

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS**  
**Stella B. Werner Council Office Building**  
**Rockville, Maryland 20850**  
**(240) 777-6660**

<b>IN THE MATTER OF:</b>	*	
<b>SHELTER DEVELOPMENT, LLC</b>	*	
<b>d/b/a BRIGHTVIEW GROSVENOR</b>	*	
Applicant	*	
Andrew Teeters	*	
Kevin Johnson	*	
Miguel Iraola	*	
Cynthia Shanaiya	*	
Zolna Russell	*	
Michael Lenhart	*	
Don Boucher	*	
	*	
For the Application	*	
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Attorneys for the Applicant	*	
* * * * *		
Jeff Klein	*	
Mariella Cacho	*	
Marissa Faraclas	*	
	*	
Opposing the Application	*	
* * * * *		
Before: Lynn A. Robeson, Hearing Examiner		

**HEARING EXAMINER’S REPORT AND DECISION**

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

On June 3, 2016, Shelter Development, LLC (hereinafter “Applicant” or “Shelter”) filed an application seeking a conditional use to establish a Residential Care Facility for over 16 persons under §59-3.3.2.E.2.c of the Zoning Ordinance.<sup>1</sup> The application proposes 98 assisted living units (104 beds), 29 of which would be dedicated to memory care. The subject site is zoned R-90 and consists of 2.67 acres (117,612 square feet), identified as Parcels P963 and P980 on Tax Map HP13 with an address of 5510 Grosvenor Lane, Bethesda, Maryland. The property is owned by Wild Acres, LLC, which has authorized the conditional use application. Exhibits 12(a) – 12(d).

By a notice dated August 26, 2016, the Office of Zoning and Administrative Hearings (OZAH) scheduled a public hearing to be held on September 30, 2016. Exhibit 33. The Applicant submitted amendments to the application between August 26 and September 2, 2016. Exhibits 34, 35 and 36. OZAH issued a Notice of the Motion to Amend on September 2, 2016, giving parties until September 12, 2016 to object to the motion (Exhibit 37).

Shortly after OZAH issued the Notice of Motion to Amend, several groups notified OZAH of their intent to appear in organized opposition to the application. These groups included the Fleming Park Community Association (FPCA), neighbors confronting the property across Fleming Avenue, and the Wildwood Manor Citizen’s Association (WMCA.) Exhibits 38-40. The Grosvenor Homeowners Association also indicated its opposition to the application in a September 15, 2016 letter addressed to Technical Staff and filed with OZAH on September 21, 2016 (Exhibit 54(a)). A number of opposition letters were appended to the Technical Staff report (Exhibit 43) as Attachment 6.

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<sup>1</sup> All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, as amended.

In a fax dated September 12, 2016 (Exhibit 41), the FPCA objected to the motion to amend on grounds that they would not have sufficient time to review the amended plans before the hearing on September 30, 2016. They “specifically object[ed] to the inclusion of . . . the Concept Site Plan [Exhibit 34(w)].” The objectors requested a continuance of the hearing to give them more time to study the amended plans. The Applicant strenuously objected to the continuance request, stating that the changes made to the plans were minor and were made to accommodate the concerns of the opposition and in response to issues raised by Technical Staff. Exhibit 44. The parties agreed to meet on September 22, 2016, in an effort to work out their differences. Exhibit 48. Because of the meeting, the Hearing Examiner agreed to delay a decision on the continuance until September 23, 2016. Exhibit 51. The parties were unable to resolve their differences, however, and those in opposition renewed their request for a continuance, which the Applicant opposed.

On September 23, 2016, the Hearing Examiner issued an Order that (1) granted the Applicant’s Motion to Amend the application, and (2) continued the public hearing until October 20, 2016. Exhibit 61. The Hearing Examiner found that the sudden hospitalization of one of the opposition’s chief representatives significantly impaired the community’s ability to prepare for a September hearing. Because the continuance was granted, the opposition’s objection to the amendment was mooted because they had sufficient time to review the changes. *Id.* OZAH issued a Notice of Rescheduled Hearing for October 20, 2016. Exhibit 62.

While these motions were pending (on September 1, 2016), Staff issued its report (Exhibit 43) recommending approval of the application subject to the following conditions:

1. No more than 104 residents may reside at the proposed facility.
2. The living units must not have full kitchens.
3. No more than 30 employee vehicular trips may occur during either of the weekday peak periods of 6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.
4. No more than 30 employees may work on-site at any one time.

5. The architecture of the building must be consistent with the architectural renderings submitted with the conditional use application.
6. Waste pick-up and truck deliveries (excluding mail and parcel deliveries) are prohibited between 9:00 p.m. and 9:00 a.m., and on weekends.
7. Parking spaces in the surface parking lot (excluding the ADA spaces) must be reserved for visitors, and wayfinding signage must be provided to direct overflow visitor parking to the garage. All employees must park in the garage.
8. The Applicant must obtain approval of a Preliminary Plan of Subdivision per Chapter 50 of the Montgomery County Code.
9. At the time of Preliminary Plan, the Applicant must address improvements to Fleming Avenue, as described in this staff report, subject to Montgomery County Department of Transportation approval.
10. The Applicant must provide two inverted-U bike racks (or equivalent approved by Staff that conform to American Pedestrian and Bicycle Professionals Guidelines) intended for employees to store four bicycles in the underground parking garage near the garage entrance in a well-lit area.
11. Prior to any land disturbing activities, the Applicant must receive approval of a Final Forest Conservation Plan by the Montgomery County Planning Board.

In a transmittal letter dated September 20, 2016, the Planning Board recommended approval as well, although it modified two of Staff's proposed conditions and added three more.

Exhibit 52. The Planning Board's revised and additional conditions are:

- 3) ~~No more~~ Fewer than 30 employee vehicular trips may occur during either of the weekday peak periods of 6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.
- 6) Waste pick-up and truck deliveries (excluding mail and parcel deliveries) are prohibited between ~~9~~ 7 p.m. and 9 a.m., and on weekends.
- 12) Smoking on the Fleming Avenue side of the building is prohibited.
- 13) Shuttle bus idling on the Property is prohibited.
- 14) The generator must be located below-grade.

