since Lot 3 (4917 Hampden Lane) is already in the TS-R Zone, thanks to LMA-769, it does not have to be rezoned; however, the development plans under which the HOC building was first conceived as a Lot 3 property (LMA's G-721, G-755, and G-769 and DPA's 98-1, 98-2 and 00-2) , must be modified to reflect its relocation to Lot 5. That is the reason for DPA 06-2.

⁹ Because the HOC property (Lot 3, at 4917 Hampden Lane) is currently in the middle of the five lots on the subject site, Applicant would not have a contiguous land area of 18,000 square feet – the minimum necessary to obtain TS-R zoning, without moving the HOC property to Lot 5.

Table 1 from the Technical Staff report reflects these proposed changes in a chart form that may ease understanding.

Table 1. Property Descriptions (HLA Development Plan and DHCA Development Plan Amendment)

Block 22 D, Edgemoor Subdivision.	Address	Current Zoning	Request	
			Zone	Development
Part of Lot 1	4921	R-60	TS-R	<i>G-842 Hampden Lane Development Plan</i>
Lot 2,	4919	R-60	TS-R	
Part of Lot 3	4917	TS-R	N/A	
Lot 4	4915	R-60	TS-R	
Lot 5	4913	R-60	TS-R	<i>DPA-06-02 DHCA Development Plan Amendment</i>

According to Applicant’s Project Description for the LMA (LMA Exhibit 12), the HLA development will include ten percent public use space to be provided along a portion of Arlington Road and Hampden Lane. The development will provide the required 20 percent passive and active recreational space, through a series of outdoor spaces, roof top terraces and inside recreational facilities. The Applicant also proposes sidewalks along the entire frontage of both Arlington Road and Hampden Lane, in addition to the open space and active and passive recreation space promised by the Applicant. The proposed building will be constructed in a single phase and will not be dependent on any Capital Improvement Program.

It is the intent of the Applicant, as well as the HOC, to develop Lot 5 in a manner essentially identical to the development approved on Part of Lot 3 by Site Plan No. 8-00023A (DPA Exhibit 47), which is reproduced on page 31 of this report. *See* Project Description for the DPA (DPA Exhibit 6). Lot 3 is 70 feet wide, and Lot 5, combined with the 5-foot wide portion of Lot 4, will

also be 70 feet wide. The Development Plan for Lot 5 would include a 3-story, 12-unit residential building, with a comparable amount of public use open space and active and passive recreational space. Once all of the land use approvals are obtained, the development of 4913 Hampden Lane will proceed independently of the development of the remaining Hampden Lane properties. The development of 4913 Hampden Lane will occur in a single phase and will not be dependent on any Capital Improvement Program.

2. Development Plan & Binding Elements in LMA G-842

The Gross Tract Area of the HLA property is 32,107 square feet. Subtracting out 11,212 square feet of previous and current dedications along Hampden Lane and Arlington Road, leaves a Net Lot Area of 20,895 square feet. The Development Plan for the HLA property is summarized in Applicant's Land Use Report, LMA Exhibit 25(a), pp. 2-4. Applicant proposes a 97,853 square foot, multi-family building on the HLA Property, containing 60 residential units, including nine (15 percent) Moderately Priced Dwelling Units (MPDUs). The proposed building, which will have a floor area ratio (FAR) of 3.05, will be 33 feet in height along Arlington Road and through a series of four steps will increase to a maximum of 71 feet at its midpoint. A 15 foot tall mechanical penthouse located on a portion of the roof is not included in the 71 foot height measurement.

The building will include a total of 89 parking spaces, thus providing a parking ratio of 1.48 parking spaces per unit, to be located on two and one-half levels of below-grade parking. Vehicular access to the parking garage will be located on Hampden Lane along the eastern property line of the HLA Property. A 24-foot wide driveway provides access to the parking garage, and a service entrance is in the same location with a 12-foot wide driveway, to be accessed directly from Hampden Lane. The building will have one centralized lobby located on Hampden Lane at approximately the mid-point of the building.

Applicant asserts in its Land Use Report that “[t]he design and scale of the building on the HLA Property has been carefully considered with the surrounding neighbors in mind, while at the same time, balancing both the objectives of the Sector Plan and the County's housing policy.” In support of this statement, Applicant notes that the building massing has been carefully broken up to give it a more residential scale. This is achieved, according to Applicant, by a series of setbacks in height starting from Arlington Road and stepping up toward the high-rise core at the Metro station and by variation in the depth of the plan, creating small outdoor public spaces along Hampden Lane. The roof terraces created by the setbacks in height are used for public or private recreation, and are improved with landscaping.

The proposed development will include 10 percent public use space to be interspersed along both the Hampden Lane frontage and the Arlington Road frontage of the HLA Property. On the north side of the project, the design extends the existing courtyard spaces of the CityHomes of Edgemoor townhouses into courtyards, which will enhance the light and air into those spaces. The façade is composed of masonry and glass, with more masonry at the lower floors and more glass at the upper floors, so that the building appears to lighten as it increases in height. The masonry is intended to be in the soft red range, similar to many of the surrounding buildings.

Applicant also points out that the proposed design incorporates several changes that were made in direct response to comments provided by the surrounding property owners during the Applicant's civic outreach efforts. These changes, as listed by Applicant, include the following:

- Increased the number of below grade parking spaces to 89 spaces, thus providing a 1.48 parking space per unit parking ratio.
- Relocated the penthouse further to the south of the roof and enhanced the design of the penthouse elevation in order to provide more effective screening.

- Provided one floor step down along two of the northern wings of the building, thereby decreasing the height of these wings by one story in order to increase the light and air to the townhouse residences.
- Changed the brick masonry color to a more reddish hue to further comport with the adjacent buildings.
- Redesigned the building to increase the amount of brick and at the same time decrease the amount of windows and glass.
- Increased the greenery on the rooftop terraces. The HLA Property will include a minimum of 20 percent active and passive recreational space in accordance with the Zoning Ordinance requirements. This space will consist of private courtyards at the garden and ground levels of the building, roof top terraces at the seventh floor and penthouse and interior fitness facility space.

While Applicant clearly has made some efforts to improve compatibility, the central issue in this case is whether Applicant has done enough to offer a project that is compatible with the surrounding development and consistent with the Bethesda CBD Sector Plan's vision of an "urban village." This issue will be discussed in Parts III. D. 4 and III. E. below, in conjunction with our discussion of conformance to the Sector Plan and compatibility with adjacent development.

Pursuant to Code § 59-D-1.1, development in 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. Under Code §59-D-1.3, this development plan must contain several elements:

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

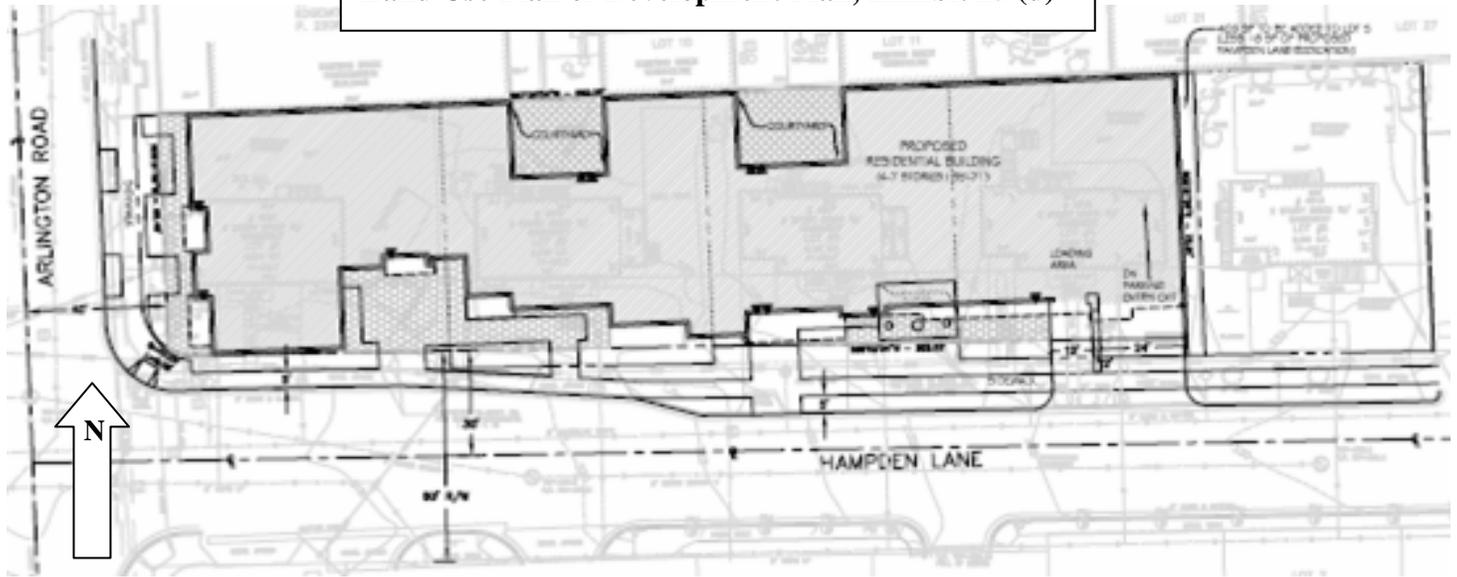
The Development Plan and the Land Use Plan that constitutes one of its primary parts are binding on the Applicant except where particular elements are identified as illustrative or conceptual. Illustrative elements may be changed during site plan review by the Planning Board, but the binding elements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

The binding elements in this case are as follows:

1. The building will have a maximum height of 71 feet.
2. The development will have a maximum density of 3.05 FAR, including the MPDU bonus density.
3. The development will provide 15% MPDUs (9 units) on site.
4. The development will provide a minimum of 10% public use space.
5. The development will provide a minimum of 20% active and passive recreational space.

The binding elements are printed on the development plan's "Land Use Plan," LMA Exhibit 25(d), and that Land Use Plan will generally be referred to as the "Development Plan" in this report. A copy of the Development Plan is reproduced on the following pages. In order to make its details more visible, the text from the Development Plan has been printed separately, following the site layout diagram. The diagram shows the proposed location of the HLA building, as well as Lot 5 (where the HOC building will be developed in accord with DPA 06-2) and additional information regarding the planned development. As specified in the "Site Area Analysis" on the Land Use Plan, Applicant has committed to dedicating 1,141 square feet to the public right-of-way along Arlington Road and Hampden Lane. Previously, 10,071 square feet of land had been dedicated to Arlington Road and Hampden Lane.

Land Use Plan of Development Plan, Exhibit 25 (d)



OPEN SPACE

PUBLIC USE SPACE REQUIRED	2,089 SF	10%	
PUBLIC USE SPACE PROPOSED	2,188 SF	10.47%	
ACTIVE / PASSIVE USE SPACE REQUIRED	4,179 SF	20%	
ACTIVE / PASSIVE USE SPACE PROPOSED	5,341 SF	25.56%	
TOTAL OPEN SPACE REQUIREMENT	6,268 SF	30%	
TOTAL OPEN SPACE PROPOSED	7,529 SF	36.03%	

GENERAL NOTES:

1. THE HORIZONTAL DATUM IS MARYLAND STATE PLANE (NAD83) & WSSC GRID 209 NW 05, 4921, 4919, 4917 & 4915 HAMPDEN LANE, BETHESDA. THE VERTICAL DATUM IS BASED ON NAVD29.
2. THE SUBJECT PROPERTY LIES WITHIN ZONE C (AREA OF MINIMAL FLOODING) AS SHOWN ON FLOOD INSURANCE RATE MAP (FIRM) COMMUNITY PANEL NUMBER 240049 0175C, FOR MONTGOMERY COUNTY, MD, AUG. 1, 1984.
3. THE SUBJECT PROPERTY IS LOCATED ON TAX ASSESSMENT MAP NUMBER HN22.
4. BOUNDARY SURVEY WAS PREPARED BY VIKI, INC. DATED JUNE, 2005.
5. THIS SITE IS LOCATED IN THE LITTLE FALLS WATERSHED, A CLASS I STREAM.
6. THE PROJECT IS PROPOSED TO BE SERVED BY PUBLIC WATER AND SEWER SYSTEMS AND IS CURRENTLY IN WATER AND SEWER SERVICE CATEGORIES W-1 & S-1, RESPECTIVELY.
7. PUBLIC UTILITY EASEMENTS & RIGHTS OF WAYS WILL BE PROVIDED ON SITE WHERE NEEDED, TO ALLOW FOR WATER, SEWER, GAS, ELECTRIC, TELEPHONE & CABLE SERVICE TO THE PROPOSED BUILDINGS. EXACT LOCATIONS TO BE DETERMINED AT SITE PLAN.

PUBLIC & ACTIVE/ PASSIVE USE SPACE DISTRIBUTION

	ACTIVE/ PASSIVE USE SPACE	PUBLIC USE SPACE
GARDEN LEVEL	697 SF*	--
GROUND LEVEL	1,183 SF	2,188 SF
LEVEL 2	741 SF	--
LEVEL 3	--	--
LEVEL 4	--	--
LEVEL 5	--	--
LEVEL 6	--	--
LEVEL 7	1,470 SF	--
PENTHOUSE LEVEL	1,250 SF	--
BUILDING TOTAL	5,341 SF	2,188 SF

* INTERIOR ACTIVE / PASSIVE USE SPACE

PARKING TABULATION

RESIDENTIAL			
10	1 BEDROOM UNITS @	1.250 SPACES/UNIT	13
4	1 BEDROOM MPDU UNITS @	0.675 SPACES/UNIT	3
13	1 BEDROOM + DEN UNITS @	1.250 SPACES/UNIT	17
12	2 BEDROOM UNITS @	1.500 SPACES/UNIT	18
5	2 BEDROOM MPDU UNITS @	0.750 SPACES/UNIT	4
16	2 BEDROOM + DEN UNITS @	1.500 SPACES/UNIT	24
60		BASE RESIDENTIAL PARKING-	79
TOTAL VEHICLE SPACES PROVIDED			89
ACCESSIBLE SPACE (INCLUDING VAN SPACES)			4
VAN ACCESSIBLE SPACES			1

BINDING ELEMENTS:

1. THE BUILDING WILL HAVE A MAXIMUM HEIGHT OF 71 FEET.
2. THE DEVELOPMENT WILL HAVE A MAXIMUM DENSITY OF 3.05 FAR, INCLUDING THE MPDU BONUS DENSITY.
3. THE DEVELOPMENT WILL PROVIDE 15% MPDUs (9 UNITS) ON SITE.
4. THE DEVELOPMENT WILL PROVIDE A MINIMUM OF 10% PUBLIC USE SPACE.
5. THE DEVELOPMENT WILL PROVIDE A MINIMUM OF 20% ACTIVE AND PASSIVE RECREATIONAL SPACE.

