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I. CASE SUMMARY

Applicant: USL2 MR Montgomery Village Business Trust

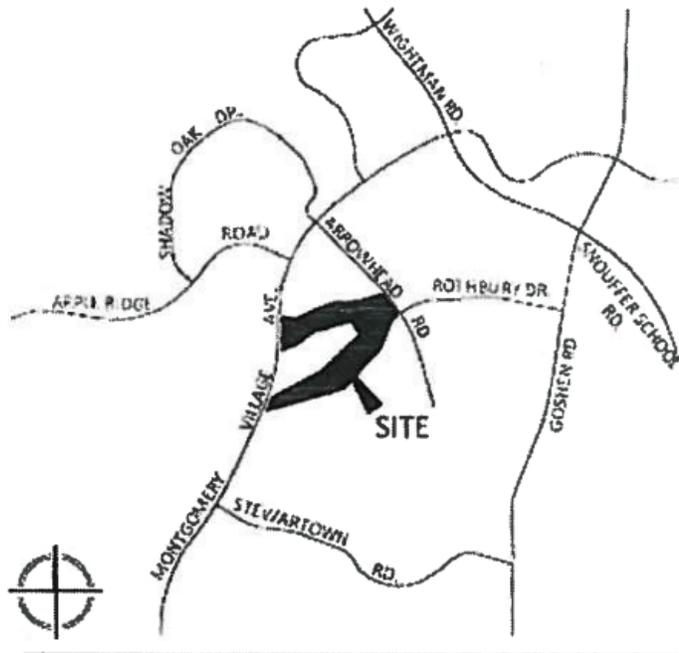
DPA No. & Date of Filing: DPA 15-01, filed December 30, 2014

Existing Zoning/Development Plan: Town Sector Zone, DPA 02-02

Proposed Use: 86 single-family attached townhouses, including 12.5% MPDUs

Current Use: Vacant; formerly Montgomery Village Golf Course (Holes 3 and 4)

Location/land area: 17.3 acres (described by metes and bounds, Exhibit 40(b)), in Montgomery Village approximately one mile north of Montgomery Village Center; location is shown below (Exhibit 40(a)):



Base Density Permitted: Residential density for all of Montgomery Village is capped at 15 persons per acre. This DPA will utilize all remaining density in Montgomery Village under the Town Sector Zone.

Environmental Issues:	Portion of site is within area shown as floodplain on FEMA map.
Consistency with Master Plan:	Planning Board and Technical Staff both concluded that it does <i>not</i> conform to the Master Plan and should await adoption of the <i>Montgomery Village Master Plan</i> (MVMP) currently pending before the Planning Board. Parties disagree on whether application is consistent with <i>1985 Gaithersburg Vicinity Master Plan</i> .
Neighborhood Response:	Both support and significant opposition. Supporters believe it will revitalize Montgomery Village and do not wish to wait for adoption of the MVMP. Opponents believe that the original developer of Montgomery Village made legally binding commitments to retain the golf course and that it is a major amenity in the Village that should not be abandoned.
Planning Board Recommends:	Denial or deferral until adoption of the <i>Montgomery Village Master Plan</i> .
Technical Staff Recommends:	Denial or deferral until adoption of the <i>Montgomery Village Master Plan</i> .
Hearing Examiner Recommends:	Denial.
Impact on <i>Montgomery Village Master Plan</i> :	
Approval of this DPA means:	The Council will <i>not</i> have the opportunity to review redevelopment of the golf course comprehensively as part of the <i>Montgomery Village Master Plan</i> or apply new zones recommended. This development will proceed under the Town Sector Zone and the 1985 Master Plan.
Denial of this DPA means:	The Council may permit redevelopment of the golf course under the <i>Montgomery Village Master Plan</i> and new zones recommended by the Plan.

II. FRAMEWORK

A. RELATIONSHIP TO THE MONTGOMERY VILLAGE MASTER PLAN

This Development Plan Amendment (DPA) would use the last of the remaining density permitted in Montgomery Village under the Town Sector (T-S) Zone and the *1985 Gaithersburg Vicinity Master Plan* (1985 Master Plan). The application proposes 86 townhouses on 17.3 acres of vacant land that formerly served as Holes 3 and 4 of the Montgomery Village golf course.

An amendment to the 1985 Master Plan, focused solely on Montgomery Village, is currently pending before the Planning Board and is expected to be before the Council in the winter/spring of 2015 and 2016. The T-S Zone will be eliminated once this master plan amendment, the *Montgomery Village Master Plan* (MVMP), is adopted and the area is rezoned comprehensively. *2014 Zoning Ordinance*, Section 8.1.1.

The Planning Department issued the Public Hearing Draft of the MVMP in July of this year. The Planning Board held its hearing on September 10, 2015, and its first worksession on October 1, 2015. *See, Staff Memo, Montgomery Village Master Plan—Worksession 1, September 24, 2015.*

Staff advises that schedule for adoption of the MVMP is (Exhibit 59):

Sept. – Oct. 2015:	Planning Board work sessions on the MVMP;
November 2015:	Transmit Planning Board Draft MVMP to County Council and County Executive;
Dec. 2015-Jan. 2016:	County Executive Review and County Council Public Hearing Noticing Period
February 2016:	County Council Public Hearing
March – June 2016	PHED Committee and County Council work sessions
July – Oct. 2016	Commission Adoption; Sectional Map Amendment

If the Council *approves* this application: The Council will be foreclosed from reviewing development of this property and the balance of the golf course comprehensively during the Master Plan process. Development may proceed under the Town Sector Zone and the 1985 Master Plan, rather than new zones in the current Zoning Ordinance. *2014 Zoning Ordinance*, §8.1.1.

If the Council *denies* this application: The golf course may still redevelop under the pending Montgomery Village Master Plan (MVMP). The Public Hearing Draft of the MVMP would permit the land use and density proposed here, although that recommendation could change after further review by the Planning Board and the Council. *MVMP*, pp. 56-57.

Because the Hearing Examiner finds that the DPA does not conform to the land use and density of the *1985 Gaithersburg Vicinity Master Plan* nor does it fulfill all purposes of the T-S Zone, she recommends denial of the DPA.

B. PROCEDURAL HISTORY

Originally filed on December 30, 2014, OZAH noticed a hearing for May 8, 2015. On April 13, 2015, Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued its report recommending deferral or denial of the application because the Montgomery Village Master Plan amendment to the 1985 Plan was underway and Staff concluded that the application did not conform to the land use recommended by the 1985 Plan. Exhibit 55. The Planning Board agreed (Exhibit 79) and recommended either denying or deferring the application until the MVMP and sectional map amendment are adopted.

After receiving Staff's recommendation of deferral, Hearing Examiner issued an order soliciting comments on whether the application should be postponed pending adoption of the MVMP. Exhibit 60.

After considering comments submitted and the Planning Board's recommendation of deferral, the Hearing Examiner deferred the DPA until August 24, 2015, to allow Planning Staff

an opportunity to issue its initial draft of the MVMP, to determine whether the DPA would preempt the comprehensive Master Plan process. Exhibit 80.

Staff issued its Working Draft of the MVMP on July 23, 2015. This preliminary draft recommends the Townhouse Low Density (TLD) Zone for the property, which would permit the use and density proposed in this DPA. This recommendation is retained in the current Public Hearing Draft of the MVMP. The Planning Board has not yet issued its draft of the MVMP.

Because, at present, the land use and density proposed in the DPA does not contradict the early drafts of the MVMP, the Hearing Examiner ordered the August 24, 2015, hearing on the DPA to proceed. Exhibit 107.

At the public hearing on the DPA, the Applicant agreed to a binding element limiting the height of the townhomes to 40 feet and the Hearing Examiner left the record open until September 8, 2015, for Staff to comment on the wording of the binding element. She received Staff's favorable recommendation shortly thereafter (Exhibit 130), and the record closed as scheduled. The Hearing Examiner reopened the record on October 1, 2015, solely to accept corrections to the DPA, the engineer's certification to the plan, and e-mails regarding this. Exhibits 135, 136. The Applicant submitted the revised DPA and the record closed on October 1, 2015.

III. FACTUAL BACKGROUND

A. SUBJECT PROPERTY

The property comprises approximately 17.3 acres of vacant land in the northeast corner of the former Montgomery Village golf course (Holes 3 and 4), which is located in the north central portion of Montgomery Village. It is approximately one mile north of the Montgomery Village Center, which is in the center of the community, ¼ mile east of the Goshen Shopping Center, within the triangle formed by Arrowhead Road to the east, Montgomery Village Avenue to the

west, and a wide PEPCO easement to the south. Exhibit 55, T. 31-35. Because of its former use, the property is shaped like a horseshoe. The golf course has never been subdivided. *See, Staff Memo, Montgomery Village Master Plan—Worksession 1, September 24, 2015.*