*Id.*, p. 2. At the same time, the Planning Board also approved a Preliminary Forest Conservation Plan (PFCP) and a tree variance for the development as proposed. *Id.*, Exhibit 84(f).

Immediately prior to the public hearing, the Applicant submitted a letter outlining its agreement with the WMCA to conditions to be placed on the approval of the application. Exhibit

70. WMCA and Shelter's agreed upon conditions of approval are as follows:

1. Shelter Development will add broadleaf evergreens—i.e., hollies—just north of the northern parking spaces and northwest curve of the oval driveway between Grosvenor Lane and the Shelter Development/Brightview facility/building, largely as shown in Shelter Development's 10/27/2016 draft "Planting Plan." Shelter

Development will assure that these plantings continue along the entire length of the parking area and parking spaces, as well as along the curved part of the oval driveway. Sufficient larger hollies (e.g., Nellie Stevens hollies), smaller hollies (e.g. Blue Princess hollies), and some green screening/buffering along Grosvenor Lane – a Green Corridor – and for our homes that are directly across Grosvenor Lane. Shelter Development will continue to consult with WMCA, and WMCA will provide appropriate input, as details are worked out.

2. Shelter Development will assure that adequate, appropriate canopy and understory plants are planted at the northwest corner of the property (at the southeast corner of Grosvenor Lane and Fleming Avenue) to help assure adequate green screening/buffering along Grosvenor Lane and for our homes. We recommend including flowering trees such as white Natchez crape [sic] myrtle, as appropriate. Shelter Development will continue to consult with WMCA, and WMCA will provide appropriate input, as details are worked out.
3. Shelter Development will adequately maintain, manage, and monitor trees and shrubs added between Grosvenor Lane and the facility/building (that are outside the Category 1 Conservation Easement/Area, which is covered by other requirements) for a period of (at least) two years. This includes (but is not limited to) planting healthy plants, watering, fertilizing, controlling competing vegetation, and protecting plants from disease, pests, and mechanical injury during the initial planting and through the maintenance and management period as necessary. Shelter Development will monitor the plantings for the duration of the maintenance and management period and will replace any trees and shrubs that die within this period, as appropriate for the site and current conditions.
4. The proposed four-story “tower element” on the north façade of the structure/building facing Grosvenor Lane (shown in plans considered by the Montgomery County Planning Board on September 15, 2016 is removed/deleted/eliminated. No part of the structure/building facing Grosvenor Lane will exceed three stories (with pitched roof).
5. No part of the structure/building or pavement will be closer to Grosvenor Lane than shown in the plans considered by the Planning Board on September 15, 2016.
6. Shelter Development will work with WMCA to agree on size, design, and lighting for a Brightview Grosvenor sign on Grosvenor Lane that is appropriate for this residential area and fits well into the context: single-family homes across Grosvenor Lane (and Fleming Avenue), forest conservation easements/areas along the south side of Grosvenor Lane, and the historic Gilbert Grosvenor residential buildings and environment setting just to the east on Grosvenor Lane.

The public hearing proceeded as rescheduled on Friday, October 20, 2016. It was continued to Monday, October 24, 2016, due to a scheduling conflict with one of the Applicant’s

witnesses. 10/20/16 T. 242. At the hearing, the Applicant submitted further revisions to the conditional use plan and landscape plan. The revisions introduced new building setbacks along Fleming Avenue and additional floor area on the southeast corner of the building. It also bolstered the landscaping previously proposed. 10/20/16 T. 101-106, 119-130; Exhibits 72, 77. The Applicant called six witnesses, several of whom qualified as experts, in support of the application: Mr. Andrew Teeter, Vice President for Shelter Development, Mr. Miguel Iraola, an expert in land planning, Mr. Kevin Johnson, an expert in civil engineering, Cynthia Shonaiya, an expert in architecture, Zolna Russell, an expert in landscape architecture, and Donald Boucher, an expert real estate appraiser. Mr. Michael Lenhart, an expert in transportation planning and engineering, appeared at the October 24<sup>th</sup> public hearing. Mr. Jeff Klein appeared on behalf of the FPCA at the October 20, 2016, hearing. He testified that, “Shelter’s latest proposal largely works for the community, but there’s one exception.” *Id.* Mr. Klein believed that there should be a minimum 50-foot landscaped buffer between the Fleming Avenue right-of-way and the building. He and the Applicant proposed to accomplish this by eliminating on-street parking in the Fleming Avenue right-of-way and substituting an additional row of street trees (as described in Part II.C of this Report.) This proposal is not shown on the revised conditional use plan. Exhibit 72. The plan did show, however, two traffic chokers within the Fleming Avenue right-of-way. Two witnesses, Ms. Mariella Cacho and Ms. Marissa Faraclas, appeared at the October 24, 2016, public hearing to voice their concerns about the traffic impact of the proposed use.

The Hearing Examiner referred the revised conditional use and landscaping plans to Staff of the Planning Department for comment.<sup>2</sup> She held the record open until November 28, 2016, to allow time for the agencies to file their comments on the revised plans, for the Applicant to

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<sup>2</sup> Section 59-7.3.1.D.3.b requires the Hearing Examiner to refer plan revisions made after the Planning Board’s recommendation to Staff for review and to keep the record open to receive comments.

submit the Planning Board resolution approving the PFCP, and to receive proposed conditions of approval agreed to by the Fleming Avenue neighbors and the Applicant.

MCDOT submitted its comments on November 14, 2016. MCDOT did not comment on the possibility of the additional row of street trees because this option had not been added to the revised conditional use plan. MCDOT did note that the revised plan contained two mid-block chokers on Fleming Avenue—one for a crosswalk and the other for a speed bump. MCDOT had agreed to the crosswalk choker, but the speed hump choker had not been discussed. MCDOT stated (Exhibit 91):

As stated above, the mid-block choker for the crosswalk was agreed to by MCDOT at the meeting. The additional mid-block choker for a speed hump along Fleming Avenue was not discussed. In a phone conversation with the applicant, they thought that the speed hump would only be reinstalled across the vehicular travel lanes and not in the parking area. Therefore, drivers could go around the speed hump in the parking area to avoid slowing down. MCDOT Staff informed the applicant that the speed hump could be reinstalled without the mid-block choker. The speed hump would extend the entire width of the street, including the parking area. Vehicles would be permitted to park on the speed hump. The speed hump without a mid-block choker would allow for additional cars to park along Fleming Avenue. MCDOT believes either having a parking space or mid-block choker with the speed hump results in the same affect—to reduce vehicle speed.

