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## I. EXECUTIVE SUMMARY

Applicant: Glenwood Glen Aldon, LLC, Glenmont Apartments, LLC, and Glenbrook, LLC

LMA No. & Date of Filing: G-909, filed October 25, 2011;

Zoning/Use Sought: Two alternative density categories in the PD-Zone and four alternative development plans: all alternatives propose three multi-family buildings with 15% MPDUs. Each alternative varies the number of dwelling units, the number of TDRs required to be purchased, and provision of Voluntary Affordable Housing Units (VAHUs), which are dwelling units proposed by the Applicant for individuals with incomes at Workforce Housing levels, but which are restricted for a period of 20 rather than the 99 years provided in Chapter 25B of the Montgomery County Code. The alternative zones/uses are:

PD-88: 644 units, with purchase of 31 TDRs and no VAHUs.

PD-100: 692 dwelling units; with purchase of 20 TDRs and including 10 VAHUs;

PD-100: 692 units, with the purchase of 31 TDRs and including 10 VAHUs;

PD-100: 750 dwelling units, with the purchase of 31 TDRs and including 10 VAHUs.

Current Zone and Use: A combination of the R-10 and R-10/TDR in four parcels. One of the R-10 parcels is recommended for PD-75 zoning in the *1994 Bethesda Central Business District Sector Plan*. The property is currently improved with three- to four-story multi-family housing units constructed *circa* 1950 and 1960.

Location: The four parcels are situated at 4857, 4858, 4890, and 4900 Battery Lane, Bethesda, MD (on the north and south sides of Battery Lane) at or near its intersection with Woodmont Avenue.

Acreage to be Rezoned: The total gross tract area of all parcels is approximately 5.67 acres; the gross tract areas by zoning categories are:

R-10: 1.07 acres;  
R-10/TDR: 3.54 acres;  
R-10 (PD-75): 1.07 acres

Base Density Permitted in the Zone Requested	PD-88: 499 dwelling units PD-100: 567 dwelling units
Bonus Density for 15% MPDUs: (22% Bonus Density)	PD-88: 548 PD-100: 692
Parking Required/Planned:	PD-88: 862 required/provided PD-100 (692 Units): 926 required/provided PD-100 (750 Units): 1,005 required/provided
Environmental Issues:	No significant environmental issues; variance for removal of four specimen trees approved by the Planning Board.
Sector Plan:	1994 Bethesda CBD Sector Plan and 2006 Woodmont Triangle Amendment to the Bethesda CBD Sector Plan.
Neighborhood Response:	Montgomery County Civic Federation opposed the PD-100 applications because the number of transferable development rights provided does not comply with the Sector Plan. It opposed the PD-88 application because it exceeded densities recommended for the properties in the Sector Plan. Mr. John Gill opposed the application if the height of Building B were above 5 stories or blocked sunlight onto his adjoining building.
Significant Issues:	Compliance with recommendations in the Sector Plan regarding density, number of TDRs provided, height limits and urban design guidelines.
Technical Staff Recommends:	Approval of PD-88 development plan.
Planning Board Recommends:	Approval of PD-100 alternative with 692 dwelling units, 20 TDRs and 10 VAHUs.
Hearing Examiner Recommends:	Approval of the PD-100 development plan specified as Exhibit 82 including 692 dwelling units, 31 TDRs and 10 VAHUs (preferred) or the PD-88 development plan.

## II. STATEMENT OF THE CASE

Filed on Application October 25, 2011, the Applicants Glenwood Glen Aldon, LLC, Glenmont Apartments, LLC and Glenbrook, LLC (Applicants) request rezoning of approximately 5.67 acres of land from the R-10 and R-10/TDR Zones to either the PD-88 or PD-100 Zones. The subject site is comprised of four parcels with addresses of 4857, 4858, 4890, and 4900 Battery Lane, Bethesda, Maryland. The site is identified as Lots 8, 22, and Parts of Parcels 35-38, Pt. of 5, 38, 40, 41, 42, in the Northwest Park subdivision, tax account numbers 07-00524265, 07-00524653, 07-00524276, 07-00524378, in the 7<sup>th</sup> Election District.

The Applicants propose to demolish three existing four-story multi-family buildings and construct three new multi-family buildings, with heights ranging from 97 to 110 feet. Currently, the Applicant has proposed four alternative development plans, one of which requests rezoning to the PD-88 Zone and the remaining three requesting varying densities under the PD-100 Zone. The proposals vary in the number of dwelling units, the number of Transferable Development Rights (TDRs) purchased, and the number of voluntary affordable housing units (VAHUs) provided.<sup>1</sup> Exhibits 80-82.

Initially, the Applicants proposed two alternative applications, one for the PD-88 Zone and one for the PD-100 Zone. The PD-88 zoning application proposes the purchase of 31 TDRs and 15% Moderately Priced Dwelling Units (MPDUs). Exhibit 31(b). As an alternative, the Applicants submitted a development plan for the PD-100 Zone proposing 692 dwelling units, the purchase of 20 TDRs, 15% MPDUs, and 10 voluntary affordable housing units or VAHUs. Exhibit 31(a). These initial alternative development plans were reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission (MNCPPC) which, in reports dated April 6, 2012, and April

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<sup>1</sup> These voluntary affordable housing units are not MPDUs or Workforce Housing, but are created by the Applicants as more particularly described in Section III.C.2 of this Report.

26, 2012, recommended approval of the PD-88 Zone. *See*, Exhibits 36, 38. The Montgomery County Planning Board (Planning Board) considered the application on April 26, 2012, recommending approval of the PD-100 alternative. Exhibit 39.

The public hearing convened as scheduled on April 27, 2012. The record was left open until June 1, 2012, to receive comments from the Montgomery County Agriculture Advisory Committee (AAC) regarding the two alternative development plans, to receive additional information on the impact of the Base Realignment and Closing Act (BRAC) on the surrounding area, and for the Planning Board's approval of a variance from the requirements of the County's Forest Conservation Law. T. 313-317; Ex. 62. These submissions were timely received. Exhibits 65, 66, 67. In addition, a letter from Mr. Richard Nelson, Director, Department of Housing and Community Affairs (DHCA) was also received and included in the record for the Council's review of this case. Exhibits 68, 69. Due to the submission of DHCA's letter, the close of the record was extended to June 12, 2012, to permit opposing parties the opportunity to provide comments. Prior to June 12, 2012, the Applicants submitted two additional alternative development plans for the PD-100 Zone, each including the purchase of 31 TDRs, with alternative densities of 692 and 750 dwelling units. Ex. 72. The close of the record was extended again to July 16, 2012, to permit the opportunity for the Planning Board (or its Technical Staff) to review the plans as required by §59-D-1.72 of the Zoning Ordinance. Exhibit 76. Technical Staff provided its comments on June 29, 2012, and the parties timely submitted written closing arguments. Ex. 77-79. The record closed on July 16, 2012, but was re-opened by the Hearing Examiner on August 6, 2012, to permit the parties to comment on the number of TDRs required to be provided by the Sector Plan, issues relating to Master Plan consistency, and the public interest. Exhibit 84. The closing of the record was extended on August 16, 2012, to receive the additional comments from Technical Staff which were not provided until

August 17, 2012 and to permit the parties an opportunity to respond to these comments. Exhibit 87. These comments were timely received and the record closed on August 22, 2012. Exhibits 88-90.

The primary issues in this case include whether the densities requested are in substantial compliance with the Sector Plan, whether the number of TDRs provided comply substantially with the Sector Plan and fulfill the requirement that the application be “in the public interest”, and whether the maximum heights of the buildings substantially comply with the Sector Plan and are compatible with the surrounding area.

### **III. FINDINGS OF FACT**

#### **A. Subject Property**

The subject property consists of four parcels containing a total of approximately 5.67 acres of gross tract area located on both the north and south sides of Battery Lane in Bethesda, Maryland. Exhibits 1, 80-82. The property on the north side (Building A as shown on all of the development plans) is located close to the northwest corner of the intersection of Battery Lane and Woodmont Avenue.<sup>2</sup> The properties along the southern side of Battery Lane (Buildings B and C as shown on all development plans) are located in the southwest corner of that intersection and extend further west along Battery Lane toward, but not reaching, the Battery Lane Urban Park. Exhibits 80-82.

Consisting of approximately 1.07 acres of gross tract area, Parcel A (4857 Battery Lane) extends along approximately 116 feet on the north side of Battery Lane. The property slopes slightly (by approximately 10 feet) from the south toward its northern property line, which it shares with the National Institutes of Health (NIH) campus. T. 207. A long and relatively narrow rectangular lot, it

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<sup>2</sup> Technical Staff refers to the different parcels comprising the property within the development plan using the nomenclature employed by the 1994 Bethesda CBD Sector Plan (i.e., Sites 1, 2, and 3). The parties sometimes refer to the respective properties by the label of the buildings shown on the development plan (i.e., Buildings A, B, and C or “Parcels A, B, and C”). T. 123. Because the subject property includes land that is outside the area of Sites 2 & 3 in the Sector Plan, this Report will refer to the different properties as Parcels A, B, and C and the different buildings as Building A, B, or C.

is separated from Woodmont Avenue to the east by an intervening property approximately 60 feet in width. This intervening lot is zoned and is subject to an approved development plan (the “Woodmont View” project), a 90-story mixed use project. T. 155. Parcel A is zoned R-10 (Multi-family, High Density Residential), but is recommended for PD-75 in the 1994 Sector Plan. Exhibit 36, pp. 3-4.

The southern portion of the site consists of three parcels totaling approximately 4.61 acres of gross tract area on the south side of Battery Lane (4858, 4890, and 4900 Battery Lane). Exhibits 80-82, 53; T. 120. The northern property lines of these parcels extend from the southwest corner of Woodmont Avenue and Battery Lane intersection approximately 640 feet to the west (toward Battery Lane Urban Park). This tract also fronts on the west side of Woodmont Avenue for approximately 160 feet. T. 240-241. The western most portion of Parcel B is zoned R-10; the balance of Parcels B and C (3.54 acres of gross tract area) is zoned R-10/TDR. The R-10/TDR portion of Parcels B and C comprises approximately 60% of the combined gross tract area of all the parcels. Exhibit 53. The subject properties (outlined in red) are depicted in an aerial photograph from the Technical Staff Report (Exhibit 38, p. 4), on the following page.

The properties are improved with four, four-story multi-family buildings, containing a total of 260 dwelling units, originally constructed in the 1950’s and 1960’s. T. 23; Ex. 36, p. 4. Each building has a paved circular drive leading to a central entrance and surface parking areas. Exhibit 36, p. 3. While each building has a main entrance on Battery Lane, Staff advises that many of the first-floor apartments have individual entrances. Currently, none of the units are regulated affordable housing (i.e., MPDUs). The rents are considered affordable for the area because of the ages of the buildings and lack of amenities such as pools and stainless steel kitchens and party rooms. Exhibit 36, p. 4; T. 28. Mr. Falcone testified that the rents are slightly above those under the County’s



Aerial view of Bethesda looking north with the subject property in the center of the image and NIH and the Naval Medical facility in the background.

**Aerial View  
Exhibit 36, p. 4.**

Workforce Housing program, but the apartments attract higher income, credit worthy tenants because of its proximity to NIH. T. 28.

Technical Staff advises that there is “no significant” vegetation on the site, the majority of which is paved parking lot or building. Ex. 38, p. 3; *see also*, T. 282. There are four specimen trees which exceed 30 inches in diameter. Exhibit 66. These trees are “stressed” by their urban environment, according to the Applicants’ expert land planner, Mr. Douglas Wrenn. Photographs of the existing properties, included in the Technical Staff Report, are on the following pages (Exhibit 36, pp. 5-7).



Views along Battery Lane looking west-Sites 2 and 3



4890 Battery Lane "Glen Mont"  
Proposed Site for Building "B"



4858 Battery Lane "The Glens at Battery Lane"  
Proposed Site for Building "C"

## B. Surrounding Area

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The "surrounding area" is defined less rigidly in a floating zone case than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account areas that would be most directly affected by the proposed development.

Technical Staff accepted the Applicants' delineation of the surrounding area as bounded by NIH to the north, Wisconsin Avenue to the east, Old Georgetown Road to the south and west and Norfolk Avenue to the intersection with Woodmont Avenue and Cheltenham Drive. An aerial view of the surrounding area submitted by the Applicants and included in the Technical Staff Report (Exhibit 36, p. 12) is reproduced on the following page. Having no evidence to the contrary, the Hearing Examiner accepts this delineation of the surrounding area.

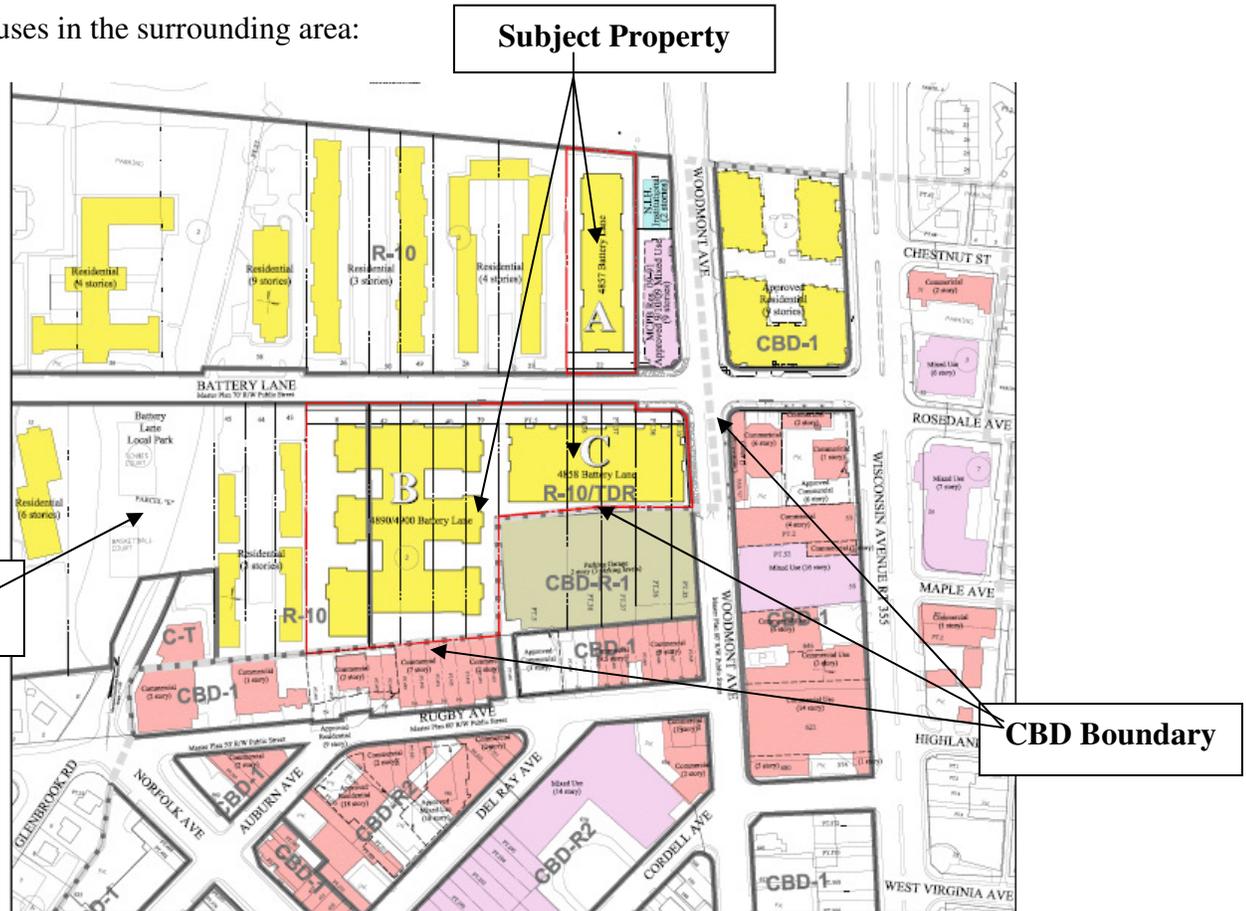
## Surrounding Area



Glen Aldon Neighborhood Map provided by the applicant

According to Staff, the area immediately surrounding the property is primarily residential, but contains a mix of other uses and services that “create a transitional area from the Metro Core to the Northern CBD boundary.” Ex. 36. Because the site is located just outside of the Central Business District, the Hearing Examiner disagrees with this assessment but does agree with

Technical Staff that the area immediately surrounding the subject property (within the Battery Lane District outlined in the Sector Plan) is primarily residential, including mid- and high-rise multi-family development. An exhibit submitted by Applicants (Exhibit 12) shows the existing and proposed uses in the surrounding area:



**LEGEND:**

- RESIDENTIAL
- COMMERCIAL
- MIXED USE  
(Residential over Commercial)
- INSTITUTIONAL
- PARKING STRUCTURE
- SITE BOUNDARY
- EXISTING BUILDINGS
- PROPOSED BUILDING ON SITE
- PROPOSED BUILDING ADJACENT SITE
- EXISTING EDGE OF CURB
- BETHESDA CBD BOUNDARY

Immediately to the north is the NIH campus, although not within the boundary of the surrounding area. The Children's Inn, a philanthropic multi-family use providing temporary housing for patients at NIH, adjoins Parcel A to the east, as well as the "Woodmont View", a development approved for multi-family residential with first-floor retail. Further to the east within the CBD, a 9-story residential project is approved for the property between Woodmont and Wisconsin Avenues on Battery Lane. To the south (within the CBD), uses include retail and commercial fronting Rugby Avenue (zoned CBD-1). A public parking garage (Garage #35) is adjacent to the southern property line of Parcel C. The Hearing Examiner finds that the surrounding area, particularly the Battery Lane portion, serves as a transition from the Metro Core less densely zoned area outside the Sector Plan boundary. Proceeding generally to the south and east (within the CBD), the uses become a mix of commercial, retail, and mixed use developments. These more intense uses transition gradually to lower density residential and the Battery Lane Park to the east and to the NIH campus to the north.

### **C. The Proposed Development Plans**

#### **1. Evidence Applicable to All Alternatives**

According to the Applicants, they desire to redevelop the site because of the age and condition of the existing buildings. Mr. Anthony Falcone, Chief Executive Officer of the owner's management company, testified that Alvin and Donald Brown originally owned all of the properties. Ownership remains in entities owned by the Brown family. According to Mr. Falcone, the four buildings are a small part of the 900 apartments owned by the family in Bethesda. Seven of the family's buildings are on Battery Lane; only the four closest to Woodmont Avenue are the subject of the application. T. 23-24. The remainder of the Brown family's Battery Lane buildings are more recent, having been built in the 1970's. Those buildings have been renovated and are not proposed for redevelopment. T. 24.

Faced with the choice of whether to renovate the existing building or redevelop the properties, the family participated in the 2006 Woodmont Triangle Amendment (2006 Amendment) to the 1994 Bethesda Central Business District Sector Plan (1994 Sector Plan), which collectively will be referred to as the "Sector Plan". While the Battery Lane District was included in the study area of the 2006 Amendment, the District Council deferred changing the zoning, building heights, and land use in the District to a separate Sector Plan amendment. The Battery Lane amendment was included in the Planning Board's work program, but was deferred and eventually removed. The Applicants then filed for rezoning at the suggestion of Technical Staff. T. 25.

Mr. Falcone testified that the family considered the impact of the BRAC consolidation at the Bethesda Naval Medical Center and NIH when considering whether and how to redevelop the site. The family traditionally has maintained full occupancy of their existing buildings by offering the most reasonable rents in the area without some of the amenities offered in buildings with higher rents. While generally more affordable, the income levels of the tenants and the rents offered are not regulated as MPDUs or Workforce Housing. The owners have been able to attract high-income tenants despite the lack of amenities due to the subject property's proximity to NIH. They wish to continue this strategy to maintain occupancy through reasonable rates and do not plan to construct the new buildings with some of the amenities that drive up the rental prices. T. 26-29.

