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I. STATEMENT OF THE CASE

A. Procedural Background

On October 16, 2008, Petitioner Holy Cross Hospital of Silver Spring, Inc., filed a petition seeking to modify existing Special Exception BOA # S-420-G to permit a new seven-story, “South Patient Tower,” an expanded North Garage and associated upgrades. Neither the number of beds nor the number of employees would change. Petitioner also requests a Parking Setback Waiver to permit approximately ten additional parking spaces, east of the South Patient Tower along the fire lane access drive, and within the required setback from the southern and eastern property lines. In addition, the special exception modification application is consolidated with Petitioner’s request for a Variance, BOA # A-6279, to allow an encroachment into the required rear-yard setback (a 128-foot variance) and an increase in building lot coverage to 52.4 percent (a 17.4 percent variance).

Holy Cross Hospital is located at 1500 Forest Glen Road, Silver Spring, Maryland, in the R-60 Zone. The site covers 14.21 acres and is located on the south side of Forest Glen Road, at its intersection with Dameron Drive.

Holy Cross was first granted a special exception in 1959 (CBA-816), and it currently operates under numerous special exceptions and modifications, the most recent being S-420-G.¹

¹ Technical Staff provided a history of the special exception and its modifications (Exhibit 32, p. 7):

Holy Cross Hospital is currently operating under a special exception that was originally granted in 1959, [authorizing a 340-bed hospital (BAS-816, also referred to as CBA-816)]. Other special exceptions approved by the Board of Appeals for the subject use include: S-420 to construct a 112-bed addition to the [“existing 330 bed hospital”] approved in 1976; S-420-A to increase the hospital square footage and add additional parking spaces approved in 1983; S-420-B to add laboratory facilities approved in 1989; S-420-C for hospital structural modifications approved in 1990; S-420-D for upgrading exterior lighting, constructing a 2-story addition and expanding parking structures approved in 1994; S-420-E to add approximately 216,051 square feet to the existing hospital, including constructing a 51,660 square foot Physicians Specialist’s Wing, [and limiting licensed beds to 408] approved in 2001; S-420-F to allow construction of a minor extension to the service building at the rear of the Hospital, and to relocate temporary trailers on site approved in 2002; and S-420-G to add approximately 216,153 square feet to the entire site, construct a drive aisle and parking facility within a portion of the scenic easement, add 325 square feet to the existing accessory building in the rear of the property, placement of three generators on an enclosed pad site in the rear of the property and add an internal

On December 5, 2008, the Board of Appeals issued a “corrected notice,” setting the hearing in this case for March 27, 2009, before the Office of Zoning and Administrative Hearings. Exhibit 25. Petitioner moved to amend the petition twice before the initial hearing, and notices were issued on January 6 and February 9, 2009 (Exhibits 27 and 30). Petitioner filed additional documents in the days before the hearing, so the Hearing Examiner announced the new filings at the hearing, and indicated that the record would be kept open at least ten days after the hearing for commentary. 3/27/09 Tr. 8-9.²

Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) issued its Report on February 23, 2009 (Exhibit 32), recommending approval of the special exception and the parking waiver, with conditions.³ On March 12, 2009, the Montgomery County Planning Board voted unanimously to recommend approval of the special exception modification and the parking waiver, with conditions, as stated in the March 12 letter of its Chairman (Exhibit 34).⁴

Joint letters of support for the petition were received on November 26, 2008 (Exhibit 22) and March 11, 2009 (Exhibit 33) from the Northmont Citizens’ Association and the Forest Grove Citizens’ Association. Northmont represents the neighbors abutting the hospital’s eastern boundary, and Forest Grove represents the neighbors abutting its northern boundary. Exhibit 33.

On March 18, 2009, the Hearing Examiner wrote to Petitioner’s counsel expressing his concern about whether the case was in a posture to go forward with the hearing. Exhibit 35. Specifically, there had been inadequate legal justification presented for the requested variance, and the Planning Board’s letter appeared to leave open-ended questions with regard to landscaping, lighting and noise. Petitioner responded with additional filings on March 19, 2009 (Exhibit 36) and

access point to the existing parking garage adjacent to Dameron Drive approved in 2002.

² There were two hearing days. References to the transcript of the March 27, 2009 hearing are designated “3/27/09 Tr. xx,” and references to the April 13, 2009 hearing transcript are designated “4/13/09 Tr. xx.”

³ The Technical Staff report is frequently quoted and paraphrased herein.

⁴ The Planning Board simultaneously approved a Scenic Easement Encroachment to the west of the subject site and the Final Forest Conservation Plan for the site.

March 25, 2009 (Exhibit 37).

A public hearing was convened, as scheduled, on March 27, 2009, to hear the special exception petition, the variance petition and the waiver request. In addition to Petitioner's witnesses, the Northmont and Forest Grove Citizens' Associations expressed their support, as did one individual neighbor, Henry Clark.⁵ Another neighbor, Cheryl Gustitus, testified in opposition. The hearing could not be completed, so it was announced, with the agreement of the participants, that it would resume on April 13, 2009.

The hearing reconvened, as scheduled, on April 13, 2009, and was completed. Another member of the community, Wayne Goldstein, testified in support of the petition, directly addressing the variance issues in the case.⁶ Martin Klauber, People's Counsel for Montgomery County, participated in both days of the hearing and expressed his support for the proposed special exception modification, the variance and the parking waiver. 4/13/09 Tr. 175.

The record was held open until May 4, 2009, for additional filings by Petitioner and responses thereto. Petitioner did file final plans and other materials (Exhibits 77 and 79), and the People's Counsel also filed some comments regarding conditions for the community liaison council (CLC) he proposed. Exhibit 78. The record closed, as scheduled on May 4, 2009.

On May 15, 2009, the Board of Appeals reopened the record to receive its Resolution granting Petitioner's request to consolidate the special exception and variance cases. Exhibit 80. The record was reopened again on June 12, 2009, to receive corrected final versions of Petitioner's plans (Exhibit 81). Since the corrections were typographical in nature, the record closed again on the same date (Exhibit 82).

⁵ Mr. Clark also raised some concerns about traffic matters.

⁶ Although Mr. Goldstein was a member of the Montgomery County Civic Federation, he testified only on his own behalf at the hearing. His testimony was quite helpful to the Hearing Examiner in analyzing the issues regarding the requested variances. Unfortunately, Mr. Goldstein passed away shortly after the hearing. His passing is a great loss to the community and to all who knew him.

B. Scope of the Hearing

Zoning Code §59-G-1.3(c)(4) provides that the public hearing on modification applications must be limited to discussion of those aspects of the special exception use that are directly related to the proposed modifications, and if the total floor area will be expanded by more than 25% or 7,500 square feet, the Board may review “the underlying special exception,” but only to a limited extent, as specified in Zoning Ordinance §59-G-1.3(c)(4)(A). That section provides:

(A) *After the close of the record of the proceedings, the Board must make a determination on the issues presented. The Board may reaffirm, amend, add to, delete or modify the existing terms and/or conditions of the special exception. The Board may require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26, if (1) the proposed modification expands the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less, and (2) the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.* [Emphasis added.]

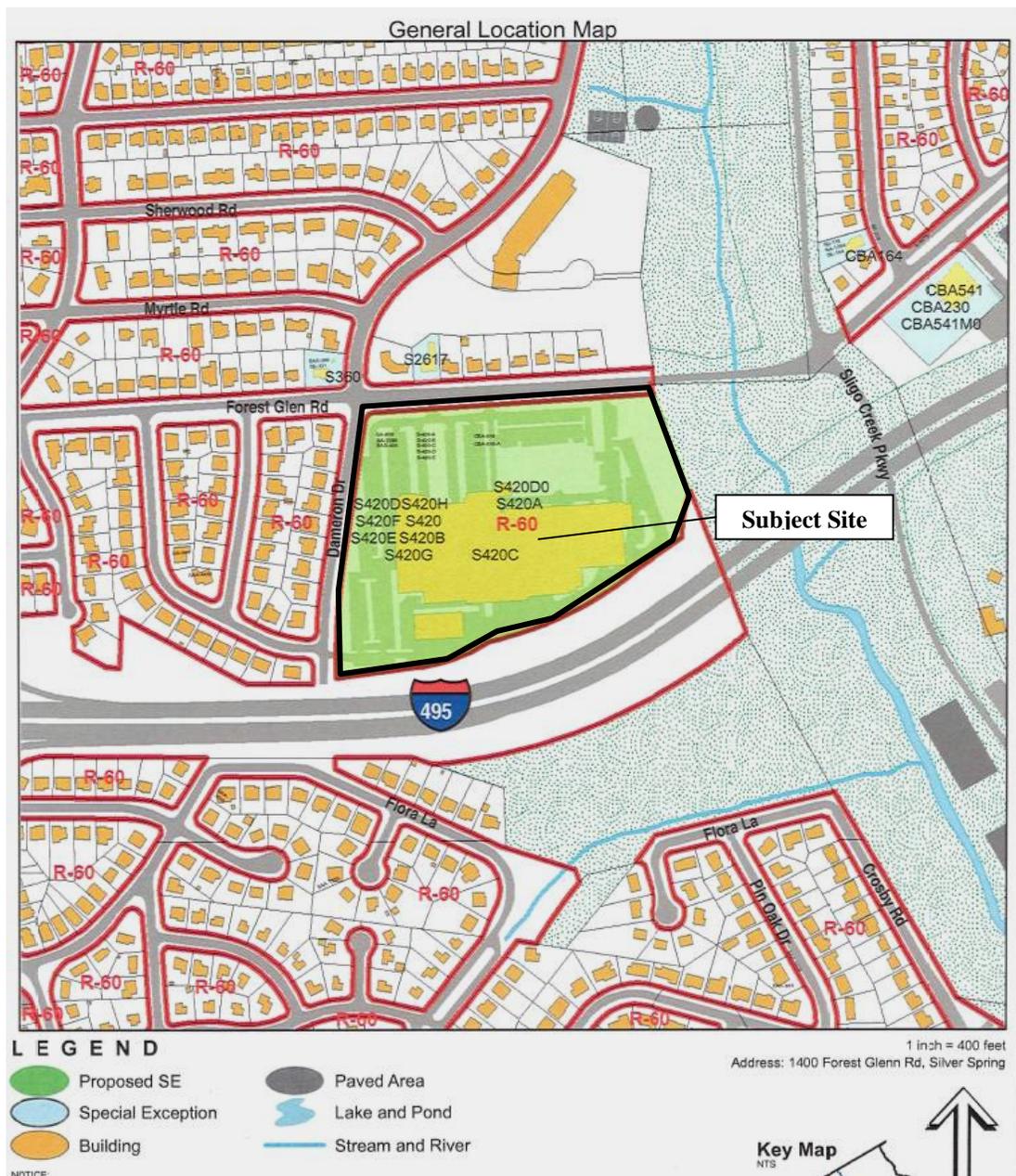
In the subject case, the planned expansion to the hospital floor space will add a net total of 208,266 square feet, according to Petitioner’s final Site Plan (Exhibit 81(e)). If the Board also finds that the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, then the Board could require that the underlying special exception be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26.

As will appear more fully below, the Hearing Examiner finds that the proposed modifications would not change the nature or character of the special exception, nor are the proposed changes so extensive as to create substantial adverse effects on the surrounding neighborhood. The Hearing Examiner concludes that the petition, the parking waiver and the requested variances should be granted.

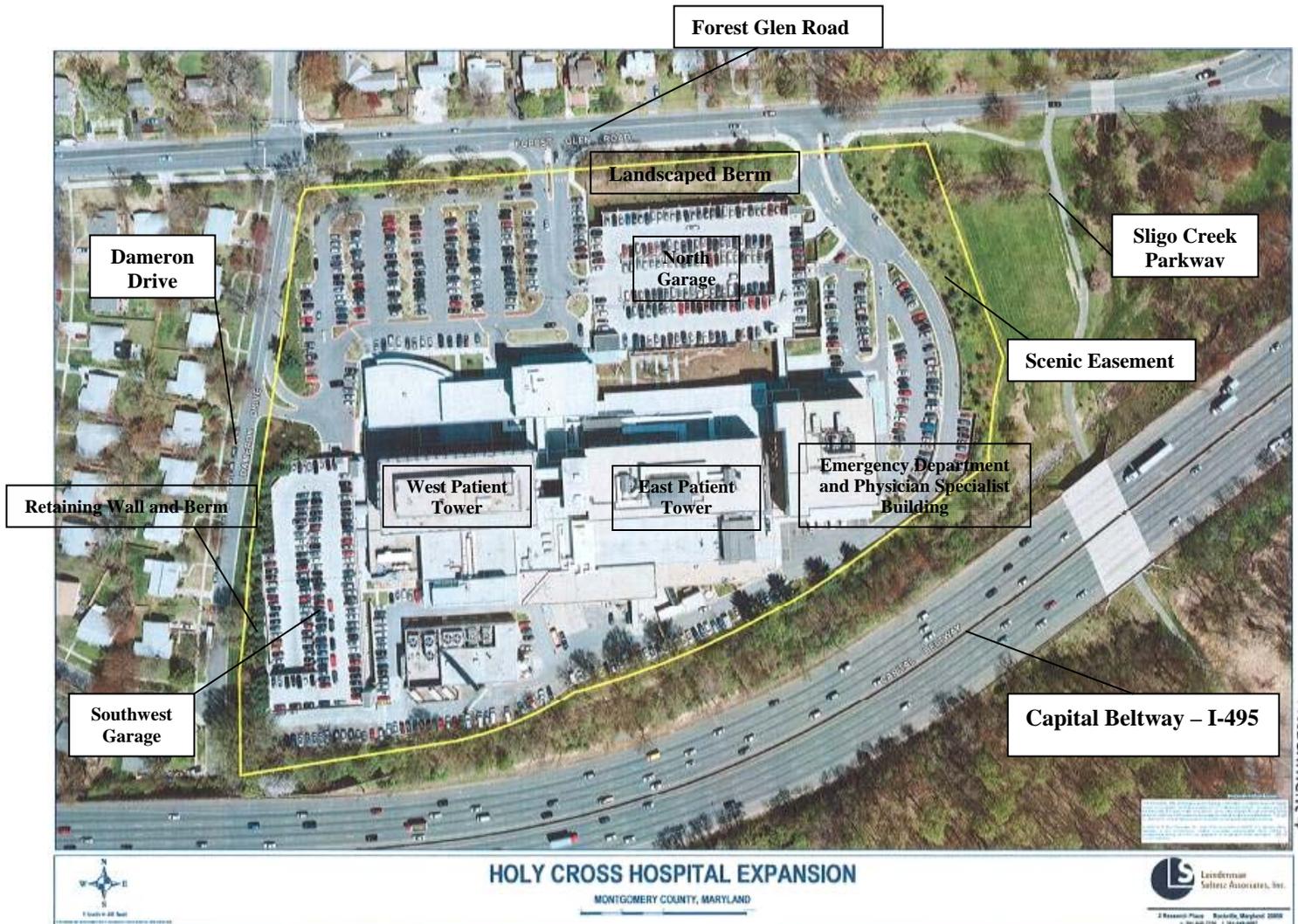
II. FACTUAL BACKGROUND

A. Subject Property and Current Use

Holy Cross Hospital operates on a site located on the south side of Forest Glen Road, at its intersection with Dameron Drive. It is described as Parcel B in Plat No. 11289, recorded in 1976, and as Parcel N607 on Tax Map JP22 (Tax Account No. 00963917). Its location, which is approximately 1,700 feet to the east of the intersection of Forest Glen Road and Georgia Avenue, can be seen on the General Location Map appended to the Technical Staff report (Exhibit 32) as Attachment 1.



As reported by Technical Staff (Exhibit 32, p. 6), the property is more or less rectangular in shape and has frontage on both Forest Glen Road and Dameron Drive. It is developed with a 408-bed, 685,000 square-foot, non-profit, teaching hospital, which consists of an eight-story West Patient Tower, a six-story East Patient Tower, a five-story Emergency Department and Physician Specialist Building to the east of the East Patient Tower, a Professional & Community Education Center just north of the West Patient Tower, a Service Building south of the West Patient Tower, two parking garages (Southwest and North), and surface parking throughout the campus. The North Parking Garage is located along Forest Glen Road in front of the hospital. This garage is a four level structure, with three levels below and one level at grade. The Southwest Parking Garage, located on Dameron Drive at the rear of the site, is a five level structure, with three levels below grade, one level at grade and one level above grade. These features can be seen below in an aerial photo of the hospital (Exhibit 45):



A retaining wall and a berm, with trees, evergreens and ground plantings, screen the southwest parking facility from the nearby residences on Dameron Drive, and a large, heavily landscaped berm, with trees and shrubs, screens the north parking facility from the residences across Forest Glen Road. The remaining on-site parking is provided in surface parking in front of the hospital, as well as in the rear and along the eastern edge of the site, adjacent to the scenic easement and Sligo Creek Park. There are currently 1,509 parking spaces provided on site, 1177 of which are in structured parking and 332 of which are in surface parking. Because the amount of on-site parking is chronically insufficient to meet demand (3/27/09 Tr. 101-102), off-site parking is provided at Sligo Creek Golf Course and other satellite facilities, and the hospital provides shuttle vans to the hospital. 4/13/09 Tr. 84-85 and Petitioner's Statement in Support of Special Exception Modification (Exhibit 3, pp. 8-9).

Access to the property is currently provided from two access points along Forest Glen Road and one access point on Dameron Drive. Currently, the main entrance to the site is from Forest Glen Road to the surface parking lot.

Petitioner's civil engineer, Stephen Goley, described the topography of the site (3/27/09 Tr. 238-280), noting that its highest point is an elevation of around 335 feet, which is located along Dameron Drive, 200 feet or so from the intersection with Forest Glen. Along Dameron Drive, the land drops approximately from the highest point to an elevation of about 222 feet at the southwest corner of the property near the Beltway. That would be about 15 feet from end to end along Dameron Drive. On Forest Glen Road, the land falls as one goes east, running at about a three percent slope until the main entrance, and then it starts dropping at about a six percent slope down to the easternmost corner along Forest Glen Road. This results in about a 40 foot drop-off on Forest Glen Road, from 334 feet down to its northeastern end at 295. About 20 percent of the site drains towards the south end of Dameron, and the remaining 80 percent drains towards the low corner at the northeast point.

According to Technical Staff (Exhibit 32, p. 12), the site is in the Sligo Creek watershed, but it is not within a Special Protection Area or Primary Management Area. There are no forests, streams, wetlands, 100-year floodplain, or associated environmental buffers on-site. Steep and severe slopes are found along perimeter property lines, with the greatest concentration located along the entire east property line, adjacent to Sligo Creek Park and the scenic easement on the subject site, which is owned by the Maryland-National Capital Park and Planning Commission.

As set forth in Petitioner's Statement in Support of the Special Exception Modification (Exhibit 3, pp. 6-7), the Hospital operates 24 hours a day, 365 days a year, employing a total of 2,310 nurses, allied health and supporting staff. The Hospital hosts the largest medical staff in Montgomery County, with approximately 1,300 physicians enjoying privileges. This past year, the Hospital served approximately 167,000 patients. Approximately 50 Hospital-based physicians practice out of the Hospital each day, and approximately 125 attending physicians come to the campus each day to visit their patients. In addition, the Hospital offers weekly Continuing Medical Education (CME) programs for physicians. Depending on the content and timing of the CME program, between 25 and 100 physicians will attend.

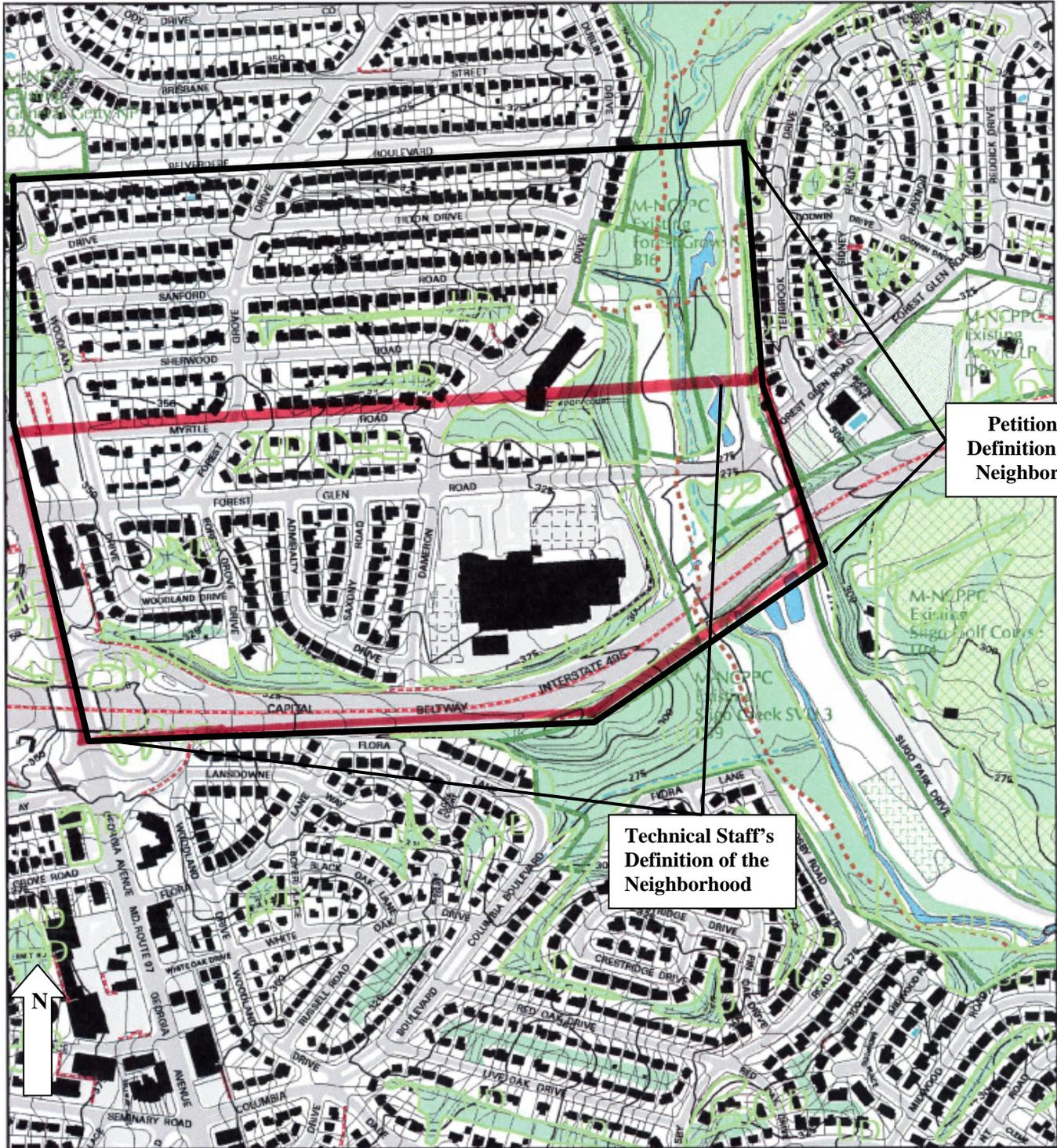
B. The Neighborhood

The neighborhood was defined by Technical Staff (Exhibit 32, p. 6) as bordered by Myrtle Road to the north, Sligo Creek Park to the east, the Capital Beltway (I-495) to the south and Georgia Avenue to the west. Petitioner's land planner, Phil Perrine, differed only on the northern border, which he would define further to the north than did Technical Staff. Mr. Perrine suggested a northern boundary of Belvedere Boulevard, which he described as a divided medium road to the north. He felt that his definition would better encapsulate the Northmont community and was consistent with past definitions of the hospital's neighborhood. A map appended to the Technical

Staff report as Attachment 2 is reproduced below, and it has been annotated to show both neighborhood definitions. 3/27/09 Tr. 182-183.

HOLY CROSS HOSPITAL (S-420H)

Attachment 2



**Petitioner's
Definition of the
Neighborhood**

**Technical Staff's
Definition of the
Neighborhood**

Though it will not make a significant difference in this case, the Hearing Examiner accepts Petitioner's recommended neighborhood definition because the testimony of community witnesses indicated that there was a significant amount of hospital generated traffic in their neighborhood (3/27/09 Tr. 43 and 52), and the larger neighborhood definition better serves to include the entire area where this hospital-related traffic would have an impact.

As outlined by Technical Staff, the properties to the north and west of the subject site are zoned R-60 and are developed with single-family, detached residential homes. Adjacent to and east of the subject site is Sligo Creek Park, owned by the M-NCPPC and zoned R-60. A 100-foot wide scenic easement is located between the park and the site's eastern property line, established by a plat filed in 1976 (Exhibit 17(c)). A portion of the easement area has been re-graded and replanted with flowering trees, shrubs and ground cover.

The southern property line abuts the outer loop of the Capital Beltway (I-495), and there is a noise wall constructed by the State Highway Administration (SHA) along this property line. Montgomery Hills Baptist Church is located at the southeast corner of Georgia Avenue and Forest Glen Road. The Forest Glen Metrorail station is on the west side of Georgia Avenue, approximately 2,500 feet from the subject site. Mr. Perrine notes in his Land Panning Report (Exhibit 14, p. 3) that within the neighborhood is an elementary school leased by the Hospital and utilized for administrative offices and community services; a three-story medical building fronting onto Georgia Avenue at Forest Glen Road; a medical practitioner's office located at the southwest corner of Forest Glen Road and Woodland Drive; an accessory apartment at Dameron Drive and Belvedere Boulevard; and a non-resident, medical practitioner on Georgia Avenue.

C. Proposed Modification

In Special Exception Petition S-420-H, Holy Cross Hospital seeks to modify the existing

special exception to permit (Exhibit 32, p.5):

- (1) Construction of a new, seven-story building, “the South Patient Tower,” on the southern edge of the property. This addition would permit the hospital to convert to single-bed rooms, without adding additional beds or staff to the 408-bed hospital;⁷
- (2) Demolition of the existing central utility plant and construction of a new one inside of the proposed South Patient Tower;
- (3) Expansion of the existing North Parking Garage, which will result in a net increase of 259 on-site spaces (*i.e.*, from the current 1509 spaces to 1768 spaces);
- (4) Relocation of the eastern-most vehicular entrance to the property along Forest Glen Road approximately 90 feet farther east to accommodate the expansion of the North Parking Garage;
- (5) Relocation of the existing fire lane access drive to the south side of the South Patient Tower;
- (6) Extension of the berm along Forest Glen Road, and the addition of extensive landscaping on it and on the eastern property line to better screen the expanded North Garage from both the scenic easement and the homes on Forest Glen; and
- (7) A parking setback waiver to allow approximately ten additional parking spaces, east of the South Patient Tower along the fire lane access drive, and within the 10-foot setback from the southern and eastern property lines.

In order to qualify for the special exception, Petitioner requires variances to permit an encroachment into the 128-foot setback required by Zoning Ordinance §59-G-2.31(3) for a 128-foot-tall building (*i.e.*, a 128-foot variance) and an increase in building lot coverage to 52.4 percent (*i.e.*, a 17.4 percent variance above the 35% lot coverage permitted in the R-60 Zone).⁸ The variance requests, which are the subject of BOA# A-6279, will be discussed in Part II. E. of this report.

Kevin Sexton, the President and CEO of Holy Cross Hospital, testified that Petitioner’s plan is

⁷ Although the hospital was approved for a total of 442 bed (*i.e.*, 330 beds plus 112 beds) by S-420 in 1976, that appears to have been cut down to 408 beds by ¶11 on page 5 of the BOA’s May 4, 2001 Resolution in S-420-E. Technical Staff refers to the bed limit as 408 (Exhibit 32, pp. 3 and 5), and Petitioner accepted that limit in its proposed condition 2 (Exhibit 77(a)).

⁸ Petitioner originally requested a 20% variance, but that was reduced to 17.4% when Petitioner reduced the size of the proposed North Garage expansion, at the request of Technical Staff. Amended plans filed on February 5, 2009 (Exhibit 29 and attachments) and thereafter reflect this change.

to make the hospital more efficient by converting to private rooms and by adding much needed parking. Petitioner is switching to private rooms because that has become the standard in healthcare, as reflected in the American Institute of Architect's (AIA) Guidelines (Exhibit 62). Single-patient rooms help in infection control and make hospitals inherently more efficient. The expanded parking garage is needed because the Hospital's parking is "woefully undersized today." Cars are stack-parked throughout the facility. The complaint he gets more than any other, from all segments of the Holy Cross community, is that there is not enough parking. The additional parking is intended to alleviate an existing parking problem and to avoid spillover into the nearby residential community. 3/27/09 Tr. 80-104.