MCDOT reiterated that it had not reviewed the possibility of removing parking spaces and using the area for landscaping, but would do so at the preliminary plan stage. It advised that landscaping in the choker is prohibited. *Id.* As a result of MCDOT's comments, the Applicant submitted another revised conditional use site plan showing only the mid-block choker agreed to by MCDOT. Exhibit 93.

The Applicant represented that the changes to the conditional use plan did not affect the Planning Board's approval of the PFCP. Staff stated that the modifications to the bio-retention facilities in the revised plan would accommodate the addition to the building in the southeast corner of the site. Staff had no further comment on the revised conditional use plan. Exhibit 89(a).

The Applicant provided the joint conditions agreed to with the FPCA. These conditions are (Exhibit 84(d)):

1. Ensure continuous maintenance of all landscaping, which shall include the timely replacement of any required plantings that fail to survive, for as long as the Conditional Use is in place.
2. Work in good faith with the Fleming Avenue owners to obtain Preliminary Plan approval that reflects the following improvements to Fleming Avenue as indicated on the revised Conditional Use Plan: 1) installation of a midblock choker along the eastern curb line in the location of the existing Fleming Avenue cross walk [sic] located adjacent to the southwest corner of the Property; and 2) reinstallation of the speed hump previously located on Fleming Avenue along the Property frontage across the entire roadbed, which shall include a midblock choker along the eastern curb line.
3. Include a provision in all service contracts or arrangements, including but not limited to trash and delivery services, that access to the property must be via Grosvenor Lane to either Old Georgetown Road or Rockville Pike, and that the contracted services shall not use secondary residential streets in the surrounding neighborhoods (that is, the area bounded by Interstate 270, Interstate 495, and Old Georgetown Road).
4. To the extent practicable, install the landscaping along the western frontage as early in the development process as possible and retain the existing landscaping along the western frontage for as long as possible.
5. Preclude any construction activity associated with the project from starting prior to 7:00 a.m., including off-site queuing and the arrival of trucks, equipment or workers. In addition, avoid, to the extent reasonably practicable, the commencement of any construction activity that generates high levels of noise or vibration until 8:00 a.m.

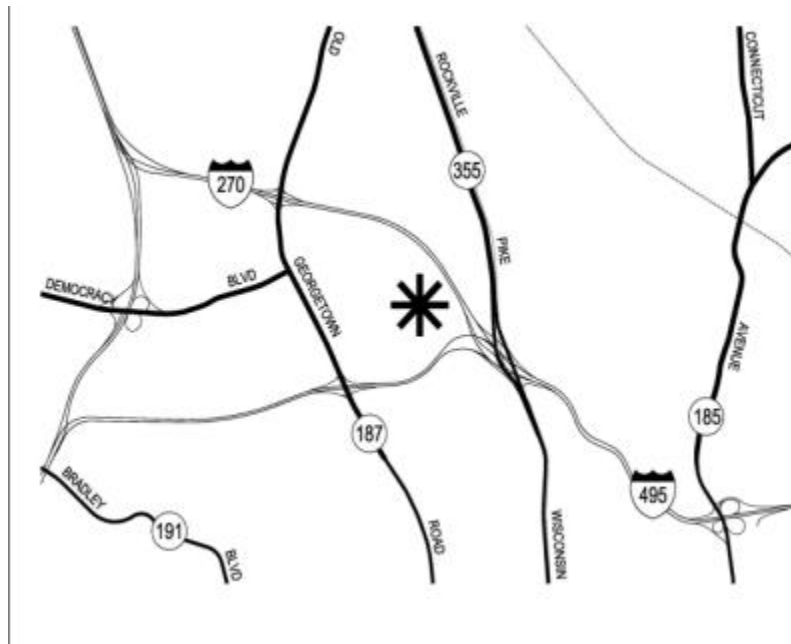
On November 28, 2016, the WMCA submitted its final comments on the application. WMCA advised that the revised site and landscape plans “meet the conditions set forth in WMCA’s October 19 letter, with the understanding that these conditions will be fully implemented/carried out, and subject to our future agreement that they have been fully implemented/carried out.” Exhibit 95. WMCA agreed with the FPCA that there should be a condition requiring extended landscape maintenance. WMCA felt, however, that the language proposed in Condition #3 of their October 19<sup>th</sup> letter better captured the maintenance requirement because it is based on language from the Planning Department’s website that “clarifies what

maintaining, managing, and monitoring involve.” *Id.* The remainder of the conditions listed in the November 28, 2016, letter mirrored those in WMCA’s October 19, 2016, letter, with some minor revisions. The record closed on November 28, 2016. Exhibits 84, 89, 91.

## II. FACTUAL BACKGROUND

### A. The Subject Property

The site is located generally in the southeast corner of the triangle formed by the east and west spurs of I-270 and I-495, the Capital Beltway. A vicinity map from the Staff Report (Exhibit 43, p. 1, below) shows the property’s general location:



The property consists of two parcels that total 2.75 acres in the R-90 Zone. It is improved with a two-story single-family home with access from Grosvenor Lane. Staff advises that the property’s grade slopes approximately 15 feet down from the north to the southeast corner of the site. A forest stand of 0.98 acres runs along the north and west sides of the property. Additional forest is located off-site immediately to the east of property. An aerial photograph included in the Staff Report (Exhibit 43) is below:



Mr. Kevin Johnson, the Applicant's expert in civil engineering, described the topography of the site in more detail. The northwestern corner of the site, at the intersection of Fleming Avenue and Grosvenor Lane, is at elevation 320. Fleming Avenue rises to an elevation of 325 at approximately the midpoint of the western property line. The property slopes from the higher elevations along Fleming Avenue down to an elevation of 304 at the site's southeastern corner. The center of the property is at an elevation of 313, 7 feet below the intersection of Fleming Avenue and Grosvenor Lane and 12 feet below the high point of Fleming Avenue. 10/20/16 T. 51-53.