According to Mr. Falcone, this led the owners to propose two alternative development plans which balance the cost of purchasing TDRs with the cost of providing regulated affordable housing on the properties. He testified that the lower number of TDRs and the increased number

of units under the initial PD-100 application (i.e., 692 units, 20 TDRs, 15% MPDUs, and 10 VAHUs) permit the Applicants to provide the 10 VAHUs.<sup>3</sup>

After the public hearing, the Applicants added two additional PD-100 alternative development plans, varying the number of TDRs provided and the maximum amount of dwelling units. One of these alternatives proposed 692 dwelling units, 31 TDRs, and 10 VAHUs, and the other proposing 750 dwelling units, 31 TDRs, and 10 VAHUs.

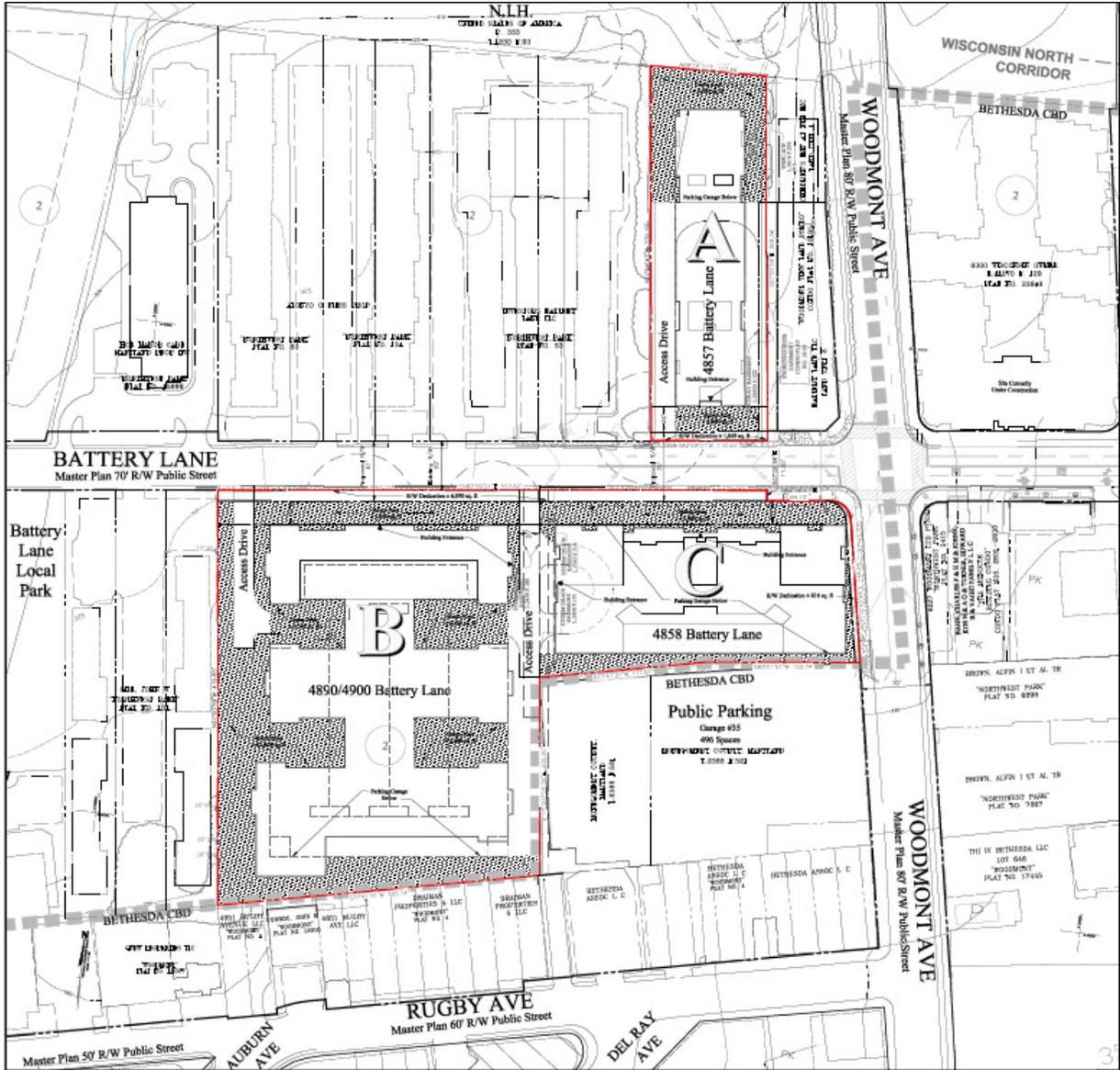
These four alternatives are accomplished under two alternative density categories in the PD Zone: The 644-unit development plan is proposed under the PD-88 Zone and the 692-unit and 750-unit development plans under the PD-100 Zone. Each plan calls for the demolition of the existing buildings and construction of three new multi-family residential buildings. No retail is proposed under any of the alternatives. T. 260. The full text of the binding elements for all plans is set forth in the appendix, which is incorporated herein, and summarized here.

The site design on all the plans is the same; the differences are primarily in the maximum number of dwelling units permitted, the number of TDRs acquired, and the provision of the VAHUs. The development plan from the PD-100 application (Exhibit 82, with 692 units and 31 TDRs, shown on the following page) shows the proposed layout of the buildings on the site, which is the same for each development alternatives.

All alternatives propose to provide 15% MPDUs, thereby qualifying for a density bonus in the PD-Zone of 22% pursuant to §7.14(c) of the Zoning Ordinance. The binding elements in all development plans provide that the MPDUs and VAHUs need not be provided on-site but must be provided within the Battery Lane District. T. 71, Exhibits 80-82.

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<sup>3</sup>Initially, the original PD-100 application did not include any TDRs. These were included at the recommendation of Technical Staff. Exhibit 36, p. 12.



**Excerpt from Exhibit 82  
Showing Site Layout**

The height of Building A is capped at 79 feet, which permits 9 stories. The textual binding elements limit the maximum heights for Buildings B and C to 110 feet. The Applicants’ seek flexibility to develop between five and 11 stories for both buildings. According to the Applicants’ architect, Mr. David Kitchens, Building B will “probably” be five stories because of the costs involved in building above that level. The Applicants’ wish to retain the flexibility to build to 11

stories because it is not economical to develop between 6 and 10 stories due to the higher construction costs for framing and other building code requirements. T. 218-219.

All scenarios call for a minimum of 30% green area within the site. Building A will be setback from Battery Lane by 26 feet and will have a rear yard setback (adjacent to the NIH campus) of 10 feet. T. 72. Buildings B and C will be setback from Battery Lane by a minimum of 24 feet, as shown below:



## 2. Alternative Development Plans

The alternative development plans differ primarily in the density, number of TDRs to be acquired, and whether 10 VAHUs are provided. These variables also change the parking calculations and the number of MPDUs required under each scenario, although each alternative development plan calls for the required number of parking spaces. Exhibits 80-82. The PD-100 Plan for 750 units is based on a 10% bonus density for provision of TDRs in the PD Zone. *See,*

§59-C-7.14(e); Exhibit 78. The Hearing Examiner does not find this development plan qualifies for bonus density under this section of the Zoning Ordinance (see Section III.D.3.b below), but includes it in the table comparing the different development plans below:

	<b>PD-88</b>	<b>PD-100</b>	<b>PD-100</b>	<b>PD-100</b>
<b>Maximum Dwelling Units</b>	644	692	692	750
<b>Percentage MPDUs</b>	15%	15%	15%	15%
<b>Potential MPDUs</b>	96	104	104	113
<b>TDRs Acquired</b>	31	20	31	31
<b>VAHUs</b>	0	10	10	10

For the higher density applications (i.e., 692 and 750 dwelling units), the Applicants propose to provide 10 “voluntary affordable housing units” or “VAHUs,” which may be located off-site within the Battery Lane District. Exhibits 80-82; T. 28-29. These “affordable units” are not legislatively defined; as described by Technical Staff, they are comparable to Workforce Housing units, regulated by Chapter 25B, Article V of the Code, but restricted for a much shorter period. Legislatively defined “workforce housing” is intended to provide housing opportunities for individuals with incomes “at or below 120% of the area-wide median income”. *Id.*, §25B-24(b)(1). To qualify as workforce housing, however, the rents must be limited to an amount set by the Department of Housing and Community Development (DHCA) for 99 years. *Id.*, §25B-26(d). Rents for the VAHUs proffered for the subject property will be restricted to regulated levels only for 20 years. While the Applicants’ state that they are not taking the bonus densities available under the zoning ordinance for providing these units, they are requesting the higher density in the PD Zone because of the cost of providing the VAHUs. T. 29.

The two alternative development plans considered by the Planning Board differed in the number of TDRs proposed. TDRs are development rights that may be transferred from the rural west and purchased in urban “receiving areas”. These have been a successful means of preserving agricultural land in the County and reducing urban sprawl. Exhibit 67(b). The TDR program, and the more recent Building Lot Transfer (BLT) program, (described in more detail in the next section) rely on TDR receiving areas designated in master plans to create a market for the transfer of rural development rights. A portion of Parcel B and all of Parcel C are designated in the *1994 Bethesda Central Business District Sector Plan* (1994 Plan) as such a receiving area. As a result, Staff concluded that compliance with the Sector Plan necessitated some level of TDR acquisition. Exhibit 36, p. 12. The question then became, and remains, the number of TDRs required for compliance with the Sector Plan, and is discussed below.

At the time of the public hearing, Technical Staff concluded that 31 TDRs were required if the property were developed under the existing R-10/TDR Zone. Exhibit 36, pp. 23-24. The Applicants originally proffered this amount only with the PD-88 Plan, but not the PD-100 Plan (for 692 units). The PD-100 development plan proposed only 20 TDRs because, according to the Applicants, it had to balance the cost of the TDRs against the cost of the VAHUs included with the higher density plan. T. 29-39. The Applicants also stated that the additional density in the 692-dwelling unit plan was necessary to cover the cost of the VAHUs. T. 28-29. The Applicants’ further indicated that it preferred the PD-100 Plan because of the Applicants’ commitment to affordable housing and because it is more economically favorable. T. 296.

After the Montgomery County Civic Federation and Montgomery County Agricultural Advisory Committee (the County agency responsible for advising on the County’s agricultural preservation programs) opposed the PD-100 Plan for failing to include more TDRs, the

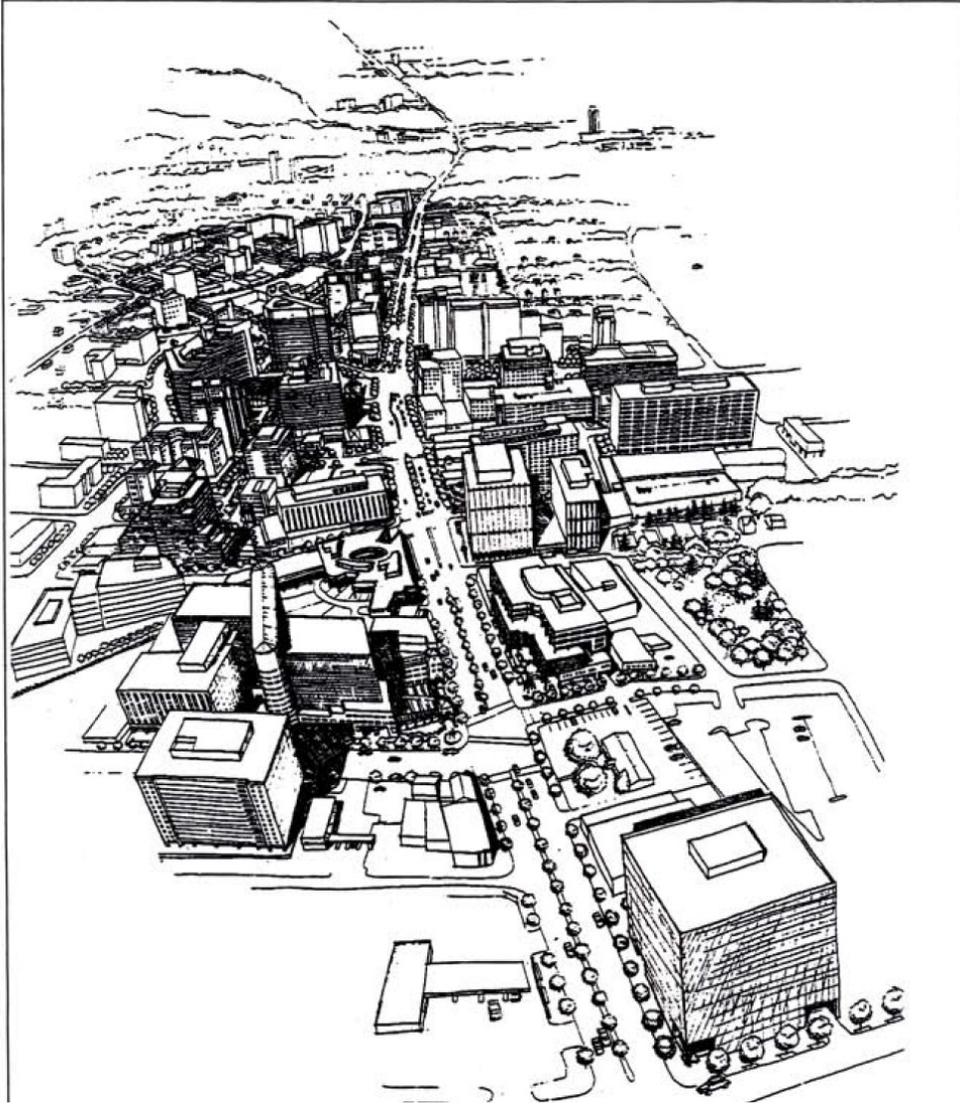
Applicants added two more alternative development plans to the application—one for 692 units with 31 TDRs and one for 750 dwelling units with 31 TDRs. According to the Applicants, the 750-unit plan took advantage of a 10% density bonus, applied to the gross tract area of the entire site, available in the PD Zone to compensate for the cost of increasing the number of TDRs from 20 to 31. Exhibit 78, p. 4. The Hearing Examiner finds, however, that the development plan for 750 exceeds the maximum density permitted in the PD-100 Zone, as discussed in the next section.

#### **D. Compliance with the Sector Plans**

In order to approve this request for rezoning, the Council must find that at least one of the alternative development plans meets the purposes of the PD Zone. As noted by the Planning Board, to satisfy the purpose clause of the PD Zone, an application “must address numerous elements, many of which relate to Sector Plan conformance.” Exhibit 39. Because the purpose clause of the PD Zone encompasses multiple elements normally considered separately in a zoning case, these elements will be consolidated in this section to the extent feasible and will begin with an analysis of the Sector Plan.

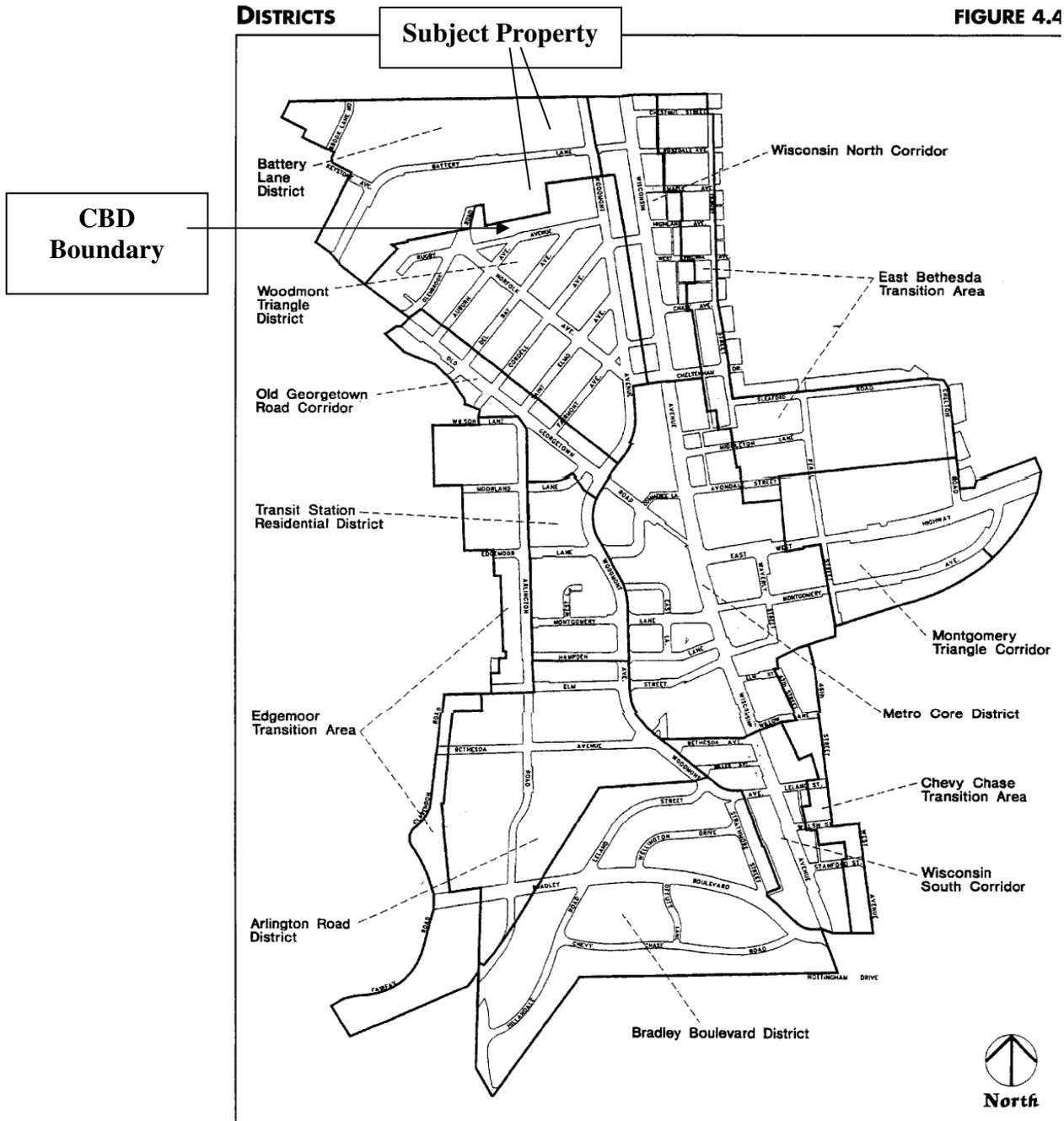
##### **1. 1994 Bethesda CBD Sector Plan**

The 1994 Plan envisioned Bethesda as a “regional employment center” and strove to create a “vibrant, urban, mixed-use neighborhood that emphasizes residential, small-scale retail, the arts and public amenities.” Exhibit 83 at 5. The 1994 Plan’s concept called for greater heights at the CBD Core (near the Bethesda Metro Station) stepping down to the edges of the Sector Plan area (some outside the CBD), to “ensure compatible transitions to adjacent neighborhoods...” *Id.*, p. 12. A graphic illustration of this concept (with the Core District in the foreground) is demonstrated in Figure 1.1 (on page 2 of the Plan), on the next page.