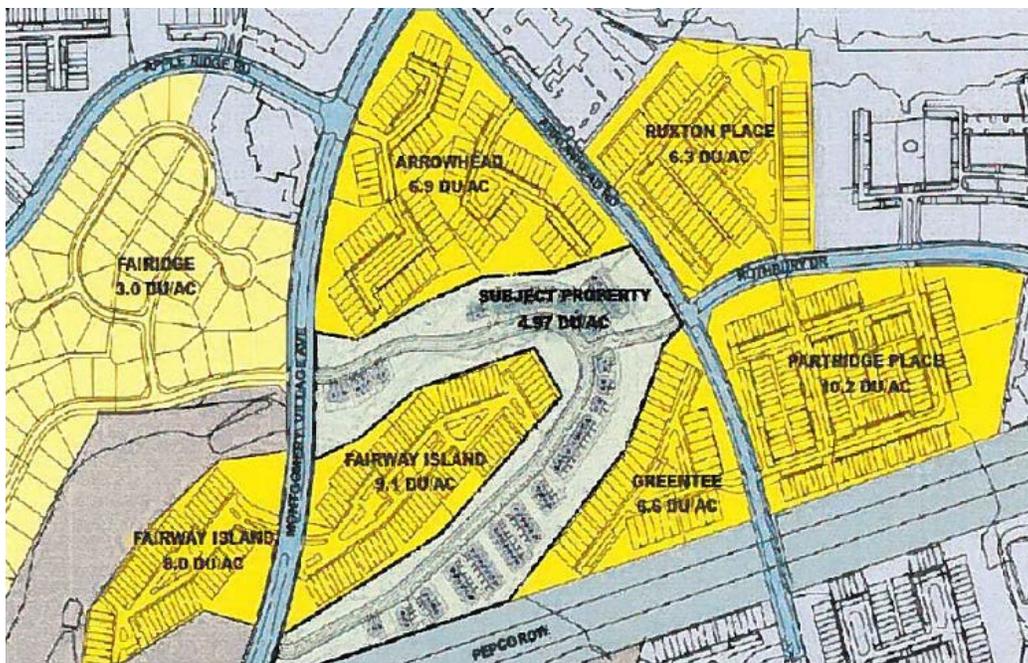
Undulating grades on the property slope generally downward from the northeast to the southwest, with mature trees bordering the former fairways. Staff advises that the balance of the property is in grass and other vegetation. Exhibit 55, p. 4. Floodplain maps developed by the Federal Emergency Management Agency (FEMA) show that a portion of the property on the southern part of the horseshoe is within the 100-year floodplain. The site is also constrained by several utility easements. An aerial photograph of the property (outlined in red) is shown below (Exhibit 55, p. 3):



B. SURROUNDING AREA

The surrounding area and its character are evaluated in a DPA case in order to determine whether the proposed development is compatible with properties it will directly impact. The borders of the area generally include those properties that will experience the direct impacts of the development.

Neither Staff nor the Applicant identified specific boundaries of the surrounding area. *See*, Exhibits 40D, 55. The Hearing Examiner finds the townhouse communities of Ruxton Place, Partridge Place, Arrowhead, Green Tee, and Fairway Islands, and the single-family detached homes in the Fairridge community that border the north side of Meadowcroft Lane and the west side of Montgomery Village Avenue comprise the surrounding area. She includes the latter because of traffic impacts at the site's northern intersection with Montgomery Village Avenue. The area is shown generally on a "density" analyses submitted by the Applicant (Exhibit 40(d)):



Staff advised that single-family attached townhouse communities immediately surround the property. One of the Applicant's expert land planners, Mr. Lawrence Brady, testified that

adjacent townhouse densities ranged between 6 to 9 dwelling units per acre. T. 42-43. The Hearing Examiner characterizes the area as consisting primarily of single-family attached homes, ranging from approximately 6 to 9 dwelling units per acre with some single-family detached homes more removed from the property across Montgomery Village Avenue.

C. ZONING, DEVELOPMENT AND MASTER PLAN HISTORY

The Applicant argues that the Master Plan defers land use recommendations to the development plan amendment process and the Town Sector Zone. Both the 1971 and 1985 Master Plans contain a fold out “Land Use Plan” with land use and density recommendations separate from the text. Because the text of the 1985 Plan does not explicitly discuss Montgomery Village, the Applicant argues that the 1985 Plan relies solely on the development plan process to determine land uses. It downplays the importance of the fold out “Land Use Plan,” asserting that the land use and densities shown operate only as an inventory of uses existing at the time the 1985 Plan was adopted. Exhibit 55, Attachment 6; T. 79. According to this argument, compliance with the Master Plan is determined by whether the DPA furthers the broader objectives of the Plan, such as increasing employment. T. 93. The Applicant also relies on several DPAs that permitted re-development of sites that are shown as future schools on the 1985 Land Use Plan, as well as a site plan approval for a property within the Village.¹

Those opposing the application believe that, when the Council approved the original development plan in 1965 and continued to show the golf course in the 1971 and 1985 Master Plan, it promised to maintain the golf course in perpetuity. T. 200-202. To support this, they rely

¹ Both the 1971 and 1985 Master Plans contain text as well as a fold out “Land Use Plan.” The fold out Land Use Plan contained land use and density recommended by the master plans.

on an earlier version of the Town Sector Zone. That version of the Town Sector Zone, contained in the 1960 Montgomery County Code, states (Exhibit 131(h)):

An appropriate statement concerning all of the land which is designated for common or quasi-public use but not to be in public ownership. This statement shall grant to the public, on such land, easements covering all rights of development, construction, or use other than recreational or other quasi-public uses adopted in the Preliminary Plan.

Both the 2004 and 2014 Zoning Ordinances contain similar language. *See, 2004 Zoning Ordinance, §7.28(e)(1); 2014 Zoning Ordinance, §8.3.3.D.3.*

To understand both parties' arguments in this case, it may be of help to list the events relied upon by the parties chronologically:

1. 1964: Council adopts the County's General Plan, "On Wedges and Corridors," which calls for major corridors of development separated by wedges of lower densities and green areas. I-270 forms one of the development corridors, including the cities of Rockville, Gaithersburg, Germantown, and Clarksburg.
2. 1965: Council adopts the "Town Sector" (T-S) Zone designed to create large scale, self-sufficient, "new towns" or "corridor cities" identified in the General Plan. The Town Sector Zone was created specifically to permit development of Montgomery Village.
3. 1965: At the request of Kettler Brothers, Inc. (Kettler), the Council rezones approximately 1,735 acres to the T-S Zone and adopts the original development plan for Montgomery Village in LMA E-327.
4. 1971: Council adopts the *1971 Gaithersburg Vicinity Master Plan* (1971 Plan). The land use plan, a foldout map within the Master Plan, designates the subject property as "conservation/private open space" and is labeled "Montgomery Village Golf Course." *1971 Master Plan, Land Use Plan.*
5. 1980: Kettler informs residents adjacent to the golf course that it will sell the course to a private operator, but assures them that "no houses will be built" on the course.
6. 1985: Council adopts the *1985 Gaithersburg Vicinity Master Plan* (1985 Master Plan.) It continues the "conservation/private open space" land use recommendation of the 1971 Plan for the golf course. *1985 Master Plan, Land Use Plan.*
7. 2012-2014: Owner of golf course declares bankruptcy. Applicant purchases property at auction sanctioned by the bankruptcy court. T. 19.

8. 2014: Council accelerates work on the *Montgomery Village Master Plan (MVMP)*, an amendment to the *1985 Master Plan*, because the Montgomery Village Foundation (MVF) had already engaged in extensive planning, culminating in the adoption of the *Vision 2030* report. Memorandum, *Montgomery Village Master Plan—Briefing*, April 9, 2015.
9. 2015: Planning Staff issues the “Public Hearing Draft” of the MVMP. The Planning Board held its public hearing on September 10, 2015 and its first Worksession on October 1, 2015. Memorandum, *Montgomery Village Master Plan—Worksession No. 1*.

The Town Sector Zone is a “performance based” zone. Exhibit 126. It contains few development standards in the text of the zone itself. Density is capped at 15 persons per acre; 10% of the land area must be open space. These standards are applied to Montgomery Village as a whole rather than to individual DPAs. *See, 2014 Zoning Ordinance, §8.3.3.C*. Several times in the history of the Village, the open space and population totals have had to be corrected on the development plan. *See, DPA 88-1, DPA 12-02* (updated by certified development plan amendment in 2006).

Rather than putting detailed standards in the zone itself, the District Council establishes the specific arrangement of land uses, densities, and infrastructure by approving a development plan, which is further refined by a site plan approved by the Planning Board. *Id.*, §8.1.2. The Development Plan contains a land use plan showing site access, proposed buildings, types of dwelling units, parking areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. *2004 Zoning Ordinance, §59-D-1.3*. The principal specifications on the Development Plan – those that the District Council considers in evaluating compatibility and compliance with the zone, for example – may not be changed without further application to the Council to amend the Development Plan (i.e., a DPA).

The Applicant here seeks to change the development plan that first established Montgomery Village, as it has been amended over the years.² The original development plan requested rezoning of approximately 1,756.33 acres adjacent to the City of Gaithersburg from R-R to the Town Sector Zone.³ Kettler envisioned Montgomery Village as one of several self-contained “corridor cities” or “community centers” along the I-270 development corridor. Exhibit 126; DPA 88-1, Exhibit 89.

During the Council’s public hearing on the original development plan, Kettler urged the Council to maintain the density it proposed for the Village. In part, this was based on “abnormal costs” for infrastructure, which was to be provided and funded by the developer. The costs listed included recreation facilities, open space, and infrastructure. Exhibit 126, pp. 55-56. Kettler promised to set aside a total of 557 acres of open space, including the 135-acre golf course.⁴ This open space was to be both publically and privately owned (Exhibit 126, p. 62):

It is our plan that the open space may best be developed by retaining substantial areas in private ownership through (1) private clubs, (2) landlords of apartments and commercial centers, and (3) through a carefully planned Automatic Homes Association Program. *This will permit the orderly scheduling and development of the two lakes, the 18 hole golf course and other facilities as required.* (Emphasis supplied).

