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## **I. STATEMENT OF THE CASE AND DESCRIPTION OF PROCEEDINGS**

On January 20, 2016, Dr. Carl Douglas Lord (hereinafter, Applicant or Dr. Lord), filed an application seeking a Medical Clinic Conditional Use for up to Four Practitioners, under Zoning Ordinance §59.3.5.7.A.2.<sup>1</sup> The subject site is located at 11016 New Hampshire Avenue, in Silver Spring, and consists of 18,591 square feet, described as Lots 10 and 11, Block B, in the Burnt Mills Subdivision. The property is owned by the Applicant and Linda Karen Lord, who has given her written consent to the application (Exhibit 39(e)). It bears Tax Account Numbers 05-00331196 and 05-00331208. The site is in the R-90 Zone and is subject to the 2014 White Oak Science Gateway Master Plan.

The Applicant seeks approval of a conditional use to bring the existing medical clinic on the site into compliance with the Zoning Ordinance. The use will employ up to three doctors, with a maximum of seven employees (including two doctors) on-site at any given time.

By notice issued on March 14, 2016, the Office of Zoning and Administrative Hearings (OZAH) scheduled a public hearing to be held on May 16, 2016. Exhibit 19.

On April 15, 2016, Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report recommending approval of the application, subject to eight proposed conditions. Exhibit 23.

On April 25, 2016, the Applicant filed a motion to amend the application with revised plans and statements in compliance with the recommendations of Technical Staff and with a request for a waiver of the Zoning Ordinance requirements for the number of parking spaces.<sup>2</sup>

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<sup>1</sup> All citations to the Zoning Ordinance in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as extensively amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015), and subsequently in ZTAs 15-10, 15-11, 15-12 and 15-14.

<sup>2</sup> The Applicant disputes the need for a parking space waiver, but requested one to satisfy the recommendation of Technical Staff.

Exhibit 24 and its subparts. A notice of the motion to amend and of the request for a parking space waiver was issued on April 27, 2016. Exhibit 25. Having received no opposition to the motion to amend, that motion was granted on May 9, 2016.

The Montgomery County Planning Board (Planning Board) met on April 28, 2016, and in a letter dated May 4, 2016, unanimously recommended approval of the application, adopting the conditions recommended by Staff, with a modification of recommended Condition No. 4 to require that landscaping be provided in accordance with the landscaping plan. Exhibit 26.

The public hearing proceeded as scheduled on May 16, 2016, and the Applicant called three witnesses. An adjacent neighbor, Wilma Johnson, testified in support of the application, although she requested two changes to the plans. There were no opposition witnesses, and the hearing was completed on May 16. The record was held open to allow the Applicant to file revised plans by May 26 based on developments at the hearing and for comments from Technical Staff by June 6 regarding the revisions. The Applicant was given until June 9, 2016 to reply to any comments from Technical Staff. The Applicant filed its revised plans on May 26 (Exhibits 39(a) – (h)), and extensive emails were exchanged among the Applicant, Technical Staff and the Hearing Examiner on a number of issues (Exhibits 31 through 38 and Exhibits 40 through 45). The record closed on June 9, 2016, as scheduled.

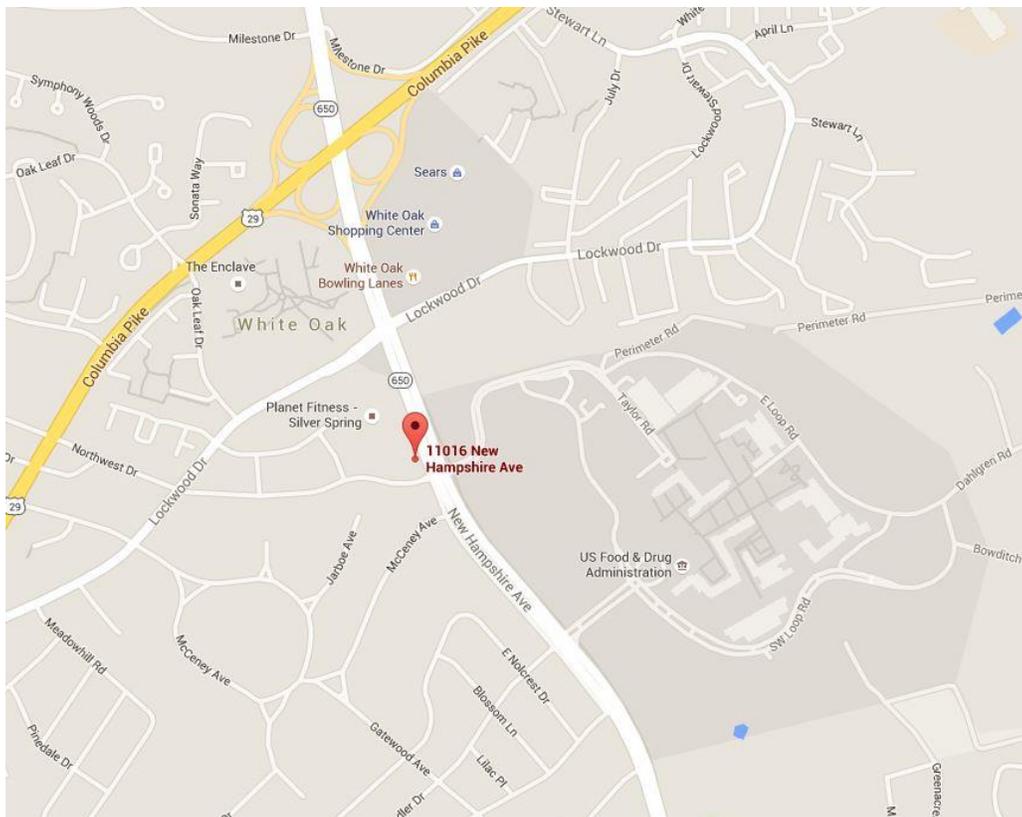
There has been no community opposition to this application. The Hearing Examiner finds that the proposed use, as represented in the final Detailed Site Plan (Exhibit 39(a)) and the other revised plans filed in support thereof, will meet all the criteria specified in the Zoning Ordinance. More specifically, it will be compatible with the neighborhood; it will be consistent with the goals of the applicable Master Plan; it will not have undue adverse effects on the neighbors; it will be served by adequate public facilities; it will comply with applicable

development standards; and it will not harm the environment. Therefore, the Hearing Examiner approves the conditional use application, subject to the conditions listed in Part IV of this Report and Decision.

## II. FACTUAL BACKGROUND

### A. The Subject Property

The location of the subject site is depicted in a vicinity map supplied by Technical Staff (Exhibit 23, p. 3) and reproduced below:



The subject site is well described in the Technical Staff report and shown in an aerial photo of the site (Exhibit 23, pp. 2-3):

The 18,591-square-foot Site is located on the west side of New Hampshire Avenue (MD 650) approximately 100 feet north of the intersection with Northwest Drive, across from the U.S. Food and Drug Administration campus (Figure 1). The Site comprises two lots, identified as Lots 10 and 11, Block B, in the Burnt Mills

Subdivision in the R-90 Zone (Figure 2). The Site is rectangular in shape, and has approximately 147 feet of frontage on the service road along the west side of New Hampshire Avenue. Paved drive aisles connect the Site with the property to the south, which is also owned by the Applicant but is not part of this Application. Paved parking areas for 21 vehicles are located on the north, west, and east sides of the existing building.



Technical Staff also describes the building on the site, as well as the landscaping, lighting, access, circulation and environmental features (Exhibit 23, p. 4):

The Site is improved with a 6,500-square-foot building that straddles the lot line. The building was originally constructed as a split-level residential house. Faced with brick and siding, the building is generally similar in character to the nearby single-family homes (Figures 3 and 4). A black-and-white sign in the front window identifies the building as an obstetrics and gynecology clinic, and the interior space includes waiting areas, exam rooms, offices, and a staff break room (Attachment 3). At present, the existing practice has four doctors, with three doctors on-site at any given time.

Foundation plantings consisting of evergreens and perennials line the front and the southern side of the building. A chain link fence is located along the Site's rear

(western) boundary (Figure 6). Waste receptacles are stored in the rear of the building (Figure 7).

A photometric plan submitted with the application indicates that twelve light fixtures are attached to the perimeter of the building; eight are wall-mounted LED full cutoff sconces, the other four are small motion-sensitive LED floodlights (Attachment 4).

Two curb cuts provide access to the Site from the southbound service road. From the northern curb cut, a one-way circulation route allows vehicles to park in one of the 15 spaces on the north side or behind the building. One handicapped space is located behind the building. Arrows on the pavement direct vehicles that park on the side or behind the building to exit the Site from a curb cut on the adjacent property to the south, also owned by the Applicant. Vehicles can also pull directly from the service road into one of the six parking spaces in front of the building. Parking is prohibited on the east side of the service road, but there are no parking restrictions on the west side of the service road adjacent to the Site.

The Site is relatively flat in grade, and there are no streams, forests, wetlands, or other significant environmental features present.

The Applicant indicates that the site has been used as a medical practitioner's office since 1957. The building and its neighbor to the south are depicted below, as viewed from the New Hampshire Avenue access road, in a photograph supplied by the Applicant (Exhibit 13(f)).



A Certificate of Use and Occupancy was issued for a resident medical practitioner's office in 1985 (Attachment 6 to the Staff Report). According to Technical Staff, "The Applicant purchased the property in 1990, at which time a small portion of the existing building contained residential uses. Since that time, the clinic's operations have evolved and the building no longer contains residential uses. The clinic no longer qualifies as a resident medical practitioner's office and it has been operating without the required conditional use approval." Exhibit 23, p. 9.

Photographs of the subject property from the Staff report (Exhibit 23, pp. 5-6) are reproduced below:



**Front View of Building**



**Medical Clinic Sign in Window**



**Rear of Building (facing north)**

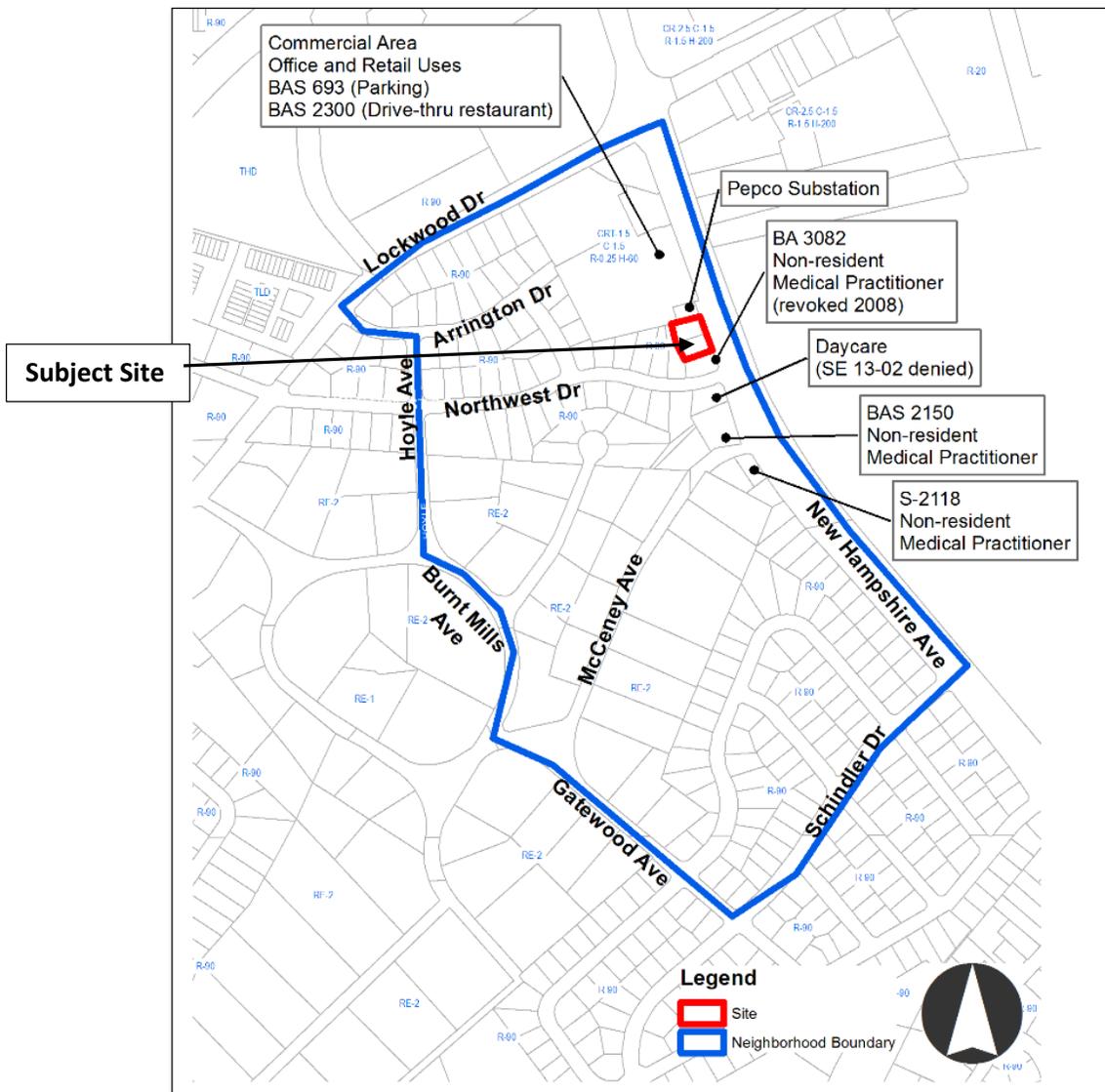


**Rear of Building (facing west), showing chain link fence and adjacent single-family property**

### B. The Surrounding Neighborhood

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Technical Staff defined the boundaries of the surrounding area as “generally bound by Lockwood Drive to the north, New Hampshire Avenue to the east, Gateway Drive and Schindler Drive to the south, and Burnt Mills Avenue and Hoyle Avenue to the west.”

Exhibit 23, p. 7. The Staff-defined neighborhood is shown below (Exhibit 23, p. 8):



Although Applicant's land planner, Bill Landfair, suggested a definition that included less territory to the west, he conceded that Staff's definition was acceptable. Tr. 47-49. The Applicant agreed to Staff's definition of the neighborhood (Tr. 48), and the Hearing Examiner accepts it as well since it includes the area and uses most likely to be affected by the proposed facility.