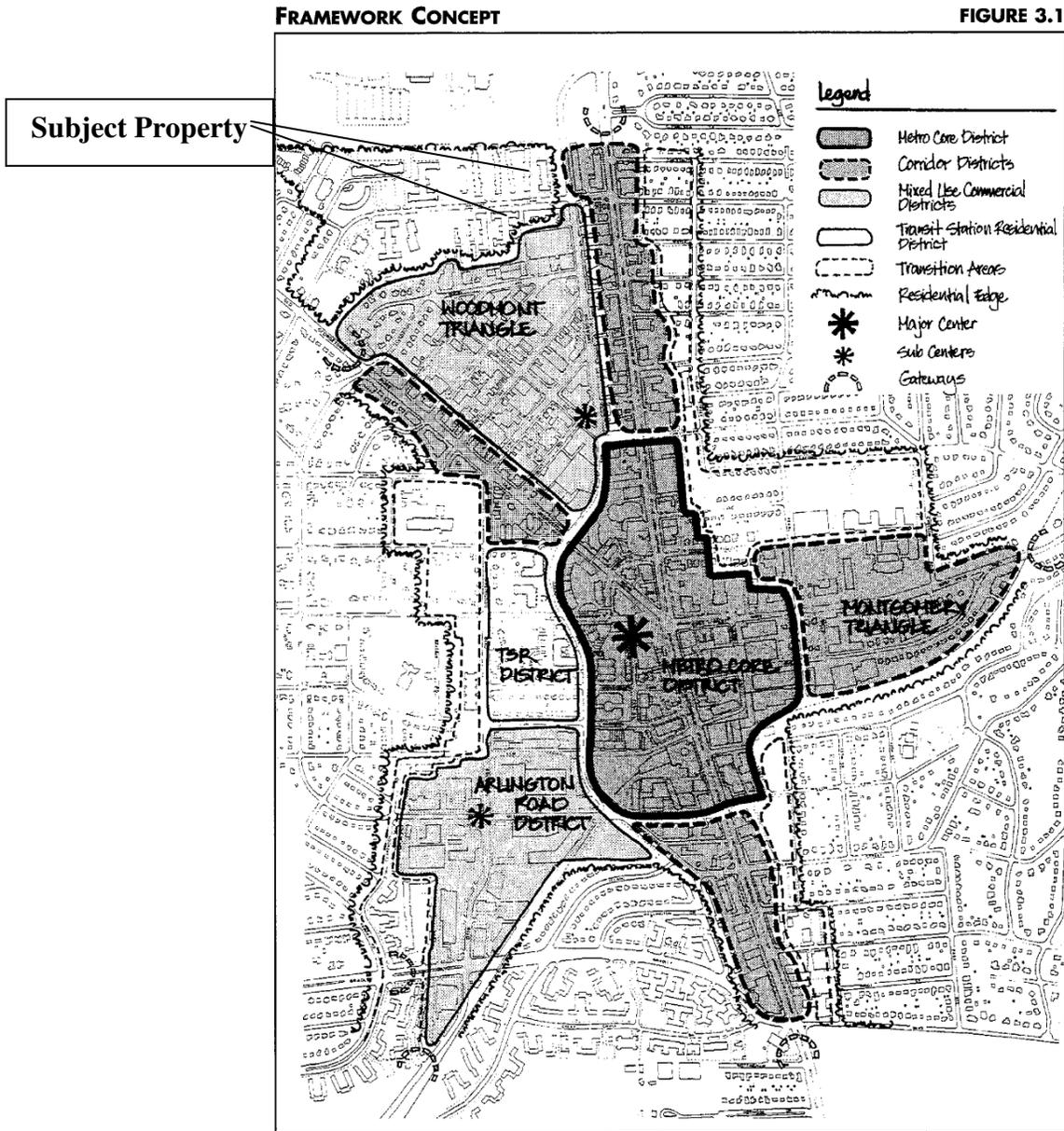
**AERIAL OF DOWNTOWN BETHESDA****FIGURE 1.1**

The Plan employed a variety of mechanisms to implement its vision. It divided the Sector Plan area into districts each with its own unique objectives. The subject property is located within the Battery Lane District, outlined in Figure 4.4 of the Plan (Exhibit 83, p. 56), just north of the Central Business District boundary (reproduced on the following page).

Relatively detailed general and district-specific urban design guidelines were used further to implement the “step-down” approach of the Plan. These address height, scale, massing and setbacks and were designed to minimize building bulk and massing, mitigate the impact of shadows on adjoining properties, and to achieve district-specific goals. *Id.*, 37-43, 92-93. The



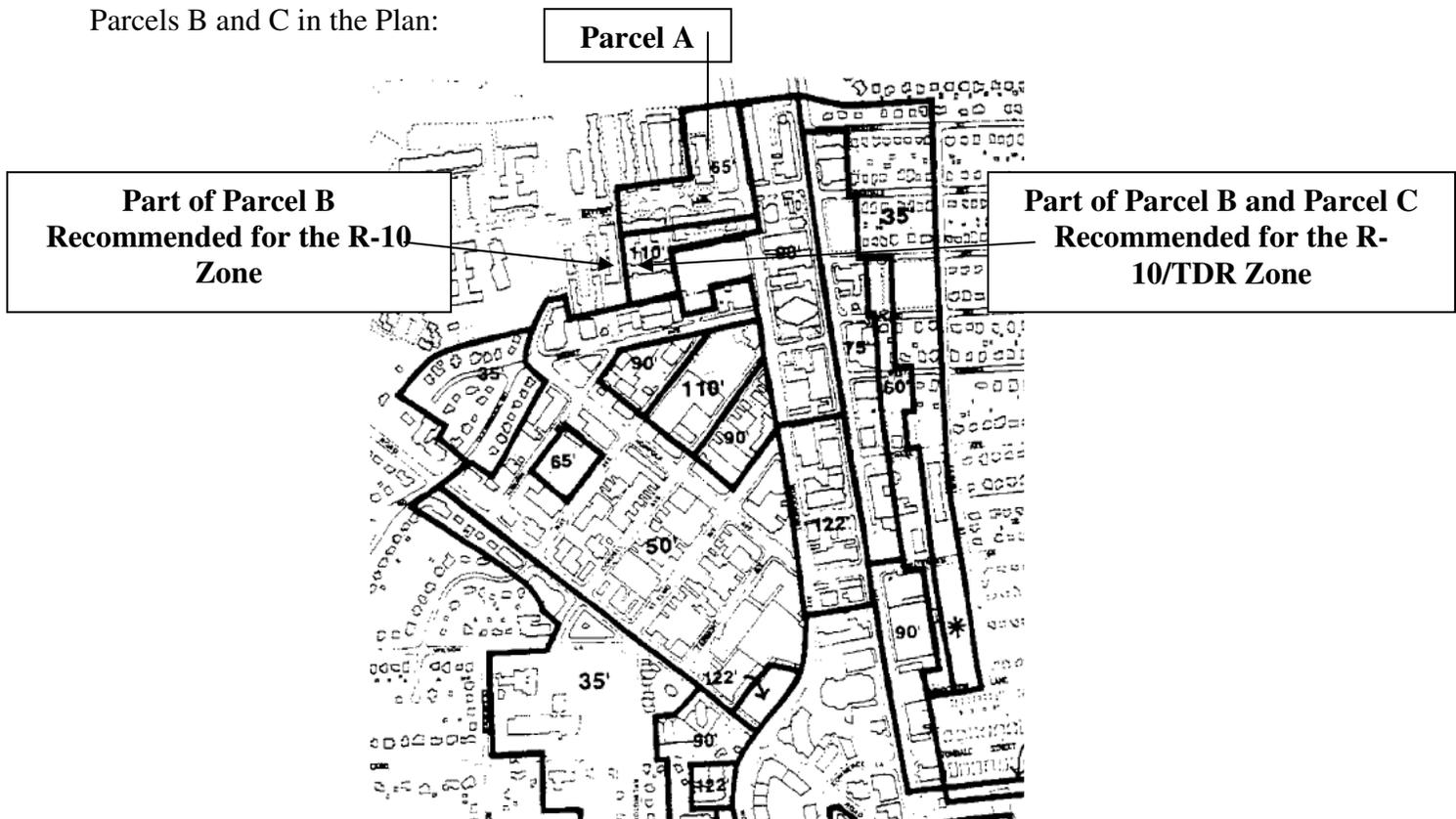
urban design framework for Bethesda (Figure 3.1 on page 38 of the Plan), includes the subject property in one of the “Residential Edge” areas adjacent to the CBD:



The Plan notes that, historically, County land use planners treated the “residential edges” in Bethesda as transitional areas between the CBD and surrounding single-family neighborhoods. *Id.*, p. 37. Pertinent portions of the general urban design guidelines endeavor to reinforce traditional transitional areas, enhance the pedestrian environment to encourage walking, maintain

a human scale, extend a network of open spaces, and improve compatibility with existing uses, mitigating impacts from shade, wind, noise, and reflection. *Id.*, p. 37, 47.

As an additional method of implementing the “Urban Form” planned for Bethesda, the 1994 Plan capped building heights and floor area ratios (FARs) on a site specific basis, gradually decreasing in height from the core to the edges. *Id.* at 39. The height limits for the “surrounding area” in this case are depicted in Figure 3.2 on page 39 of the Plan (below). The western most portion of Building B is not included within the 110-foot height limit shown for the balance of Parcels B and C in the Plan:



The Plan further recommends “stepping back” the roofline of the portion of the subject property zoned R-10/TDR, beginning with 65 feet at the street and stepping up to 100 feet towards the nearby CBD. *Id.*, 90-93.

As an overall housing goal, the 1994 Plan called for an increase of approximately 2,700 housing units in Bethesda by 2010, based on then-existing housing absorption rates. *1994 Plan*, p. 28. While the Plan recognized a need for affordable housing to support retail and service uses, it hesitated to permit additional housing potential, concerned that this would destroy the “ambiance” of street life, with shops and restaurants, that made Bethesda attractive to new residents. *Id.* at 29.

Just north of the CBD boundary, the Battery Lane District is described as home to one of the largest concentrations of housing in the Sector Plan area. T. 25. Characterizing some of the existing housing stock as more “affordable” due to lack of amenities such as air conditioning, the 1994 Plan relied on this existing stock as well as increasing density on certain parcels to meet the need for affordable housing. T. 30. The Plan identified three objectives for the District:

1. Retain most of the existing affordable housing.
2. Allow redevelopment of certain sites to increase the amount of housing near Metro and further the goals of the County’s agricultural preservation policy.
3. Provide a northern gateway to the Woodmont Triangle with redevelopment of the parcel on the corner of Woodmont Avenue and Battery Lane. *Id.*, p. 90.

In furtherance of this, the plan recommended preserving the existing housing stock along Battery Lane as “lower-cost” housing. *Id.* at 90. The sites targeted for increased density included Parcel A, recommended for the PD-75 Zone, and the majority of Parcel B and Parcel C recommended for R-10/TDR. The balance of Parcel B remained in the R-10 Zone. *Id.* at 91. The basis for the increased density was two-fold: Redevelopment would allow (1) additional density near two Metro stops and (2) designation of the TDR receiving area along the southern side of Battery Lane would “further the public policy objective of agricultural preservation.” *Id.* at 92.

At the time, there was a possibility that Parcel A redevelopment would occur in conjunction adjoining parcel to the east (i.e., the Trunnell property), which fronted Woodmont Avenue.<sup>4</sup> The Plan established urban design guidelines for development of Parcel A applicable whether developed independently or with the Trunnell property:

1. Maintain a building setback along Battery Lane which is consistent with the setbacks of existing buildings. (See Figure 4.20).
2. Orient building entrances, where feasible, toward Battery Lane to activate the street and increase public safety.
3. Provide parking in the rear or below grade to minimize the impact on the pedestrian environment.
4. Achieve a lushly landscaped, garden character along Battery Lane, consistent with the garden character already established in this residential neighborhood. *Id.* at 90.

The Plan also established specific urban design guidelines for Parcel C and the portion of Parcel B recommended for the R-10/TDR Zone:

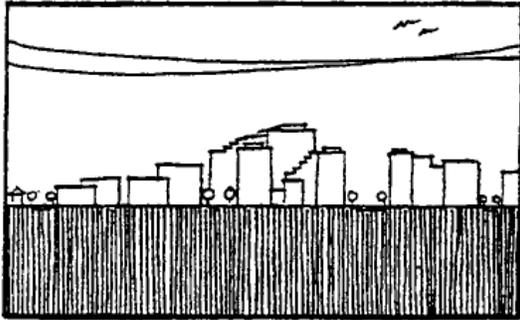
1. Maintain a human scale adjacent to the street by providing a height of no more than 65 feet along Battery Lane, with the building stepping up to a maximum of 110 feet toward the rear of the property to avoid a “canyon effect” along Battery Lane. (See Figure 3.2, Building Height Limits)
2. Reduce the building mass as seen from the street by locating the bulk of the building toward the rear of the site and providing landscaped courtyards between the building’s wings. *Id.* at 94.

The 1994 Plan (Exhibit 84, p. 42) included graphic examples of the desired “urban form” and the results it sought to avoid, selected sections of which are shown on the following pages.

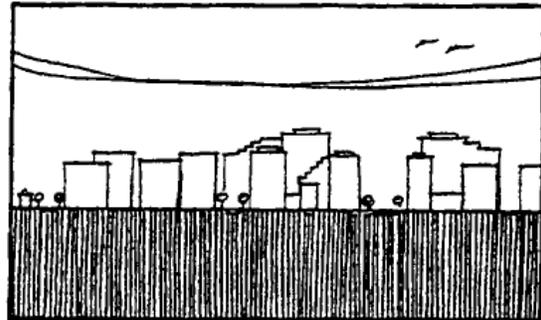
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<sup>4</sup> Rezoned to the PD-75 Zone in 2004, the Trunnell property was eventually developed independently of the subject property. This “Woodmont View” development is approved at a height of 90 feet. *See*, LMA No. G-808; DPA No. 10-2.

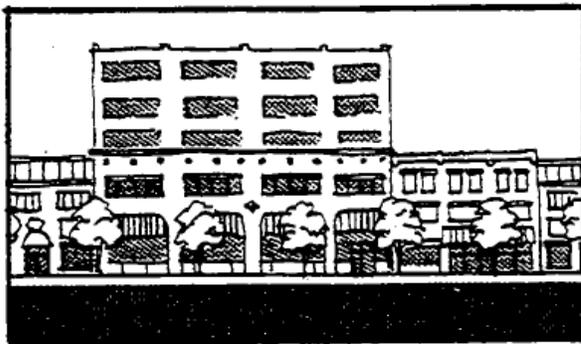
2. Step-down building heights.



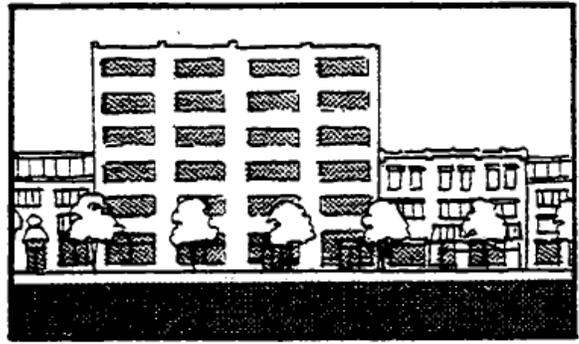
2. Avoid uniform building heights.



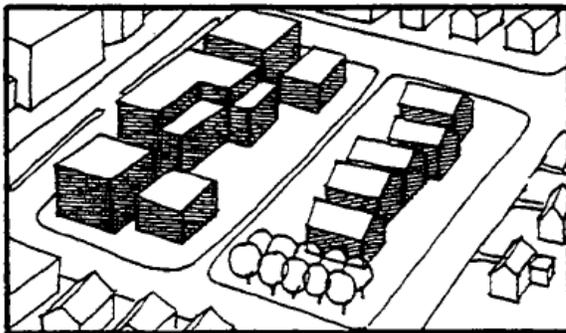
6. Achieve compatible building styles.



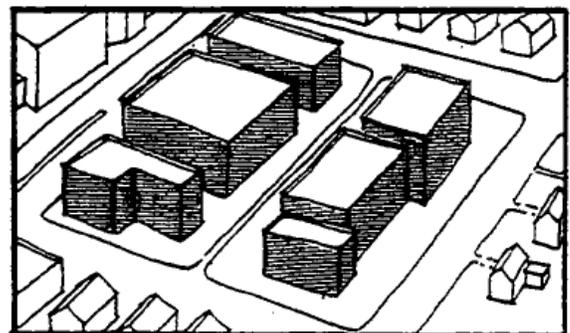
6. Avoid incompatible building styles.



7. Achieve compatible transitions.



7. Avoid incompatible transitions.



## 2. The 2006 Woodmont Triangle Sector Plan Amendment

The District Council amended the 1994 Plan in 2006, finding that the objectives for the Woodmont Triangle District had not been achieved. Exhibit 55, p. 2. The Council concluded that the height and density limitations imposed by the 1994 Plan inhibited redevelopment of the

Woodmont Triangle District, causing the existing retail businesses to relocate to newly developed areas south toward the CBD Core. *Id.* at 2. It also found that the cost of housing had “increased significantly” since the 1994 Plan had been approved, hindering the ability to provide housing for a range of incomes. *Id.* at 11. Ultimately, the Council decreased the amount of commercial zoning within the Triangle by approximately 300,000 square feet and increased residential capacity by approximately 1,600 dwelling units. *Id.* at 3. The Amendment removed some of the height caps, recommended higher FARs for residential projects and identified the need for MPDUs within the study area as “a priority for all projects developing under the Optional Method of Development.” *Id.*

The 2006 Amendment did not make zoning changes outside the Woodmont Triangle District; it included the Battery Lane District within its study area to “more comprehensively evaluate” the effect the Woodmont Triangle changes would have on surrounding districts. *Id.* at 3. Designated as Blocks 16 and 17 within the Amendments’ study area, the Amendment stated that it:

...leaves unchanged the current zoning and height limits in the Battery Lane District. In the future, the M-NCPPC will prepare a new Sector Plan Amendment to address options to retain or increase housing in the Battery Lane District while maintaining a stock of affordable housing. *Id.* at 23.

According to the Applicants, this future amendment to the Battery Lane District was placed on the Planning Board’s work program, but was eventually removed. In lieu of the Amendment, the Applicants’ filed this LMA at the suggestion of Technical Staff.

### **3. Compliance with the 1994 Plan and the 2006 Amendment**

#### **a. In General**

The Applicants assert that all alternative development plans are in substantial compliance with the 1994 Plan and the 2006 Amendments. According to Mr. Wrenn, the Applicant’s expert

land planner, the development complies generally with the Sector Plan's goals by increasing housing for a range of income levels in proximity to transit, which in turn supports the commercial uses in the Woodmont Triangle. T. 102-103.

Mr. Wrenn opined that the older the master plan, the more important it is to look at its overall goals rather than its specific guidelines. He summarized the ways, in his opinion, in which the project meets these goals:

- The development plans comply with the site-specific guideline to maintain a building setback along Battery Lane, which is consistent with the setbacks of existing buildings. The 24- and 26-foot setbacks on Battery Lane proposed, in his opinion, are similar to those of the existing buildings.
- The major goal of the 1994 Plan was to revitalize Bethesda into a lively and diverse downtown. The project will create an urban edge for downtown Bethesda because it balances residential use with landscaped areas and creates connections to the retail/restaurant uses in the Woodmont Triangle. He opined that the Woodmont Triangle Plan retained that goal, but recognized that changes were needed to implement the goal. T. 139.
- The second principle goal of both Plans is to complement the "physical form" of Bethesda and enhance residential development. According to Mr. Wrenn, the development contributes to Bethesda's physical form by proposing a variety of building heights and massing, and creating an enhanced residential environment. T. 140.
- Mr. Wrenn opined that a third goal of both Plans is to provide a variety of housing types in Bethesda, including affordable housing units. In his opinion, this development achieves this goal by providing regulated and unregulated affordable housing units in a variety of unit types for different income levels. T. 140.
- The 2006 Woodmont Triangle Amendment expanded the area eligible for a 110-foot height limit to include all of Parcel B. He believes that the line delineating boundary between the recommended 110-foot height limit and the 65-foot height limited moved further west on the subject property between the 1994 Plan and the 2006 Amendment. T. 142-143. As the more recent Plan should control, according to Mr. Wrenn, he believes the 2006 Amendment expanded the 110-foot height limit on the subject property. T. 146.
- The project will further the goals of the Battery Lane District to preserve the existing affordable housing stock. While the redevelopment will remove relatively affordable market rate units, it will replace these units with regulated MPDUs which do not currently exist. The additional affordable housing will not affect the remaining housing

mix consisting of apartments, condominiums, and senior assisted living units. T. 140-141.