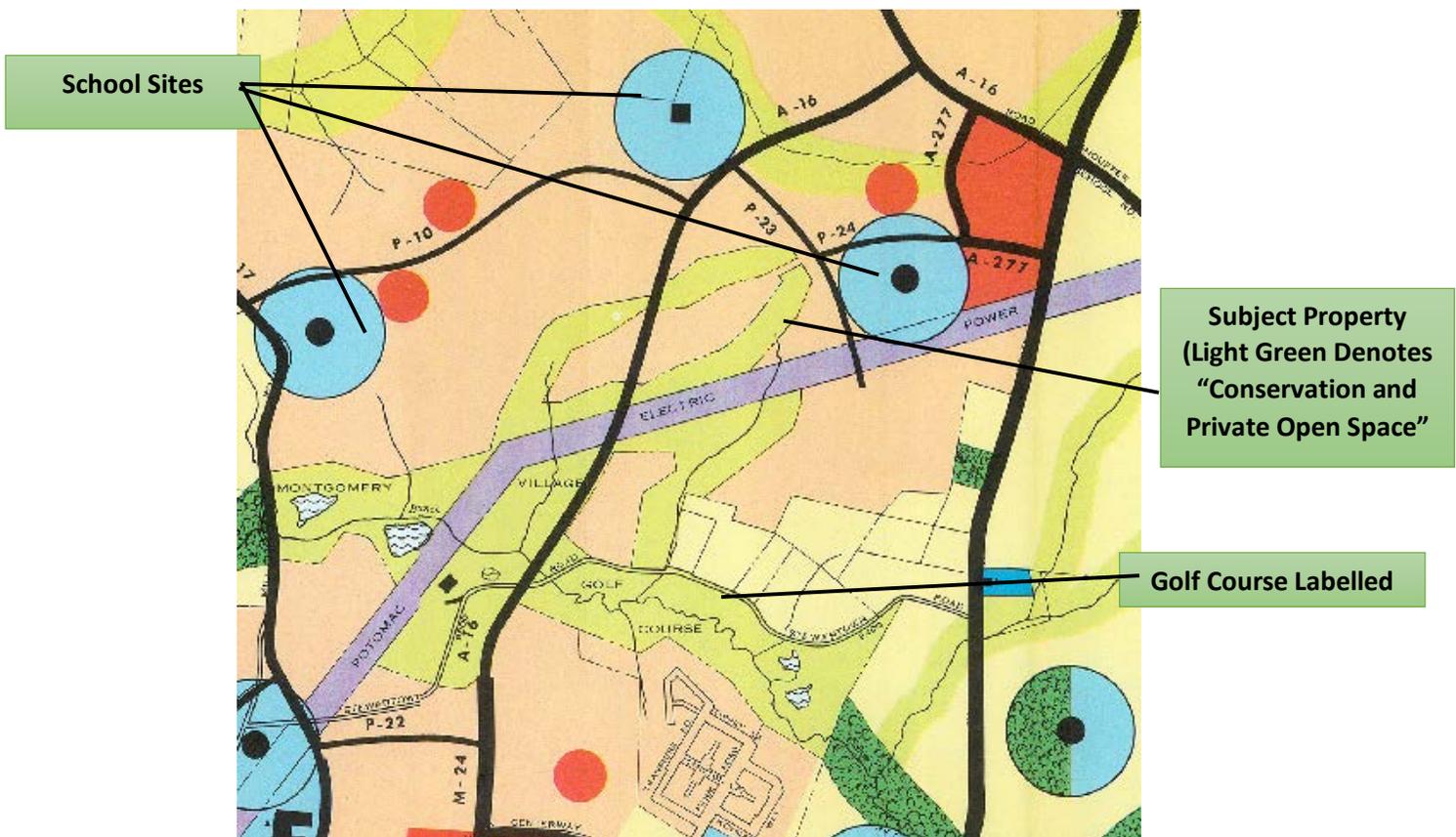
In addition to open space, Kettler agreed to provide several public school sites to serve the new community. *Id.* at 54. Kettler began construction of the first homes in Montgomery Village in 1967. Shortly after, the County adopted the first master plan for the Gaithersburg Vicinity planning area.

² There have been 19 amendments to the original development plan for Montgomery Village, which are listed in the Staff Report. Exhibit 55, Attachment 2. This Report mentions only the DPAs relevant to in this case.

³Local Map Amendment E-327.

⁴ Kettler’s testimony before the Council in 1965 indicated that the course was to be 135 acres; the MVMP states that the golf course is 147 acres. *MVMP (Public Hearing Draft)*, p. 37.

The 1971 *Master Plan for Gaithersburg Vicinity* (1971 Plan) endorsed the concept of having self-sufficient “corridor cities” or community centers along the I-270 corridor, like Montgomery Village. The Plan recognized that much of the land within the planning area was “already committed,” to specific uses, but sought to “blend the existing and future uses into a coherent pattern.” *1971 Plan*, p. 14. The 1971 Land Use Plan mirrors the original development plan already approved for the Village. It included the open space, school sites, and densities approved in the original development plan, and specifically labels the subject property as the “Montgomery Village Golf Course.” The land use recommended by the 1971 Plan is “conservation/private open space” (*1971 Plan*, excerpt below):



Key to applicant's arguments in this case, the *1971 Plan* relied heavily on joint use of school sites for neighborhood parks, as well as privately held property (including the golf course), for recreational facilities in the area:

Basically, the Master Plan proposes to utilize the park-school development concept to meet the local and neighborhood park needs of the Planning Area...Under this concept, park and school facilities are provided on an adjoining site, with construction in the elementary school of an additional room which has direct access to the park, to provide for various indoor recreation activities..." *1971 Plan*, p. 34.

Kettler retained ownership of the golf course until 1981, when it sold the property to professional golf course operator. The sales contract permitted (but did not require) the *purchaser* to record covenants permanently restricting its use to a golf course. Exhibit 77(b). At approximately the same time, Kettler sent a letter to residents whose homes bordered the golf course assuring them that the golf course would remain (Exhibit 118):

Mr. Doser [the new owner] is dedicated to preserving the aesthetics of the golf course for all surrounding homeowners, and to keeping the appearance on par with that of any first rate golf club in Montgomery County. As with all Village facilities, Kettler Brothers will retain architectural control over any changes to the existing buildings, grounds, and exterior signage. *Of course, current zoning and the Town Sector Ordinance also assure you that the Club will be used exclusively for golfing and related purposes. No homes can, nor will, be built on this property.* (Emphasis supplied.)

Like its predecessor, the 1985 Master Plan recognized that the land in much of the planning area was already committed. Thus, it focused on particular parcels or areas that could be redeveloped. Nevertheless, the Plan sought to blend future development of the committed parcels with existing development. The Sectional Map Amendment following the 1985 Plan stated, "[i]n accordance with this overall land use and development concept, zoning changes were generally limited to those necessary to promote stability, better reflect existing land uses, and to carry out the employment/housing center development objectives." *Council Resolution 10-1726*, p. 2. This

sectional map amendment not only rezoned the areas studied by the 1985 Plan, it also “reaffirmed” the existing zoning for properties that were not recommended for redevelopment. *Id.*, p. 3.

The *1985 Master Plan* continued the land use recommendations for Montgomery Village in the *1971 Plan*, and retained both the “golf course” label and “conservation and private open space” land use designation for the subject property. When developing the 1985 Plan, the golf course was considered a resource to serve the recreational needs of residents of the area. The Staff Draft of the 1985 Plan contains an inventory of public and private recreational facilities and specifically lists the golf course as a private recreational resource in the Village. *1981 (November) Staff Draft of the Gaithersburg Vicinity Master Plan*, p. 153.

Unlike the designation for the golf course, the 1985 Plan anticipated that several of the school sites shown on the Montgomery Village development plan and the 1985 Master Plan would not be needed because of declining population, and the Planning Board and the Council considered the potential to re-use those sites.⁵ Because the 1971 Plan relied on joint use of school sites to provide active recreational facilities for the community, 1985 plan recommended the following for these sites (1985 Plan, p. 95):

It is important that at least a portion of each undeveloped school site in the Village be transferred to the Montgomery Village Association for field sport recreation, if the site is not needed for school construction. For example, the ballfield site on Apple Ridge Road should be retained by the Association even if a portion of the site is ultimately used for non-school purposes.

The school system ultimately released four of the five school sites included in the original development plan for Montgomery Village and shown on the 1971 and 1985 Master Plans. This

⁵ The MVF testified of the need for additional locations for active recreational use. It supported preserving a portion of school sites for active recreational use if not used for school purposes. *MVF Council Testimony*, November 10, 1983.