UNIT COUNT DISTRIBUTION

	1 BR	1 BR + DEN	2 BR	2 BR + DEN	TOTAL
GARDEN LEVEL	--	2	2	--	4
GROUND LEVEL	1	3	2	1	7
LEVEL 2	3	3	3	2	11
LEVEL 3	3	2	3	3	11
LEVEL 4	3	1	3	2	9
LEVEL 5	2	1	1	3	7
LEVEL 6	2	1	1	3	7
LEVEL 7	--	--	2	2	4
BUILDING TOTAL	14	13	17	16	60
MPDU TO BE PROVIDED	4 - 1 BR	5 - 2 BR	9 - TOTAL		

SQUARE FOOTAGE CALCULATIONS

	FAR	GARAGE / SERVICE	ACTIVE / PASSIVE	PUBLIC USE SPACE
P3	--	11,435 SF	--	--
P2	--	19,127 SF	--	--
GARDEN LEVEL	8,554 SF	10,222 SF	697 SF	--
GROUND LEVEL	12,582 SF	2,865 SF	1,183 SF	2,188 SF
LEVEL 2	15,613 SF	--	741 SF	--
LEVEL 3	15,616 SF	--	--	--
LEVEL 4	13,220 SF	--	--	--
LEVEL 5	11,644 SF	--	--	--
LEVEL 6	11,644 SF	--	--	--
LEVEL 7	8,095 SF	--	1,470 SF	--
PH	884 SF	2,097 SF	1,250 SF	--
TOTAL	97,853 SF	45,748 SF	5,341 SF	2,188 SF
TOTAL GROSS 143,601 SF				

SITE AREA ANALYSIS

LOT	EXISTING AREA	PROPOSED AREA
LOT 1 - #4921	6,004 SF	5,564 SF
LOT 2 - #4919	5,730 SF	5,354 SF
LOT 3 - #4917	5,119 SF	5,119 SF
LOT 4 - #4915	5,183 SF	4,858 SF*
NET LOT AREA-	22,036 SF	20,895 SF

*THE PROPOSED AREA FOR LOT 4 DOES NOT INCLUDE THE 5 FOOT STRIP OF LAND TOTALING 403 SF (LESS 18 SF OF PROPOSED HAMPDEN LANE DEDICATION) THAT WILL BE INCORPORATED INTO LOT 5.

PREVIOUS ARLINGTON RD. & HAMPDEN LN. DEDICATION	10,071 SF
PROPOSED ARLINGTON RD. & HAMPDEN LANE DEDICATION	1,141 SF
GROSS TRACT AREA	32,107 SF

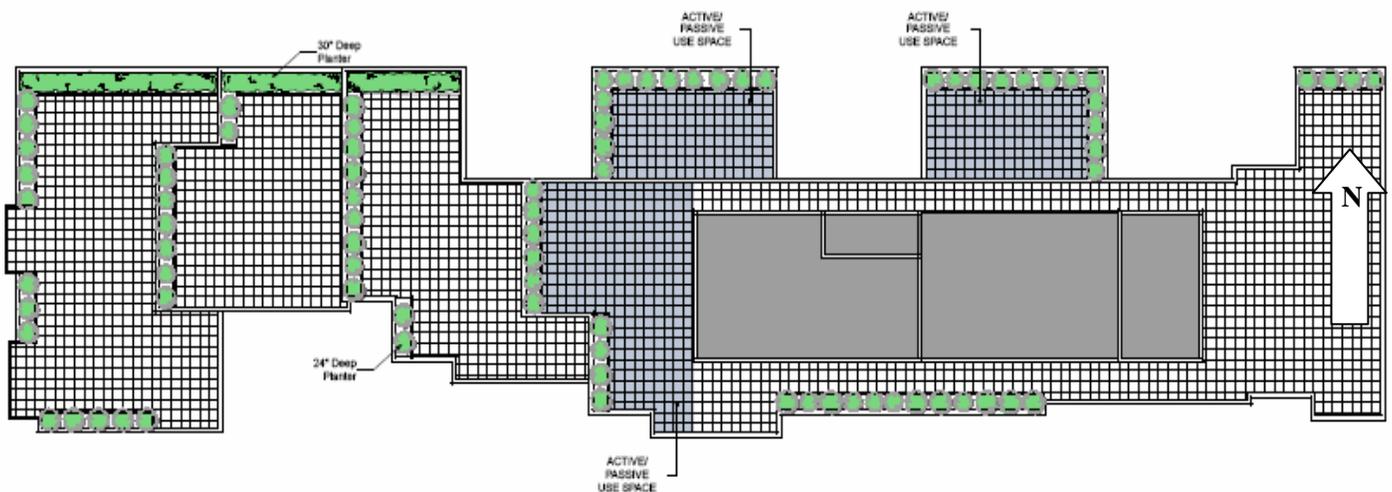
DEVELOPMENT PROGRAM

TS-R DEVELOPMENT STANDARDS

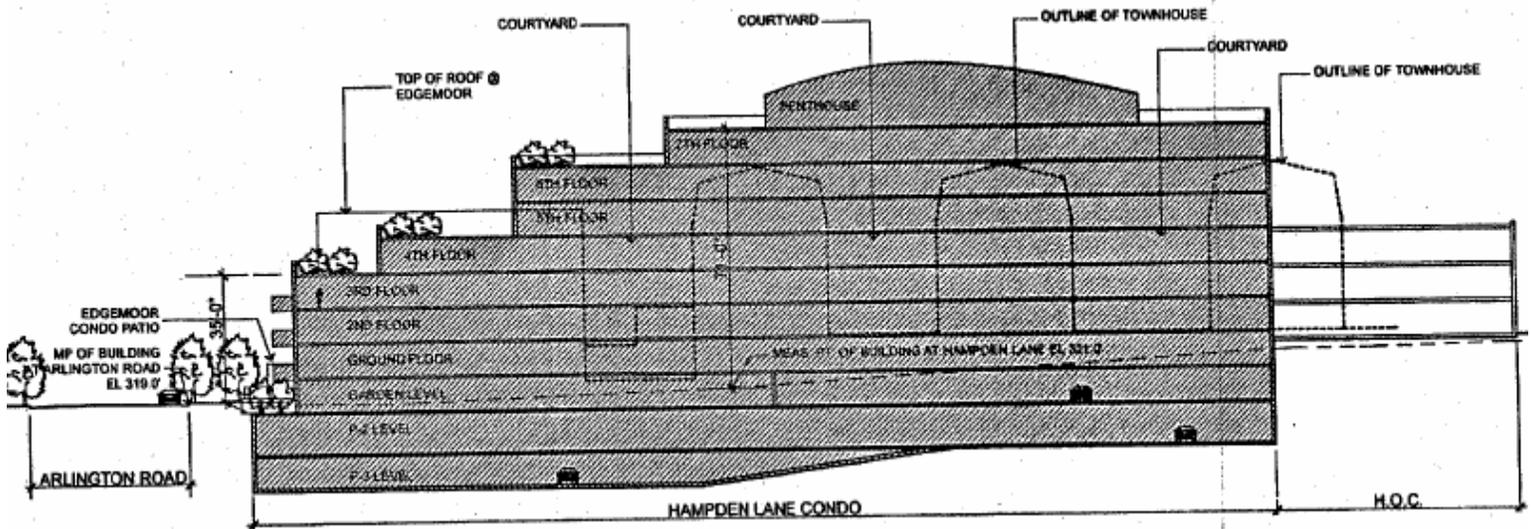
GROSS TRACT AREA	32,107 SF
MAXIMUM DENSITY PERMITTED	2.50 FAR
MAXIMUM DENSITY PROPOSED	3.05 FAR *
DWELLING UNITS PROPOSED	60 MULTI-FAMILY
MPDUs PROPOSED	9 UNITS (15%)

* INCLUDES MPDU BONUS DENSITY PERMITTED PURSUANT TO COUNTY CODE SECTION 25A-5(c)

In addition to the Land Use Plan, the contours of the development plan are fleshed out with other diagrams. The following one illustrates the rooftop terrace and planned rooftop landscaping:



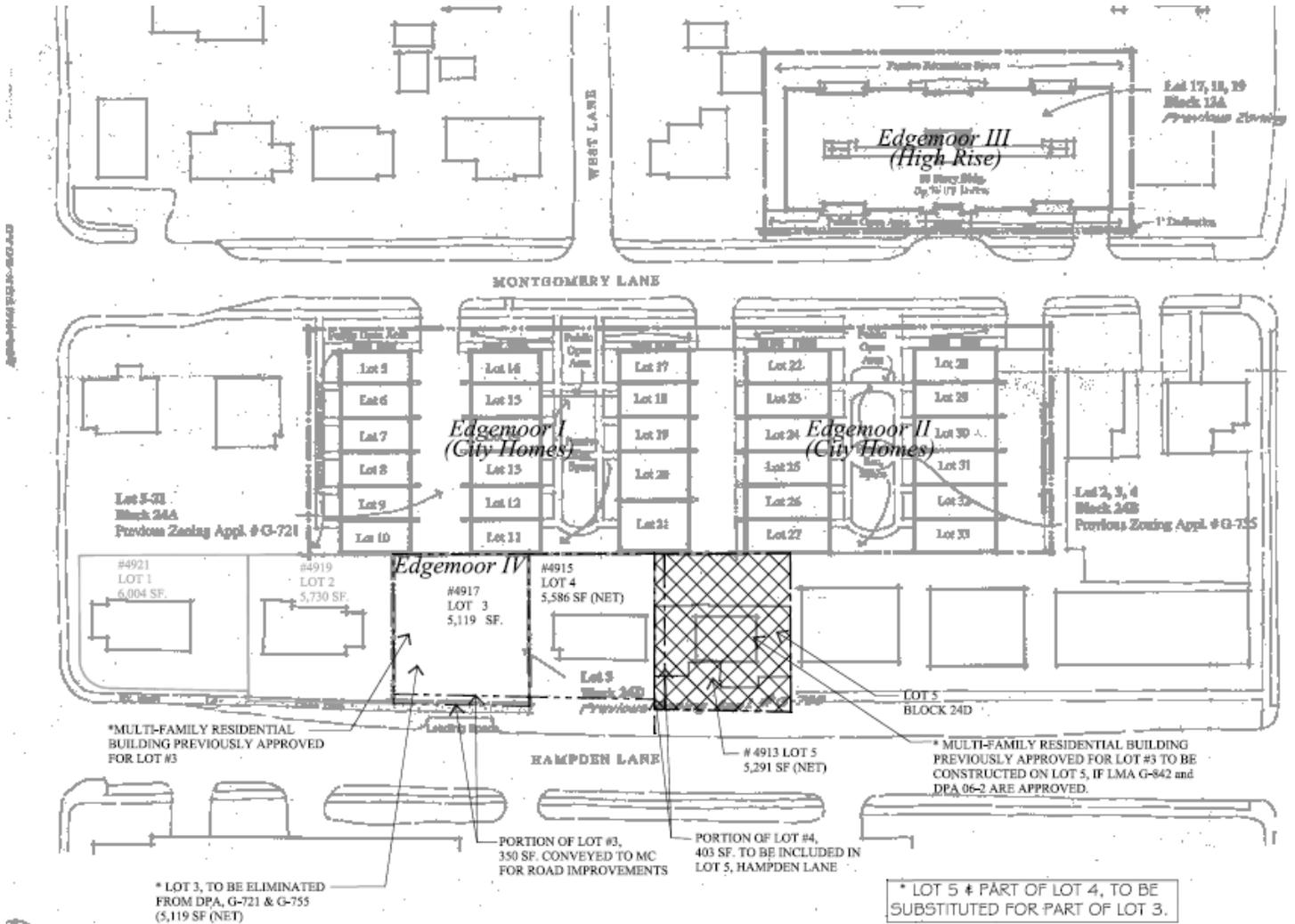
The following “Hampden Lane – Long Section (LMA Exhibit 36) shows the height of the proposed HLA building compared to the CityHomes of Edgemoor (labeled “Outline of Townhouse,” adjacent to the north:



3. DPA 06-2 and the Approved Site Plan for HOC Transitional Housing

As mentioned above, DPA 06-2 would amend DPA 00-2 and earlier development plans for Edgemoor I, II, III and IV, by showing the relocation of the proposed HOC transitional housing from Lot 3 (4917 Hampden Lane) to Lot 5 (4913 Hampden Lane).

Another change had to be made to the Development Plan Amendment to reflect an agreement by the developer of Edgemoor I, II and III on Montgomery Lane (HSNK, LLC) to transfer Lot 3 on Hampden Lane to the County (DPA Exhibit 39), purportedly in satisfaction of that developer’s MPDU obligations. These changes are reflected in the revised DPA 06-2, shown below. Following it is an explanation of the changes which are recommended in recognition of the agreement between HSNK, LLC and the County.



Development Plan Amendment 06-2

an amendment to Development Plans G-769, 755 and 721 and Development Plan Amendments 98-1, 98-2 and 00-2

LEGEND



EXTENT OF #4313 PROPERTY INCLUDING PORTION OF #4915; 5,694 SF.

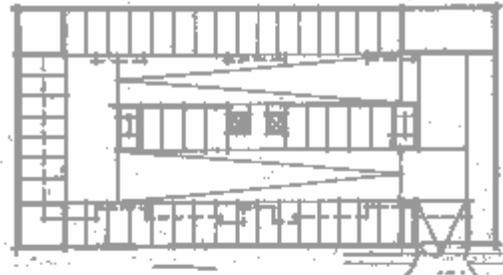
General Notes:

1. DPA 06-2 eliminates Part of Lot 3 from land area originally approved in connection with DPA 00-2 and substitutes in its place Lot 5 and a five foot wide portion of the most easterly portion of Lot 4.
2. DPA 06-2 eliminates Notes 2 and 3 set forth on DPA 00-2 Certified Plan and replaces said notes with the following: Recreation and Parking for the HOC transitional housing to be located on Lot 5, Block 24D will be considered by the Planning Board at Site Plan review.

EDGEWOOD - PHASES I-IV

Site Analysis

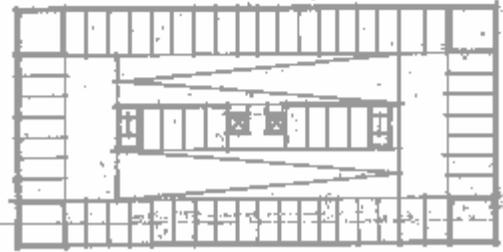
	Totals
Existing Zoning	
Lots 5-21, Parcels A, B, C, & D, Block 24A (Phase I)	TSR
Lots 22-33, Parcels E, F, & G, Block 24A (Phase II)	TSR
Lots 17, 18, 19, Block 13A (Phase III)	TSR
Lot 3, Block 24D (Phase IV)	TSR
Precision Zoning Application Numbers	
Lots 5-31, Parcels A, B, C, & D, Block 24A (Phase I)	G-721
Lots 22-23, Parcels E, F, & G, Block 24A (Phase II)	G-755
Lots 17, 18, 19, Block 13A (Phase III)	G-763
Lot 3, Block 24D (Phase IV)	G-769
Grass Land Area (a-k) (Phases I-IV)	86,775
Area of Dedication (a)	17,274
Net Land Area (a)	69,501
Units Permitted (150 Units/ac.) (Phases I-IV)	299
Units Proposed (Max. Phases I-IV)	138 ⁽¹⁾
Phase I	17
Phase II	12
Phase III	117
Phase IV	12
Maximum FAR Allowed (Phases I-IV)	216,838
FAR Proposed (Phases I-IV)	231,800
Public Open Space Required (10%) (Phases I-IV)	6,950
Public Open Space Proposed (18.1%) (Phases I-IV)	7,838
Active/Pedestrian Retention Space Required (2.5%) (Phases I-IV)	17,375
Active/Pedestrian Retention Space Proposed (2.5%) (Phases I-IV)	17,382 ⁽²⁾
Parking Tabulation	
(Phase I):	
17 - Townhouses (2 Spaces/Unit)	34
(Phase II):	
12 - Townhouses (2 Spaces/Unit)	24
(Phase III):	
66 - 1 Bedroom - 1 1/2 Spaces/Unit	99
44 - 2 Bedroom - 1 1/2 Spaces/Unit	66
7 - Studio - 1 Spaces/Unit	7
(Phase IV):	
5 - Studio - 1 Spaces/Unit/2	3
3 - 1 Bedroom - 1 1/2 Spaces/Unit/2	2
4 - 2 Bedroom - 1 1/2 Spaces/Unit/2	3
Total Spaces	231
Parking Credits (Phase I-IV)	
10% within Transit Station Development area	22
5% within 1,600 Feet of Metro Station	11
Total Credits	33
Total Spaces Required	198
Parking Provided (Phases I-IV)	192
Multi-Family	134
Townhouses	58
Building Heights (Maximum)	
Lots 5-21, Parcels A, B, C, & D, Block 24A (Phase I)	48'-4" ⁽³⁾
Lots 22-33, Parcels E, F, & G, Block 24A (Phase II)	48'-11" ⁽⁴⁾
Lots 17, 18, & 19, Block 13A (Phase III)	100'-0" ⁽⁵⁾
Lot 3, Block 24D (Phase IV)	Proposed 48'-0"



G1: 46 spaces

Conceptual Parking Layout
For Lot 17, 18, 19, Block 13A
Scale 1"=50'

April 12, 2010



G1G2: 56 spaces

⁽¹⁾ MPDU's will be provided in conformance with the requirements of Chapter 25A.