Mr. Wrenn believes that the original two development plans submitted (i.e., the PD-88 plan and the PD-100 plan with 692 units and 20 TDRs) would further the County's Agricultural Policy, but felt that the latter goal "competed" with the goal of increasing the County's housing stock. He believes that both applications provide the right "balance" of these goals. The PD-100 project will provide housing at a location near not just one but two metro stops where the number of jobs will be expanding due to BRAC. This will relieve pressure for development in the Agricultural Reserve. In addition, the project will purchase some TDRs, thereby furthering the agricultural policies. T. 141.

Both the Planning Board and Technical Staff agreed that both the PD-100 development plan and the PD-88 development plan substantially complied with the Sector Plan's general goals, but disagreed on the preferable alternative. The general goals identified by Staff were as follows:

- Realize the vision of Bethesda as a lively downtown and contribute to well-designed redevelopment within the Metro Core...
  - Staff concluded both alternatives met these goals because of the increased and more compacted residential density.
- Encourage infill development that complements the underlying physical form of Bethesda...Enhance Bethesda's residential district."
  - Staff found these goals were met because either alternative created infill development that increased housing stock within the northernmost residential district in the CBD.
- Encourage and maintain a wide range of housing types and neighborhoods in and around Bethesda for people of all incomes, ages, lifestyle...Provide an adequate supply of housing, including affordable units to reinforce Bethesda as a place to live as well as work.

- According to Staff, both development plans met this goal because of the provision of 15% MPDUs within both projects.

Staff summarized compliance of both alternatives with the Sector Plan goals for the Battery Lane District:

- Retain most of the existing affordable housing.
  - While the existing units on the property are considered “affordable”, they are market rate units. Staff reasoned that substitution of regulated affordable housing in the form of MPDUs or VAHUs continued to meet this goal.
- Allow redevelopment of certain sites to increase the amount of housing near Metro and further the goals of the County’s agricultural preservation policy.
- - Staff found that the site-specific recommendations in the Sector Plan were intended to increase housing while continuing to support the County’s agricultural policy for acquisition of development rights on farmland through the purchase of TDRs. Exhibit 36, pp. 22-23.

Because of the 1994 Plan’s goal to support the County’s TDR program, Technical Staff preferred the PD-88 Plan, finding it better balanced both of the above public policies: to provide more affordable housing (through the 15% MPDUs) and to preserve agricultural land through acquisition of which Staff considered to be the full complement of required TDRs. *Id. at 22.* Staff did not deem the VAHUs with the shorter control period as a sufficient substitute for Workforce Housing. Rather, it concluded that the PD-88 development plan better achieved the Plan’s overall objectives because the rezoning would replace the TDR receiving area “in its entirety” and 15% MPDUs would be included within the development. *Id. at 22.*

Technical Staff also concluded that neither of the development plans complied with some of the Plan’s urban design guidelines. Building A, recommended for a maximum of 65 feet, has a maximum height of 79 feet. Buildings B and C call for a 110-foot height limit, which Staff found was *not* consistent with the Sector Plan’s recommendation for the western portion of

Parcel B, which was not designated for that height, nor with the requirement that the eastern portion of Parcels B C have a roofline of 65-foot at street level, stepping back to 110 feet toward the rear or southern portion of the building. *Id.* at 46. Staff found that the heights shown on the development plans were contrary to the goal of achieving a “human scale” and avoiding a “canyon affect” on Battery Lane. *Id.* Similarly, Staff determined that failure to include a roofline stepped back in height impaired the compatibility of the project with the surrounding area and did not fulfill the “urban form” of Bethesda. *Id.* at 46-47.

To address the problem, Staff recommended a binding element stepping back the height of Building A from 65 feet at the street to 79 feet toward the rear. It also recommended a binding element stepping back Buildings B and C from 65 feet along Battery Lane to 110 feet along the southern portion of the buildings. *Id.* at 17-18. Staff advised that these step backs were necessary to maintain the “visual character of the proposed buildings with the existing massing of buildings in the Battery Lane district.” It recommended modifying the binding elements as follows (Exhibit 36, pp. 17-20):

#### Building A

The maximum height along Battery Lane will be no greater than 65 feet before stepping up to the maximum 79 foot height. The step back must be at least 15 feet in depth before increasing the height to 79 feet in order to maintain a pedestrian scale adjacent to the street.

#### Building B

Buildings B and C will be designed to step back from an initial height of 65 feet closest to Battery Lane to an ultimate height of 110 feet toward the southern boundary. The step back must be at least 15 feet in depth before increasing the height up to 110 feet in order to maintain a pedestrian scale adjacent to the street.

*Id.* at 17-20.

The Planning Board recommended deferring the issue to site plan review in order to provide the Applicants with “flexibility” to design the project. Exhibit 39. It modified Staff’s proposal by deleting the requirement for roofline setbacks and adding the following sentence to the binding elements for both the PD-88 and PD-100 development plans it considered and to each building on those plans:

Although no specific building setback was recommended in the Sector Plan, Staff will evaluate any setbacks and building setbacks at the time of Site Plan review, as appropriate to avoid a canyon effect along Battery Lane, consistent with the goals and objectives of the Sector Plan. Exhibit 39.

The Planning Board agreed with Technical Staff that both applications met the purposes of the PD Zone and substantially complied with the Sector Plan, but preferred the PD-100 application (with 20 TDRs and 10 VAHUs) over the PD-88 application. Exhibit 39. The Board recommended approval of the PD-100 plan because the applicant “was willing to spend a much larger sum on VAHUs than it would spend on TDRs, with a correspondingly larger public benefit.” *Id.* There is no evidence to support this conclusion in the Hearing Examiner’s record.

Specific areas of controversy relating to compliance with the Sector Plan are set forth below.

#### **b. Alternative Densities**

Mr. Wrenn opined that, were the Council to consider a Sector Plan amendment for the Battery Lane District today, it would rezone the area at 100 dwelling units per acre. T. 114. He believed that the density of 125 units per acre immediately to the northeast constituted recognition from the County Council that 100 dwelling units per acre is an appropriate density for this site. Building A was zoned at 75 units per acre; the R-10/TDR portion of Parcel B could achieve 100 dwelling units per acre, although the western-most portion of Parcel B was stepped

down to 43.5 dwelling units per acre. Were the Council to convene again on the Battery Lane District, the Applicants assert that the “overarching” public interest would have been to apply 100 dwelling units per acre to the remainder of Parcel B. T. 114. He also believes that the increase in residential units is particularly important due to the increased jobs coming to the Bethesda Naval Medical Center and the National Institutes of Health due to the Base Realignment and Closing Act (BRAC). T. 160.

Beyond this, the Applicants’ theories supporting the specific densities requested (i.e., 644, 692 and 750 dwelling units) become less clear. The Hearing Examiner believes that substantial compliance with the *density* recommended in the Sector Plan may be resolved without resort to the calculations posited by the Applicants. Should the Council disagree, the Applicants’ theories, and the Hearing Examiner’s analysis of those theories, is set forth below. More difficult, however, is the issue regarding the number of TDRs required to comply substantially with the Sector Plan and whether the PD-100 development plans are able to implement the “urban form” envisioned for Bethesda’s Central Business District.

The starting point for all of the Applicants’ formulas is the “base density” recommended in the Sector Plan. The Applicants state that this “base density” for the entire tract is 480 dwelling units, a number with which Technical Staff agrees.<sup>5</sup> Ex. 78, pp. 6-7. This density already includes the “bonus density” available under the optional method of the R-10/TDR Zone for provision of TDRs. The R-10/TDR Zone awards additional density for provision of TDRs by allowing an increase up to 100 dwelling units per acre depending on the number of TDRs

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<sup>5</sup> The term “base density” is defined in the Zoning Ordinance as “The maximum number of dwelling units permitted by the zoning classification of a property in a receiving area computed over the gross area of the property without the use of TDR or the MPDU density increase.” *Zoning Ordinance*, §59-A-2.1. Because the 480 dwelling units already includes the “optional method” bonus density for provision of MPDUs, it is questionable whether it meets the explicit definition of “base density” in the zoning ordinance, although the Hearing Examiner need not resolve this issue here.

acquired. *Zoning Ordinance*, 59-C-2.432. The 480 unit “base density” includes the maximum 100 dwelling units per acre that could be achieved for the R-10/TDR portion of the site. Technical Staff advises that the total maximum development potential under the Sector Plan recommended zoning (including the optional method TDR density and a MPDU bonus density) is 585 dwelling units (Exhibit 36, p 24), a conclusion with which the Hearing Examiner agrees.

The PD Zone incorporates a different density bonus for providing TDRs. Section 7.14(e) permits the Council to award an increase in density “of up to 10% above the maximum density specified in the approved and adopted master plan for the provision of TDRs, if the use of TDRs is recommended for the site.” *Id.*, §59-C-7.14(e).

The Applicants assert that the PD-88 development plan, with 644 dwelling units, is in “strict compliance” with the Sector Plan because it provides:

...480 du [dwelling units] plus the 22% density bonus for provision of 15% MPDUs under 59-C-7.14(e) and the 10% density bonus for provision of TDRs in the PD zone under 59-C-7.14(e). Exhibit 78.

This does not necessarily support an argument for “strict compliance” with the Sector Plan, although it is certainly the closest to the recommendation in the Sector Plan. Depending on one’s definition of “strict”, it may not be in exact compliance because it applies a PD-Zone density bonus to the Sector Plan’s recommended R-10/TDR Zone. In addition, only 60% of the site is in the TDR Zone. The Applicants apply the 10% density bonus across the entire site rather than only the 60% designated as a TDR receiving area.

The Applicants’ asserted justification for the PD-100 development plans contained in their Closing Statement is somewhat confusing. According to the Applicants, the 692-unit development plan adds only 48 dwelling units to the application or 10% of the base density.

Exhibit 78, p. 6. The Applicants justify the additional density as being in substantial compliance with the Sector Plan because it:

...permits only 48 additional units (10% variance) over the master plan recommended density plus the 22% density bonus for provision of 15% MPDUs under 59-C-7.14(c). *Id.*, p. 6.<sup>6</sup>

Technical Staff's explanation of the 692 dwelling units is clearer, as is the explanation on Applicants' Exhibit 53: The 692 units equal the maximum density for the site under the PD-100 Zone combined with a 22% MPDU bonus. Because the Sector Plan does not recommend the PD-100 zone for the property, it is difficult to determine that it conforms to the Sector Plan solely on the above basis. Exhibits 36, 53.

After amending the PD-100 development plan to include 31 rather than 20 TDRs, the Applicants submitted a fourth alternative based on adding a 10% TDR bonus under Section 7.14(e) of the PD Zone to the former PD-100 development plan with 692 dwelling units. They reason as follows:

The PD-100 development Plan ... permits a total of 750 du (10% variance from master plan density and an additional 10% due to the PD bonus) and substantially conforms to the master plan recommended density plus the 22% bonus for provision of 15% MPDUs under 59-C-7.14(c) and the 10% density bonus for provision of TDRs in the PD Zone.... *Id.* at 78 (emphasis in original).

The mechanics of achieving 750 dwelling units based on this formula is unclear; however, the request for 750 dwelling units does not fall within the parameters of the TDR density bonus in the PD Zone. Section 7.14(e) of the Zoning Ordinance restricts the Council's ability to award a TDR bonus in the PD Zone to 10% above the "maximum density specified in the approved and adopted master plan for the provision of TDRs, if the use of TDRs is recommended for the site."<sup>7</sup>

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<sup>6</sup> The Hearing Examiner does not discern how this formula equates to 692 units: 480 (base density) + 48 (10% variance) x 1.22 = 644 units.

<sup>7</sup> The Civic Federation argues that the 10% bonus density from the PD Zone should be applied only to the portion of the parcel designated as a TDR receiving area. Exhibit 90, p. 2. Because the Hearing Examiner finds that 750

The maximum density of development permitted under the Sector Plan for provision of TDRs is the “base density” of 480 dwelling units, because it already includes the maximum development potential providing TDRs in the R-10/TDR Zone (i.e., the optional method of development which yields 100 dwelling units per acre). Thus, the maximum density achievable for the site in the PD Zone is the PD-100 application with 692 units: 5.67 acres x 100 dwelling units per acre x 1.22 MPDU bonus density = 692 units. The maximum density for the site utilizing the bonus density for TDRs in the PD Zone is the 644 units requested by the PD-88 development plan: An additional 10% TDR bonus would yield 528 units; if a 22% MPDU bonus is added to that number, the total yield is 644 dwelling units. Therefore, the the PD Zone does not serve as authority to increase the number of dwelling units to 750 units.

As noted, aside from these formulas, Mr. Wrenn posited that the 692 units are warranted because the Council would rezone the property to 100 dwelling units per acre if it were to consider a Sector Plan amendment for the Battery Lane District today. Technical Staff found that all densities substantially complied with the Sector Plan, primarily because all would provide 15% of the units as MPDUs and because of the overall increase in residential units. The Planning Board adopted this approach when it considered the densities proposed in the PD-88 and PD-100 plan with 692 dwelling units, differentiating between the two alternatives posed at the time of the Planning Board hearing by the cost of the VAHUs as opposed to the cost of purchasing the TDRs. Exhibit 39.

The Civic Federation opposed the densities requested because they exceeded those recommended in the Sector Plan: “You can’t get any clearer than the master plan. So, for a group of persons to tell a property owner, oh...We think we can get you 88 [sic] or PD-100

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dwelling units exceed the number authorized by the TDR density bonus, she does not address the Federation’s position.

shows to the Federation a disregard, a callous disregard for master planning.” T. 286. Even that opposition, however, was relatively muted. Mr. Humphrey testified:

We don't have a problem with the design of the project. We don't have a problem with height. Even, really, with too much about the density other than the fact that, you know, clearly on the north side of Battery Lane PD 75 is called for. And that'll get you 91.5 dwelling units an acre with your bonus density, you know. There's no need to violate the master plan just to push that up to 100 unless you want to go to 122, you know, with your bonus density. So, we just wish that the developers, the property owners in this county that develop the property had a little more respect for the master plan's areas in which they own properties in and the recommendations of this plan. T. 291.

The Federation argues that the 10% bonus density from the PD Zone should be applied only to the portion of the parcel designated as a TDR receiving area. Exhibit 90, p. 2. While there may be some support for this argument in §7.14(e) of the PD Zone because it references sites “designated” as TDR receiving areas, the Hearing Examiner finds that this need not be addressed because (1) the 750 dwelling units exceed the number authorized by the TDR density bonus, and (2) she resolves consistency with the Sector Plan without resort to the TDR bonus density available under that section.

It is difficult for the Hearing Examiner to predict the result if a Sector Plan Amendment for the Battery Lane District were to pass through a public, legislative process. This being said, there is guidance from the Sector Plan in this instance to support the Applicants' assertion that the Council would have increased residential capacity in this District, and particularly would desire to increase the number of MPDUs in the area. While the 2006 Amendment for the Woodmont Triangle did not change the zoning for the Battery Lane District, it did articulate one policy goal for the *entire* study area including the subject property: It identified the need for more MPDUs, pronouncing that this should be “a priority for all projects developing under the

Optional Method of Development.”<sup>8</sup> *Id.* The specific references to the blocks on which the subject property are located also identify the need for more housing, calling for a Sector Plan amendment to “address options to retain or increase housing in the Battery Lane District while maintaining a stock of affordable housing.” *Id.* at 23. The Housing Element Amendment to the General Plan also articulates the goal of providing more housing within developed areas of the County such as Bethesda, although this general goal could be achieved under either the Sector Plan’s recommended base density with the MPDU and TDR bonuses or under the development plans proposed here. Exhibit 50.

The Hearing Examiner finds that the PD-100 development plan calling for 692 units, 31 TDRs, and 10 VAHUs and the PD-88 development plan substantially complies with the Sector Plan, as does the request for 644 dwelling units under the PD-88 development plan. The Hearing Examiner finds it more appropriate to look at the potential density which possibly could have been achieved under the Sector Plan at the time it was enacted as a starting point in the analysis for substantial compliance. The Council presumably considered the achievable density as a possibility when it adopted the plans, assuming the development accomplished the policy goals they desired. The achievable density would include the base density (using the optional method of development under the R-10/TDR Zone with a 22% density bonus for affordable housing. Utilizing the bonus densities in this calculation is appropriate here as a starting point because all development plans provide at least some of the items necessary to qualify for the density bonuses (i.e., 15% MPDUs and TDRs).

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<sup>8</sup> The use of the term “Optional Method of Development” may imply that the Amendment spoke only to properties within the CBD. Still, the Hearing Examiner finds that the overall intent of the Amendment indicated the need for additional housing options, which when combined with the specific recommendation for the subject site, support this rationale.

Technical Staff concluded the maximum achievable density under the zoning categories recommended in the Sector Plan yields 585 dwelling units. Exhibit 36, p. 24. The PD-88 application, requesting 644 dwelling units, is approximately 9% above the achievable density. The PD-100 density of 692 dwelling units is an increase of 15% over the Sector Plan's achievable density. Given the legislatively articulated need for additional and more affordable housing options, it is reasonable to conclude a maximum of 692 dwelling units substantially conforms to the goals of the 1994 Plan and the 2006 Amendment.<sup>9</sup> For these reasons, the Hearing Examiner finds that the densities set forth in the PD-88 development plan and the PD-100 development plan for 692 units are in substantial compliance with the Sector Plan, but recommends the PD-100 because it best supports all public policies, including the County's agricultural preservation policy and providing a variety of affordable housing options.

Further, when considering the "appropriate density" for a property, the PD Zone permits the Council to take into account "other relevant" information in determining whether the density requested is appropriate. *Zoning Ordinance*, §7.14(b). The Applicants' assert that the advent of the Base Realignment and Closing Act (BRAC), calling for increased jobs in the Bethesda area, after adoption of the 1994 Plan and the critical shortage of affordable housing in Bethesda, are appropriate for the Council to consider. Exhibit 78, p. 5. The Hearing Examiner agrees as is discussed more fully in the Section V.A.3 of this Report, relating to compliance with the standards of the PD Zone.

Of more concern to the Hearing Examiner, and what was the subject of some controversy at the public hearing, is whether (1) the number of TDRs proffered are in substantial compliance

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<sup>9</sup> While Technical Staff found all densities complied with the Sector Plan, it did not consider whether the PD-100 plan permitting 750 dwelling units exceeded the Council's ability to award a TDR bonus under the PD Zone. As the Hearing Examiner concludes that it does exceed this limitation, she addresses only the PD-100 plan calling for 692

with the Sector Plan and in the public interest, and whether (2) the density proposed may be accomplished under the urban design guidelines contained in the Sector Plan.

**c. TDRs, Compliance with the Sector Plan, and the Public Interest**

Most of the controversy in this case sprouts from whether the number of TDRs proffered in the alternative plans satisfies the purpose clause of the PD-Zone, substantially complies with the Sector Plan and is in the public interest. To satisfy the purpose clause of the PD Zone, the Applicants must show that “zoning category be utilized to implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said County plans and policies than may be possible under other zoning categories.” *Montgomery County Zoning Ordinance*, §59-C-7.11. State law requires the Council to exercise its zoning power only where to do so would be “in the public interest”:

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

Traditionally, whether a rezoning is “in the public interest” is determined by whether it complies with the master plan and adopted County plans and policies. As noted, the Sector Plan designated the area as a TDR receiving area for two reasons: (1) to locate residential density close to two Metro stations and (2) to further the County’s agricultural land preservation program.

1. Method of Calculating TDR Density

Before delving into whether the number of TDRs offered complies with the Sector Plan, the parties dispute the proper method of calculating the number of TDRs called for by the Sector Plan’s R-10/TDR zoning. The Zoning Ordinance specifies that property within the R-10/TDR Zone may be

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dwelling units. The 692 dwelling units is the maximum number permitted for the site in the PD-100 Zone with an

developed under the standard method (without purchasing TDRs) at a base density of 43.5 dwelling units per acre. If MPDUs are included within the standard method development, density may be increased to 53.07 units per acre. (i.e., 22% more than the base density of 43.5 dwelling units per acre). *Id.*, §59-C-2.421.