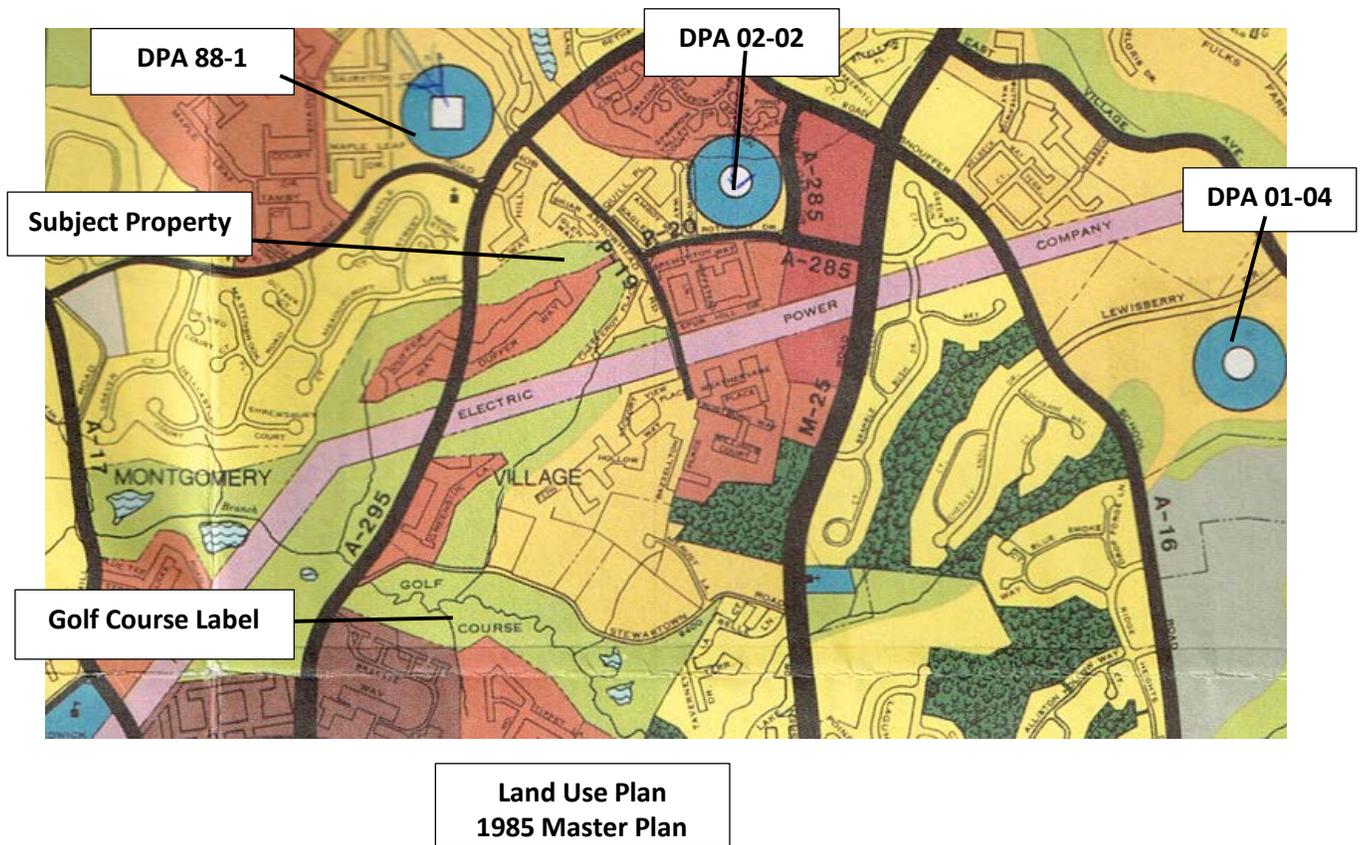
prompted a series of amendments to the original development plan upon which the Applicant relies for its arguments. *See*, DPA 88-01, DPA 01-04, and DPA 02-02.

In DPA 02-02, Technical Staff summarized all of the school site amendments (the Applicant in this case does not rely on the first listed below) as follows:

- 1) East Village Avenue (near Doubleland Road) was a former park/elementary school site that developed residentially in the late 1980s with single-family homes (approximately 4 houses per acre) and nearly 6 acres of open space.
- 2) Apple Ridge Drive [**DPA 88-1**] (at the corner of Montgomery Village Avenue) was originally designated as a junior high site. It was the subject of several proposed developments that attempted to balance the appropriate amount of private/public space. The DPA that was approved in 1990 stipulated that the building envelope not exceed 35% of the site and the remaining 65% be used for perimeter buffer open space and an active recreational area. Per the Master Plan language (cited in the paragraph referenced above), the ballfield that occupied a portion of the proposed school site was retained. The site was developed with single-family homes (at a density of eight houses per acre) and nearly 14 acres of recreational/open space.
- 3) Lewisberry Drive [**DPA 01-04**] (at East Village Avenue) was a former elementary school site. The County Council approved a DPA in 2002, removing the school designation and allowing development of administrative offices for a private, non-profit institutional use. A portion of this site (four acres) has been reserved for recreation/open space, consistent with the Master Plan recommendation.
- 4) Rothbury Drive [**DPA 02-02**] (just west of Goshen Drive) was a proposed elementary school site and is the subject of the extant Development Plan Amendment.

Hearing Examiner's Report and Recommendation, DPA 12-02, January 3, 2003, pp. 40-41. An excerpt from the 1985 Land Use Plan is reproduced on the following page.

The Apple Ridge Road school site (DPA 88-1) mentioned in the text of the 1985 Plan was the first to redevelop. Both the original development plan and the 1985 Master Plan designated the property as a school, with underlying medium density residential zoning (between 5 and 7 dwelling units per acre). The developer sought to remove the school site designation in the



original development plan (and on the Master Plan) to develop 90 single-family detached homes. After several remands by the Council, the developer reduced the density proposed to 60 dwelling units, to transfer 65% of the property as open space to the MVF or other homeowner's association, and to preserve the existing ball field with sufficient space for associated parking. The density approved was 2.75 units per gross acre and 8 units per net acre, very close to the densities recommended by the 1985 Master Plan. *Hearing Examiner's Report and Recommendation*, DPA 88-1, November 18, 1988; *Hearing Examiner's Report and Recommendation*, DPA 02-02, January 3, 2003, p. 41.

The Council approved redevelopment of another school site in DPA 01-04. The applicant in that case, Community Services for Autistic Adults and Children, Inc. (CSAAC), sought to remove the school site designation from the 1965 development plan and change the land use to

commercial/office. Like the Apple Ridge Road site, the Master Plan recommended the property for medium density residential. To address concerns from the community about commercial use, the CSAAC proffered a binding element limiting its use to charitable, philanthropic, and education purposes. The DPA also preserved 70% of land as setbacks and green space, and promised to transfer three to four acres of land for community recreational use. The Council concluded that the application conformed to the 1985 Master Plan because (1) the size of the building was similar to a school, (2) the use was institution, similar to a school, and (3) an area approximately the size of a school ball field would be preserved for community recreation. *Council Resolution 14-1123*, adopted January 29, 2003.

The last development plan amendment relied upon by the Applicant is DPA 02-02, a reserved school site on Rothbury Drive. The DPA proposed 203 dwelling units in seven buildings; 20% would be rented to individuals at or below 50% of the median income. The property was sandwiched between a parcel recommended for 5-7 units per acre and one recommended for 8-15 dwelling units per acre. The Applicant proposed to maintain approximately four acres as landscaped open space because the MVF did not want to acquire another active recreational use. The Council did find that the development plan *did* conform to land use recommended by the Master Plan because it provided significant open space and because the residential density was consistent with the “upper limit of the base densities recommended for adjacent properties.” *Council Resolution No. 15-257*, adopted July 1, 2003, p. 5.

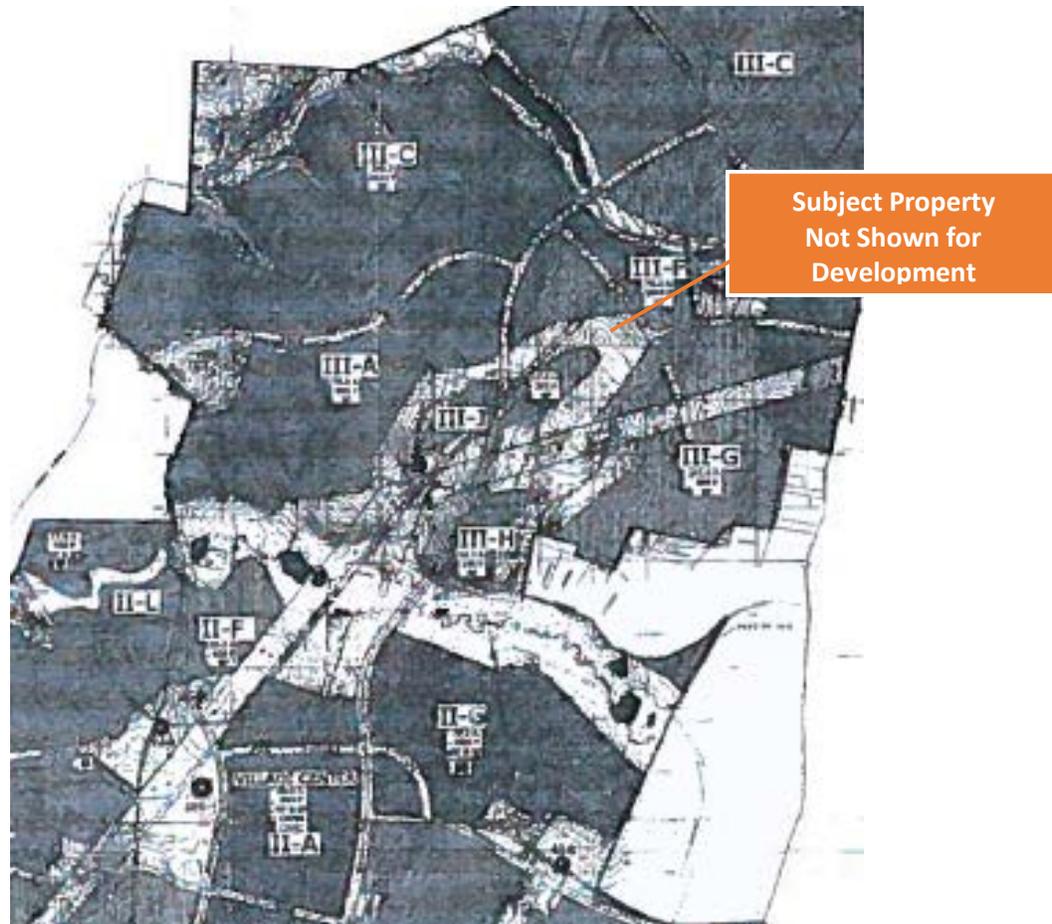
The Applicant also relies on a site plan approval (Site Plan No. 820060400) that it contends approved changes to the development plan that were not “drastic enough” to require a development plan amendment. *MCPB No. 07-100*, Site Plan No. 820060400, August 13, 2007.