Staff described the neighborhood as follows (Exhibit 23, pp. 7-8):

A commercial area is located in the northeastern section of the neighborhood and includes a townhouse-style office park, an office building, an office supply store, a drive-through restaurant, and a gas station.<sup>3</sup> The drive-through restaurant, and the parking lot associated with the office building were approved by special exception.

The balance of the neighborhood consists of single-family homes in the R-90 and RE-2 Zones, with the exception of a strip of non-residential uses along the New Hampshire Service Road between McCeney Avenue and the commercial area. South of the commercial area and north of the Site on the New Hampshire Service Road is a Pepco substation housed within a building with a residential appearance. The property to the south of the Site, [924 Northwest Drive – a/k/a] 11012 New Hampshire Avenue, is also owned by the Applicant and was approved in 1971 for special exception use as a non-resident medical practitioner's office (BA- 3082). The special exception was revoked as abandoned in 2008 . . .<sup>4</sup> On the south side of Northwest Drive, at 921 Northwest Drive, a special exception application for a day care with up to 30 children (SE 13-02) was denied in 2013. . . . A sign outside 921 Northwest Drive indicates that a day care, presumably a family day care with no more than 8 children, is now located in the building. South of the daycare, at 11000 New Hampshire Avenue, is a property that was approved for special exception use as a non-resident medical practitioner's office in 1995 (BA 2150). Another non-resident medical practitioner's office, approved by special exception in 1966 (BA-2118), is located on the opposite side of McCeney Avenue, at 10928 New Hampshire Avenue.

### **C. Proposed Use**

The Applicant seeks a conditional use, pursuant to Section 59.3.5.7.A.2. of the Zoning Ordinance, to lawfully operate what is statutorily classified as a medical clinic for up to four

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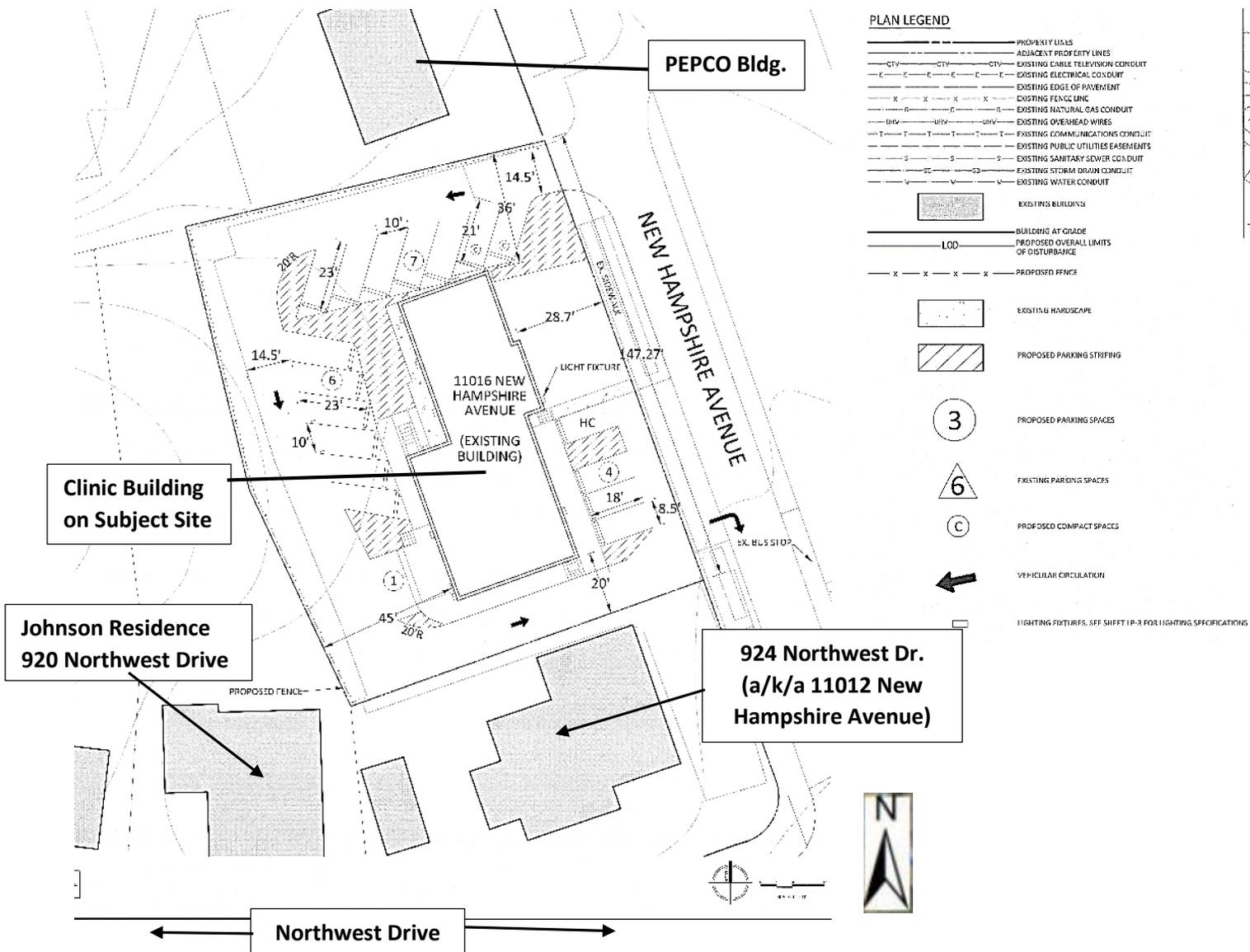
<sup>3</sup> The zoning in the commercial area is designated CRT 1.5 C-1.5 R-0.25 H-60. The subject site is in the R-90 Zone.

<sup>4</sup> Technical Staff indicated in its report that the building just to the south of the subject site was "not used for residential purposes;" however, the Hearing Examiner excised that statement from the above quote because Dr. Lord testified at the hearing that there were tenants living on one floor of the building, although the rest of the building was used for storage. Tr. 31-32. As will be discussed in relation to the Zoning Ordinance requirements for this type of conditional use, the existence of tenants in this commercially improved building does not alter the required setbacks.

practitioners. In actual practice, the use will employ up to three doctors, with a maximum of seven employees (including two doctors) on-site at any given time. A medical clinic has been operating on this site for many years, and no new structures are proposed.

### 1. Site Plan and Floor Plan

The final approved Conditional Use Site Plan, labelled "Detailed Site Plan" (Exhibit 39(a)), is set forth below and on the following page. The final amendment to the Detailed Site Plan was the result of the Hearing Examiner's ruling at the hearing that a parking space waiver was needed to permit only 18 parking spaces on the site, as will be discussed in Part III of this Report and Decision. The building itself will not be expanded.



Standard Method Development Standards			REQUIRED	PROPOSED
<b>Lot and Density - 59-4.4.8.B</b>				
Lot (min)				
Lot area		9,000 SF		18,591 SF
Lot width at front building line		75'		150'
Lot width at front lot line		25'		147.27'
Coverage (max)				
Lot		30%		30%

			REQUIRED	PROPOSED
<b>Placement - Principal Building Setbacks - 59-4.4.8.B</b>				
Front setback [1]		30'		28.7
Side street setback, abutting lot fronts on the side street and is in a Residential Detached zone		30'		n/a
Side street setback, abutting lot does not front on the side street or is not in a Residential Detached zone		15'		n/a
Side setback		8'		20'
Sum of side setbacks		25'		56'
Rear setback		25'		45'

<b>Height (maximum) - 59-4.4.4</b>			REQUIRED	PROPOSED
Principal building [2]		30'		20'

<b>Parking setbacks- Conditional Uses - 59-6.2.5.K.2</b>			REQUIRED	PROPOSED
a. Rear parking setback (same as rear setback required for principal building) [3]		25'		6'
b. Side parking setback (2 times min side setback required for principal building) [3]		16'		1'

<b>Parking - 59-6.2.4B</b>			REQUIRED	PROPOSED
Parking required for a Medical Clinic is as follows: Automobile spaces: 4.00 spaces per 1,000 SF of GFA [4]		26		18

[1] It is likely that the building was originally built in conformance with the applicable front setback requirements at the time and that the existing condition is a result of a subsequent taking by the State Highway Administration for right-of-way for New Hampshire Avenue.

[2] Principal building (measured to mean height between eaves and ridge of a hip roof).

[3] As allowed by section 6.2.10, a waiver may be granted and is requested.

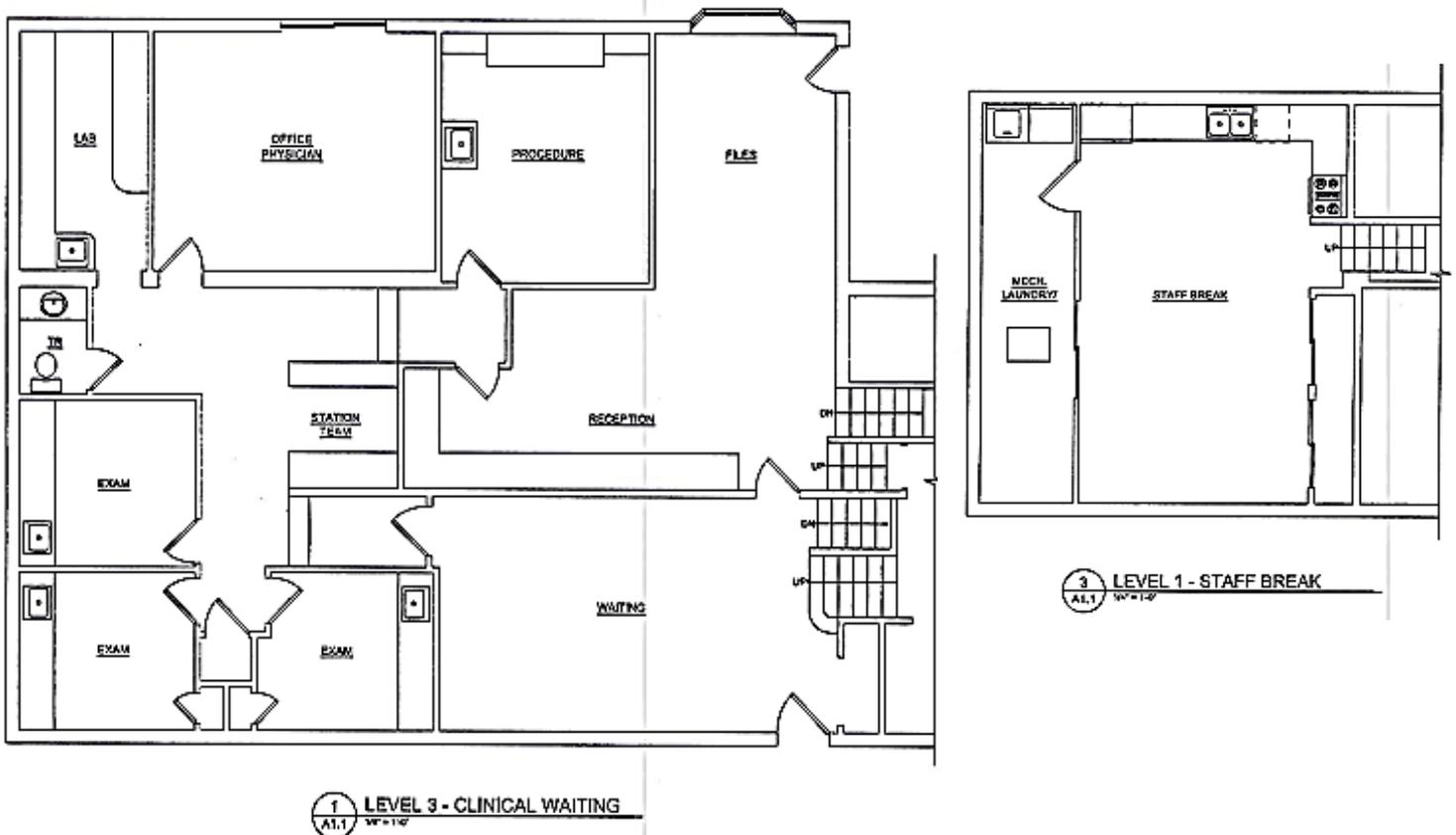
[4] Eight space reduction authorized pursuant to parking waiver provision of Section 59.6.2.10 of the Zoning Ordinance.

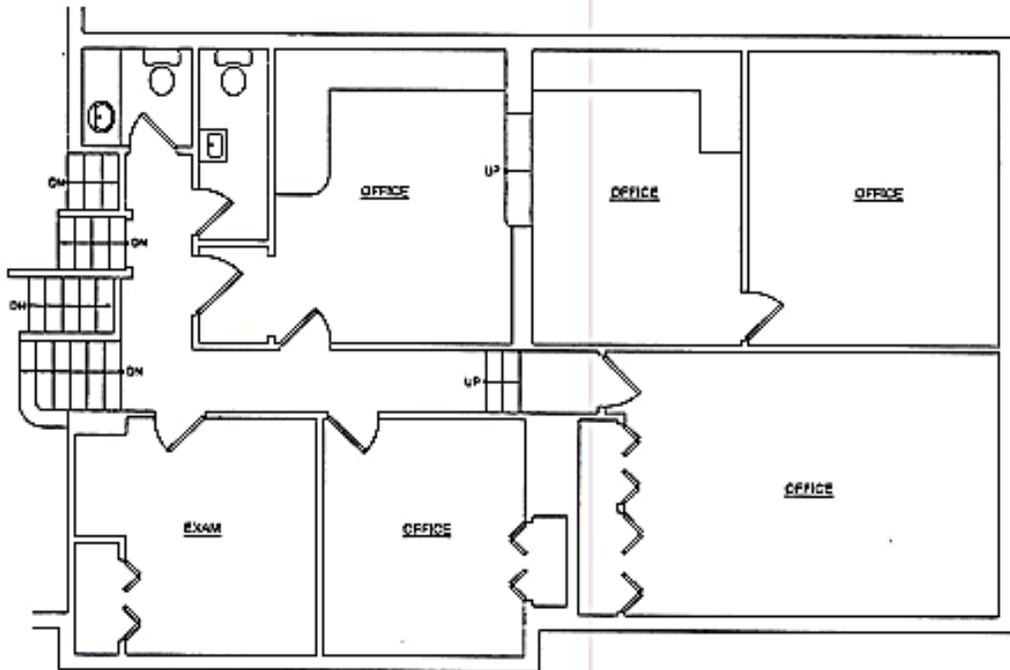
**General Notes:**

1 Per section 59.3.5.7.A.2, the minimum lot width at the front lot line is 100 feet; the minimum setbacks from a lot that is vacant or residentially improved is 40 feet; the minimum setback from all other abutting lots is 20 feet; the site must have access to a business district street or higher. Refer to discussion in land use report for conformance to these standards.

