

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS**

**Office of Zoning and Administrative Hearings  
Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
(240) 777-6660**

IN THE MATTER OF: \*

M. WAJEED KHAN, M.D., \*

*Petitioner.* \*

Board of Appeals Case No. S-2732  
(OZAH No. 08-33)

M. LEE SUTHERLAND, \*

M. WAJEED KHAN, \*

*Witnesses for Petitioner,* \*

STANLEY D. ABRAMS, Esquire, \*

*Attorney for Petitioner.* \*

\* \* \* \* \*

MARTIN KLAUBER, *Esquire,* \*

*People's Counsel.* \*

\* \* \* \* \*

BEFORE: LUTZ ALEXANDER PRAGER, *Hearing Examiner*

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**I. INTRODUCTION.**

Dr. M. Wajeed Khan and Bebe Khan own two adjacent properties fronting on both Georgia Avenue and Grandview Avenue in Wheaton. Both properties are in the R-60 zone. In the current proceeding Dr. Khan petitions for a special exception under § 59-G-2.38 of the Zoning Ordinance to allow use of 12014 Georgia Avenue, tax parcel 241, for nonresidential professional offices. Khan already has special exception approval for nonresidential professional use of the Khans' next-door property, 12016 Georgia Avenue. Khan originally proposed to use part of 12016 to provide access to, and parking for, parcel 241. When I cautioned that such dependency might cause the doctrine of zoning merger to apply to both parcels, Khan filed amended plans eliminating dependence on 12016 for access and parking.<sup>1</sup>

The County Planning Department recommended approval of the special exception as currently planned, subject to conditions. Ex. 31 at 1. None of the Department's conditions covered the special exception's operations. *Id.* The Montgomery County Planning Board had unanimously recommended approval of the original plan (ex. 21(a)). The Planning Department concluded that the revised plans eliminating dependence on 12016 Georgia Avenue did not require Planning Board scrutiny, presumably because the Department did not regard the change in plans to be substantial enough to necessitate a second public hearing by the Planning Board.

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<sup>1</sup> Under the zoning merger doctrine, two adjacent parcels under common ownership can sometimes be deemed to merge into a single parcel for zoning purposes by operation of law when the owner uses one of the parcels to satisfy zoning requirements for the other parcel. See *Remes v. Montgomery County*, 387 Md. 52, 874 A.2d 470 (2005); *Friends of the Ridge v. Baltimore Gas & Electric Co.*, 352 Md. 645, 724 A.2d 34 (1999); *Mueller v. People's Counsel*, 177 Md. App. 43, 934 A.2d 974 (2007).

Hearings by the Office of Zoning and Administrative Hearings (OZAH) on the petition spanned two sessions, four months apart. No one appeared in opposition at either session. The People's Counsel, Martin Klauber, appeared at both sessions. He recommended approval of the petition but with the addition of conditions addressing daily operations. He also recommended that some of the Planning Department's proposed conditions be deferred until subdivision review.

The revised plan for the property is inferior to the original proposal to use the Khans' neighboring property. Under the revised plan, the parking lot on parcel 241, the subject site, will be larger and closer to neighboring residential property and to Grandview Avenue. A new driveway and curb-cut are necessary for access to and from the parking lot. These modifications consume much more of the existing lawn and replace the lost sod with pavement.

Nevertheless, I recommend approval because the revised plan, though inferior, meets all special exception criteria. Nothing in the Zoning Ordinance requires the Khans to risk the possibility that the doctrine of zoning merger will impede sale of either property. The revised plan places a new eleven-space parking lot as close as 34 feet to an existing residence. In order to avoid having noise, fumes, and light from the lot disturb the neighboring residential property, I recommend erection of a wood-on-wood fence to screen the parking lot as specified in exhibit 40(b). I also recommend that approval be subject to conditions regulating operations of the special exception use as reflected in the testimony and exhibits submitted on behalf of the petition. In that connection, I recommend that the co-owner of the property, Bebe Khan, agree in writing to be bound by all conditions of approval. Finally, I agree with People's Counsel that a condition recommended by the Planning Department concerning improvements to the public Georgia Avenue sidewalk should be deferred until subdivision review, but I recommend that this Board's

approval of the special exception contain a condition that the sidewalk be altered if the Planning Board concludes that the current sidewalk needs improvement.

## **II. THE PROPERTY.**

Parcel 241 lies in the middle of a block bounded by Weisman Road to the north; Georgia Avenue to the east; Henderson Avenue to the south; and Grandview Avenue to the west. Ex. 26. Georgia Avenue is a six-lane divided arterial road classified as a “major highway”; Grandview Avenue is a secondary residential roadway with a 60-foot right-of-way, classified as a “signed shared road.” Ex. 38 at 16. The parcel is about three-tenths of a mile north of the Wheaton central business district. *Id.* at 6.

Parcel 241 bifurcates the block from east to west. It is a 0.42 acre (18,459 sq. foot) rhomboid through-lot running from Georgia to Grandview. It is 55 feet wide on the east and 85 feet on the west. Ex. 26. The parcel slopes slightly to the west but contains no steep slopes or erodible soils. Ex. 38 at 6. It contains no forests, streams, flood plains, wetlands, historic or cultural features, or endangered plants and animals. *Id.* at 16-17.

The two Khan properties share a common property line, almost 273 feet long. *Id.* The northern Khan property, also a through lot, is used for doctors’ offices under special exception authority (S-1735, approved November 17, 1989). *See* ex. 23(a)-(b). Two residential properties adjoin parcel 241’s southern property line. Ex. 26. Parcel 241 and its three adjacent properties are all zoned R-60. Ex. 12(a). From the air, they look like this:

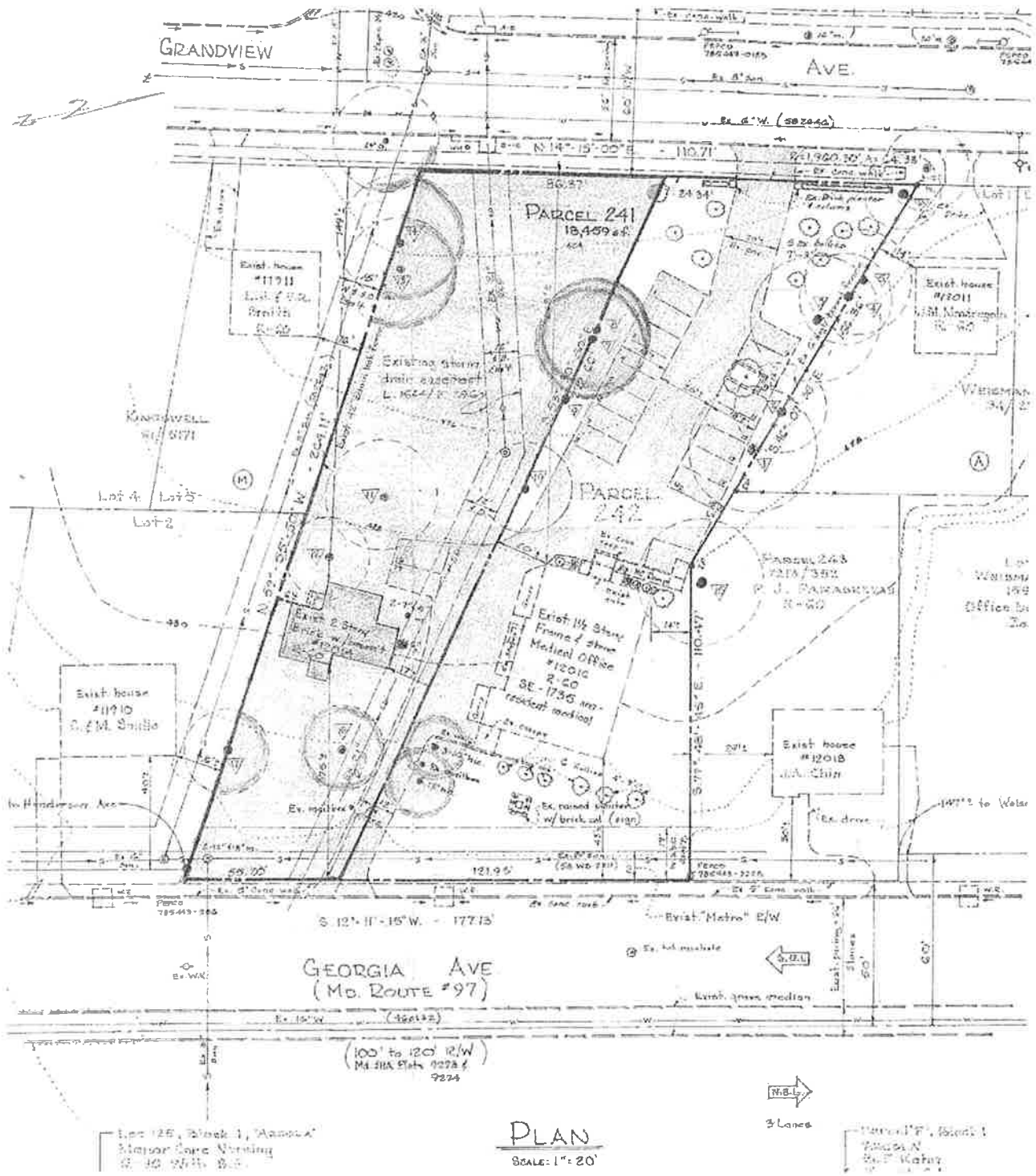


*Aerial view facing east (ex. 25)*

As currently configured, parcel 241 has vehicular access from Georgia Avenue over a driveway shared with the Khans' other property and no automobile access to Grandview Avenue. Both conditions will change if the special exception is granted.

A two-story brick house with a basement is the only structure on site. It sits 75 feet from Georgia Avenue and roughly 145 feet from Grandview Avenue. See ex. 26. To accommodate the special exception, the house will be expanded and modified.

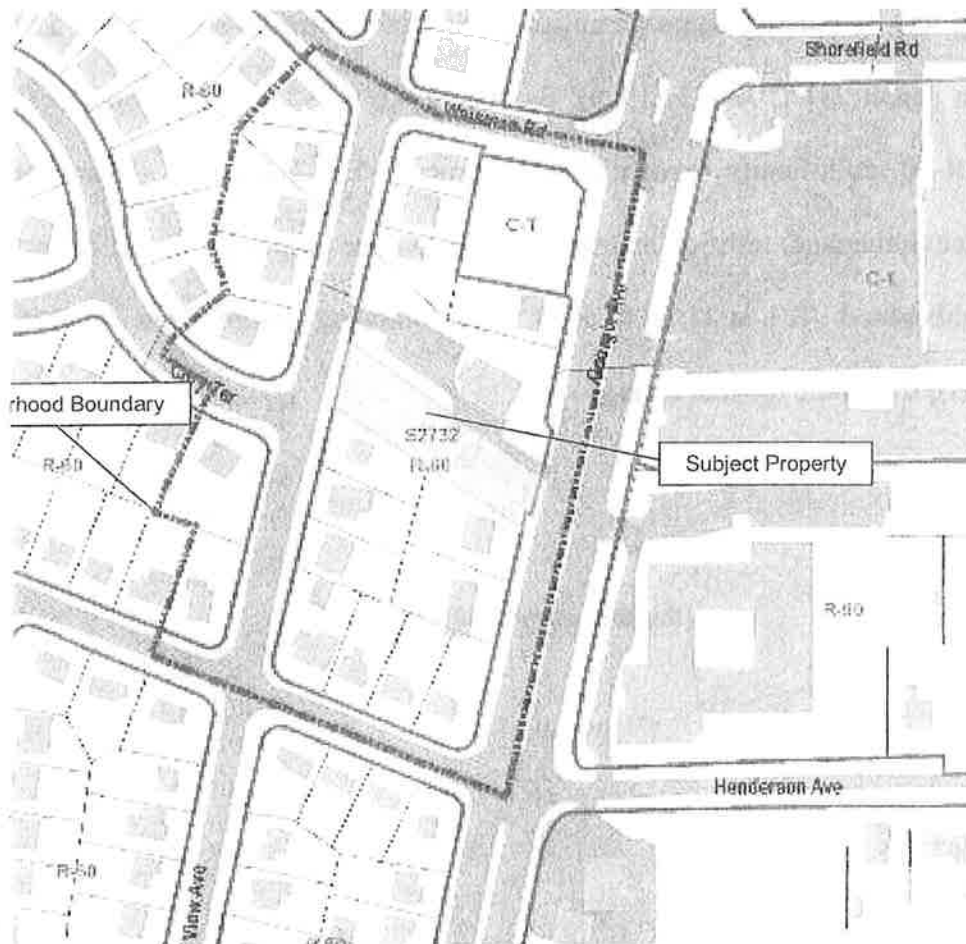
The existing conditions are shown graphically here:



Existing conditions (ex. 26)

**III. THE NEIGHBORHOOD.**

The Department of Planning report described the neighborhood as consisting of the block in which parcel 241 is located and seven single-family homes across Grandview Avenue. Ex. 38 at 9. The report describes that neighborhood as having a “predominantly residential appearance” except for a large professional office building (zoned C-1) at the southwest corner of Georgia Avenue and Weisman Road. All other property in the neighborhood (as the Department defines it) is zoned R-60. Ex. 12(a). The Khans’ existing special exception is the only special exception use in the neighborhood. The Department’s neighborhood is depicted here:



*Planning Department graphic of neighborhood (from ex. 38 at 8)*

The Department's definition of the neighborhood properly focuses attention on its residential nature. Of greatest importance are the two adjoining southern properties. Both are improved by single-family houses. At its closest, the house on the south-western lot is only 16 feet from the joint property line with parcel 241. Ex. 26.

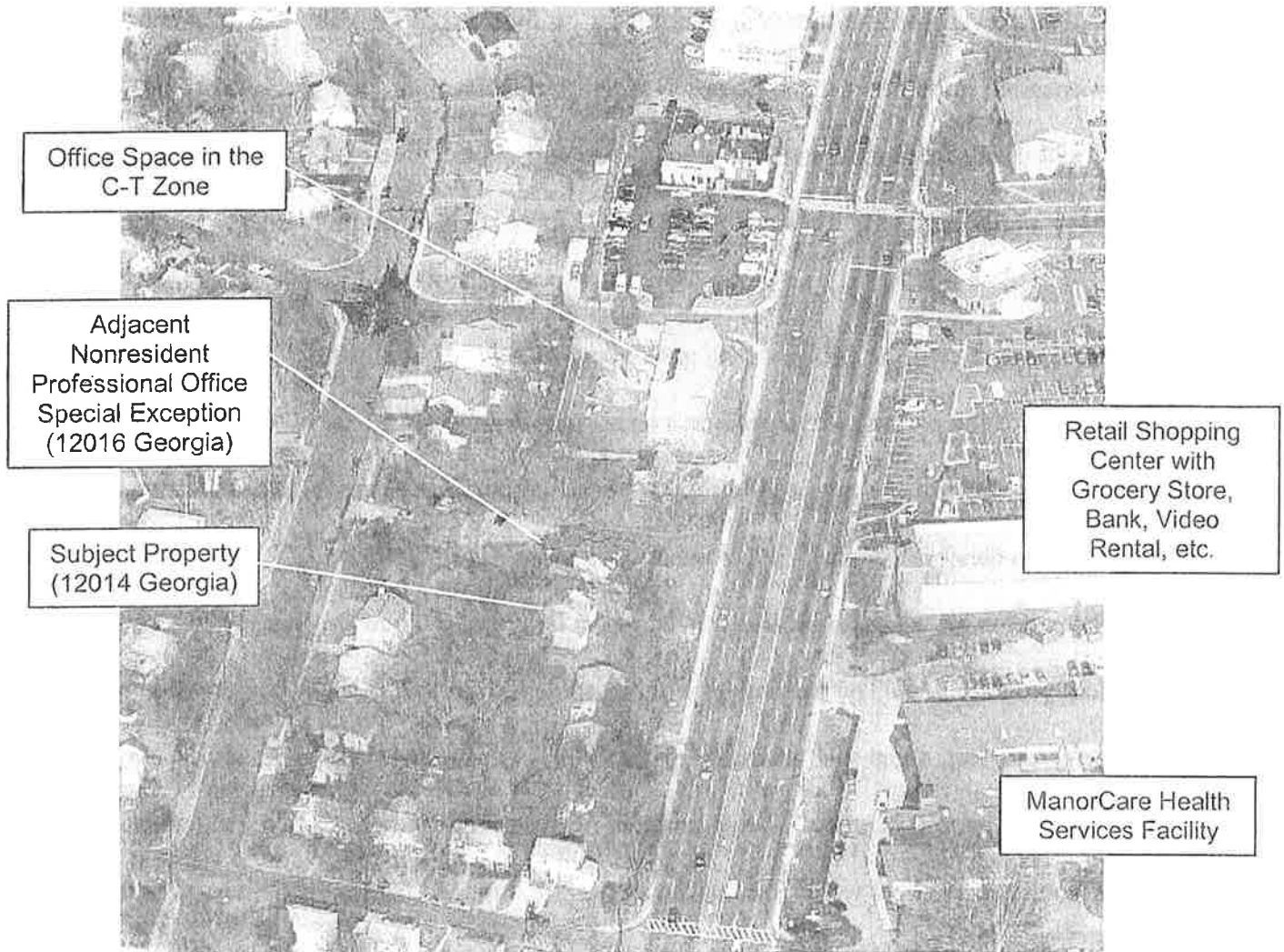
The Department's definition of the neighborhood does not include the properties across Georgia Avenue from parcel 241. Those are largely commercial or institutional. A commercial building, known as the Wheaton Park Shopping Center, with a branch bank and several retail stores, occupies about half the block. Ex. 38 at 7-8. Most of its street frontage appears to be a large parking lot. A nursing home permitted by special exception sits directly across Georgia Avenue from parcel 241 (BA-713 (1959); S-356 (1974); S-798 (1981)). South of the nursing home is an R-90 multi-family residential development. Ex. 27(c) at 3. Khan's site-planning expert, M. Lee Sutherland, testified that the Georgia Avenue properties should be included in the relevant neighborhood. T. I. at 22; T. II. at 25.<sup>2</sup> The following picture (from ex. 38 at 9) and map (from ex. 27(f)) depict the broader area.

[this area intentionally left blank]

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<sup>2</sup> "T. I." designates the transcript of the first session of the hearing, on September 22, 2008; "T. II." designates that of the second session, January 27, 2009.





*Aerial view, looking north (from ex. 38 at 9)*

Although it makes no practical difference in this case, Sutherland's neighborhood boundaries are more realistic, as explained below.

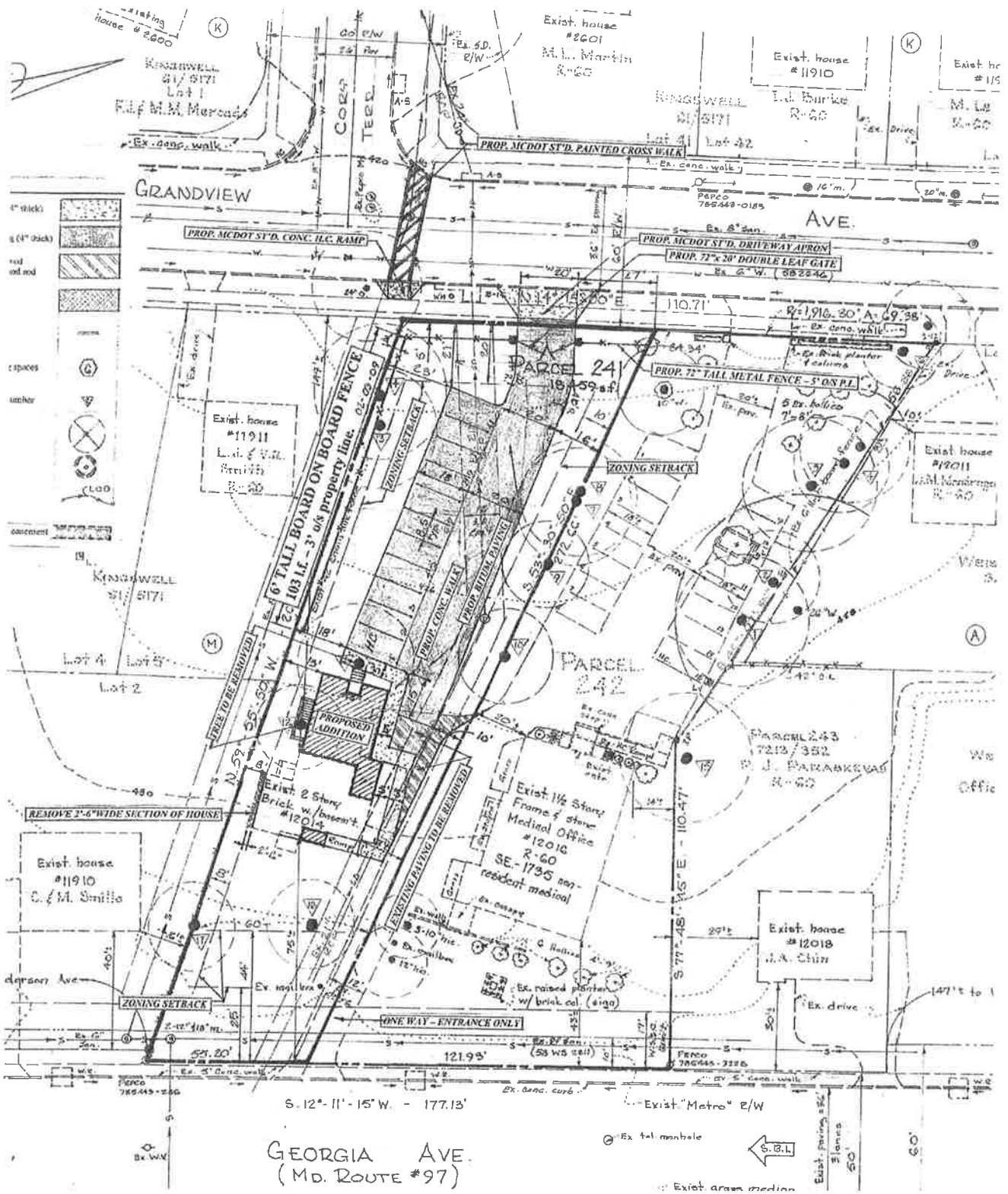
#### **IV. PROPOSED DEVELOPMENT AND USE.**

1. *Physical changes to the site.* The existing residence will be modified and almost doubled in size. In addition, use of parcel 241 for medical offices without relying on the Khans' next-door property necessitates building a new bituminous driveway opening on Grandview

Avenue and an eleven-space bituminous parking lot on the back lawn. The loss of green space and commensurate increase in impervious cover will be substantial. See ex. 40(a) (reproduced below). Paving will quadruple and impervious area will triple. Even so, green space will still occupy 63% of the property (down from 87.5%), more than enough to meet development standards.

The driveway will be 140 feet long and twenty feet wide but will taper to fifteen feet past the eastern end of the parking lot to provide a small turn-around area. Ex. 40(a); T. II. at 12. A small slice of paving will be removed to prevent direct automobile access between the two Khan properties and to Georgia Avenue. See crosshatching on ex 40(a); T. II. at 12.