⁽²⁾ Recreation and Parking for the HOC transitional housing to be located on Lot 5, Block 24D will be considered by the Planning Board at Site Plan review.

⁽³⁾ Permit approved Site Plan 9-97011A

⁽⁴⁾ Permit approved Site Plan 9-98035

⁽⁵⁾ Permit approved Site Plan 9-99036

Todd Brown, Esquire, an attorney for HSNK, LLC, wrote to the County Attorney's office, the Planning Board and the Hearing Examiner (DPA Exhibits 33, 38 and 39) to assert HSNK's position that its agreement with the County to transfer title to Lot 3 to the County completely satisfied all its MPDU requirements and that it was not required to provide any parking or recreation for the transitional housing (Edgemoor IV) in its Edgemoor Condominium high-rise (Edgemoor III).¹⁰ Mr. Brown requested at the hearing that DPA 00-2 be modified to replace notes 2 and 3 with a statement that the Edgemoor Condominium high-rise (Edgemoor III) has no obligation to provide recreation or parking for the HOC transitional Housing (Edgemoor IV). 3/17/06 Tr. 22-25. This issue was taken under advisement at the time.

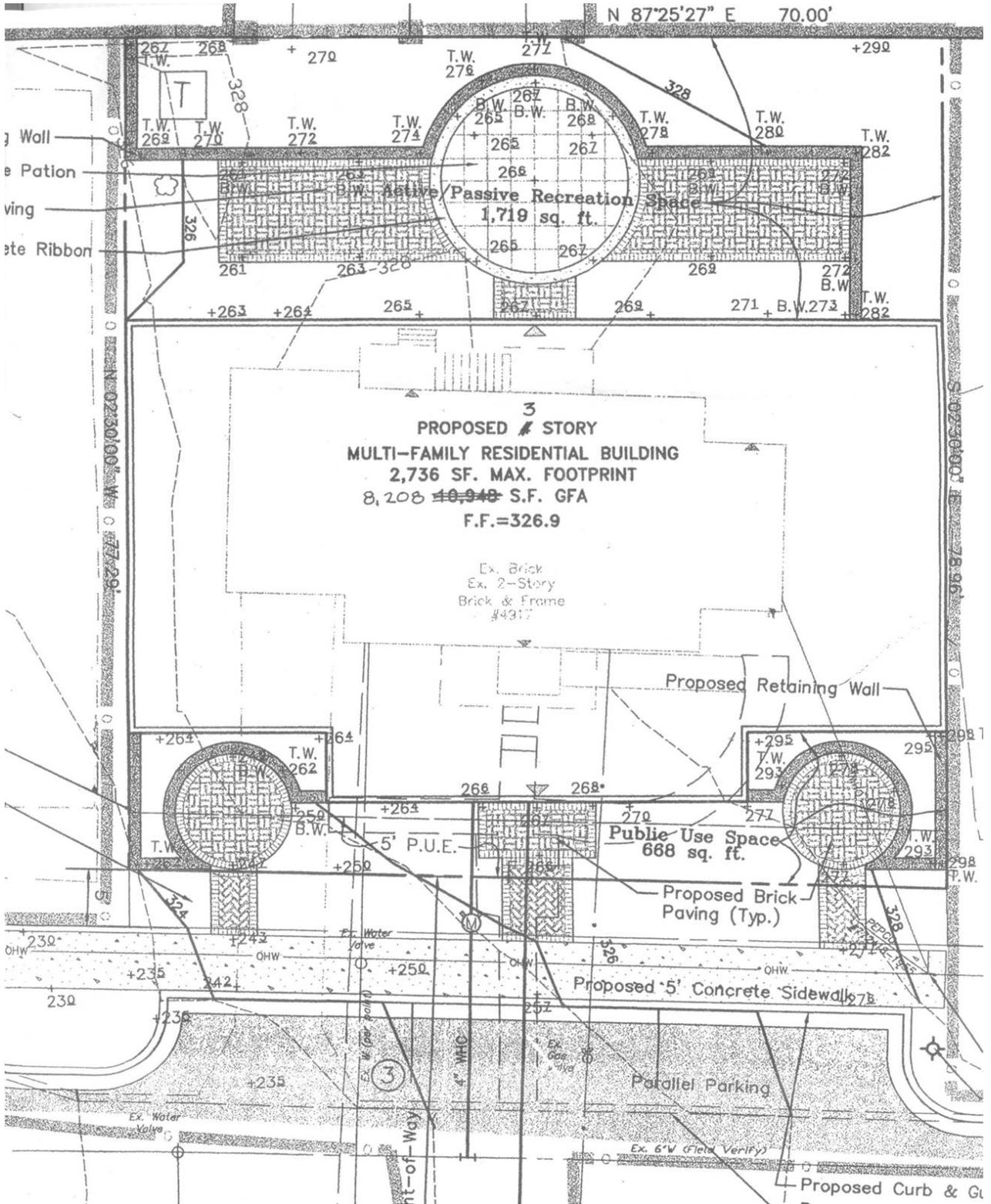
There is no evidence to dispute HSNK's interpretation of its contractual agreement to transfer Lot 3 on Hampden Lane to the County; however, the Hearing Examiner concludes that this zoning review of LMA G-842/DPA 06-2 is not the appropriate forum for interpreting the contractual agreement between HSNK, LLC and the County regarding a development (Edgemoor I, II and III) which is not before the Hearing Examiner. Nevertheless, because DPA 00-02 is being amended by DPA 06-2, insofar as it the HOC transitional housing is being moved from Lot 3 on Hampden Lane to Lot 5 on Hampden Lane, the amended development plan should not contain inaccurate information as to HSNK's obligations to provide parking and recreation for the transitional housing within the Edgemoor condominium high-rise (Edgemoor III).

As noted in Part II of this Report, the Planning Board recommended the kind of affirmative language HSNK seeks with regard to recreation (note 2), but with regard to parking, simply recommended "removing note #3." The Hearing Examiner is not aware of any basis for distinguishing between parking and recreation in this fashion. However, accuracy on both issues can be restored to the development plan for the project by removing both notes 2 and 3 found in DPA 00-

¹⁰ Mr. Brown also appeared at the March 17, 2006 hearing and asserted the same position. 3/17/06 Tr. Tr. 22-25.

2, and replacing them with the following note in DPA 06-2, "Recreation and Parking for the HOC transitional housing to be located on Lot 5, Block 24D will be considered by the Planning Board at Site Plan Review." A separate General Notes section on DPA 06-2 would contain a verbal explanation of how DPA 06-2 is changing DPA 00-2 (*e.g.*, the Lot 3 to Lot 5 swap) and a note to the effect that the original language of notes 2 and 3 in DPA 00-2 has been eliminated, and a single note has been substituted with the new language suggested above. While this change would not make the kind of affirmative statement HSNK seeks, it would eliminate the language which creates an affirmative obligation HSNK contends it no longer has. If the County disputes HSNK's interpretation of their agreement (and there is no indication that it does), these issues will have to be decided in a different forum. The changes recommended by the Hearing Examiner are reflected in the revised DPA 06-2 shown above.

In addition to the changes in shown in DPA 06-2, the approved Site Plan for the development of the HOC transitional housing has been made a part of this record (DPA Exhibit 47), and is shown on the following page. Although the Site Plan expressly pertains to Lot 3, not Lot 5, the evidence in this case, as detailed in Applicant's Land Use Plan (DPA Exhibit 26), is that the Site Plan will not change materially if the HOC housing is constructed on Lot 5. Consistent with its previous DPA and Site Plan approvals, HOC proposes a three-story, 10,622 square foot (including 2,604 square feet of basement area) freestanding building. The building will include seven one-bedroom units, five studio apartments and a counselor's office on the ground floor. The design of the building will be brick, with large windows and some balconies. The HOC Property will include the requisite 10 percent public use space in front of the building along Hampden Lane, and will have special paving, landscaped areas and seating. Consistent with the previously approved Site Plan, the active and passive recreational space will be provided in the rear of the building and will include a nicely landscaped outdoor area.



4. Conformance with the Master Plan

The subject site is located within the area governed by the *Bethesda Central Business District (CBD) Sector Plan*, approved and adopted in July, 1994. More specifically, it is within the southern end of the Transit Station Residential District, as shown in Figure 4.13 from the Sector Plan (p. 81), reproduced on page 10 of this report. The subject properties are specifically referenced on page 24 of the Sector Plan as having “redevelopment potential,” and the Sector Plan recommends and encourages “a wide range of housing types and neighborhoods in and around Bethesda for people of all incomes, ages, lifestyles and physical capabilities . . . ” (page 3).

For the Transit Station Residential District, the Sector Plan states that “[r]eservation of the TS-R area for high-density housing is an important objective of the Sector Plan.”¹¹ The Plan therefore recommends (page 5) “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 up to about 100 dwelling units per acre. . . .”

The goal of achieving the low-rise urban village is repeated on page 80 of the Sector Plan as one of the three objectives of the Plan. On page 83 of the Sector Plan, a “Low-Rise, High-Density Prototype” is depicted as a four-five story building with an underground garage, and on page 84 of the Sector Plan, the desired “Low-Rise, High-Density Housing on a Mixed Street” is depicted as a mix of three and four-story residential buildings, as shown on the following page:

¹¹ It should be noted that the Sector Plan contains a diagram of recommended “future land use” (Figure 4.13, on page 81), that appears to be inconsistent with the text of the Sector Plan, in that the diagram recommends low density office use for the eastern portion of the subject site and mixed use for the western portion of the site, while the quoted text of the Sector Plan calls for a residential urban village in the TS-R District. Applicant’s land use expert, William Landfair, addressed this point at the Hearing Examiner’s request, and suggested that the framers of the plan erred in creating the diagram by including then current uses. 5/22/06 Tr. 20-24. His analysis appears to be borne out by subsequent rezonings (G-720, G-779 and G-778) for purely residential redevelopment in areas along Arlington Road which were also recommended for mixed use in the same diagram. The Hearing Examiner concludes that the text of the Sector Plan controls over this diagram, and that whether or not the framers of the Sector Plan intended to allow mixed use and low density office use on the subject site, they did not intend to prohibit a purely residential use. Applicant’s proposal for residential use of the site is consistent with the objectives of the Sector Plan.



"After", Proposed Low-Rise, High-Density Housing on a Mixed Street

The Urban Design Guidelines for the Transit Station Residential District are set forth on page 85 of the plan:

D. URBAN DESIGN GUIDELINES

In addition to the general objectives and principles in Section 3.2, the following guidelines apply in the TS-R District (see Figure 4.16):

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 Applicant has met the first, fourth, sixth and seventh of these guidelines, and partially fulfills the third guideline by stepping down to three floors along Arlington Road; however, Applicant's Development Plan does not meet the second, fifth and part of the third guideline. Applicant does not plan a low-rise building as depicted in the Sector Plan, nor does it intend the pitched roofline recommended in Guideline 5. Instead of the six floors recommended near Woodmont Avenue in Guideline 3, Applicant intends seven stories in the middle of Hampden Lane. Since the planned HOC building, immediately to the east of the proposed HLA building, will be only 38 feet tall, and it will abut a garden apartment building which is only three stories tall, the "tenting effect" sought in the Sector Plan, with buildings gradually rising from three stories on Arlington Road to six stories on Woodmont Avenue, will not be achieved by Applicant's proposed development plan.

William Landfair, Applicant's land use expert, argued in his final day of testimony on May 22, 2006, that the Sector Plan's recommendation of 65 feet along Woodmont Avenue was not intended to exclude buildings of equal height further west on Hampden Lane, as evidenced by the height limits in Sector Plan Figure 3.2 on page 39. He also pointed to Zoning Text Amendment (ZTA) 01-08 (Ordinance No. 14-43, effective November 26, 2001) as evidencing the Council's intent to allow taller buildings along Arlington Road, including a new mixed use building planned for the site of the old Giant Supermarket on the east side of Arlington Road. 5/22/06 Tr. 24-26.

The Hearing Examiner does not find this argument persuasive. While Sector Plan Figure 3.2 does show height limits of up to 65 feet along the eastern portion of Hampden Lane, that

diagram does not suggest that buildings along Hampden Lane should rise from 33 feet tall on Arlington Road to 71 feet in mid-block, and then tail off to 3 stories for three buildings in a row (HOC housing plus two garden apartment buildings), before rising again to a six or seven story building along Woodmont Avenue. That is the outcome that would result from this plan, and it does not provide the sought-after “tenting” effect. Moreover, ZTA 01-08 refers to commercial zones, not to the subject TS-R Zone, and Mr. Landfair’s reference to the Giant Supermarket on the east side of Arlington Road concerns areas outside of the TS-R District, which are not directly relevant to this case.

In addition to building height recommendations, the Sector Plan discusses appropriate densities in the TS-R District, suggesting 45 to 100 dwelling units per acre, with a maximum floor area ratio (FAR) of 2.5, the density cap specified for the TS-R Zone.¹² Although HLA’s proposed density of 3.05 FAR exceeds the 2.5 FAR density permitted in the TS-R Zone (absent MPDUs), when density is measured by dwelling units per acre, this project, at 81.5 units per acre, falls between the 45 to 100 dwelling units per acre recommended by the Sector Plan.

In any event, an Applicant may pursue a proposal exceeding the density and height limits suggested in the Sector Plan, if an Alternative Review Committee (ARC) finds that it is not “financially feasible” to meet those limits because of the inclusion of MPDUs on site. *See Zoning Ordinance §59-D-1.61(a)*. In such a case, the Planning Board may recommend permitting a height and density greater than recommended in the Sector Plan. That is what occurred in the case under

¹² The Hearing Examiner notes that the Sector Plan estimated (page 82) that a density of about 100 dwelling units per acre would result in a FAR of 2.5. This estimate was far off in this case (81.5 units per acre resulting in a FAR of 3.05) because Applicant has included a previous dedication of 10,071 square feet (*i.e.*, almost half of the net lot area) in its determination of gross tract area for purpose of calculating dwelling units per acre. This procedure is permitted under the Zoning Ordinance’s definition of gross tract area; however, in a case like this one, it results in a misleading figure for density, one much lower than the density one would sense upon looking at the completed project because the building will be located on a tract, outside of the previously dedicated roadway, which is much smaller than the official gross tract. 5/22/06 Tr. 29-30.