### **B. 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 I-495 and Kingswood Road to the south, I-270 to the east, Cheshire Drive to the north, and Hurst

Street and Hatherleigh Drive to the west, as shown on an aerial photograph from the Staff Report (Exhibit 43, below):



All properties within the defined neighborhood are zoned either R-60 or R-90. Staff describes the neighborhood as follows (*Id.*, pp. 6-7):

The Neighborhood is predominately residential, consisting of townhouses and one or two-story detached homes. It also contains various institutional, civic, and commercial uses, which are located in the northwest and southeast quadrants of the Neighborhood. The northwest quadrant of the Neighborhood includes the Wildwood Manor Swimming Pool (approved by special exception S-125); the Bethesda Health and Rehabilitation Center (approved by special exception BA-

1987); and the Grosvenor Center, a Montgomery County Public Schools (MCPS) elementary level holding school.

The southeast quadrant of the Neighborhood includes Fleming Local Park and approximately 11.3 acres of Legacy Open Space. The site that directly abuts the Property to the south and east is owned by EYA, including the Wild Acres/Grosvenor Estate, a historic site designated in the Master Plan for Historic Preservation (#30/15). Wild Acres contains the 8,000-square-foot, three-story Grosvenor mansion and a caretaker's house. The Grosvenor mansion houses the headquarters of the Society of American Foresters, a use approved by Special Exception S-257.

The balance of the EYA site is under development with a residential subdivision known as Grosvenor Heights. It will consist of 142 townhomes and 10 detached houses. EYA is constructing 123 of the townhouses, Michael Harris Homes is constructing 19 townhomes, and Sandy Spring Builders is constructing 10 detached dwellings. The detached houses will front on Fleming Avenue, immediately south of the Property. Four of the townhouses and one of the detached houses will directly abut the Property. A modern, two-story office building, approved as Special Exception S-257 in the 1980s, is in the middle of the EYA property and will remain on the site.

The Neighborhood has two additional special exceptions: a Verizon telephone company dial center (CBA-2683) that fronts on Grosvenor Lane; and an accessory apartment on Greenlawn Drive (as indicated by The Department of Housing and Community Affairs accessory apartment map).

The Applicant's expert land planner, Mr. Iraola, characterized the neighborhood as "eclectic mix of single-family detached homes and non-residential uses." 10/20/16 T. 73. According to him, the area has been primarily been devoted to single-family detached residential uses that are "in a constant state of change." *Id.* He explained that there are residential plats dating from each decade, and approximately 22% of the housing stock have been torn down and reconstructed. Despite the change, Mr. Iraola opined that the area maintains its residential character. *Id.*

### **C. Proposed Use**

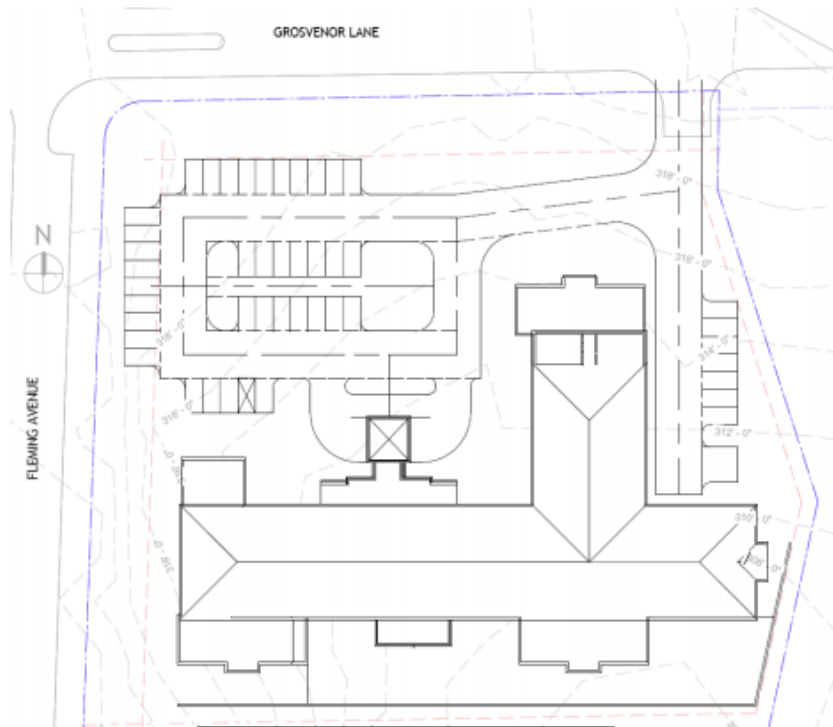
The Applicant seeks a conditional use for a Residential Care Facility consisting of 98 assisted living units with 104 beds. Twenty-nine of the units will be dedicated to specialized memory care. It will have 85,000 square feet of floor area and a total of 51 parking spaces. Thirty-seven of the parking spaces will be located in an underground garage; 14 of the spaces will be located along a surface drive aisle in front of the building.

#### **1. Conditional Use Site Plan**

This conditional use site plan has gone through several iterations, responding to concerns raised by Staff and the surrounding community. The concept the Applicant *originally* submitted is shown on the following page (Exhibit 43, p. 8). Before the Planning Board hearing, the Applicant made additional revisions to the conditional use plan (also shown on the following page), described in the Staff Report (Exhibit 43, p.7):

The Applicant shared initial concept plans with neighboring residents and Planning staff in the fall of 2015. The original plan had a large surface parking lot in front of the building, and parking spaces closer to the western (Fleming Avenue) property line. After feedback from Planning staff and neighbors, the Applicant revised the plans and put most of the parking spaces below grade. Subsequent to the submittal of the Application, Staff worked with the Applicant to add a lead-in sidewalk from Grosvenor Lane to the proposed facility, increase the amount of evergreen screening along the east and west lot lines, and to add a step-down to the south side of the building façade facing Fleming Avenue.