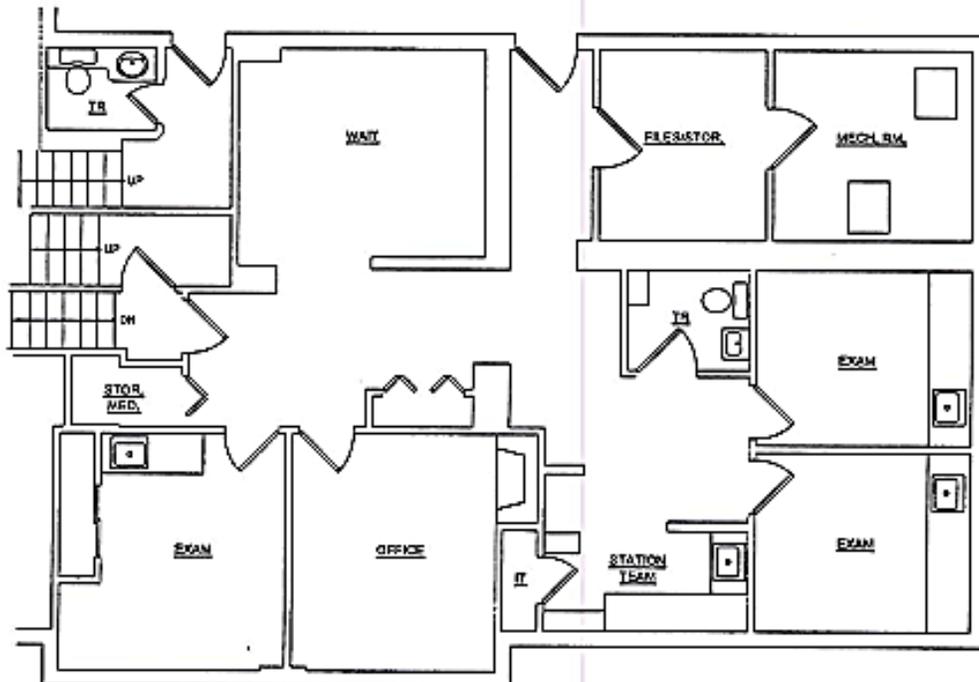
As can be seen from the above site plan, the Applicant will reconfigure and restripe the vehicle parking areas and provide 18 total parking spaces on-site. Four of the parking spaces, including one handicapped accessible space, will be located in front of the building. Seven spaces will be located on the north side of the building, and seven to the rear of the building. As noted by Technical Staff (Exhibit 23, p. 9), the new parking configuration would remove two parking spaces from the site to improve circulation. The parking space waiver and the other waivers needed in regard to the parking facility and its landscaping will be discussed in Part III of this Report and Decision. The external lighting fixtures will be replaced, but the locations of the lighting fixtures will remain unchanged, and the revised Site Plan shows the locations of those fixtures. Based on an objection raised by an adjacent neighbor, Wilma Johnson, who lives at 920 Northwest Drive, there will be no motion sensors on the lights. Tr. 56-58.

The Floor Plans (Exhibit 10) are reproduced below and on the following page:





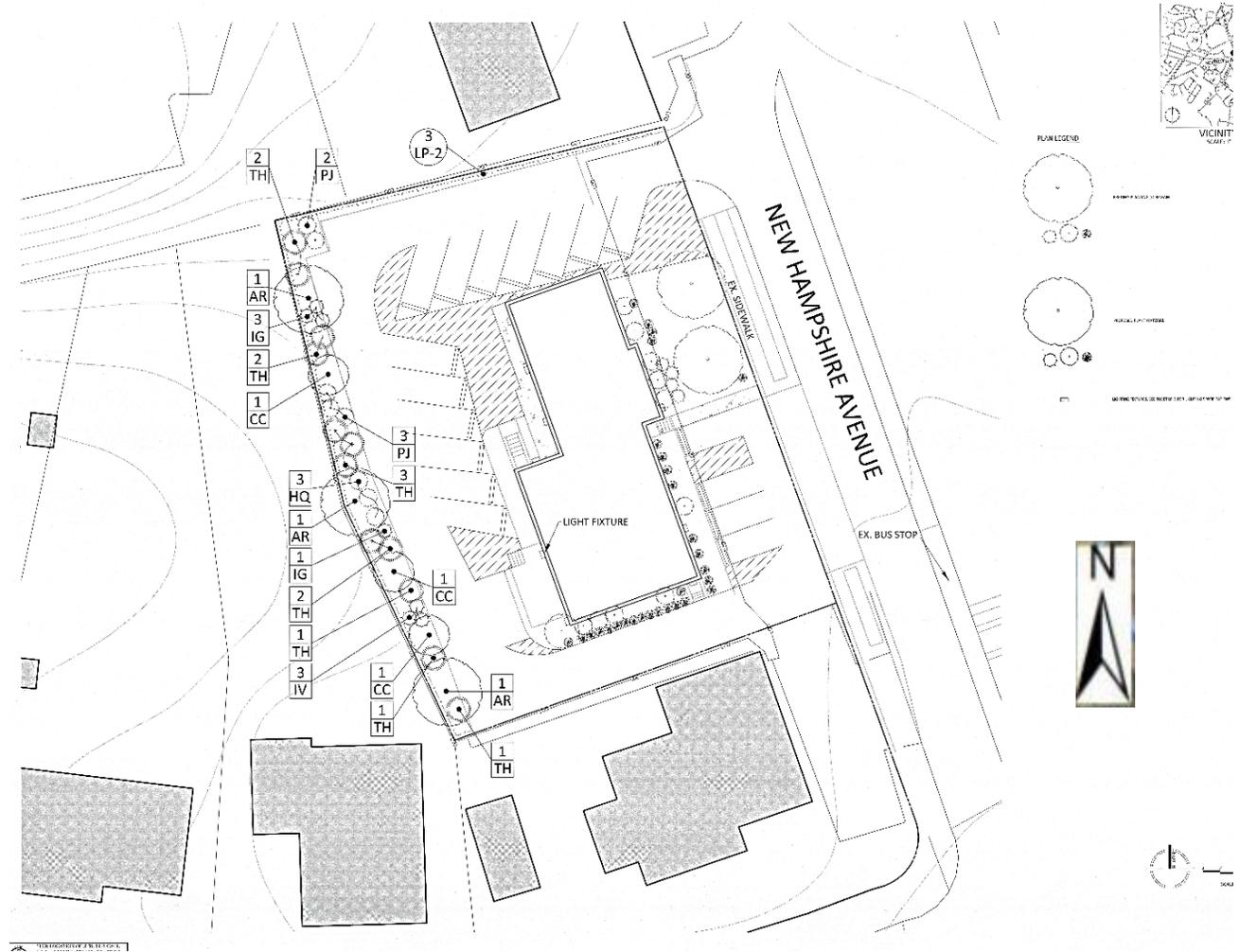
2 LEVEL 4 - OFFICE/SUBLET  
AT.1 10' x 13'



4 LEVEL 2 - CLINICAL  
AT.1 10' x 13'

## 2. Site Landscaping, Lighting and Signage

Landscaping proposed for the site is shown on Applicant’s “Landscaping Plan” (Exhibit 39(b)), with details, including vegetation and fencing shown on Applicant’s “Landscape Details” Plan (Exhibit 39(c)). Portions of these plans are reproduced below and on the following pages (omitting some details):



### PLANTING SCHEDULE

KEY	QUANTITY	BOTANICAL NAME	COMMON NAME	SIZE	ROOT BALL	COMMENT
<b>SHADE TREES</b>						
AR	3	Acer rubrum	Red Maple	2.5"-3"	B&B	
<b>ORNAMENTAL TREES</b>						
CC	3	Cercis canadensis	Red Bud	1.5"-2"	B&B	Multi stem trunk
<b>EVERGREEN TREES</b>						
TH	12	Thuja occidentalis 'Emerald Green'	Emerald Green Arborvitae	6-8'	container	Heavy, full to ground
<b>SHRUBS</b>						
IG	4	Ilex glabra	Inkberry Holly	3 gal	container	Heavy, full to ground
IV	3	Itea virginica	Virginia Sweetspire	3 gal	container	Heavy, full to ground
HQ	3	Hydrangea quercifolia	Oakleaf Hydrangea	3 gal	container	Heavy, full to ground
PJ	5	Pieris japonica, 'Mountain Fire'	Pieris Mountain Fire	3 gal	container	Heavy, full to ground

## GENERAL PLANTING NOTES

### PLANT / MATERIAL NOTES

#### PLANT IDENTIFICATION:

1. ALL PLANTS SHALL BE PROPERLY MARKED FOR IDENTIFICATION AND CHECKING AND ARE SUBJECT TO APPROVAL BY THE OWNER'S REPRESENTATIVE.
2. STATE OR FEDERAL NURSERY INSPECTION CERTIFICATES SHALL BE FURNISHED TO THE OWNER UPON REQUEST.
3. THE CONTRACTOR SHALL VERIFY PLANT QUANTITIES AND ANY DISCREPANCIES SHALL BE BROUGHT TO THE ATTENTION OF THE OWNER. PLANT QUANTITIES SHOWN ON THE PLAN SHALL GOVERN OVER THOSE SHOWN ON THE PLANT LIST.
4. CONTRACTOR SHALL FURNISH AND PLANT ALL PLANTS REQUIRED TO COMPLETE THE WORK AS SHOWN ON THE DRAWINGS.
5. PLANTS WILL BE IN ACCORDANCE WITH THE CURRENT EDITION OF THE 'AMERICAN STANDARD FOR NURSERY STOCK' PUBLISHED BY THE AMERICAN NURSERY AND LANDSCAPE ASSOCIATION AND CONFORM IN GENERAL TO THE REPRESENTATIVE SPECIES.
6. SUBSTITUTIONS SHALL NOT BE MADE WITHOUT PRIOR WRITTEN APPROVAL FROM THE OWNER AND APPLICABLE REGULATORY AUTHORITY STAFF. ANY SUBSTITUTIONS MADE WITHOUT THIS APPROVAL MADE BE SUBJECT TO REJECTION AND REMOVAL AT THE CONTRACTOR'S EXPENSE.
7. PLANT MATERIAL SHALL BE SUBJECT TO INSPECTION AND APPROVAL BY OWNER OR OWNER'S REPRESENTATIVE FOR CONFORMITY TO SPECIFICATION REQUIREMENTS AS TO QUALITY, SIZE AND VARIETY. PLANTS DAMAGED IN HANDLING OR TRANSPORTATION MAY BE REJECTED BY THE OWNER.

#### PLANT QUALITY:

1. ALL PLANTS SHALL BE NURSERY GROWN IN ACCORDANCE WITH GOOD HORTICULTURAL PRACTICE AND BE FREE OF PLANT DISEASE, INSECTS, EGGS AND LARVAE AND SHALL HAVE HEALTHY ROOT SYSTEMS, PLANTS SHALL BE OBTAINED FROM SITES WHICH ARE SIMILAR IN SOIL AND CLIMATIC CONDITIONS AS THOSE OF THE PROJECT SITE.
2. BALLED AND BURLAPPED PLANTS SHALL BE DUG WITH FIRM, NATURAL BALL OF EARTH. BALL SIZES SHALL BE IN ACCORDANCE WITH A.N.L.A. SPECIFICATIONS.
3. CONTAINER GROWN STOCK SHALL HAVE BEEN GROWN IN THE CONTAINER LONG ENOUGH FOR THE ROOT SYSTEM TO HAVE DEVELOPED SUFFICIENTLY TO HOLD ITS SOIL TOGETHER.
4. PRUNING SHALL BE DONE DURING PLANTING OPERATION.
5. ALL PLANT MATERIAL IN TRANSIT SHALL BE COVERED WITH BURLAP OR SIMILAR COVER TO KEEP IT FROM WIND DAMAGE AND DRYING OUT.

#### PLANT SIZE:

1. ALL PLANT SIZES SHALL AVERAGE AT LEAST THE MIDDLE OF THE PLANT RANGE GIVEN IN THE PLANT LIST, BUT IN NO CASE SHALL ANY PLANT BE LESS THAN THAT SIZE STATED FOR THAT SPECIES.
2. CALIPER MEASUREMENTS SHALL BE TAKEN AT A POINT ON THE TRUNK 6 INCHES ABOVE NATURAL GRADE FOR TREES UP TO 4 INCHES IN DIAMETER; AND AT A POINT 12 INCHES ABOVE NATURAL GRADE FOR TREES OVER 4 INCHES IN DIAMETER.
3. SINGLE TRUNK TREES SHALL NOT INCLUDE THE "V" CROTCHES THAT COULD BE POINTS OF WEAK LIMB STRUCTURE OR DISEASE.
4. SHRUBS HEIGHT SHALL BE MEASURED FROM THE GROUND TO THE AVERAGE HEIGHT OF THE TOP OF THE PLANT. SPREAD SHALL BE MEASURED FROM THE END OF THE BRANCHING, EQUALLY AROUND THE PLANT. MEASUREMENTS SHALL NOT INCLUDE TERMINAL GROWTH.
5. HEIGHT AND SPREAD DIMENSIONS SPECIFIED SHALL REFER TO THE MAIN BODY OF THE PLANT AND NOT FROM BRANCH TIP TO TIP.

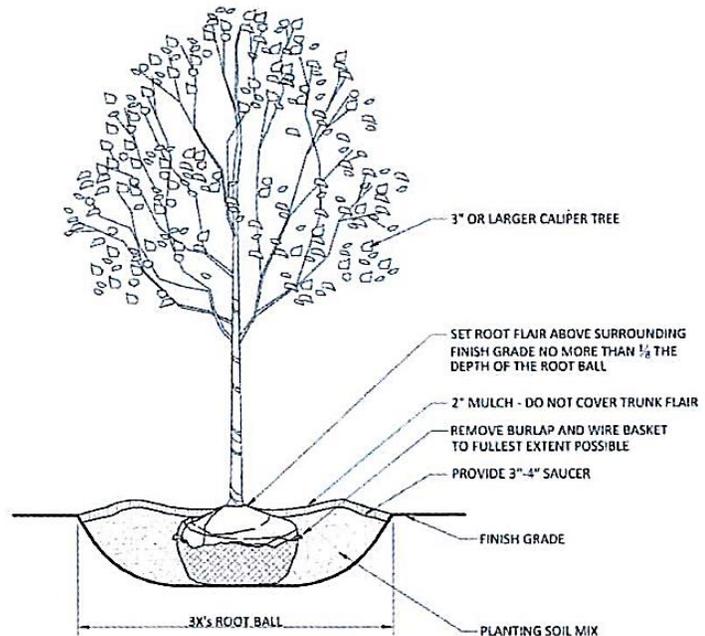
#### MULCH:

1. MULCH SHALL BE EITHER COMPOSTED HARDWOOD BARK, FINE SHREDDED HARDWOOD BARK, PINE BARK OR APPROVED EQUAL, AND FREE OF FOREIGN MATTER.