The parking lot will be built along much of the length of the new driveway, between it and the southern property line. The parking lot will be set back from the southern property line by the requisite eighteen feet, a gap that gradually grows to 23 feet as it approaches Grandview Avenue. At its closest, the lot will be about 34 feet from the nearest residence. Each of the eleven parking spaces will be about 8½-feet wide. Two of the spaces are intended for residential use by residents of a second-floor apartment in the remodeled building. The space nearest the building will be marked for use by handicapped patients. The proposed major alterations are depicted on the next page:



Site plan graphics (from ex. 40(a))

LEGEND	
Proposed concrete paving (4" thick)	
Proposed bituminous paving (4" thick)	
Existing paving to be removed And replaced with topsoil and sod	
Proposed building addition	
Proposed wheel stop	
Proposed number of parking spaces	
Existing tree identification number	
Existing tree to be removed	
Critical Root Zone (CRZ)	
Limit of Disturbance (LOD)	
Ingress, egress and parking easement	
Existing pole light (L.)	

Site plan legend (from ex. 40(a))

EMPLOYEES AND PARKING FOR MEDICAL PRACTICE	
EMPLOYEES	PARCEL 241
Doctors	3 total - 2 on duty at a time
Nurse/Assistant	1 full time + 3 part time
Patient load	4/ doc./ hour
<b>HOURS</b>	9:00 AM - 5:00 PM - Mon., Wed. & Fri. 9:00 AM - 7:00 PM - Tues. & Thru. 10:00 AM - 2:00 PM - Sat.
<b>PARKING</b>	
Doctors: @ 4/doc.	2 x 4 = 8
Staff: @ 1/person.	1 x 1 = 1
Dwelling - apartment	2/ unit = 2
Total required	+ 11 spaces
<b>PROPOSED</b>	11 spaces provided - includes 1 handicapped space.

Site plan table: employees and parking for medical practice (from ex. 40(a))

DEVELOPMENT DATA			
ITEM	EXISTING CONDITIONS	REQUIRED	PROPOSED PARCEL 241
Site area	18,459 s.f. or 0.424 acres	6,000 s.f. min.	18,459 s.f. or 0.424 acres
Zoning	R-60	N/A	R-60 with proposed Special Exception for Non-residential professional office (59-G-2.38)
Building coverage	980 s.f. or 5.3%	35% max. or 6,460 s.f.	1,712 s.f. or 9.3%
F.A.R.	1,460 s.f. or 0.08	N/A	2,852 s.f. or 0.16
Paving coverage	1,440 s.f. or 7.8%	N/A	4,988 s.f. or 27.0%
Impervious area	2,304 s.f. or 12.5%	N/A	6,700 s.f. or 36.3%
Green area	16,155 s.f. or 87.5%	N/A	11,759 s.f. or 63.7%
Frontage	55.2'	25' min.	55.2'
@ BRL (front)	60' @ 44'	60' min.	64' @ building
<b>SETBACKS</b>			
Front	75'	25' min.	74' +/-
Side	6' min (existing) 23' total	8' min. 18' total	8' proposed (min.) 25' total
Side- parking	N/A	16' min.	16'
Rear	145'	20' min.	116'
Building height	25' +/-	35' max.	25'-2"

*Site plan development data table (from ex. 40(a))*

GENERAL NOTES

- 1.) Area of property:  
Parcel 241: 18,459 sq. ft. or 0.424 acres
- 2.) Zoning:  
Parcel 241: R-60  
Proposed Special Exception
- 3.) Tax I.D. numbers:  
Parcel 241: 13-00956125
- 4.) Deed reference:  
Parcel 241: L. 2149/ F. 149
- 5.) Boundary from plats by Beltway Surveys and Surveys Inc.
- 6.) Topography from aerial surveys, available plans and field observations.
- 7.) WSSC 200 ft. sheet # 215-NW- 3; Sewer = S-1, Water = W-1.
- 8.) Tax map HQ- 62.
- 9.) ADC Map # 30, grid Gx12.
- 10.) Property address:  
Parcel 241: 12014 Georgia Ave. Silver Spring, Md. 20902.
- 11.) Soils Map # 24 of 28, soils 2UB (glenelg) K= 0.32.
- 12.) Watershed: Rock Creek, Tributary # 8.
- 13.) Tree survey by Elise A. P. Cary, Rockville, Md. & J. Cook, Owings, Md.
- 14.) There are no steep slopes or highly erodeable soils on site.
- 15.) There are no streams, water courses, flood plains or wetlands on or within 200 feet of this site.
- 16.) There are no historic resources or cultural features on this site.
- 17.) No rare, threatened or endangered plant or animal species were observed on this site.
- 18.) This site is exempt from the Forest Conservation requirements under Section 22 A.5.(r)(2), small property exemption (0.424 acres) and deeded before 1957. Exemption (4-2008115E) approve January 14, 2008.
- 19.) Attorney: Stanley Abrams, Abrams and West, S-760N, 4550 Montgomery Ave., Bethesda, Md. 20814. Phone 301-951-1450.
- 20.) Architect: Jason Gagan, J.M.G. Design, 3004 Blueridge Ave. Silver Spring, Md. 20902. Phone 240-271-4534.
- 21.) No new site lighting is proposed by this plan. Security lighting on the existing building mounted lighting will be directed downward and away from adjoining properties.

*Site plan general notes (from ex. 40(a))*

2. *Lighting.* The parking lot will be used by patients and staff after dark for several months of the year, until 7 p.m. two days a week and until 5 p.m. the other three weekdays. At the hearing, Khan's site planner testified that no lighting would be provided for the lot. T. II. 27.

As a consequence of a post-hearing order questioning the adequacy of lighting for the lot after dark, Khan submitted a lighting plan. The Department of Planning did not comment on the lighting plan during its opportunity to do so.

Khan's lighting plan for the parking lot envisages a 10-foot light pole described as a "HADCO C-5281 'Luminaire'" depicted on the plan, ex. 42(b), reproduced on the next page.<sup>3</sup> The lot light will have a 70 watt bulb and a custom designed shield to deflect light away from the south. Ex. 42(a) (Sutherland statement); see ex. 42(b). The lighting plan graphic shows a lumens contour that does not reach the property to the south or any public space but does extend into the parking lot on Khan's next-door property. Ex. 42(b). The light pole will be set into a concrete (or similar) base three feet south of the lot line, midway along its east-west axis. Ex. 42(b); ex. 42(a).

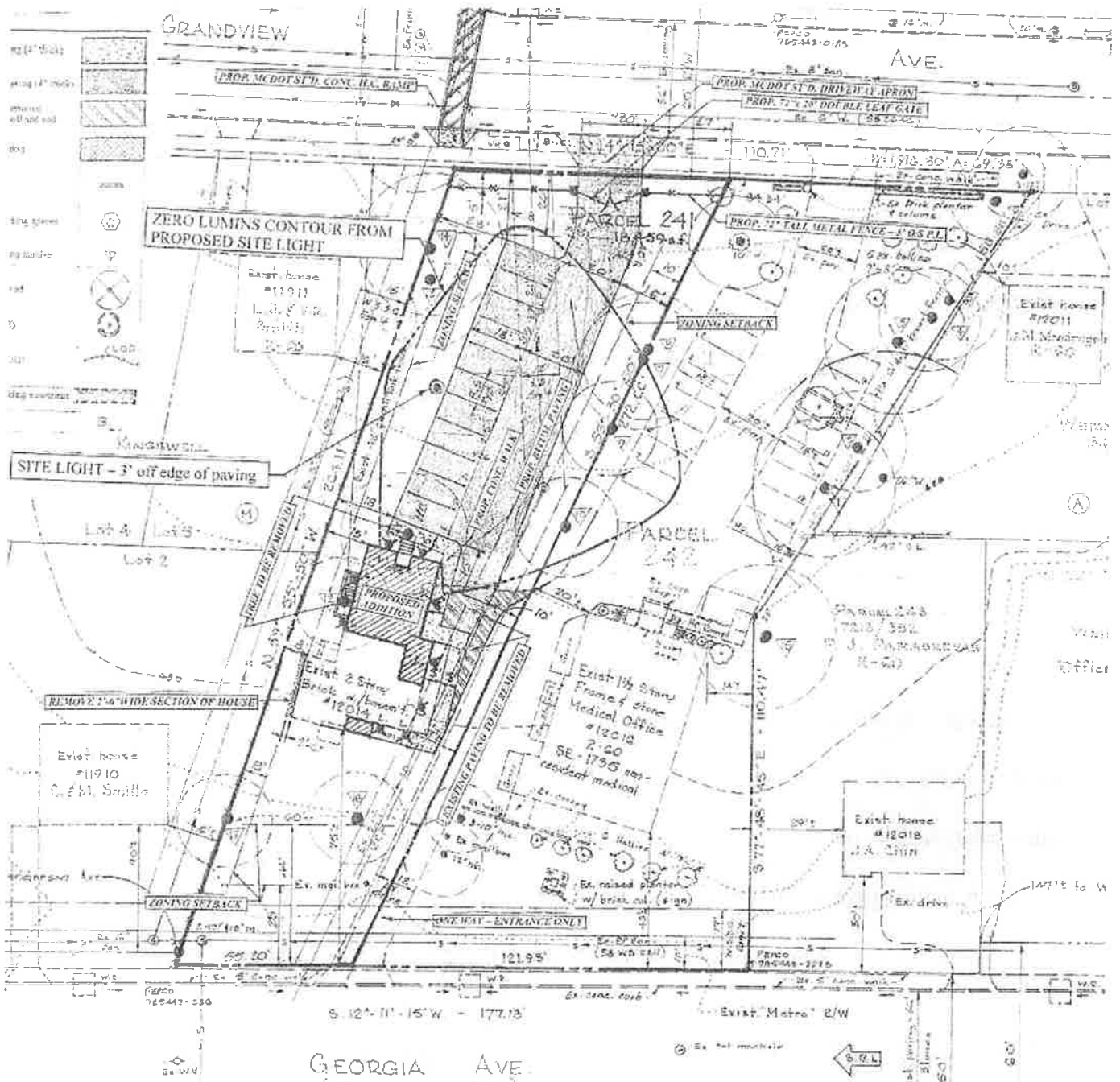
According to a post-hearing statement by Sutherland accompanying the plan, the parking lot light will be on only on Tuesdays and Thursdays during late fall and winter from dusk until 7:30 p.m., half an hour beyond office hours. Ex. 42(a); see ex. 42 (Abrams letter). Sutherland asserted that the light "will provide the security and safety desired for those people using the parking area" after dark. Ex. 42(a). (Below, I propose a minor change to the lighting plan to require lighting for the lot on *all* weekdays from dusk until half an hour after office hours. In most months, of course, dusk will fall after office close and lighting for the lot will be unnecessary). The lighting plan appears on the next page.