As noted, if a developer acquires TDRs, it may develop under the “optional method of development” in the R-10/TDR Zone, which permits densities of up to 100 units per acre. *Id.*, §2.431(b). The density achieved on a particular site, however, is based on the number of TDRs the property owner actually acquires: A developer may receive TDR bonus density (above the base density) at a rate of three multi-family units for every TDR purchased. *Id.*, §59-C-2.441. The optional method of development under the R-10/TDR Zone does not assign a specific bonus density for MPDUs as it does under the standard method, although it does require that the number of MPDUs “and any resulting bonus density” must be calculated *after* the TDR bonus density is applied. *Id.*, §§2.431(c), 2.442. In order to utilize *any* TDR density, however, a developer must acquire a minimum of  $\frac{2}{3}$  of the TDRs necessary to develop at the density recommended in a master plan unless the Planning Board waives that requirement based on criteria set forth in the Zoning Ordinance. *Id.*, §59-C-2.443.

Technical Staff calculated the number of TDRs required by first subtracting MPDUs from optional method density. Staff then subtracted the base density from the remaining optional method density and divided the balance by 3 (i.e., the 3-1 ratio for the additional TDR density). To complete the calculation, Staff took  $\frac{2}{3}$  of that amount to reach the “required” number of TDRs, as set forth here:

Portion of Parcel B Zoned R-10/TDR

Lots 39-42 = 87,120 s.f. or 2 ac.

2 ac. x 43.5 = 87 (base density)

2 ac. x 100 [TDR Optional Method Density] = 200

200 [TDR density] – 87 [base density] = 113 – 30 [MPDUs @ 15%] = 83

83/3 [3:1 ration for multi-family units] = 28

28 x 2/3 = 19

**19 TDRs required**Parcel C (south side of Batter Lane adjacent to Woodmont Avenue)

R-10/TDR (Lots pt. lots 5, 35-38 = 55,606 s.f. or 1.28 ac.)

43.5 x 1.28 = 55.68 dwelling units or 55 dus [base density]

1.28 x 100 [Optional Method TDR Density] = 128 dus

128 [TDR density] – 55 [base density] = 73 – 20 [MPDUs at 15%] = 53

53/3 [3:1 ratio for multi-family units] = 18

18 x 2/3 requirement = 12

**12 TDRs required**

Total TDR Requirement: 19 + 12 = 31 TDRs at the maximum density

Total MPDU requirement (@ 15%) = 63 MPDUs

Mr. Humphrey, representing the Montgomery County Civic Federation, opposed the development plans, arguing that none provided the “full complement” TDRs required by the Sector Plan. T. 286-292, Exhibits 79, 90. The Federation opined that the MPDU density in the R-10/TDR Zone is limited to 53.07 dwelling units per acre and that density above that level must be achieved only by purchasing TDRs. Exhibits 79, 90. Using these parameters, the Federation concludes that approximately 51 TDRs are required to comply with the Sector Plan. Exhibit 90, p. 2. At the Hearing Examiner’s request, the parties and Technical Staff provided alternative calculations of the number based on the gross and net tract area of the property. Exhibits 84-91.

As to the correct method of calculating TDR bonus density, the Hearing Examiner agrees with the Applicants that the densities of the R-10/TDR Zone should be based on the net tract area (exclusive of right of way dedications), pursuant to §2.418 of the Zoning Ordinance. She disagrees with the Federation’s position that all density above 53.07 units per acre must be acquired through

TDRs for several reasons. The section setting the maximum density for MPDUs is contained within the regulations governing the standard method of development. In addition, such a limitation on density is contrary to the language in §59-C-2.442(d), requiring the number of MPDUs and the MPDU bonus density to be calculated *after* adding in any TDR bonus density; this provision makes clear that the number of MPDUs in the optional method is to be based on the higher TDR density. Thus, adopting the Federation's approach would result in fewer MPDUs and more TDRs than called for in the Zoning Ordinance.

Applying this method of calculation, a developer would be required to purchase a total of 46 TDRs to achieve the maximum density permitted under the optional method in the R-10/TDR Zone, as determined by Technical Staff. In order to utilize any optional method density, it would have to provide 2/3 of the full complement, or 31 TDRs, as calculated by Technical Staff. Exhibit 36, pp. 23-24. The Hearing Examiner agrees and so finds.

## 2. Competing Public Interests

Initially, the Applicants' two alternative development plans presented to the Planning Board required a choice between two public policies: provision of affordable housing or support for the County's agricultural preservation program through purchase of TDRs. Under the PD-88 development plan, the Applicants agreed to a binding element to purchase 31 TDRs. The PD-100 development plan committed to the purchase of only 20 TDRs, but added 10 "VAHUs" or shorter-term Workforce Housing. Technical Staff viewed the PD-88 Plan as a better balance between the public policies expressed in the Sector Plan finding the short-term restriction of VAHUs did not adequately compensate for the loss of TDRs and the removal of a TDR receiving area. Exhibit 36. The Planning Board disagreed, finding that the cost to provide the VAHUs was greater than the cost to acquire TDRs, equating the greater cost to greater public benefit.

Exhibit 39. At the public hearing, the Applicants expressed two reasons for their preference for the PD-100 plan. One was the family's personal commitment to provide affordable housing as they had done in the area since the 1950's. Another was that the PD-100 application was economically more favorable.

The Montgomery County Agricultural Advisory Committee (AAC) and the Montgomery County Civic Federation oppose both development plans and request retention of the R-10/TDR Zone. T. 291-294; Exhibits 67, 77. According to the AAC, while the County had attained its goal of preserving 70,000 acres of agricultural land through the use of TDR easement, there still remains a deficit of receiving areas to support the sale of "excess TDRs". Exhibit 67, p. 2. "Excess TDRs" are transferable development rights that may be sold without impacting the property owner's ability to develop under the RDT Zone. Exhibit 67(d), circle 11. A second TDR program, the Building Lot Termination program, utilizes "buildable TDRs" to extinguish the remaining development potential under the RDT zone. Exhibit 67(a), p. 1.

The AAC advises that in 2007-2008, the Council ascertained that there were significantly more TDRs available for purchase than previously thought, due to the method for tracking the utilization of TDRs. Exhibit 67(d). While in 2008 Technical Staff estimated that this unanticipated deficit of excess TDRs could be met in the White Flint master plan, the AAC advises that subsequent master plans have incorporated receiving areas for "buildable TDRs" rather than the excess TDRs. As a result, the AAC advises that there is a continuing need for receiving areas using excess TDRs that has not been met. Exhibit 67(a). It also points out that there are many properties in Bethesda available for residential use, but only this property is designated as a TDR receiving area. *Id.*

A day after the AAC submitted its comments, Mr. Richard Nelson, Director of the DHCA, submitted a letter expressing DHCA's preference for the PD-100 development plan (with 692 units, 20 TDRs and 10 VAHUs). The DHCA supported the higher density because it resulted in more MPDUs and because of the shortage of Workforce Housing units in the Bethesda Sector Plan area. Characterizing the need for affordable housing as particularly "acute" in the Bethesda/Chevy Chase area because of its higher rents, DHCA reports that vacancy rates for rental housing County-wide were 3.7 percent in 2011, lower than the rates attributable to normal turnover. It advised that rents increased at a much higher rate than the Consumer Price Index between 2000 and 2011. Exhibit 68. DHCA also indicates that there is a lack of Workforce Housing in the Bethesda/Chevy Chase area; thus far, only one project has included Workforce Housing meeting the requirements of the County Code. *Id.*

Subsequently, the Applicants submitted two additional alternative development plans as follows: (1) 692 dwelling units, 10 VAHUs, and increasing the number of TDRs from 20 to 31, and (2) 750 dwelling units, including 10 VAHUs and 31 TDRs. Exhibits 81, 82. Because both development plans offer the same number of TDRs as does the PD-88 plan, it is not necessary to weigh the public benefit of one program over another, except to the extent that the original PD-100 development plan offering only the 20 TDRs has not been formally withdrawn. As to the remaining development plans, the question remains whether the number of TDRs proffered substantially complies with the Sector Plan.

3. Number of TDRs Necessary to Comply with the Sector Plan

The parties disagree on whether the number of TDRs proffered by any of the plans complies with the Sector Plan. This stems in part from Staff's finding that purchase of only 2/3 of the total

number of TDRs needed to achieve the maximum density under existing zoning was the full complement of TDRs required. Exhibit 36, pp. 23-24.

Technical Staff concluded that development of Parcels B and C at the maximum density permitted under the optional method of the R-10/TDR Zone (i.e., 100 dwelling units per acre) would require the Applicants to purchase 46 TDRs. Exhibit 36, p. 22. It found, however, that the “required” number was 2/3 of that total or 31 TDRs, apparently on the theory that this was the minimum number to qualify for *any* TDR density and because there was no TDR requirement in the PD Zone. The Applicants’ acknowledge that 31 TDRs is less than the amount it would have to purchase to develop under the Sector Plan’s recommended zoning, but argues that “substantial compliance”, rather than strict compliance with the Sector Plan, is all that is legally necessary. Exhibit 78, p. 8. Mr. Humphrey, on behalf of the Federation, opined that Sector Plan compliance requires acquisition of the full number of TDRs necessary to develop to the maximum extent under the Sector Plan, pointing out that one of the purposes of the PD Zone is to “implement the general plan, area master plans, and other County plans and policies *in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories.*” Exhibit 79, p. 3 (emphasis in original). The Federation believes that the full number of TDRs is particularly important here because the proposed rezoning will eliminate a TDR receiving area. Aside from its general position advocating the need for TDRs, the AAC did not weigh in on whether the higher number (i.e., 31) of TDRs substantially complied with the Sector Plan, appearing to advocate against elimination of a receiving area. Exhibit 67.

For the reasons set forth in Section V (Findings) of this Report, the Hearing Examiner concludes that the acquisition of 31 TDRs substantially complies with the Sector Plans.

#### **d. Urban Form and Design Guidelines**

The Applicants' acknowledge that the development plans do not comply with the specific height limits and urban design guidelines recommended by the 1994 Plan. They believe, however, that the Plan's overall goal to maintain a human scale, reduce building mass, and avoid a "canyon-like" effect along Battery Lane may be achieved through the design proposed.

Mr. David Kitchens, the Applicants' expert in architecture, presented a preliminary illustrative plan of one possible configuration of the three buildings. Exhibit 46. This illustration assumes that each dwelling unit is 1,000 square feet and, according to Mr. Kitchens, may accommodate up to 692 dwelling units. Exhibit 46, T. 197. The illustration shows Parcel A at 7 stories, Parcel C at 11 stories, and Parcel B at 5 stories:



### 1. Roofline Stepbacks

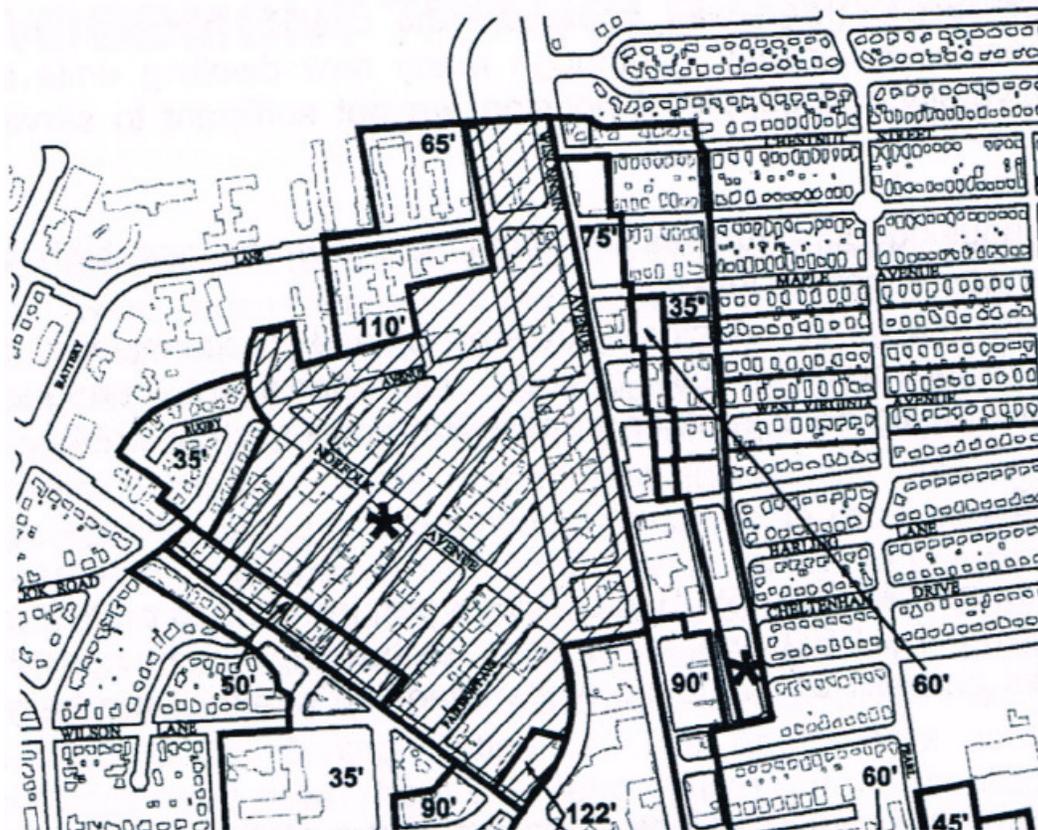
According to Mr. Kitchens, step-backs of the rooflines of the buildings are not necessary to preserve a residential scale nor do they provide the most desirable means of reducing building mass. He testified, under the current urbanism theory, the appropriate residential scale and massing is determined by the ratio between the width of the right of way and setbacks to the building's height. He opined that residential scale might be preserved at a 1:3 ratio of width to building height; in the configuration shown in the illustrative graphic, the tallest building has a ratio of less than 1:1 due to the wide (120 foot) right of way. In addition, curb cuts, inconsistent paving and sidewalks now break up the right of way. In his opinion, the additional setbacks at the street level and the more "organized and lush" streetscape address residential scale better than having a narrower setback from the street and stepping back the building height. T. 200-201.

Methods other than step-backed building heights have also been used to address the residential scale of buildings in the development plans, according to Mr. Kitchens. These include variations in setbacks along the buildings' frontages and orienting buildings perpendicular to the street, both of which have been utilized in this development plan. T. 201. He believes that other techniques don't really affect the overall massing of the buildings. T. 200-201. They have provided the varied setback in the five-story building as well. T. 202.

The step-back in height is difficult to apply in residential buildings because plumbing and structural elements do not align and the configuration and sizes of the individual units would have to be changed, thus adding costs to the construction. T. 222-223. In his opinion, the stepbacks recommended in the Plan were focused more on commercial office and retail buildings rather than residential buildings.

2. Uniform Building Heights

With regard to overall physical form for the Sector Plan area (i.e., gradually decreasing heights from the Core to the residential edge), Mr. Wrenn opined that the 2006 Woodmont Triangle Amendment expanded the area eligible for a 110-foot height limit to include all of Parcel B. He believes that the line delineating the boundary between the recommended 110-foot height limit and the 65-foot height limit moved further west on the subject property between the 1994 Plan and the 2006 Amendment. T. 142-143. As the more recent Plan should control, according to Mr. Wrenn, he believes the 2006 Amendment expanded the 110-foot height limit on the subject property. T. 146. The figure contained in the 1994 Plan (on page 25 of this Report) and the figure from the 2006 Amendment (Exhibit 55, p. 12) is set forth below:



As described above, Technical Staff recommended that roofline heights be step backed not only to address the Sector Plan's recommendations relating to reduction of building mass and avoiding a canyon-like effect on Battery Lane, but also to conform to the "urban form" envisioned by the Sector Plan (i.e., the gradual transition from lower heights in the residential edges to higher heights in the CBD Core). It found that this technique would "emphasize the lower heights along Battery Lane with the gradual stepping of heights to the CBD zone." Exhibit 36, p. 35.

On cross-examination, Mr. Kitchens acknowledged that the illustrative graphic (shown on page 49 of this Report) did not show the possibility that Building B could be 11 stories rather than 5 stories high. According to him, the Applicants desired the flexibility to build to 11 stories because there is the "no man's land" between five and 10 or 11 stories. T. 206, 218. Once a building exceeds five stories, which may be stick built, it must utilize concrete rather than wood framing and comply with additional building and fire code requirements. Typically, the developer cannot recoup the added costs unless the building is 11 stories. Currently, the owners intend to build a five-story building because their goal is to continue to provide affordable housing. According to Mr. Kitchens those affordable units are more in demand. T. 203-204. While the Applicant currently intends to build only five stories, they wish to retain the ability to build to 11 stories for flexibility. T. 206.

For the reasons set forth in Section V (Findings) of this Report, the Hearing Examiner finds that there is sufficient evidence in this record to make a finding that the project will sufficiently comply with the Sector Plan's urban design guidelines to defer the exact method of accomplishing this goal to site plan review.

### **E. Other Zoning Issues**

The Federation argues that the Zoning Ordinance prohibits the Applicants from requesting approval of four alternative development plans and two alternative densities within the PD Zone, citing to §59-H-1.1(a): “A local map amendment covering a single tract, all portions of which are proposed to be classified in the same zone, or all portions of which are proposed to be classified in one of 2 alternative zones.” Mr. Humphrey also cites to §7.14(a): An application for the planned development zone must specify *one* of the following density categories and the district council in granting the planned development zone must specify *one* of the following density categories...” (Emphasis supplied). Exhibit 89.

The Hearing Examiner does not read these provisions together as a limitation on *applying* for multiple density categories in the PD Zone. The first prohibits the Applicants from applying for two different *zones* rather than *density categories*. The Hearing Examiner interprets the second section (i.e., §7.14(a)) as requiring an applicant to specify which density category is being applied for so that a rezoning application may be evaluated based on that density category, which would affect several criteria for approval in the PD Zone. She does not interpret this provision as limiting the number of density categories for which an Applicant must apply, although the Council must identify which of the multiple development plans it actually approves.

### **F. Compatibility**

Mr. Wrenn also opined that the proposed development is compatible with the surrounding area because the Battery Lane District is primarily residential, and this replaces an existing multi-family use. T. 150.

He opined that the project’s density is compatible because it continues the transition from the highest heights in the CBD Core decreasing to the north in the Battery Lane District. In

addition, he believes that the mix of heights and densities, shown in the illustrative graphic on page 49, is similar to other uses in the area. In his opinion, the open space provides compatible connections with retail areas and the expanded setbacks (i.e., 24 and 26 feet) significantly improve pedestrian connections to other parts of the CBD. T. 151. These expanded setbacks also enhance the residential character of the neighborhood and make it more walkable. T. 154.

Technical Staff advised generally that the alternative development plans were compatible with the surrounding area because the proposed development includes only residential uses, it provided amenities that enhanced pedestrian connections, and open space and green areas were distributed throughout the site in keeping with the uses in the District. It found, however, that the building heights should be stepped back to address not just Sector Plan guidelines, but to be compatible with the surrounding area. Exhibit 36, p. 35. Staff proposed its binding elements requiring stepbacks in the rooflines because “the articulation of heights would assist in maintaining the visual character of the proposed buildings with the existing massing of buildings in the Battery Lane District.” Exhibit 36, p. 35. It also determined that stepbacks were necessary to maintain the compatible transition from the residential edge to the urban core of the Bethesda CBD. The Planning Board found that the PD-100 Plan with a potential for 692 dwelling units was compatible with the surrounding area, provided that the transition issues are addressed at site plan review. Exhibit 39.

The major controversy regarding the compatibility of the subject property with surrounding uses is the relationship between Building B and the property that adjoins it to the west. Mr. John Gill, Jr., the adjacent property owner, opposed both the development plans because of the potential that Building B may be 11 stories in height. Mr. Gill owns “Battery Gardens”, a 2½-story apartment building located between Building B and Battery Lane Urban

Park. He does not have any present plans to redevelop his property and is concerned that development of Building B will block the sparse sunshine available to Battery Gardens if Building B is more than five stories in height.