#### FERTILIZER:

1. FERTILIZER SHALL BE GRANULAR, PACKET OR PELLET, WITH 35% TO 80% OF TOTAL NITROGEN IN ORGANIC FORM. IT SHALL BE A COMPLETE FERTILIZER WITH A MINIMUM ANALYSIS OF 10% NITROGEN, 6% PHOSPHOROUS AND 4% POTASSIUM. GRANULAR FERTILIZER SHALL BE APPLIED TO THE SOIL MIX WITH A 10-6-4 ANALYSIS AT THE FOLLOWING RATES: TREE PITS, 2-3 LBS. PER INCH OF TRUNK DIAMETER; SHRUB BEDS, 2 LBS. PER 100 SQUARE FEET OF BED AREA (OR 1/4 LB. PER FOOT OF HEIGHT OR SPREAD). GROUND COVER, VINE AND HERBACEOUS PLANTS, 2-3 LBS. PER 100 SQUARE FEET. THE OWNER RESERVES THE RIGHT TO DETERMINE THE TIME FERTILIZATION SHOULD OCCUR WITHIN THE ONE YEAR GUARANTEE PERIOD.

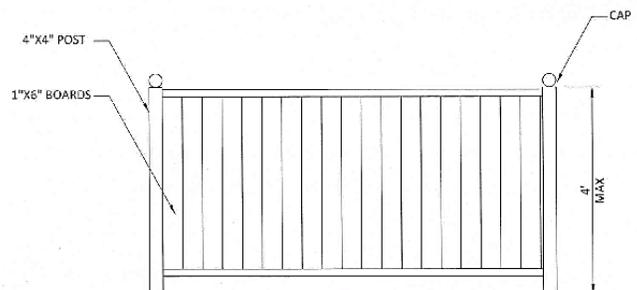
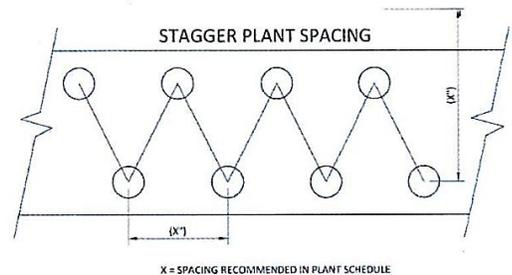
2. TOPSOIL, IF REQUIRED, SHALL BE FERTILE, FRIABLE NATURAL LOAM, UNIFORM IN COMPOSITION, FREE OF STONES, CLUMPS, PLANTS, AND THEIR ROOT DEBRIS AND OTHER EXTRANEIOUS MATTER OF 1 INCH IN DIAMETER, AND CAPABLE OF PERMITTING VIGOROUS PLANT GROWTH. TOPSOIL SHALL HAVE A pH RANGE OF 6.0 TO 6.5, WITH A pH RANGE OF 5.0 TO 5.5 FOR PLANTS REQUIRING ACID SOILS. CONTRACTOR SHALL PROVIDE SOIL ANALYSIS TO OWNER PRIOR TO IMPORTING TOPSOIL ONTO THE PROJECT SITE.



NOTE:  
FLAGGING IS ENCOURAGED NEAR PEDESTRIAN AREAS WHETHER PAVED OR NOT.  
OBTAIN OWNER REPRESENTATIVE'S APPROVAL FOR FLAGGING LOCATIONS.

### 4 TREE PLANTING DETAIL

NOT TO SCALE



### 3 BOARD ON BOARD FENCE

NOT TO SCALE

The Applicant had proposed a 6-foot high board on board fence, to add screening to the north and west sides of the site; however, based on the objection of the adjacent neighbor, Wilma Johnson, the height of the proposed fence was reduced, with the agreement of the Applicant and Technical Staff, to four feet. Tr. 27-28 and Exhibit 39(c). Technical Staff found that the additional landscaping and the proposed fence would provide sufficient screening for the neighborhood. Exhibits 23, p. 24 and Exhibit 43. Applicant’s land planner, William Landfair agreed, testifying that reducing the height of the proposed fence would have no adverse effect on compatibility since it would still block any headlights on the site and will make “a friendlier view” for the neighbors. Tr. 52-53.

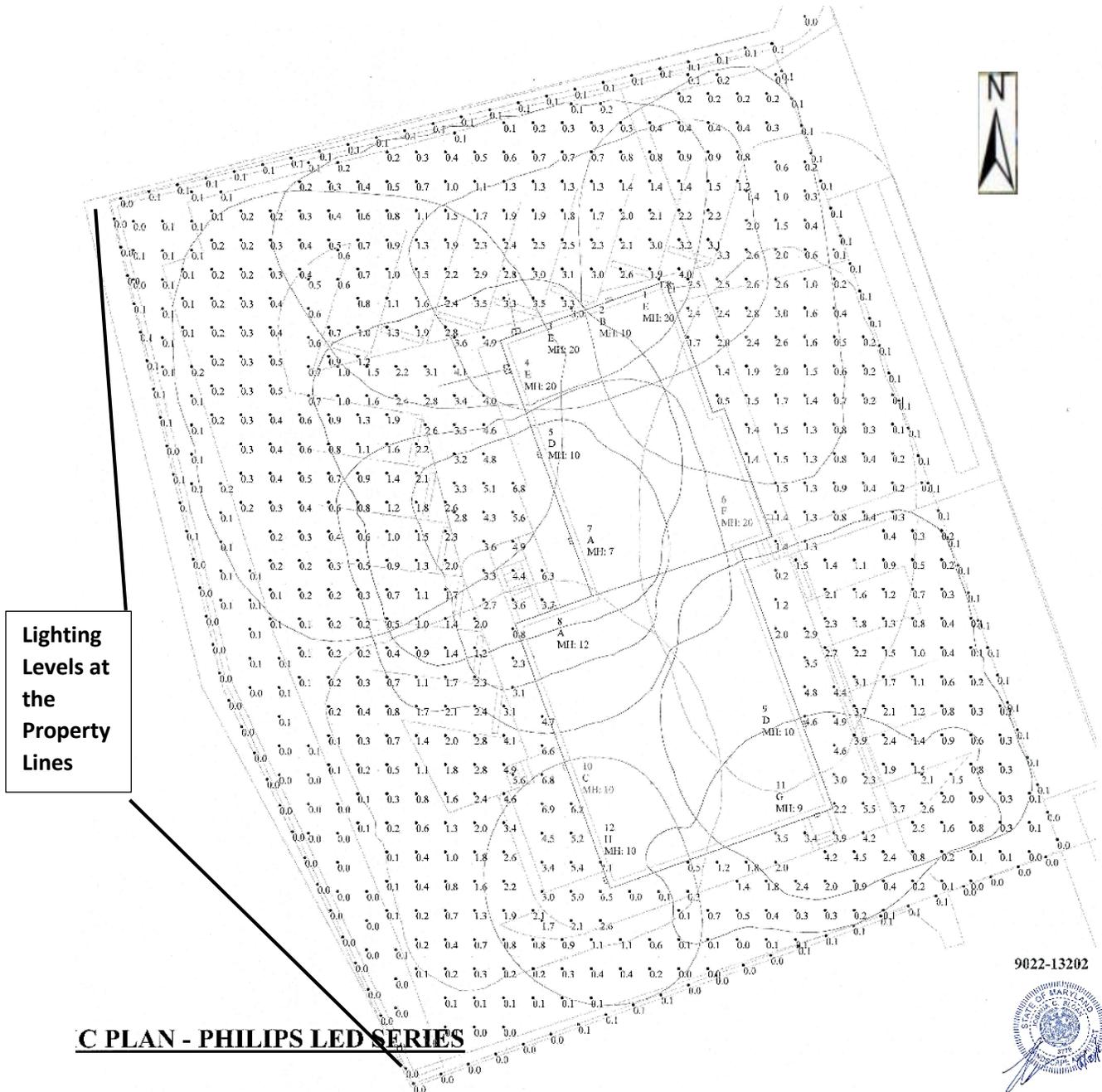
Applicant’s Lighting and Photometric Plan (Exhibit 39(d)) is reproduced below:

Luminaire Schedule								
Project: Doctor's Office - 11016 New Hampshire Ave								
Symbol	Qty	Label	Arrangement	Lum. Lumcns	LLF	Description	Lum. Watts	BUG Rating
□	2	A	SINGLE	1609	1.000	121-4-18LA-NW	18	B1-U0-G1
□	1	B	SINGLE	1707	1.000	121-3-18LA-NW	18	B1-U0-G1
□	1	C	SINGLE	5365	1.000	121-4-50LA-NW	50	B1-U0-G1
□	2	D	SINGLE	3523	1.000	121-4-35LA-350-NW	35	B1-U0-G1
□	3	E	SINGLE	2174	1.000	CSFS-16L-350-NW-A33	19.6	B1-U0-G0
□	1	F	SINGLE	2100	1.000	CSFS-16L-350-NW-RM	20	B1-U0-G1
□	1	G	SINGLE	1683	1.000	111L-2-20LA-NW	18	B1-U0-G1
□	1	H	SINGLE	1154	1.000	LPW7	14	B1-U0-G0

Calculation Summary								
Project: Doctor's Office - 11016 New Hampshire Ave								
Label	CalcType	Units	Avg	Max	Min	Avg/Min	Max/Min	
Grass Area FC at Grade	Illuminance	Fc	1.75	7.1	0.0	N.A.	N.A.	
Paved Area FC at Grade	Illuminance	Fc	1.02	4.9	0.0	N.A.	N.A.	
Property Line FC at Grade	Illuminance	Fc	0.06	0.1	0.0	N.A.	N.A.	

ALL VALUES SHOWN ARE HORIZONTAL INITIAL FOOTCANDLES AT GRADE  
 FIXTURE DISTRIBUTION TEMPLATES ARE SHOWN AT 0.1 FC FOR REFERENCE USE ONLY  
 VALUES DO NOT INCLUDE CONTRIBUTION FROM ADJACENT STREET OR PROPERTY LIGHTING

Luminaire Location Summary			
LumNo	Label	Z	Tilt
1	E	20	9.5
2	B	10	0
3	E	20	19
4	E	20	31
5	D	10	0
6	F	20	4
7	A	7	0
8	A	12	0
9	D	10	0
10	C	10	0
11	G	9	0
12	H	10	0



**C PLAN - PHILIPS LED SERIES**

The Technical Staff report states that “No modifications to the existing building, signage, or lighting are proposed.” Exhibit 23, p. 9. However, the Applicant indicated that new fixtures would replace the old ones, but that they would be placed in the same locations as the existing fixtures on the site. Exhibit 34. Zoning Ordinance §59.6.4.2. provides:

*Division 6.4 applies to landscaping required under this Chapter, the installation of any new outdoor lighting fixture, and the replacement of any existing outdoor*

*fixture. Replacement of a fixture means to change the fixture type or to change the mounting height or location of the fixture. [Emphasis added.]*

Since existing light fixtures will be replaced, the lighting requirements of Division 6.4 do apply in this case. The permissible lighting levels for a conditional use are specified in Zoning Ordinance §59. 6.4.4.E., which provides,

*Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.*

The above Photometric Plan demonstrates that the lighting levels at the lot lines will not exceed 0.1 footcandles. Technical Staff's review of the lighting levels also finds that they will not exceed statutory maximum levels at the lot lines. (Exhibit 23, p. 23). The Hearing Examiner agrees.

Technical Staff also expressed concern that the lighting must be adequate for safety on the site and recommended a condition to ensure that the issue be addressed. Exhibit 23, p. 2. In response, the Applicant introduced certification by Land Planner Joshua Sloan that the parking area will have adequate lighting to ensure safety during evening hours. Exhibit 24(h). The Hearing Examiner finds that Applicant has thereby satisfied Condition #8 proposed by Technical Staff (Exhibit 23, p. 2), and that the proposed lighting will provide sufficient illumination for safety on the site.

The final issue in this section concerns signage. There are no exterior signs proposed for the use, but the Applicant has been displaying a black and white sign inside of a front window identifying the building as an obstetrics and gynecology clinic, and the sign is depicted in one of the photographs reproduced on page 8 of this Report and Decision. Although the sign is located indoors, it is visible outdoors through the window, and Zoning Ordinance §59. 6.7.1. specifies

that “Division 6.7 regulates the size, location, height, and construction of all signs placed for public view . . . [Emphasis added.]” Since the existing sign is clearly “placed for public view,” even though located inside of a window, it is governed by the Zoning Ordinance’s regulations and must comply with the limits for the size of signs in a residential zone<sup>5</sup> unless the Applicant first obtains a sign variance from the Sign Review Board. When the Hearing Examiner raised this issue with the Applicant and Technical Staff, they both agreed that a sign variance must be obtained before a sign of the current size can be lawfully displayed in the front window. Exhibit 37. A condition to that effect is imposed in Part IV of this Report and Decision.

### **3. Operations**

The subject site has been in use as a medical practice (obstetrics and gynecology) since the Applicant purchased the property in 1990. The Applicant detailed the operations of the facility in his Statement in Support of the Application (Exhibit 2, p. 4):

The proposed use will operate between 9 a.m. and 5 p.m., Monday through Friday, year round. A maximum of 7 employees will be on-site at a given time. A maximum of 3 doctors will practice at the site, with a maximum of 2 doctors on-site at a given time, and a maximum of 50 patients will be seen on a given day.

Deliveries to the site are made via UPS, FedEx and postal service during office hours. Trash and recycling pick-ups occur a maximum of twice a week.