A building elevation graphic (ex. 29(b), reproduced below) shows that Khan also proposes to mount nine lights on the expanded office building, three at the front (east) and two each on the

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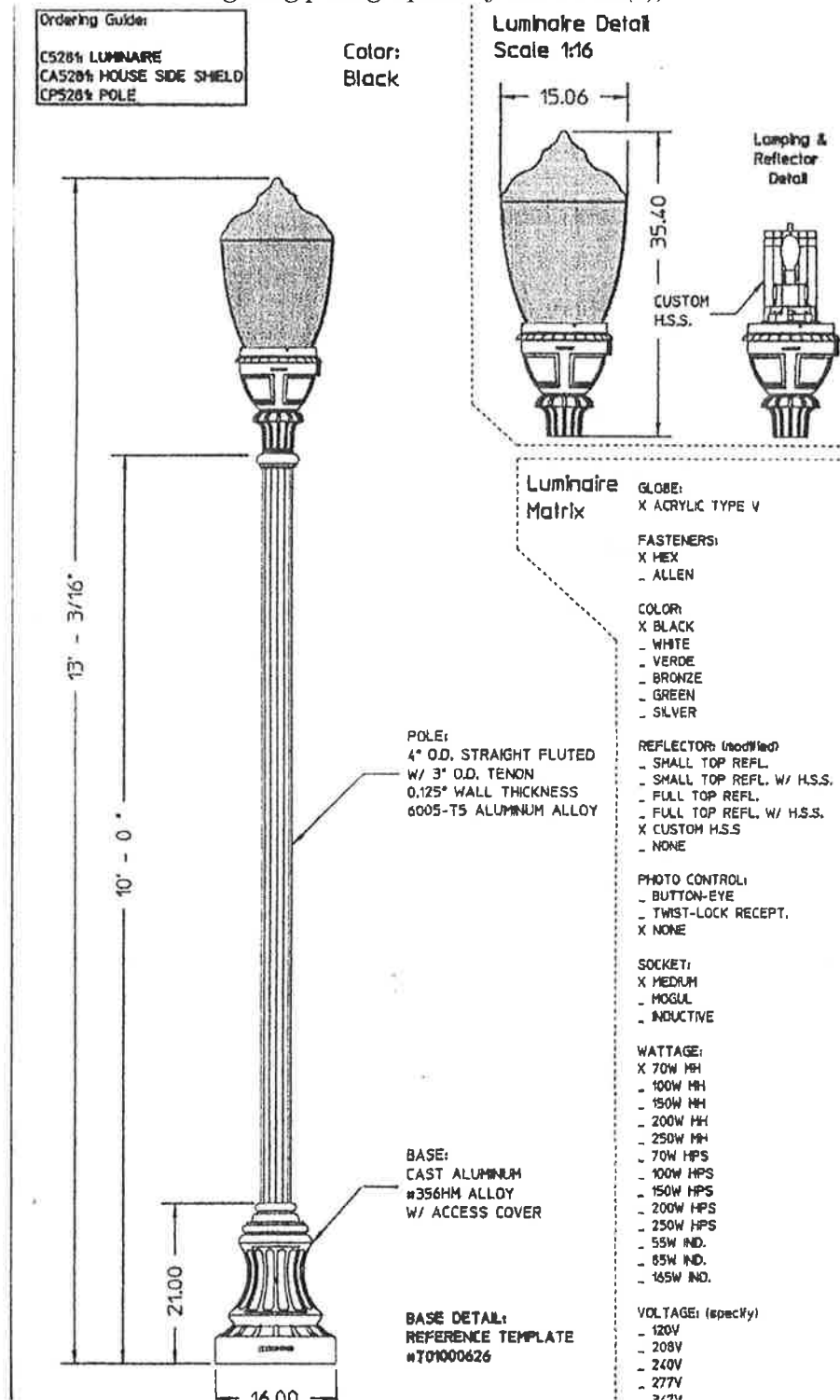
<sup>3</sup> A legend on the plan erroneously states that "no new site lighting is proposed by this plan." Ex. 42(b), General Notes, ¶ 21.

other sides of the building. These lights will be controlled by interior switches and by timers and motion sensors with manual overrides. Ex. 42(b); T. II 44. The record contains no evidence about when those lights will be in use or why so many are necessary.





Lighting plan graphics (from ex. 42(b))



Lighting plan detail (from ex. 42(b))

## LIGHTING LEGEND

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Proposed building mounted lights  
(see architectural plans for specifications)



Site light with House Side Shield (HSS)  
(see detail this sheet)

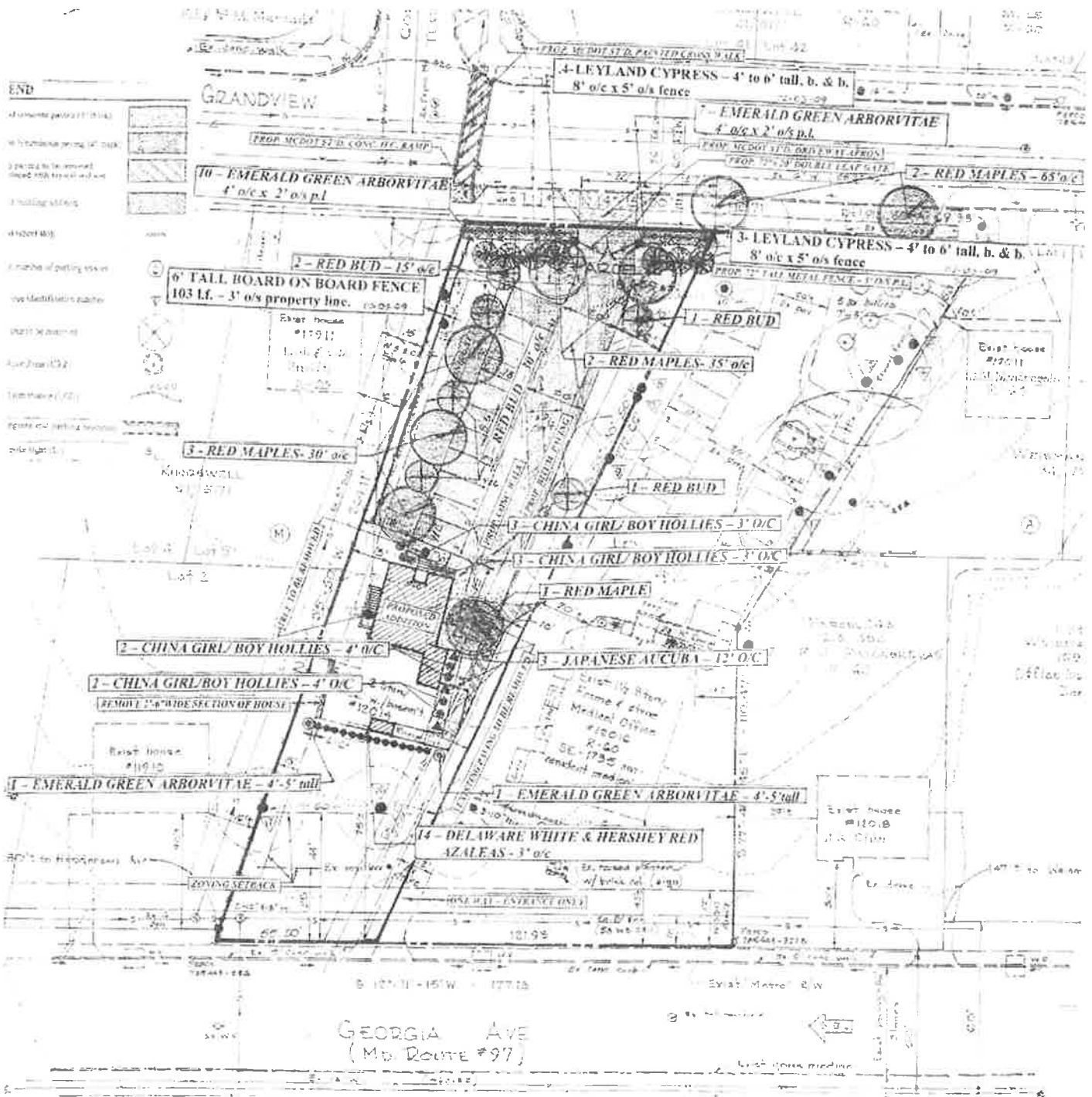


*Lighting legend (from ex. 42(b))*

3. *Landscaping.* Khan's decision to abandon partial use of his 12016 Georgia Avenue property and to build the driveway and parking lot on parcel 241 necessitated several changes in landscaping plans. Khan was amenable to increasing the number and kinds of plants to screen the driveway and parking lot more effectively. He submitted alternative plans, one that will replace an existing chain-link fence along the southern property line from Grandview Avenue to the eastern end of the parking lot with a six-foot wood-on-wood fence. Ex. 40(b). The other plan, which Khan prefers, keeps the chain link fence and substitutes thirteen Leyland cypresses for the wood-on-wood fence as a screening device. Ex. 40(c).<sup>4</sup> The competing plans are otherwise identical. For reasons explained below, I find the fence to be more protective of neighboring properties. Both plans are reproduced on the pages that follow.

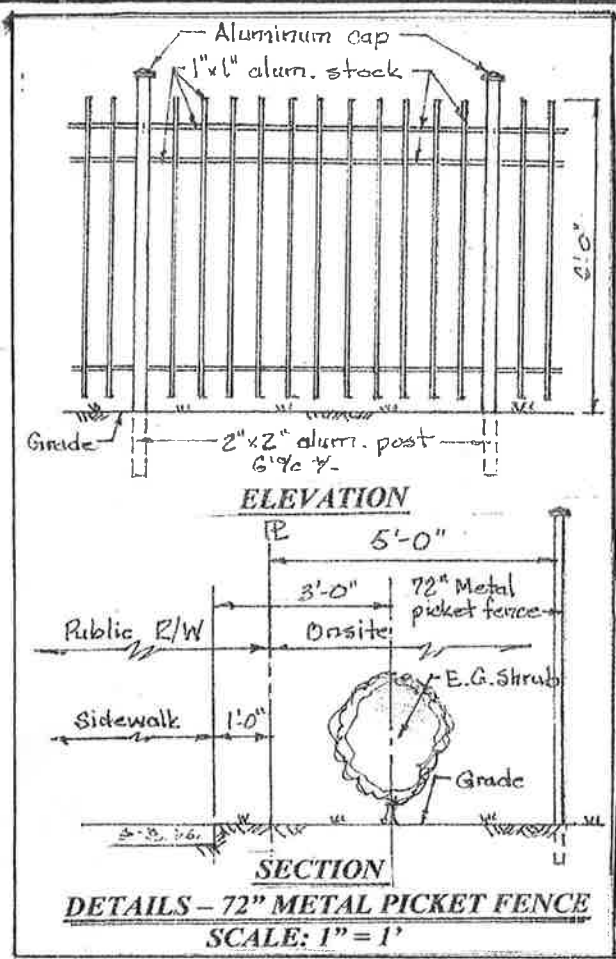
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<sup>4</sup> The exhibit lists fourteen cypresses, including one at the southwestern corner of the lot that also provides screening from Grandview Avenue. That cypress is included in both plans and should be counted with the landscaping along Grandview Avenue.



Recommended landscape plan graphics (from ex. 40(b))

PLANT LIST		
ITEM	NUMBER	REMARKS
RED MAPLE (acer rubrum)	6 = SITE + 2 = STREET <u>8 TOTAL</u>	2-1/2" CAL b & b
RED BUD	6	1-1/2" CAL b & b
ARBORVITAE- Emerald green (Thuja occ. Emerald green)	2 + 17 <u>19 TOTAL</u>	4' to 5' b & b 3 gal. cont.
AZALEAS - (rhododendron) Delaware Valley White & Hershey Red)	14	3 gal. cont.
JAPANESE AUCUBA (aucuba japonica variegata)	3	5 gal. cont.
HOLLIES - CHINA GIRL/BOY (Ilex cornuta - china girl & china boy)	10	3 gal. cont.
LEYLAND CYPRESS (cypressocyparis leylandii)	7	4' to 6' - b. & b.



Recommended Landscape Plan Plant List  
(from ex. 40(b))

Recommended Landscape Plan Fence Detail  
(from ex. 40(b))

(Please see page 12 for legend, which is the same as on the site plan and the lighting plan. All three are produced on the same base plan).