In 2006, population totals and land uses were updated by a “corrective” amendment to the DPA, accomplished by a certified DPA. The 2006 DPA lists the density of all of Montgomery Village at 14.78 persons per acre.⁶ The 2006 DPA lists the subject property as “golf course.” The breakdown of land uses within the Village and an excerpt from the 2006 Development Plan are shown below and on the following page (Exhibits 40(h) and (i)):

2006 analysis of Montgomery Village Uses

Existing Land Use Analysis from DPA								
Land Use	Lot and Private Streets	Commercial/ Employment	Schools and Churches	Public Use	Major Roads	Open Space	Totals per DPA	Corrected Totals
Residential Areas	1,220.03	33.30	24.05	7.47	21.45	0.00	1,306.30	1,306.30
Public Schools			54.40				65.16	54.40
Designated Commercial/ Employment								
- Village Center		43.10					43.10	43.10
- Goshen Center		10.00					10.00	10.00
- Shopping Centers		36.80					36.80	36.80
- CSAAC		10.76					10.76	10.76
Golf Course	148.44						148.44	148.44
PEPCO Substation				2.00			2.00	2.00
Local Open Space						481.80	467.80	481.80
Open Space	10.50					215.00	225.50	225.50
Major Roads					115.70		115.70	115.70
Totals	1,378.97	133.96	78.45	9.47	137.15	696.80	2,434.80	2,434.80
Corrected total							2,431.56	
Source: DPA 02-2, corrected 4-7-06								

⁶ The total population was 35,992 persons over 2,434.8 acres. This number has been increased by 6 persons as a result of DPA 11-2, which converted two residential management offices into two apartment units, bringing the current population to 35,998. *Council Resolution 17-79* (adopted March 29, 2011).



**2006 Corrected Development Plan
Exhibit 40 (I)**

The Public Hearing Draft of the MVMP would permit the land use and density proposed in this DPA. It recommends placing the new TLD Zone on the property, which permits a density of up to 9.6 single-family attached townhouses per acre. Unlike the DPA, the MVMP also addresses re-use of the balance of the golf course. It recommends that 70 acres of the 147-acre course be placed in an environmental buffer surrounding the Cabin Branch stream. It further recommends that 40 of the 70 acres be dedicated to Montgomery Parks for an active and passive recreation. *MVMP Public Hearing Draft*, pp. 55-57.

D. PROPOSED USE

1. Development Plan

The Applicant proposes 75 market rate townhouse units and 11 MPDUs (or 12.5% of the units) that will be distributed evenly throughout the project. T. 51. The density of this particular DPA is 4.9 dwelling units per acre. If approved, the total population of Montgomery Village (under the Town Sector Zone) would increase by 225 persons, bringing the total to 36,229 persons or 14.87 persons persons per acre. Because the T-S Zone limits density throughout Montgomery Village to 15 persons per acre, the DPA will absorb the remaining density available. Paradoxically, the DPA still labels the use of the remainder of the former golf course as “golf course,” even though the Applicant maintains that the golf course is now defunct. T. 15, 18. An excerpt from the DPA (Exhibit 136) showing the overall population density and breakdown of land uses for Montgomery Village, if this DPA is approved, is below:

AREA AND DENSITY ANALYSIS		
	Acres	People
Residential	1306.30	35,842
(Area IV/Parcel B)	17.34	225
Public Schools		
Board of Education	54.40	
Kettler/reservation	0.00	
Commercial/Employment		
Village Center	43.10	
Goshen Center	10.00	150
Shopping Centers	36.80	
CSAAC	10.76	
Golf Course	148.44	
(minus Area IV/Parcel B)	-17.34	
PEPCO Substation	2.00	
Foundation Headquarters	10.50	
Open Space		
Local Open Space	481.80	696.80
Major Open Space	215.00	
Major Roads	115.70	
TOTALS	2434.80	36,217
<hr/>		
<u>36,217.0 People</u>		
2,434.8 Acres	= 14.87	PPA Average

Mr. Russell Hines, President of Monument Realty, testified that the original golf course owner declared bankruptcy in 2012. The Applicant purchased the the entire golf course at bankruptcy auction and continued to operate the course until 2014, when it closed. Since it purchased the property, Mr. Hines testified, the Applicant has done extensive outreach with the Montgomery Village Foundation (MVF) and communities within Montgomery Village and has modified the development plan to incorporate their suggestions. This process ended approximately a year ago. T. 19, 23-24.

Mr. Brady described the proposed DPA (Exhibit 136), shown below:



He testified that the plan uses the same concept of clustered development used in the original development plan for the Village. This design concentrates building units to maximize the available open space. According to Mr. Brady, the proposed development plan breaks up building clusters using the street framework, preserving landscaped buffers wherever possible.

Mr. Brady testified that smaller neighborhoods within the Montgomery Village each have a unique character. He characterized this development as a “walkable hamlet,” organized around a series of neighborhood “events” or open spaces. They designed the townhomes to face on streets lined with sidewalks, sometimes as an alternative to open space. Each unit has an integral garage; parking is located to the rear of the units and accessed via a service road. In addition to spaces within the garage, there are two tandem spaces in the rear driveways. Curb cuts are minimized to make the sidewalk and cycling experience more pleasant and avoid conflicts with cars. Approximately 35 on-street parking spaces for visitors line the proposed road. T. 43-46.

Mr. Brady opined that the cluster concept is revealed immediately upon entering from the northwest; there is a cluster of homes surrounded with open space. Another group of homes is located further to the northeast and faces an amenity green or “hamlet green.” This green serves as a public amenity for this and surrounding neighborhoods. Proceeding clockwise, a group of homes borders a “crescent green,” a central community gathering space. T. 46-47. Leaving this space open permits them to preserve some of the existing trees and provide an amenity for the duplex units at that location. Along the southern leg of the property, the townhomes are oriented perpendicular to the street, facing on semi-public mews, providing some open space amenity. Members of the Duffer Way community requested the Applicant to consider this option because it tends to pull the development away from their property. He opined that this alignment is more compatible with the existing neighborhood because it provides views to the open space on the

PEPCO easement and allows a solid landscaped buffer along the edge of the community. The southern intersection is a right-in, right-out movement because of an existing median on Montgomery Village Avenue. T. 46-51.

A textual binding element limits the height of the townhouse units:

Height is limited to 35', as measured from average grade along the front building wall of each townhouse to the midpoint of a sloped roof or the highest point of roof surface on a flat roof.

2. Purpose and Development Standards of the Town Sector Zone

Technical Staff concluded that the proposed development furthers the purpose of the Town Sector Zone because the street design promotes orderly circulation with a minimal impact on surrounding communities, the Applicant is providing MPDUs, and the design complements the surrounding townhouse communities. Exhibit 55, p. 15.

Mr. Sloan testified that the proposed DPA complies with the purpose clause of the T-S Zone. According to him, these objectives intended the town to be self-sufficient (i.e., to have all necessary uses, commercial employment, cultural, and recreational) for its residents; to provide a diversity of housing types both in terms of building type as well as rental and ownership opportunities; to cluster development and provide urban densities, to save significant areas of open space and the open space network, and to provide the requisite transportation and public facilities to support the development. In his opinion, the proposed development will further the purposes of the Zone even though it forecloses use of the property for a golf course. The T-S Zone requires that at least 10 percent of its entire area be devoted and set aside for open space, defined as publicly accessible open space. By providing publically accessible open space in this area, they will be expanding the amount of open space for public use. While the definition of "open space" in the Zoning Ordinance permits privately owned open space, the golf course has never counted toward

the open space requirement because it is listed separately on the development plan (T. 102-103; Exhibit 40(d)).

E. PLANNING BOARD AND STAFF RECOMMENDATIONS

Staff recommended denial of the DPA because it failed to conform to the land use and density of the 1985 Master Plan. Otherwise, it found generally that the proposed development met the purpose clauses of the T-S Zone and was compatible with adjacent neighborhoods. Exhibit 55. The Planning Board also recommended deferral or denial, agreeing that it did not conform to the land use and density recommended by the 1985 Master Plan and that the public interest would be better served by reviewing redevelopment of the golf course as part of the comprehensive master plan process (Exhibit 79):

- The 1985 Gaithersburg Vicinity Master Plan (Master Plan) designated the golf course as private conservation/recreation area on the Plan's foldout land use map. It assumed that the land occupied by the former golf course would be the foundation of the recreational and open space in Montgomery Village. The Master Plan contains no narrative or background about Montgomery Village, but the Board concluded that redevelopment of a portion of the former golf course would undermine the comprehensive nature of the Master Plan's approach to space that was to be set aside for recreation and conservation use. Therefore, the proposed amendment for residential townhouse development on this site is not consistent with [the] framework of the current Master Plan.
- The Board concluded that even assuming that the proposed amendment does not violate the current Master Plan, the public interest would be served by awaiting the results of the ongoing Montgomery Village Master Plan study, which is well underway and will address conservation, recreation, and public use space as well as other issues in a comprehensive manner.