### **D. Environmental Issues**

There do not appear to be any environmental issues in this case. Technical Staff mentions the environment on three pages of its report (Exhibit 23, pp. 4, 13 and 29):

The Site is relatively flat in grade, and there are no streams, forests, wetlands, or other significant environmental features present. [Exhibit 23, p. 4.]  
The Site contains no forest, streams, wetlands, 100-year floodplains, steep slopes, or known habitats of rare, threatened or endangered species. The Application is not

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<sup>5</sup> Generally, the sign area for signs in residential zones is limited to two square feet, per Zoning Ordinance §59.6.7.8.

subject to the Forest Conservation Law under Chapter 22A because no clearing or grading is proposed (Attachment 7). [Exhibit 23, p. 13.]

Staff concluded that the use “. . . will not result in any unacceptable . . . environmental impacts.”

Exhibit 23, p. 29. There is no contrary evidence in this case.

### **E. Community Response**

There has been no community opposition to this application. The only community input came from the testimony at the hearing of an adjacent neighbor, Wilma Johnson of 920 Northwest Drive, who testified in support of the application, although she requested two changes to the plans – 1. That the proposed fence be reduced from 6 feet tall to 4 feet tall (Tr. 27-28); and 2. That there be no motion sensing lights. Tr. 56-58. Both of these requests have been agreed to by the Applicant (Tr. 28, 57-58), and the final plans reflect that (Exhibits 39(c) and (d)). Technical Staff approved these changes (Ex. 42 and 43), and the Hearing Examiner finds that they are appropriate.

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

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific to a particular type of use, as set forth in Article 59.3 of the Zoning Ordinance, and general (*i.e.*, applicable to all conditional uses), as set forth in Division 59.7.3 of the Zoning Ordinance. The specific standards applied in this case are those for a Medical Clinic Conditional Use for up to Four Practitioners, under Zoning Ordinance §59.3.5.7.A.2.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (*Zoning Ordinance*, §7.1.1.), the Hearing Examiner concludes that the conditional use proposed in this application, with the conditions imposed in Part IV of this Report and Decision, would satisfy all of the specific and general requirements for the use.

### A. Necessary Findings (Section 59.7.3.1.E)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E. of the Zoning Ordinance. Standards pertinent to this approval, and the Hearing Examiner's findings for each standard, are set forth below:<sup>6</sup> The major topics of discussion are further divided under the following headings:

1. Substantial Conformance with the Master Plan;
2. Adequate Public Services and Facilities;
3. No Undue Harm from Non-Inherent Adverse Effects; and
4. Compatibility with the Neighborhood

#### *E. Necessary Findings*

##### ***1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:***

- a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;***

Conclusion: Technical Staff advises that "No applicable previous approvals exist." Exhibit 23, p. 13. Therefore, this subsection is inapplicable.

- b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;*<sup>7</sup>**

Conclusion: This subsection requires an analysis of the standards of the R-90 Zone contained in Article 59-4; the use standards for a Medical Clinic Conditional Use for up to Four Practitioners contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and

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<sup>6</sup> Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

<sup>7</sup> The underlined language was added by the Council when the 2014 Zoning Ordinance was amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds, as did Technical Staff (Exhibit 23, p. 1), that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6.

### **1. Substantial Conformance with the Master Plan**

#### ***c. substantially conforms with the recommendations of the applicable master plan;***

Conclusion: The property lies within the geographic area covered by the 2014 White Oak Science Gateway Master Plan. The Plan does not provide specific language for this property, but as noted by Technical Staff (Exhibit 23, p. 11), one of its goals is “to protect the character of the single-family neighborhoods by confirming existing use and zoning” (Master Plan p. 30). The Hearing Examiner agrees with Staff’s observation that because the application does not propose any expansion of the existing structure or its use, the character of the surrounding residential neighborhood will not change as a result of this conditional use. Staff also opined that “a medical clinic in a renovated residential structure provides an appropriate transitional use between the adjacent single-family residential neighborhood, New Hampshire Avenue, and the commercial center to the north.” Exhibit 23, p. 11. This opinion is similar to the testimony of Applicant’s land planner, Bill Landfair, at the hearing (Tr. 77-78), and the evaluation in Applicant’s Land Use Report (Exhibit 8, p. 4):

. . . The Master Plan supports a continuation of the existing R-90 Zone for the Property and . . . a medical clinic with up to 4 medical practitioners is allowed as a conditional use in the R-90 Zone . . . [S]uch a facility in a renovated residential structure provides an appropriate transitional use recommended in the Master Plan between the adjacent single-family residential neighborhood, the commercial center to the north with potential mixed-use development, and the envisioned redevelopment of the nearby White Oak Shopping Center with a more urban design. Furthermore, the use has been in operation as a medical practitioner’s office since 1984 and the proposed enhancements are within the scope of the Master Plan’s recommendation to confirm existing uses.

Technical Staff concluded that this application “substantially conforms with the recommendations of the Master Plan.” Exhibit 23, p. 25. There is no contrary evidence in this case, and the Hearing Examiner agrees with Staff’s analysis. Based on this record, the Hearing Examiner finds that the proposed use substantially conforms with the recommendations of the 2014 White Oak Science Gateway Master Plan.

*d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;*

Conclusion: This provision is a mix of Master Plan analysis and compatibility considerations. The Master Plan issues have been discussed in connection with the previous provision, and the Hearing Examiner concluded that the proposed use substantially conforms to the Master Plan’s recommendations. Compatibility is a question that crosses a number of topics, including the nature of the surrounding uses; any potential adverse impacts; the design of the building housing the use, including its height, density and architecture; traffic generation; and other issues to be discussed extensively in other sections below.

Although there are single-family residences to the southwest and west of the subject site, the surrounding neighborhood is by no means exclusively defined by single-family residences, given the PEPCO building and commercial area to the north of the site, the major roadway (New Hampshire Avenue and its service road) to the east and a building previously housing a medical clinic to its immediate south. As observed by Technical Staff, the proposed use and the building that houses it are harmonious with the surrounding neighborhood (Exhibit 23, p. 26):

The existing building is residential in appearance and reflects the architectural style of the surrounding residential neighborhood. The reduction in the parking area in the front of the building will enhance the residential appearance of the Site. The parking areas on the north and west sides of the building will be screened with a six-foot-high wooden fence to shield the views to the parking areas from the neighboring residential properties making it more harmonious with the surrounding neighborhood. In addition, the Applicant is proposing to scale down

the current operations, which will reduce any impact on the character of the surrounding neighborhood. Although the clinic has been operating without the appropriate approval, it is already integrated into the surrounding neighborhood. Confirming the existing use by granting it a conditional use status will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan.

There is no contrary evidence in this record, and the Hearing Examiner finds that the proposed use will be harmonious with the neighborhood and will not “alter the character of the surrounding neighborhood,” which is the question posed by this provision.

*e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;*

Conclusion: In response to this subsection, Technical Staff reports (Exhibit 23, p. 26):

Within the defined neighborhood, there are two existing and approved special exceptions/conditional uses that are in a Residential Detached Zone. Both existing special exceptions are medical practitioner’s offices, one at 11000 New Hampshire Avenue (BA 2150), and the other at 10928 New Hampshire Avenue (S-2118). Both special exceptions are in buildings with a residential appearance that are consistent with the character of the surrounding residential neighborhood. Approving this Application will increase the number of approved conditional uses in the neighborhood, but validating the use of this Site as a medical clinic will not adversely affect the area or alter its predominantly residential nature.

It is clear in this record that the proposed use (a medical clinic) has been operating on the subject site for many years (Exhibit 23, p. 9). Thus, approving this application will not “alter the predominantly residential nature of the area,” but will rather legally sanction an existing use and condition it to avoid adverse consequences to the neighbors. The Hearing Examiner agrees with Staff’s finding that the proposed conditional use, when evaluated in conjunction with existing and approved conditional uses, will not increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely. Moreover, as specified in the last clause of the

provision, “a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area.”

## **2. Adequate Public Services and Facilities**

*f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:*

*i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or*

*ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and*

Conclusion: As observed by Technical Staff, “The Site consists of two recorded lots, and no modifications are proposed as part of this Application. A preliminary plan of subdivision is not required.” Exhibit 23, p. 27. Under Subsection 59.7.3.1.E.1.f.ii., quoted above, it is therefore the Hearing Examiner who must determine the adequacy of public services and facilities to serve the proposed use, including schools, police and fire protection, water, sanitary sewer, public roads and storm drainage. We begin with transportation facilities.

### **a. Local Area Transportation Review and Transportation Policy Area Review**

The Hearing Examiner’s findings regarding transportation facilities are in large part determined by reference to the Planning Board’s Guidelines for Local Area Transportation

Review (LATR) and Transportation Policy Area Review (TPAR), adopted January 24, 2013.<sup>8</sup>

The LATR Guidelines are designed to evaluate the adequacy of the local road network by measuring congestion at roadway intersections based on critical lane volume (CLV) and volume to capacity ratio (v/c). LATR projects the impact of trips to be generated by the proposed development, taking into account existing development and developments that are approved, but not yet built. Applications that are expected to generate fewer than 30 trips are exempt from LATR review, but must submit a “Traffic Exemption Statement” to demonstrate that the number generated by the proposal will be under the 30-trip maximum. *Guidelines*, p. 3.

The Applicant’s transportation planner, Michael Lenhart, submitted the required Traffic Exemption Statement to Technical Staff, dated October 22, 2015 and stamped in on December 23, 2015. Exhibit 9. Mr. Lenhart noted that the LATR Guidelines do not have trip generation rates for a medical office, and therefore the trip generation rates were obtained from the Institute for Transportation Engineers (ITE) Trip Generation Manual, 9th Edition. Because the ITE Trip Generation Manual has two potential independent variables that can be used to project the trip generation – 1. the building floor area (6,500 square feet) and 2. the number of employees (7) – he calculated potential trip generation using both, with the following results (Ex. 9, p. 4):

**Trip Generation Totals**

			AM Peak			PM Peak		
			In	Out	Total	In	Out	Total
Scenario I	Medical-Dental Office (employees, ITE-720)	7 employees	3	1	4	2	5	7
Scenario II	Medical-Dental Office (ksf, ITE-720)	6,550 sq.ft.	13	3	16	7	18	25

Maximum Potential Peak Hour Trips based on a comparison of the number of employees versus the building floor area: 13 3 16 7 18 25

As summarized by Mr. Lenhart (Exhibit 9, p. 2):

The trip generation total . . . shows that the use of employees as the independent variable would yield four (4) trips in the morning peak hour and seven (7) trips in

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<sup>8</sup> This section addresses only traffic volume issues. Traffic safety issues are addressed in Part III.A.3. of this Report.

the evening peak hour. The use of the building floor area as the independent variable would yield 16 morning peak hour trips and 25 evening peak hour trips. In both scenarios, the site will generate fewer than 30 peak hour trips; therefore, the site is exempt from LATR.

Technical Staff adopted the highest projection of trips in its report (Exhibit 23, pp. 12-13), based on the gross floor area of the building, and concluded that the number of potential trips would be 16 in the morning and 25 in the evening. Given that those projections result in fewer than 30 trips, Staff agreed that an LATR traffic study was not called for.

Mr. Lenhart testified at the hearing that, in his opinion, the lower projection of 4 trips in the morning and 7 in the evening is the more accurate one because it is the number of employees that generates the turnover of patients and therefore the traffic, while the square footage method assumes that the building is fully utilized for the clinic. Tr. 37. Nevertheless, the final result in either case is that an LATR traffic study is not required.

As to TPAR, Mr. Lenhart stated the following in his report (Exhibit 9, p. 2):

The project is located in the Fairland/White Oak Policy Area which has been identified as “adequate” under the TPAR transit test and “inadequate” under the TPAR roadway test. As a result, a mitigation fee equal to 25% of the transportation impact is required to mitigate the TPAR analysis.

Technical Staff concluded that no TPAR fee was required (Exhibit 23, p. 13):

The TPAR test typically requires an Applicant to pay 50% of the transportation/development impact tax for new development in the White Oak Policy area since the policy area fails both the transit and roadway capacity tests. In this case, however, the Applicant is not proposing to increase the square footage of the existing building, so no TPAR payment is required.

At the hearing, Mr. Lenhart adopted Technical Staff’s conclusion, stating “I concur with the Staff Report that because this is not adding square footage, it’s an existing building that there is no TPAR assessment on this property.” Tr. 39.

Technical Staff concluded that transportation facilities will be adequate for the proposed

use (Exhibit 23, p. 27), and Mr. Lenhart agreed. Tr. 39-40. There is no contrary evidence in the record regarding transportation facilities, and based on this record, the Hearing Examiner finds transportation facilities will be adequate to handle traffic to be generated by the proposed use.

**b. Other Public Facilities**

In addition to transportation facilities, the Hearing Examiner must determine whether schools, police and fire protection, water, sanitary sewer and storm drainage are adequate to serve the proposed facility. Evaluation of public facilities is controlled by Subdivision Staging Policies (formerly known as Growth Policies) approved by the County Council. The 2012-2016 Subdivision Staging Policy provides, at p. 21, that we “. . . must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated.” There is no evidence of inadequacy in this case, and therefore police stations, firehouses and health clinics will be considered sufficient.<sup>9</sup>

The remaining four public services and facilities – schools, water, sanitary sewer and storm drainage – will be addressed below.

As noted by Technical Staff (Exhibit 23, p. 27),

The proposed use will be served by adequate public services and facilities. The neighborhood is served by public utilities including electricity, telephone, water, and sewer service. The Site is classified in the W-1/ S-1 water and sewer service categories. . . . Metrobus and Ride On stops are located directly in front of the Property. School facilities are not relevant to this application due to the commercial nature of the use. As the medical clinic is an existing use, it will not increase impacts on public services and facilities.

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<sup>9</sup> In addition, Technical Staff reports (Exhibit 23, p. 27) that “The closest police station is the 3rd District Station located in the northern quadrant of the New Hampshire Avenue and Columbia Pike (US 29) interchange, approximately 0.57 miles away [and t]he nearest fire station, Station 12, is located to the south on New Hampshire Avenue, approximately 0.58 miles away.

The Hearing Examiner agrees with Technical Staff's findings regarding the adequacy of the listed public facilities and services; however, since Staff's language did not specifically address storm drainage, the Hearing Examiner made further inquiry of the Applicant and Staff regarding that issue (Exhibit 38(a)).

The Applicant replied as follows (Exhibit 38(b)):

There is substantial evidence in the record to support a finding that the subject property will be served by adequate storm drainage. As shown in the MC Atlas aerial (Exhibit 24(b)), the subject property is served by a public storm drain within 50 feet of the site, which is located in front of the PEPCO substation structure at the entrance to the service drive parallel to New Hampshire Avenue.