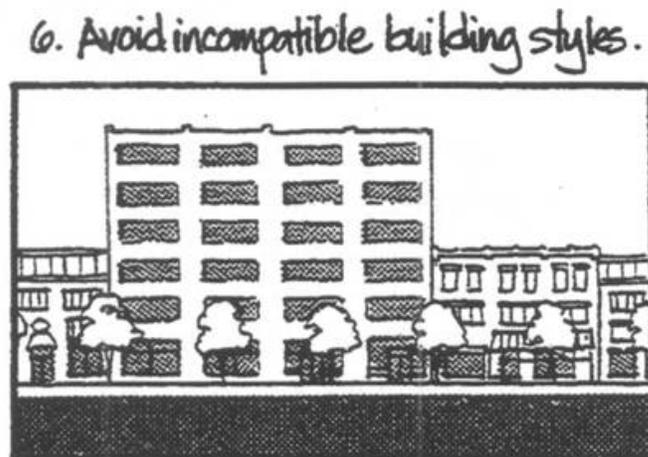
review.¹³ See LMA Exhibits 52 and 55. Thus, the Planning Board recommended permitting Applicant to build its proposed building up to 71 feet tall with a FAR of 3.05. Jim Humphrey, testifying on behalf of the Montgomery County Civic Federation, urged that such a variance from the Sector Plan sacrifices the public interest goal of predictability and reliability, which is a significant part of the rationale for using master plans. 5/22/06 Tr. 89-90. Mr. Humphrey also challenged the premise behind the ARC review process, asserting that “economic feasibility” is entirely within the control of the developer, and that the developer should just not purchase the property if it would not be economically feasible to build a project with the required MPDUs, and within the height and density limits set forth in the Sector Plan. 5/22/06 Tr. 91.

While Mr. Humphrey clearly identified a downside to varying from master plans, it must be remembered that a master plan is only a guide where, as here, the Zoning Ordinance does not make it mandatory. See *Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997). The ARC process, established by the Council in the Zoning Ordinance, actually makes it more difficult to vary from the Sector Plan by requiring the Applicant to establish

¹³ Two witnesses at the May 22, 2006 hearing (David O’Byron and Brent Polkes) challenged the ARC’s findings in this case based on a possible conflict of interest of two of its members. 5/22/06 Tr. 93-96; 100; 105-106. The unusual conflict problem in this case arose because two members of the Alternative Review Committee, Elizabeth Davison (on behalf of DHCA) and D. Scott Minton (on behalf of HOC), previously signed the development agreement (LMA Exhibit 32) in which their agencies pledged to cooperate with the developer in the development review process. Ms. Davison reportedly asked the County Attorney’s office about the possibility of a conflict and apparently received an okay, but no written opinion was issued. 5/22/06 Tr. 100. One could certainly argue that, having pledged contractually to support the development, participation of HOC and DHCA in the ARC review (part of the development review process) gives at least the appearance of a conflict, and renders the ARC review illusory. On the other hand, there may have been no way to avoid this problem. Zoning Ordinance §59-D-1.6(a) requires that the Alternative Review Committee be “composed of the Director of the Department of Housing and Community Affairs, the Executive Director of the Housing Opportunities Commission, and the Director of Park and Planning, or their respective designees.” While using designees might have helped reduce obvious appearance problems, it would not eliminate the underlying problem, because the designees would still be acting on behalf of HOC and DHCA. In these circumstances (*i.e.*, the statutory requirement for participation of HOC and DHCA in the ARC process), the “rule of necessity” allows the participation of the HOC and DHCA officials in the ARC proceedings because there appears to be no way of avoiding the conflict or the appearance thereof. See, Office of the Attorney General of the State of Maryland, Opinion No. 01-004, 2001 Md. AG LEXIS 4 (January 30, 2001). The Hearing Examiner’s concerns about the objectivity of the ARC review are also alleviated to some extent by the fact that the ARC was assisted in its review by an independent economic advisor under a contract for professional service to DHCA. See *ARC Memorandum of April 27, 2006, attached to LMA Exhibit 52.*

that it would not be financially feasible to include MPDUs and still meet the Sector Plan's height and density limitations.

The finding of the ARC means that the project has gone through the appropriate review of financial feasibility, as prescribed by the Zoning Ordinance, but it does not establish that the proposed building is consistent with the Sector Plan's vision or compatible with surrounding development. The Hearing Examiner finds that, in its present version, it is neither. The issue of compatibility will be discussed in Part III. E. of this report, although it should be noted in this section that the Sector Plan's "Urban Form Principles" (Figure 3.4B on page 43) specify that one should "[a]void incompatible building styles." Below that caption is a diagram of a six-story building with large windows surrounded by three-story buildings similar to the planned HOC housing and the garden apartments near the subject site.



The similarity of this "example to be avoided" with Applicant's plan is evident. As to the Sector Plan's vision, the Hearing Examiner finds that the proposed building does not comport with the low-rise, "urban village" concept depicted in the plan, nor with some of the specific urban design guidelines.

While Applicant argues that architectural compatibility (*e.g.* façade, as distinguished from height, bulk and density) should not be a factor at the zoning stage, the Hearing Examiner finds that façade must be considered in connection with the Sector Plan’s recommendation for an “urban village” with low-rise buildings that “appear to be townhouses but actually [are] three to six-floor buildings with apartments at each level.” *Sector Plan*, p. 82. Looking at the architect’s concept of the proposed building (LMA Exhibit 37), reproduced on page 17 of this report, with its seven-story, mostly glass façade, the Hearing Examiner does not see anything approaching the townhouse appearance called for in the Sector Plan.

In reaching this conclusion, the Hearing Examiner has taken official notice of the District Council’s April 12, 2005, Resolution No. 15-960 (LMA Exhibit 50(a), which denied an application to reclassify the nearby site of G-819, located on Woodmont Avenue, between Hampden and Montgomery Lanes, to the TS-R Zone. The District Council’s action was based on its dissatisfaction with the proposed development plan which called for a 100 foot tall high-rise.¹⁴ On page 7 of the Opinion accompanying that Resolution, the District Council emphasized that: “[t]he Sector Plan’s extensive recommendations and guidelines for the TS-R District clearly establish a vision for the TS-R District centered on a low-rise, high-density urban village . . .” The District Council added (pp.16-17):

the subject application is in substantial compliance with the use and density recommended in the Bethesda CBD Sector Plan, but is not consistent with the Sector Plan’s overall vision for the TS-R District or with its specific height recommendation for the subject property. The District Council is persuaded that the Sector Plan’s basic vision can still be implemented successfully, and that the present proposal offers no countervailing public benefit that would justify the substantial departure from the Sector Plan that is requested.

¹⁴ The applicant in G-819 appealed the Council action to the Circuit Court. The parties in that action agreed to remand it back to the Council, which in turn remanded the matter back to the Hearing Examiner on January 31, 2006. That remand, embodied in Resolution No. 15-1314, directed the Hearing Examiner to reopen the record for further proceedings to consider a revised development plan limiting height of the proposed structure on Woodmont Avenue and Hampden Lane to 70 feet. The matter is still pending with the Hearing Examiner for that case.

The subject case raises a more difficult decision than G-819, because HLA's proposal does not depart from the height recommendations of the Sector Plan as dramatically as the original proposal in G-819.¹⁵ Nevertheless, the clear sense of the District Council's Opinion in Resolution No. 15-960 is that, even when the proposed zone change (*i.e.*, R-60 to TS-R) is consistent with the Sector Plan's recommendation, a rezoning application should be denied if the proposed development plan is not consonant with the vision of the Sector Plan. That is the case here. The development proposed by HLA does not call for the kind of low-rise urban village that embodies the vision of the Sector Plan for the TS-R District.

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

The County's Annual Growth Policy (AGP) and the Adequate Public Facilities Ordinance (APFO) require a review of the availability of adequate public facilities for any proposed development. Applicant provided testimony and exhibits with regard to transportation, schools and water and sewer service.

a. Transportation:

Arlington Road (A-82) is an arterial road with a planned right-of-way of 80 feet, and Hampden Lane is a business district street with a planned right of way of 60 feet. Hampden Lane has two through lanes, with parking along the south side of the road for the commercial uses on that side of Hampden Lane.

Applicant presented a "traffic statement" (LMA Exhibit 42) and the testimony of Chris Kabatt, an expert in transportation planning. 3/17/06 Tr. 116-121. His traffic statement reports that the HLA project would generate 18 a.m. peak hour trips and 18 p.m. peak hour trips. The HOC transitional housing will generate an additional 4 a.m. peak hour trips and 4 p.m. peak hour trips.

¹⁵ The HLA proposal offers the public benefit of including 15% on-site MPDU's, but so did G-819, and this factor is therefore not a distinguishing characteristic.

The total number of trips is below the threshold (30 peak hour trips) necessary to require a full traffic study under local area transportation review (LATR) guidelines. Mr. Kabatt's conclusions were confirmed by the Transportation Planning Division of Technical Staff, which concluded that "The hourly contribution to the peak hour traffic volumes is not considered significant or likely to cause additional congestion." Attachment to LMA Exhibit 26.

Nevertheless, Applicant went beyond what is required and looked at turning movement and critical lane volumes at nearby intersections. Mr. Kabatt found that the Arlington Road and Woodmont Avenue intersections with Hampden Lane operate well within the congestion standard (1800 critical lane volume) for the Bethesda CBD. He also found similar results for the intersections of Arlington Road with Elm Street and Edgemoor Lane. LMA Exhibit 42.

Vehicles would enter the project's parking garage via a single driveway on Hampden Lane, which is approximately 250 feet east of Arlington Road. In Mr. Kabatt's opinion, the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient. The parking garage access is 24 feet in width. Applicant will provide a sidewalk along the north side of Hampden Lane, and that provides connection to the area sidewalks and the Bethesda Metro Station. Technical Staff noted that the pedestrian facilities that are proposed as part of the HLA Development Plan will enhance the existing sidewalk network, and concluded, "Primary site access and service access [are] adequate and will not pose a threat to public safety." LMA Exhibit 26, p. 18.

Technical Staff also indicated that, at the time of preliminary plan review of the adequacy of the public facilities for the future subdivision, the HLA Development Plan would be limited to 60 mid-rise residential units, and the developer would be required to enter into a Traffic Mitigation Agreement and to participate in the Bethesda Transportation Management District.

The HLA Development Plan includes dedication along Hampden Lane at thirty feet from the centerline of the road, which will be provided to establish a public right-of-way of 60 feet. The 40 feet of property dedication for Arlington Road will facilitate the establishment of new public facilities and sidewalks to promote safe and efficient circulation.

Although the Applicant has not provided 25 feet of standard truncation for the corner of Arlington Road and Hampden Lane, Technical Staff recommends that, at the time of preliminary plan review, the Applicant be required to dedicate the required right of way for standard truncation at the corner of Arlington Road and Hampden Lane or to obtain a waiver from DPS. Applicant will also be required to provide one inverted U-Turn bike rack and four bike lockers in the parking garage at the time of preliminary plan review.

b. School Capacity:

School capacity is not significant concern in this case according to Technical Staff, and there is no evidence in the record to the contrary. Bruce H. Crispell, Director of the Division of Long-range Planning, Montgomery County Public School's (MCPS), stated in a letter dated December 23, 2005 (LMA Exhibit 54):

This rezoning would result in 60 multi-family dwelling units. Based on average yield factors derived from the Maryland National Capital Park and Planning Commission 2003 Census Update Survey, the impact of this project is estimated to be approximately five (5) elementary, (3) middle and three (3) high school students.

This property is located within the Bethesda Elementary School, Westland Middle School and Bethesda-Chevy Chase High School service areas. Enrollment at Bethesda Elementary School is currently within capacity but is expected to exceed capacity beginning next year. Enrollment at Westland Middle School currently exceeds capacity but is trending down and is projected to have space available beginning next year. Enrollment at Bethesda-Chevy Chase High School currently exceeds capacity but is trending down and is projected to have space available beginning in 2009-2010

The current Growth Policy schools test finds capacity adequate in the Bethesda/Chevy Chase cluster.

Thus, MCPS's own projection is that the Middle School will have space available next year, and the High School will have space available by 2009. Although MCPS projects the Elementary School to be above capacity next year, the AGP schools test finds that capacity is adequate. Therefore, the Hearing Examiner concludes that MCPS will be able to handle the increased demand projected from the subject development.

c. Water and Sewer Service:

According to Mark Morelock, Applicant's expert in civil engineering (3/17/06 Tr. 104-115), there is a 6 inch to 8 inch sewer line on Hampden Lane, and there is an 8 inch sewer line that runs along Arlington Road. There is an 8 inch water line in Hampden Lane and a 10 inch water line in Arlington Road. These facilities provide service rated as S-1 and W-1, and capacity appears to be adequate, as are the gas supply and electric power. Technical Staff confirms the S-1 and W-1 service categories.

6. Environmental Issues

No environmental issues were raised in this case. Applicant's engineer, Mark Morelock, testified that the property contains no flood plains, protected soils, rock outcroppings, or other natural features that would impact development of the proposed project, and the subject site is not located in a special protection area. This assertion was confirmed in Technical Staff's letter exempting the site from having a forest conservation plan. LMA Exhibit 8. The letter does, however, require a "Tree Save Plan,"¹⁶ and the Applicant will consult with Park and Planning Staff on implementing "green" building elements into the HLA project.

According to Mr. Morelock, this project would be considered as a redevelopment, and as such, the storm water management requirements for recharging the water runoff do not apply.

¹⁶ Mr. Morelock stated that, as part of the NRI/FSD, Applicant noted two 24 inch locust trees located on the site, one at the corner of Arlington Road at Hampden Lane and one at the corner of Lot 5.

Moreover, because there is less than 2 CFS (cubic feet per second) discharging from the proposed property, the site is exempted from channel protection volume (CPV) controls [*i.e.*, quantity control], as well. Quality control will be provided on site through an underground filtration system. It would be in a vault structure, a filtration device similar to a storm filter which uses charcoal cartridges, stores the water, filtrates it through the medium, cleansing it, and then discharges the filtered water back into the existing storm drain system. Adjacent to the subject property, there is a 42 inch reinforced concrete pipe located along Arlington Road, and the new project would connect into that.

A Stormwater Management Concept Plan has not yet been approved by DPS for this mid-rise, residential development plan. Technical Staff indicates that the Applicant will be required to submit a Stormwater Management Concept Plan at the time of Preliminary Plan of Subdivision, a review which is required to consolidate the properties.

During construction, Applicant will employ temporary sediment erosion control measures as required by Montgomery County and Maryland Department of the Environment. In addition, Applicant will stabilize construction entrances and silt beds protecting the perimeter of the property. Mr. Morelock opined that the proposed development plan will prevent erosion of the soil and preserve any natural vegetation and other natural features of the site. Applicant notes in its Land Use Report that the proposed development will take advantage of the natural grade of the properties, but minor grading will be needed. Sediment Control Plans will be prepared directing the contractor to specific construction techniques so that adjacent properties will not be damaged by erosion or siltation during the construction process.

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

E. Neighborhood Concerns and Compatibility

The proposed LMA and DPA are supported by the County's Department of Housing and Community Affairs (DHCA) in order to provide "an overall residential context for the HOC [transitional housing] project." DPA Exhibit 40. No neighbors appeared at the initial hearing to testify regarding the subject application; however, there was some pre-hearing opposition from Jim Humphrey, as Chairman of the Land Use Committees of the Montgomery County Civic Federation and the Edgemoor Citizen's Association. DPA Exhibits 35 and 36. Mr. Humphrey supported the rezoning and the DPA in general; however, he objected to exceeding the 65 foot height limit recommended by the Sector Plan. Mr. Humphrey appeared during the third hearing day, on May 22, 2006, to express the concern of the Montgomery County Civic Federation about varying from the Sector Plan. He also challenged the premise of the ARC's evaluation of "economic feasibility" to determine whether to vary from the Sector Plan. 5/22/06 Tr. 89-91. These issues have already been addressed in the discussion of Sector Plan compliance in Part III.D.4. of this report.