Alternate landscape plan (partial, from ex. 40(c))

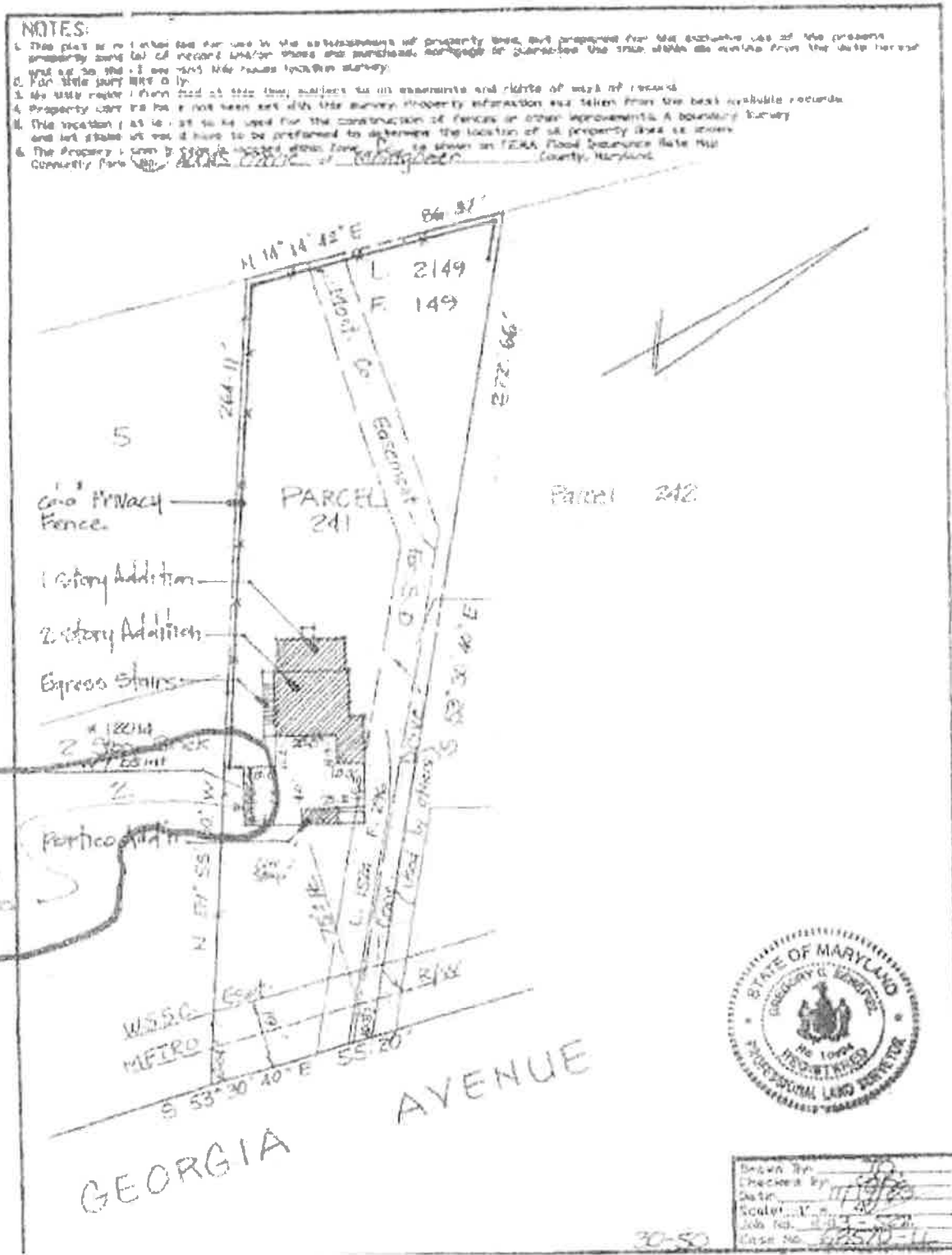
Under either landscape plan, three red maples and two redbuds will be interspersed at the southern edge of the parking lot. Ex. 40(b), (c). Screening from Grandview Avenue will be provided by seventeen arborvitae along the fence line, ten south of the driveway, seven to its north; they will be backed by seven Leyland cypresses, four to the south, three to the north. *Id.* An aluminum six-foot high ornamental fence, with a double-leaf gate for the driveway, will be erected parallel to Grandview Avenue. *Id.*; T. II. at 14. Two red maples will flank the driveway,

one on either side, immediately behind the cypresses. Ex. 40(b), (c). Two red buds will be planted along the northern edge of the driveway, one behind the maple and the other roughly two-thirds of way toward the eastern end of the driveway. *Id.* Khan intends to plant two red maples on public space on Grandview Avenue. *Id.*

Landscaping around the enlarged building will consist of six hollies at the rear and a red maple and a mixture of hollies and Japanese acuba along the pedestrian path from the parking lot. *Id.* The front will have fourteen azalea bushes and two arborvitae, one at each end of the row of azaleas. *Id.*

Two existing trees, a muckerhut hickory and a blackgum, will be destroyed to make way for the building addition. *Id.* Otherwise, all of the existing trees, including a large ash, will be retained.

4. *Changes to the existing structure.* The existing two-story residence will roughly double in size, growing from 1460 square feet to 2952 square feet. Ex. 29(a); T. I. 32 A stepped-up addition – part one-story, part two-story – will be built on the Grandview Avenue side and a portion of the north side of the existing building; a portico will be added on the Georgia Avenue side. *Id.* A 48-sq. ft. portion of the existing building intruding on the required side-yard set-back will be demolished. T. I. 28-29, 32; ex 30. These changes can be seen on the next page:



Graphics from site plan and scope of work showing demolition (from ex. 29(a))

### GENERAL NOTES:

1 All work shall be done to STRICT compliance with ALL applicable codes, ordinances, rules, regulations and requirements, of ALL governmental agencies having jurisdiction over this project.

2 All plan dimensions for walls and partitions are face of studs, masonry or concrete, regardless of finish unless otherwise noted. Dimensions for masonry are based on nominal sizes. Do NOT scale from drawings. Field crews shall verify dimensions, and if there are any discrepancies, notify the architect for solution prior to start of construction or at earliest time practical.

### SCOPE OF WORK:

Existing House- 1460 Sq Ft - 48 sf

Additions/Renovations 1440 Sq Ft

Total House- 2900 Sq Ft 2852 sf

Existing First Floor- 980 Sq Ft - 48 = 932 sf

First Floor Addition- 780 Sq Ft

Total First Floor- 1760 Sq Ft 1712 sf

Existing Second Floor- 480 Sq Ft

Second Floor Addition- 660 Sq Ft

Total Second Floor- 1140 Sq Ft

Area to be removed = 48 sf

Tables from site plan and scope of work showing demolition (from ex. 29(a))



Construction will extend the building by 30 feet, making its length along the southern elevation slightly over sixty feet. Ex. 29(b). The building will be 39 feet wide. At its tallest, it will stand 31 feet high, measured from ground to roof ridge, or about 25 feet to the second-story roof line. Siding will consist of the existing brick and new vinyl. *Id.* All roofs will be covered with new asphalt shingles. The elevations are shown here:<sup>5</sup>



*Building elevations (ex. 29 (b))*

<sup>5</sup> On the exhibit, “front” means facing Georgia Avenue; “rear” means facing Grandview; “left side” means southern elevation and “right side” means “northern elevation.”

A five-foot wide pedestrian walk will connect the end of the parking lot to a handicap ramp leading to the front door (on the Georgia Avenue side). T. I. at 33; T. II. at 64. Pedestrian access will also remain available from Georgia Avenue along the driveway on Khan's next-door property. T. II. at 46. A small non-illuminated sign giving the doctors' names, no larger than two square feet, will be mounted near the first floor entrance. *Id.* at 57, 58.

The first floor of the building will be used entirely for the medical practice, the second solely as a residence. The first floor will consist of a reception area, a patient waiting room, three physicians' offices, seven examining rooms, and two bathrooms. Ex. 17(g); T. I. at 32-33. The second floor will be a two-bedroom, one-bath, 1140 sq. ft. apartment. Ex.17(h); T. I. at 32-33. Entry to the second floor will be by an outside staircase on the south side of the building as well as an inside staircase from the first floor. *Id.* An expanded basement will be unused, except possibly for storage. Ex. 17(g); T. II. at 52.

5. *Proposed operations.* Dr. Khan plans to use the non-residential portions of the site as medical offices for three doctors, "absolutely" no more than two of whom will ever be present at a time. T. I. at 53, 62, 66. A nurse and one of three part-time aides will assist them. *Id.* at 53, 61. Personnel will arrive by car. *Id.* at 61. No administrative personnel will be present; administrative functions will be performed in Khan's next-door medical offices. *Id.*

The building will house only basic medical equipment. *Id.* at 55. If one of the physicians is a cardiologist, "nuclear stress test" equipment may also be installed. *Id.* Based on his experience, Khan expects medical supplies to be delivered no more than once a week and biohazard material to be collected no more than once a month.. *Id.* 57-58. Equipment technicians

will be on call but will rarely be needed. *Id.* at 59 (x-ray equipment at the next-door property was serviced only once in the past five years).

Office hours are to be from 9 a.m. to 5 p.m. weekdays, with extended hours to 7 p.m. on Tuesdays and Thursdays. *Id.* at 54. The offices will also be open to patients on Saturdays from 10 a.m. to 2 p.m. *Id.* Khan did not expect to open for emergency treatment outside normal hours. *Id.* at 59-60. If a rare emergency occurs, it will be treated at the next-door property. *Id.*

Khan estimated that each of the two doctors on duty will treat a maximum of four patients an hour, although there could be more during influenza seasons. *Id.* at 54.

#### **V. MASTER PLAN COMPLIANCE.**

The property is subject to the 1989 Kensington-Wheaton master plan. Ex. 9(a), (b). The plan lists parcel 241 as a “critical parcel” in which “changes with significant impact can occur.” Ex. 9(b) at 44, 50. It explicitly designates parcel 241 “as suitable for a non-professional office use as a special exception.” *Id.* 57.

The Department of Planning report notes that the master plan envisages a safe and attractive sidewalk network throughout the plan area. In that connection, the Department deems improving sidewalks along Georgia Avenue “to be critical in enhancing the green corridor concept as well as the overall mobility of Georgia Avenue.” Ex. 38 at 11-14 & n. 6, citing Kensington-Wheaton Master Plan at 36, 70-76, 104. The Department considers parcel 241’s Georgia Avenue sidewalk neither safe nor attractive and therefore recommends that the Khans improve the sidewalk as a condition for granting the petition. *Id.* 13-14. That recommendation is discussed below.

## VI. ENVIRONMENTAL AND TRAFFIC IMPACTS.

The Department of Planning (and its environmental planning division), reports that parcel 241 contains no large or specimen trees. Ex. 38 at 16-17 & att. 3 at 1. The Department issued a forest conservation exemption for the parcel in 2008 under the small-property exemption. Ex. 7(b). According to the Department's environmental planning division, the project is not subject to the County's Green Buildings Law. Ex. 38 att. 3 at 2.

The Department was satisfied that the special exception use will generate fewer than thirty peak-hour trips and therefore requires no local area transportation review. Ex. 38 at 16 & att. 2 at 1. The Department relied on a 1½-page report from Khan's traffic consultant. Ex. 11. The consultant did not testify. According to his report, the residential apartment will generate one peak hour trip each in the morning and afternoon based on County local rates. Using the average trip-rates listed in the Institute of Transportation Engineers' *Trip Generation Report* ("ITE"), Khan's consultant calculated that a 1766 sq. ft. medical office (ITE 720) will generate four peak hour trips in the morning and seven in the evening. *Id.* at 1-2. The Department accepted the consultant's analysis. Ex. 38, att. 2 at 2. I discuss that analysis below.