Mr. Gill stated that the Battery Gardens building is 20 feet away from the existing building on Parcel B. T. 134. The basement apartments in Battery Gardens are halfway below grade, which makes them difficult to rent now. He is concerned that if the subject property is developed at the maximum height of eleven stories, it will block all sun from the lower level Battery Gardens. This problem exists currently because the subject property is higher than Battery Gardens, and the rear apartments already look up to a retaining wall and the four-story existing building. He believes that if Building B is between 9 and 11 stories, the Battery Gardens apartments would be virtually unrentable, especially those units that are partially below grade. T. 135. Mr. Gill would prefer that the building at least be stepped back because every inch of sunlight is important. T. 136-137.

Mr. Gill submitted photographs (Exhibits 54 (a) through (c)) to demonstrate the narrow separation between the building currently located on Parcel B and Battery Gardens. These photographs are reproduced below and on the following pages.







In response to Mr. Gill's concerns, Mr. Kitchens and Mr. Wrenn opined that the setback between the two properties under both development plans is almost double that of the existing setbacks. In addition, if Building B were 11 stories, the cap on the number of units would force the footprint to decrease. T. 147. If this occurred, Mr. Kitchens opined that he would "probably" bring the building further from Battery Gardens and "possibly" orient it perpendicular to the street. In his opinion, there are many different ways to accomplish compatibility with adjacent projects, as well as breaking the massing into a smaller scale. T. 202.

Mr. Humphrey pointed out that the number of units does not necessarily require the footprint to shrink because the individual unit sizes may be increased above the 1,000 square feet assumed in the illustrative plan. T. 232-233. In response, Mr. Kitchens reiterated his opinion that it is unlikely the Applicants will build above five stories because multi-family development below five stories is more affordable to build and more in demand. T. 203-204.

Mr. Kitchens further testified that, given the orientation of the proposed buildings, Battery Gardens would be shaded in the morning, but would have sunshine from approximately Noon throughout the rest of the day. T. 210. In addition, the existing building on Parcel B is now approximately 20 feet from the property line. The development plan calls for a 40-foot setback from the property line, doubling the distance from the building line. The courtyards also extend more than 100 from the property line, so he does not share Mr. Gill's concerns regarding the relationship between the two buildings. T. 215. He stated that much of the reason for the "unrentability" of the lower level apartments at Battery Gardens is attributable to the grade and the small windows in the units, which are probably only four – five feet from the floor, significantly restricting views out of those windows. Those windows are not designed to see out,

but only to get some ambient light down into the apartment. T. 217. As a result, achieving direct sunlight is going to be difficult because even bushes outside those windows will block the sun. T. 217. In his opinion, tenants in those units will not see either five or eleven stories because their view is so restricted. T. 217. He testified:

You know, you can't get over the fact that at least on his piece of property, that you chose to put a retaining wall up and to build X amount of apartments....Which, you know, that's -- they are what they are. And there's probably nothing that we could do to really mediate that kind of impact. But, I do think that if we were to look at present conditions and potential future conditions related to this and the fact that we've got a park sitting over here, it makes sense to reasonably step from what we call the gateway interest into Bethesda down towards the park, and that's what we look at. There's not a whole lot of reason, necessarily, to step this way because the density and the height is really only getting lower because that is part of the CBD. T. 211.

Mr. Kitchens also urged that the project should be viewed in an urban context. According to him, it is typical to have a mix of building heights because these urban districts are built over time. T. 208-209. Right behind Building B, which will probably be only five stories, is an existing building on Rugby Avenue, which is also nine stories. T. 216. He pointed out that there is a nine-story building next to a three-story building immediately across Battery Lane. There are “probably” many buildings with this type of relationship in and around Bethesda. T. 216. He believed the 11-story height is compatible with the area immediately surrounding Site B. He stated that building heights along Battery Lane are diverse, and that truly urban settings permit a mix of heights. In his opinion, people are accustomed to thinking of Washington, D.C. as urban, although it has height restrictions generally rendering most buildings a similar height. In Bethesda and the suburbs, he believes there is an opportunity to create diverse heights and to create light, air, and space between buildings. He believes that the “tent effect” decreasing height from the CBD core to the edges of the CBD can be a collection of high and short

buildings rather than a straight line. T. 221. He opined that diversity in height avoids a “canyon effect” better than having the same height along a single street. T. 221.

Mr. Kitchens opined that the proposed design is compatible because of its connection to the surrounding area. He recognized early that there were two potential places other than Woodmont Avenue and the Battery Lane Park to provide connections. One is a natural path and the other is a paved area where they are required to provide fire access. T. 212. In other areas of Bethesda, the public open space is in the middle of the development, and may be accessed only by climbing stairs or other impediment. He acknowledged, however, that neither of these two access points will be publically accessible. T. 213. Currently the only publically accessible access to other areas is via the sidewalks on Woodmont Avenue and Battery Lane and the Battery Lane Park. T. 214.

With their amended development plans, the Applicants included a binding element committing them to addressing review the setbacks to Battery Gardens at site plan review: “In the event Building B exceeds 5 stories, the side yard setback adjoining Block 1, Lot 43 Northwest Park shall be reviewed at site plan.” Exhibits 80-82.

As more fully discussed in Part V of this Report, the Hearing finds that there is sufficient evidence in the record to support a finding that the project will be compatible with the surrounding area and adjacent uses to defer the issue to site plan review, when the height of the building will be known.

### **G. Public Interest**

Under the County’s Adequate Public Facilities Ordinance (APFO) (County Code §50-35(k)), an assessment must be made by the Planning Board as to whether the transportation infrastructure, schools, water and sewage facilities, police, fire and health services will be adequate to support the

proposed development, and whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that the County Council sets in the Growth Policy.

In addition, Zoning Ordinance §59-H-2.4(f) requires the re-zoning Applicant to provide sufficient information to demonstrate a reasonable probability that available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application is submitted. Thus, both the Planning Board and the Council play a role regarding the evaluation of the adequacy of public facilities.

While the final test under the APFO is carried out at subdivision, the District Council must first make its own public facilities evaluation in a rezoning case, because the Council bears the responsibility of determining whether the reclassification would be compatible with the surrounding area and would serve the public interest. We turn first to transportation facilities.

### **1. Transportation: Roadway Capacity**

The Applicants' expert transportation engineer, Mr. Edward Papazian, submitted a traffic impact study (Exhibit 31) for the 692-unit development plan, concluding that all intersections included within the study area operated within the maximum congestion levels for the policy area in accordance with the Local Area Transportation Review (LATR) guidelines. He testified that the subject property is within the Bethesda CBD Policy area even though technically located just north of the CBD. The property is within a Metro Station Policy Area, for which the congestion standard is 1800 CLV. T. 269. Based on 692 dwelling units, the development will generate 102 "net" new trips because the Applicants' receive a "credit" for the 260 existing units, as set forth in the Technical Staff Report (Ex. 36), shown below:

**TABLE 1**  
**SUMMARY OF SITE TRIP GENERATION**  
**PROPOSED GLEN ALDON DEVELOPMENT**

Trip Generation	Morning Peak-Hour			Evening Peak-Hour		
	In	Out	Total	In	Out	Total
Proposed: 692 high-rise dwelling units	44	130	174	124	79	203
Existing: 260 multi-family dwelling units	-18	-70	-88	-67	-34	-101
<b>Net "New" Trips</b>	<b>26</b>	<b>60</b>	<b>86</b>	<b>57</b>	<b>45</b>	<b>102</b>

Source: Kimley-Horn and Associates, Inc. Traffic Impact Study; Glen Aldon on Battery Lane, January 26, 2011.

Notes: Trip generation as above reflects an 18% reduction allowed in Metro Station Policy Areas over Countywide peak-hour trip generation for residential uses.

Including the background trips (i.e., existing trips and trips estimated to be generated by new development), Mr. Papazian testified that all intersections required to be studied operated within the 1800 CLV congestion levels (T. 267-268; Exhibit 31(e), p. 33):

Intersection	Existing Traffic Volumes		Background Traffic Volumes		Total Future Traffic Volumes	
	AM	PM	AM	PM	AM	PM
Battery Lane and Old Georgetown Road	1073	1120	1147	1271	1147	1286
Woodmont Avenue and Battery Lane	813	724	923	860	954	894
Woodmont Avenue and Rugby Avenue	616	624	733	654	740	659
Building B and C West Site Driveway	-	-	-	-	219	236
Building B and C East Site Driveway	-	-	-	-	298	331
Building A West Site Driveway	-	-	-	-	234	267
Building A West Site Driveway	-	-	-	-	241	274

In addition to LATR, Mr. Papazian testified that development of 692 dwelling units would also pass Policy Area Mobility Review (PAMR). Applicants within the Bethesda CBD Policy Area must mitigate 25% of the estimated trips to be generated or 22 trips in the a.m. peak hour and 26 trips in the p.m. peak hour. Exhibit 31(e), p. 35. The 692-unit development may achieve the trip mitigation requirements of PAMR in two ways: (1) projects within a Metro Station Policy Area may

take a credit of 18% reduction in trip generation rates, and (2) paying a fee (\$11,700 per trips) for the balance of the trips. In this case, the 18% reduction in rates results in a mitigation of 19 and 23 trips in the a.m. and p.m. peak hours; the Applicants will mitigate the balance of the trips by paying a total of \$35,100. Exhibit 31(e), p. 35; T. 267-268.

After amending the application to add an additional 58 dwelling units, Mr. Papazian submitted a supplemental traffic analysis (Exhibit 75(a)) for a total development of 750 dwelling units. This analysis determined that, although slightly higher, the development remained within the congestion levels for the Bethesda CBD Policy Area. Exhibit 75(a), p. 11. The analysis also concluded that PAMR mitigations requirements could be met through the 18% reduction in trip generation rates available for Metro Station policies areas and through payment of a larger total fee (i.e., \$46,800). *Id.* at 12.

## **2. Transportation: Access, Circulation and Parking**

All four development plans in this case show identical access points. The access for Parcel A will be via a shared drive with the “Woodmont View” development, adjacent to the eastern boundary line. T. 72-73, 259-260. Binding Element #10 on the 692-unit development plans provides: “At least one point of vehicular access for the building north of Battery Lane shall be provided by the common driveway per the Common Drive Agreement recorded in Liber 26425 at folio 122.” Exhibits 82, 81. An identical textual binding element (i.e., Binding Element #9) is included in the PD-88 Plan. Exhibit 80.

Access to the garage for Building B will be from the east and west sides of the building. Building C will have a shared access with Building B. Mr. Frank Bossong, the Applicants’ expert civil engineer, opined that this will be an improvement over existing conditions because the approximately six access points or drop-offs which exist today will be reduced to two. T. 279-280.

Technical Staff agreed: “The internal vehicular and pedestrian circulation systems for the project have been designed to decrease the number of vehicular access points from Battery Lane and create a network of internal pedestrian connections between proposed Building B and C.” Exhibit 36, p. 29.

The Applicants’ propose that all parking will be either underground or screened from the street. Exhibits 80-82.

### **3. Water and Sewer**

The subject property is within W-1 and S-1 water and sewer categories, respectively. Mr. Bossong opined that on a preliminary basis, existing facilities are adequate to serve even the larger number of units. If there is a deficiency in one of the lines, the Applicant will be required to upgrade the line unless there is an existing capital improvement project. T. 252.

### **4. Schools**

The Planning Board is required under the Growth Policy to determine, for each fiscal year, whether each school cluster has adequate capacity under the Growth Policy test to permit approval of additional subdivisions. The subject property is located within the Bethesda-Chevy Chase (B-CC) Cluster, which includes Bethesda Elementary School, Westland Middle School, and Bethesda-Chevy Chase High School. Technical Staff advises that there is adequate capacity in the schools under the current growth policy school test (FY 2010), as do the Applicants. Exhibit 36, p. 38; T. 163. The Applicants will be required to pay a school facility payment for all three levels: elementary, middle and high school unless enrollment decreases or additional capacity becomes available. Exhibit 36, p. 38.

## **H. Environmental Issues and Storm Water Management**

As demonstrated by the photographs of existing on-site conditions shown earlier, there is little natural vegetation on the site. Technical Staff reports that there is an approved Natural Resources Inventory/Forest Stand Delineation (NRI/FSD) for the subject property, which does not identify any forested area on the property. The NRI/FSD did identify four trees greater than 30 inches in diameter, necessitating a variance from the requirements of the Montgomery County Forest Conservation Law (§22A-21(c)). At the time of the public hearing in this case, the Planning Board had not approved the required variance. The record of the public hearing was left open, and the Board subsequently approved it on May 3, 2012. Exhibit 66.

The Applicant's civil engineer, Frank Bossong, testified that there has never been any stormwater management on the property. This development plan will provide the opportunity for stormwater management under the most recent State stormwater management regulations. The preliminary concept plan is currently under review by the Department of Permitting Services. They are proposing green roofs in certain locations on top of the buildings and in the green area above the underground garages. Bio-retention facilities, including bio-filtration planter boxes will also be used. Should these be insufficient, structural measures, such as vaults, may be located within the garage. Mr. Bossong stated that he is confident that the project can meet the parking requirements and also provide stormwater vaults if necessary. T. 249-250.

## **I. Community Participation**

Ms. Kathy Russell, the Chief Executive Officer of the Children's Inn at NIH, submitted a letter in support of the Application. Located on the adjoining property to the east, the Children's Inn shares an access easement on the western side of their property with Parcel A. As configured

on the site plan, Ms. Russell felt that the development plan was compatible with the Children's Inn use on the adjacent parcel. Exhibit 34.

Representatives of the Montgomery County Civic Federation, the Department of Housing and Community Affairs, and the Montgomery County Agricultural Advisory Committee and Mr. John Gill also submitted comments or testified at the public hearing in this case. This evidence is summarized in this Report where relevant.

#### **IV. SUMMARY OF HEARING**

The Applicants' presented testimony from the owners of the subject property as well as experts in land use planning, architecture, and civil engineering. Mr. Humphrey testified on behalf of the Montgomery County Civic Federation in opposition to the application; Mr. Gill opposed development plans due to the possibility that Building B could be developed to 11-stories. Their testimony is set forth herein where relevant.

#### **V. ZONING ISSUES AND REQUIRED FINDINGS**

The subject application seeks to rezone the property from the R-60 Zone to the PD-44 Zone. The PD-44 Zone falls into a category known as "floating zones." A floating zone is a flexible device that allows a legislative body to establish a district for a particular type of use, with land use regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, *i.e.*, it satisfies the purpose clause and requirements for the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

PD (Planned Development) zones are a special variety of floating zone with performance specifications integrated into the requirements of the zone. These zones allow considerable design

flexibility if the performance specifications are satisfied. The applicant is not bound to rigid design specifications, but may propose site-tailored specifications, within the parameters established for the zone, for elements such as setbacks, building heights and types of buildings. These specifications are set forth on a development plan to facilitate appropriate zoning oversight by the District Council.

Pursuant to Zoning Ordinance §59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone. Once it is approved, the development plan provides the design specifications for the site, much as the Zoning Ordinance provides design specifications for more rigidly applied zones. Accordingly, the evaluation of zoning issues must begin with the Development Plan and proceed to the requirements of the zone itself.

Before approving a development plan, the District Council must make five specific findings set forth in Code § 59-D-1.61. These findings relate to consistency with the master plan and the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas.

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

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

In sum, there are six findings required (§59-D-1.61 (a) through (e) and the public interest). The “Required Findings” are discussed below in the order set forth in the statute to facilitate review. Based on this review, the Hearing Examiner concludes that the evidence in this case supports some, but not all, of the required findings.

## **A. Review of the Development Plan**

### **1. Consistency with the Sector Plan**

**The first required finding relates to consistency with the Sector Plan and other County policies:**

*(a) The proposed development plan is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies. However:*

*(1) To permit the construction of all MPDUs under Chapter 25A, including any bonus density units, on-site in zones with a maximum permitted density more than 39 dwelling units per acre or a residential FAR more than .9, a development plan may exceed:*

*(A) any dwelling unit per acre or FAR limit recommended in a master plan or sector plan, but must not exceed the maximum density of the zone; and  
(B) any building height limit recommended in a master plan or sector plan, but must not exceed the maximum height of the zone.*

*The additional FAR and height allowed by this subsection is limited to the FAR and height necessary to accommodate the number of MPDUs built on site plus the number of bonus density units. . . .<sup>10</sup>*

The above requires a finding that the development plan is in substantial compliance with the “use and density” recommended in the Sector Plan. The Hearing Examiner finds that a multi-family development under the PD Zone does coincide with the use proposed in the Sector Plan, which recommends PD-75, R-10 and R-10/TDR for the subject site, all multi-family residential zones. For the reasons stated in Section III.D.3 of this Report, the Hearing Examiner also finds that the densities

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<sup>10</sup> The remaining language of this section addresses additional height and density based on the inclusion of on-site workforce housing. That language is inapplicable to this case because no legislatively defined Workforce Housing is proposed.

proposed substantially comply with the Sector Plan, with the exception of the PD-100 development plan calling for 750 dwelling units, given the need for additional housing options expressed in the 2006 Amendment. The development plan calling for 750 dwelling units does not conform to the requirements for award of a TDR density bonus under the PD Zone.

The Hearing Examiner finds that none of the development plans *conflict* with other county plans or policies, or the capital improvement program, although the development plan proposing only 20 TDRs does not support the County's agricultural preservation program to as great an extent as those proposing to acquire 31 TDRs. Each plan significantly supports the County's policies relating to providing affordable housing, particularly near two Metro stops and each is consistent with the County's growth policy.

## **2. Compliance with the Purpose Clauses of the PD Zone**

**The second required finding requires an evaluation of the PD Zone's purpose and regulations:**

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

The purpose clause for the PD Zone, found in Code §59-C-7.11, is set forth in full below, followed by relevant analysis and conclusions for each paragraph:<sup>11</sup>

*[1] It is the purpose of this zone to implement the general plan for the Maryland-Washington Regional District and the area master plans by permitting unified development consistent with densities proposed by master plans. It is intended that this zone provide a means of regulating development which can achieve flexibility of design, the integration of mutually compatible uses and optimum land planning with greater efficiency, convenience and amenity than the procedures and regulations under which it is permitted as a right under conventional zoning categories. In so doing, it is intended that the zoning category be utilized to implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories.*

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<sup>11</sup> Numbering of the paragraphs has been added by the Hearing Examiner for ease of reference.

*[2] It is further the purpose of this zone that development be so designed and constructed as to facilitate and encourage a maximum of social and community interaction and activity among those who live and work within an area and to encourage the creation of a distinctive visual character and identity for each development. It is intended that development in this zone produce a balance and coordinated mixture of residential and convenience commercial uses, as well as other commercial and industrial uses shown on the area master plan, and related public and private facilities.*

*[3] It is furthermore the purpose of this zone to provide and encourage a broad range of housing types, comprising owner and rental occupancy units, and one-family, multiple-family and other structural types.*

*[4] Additionally, it is the purpose of this zone to preserve and take the greatest possible aesthetic advantage of trees and, in order to do so, minimize the amount of grading necessary for construction of a development.*

*[5] It is further the purpose of this zone to encourage and provide for open space not only for use as setbacks and yards surrounding structures and related walkways, but also conveniently located with respect to points of residential and commercial concentration so as to function for the general benefit of the community and public at large as places for relaxation, recreation and social activity; and, furthermore, open space should be so situated as part of the plan and design of each development as to achieve the physical and aesthetic integration of the uses and activities within each development.*

*[6] It is also the purpose of this zone to encourage and provide for the development of comprehensive, pedestrian circulation networks, separated from vehicular roadways, which constitute a system of linkages among residential areas, open spaces, recreational areas, commercial and employment areas and public facilities, and thereby minimize reliance upon the automobile as a means of transportation.*

*[7] Since many of the purposes of the zone can best be realized with developments of a large scale in terms of area of land and numbers of dwelling units which offer opportunities for a wider range of related residential and nonresidential uses, it is therefore the purpose of this zone to encourage development on such a scale.*

*[8] It is further the purpose of this zone to achieve a maximum of safety, convenience and amenity for both the residents of each development and the residents of neighboring areas, and, furthermore, to assure compatibility and coordination of each development with existing and proposed surrounding land uses.*

*[9] This zone is in the nature of a special exception, and shall be approved or disapproved upon findings that the application is or is not proper for the comprehensive and systematic development of the county, is or is not capable of accomplishing the purposes of this zone and is or is not in substantial compliance with*

*the duly approved and adopted general plan and master plans. In order to enable the council to evaluate the accomplishment of the purposes set forth herein, a special set of plans is required for each planned development, and the district council and the planning board are empowered to approve such plans if they find them to be capable of accomplishing the above purposes and in compliance with the requirements of this zone.*

#### First Paragraph: Master Plan Implementation

##### a. Density

The first paragraph of the purpose clause establishes consistency with the applicable master plan as an important factor in applying the zone. As set forth in Section III.D.3 of this Report, given the Council's articulated need for affordable housing in the Sector Plan study area and for increasing housing options on this property, the Hearing Examiner finds that the *densities* proposed substantially comply with the Sector Plan (with the exception of the development plan requesting 750 dwelling units). The Hearing Examiner recommends the PD-100 development plan for 692 units, 10 VAHUs, and 31 TDRs over the PD-88 development plan because it provides both TDRs and VAHUs, thus forwarding two important County policies, (i.e., provision of a variety of types of affordable housing and support for the County's agricultural preservation program).