At the public hearing before the Hearing Examiner, the Applicant presented additional changes to the building and landscaping. Exhibit 77, 93. The current version of conditional use plan is reproduced on page 18. A redlined version of the revised plan, submitted by the Applicant, shows the changes to the building made after the Planning Board's approval (Exhibit 84(b), shown on page 16.)



**Conditional Use Site Plan  
Originally Submitted  
Exhibit 43**



**Conditional Use Site Plan Presented  
to Planning Board  
Exhibit 43**



These revisions increased the setback along the southern half of the Fleming Avenue façade from 38 to 48 feet and added floor area to the southeastern corner of the building. Ms. Cynthia Shonaiya, an expert in architecture, described the current conditional use plan in detail. In addition to the increased setback along Fleming Avenue, the third floor remains “stepped back” an additional 10 feet along the northern half of the western facade. As a result, the entire third floor is setback 48-feet from the Fleming Avenue right-of-way. 10/20/16 T. 101-106. While additional floor area has been added at the southwest corner of the facility, the overall square footage of the building has not changed. A version of the Applicant’s revised landscape plan shows the building revisions in context with the landscaping, with the changes to the building highlighted (Exhibit 88(a), shown on the following page.)



Along the northern boundary (Grosvenor Lane), the Applicant will preserve approximately .33 acres of existing forest in a Category I forest conservation easement between the building (which is setback 134 feet from the right-of-way) and Grosvenor Lane. The health of the forest will be monitored for two years and then at the conclusion, they will work with Staff to do any supplemental planting they think is advisable. T. 126

Storm Drain Public  
Utility Easement

On-Site Forest Conservation Area  
(along Grosvenor Lane)

Surface Parking

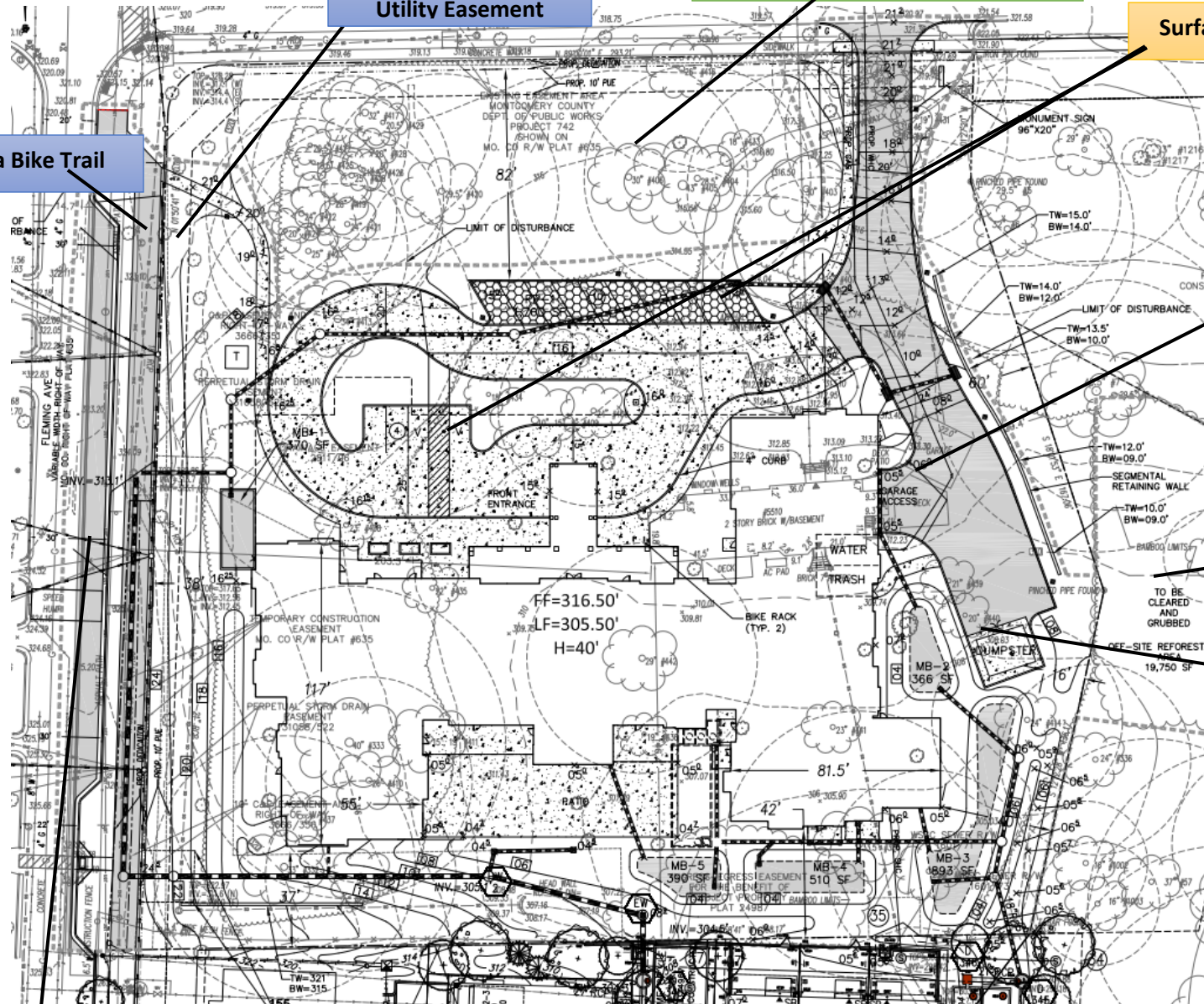
Bethesda Bike Trail

Garage Entrance

Off-site Forest  
Conservation Area

Loading/Trash

On-Street Parking in  
Fleming Avenue  
Right-of-way



Landscaping around the looped driveway has been enhanced. Originally, the Applicant proposed a green hedge to screen the circular drive. Evergreens of a variety of sizes have been added, along with flowering trees. She opined that the landscaping is reminiscent of the edge of a forest. T. 126-127.