The Department's policy area mobility review standard requires special exception uses in the area in which parcel 241 is located to reduce automobile trips by 10%. Ex. 38 at 16. In this case, that means a reduction of one trip in the morning and another in the evening. *Id.*, att. 2 at 2. Because of the small numbers in question, the Department determined that a traffic mitigation agreement is infeasible. *Id.* Instead, the Department accepted Khan's proposal to build a ramp usable by handicapped persons between the northwest corner of Cory Terrace/Grandview Avenue

and the western sidewalk of Grandview. Ex. 38 at 16 & att. 2 at 2; see ex. 40(a), reproduced above.

**VII. PLANNING COMMISSION AND PLANNING DEPARTMENT  
RECOMMENDATIONS.**

The Planning Board reviewed only Khan's original plan and recommended approval with conditions. Ex. 21(a). As noted above, Khan's amended plan was not submitted to the Board. The Board's recommended conditions are adopted in the Planning Department's report on the amended plan to the extent still relevant.

The Planning Department recommended approval of both the original and amended proposals. Ex.20, 38. Insofar as relevant here, its report concluded that the amended proposal satisfied all pertinent Zoning Ordinance criteria. Ex. 38 at 2, 17-25. The report recommended that approval of the petition be subject to five conditions. One condition is that Khan be required to construct the Cory Terrace/Grandview Avenue ramp. *Id.* at 1, condition 2. Another is that the final sediment control plan be consistent with the limits of disturbance shown on the approved forest conservation exemption. *Id.*, condition 3. A third condition is the standard one binding Khan to all statements made by him or on his behalf and all materials filed in support of his petition. *Id.*, condition 4.

The Department's two remaining conditions are related. One requires Khan to obtain a preliminary plan of subdivision. *Id.*, condition 5. The other requires him to rebuild and realign the sidewalk along Georgia Avenue consistent with master plan recommendations. *Id.*, condition 1; see discussion, *id.* at 11-14, 19. The Department report makes a persuasive argument that the present sidewalk is unsafe for pedestrians. For reasons discussed below, I believe that the sidewalk issue should be deferred to preliminary subdivision review by the Planning Board.

Not included in the Department's report's formal list of recommendations are recommendations from the Department's community-based planning division to reduce impervious surfaces by increasing the parking lot setback from Grandview Avenue and to provide more landscaping to screen the parking lot. Ex. 38, att. 4 at 1-2; see ex. 38 at 14. Those recommendations are discussed below.

#### **VIII. STATEMENT OF PROCEEDINGS.**

The petition was filed by Dr. Khan on April 8, 2008. Ex. 1. According to the Department of Assessments and Taxation (district 13, acct. 00956125), Parcel 241 is co-owned by Bebe Khan. Ms. Khan did not sign the petition.

The hearing began as scheduled on September 22, 2008. No one appeared in opposition. The People's Counsel participated in the hearing and announced he supported approval.

At the beginning of the hearing, counsel for Khan informed me that this Board had referred a Khan request for an administrative modification of the special exception for the neighboring parcel (S-1735) to OZAH. T. I. at 6-8; see ex. 33, item 8. The referral had not been made known to me beforehand. Rather than taking a recess at that point, I permitted Sutherland to testify and admitted him as an expert on site planning. T. I. at 11-13. When Sutherland began to discuss the proposed modification to S-1735, I recessed the hearing briefly to obtain information about the Board's referral. *Id.* at 41.

After consulting with OZAH staff, I concluded that adjournment was necessary so that notice of the modification request could be given to the community and so that a combined public hearing on the petition and modification request could be scheduled. *Id.* at 42. I also asked Khan's counsel to file a legal memorandum during the recess discussing application of the

doctrine of zoning merger here, where the petitioner proposed to use commonly-owned adjoining property to satisfy requirements imposed on the special exception property. *Id.* at 42.

While the hearing was in recess, Khan moved to amend the petition and to revise his plans to avoid all dependence on his other property. Ex. 27. He also withdrew his request for administrative modification of S-1735. Ex. 27(d). The Board acknowledged the withdrawal and rescinded the OZAH referral. Ex. 39, item 10. With the request to amend, Khan's counsel submitted a memorandum of law arguing that the zoning merger doctrine would not have applied. Ex. 27(h). He acknowledged, however, that the amended plans mooted the issue. *Id.* at

The hearing resumed on January 29, 2009, after two postponements caused by scheduling problems. Ex. 35, 36. Sutherland resumed testifying. Khan also testified. People's Counsel again participated. No other party appeared. In closing comments, People's Counsel urged the Board not to include conditions to special exception approval that more appropriately should be addressed during subdivision review. T. II. at 75.

Before adjournment, time was given to Khan to submit revised landscaping plans, including one showing the board-on-board fence along the southern property line. *Id.* at 74. The revised landscaping plans were filed February 5, 2009. Ex. 40(a), (b), (c). The record closed February 10, 2009. T. II. at 76.

The record was reopened on February 26, 2009, to give petitioner the opportunity either to explain why no lighting is necessary for the parking lot or to submit a lighting plan for the lot. Ex. 41. Khan filed his response on March 10. No comments were received from any potentially interested party, including the Department of Planning. The record closed again on March 26.

**IX. SUMMARY OF TESTIMONY.**

The salient elements of Sutherland's and Khan's testimonies are included in the preceding sections. This summary is compressed to avoid repetition.

A. SUTHERLAND. Sutherland was admitted as an expert in site planning. T. I. at 15. At the first hearing he described the neighborhood and urged that the buildings across Georgia Avenue from parcel 241 be included in it. *Id.* at 21-23. If so expanded, the neighborhood was "very mixed" use. *Id.* at 23; see, similarly, T. II. 17, 25.

Sutherland described parcel 241 which, he noted, now has "probably the largest lawn in the neighborhood." T. I. at 24. He also described the relationship between parcel 241 and Khan's neighboring property, testimony largely no longer relevant after Khan's decision not to rely on that property for this special exception. See T. I at 19-20, 24, 33-38. In Sutherland's view, the initial plan would cause "much less disturbance" to the green space than if (as is true with the revised plan) a new driveway to Grandview Avenue were constructed on parcel 241. T. I. at 36; see *id.* at 35 (placing an elongated parking lot and new driveway would "basically do away with all the green space that we're preserving in the rear yard" under the original plan).

Sutherland explained how the proposed building would meet all zoning setback strictures after the two-foot portion of the existing structure is demolished. T. I. at 25-29. He testified about the location of the additions and size of the enlarged structure. *Id.* at 32-33. He also testified about landscaping proposals that have since been materially superseded. T. I. at 40.

At the continuation of the hearing in January Sutherland described the new site and (then proposed) landscaping plans for the parking lot and driveway. T. II. at 10-14, 23-24. The eleven-space lot, he said, would satisfy the Zoning Ordinance's parking standards and setback



restrictions. *Id.* at 14. The proposed building and landscaping would not change the residential character of the property or alter the neighborhood. *Id.* at 16-17, 20, 22, 26, 27. The proposed use would be compatible with the master plan. *Id.* 18, 29, 30-32. The use would not constitute a nuisance or adversely affect the neighborhood because of traffic or on site activity. *Id.* at 19. Grandview Avenue is a “minor” street and “this would be just another driveway with a little more traffic than a house, but not much more.” *Id.* at 19, 20, 26. The proposed use would not create objectionable noise, fumes, or physical activity and would not adversely affect health. *Id.* at 26, 27. Sutherland testified that the parking lot would have no lighting (*id.* at 27 44), testimony that became irrelevant with the post-hearing submission of a lighting plan for the lot. Sutherland characterized the lighting on the building as residential in nature: “The lighting proposed is basically an upgrade of the existing residential type of lighting on the building with the additions of the similar residential type lighting for the structure itself.” *Id.* at 27, 44. Because of parcel 241’s size, Sutherland thought that medical office use of the property would provide a buffer and “transition” between commercial activity on Georgia Avenue and residential use along Grandview Avenue. T. II. at 21-22.

Sutherland testified that the property is adequately served by public facilities. It is already connected to water and sewer services. *Id.* at 27. The drainage system on Grandview is adequate to handle runoff. *Id.* A fire station exists four-tenths of a mile south at the intersection of Georgia Avenue and Randolph Road; police district 4 headquarters are “just around the corner”; the Glenmont subway station is six-tenths of a mile north; and Metro and County Ride-On buses stop at both ends of the block along Georgia Avenue. *Id.* at 27-28.

Asked if parcel 241's use in the proposed manner created unusual impacts, Sutherland responded (*id.* at 29):

It would probably be a little bit because it is a bigger parking lot. Typically, if it were developed into three residential lots, you would have six parking spaces. So you would have five more parking spaces that could be termed or be an impact. But I think it's such a small increase, it wouldn't matter to the neighborhood.

Sutherland said he was unaware of any non-inherent adverse effects. *Id.*

Pressed to state whether the revised site plan was inferior to the earlier plan, Sutherland reluctantly said the earlier plan was superior, "I mean if you are taking [*sic*] on a statistical basis of amount of disturbed space, the amount of impervious area, the lesser amount of work involved, yes, it is, if you will, superior." *Id.* at 35-36. Once the decision was made to sever the two Khan parcels, parcel 241 would need to meet zoning standards on its own, "even though there is an excess of property on [parcel] 242 that could be used." *Id.* at 36.

On the issue of landscaping for the parking lot, Sutherland testified that the tops of cars would be visible from Grandview Avenue even after the plants then proposed had matured. *Id.* at 39. Additional plants, Leyland cypresses or white pines could be planted in the 21-foot setback along Grandview Avenue to provide taller screening. *Id.* at 39-40.

A wood-on wood fence would be the "most efficient" way to provide screening between the parking lot and the southern property line if screening there is necessary. *Id.* at 41. On redirect examination by Khan's counsel, Sutherland testified that no fence exists between the two Khan properties and that this Board had not required a fence when it issued special exception approval in S-1735. *Id.* at 45-46. Even without a fence, he said, the parking lot would not have a "major impact" on the nearest residence because most parking activity would occur during daylight hours. *Id.* at 47.

B. KHAN. Khan is an internist practicing at his next-door property since 1990, together with a gastroenterologist partner. *Id.* 48. He believes that his practice is welcome in the neighborhood and is an asset to it. *Id.* About 40% to 45% of his patients come from within a six-block radius. *Id.* at 49. Some come by bus on Georgia Avenue. *Id.* He hopes to hire a cardiologist for his new offices or a gynecologist to create “a one-stop shopping center for my patients.” *Id.* at 50.

Khan’s testimony about his planned activities (T. II., at 51-69) appears above in the “proposed use” subsection. Khan testified that the hours he proposed for the practice are consistent with hours maintained by other medical offices in the nearby area. *Id.* at 55. After-hours emergencies are rare and will be handled exclusively next door. *Id.* at 60. The specialists he expected to occupy the new space “would much rather see their patients in the emergency room” of a hospital. *Id.*

Khan testified that there would “absolutely not” be more than two doctors on site simultaneously. *Id.* at 66; see at 62. Not only is it difficult for three physicians to share seven examining rooms, the doctors he expected to occupy the space would be in surgery parts of the day. *Id.* at 62. It was not possible for him to specify when the three part-time assistants will be on-site because that would be dictated by off-site needs in off-site operating rooms. *Id.* at 61.