At the second and third hearing days, a number of neighbors, including a representative of the homeowners association for the CityHomes of Edgemoor, testified in opposition to the proposed development based on its failure to follow the Sector Plan's recommendations and their concern that the proposed building's height and bulk were not compatible with their adjacent townhouse development. A number of witnesses testified that the new building would block their southern exposure and therefore their sunlight. One neighbor, Brent Polkes, expressed concerns about a possible conflict of interest on the ARC, and that issue was addressed in footnote 13 on page 36 of this report. Two neighbors, Sheryl Staren and David Koitz, also raised a notice issue, testifying that they had not heard of the initial hearing date. The Hearing Examiner finds that the complaint about notice is not sustainable. As required by the Zoning Ordinance, notice was mailed out to all adjoining and confronting property owners, as well as to local civic associations, posted

conspicuously on both Arlington Road and Hampden Lane and published in two newspapers. LMA Exhibits 49, 51, 57 and 58. Moreover, Applicant's attorney met with the City Homes of Edgemoor Homeowner's Association to discuss their issues on two occasions. In any event, the neighbors were given the opportunity to testify, and a number availed themselves of that opportunity.

The concerns raised in the neighbors' testimony about non-compliance with the Sector Plan, lack of compatibility and ill effects on the adjoining properties are much more problematic than the notice issue. Immediately to the north of the subject site are the 50 to 55 foot tall,¹⁷ brick, CityHomes of Edgemoor townhouses and the 46-foot high, brick, Edgemoor at Arlington development; to the east will be the 38 foot tall, brick, transitional housing and two existing, three-story, brick, garden apartment buildings; to the west, across Arlington Road, is the low-rise, brick, County library, and across Hampden Lane are low-rise commercial properties in the Shoppes of Bethesda shopping center. The CityHomes townhouses and other surrounding structures are depicted on pages 14 -16 of this report.

The building proposed by HLA is shown on page 17 of this report (LMA Exhibit 37). It would be 71 feet tall (not including its 15 foot tall mechanical penthouse), 282 feet long, and would have a mostly glass façade. It would be much taller and bulkier than any of its immediate surroundings, and would, according to the testimony of the northern neighbors, block their sunlight.¹⁸ Under Zoning Ordinance §59-C-8.51, it is up to the Planning Board, at site plan review,

¹⁷ Applicant describes the CityHomes development as approximately 50 feet tall on page 2 of its Land Use Report; however, the Council Opinion in G-819 (Resolution No. 15-960, p. 3) refers to the CityHomes townhouses as being 55 to 60 feet tall. At the third day of hearing in the subject case, on May 22, 2006, Applicant revised its height description of the CityHomes townhouses to 55 feet. 5/22/06 Tr. 52 and 75.

¹⁸ Applicant's architect, I. Guyman Martin, testified that because the grade of Montgomery Lane is higher than Hampden Lane, the proposed building, at 71 feet in height (not including the penthouse), would be only 10 feet taller than the 55 foot tall CityHomes development abutting it to the north. 5/22/06 Tr. 51-52. The Hearing Examiner finds that although the difference in grade does help to alleviate the height difference, the total impact of the proposed HLA building upon CityHomes would still be significant, especially in view of the additional 15 foot difference in height created by the mechanical penthouse. Although the penthouse cannot be considered for purposes of establishing whether Applicant meets height limits in the Zone, it may be considered when assessing the impact of the proposed building on its neighbors.

to make a final assessment of building's impact on light and air available to surrounding properties and to determine the appropriate height of the building. However, under Zoning Ordinance §59-D-1.61(b), the Council, during the rezoning process, must assess compatibility with adjacent development, and the height of the proposed building clearly affects compatibility. The District Council considered the issue of compatibility, and the impact of nearby taller buildings on "air, light and visual appeal" available to adjacent shorter buildings, to be significant in its evaluation and denial of LMA G-819. *Resolution No. 15-960, pp. 14-15.* Despite Applicant's efforts to establish open spaces corresponding with the open areas between townhouse rows to the north, it is evident that the proposed building would block air and light from the shorter townhouses adjacent to it.. It is thus not compatible, in terms of height and bulk, with either the existing development immediately around it or with the planned transitional housing that would be adjacent to it.

Although compatibility of the façade is not usually a zoning issue, we have considered this architectural feature in conjunction with the Sector Plan's call for an "urban village" with the appearance of townhouses, mentioned in Part III. D. 4. of this report. Applicant's own architectural expert, I. Guyman Martin, testified that compatibility "is not purely a question of style, but is a question of relative scale, proportion, height, feeling of the building being residential versus the building of some other use." 5/22/06 Tr. 53. Thus, the "feeling" that the building conveys is, on Applicant's evidence, a legitimate aspect to consider in evaluating compatibility. The surrounding brick structures all have the urban village sense called for in the Sector Plan, while HLA's planned structure, with its mostly glass façade and monolithic size,¹⁹ does not convey the same impression.

¹⁹ In fairness, Applicant did attempt to break up the monolithic feeling to the building by "tak[ing] out chunks of space along the back of [the] building" for courtyards, by stepping the building in and out, by adding balconies to the façade and by using "a warm colored brick" on non-glass areas of the façade. 5/22/06 Tr. 53-54. The Hearing Examiner finds that these steps did not go far enough, as demonstrated by Applicant's own conception of the building in LMA Exhibit 37.

When the Hearing Examiner raised the façade issue directly with Applicant's architect, Mr. Martin, the exchange was instructive (3/17/06 Tr. 95-96):

MR. GROSSMAN: Wouldn't it be more residentially compatible with even more brick than it has as shown in the current Hampden Lane elevation?

MR. MARTIN: As a question of design, would it be more residential? I would defer in these cases to the judgment of my clients and others rather than interpose my own professional view. I think that that's a perfectly residential building, but, I wouldn't want to argue an aesthetic point here.

I think what we were really trying to say was --

* * *

MR. GROSSMAN: And was there a particular reason for designing it that way [*i.e.*, with more glass than brick]?

MR. MARTIN: Yes. We thought, from the architect's perspective we felt that units, we're talking about the actual apartments when you're living in them, to have lots of light and are open and have the potential of the views, particularly looking out over Arlington out in that direction, made a very desirable building.

MR. GROSSMAN: In other words, that's considering it from the inside out?

MR. MARTIN: Yes. It's definitely from the inside out. I mean, I think there's a -- all buildings have an inside and an outside ratio and I think the inside out view is, if it's an appealing space when I walk into it and it has light and I feel, you know, that kind of openness, that that makes it desirable and people will want to live there.

* * *

The Hearing Examiner's sense of that exchange is that the architect was more concerned, in his design, with how the residents of the proposed building would benefit from the mostly glass façade, than with how others in the area would be impacted by having a large, mostly glass building among their smaller brick buildings. Mr. Martin also admitted that the façade issue was not the focus of his attention with regard to Applicant's obligation to propose a compatible structure (3/17/06 Tr. 96):

Do we have a responsibility, yes, we have a civic responsibility to make our building fit in. To us, the major civic issues had more to do with stepping the building and breaking down its apparent mass by having it go in and out and out and in and, you know.

While clearly, these issues of mass are critical to compatibility, the impact of the façade upon the look of the neighborhood cannot be ignored.

It should be mentioned, that the Hearing Examiner's findings with regard to compatibility and the Sector Plan are contrary to the conclusions of the Technical Staff and the Planning Board. Technical Staff concluded that "[t]he development plan will be compatible with adjacent development and will integrate mutually compatible uses as envisioned in the Sector Plan." LMA Exhibit 26, p. 11. The Planning Board opined that "[i]n terms of density and height, the reclassification will be compatible with the surrounding uses." LMA Exhibit 55, p. 3. To some extent, compatibility, like beauty, is "in the eye of the beholder." Yet the undisputed evidence in this case demonstrates that the proposed building would be surrounded by much shorter structures constructed with a very different mix of materials. Applicant's proposed building would be an outsized, glass and masonry structure surrounded by smaller brick structures. In spite of Applicant's efforts to date, the Hearing Examiner does not find the present proposal compatible with its surroundings.

Applicant also notes that there were no experts called by the opposition to refute Applicant's evidence, which included expert testimony that the proposed building would be compatible and would be compliant with the Sector Plan. While the testimony of Applicant's experts cannot be outweighed by generalized concerns of the neighbors, *Moseman v. County Council of Prince George's County*, 99 Md. App. 258, 265, 636 A.2d 499 (Ct. Spec. App. 1994), the Hearing Examiner must not ignore what is apparent on its face – the proposed building would be taller and bulkier than its surroundings, and would not have the townhouse appearance described by the Sector Plan as an "urban village." Moreover, the lay testimony of the local residents amounted to more than generalized concerns. Their testimony related directly to the height of the proposed building, which would stand right next to their homes, and to Applicant's failure to substantially comply with the Sector Plan.

IV. SUMMARY OF THE HEARING

The hearing in this combined case took place over three days, March 17, April 18 and May 22, 2006. Applicants called six witnesses at the March 17, 2006 hearing, James Alexander and Arnold Polinger, both principals of the Van Ness Property Group, which is the “Managing Member” of Applicant, Hampden Lane Associates, LLC; William Landfair, an expert in land planning; I. Guyman Martin, an architect; Mark Morelock, an engineer; and Chris Kabatt, an expert in transportation planning. No members of the community appeared to testify on this first hearing date; nor did the People’s Counsel participate.

Todd Brown, Esquire, an attorney for HSNK, LLC, the successor developer of the Edgemoor I, II and III development on Montgomery Lane, to the north of the subject site, appeared at the March 17 hearing to assert HSNK’s position that its agreement with the County to transfer ownership of Lot 3 on Hampden Lane to the County completely satisfied all the MPDU requirements for the Edgemoor I, II, and III projects, and that it was not required to provide any parking or recreation for the transitional housing (Edgemoor IV) in its Edgemoor Condominium high-rise (Edgemoor III). He requested that DPA 00-2 be modified to replace notes 2 and 3 with a statement that the Edgemoor Condominium high-rise (Edgemoor III) has no obligation to provide recreation or parking for the HOC transitional Housing (Edgemoor IV). 3/17/06 Tr. 22-25.

At April 18 hearing, James Alexander testified again briefly, but almost all the testimony was provided by neighbors from the CityHomes of Edgemoor project located immediately to the north of the subject site.

On May 22, 2006, Applicant recalled James Alexander to identify photographs of the adjacent properties and Bill Landair and I. Guyman Martin to discuss compatibility. Jim Humphrey appeared to testify on behalf of the Montgomery County Civic Federation. David O’Bryon,

President of the CityHomes of Edgemoor Homeowners Association testified to challenge the ARC review process, as did another CityHomes resident, Brent Polkes.

A. Applicant's Case

1. James Alexander (3/17/06 Tr. 34-46 and 101 ; 4/18/06 Tr. 38-46; 5/22/06 Tr. 14-20):

James Alexander testified that he and Arnold Polinger (as well as two others) are principals of the Van Ness Property Group, which is the “Managing Member” of Applicant, Hampden Lane Associates, LLC. Applicant was formed from the Van Ness Property Group and owners of the five subject properties on Hampden Lane. Because the minimum lot size requirement for the TS-R zone is 18,000 square feet, the HOC project, planned for the middle of those five properties, “would have absolutely prevented any coherent development consistent with the plans for downtown Bethesda for that block.” Applicant therefore worked with the DHCA, which has title to the property, the Housing Opportunity Commission, which was the contract purchaser for Lot 3, and the community to finalize a plan for transferring the HOC project to Lot 5 with an identical configuration, and building HLA’s building on Lots 1, 2, 3 and 4.

Mr. Alexander further testified that, as part of HLA’s agreement with the County, HLA promised to guarantee the \$420,000 HUD grant the County had, if HUD refused to extend it, and to pay the County up to an extra \$100,000 for the additional expenses it might incur in moving the planned HOC transitional housing project from Lot 3 to Lot 5. DPA Exhibit 46. He further stated that Applicant’s number one development objective was to build a consensus among the various constituencies that are involved in this project, the community, Montgomery County, and HOC, in an effort to build a first-class, Smart Growth, residential project that is consistent with the sector plan and TS-R zoning and represents the best development opportunity in a very important part of downtown Bethesda, very close to the Metro.

Mr. Alexander also noted that Applicant would be providing 15% MPDUs (9 out of 60

units), which is more than the minimum required, and which influences “the massing for the building.” He pointed to three competing interests Applicant was attempting to balance:

One, the fact that Applicant is providing 15 percent MPDU's on site; two, that Applicant is trying to achieve a reduced massing as the building steps up from Arlington Road, in accordance with the master plan; and, three, Applicant is trying to be respectful of the townhouses that are behind the property, by designing the proposed building with notches on the back side (*i.e.*, abutting the townhouses). Taking all those factors together, Mr. Alexander believes Applicant is seeking “a very modest interpretation of the master plan” by designing a building 71 feet tall for only a portion of the building, rather than the 65 foot height that's recommended in the sector plan.

Mr. Alexander further testified that the homeowner association for the proposed building will be responsible for the perpetual maintenance of the common areas. Homeowner documents so providing will be prepared after all the approvals of the development.

When the hearing resumed on April 18, Mr. Alexander testified that his 60 unit project would provide nine units of affordable housing and will allow the construction of 12 transitional housing units by Montgomery County, for a total of 21 affordable units and 51 market rate units. In order to provide that critical component, Applicant is seeking to develop a building at a density that is consistent, in his view, with the Sector Plan recommendations with respect to height and density.

Mr. Alexander further testified that, had the project for Lot 3 not been swapped to the end of the property assemblage [*i.e.*, to Lot 5], Applicant would not have had enough land to provide affordable housing on the site, and the County would lose nine affordable housing units. Although he realized that Applicant's proposal had twice the density of the adjacent City Homes project, Applicant was responding to what the County has requested that developers produce in the TS-R zone on sites that are walking distance to the Metro. In his opinion, his project exhibits “all the good characteristics of smart growth, to encourage public transportation and densities that [are]

appropriate for Metro center sites.”

Mr. Alexander identified the photos of adjacent buildings contained in LMA Exhibit 59.

2. Arnold Polinger (3/17/06 Tr. 47-51):

Arnold Polinger testified regarding the financial need for the additional density Applicant proposes. He estimated that the cost of the building comes out in excess of \$500 per square foot. That means a cost of an MPDU unit, which may occupy about 800 square feet, would be about \$400,000. The price range of what Applicant can sell an MPDU for is estimated at \$200,000, at most, and maybe as low as \$175,000. That means that each MPDU that Applicant builds will recognize about a \$200,000 loss, without even taking into account profit and other factors.

According to Mr. Polinger, the original building plan called for a 65 foot tall building, but the City Homes of Edgemoor town house residents objected because the proposed building would be abutting them with a flat wall. Therefore, Applicant modified their plans by putting notches in the back of the proposed building to coincide with some of the courtyards in the City Homes project. This change reduced the available floor area in the proposed building, so increasing the proposed height by six feet was necessary. In Mr. Pollinger’s opinion, the additional six feet makes a difference in this case between an economically viable project and the economically nonviable project because “the top floor of the building, like every residential building, is where you achieve your highest sales prices and to be caused to eliminate the top floor of the building would eliminate the profit from the project.”

3. William Landfair (3/17/06 Tr. 54-80; 5/22/06 Tr. 20-45):

William Landfair testified as an expert in land use planning. Mr. Landfair evaluated the compatibility of the proposed development with the adjoining properties and coordinated the preparation of supporting documents for both the local map amendment and the DPA. Mr. Landfair described the five subject lots, noting that the topography of the properties slopes up from Arlington

Road for about 12 feet, although Lot 5 is pretty much flat in grade. According to Mr. Landfair, the properties are all improved today with single family structures, which are now occupied by commercial businesses by special exception.