F. PUBLIC FACILITIES

1. Transportation

Before approving a development plan amendment, the Council must find that the roadway capacity in the area is adequate to accommodate trips generated by the proposed use. *2012-2016*

Subdivision Staging Policy (November 13, 2012.) The Applicant must meet two tests necessary for the Council to find that area roads have sufficient capacity.

The first test, Local Area Transportation Review (LATR), projects the impact of this development by adding together (1) existing traffic, (2) projected traffic from developments that have been approved, but are not yet built, and (3) traffic projected from the proposed development. It then determines whether Critical Lane Volumes (CLV) or capacity at impacted intersections meet congestion limits in the traffic policy area. *Local Area Transportation Review and Transportation Policy Area Review Guidelines* (adopted January 24, 2013) (Guidelines).

Staff reports that the proposed development will generate 41 peak-hour trips during the morning peak period (i.e., 6:30 a.m. to 9:30 a.m.) and 71 peak-hour trips within the evening peak period (i.e., 4:00 to 6:00 p.m.). The development qualifies for a credit of 3 peak period trips in the morning peak hour and 17 peak hour trips in the evening period because existing trips from the golf course have been removed from area roadways. Exhibit 55, Attachment 4.

The property is located within the Montgomery Village/Airpark traffic policy area, which has a maximum congestion level of 1,425. Staff advises that the all intersections studied are well below the maximum level. *Id.*

In addition to LATR, the Applicant must also satisfy a Transportation Policy Area Review (TPAR) at the time of preliminary plan. TPAR tests the adequacy of roads and transit facilities within the larger policy area. If either is deemed inadequate, the Applicant must pay a portion of the transportation impact tax at the time of building permit. In this case, roadway facilities are adequate within the Montgomery Village/Airpark policy area, but transit facilities are inadequate. Thus, the Applicant will have to pay 25% of the transportation impact tax before receiving its building permits.

2. Other Public Facilities

The Montgomery County Public Schools report that school facilities are adequate to serve the use. Exhibit 66, Attachment 5. The Applicant's expert in civil engineering, Mr. John Clapsaddle, testified that all utilities are available to serve the site and that the design will meet all stormwater management requirements under Chapter 19 of the County Code. T. 153-158. The Applicant has prepared a plan showing potential stormwater management for the site, which utilizes a number of small micro bio-retention facilities throughout the community. The plan also shows a swale running along about half of the roads in the development. The combination of these will meet the environmental site design requirements under Chapter 19, in Mr. Clapsaddle's opinion. T. 160.

G. ENVIRONMENT

A portion of the property is within the 100-year floodplain mapped by the Federal Emergency Management Agency (FEMA). Mr. Clapsaddle testified that his firm has looked at floodplain studies that are more detailed than the FEMA map and have determined that this area is too small to be subject to restrictions on building within the floodplain. Their firm intends to modify the FEMA map to remove the area from the floodplain designation. The current development plan shows four townhouse units protruding into the FEMA floodplain designation. According to Mr. Clapsaddle, Planning Staff is aware of this and has no objection. T. 154-156.

Mr. Sloan opined that the application meets the requirements of the County's Forest Conservation Law (Chapter 22A of the Montgomery County Code) and will place approximately 2.6 acres into forest conservation easements. T. 92. The Applicant has received approval of a preliminary forest conservation plan. The Planning Board also approved a variance to allow specimen trees to be impacted. Exhibit 55, p. 4. All but seven of these trees, according to Mr.

Sloan, are white pines and non-native spruce that are approaching the end of their life span. T. 115.

H. COMMUNITY RESPONSE

The MVF and several property owners supported the application. The MVF believes that development of the property as soon as possible will help revitalize the Village. Mr. John Driscoll, President of the MVF Board of Directors, testified that MVF independently hired a professional land planning firm to coordinate community charrettes in 2011 when the County delayed review of the Master Plan. This effort resulted in the Vision 2030 report, which considered redevelopment of the golf course as one option. When the Applicant purchased the property, MVF quickly appointed a committee to provide input and coordinate community involvement that has led to this DPA. The committee included presidents of the community associations that border the golf course. The committee vote was 10 to 0 in favor of redevelopment of the golf course. On March 25, 2014, the MVF Board approved the concept plan for the entire golf course that includes the community described in the DPA. T. 134-136.

Mr. Driscoll testified that he is frustrated because he knows that the community wants this redevelopment as soon as possible, yet the approval process works very slowly. According to him, many residents in the community want the redevelopment because of its greater benefit for Montgomery Village. Other communities in the area have moved forward with successful revitalizations, but nothing is moving forward in the Village. Residents feel that new housing will stimulate further revitalization and failure to approve redevelopment will make it harder to move forward. T. 136-138. Other property owners also support the application because they believe that it will revitalize the Village. They are reluctant to rely on the master plan process because it had been delayed in the past and redevelopment is needed now because the golf course has already failed. Some support the application because it provides connectivity to other spaces in the

Village, it removes the golf course, which they believe is an eyesore, and mitigates some of the environmental impacts of the course. Exhibits 41, 46-47, 128.

Those opposing the application do so for a number of reasons. Many relied on the golf course when purchasing their homes and paid a premium and higher property taxes for their properties. Others relied on written assurances from Kettler at the time it sold the course that no home would ever be built on the property. Several felt that the golf course provided a major amenity, including green vistas, for the community and approval of this application would foreclose future use of the golf course. Some felt that the developers should not benefit from promising amenities and then renege on those promises. Exhibits 61, 63-72. Several individuals believe that the application should continue to be deferred until the MVMP is adopted. *See, e.g.*, Exhibits 87-88.

Ms. Margie DeFino testified that she believes developing the golf course would be detrimental to the Montgomery Village community. This was not the vision Kettler Brothers had in mind for the golf course, in her opinion. That is reinforced, she believes, by a letter sent by Kettler when it sold the golf course in 1980. That letter reassured residents that no homes would be built on the golf course. There are also representations in the contract of sale foreclosing re-use of the golf course. She also believes that these both documents are valid and legally binding and should be considered by the Council in rezoning the property. T. 142-144. In her opinion, developing the golf course is just a distraction from the very serious issues that plague the community, which should be the number one priority now. T. 144-145.

Much of the testimony and evidence centered on whether a majority of residents supported or opposed the application. *See, e.g.*, T. 23, 144-145. Ms. Margie DeFino submitted a packet of letters from homeowners who property borders the golf course opposing the application. She also

submitted a petition signed by individuals opposing the golf course.⁷ Ms. DeFino testified that, during the course of this DPA, she has found that hers is the voice of the community. T. 145; Exhibits 119, 120.

Mr. David Lechner testified in detail regarding the zoning and development history of the Village. He contends that language in the Town Sector Zone, combined with representations and covenants made by the developer and the Master Plan require the property to be used as a golf course in perpetuity. These arguments are discussed in detail in Part VI.A of this Report.

IV. FINDINGS AND CONCLUSIONS

A. STANDARDS FOR COUNCIL REVIEW

This DPA is unusual because it must be reviewed under regulations contained both in the old and new Zoning Ordinance. The 2014 Zoning Ordinance requires DPAs in the Town Sector Zone to follow the procedures for amending a DPA in the 2004 Zoning Ordinance, but apply the development standards for the T-S Zone in the 2014 Ordinance.⁸ *2014 Zoning Ordinance*, §8.1.2. The procedures for approving a DPA require the District Council to make five specific findings:

⁷ Because the Hearing Examiner's recommendation must be based on whether the application meets the zoning ordinance requirements, she may not rely on a simple majority of opinions as to whether the property should develop. *Smith v. Board of County Commissioners of Howard County*, 252 Md. 280, 285 (1969). While she admitted the petitions presented by Ms. DeFino, she does not rely on them in making her recommendation.

⁸ Because this application was filed prior to the effective date of the 2014 Zoning Ordinance, there is some question as to whether the requirements of the 2004 Town Sector Zone must be applied or those of the 2014 Town Sector Zone. The Applicant argues that the application is grandfathered under Section 7.7.1.B of the 2014 Ordinance, which would allow the DPA to be governed by the 2004 Ordinance. The Applicant, however, applies the standards of the Town Sector Zone contained in the 2014 Ordinance. Technical Staff applied the standards of the Town Sector Zone as it appeared in the 2004 Ordinance. Exhibit 55. The Hearing Examiner notes that the Omnibus Zoning Text Amendment (ZTA 15-09) proposed by the Planning Board clarifies that the zones retained in the 2014 Ordinance (which includes the Town Sector Zone) must follow the requirements of Article 8 of the 2014 ordinance. Section 59.8.1.2.A. provides that DPAs must follow the *procedures* for approval in the 2004 Ordinance, while applying the *standards* of the 2014 Zoning Ordinance with regard to parking and sign regulations (in Divisions 6.2 and 6.7 of the 2014 Ordinance). Nevertheless, the *procedures* in Section 59-D-1.6 refer back to the zones in article 59-C of the 2004 Zoning Ordinance. With relief, the Hearing Examiner finds that the standards of both Zoning Ordinances are not materially different as applied to this case. Because of the general intent to govern the retained zones under Article 8 of the Zoning Ordinance, the Hearing Examiner applies the standards of the Town Sector Zone included in the 2014 Ordinance.

(a) [That] the proposed development plan substantially complies with the use and density indicated by the Master Plan or sector plan, and does not conflict with the general plan, the county capital improvements program, or other applicable county plans and policies . . .