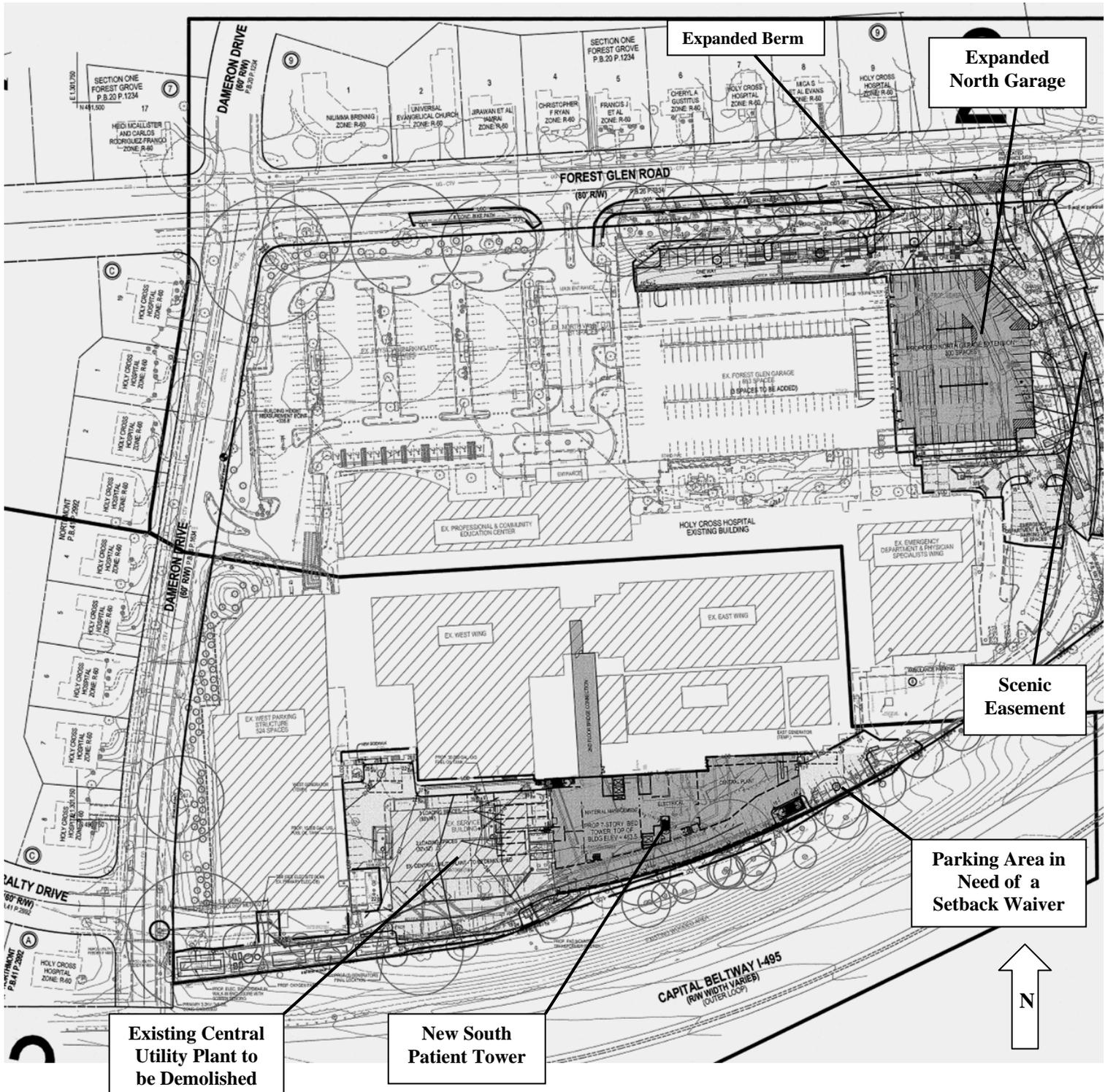
Petitioner's vision for the completed hospital is shown below (Exhibit 47):



According to Mr. Sexton, Petitioner has no additional long range plans to expand the hospital on this site, and has been selling the homes it owned across Dameron Drive (about a dozen of them). Mr. Sexton pointed out that neither new beds nor outpatient capacity is being added in this modification, so there is nothing inherent in this project that would increase the number of employees.

While there will be more square footage, it will be newer and easier to maintain. The number of nurses required is tied to the number of beds, not to the additional floor area. 3/27/09 Tr. 97.

The revised Site Plan (Exhibit 81(e)), is reproduced below and on the following pages:



HOLY CROSS HOSPITAL PROJECT DATA TABLE:

| | <i>Zoning Ordinance Development Standards</i> | | |
|---|---|--|---|
| | Standard Development for R-60 and Hospital Special Exception | Special Exception Approval S-420-G | As shown In Special Exception Revision S-420-H |
| Net Lot Area (AC): Min. Gross Tract Area (acres) | 5 ac. | 14.21 ac. (619,159 s.f.) | 14.21 ac. (619,159 s.f.) |
| Min. Frontage: | 200' | 200' | 625' |
| Hospital Gross Floor Area (GFA): | 6000 s.f. | 685,000 s.f. | 219,194 s.f. Added 10,928 s.f. Removed 893,266 s.f. Total GFA |
| Building Coverage (Includes Accessory Buildings) | 35% | 195,000 s.f. (31.5%) (Excluding coverage from existing garages) Note: Existing incl. garages = 243,115 s.f. or 39.3% | 324,343 s.f. (52.4%) (Including coverage from existing and proposed garages) (Variance Requested) |
| Green Space Requirement (percentage of gross tract area): | N/A | 160,994 s.f. (26%) | 132,350 s.f. (21.3%) |
| Maximum Building Height (FT): | 145' | max. height of 145' | max. height of 145' 128' proposed* |
| Maximum Accessory Building Height (FT): | 20' from ex. grade | N/A | N/A |
| Minimum Building Setbacks (FT): front (Street - Forest Glen) front (Street - Dameron Drive) side (Silgo Creek) rear (Beltway) | 50' or Height of Building where adjacent land is residential | 240' 25' 155' 47' | 240' 118' 169' 128' required 0' proposed (Variance Requested) |
| Minimum Parking, Loading, and Maneuvering Area Setbacks (FT): front (Street - Forest Glen) front (Street - Dameron Drive) side (Silgo Creek) rear (Beltway) | 25' (R-60 front yard) 25' (R-60 front yard) 18' (R-60 side yd x 2) + 10' = 28' 10' (59-E 2.81(b)(1)) | | 25' 25' 65' 0' (Waiver Requested) |
| Parking: Total Spaces (including surface spaces, accessible and van accessible spaces) Structured Parking Spaces Surface Parking Spaces Ambulance Spaces Motorcycle Spaces Bicycle Parking | | 1509 1177 332 8 4 20 | 1768 1480 288 8 10 20 |
| Parking Requirement Tabulation: Requirements per Zoning Ordinance: 1 Space/1000 s.f. of total floor area, +1 Space/Resident Doctor, +1 Space/Visiting Doctor, + 1 Space/3 Employees on the Major Shift | | | |
| Parking Required per Total Square Footage | | 685 | 894 |
| Parking Required per Resident Doctor | | 74 | 74 |
| Parking Required per Visiting Doctor | | 245 | 245 |
| Parking Required per 3 Employees | | 342 | 342 |
| Total Parking Required | | 1346 | 1555 |
| Total Parking Provided | | 1509 | 1768 |

* As measured from the building height measurement point located on the adjoining curb grade on Dameron Drive, as shown on the plans

GENERAL NOTES

1. Existing 2' contour interval topography prepared by Virginia Resource Mapping in June 2008 , supplemented by Loiederman Soltesz Associates, Inc. in June 2008.
2. Boundary information by Loiederman Soltesz Associates, Inc., May 2008.
3. Total Area of Tract: 14.2139 ac.; 619,157 s.f.
4. Existing Zoning: R-60
5. The subject property is located within WSSC grid 212 NW 02.
6. This project lies within the Forest Glen Sector Plan Area.
7. There are no cultural or historic features on this site according to M-NCPPC Locational Atlas of Historic Sites in Montgomery County, MD, 1976.
8. Existing Water & Sewer Service Categories: W1/ S1.
9. Grid coordinates are per Maryland State Plane Datum (NAD 83/91).
10. The property is located in the Sligo Creek watershed, Class I Waters.
11. There are no 100-year Floodplains, Wetlands, or other significant natural resources on this site according to available information and field inspections, Dec. 1997 and Feb. 2000.
12. There are no rare, threatened, and endangered species or critical habitats on this site according to available records.
13. No Forest exists on-site.
14. The NRI-FSD # 4-00255 was approved on May 5, 2000, for this site.
15. A Final Forest Conservation Plan #S-420-EAG was approved on April 8, 2002. An amended Final Forest Conservation Plan is submitted with this Special Exception Site Plan.
16. The previous Special Exception Plan #S420-G was approved on April 7, 2004.

Some of these features may be more easily seen on a rendered site plan (Exhibit 46):



Mr. Perrine testified as to the distances between the new construction and existing residences. From the new South Tower to the nearest residence (on Dameron Drive) would be 480 feet. It would be 670 feet from the South Tower to the nearest residence on Forest Glen Road. From the new addition to the North Parking Garage, it would be 180 feet to the nearest residence on Forest Glen Road, and 730 feet to the nearest residence on Dameron Drive. 3/27/09 Tr. 188-189.

1. The Proposed Modifications, in Detail:

The South Patient Tower:

Petitioner provides details regarding the proposed South Patient Tower in its Statement in Support of Special Exception Modification (Exhibit 3, pp. 10-11):

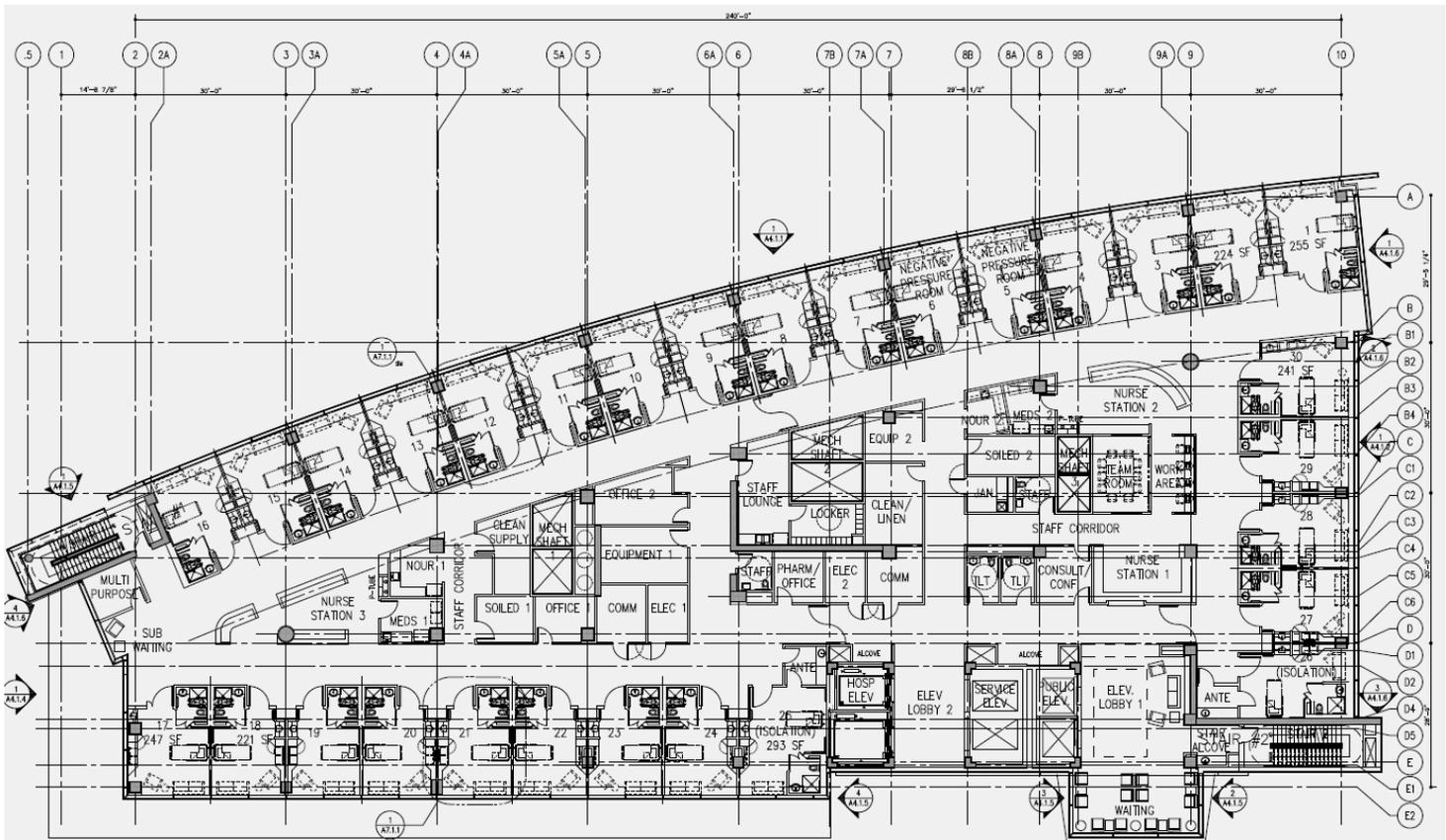
The South Patient Tower will be located on the southern edge of the Property, and will be comprised of approximately 219,000± gross square feet at an approximate height of 128 feet, . . . well within the permitted 145-foot height. The South Patient Tower will contain private patient rooms and will include a partial basement with a new central utility plant (the existing central utility plant is proposed to be demolished and relocated to the South Patient Tower); an access drive, service docks, loading area, and expanded material handling facilities on the ground level; surgical support facilities, preparation, and recovery on the first level; critical care on the second level; and patient rooms on the upper levels organized in units of 30 beds per floor, providing up to 180 beds. The current plan is to build out 150 of these beds (on five (5) floors) and to shell the top floor.

The addition of the South Patient Tower will also allow the Hospital to convert existing semi-private patient rooms to private rooms, provide enhanced surgical services, and otherwise address the public need for more efficient and effective health care. In converting to private rooms, the Hospital will improve patient satisfaction, enhance family involvement in the care process, reduce hospital-acquired infections, and eliminate room assignment conflicts. The South Patient Tower, located above the existing service yard area adjacent to the existing mechanical plant, will connect to the ground, first, and second levels of the existing Hospital.

. . . The South Patient Tower will provide four-sided architecture responding to the need to ensure compatibility with adjacent internal and external uses. The south face of the Hospital and associated Physician Specialist Building comprise a building face length of approximately 660 feet extending along the Beltway. The proposed South Patient Tower will occupy about 265 feet of this elevation. The South Patient Tower will provide a new “face” to the very visible façade of the Hospital along the Beltway, comprised primarily of seven (7) stories of glass resting on a two-story base of metal panels and split-face block to provide an aesthetically pleasing view from the Beltway. The narrow eastern and western

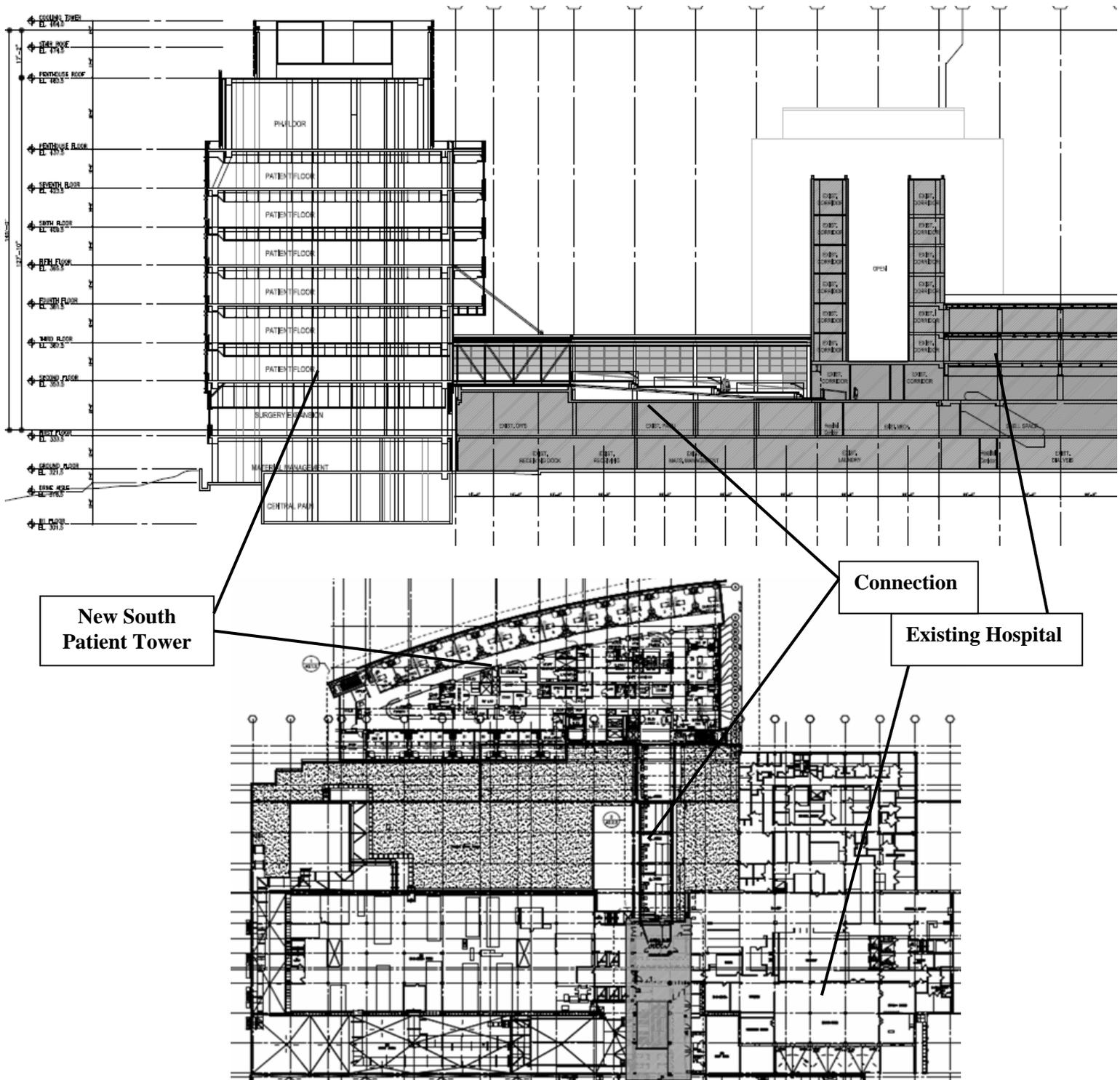
South Patient Tower elevations will be a combination of glass and metal panel with the east stairwell serving as a signature element for the entire Hospital complex. The northern façade, facing the existing Hospital East and West Patient Towers, will be predominantly metal panel with window treatment more in scale with the punched windows on the existing precast buildings. The ground level of the South Patient Tower will be partially open to provide vehicular service access to the facility, functionally serving as an elevated base supporting the tower elements above.

The South Tower will consist of seven floors – six floors of 30 patient beds each and one floor of expanded surgery. The floor plan for a typical floor in the new South Patient Tower is shown below (Exhibit 5(o)):



Directly underneath the surgery floor is a new central utility plant. The old one will be removed. According to Petitioner's Architect, Philip Tobey, the new patient tower must have at least 30 beds on a floor because that is the optimum size for a nursing unit. There must also be functional

connectivity. As shown in Petitioner's Transverse Section (Exhibit 11(k)) and in the Second Floor Composite Plan (Exhibit 5(l)), both reproduced below, the South Tower will connect directly back to the core of the hospital complex, which enables the tower to be supported optimally. There will be a direct relationship, on one floor, between the surgical suite in the existing building and an expanded pre- and post-operative space adjacent to it. 3/27/09 Tr. 119-121.



Mr. Tobey also noted that the planned site for the South Tower is the optimal location in terms of the mass of that building in relationship to the existing residential areas, and that the project has been commended by Parks and Planning and the County for its architecture (3/27/09 Tr. 122-123), which can be seen below in two renderings submitted by Mr. Tobey (Exhibits 11(c) and (e)).



Stephen Goley, Petitioner's civil engineer, testified that public facilities on site are adequate to provide needed services to the new building. There will be electric and gas relocations to accommodate the new construction, mostly located to the rear of the property. The WSSC gave conceptual approval for the project in a letter dated December 8, 2008 (Exhibit 66). 3/27/09 Tr. 249-250.

Petitioner also produced testimony (3/27/09 Tr. 135-154, 164) and reports (Exhibits 36(a) and 51) from Kevin Miller, an expert in acoustics, establishing that traffic noise from the beltway impacting the new South Patient Tower and any noise impacting the community from the new hospital equipment, such as generators and exhaust fans, can be sufficiently mitigated to meet applicable noise control standards, both internal and external. Petitioner agreed to the following condition, which is recommended in Part V of this report:

The Petitioner must design and construct the South Patient Tower to attenuate projected exterior noise sources to an interior noise level not to exceed 45 dBA L_{dn} . The Petitioner must comply with the County Noise Ordinance (Chapter 31B of the County Code) for onsite noise sources as they may affect offsite residential properties at all times. The Petitioner shall submit a certification to the Department of Permitting Services, with a copy to the Board of Appeals, when applying for the initial building permit that these requirements relating to internal and external noise will be met. During the construction process, the Petitioner must adhere to the “maximum allowable noise levels for construction” (Section 31B-6(a) of the County Code). The construction contract between the Petitioner and its general contractor will include provisions relating to construction activity compliance with the County Noise Ordinance.

The Parking Garage Expansion:

Petitioner’s Statement in Support of Special Exception Modification (Exhibit 3, pp. 11-13) provides the following additional detail about the proposed North Garage expansion and other proposed modifications:

The proposed parking expansion of the North Parking Garage will be an eastward expansion of the existing garage, which is setback from Forest Glen Road approximately 70 feet with grade falling from west to east toward Sligo Creek Park. The approximately [95,000]⁹ square-foot precast concrete structure will add approximately [300] parking spaces for a net increase of approximately [259] parking spaces. [The expansion will be added on the eastern side of the existing garage and will align with it.] The expansion will utilize the existing ramping system, and each of the four (4) levels of the expansion will simply be flat floor plates that horizontally extend the four (4) existing levels, thereby maximizing the utility and efficiency of the overall parking structure. Architecture, lighting, stair details, and signage will be extensions of the existing system. The eastern berm and landscape planting along Forest Glen Road that currently screen the North Parking Garage from the street will be extended along the face of the expansion.

Other Modifications:

The eastern-most vehicular entrance to the Property along Forest Glen Road will be relocated approximately 90 feet further east to accommodate the proposed North Parking Garage expansion, also improving sight lines at the intersection of the entrance and Forest Glen Road. The other existing Property access points will be unchanged by the Proposed

⁹ The original plans called for a 115,000 square-foot expansion, but the size of the expansion was cut back in accordance with Technical Staff’s recommendation, in order to increase the setback from Sligo Creek Park from 45 feet to 65 feet. This also resulted in a reduction in the number of parking spaces that will be added from a net increase of 306 spaces to a net increase of 259 parking spaces. The Hearing Examiner has substituted the correct numbers in the quoted paragraphs, in brackets.

Improvements. The existing fire lane access drive extending around the rear of the Property will be relocated slightly to extend under the south side of the South Patient Tower. Approximately 10 parking spaces are proposed east of the South Patient Tower along the fire lane access drive; these parking spaces are proposed to be located within the 10-foot setback from the eastern side Property line, requiring a parking setback waiver by the Board of Appeals as part of this Petition and pursuant to Section 59-E-4.5 of the Zoning Ordinance. All other vehicular site circulation, including access for public, staff, service, and emergency traffic, will remain unchanged.

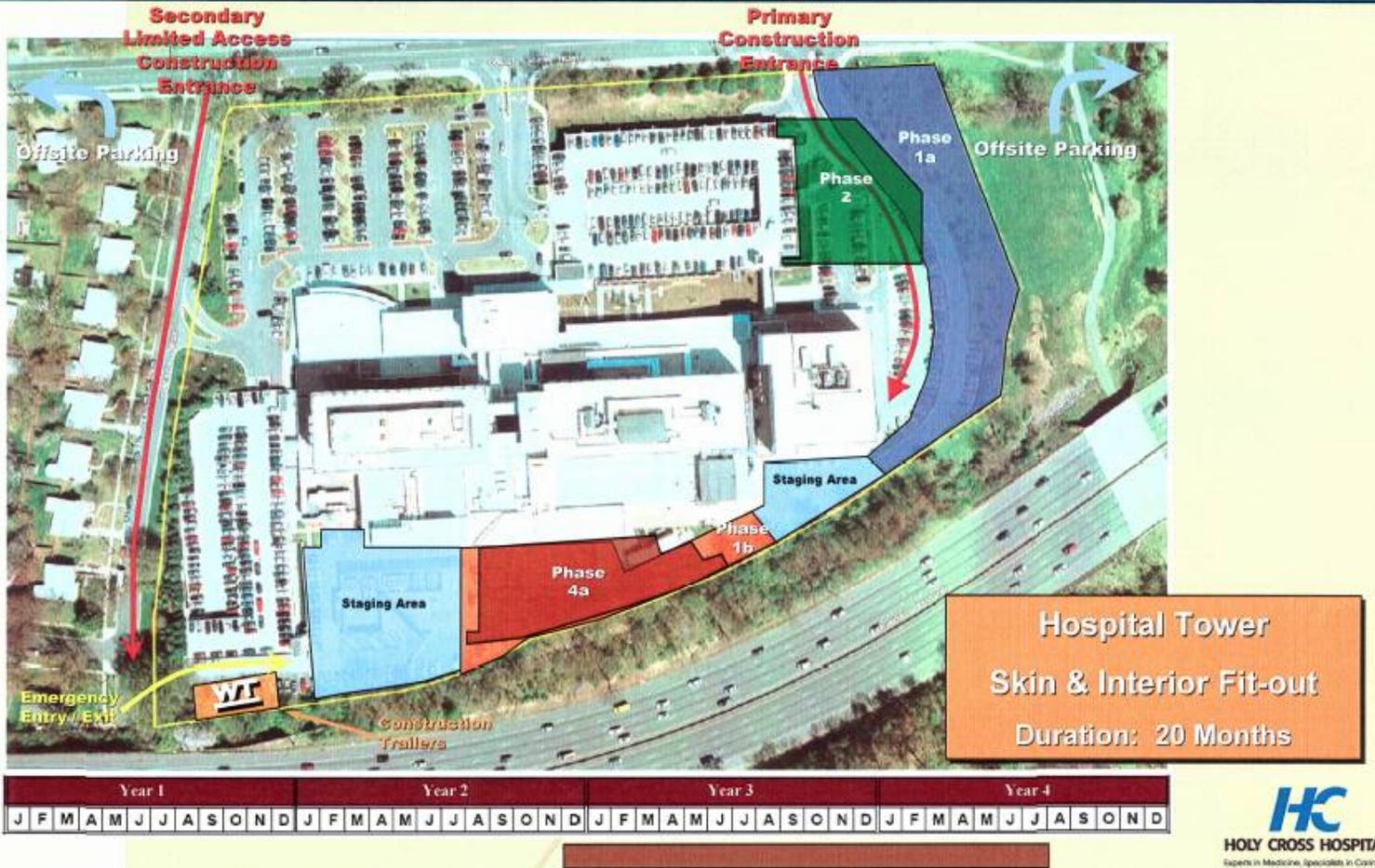
As indicated above, the North Parking Garage and relocated access drive will encroach upon the 100-foot wide Scenic Easement, thereby requiring approval by the M-NCPPC Parks Department per the terms of the Scenic Easement (which was created solely by notation on the Record Plat). [The Planning Board gave that approval on March 12, 2009 (Exhibit 34).] The existing access drive serving the eastern access point to Forest Glen Road currently encroaches upon the Scenic Easement. The possible further encroachment into the Scenic Easement in order to reduce the impact of any Hospital expansion to the surrounding neighborhood is recognized in the Sector Plan and in previous Special Exception modifications for the Hospital (BOA Case No. S-420-E). . . . [E]xtensive landscaping will be planted within the Scenic Easement to the satisfaction of the M-NCPPC Parks Department to offset any impacts and to further promote overall compatibility of the Proposed Improvements with the surrounding community.

The matter of screening within the Scenic Easement will be discussed in the next numbered section of this report, in connection with the Landscaping Plan.