Mr. Landfair described the surrounding area as including older garden apartment buildings, townhomes and multi-family buildings, many of them having been developed within the TS-R Zone since the sector plan was approved in 1994. Adjacent to the property to the north are the Edgemoor I and Edgemoor II. These properties are located in the TS-R zone and consist of 29 townhouse units in five rows perpendicular to Montgomery Lane. These buildings are roughly 50 feet in height. To the northwest of the site is the Edgemoor at Arlington, also developed within the TS-R zone. This building is 46 feet in height and contains 12 units. Confronting to the west across Arlington Road is the Bethesda Public Library. To the south is The Shops of Bethesda, which is a commercial shopping center in the C-2 zone with surface parking along Hampden Lane, and then to the east are two garden apartment buildings located in the R-10 zone, which are recommended in the sector plan for TS-R zoning.

Mr. Landfair further testified that there will be dedication of certain areas along both Hampden Lane and Arlington Road. The net area is going to be 20,895 square feet, and the gross tract area is 32,107 square feet. The existing area for lots 1 through 4 is 22,611 square feet, which does not take into consideration dedications that have already occurred along Arlington Road and Hampden Lane. According to Mr. Landfair, when one is calculating gross tract area you are allowed to review previous dedications and factor those into the gross tract area. There have been previous dedications on this site which added up to 10,071 square feet.

Mr. Landfair indicated that one of the overall themes of the Bethesda Sector Plan is to provide a variety of housing options within close proximity to the Metro station as well as to emphasize diversity, product type and cost in order to provide housing at all economic levels. In his

opinion, the proposed development will further these objectives, in that the five single family structures that exist today and are occupied by commercial uses will be replaced with a 60 unit building containing 51 market rate units and 9 MPDU's, and the HOC building, which will be devoted to 12 units of transitional housing for households below the median income. According to Mr. Landfair, these properties are located within 1,000 feet of the Bethesda Metro Station²⁰ and are near the heart of the CBD employment area.

Mr. Landfair further testified that he Sector Plan recommends a minimum of 45 dwelling units to the acre, but finds that up to 100 dwelling units to the acre would be appropriate. The Sector Plan also recommends that density not exceed a floor area ratio (FAR) of 2.5, that there be both public and private open space, that the entrances to the buildings front from the street, that parking be located underground and that there be good spatial relationships with the street. According to Mr. Landfair, the HLA property achieves a density of 81.5 dwelling units to the acre, while the HOC property results in 92.3 dwelling units to the acre. The zoning ordinance provides for an increase in the FAR in accordance with the MPDU regulations, and under Chapter 25-A of the County Code an additional density of 22 percent can be achieved when the 15 percent MPDU's are provided, as is the case here. Mr. Landfair concluded that these provisions allow the 3.05 FAR which is shown on the development plan, when factoring in the gross tract area. In his opinion, this extra density is necessary to accommodate the 51 market rate units and the 9 MPDU units that will be provided on site. The HOC property will result in a density of 1.4 FAR. The HLA property will have 10.5 percent public use space and 25.5 percent active-passive recreational space. The HOC property will have about 13 percent public use space and 34 percent active-passive recreational space.

Mr. Landfair indicated that both buildings will maintain their primary access from Hampden

²⁰ The Hearing Examiner own measurements indicate that the distance to the Metro Station is closer to 1,300 feet.

Lane. Parking for the HLA building will be located in a below grade structure accessed from Hampden Lane. The HOC property is located within a parking district, and in his opinion, the nature of transitional housing is such that the demand for parking is relatively low, particularly given the benefit of being so close to the CBD and so close to public transportation. He also observed that the buildings both maintain a very good continuous relationship to Hampden Lane because they front on Hampden Lane. The building line will be continuous along Hampden Lane.

Mr. Landfair stated that the Sector Plan recommends that projects should not have isolated parcels. In his opinion, the agreement between HLA and Montgomery County to move the HOC project to lot 5 instead of lot 3 permits HLA's development by giving it the 18,000 square feet needed for development in the TS-R Zone, and avoids the fragmented development that currently exists.

The Sector Plan also recommends 25 foot building setbacks from the curb along Arlington Road and upgraded streetscapes to highlight the area. Mr. Landfair notes that the proposed building will maintain a 25 foot setback from the curb of from Arlington Road, as is required in the plan, and the streetscape along both Arlington Road and Hampden Lane will be improved with street trees, street lights, and improved paving for the sidewalks themselves, all consistent with the Sector Plan.

Mr. Landfair further testified that the TS-R zone is intended to be used in "transit station development areas." Section 59-A-2.1 of the Zoning Ordinance defines a transit station development area as an area near a metro station which is not located within a CBD, and which has been designated as a transit station development area by an approved and adopted master plan or sector plan. He noted that the Bethesda CBD Sector Plan designates the subject area for TS-R development. The TS-R zone is also intended for locations where multi-family residential use is recommended by the sector plan. As has been noted, the Sector Plan specifically recommends this site for that use.

Mr. Landfair recited the purposes of the TS-R Zone to promote effective use of and access to transit station development areas; to provide residential uses within walking distance of the station; to provide a range of densities, high-rise, multi-family, different design and styles; to provide the maximum amount of freedom possible in the design of the buildings and the roofing and layout within the areas classified in the zone; to stimulate the coordinated, harmonious and systematic development of the area, the area surrounding the zone, and the regional district as a whole; to prevent detrimental effects to the use or development of adjacent properties; to provide housing for persons of all economic levels; and, finally, to promote the health, safety, morals, and welfare of the present and future inhabitants of the district and the county as a whole.

Mr. Landfair stated that the proposed development will provide for redevelopment of the property, which presently is commercial in use, and the resulting new 72 units, including the affordable housing, will be within close proximity to the CBD. The density of development is appropriate for residential uses. It is within walking distance of a metro station. “And in contrast to many of the more recent developments in the TS-R zone we believe it's very much closer to the density, the 100 units to the acre, envisioned by the sector plan.” In Mr. Landfair’s opinion, this development will expand the range of density currently available within the transit station district, and its unique design will work well for the site and will contribute to the variety of housing choice currently available in the district.

As to facilities and amenities, there will be a much improved streetscape along the frontage with Arlington Road and Hampden Lane and a public use space in conformance with the standards for the zone. This will include a small urban “pocket park,” located off of Hampden Lane. Multi-family residential land use is one of the permitted land uses in the TS-R Zone. While the ordinance does not prescribe a specific height limitation for the zone, the Sector Plan makes specific recommendations for height. Along Arlington Road that height limitation is 35 feet, increasing to

65 feet within the remainder of the district; however, building height is ultimately to be determined at site plan review, at which time the Planning Board will have to consider the size of the property, the relationship to the surrounding uses and buildings, and the need to preserve light and air for those surrounding properties. According to Mr. Landfair, recent revisions to the MPDU law allow the Alternative Review Committee to increase the maximum height allowed up to 10 feet in recognition of the financial difficulties that can be imposed on many CBD projects. This development is providing the 15 percent MPDU's on site, and it is only resulting in a six foot height increase above the 65 foot limit (and only then for a portion of the building). The building steps up in four levels from Arlington Road, from 33 feet in height to the maximum height of 71 feet. So, in Mr. Landfair's opinion, the height being proposed is consistent with the zoning ordinance, the Sector Plan, and the MPDU legislation.

Mr. Landfair opined that the development proposed is fully consistent with the Sector Plan, the general plan, the CIP, and other applicable county plans and policies, as required by Zoning Ordinance §59-D-1.61. The subject development plan promotes county housing policy of residential development, particularly affordable housing near metro.

Mr. Landfair also opined that the development plan complies with the purposes, standards, and regulations of the zone, provides for the maximum safety, convenience, and amenity for the residents, and is compatible with the adjacent development. The improved streetscape will benefit the residents not just of this development, but also, the surrounding community. It will make it much safer and more attractive. The public use space will result in an urban park along Hampden Lane, and Applicant is "assuring compatibility through the setbacks" and other design changes to reduce the impact on the adjacent City Home townhouses. Most importantly, that includes the notches along the northern facade which align with the City Home courtyards and that help to improve the light and air that will circulate within those courtyards. And, in addition, the northern

wings created by those notches have been reduced by one floor, again, to improve the light, air circulation on that side of the building and compatibility.

According to Mr. Landfair, Applicant will meet the terms of Zoning Ordinance §59-D-1.61(C), which requires that the internal vehicular pedestrian systems and point of access be safe, adequate, and efficient. There will be a much needed, improvement to the sidewalk along the north side of Hampden Lane, and vehicle access to the building itself would be off Hampden Lane, about 250 feet from the intersection with Arlington Road, which is far enough to prevent conflicts with turning movements. In his opinion, the development plan is sufficient to allow the Council to make necessary findings outlined in Zoning Ordinance §59-D-1.61(A)(B) and (C). Mr. Landfair added that the Annual Growth Policy finds that there is capacity within the school cluster that serves this particular property.

In Mr. Landfair's opinion, the Hampden Lane project is in the public interest – It's encouraging Smart Growth; it's promoting the use of public transportation; it's providing affordable housing within close proximity of the CBD area; and it is “very sensitive and compatible with surrounding adjacent uses.”

Mr. Landfair argued, in his final day of testimony on May 22, 2006, that the Sector Plan's recommendation of 65 feet along Woodmont Avenue was intended to ensure that the development along Woodmont Avenue would be of sufficient height to be compatible with the heights of 125 feet to 143 feet on the east side of Woodmont Avenue. According to Mr. Landfair, it was not intended to exclude buildings of 65 feet further west on Hampden Lane, as evidenced by Sector Plan Figure 3.2 on page 39. He also pointed to Zoning Text Amendment (ZTA) 01-08 (Ordinance No. 14-43, effective November 26, 2001) as evidencing the Council's intent to allow taller buildings along Arlington Road, including a new mixed-use building planned for the site of the old Giant Supermarket on the east side of Arlington Road.

Mr. Landfair also observed that the Sector Plan contains a diagram of recommended “future land use” (Figure 4.13, on page 81), that appears to be inconsistent with the text of the Sector Plan, in that the diagram recommends low density office use for the eastern portion of the subject site and mixed use for the western portion of the site, while the text of the Sector Plan calls for a residential use in the TS-R District. Moreover, there are sections of the text (page 85) which recommend other-than-residential uses for other specific sites, and do not mention the subject site. Mr. Landfair suggested that the framers of the plan erred in creating the diagram by including then current uses. 5/22/06 Tr. 20-24. He noted that subsequent rezonings (G-720, G-779 and G-778) reclassified areas along Arlington Road for purely residential redevelopment even though they were also recommended for mixed use in the same diagram.

Mr. Landfair testified regarding the meaning of the language in Zoning Ordinance §59-C-8.42(b), which provides that density must be calculated on the basis of the area of the zoned land within the approved development plan and not the individual lots. According to Mr. Landfair, this provision is intended to address situations where a tract of land subject to a development plan was bisected by a right-of-way. The provision allows the density be calculated based on the entire area subject to the development plan and distributed anywhere within the development plan area. As a result, the density may be concentrated on one or more lots instead of allocated proportionally on each lot based on the land area.

He noted that the zoning ordinance provides that floor area ration, otherwise known as FAR, is to be based on gross tract area. Gross tract area is defined in Section 59-A-2.1 of the ordinance as “the total area of a lot or parcel of land including any existing or proposed streets, highways or other land required for public use as attributable to the lot or parcel dedicated by the owner or predecessor and title.” Based on the zoning ordinance provisions, density is always based on a combination of the area of the parcel, *i.e.*, the net tract area, plus current or previously required dedicated street area,

except in those very few instances where an alternative calculation is specifically provided.

Mr. Landfair opined that HLA's proposal would be a very high quality residential development that is going to be compatible with the adjacent uses. It would improve the pedestrian environment and circulation, including the streetscapes and sidewalks in the immediate area, and would provide some open space in the form of an urban pocket park. It would also contribute to a range of housing types by providing MPDUs on site. In Mr. Landfair's opinion, the development would enhance the character of this particular part of Bethesda and strengthen the community by helping to create a sense of place for this part of Bethesda. In sum, he opined that the proposed development is consistent with the goals of the sector plan.

4. I. Guyman Martin (3/17/06 Tr. 81-100; 5/22/06 Tr. 49-81):

I. Guyman Martin testified as an expert in architecture. He designed HLA's proposed building. Mr. Martin discussed the factors that influenced the building's design. For example, a setback from Arlington Road was required and he wanted to create "some protective, viable public open space here along Hampden Lane." He also wanted to extend the courtyards that existed between the City Homes townhouses next to the proposed building in such a way as to not have the kind of negative impact that would have occurred had a sheer wall been built.

Mr. Martin noted that the City Homes townhouses are actually at a higher elevation than the proposed building will be because Montgomery Lane is quite a bit higher than Hampden Lane. The proposed building, at the point where you actually would enter the building, relative to the grade at that point, is 65 feet tall, but for purposes of measurement, it's 71 feet tall. At the peak height, the area from the peak height of the structure to the ground that's immediately below that point would be about 68 feet. At no point can you stand next to the building and take a tape and measure 71 feet from grade to the roof. According to Mr. Martin [and Ms. Harris, Applicant's attorney], because the subject site is a corner lot, under the Code Applicant has the option to measure height anywhere

along the entire facade of the building. If the Code is applied in this fashion, the height of the proposed building could be measured at 63 feet (*i.e.*, below the 65 feet recommended by the Sector Plan). Mr. Martin testified that the building was not measured in this fashion because Technical Staff required it to be measured at the midpoint along Hampden Lane, yielding the 71 foot height measurement. Mr. Martin indicated that the mechanical penthouse, which runs along about 30% of the length of the building and covers under 20% of its roof, rises another 15 feet above the 71 foot height, but is not counted into building height pursuant to the zoning ordinance. According to Mr. Martin, because the grade of Montgomery Lane is higher than Hampden Lane, the proposed building, at 71 feet in height, would be only 10 feet taller than the 55 foot tall CityHomes development abutting it.

Mr. Martin interprets the “tenting” requirement of the Sector Plans to be a general one, not specific to particular sites, and he opined that the proposed building fits into the Sector Plan’s concept of stepping down heights from the center of the CBD outward.

Mr. Martin further testified that he made a number of changes in the plans to accommodate the neighbors. The first was adding more brick to the elevation and having less glass. “Our goal was a fairly contemporary building, but, the response was to make it more contextual.” He also deleted a piece of the 7th floor adjacent to the City Homes courtyards, so that the height of the proposed building, where the courtyards are extended, would be more compatible with the height of the City Home structures as they exist. Applicant also increased the amount of parking from 79 to 89 spaces.

In answer to the Hearing Examiner’s question, “Wouldn't it be more residentially compatible with even more brick than it has as shown in the current Hampden Lane elevation?”, Mr. Martin stated:

As a question of design, would it be more residential? I would defer in these cases

to the judgment of my clients and others rather than interpose my own professional view. I think that that's a perfectly residential building, but, I wouldn't want to argue an aesthetic point here.

Mr. Martin then indicated that there are numerous types of architecture in the Bethesda core area, including ones with large areas of glass. The proposed building has more glass than the Edgemoor and, therefore, proportionately less brick. The following exchange then occurred:

MR. GROSSMAN: And was there a particular reason for designing it that way?

MR. MARTIN: Yes. We thought, from the architect's perspective we felt that units, we're talking about the actual apartments when you're living in them, to have lots of light and are open and have the potential of the views, particularly looking out over Arlington out in that direction, made a very desirable building.

MR. GROSSMAN: In other words, that's considering it from the inside out?

MR. MARTIN: Yes. It's definitely from the inside out. I mean, I think there's a -- all buildings have an inside and an outside ratio and I think the inside out view is, if it's an appealing space when I walk into it and it has light and I feel, you know, that kind of openness, that that makes it desirable and people will want to live there. Do we have a responsibility, yes, we have a civic responsibility to make our building fit in. To us, the major civic issues had more to do with stepping the building and breaking down its apparent mass by having it go in and out and out and in and, you know.