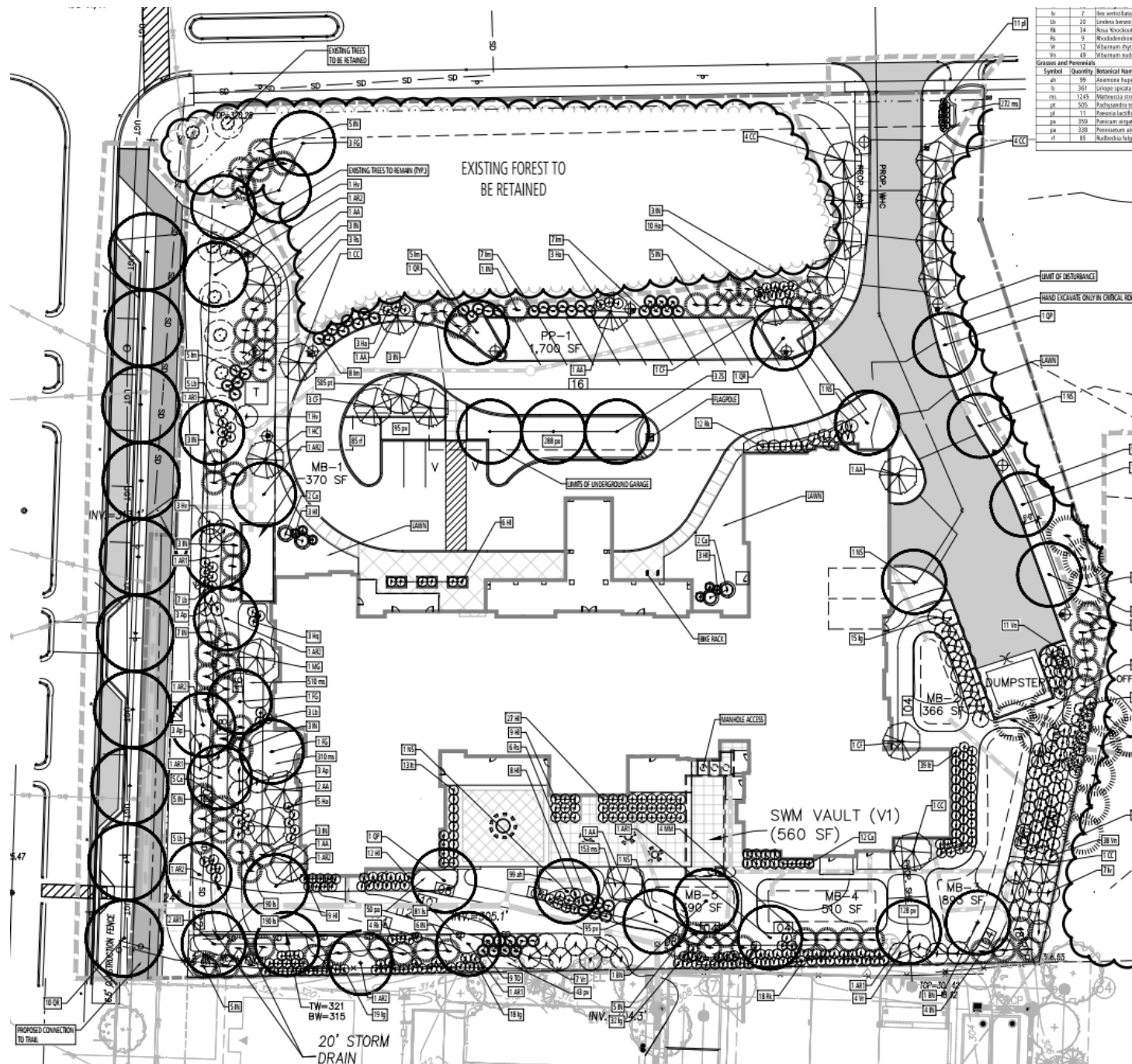
Adjacent to the property's eastern boundary is an existing Category I conservation easement located on the Grosvenor mansion property adjacent to this site. The Applicant proposes to remove invasive species from that conservation easement and supplement it with additional forest plantings. Exhibit 43, p. 17. Along the southern property line, Shelter has worked with builders of the Grosvenor Heights development to add plantings that exceed the screen buffer required by the Zoning Ordinance.

The most contentious screening issues arise along the site's boundary adjoining Fleming Avenue. Ms. Russell described the screening proposed along this boundary in detail. The entire length of the Fleming Avenue side of the property will have a row of street trees planted within the right-of-way. The street trees will be oaks and will grow to be between 30 and 50 feet in height at maturity (in approximately 20 years). When installed, the oaks will be 2- to 3-inch calipers and 10-12 feet high. The bike trail and a public storm drain easement are located just to the east of the street trees. No plantings are permitted within the storm drain easement. Between the bike trail/public utility easement and the building, the Applicant proposes to plant clusters of hollies along the southern half of the property's western edge. These will be planted at 8 feet high and will block the view of the lower floor from anyone standing on the bike trail. At maturity, the hollies will grow to 12- to 14-feet high and will be 8-feet wide. Ms. Russell opined that the landscaping would "cover[ing] views" from anyone standing on the bike trail. 10/20/16 T. 220-

222. The hollies are not contiguous because, she opined, a solid wall of evergreens becomes “very claustrophobic.” 10/20/16 T. 222. The proposed plantings create variety and diversify the habitat.

The northern half of the western property frontage, where the looped driveway is located, will have a variety of trees that will range between 10 and 14 feet in height with 12-foot canopies. All of the tree species have not been identified, but they will be deciduous, flowering trees that are relatively fast-growing. These will add flowering interest in the spring and foliage color in the fall. Mid-level shrubs that grow from 4 to 6 feet in height will be used to screen headlights from the western property line. The enhanced landscaping, combined with the site’s grade, will significantly screen activities in the driveway and the first floor of the building, in her opinion. 10/20/16 T. 222-224. Ms. Russell opined that, while the landscaping does not block every inch of the building, it will be very well screened. 10/20/16 T. 226.