Phasing:

Since this project will take a number of years to complete, Petitioner has submitted a draft construction phasing plan that Technical Staff reports “addresses the noise and dirt issues created by constant truck activity, limits hours of operation for the contractors, and requires the use of main roads for access and egress instead of the use of side streets to avoid lights and traffic.” Exhibit 32, p. 15.

The Phasing Plan contemplates four years of construction. As shown in the sample from Phase 4a (part of Attachment 16 to the Technical Staff report), reproduced on the next page, the staging areas for the construction are located against the Beltway so as to have as little impact on the nearby residential community as possible.



Other steps to reduce the impact of construction will be discussed in Part II. D. of this report, in connection with the concerns of the neighbors.

2. Landscaping, Lighting and Signage:

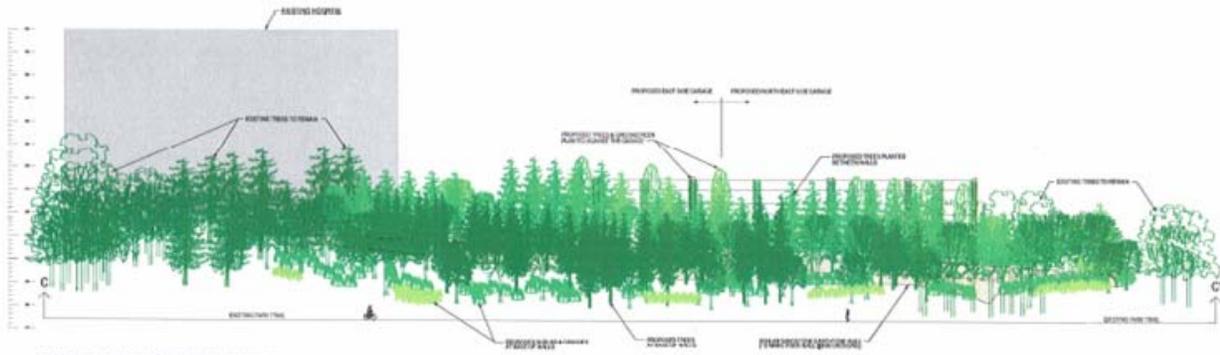
Landscaping:

Holy Cross Hospital already has significant landscaping. Additional landscaping will be needed as the result of the planned construction, especially along the eastern property line, adjacent to Sligo Creek Park, and on the northern property line, adjacent to Forest Glen Road and across from residences located along that roadway. The existing condition on the eastern property line and

Petitioner's proposed landscaping within the Scenic Easement to buffer the view of the extended garage, are shown below in two Scenic Easement exhibits (Exhibit 49(b) and 29(g)):



PHOTOS OF EXISTING SCENIC EASEMENT AND BUFFER ALONG PARK PROPERTY



PROPOSED BUFFER ALONG PARK PROPERTY
SCALE: 1/8" = 1'-0"

A set of site plan diagrams. The left diagram is titled 'EXISTING SCENIC EASEMENT AND BUFFER LANDSCAPING' and shows a site with various trees and landscaping. The middle diagram is titled 'PROPOSED BUILDING, ACCESS DRIVE, AND BUFFER LANDSCAPING' and shows a building footprint, an access drive, and landscaping. The right diagram is titled 'RECORD PLAT SHOWING SCENIC EASEMENT' and shows a site plan with a shaded area for the scenic easement. Below it is another diagram titled 'FOREST GLEN SECTOR PLAN SHOWING HOLY CROSS HOSPITAL' showing a building footprint and surrounding landscape.

EXISTING SCENIC EASEMENT AND BUFFER LANDSCAPING

PROPOSED BUILDING, ACCESS DRIVE, AND BUFFER LANDSCAPING

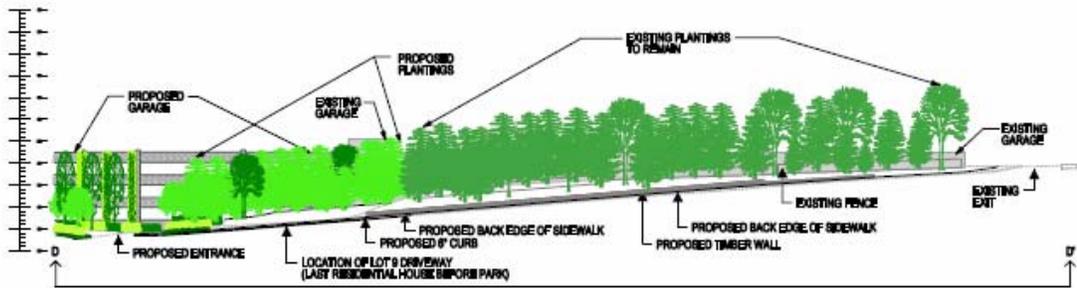
RECORD PLAT SHOWING SCENIC EASEMENT

FOREST GLEN SECTOR PLAN SHOWING
HOLY CROSS HOSPITAL

The buffer along Forest Glen Road (a landscaped berm) and the planned additional landscaping and berm are shown below in Ex. 79(e), followed by the Rendered Landscape Plan for the site (Ex. 81(h)):



PHOTO OF EXISTING LANDSCAPE BUFFER ALONG FOREST GLEN ROAD

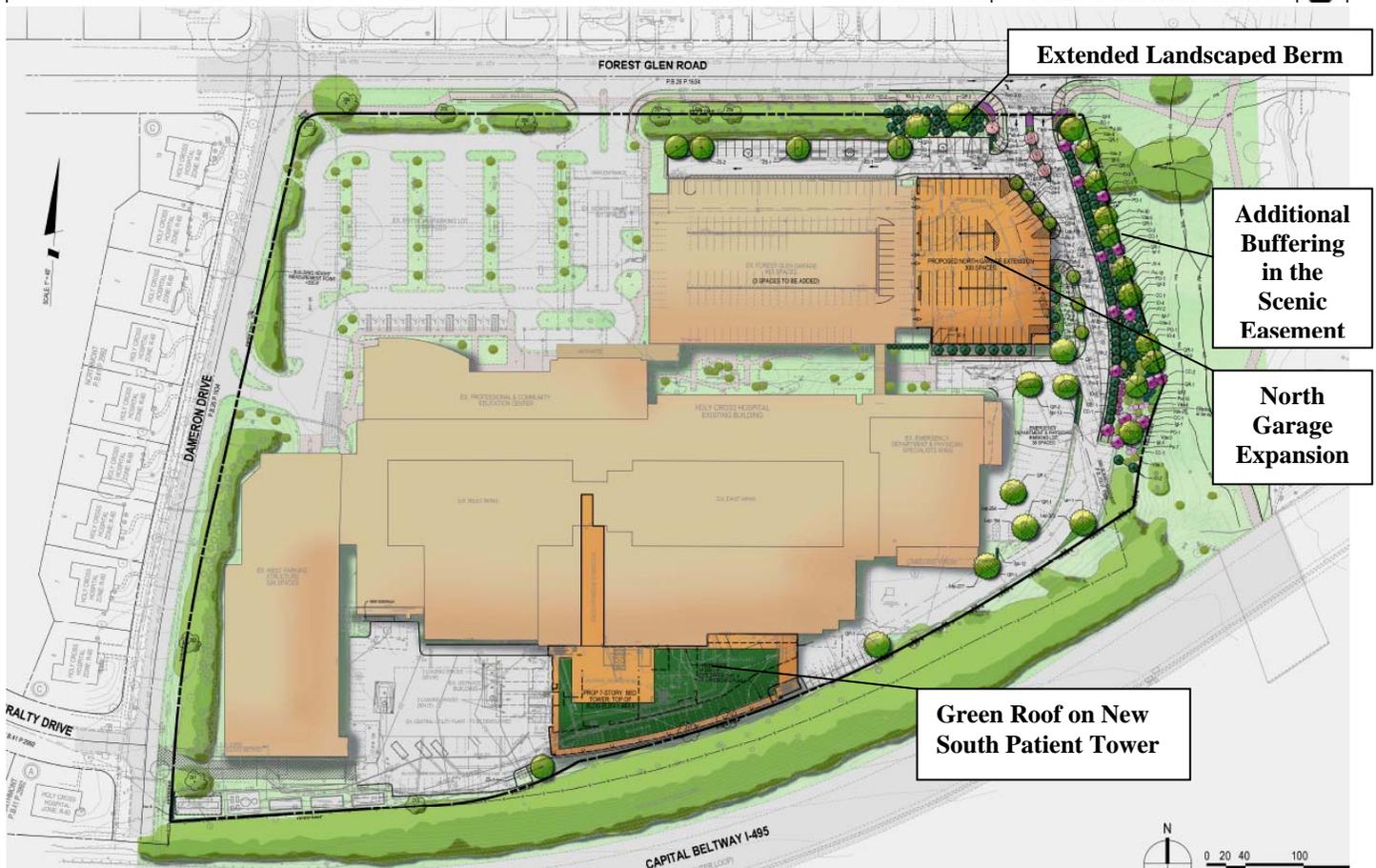


PROPOSED LANDSCAPE BUFFER ALONG FOREST GLEN ROAD

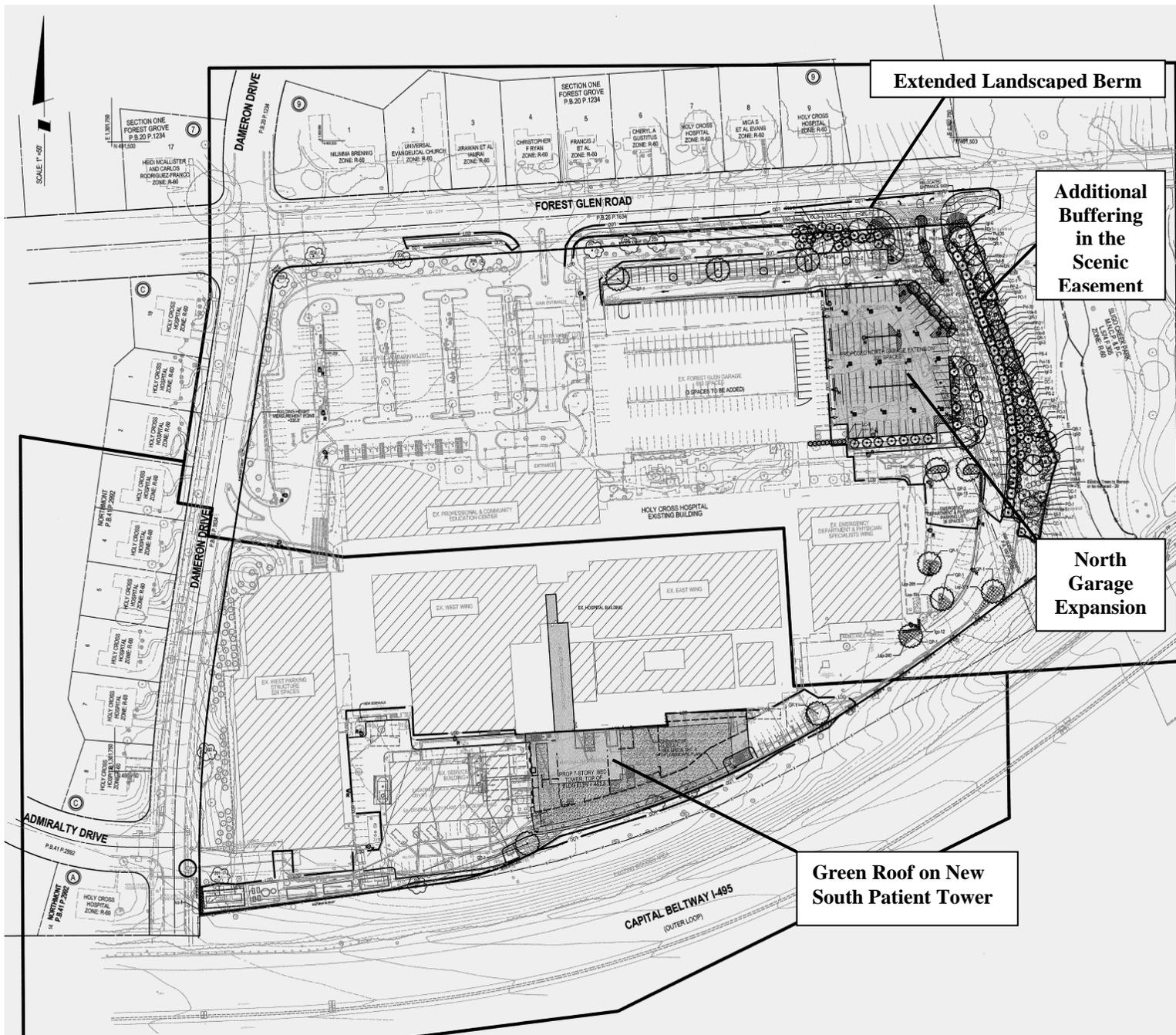


CURRENT VIEW FROM LOT 9 (LAST RESIDENTIAL HOUSE BEFORE PARK)

FOREST GLEN LANDSCAPE BUFFER EXHIBIT



Petitioner had originally intended its expansion of the North Garage to extend further east into the Scenic Easement. At the recommendation of Technical Staff, the Planning Board approved a smaller encroachment into the Scenic Easement and required additional buffering therein (Exhibit 34). Petitioner therefore redrew its plans, and added the additional buffering as indicated in the exhibits reproduced above. The final plans reflect the additional landscaping required by Staff and the Planning Board. The final Landscape Plan for the site (Exhibit 81(a)) is reproduced below:



| Plant Schedule (minus scenic easement planting) | | | | | | | |
|---|----------|------|------------------------------------|----------------------------|-----------------|-----------|--------------------------|
| TYPE | QUANTITY | Code | SCIENTIFIC NAME | COMMON NAME | HEIGHT/SPREAD | B&B/CONT. | REMARKS |
| Shade Trees | 3 | GB | Ginkgo Biloba 'Princeton Sentry' | Princeton Sentry Ginkgo | 2 1/2- 3' Cal. | B&B | |
| | 1 | PO | Platanus occidentalis | American Sycamore | 2 1/2- 3' Cal. | B&B | |
| | 11 | QP | Quercus phellos | Willow Oak | 2 1/2- 3' Cal. | B&B | |
| | 2 | QPL | Quercus phellos | Willow Oak | 6 1/2 - 7' Cal. | B&B | Min. 28' -30' ht. |
| | 5 | QR | Quercus rubra | Red Oak | 2 1/2- 3' Cal. | B&B | |
| Ornamental Trees | 1 | CC | Cercis canadensis | Eastern Redbud | 8'-10' | B&B | |
| | 5 | PI | Prunus x incam 'Okame' | Okame Cherry | 8'-10' | B&B | |
| | 2 | CL | Cupressocyparis leylandii | Leyland Cypress | 14-16' | B&B | Full, Branched to ground |
| | 7 | CLL | Cupressocyparis leylandii | Leyland Cypress | 28-30' | B&B | Full, Branched to ground |
| | 3 | CLG | Cupressocyparis leylandii | Leyland Cypress | 31-33' | B&B | Full, Branched to ground |
| Evergreen Trees | 7 | IF | Ilex attenuata "Fosters 2" | Foster's Holly | 8'-10' | B&B | Full, Branched to ground |
| | 2 | IO | Ilex opaca | American Holly | 12-14' | B&B | Full, Branched to ground |
| | 7 | IOL | Ilex opaca | American Holly | 18-20' | B&B | Full, Branched to ground |
| | 9 | JC | Juniperus chinensis 'Spartan' | Spartan Juniper | 8'-10' | B&B | |
| | 5 | PF | Pinus flexilis | Limber Pine | 8-10' | B&B | |
| | 2 | PS | Picea Omorika | Serbian Spruce | 8'-10' | B&B | |
| | 11 | Igl | Ilex glabra | Inkberry | 18"-24" | #5 | |
| Shrubs | 25 | Igc | Ilex glabra 'Compacta' | Compact Inkberry Holly | 18"-24" | #3 | |
| | 15 | Lga | Lagerstroemia 'Gamad' | Cherry Dazzle Crape Myrtle | 18"-24" | #3 | |
| | 29 | Pls | Prunus laurocerasus 'Schipkaensis' | Schipka Cherry Laurel | 18"-24" | #5 | |
| | 8 | Vde | Viburnum dentatum | Arrowwood Viburnum | 18"-24" | #5 | |
| | 2,293 | Lsp | Liriope spicata | Creeping Lilyturf | | Peat Pot | 12" spacing |
| Groundcover | 36 | Pvi | Panicum virgatum | Switchgrass | | #2 | |
| | 54 | Pah | Pennisetum alopecuroides 'Hamelin' | Hamelin's Fountain Grass | | #2 | |
| Vine | 9 | Cra | Campsis radicans | Trumpet Vine | | #2 | |
| Annuals | 675 | Ann | Variety | | | | |

| Scenic Easement Plant List | | | | | | | |
|----------------------------|----------|------|--|----------------------------|----------------|-----------|-------------|
| TYPE | QUANTITY | Code | SCIENTIFIC NAME | COMMON NAME | HEIGHT/SPREAD | B&B/CONT. | REMARKS |
| Shade Trees | 4 | GB | Ginkgo Biloba 'Princeton Sentry' | Princeton Sentry Ginkgo | 2 1/2- 3' Cal. | B&B | |
| | 4 | PO | Platanus occidentalis | American Sycamore | 2 1/2- 3' Cal. | B&B | |
| | 1 | QP | Quercus phellos | Willow Oak | 2 1/2- 3' Cal. | B&B | |
| | 4 | QR | Quercus rubra | Red Oak | 2 1/2- 3' Cal. | B&B | |
| | 4 | IF | Ilex attenuata "Fosters 2" | Foster's Holly | 8'-10' | B&B | |
| | 23 | PF | Pinus flexilis | Limber Pine | 8'-10' | B&B | |
| | 16 | PS | Picea Omorika | Serbian Spruce | 8'-10' | B&B | |
| | 5 | TP | Thuja plicata 'Green Giant' | Green Giant Arborvitae | 8'-10' | B&B | |
| | 7 | CC | Cercis canadensis | Eastern Redbud | 8-10' | B&B | |
| Shrubs | 32 | Igl | Ilex glabra | Inkberry | 18"-24" | #5 | |
| | 12 | Lga | Lagerstroemia 'Gamad' | Cherry Dazzle Crape Myrtle | 18"-24" | #3 | |
| | 15 | Pls | Prunus laurocerasus 'Schipkaensis' | Schipka Cherry Laurel | 18"-24" | #5 | |
| | 28 | Vde | Viburnum dentatum | Arrowwood Viburnum | 18"-24" | #5 | |
| | 9 | Vra | Viburnum x rhytidophylloides 'Allegheny' | Allegheny Viburnum | 18"-24" | #5 | |
| | 71 | Pah | Pennisetum alopecuroides 'Hamelin' | Hamelin's Fountain Grass | | #2 | |
| Grasses | 71 | Pvi | Panicum virgatum | Switchgrass | | #2 | |
| | 208 | Lsp | Liriope spicata | Creeping Lilyturf | | Peat Pot | 12" spacing |
| Vine | 18 | Cra | Campsis radicans | Trumpet Vine | | #2 | |

Petitioner's final plans also reflect additional plantings along the Forest Glen Road berm and its 40-foot extension, in accordance with Technical Staff's recommendations. In addition, the plantings will be taller at the time of planting, to satisfy the concerns of the neighbors, as expressed in the testimony of Cheryl Gustitus. 3/27/09 Tr. 66-79 and 4/13/09 Tr. 38-41.

With these changes, both Technical Staff and the Planning Board recommended approval of the proposal for modification of the special exception to allow the needed hospital expansion and additional parking. Exhibit 32, p. 9 and Exhibit 34. The Hearing Examiner agrees.

Lighting:

With regard to lighting in residential zones, Zoning Ordinance §59-G-1.23(h) provides:

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:

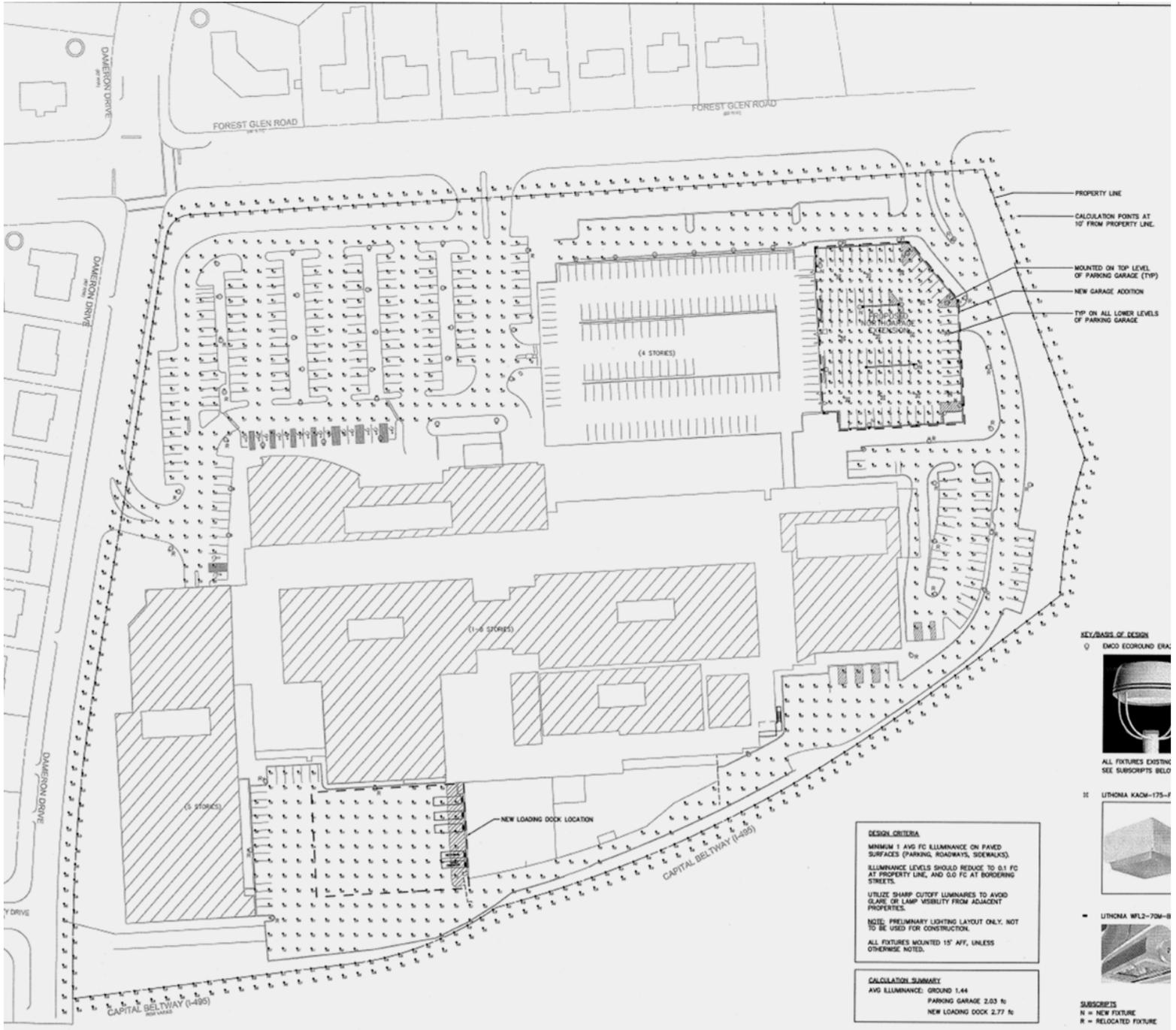
- (1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

The new lighting proposed by Petitioner was described by Petitioner's civil engineer, Stephen Goley (3/27/09 Tr. 264 and 4/13/09 Tr. 62-68), who indicated that Petitioner will be extending the current lighting scheme, fixtures, pole heights and light bulb types to the new areas to provide the lighting levels desired and recommended by the Illuminating Engineer Society of North America, in addition to complying with Technical Staff's recommendation to maintain a light level of 0.1 footcandles along the lot lines.

At the second hearing, Mr. Goley introduced an amended Photometrics and Lighting Plan (revised 4/7/09 - Exhibit 70).¹⁰ Based on the reduced size of the garage after Technical Staff review, all the lights along the eastern property line have been pulled in from the property line. The relocation of those lights further away from the property line has caused the lighting levels at the eastern property line to go down. Along the western edge, adjacent to Dameron Drive, there have also been some changes to either eliminate or move light poles and fixtures away from the property line, again achieving the maximum 0.1 footcandles at the property line. Towards the rear, the lights have moved back as well. The results of these changes are displayed on a point by point plot showing that, in all cases, the lighting levels and footcandles at the property boundaries are 0.1

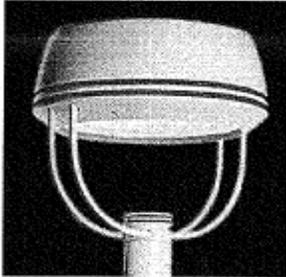
¹⁰ Exhibit 70 is identical to Exhibit 77(e), which was submitted by Petitioner to get copies to all interested parties.

footcandles or less. The lighting fixtures that are being proposed are the same type as the existing lighting fixtures that are used on site. The revised Photometrics and Lighting Plan (Exhibit 70) is reproduced below:



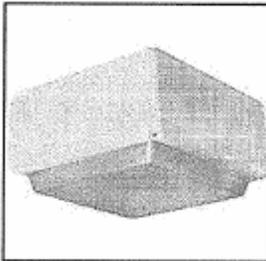
KEY/BASIS OF DESIGN

⊙ EMCO ECOROUND ERA20-3H-175MH

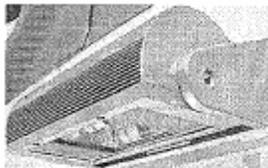


ALL FIXTURES EXISTING TO REMAIN, UON.
SEE SUBSCRIPTS BELOW.

⊗ LITHONIA KACM-175-FP



■ LITHONIA WFL2-70M-BP



SUBSCRIPTS

N = NEW FIXTURE
R = RELOCATED FIXTURE

DESIGN CRITERIA

MINIMUM 1 AVG FC ILLUMINANCE ON PAVED SURFACES (PARKING, ROADWAYS, SIDEWALKS).

ILLUMINANCE LEVELS SHOULD REDUCE TO 0.1 FC AT PROPERTY LINE, AND 0.0 FC AT BORDERING STREETS.

UTILIZE SHARP CUTOFF LUMINAIRES TO AVOID GLARE OR LAMP VISIBILITY FROM ADJACENT PROPERTIES.

NOTE: PRELIMINARY LIGHTING LAYOUT ONLY. NOT TO BE USED FOR CONSTRUCTION.

ALL FIXTURES MOUNTED 15' AFF, UNLESS OTHERWISE NOTED.

CALCULATION SUMMARY

AVG ILLUMINANCE: GROUND 1.44

PARKING GARAGE 2.03 fc

NEW LOADING DOCK 2.77 fc

In Mr. Goley’s judgment, the lighting fixtures will not cause any glare into the neighboring residential communities to the west or to the north. Technical Staff found that “[t]he new site lighting will not directly impact the adjoining properties [and that] . . . the lighting and landscape plan [is] acceptable; however, the applicant must obtain approval of a final landscape and lighting plan by M-NCPPC technical staff before issuance of a building permit.” Exhibit 32, p. 22.

The Hearing Examiner finds that the relocation of the planned lighting, as described by Mr. Goley, results in compliance with the Zoning Ordinance’s requirement that lighting at the side and

rear property lines not exceed 0.1 footcandles, as demonstrated in the revised Photometrics and Lighting Plan (Exhibit 70).

Signage:

The final item in this section concerns signage. According to Mr. Goley (4/13/09 Tr. 74-78), there is one sign that will be relocated, corresponding with the relocation of the eastern entrance. That sign will just be picked up and moved down with the entrance. Its new location is shown on both the site plan and the landscape plan, just to the east of the east entrance, in the northeastern corner of the site. There will be a new signage plan prepared for wayfinding signs, but that does not yet exist. Petitioner's counsel stated that there are no additional identification signs for the hospital or any new illuminated signs, and that any other signage for the site would be the typical way-finding signs that would be approved as part of the permitting process. A condition is recommended in Part V of this report requiring Petitioner to submit a final signage plan, including wayfinding and other signs, to the Board of Appeals prior to the issuance of any sign permits.

3. Transportation and Parking:

Traffic:

Petitioner's expert in transportation planning and traffic engineering, Craig Hedberg, prepared a traffic study, addressing both local area transportation review (LATR) and a policy area mobility review (PAMR), which are the required types of analysis for a special exception. The study was updated as of December 2008 (Exhibit 26(a)).