Khan believes that his current practice does not have adverse impacts on adjoining neighbors or the neighborhood in general and “I don’t intend to do so at the new building.” *Id.* The previous owner of parcel 241 had never objected to activities at Khan’s existing practice and even “welcomed the idea of sharing parking” during the evenings for family gatherings. *Id.* at 56. Khan considered the expanded building to be compatible with the residential neighborhood. *Id.*

Khan was willing to consider some changes to the site and landscape plans but was reluctant to embrace others. He enthusiastically agreed to the handicapped-access ramp across Grandview Avenue. *Id.* at 64. Additional foliage along the Grandview frontage was “[n]ot a problem.” *Id.* He was reluctant to rebuild the Georgia Avenue sidewalk. *Id.* As for a wood-on-wood fence along the southern property line, Khan said he would prefer to plant Leyland cypresses because a fence is harder to maintain, but “either way, I will do whatever the Board recommends.” *Id.* In conversations with the southern neighbor, the neighbor said he was “interested” in having a wooden fence. *Id.* at 65.

Following Khan’s testimony and consultations among him, his counsel, and Sutherland, counsel reported that Khan agreed to provide additional landscaping along Grandview Avenue. *Id.* at 72. Counsel said Khan continued to prefer foliage to fencing on the southern property line but would submit alternative landscape plans, one with the fence, the other with cypresses. *Id.*

#### **X. FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

I credit Khan’s factual testimony. He seemed to me to be candid and believable. I also accept all of Sutherland’s testimony concerning his site and landscaping plans. As I explain through the rest of this report, I accept much of Sutherland’s expert opinion except where it is inconsistent with the facts or trumped by more cogent Department of Planning analyses. On the other hand, I accept Sutherland’s delineation of the neighborhood to encompass the block on the east side of Georgia Avenue. It is unrealistic to exclude buildings that are so close and so prominent. Still, even though the neighborhood is somewhat broader than the Department of Planning’s definition, the Department is correct in focusing on the residential uses to the west and south. It is there where the proposed changes to the property – the driveway, parking lot,

increased traffic – will have the greatest impact. Besides, the Zoning Ordinance emphasizes protecting neighboring residential, not commercial, uses from a special exception's adverse effects. Consequently, the east side of Georgia Avenue has no practical relevance to the analysis that follows.

***1. Inherent and Non-inherent Adverse Effects.***

***§ 59-G-1.2 Conditions for Granting a Special Exception.***

*A special exception must not be granted without the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.*

Analysis of inherent and non-inherent adverse effects begins with determining what physical and operational characteristics are necessarily associated with non-resident professional office special exceptions. Characteristics that are universal for all professional office uses are *inherent* adverse effects. Idiosyncratic physical and operational characteristics, including adverse effects created by unusual site conditions, are *non-inherent* adverse effects. Inherent and non-inherent effects must be analyzed in the context of the particular property at issue and of the general neighborhood to determine whether those effects are acceptable or would create adverse impacts sufficient to result in denial.

By definition, inherent adverse effects are not sufficient to justify denial of a petition. The

inherent adverse physical and operational characteristics of non-residential professional offices used for medical practice are vehicular traffic generated by patients, employees, and medical supply deliveries and associated noise, fumes, and automobile lights; buildings that may be larger than single-family homes in the neighborhood; parking areas with lighting sufficient to provide for safe use; and the use of medical equipment and temporary storage of bio-hazardous materials. See ex. 38 at 17.

In general, there are no non-inherent adverse effects likely from the physical changes and activities contemplated by this petition. The residential character of the building will be retained. Its size exceeds residences in the neighborhood but not excessively. It appears to be about the same size as Khan's existing office building. Traffic is within a normal range for this type of use. Medical equipment is stored indoors and should not adversely affect the neighborhood. Medical supply deliveries are infrequent. There is no indication that bio-hazardous materials pose an unusual danger or that their removal once a month is abnormal. There is nothing unusual about having two physicians and two support staff on site. It is common experience that physicians' offices normally also have administrative personnel; this project will not. I credit Dr. Khan's testimony that the planned hours of operation are typical of medical offices in the general area.

Non-inherent adverse effects can include "adverse effects created by unusual characteristics of the site." Here, the nature of the lot and the need for an elongated eleven-space lot force placement of the lot within 34 feet of the nearest residence. The ITE study, while presumptively valid, is rebuttable by specific evidence to the contrary. With a projected patient load of as many as eight patients an hour, as many as sixteen automobile trips and parking movements can sometimes occur, even as late as 7 p.m. twice a week. To be sure, traffic can

often be lighter: patients may arrive on foot or bus and patient loads may be less than Khan projected. Sometimes, however, as in flu seasons, traffic and parking needs may be heavier. The directly neighboring southern property is therefore reasonably likely to be adversely affected by the fumes, noise, and (during the winter) automobile headlights emanating from the parking lot. Such adverse effects arise from “unusual characteristics of the site.”

The non-inherent adverse effects on the immediately neighboring residence can be fully mitigated by landscaping. Denial of the petition is therefore not justified. The board-on-board fence included in exhibits 40(a)-(b) should protect the residence from the adverse effects of the busy, eleven-car parking lot. Although the testimony is somewhat ambiguous, the next-door occupant expressed an “interest” in (preference for?) such a fence. The fence will more effectively reflect noise away from the adjacent residence than cypresses. Sutherland conceded that a fence would be the “most efficient” screening device. T. II 41. A wood fence will also provide immediate full screening, unlike cypresses that may take time to mature to be fully effective.

In redirect examination of Sutherland, Khan’s counsel elicited testimony that this Board had not required fencing when it approved S-1735. Irrespective of the Board’s reasoning at the time, substantial differences exist between the layouts of the two properties. The closest parking space at Khan’s other parcel is a full ninety feet distant from the existing house on parcel 241, not 34 feet. See ex. 26 (space 8). While the nearest parking space on Khan’s current special exception site is only about forty feet from the neighboring Grandview Avenue residence, it’s plain from the “existing conditions plan” (ex. 26) that those two properties are in fact separated by a “6' High [*sic*] board fence.”

I therefore strongly recommend adoption of the landscape plan that includes the fence. That recommendation of course doesn't preclude Khan from planting cypresses or other plants between the parking lot and fence to make the area more attractive.

**2. § 59-G-1.21. General conditions.**

*(a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Non-resident professional offices are permitted in the R-60 zone by § 59-C-1.31(d).

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

The proposed use complies with the relevant provision, § 59-G-2.38, which is discussed below.

*(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny a special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

The Kensington-Wheaton master plan expressly designates the property for development as nonresident professional offices.

The Department of Planning recommends that Khan rebuild the sidewalk along Georgia Avenue to meet master-plan goals. I discuss that recommendation below.



*(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

The special exception will be in harmony with the neighborhood, which includes all properties in the block, the residential uses along Grandview Avenue, and the mixed use properties across Georgia Avenue.

The expanded building will be larger than residences in the neighborhood but the design, scale, and bulk is nevertheless harmonious with the general character of the neighborhood. Population density will not meaningfully increase. The use requires more parking than if the parcel were split into three residential lots but, by virtue of the landscaping planned at Grandview Avenue, should not jar neighborhood harmony. Aside from automobile and foot traffic, all activity occurs within the medical office building.

Traffic will increase but not enough to affect the general character of the neighborhood. The Department of Planning calculated that only one trip in the morning and one at night needed to be eliminated but a traffic-mitigation agreement is infeasible when numbers are so small. The Department found Khan's proposal to build a handicapped-persons ramp across Grandview to be a suitable substitute. I concur and include the ramp among my recommendations below.

The Department of Planning found no adverse consequences from side-by-side special exceptions in the block. There is no evidence to the contrary and, as noted, the applicable master plan encourages the location of non-resident professional offices on both of the Khans' properties.

*(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject*

*site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The medical offices should have no detrimental effect on use, peaceful enjoyment, economic value, or development of the general neighborhood. Noise, automobile exhaust, and car lighting could disturb the residential use to the immediate south of the parking lot if not otherwise mitigated. Khan did not present evidence concerning the special exception's economic impact on neighboring residences but it can reasonably be assumed that increased traffic and its concomitants will have an adverse impact of indeterminate, but not significant, magnitude.

All adverse impacts will be essentially eliminated by Khan's landscape plan containing the board-on-board fence, ex. 40(a)-(b).

*(6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Except as noted under the previous standard, the use will cause no objectionable noise, vibrations, fumes, odors, dust, or physical activity. All of the non-traffic related activity will occur indoors.

The parking lot light lighting should not produce objectionable illumination or glare. The contour outline on the lighting map shows that light will be deflected away from the south and should not extend beyond the southern property line. As a further precaution, fencing along the property line that I recommend should prevent possible light seepage to the south. The lamppost's low wattage is unlikely to produce an objectionable glare. In addition, the light will be on only during late fall and winter, and then only from dusk to no later than 7:30 p.m. Given these safeguards, whatever glare the light produces is insufficient to be characterized as objectionable.

The impact of the outdoor building lights is less clear. The testimony about it was less

than illuminating (pun intended). Sutherland described the lights as residential in nature. They appear to be so in the building drawings, ex 29(b), and the Department of Planning raised no objections to the lighting. See ex. 38 at 20. Nevertheless, there was no explanation for why *nine* fixtures are necessary for the limited use to which the building will be put after dark. Neither was there an explanation as to how these many lights will be employed. Nine outdoor light fixtures, unusual on a partially residential single-family house in a residentially-zoned neighborhood, could produce objectionable – and seemingly unnecessary – illumination. I therefore include a recommendation that no more than four lights (preferably fewer) be lit at any time later than half an hour after office hours. This recommendation does not preclude additional lighting when triggered by motion detectors.

*(7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

The master plan recommends use of both Khan properties for nonresident professional offices. By definition, therefore, office use of parcel 241 does not alter the area.

*(8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Nothing in the record suggests that the special exception could adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers. The Department of Planning found no adverse effects. Ex. 38 at 21.

*(9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

*(A) If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities at the time of subdivision review. In that case, approval of a preliminary plan of subdivision must be included as a condition of granting the special exception.*

*(B) If the special exception does not require approval of a preliminary plan of subdivision, The Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

*(C) With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

According to the Department of Planning report, approval of a preliminary plan of subdivision is required. Ex. 38 at 21-22.<sup>6</sup> Since paragraph (A) applies to parcel 241, no finding by this Board under paragraph (B) is necessary. However, I credit the Department of Planning's and Sutherland's assessments that public facilities will be adequate. Ex. 38 at 21-22; T. II at 27-28.

The Department of Planning report found no evidence that the proposed use will reduce vehicular or pedestrian safety. *Id.* at 22. Nothing in the record calls the Department's finding into question.

During subdivision review, it will be appropriate for the Planning Board to consider the adequacy of the Georgia Avenue sidewalk and the proposed development's compliance with the master plan. The Department of Planning makes a compelling case that the sidewalk should be

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<sup>6</sup> The property is currently an unplatted parcel. Before a building plan can be approved, a plat must be recorded through subdivision proceedings. See M.C. Code § 50-20.

substantially improved. Ex. 11-14. The Planning Board itself has recommended that the sidewalk be realigned and rebuilt to meet the standards of the Montgomery County Road Code. Ex. 21(a). At the hearing, Khan testified that some patients will arrive on foot along Georgia Avenue. The special exception will therefore generate new pedestrian traffic.

While special exception use will not *reduce* safety, the increased foot traffic will subject more pedestrians to potential harm as they navigate a sidewalk the Department calls “not safe.” *Id.* at 12. I therefore recommend that special exception approval be conditioned on changes to the Georgia Avenue sidewalk *if* the Planning Board, which has primary jurisdiction, recommends such changes during subdivision review.

*(b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board’s finding of facts regarding public facilities does not bind any other agency or department which approves or licenses the project.*

This provision requires no finding.

*(c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. The burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.*

As a result of the post-hearing submission of the lighting plan for the parking lot, petitioner has met his twin burdens of proof.