Additionally, both Applicant's Land Use Report (Exhibit 8) and M-NCPPC's Technical Staff Report (Exhibit 23) note that the only physical changes associated with the requested conditional use are reconfiguring/restriping the existing parking facilities and providing additional landscaping. This new landscaping, which is depicted on the landscaping plans (Exhibits 24(e)(iii) and (iv)), . . . will provide additional control of storm runoff from the parking area in the rear of the site. . . .

Although Technical Staff questioned Applicant's additional assertion that impervious area would be reduced, Staff agreed that "the subject property will be served by adequate storm drainage given the limited scope of this application." Exhibit 38(d). The Applicant conceded that the impervious area would not be changed (Exhibit 44), and supported its assertion of adequate stormwater drainage with an affidavit from land planner Bill Landfair (Exhibit 44(a)).

Applicant's evidence and Technical Staff's conclusion are not disputed in the record, and the Hearing Examiner finds that stormwater drainage, as well as other public services and facilities, will be adequate to serve the subject site.

### **3. No Undue Harm from Non-Inherent Adverse Effects**

*g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:*

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;*
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use on nearby properties and the general neighborhood. Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” *Zoning Ordinance*, §1.4.2. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* Non-inherent adverse effects are a sufficient basis to deny a conditional use, alone or in combination with inherent effects, if the harm caused by the adverse effects would be “undue.”

The Hearing Examiner must assess whether any of the listed harms will actually occur, and if so, whether they will result, at least in part, from non-inherent adverse effects. If both of these questions are answered in the affirmative, the Hearing Examiner must then determine whether any of these purported harms are “undue” within the meaning of the Zoning Ordinance.

Technical Staff listed the following physical and operational characteristics that are necessarily associated with (*i.e.*, inherent in) a medical clinic for up to four practitioners (Exhibit 23, p. 27):

- (1) Buildings for conducting the use on-site;
- (2) Parking facilities to accommodate employees, patients, and visitors;
- (3) Lighting of walkways and parking areas for safety and security; and
- (4) Traffic to and from the property by staff, patients, and visitors.

Staff found one non-inherent characteristic of the proposed use – the size of the existing building in relation to the size of the lot and the parking needs generated by the use. As stated in the Staff report (Exhibit 23, p. 27):

Staff considers the footprint of the existing building in relation to the size and configuration of the Site a non-inherent effect that results in the need for the parking waivers discussed in this report.

Nevertheless, Staff concluded that “. . . there is no expected undue harm to the neighborhood either as a result of the non-inherent adverse effect alone, or a combination of inherent or non-inherent adverse effects.”

The Applicant’s land planner, Bill Landfair, agreed that there would be no adverse effects from the site conditions, but disagreed with Technical Staff’s finding that the size of the existing building, in relation to the size of the lot and the parking needs generated by the use, constituted a non-inherent site characteristic. He testified that the building is typical of residential buildings in the surrounding neighborhood, and there is nothing unusual about its size. Given the number of offices needed for this kind of medical clinic commercial use, the building quite easily accommodates the nature of the use and the scope of the operations. He therefore does not see the parking demand as unusual, nor does he feel that the need for waivers from the parking standards would create any non-inherent impact on the neighborhood. Tr. 79-81.

The Hearing Examiner agrees with Technical Staff, not Mr. Landfair. As Mr. Landfair points out, the building size is not unusual for this kind of use; however, the size of the lot on which the building sits is too small to accommodate the parking that will be generated by the use, without waiving the ordinary requirements of the Zoning Ordinance intended to protect the neighborhood. Thus, the configuration of the building on a lot this size does create a non-inherent characteristic of the site. Mr. Landfair conflated this step of the analysis with the

question of whether this site characteristic would have adverse effects on the community in this case. While we agree with both Mr. Landfair and Technical Staff that there is no evidence in this case of any resulting harm to the neighborhood, that does not mean that a site characteristic requiring so many parking-related waivers is inherent in the use. It is not, and if there were any adverse impacts on the neighborhood, they would justify denial of this application, unless those effects could be ameliorated.

We now turn to the specific subheadings under Section 59.7.3.1.E.1.g.

***i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood.***

Conclusion: Technical Staff found that (Exhibit 23, p. 27):

The proposed medical clinic will not disturb the use, peaceful enjoyment, economic value, or development potential of abutting and confronting properties or the general neighborhood. No modifications are proposed to the existing building, and the proposed operational characteristics of the medical clinic will be less intensive than current operations. Parking facilities will be screened from the abutting residential property with the addition of a six-foot-high wooden fence and landscaping.

Not surprisingly, Mr. Landfair agreed with Technical Staff on this point. Tr. 83-85. There is no contrary evidence in the record, and the Hearing Examiner finds that the proposed use will not cause undue harm to the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood.

***ii. traffic, noise, odors, dust, illumination, or a lack of parking.***

Conclusion: In response to this subsection, Technical Staff found (Exhibit 23, p. 28):

The proposed use will not have an adverse impact due to traffic, noise, dust, illumination, or a lack of parking. Traffic will be accommodated by the adjacent roadway network, with direct access to the Site from the New Hampshire Avenue Service Road. The use will generate minimal noise, odors, or dust. As demonstrated by the Photometric and Lighting Plan, illumination is typical of residential fixtures and will be shielded to ensure that only the walkways and parking areas are illuminated. Parking is sufficient to accommodate employees, patients, and visitors.

The Hearing Examiner agrees with Staff. Based on the parking, site circulation, planting, fencing, screening, and lighting specified in the final plans submitted by the Applicant, the Hearing Examiner finds that the proposed use will not cause undue harm due to traffic, noise, odors, dust, illumination, or a lack of parking.

***iii. the health, safety, or welfare of neighboring residents, visitors, or employees.***

Conclusion: In response to this subsection, Technical Staff found (Exhibit 23, p. 28):

There will be no undue harm to the health, safety, or welfare of neighboring residents, visitors, or employees because the proposed Conditional Use meets all applicable development standards, has adequate and safe circulation in and around the site, and will be adequately served by public services and facilities. Further, the proposed medical clinic will offer medical services on an out-patient basis for the surrounding neighborhood.

As pointed out by Technical Staff, a neighborhood medical clinic adds to the health services offered in the neighborhood and thus is a benefit, not a harm. The only safety issue to consider involves automobile traffic, and there have been no traffic safety issues raised in this case. Mr. Lenhart testified that the proposed conditional use will not cause undue harm to the neighborhood with respect to traffic and that the proposed traffic pattern will be safe and efficient. Tr. 41-43. Technical Staff also found that traffic generated by the proposed use will not have an adverse impact on the neighborhood. Exhibit 23, pp. 27-28.

Based on this record, and in the absence of any contrary evidence, the Hearing Examiner finds that the proposed use will not cause undue harm to the health, safety, or welfare of neighboring residents, visitors, or employees.

#### **4. Compatibility with the Neighborhood**

***2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.***

Conclusion: Zoning Ordinance §59.7.3.1.E.2. requires that any structure “to be constructed, reconstructed, or altered” in a Residential Detached Zone “be compatible with the character of the residential neighborhood” in which it is located. In this case, there is no proposal to construct, reconstruct or alter the existing structure, so technically, this provision is inapplicable. Moreover, as noted by Technical Staff (Exhibit 23, p. 28), “The existing building is residential in appearance and compatible with the character of the residential neighborhood.”

The question posed by this provision is similar to the one raised by Zoning Ordinance §59.7.3.1.E.1.d., above, which asked whether the proposed use will be harmonious with the neighborhood or would alter its character. In response to that question, the Hearing Examiner found that the proposed use would not alter the residential character of the neighborhood. The Hearing Examiner also now finds that the existing structure is compatible with the neighborhood.

***3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.***

Conclusion: The application satisfies all specific requirements for the conditional use, and with the conditions imposed to mitigate adverse impacts, meets the standards required for approval.<sup>10</sup>

### **B. Development Standards of the Zone (Article 59.4)**

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the R-90 Zone, contained in Article 59.4 of the Zoning Ordinance.

Conclusion: Staff included a table comparing the minimum development standards of the R-90

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<sup>10</sup> As previously noted, §59.7.3.1.E. contains six subsections (E.1. through E.6.), but only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that apply to this application.

Zone to what is provided on the conditional use site plan. Exhibit 23, p. 15. It is reproduced below:

**Development Standards for the R-90 Zone under Article 59-4**

	<b>Required (59-4.4.8.B)</b>	<b>Proposed</b>
Minimum Lot Area	9, 000 sf	18,591sf
Minimum Lot Width <ul style="list-style-type: none"> <li>• At front building line</li> <li>• At front lot line</li> </ul>	75' 25'	150' 147.27'
Maximum Density	1.84 units/ acre	N/A
Maximum Lot Coverage	30%	23.6%
Minimum Building Setback <ul style="list-style-type: none"> <li>• Front</li> <li>• Side</li> <li>• Sum of Sides</li> <li>• Rear</li> </ul>	30' 8' 25' 25'	28.7' * 20' 56' 45'
<b>Maximum Building Height</b> (measured between eaves and ridge of a hip roof)	30'	20'

\* Under Section 59-7.7.1.1 of the Zoning Ordinance: “A legal structure or site design existing on October 30, 2014 that does not meet the zoning standards on or after October 30, 2014 is conforming.” The subject lot was platted in 1954 (plat 3931) and the existing building satisfied the 25’ front setback required for the R-90 Zone under the 1954 Montgomery County Zoning Ordinance . . .

As can be seen from the above Table, the application comports with the current development standards of the R-90 Zone, except for the front building setback, which 28.7 feet, rather than the 30 foot setback required under the current Zoning Ordinance; however, Technical Staff correctly points out in a footnote to its Table, that the existing front setback of 28.7 feet was lawful in the R-90 Zone under the 1954 Zoning Ordinance in force when the lots in question were platted in 1954. Therefore the building on the site is a legal structure, and under Section 59-7.7.1.A.1 of the 2014 Zoning Ordinance, it is defined as “conforming.” Based on these

factors, the Hearing Examiner finds that the application meets the development standards of the R-90 Zone, contained in Article 59.4 of the Zoning Ordinance, to the extent required by the 2014 Zoning Ordinance.<sup>11</sup>

**C. Use Standards for a Medical Clinic for up to Four Practitioners, under §59.3.5.7.A.2.**

The specific use standards for approval of a residential care facility are set out in Section 59.3.5.7.A.2 of the Zoning Ordinance.

**A. Clinic (Up to 4 Medical Practitioners)**

**1. Defined**

*Clinic (Up to 4 Medical Practitioners) means a building occupied by up to 4 medical practitioners and related services to provide healthcare on an outpatient basis.*

**2. Use Standards**

*Where a Clinic (Up to 4 Medical Practitioners) is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:*

*a. The minimum lot width at the front lot line is 100 feet.*

Conclusion: This provision is satisfied because the front lot line is approximately 147 feet.

Exhibit 39(a).

*b. The minimum setback from a lot that is vacant or residentially improved is 40 feet. The minimum setback from all other abutting lots is 20 feet.*

Conclusion: There is no issue regarding compliance with this provision to the north, east and west. To the north the setback is 30 feet, but the lot to the north is improved with a commercial PEPCO facility, so only a 20 foot setback is required. To the east is the New Hampshire Avenue

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<sup>11</sup> The Hearing Examiner notes that Technical Staff also analyzed the development standards issue by reference to §59-B-5.3 of the 2004 Zoning Ordinance. That additional analysis is unnecessary because the 2014 Zoning Ordinance went into effect on October 30, 2014, the date referenced in Section 59-7.7.1.A.1 of the 2014 Zoning Ordinance, so the 2014 Code language, in combination with the 1954 Code language, is sufficient to establish the conformity of the building legally constructed on a lot platted in 1954.

right-of way, so this provision does not apply. To the west are residential lots, but the setback is 45 feet, so it meets the 40 foot minimum. To the south, the issue is more complicated because the setback from the lot line is only 20 feet, and the lot at 924 Northwest Drive (a/k/a 11012 New Hampshire Avenue) was initially improved as a residential property. It was thereafter improved for commercial use as a medical clinic with a special exception, and it continued in that commercial use for over 30 years, from 1971 to 2008, until the special exception was revoked as abandoned. Exhibit 23, p. 7. Although Technical Staff initially opined that the property was unlikely to revert back to a residential use, Dr. Lord testified that one floor of the building is currently occupied by tenants, and about 60% of the building is used for storage of medical records and equipment. Tr. 31-32. Dr. Lord owns that property, as well as the subject site.

Given this situation, the Hearing Examiner asked Technical Staff and the Applicant to respond with their assessments of whether the setback provision of Section 59.3.5.7.A.2.b. has been met in this case. Exhibit 32(a). Technical Staff raised concerns (Exhibit 32(b)), and suggested that a variance would be needed (Exhibit 32(d)). The Applicant filed two responses (Exhibits 39(g) and 45), arguing that despite the current tenant use, the lot in question was commercially, not residentially, improved, as evidenced by its paved over parking area along the front and side of the building (Tr. 62), parking spaces delineated with striping and concrete wheel-stops, faded letters on the building surface identifying the name of a former medical office, and internally, a waiting room, treatment rooms, private offices for physicians and storage of medical records and equipment.

Alternatively, the Applicant argues (Exhibit 39(g), unnumbered pp. 3-4) that the doctrine of zoning merger should be applied to consider both the subject site and the lot at 924 Northwest Drive as one lot for zoning purposes, thereby eliminating the issue of the setback between the

two properties. “Zoning merger” is a legal construct defined by the Maryland Court of Appeals as “the merger for zoning purposes of two or more lots held in common ownership where one lot is used in service to one or more of the other common lots solely to meet zoning requirements.”

*David H. Remes v. Montgomery County, Maryland*, 387 Md. 52, 63-64, 874 A.2d 470 (2005), citing *Friends of the Ridge v. Baltimore Gas & Elec. Co.*, 352 Md. 645, 724 A.2d 34 (1999).

The court noted that “[the] merger may be derived from the common owner’s intent, as evidenced by ‘integrating or utilizing the contiguous lots in the service of a single structure or project . . . .’” *Remes, supra*, 387 Md. at 66, 874 A2d at 477-478.

Technical Staff’s response to the zoning merger argument is to question whether the resulting combined lot would comply with zoning for all other purposes. As stated by Staff, “It’s not at all clear that it would, and, at a minimum, it would create a very muddled situation going forward.” Exhibit 42.