##### b. Number of TDRs

While mindful of the admonition that development plans for the PD Zone should implement the Sector Plan "in a manner and to a degree more closely compatible" with the Plan, the Hearing Examiner finds that the 31 TDRs proffered by the Applicant in the PD-88 and PD-100 development plans do comply with the Sector Plan sufficiently to fulfill the purposes of the PD Zone. Providing fewer than the full number of TDRs which would be needed to develop the property at its maximum density is problematic in theory: The Applicants seek the benefit of the maximum density to justify compliance with the Sector Plan, but do not provide the concomitant TDRs associated with that density. Practically, however, it is difficult to predict how many TDRs would actually be achieved if

the site were developed under the existing zoning; the 2/3 requirement may be more or less than would have been achieved (because the Planning Board has the ability to waive that minimum standard). The AAC did not weigh in on this specific issue other than to oppose both applications because they would eliminate a receiving area and to stress the continuing need for TDR receiving areas to support agricultural preservation policies.

The Hearing Examiner finds that an exact *quid pro quo* between Sector Plan density and the number of TDRs required is not necessary to fulfill the purpose of the PD Zone, especially because there is no evidence as to how many TDRs would have been achieved on the site. This conclusion is particularly appropriate here where the development plans *do* more closely achieve other goals, such as the provision of a variety of affordable housing options (i.e., the VAHUs and TDRs) in the Battery Lane District. The Hearing Examiner finds that both the PD-88 application and the PD-100 application for 692 dwelling units with 31 TDRs substantially comply with the Sector Plan.

While the Planning Board preferred the development plan proposing the 692 dwelling units, 20 TDRs, and 10 VAHUs, it was not presented with the plan for 692 units and the increased number of TDRs. Further, the Board preferred the 692 dwelling units because the cost to provide those units was greater than the cost to purchase the TDRs. The Applicants did not present any evidence before the Hearing Examiner that this is the case; they preferred the lower number of TDRs due to the family's personal commitment to affordable housing and because the lower number of TDRs was economically more favorable. Based on this evidence, there is little evidence here to support the PD-100 application with only 20 TDRs because it forces a choice between the two competing public policies. While laudable, the family's personal goal to provide affordable housing is not the legal standard in this case; the PD Zone requires an examination of whether the development plan supports adopted County policies.

### c. Urban Design

More problematic is whether the development plans comply with the Sector Plan's vision for the "urban form" of Bethesda if Building B is developed to the full 11 stories. Located outside of the CBD, the Sector Plan designates the Battery Lane District as a "residential edge", traditionally an area of transition between the CBD and residential uses outside the CBD. The Sector Plan's "urban form" for Bethesda called for gradual decreases in heights from the Metro Core to the residential edge capped heights on specific parcels and identified urban designs to be avoided. The Sector Plan permitted a stepbacked height between 65 and 110 feet for the eastern portion of Parcel B zoned R-10/TDR; it did not recommend this height for the western portion adjacent to Mr. Gill's Battery Gardens (zoned R-10). While Mr. Wrenn asserts that the 2006 Amendment expanded the higher height limit to the western portion of Parcel B, the Hearing Examiner finds this hard to discern from the graphic included in the Amendment and does not believe it overrides the site-specific direction in the text that, "This Amendment leaves unchanged the current zoning and height limits in the Battery Lane District." Exhibit 55, p. 23.

As a result, the 2006 Amendment provides little guidance on whether and to what extent the Council may have modified the urban design guidelines in the 1994 Plan for the Battery Lane District to accommodate expressed desire for additional residential capacity, except implicitly. The Council did remove the height caps from certain properties to increase residential density in the Woodmont Triangle. Without further amendment of the Plan, however, development of Building B to its full potential could create one of the scenarios the 1994 Plan sought to avoid: There would be two buildings of identical height transitioning to a much smaller building to the west, and immediately to Battery Lane Urban Park, a scenario possibly illustrated by the "what to avoid" graphic from the Sector Plan.

Mr. Kitchens repeatedly presented the possibility that Building B will be 11 stories as “unlikely” because the present market is for smaller, more affordable units. He also indicated, however, that the building would likely be either five stories or 11 stories, because the cost to construct the taller building cannot be recouped without using all of the additional height. Without knowing when these buildings will develop, the Hearing Examiner must assume that the 11-story scenario *is* possible as long as it continues to be an option under the development plan. She also finds that the more transitional heights (i.e., six to 10 stories) are the most unlikely scenario based on Mr. Kitchens’ testimony.

To support its case for the 11-story height of Building B, the Applicants posit that the overall transition in heights called for in the Sector Plan may be accomplished through varied building heights (i.e., some taller buildings mixed with some small buildings) rather than a straight line descending from east to west. Mr. Wrenn (when presenting the illustrative graphic on page 49) testified that the project conformed to the Sector Plan because it created varying heights, but did not address the possibility that Building B would be 11 stories.

The Applicants also argue against using stepbacked rooflines as a means of transitioning to the lower density uses to the west. According to Mr. Kitchens, these are not suitable for residential buildings, which are much more efficient if all plumbing and unit designs are aligned. The Applicants believe that the Sector Plan intended the stepbacked rooflines to apply to commercial properties. They argue that the heights set in the Sector Plan should be modified because the Sector Plan is old and because the “new urbanism” suggests a newer, more urban approach is desirable in the longer term, i.e., for the next 50-60 years.

Technical Staff attempted to address the issue by recommending binding elements mandating roofline stepbacks. The Planning Board removed the stepbacks from the binding elements in order

to provide the developer with more flexibility in future site design and deferred the matter to site plan review. As a result, there is little in this record from Technical Staff and the Planning Board indicating how the “urban form” of Bethesda, envisioned by the Sector Plan and implemented by gradually decreasing heights from the Metro Core will actually be achieved.

Although there is little here to demonstrate how the east to west transition between Woodmont Avenue and the edge of the Sector Plan area may be accomplished, the Hearing Examiner finds the illustrative graphic presented by the Applicants (showing Building A at 7 stories, Building B at 5 stories, and Building C at 11 stories) does accomplish a compatible transition. Because the Applicants’ presented testimony and evidence that the full building height for Building B is unlikely, binding elements ensure that this transition will be reviewed at site plan approval, and the illustrative graphic demonstrates that a compatible transition is possible at 692 dwelling units, the Hearing Examiner finds that there is sufficient evidence in the record demonstrating that development may be achieved in compliance with the Sector Plan without knowing exactly how this will occur. While the graphic assumes that all of the units are 1,000 square feet in size, this assumption is reasonable given that the Brown family intends the market rate units to be more affordable than others in the area. While the Hearing Examiner agrees with the Planning Board that some flexibility may be deferred to site plan review, absent more evidence on this issue, the Hearing Examiner does not recommend the 750-unit development plan (even were the Council able to award that level of density).

The Sector Plan also recommends roofline setbacks to maintain a “human scale” at the street level, to avoid a “canyon like” effect along Battery Lane and to mitigate the impacts of wind and shadows. With regard to the project’s human scale, the Applicants’ architect testified that this goal might be accomplished by varying the building edges at the street level, with the additional setbacks

from the street. While this does not address the 1994 Plan's goal of maintaining sunlight, the Hearing Examiner finds this a reasonable approach and believes that compliance with these urban design guidelines may appropriately be left to site plan review, as suggested by the Planning Board.

d. General Goals

In other respects, the Hearing Examiner finds that the development plan accomplishes the goals of the Sector Plan. The Hearing Examiner agrees with the Applicants that the development plans continue the multi-family residential uses currently occupying the Battery Lane District. She also finds that substituting landscaped streetscape at widths of 24 and 26 feet for the existing curb cuts and mixed materials significantly furthers the Sector Plan's goal to provide a residential, pedestrian-oriented environment and to connect the site to the Central Business District.

All development plans further the goals expressed for the Battery Lane District, which included (1) retaining existing affordable housing, (2) increasing the zoning on the subject property (with the exception of the western portion of Parcel B) to provide housing close to Metro Stations and to further the County's agricultural preservation policy. The development plans proposed here all further the first goal by introducing regulated affordable housing units, both in the form of MPDUs and VAHUs, into the District. As discussed, the development plans that propose 31 TDRs substantially support the County's agricultural preservation program because they provide the minimum number of TDRs necessary to achieve the TDR bonus density.

Except for the roofline setbacks, the development plans substantially comply with the Sector Plan's goals for the Battery Lane District. The setbacks proposed for Parcel A will significantly improve existing conditions, as will the streetscape provided in the new development. The entrances for all buildings, including Building A, will be oriented toward

Battery Lane and parking will be either underground or screened from the street, in accordance to the Plan.

Second Paragraph: Social and Community Interaction, Visual Character, Mix of Uses

The Hearing Examiner agrees with Technical Staff and the Applicants that the development plans encourage social and community interaction by creating a courtyard area for residents and significantly improved streetscape connecting the property to the Central Business District and Battery Lane Urban Park. Exhibit 36, p. 32. Mr. Wrenn testified that the project organizes buildings so that people can circulate around them and creates setbacks that provide a more residential character to the area and a connection to Battery Lane Park. Technical Staff found that plans use green space to create a distinctive visual character, establishing a visual connection along Battery Lane west toward the park with additional green space buffering the subject properties from the NIH. The Hearing Examiner agrees with these conclusions and so finds. Exhibit 36. T. 105.

Third Paragraph: Broad Range of Housing Types

All development plans would increase the stock of multi-family housing, including MPDUs, available in Bethesda. The PD-100 development plan would add a 10 new unit types, called here a “voluntary affordable housing unit” in which rentals and incomes are restricted to Workforce Housing levels for a period of 20 years. DHCA supports all of the development plans, although it expressed a preference for the 692-unit PD-100 plan because it provided more affordable housing units. The 750-unit plan was submitted after the DHCA’s comments, and the DHCA provided no further comments on the last alternative plan. The Hearing Examiner finds, as did Technical Staff, that both the PD-88 development plan and the PD-100 development requesting 692 units, 31 TDRs, and 10 VAHUs meet these goals.

#### Fourth Paragraph: Tree Preservation

The photographs of existing conditions submitted by the Applicants support Mr. Wrenn's assessment that the three existing trees on the site over 30 inches in diameter are indeed "stressed" from existing conditions and that there is little significant vegetation on the site. The Planning Board waived the requirement to preserve these trees, as evidenced by their opinion submitted into the record in this case. Mr. Wrenn testified that redevelopment of the property will introduce more vegetation onto the site, a finding confirmed by both Mr. Bossong and Technical Staff. T. 107, 281, Exhibit 36, p. 32. The Hearing Examiner finds, based on this evidence, that this purpose of the PD Zone has been met.

#### Fifth and Sixth Paragraphs: Open Space and Pedestrian Networks

The Applicants opine that the project uses open space to locate residential and commercial conveniently to each other and to allow circulation around the buildings. T. 108. Building A has a 10-foot setback on its north edge adjacent to the NIH campus. Technical Staff determined that this purpose of the zone was met because the courtyard areas for the residents and landscaping and lighting will provide a more enjoyable pedestrian experience. The minimum 30% green space in the PD Zone is met through the streetscape proposed along Battery Lane, the internal courtyards and buffer areas to adjacent uses. Exhibit 36, pp. 32-33. The Hearing Examiner agrees with these conclusions and so finds.

#### Seventh Paragraph: Scale

The PD Zone encourages development on a large scale. The Applicants' assert that the ability to assemble a parcel of 5 acres in this area is unusual, and offers the opportunity to design more comprehensively a gateway to the CBD. Family ownership of all the parcels makes it possible to provide affordable housing and a range of units that probably would not be possible

under other circumstances. T. 109. Technical Staff agreed that the development plans incorporate an assemblage of parcels that permit a more comprehensive residential development with different housing types at a scale that achieves the purposes of the zone. Staff cautioned, however, that the scale of the buildings would need to address the transition from the higher heights toward Woodmont Avenue to lower heights at the property's west edge through either roofline stepbacks or other means. Exhibit 36, p. 33. Based on this evidence, the Hearing Examiner finds that the PD-88 development plan and the PD-100 development plan with 692 units fulfill this purpose, but not the PD-100 proposal for 750 units as there is little evidence to support how the transition would be accomplished.

Eighth Paragraph: Compatibility and Maximum Safety, Convenience and Amenity

Technical Staff found that the development maximizes safe connections between the proposed development and the surrounding area. It recommended that pedestrian connection between Building B and Parking Garage 35 should be explored to facilitate a mid-block connection from Battery Lane and Rugby Avenue. Internal sidewalks connect residences to open areas and amenities. Buffer areas around perimeter add to the compatibility with adjacent properties. Exhibit 36, p. 33. The Hearing Examiner agrees with all of Technical Staff's conclusions and so finds.

Ninth Paragraph: Summary of Required Findings.

Paragraph nine of the purpose clause states that the PD Zone "is in the nature of a special exception," and shall be approved or disapproved based on three findings:

- (1) the application is or is not proper for the comprehensive and systematic development of the county;
- (2) the application is or is not capable of accomplishing the purposes of this zone; and
- (3) the application is or is not in substantial compliance with the duly approved and adopted general plan and master plans.

This paragraph of the purpose clause does not add new requirements. Based on the preponderance of the evidence and for the reasons stated above, the Hearing Examiner concludes that present application supports the comprehensive and systematic development of the County, and that the PD-100 development plan with 31 TDRs and 10 VAHUs strikes the best balance among the competing County plans and policies, including Sector Plan density, support of the agricultural preservation program, and provision of affordable housing for a variety of incomes.

### **3. Standards and Regulations of the Zone**

The standards and regulations of the PD Zone are summarized below, together with the grounds for the Hearing Examiner's conclusion that the proposed development would satisfy these standards (except that the development plan requesting 750 dwelling units does not meet §7.14(e) of the Zoning Ordinance).

Section 59-C-7.121, Master Plan Density. Pursuant to Code §59-C-7.121, "no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher." Parcel A is recommended in the Sector Plan for residential development at a density of up to 75 units per acre; Parcels B and C are recommended for a base density of 43.5 units per acre. Therefore, this requirement is satisfied.

Section 59-C-7.122, Minimum Area. Code §59-C-7.122 specifies several criteria, any one of which may be satisfied to qualify land for reclassification to the PD Zone. The subject application satisfies the first of these criteria, which states the following:

That it contains sufficient gross area to construct 50 or more dwelling units under the density category to be granted.

The Hearing Examiner finds, as did Technical Staff, that the subject property contains sufficient gross area to permit the construction of 50 or more dwelling units.

Section 59-C-7.131, Residential Uses. For “urban high” density PD Zones, all types of residential units are permitted except single-family detached houses, without a specific percentage mix of uses required. All of the alternative development plans include only multi-family residential units; therefore, this requirement has been met.

Section 59-C-7.132, Commercial Uses. Commercial uses are permitted but not required. None of the alternative development plans propose commercial use; therefore, the standards governing these uses are not applicable to the application.

Section 59-C-7.14, Density of Residential Development. The Zoning Ordinance provides the following direction for the District Council in considering a request for the PD Zone (§ 59-C-7.14):

*(b) The District Council must determine whether the density category applied for is appropriate, taking into consideration and being guided by the general plan, the area master or sector plan, the capital improvements program, the purposes of the planned development zone, the requirement to provide [MPDUs], and such other information as may be relevant. . . .*

*(c) The density of development is based on the area shown for residential use on the master plan and must not exceed the density permitted by the density category granted. However, the maximum density allowed under subsection (a) may be increased to accommodate the construction of Moderately Priced Dwelling Units and workforce housing units as follows...*

*(e) The District Council may approve a density bonus of up to 10 [percent] above the maximum density in the approved and adopted master plan for the provision of TDRs, if TDRs are recommended for the site.*

The Zoning Ordinance classifies the density categories applied for, PD-88 and PD-100, as “urban high”. Technical Staff advised that the Applicants submitted the initial PD-100 Plan at 692 dwelling units because that was the maximum density in the PD-100 Zone plus a 22% bonus for providing MPDUs. Staff reports that the alternative PD-88 development plan was submitted because it was more consistent with the Sector Plan. Staff advised that, overall, the two alternative zoning

requests represented a 25-30% increase over the base density recommended in the Plan, and achieved 121-130 dwelling units per acre.

The Applicants assert that the 692 dwelling units (the maximum density in the PD-100 Zone with the MPDU bonus density) is appropriate because the Council may take into account “relevant information” in addition to the Sector Plan recommendations. The Applicants assert that the BRAC consolidation at the Bethesda Naval Medical Center and the “affordable housing crisis in Bethesda” are both factors occurring after adoption of the 1994 Plan that support higher density. The letter from Mr. Richard Nelson, attesting to the shortage of affordable housing in Bethesda, and in particular, housing at workforce income levels, supports the Applicants’ arguments. The Applicants also submitted information on the number of additional jobs in the area attributable to BRAC. The Hearing Examiner agrees with the Applicants that this constitutes “other relevant” information and finds that a density of 692 dwelling units *is* appropriate for the site. Because the PD Zone prohibits the Council from approving a development plan that exceeds the density permitted in the zone (exclusive of applicable bonus densities), the Hearing Examiner does not recommend the PD-100 plan for 750 units, as that number is above the maximum allowable density in the PD-100 Zone and does not qualify for the TDR bonus contained in the PD Zone.

Section 59-C-7.15, Compatibility. Section 59-C-7.15(a) provides:

*(a) All uses must achieve the purposes set forth in section 59-C-7.11 and be compatible with the other uses proposed for the planned development and with other uses existing or proposed adjacent to or in the vicinity of the area covered by the proposed planned development.*

This subsection requires that a proposed development be compatible internally and with adjacent uses. As described above in various sections, the Hearing Examiner finds that the development provides green spaces, access, and circulation that are compatible with internal uses.

The most difficult issue are whether the project will be compatible with nearby uses if Building B is constructed to the maximum 11-story height and whether the project provides a sufficient transition from the Metro Core to uses outside the Sector Plan area. Technical Staff identified the latter problem, finding that the plan *could* be compatible but needed to “better address building heights along Battery Lane to incorporate a gradual increase in massing and height to the higher density CBD Zones.” Exhibit 36, p. 35. As already described, Staff proposed binding elements requiring stepped rooflines; however, the Planning Board deferred the matter entirely to site plan review. The Applicants oppose roofline stepbacks because they do not lend themselves to residential buildings.

Mr. Gill raises essentially the same issue, but is more immediately concerned about the impact of an 11-story building on his property adjacent to Parcel B. The proximity of his building to the subject property is demonstrated in the photographs submitted.