Mr. Hedberg testified (4/13/09 Tr. 80-102; 132-142) that Technical Staff gave him a list of seven off-site intersections to be analyzed, along with the two site driveways that intersect with Forest Glen Road. He took existing peak period traffic counts at each of those intersections and evaluated the operations relative to the applicable policy area standards. The intersections are listed

in the summary table on pages 19 – 20 of Exhibit 26(a). He found that all intersections are operating under existing conditions within the congestion standard for the Kensington/Wheaton policy area, which is a critical lane volume (CLV) of 1600, except for the intersection of Georgia Avenue and Dennis Avenue which currently operates at a 1662 CLV level in the a.m. peak hour.

Under the background conditions, initially, there were no other approved developments that were identified by Transportation Staff within the study area, so the base background conditions would be the same as the existing conditions. The hospital currently rents approximately 55 parking spaces at the Sligo Creek Golf Course, and the hospital currently operates a shuttle van between the golf course and the main campus. However, the future of that lease may be in question, according to Mr. Hedberg, so he made a projection of the impact on the studied intersections if that parking moved to the hospital campus. That projection is included in the background traffic projection listed on pp. 19-20 of his Traffic Study. These results are shown in a Table from the Technical Staff report (p. 11).

Table 2 – Results of Intersection Capacity Analysis

| Intersection | Congestion Standard | Weekday Peak-Hour | Traffic Condition | | |
|--|---------------------|-------------------|-------------------|--------------|--------------|
| | | | <i>Existing</i> | Background | Total |
| 1. Forest Glen Road and Sligo Creek Parkway | 1,600 | AM | 1,187 | 1,203 | 1,203 |
| | | PM | 921 | 912 | 912 |
| 2. Forest Glen Road and Dameron Drive | 1,600 | AM | 928 | 928 | 928 |
| | | PM | 871 | 871 | 871 |
| 3. Forest Glen Road and Georgia Avenue | 1,600 | AM | 1,507 | 1,507 | 1,507 |
| | | PM | 1,438 | 1,438 | 1,438 |
| 4. Forest Glen Road and Seminary Road/Capital View | 1,600 | AM | 975 | 975 | 975 |
| | | PM | 1,148 | 1,148 | 1,148 |
| 5. I-495 Westbound Off Ramp, Georgia Avenue | 1,600 | AM | 1,190 | 1,271 | 1,217 |
| | | PM | 1,267 | 1,268 | 1,268 |
| 6. Georgia Avenue and August Drive | 1,600 | AM | 1,234 | 1,234 | 1,234 |
| | | PM | 1,154 | 1,155 | 1,155 |
| 7. Georgia Avenue and Dennis Avenue | 1,600 | AM | 1,662 | 1,662 | 1,662 |
| | | PM | 1,441 | 1,443 | 1,443 |

As can be seen in this Table, the additional background traffic increases the CLVs at some intersections, but not over the 1600 CLV congestion standard, and it did not increase the a.m. peak hour count at the one non-compliant intersection, Georgia Avenue and Dennis Avenue (Item #7). That remained at 1662 CLV.

Since no additional beds or staff will be added by the proposed modifications, the projection of total post-development traffic volumes also remains the same as the background level CLV at all intersections. Technical Staff agreed that these findings satisfy LATR. “[S]ince the proposed modification of the Hospital does not result in a projected increase of new vehicle trips through this intersection [*i.e.*, Georgia Avenue and Dennis Avenue], there is no increase to the measured CLV and thus no required mitigation to meet LATR.” Exhibit 32, p. 12.

Mr. Hedberg further testified that PAMR is satisfied because the new project will not create any additional trips. Even if there were a minor increase in employees as a function of overall hospital operations not related specifically to these improvements, the increase in trips amounts to less than half a trip, which is de minimis.

Technical Staff agrees that PAMR required no mitigation in this case. PAMR requires that an applicant in this neighborhood (the Kensington/Wheaton Policy area) mitigate 10% of their new vehicle trips; however, “[t]he proposed expansion of the hospital is not expected to generate new trips and therefore is not subject to PAMR trip mitigation measures.” Exhibit 32, p. 12. Technical Staff concluded that, as long as all conditions are satisfied, “the proposed Hospital modification satisfies the Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR) tests and will have limited impact on area roadway conditions and nearby pedestrian facilities.” Exhibit 32, p. 12.

As will be discussed in Part II. D. of this report, concerns about traffic in the area were expressed by both the local citizens’ associations and a neighbor, Mr. Henry Clark. Mr. Hedberg

discussed the transportation issues raised by Mr. Clark, and he concluded that, while they can be discussed in the CLC (which already exists for this special exception) and with the County, they are not matters that pertain to the modifications sought in this petition. The Hearing Examiner agrees since the proposed changes would lead to no additional patients and no additional staff. The only additional trips at the site will be caused by the possible elimination of satellite parking at the nearby Sligo Creek Golf course.

Petitioner has proposed a draft Transportation Management Plan (TMP – Exhibit 29(b)) to alleviate traffic and parking issues. Petitioner has agreed to a condition requiring it to use the CLC as a forum to finalize the TMP, with input from Technical Staff and DOT, for submission to the Board of Appeals prior to release of the initial building permit. Measures to be discussed at the CLC, as they relate to reducing trip generation, include a possible shuttle bus to the Glenmont Metro Station; the possibility of having a zip car located on campus; and ways to encourage the use of public transportation.

Parking:

The number of parking spaces required by Zoning Ordinance §59-E-3.7 for hospital institutions is one parking space for each 1,000 square feet of total floor area, plus one space for each resident doctor, plus adequate reserved parking space for visiting staff doctors, plus one space for each 3 employees on the shift. Technical Staff calculated the required parking and that which the hospital proposes following the new construction, as follows (Exhibit 32, pp. 20-21):

| | <u>Required</u> | <u>Proposed</u> |
|--------------------|-----------------|-----------------|
| Surface Parking | 337 spaces | 288 spaces |
| Structured Parking | 1,218 spaces | 1,480 spaces |
| Total | 1,555 spaces | 1,768 spaces |

While the number of proposed spaces exceeds the minimum required by the Zoning Ordinance, the evidence in this case is undisputed that the number of parking spaces at the hospital is “woefully” inadequate. 3/27/09 Tr. 101. Cars are stack-parked throughout the facility. The additional parking is intended to alleviate an existing parking problem and to avoid spillover into the nearby residential community. 3/27/09 Tr. 80-104. Mr. Hedberg opined that, given the site conditions, there is no way to handle the parking demands other than through additional structured parking. 4/13/09 Tr. 101.

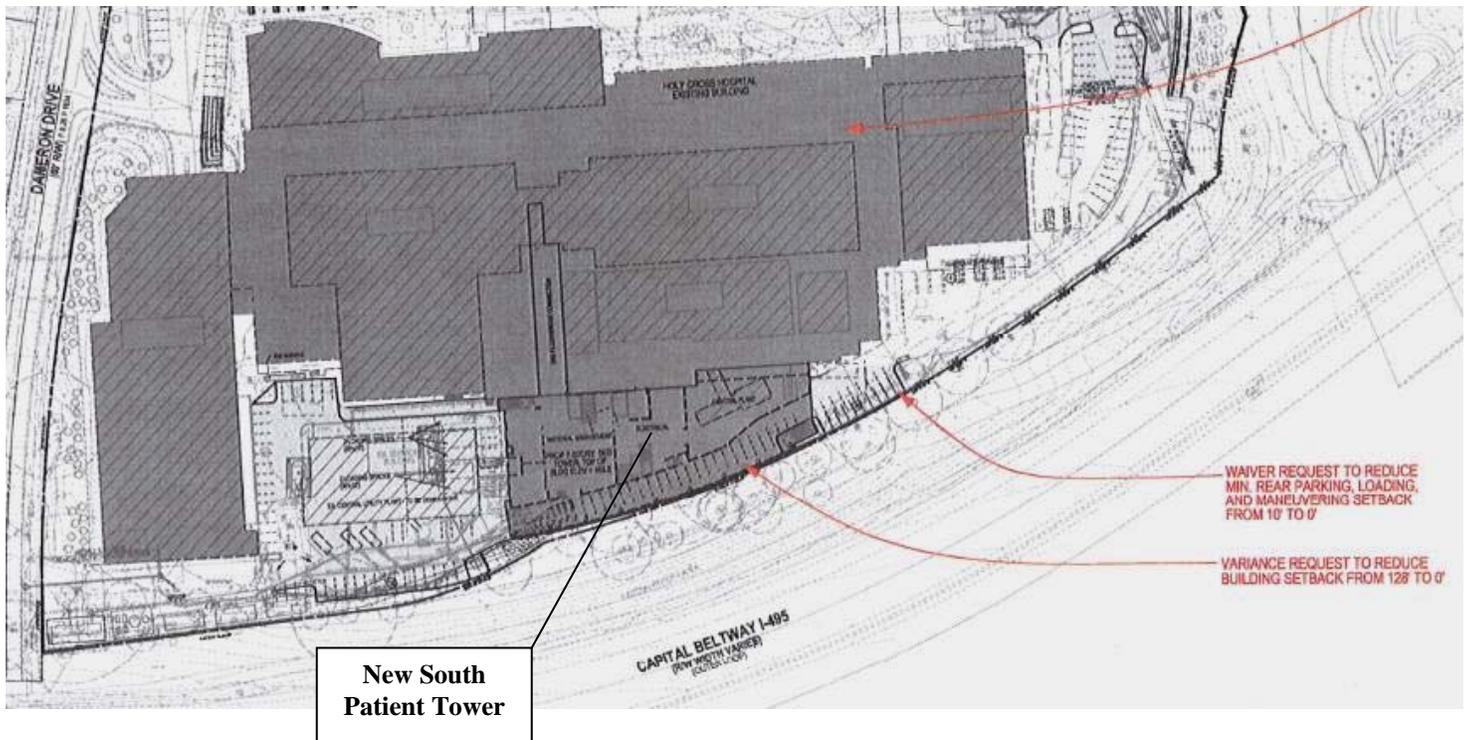
According to Mr. Hedberg, the demand for parking exceeds the supply now available by more than 200 parking spaces. As cars come onto the site, there is a gate fronting on Forest Glen Road. Cars cannot find a space, and attendants have to stack the cars, which means that cars will be blocked in and require an attendant to move other cars to let people get their cars out. It becomes a real bottleneck in the front of the hospital. The valet parking also creates similar problems. Petitioner is trying to expand the garage in order to address these existing deficiencies and to prevent spillover into the neighborhood.

Mr. Hedberg observed that adding a net of 259 parking spaces after all the improvements on the campus are done, should increase the efficiency and the safety of operations on the hospital campus. It will eliminate some stacking and queuing at the site and enhance the on-site pedestrian and vehicular circulation system.

4. The Parking Waiver Request:

Petitioner proposes to place 10 parking spaces east of the South Patient Tower along the fire lane access drive to the rear of the building. Petitioner indicates that a 10-foot setback waiver is needed because the 10 parking spaces in question will have no setback from the property line. The

location of the parking spaces in question can be seen on the portion of the Variance and Waiver Exhibit (Exhibit 29(f)) shown below:



Setbacks for special exception parking in residential zones are determined by Zoning Ordinance §59-E-2.83(b), which provides: *“Each parking and loading facility, including each entrance and exit driveway, must be set back a distance not less than the applicable building front and rear yard and twice the building side yard required in the zone.”* [Emphasis added.]

The rear-yard setback for buildings in the R-60 Zone depends on whether the building in question is a main building or an accessory building. The rear-yard setback for a main building is 20 feet, pursuant to Zoning Ordinance §59-C-1.323(b)(2). For an accessory building, the rear-yard setback is 5 feet, pursuant to Zoning Ordinance §59-C-1.326(a)(3)(B). Since §59-E-2.83(b) calls for a setback equal to the “applicable building” rear-yard setback, the required setback for the parking spaces in question would be 20 feet if the main building setback is applicable and 5 feet if the accessory setback is applicable.

Based on the fact that the parking area in question is adjacent to the Beltway (a right-of-way more than 120 feet in width), Petitioner has applied a different section of the Zoning Ordinance to reach the conclusion that only a 10-foot parking setback waiver is needed. Zoning Ordinance §59-E-2.81(b)(1), referenced in the Data Tables of Petitioner's Site Plan and in its Variance and Waiver Exhibit, provides:

If a parking facility adjoins an existing or planned public right-of-way that is 120 feet or more in width, the provision for a landscaped strip, as stated in section 59-E-2.71, applies to the property line abutting that right-of-way in lieu of the residential setback.

The landscaped strip required under §59-E-2.71 is 10 feet wide. Thus, Petitioner seeks a 10-foot parking setback waiver. 3/27/09 Tr. 204-207. Technical Staff refers to § 2.83(b) and not §2.81(b)(1), but Staff nevertheless appears to have accepted the 10-foot setback assumption without comment. Exhibit 32, p. 9. One could argue either way which section is more appropriately applied here, and also, if one applied § 2.83(b), whether the "applicable building" setback is the main building setback or the accessory building setback. The Hearing Examiner concludes that it is unnecessary to resolve these questions because to do so would make a distinction without a difference – exactly the same findings and arguments justify the waiver in either case.

As noted by Technical Staff, the intent of this provision is to mitigate the potential impacts of a parking facility on adjacent residential land uses. In this case, however, the eastern service drive is adjacent to open, undeveloped parkland. The hiker/biker trail and parkway are located over 200 feet from the drive and will be screened by landscaping along the drive. The proposed 10 parking spaces are adjacent to I-495, elevated above the Beltway and screened by existing vegetative growth. Thus, "Staff supports the parking setback reduction." Exhibit 32, p. 9. The Planning Board agreed. Exhibit 34.

Pursuant to Zoning Ordinance §59-E-4.5, the “*Board of Appeals may waive any requirement in this Article not necessary to accomplish the objectives in Section 59-E-4.2,*” after notice to adjoining property owners and affected citizen associations. The required notice was provided (Exhibits 25, 27 and 30), and no objections were received.

Zoning Ordinance §59-E-4.2 provides:

Sec. 59-E-4.2. Parking facilities plan objectives.

A parking facility plan shall accomplish the following objectives:

(a) The protection of the health, safety and welfare of those who use any adjoining land or public road that abuts a parking facility. Such protection shall include, but shall not be limited to, the reasonable control of noise, glare or reflection from automobiles, automobile lights, parking lot lighting and automobile fumes by use of perimeter landscaping, planting, walls, fences or other natural features or improvements.

(b) The safety of pedestrians and motorists within a parking facility.

(c) The optimum safe circulation of traffic within the parking facility and the proper location of entrances and exits to public roads so as to reduce or prevent traffic congestion.

(d) The provision of appropriate lighting, if the parking is to be used after dark.

Petitioner’s land planner, Phil Perrine, testified that the waiver would meet all the requirements of §59-E-4.2. It would maximize the utilization of opportunities to park, and provide parking in a way that is efficient and compatible with adjacent uses. This parking is intended for use by staff of the hospital. It is not located within the general parking area used by visitors or patients or anyone else coming just to visit the hospital. The health, safety and welfare of those who use any adjoining land or public road that abuts the parking facility will be protected if the waiver is granted. Being next to the Beltway, the only adjacent users are people driving on the Beltway, and the Beltway is about 18 to 20 feet below where the parking would be located. The proposed location of these spaces would not have any adverse impacts with respect to noise, glare, reflection from automobiles, automobile lights, parking, lighting, or automobile fumes. Neither the waiver nor the location of these parking spaces would in any way impact the safety of pedestrians and motorists

within the parking facility. These spaces are relatively isolated, along the road that goes under the tower, so there would be few pedestrians walking around in this area. The granting of the parking waiver and the location of the resulting parking spaces also would not have any adverse impacts on the circulation of traffic within the parking facility or ingress and egress to a public road, nor in any manner create any traffic congestion issues. There is a full-width driveway adjacent to them, so they would not congest the use of that driveway. The 10-foot setback also has no impact on the lighting. The parking spaces and waiver would not create any internal or external compatibility issues.

3/27/09 Tr. 204-207.

In addition, Petitioner's civil engineer, Stephen Goley, testified that lighting will be provided in the area of the parking setback waiver to ensure the safety of users of those parking spaces.

4/13/09 Tr. 79.

There was no evidence contrary to Petitioner's presentation regarding the parking waiver issue, and the Hearing Examiner agrees with Technical Staff's finding that the requested parking waiver is justified by this record. Therefore, the Hearing Examiner recommends the following condition in part V of this report:

The requirement of Zoning Ordinance §59-E-2.8 that a parking facility be set back from the rear property line is hereby waived, pursuant to Zoning Ordinance §59-E-4.5, solely with regard to ten additional parking spaces, which may be located east of the South Patient Tower along the fire lane access drive, adjacent to the Capital Beltway, without any setback from the rear property line.

5. Environment and the Forest Conservation Plan:

Technical Staff reports (Exhibit 32, p. 12) that the subject site "is not located within a Special Protection Area or Primary Management Area." The property is in the Sligo Creek watershed, but there are no streams, wetlands, 100-year floodplain, or associated environmental buffers on-site. There is a stream and a 100-year floodplain on the adjacent park property, and the adjacent parkland

is protected by a Scenic Easement and extensive landscape buffering, as discussed in Part II. C. 2 of this report.

While there is no forest on site, Petitioner does have a Final Forest Conservation Plan, including a Tree Save Plan, approved by the Planning Board on March 12, 2009 (Exhibit 34), and subsequently approved in its amended form by Technical Staff on April 16, 2009 (Exhibits 77(l) – (s)), as is permitted by County Code §22A-11 (Exhibit 63). Mr. Goley testified that there would be no conflict between the special exception and the Forest Conservation Plan that was approved by the Planning Board or the amendment to it approved by the Staff. 3/27/09 Tr. 254.

Mr. Goley also indicated that the entire site is treated for stormwater management, with quantity and quality control. Those systems will be modified for the new development to be in compliance with the most current stormwater management regulations in Montgomery County. The stormwater management facilities constructed as part of the improvements will provide higher levels of quality and quantity control than currently exist because the new standards are more stringent. 3/27/09 Tr. 246-248.

Petitioner's Stormwater Management Concept Plan (Exhibits 81(l) and (m)) was found acceptable by the Department of Permitting Services on April 7, 2009 (Exhibit 67).

Finally, Technical Staff notes that Petitioner has committed to providing a green roof on the new South Patient Tower and a "green screen" along the east façade of the modified parking garage. Exhibit 32, pp. 14-15. 3/27/09 Tr. 170, 191.

Noise issues were discussed in Part II. C. 1. of this report. The Hearing Examiner finds that Petitioner has appropriately addressed all environmental concerns in this case.

6. Staff and Hours of Operation:

As noted earlier, the Hospital operates 24 hours a day, 365 days a year, employing a total of 2,310 nurses, allied health, and supporting staff. This past year, the Hospital served approximately 167,000 patients. The nursing shifts are primarily organized around three times: (a) 7:00 am – 3:30 pm; (b) 3:00 pm – 11:30 pm; and (c) 11:00 pm – 7:30 am. Some nurses may work a 12-hour shift. The shifts overlap by one half-hour to ensure a smooth and successful transition of the patient's nursing care team. *See*, Petitioner's Statement in Support of the Special Exception Modification (Exhibit 3, pp. 6-7).

The Hospital hosts the largest medical staff in Montgomery County, with approximately 1,300 physicians enjoying privileges. As the County's only community teaching, the Hospital offers obstetric/gynecology, surgery, and pediatric residency programs to a total of approximately 90 physician residents rotating throughout the year (approximately 20 at any one time). Approximately 50 Hospital-based physicians practice out of the Hospital each day, and approximately 125 attending physicians come to the campus each day to visit their patients. Of those 125 physicians, approximately 50% arrive in the morning, 25% arrive at noon, and the remaining 25% arrive in the evening. In addition, the Hospital offers weekly Continuing Medical Education (CME) programs for physicians. Depending on the content and timing of the CME program, between 25 and 100 physicians will attend. *See*, Petitioner's Statement in Support of the Special Exception Modification (Exhibit 3, pp. 6-7).

The Petitioner has indicated that the proposed modification will not result in an increase in the number of patient beds in the hospital, nor in an increase in outpatients seen. The intent is to increase the number of private rooms and to provide additional parking. Therefore, no additional staff is anticipated, and the operating hours will also remain the same. According to Kevin Sexton, the

hospital's CEO, the switch to single-patient rooms and the addition of more on-site parking will result in greater efficiencies in hospital operations. 3/27/09 Tr. 85.

D. Concerns of the Neighbors (Traffic, Screening and Construction Noise)

The neighborhood surrounding this site is generally supportive of the proposed modification, as reflected in the letters and testimony of the local citizens' groups, the Northmont and Forest Grove Citizens' Associations. Exhibits 22 and 33 and 3/27/09 Tr. 39-50.

Alan Petty and Margot Cook, the representatives of these citizens' groups, noted that the Hospital's administration and its architectural consultant have worked closely with all the neighbors as plans were being developed over the past year. Placing the new patient tower to the rear of the campus satisfied all parties. The neighbors had hoped that the new parking would be provided further from Forest Glen Road, but the hospital has assured the neighbors that a berm and significant landscaping will make the front acceptable. Mr. Petty and Ms. Cook recognized that an all-private-bed facility is "imperative" in this day and age. Once this work is completed, they hope it will be acknowledged by all parties that the current Silver Spring campus will have reached its maximum capacity.

In spite of their general support, three concerns were raised by the community – the impacts of traffic; the need for adequate screening of the expanded garage; and anticipated construction noise. However, the only witness identifying herself as being in opposition to Petitioner's proposal was Cheryl Gustitus, who lives directly across Forest Glen Road from the North Parking Garage.

She observed that beginning with the hospital's last expansion, there were significant negative impacts on the neighborhood. Ms. Gustitus therefore opposes the current proposal, which she felt would increase the amount of traffic on the neighborhood's already busy streets, change the landscape compatibility of the hospital, increase the noise, negatively impact property values, further

encroach upon the park and diminish the quality of life for those who now live in the midst of one of the busiest hospitals in the state. 3/27/09 Tr. 66-79; 4/13/09 Tr. 38-41.

1. Traffic Issues:

The concerns about traffic in the neighborhood were raised by the local Citizens' associations, as well as by neighbors, Henry Clark and Cheryl Gustitus, both of whom live on Forest Glen Road.

Mr. Petty and Ms. Cook testified that the traffic on Forest Glen Road is "horrendous," though not all due to the hospital, and the cut-throughs in the neighborhood are becoming more significant. 3/27/09 Tr. 42-43. The draft of the hospital's transportation management plan (TMP) stated several major goals, but focused almost entirely on parking, not traffic. It is extremely important to the neighbors that this be addressed and that they have a chance to review the plan before it is submitted in final form. That consultation is a recommended condition in Part V of this report. They also expressed the hope that Holy Cross will continue to work with the community and the County on traffic mitigation, which will be more critical after this expansion, and that the project's planned additional parking spaces will be sufficient to meet the hospital's current and future needs, avoiding spill-over of visitor parking into the neighborhoods that is currently the case.

Finally, Mr. Petty and Ms. Cook appealed to the County and State to make the necessary repairs to Forest Glen Road, which is currently in "dire straits."

Mr. Clark, although supportive of the Hospital's proposed modifications, recited the serious traffic problem on and around Forest Glen Road. He stated that he is more concerned about safety and efficiency than volume. Mr. Clark suggested a number of possible ways to make Forest Glen Road safer, to improve vehicle flow and to encourage public transportation. He asked that the County departments, including DOT and Park and Planning, along with Holy Cross Hospital and interested citizens' groups, use the opportunity of hospital expansion to study the traffic issues raised and find

viable long-term, cost-effective solutions. He noted that the Hospital is planning steps to encourage more use of public transport by employees, patients and visitors, and he suggested that the goals set should be actionable and measurable, and that the hospital should be accountable to the County and the neighbors for the results they get.

While Mr. Clark made some excellent points, they are, as testified to by Petitioner's transportation expert, Craig Hedberg (4/13/09 Tr. 94-99), beyond the scope of the special exception modification petition before the Hearing Examiner. Some of these suggestions should be considered in conjunction with finalization of the TMP and thereafter at CLC meetings. Others are matters which can be discussed at CLC meetings, but are within the control of the County Department of Transportation (DOT) and the State Highway Administration (SHA).

One of the conditions recommended in Part V of this report calls for the review of the proposed TMP at CLC meetings prior to its submission in final form.

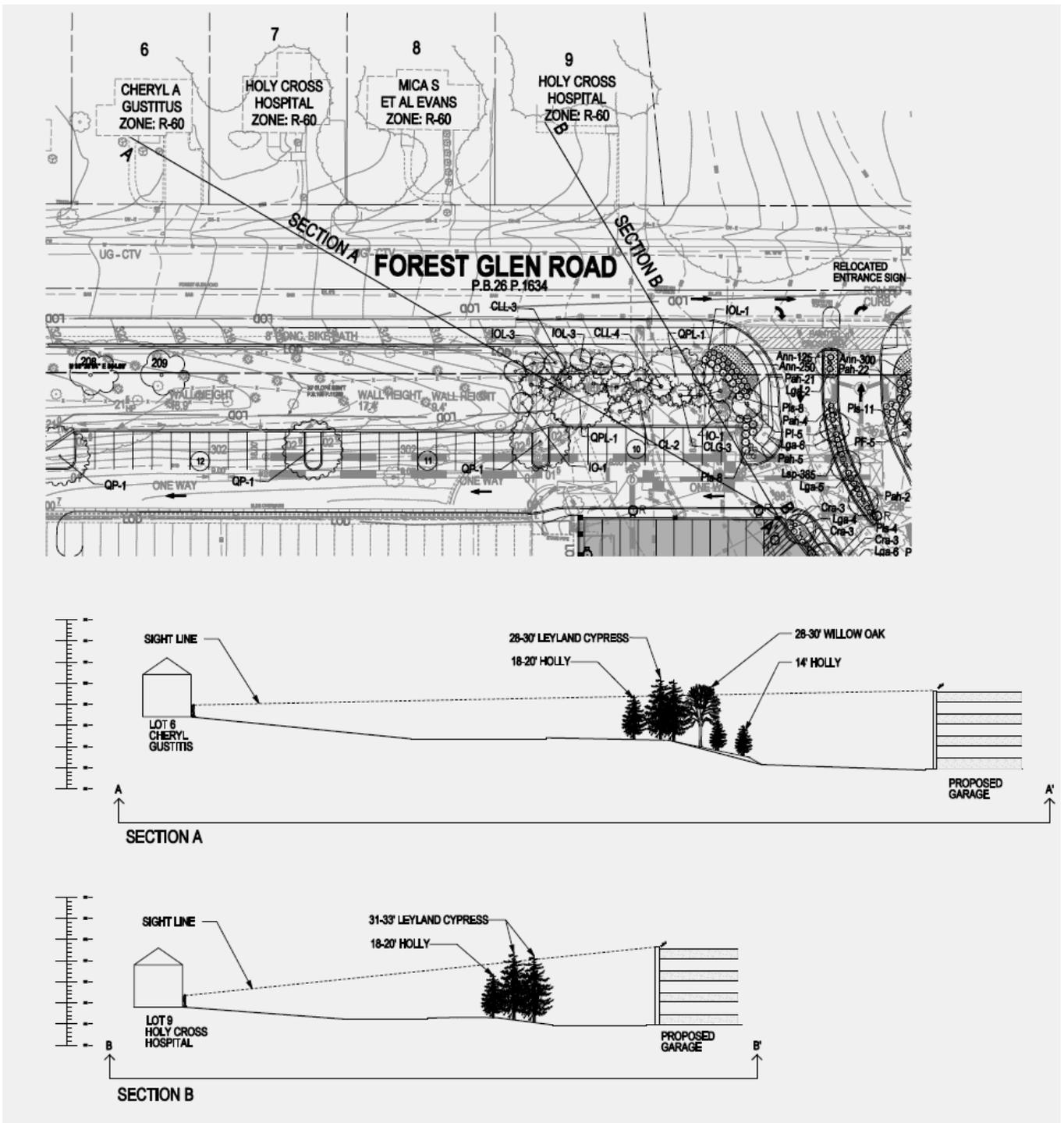
2. Screening of the Expanded Garage:

The chief concern expressed by Cheryl Gustitus relates to the need to adequately screen the expanded North Garage from the residents living on Forest Glen Road, so that it will be largely invisible from the inception. To that end, she negotiated with Petitioner, and they agreed to revise their plans and to increase the amount and height of the landscaping planned for the berm on Forest Glen Road. As stated by Petitioner's Counsel in a letter dated May 4, 2009 (Exhibit 79),

Based upon these revised plans, please be advised that HCH has represented to Ms. Gustitus that the proposed landscape buffer along Forest Glen Road, as initially planted, will provide full year-round screening of the new garage structure from Ms. Gustitus' front door (this year-round screening coming from the evergreen plantings, with the screening enhanced during the growing seasons through deciduous trees which are also added for aesthetic purposes). With this letter, we are also stating for the record that should the plantings proposed by the revised landscape plan not provide the year-round screening that has been represented to be in place upon initial planting by HCH, that HCH (and its consultants), working with Ms. Gustitus, will take such remedial actions necessary to provide the

screening as represented. I have discussed my intention to memorialize this commitment through this letter and submission with Ms. Gustitus on Friday, May 1, 2009, and she has expressed satisfaction with this resolution.