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

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

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

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

In addition to these five findings, Maryland law also requires that the proposed rezoning be in the public interest (*Maryland Land Use Article*, Code Ann. § 21-101(a)(4)(i) (2012):

(i) planning, zoning, or subdivision control powers in the regional district must be exercised to:

(1) guide and accomplish a coordinated, comprehensive, adjusted, and systematic development of the regional district;

(2) coordinate and adjust the development of the regional district with public and private development of other parts of the State and of the District of Columbia; and

(3) protect and promote the public health, safety, and welfare.

When considering the public interest, OZAH considers the recommendation of the Planning Board and compliance with adopted County plans and policies, such as the relevant master Plan and the *Subdivision Staging Policy*.

Parsing through all of these criteria, there are six findings required (the five in §59-D-1.61(a) through (e) and the public interest). The “Required Findings” are listed in the next part of this Report along with the Hearing Examiner’s conclusions whether these standards have been met.

1. Compliance with County Plans and Policies

a. The Master Plan

The Hearing Examiner disagrees with both the Applicant’s and the opposition’s theories regarding the 1985 Master Plan.

She finds that the Applicant has failed to prove that the DPA substantially conforms to the Master Plan. The Applicant’s theory that compliance with the broader goals of the master plan, rather than the land uses recommended, ignores the mandatory and plain language of the Zoning Ordinance: Section 59-D-1.61(a) requires substantial compliance with the “*land use and density* indicated by the master plan...” (Emphasis supplied). The only place the 1985 Plan indicates the land use and density for the subject property is the Land Use Plan adopted with the text of the Master Plan. The Land Use Plan designates this property as “private conservation/recreation” space. Were this not explicit enough, it also labels the property as the “Montgomery Village Golf Course.”

The theory that the 1985 Master Plan “defers” land use planning to the development plan amendment process would contravene State law, which requires that all zoning power be exercised in accordance with a comprehensive plan. There is no evidence in this record that the Council intended to delegate its responsibility to plan comprehensively to the development plan amendment process, especially when the Zoning Ordinance specifically requires development plan amendments to conform to the “land use and density” of the master plan.

The Hearing Examiner agrees with the Planning Board that the evidence demonstrates that the golf course was a major amenity for the Village and integral to its design. The “new town” proposed by Kettler incorporated the idea that recreational facilities would be provided by “private clubs” on private property in addition to land managed by the MVF.

It is also clear that the County’s two long term plans incorporated this central amenity, even though in private ownership, as part of their planning efforts for recreational facilities in the Gaithersburg Vicinity policy area. The Applicant’s argument that the Land Use Plan adopted in the Master Plan only reflects uses existing at the time may stem from the fact that the original development plan for Montgomery Village was approved before the first master plan for the Gaithersburg Vicinity planning area, and it was incorporated into both the 1971 and 1985 Plans. Simply because both the 1971 and 1985 Master Plans incorporate the original (earlier) development plan for the Village, however, doesn’t mean that the Village’s design wasn’t part of the comprehensive planning effort. Both the 1971 and 1985 Plans reaffirm the existing (or “committed”) areas as part of the Plans; the Sectional Map Amendment implementing the 1985 Plan explicitly reconfirms the existing zoning. The only interpretation of both the Land Use Plan accompanying the 1985 Master Plan and the text of the Plan itself, is that the land use and density in the 1985 Plan reflected the existing golf course. While perhaps some other type of recreational or open space use could also comply with the Plan, the Plan simply does not designate the subject property for single-family attached townhomes.

Nor do the three DPAs for re-use of the school sites support the applicant’s argument because the 1985 Master Plan anticipated that these sites would redevelop and included recommendations for re-use. In all three cases, binding elements significantly limited each use so that it was *consistent with the school site designation* in the Master Plan. Both DPA 88-1 and DPA

01-04 proposed buildings and open area similar in scale to the relationship of a school and associated athletic fields. In DPA 01-04, CSAAC limited its use to an institutional one similar to a school. The developer in both DPA 88-1 and DPA 01-04 also agreed to transfer or devote a significant amount of the property for active recreational use. DPA 02-02 promised four acres of open space, although in that case, the MVF did not want the property for active recreational use. While the density of the rental apartments was at the “upper limit” of neighboring properties, the development there served the important public interest of providing well more than the minimum MPDUs required.

The Site Plan approval relied on by the Applicant is not persuasive because approval of a site plan requires compliance only with the development plan, not the land use and density shown on the Master Plan. *See, 2004 Zoning Ordinance, §59-D-3.*

The Hearing Examiner does not find the opposition’s argument persuasive either. It has long been held that zoning and land use covenants operate independently of one another. *City of Bowie v. Mie Properties, Inc.*, 398 Md. 657, 695-96, (2007). Even if they did not, the Council may not contractually agree to forego its authority to zone. *See, Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 547 (2002)(Council could not “bargain away” its police power). To the extent any private commitments to maintain the golf course are relevant to this case, it is only to demonstrate that the golf course was an integral part of Montgomery Village that was reflected on the Master Plan.

b. Other County Policies

The evidence here is unrefuted that the application meets both LATR and TPAR. The Hearing Examiner finds that it is consistent with the Subdivision Staging Policy. Nor is there evidence that it conflicts with any County or State capital improvements programs.

2. Zone Requirements, Safety and Amenity, and Compatibility

The second standard for approval of a DPA requires the Council to make three decisions: (1) whether the DPA meets the requirements of the T-S Zone, (2) whether it would provide for the maximum safety, convenience, and amenity of the residents and (3) whether it will be compatible with the adjacent area. *2004 Zoning Ordinance*, §59-D-1.61(b).

a. Zone Requirements.

The requirements of the T-S Zone are listed below with the Hearing Examiner's analysis and conclusions for each.

1. Purposes of T-S Zone.

First Purpose (Section 8.3.3.A.1.)

1. The T-S zone is designed to permit development of or additions to planned new towns or additions to existing urban developments. Such towns must contain, to the extent possible, all of the residential, commercial, civic and institutional, and industrial facilities needed to make a town reasonably self-sufficient for all purposes, except major employment and central business district shopping. A development in the T-S zone must:

- a. provide for the maintenance of open space;*
- b. locate streets and highways to assure orderly traffic circulation;*
- c. include housing for families of low and moderate incomes; and place a wide variety of types of housing accommodations in an efficient and orderly design.*

Conclusion: Planning Staff concluded that the applicant fulfilled this requirement because the road design was safe and efficient and MPDUs are included. Exhibit 55. The Hearing Examiner agrees with this and also finds that the parking access roads reduce the number of curb cuts, enhance pedestrian and bicycle traffic, the circular roadway may reduce speeds, and the three access points have been aligned for safety. The residential housing type (i.e., single-family

attached units) does not add to the variety within the surrounding area, but does support the compatibility of the proposed development with the immediate neighborhood.

Second Purpose (Section 8.3.3.A.2.)

2. *A new town located on a substantially undeveloped site must:*
 - a. *be self-sufficient and contain, as nearly as possible, all of the commercial, employment, cultural, and recreational facilities desirable and necessary for the satisfaction of the needs of its residents;*
 - b. *include a wide variety of residential facilities to offer a wide range of structural types, site planning layouts and arrangements, and rental and purchase prices;*
 - c. *have an urban rather than rural density that would:*
 - i. *facilitate travel between residential, commercial, employment, and other types of areas;*
 - ii. *make the most efficient use of public utilities;*
 - iii. *permit the incorporation of large amounts of open land within the town for recreational and scenic purposes;*
 - iv. *have or plan for the construction of transportation facilities adequate to serve the anticipated total population; and*
 - v. *have public sewer and water available at the site or planned for construction.*

Conclusion: Under these standards, any amendment to the existing development plan must view Montgomery Village as a whole.⁹

While the development plan meets many of the purposes listed above, it also forecloses a major recreational and green space amenity in the center of the Village. The original developer anticipated that the golf course would be privately owned in order to coordinate construction of the facility with surrounding development. What this DPA does not do is address the loss of this major amenity, either as an aesthetic or recreational facility. This is illustrated by the fact that the

⁹ In DPA 88-1, the Master Plan's recommendation for a ball field prompted a review of the sufficiency of recreational facilities within the Village.

DPA still labels the balance of the original golf course as “golf course,” even though it maintains that the course is defunct. This DPA cannot view the fate of the course comprehensively.

The Applicant argues that loss of the golf course does not affect the “self-sufficiency” of Montgomery Village because course was never counted as “open space” on the development plan. The Hearing Examiner doesn’t agree. It is difficult to say that removal of the golf course will not have a significant impact on the original concept for Montgomery Village. As recognized by the Planning Board, it was originally envisioned as a central part of the Village’s “open space,” however it is defined, and contributed significantly to the overall design of the Village. The DPA is well designed and compatible with the immediately surrounding area, but the Applicant does not adequately address its impact on the entirety of Montgomery Village as a whole.

Third Purpose (Section 8.3.3.A.3.)

3. *The T-S zone is designed to:*
 - a. *eliminate some of the specific restrictions which regulate, in other zoning categories, the height, bulk, and arrangement of buildings and the location of the various land uses;*
 - b. *provide for more flexibility in development;*
 - c. *achieve flexibility of design, integration of mutually compatible uses, and optimum land planning with greater efficiency, convenience, and amenity than the standards permitted by right and required in conventional zoning categories; and*
 - d. *preserve and take the greatest possible aesthetic advantage of trees by minimizing the amount of grading necessary for construction of a development.*

Conclusion: The Hearing Examiner finds that the DPA fulfills this purpose of the T-S Zone. Mr. Brady testified that the proposed development employs the original “cluster” concept used for Montgomery Village, permitting different orientations of the townhomes along the road and common green areas to break up the design. Townhomes within the southern leg of the “horseshoe” were oriented perpendicular to the road with semi-private mews to maximize views

of the open space in the PEPCO easement. He also testified that they have attempted to preserve and enhance existing tree stands along the fairways to provide landscape buffers between different clusters of townhomes and adjoining uses. Mr. Sloan testified that the Planning Board has approved a preliminary forest conservation plan for the proposed use.