The Applicant was able to add the flowering trees along the western property line partly because of the increase setback. These trees will screen approximately the first one and one-half floors. The Applicant added additional shade trees that will eventually screen the entire building, even at the lower levels. *Id.* at 227. Ms. Russell pointed out that houses along the northern half of Fleming Avenue do not confront the actual building. Their views of the driveway will be screened by the trees and shrubs already described. The plantings proposed are all relatively fast-growing species. The different varieties of plants will mitigate a view of all levels of the building. 11/20/16 T. 119-130. A copy of the revised landscape plan (Exhibit 88(c)) is reproduced on the following pages.

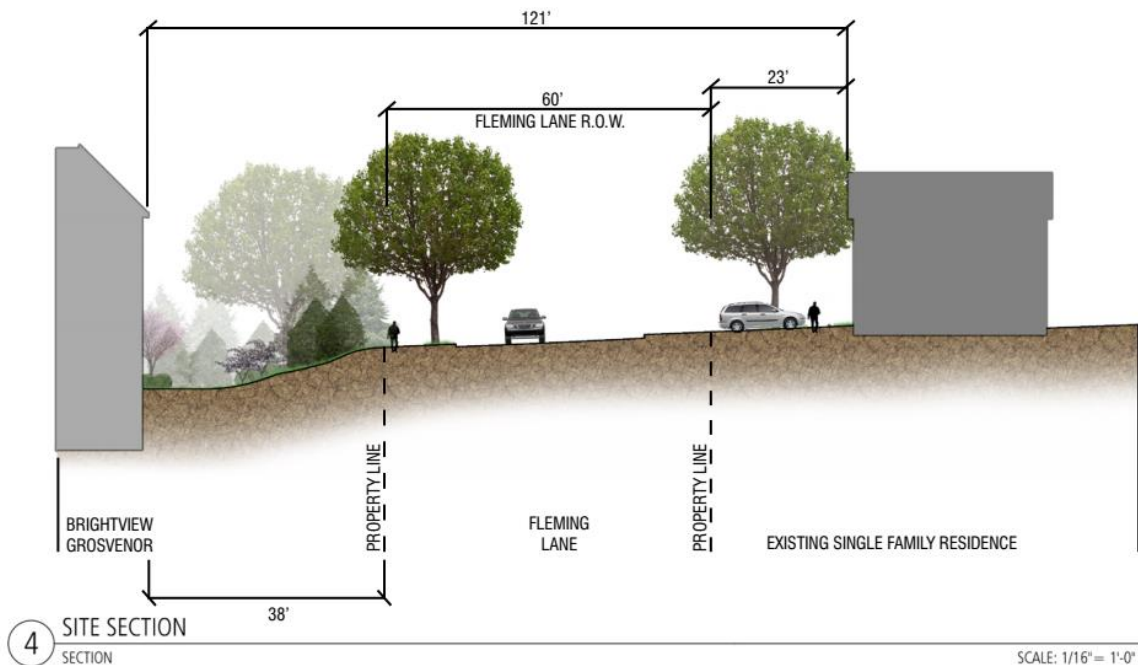


Major Trees								
Symbol	Quantity	Botanical Name	Common Name	Size	Mitigation For Variance Trees	Total Afforestation Credit	Root	Notes
AR1	8	Acer rubrum	Red Maple	2.5" Cal.	18.0"	10,806 SF	B&B	
AR2	7	Acer rubrum	Red Maple	3.0" Cal.		B&B		
BN	2	Betula nigra	River Birch	6' ht.		402 SF	B&B or cont.	Multistem - 3 stems
FG	5	Fagus grandiflora	Beech	1" cal.			B & B or cont.	
NS	6	Nyssa sylvatica	Black Gum	2.0" Cal.			B&B	
QR	12	Quercus rubra	Red Oak	3.0" Cal.			B&B	
QP	3	Quercus palustris	Pin Oak	2.5" Cal.			B&B	
ZS	3	Zelkova serrata 'Green Vase'	Green Vase Zelkova	2.5" Cal.			B&B	
Minor Trees								
Symbol	Quantity	Botanical Name	Common Name	Size			Root	Notes
AA	8	Amelanchier arborea	Downy Serviceberry	8' Ht.			B&B	Multistem
CC	11	Cercis canadensis 'Forest Pansy'	Forest Pansy Eastern Redbud	8' Ht.			B&B	
CF	5	Cornus florida	Flowering Dogwood	8' Ht.			B&B	
HC	1	Halesia carolina	Carolina Silverbell	8' Ht.			B&B	
Evergreen Trees								
Symbol	Quantity	Botanical Name	Common Name	Size			Root	Notes
CD	6	Cedrus deodara	Deodara Cedar	8' Ht.			B&B	
IN	70	Ilex x 'Nellie R. Stevens'	Nellie R. Stevens Holly	8' Ht.			B&B	1 male/5 female
MG	1	Magnolia grandiflora	Southern Magnolia	6' ht.				
MM	4	Magnolia virginiana 'Moonglow'	Moonglow Magnolia	8' Ht.			B&B	
PS	6	Pinus strobus	Eastern White Pine	6' Ht.			B&B	
TO	9	Thuja occidentalis 'Green Giant'	Green Giant Arborvitae	6' Ht.			B&B	
Deciduous & Coniferous Shrubs								
Symbol	Quantity	Botanical Name	Common Name	Size			Root	Notes
Ap	6	Aesculus parviflora	Bottlebrush Buckeye	36" ht .			#5 CG	
Ca	21	Callicarpa americana	American Beautyberry	24" Ht.			3/5' OC	
Hv	5	Hammamelis virginiana	Witch Hazel	36" Ht.			B&B	
Ha	21	Hydrangea arborescens "Annabelle:	Smooth Hydrangea	24" ht.			#3 CG	
HI	77	Hydrangea 'Little Lime'	Little Lime Hydrangea	24" Ht.			#5 CG	
Hq	3	Hydrangea quercifolia	Oak-leaf Hydrangea	36" Ht.			#5 CG	
Iq	84	Ilex glabra "Nordic"	Inkberry	36" Ht.			B&B	1 male/5 female
Im	44	Ilex x meserveae 'Blue Princess/Blue Prince '	Blue Princess Holly	36" Ht.			B&B	1 male/5 female
It	52	Itea virginica "Merlot"	Virginia Sweetspire	24" Ht.			#3 CG	
Iv	7	Ilex verticillata "Winter Red"	Winterberry	24" Ht.			B&B	
Lb	20	Lindera benzoin	Spicebush	36" ht.			#3 CG	
Rk	34	Rosa 'Knockout'	Knockout Rose	24" Ht.			#5 CG	
Rs	9	Rhododendron "Scintillation"	Scintillation Rhododendron	36" ht.				
Vr	12	Viburnum rhytidophylloides 'Allegany'	Leatherleaf Viburnum	36" Ht.			B&B	
Vn	49	Viburnum nudum	Possumhaw Viburnum	36" Ht.			B&B	
Grasses and Perennials								
Symbol	Quantity	Botanical Name	Common Name	Size			Note	Notes
ah	99	Anemone hupehensis	Japanese anemone	1 gal			18" OC	
ls	361	Liriope spicata	Lily Turfgrass	1 Qt.			12" O.C.	
ms	1245	Matteuccia struthiopteris	Ostrich Fern	1 gal			12" O.C.	
pt	505	Pachysandra terminalis	Japanese Spurge	2.5" Pots			12" O.C.	
pl	11	Paeonia lactiflora 'Edulis Superba'	Peony	1 gal.			12" O.C.	
pv	359	Panicum virgatum	Switchgrass	#1 Cont.			18" OC	
pa	338	Pennisetum alopecuroides 'Little Bunny'	Little Bunny Fountain Grass	#1 Cont.			24" OC	
rf	85	Rudbeckia fulgida 'Goldstrum'	Black Eyed Susan	#1 Cont.			24" OC	