The Hearing Examiner has expressed Petitioner's promise in the form of a condition recommended in Part V of this report. The results of these changes can be clearly seen in the Revised Forest Glen Buffer Sections (Exhibit 79(f)), reproduced below:



The Hearing Examiner finds that Petitioner has agreed to steps which should reasonably resolve Ms. Gustitus's concerns about properly screening the expanded North Garage.

3. Construction Noise:

Mr. Petty and Ms. Cook also raised a concern about the overall disruption caused by the impending construction activity. They suggested that it is imperative that the hospital's representatives strictly enforce the hours of operation with their contractors, as well as require them to use the main roads for access and egress, not side streets as short cuts to avoid lights and traffic. Both of these areas have been problematic in the past.

Ms. Gustitus suggested that the hospital be required to strictly and proactively enforce the Montgomery County Noise Ordinance and provide a clear means of immediate remedy should construction-related noise occur outside of the parameters stipulated by the ordinance. She testified that the hospital has not done a good job of enforcing the noise ordinance that prohibits construction noise prior to 7 a.m. on weekdays and 9 a.m. on weekends. According to Ms. Gustitus, the trucks tend to sit right in front of the houses on Forest Glen Road, running their engines before 7 a.m. because they are waiting to go into the construction site. Providing a phone number to a security office at the hospital has proven to be an unsatisfactory remedy because no one in that office has any authority, nor are they willing to wake up any of the administration that early.

To meet this concern, Petitioner suggested a condition calling for the appointment of noise compliance contacts available "24/7." The Hearing Examiner has beefed up the proposed condition, and it now reads:

There must be no construction noise audible outside of the subject site before 7 a.m. on weekdays and 9 a.m. on weekends and holidays. Trucks connected with the construction must not idle on Forest Glen Road or Dameron Drive; rather they must be admitted to on-site staging areas to await construction duties. The Petitioner must designate a noise compliance contact or contacts who will be available 24 hours/day, 7 days/week for questions and concerns regarding noise

issues and/or other construction related issues during the construction process. All designated compliance contacts must have the authority to immediately halt any conduct violative of these conditions. This contact information, including available phone numbers, email addresses, and other contact information allowing for instant access, shall be provided to the community through the CLC and through a direct mailing to all persons required to receive notice of these proceedings prior to commencement of construction on the project.

The Hearing examiner finds that, with the changes agreed to by Petitioner and the conditions recommended in Part V of this report, all of the community concerns relating to the modifications proposed in Petition S-420-H have been appropriately addressed.

E. The Request for Variances

1. The Requested Variances and the Authority of the Board of Appeals:

Petitioner's request for a special exception modification to allow construction of the new South Patient Tower and enlargement of the North Parking Garage cannot be granted unless Petitioner is also granted the area variances it has requested in BOA # A-6279.¹¹ Specifically, Petitioner requires a variance to permit an encroachment into the 128-foot, rear-yard setback required by Zoning Ordinance §59-G-2.31(3) for a 128-foot-tall building (a 128-foot variance) and an increase in building lot coverage to 52.4 percent (a 17.4 percent variance above the 35% building lot coverage permitted in the R-60 Zone).

The special conditions for a hospital special exception, found in Zoning Ordinance §59-G-2.31, provide, *inter alia*:

(3) *Setback. No portion of a building shall be nearer to the lot line than a distance equal to the height of that portion of the building, where the adjoining or nearest adjacent land is zoned single-family detached residential or is used*

¹¹ The variances in question are "area" variances, as distinguished from "use" variances because they relate to dimensional restrictions (*i.e.*, building coverage and setbacks) rather than the nature of the use intended for the property. The Zoning Ordinance makes no provision for "use" variances, so only "area" variances may be considered. A variance may be granted to make a special exception possible, pursuant to the holding in *Alviani v. Dixon*, 365 Md. 95, 117, 775 A.2d 1234, 1247 (2001).

solely for single-family detached residences, and in all other cases not less than 50 feet from a lot line.

Because the land adjoining the subject site is zoned *single-family detached residential*, this provision requires a setback equal to the height of the proposed South Patient Tower. The proposed seven-story, South Patient Tower would be 128 feet tall and would be placed directly adjacent to the southern property line (*i.e.*, with no setback). Thus, a variance of 128 feet is required.

The issue regarding building lot coverage is a little more complicated. The Development Standards for the R-60 Zone, found in Zoning Ordinance §59-C-1.328, limit building lot coverage to 35 percent. Petitioner initially argued that parking garages should not be counted towards building lot coverage, thereby obviating the need for a variance in this regard.¹² However, the Department of Permitting Services (DPS) determined that multi-level garages are buildings (as well as structures) and therefore do count towards the measure of building lot coverage (Exhibit 57). Technical Staff accepted this interpretation of the Zoning Ordinance and concluded that Petitioner would require a 17.4 percent variance because, counting the garages on site, building lot coverage would be 52.4 percent, instead of the 35 percent required by the Zoning Ordinance. Accordingly, Petitioner now seeks a 17.4 percent variance from the R-60 Zone's building lot coverage limit.

While the Zoning Ordinance does not clearly indicate whether all multi-level parking structures are defined as buildings, it is a maxim of statutory construction that an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight. As stated in *Watkins v. Secretary, Dept. of Public Safety and*

¹² As stated in Petitioner's Statement in Support of Petition For Variance (Exhibit 3, p. 15, n. 2, in Case A-6279), "[t]he Hospital contends that building coverage limitations (as "Building coverage" is defined in Section 59-A-2.1 of the Zoning Ordinance) do not apply to parking structures, as a parking garage, while a "structure" is not a "building" as both terms are defined, and building coverage applies only to buildings, not all structures. This interpretation would eliminate the need to request a variance from the 35% building coverage requirement, as building coverage on the Property would only be 33.9%"

Correctional Services, 377 Md. 34, 46, 831 A.2d 1079, 1086 (2003), “We must respect the expertise of the agency and accord deference to its interpretation of a statute that it administers.”

Thus, DPS’s interpretation of the Zoning Ordinance must be given considerable weight, and Petitioner has not elected to appeal its determination in this instance. The Hearing Examiner agrees with DPS’s interpretation, as it applies to this case, because the multi-level parking structures in question have portions which clearly extend above grade at some locations. The Southwest Garage has at least one level above grade. Although the top level of the North Garage is at grade along Forest Glen Road, some of its lower levels are above grade on the eastern property line, due to the decline in ground elevations to the east. 3/27/09 Tr. 177-182. The Hearing Examiner does not rule out the possibility that a multi-level parking structure, with no substantial part above grade, could be considered a “non-building” for purposes of determining building lot coverage because, in such a case, it would be visually analogous to a parking lot, and thus would not have the zoning impact of a normal building. Nevertheless, that is not the case here. In this situation, the Hearing Examiner finds that the parking structures do count towards building coverage, and Petitioner requires a 17.4 percent building lot coverage variance to qualify for the special exception modification it seeks.

The statutory criteria for obtaining a variance in Montgomery County are set forth in Zoning Ordinance §59-G-3.1:

Sec. 59-G-3.1. Authority-Board of Appeals.

The board of appeals may grant petitions for variances as authorized in section 59-A-4.11(b) upon proof by a preponderance of the evidence that:

(a) *By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;*

(b) *Such variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions;*

(c) *Such variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or any duly adopted and approved area master plan affecting the subject property; and*

(d) *Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties. These provisions, however, shall not permit the board to grant any variance to any setback or yard requirements for property zoned for commercial or industrial purposes when such property abuts or immediately adjoins any property zoned for residential purposes unless such residential property is proposed for commercial or industrial use on an adopted master plan. These provisions shall not be construed to permit the board, under the guise of a variance, to authorize a use of land not otherwise permitted.*

(e) *Any allegation of error or any appeal from any action, inaction, order or decisions pertaining to calculation of building height or approved floor area ratio (FAR) standard shall be considered according to the provisions governing appeals for a variance (section 59-G-3.1), rather than as an administrative appeal (section 59-A-4.11(c)).*

* * *

Petitioner, Technical Staff, the Planning Board and all of the witnesses testifying with regard to the variance application, including community witnesses, Wayne Goldstein (4/13/09 Tr. 146-158) and Margot Cook (3/27/09 Tr. 227), urged approval of the requested variances. Though initially skeptical, the Hearing Examiner is now persuaded that the requested variances would meet the statutory requirements for granting them and that they would be appropriate, based on the entire record in this case. They would also serve the public interest by allowing a needed hospital modernization.

2. Uniqueness:

The Hearing Examiner's preliminary concern stemmed from the language in *Cromwell v. Ward*, 102 Md. App. 691, 651 A. 2d 424 (1995), a case oft-cited with regard to variance issues. The *Cromwell* opinion makes it clear that the evidence must establish the unique characteristics of the site itself before addressing the practical difficulties the site conditions will create. *Id.*, 102 Md. App. at 695. One tends to think of site conditions as relating to physical characteristics, such as shape and topography, but the applicable provision of the Zoning Ordinance also refers to "*other extraordinary situations or conditions peculiar to a specific parcel of property.*" Here, the site is not narrow,

shallow or shaped oddly, compared to surrounding properties, nor is its topography particularly difficult. Thus, the question is whether there are other extraordinary situations or conditions peculiar to the subject site which satisfy the uniqueness criterion.

What can constitute “uniqueness” of a site for this purpose was well summarized by the Maryland Court of Special Appeals in *North v. St. Mary's County*, 99 Md. App. 502, 514, 638 A.2d 1175 (1994),

“Uniqueness” of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, *i.e.*, its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions.

...

Clearly, then, more than physical characteristics of the site come into play in determining “uniqueness.” Utilizing this approach, the Board of Appeals has previously held that non-physical site conditions can serve as “conditions peculiar to a specific parcel of property” for purposes of determining eligibility for a variance. Examples are:

- In the *Petition of William Karas*, BOA # A-6152 (effective 10/27/06), the Board granted a setback variance where the required established building line (EBL) was in direct conflict with the goals and requirements of the Historic District Master Plan. The Board found that the location of the hospital in the Capital View historic district “is a unique circumstance affecting and constraining development of the subject site.”
- In the *Petition of Carol Lindeman*, BOA # A-6146 (effective 10/12/06), the Board granted a setback variance, based on its finding that the uniqueness of the property was its location in Takoma Park’s historic district, the fact that it is surrounded by outstanding historic resources, and that the property is subject to very specific guidelines contained in the Takoma Park historic master plan in order to maintain consistency with other outstanding resources in the historic district
- In the *Petition of Peter and Sheila Blake*, BOA # A-6040 (effective 2/12/05), the Board granted a variance because the Takoma Park Tree Ordinance prevented the owners from construction on their site near some protected trees on adjoining land, in order to protect the root systems of the trees. The Board found “that the application of the City of Takoma Park’s tree ordinance to this property constitutes an exceptional circumstance peculiar to the property and that the strict application of the

zoning regulations would result in practical difficulties to, and an undue hardship upon the property owners.”

A number of factors lead the Hearing Examiner to conclude that the subject site also satisfies the uniqueness criterion. The Hospital confronts residential properties on its west and north, and is adjacent to the Capital Beltway (I-495) on its south and Sligo Creek Park (with its Scenic Easement to protect the park) on its east, all of which result in impediments on the site. The proximity of the confronting residential developments impose limits on the subject site through the applicable master plan, which will be discussed below; the adjacent Beltway physically limits expansion and creates very high traffic noise levels which must be addressed on site (*See* report of Petitioner’s acoustics expert -Exhibit 36(a)); and the Scenic Easement poses restrictions and conditions on the use of the site along its eastern property line. Perhaps even more important, the applicable master plan, the Forest Glen Sector Plan, approved and adopted in July 1996, specifically addresses the subject site and contains recommendations which severely limit flexibility in the use of the property.

Zoning Ordinance §59-G-1.21(a)(3) requires the Hearing Examiner and the Board of Appeals to find that the special exception “[w]ill be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission.” Master plans often have little impact in a modification case because the underlying special exception is already established; however, in this case, the recommendations in the Sector Plan do make a difference because they constitute “*other extraordinary situations or conditions peculiar to [this] specific parcel of property.*”

The Forest Glen Sector Plan (Exhibit 60) discusses the Holy Cross Hospital site on pages 15 through 23. It recommends striking a balance which would allow Hospital expansion but avoid destabilizing the neighborhood by keeping any hospital expansion within its present boundaries. The Plan’s objective is to “[e]nsure that new development is compatible with the character of the

existing residential neighborhood.” Plan page 23. To accomplish this objective, the Sector Plan set forth the following “guidelines and limitations” which apply only to the subject site (p. 23):

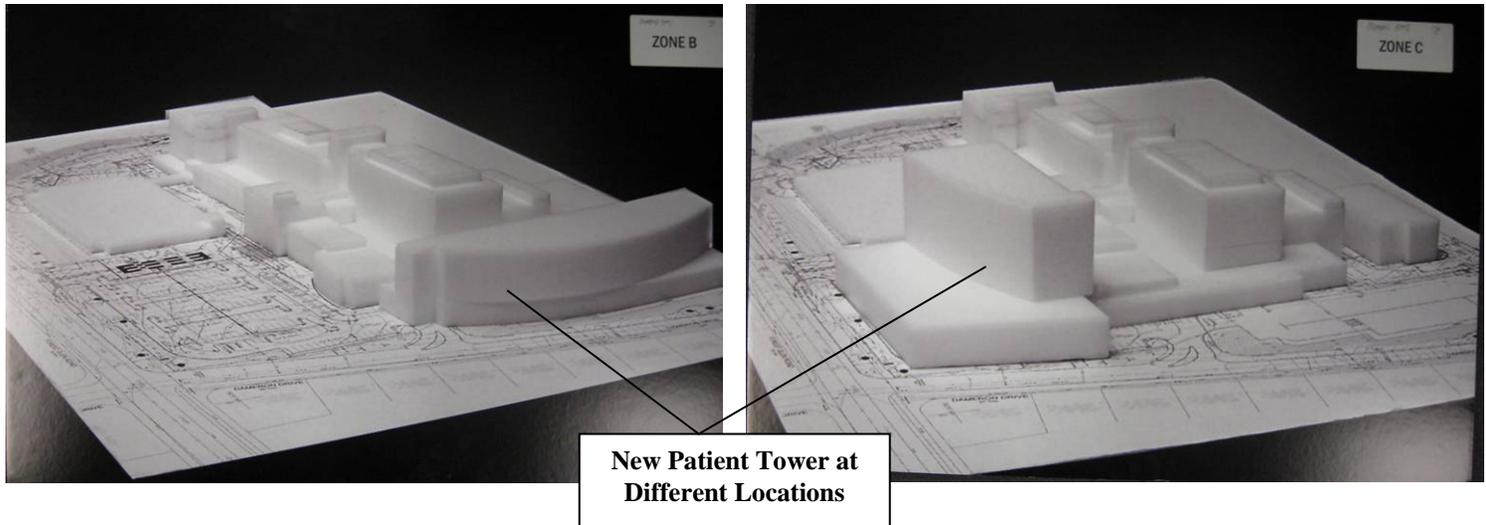
- Development will be on the existing hospital campus only.
- The building(s) may contain up to 80,000 square feet and additional parking associated with the facility.
- Any building along Forest Glen Road should not exceed 4 stories. If the building is located along Forest Glen Road, architectural details should be used to minimize the perceived height and mass of the building. Use of materials, such as brick, that are compatible with the residential neighborhood along Forest Glen Road are encouraged.
- A building of up to 8 stories may be constructed if it is located toward the rear and eastern edge of the site, along Sligo Creek Park, if absolutely necessary. Adjustments to the scenic easement (or removing the easement altogether) may be permitted in order to lower the height of the buildings or otherwise reduce the impact of the hospital on the surrounding neighborhood.
- Additional parking should be located on the existing hospital campus (or in satellite facilities located in non-residential areas) and designed as efficiently as possible to minimize its height and visual impact on the surrounding neighborhoods, also taking into account such factors as Holy Cross’ needs for technological expansion and concerns about emergency room access.

The Hearing Examiner concludes that the restrictions on the site posed by the beltway on the south, Sligo Park on the east and the language of the Master Plan constitute “conditions peculiar to a specific parcel of property” and thereby satisfy the “uniqueness” criterion.

3. Practical Difficulties and Minimum Variance Necessary:

The practical difficulty these conditions create is that, given the functional needs of the hospital, they severely limit the locations on the site where the needed facilities can be placed. The existing hospital wings could not be increased in height to provide the needed space because neither tower is structurally capable of supporting additional floors. 4/13/09 Tr. 108. Petitioner’s architect, Philip Tobey, testified to his efforts to find other locations on site for the proposed modifications. 3/27/09 Tr. 117; 4/13/09 Tr. 105-113. To do so, he put together 3-D models and presented them at

community meetings as possible alternatives. Photographs of two such models (Exhibits 73 and 74) are shown below:



These other locations were unacceptable because they located too much mass near residential areas and did not adequately access the rest of the hospital from a functional standpoint. 4/13/09 Tr. 115-120. There are also minimum size requirements to insure proper functionality for the expanded hospital. The new patient tower must have at least 30 beds on a floor because that is the optimum size for a nursing unit. 3/27/09 Tr. 118-119. There must also be connectivity to the rest of the hospital. 3/27/09 Tr. 116.

As shown in Petitioner's 3-D model (Exhibit 71), and in the Petitioner's Transverse Section (Exhibit 11(k)) and Second Floor Composite Plan (Exhibit 5(l)) reproduced on page 20 of this report, the final location chosen for the South Tower allows it to connect directly back to the core of the hospital complex, which enables the tower to be supported optimally. There is a direct relationship between the surgical suite in the existing building and an expanded pre- and post-operative space adjacent to it. 3/27/09 Tr. 119-121.

The restrictions contained in the Sector Plan, which limit the height of any building along Forest Glen Road to four stories, made the northern location along Forest Glen Road unacceptable,

given the hospital's need for at least a seven-story structure to provide adequate additional bed space, connectivity and functionality. The Sector Plan (page 23) expressly permitted up to an eight-story structure along the rear (southern) part of the site. It also allowed such a structure along the eastern edge of the site, near Sligo Creek Park, but only "if absolutely necessary." The Sector Plan does not permit such a tall structure anywhere else on the site. Thus, the Sector Plan restrictions and the limitations posed by proximity to Sligo Creek Park and residential areas create "practical difficulties" for Petitioner, unless the new South Tower is located where the requested setback variance will be required, along the southern property line, adjacent to the Capital Beltway and away from residences and parklands. The Hearing Examiner finds, as well, that these improvements and the variances being requested are the minimum reasonably necessary for the hospital to address the health needs of the community, as testified by Petitioner's architect, Philip Tobey. 3/27/09 Tr. 167; 4/13/09 Tr. 123.

The Sector Plan restrictions and the limitations posed by proximity to Sligo Creek Park and residential areas also create "practical difficulties" for Petitioner's efforts to provide the needed additional parking on campus. The need for that additional parking was amply demonstrated in the record. It is undisputed that the number of parking spaces at the hospital is "woefully" inadequate. 3/27/09 Tr. 101. Cars are stack-parked throughout the facility and spill over into the community. 3/27/09 Tr. 80-104; 4/13/09 Tr. 142-146. Petitioner's transportation expert, Craig Hedberg, testified that, given the site conditions, there is no way to handle the parking demands other than through additional structured parking. 4/13/09 Tr. 101. Such additional parking is permitted by the Sector Plan, but it must be designed "to minimize its height and visual impact on the surrounding neighborhoods . . ." Sector Plan, p. 23.

Petitioner considered expanding its on-site parking in ways that would not increase building lot coverage, such as adding parking spaces to the existing Southwest Garage (adjacent to Dameron

Drive). Unfortunately, it cannot be expanded vertically because it was not designed for that additional load. It would therefore have to be torn down and rebuilt, creating a large expense and an unacceptable dislocation of available parking for a long time. 3/27/09 Tr. 123-124. Going further underground was also prohibitively expensive.

The alternative of adding a long, narrow parking facility east of the eastern access road was proposed by Petitioner, but that was rejected by Technical Staff. 3/27/09 Tr. 125-128; 4/13/09 Tr. 114-115. That alternative is shown below (left-hand panel), along with a second garage proposal and the final North Garage expansion plan (right-hand panel) agreed to by Technical Staff and the Planning Board (Exhibit 48):



As stated by Petitioner’s land planner, Phil Perrine, the proposed improvements could not reasonably be built elsewhere on this site and achieve the numerous goals, objectives, requirements

and restrictions which apply. 3/27/09 Tr. 225-226. These are extraordinary situations and conditions peculiar to the property which result in unusual practical difficulties to Holy Cross Hospital.

Technical Staff also found “that the reduced setback and increased building coverage are justified due to the restricted amount of land available and the need for the expansion to be located to the south and east in order to conform to the Sector Plan recommendations.” Exhibit 32, pp. 7-8.

The Hearing Examiner finds that the practical difficulties created by the Sector Plan restrictions and the limitations posed by the site’s proximity to Sligo Creek Park and residential areas require Petitioner to create a new South Patient Tower and to locate additional needed parking in an expanded parking facility, which together will increase building lot coverage to 52.4%, thereby justifying a variance of 17.4% above the 35% standard for the R-60 Zone. These improvements and the variances being requested are the minimum reasonably necessary for the hospital to address its needs and to provide adequate parking for the facility, as testified by Petitioner’s land planner, Phil Perrine. 3/27/09 Tr. 225.

4. Consistency with the Master Plan and Impact on the Neighbors:

The third and fourth criteria for granting a variance call for a determination that the requested variances will not impair the intent, purpose and integrity of the applicable master plan and that they will not be detrimental to the use and enjoyment of adjoining or neighboring properties. The evidence in this case amply supports such a finding.

As discussed above, the planned modifications to the subject site were designed and located specifically to comply with objectives and recommendations set forth in the Forest Glen Sector Plan. As stated by Mr. Perrine, the planned modifications “implement the guidelines of that master plan” and “they achieve the compatible relationship . . . of the hospital’s expansion to the neighborhood that

the sector plan sought to achieve.” 3/27/09 Tr. 227. Technical Staff agreed, concluding that “the proposed application is consistent with the Forest Glen Sector Plan.” Exhibit 32, p. 10.

The testimony of the Northmont and Forest Grove Citizens’ Associations also supported the modification petition, evidencing the fact that Petitioner’s proposals will not be detrimental to the use and enjoyment of adjoining or neighboring properties. 3/27/09 Tr. 39-50. The concerns expressed by the community regarding traffic, screening of the expanded garage and construction noise have all been appropriately addressed by Petitioner and by conditions recommended in Part V of this report, as discussed at length in Part II.D. of this report.

The Hearing examiner finds that, since the proposed modifications will not increase the hospital’s patient load or staffing, they should create no additional burden upon the community. While there may be a small increase in the CLVs at some intersections from the possible loss of satellite parking at the Sligo Creek Golf Course, there is no indication that these effects will burden the neighborhood. The evidence is that the increase in parking available on site will improve vehicular and pedestrian circulation, will make parking on the hospital campus more efficient and will avoid spillovers of hospital parking into the community. 4/13/09 Tr. 90-93, 134-136. Moving the eastern driveway 90 feet further to the east will also improve safety by increasing sight distances from the driveway entrance. 4/13/09 Tr. 90-91.

In sum, the evidence establishes that the criteria specified in Zoning Ordinance §59-G-3.1 will be met. The site is subject to extraordinary situations and conditions peculiar to this property; as a result, the strict application of the zoning regulations would result in unusual practical difficulties; the variances sought are the minimum reasonably necessary; they will be consistent with the applicable master plan; and they will not be detrimental to adjoining or neighborhood properties. The Hearing Examiner therefore concludes that the requested variances should be granted.

III. SUMMARY OF THE HEARING

The public hearing began on March 27, 2009, and was completed on April 13, 2009. Petitioner called seven witnesses in all. At the beginning of the hearing, the Hearing Examiner announced that Petitioner had filed documents in the days before the hearing, so the record would be kept open at least ten days after the hearing for commentary. 3/27/09 Tr. 8-9. The Hearing Examiner also outlined issues of concern to him in the case, and there was some discussion of relevant legal issues.

Two civic associations, the Northmont and Forest Grove Citizens' Associations, testified, both in support of the petition. One neighbor, Henry Clark, testified in support of the petition, though raising concerns about traffic, and another neighbor, Cheryl Gustitus, testified in opposition. Another member of the community, Wayne Goldstein, testified in support of the petition, directly addressing the variance issues in the case. Martin Klauber, People's Counsel for Montgomery County, participated in both days of the hearing and expressed his support for the proposed special exception modification, the variance and the parking waiver. 4/13/09 Tr. 175. The record was held open until May 4, 2009, for additional filings by Petitioner and responses thereto.

To avoid confusion, the testimony at each hearing is summarized separately below. References to the transcript of the March 27, 2009 hearing are designated "3/27/09 Tr. xx," and references to the April 13, 2009 hearing transcript are designated "4/13/09 Tr. xx."

The March 27, 2009 Hearing:

A. Petitioner's Case

Petitioner called five witnesses at the March 27 hearing: Kevin Sexton, Holy Cross President and CEO; Philip Tobey, an architect; Kevin Miller, an acoustical engineer; Philip Perrine, a land planner; and Stephen Goley, a civil engineer.

1. Kevin Sexton (3/2709 Tr. 80-103):

Kevin Sexton testified that he is the President and CEO of Holy Cross Hospital. He described Petitioner as a large community hospital, which does a significant amount of teaching, as well. There is a large medical staff, but a very limited number of physicians are actually employed by the hospital. Petitioner has a very large number of nurses and many other employees.

Mr. Sexton stated that healthcare has three big issues – access to care, cost of the care and the quality of the care. He outlined the impacts of those issues on the national healthcare system. Because there will be an enormous growth in the people who need healthcare services, Petitioner is trying to balance the general healthcare needs with the immediate community's needs. Petitioner's plan is to make the hospital more efficient, partly by converting to private rooms and other modifications planned here. In addition, Petitioner seeks to open another hospital at another site and operates primary care clinics in the County.

Mr. Sexton further testified that the reason Petitioner is switching to private rooms is that it has become the standard in healthcare. It helps in infection control and makes hospitals inherently more efficient. The standard is set forth in the AIA Guidelines. The addition of parking was also a balancing act between the hospital's needs and those of the community. He is committed to working with the community, and in particular, with the community liaison council to address issues of transportation and construction management.

Petitioner has no additional long range plans for this site, and has been selling the homes it owned across Dameron Drive (about a dozen of them).

According to Mr. Sexton, in addition to the local zoning approvals, the size and scope of the project requires a Certificate of Need from the State, and Petitioner is in that process.

Mr. Sexton further testified that neither new beds nor outpatient capacity is being added in this

modification, so there is nothing inherent in this project that would increase the number of employees. While there will be more square footage, it will be newer and easier to maintain. The number of nurses is tied to the number of beds.

If the Board grants approval of the applications, Petitioner will construct and operate the improvements in accordance and full compliance with the plans and specifications submitted with the applications and any conditions that are imposed by the Board of Appeals.

Mr. Sexton was asked on cross-examination why Petitioner needed so many additional parking spaces if Petitioner is not expanding either the number of employees or the number inpatients and outpatients. He responded that parking at Holy cross is “woefully undersized today.” Cars are stack-parked throughout the facility. If there is one complaint he gets more than any other complaint from the people who come to Holy Cross, it is that there is not enough parking. So the additional parking is intended to alleviate an existing parking problem and to avoid spillover into the nearby residential community. Adding additional parking on campus is an advantage to the community as well as to the hospital.

2. Philip Tobey (3/27/09 Tr. 104-135; 155-172):

Philip Tobey testified as an expert in architecture. He developed a master plan for the site and his firm is providing the architectural and most of the engineering. He explained that the AIA Guidelines is issued by the American Institute of Architects.