2. Development Standards of the T-S Zone.

The development standards of the T-S Zone are listed below, along with the Hearing Examiner's evaluation of each standard:

Area Requirements (Section 8.3.3.A.1.)

- a. Each development in the T-S zone must have a minimum area of 1,500 acres unless a sectional map amendment reduces the area zoned T-S to less than 1,500 acres.*
- b. A maximum of 10% of the total area of the town sector may be devoted to commercial purposes. All required parking for commercial purposes must be included within the 10% calculation.*
- c. A maximum of 6% of the total area of the T-S zone may be devoted to industrial purposes and other major employment facilities.*
- d. A minimum of 10% of the total area of the T-S zone must be devoted to open space. This open space may include publicly owned, community-wide, or common open space and facilities, but must not include streets and parking areas.*

Conclusion: Montgomery Village currently contains 2,434.8 acres, which is not affected by this DPA. The DPA proposes only residential development, and does not affect the cap on commercial, industrial or major employment development.

Technical Staff advises that approximately 28.62% of the land area in Montgomery Village consists of open space, as that was defined in the 2004 Zoning Ordinance. Exhibit 55. Mr. Sloan testified that the application will provide a greater amount of open space for a greater number of

people, but the “existing land uses” table shown on the DPA does not indicate that the amount of open space will increase. T. 110; Exhibit 136.

Density (Section 8.3.3.A.2.)

- a. *The population of the T-S zone must be planned for a maximum of 15 persons per acre based upon the total area within the T-S zone. However, the planned population may be increased by an amount equal to the population to be housed in MPDUs included in the development plan under Chapter 25A if the total increase in population does not exceed 22% of the population that would otherwise be permitted.*
- b. *To calculate density:*
 - i. *dwelling units in detached houses must be assumed to have an average occupancy of 3.7 persons;*
 - ii. *dwelling units in townhouses must be assumed to have an average occupancy of 3 persons;*
 - iii. *apartment buildings less than 50' in height must be assumed to have an average occupancy of 3 persons per dwelling unit; and*
 - iv. *apartment buildings 50' in height or higher must be assumed to have an average occupancy of 2 persons per dwelling unit.*

Conclusion: The Applicant proposes 86 townhomes, 11 of which will be MPDUs. Staff advises that MPDUs are not counted toward the population density. Exhibit 55, p. 19. Under the formulas above, this DPA adds 225 persons to the existing population of Montgomery Village, bringing the total to 36,229. If this DPA is approved, there will be 14.87 persons per acre (i.e., $36,229/2434.8=14.87$), under the maximum of 15 persons per acre. Based on this evidence, the Hearing Examiner concludes that the DPA falls within this requirement of the T-S Zone.

Height (Section 8.3.3.A.2.3.)

The height of any building in the T-S zone must be consistent with the limits set in other zoning classifications for areas of similar density or similar use.

Conclusion: Staff concluded that the T-S Zone was similar in use and density to the Townhouse Low Density and Townhouse Medium Density Zones in the 2014 Zoning Ordinance. These zones have a height limit of 40 feet. The DPA includes a binding element limiting the height to 35 feet,

“as measured from average grade along the front of the building wall of each townhouse to the midpoint of a sloped roof or the highest point of roof surface on a flat roof,” which similar to the height requirement in the Townhouse Low Density Zone. *See, 2014 Zoning Ordinance, §§4.4.11.B.4, 4.1.7.C; Exhibit 136.* The Hearing Examiner finds that this standard has been met.

3. Parking and Signage.

Divisions 6.2 and 6.7 of the 2014 Zoning Ordinance governs parking and signage, respectively. *Id.*, §8.1.2. The minimum required parking for this use is 2 spaces per unit. *Id.*, §6.2.4.B. Mr. Brady testified that the DPA exceeds this requirement because each unit has a garage with two parking spaces, some of the units have a driveway that provides two more tandem spaces, and there are 35 spaces along the street for visitor parking. He further testified that the application meets all other parking requirements of Division 6.2. T. 56, 57. The Hearing Examiner finds that the DPA fulfills these standards.

According to Mr. Brady, a signage plan will be developed at the time of site plan review. It will be designed in accordance with Division 6.7 of the 2014 Zoning Ordinance. T. 51-53.

b. Safety and Amenity for Residents

Section 59-D-1.61(b) requires a finding that the DPA provides the “maximum safety, convenience, and amenity of the residents. Staff concluded that the DPA meets these standards because the property is within walking distance of a commercial center and parking is provided in garages, with visitor parking along the streets, permitting guests to visit without spill over parking. The Hearing Examiner agrees and adds to this that the use of alleys to access parking also enhances pedestrian and bicycle circulation by minimizing curb cuts. Mr. Brady testified to the fact that the cluster concept provides the opportunity for green space, gathering areas, and connection of

pathways to the large path network. The Hearing Examiner finds that these standards have been met.

c. Compatibility

Technical Staff concluded that the development was compatible with surrounding neighborhoods, which are townhouse communities with densities of approximately 6 to 9 dwelling units per acre. Mr. Brady testified that the DPA uses the same “cluster development” design used for the original development plan. He opined that the DPA incorporates green spaces, open space, and pathways in an orderly fashion. As already noted, roads have been aligned to maximize safety, and thus will not impact homes across Montgomery Village Avenue, and bike and pedestrian pathways will connect to other areas of the Village.

Based on this evidence, the Hearing Examiner finds that the proposed development will provide “for the maximum safety, convenience, and amenity of the residents,” and will be compatible with the surrounding area.

3. Safety and Adequacy of Site Access and Circulation

The third standard for approval of a development plan requires the Council to find that site access and internal circulation for vehicles, pedestrians, and bicyclists is safe and efficient.

Technical Staff concluded (Exhibit 55, p. 20):

The external access points are safe and efficient, with crosswalks proposed to assist pedestrians and bicyclists out of the community. Pedestrian circulation was a major focus of the design and sidewalks are provided throughout, and alleys serving most of the units remove potential vehicular conflicts from the main road.

The same evidence that supports the Hearing Examiner’s finding that the third purpose of the T-S Zone has been met (on page 39 of this Report), supports a finding that this standard has been met as well.

4. Grading, Forest Conservation, and Stormwater Management

The Applicant must demonstrate that the proposed development is designed to minimize grading and meet all regulations governing forest conservation (Chapter 22A of the Code) and stormwater management (Chapter 19 of the Code). *2004 Zoning Ordinance*, §59-D-1.61(d). Mr. Clapsaddle testified that the grading plan attempts to minimize as much disturbance as possible while still keeping adequate drainage (T. 153); Mr. Brady testified that the clustered development design, which permits greater amounts of open space, minimizes the impact of the development on the site. T. 52-53. The evidence here demonstrates that the property can accommodate required stormwater management design, through bio-retention facilities and swales to address stormwater from the roadway, to meet all requirements of Chapter 19 of the Code. As evidenced by an approved preliminary forest conservation plan, the application meets the requirements of Chapter 22A of the Code.

5. Preservation of Open Space, Common Areas and Recreational Facilities

The final standard for approval of a development plan contained in §59-D-1 of the 2004 Ordinance requires a finding that documents providing for perpetual maintenance of common or quasi-public purposes and recreational facilities are “adequate and sufficient.” Technical Staff concluded that the “draft Homeowner’s Association (HOA) documents...establish a mechanism for perpetual maintenance of the common areas.” Exhibit 55, p. 21. Having no evidence to the contrary, the Hearing Examiner so finds.

B. PUBLIC INTEREST

The applicant must show that the proposed development plan amendment bears sufficient relationship to the public interest to justify its approval. When evaluating the public interest, the

District Council normally considers conformance to the Master Plan, the recommendations of the Planning Board, compliance with other County plans and policies, including the Subdivision Staging Policy. In this case, Technical Staff, the Planning Board, and the Hearing Examiner conclude that it does not substantially conform to the land use and density shown on the master plan. The Hearing Examiner also concludes that the DPA does not fully meet the purpose clause of the T-S Zone. The Planning Board and Council are currently reviewing development of the area as a whole through the comprehensive planning process, the MVMP. The Hearing Examiner agrees with the Planning Board the public interest is better served by reviewing redevelopment of the golf course through the comprehensive planning process.

C. CONCLUSION

Based on the foregoing and a review of the entire record, I reach the following conclusions:

1. The proposed development does not substantially conform to the land use and density recommended in the *1985 Gaithersburg Vicinity Master Plan*;
2. The proposed development does not fulfill the purpose clause of the T-S Zone because it forecloses part of an amenity central (i.e., the golf course) to Montgomery Village without a comprehensive plan for the entire property.
3. Because it does not substantially conform to the 1985 Master Plan, approval of this application is not in the public interest. The public interest is better served by reviewing the redevelopment of the subject property comprehensively as part of the *Montgomery Village Master Plan*.

V. RECOMMENDATION

For the reasons stated above, I recommend that Development Plan Amendment No. 15-01, requesting approval of 86 single-family attached units on 17.3 acres of unimproved property

(formerly the Montgomery Village golf course) described in Exhibit 40, Attachment A of this record, be *denied*.

Dated: October 7, 2015

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lynn A. Robeson', enclosed within a thin black rectangular border.

Lynn A. Robeson
Hearing Examiner