### **3. Additional requirements, § 59-G-1.22.**

*(a) The Board, the Hearing Examiner, or the District Council, as the case may be, may supplement the specific requirements of this Article with any other requirements necessary to protect nearby properties and the general neighborhood.*

My recommended conditions are listed below.

*(b) Using guidance by the Planning Board, the Board, the Hearing Examiner, or*

*the District Council, as the case may be, may require a special exception to comply with Division 59-D-3 if:*

*(1) The property is in a zone requiring site plan approval, or*

*(2) The property is not in a zone requiring site plan approval, but the Planning Board has indicated that site plan review is necessary to regulate the impact of the special exception on surrounding uses because of disparity in bulk or scale, the nature of the use, or other significant factors.*

No site plan approval is necessary in this residential zone.

**4. General development standards, § 59-G-1.23.**

*(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in § G-1.23 or in § G-2.*

Special exceptions are subject to the development standards of the underlying zone. The standards for the R-60 zone are met here:

Development Standard	Required	Provided	Applicable Zoning Provision
Maximum Building Height	2.5 Stories or 35 ft.	25 ft.	§ 59-C-1.327
Minimum Lot Area	6,000 sq. ft.	18,459 sq. ft.	§ 59-C-1.322(a)
Minimum Lot Width at Front Building Line	60 ft.	60 ft.	§ 59-C-1.322(b)
Minimum Lot Width at Street Line	25 ft.	55 ft.	§ 59-C-1.322(b)
Minimum Setback from Street	25 ft.	73 ft.	§ 59-C-1.323(a)
Minimum Side Yard Setback	8 ft. one side; sum of 18 ft. both sides	8 ft. south side yard; 17 ft. north side yard	§ 59-C-1.323(b)(1)
Minimum Rear Yard Setback	20 ft.	125 ft.	§ 59-C-1.323(b)(2)
Maximum Building Coverage	35%	10%	§ 59-C-1.328
Minimum Green Area	25%	64%	§ 59-G-2.38(c)

Parking (see discussion below)	5 spaces per every 1,000 sq. ft.	11 spaces for 1712 sq. ft.	§ 59-E-3.7
Parking Setback	16 ft.	16 ft.	§ 59-E-2.83(b)

*(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

The proposed parking lot meets the standards of Article 59-E. It will provide eleven spaces. Under § 59-E-3.7 two of those spaces are needed for the second floor apartment, a “one-family residence.” The other nine spaces are needed for the medical office use. Under § 59-E-3.7 an “[o]ffice, professional, nonresidential,” must provide “[f]ive parking spaces for each 1,000 square feet of gross floor area used by medical practitioners \* \* \*. The gross floor area calculation shall exclude storage area[s], and the attic and cellar areas of the building if not occupied by professional personnel.” The Department of Planning plausibly reads § 59-E-3.7 as requiring one parking space for every 200 square feet of gross floor area. Here that means the 1712-sq. ft medical-office space needs nine spaces in addition to the two needed for the residence.

The six-foot high board-on-board fence will meet the screening requirements of § 59-E-2.83(c).<sup>7</sup> As the previous chart shows, the lot meets the relevant 16-foot set-back standard.

Sec. 59-E-2.6 requires “[a]dequate lighting [to] be provided for surface parking facilities used at night \* \* \*. Lighting shall be installed and maintained in a manner not to cause glare or

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<sup>7</sup> Subsection (c) states:

*Screening. Each parking and loading facility, including driveway and dumpster areas, must be effectively screened from all abutting lots. Screening must be provided in a manner that is compatible with the area's residential character. Screening must be at least 6 feet high, and must consist of evergreen landscaping, a solid wood fence, a masonry wall, a berm, or a combination of them. Along all street right-of-ways screening of any parking and loading facility must be at least 3 feet high and consist of evergreen landscaping, a solid wood fence, or masonry wall.*

reflection into abutting or facing residential premises, nor to interfere with safe operation of vehicles moving on or near the premises.”

Based on the lighting plan (ex. 42(b)), I agree with Sutherland that the proposed parking lot light will provide sufficient illumination for the safety and security of patients and employees using the parking lot after dark. For reasons already discussed, the light will not reach abutting residences. There is no reason to believe that the amount of light emitted will interfere with the safety of automobile traffic on, much less off, the premises.

*(c) Minimum frontage. In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21: \* \* \**

Inapplicable. The special exception use meets all minimum frontage requirements. See chart.

*(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

This property was granted a small-property exemption. Ex. 7(b).

*(e) Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception.*

*Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

The special exception does not require a water quality plan. The Department of Planning report does not address the point



*(f) Signs. The display of a sign must comply with Article 59-F.*

The proposal to mount an unlighted sign bearing the doctors' names, no larger than two square feet, complies with Article 59-F. See § 59-F-4.2(2).

*(g) Building compatibility in residential zones. Any structure that is constructed, reconstructed, or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. \* \* \**

The expanded building will be compatible with the surrounding residential neighborhood. Its building materials, brick and siding, are consistent with the materials used in the existing building. Its bulk, 53.5 feet long (plus a 5.75 foot entry-way) and 42.75 foot wide is extremely large for a residential building but is proportionate to the site.

*(h) Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

*(1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

*(2) Lighting levels along the side and rear lot line must not exceed 0.1 foot candles.*

The parking lot light will be buffered by a light shield and by the fence I recommend. According to the lighting plan, it will not emanate more than 0.1 foot candles along the side and rear lot lines. A recommended condition for approval of the special exception would require the light fixtures along the southern side of the building to be calibrated not to emanate more than 0.1 foot candles along the side and rear lot lines. Another recommended condition would limit the number of lights that may be used during time periods more than 30 minutes after office hours.

**5. Specific Standards: § 59-G-2.38. Offices, professional, nonresidential.**

*An existing single-family structure may be used for professional office purposes by any member or members of a recognized profession, such as a doctor, lawyer, architect, accountant, engineer, veterinarian, but not including the following:*

- (a) a medical, dental or veterinarian clinic*
- (b) an in-patient treatment facility*
- (c) a general business office, such as an insurance company office, a trade association, a manufacturing company, an investment company, a bank or a real estate company.*

The petition requests use of a single-family house for medical offices to be used by no more than two accredited physicians at a time. The offices will not be used as a clinic. A medical clinic is defined in the Ordinance as “[a]ny building or group of buildings occupied by 3 or more medical practitioners and related services for the purpose of providing health services to people on an outpatient basis.” § 59-A-2.1. Here, fewer than three doctors will be on site at any time and a condition to that effect is included among my recommendations. The medical practice will not provide in-patient treatment.

*The property must be:*

- (a) located in a central business district that is designated as being suitable for the transit station-residential (TS-R) zone on an approved and adopted sector plan;*
- (b) designated as suitable for a nonresidential professional office in the R-60 zone on an approved and adopted master or sector plan and located along a highway with an existing right-of-way width of at least 90 feet or along a portion of an arterial road designated as a boundary of a Central Business District; or*
- (c) located in the R-90 zone and*
  - (1) designated as historic in the Master Plan for Historic Preservation;*
  - (2) located along a highway with an existing right-of-way of at least 120 feet; and*
  - (3) contain a structure formerly used for nonresidential purposes.*

Only subsection (b) is relevant. It is met here. Parcel 241 is expressly designated as suitable for non-residential professional office use in the R-60 zone by the Kensington-Wheaton master plan. It is located on a road 120 feet wide, Georgia Avenue, even if the special exception will make no meaningful use of the road. Both People's Counsel and Khan's counsel argued that access to the road is not a criterion; the subsection simply requires offices to be "located along" a highway at least 90 feet wide. T. II. at 70-72. I agree that the section can reasonably be read literally without creating absurd consequences using the standard enunciated in *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006) (citations omitted):

We have stated the rules governing construction so often that only the most cursory repetition is necessary. Our goal is to ascertain and implement the legislative intent, and if that intent is clear from the language of the statute, giving the language its plain and ordinary meaning, we need go no further. We do not stretch the language used by the Legislature in order to create an ambiguity where none would otherwise exist.

*The Board must find that the property:*

- (a) will not constitute a nuisance because of traffic or physical activity;*
- (b) will not affect adversely the use and development of adjacent property;*
- (c) will have at least 25 percent of the lot area devoted to green area.*

The use will not create a nuisance because of traffic or other physical activity. The traffic generated is, on average, low. Parking noise, lighting, and exhaust will be adequately mitigated by landscaping. The use and development of adjacent property will not be adversely affected. Almost 64% of the parcel will be left as green space.

*The Board may allow for other than a building designated as historic in the Master Plan of Historic Preservation, the exterior of the premises to be changed, altered or modified provided the single-family character and the basic residential appearance of the building are retained. A historic area work permit must be obtained before any work may be done to alter the exterior features of an historic structure.*

The present building is not designated as historic. It will retain its single family character and residential appearance as the architectural drawings reproduced above demonstrate.

**IX. RECOMMENDATIONS AND CONDITIONS.**

I recommend granting the petition with the following conditions:

1. Petitioner shall be bound by his testimony and exhibits filed on his behalf during these proceedings, as well as the representations of his counsel and the testimony of his site-planner witness to the extent that their representations and testimony are identified in this report. In particular:


- a. No more than two physicians shall be on site at a time.
- b. No more than two medical assistants shall be on site at a time.
- c. Office hours shall be restricted to the following times: 9:00 a.m. to 5 p.m. Mondays, Wednesdays, and Fridays; 9:00 a.m. to 7:00 p.m. Tuesdays and Thursdays; 10 a.m. to 2:00 p.m. Saturdays.
- c. Medical-office use shall be limited to the first floor of the building and basement use shall be limited to storage.
- d. No more than one exterior sign, no larger than two square feet, is permitted. The sign shall be mounted on the building at the first-floor level. The sign shall have no illumination.
- e. Petitioner shall implement and maintain the landscape plan depicted in exhibit 40(b), including erection of a six-foot high board-on-board fence along the southern property line.
- f. Petitioner shall construct a handicapped-usable ramp for movement across Grandview

Avenue at its intersection with Cory Avenue as depicted on exhibit 40(a).

- g. Construction of the building and other on-site improvements must conform to exhibits 29(b) and 40(a).
  - h. Lighting for the parking lot shall conform to the lighting plan, ex. 42. The parking lot light will be lit only between dusk and half an hour after office hours, *i.e.*, until 7:30 p.m. on Tuesdays and Thursdays and 5:30 p.m. on other weekdays.
  - i. No more than four outdoor building lights (preferably fewer) shall be lit at any time later than half an hour after office hours. This condition does not preclude additional lighting when triggered by motion detectors. Light fixtures on the southern side of the building must be calibrated not to emanate more than 0.1 foot candles along the side and rear lot lines.
2. The co-owner of the property, Bebe Z. Khan, shall file a declaration with the Board agreeing to be bound by all conditions imposed by the Board.
  3. Petitioner shall obtain approval of a preliminary plan of subdivision.
  4. Petitioner shall reconstruct the sidewalk along 12014 Georgia Avenue if directed to do so by the County Planning Board during subdivision review.
  5. The final sediment control plan must be consistent with the limits of disturbance as shown on the approved forest conservation exemption dated August 20, 2008.
  6. Petitioner must obtain and satisfy the requirements of all licenses, permits, and approvals necessary to implement the special exception as granted, including but not limited to building permits, use and occupancy permits, and permits necessary to construct the Grandview Avenue ramp.

7. Petitioner shall at all times ensure that the special exception use and facility comply with all applicable codes (including but not limited to building, life, safety, and handicap accessibility requirements), regulations, directives, and other governmental requirements.

Respectfully submitted.



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LUTZ ALEXANDER PRAGER  
*Hearing Examiner*

Dated: April 27, 2009