Mr. Tobey identified Exhibit 45 as an aerial photo showing the hospital as it presently exists. He noted that the site is a very constrained 14.2 acres, bounded by Forest Glen Road on the north, Dameron Drive on the west, the Beltway on the south and the park on the east. There are three major entry points to the site, one off Dameron Drive and two off Forest Glen Road. The main entrance to the hospital is off of Forest Glen, more or less in the center of the site. It is the westernmost entry on

Forest Glen. The second and most easterly entrance is the entrance that provides access to the emergency department, to the professional office building and for all service vehicles moving around to the south side of the hospital. So all vehicles providing material and removing material from the hospital utilize the easternmost road. The western entrance off of Dameron essentially provides access to the parking at that end of the site, and one can move between the western entrance and the front door through the site on surface parking. There's a major parking garage on Dameron, on the west side of the complex, and there's a surface lot on the northwest corner of the site between, on the corner of Dameron and Forest Glen near the main entrance. Off of the main entrance, you can access the next large parking garage, which is in the front of the hospital, and then a series of individual surface parking lots along the eastern edge and miscellaneous parking along the south which is primarily used by staff that use the hospital on a daily basis.

The goals of the expansion are to maximize the number of single patient rooms at Holy Cross, which requires finding a place to house approximately 180 new single-patient rooms on the site, and to deal with the parking problem. One of the problems was to determine how best to connect the new patient tower back to the existing hospital in terms of service and supply, patient flow, movement of staff and so forth.

He examined the entire site for opportunities for this tower, examining various possibilities, including the feasibility of actually tearing down the Dameron Street garage, which is on the western end of the site, rebuilding the garage elsewhere and locating a tower on the western end of the complex. He also examined a third location, in the northwest quadrant of the entire property on the front of the hospital, on what is currently the surface parking lot. In each of these three cases, he considered connectivity issues and the possible impact on the neighborhood of an additional mass from the new patient tower. In the end, the south tower location proved to be the most effective

solution.

The new wing must have at least 30 beds on a floor because that is the optimum size for a nursing unit. There must be connectivity. As shown in the rendered Site Plan (Exhibit 46), the south tower connects directly back to the core of the hospital complex, which enables the tower to be supported optimally. There's a direct relationship on one floor between the surgical suite in the existing building and an expanded pre- and post-operative space adjacent to it.

The south tower consists of seven floors, six floors of 30 patient beds each and one floor of expanded surgery. Directly underneath it, in addition to a pass-through connection underneath the building, is a new central utility plant. The old one will be removed. The south tower location also is the optimal location in terms of the mass of that building in relationship to the existing residential areas. And so clearly, that had neighborhood support. The project has been commended by Parks and Planning and the County for the architecture of the building.

Mr. Tobey also considered various alternatives for the parking expansion, such as possibly expanding the Dameron Street garage that exists on the west, which became prohibitively expensive because it would have to be taken down and rebuilt. He also examined the idea and the feasibility of a parking garage in the northwest corner of the site on what is now currently the surface lot. Building it on the surface at that location was not acceptable to the neighbors, and building it underground would have been prohibitively expensive. Any parking underground runs at about 45 to \$50,000 per space, whereas above-ground runs about \$20,000 a space.

He then turned to a third alternative location, at the northeast end of the site toward the park. Exhibit 48 shows the three possible designs considered at that location. After review by Technical Staff, the final form at the right side of the exhibit was accepted for that location. That alternative takes the existing north parking structure, which is on the front of the building, and simply expands it

horizontally to the east. Technical Staff did not allow it to expand as far as Petitioner proposed in the middle design because of excessive encroachment into the scenic easement and inadequate screening. The garage that is now being proposed would have approximately 303 spaces, which yields a net gain of about 259 new spaces upon the entire site. The final design of the garage has a very minor encroachment into the scenic easement and is designed to extend the north parking structure with four horizontal bays.

Mr. Tobey then described the screening for the garage as viewed from the Scenic Easement in Exhibit 49. Exhibit 50 shows the landscape buffering of the expanded garage along Forest Glen Road. He noted that you can barely see the garage that currently exists behind the berm and landscaping. Petitioner is proposing to extend the berm utilizing the same types of planting on that berm and mature trees will be used so that the existing berm and new berm appear to be as a whole.

Mr. Toby further testified that the design for the south patient tower will meet the applicable noise mitigation requirements and maintain interior noise levels below 45 dBA-LDN. It will also adhere to the County's exterior noise ordinance requirements.

The additions will be constructed in phases, and the phasing plan will be crafted in consultation with the community liaison council (CLC). Exhibit 52 is the current phasing plan.

Mr. Tobey described the location of the parking and the reasons for the parking waiver request. The parking waiver is a request for 10 spaces on the southeast face of the site against the property line adjacent to the Beltway. Petitioner is requesting a 10-foot waiver. In Mr. Tobey's opinion, the granting of this waiver would not have any adverse impacts internally or externally. Also in his expert opinion, the special exception modification would be in harmony with the general character of the surrounding neighborhood considering population density, design scale and bulk of the proposed structure, intensity and character of activity, traffic and parking conditions and the

number of similar uses. He also testified as to compliance with the other general conditions for granting a special exception and stated that, from an architectural standpoint, the proposed special exception modification and development are suitable for this site and compatible with the surrounding neighborhood.

Mr. Tobey further testified that Petitioner is requesting two variances. One pertains to the rear setback requirement. The proposed south tower sits against the property line and against the Beltway, and the variance Petitioner seeks would permit it in that location. Otherwise, a setback equivalent to the height of the building would be required, and that would be impossible in this location. Petitioner would not be able to achieve a tower of any kind in that location absent the variance. The other variance pertains to maximum building coverage as it relates to the garage expansion. Mr. Tobey opined that the proposed improvements cannot reasonably be built elsewhere on this site and achieve the numerous goals and objectives, while meeting all requirements and restrictions. In his opinion, the strict application of the rear setback and building coverage regulations, if applied to this property, would result in peculiar or unusual practical difficulties to the hospital. It would preclude both the south tower and the expanded parking facility. He also opined that the requested variances are the minimum reasonably necessary to overcome these problems.

3. Kevin Miller (3/27/09 Tr. 136-154; 164):

Kevin Miller testified as an expert in acoustics. He is familiar with both the property and the surrounding area of the site. He is also familiar with the current operations of the hospital and specifically, the existing conditions, both internal and external to the hospital property that relate to noise generation and possible needs for attenuation measures. His firm conducted analyses of existing and future noise sources to help propose mitigation strategies.

Exhibit 36(a), is a Traffic Noise Measurement Analysis, Noise Impact Assessment and Mitigation Recommendations dated September 23, 2008, that prepared under his supervision. He also prepared a letter dated March 23, 2009 (Exhibit 51). It is entitled “Holy Cross Hospital Potential Building Noise on Hospital and Surrounding Community.”

The “dBA LDN” is the descriptor used predominantly for transportation noise impact. The label “dBA” is the predominant descriptor used for noise codes and noise ordinances. Both of those are fairly universal throughout the country. LDN, stands for day/night average.

The term “dBA LDN” stands for a 24-hour average with a penalty at nighttime, recognizing that humans are more sensitive to noise at nighttime. This dBA LDN standard was actually originally established by HUD, and Montgomery County has adopted it in Technical Staff’s memorandum regarding transportation noise impacts.

The standard simplistically states that if you're under 65 dBA LDN outdoors, you're not considered noise impacted. If you're over 65 dBA LDN, you're considered noise impacted and then the intent is to address it in whatever methods are necessary so that the resulting receivers are not impacted. Generally speaking, for this kind of project, the design intent is to not allow traffic to create noise exceeding 45 dBA LDN inside the hospital, the rationale being that normal building construction is assumed to provide a 20 dBA LDN reduction. Hence, if you're less than 65 dBA LDN outside, they say you're not impacted because you will be less than 45 dBA LDN inside. Petitioner’s obligation for the new proposed facility would be to make sure that the interior of that facility does not exceed 45 dBA LDN inside.

His measurement of the current existing traffic noise levels and any extrapolated likely increase over time in this vicinity came up with a nominal 80 dBA LDN exterior noise level at the building face, which is fairly substantial. Hence, the site would be considered noise impacted by

the definitions in the HUD and of the County and hence, noise mitigation measures would be necessary on the building face to make sure that noise levels inside do not exceed 45 dBA LDN.

The building is still in the very early phases, so he did a preliminary analysis to pass along to the design team saying that the preliminary analysis indicates that the windows will need to maintain a nominal 40 STC (sound transmission class) performance to maintain 45 dBA LDN inside. This will be reviewed further as the building progresses.

In addition to considering the traffic from the Beltway and other traffic noise generators, Mr. Miller also analyzed noise generators that will be associated with the new proposed improvements, such as generators, oxygen supply, exhaust fans in the garage and the like.

So the other consideration is any site noise that is generated by the site itself, that would be outdoor sources such as the emergency generators and garage exhaust fans. We understand that the oxygen tank farm was brought up also. It's never been a problem, to my knowledge, in the past but we were asked to address it so we looked at it and we understand that it is not a noise generating source but if it becomes one, it's something we would have to address. And other sources would be the main air handlers that could reside on the roof and/or the power plant at the basement that was described earlier. All of these are potential noise sources to the building exterior and to the interior, and all of them would have to be addressed. It is part of Petitioner's obligation to make sure that noise sources of the hospital that are exposed to the exterior do not exceed the Montgomery Noise Code at the property line, which was 65 day and 55 night.

Mr. Miller testified that he will continue to work with the design team to ensure that the County's noise ordinance for noise leaving the site will comply with the County's noise ordinance.

Mr. Miller explained that when noise is already at a given level and you add the noise that would be produced from HVAC or any other machinery that produces noise, the perceived noise is determined in the following way:

A three decibel change, up or down, is twice or half the energy, which means a hi-fi amp going from 5 watts to 10 watts or 5 watts to 2.5 watts. But subjectively, humans can barely perceive a three decibel change. If there are two noise sources that are 65 dB, they don't add up to 130 dB. They end up with 68 dB. That's the way logarithms add.

Because it's logarithmic, if there is a noise source that is meeting the Code, for example, at 55 dBA and there is a traffic noise source at 70 dBA, the 55 dBA source adds essentially nothing. If there's a 10 dB variation between two sources, the combination would be perhaps a half a dB louder than the louder one. A 10 decibel change is necessary to double the sound perception. Sound juries determined that a 10 decibel increase, on the average, will cause people to say it is twice as loud.

Mr. Miller further testified that if mitigation measures he is proposing are adhered to, the special exception modification will not cause any objectionable noise or vibrations at the subject site. 3/27/09 Tr. 164.

4. Phil Perrine (3/27/09 Tr. 172-238):

Phil Perrine testified as an expert in land planning. He is familiar with the site and hospital operations and plans. Mr. Perrine analyzed the proposal and prepared a land planning report, addressing the special exception requirements that are involved and the parking waiver and the variance requirements of the ordinance. He noted that there is an eight-story west wing of the hospital and a six-story east wing on the hospital. There is also a physicians specialist wing added on, east of the east wing. The North Garage has one level at grade and a three levels below grade, while the Dameron Drive Southwest Garage has five levels.

Mr. Perrine argued that the North Garage should not count towards building coverage because it does not have a roof. Its top level is at grade on the western end, but he admitted that on the eastern end, the top level is well above grade.

Mr. Perrine described the surrounding property as, by and large, a single-family detached neighborhood in the R-60 Zone, adjacent to the Beltway, Forest Glen and Sligo Creek Parkway. To the north of Forest Glen Road is the Forest Grove Elementary School. Its site is now leased by Holy Cross Hospital for some health-related services. In terms of the surrounding neighborhood, he suggested Georgia Avenue, I-495 and Sligo Creek and then Belvedere Boulevard, which is a divided medium road to the north, that kind of encapsulates that Northmont community. The Staff stopped at Myrtle Road, but he goes further to the north because that was historically the neighborhood that had been adopted. That was the only difference. 3/27/09 Tr. 182-183. Either one, by and large, is a single-family detached community, and the only thing other than the hospital actually is the Forest Grove Elementary School.

Mr. Perrine further testified that the proposed improvements conform to the Forest Glen Sector Plan. The Sector Plan adopted in 1996 had some constraints on hospital expansion. On page 15 the Sector Plan observes that the hospital is an important resource to the region and to the immediate community. It is the only teaching hospital in the County, and it treats the high-risk indigent obstetric cases. The Sector Plan describes the concerns the neighborhood had about expansion of the hospital, physically, beyond the 14 acre campus and that there was very limited unoccupied space to the rear of the hospital, between the hospital building and 495. It also has specific guidelines. On page 23 of the Sector Plan, under objective A, there is a fourth bullet point that says a building of up to eight stories would be permitted if located to the rear, that is the south and eastern edge of the site along Sligo Parkway, if necessary. The Plan also indicated that

adjustments to the scenic easement or removal of the easement entirely would be permitted in order to lower the height or to reduce the impact of any building on the surrounding neighborhood. The Plan states explicitly that any expansion had to be constrained to the existing boundaries of the campus.

In terms of compatibility of this proposal with the surrounding existing and proposed uses, the south tower will be located along 495, where there is a 160-foot wide right of way separating it from any adjacent residential. There is an eight-story west wing separating it, as well as the distance, to any residential community, and a six-story east wing that also screens part of the building as viewed from across Forest Glen Road.

Exhibit 53 is a Site Plan annotated to show distances to residences. From the tower to the nearest residence would be 480 feet. That's to the residence to the west of Dameron Drive. It would be 670 feet to the nearest residence on Forest Glen. From the new addition to the north parking garage, it is 180 feet to the nearest residence on Forest Glen, and 730 feet to the nearest residence on Dameron Drive. 3/27/09 Tr. 188-189.

The proposed garage expansion would be 65 feet away from Sligo Parkway on the east, and as with the current garage, 70 feet back from Forest Glen Road, with the landscaping and berming in-between. There is an existing opening to the garage on Forest Glen that will be taken out with the extension, and that access point to Forest Glen won't exist when that driveway is relocated. That will move the entranceway further away from the residences across the street. There will no longer be an entranceway opposite the residences. There will be, instead, an extended landscape berm and landscaping in between the hospital and all the residences to the north.

All of the homes, according to the site plan, on the west side of Dameron Drive, are owned by Holy Cross Hospital. Two homes on Forest Glen are owned by Holy Cross Hospital, and the rest are

private residences. The ones that are owned by Holy Cross Hospital, are rented out as residences. Also, in Mr. Perrine's opinion, the terracing walls and green screen along the garage face to the east make it compatible with the adjacent parkland.

Mr. Perrine testified that there were no non-inherent characteristics of the site, based on the fact that the use was similar to other hospitals. The Hearing Examiner suggested that the fact that Petitioner is seeking a variance because of unique site conditions logically means there are non-inherent site conditions. Petitioner's counsel agreed, but noted that those characteristics had no adverse effects on the neighbors. 3/27/09 Tr. 196-201.

Addressing the special conditions for a hospital in §59-G-2.31, Mr. Perrine testified that it requires five acres as a minimum area, and the site has 14.21. Minimum frontage is 200 feet, and the site has 805 feet along Forest Glen. The setback adjacent to any single-family detached zone is equal to the height or 50 feet. The south tower would be 128 feet of height. It will be set back 370 feet from Dameron Drive, but there would be no setback from 495, so a variance is needed.

In terms of off-street parking, there's a requirement to have a maximum coordination between the proposed development and the surrounding uses. The site will have three separate driveways that distribute traffic evenly along adjacent roads to ensure that the development is coordinated with its surroundings. The distribution of traffic should avoid any queuing onto local streets.

Mr. Perrine noted the location where the parking waiver is needed. If one enters the site by the far eastern driveway, there are 10 spaces just before one gets to the proposed tower. Those are the spaces for which a waiver to the 10-foot setback is needed. Sections 59(e) 2.71 and 2.8(b)1, require that setback of 10 feet. The waiver would maximize the utilization of opportunities to park, and provide parking in a way that is efficient and compatible with adjacent uses. This parking would be, by and large, used by staff of the hospital. It's not located within the general parking area used by

visitors or patients or anyone else coming just to visit the hospital. The health, safety and welfare of those who use any adjoining land or public road that abuts the parking facility will be protected if the waiver is granted. Being next to the Beltway, the only adjacent users are people driving on the Beltway and the Beltway is about 18 to 20 feet below where the parking is located.

The location of these spaces in the parking waiver would not have any adverse impacts with respect to noise, glare, reflection from automobiles, automobile lights, parking, lighting, or automobile fumes. There's no need for any protection for the Beltway. If the parking waiver is granted by the Board of Appeals, neither the waiver nor the location of these parking spaces would in any way impact the safety of pedestrians and motorists within the parking facility. These spaces are pretty much by themselves. They are along the road that goes under the tower, so there would not be a lot of pedestrians walking around in this area. The granting of the parking waiver and the location of the resulting parking spaces also would not have any adverse impacts on the circulation of traffic within the parking facility or ingress and egress to a public road, nor in any manner create any traffic congestion issues. There is a full-width driveway adjacent to it them, so they wouldn't congest the use of that driveway. The 10-foot setback also has no impact on the lighting. The parking spaces and waiver would not create any internal or external compatibility issues.

In Mr. Perrine's opinion, the special exception modification would comply with the standards and requirements set forth in Division 59-G-2 of the Zoning Ordinance, the Forest Glen Sector Plan and the general plan of development for Montgomery County. Also, the special exception modification would be in harmony with the general character of the surrounding neighborhood, and would be in conformance of the general and specific provisions of the Zoning Ordinance relative to this special exception. All the more active areas of the hospital, the emergency access and access to this tower are at the southeastern end and eastern edge away, as far as possible from the residential

community. There are no other currently active special exceptions in the general neighborhood, except a medical clinic at the corner of Georgia and Forest Glen.

As to the request for a variance, Mr. Perrine testified that the property is subject to some extraordinary situations and conditions that are peculiar to it, both some physical features and the recommendations associated with the sector plan. First of all, it's been designated as an institutional use, a hospital, historically, by the fact of being approved for a special exception from 1959 to the current time, and acknowledged in the sector plan and the master plan for the area, as a hospital and appropriate for hospital use.

Mr. Perrine was unable to give any other example where the Board of Appeals here or the courts have allowed the site's use, as distinguished from its physical conditions, to be a part of the analysis for an area variance. He said he would search for one.

The site is bounded by the Beltway and by Sligo Creek Parkway in a scenic easement and has residential development on the other sides of the property. Moreover, the Zoning Ordinance requires consistency with the sector plan, and the guidelines within the sector plan constrain the hospital's expansion. Those guidelines are unique to this property. They don't apply to any other property, and they prohibit expansion of the campus boundaries, and contain other restrictions. In Mr. Perrine's opinion, the only way that the expansion to meet community medical needs, which is contemplated by the sector plan, can take place under the constraints provided by the sector plan guidelines, is to have a variance. So those are the constraints within the Zoning Ordinance and the sector plan that lead to this unusual practical difficulty and undue hardship. It's a burden in excess of what the normal development standards provide for. There's a similar relationship in terms of building coverage. When you try to get down to 35 percent or close to it, you start to conflict with the sector plan guidelines. Given the requirements for single bed units, this is the minimum size structure and

parking facility that Petitioner could have. The proposed improvements could not reasonably be built elsewhere on this site and achieve the numerous goals, objectives, requirements and restrictions which apply. 3/27/09 Tr. 225-226. These are extraordinary situations and conditions peculiar to the property which result in unusual practical difficulties to Holy Cross Hospital. In his opinion, the requested variances are the minimum reasonably necessary to overcome the aforesaid exceptional conditions. The requested variances can be granted without substantial impairment to the intent, purpose and integrity of the general plan and the Forest Glen Sector Plan, and they in fact implement the guidelines of that master plan. They will not be detrimental to the use and enjoyment of adjoining or neighboring properties or other uses, and will achieve the compatible relationship that the sector plan sought to achieve.

Mr. Perrine further testified that, except where a variance is sought, the proposal meets all the development standards of the R-60 Zone, as required by § 59-G-1.23. The proposal also meets all the parking requirements of Article 59(e), except where a variance or parking waiver is sought. 1,555 spaces are required, and Petitioner will provide 1,768. The special exception will not conflict with the Preliminary Forest Conservation Plan. There is no requirement for a water quality plan because the site is not in a special protection area. All the signs would conform to the sign ordinance.

5. Stephen Goley (3/27/09 Tr. 238-280):

Stephen Goley testified as an expert in civil engineering. He is familiar with the existing hospital operations and the physical conditions of the hospital property and in particular, the characteristics of the site. The scenic easement was created by a note on a plat in 1976, to the benefit of the Montgomery County Park Department.

Mr. Goley's firm provided planning exhibits, site plan design, forest conservation law compliance plans and related matters. He supervised preparation of the written report that has been

submitted as part of this application relating to the civil engineering. Mr. Goley described the site, noting that its highest point is an elevation of around 335 feet, which is located along Dameron Drive, 200 feet or so from the intersection with Forest Glen. The land falls as you go east on Forest Glen Road, running at about a three percent slope until the main entrance, and then it starts dropping, perhaps at double that at about six percent slope down to the easternmost corner along Forest Glen Road. Along Dameron Drive, it drops approximately from the highest point to an elevation of about 222 feet at the southwest corner of the property near the Beltway. That would be about 15 feet from end to end along Dameron Road. To answer that same question along Forest Glen, that would be about 334 down to its northeastern end at 295, so that's about 40 feet. About 20 percent of the site drains towards this low corner at the dead end, south end of Dameron. And then the remaining 80 percent would then drain towards the low corner at the northeast point.

Mr. Goley described existing utilities serving the site, including storm drains and sewage lines. The entire site is treated for storm water management and quantity and quality control. Those systems will be modified to be in compliance with the most current storm water management regulations in Montgomery County to provide for the new development. He submitted a preliminary storm water management concept plan, which is being reviewed. The storm water management facilities constructed as part of the improvements will provide higher levels of quality and quantity control than currently exist because the new standards are more stringent.

Mr. Goley further testified that he has a letter of findings from WSSC stating that there's adequate water and sewer capacity for the project. There will also electric and gas relocations to accommodate the new construction, mostly located to the rear of the property. He also described the fire safety and emergency access plan for the property. The perimeter road that exists now will be shifting and will be the major fire access route. That route will actually circle around the perimeter,

along the back, under the new south tower, out to the southwest corner of the property, and will come out on Dameron Drive at the intersection with Admiralty Drive. There's a minimum height clearance of 13.5 feet, but the clearance will probably be close to 15 feet. Ambulances would use the perimeter road, and it will still be used after construction the same way as now.

The amended Forest Conservation Plan status is nearing approval. The Planning Board approved some elements of a Forest Conservation Plan when it considered this case some 10 days ago. If the Board of Appeals were to approve the special exception, there would be no conflict between the special exception and the Forest Conservation Plan that was approved by the Planning Board or the amendment to it approved by the Staff.

With regard to the scenic easement, the Planning Board approved the requested encroachment for this proposed project, with conditions, and compliance is being ironed out with Technical Staff.

Mr. Goley further testified that Petitioner extended the berm along Forest Glen Road 95 feet or so required to move the entrance down, and maintained the level height at around 320, elevation 320. It will provide the same amount of screening, same amount of height as currently exists. The plant palette that we're using there is the same plant palette that exists which are mostly cedars, hollies and oak trees. So it will appear very much like the existing berm except the plants will be new.

One of the DOT conditions was to move the sidewalk back and provide a green space or a green panel between the curb and the sidewalk. The sidewalk will be moved back three or four feet, depending on the final design in order to comply with that. There will be a wall behind it which rises to about 16, 18 feet. It will dip down at the end of it but through most of the stretch, it's about 16 to 18 feet high. The wall actually is simply cutting off the backside of the berm and is below the backside of the berm. No one will see any wall from the opposite side or from the roadway at all. The top of the wall will be three or feet below the top of the berm. Petitioner will have a number of

shrubs at the lower understory, some tall trees, and more evergreens so that at the end of the day, it's going to be full screening of a height and density that it will be hard to see through. With the exception of perhaps some tweaking of the planting and landscaping within the scenic easement, the landscape plan that's before the Hearing Examiner and the Board of Appeals will be a final landscape plan.

The revised photometric plan was introduced as Exhibit 55. Petitioner will be extending the current lighting scheme, fixtures, pole heights, fixture types, lighting light bulbs to the new areas to provide the lighting levels desired and recommended by the Illuminating Engineer Society of North America, in addition to complying with the Planning Commission's staff recommendation to maintain a light level of .1 footcandles along the lot line. The levels shown on this plan along Dameron Drive and Forest Glen are not effected by the new development. Those are the light levels that exist currently. Shields can be placed on some of them along the perimeter to drop the light trespass to the required levels. [The Hearing Examiner pointed out that the Zoning Ordinance permitted the Board to vary the standard for public safety reasons.]

B. Community Concerns

Four community witnesses testified at the March 27 hearing, Alan Petty, on behalf of the Northmont Citizens' Association; Margot Cook, on behalf of the Forest Grove Citizens' Association; Henry Clark, a neighbor and Cheryl Gustitus, a neighbor.

1. Alan Petty, on behalf of the Northmont Citizens' Association (3/27/09 Tr. 39-50); and
2. Margot Cook, on behalf of the Forest Grove Citizens' Association (3/27/09 Tr. 39-50; 227);

Allan Petty testified on behalf of the Northmont Citizens' Association, jointly with Margot Cook, who testified on behalf of the Forest Grove Citizens' Association. Together they represent approximately 180 homes. They stated that Holy Cross Hospital has proposed a bold and

comprehensive expansion plan for its current campus and beyond. As neighbors adjacent to Holy Cross, the Forest Grove Citizens' Association and Northmont Citizens' Association expressed their general support for all the hospital plans.

Mr. Petty and Ms. Cook noted that the hospital's administration and its architectural consultant have worked closely with all the neighbors as plans were being developed over the past year. Placing a new patient bed tower at the rear of the campus satisfied all parties. However, they are disappointed that the new parking garage will be built directly on Forest Glen Road. They had hoped for an additional easement towards Sligo Creek which would have been a more palatable location for the neighbors. Unable to achieve this, the hospital has assured the neighbors that a berm and significant landscaping will make the front acceptable. Although the homeowners directly facing the hospital are not enthusiastic about more construction directly across from their front doors, the neighbors, in general, support the hospital's proposed plans. An all private bed facility is imperative in this day and age. Once this work is completed, they hope it will be acknowledged by all parties that the current Silver Spring campus will have reached its maximum capacity.

Mr. Petty and Ms. Cook further testified that the hospital community liaison committee has been meeting bi-annually since the last special exception modification, and they hope this continues to be a requirement with no term limits. Such a committee and meetings are imperative for continued cooperation between the hospital and the community.

As with any further development in an already impacted area, traffic is always a concern. They feel that the traffic on Forest Glen Road is "horrendous," though not all due to the hospital, and the cut-throughs in the neighborhood are becoming more significant. The draft of the hospital's transportation management plan stated several major goals, but focused almost entirely on parking, not traffic. It is extremely important to the neighbors that this be addressed and that they have a

chance to review the plan before it is submitted in final form. Therefore, they are requesting that the Board stipulate such a requirement. They also expressed the hope that Holy Cross will continue to work with the community and the County on traffic mitigation, which will be more critical after this expansion, and that the project's planned additional parking spaces will be sufficient to meet the hospital's current and future needs, avoiding spill-over of visitor parking into the neighborhoods that is currently the case.

Mr. Petty and Ms. Cook also raised a concern about the overall disruption caused by construction which is not insignificant to the neighbors surrounding the facility. It is imperative that the hospital's representatives strictly enforce the hours of operation with their contractors as well as require them to use the main roads for access and egress, not side streets as short cuts to avoid lights and traffic. Both of these areas have been problematic in the past. They also appealed to the County and State to make the necessary repairs to Forest Glen Road, which is currently in dire straits, and to the hospital to submit an update to its long-range strategic plan for the next 5 to 10 years.

Both agreed that the sum of their testimony is that they support the applications, and they have some concerns which they believe are being adequately addressed by the community liaison council provisions and the transportation management plan provisions. 3/27/09 Tr. 47.

During Mr. Perrine's testimony, Ms. Cook stated that, as neighbors, she hoped that the variances are approved. 3/27/09 Tr. 227.

3. Henry Clark (3/27/09 Tr. 50-66):

Henry Clark testified that he lives at 1701 Forest Glen Road, which is seven houses west and across the street from Holy Cross Hospital. We've lived there since 2005. Basically, that's over top of the "T" on "Forest" on Exhibit 40.