The Hearing Examiner finds insufficient evidence in this case to conclude that the two properties in question were integrated and used together in the fashion described in the *Remes* case. He therefore finds no zoning merger in this case. Even if there were a zoning merger, it would create another issue, in that it is unclear that the commercially used buildings on the theoretically merged lots were set back far enough from Wilma Johnson’s admittedly residential property to the west to satisfy the 40-foot setback restriction of this provision.<sup>12</sup>

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<sup>12</sup> The Applicant argues that the setback should be only from the proposed medical clinic on the conditional use site, not from other buildings on the merged lots (Exhibit 41(b)). While this may be arguable, that construction seems to be at odds with the analysis of how to apply the zoning merger doctrine in the *Remes* case, *supra*. However, the Hearing Examiner need not reach this issue because he has concluded that zoning merger has not been established in this case. In addition, on the last day the record was open, the Applicant filed another affidavit from Applicant’s land planner, William Landfair, opining that if the lots were merged, they would comply with the development standards of the R-90 Zone (Exhibit 45(a)). Although the Hearing Examiner finds that the argument of Applicant’s counsel in Exhibit 45 was a timely and appropriate reply to Technical Staff’s filings, the affidavit from Mr. Landfair attached to that reply is not admissible since it constitutes additional expert evidence that should have been submitted, if at all, when there was still an opportunity for any interested party to respond, not on the last day the record remained open. It will be lodged in the administrative file with a notation on the exhibit list that it was not

We are therefore left with the question of whether the property at 924 Northwest Drive (a/k/a 11012 New Hampshire Avenue) is residentially improved or commercially improved. If the former, as Staff argues, then a variance would be required to permit the conditional use; if the latter, then the conditional use could be permitted. The Hearing Examiner finds this a close question. Technical Staff argues that although “[t]here is no question that there are some legacy elements of the former commercial use on the property, . . . the building on the abutting lot is a detached house, and the property has a residential appearance when viewed from Northwest Drive.” Exhibit 42. Staff also points to the fact that part of the building is being used as a residence currently. In contrast are all the elements of commercial improvements cataloged by the Applicant in Exhibits 39(g) and 45, and summarized above by the Hearing Examiner.

On balance, the Hearing Examiner finds that the lot at 924 Northwest Drive (a/k/a 11012 New Hampshire Avenue) is commercially, not residentially improved. The Applicant correctly points out that the current use of the building is not the issue. The actual language in Zoning Ordinance §59.3.5.7.A.2.b. does not talk about the use in the abutting property, but about whether the abutting lot is “vacant or residentially improved.” If the building on that lot were a factory and a family were somehow living there as tenants, that would not convert the lot into one that is residentially improved. Of course, the current example is not that extreme, for the lot in question was once residentially improved; however, its current improvement is clearly commercial, given its paved parking lots, commercial striping, signage and internal medical clinic design. In an ambiguous situation like this, where the proper application of the statutory language is not easily discerned, the effort should be to give effect to the intent of the Council in

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admitted into evidence. Moreover, even if it were considered, it did not address the only setback issue raised by the hypothesized zoning merger – the 40-foot setback required from residentially improved lots under Zoning Ordinance §59.3.5.7.A.2.b.

specifying a 40-foot setback from residentially improved lots. *Montgomery County v. Robinson*, 435 Md. 62, 76-77, 76 A.3d 1159, 1168 (2013).

This provision was clearly intended to protect nearby residential properties from being adversely affected by a commercial medical clinic too close next door. The provision was not intended to prevent the owner of two adjoining lots from having a medical clinic on one of his commercially improved properties sitting next to his other commercially improved property. To rule otherwise in this case would be to rigidly interpret the language of the Code in ambiguous circumstances, while failing to recognize that allowing this conditional use will not defeat the intent of the provision in question.

On balance, the Hearing Examiner concludes that the setback provision of Zoning Ordinance §59.3.5.7.A.2.b. is satisfied in this case, subject to the following condition, included in Part IV of this Report and Decision:

The Applicant must maintain the adjacent lot he owns at 924 Northwest Drive (a/k/a 11012 New Hampshire Avenue) as commercially improved while the conditional use is in force.

***c. The site must front on and have direct access to a business district street or higher classification; however, access to a corner lot may be from an abutting street built to primary residential standards, if the Hearing Examiner finds the access to be appropriate and not detrimental to existing residential uses on the primary residential street.***

Conclusion: As noted by Technical Staff (Exhibit 23, p. 14), the subject site fronts on a major highway (New Hampshire Avenue), and this provision is thus satisfied.

***d. Office space suitable for the practice of the profession must be unavailable in either the nearest Commercial/Residential or Employment zone or the nearest medical clinic office building constructed.***

Conclusion: The Applicant has demonstrated compliance with this provision by supplying a letter from Fraser Forbes Real Estate Services (Exhibit 24(a)) indicating that the closest

Commercial/ Residential zone and medical clinic office building are both “fully leased” with no space available. These facilities are located at 11120 New Hampshire Avenue. The building at this address is managed by Zalco Commercial, and Technical Staff confirmed that the building has no vacancies “using the CoStar website.” Exhibit 23, p. 14.

*e. A maximum of 4 additional medical practitioners may be present at any one time, and only if the presence of the additional practitioners will not generate additional patient-related traffic. The additional practitioners are only allowed to assist a practitioner in a specific surgical or diagnostic procedure or perform administrative work related to the treatment of patients on-site the same day. A written record must be kept for inspection by County enforcement staff identifying the physicians on-site and their schedules of seeing patients and performing administrative work.*

Conclusion: This provision is inapplicable because no additional medical practitioners will be employed beyond the three already noted, and no more than two will be present at any one time, as specified by the Applicant (Exhibit 2, p. 4) and required by a condition to the grant of this conditional use.

#### **D. General Development Standards (Article 59.6)**

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. Under the amendments to Section 59.7.3.1.E.1.b. of the new Zoning Ordinance, effective December 21, 2015, the requirements of these sections need be satisfied only “to the extent the Hearing Examiner finds necessary to ensure compatibility.”<sup>13</sup> The applicable requirements, and whether the use meets these requirements, are discussed below. Technical Staff found that “. . . the following Divisions apply: Division 6.2 Parking, Queuing and Loading,

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<sup>13</sup> The 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), was amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

Division 6.4 General Landscaping and Outdoor Lighting, and Division 6.5 Screening.” Exhibit 23, p. 16. The Hearing Examiner would add “Division 6.7 Signs” to this list. The Hearing Examiner agrees with Staff that the proposed use and Zone do not require the review of Division 6.1 for Site Access, Division 6.3 Open Space and Recreation, or Division 6.6 Outdoor Storage.

### **1. Parking, Queuing and Loading**

Conclusion: Parking, queuing and loading standards are governed by Division 6.2 of the Zoning Ordinance. Technical Staff found that the Applicant’s plans satisfy a number of the parking, queuing and loading standards (Exhibit 23, p. 18):

The proposed parking spaces are all within ¼ mile of the entrance to the medical clinic (Section 6.2.5.B), and each space has access to a street or alley open to use by the public (Section 6.2.5.C). The proposed pavement striping satisfies the marking requirements (Section 6.2.5.D). The sizes of the proposed perpendicular and angular parking spaces satisfy the minimum dimensional requirements under Section 6.2.9.E:

Staff also notes that the proposed parking facility will satisfy Section 6.2.5.K.1. by reducing the number of parking spaces in front of the building and screening those located in the rear. It will thus maintain a residential character and a pedestrian friendly street. Exhibit 23, p. 18. Further, the plans will meet the requirements of Section 6.2.6. by providing a bicycle parking space.

Exhibit 23, p. 20. The Hearing Examiner agrees with Staff’s findings of compliance listed above.

Technical Staff also observed (Exhibit 23, p. 16), “Due to the existing configuration of the Site, the Application does not satisfy several of the prescribed parking standards under Division 6.2.” Staff lists the six items that the application does not satisfy under Division 6.2:

1. Number of required vehicle parking spaces (Section 6.2.4)
2. Drive aisle width (Section 6.2.5.G)
3. Parking setbacks (Section 6.2.5.K.2)
4. Parking lot landscaped area (Section 6.2.9.C.1.a)

5. Parking lot tree canopy (Section 6.2.9.C.2)
6. Parking lot perimeter planting (Section 6.2.9.C.3)

Staff recommended that in each of these cases, a waiver should be granted, pursuant to Zoning Ordinance §59.6.2.10, because doing so would improve safety and/or functionality without compromising compatibility. In each case, the Hearing Examiner agrees with Technical Staff, as discussed below, and grants the requested waivers.

Section 6.2.10 provides:

*The deciding body may waive any requirement of Division 6.2, except the required parking in a Parking Lot District under Section 6.2.3.H.1, if the alternative design satisfies Section 6.2.1. Any request for a waiver of the vehicle parking space requirement under Section 6.2.4.B requires application notice under Section 7.5.2.D.*

Technical Staff discussed each of the waiver situations in detail (Exhibit 23, pp. 17-21), and those discussions are summarized and analyzed below.

1. Number of required vehicle parking spaces (Section 6.2.4)

Under Zoning Ordinance §6.2.4.B., four parking spaces are required for each 1,000 square feet of gross floor area. The gross floor area of the existing building is 6,500-square feet, and therefore Staff calculated that the subject use required 26 parking spaces ( $4 \times 6.5 = 26$ ) to be fully compliant. The Applicant disagreed with Staff's calculation, asserting that only 4,500 square feet of the building would be devoted to the provision of medical services, and the balance of the space in the building will be used for a staff break-room, mechanical rooms, and storage. Thus, the Applicant argued, the proper calculation is  $4.5 \times 4$ , which would yield a parking space requirement of 18 spaces. Exhibit 24(d), pp. 2-3. The Applicant noted that a Permitting Services Specialist with the Department of Permitting Services (DPS) concurred with the Applicant's approach to the calculation (Exhibit 24(d)).

Conclusion: The Hearing Examiner agrees with Technical Staff, not the Applicant or DPS.

There is no basis in the Zoning Ordinance, to “carve up” the use by assuming which portions generate traffic. Section 6.2.3 of the Zoning Ordinance states,

The minimum number of vehicle and bicycle parking spaces required in all zones is the sum of the number of spaces required for each applicable land use in the tables in Section 6.2.4.B and Section 6.2.4.C, unless the total number is reduced under Section 6.2.3.I.

A “use” is defined in Section 1.4.2 as, “the purpose for which a property or the building on that property is designed, arranged, or intended, and for which it is or may be used, occupied, or maintained.” A staff break-room, mechanical rooms, and storage are all part of the use.

Thus, the “use” on which the parking requirements are based is not a portion of the proposed use, but the entirety of the building that is used for a medical clinic. Further, the “metric” used to calculate parking is 1,000 square feet of gross floor area. As such, the statute contemplates that even portions of the building not physically used for the clinic contribute to the parking requirement. The intent of the parking regulations, as stated in Section 6.2.1, is “to ensure that adequate parking is provided in a safe and efficient manner.” Excluding portions of a building from the calculation does not forward this goal.

On the other hand, the peculiar facts in this case (including past experience in this clinic and limitations on the number of practitioners on site at any given time) indicate that the number of parking spaces called for in the Zoning Ordinance will not be needed. Based on these facts, the Applicant requested and Technical Staff recommended that a parking space waiver be granted to allow just 18 parking spaces on this site. A notice of the request for a parking space waiver was issued on April 27, 2016 (Exhibit 25). Staff concluded (Exhibit 23, p. 17):

. . . a waiver for the required number of parking spaces is justified because the 18 proposed spaces are sufficient to ensure adequate parking for the proposed medical clinic. The medical clinic doctors and staff will use up to seven parking spaces daily. Assuming the clinic is closed an hour each day for a lunch break, the 50 patients that are allowed to visit the practice daily will likely arrive to the clinic at a rate of approximately seven patients per hour. The proposed 18 spaces would provide enough parking capacity for the seven staff and up to 11 additional vehicles at any one time. Given the limitation on the number of patients per day (50) and the number of staff on-site at one time (seven), staff finds the proposed number of parking spaces will be adequate to accommodate the use. . . .

Conclusion: The Hearing Examiner agrees with Technical Staff and hereby grants the waiver regarding the number of parking spaces required under Zoning Ordinance §6.2.4.B. The waiver permits the Applicant to provide only 18 vehicle parking spaces, including 1 handicapped and 2 compact spaces. One long-term bicycle parking space will be provided on the first floor of the building, satisfying the bicycle parking requirement.

## 2. Drive aisle width (Section 6.2.5.G)

The Applicant requests a parking waiver for relief from the drive aisle requirement of Section 6.2.5.G, which requires a minimum 18-foot one-way drive aisle width for 60-degree angled parking spaces. Technical Staff recommended the waiver, stating (Exhibit 23, p. 18):

Although the proposed drive aisle width of 14.5 feet does not satisfy the minimum aisle width under Section 6.2.5.G., it meets the standards specified in The American Planning Association's (APA) Planning and Urban Design Standards, 2006, for the type of spaces provided in a parking lot with relatively low turnover. The proposed drive aisle width will provide safe and efficient circulation around the parking areas of the Site based on the specifications provided in a commonly used urban design reference guide.

Conclusion: The Hearing Examiner agrees with Technical Staff and hereby grants the waiver allowing the proposed drive aisle width of 14.5 feet.

## 3. Parking setbacks (Section 6.2.5.K.2)

Section 6.2.5.K.2 provides:

## 2. *Setbacks*

- a. *The minimum rear parking setback equals the minimum rear setback required for the detached house.*
- b. *The minimum side parking setback equals 2 times the minimum side setback required for the detached house.*

Technical Staff recommends waivers regarding both of these parking setback requirements

(Exhibit 23, pp. 19-20):

The minimum rear setback required in the R-90 Zone is 25 feet. The rear parking area will be reconfigured according to the parking lot design guidelines specified in APA's Planning and Urban Design Standards, and Staff recommends approval of a parking waiver from the 25-foot parking setback requirement. The drive aisle will be setback a minimum of 6 feet and the parking spaces will be a minimum of 22 feet from the rear property line. The proposed configuration will improve the circulation and pedestrian access, and provide the safest and most efficient layout of the parking area given the dimensions of the Site. The parking configuration necessary to accommodate the 25-foot setback would require a less desirable tandem parking configuration that would not be as safe or efficient. The proposed fence and landscape bed will provide screening to the parking area from the adjacent property, mitigating the effects of the decreased setback. Therefore, Staff recommends a waiver for this requirement.