Mr. Martin then extolled the virtues of diversity in architectural design, showing that human beings are there and they're being creative. He also reviewed the zone's development standards and indicated Applicant's compliance therewith.

Mr. Martin further testified that his view of compatibility is that "it is not purely a question of style, but is a question of relative scale, proportion, height, feeling of the building being residential versus the building of some other use." 5/22/06 Tr. 53. Applicant attempted to "break down the scale of the building" by "tak[ing] out chunks of space along the back of [the] building" for courtyards, by stepping the building in and out, by adding balconies to the façade and by using "a warm colored brick" on non-glass areas of the façade. 5/22/06 Tr. 53-54. In Mr. Martin's opinion, the proposed building "is consistent with the intention of the TS-R zone and consistent

with a residential scale in terms of breakdown and mass,” while the nearby townhouses do not meet the density goals of the Sector Plan.

5. Mark Morelock (3/17/06 Tr. 104-115):

Mark Morelock testified as an expert in civil engineering. His firm produced a report describing the property, the natural resource inventory and forest stand delineation (NRIFSD), existing and proposed utilities, a storm water management concept, sediment erosion controls and conclusions. Mr. Morelock stated that, as part of the NRIFSD, Applicant was required to note any specimen trees over 24 inch in diameter. There are two located on the five lots. One is at the corner of Arlington Road at Hampden Lane and one is at the corner of Lot 5. They are both 24 inch locust. According to Mr. Morelock, the property contains no flood plains, protected soils, rock outcroppings, or other natural features that would impact development of the proposed project. This project is not located in a special protection area.

Mr. Morelock further testified that there is a 6 inch to 8 inch sewer on Hampden Lane. It grows as you are heading east to west from six inches about two-thirds of the property to 8 inches, and there's an 8 inch sewer that runs on Arlington Road. There is an 8 inch water line in Hampden Lane and a 10 inch water line in Arlington Road. These facilities provide service rated as S-1 and W-1, and capacity appears to be adequate, as do gas supply and electric power. The storm water management for this project would be considered as a redevelopment, and as such, recharge is waived in this area, but water quality and channel protection volume (CPV) [*i.e.*, quantity control] would normally be requirements. However, if there is less than 2 CFS discharging from the proposed property, as is the case here, the site is exempted from CPV, as well. Quality control will be provided on site through an underground filtration system. It would be in a vault structure, a filtration device similar to a storm filter which uses charcoal cartridges and stores the water and filtrates it through the medium cleansing it, and then discharges back into the existing storm system.

Adjacent to the subject property, there is a 42 inch reinforced concrete pipe located along Arlington Road, and the new project would connect into that.

During construction, Applicant will employ temporary sediment erosion control measures as required by Montgomery County and MDE. In addition, Applicant will stabilize construction entrances and silt beds protecting the perimeter of the property. Mr. Morelock opined that the proposed development plan will tend to prevent erosion of the soil, preserve any natural vegetation and other natural features of the site.

Mr. Morelock further testified that there will be several dedications on the property. Along Arlington Road, Applicant will be dedicating the right-of-way from 33 feet to 40 feet. Along Hampden Lane, Applicant will be dedicating five additional feet from 25 to 30 feet to give an ultimate right-of-way of 60 feet in several locations where the land hasn't already been dedicated. In Mr. Morelock's opinion, the proposed development plan does not conflict in any way with the County's Capital Improvement Program.

Mr. Morelock then discussed the definition of height under Zoning Ordinance §59-A-2.1, which provides, "on corner lots exceeding 20,000 square feet in the area the height of the building may be measured from either adjoining curb grade." If the subject lot were not a corner lot, height would have to be measured at the midpoint of the building. In the case of a corner lot, however, that definition is waived and you have the ability to measure it at any point along either curb line. According to Mr. Morelock, that definition has been further confirmed by Dave Niblock in zoning code enforcement, at DPS. In other words, if Applicant were to measure the way it is entitled to under the code, measuring from somewhere along the adjoining curb line to the highest point in the building, it would not exceed 65 feet. In an effort to improve Applicant's relationship with the community and because Applicant felt under the code that it also had the right to increase up to 71 feet by virtue of the MPDU's, it did not argue for the 65 foot height determination.

6. Chris Kabatt (3/17/06 Tr. 116-121):

Chris Kabatt testified as an expert in transportation planning. His traffic statement reports that the Hampden Lane Associates project would generate 18 a.m. peak hour trips and 18 p.m. peak hour trips. This number of trips is below the threshold necessary to require a local area transportation review, which is 30 peak hour trips. Mr. Kabatt's conclusion was confirmed by transportation staff.

Vehicles would enter the project's parking garage via a single driveway on Hampden Lane, which is approximately 250 feet east of Arlington Road. In his opinion, this access is safe and adequate and efficient to serve the property, and there are adequate public facilities to accommodate the proposed rezoning. In sum, the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient. The parking garage access is 24 feet in width. Applicant will provide a sidewalk along the north side of Hampden Lane, and that provides connection to the area sidewalks and the Bethesda Metro Station.

According to Mr. Kabatt, Applicant went beyond what is required and looked at turning movement and critical lane volumes at adjacent intersections. Mr. Kabatt found that the Arlington Road and Woodmont Avenue intersections with Hampden Lane operate well within the congestion standard for Bethesda CBD.

B. Opposition Case

1. Sheryl Staren (4/18/06 Tr. 7-11):

Sheryl Staren testified that although she lives on Montgomery Lane, she did not receive any notice of the initial hearing on March 17, 2006, and she felt that her rights "were being abused." She also did not understand "why Montgomery County's in bed with the private developer at the expense of local residents" On cross-examination, Ms. Staren acknowledged that she was aware that her Home Owners Association (HOA) had received notice of the hearings, and she now understood that she did not get individual notice because she is not an adjoining or confronting

property owner.

2. David O'Bryon (4/18/06 Tr. 13-37; 5/22/06 Tr. 98-104):

David O'Bryon testified as President of the HOA for the CityHomes of Edgemoor, the townhouse development located on Montgomery Lane, immediately to the north of the subject site. The position of his HOA is that the subject property should be developed "at less than or equal to our community, if it is going to be compatible with the surrounding area. . . . Taking away the light, the air, the shading that comes from the towering building that's proposed, which abuts our property, will strip us of the ambiance and the quality of life that we enjoy in the urban village setting that we bought into, and the County sold us on."

Mr. O'Bryon stated that Park & Planning had approved his four-story development (City Homes of Edgemoor), "consistent with the low density urban village concept plan for our block, as envisioned in the Bethesda CBD Plan." The building planned by Applicant would abut Arlington Road and would be further away from the central business district than the CityHomes project is, yet would be much taller. In the opinion of the HOA, the request for reclassification for the TS-R zone is not in the public interest, as it would abandon the urban village concept.

Mr. O'Bryon further testified that the Bethesda Business District Plan calls for reducing the height as the property moves away from Wisconsin and moves toward Arlington Road, but the present plan is outside that vision. On page 11 of the Park & Planning Zone Report, it calls for conformance to the sector plan. The plan calls for a maximum of 65 feet, descending to three stories at Arlington Road. And this proposed development would be a higher building, further away from Metro. Mr. O'Bryon introduced blowups of two pages from the Bethesda CBD Sector Plan, one with an illustration of the planners' vision for the area and the other with the urban design guidelines for the area to demonstrate their inconsistency with the planned building. Mr. O'Bryon believes that the building will be more than 1000 feet from the Metro station.

Mr. O'Bryon contended that it was economically feasible to build the subject site with much less height because the developer of CityHomes of Edgemoor did so and still made a profit. His HOA wants the height of the new building to be limited to four stories, with a shade study and some kind of a construction agreement before the project could go forward. His group fears the canyon-like effect of having a seven story building right next to their townhouses. The high point in the planned building will be at the high point on the block because the street rises from Arlington Road.

Mr. O'Bryon argued that the ARC process is flawed, and did not give enough detail to justify the committee's decision that the project would not be economically feasible absent additional height and density. He also raised the question of whether there was a conflict of interest in the ARC review because ARC members had been involved in an agreement with the developer. He was told that Elizabeth Davison (Director of DHCA) had consulted the County Attorney about the possible conflict, but there was no written opinion.

3. Miriam Levine (4/18/06 Tr. 48):

Miriam Levine testified that she lives at 4816 Montgomery Lane in Bethesda. Where she lives, most of the light comes in, in the morning, and in the afternoon. "If we put up a building contiguous to our properties, it will completely eliminate the light several hours of the day."

4. David Koitz (4/18/06 Tr. 49-54):

David Koitz testified that he lives at 4904 Montgomery Lane in Bethesda and that his wife was President of the Homeowner's Association Board for CityHomes of Edgemoor before Mr. O'Bryon took over; yet, he was not aware of the earlier hearing. He did see the signs posted, but he never called in to determine if a hearing was scheduled. He could not say whether his wife had called in to check on a hearing date. Mr. Koitz was aware that Applicant's attorney had contacted his wife and had met with the HOA in September of 2005 and again a couple of months later.

[Applicant's attorney noted that the City Homes of Edgemoor development is not a condominium, and therefore was not sent notice initially; however, "they obviously got due notice and we affirmatively contacted them on at least three or four occasions." 4/18/06 Tr. 51.]

Mr. Koitz also noted that the high point of the building at seven stories would be in the middle of Hampden Lane, not adjacent to Woodmont, as the plan envisioned. Thus, instead of scaling down gradually to Arlington Road, the design will have a peak in the middle of the block.

5. Bruce Mackey (4/18/06 Tr. 55-56):

Bruce Mackey testified that he lives at 4838 Montgomery Lane, and that his house would be right up against the proposed building, and would be completely shaded by it. "And that will change the quality of my life and my family's life."

6. Jim Humphrey (5/22/06 Tr. 89-91):

Jim Humphrey, testified on behalf of the Montgomery County Civic Federation. He urged that varying from the Sector Plan sacrifices the public interest goal of predictability and reliability which is a significant part of the rationale for using master plans. 5/22/06 Tr. 89-90. Mr. Humphrey also challenged the premise behind the ARC review process, asserting that "economic feasibility" is entirely within the control of the developer, and that the developer should just not purchase the property if it would not be economically feasible to build a project with the required MPDUs, and within the height and density limits set forth in the Sector Plan. 5/22/06 Tr. 91.

7. Brent Polkes (5/22/06 Tr. 93-96, 105-113):

Brent Polkes testified that he lives at 4808 Montgomery Lane, in the CityHomes of Edgemoor. Mr. Polkes challenged the ARC's findings in this case based on a possible conflict of interest of two of its members. Those two members of the Alternative Review Committee, Elizabeth Davison (on behalf of DHCA) and D. Scott Minton (on behalf of HOC), previously signed the development agreement (LMA Exhibit 32) in which they pledged, in paragraph 4(a) of the agreement,

to cooperate with the developer in the development review process. Mr. Polkes observed that, having pledged contractually to support the development, these ARC members would have been in violation of their agreement if they had voted in the ARC review in opposition to the project.

Mr. Polkes also testified that there had been insufficient opportunity for public participation in the proposal to move the proposed HOC transitional housing from Lot 3 to Lot 5. He believes that the reason the HOC housing went unopposed on Lot 3 was “that the building of 12 or 13 MPDU units on lot 3 guaranteed that there could only be low rise, low density development on Hampden Lane.”

Mr. Polkes referenced the District Council’s Resolution denying LMA G-819, and noted that neighboring “owners . . . purchased their units with the understanding that this was going to be a low rise, high density, urban village environment as described by the sector plan.”

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Standards for Council Review

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

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

- (a) [That t]he zone applied for substantially complies with the use and density indicated by the master plan or sector plan, and does not

conflict with the general plan, the county capital improvements program, or other applicable county plans and policies.²¹

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

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

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

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

Because the general requirement of the law – that the application must fulfill the “purposes and requirements” of the new zone – is subsumed in the language of the five specific required findings (especially in subsection (b)), a determination that the five findings have been satisfied

²¹ A recent amendment to the Zoning Ordinance added the following “ARC” procedure to Finding (a):
However, to permit the construction of all MPDUs required under Chapter 25A, including any bonus density units, on-site, a development plan may exceed, in proportion to the MPDUs to be built on site, including any bonus density units, any applicable residential density or building height limit established in a master plan or sector plan if a majority of an Alternative Review Committee composed of the Director of the Department of Housing and Community Affairs, the Executive Director of the Housing Opportunities Commission, and the Director of Park and Planning, or their respective designees, find that a development that includes all required MPDUs on site, including any bonus density units, would not be financially feasible within the constraints of any applicable density or height limit. If the Committee finds that the development would not be financially feasible, the Planning Board must recommend to the District Council which if any of the following measures authorized by Chapter 59 or Chapter 50 should be approved to assure the construction of all required MPDUs on site:

- (1) exceeding an applicable height limit, lower than the maximum height in the zone, that was recommended in a master plan or sector plan,
- (2) exceeding an applicable residential density limit, lower than the maximum density in the zone, that was recommended in a master plan or sector plan, or
- (3) locating any required public use space off-site.

would satisfy the Montgomery County Zoning Ordinance. However, in addition to these five findings, Maryland law also requires that the proposed rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to Montgomery County, all zoning power must be exercised:

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

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

B. Required Findings

1. County Plans and Policies

The first required finding is that:

The zone applied for substantially complies with the use and density indicated by the master plan or sector plan, and does not conflict with the general plan, the county capital improvements program, or other applicable county plans and policies. . . . [The remainder of this provision permits a project to exceed the height and density recommendations of a Sector Plan if an Alternative Review Committee (ARC) finds that it is not “financially feasible” to meet those recommendations because of the inclusion of MPDUs in the project. In such a case, the Planning Board may recommend permitting a height and density greater than recommended in the Sector Plan.]

a. The Applicable Master Plan or Sector Plan

The subject site is located within the area governed by the *Bethesda Central Business District (CBD) Sector Plan*, approved and adopted in July, 1994. More specifically, it is within the southern end of the Transit Station Residential District, as shown in Figure 4.13 from the Sector Plan (p. 81), reproduced on page 10 of this report. The issue of compliance with the Sector Plan

was discussed at some length in Part III.D.4. of this report (pp. 32-38). For the reasons set forth in that discussion, the Hearing Examiner finds Applicant's Development Plan for the HLA building is not in substantial compliance with the Sector Plan, in that it does not call for the kind of "urban village" structure, resembling townhouses, that embodies the vision of the Sector Plan for the TS-R District; nor does it properly employ the "tenting" effect prescribed in the Sector Plan.

b. The General Plan and the County Capital Improvements Program

The General Plan "encourages housing plans that foster transit serviceability and proximity of affordable housing to transit." General Plan Refinement, Approved and Adopted 1993, p. 53. This Application would place 72 housing units (60 in the HLA building and 12 in the HOC facility) about 1300 feet from a Metro Station, thus satisfying that aspect of the General Plan. Applicant's land use expert, William Landfair, testified that this project would not conflict with the County's Capital Improvements Program or other applicable County plans and policies. 3/17/06 Tr. 74. Except with regard to the Sector Plan, this testimony is supported by the other evidence in this case, and the Hearing Examiner finds, based on all the evidence, that the proposed development is consistent with County policies, except for the Sector Plan.

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

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

rezoning case as to whether the reclassification would serve the public interest.

Under the 2003-05 AGP Policy Element (p.14), which remained unchanged in FY 2006, “[t]he Planning Board and staff must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated.” There is no such evidence in this case. We therefore turn to the remaining three public facilities, transportation, schools and water and sewer service.