Mr. Clark volunteers at the hospital, and he is a member of an organization known as the HCH ad hoc traffic mitigation committee that was created as part a Citizens' association meeting. He believes the neighborhood benefits from a prosperous hospital, and an expansion should help the hospital remain viable for the years to come. He also believes the hospital expansion is an excellent opportunity for the Holy Cross, DOT and Park and Planning to master a dangerous and inefficient traffic situation in and near the hospital.

Mr. Clark feels that Petitioner's traffic study underestimates the traffic on Forest Glen Road and the various cross-streets from between Sligo Parkway to the east and Georgia Avenue to the west. These issues are not solely Holy Cross Hospital driven, though nearly 2,000 hospital employees and many hospital visitors use Forest Glen Road every week. Traffic jamming occurs during a.m. and p.m. drive times because of the hospital traffic, plus people leaving the neighborhoods and cut-throughs from Colesville Road and University Boulevard. Cars back up to Sligo Parkway from Georgia. Georgia Avenue at Forest Glen Road was named the most congested intersection in Montgomery County according to a 2006 County study.

During non-rush hour periods, drivers consistently drive above the 30 mile per hour limit. There are a number of disabled residents, children and pregnant hospital visitors who take risks crossing the street under these conditions. Mr. Clark is more concerned about safety and efficiency than volume. He described various dangerous conditions, including at the hospital main and lower entrances, regardless of the hour, where left turns onto Forest Glen Road westbound are hazardous. All left turns onto the hospital from westbound Forest Glen Road are awkward because cars must cross two lanes of traffic. Dameron Drive is a choke point for traffic coming from all directions and includes ride-on stops in both sides that further impede traffic.

Furthermore, HCH is adding 315 additional spaces, which will be filled by vehicles.

Holy Cross Hospital reports 15 percent growth in hospital visits during 2008 and projects eight percent year-on-year growth despite opening the Silver Spring Health Center on Georgia Avenue. Montgomery County's safe speed group studied Forest Glen Road for possible traffic camera installation in January of 2009. In one seven-day period, over 89,000 vehicles passed the counter at 1611 Forest Glen Road, which is one house closer to the hospital from where he lives. In the past three years, there have been 39 reported accidents, 21 including personal injury, on the stretch of Forest Glen Road near Holy Cross. Forest Glen Road, from Georgia Avenue to Sligo Parkway, was recommended to the County for future speed camera installation despite only three percent of drivers exceeding 11 miles per hour over the speed limit.

The hospital is planning steps to encourage more use of public transport by employees, patients and visitors. The goals set should be actionable, measurable and the hospital should be accountable to the County and the neighbors for the results they get. Members of the community have participated with Holy Cross in defining a number of possible improvements that could increase bus and Metro ridership. Among these are hospital signs in the metro and signage more prominently displayed on the streets. The hospital is studying a Metro shuttle to and from Forest Glen Metro that could be used by all patients and visitors as well as employees, as is now offered. One great idea is to rename our Metro stop Forest Glen/Holy Cross Hospital. These ideas won't happen unless the hospital takes a leadership role in mastering the Forest Glen traffic situation.

Mr. Clark suggested a number of possible ways to make Forest Glen Road safer, to improve vehicle flow and encourage public transportation but not turn Forest Glen into another Georgia Avenue. He asks that the County departments, including DOT and Park and Planning, along with Holy Cross Hospital and interested citizen groups, use the opportunity of hospital expansion to study the traffic issues raised and find viable long-term cost-effective solutions. He suggested that the

HCH ad hoc committee for traffic mitigation be kept in operation at least through the construction phase of the project, and the Montgomery County DOT and Park and Planning provide representation to assist the hospital and neighbors in solving traffic issues in our neighborhood.

Mr. Clark agreed that the sense of his testimony is that he supports the proposal, but feels that serious transportation questions that affect the community need to be addressed.

[Mr. Klauber noted that there was a draft Transportation Management Plan (TMP), and that it could be reviewed at a CLC meeting and by DOT and Technical Staff before being forwarded to the Board of Appeals. Petitioner's counsel agreed, with the caveat that the transmittal of that final TMP would be prior to issuance of the initial building permit, but it wouldn't be prior to closing the record and submitting it to the Board of Appeals.]

4. Cheryl Gustitus (3/27/09 Tr. 66-79):

Cheryl Gustitus testified that she lives at 1515 Forest Glen Road, in Silver Spring. Her house is located directly across the street from the hospital on Forest Glen Road, four houses up from the, from Sligo Creek Park on Exhibit 40, and almost directly north of the parking garage. She has been in that house for 15 years, and living across from the hospital was not all that unpleasant until the last expansion project. The size of the hospital, it's level of activity, the fact that what went on at the hospital pretty much stayed on the hospital campus made for a relatively harmonious existence.

Everything changed, however, with the hospital's last expansion, despite all the independent studies that concluded that there would be no negative impact on the neighborhood. She therefore opposes the current proposal, which would increase the amount of traffic on the neighborhood's already busy streets, change the landscape compatibility of the hospital, increase the noise, negatively impact property values and further encroach upon the park and diminish the quality of life for those who now live in the midst of one of the busiest hospitals in the state.

Ms. Gustitus has five requests:

1. that the hospital be required to work with the members of the community, those both represented by the associations as well as those individuals with special interests, to develop a Transportation Management Plan that is designed to reduce the amount of hospital-related traffic on the streets and keep more of it within the campus.
2. that the hospital be required to meet one, three and five year goals of consistently increasing use of public transportation by its employees, its patients, its visitors and its staff.
3. that the hospital maintain its current use of satellite parking lots at Sligo Creek Golf Course, St. John's Catholic Church, Montgomery Hills Baptist Church and seek additional satellite parking space to alleviate the traffic on Forest Glen Road and surrounding neighborhood streets.
4. that the hospital be required to go beyond the standard of simply sufficient landscaping in order to visually buffer Forest Glen Road from the parking structure. She asked that the hospital be required to heavily landscape the Forest Glen berm with mature and dense trees, bushes and shrubs in order to ensure that the view of the new parking structure is completely or best obscured from the sight of Forest Glen Road home owners. (After reviewing the revised landscape plans during a recess, Ms. Gustitus stated that she felt the plans would be satisfactory to obscuring the view and making it palatable for her.)
5. that the hospital be required to strictly and proactively enforce the Montgomery County Noise Ordinance and provide a clear means of immediate remedy should construction-related noise occur outside of the parameters stipulated by the ordinance. As evidenced by previous complaints from neighbors, the hospital has not done a good job of enforcing the noise ordinance that prohibits construction noise prior to 7 a.m. on weekdays and 9 a.m. on weekends. The trucks tend to sit right in front of the houses on Forest Glen, running their engines before 7 a.m. because they're waiting to go into the construction site. Providing a phone number to a security office at the hospital has proven to be an unsatisfactory remedy because no one in that office has any authority, nor are they willing to wake up any of the administration in the middle of the night.

[Mr. Klauber noted that one of the proposed conditions would require two telephone numbers supplied to people situated like Ms. Gustitus. The first number is going to be a person from the hospital with enough supervisory control. The second is going to be the general contractor who is responsible for those employees creating the noise. The hospital has been amenable to providing the appropriate telephone numbers for immediate action.]

C. People's Counsel

The Peoples Counsel, Martin Klauber, Esquire, indicated that he had discussed potential conditions for the special exception modification with Petitioner's counsel, and would be forwarding a recommendation that the community liaison council continue, like the other 29 community liaison councils, for the life of this special exception, that it will meet two times a year, that minutes would be taken, and that there be an annual report. That's a continuation of what has occurred before. But the community liaison council should also take up and finalize a transportation management plan (TMP) so that it could be submitted to the Board of Appeals for approval.

Secondly, the community liaison council should also discuss the construction transportation implications, and give the neighbors telephone numbers to call both the hospital and the general contractor if there are certain occurrences that should not happen. That all will be discussed during the community liaison council along with the provision that the community liaison council meets two times a year. It may, on request of any participant, meet more often than that, especially under the circumstances being discussed about the TMP. 3/27/09 Tr. 44-45.

The April 13, 2009 Hearing:

A. Petitioner's Case

Petitioner called five witnesses at the April 13 hearing, some of whom had testified at the March 27 hearing: Stephen Goley, a civil engineer; Craig Hedberg, a traffic engineer; Philip Tobey, an architect; Philip Perrine, a land planner; and Eileen Cahill, Petitioner's Vice President for Government and Community Relations. At the beginning of the hearing, Petitioner's counsel indicated that he would be filing a final forest conservation plan approved by the Staff Director. That is permissible under Code Chapter 22-A. Counsel also submitted revised proposed conditions (Exhibit 58); a supplemental memorandum regarding the variance requests (Exhibit 59); a copy of

the Forest Glen Sector Plan (Exhibit 60); DPS's e-mail regarding building coverage (Exhibit 61); AIA Guidelines, pp. 40-41 (Exhibit 62); portions of the Code regarding Forest Conservation (Exhibit 63); a letter from DPS regarding transportation issues (Exhibit 64); a letter from SHA regarding an updated traffic impact study (Exhibit 65); a letter from WSSC giving concept approval (Exhibit 66); a letter from DPS giving concept approval regarding stormwater management (Exhibit 67); and a revised site plan (Exhibit 68).

1. Stephen Goley (4/13/09 Tr. 42-79):

Stephen Goley resumed his testimony as an expert in civil engineering. He described changes to the site plan made on 4/10/09 to address two of the DPS comments. One of them was to extend the median in the new eastern entrance, the relocated entrance, to the curb line. Petitioner did that. The second change was also in response to one of the DPS comments, and it was to redraw the sidewalk ramps so the direction of the sidewalk ramps run parallel to Forest Glen Road. Petitioner made that change as well. Those are the only changes to the site plan.

The landscaping plan was also revised on 4/10/09 (Exhibit 69) in light of the testimony of Ms. Gustitus to make the initial size of the plantings on the berm taller so as to fully screen the garage. The additional heights will vary to some degree because the height of the berm varies with respect to the height of the garage and the street. Mr. Goley indicated that he could not simply say the plantings would be six feet taller across the board, but he accomplished the objective of screening the garage with the initial planting material.

On the eastern edge, facing the scenic easement, there will be buffering or screening from the park, which will extend beyond the scenic easement, using the same plant palate. There's no differing of the materials just because the scenic easement line stops short of Forest Glen Road by a distance of about 100 feet.

Mr. Goley expected the final forest conservation plan to be approved by Technical Staff within days, and it would be consistent with the amendment to forest conservation plan already submitted into this record.

Mr. Goley introduced an amended photometrics and lighting plan (revised 4/7/09 - Exhibit 70). The lighting expert remodeled it, taking out the existing lighting on Forest Glen Road, outside of the property. Also, based on the reduced size of the garage after Technical Staff review, all the lights along the eastern property line have been pulled in from the property line. The relocation of those lights further away from the property line has caused the lighting levels at the eastern property line to go down. Along the western edge, that would be Dameron Drive, there have also been some changes to either eliminate or move light poles and fixtures away from the property line, again achieving the maximum 0.1 footcandles at the property line. Towards the rear, the lights have moved back as well. The results of these changes are displayed on a point by point plot showing that in all cases, the lighting levels and footcandles at the property boundaries are 0.1 footcandles or less. The lighting fixtures that are being proposed are the same as the existing lighting fixtures that are used on site. Mr. Goley described that lighting. In his judgment, the lighting fixtures will not cause any glare into the neighboring residential communities to the west or to the north.

There's actually one sign that will be relocated, corresponding with the relocation of the eastern entrance. That sign will essentially just be picked up in its relation to the entrance and moved down with the entrance. Its new location is shown on both the site plan and the landscape plan, just to the east of the east entrance, in the northeastern corner of the site. There will be a new signage plan prepared for wayfaring signs, but that does not yet exist. [Petitioner's counsel stated that there are no additional identification signs for the hospital or any new illuminated signs, and that any other

signage for the site would be the typical way-finding signs that would be approved as part of the permitting process. He will submit a condition of approval that would reflect that.]

Mr. Goley further testified that the special exception modification would not cause any objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity of the subject site, nor adversely effect the health, safety, security, morals or general welfare of residents, visitors or workers in the area. He also opined that the proposed use continue to be served by adequate public services and facilities if the improvements are constructed, and from a civil engineering standpoint, the proposed special exception modification will be suitable for the site and compatible with the surrounding neighborhood.

Mr. Goley also stated that, with respect to the parking waiver, lighting will be provided in that area to ensure the safety of users of that parking facility.

2. Craig Hedberg (4/13/09 Tr. 80-102; 132-142):

Craig Hedberg testified as an expert in transportation planning and traffic engineering. He is familiar with the subject property and the surrounding area. He prepared a traffic study, which is a local area transportation review (LATR) and a policy area mobility review (PAMR), which are the required types of analysis for a special exception. The study was updated as of December 2008 (Exhibit 26(a)).

Technical Staff gave him a list of seven off-site intersections to be analyzed, along with the two site driveways that intersect with Forest Glen Road. He took existing peak period traffic counts at each of those intersections and evaluated the operations relative to the applicable policy area standards. The intersections are listed in the summary table on pages 19 – 20. All intersections are operating under existing conditions within the congestion standard for the Kensington/Wheaton policy area, which is a critical lane volume (CLV) of 1600, except for the intersection of Georgia

Avenue and Dennis Avenue in the a.m. peak hour which currently operates at a 1662 CLV level.

Under the background conditions, initially, there were no other approved developments that were identified by transportation staff within the study area, so the base background conditions would be the same as the existing. The hospital currently rents approximately 55 parking spaces at the Sligo Creek Golf Course, and the hospital currently operates a shuttle van between the golf course and the main campus. However, the future of that lease may be somewhat in question, so Mr. Hedberg made a projection of the impact on the studied intersections if that parking moved to the hospital campus. That projection is included in the background traffic projection listed on pp. 19-20 of his Traffic Study. As it turns out, the additional background traffic increases the CLVs at some intersections, but not over the 1600 CLV congestion standard, and it did not increase the a.m. peak hour count at the one non-compliant intersection, Georgia Avenue and Dennis Avenue. That remained at 1662 CLV.

Since no additional beds or staff will be added by the proposed modifications, the projection of total post-development traffic volumes also remains the same as the background level CLV at all intersections.

Mr. Hedberg further testified that PAMR is satisfied because the new project will not create any additional trips. Even if there were a minor increase in employees as a function of overall hospital operations not related specifically to these improvements, the increase in trips amounts to less than half a trip, which is de minimis. Park and Planning acknowledges that and so there was no PAMR requirement for this project. Technical Staff agrees that there's no mitigation required.

According to Mr. Hedberg, the proposed location of the additional parking and the resulting changes to the driveway intersection at Forest Glen Road will be safe, adequate and efficient. It's going to be a safer condition than at present because the eastern driveway will be moved 90 to 100 feet to the east and right now, the topography is such that traffic coming from the Georgia Avenue

direction comes over a crest of a hill and descends towards Sligo Creek Parkway. The additional spacing between the crest and the driveway will yield better sight distance for traffic turning left out of that location.

As to parking, Mr. Hedberg observed that adding a net increase of 259 spaces after all the improvements on the campus are done, should certainly increase the efficiency and the safety of operations on the hospital campus. It will eliminate some stacking and queuing at the site. The number of parking spaces will exceed the code requirements of Chapter 59-E of the Zoning Ordinance. The parking being provided is responsive to the real demand, as opposed to Code. The improvements will enhance the onsite pedestrian and vehicular circulation system.

A transportation management plan (TMP) will be finalized before the release of the initial building permit for these improvements. Measures to be discussed at the CLC relating to trip generation, and the hospital is considering shuttle bus van operations to the Glenmont Metro Station. There has also been discussion of having a zip car located on campus so that drivers could take public transit or carpool and then use a zip car if the need would occur.

Mr. Hedberg discussed the transportation issues raised by community witness Henry Clark, and he concluded that, while they can be discussed in the CLC and with the County, there is nothing to be done within the special exception, *per se*, addressing these transportation issues.

In Mr. Hedberg's opinion, the special exception modification will be in harmony with the general character of the surrounding neighborhood, considering intensity and character of activity, traffic and parking. The 259 additional spaces after the improvements are done will certainly increase the efficiency and safety within the hospital campus. The proposed improvements will be served by adequate public roads. All intersections operate within the congestion standard within the Forest Glen policy area, except for that one intersection where hospital traffic will not make the situation

worse. The proposed improvements will allow for safe and efficient vehicular and pedestrian movement both externally and internally. The proposed special exception modification will be suitable for this site and compatible with the surrounding neighborhood.

Mr. Hedberg opined that, given the site conditions, there is no way to handle the parking demands other than through structured parking. The demand for parking for exceeds the supply now available. To have efficiencies in parking, you've got to have more spaces than you have cars, by about 10 to 15 percent. There is more than a 200 parking space deficiency right now. As cars come onto the site, there's a gate fronting on Forest Glen Road. Cars can't find a space, and attendants are trying to get the keys; they have to stack the cars, which means that cars will be blocked in and require an attendant to move other cars to let people get their cars out. It becomes a real bottleneck right there in the front of the hospital. The valet parking also creates similar problems. So a large part of what Petitioner is trying to do with this garage is build as much parking as it can in order to address existing deficiencies. The inability to address the current deficiencies would have an impact on the ability of the hospital to remain compatible with the surrounding community by creating pressure to spill over into the neighborhood.

3. Philip Tobey (4/13/09 Tr. 102-124):

Philip Tobey resumed his testimony as an expert in architecture. Mr. Tobey addressed the question of whether or not the proposed improvements could be located elsewhere on the site so that it would not necessitate a variance or would reduce the amount of the variance needed. In consulting with the neighbors, Mr. Tobey considered three possible locations on the site and used three massing models. Exhibit 72 is a photo of massing study for Zone A, which is the southern location on the site. Exhibit 73 is a photo of massing study for Zone B, which is the western location on the site. Exhibit 74 is a photo of massing study for Zone C, which is the northwestern location on the site. Mr. Tobey

noted these zones on the Replacement Exhibit 46. These demonstrate that the current proposal is the only feasible place for both the tower and the garage.

Petitioner first considered just adding to the height of existing towers, but under building code regulations, their height is maxed out, and to make them taller, they would have to be torn down and rebuilt. So there were no opportunities to add on top of any existing buildings.

They couldn't put the new tower in Zone B because there was already a garage there which could not hold a building on top of it, and Petitioner would have to temporarily house 500 displaced cars. Moreover, the massing and bulk of the building on Dameron would have loomed over the residential area and so it was not something that the neighbors were at all happy about. There was no room on the eastern end of the site at all, toward the park. The north parking structure is also not designed for vertical construction. It houses more than 700 cars and it's the same kind of issues that Petitioner would have had with Dameron. Zone C was looked at with interest, but the massing of the building on the front of the site was just unacceptable to the neighborhood and again, prohibitive of the expense in terms of the garage underneath. Also, this was the option that was least functionally acceptable. It was the one that was the most difficult to attach to the functions within the existing hospital.

Using Exhibit 71, a 3-D massing model, Mr. Tobey demonstrated how the proposed location allows functional connection with the hospital.¹³ It allows each patient room to have a window, with the optimum of 30 rooms. Another thing that made this location so important is that the main vertical circulation for all of the hospital is in a major core of elevators, which is located between the two existing patient towers. Other locations on the site would not give the easy access to the core elevators that the planned location does, without going through existing nursing units.

¹³ Exhibit 71 does not show the proposed garage expansion in its final form.

The existing hospital does not have adequate pre and post-op space to take care of patients. Additional operating rooms are also needed. The space under the south tower is a critical piece of the way in which surgery operates and connects with post operative rooms.

Mr. Tobey opined that the planned location for the new patient tower “is exactly where the tower has to go. There can be no question otherwise. It's a functional question.” 4/13/09 Tr. 120. Both from an internal hospital functional aspect as well as the site's relationship with the surrounding community, the new tower has to be in the south.

Based on his analysis of functionality and compatibility, Mr. Tobey's opinion is that the improvements and the variances being requested are the minimum reasonably necessary to achieve the need for the hospital to address the health needs of the community. The required modification, as requested by the hospital, cannot be located on any other portion of the site other than what has been proposed.

4. Phil Perrine (4/13/09 Tr. 125-132):

Phil Perrine resumed his testimony as an expert in land planning. He noted that the property has been used as a hospital for a long time, pre-dating the Sector Plan. The Sector Plan guidelines were developed in order to define the compatible relationship of a future expansion that the Sector Plan contemplated would occur at the hospital over the 20-year life span of the Sector Plan. Were there construction of a building along Forest Glen, it would be seven stories, and in excess of a four-story limit that the sector plan contemplated for along Forest Glen. If the building, as it's proposed, were to be developed in accordance with the setback requirements, as each floor went up, it would have to shift back further from the Beltway, set back further from the Beltway to be in accordance with the setback being equal to the height. So you'd have a staggered floor arrangement, which is very inefficient and would end up with about 42,000 square feet, way insufficient for what the

requirement is here. You wouldn't be able to have an expansion that would function in terms of the hospital's needs and would impose an extreme practical difficulty on the hospital.

The building coverage is 35 percent right now, at the maximum, including the buildings and parking structures. There's a need to gain some greater efficiency in how cars are parked here on site, and that's why there is a need for extension of the garage, that adds to the increase in building coverage. There's also increase in building coverage due to new south tower. The Dameron Street garage and the Forest Glen garage would have to be demolished in order to provide a building above them. They're not built to handle building above them. Without the addition to the garage, there would not be a safe and efficient condition for parking. Moreover, people using the hospital are more likely to park on the local streets to avoid car stacking on site.

5. Eileen Cahill (4/13/09 Tr. 142-146):

Eileen Cahill testified that she is the vice-president of government and community relations for Holy Cross Hospital. She testified about the practical difficulties that are being experienced by the hospital right now in terms of the parking shortage. The existing west parking structure, which is Zone B on Exhibit 46, is all stacked parking. The existing parking that Phil Tobey denoted by Zone C is physician parking. And then the existing north parking structure that's being proposed for expansion on the first level, the ground level is employee parking, and the second and third and fourth levels are patient, visitor parking for both the hospital and for the physician office building.

Just about any time during the working week, Monday through Friday, normal working hours, 8:00 to 6:00, there is stacked assisted parking in effect for employees because there's just not enough to accommodate the need. There is an impact on the movement of traffic into the campus and out of the campus as the stacked assisted valet attendants try to move the cars, try to tag the new cars

coming in, get keys, move the cars, and that's in addition to what happens when those patients that are coming in to use the actual valet service in front of the hospital.

Ms. Cahill gets complaints about the parking situation (*i.e.*, the lack of parking and the time it takes to get your car valet parked or stacked) from everyone – physicians, patients, visitors, employees, volunteers, and those that are coming to visit the hospital for business purposes. There is also displeasure by the neighbors and particularly, the bordering houses, the houses that border Dameron and Forest Glen, because of the congregation of traffic on those two streets as people try to enter the building, enter the campus. Petitioner fully expects a transportation management plan to help the hospital further mitigate the parking problem.

B. Community Concerns

Two community witnesses testified at the April 13 hearing, Cheryl Gustitus and Wayne Goldstein.

1. Cheryl Gustitus (4/13/09 Tr. 38-41):

Ms. Gustitus testified that petitioner and she discussed the need for the revised landscape plan to be revised again in order to achieve the coverage goals necessary in order to buffer Forest Glen and the homeowners of Forest Glen from views of the parking garage. Unless that is done, the size of the plantings will not cover the garage; they must be larger in terms of height at planting in order to do so. They need to be 18 to 24 feet high when they're initially planted. The point being that the garage would be covered from sight from the very beginning, not over time.

Petitioner's counsel agreed to make changes in the landscape plan to provide for plantings of the desired height. Nevertheless, Ms. Gustitus still opposes the project.

2. Wayne Goldstein (4/13/09 Tr. 146-158):

Wayne Goldstein testified that while he is a member of the Montgomery County Civic

Federation, Planning and Land Use Committee and its Environment Committee, he testifying as an individual in support of the two variances requested by Holy Cross as part of this modification. The most compelling comments can be found in *Cromwell v. Ward*.

Mr. Goldstein cited a paragraph in the case of *Montgomery County v. Merland's Club*, differentiating between a special exception and a variance. He mentioned the case of *Zengerle v. the Board of County Commissioners*, and noted that the requested variance would apply to very few other instances. In *McLean v. Solely*, the court noted that there have been three important public policy developments that have eased the strictness standard for variances in the last few decades and that it was debatable whether strict compliance with the regulations would result in practical difficulty.

Mr. Goldstein also cited two Board of Appeal decisions (Cases A-6026 and A-6040) where the Board of Appeals deferred to the requirements of the city of Takoma Park's Tree Ordinance and granted variances because those regulations created practical difficulties.

Mr. Goldstein also listed nine medical variances sought since 2002 where request for variances were made based on meeting the legal requirements of the Federal Americans with Disabilities Act, the ADA. Of these, seven were approved as an accommodation to the requirements of the ADA despite a finding that they did not comply with the standards for a variance. One was approved with a finding that it did comply with the standards, and one was denied because testimony revealed that the applicant could easily build what he wanted in a different location without meeting, needing a variance.

Mr. Goldstein noted that, in his report in S-2651, the Hearing Examiner discussed the interplay between the Historic Preservation Ordinance and the requirements for a variance.

According to Mr. Goldstein, the standards for allowing a variance are, at its core, based on the presumption that certain lots, because of unique characteristics concerning size, shape and

topography, cannot be used in an economically acceptable way by their owners without a variance. However, this standard has clearly been changed by changing public policies in the last 30 years. While the 1973 *McLean* court made what was described as a close call about tree preservation which was subsequently interpreted in the same way by the 1995 *Cromwell* court, the Montgomery County Board of Appeals regularly defers to the requirements of municipal tree ordinances granting variances based on tree preservation. Such variances are no longer close calls.

With the passage of the ADA in 1990, a new requirement was created, and the BOA regularly approved variances based on that ordinance. With the passage of Montgomery County's Historic Preservation Ordinance in 1979, a new requirement was created, and the BOA approves variances based on that ordinance as well. Mr. Dalrymple pointed out two of those in his memo – A-6152 and A-6146.

Looking beyond the legal requirements, what distinguishes these three exceptions to a strict interpretation is that these changes are imposed on the land or the improvements from conditions outside of the site itself. A small tree, over time, will grow to a size that it will be protected from being removed without good cause. Eventually, this tree will die. A person will live in a house, perhaps develop a disability, perhaps be accommodated by new construction and will eventually move on. These are somewhat temporary changes to a lot that still allow for variances. A building on a lot may be found to one day meet the criteria for historic designation. With proper care of such a building, this change, imposed by law, could be permanent. Still, these three changes are imposed on a lot from external sources, not from changes to the land or the lot size and shape itself.

Hospitals remaining in the smaller residential zones have been changed by external sources over the last 40 to 65 years since they were built. Looking beyond hospital growth based on population growth, there has been growth in the size of the facilities created by medical

developments. Because of new equipment needs, operating rooms are no longer large enough or tall enough to accommodate them. New ORs must be larger than existing or renovated ones. Because of infection control, privacy and wellness standards, new patient rooms must, in most circumstances, be larger and be single occupancy only.

When special exceptions were approved for hospitals in residential zones beginning in the 50s for either new or existing hospitals, the definition of the size and services of the community hospital were far different than they are today. Even if these hospitals had never increased the number of beds that were originally approved, they still would have grown substantially in size because of changes in how healthcare is provided.

While a special exception is always seen as temporary no matter how long it has been in place, it is still considered to be the equivalent of “by right,” as long as there are no non-inherent adverse impacts. The external requirements being imposed on hospitals, perhaps at no time greater than today, are challenged in the intersection between the special exception and the need for variances.

If a hospital grows to the point that it can no longer properly operate without causing non-inherent adverse impacts on the surrounding residential community, then it becomes necessary for it to find a new location despite millions invested in buildings and other improvements. This appears to be what Washington Adventist Hospital decided it had to do when it sought approval to build a new hospital on a large property in Fairland. This may be the eventual fate of the other two down-county hospitals. However, it seems that it is good public policy to make reasonable accommodations to their needs for as long as practicable until it reaches the point that non-inherent adverse impacts can no longer be prevented.

Holy Cross Hospital lost access to a much larger campus when the Beltway came through. This 45-year long curse on the hospital has now become somewhat of a blessing because there can be no adverse non-inherent impact on the surrounding community if any hospital buildings were to be built at the lot line adjacent to the Beltway. With this modification, this variance comes out of the intention to avoid any adverse impact on the residential community. "The strict interpretation of the variance requirement should not thwart the continuation of this special exception that avoids non-inherent adverse impacts by receiving this variance." 4/13/09 Tr. 155-156.