Mr. Kitchens testified that the existing setbacks from Battery Gardens will be increased to 40 feet and that the courtyard design should provide some sunlight onto Mr. Gill’s property. He estimates that Battery Gardens will receive sun from Noon throughout the rest of the day. T. 210. Both Mr. Wrenn and Mr. Kitchens assert that if the building height increases to 11 stories, the footprint of the building will shrink, although Mr. Humphrey correctly pointed out that this depends on the size of the individual units. After the public hearing, the Applicants submitted an additional binding element committing to address the issue later at site plan review.

Because of Mr. Kitchens’ testimony that Battery Gardens will receive some sunlight due to the courtyard design and increased setback of Building B, the Hearing Examiner finds that there is sufficient evidence here to support a finding that the PD-88 development plan and the PD-100

development plans calling for 692 dwelling units may be developed compatibly with the surrounding area, provided that the issue is further refined at site plan review.

Section 59-C-7.16, Green Area. Both the PD-88 and PD-100 Zones requires a minimum of 30 percent green area. All of the development plans (Exhibits 80-82) specify that the development will meet this requirement by providing a minimum of 1.519 acres of green area out of a gross tract area (including the abandonment areas) of 5.67 acres. Exhibit 36, p. 35. The Hearing Examiner finds, as did Technical Staff, that this requirement has been met.

Section 59-C-7.17, Dedication of Land for Public Use. This section requires that land necessary for public streets, parks, schools and other public uses must be dedicated to public use, with such dedications shown on all required development plans and site plans. All development plan show the required dedications along Woodmont Avenue and Battery Lane. Exhibits 80-82; Exhibit 36, p. 35.

Section 59-C-7.18, Parking Facilities. Off-street parking must be provided in accordance with the requirements of Article 59-E of the Zoning Ordinance. All development plans provide the required number of spaces to support the multi-family use.

The final two elements of finding “b,” the maximum safety, convenience and amenity of the residents, and compatibility, have already been addressed.

#### **4. Remaining Findings**

**The third required finding evaluates access and site circulation:**

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

Both Mr. Wrenn and Mr. Kitchens testified that the proposed development will eliminate the number of existing curb cuts along Battery Lane and reduce the number of potential conflicting

movements. T. 106, 200. Hearing Examiner finds that the proposed internal vehicular and pedestrian circulation systems and points of external access would be safe, adequate, and efficient.

**The fourth required finding evaluates environmental concerns:**

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

The Applicants' experts testified that development of the project will require a minimal amount of grading because most of the site is already paved. T. 107, 280. According to Mr. Bossong, redevelopment will improve existing conditions and improve any existing erosion because more vegetation will be on the property. The introduction of stormwater management to the site will also improve erosion. T. 279-280.

**The fifth required finding pertains to ownership and maintenance of common areas:**

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

Applicant's ownership of the subject site set forth in Exhibit 9(b). The Applicant has provided draft documents regarding perpetual maintenance of common areas, and therefore the Hearing Examiner finds this requirement has been met. Exhibit 75(b).

**B. Assessment of the Public Interest**

The final finding required under Maryland law is that the proposed rezoning will be in the public interest. When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse

impact on public facilities or the environment and public benefits such as provision of affordable housing.

Initially, the Applicants offered a choice among competing public policies, i.e., support for the agricultural preservation program or increasing affordable housing through 10 VAHU units. The justification for this is that the family's long term goal has been to support affordable housing. It is clear that provision of affordable housing is in the public interest, as expressed in the Sector Plan. However, a finding that an Applicant's preferred activities would be in the public interest is not the same as a finding that a rezoning would be in the public interest. The Maryland statute, quoted at the beginning of Part V of this report, specifies first that all zoning power must be exercised, ". . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . ." Thus, the public interest question, first and foremost, addresses the systematic development issue, which is embodied in consistency with master plans, or in this case, the Sector Plan, and the public policies adopted by the County Council.

The Hearing Examiner finds that a development plan that balances to the maximum extent all of the competing interests in this case furthers the public interest best. Thus, while the Brown family's laudable personal commitment to affordable housing, represented by the VAHUs, clearly benefits the public, this does not *legally* provide a basis for favoring one policy over the other. As a result, the Hearing Examiner finds that the PD-100 development plan proposing 692 dwelling units, 20 TDRs, and 10 VAHUs is not in the public interest.

The Applicants have proposed three alternative development plans all committing to the purchase a higher number of TDRs. None of these plans necessitate a choice between supporting agricultural preservation or provision of affordable housing. Of these three alternatives, the Hearing Examiner concludes that the PD-88 development plan and the PD-100 development plan for 692

dwelling units both further the public interest. Both plans are more consistent with the Sector Plan for the reasons set forth earlier and both pass the test for adequate public facilities, factors normally considered when evaluating the public interest. Both support equally the agricultural preservation program and the clear need for affordable housing.

The Hearing Examiner does not find the PD-100 development plan for 750 dwelling units to be in the public interest because the Zoning Ordinance limits the ability of the Council to award that level of density as a TDR bonus in the PD Zone. Thus, the additional density requested is not consistent with the systematic development of the County.

In addition, both the Planning Board and Technical Staff found that there are still issues relating to conformity with the Sector Plan and compatibility with the surrounding area to address at site plan review stage. While there is some evidence here that the PD-100 plan for 692 dwelling units can be implemented in a manner compatible with the surrounding area, there is little evidence as to how this will be achieved. While the Applicants' maintain that the 750 dwelling units may be provided within the footprint of the PD-100 development, the issue here is height rather than building footprint, which will ultimately depend on the size of the units. For that reason also, the Hearing Examiner does not recommend approval of the PD-100 development plan for 750 units.

### **C. Conclusions**

Based on the foregoing analysis and after a thorough review of the entire record, I reach the following conclusions applicable to the PD-88 development plan (Exhibit 80) and the PD-100 development plan (Exhibit 82) requesting a density of 692 dwelling units and committing to 31 TDRs:

1. The submitted development plans are in substantial compliance with the Sector Plan.

2. These development plans comply with the purposes, standards and regulations of the PD-88 and PD-100 Zones and provide for a form of development that will be compatible with adjacent development.
3. The development plans propose internal vehicular and pedestrian circulation systems and points of external access that will be safe, adequate and efficient.
4. The proposed development will satisfy environmental requirements.
5. Documents have been submitted to show the ownership and method of perpetual maintenance of areas intended to be used for recreational or other common or quasi-public purposes, demonstrating that the Applicants intend to arrange for maintenance of the common areas.
6. The proposed rezoning would be in the public interest under the proffered development plans.

## VI. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-909, requesting that 5.67 acres of land located at 4857, 4858, 4890, and 4900 Battery Lane, Bethesda, Maryland, in the 7<sup>th</sup> Election District, be reclassified from the R-10 and R-10/TDR Zones to the PD-100 Zone under a development plan specified as Exhibit 82, or to the PD-88 Zone under a development plan specified as Exhibit 80, be *approved*.

Dated: August 31, 2012

Respectfully submitted,



Lynn A. Robeson  
Hearing Examiner

**APPENDIX**

**Exhibit 82 (PD-100 Development Plan including 692 Dwelling Units, 31 TDRs,  
and 10 VAHUs)**

TEXTUAL BINDING ELEMENTS

1. The maximum number of multi-family dwelling units to be contained in the Development shall not exceed 692 du.
2. Thirty-one (31) Transferable Development Rights (TDRs) must be acquired for the increase in density.
3. The building north of Battery Lane will have a maximum height of 79' (65' plus additional height for MPDUs), as measured from the centerline of the pavement of Battery Lane, to the high point of the main roof slab or the midpoint of any gable roof (excluding mechanical equipment and screening, access, elevator penthouses and decorative gables and architectural features). Although no specific building setback was recommended in the Sector Plan, Staff will evaluate any setbacks and building setbacks at the time of Site Plan review, as appropriate to avoid a canyon effect along Battery Lane, consistent with the goals and objectives of the Sector Plan.
4. The buildings south of Battery Lane will have a maximum height of 110', with respect to the building fronting on Woodmont Avenue and Battery Lane as measured from the centerline of the pavement of Woodmont Avenue, and with respect to the building fronting on Battery Lane as measured from the centerline of the pavement of Battery Lane, to the high point of the main roof slab or the midpoint of any gable roof (excluding mechanical equipment and screening, access, elevator penthouses and decorative gables and architectural features). Although no specific building setback was recommended in the Sector Plan, Staff will evaluate any setbacks and building setbacks at the time of Site Plan review, as appropriate to avoid a canyon effect along Battery Lane, consistent with the goals and objectives of the Sector Plan.
5. The Development shall provide 15% of the final unit count as Moderately Priced Dwelling Units per Chapter 25A. MPDUs shall be distributed within the Development and off-site within the within the Battery Lane District as may be approved by the Department of Housing and Community affairs ("DHCA").
6. The Development shall provide 10 units as Voluntary Affordable Housing Units ("VAHUs") with a control period of 20 years pursuant to a recorded covenant satisfactory to the Department of Housing and Community affairs ("DHCA") and income eligibility consistent with Chapter 25B except as modified by DHCA. VAHUs shall be distributed within the development and off-site within the Planning Area as may be approved by the Department of Housing and Community Affairs ("DHCA"). The VAHUs to be provided per the terms of the covenant are to be recorded before the first building permit is issued.
7. The Development shall provide no less than 30% of the gross site area as green area on-site, variably distributed throughout the Development Plan area. Final green area per building site shall be finalized at site plan.
8. Required building setbacks along Woodmont Avenue right-of-way shall be zero per zoning ordinance. Setbacks shall be no less than 24 feet from the Battery Lane right-of-way for Buildings B and C and not less than 26 feet from the Battery Lane right-of-way for Building A. Sideyard setbacks shall be zero, and rear yard setback shall be zero except along the northern rear yard boundary with NIH where they shall be 10 feet. In the event Building B exceeds 5 stories, the sideyard setback adjoining Block 1, Lot 43 Northwest Park shall be reviewed at site plan.
9. Final parking counts and layouts to be determined at site plan.
10. At least one point of vehicular access for the building north of Battery Lane shall be provided by the common driveway per the Common Driveway Agreement recorded in Liber 26425 at folio 122.
11. The Development program is intended to be developed in multiple phases. Development of on-site amenities associated with each building site will occur concurrently with the occupancy of the residential units in such building and will be completed prior to the occupancy of 75% of the units in such building, subject to possible deferral of landscaping to the appropriate planting season.
12. Any structured parking that is not below grade must be lined with units so the parking is not visible from the street, and lined with units or architectural screening from courtyards and adjacent residential properties. Details to be reviewed with the Site Plan for each building.

## Exhibit 80 (PD-88 Development Plan)

### TEXTUAL BINDING ELEMENTS

1. The maximum number of multi-family dwelling units to be contained in the Development shall not exceed 644 du.
2. For PD-88 with the 10% density bonus per Section 59-C-7.14(e), thirty-one (31) Transferable Development Rights (TDR's) must be acquired for the increase in density.
3. The building north of Battery Lane will have a maximum height of 79' (65' plus additional height for MPDUs), as measured from the centerline of the pavement of Battery Lane, to the high point of the main roof slab or the midpoint of any gable roof (excluding mechanical equipment and screening, access, elevator penthouses and decorative gables and architectural features). Although no specific step backs are being specified along Battery Lane, at the time of Site Plan, each of the buildings should be designed to avoid a canyon effect in order to meet the objectives of the master plan. Although no specific building setback was recommended in the Sector Plan, Staff will evaluate any setbacks and building setbacks at the time of Site Plan review, as appropriate to avoid a canyon effect along Battery Lane, consistent with the goals and objectives of the Sector Plan.
4. The buildings south of Battery Lane will have a maximum height of 110', with respect to the building fronting on Woodmont Avenue and Battery Lane as measured from the centerline of the pavement of Woodmont Avenue, and with respect to the building fronting on Battery Lane as measured from the centerline of the pavement of Battery Lane, to the high point of the main roof slab or the midpoint of any gable roof (excluding mechanical equipment and screening, access, elevator penthouses and decorative gables and architectural features). Although no specific building setback was recommended in the Sector Plan, Staff will evaluate any setbacks and building setbacks at the time of Site Plan review, as appropriate to avoid a canyon effect along Battery Lane, consistent with the goals and objectives of the Sector Plan.
5. The Development shall provide 15% of the final unit count as Moderately Priced Dwelling Units per Chapter 25A. MPDUs shall be distributed within the Development and off-site within the Battery Lane District as may be approved by the Department of Housing and Community Affairs ("DHCA").
6. The Development shall provide no less than 30% of the gross site area as green area on-site, variably distributed throughout the Development Plan area. Final green area per building site shall be finalized at site plan.
7. Required building setbacks along Woodmont Avenue right-of-way shall be zero per zoning ordinance, and not less than 24' from the Battery Lane right-of-way for Buildings B and C, and not less than 26' from the Battery Lane right-of-way for Building A, side yard setbacks shall be zero, and rear yard setback shall be zero except along the northern rear yard boundary with NIH where it shall be not less than 10 feet. In the event Building B exceeds five stories, the sideyard setback adjoining Block 1, Lot 43 Northwest Park shall be reviewed for compatibility at site plan.
8. Final parking counts and layouts to be determined at site plan.
9. At least one point of vehicular access for the building north of Battery Lane shall be provided by the common driveway per the Common Driveway Agreement recorded in Liber 26425 at folio 122.
10. The Development program is intended to be developed in multiple phases. Development of on-site amenities associated with each building site will occur concurrently with the occupancy of the residential units in such building and will be completed prior to the occupancy of 75% of the units in such building, subject to possible deferral of landscaping to the appropriate planting season.
11. Any structured parking that is not below grade must be lined with units so the parking is not visible from the street, and lined with units or architectural screening so the parking is not visible from the courtyards and adjacent residential properties. Details to be reviewed with the Site Plan for each building.

**Exhibit 81 (PD-100 Development Plan including 750 Dwelling Units, 31 TDRs, and 10 VAHUs)**

## TEXTUAL BINDING ELEMENTS

1. The maximum number of multi-family dwelling units to be contained in the Development shall not exceed 750 du.
2. Thirty-one (31) Transferable Development Rights (TDRs) must be acquired for the increase in density.
3. The building north of Battery Lane will have a maximum height of 79' (65' plus additional height for MPDUs), as measured from the centerline of the pavement of Battery Lane, to the high point of the main roof slab or the midpoint of any gable roof (excluding mechanical equipment and screening, access, elevator penthouses and decorative gables and architectural features). Although no specific building setback was recommended in the Sector Plan, Staff will evaluate any setbacks and building setbacks at the time of Site Plan review, as appropriate to avoid a canyon effect along Battery Lane, consistent with the goals and objectives of the Sector Plan.
4. The buildings south of Battery Lane will have a maximum height of 110', with respect to the building fronting on Woodmont Avenue and Battery Lane as measured from the centerline of the pavement of Woodmont Avenue, and with respect to the building fronting on Battery Lane as measured from the centerline of the pavement of Battery Lane, to the high point of the main roof slab or the midpoint of any gable roof (excluding mechanical equipment and screening, access, elevator penthouses and decorative gables and architectural features). Although no specific building setback was recommended in the Sector Plan, Staff will evaluate any setbacks and building setbacks at the time of Site Plan review, as appropriate to avoid a canyon effect along Battery Lane, consistent with the goals and objectives of the Sector Plan.
5. The Development shall provide 15% of the final unit count as Moderately Priced Dwelling Units per Chapter 25A. MPDUs shall be distributed within the Development and off-site within the within the Battery Lane District as may be approved by the Department of Housing and Community affairs ("DHCA").
6. The Development shall provide 10 units as Voluntary Affordable Housing Units ("VAHUs") with a control period of 20 years pursuant to a recorded covenant satisfactory to the Department of Housing and Community affairs ("DHCA") and income eligibility consistent with Chapter 25B except as modified by DHCA. VAHUs shall be distributed within the development and off-site within the Planning Area as may be approved by the Department of Housing and Community Affairs ("DHCA"). The VAHUs to be provided per the terms of the covenant are to be recorded before the first building permit is issued.
7. The Development shall provide no less than 30% of the gross site area as green area on-site, variably distributed throughout the Development Plan area. Final green area per building site shall be finalized at site plan.
8. Required building setbacks along Woodmont Avenue right-of-way shall be zero per zoning ordinance. Setbacks shall be no less than 24 feet from the Battery Lane right-of-way for Buildings B and C and not less than 26 feet from the Battery Lane right-of-way for Building A. Sideyard setbacks shall be zero, and rear yard setback shall be zero except along the northern rear yard boundary with NIH where they shall be 10 feet. In the event Building B exceeds 5 stories, the sideyard setback adjoining Block 1, Lot 43 Northwest Park shall be reviewed at site plan.
9. Final parking counts and layouts to be determined at site plan.
10. At least one point of vehicular access for the building north of Battery Lane shall be provided by the common driveway per the Common Driveway Agreement recorded in Liber 26425 at folio 122.
11. The Development program is intended to be developed in multiple phases. Development of on-site amenities associated with each building site will occur concurrently with the occupancy of the residential units in such building and will be completed prior to the occupancy of 75% of the units in such building, subject to possible deferral of landscaping to the appropriate planting season.
12. Any structured parking that is not below grade must be lined with units so the parking is not visible from the street, and lined with units or architectural screening from courtyards and adjacent residential properties. Details to be reviewed with the Site Plan for each building.

**Exhibit 31(a) (PD-100 Development Plan including 692 Dwelling Units, 20 TDRs, and 10 VAHUs)**

TEXTUAL BINDING ELEMENTS

1. The maximum number of multi-family dwelling units to be contained in the Development shall not exceed 692 du.
2. Twenty (20) Transferable Development Rights (TDRs) must be acquired for the increase in density.
3. The building north of Battery Lane will have a maximum height of 79' (65' plus additional height for MPDUs), as measured from the centerline of the pavement of Battery Lane, to the high point of the main roof slab or the midpoint of any gable roof (excluding mechanical equipment and screening, access, elevator penthouses and decorative gables and architectural features).
4. The buildings south of Battery Lane will have a maximum height of 110', with respect to the building fronting on Woodmont Avenue and Battery Lane as measured from the centerline of the pavement of Woodmont Avenue, and with respect to the building fronting on Battery Lane as measured from the centerline of the pavement of Battery Lane, to the high point of the main roof slab or the midpoint of any gable roof (excluding mechanical equipment and screening, access, elevator penthouses and decorative gables and architectural features).
5. The Development shall provide 15% of the final unit count as Moderately Priced Dwelling Units per Chapter 25A. MPDUs shall be distributed within the Development and off-site within the Planning Area as may be approved by the Department of Housing and Community affairs ("DHCA").
6. The Development shall provide 10 units as Voluntary Affordable Housing Units ("VAHUs") with a control period of 20 years pursuant to a recorded covenant satisfactory to the Department of Housing and Community affairs ("DHCA") and income eligibility consistent with Chapter 25B except as modified by DHCA. VAHUs shall be distributed within the development and off-site within the Planning Area as may be approved by the Department of Housing and Community Affairs ("DHCA"). The VAHUs to be provided per the terms of the covenant are to be recorded before the first building permit is issued.
7. The Development shall provide 30% of the gross site area as green area on-site, variably distributed throughout the Development Plan area. Final green area per building site shall be finalized at site plan.
8. Required building setbacks along Woodmont Avenue right-of-way shall be zero per zoning ordinance, and 24 feet from the Battery Lane right-of-way for Buildings B and C and 26 feet from the Battery Lane right-of-way for Building A, sideyard setbacks shall be zero, and rear yard setback shall be zero except along the northern rear yard boundary with NIH where it shall be 10 feet.
9. Final parking counts and layouts to be determined at site plan.
10. At least one point of vehicular access for the building north of Battery Lane shall be provided by the common driveway per the Common Driveway Agreement recorded in Liber 26425 at folio 122.
11. The Development program is intended to be developed in multiple phases. Development of on-site amenities associated with each building site will occur concurrently with the occupancy of the residential units in such building and will be completed prior to the occupancy of 75% of the units in such building, subject to possible deferral of landscaping to the appropriate planting season.
12. Any structured parking that is not below grade must be lined with units so the parking is not visible from the street, and lined with units or architectural screening from courtyards and adjacent residential properties.