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The minimum side setback for a detached house in the R-90 Zone is 8 feet, so the minimum side parking setback is 16 feet. The parking area on the Site's northern side will be reconfigured according to APA's Planning and Design Standards, and Staff recommends approval of a parking waiver in lieu of the required 16-foot setback. The proposed drive aisle will be setback a minimum of 1 foot from the property line and the parking spaces will be setback approximately 16 feet from the property line. Given the placement of the existing building, Staff finds that the proposed layout is the safest and most efficient option to provide adequate parking. In addition, the property to the North is an unoccupied building owned by Pepco, and the reduction in the parking setback will have no adverse impact on anyone. The addition of the 6-foot wooden fence will also mitigate the decreased setback. Staff recommends a waiver for this requirement. The necessary 16-foot setback is met on the southern side of the Site where there are no parking spaces along the drive aisle.

Conclusion: The Hearing Examiner agrees with Technical Staff and hereby grants the requested waivers regarding parking setbacks for the reasons set forth by Staff and quoted above.

#### 4. Parking lot landscaped area (Section 6.2.9.C.1.a.)

The Applicant requests a waiver from the landscaping requirements for parking lots specified in Section 6.2.9.C.1.a., which calls for landscaped islands. As observed by Technical Staff (Exhibit 23, p. 20), “. . . there is not sufficient space on the Site to provide the required number of parking spaces in a safe and efficient manner, while also satisfying the requirement for the landscaped islands. Staff finds that a waiver for the landscaped islands is justified in order to provide safe and adequate parking and circulation.”

Conclusion: The Hearing Examiner agrees with Technical Staff and hereby grants the requested waivers of the landscaped island requirements for the reasons set forth by Staff and quoted above.

#### 5. Parking lot tree canopy (Section 6.2.9.C.2)

The Applicant requests a waiver from some of the landscaping requirements for parking lots specified in Section 6.2.9.C.2., which calls for “a minimum tree canopy of 25% coverage at 20 years of growth.” As observed by Technical Staff (Exhibit 23, p. 21),

The Applicant proposes to plant three canopy trees and three understory trees in the planting bed along the Site’s rear lot line. While the proposed trees will not completely satisfy the tree canopy coverage requirement, staff finds that the proposed planting design represents the best compromise between increasing the Site’s canopy coverage and improving the safety and efficiency of the parking areas. Staff recommends a waiver from strict compliance with this requirement.

Conclusion: The Hearing Examiner agrees with Technical Staff and hereby grants the requested waivers from strict compliance with the required tree canopy for the reasons set forth by Staff and quoted above.

#### 6. Parking lot perimeter planting (Section 6.2.9.C.3)

The Applicant requests a waiver from the perimeter planting requirements for parking lots specified in Section 6.2.9.C.3. As observed by Technical Staff (Exhibit 23, p. 22),

This standard applies to the perimeter of the parking areas in the front (east) and on the side (north) of the house. The property to the south has a paved drive aisle along the shared lot line, and a perimeter planting area is not required. . . .

[A]dding a 6-foot planting bed would require removing the drive aisle. A right-of-way abuts the front (eastern) parking area and a perimeter planting would require removing these parking spaces. Staff finds that a waiver for the perimeter planting requirements is appropriate because adhering to the standards would render the existing parking areas useless.

Conclusion: The Hearing Examiner agrees with Technical Staff and hereby grants the requested waivers regarding parking lot perimeter planting for the reasons set forth by Staff and quoted above.

Summary Conclusion Regarding Waivers of Division 6.2 Requirements:

Waivers of the following provisions of Division 6.2 are hereby granted pursuant to Zoning Ordinance §59.6.2.10:

- a. Number of required vehicle parking spaces (Section 6.2.4) – a minimum of 18 spaces is permitted, instead of the 26 called for in the Code;
- b. Drive aisle width (Section 6.2.5.G) – a minimum drive aisle width of 14.5 feet is permitted instead of the 18 foot width called for in the Code;
- c. Parking setbacks (Section 6.2.5.K.2) – the drive aisle will be setback a minimum of 6 feet and the parking spaces will be a minimum of 22 feet from the rear property line instead of the 25 foot setback called for in the Code; the side setback for the parking spaces will be a minimum of 16 feet and the drive aisle will be setback a minimum of 1 foot from the property line instead of the overall 16-foot side yard setback called for in the Code;
- d. Parking lot landscaped area (Section 6.2.9.C.1.a) – no landscaped islands will be required so that there will be sufficient room to provide is safe and adequate parking and circulation.
- e. Parking lot tree canopy (Section 6.2.9.C.2) – the plantings specified in Applicant’s landscape plan will be permitted instead of the requirement of 25% coverage at 20 years of growth, in order to improve the safety and efficiency of the parking areas; and
- f. Parking lot perimeter planting (Section 6.2.9.C.3) – the perimeter plantings and four-foot high fence specified in Applicant’s landscape plan will be permitted instead of the perimeter planting requirements of the Code, in order to improve the safety and efficiency of the parking areas.

Based on this record, the Hearing Examiner finds that the Applicant’s plans meet all the applicable parking and loading requirements specified in the Zoning Ordinance. There are no applicable queuing standards.

## 2. Site Landscaping and Screening

Division 6.4 of the Zoning Ordinance sets minimum standards for site landscaping, which are intended to “preserve property values, preserve and strengthen the character of communities, and improve water and air quality.” §59.6.4.1. Section 59.5.3.A.1. provides that “*Screening is required along a lot line shared with an abutting property that is vacant or improved with an agricultural or residential use.*”

As observed by Technical Staff (Exhibit 23, pp. 23-24):

In this Application, screening is required along the rear (western) lot line where the Site abuts a property, also in the R-90 Zone, improved with a residential use. Screening is not required for the properties to the north and south of the Site because they are both improved with non-residential uses.

Section 6.5.3.C.7 provides two screening options for a conditional use in a Residential Detached zone. Option A requires an 8-foot planting bed and a 4-foot wall or fence in addition to trees and shrubs. Option B requires trees and shrubs planted in a 12-foot planting bed.

The proposed screening shown in Applicant revised landscape plan (Exhibit 39(b)) will extend along the entire length of the lot line. However, in lieu of the options under Section 6.5.3.C.7, the Applicant proposes the alternative method of compliance, as allowed under Zoning Ordinance Section 6.8.1, in the form of a four-foot-high board-on-board fence and a planting design that will fit within the existing planting bed. Staff agreed that alternative compliance would be appropriate in this case (Exhibit 23, p. 24-25):

Given the location of the existing building and the configuration of the Site, strict adherence to the screening requirements would impede safe and efficient circulation around the Site’s parking areas, or cause such a significant reduction of parking spaces as to render the Site unusable for the proposed use. The proposed fence and planting will satisfy the intent of Division 6.5, “to ensure appropriate screening between different building types and uses.” The plantings will be provided without removing any paving or impacting the drive aisle. The [four]<sup>14</sup>-

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<sup>14</sup> Although Staff had originally called for a six-foot fence, it agreed to reducing the height to four feet because of the objection of the adjacent neighbor (Exhibit 43). Applicant’s land planner, William Landfair also agreed,

foot-high fence will provide sufficient mitigation to screen the views of the parking lot from the adjacent neighborhood to the west. The alternative method of compliance [under Section 6.8.1] is in the public interest to preserve safe and efficient circulation around the medical clinic's parking areas . . .

Conclusion: The Hearing Examiner accepts Staff's assessment, and finds that the proposed use meets the landscaping and screening standards required by Division 59-6.5 of the Zoning Ordinance, in accordance with the alternative compliance provisions of §59.6.8.1.

### 3. Outdoor Lighting

The outdoor lighting proposed for the conditional use was discussed in Part II.C.2. of this Report and Decision. As indicated there, permissible lighting levels for a conditional use are specified in Zoning Ordinance §59.6.4.4.E., which provides,

*Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.*

The proposed fixtures must also meet the design requirements and fixture height limits specified in Zoning Ordinance §59.6.4.4.B.

The Lighting and Photometric Plan (Exhibit 39(d)), reproduced on pages 17 and 18 of this Report and Decision, demonstrates that the lighting levels at the lot lines will not exceed 0.1 footcandles. Technical Staff's review of the lighting levels also found that they will not exceed statutory maximum levels at the lot lines. (Exhibit 23, p. 23).

Technical Staff also expressed concern that the lighting must be adequate for safety on the site and recommended a condition to ensure that the issue be addressed. Exhibit 23, p. 2. In

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testifying that reducing the height of the proposed fence would have no adverse effect on compatibility since it would still block any headlights on the site and will make "a friendlier view" for the neighbors. Tr. 52-53.

response, the Applicant introduced certification by Land Planner Joshua Sloan that the parking area will have adequate lighting to ensure safety during evening hours. Exhibit 24(h).

Conclusion: There is no evidence in this record to refute Applicant's photometric study and Technical Staff's findings. Therefore, the Hearing Examiner finds that the proposed lighting for the conditional use will meet the Zoning Ordinance standards and will not cause undue harm to neighboring properties due to illumination. The Hearing Examiner also finds that Applicant has satisfied Condition #8 proposed by Technical Staff (Exhibit 23, p. 2), and that the proposed lighting will provide sufficient illumination for safety on the site.

#### **4. Signage**

The signage proposed by the Applicant was discussed in Part II.C. 2. of this Report and Decision. As stated there, there are no exterior signs proposed for the use, but the Applicant has been displaying a black and white sign inside of a front window identifying the building as an obstetrics and gynecology clinic, and the sign is depicted in one of the photographs reproduced on page 8 of this Report and Decision. Although the sign is located indoors, it is visible outdoors through the window, and Zoning Ordinance §59.6.7.1. specifies that "Division 6.7 regulates the size, location, height, and construction of all signs placed for public view . . . [Emphasis added.]"

Conclusion: Since the existing sign is clearly "placed for public view," even though located inside of a window, it is governed by the Zoning Ordinance's regulations and must comply with the limits for the size of signs in a residential zone<sup>15</sup> unless the Applicant first obtains a sign variance from the Sign Review Board. When the Hearing Examiner raised this issue with the Applicant and Technical Staff, they both agreed that a sign variance must be obtained before a

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<sup>15</sup> Generally, the sign area for signs in residential zones is limited to two square feet, per Zoning Ordinance §59.6.7.8.

sign of the current size can be lawfully displayed in the front window. Exhibit 37. The following condition to that effect is imposed in Part IV of this Report and Decision.

The Applicant must obtain a permit from the Department of Permitting Services (DPS) for any proposed sign placed for public view, and must file a copy of any such sign permit with OZAH. The final design of the proposed sign must be in compliance with the Zoning Ordinance restrictions for signs displayed in a residential zone, or the Applicant must first obtain a sign variance from the Sign Review Board.

#### **IV. Conclusion and Decision**

As set forth above, the application meets all the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Dr. Carl Douglas Lord (CU 16-10) for a conditional use under Section 59.3.5.7.A.2. of the Zoning Ordinance to operate a Medical Clinic for up to Four Practitioners at 11016 New Hampshire Avenue, in Silver Spring Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Applicant shall be bound by the testimony of his witnesses and the representations of his counsel identified in this Report and Decision.
2. Waivers of the following provisions of Division 6.2 are hereby granted pursuant to Zoning Ordinance §59.6.2.10:
  - a. Number of required vehicle parking spaces (Section 6.2.4) – a minimum of 18 spaces is permitted, instead of the 26 called for in the Code;
  - b. Drive aisle width (Section 6.2.5.G) – a minimum drive aisle width of 14.5 feet is permitted instead of the 18 foot width called for in the Code;
  - c. Parking setbacks (Section 6.2.5.K.2) – the drive aisle will be setback a minimum of 6 feet and the parking spaces will be a minimum of 22 feet from the rear property line instead of the 25 foot setback called for in the Code; the side setback for the parking spaces will be a minimum of 16 feet and the drive aisle will be setback a minimum of 1 foot from the property line instead of the overall 16-foot side yard setback called for in the Code;
  - d. Parking lot landscaped area (Section 6.2.9.C.1.a) – no landscaped islands will be required so that there will be sufficient room to provide is safe and adequate parking and circulation.

- e. Parking lot tree canopy (Section 6.2.9.C.2) – the plantings specified in Applicant’s landscape plan will be permitted instead of the requirement of 25% coverage at 20 years of growth, in order to improve the safety and efficiency of the parking areas; and
- f. Parking lot perimeter planting (Section 6.2.9.C.3) – the perimeter plantings and four-foot high fence specified in Applicant’s landscape plan will be permitted instead of the perimeter planting requirements of the Code, in order to improve the safety and efficiency of the parking areas.
3. The medical clinic is limited to a maximum of three doctors on staff. A maximum of seven employees, including two doctors, may be on-site at any given time.
  4. The maximum number of patients allowed in the medical clinic per day is 50.
  5. The medical clinic’s hours of operation are limited to Monday-Friday, 9:00 a.m.- 5:00 p.m.
  6. The north and west sides of the Site must be enclosed with a four-foot-high board-on-board privacy fence and landscaping must be provided in accordance with the landscaping plan.
  7. Each compact parking space must be clearly marked.
  8. Physical improvements to the site are limited to those shown on the Detailed Site Plan (Exhibit 39(a)), the Landscape Plan (Exhibits 39(b) and (c)) and the Lighting and Photometric Plan (Exhibit 39(d)) submitted in this case.
  9. The Applicant must maintain the adjacent lot he owns at 924 Northwest Drive (a/k/a 11012 New Hampshire Avenue) as commercially improved while the conditional use is in force.
  10. The Applicant must obtain a permit from the Department of Permitting Services (DPS) for any proposed sign placed for public view, and must file a copy of any such sign permit with OZAH. The final design of the proposed sign must be in compliance with the Zoning Ordinance restrictions for signs displayed in a residential zone, or the Applicant must first obtain a sign variance from the Sign Review Board.
  11. The Applicant must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Issued this 14<sup>th</sup> day of June, 2016.



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Martin L. Grossman  
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record or aggrieved party may file a written request to present oral argument before the Board of Appeals, in writing, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. Any party of record or aggrieved party may, no later than 5 days after a request for oral argument is filed, file a written opposition or request to participate in oral argument.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

Montgomery County Board of Appeals  
100 Maryland Avenue, Room 217  
Rockville, MD 20850  
(240) 777-6600

NOTICE TO:

Phillip Hummel, Esquire  
Erin Girard, Esquire  
Dr. Carl Douglas Lord, Applicant  
Wilma Johnson  
Barbara Jay, Executive Director  
Montgomery County Board of Appeals  
Emily Tettelbaum, Senior Planner, Planning Department