The lot coverage requirement is intended to prevent massive buildings on residential lots towering over adjacent houses. There is also an absolute height limitation of 30 feet to the top of the roof line in the R-60 Zone where Holy Cross Hospital is located. However, allowing hospital buildings to be as tall as 143 feet with appropriate setbacks turns the application of residential standards to such lots on its head. A new house could not be any taller than 30 feet in the R-60 Zone no matter how far it was from the lot lines of its neighbors, nor could residential and related structures cover more than 35 percent of the lot no matter how big the lot.

Yet if hospitals can, by right, build up to 143 feet if such a building does not have a negative impact on the surrounding residential community, then why can't hospitals be allowed to exceed the lot coverage requirements that also does not have a negative impact on the surrounding residential community, which certainly appears to be the case here.

As *Zengerle* points out, there is no risk of creating a precedent because only one other hospital would have the use of this tool, and the safeguards built into the special exception process would ensure that these two hospitals would be able to expand for as long as practicable without harming the surrounding residential neighborhoods. Holy Cross Hospital appears to be doing everything it can to expand without causing such harm and based on community support for the project itself, it appears

lawful, and it is good public policy for the Hearing Examiner to recommend that the BOA approve the two requested variances as well as the modification to the special exception.

Mr. Goldstein also pointed out Case A-5599, which was also Case No. S-862-A, the Petition of the Federation of American Societies for Experimental Biology (FASEB), from December of 2001. The Board indicated that the proposed additional building and parking structure would be consistent with the size, scale and scope of the existing improvements that have been part of the special exception used for 47 years, and FASEB has become an integral part of the neighborhood and the community. Mr. Goldstein felt that would also be an accurate statement about the relationship of Holy Cross Hospital to its surrounding community.

Mr. Goldstein asked that the Hearing Examiner recommend approval.

C. People's Counsel

Martin Klauber, People's Counsel for Montgomery County, participated in both days of the hearing and expressed his support for the proposed special exception modification, the variance and the parking waiver. He believes approval is in the public interest. 4/13/09 Tr. 175.

Mr. Klauber noted that he concurred with Mr. Hedberg's comments about the points made by Mr. Clark. Mr. Clark's points do not relate to the transportation management plan that the hospital is going to develop with the community. They deal with approvals that are not within the hospital's power to do. They're related to DOT approvals, and at times SHA approvals, but certainly not Holy Cross Hospital. So they are not going to be discussed by the CLC or be in the TMP. 4/13/09 Tr. 170-171.

Mr. Klauber observed that the Technical Staff Director did have the authority to approve a modification of the final forest conservation plan, and that the final form of the FCP will be in the record. 4/13/09 Tr. 173.

Mr. Klauber stated that members of the community should be permitted to call additional CLC meetings, and they will not abuse the privilege. He also had lot of faith and confidence that the hospital will continue to listen to community concerns and that the annual reports will be ample evidence of the hospital's willingness to talk to the community and to resolve, in a very good way, issues and problems that the community raises. 4/13/09 Tr. 171-175.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards.

Petitions to modify the terms or conditions of a special exception are authorized by §59-G-1.3(c)(4) of the Zoning Ordinance. At the beginning of this report, we noted that because the proposed modifications would expand floor area by more than 7,500 square feet, under Zoning Ordinance §59-G-1.3(c)(4)(A), the Board may require that the underlying special exception be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26, if it finds that the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected. Otherwise, the inquiry must be limited to discussion of those aspects of the special exception use that are directly related to the proposed modifications.

Thus, the threshold issue in this case, established by Zoning Code §59-G-1.3(c)(1), is whether the proposed modifications, when considered in combination with the underlying special exception, change the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.

The use will, of course, remain a hospital under Zoning Code §59-G-2.31. The overwhelming weight of the evidence supports the testimony of Petitioner's witnesses that the improvements can be implemented without substantially changing the nature and character of the use of hospital property, and the Hearing Examiner so finds. As discussed in the following pages, based on the testimony and evidence of record, the Hearing Examiner concludes that the Petitioner will continue to meet both the general requirements for special exceptions and the specific requirements spelled out in Zoning Ordinance §59-G-2.31 for hospitals, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. 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.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff has identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with hospitals. Characteristics of the proposed modifications that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed modifications that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff enumerated the following inherent characteristics of “a modern day hospital”

(Exhibit 32, p. 16):

(1) size of buildings and structures; (2) early and long hours of operation; (3) traffic to and from the site by a large number of staff, patients, and visitors; (4) physicians’ offices affiliated with the hospital; (5) lighting; and (6) a certain amount of operational noise from generators, air conditioning systems, and emergency vehicles.

To this list of inherent characteristics, the Hearing Examiner would add that the size and bulk of the hospital’s buildings and structures will have some visual impact on its surroundings; that hospital operations run round the clock, seven days per week; that there will be hospital generated parking commensurate with the size of the staff and patient body; and that there will be a large amount of bio and other waste which must be carefully removed.

Phil Perrine, Petitioner’s land planner, testified that there were no non-inherent characteristics of the site, based on the fact that the use was similar to other hospitals. 3/27/09 Tr. 196-197.

Technical Staff agreed (Exhibit 32, p. 16). The Hearing Examiner suggested at the hearing that the

fact that Petitioner is seeking a variance because of unique site conditions logically means there are non-inherent site conditions. Petitioner's counsel agreed, but noted that those characteristics had no adverse effects on the neighbors. 3/27/09 Tr. 197-201.

The Hearing Examiner finds that the unusual site conditions discussed in Part II. E. of this report, which result in the need for variances, are non-inherent characteristics of the site. However, the granting of the variances allows Petitioner to place its new structures in locations which will not result in adverse effects on the community, as mentioned in Part II.E.4. of this report. There appear to be no other non-inherent characteristics of the site, since Holy Cross has the facilities one might ordinarily expect in a hospital.

Technical Staff found that the inherent characteristics of size, scale and scope associated with the proposed modifications "are minimal and not likely to result in any unacceptable noise, traffic disruption, or environmental impacts at the proposed location." Exhibit 32, p. 16. As explained by Staff, the addition of the South Patient Tower will be in conformance within the height scale for other hospitals in the County. All of the planned activities are inherent to hospital operations. Staff notes that the proposed South Patient Tower would face the Capital Beltway rather than a residential area and will not impact neighboring residences. Staff also found that the proposed improvements will provide adequate parking for the hospital staff, employees and visitors. Views of the garage expansion will be screened from neighbors located across Forest Glen Road and from users of Sligo Creek Park by the grading and landscaping to be provided within the Petitioner's property. Creative design and tiered retaining walls will maintain the general character of the neighborhood.

The Hearing Examiner agrees with Staff's findings in this regard, and concludes that there are no non-inherent characteristics of the site which warrant denial of this modification petition.

B. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report, the documentary evidence and the testimony of the witnesses provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Sec. 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.*

Conclusion: Hospitals (Zoning Code §59-G-2.31) are permitted as special exception uses in the R-60 Zone by virtue of Zoning Code §59-C-1.31(d), and the use already exists in this case.

(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.*

Conclusion: As described in Part IV. C., below, the proposed modifications would comply with the standards and requirements set forth for the use in Code §59-G-2.31.

(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 special exception must be consistent with any recommendation in an approved and adopted 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.*

Conclusion: The subject property lies within the area analyzed by the Forest Glen Sector Plan, approved and adopted in July 1996. As discussed in Parts II. E. 2. and 4. of this report, the proposed modifications will be consistent with objectives and recommendations of the Sector Plan. In fact, the proposed improvements were sited and designed to carry out the Sector Plan's specific recommendations.

- (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.*

Conclusion: On this issue, Technical Staff states that "the use will be in harmony with the general character of the surrounding residential neighborhood considering population density, design, scale and bulk of the proposed new structures." Exhibit 32, p. 17. The proposed location of the new South Patient Tower places it as far away from residential areas as is possible on the hospital campus. The adjoining property is I-495, whose users will not be adversely affected in any way. The proposed tower will be set back approximately 370 feet from Dameron Drive.

Although the garage expansion will encroach into the scenic easement, Petitioner revised its plans in an effort to minimize the adverse effects of the encroachment (*i.e.*, by moving the garage expansion farther away from the eastern property line), and will provide extensive vegetative landscaping within the easement, will use natural tone materials and colors for the retaining walls, and will provide tiered retaining walls and a green screen on the face of the garage in order to enhance the garage's appearance from

the trail. Additionally, the berm and landscape planting along Forest Glen Road that currently screen the north parking garage from the street and confronting homes will be extended along the face of the expansion. Based on these factors, both Technical Staff and the Planning Board recommended approval.

The Hearing Examiner also notes that this use has co-existed in harmony with the neighborhood for many years, and the proposed modifications will not adversely affect that relationship. The evidence is that public facilities will be adequate to serve the proposed use, as modified.

- (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.*

Conclusion: The evidence supports the conclusion that the requested modifications would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, for the reasons stated in response to the previous general condition.

- (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.*

Conclusion: The subject property has been improved with this hospital since about 1959. With the exception of construction noise and traffic concerns, there is no evidence that the use has caused objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity in the past. The evidence indicates that traffic problems will not be exacerbated by these proposed modifications, and in any event a draft TMP will be the subject of CLC meetings, per a condition recommended in Part V of this report. A

recommended condition also addresses concerns about possible construction noise. Operating noise from the hospital is the subject of another recommended condition, which will require Petitioner to meet all applicable laws and regulations governing noise control, both external and internal to the site. As evidenced by the revised Photometric and Lighting Plan (Exhibit 70), hospital lighting will remain within applicable standards (*i.e.*, will not exceed 0.1 footcandles at the rear and side property lines), and will not produce glare in adjacent residential areas. The Hearing Examiner finds that the requested modifications will not adversely change the operational characteristics of the site.

- (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.*

Conclusion: The Hearing Examiner concludes that the proposed modifications will not increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely. Moreover, as stated above, this special exception use is consistent with the recommendations of the applicable Master Plan, and therefore, under the terms of this provision, it does “not alter the nature of an area.” The modifications to the Hospital will not, by dint of number, scope, or intensity, change the predominantly residential character of the neighborhood or alter it adversely.

- (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.*

Conclusion: The evidence supports the conclusion that the proposed modifications would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. The hospital has existed for many years at this location and, after the planned modernization, will continue to provide employment and health service to the community, and will have no adverse effect on any of the listed individuals.

(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 in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*

(B) *If the special exception does not require approval of a preliminary plan of subdivision, by 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 special exception application was submitted.*

Conclusion: The proposed modifications do not require a preliminary plan of subdivision, and the Board of Appeals must therefore determine the adequacy of public facilities. The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities. Public water and sewer serve the site and are adequate. By its nature, the site will require no school services.

A traffic impact study (Exhibit 26(a)) was prepared by Petitioner's transportation planning expert, Craig Hedberg, and reviewed by Transportation Planning Staff. Technical Staff agreed that his findings satisfy LATR. "[S]ince the proposed modification of the Hospital does not result in a projected increase of new vehicle trips through this intersection [*i.e.*, Georgia Avenue and Dennis Avenue], there is no increase to the measured CLV and thus no required mitigation to meet LATR." Exhibit 32, p. 12. Mr. Hedberg also testified that PAMR is satisfied without any mitigation because the new project will not create any additional trips. Even if there were a minor increase in employees as a function of overall hospital operations not related specifically to these improvements, the increase in trips amounts to less than half a trip, which is *de minimis*. Technical Staff agrees that PAMR required no mitigation in this case.

Based on this uncontradicted record, the Hearing Examiner finds that the proposed modifications would have no adverse impact on transportation facilities, and as discussed at length in Part II. C. 3 of this report, the subject modification petition will comply with the applicable Growth Policy standards.

(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*

Conclusion: According to Mr. Hedberg, the proposed modifications will improve circulation and will allow for safe and efficient vehicular and pedestrian movement on site. 4/13/09 Tr. 93, 100-101. There is no contrary evidence, and the Hearing Examiner so finds.

C. Specific Standards: Hospitals

The specific standards for hospitals are found in Zoning Ordinance § 59-G-2.31. The Technical Staff report, the documentary evidence and the witnesses' testimony provide sufficient evidence that the proposed modifications would be consistent with these specific standards, as outlined below.

Sec. 59-G-2.31. Hospitals

A hospital or sanitarium building may be allowed, upon a finding by the board that such use will not constitute a nuisance because of traffic, noise or number of patients or persons being cared for;

Conclusion: The hospital already exists, and has been at this site for many years without creating a nuisance. The proposed modifications will add no new patients and little or no new traffic. As discussed previously in this report, the Hearing Examiner finds that the proposed changes will not create a nuisance from any of the enumerated factors.

that such use will not affect adversely the present character or future development of the surrounding residential community;

Conclusion: The best evidence that the hospital expansion will not be detrimental to development of the surrounding residential community is the Master Plan's support for such an expansion, as previously discussed. The location of the new South Patient Tower will insulate it from the residential community, and the hospital, in general, promotes development by providing employment and needed hospital services.

and if the lot, parcel or tract of land on which the buildings to be used by such institution are located conforms to the following minimum requirements; except, that in the C-2 and C-O zones, the minimum area and frontage requirements shall not apply:

(1) Minimum area. Total area, 5 acres.

Conclusion: The Hospital campus is 14.21 acres, thus exceeding the minimum area requirements.

(2) Minimum frontage. Frontage, 200 feet.

Conclusion: The proposal complies with this requirement. The existing use is located on a corner lot with frontage on Forest Glen Road of approximately 810 feet and frontage on Dameron Drive of approximately 756 feet.

(3) Setback. No portion of a building shall be nearer to the lot line than a distance equal to the height of that portion of the building, where the adjoining or nearest adjacent land is zoned single-family detached residential or is used solely for single-family detached residences, and in all other cases not less than 50 feet from a lot line.

Conclusion: Since Petitioner proposes to build a South Patient Tower to a height of 128 feet, adjacent to land zoned single-family detached residential, a 128 foot setback would be required to satisfy this requirement. Because the South Patient Tower would have no setback from the south (rear) property line, Petitioner seeks a 128 foot setback variance, which the Technical Staff, the Planning Board and the Hearing Examiner all recommend, for the reasons discussed in Part II. E. of this report. The proposed South Patient Tower will be set back approximately 370 feet from the single-family detached dwellings located to the west, across Dameron Drive, thus meeting the setback requirements in that direction. The proposed garage expansion will also be in compliance with setback requirements.

(4) Off-street parking. Off-street parking shall be located so as to achieve a maximum of coordination between the proposed development and the surrounding uses and a maximum of safety, convenience and amenity for the residents of neighboring areas. Parking shall be limited to a minimum in the front yard. Subject to prior board approval, a hospital may charge a reasonable fee for the use of off-street parking. Green area shall be located so as to maximize landscaping features, screening for the residents of neighboring areas and to achieve a general effect of openness.

Conclusion: Additional off-street parking is proposed along Forest Glen Road, in an extension to the existing North Parking Garage. As stated by Technical Staff (Exhibit 32, pp. 23-24), “the garage expansion reduces the visual impact on the surrounding neighborhood since it is being extended to the east toward open parkland, and it minimizes height as the top level of parking is no higher than currently exists, thereby achieving better compatibility with the surrounding residences than if located elsewhere on the property. The off-street parking is so located as to achieve a maximum of safety, convenience, and amenity for the residents of the surrounding area.” Staff also found that Petitioner has maximized the landscaping features which will provide screening to mask the bulk of the proposed garage expansion. The Hearing Examiner agrees, especially after Petitioner agreed to further enhance the screening along the Forest Glen Road berm, as discussed in Part II. C. 2, of this report.

(5) Commission recommendation. The board or the applicant shall request a recommendation from the commission with respect to a site plan, submitted by the applicant, achieving and conforming to the objectives and requirements of this subsection for off-street parking and green area.

Conclusion: The site plan has been reviewed by Technical Staff, and modified in accordance with their suggestions. The revised plans were thereafter approved by the Planning Board.

(6) Building height limit. Building height limit, 145 feet.

Conclusion: The Building height for the proposed South Patient Tower will be 128 feet, well within the 145-foot maximum height. The North Garage extension will continue at the same elevation as the existing structure (at grade along part of Forest Glen Road), and the maximum height of the proposed garage expansion is 43 feet.

(7) Prerequisite. A resolution by the health services planning board approving the establishment of the hospital shall be filed with the petition for a special exception.

Conclusion: The hospital already exists, and has been at this site for many years. This provision is therefore inapplicable to this modification petition.

D. 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 Section G-1.23 or in Section G-2.*

Conclusion: In addition to the other general and specific standards set forth above, “*Special exceptions are subject [under Code § 59-G-1.23(a)] to the development standards of the applicable zone where the special exception is located [in this case, R-60 Zone] except when the standard is specified in Section G-1.23 or in Section G-2.*” The following table was provided by Technical Staff demonstrating compliance with applicable development standards, except where variances are requested (Exhibit 32, p. 20):

Development Standards Table

| | <u>Required</u> | <u>Proposed</u> |
|--|--------------------|---|
| Minimum lot area | 5 acres | 14.21 acres |
| Maximum lot coverage (.59-C-1.328) | 35% | *52.4% |
| Off-street parking | 1612 | 1768 spaces |
| Minimum lot width (59-C-1.322) at street line at building line | 25 feet 75 feet | 810 ft. (approx.) 950 ft. (approx.) |
| Minimum setbacks: Front Side Rear | 25 8 128 | 67 ft. (approx.) 65 ft. (approx.) *0 ft. |
| Maximum building height | 145 feet | 128 ft. (seven-story tower) 43 ft. (four-story garage) |

**The applicant has requested variances for relief of these development standards, and the variance case (A-6279) has been consolidated with the special exception modification case.*

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

Conclusion: Pursuant to Section 59-E-3.7, the parking requirements for a hospital are: One parking space for each 1,000 square feet of total floor area, plus one space for each resident doctor, plus adequate reserved space for visiting staff doctors, plus one space for each 3 employees on the major shift. The petition proposes a total of 1,768 spaces, of which 288 are surface parking and 1,480 will be in structured parking. Technical Staff calculated required parking as 1,555 spaces, based on the following figures:

| | |
|---|-----------------|
| 1sp/ 1,000 SF floor area= 894,000 SF/1,000= | 894 sp |
| 1sp/resident doctor=1sp/74 doc= | 74 sp |
| Reserved sp for 245 visiting Staff doctor= | 245 sp |
| 1 sp/3 employees 1026 employees/3 | <u>342 sp</u> |
| Total spaces required | 1,555 sp |

Since Petitioner will provide 1,768 spaces, plus 8 ambulance, 10 motorcycle and 20 bicycle parking spaces, it more than meets the parking space requirements of the Code. Except where Petitioner has requested a parking setback waiver, Petitioner meets all other requirements of Article 59-E. As discussed in Part II. C. 4. of this report, a parking setback waiver is recommended by Technical Staff, the Planning Board and the Hearing Examiner.

- 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:*

Conclusion: Not applicable.

- (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.

Conclusion: As discussed in Part II. C. 5. of this report, there is no forest on site, but Petitioner does have a Final Forest Conservation Plan, including a Tree Save Plan, approved by the Planning Board on March 12, 2009 (Exhibit 34), and subsequently approved in its amended form by Technical Staff on April 16, 2009 (Exhibits 77(l) – (s)), as is permitted by County Code §22A-11 (Exhibit 63). Petitioner’s civil engineer, Stephen Goley, testified that there would be no conflict between the special exception and the Forest Conservation Plan that was approved by the Planning Board or the amendment to it approved by the Staff. 3/27/09 Tr. 254. The Hearing Examiner finds that the requirements of this section have been satisfied.

(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.

Conclusion: This section is inapplicable because water quality plans are required only in special protection areas, and this site is not in an SPA. Petitioner’s stormwater management concept plan (Exhibits 81(l) and (m)) has been approved by DPS (Exhibit 67).

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

Conclusion: As discussed in Part II. C. 2. of this report, an existing entry sign will be moved under the proposed plans. To insure compliance with Article 59-F, the following condition has been recommend in Part V of this report, addressing any new or relocated signage:

The final signage plan approved for the property in conjunction with building permits that addresses way-finding and other signage internal to the property shall be submitted by the Petitioner to the Board of Appeals prior to issuance of permits relative to the signage.

(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. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.

Conclusion: It is not reasonable to expect a major hospital, which is institutional in nature, to have a residential appearance. However, the proposed modifications will complement the existing structures in terms of scale, massing, design and function. As stated by Technical Staff (Exhibit 32, p. 22), “the proposed tower addition and garage expansion [are] well-related to the surrounding neighborhood in [their] siting and . . . landscaping, scale, bulk, height, material, and texture.”

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 lines must not exceed 0.1 foot candles.*

Conclusion: The revised photometric study (Exhibit 70) demonstrates Petitioner's compliance with this requirement, as discussed in Part II. C. 2. of this report.

59-G-1.26. Exterior appearance in residential zones.

A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.

Conclusion: The proposed modification complements the existing structures in terms of scale, massing, design and function, as discussed above.

E. The Requested Variances

Petitioner seeks variances to permit an encroachment into the 128-foot, rear-yard setback required by Zoning Ordinance §59-G-2.31(3) for a 128-foot-tall building (a 128-foot variance) and an increase in building lot coverage to 52.4 percent (a 17.4 percent variance above the 35% building lot coverage permitted in the R-60 Zone).

For the reasons set forth in Part II. E. of this report, the Hearing Examiner concludes that Petitioner has satisfied the requirements for the area variances it requests, with regard to both building lot coverage and setbacks. Therefore, the variances should be granted in the amounts requested.

In sum, it is clear from the record that the proposed modifications will not change the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, and the petition satisfies the requirements specified in the Zoning Ordinance. The Hearing Examiner therefore recommends that the Board of Appeals grant the modification petition, with the conditions suggested in the final section of this report.

V. RECOMMENDATION

Based on the foregoing analysis and a thorough review of the entire record, I recommend that Petition No. S-420-H, filed by Holy Cross Hospital of Silver Spring, Inc, located at 1500 Forest Glen Road, Silver Spring, Maryland, for modification of the existing special exception and for a waiver of the parking standards of Section 59-E-2.8 of the Zoning Ordinance to allow ten additional parking spaces, east of the South Patient Tower along the fire lane access drive, within the applicable setback from the rear property line be **GRANTED**, and that Petition A-6279, to obtain a variance from both building coverage and setback restrictions in the Zoning Ordinance, be **GRANTED**, with the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. The number of patient beds shall be limited to 408 in-patient beds as approved for the Petitioner by the Board of Appeals in S-420-E on May 4, 2001.
3. The expansion of the south patient tower shall be limited to 219,194 square feet of gross floor area and 180 in-patient beds, based on the Site Plan (Exhibit No. 81(e)).
4. The height of the south patient tower shall not exceed seven stories and 128 feet in height, based on the Site Plan (Exhibit No. 81(e)).
5. The north parking garage shall have four levels and 95,000 square feet, based on the Site Plan (Exhibit No. 81(e)).
6. Any amendments to the landscape plans, outside of the Scenic Easement Area, shown on Exhibit, must be submitted to and approved by the Board of Appeals as provided for in Section 59-G-1.3(c) of the Zoning Ordinance.
7. Lighting at the side and rear property lines must not exceed 0.1 foot-candle level allowed by the special exception, as shown on the Photometric and Lighting Plan (Exhibit No. 77(e)).
8. The median for the east access drive shall be constructed to extend beyond the crosswalk to the Forest Glen Road thru-lane curb line, with a break for the crosswalk, as the existing west entrance from Forest Glen Road is now configured, as shown on the Site Plan (Exhibit No. 81(e)).

9. Pedestrian ramps shall be constructed across the relocated east entrance so that the pedestrian ramps are perpendicular to the travelway directing pedestrians to the opposite ramp and not on an angle into the roadway, as shown on the Site Plan (Exhibit No. 81(e)).
10. Petitioner must provide 14 bike lockers in the northeast corner of the proposed garage and 3 inverted-U bike racks at the main entrance of the professional building.
11. The Community Liaison Council (CLC) shall continue to meet a minimum of two times per year, as long as this Special Exception exists. The frequency of meetings may be expanded to four times per year at the request of either the Petitioner or the community, with additional meetings, called as needed, by either Petitioner or the community. The People's Counsel of Montgomery County shall be an ex officio member of the CLC and shall facilitate meetings of the CLC. Minutes shall be taken at each CLC meeting, and an Annual Report shall be prepared that shall include the minutes of the CLC meetings and information to indicate how the Petitioner is satisfying the conditions of this Special Exception that have been established by the Board of Appeals.
12. The CLC shall act as a forum for the Petitioner to finalize a Transportation Management Plan (TMP), with input from Maryland-National Capital Park and Planning Commission (M-NCPPC) Staff as necessary, to be submitted to and approved by the Board of Appeals prior to release of the initial building permit. The Petitioner shall also use the CLC as a forum to seek input on issues relating to construction and build-out of the project, including construction phasing and construction management (with additional input from MCDOT as necessary).
13. The Petitioner must design and construct the South Patient Tower to attenuate projected exterior noise sources to an interior noise level not to exceed 45 dBA L_{dn} . The Petitioner must comply with the County Noise Ordinance (Chapter 31B of the County Code) for onsite noise sources as they may affect offsite residential properties at all times. The Petitioner shall submit a certification to the Department of Permitting Services, with a copy to the Board of Appeals, when applying for the initial building permit that these requirements relating to internal and external noise will be met. During the construction process, the Petitioner must adhere to the "maximum allowable noise levels for construction" (Section 31B-6(a) of the County Code). The construction contract between the Petitioner and its general contractor will include provisions relating to construction activity compliance with the County Noise Ordinance.
14. There must be no construction noise audible outside of the subject site before 7 a.m. on weekdays and 9 a.m. on weekends and holidays. Trucks connected with the construction must not idle on Forest Glen Road or Dameron Drive; rather they should be admitted to on-site staging areas to await construction duties. The Petitioner must designate a noise compliance contact or contacts who will be available 24 hours/day, 7 days/week for questions and concerns regarding noise issues and/or other construction related issues during the construction process. All designated compliance contacts must have the authority to immediately halt any conduct violative of these conditions. This contact information, including available phone numbers, email addresses, and other contact

information allowing for instant access, shall be provided to the community through the CLC and through a direct mailing to all persons required to receive notice of these proceedings prior to commencement of construction on the project.

15. Prior to issuance of the first building permit, the Petitioner must grant a scenic easement to M-NCPPC for recordation in the Land Records of Montgomery County, in a form and with terms approved by the Parks Department of the M-NCPPC, which reflects the language related to the scenic easement referenced on plat, as well as the conditions of the M-NCPPC as required for approval granted to the Petitioner to encroach into the easement.
16. The final signage plan approved for the property in conjunction with building permits that addresses way-finding and other signage internal to the property shall be submitted by the Petitioner to the Board of Appeals prior to issuance of permits relative to the signage.
17. The proposed landscape buffer along Forest Glen Road, as initially planted, must provide full year-round screening of the expanded garage structure for Lots 5 through 9 on the north side of Forest Glen Road opposite the North Parking Garage. This year-round screening will be provided by the evergreen and other plantings shown on the revised Landscape Plan (Exhibit 81(a)) and the Forest Glen Landscape Buffer Sections Plan (Exhibit 79(f)), with the screening enhanced during the growing seasons through deciduous trees. Should the plantings proposed by the revised landscape plan not provide the year-round screening that has been represented by Petitioner to be in place upon initial planting, Petitioner and its consultants will take such remedial actions necessary, in consultation with the users of the aforementioned Lots 5 through 9, to provide the screening as represented.
18. All terms and conditions of the approved special exception remain in full force and effect, except as modified in the Board's order granting this modification request.
19. The number of permitted employees will remain unchanged by the instant modification.
20. Petitioner's hours of operation are 24 hours per day, seven days a week. These hours are unchanged by the instant modification.
21. The requirement of Zoning Ordinance §59-E-2.8 that a parking facility be set back from the rear property line is hereby waived, pursuant to Zoning Ordinance §59-E-4.5, solely with regard to ten additional parking spaces, which may be located east of the South Patient Tower along the fire lane access drive, adjacent to the Capital Beltway, without any setback from the rear property line.
22. Petitioner is hereby granted a variance permitting an encroachment into the 128-foot, rear-yard setback required by Zoning Ordinance §59-G-2.31(3) for a 128-foot-tall building (a 128-foot variance) and an increase in building lot coverage to 52.4 percent (a 17.4 percent variance above the 35% building lot coverage permitted in the R-60 Zone).
23. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the

special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: June 22, 2009

Respectfully submitted,

Martin L. Grossman
Hearing Examiner