1. Transportation

Under the 2003-05 AGP Policy Element, subdivision applications are subject to Local Area Transportation Review (“LATR”) requirements. LATR generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion during the peak hour of the morning and evening peak periods. In this case, the total number of projected trips (for both the HLA building and the HOC facility) is below the threshold (30 peak hour trips) necessary to require a full traffic study under local area transportation review (LATR) guidelines. Technical Staff concluded that “The hourly contribution to the peak hour traffic volumes is not considered significant or likely to cause additional congestion.” Attachment to LMA Exhibit 26.

Technical Staff also found that “Primary site access and service access is adequate and will not pose a threat to public safety.” LMA Exhibit 26, p. 18. At the time of preliminary plan review of the adequate public facilities for the future subdivision, the HLA Development Plan will be limited to 60 mid-rise residential units, and the developer will be required to enter into a Traffic Mitigation Agreement to participate in the Bethesda Transportation Management District.

As explained more fully in Part III.D.5.a. of this report, the Hearing Examiner finds that Applicant’s proposal complies with the LATR standards and other transportation requirements.

2. School Capacity:

This property is located within the Bethesda Elementary School, Westland Middle School and

Bethesda-Chevy Chase High School service areas. Bruce H. Crispell, Director of the Division of Long-range Planning, Montgomery County Public School's (MCPS), estimated that the impact of this project would be approximately five (5) elementary, three (3) middle and three (3) high school students. LMA Exhibit 54. According to Mr. Crispell and Technical Staff, the current Growth Policy schools test finds capacity adequate in the Bethesda/Chevy Chase cluster. As explained more fully in Part III.D.5.b. of this report, the Hearing Examiner concludes that MCPS will be able to handle the increased demand projected from the subject development.

3. Water and Sewer Service:

Under the FY 2003-05 AGP Policy Element, p.14, "applications must be considered adequately served by water and sewerage if the subdivision is located in an area in which water and sewer service is presently available, is under construction, is designated by the County Council for extension of service within the first two years of a current approved Comprehensive Water Supply and Sewerage Systems Plan (*i.e.*, categories I, II, and III)."

According to Mark Morelock, Applicant's expert in civil engineering (3/17/06 Tr. 104-115), there is a 6 inch to 8 inch sewer line on Hampden Lane, and there is an 8 inch sewer line that runs along Arlington Road. There is an 8 inch water line in Hampden Lane and a 10 inch water line in Arlington Road. These facilities provide service rated as S-1 and W-1, and capacity appears to be adequate, as are the gas supply and electric power. Technical Staff confirms the S-1 and W-1 service categories.

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

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

The second required finding is:

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

a. Compliance with Zone Purposes, Standards and Regulations

The requirements for the TS-R Zone are found in Code §59-C-8. The TS-R Zone is a “floating zone,” intended to be used in transit station development areas and in areas adjacent to central business districts, within 1,500 feet of a Metro transit station. Section 59-C-8.21(b) also specifies that TS-R Zones are intended for locations where multiple-family residential development already exists or where such development is recommended by an approved and adopted Master Plan. As discussed in Parts III.B., III.C and III.D.4 of the report, that is the case here.

The purposes of the TS-R Zone are set forth in Code §59-C-8.22:

- (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 evidence amply demonstrates that the proposed development satisfies the purposes of the TS-R Zone, except with regard to compatibility. It will put 72 residential units within easy walking distance of a Metro station. Thus, the Development Plan directly addresses purposes (a)

and (b). It also provides for much higher densities than presently exist on the site, but within the range approved by the ARC and the Planning Board.

Moreover, by committing to nine moderately priced dwelling units in the HLA building and 12 in the HOC transitional housing, Applicant has insured that housing will be provided for persons of different economic levels.²² In sum, except for compatibility and Sector Plan compliance problems, the proposed development would promote the “health, safety, morals and welfare of the present and future inhabitants of the regional district and the county” (*i.e.*, the public interest) by providing the kind of residential development near a Metro Station that the Council determined was in the public interest when it created the TS-R zone and approved the applicable Sector Plan. By providing a much higher density of residential facilities within easy walking distance of a Metro Station, the overall amount of vehicular traffic in the County should be reduced, which is clearly in the public interest.

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

The Sector Plan does not include any specific recommendations regarding amenities, facilities, easements or dedications. The proposed development would provide a sidewalk along Hampden Lane, a minimum of 10% public use space and 20% active and passive recreational space, well landscaped seating areas, and a small pocket park on Hampden Lane. The Development Plan includes dedication along Hampden Lane, which will establish a public right of way of 60 feet, and 40 feet of dedication along Arlington Road, both of which will allow the establishment of new public facilities and sidewalks to promote safe and efficient circulation. The area can clearly

²² Applicant’s plans are in compliance with Montgomery County Code § 25A-5(c), which requires that at least 12.5% of the residential units in a development this size be devoted to MPDU’s.

accommodate a multi-family residential use; however, as already stated, the present development plan calls for a structure that is not compatible with the surrounding area.

The remaining requirements of the TS-R Zone are spelled out in Code Sections 59-C-8.4 and 59-C-8.5. Section 59-C-8.4 prescribes development standards, which are set forth below, juxtaposed against what Applicant will be providing:

§59-C-8.4. Development standards.

		TS-R Requirement	HLA Property Proposed	HOC Property Proposed
59-C-8.41	Minimum Area	18,000 S.F.	32,107 S.F.	5,694 S.F.
59-C-8.42	Density of Development (a) Maximum Floor Area Ratio with 15% MPDUs & 22% bonus density ²³ (b) Dwelling units per acre	3.05 (2.5 without the MPDUs) 150	3.05 82	1.4 93
59-C-8.43	Open Space (a) Minimum percentage of net area devoted to public use space (b) Minimum percentage of net area devoted to active and passive recreational purposes Total minimum open space requirement (percent)	10 20 30	10.5 (10% binding) 25.5 (20% binding) 36 (30% binding)	10 25 35

As is evident from the chart, Applicant has met all the development standards.

Code §59-C-8.51 provides standards for the Planning Board to use in setting the maximum building height at site plan review. In approving height limits, the Planning Board is required “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 height of the building.” Although the final determination of building height is left to the Planning Board, the standards set forth in the statute do provide some guidance in evaluating the impact of building height on compatibility with adjoining

²³ Pursuant to Montgomery County Code §25A-5(c).

properties. In assessing that compatibility, the Hearing Examiner finds that a building of the proposed 71 foot height, plus the 15 foot tall mechanical penthouse, would impact significantly and adversely on the surrounding residential uses, all of which are considerable shorter than the proposed building. *See* Part III. E. of this report.

Code §59-C-8.52 specifies that parking shall be located as to have “a minimal impact” on any adjoining residential properties. All HLA Development Plan parking (89 spaces, including 4 handicapped accessible) is located under the building, within the parking garage, and will not impact adjoining properties. Access for parking is located along Hampden Lane and will have a minimal impact on the area. A 24-foot wide driveway will provide safe and adequate access to the parking garage. A service entrance is in the same location with a 12-foot wide driveway to be accessed directly from Hampden Lane. The Development Plan Amendment for the HOC transitional housing (DPA 06-2), as revised pursuant to the Hearing Examiner’s suggestion, leaves the question of parking and recreation to the Planning Board,²⁴ which stated in its March 9, 2006, memorandum (Exhibits LMA 39, DPA 49) that it would consider these needs for the transitional housing development at site plan review.

Code §59-C-8.53 is inapplicable because no private streets are called for either in the HLA Development Plan or in DPA 06-2. Section §59-C-8.54 is also inapplicable because there is no plan to include ancillary commercial uses in the development.

In sum, the Hearing Examiner finds that Applicant’s plans are in accordance with all of the purposes, standards and regulations of the TS-R Zone, as set forth in Article 59-C of the Code, except as noted with regard to compatibility and Sector Plan compliance.

²⁴ The Hearing Examiner considered HSNK’s request that DPA 06-2 modify DPA 00-2 by replacing notes 2 and 3 with a statement that the Edgemoor Condominium high-rise (Edgemoor III) has no obligation to provide recreation or parking for the HOC transitional Housing (Edgemoor IV). 3/17/06 Tr. 22-25. As noted in Part III.D.3. of this Report, the Hearing Examiner finds that this is not the proper forum for making the kind of affirmative statements HSNK seeks. Instead, DPA 06-2 was revised to incorporate the Planning Board’s intent to review these issues at site plan review. (DPA Exhibit 57(c)).

b. Safety, Convenience and Amenity of Residents

The next part of “Finding (b)” required by Section 59-D-1.61 is a determination that the proposed development would provide the “maximum safety, convenience, and amenity of the residents.” This issue has been discussed above in conjunction with the requirements for the TS-R Zone. The Hearing Examiner finds that Applicant has provided the maximum in safety, convenience and amenities for the future residents of this development.

c. Compatibility with Adjacent Development

The final required determination under “Finding (b)” is that the proposed development be compatible with adjacent development. The issue of compatibility was discussed at some length in Part III. E. of this report (pp. 43-48). For the reasons set forth in that discussion, the Hearing Examiner finds Applicant’s Development Plan for the HLA building, in its present form, would not be compatible with adjacent development. Compatibility of the proposed HOC transitional housing has already been established by the Council’s approval of DPA 00-2, which authorized the same development on Lot 3 which is now planned for Lot 5.

3. Internal Vehicular and Pedestrian Circulation Systems and Site Access

The third required finding is:

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

Primary and service vehicular access to the property is from Hampden Lane. According to Technical Staff, the pedestrian and vehicular entrances are located in such a way that they will provide for the safe and adequate movement of pedestrians and vehicular traffic. Vehicles would enter the project’s parking garage via a single driveway on Hampden Lane, which is approximately 250 feet east of Arlington Road. The parking garage access is 24 feet in width. Applicant will

provide a sidewalk along the north side of Hampden Lane, and that provides connection to the area sidewalks and the Bethesda Metro Station. Technical Staff noted that the pedestrian facilities that are proposed as part of the HLA Development Plan will enhance the existing sidewalk network, and concluded, "Primary site access and service access is adequate and will not pose a threat to public safety." LMA Exhibit 26, p. 18. Applicant's transportation expert, Chris Kabatt, testified that the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient. 3/17/06 Tr. 116-121. The Hearing Examiner so finds.

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

The fourth required finding is:

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

No environmental issues were raised in this case. Applicant's engineer, Mark Morelock, testified that the property contains no flood plains, protected soils, rock outcroppings, or other natural features that would impact development of the proposed project, and the subject site is not located in a special protection area. This assertion was confirmed in Technical Staff's letter exempting the site from having a forest conservation plan. LMA Exhibit 8.

The current surface of the subject site is mostly impervious, and this project would be considered as a redevelopment. As such, the storm water management requirements for recharging the water runoff do not apply. Moreover, because there is less than 2 CFS (cubic feet per second) discharging from the proposed property, the site is exempted from channel protection volume (CPV) controls [*i.e.*, quantity control], as well. Quality control will be provided on site through an

underground filtration system. Technical Staff indicates that the Applicant will be required to submit a Stormwater Management Concept Plan at the time of Preliminary Plan of Subdivision, a review which is required to consolidate the properties.

During construction, Applicant will employ temporary sediment erosion control measures as required by Montgomery County and Maryland Department of the Environment. In addition, Applicant will stabilize construction entrances and silt beds protecting the perimeter of the property. Sediment Control Plans will be prepared directing the contractor to specific construction techniques so that adjacent properties will not be damaged by erosion or siltation during the construction process.

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

5. Ownership and Perpetual Maintenance

The fifth required finding is:

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

The ownership of the subject properties is set forth in the Development Agreement signed by the DHCA, HOC, HLA and all property owners. LMA Exhibit 32; DPA Exhibit 46. The HLA Property will ultimately be controlled by a homeowner's association (HOA), and the requisite HOA documents will provide for the maintenance of the public use spaces. Applicant provided a statement certifying that the HOA documents to be recorded in connection with the establishment of the condominium regime for the HLA property “shall provide for the private perpetual maintenance of all active and passive recreational spaces and public use spaces.” LMA Exhibit 44(a). The HOC will be responsible for the ongoing maintenance of the HOC Property.

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

6. The Public Interest

The applicant must show that the proposed reclassification 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. The impact on public facilities was discussed in Part. III. D.5. of this report. The evidence indicates that transportation, schools and water and sewer services would not be adversely affected by the proposed development. The issue of conformity with the Sector Plan raises a much more difficult problem.

The issue of Sector Plan conformance and the recommendations of the Planning Board and Technical Staff were considered in Parts III.D.4. and III.E. of this report. The Sector Plan expressly recommends the zoning change sought by Applicant, but HLA’s development plan is not consistent with the Sector Plan’s vision for a low-rise “urban village.” The Planning Board and its Technical Staff supported the proposed rezoning; however, when they reached these conclusions, neither the Planning Board nor the Technical Staff had the benefit of evidence introduced by adjoining neighbors

during the hearing with respect to compatibility problems and the Sector Plan's vision for the TS-R District.

For the reasons discussed at length in this report, the Hearing Examiner concludes that the HLA development, as currently planned, would be incompatible and not in compliance with the Sector Plan. Approval of the current development plan would therefore not be in the public interest. The HOC development plan amendment, DPA 06-2, is consistent with the Sector Plan and compatible with its surroundings; however, it cannot be granted absent a rezoning of Lot 5 to the TS-R Zone, and that rezoning is part of the flawed LMA G-842 application.

C. Conclusion

The Hearing Examiner has no doubt that the subject site would be appropriate for rezoning to the TS-R Zone and that Development Plan Amendment 06-2, which would move the planned HOC housing from Lot 3 to Lot 5, is in the public interest; however when the Council approves a reclassification to the TS-R Zone, it must do so in conjunction with approval of a proposed development plan. Zoning Ordinance §59-D-1.2. The development plan proposed in this case does not permit the required finding of compatibility with the immediate surroundings and substantial conformance with the Sector Plan. The Hearing Examiner does not recommend outright denial because it would be in the public interest to implement a project which, like this one, permits both creation of the HOC transitional housing and the assemblage of sufficient area to allow development in the TS-R Zone of a private, multi-family, residential project. Thus, a remand is recommended because it is possible that a remand can lead to a modified proposal which will eliminate compatibility problems, produce a structure more in keeping with the vision of the Sector Plan and still provide the benefits of the proposed HOC transitional housing.

VI. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-842, requesting reclassification from the R-60 Zone to the TS-R Zone of approximately half an acre of land on Hampden Lane in Bethesda (Lots 5,4, 2 and Part of 1, of Edgemoor Subdivision, Block 24D, located at 4913, 4915, 4919 and 4921 Hampden Lane), in the 7th Election District, be **remanded** to the Hearing Examiner with instructions to reopen the record and conduct further appropriate proceedings to allow Applicant the opportunity to revise its development plan in a fashion that would make it compatible with its immediate surroundings and consistent with the vision of the Bethesda CBD Sector Plan for an “urban village” in the Transit Station Residential District.

I further recommend that DPA 06-2, also filed by Applicant, seeking to amend the development plans in LMA’s G-721, G-755, and G-769 and DPA’s 98-1, 98-2 and 00-2, to allow relocation of the planned Housing Opportunity Commission (HOC) transitional housing from its currently approved location at 4917 Hampden Lane (Lot 3 of Block 24D, Edgemoor) to 4913 Hampden Lane (Lot 5 of Block 24D, Edgemoor), be **remanded** to the Hearing Examiner to reopen the record and conduct further appropriate proceedings in conjunction with LMA G-842.

Dated: June 12, 2006

Respectfully submitted,

Martin L. Grossman
Hearing Examiner