The micro-bioretenion facilities will be fully planted per the MD stormwater regulations. Species selection and location are subject to review by Montgomery County.

<b>SCREENING REQUIREMENTS (applicable only to southern property line)</b>				
<b>Screening #7. Conditional Uses in the Residential Detached Zone</b>				
<b>REQUIREMENTS</b>	<b>REQ'D PER 100'</b>	<b>REQUIRED</b>	<b>PROVIDED</b>	
Depth	12'	358 LF		
Canopy Trees (min per 100')	2	7.1	7	
Understory or Evergreen Trees	4	14.3	23	
Large Shrubs	8	28.6	21	
Medium Shrubs	12	43.0	95	
Small Shrubs	0	0.0		
Wall, Fence or Berm	4' ht	N/A	N/A	

Ms. Russell referred to a site section of Fleming Avenue, depicting a prior version of the conditional use plan (Exhibit 34(l)), to give some idea of how the landscaping and topography will screen the building from Fleming Avenue at maturity. This exhibit, however, does *not* include the revised increased building setbacks and additional landscaping shown on the plan submitted to the Hearing Examiner:



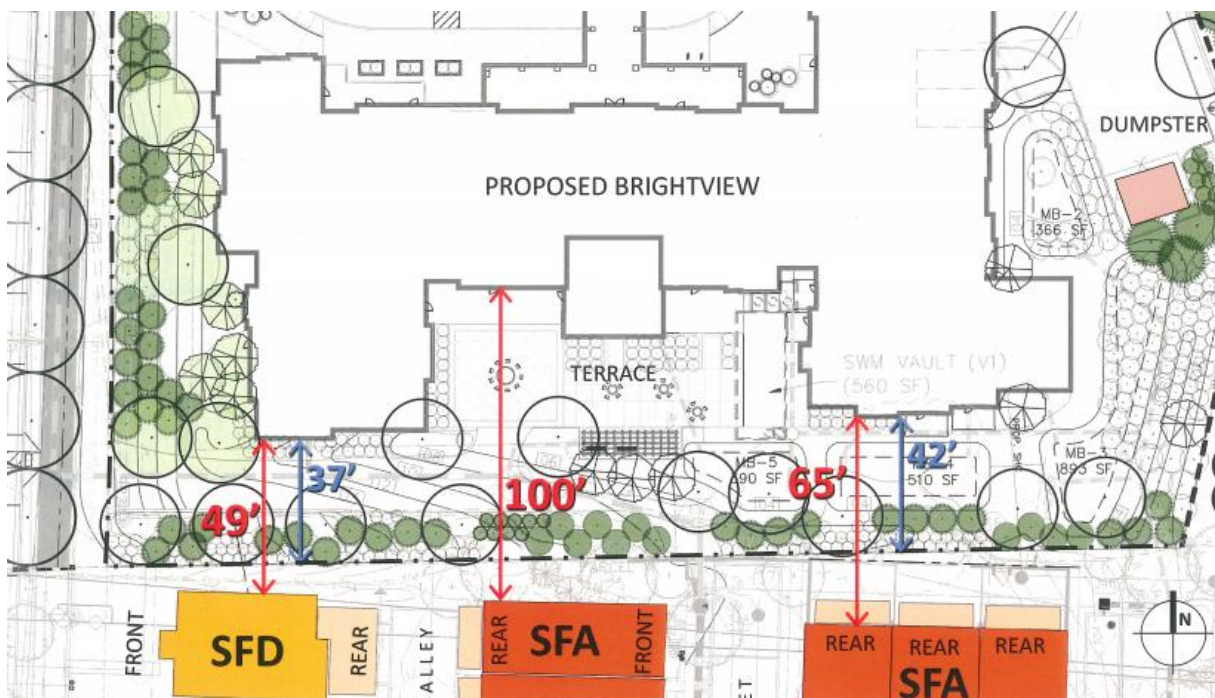
As shown in the section above, Mr. Johnson testified that the sloping topography will reduce the perceived height of the building and screen the activity in the driveway from Fleming Avenue. The elevation of the mid-point of the site, where the building is located, is approximately 7 feet lower than the site's elevation along Fleming Avenue. In his opinion, the perceived height of the building from the homes along Fleming Avenue will be only 28 feet tall, even though the building is actually 40 feet tall. 10/20/16 T. 54.

Ms. Russell also gave some examples of the screening within the neighborhood using plants comparable to those proposed in the application. She submitted photographs of landscaped buffers in the neighborhood to demonstrate that significant screening can be provided year-round by hollies, ground cover and decorative grasses (Exhibit 79, shown below.) She estimated the widths of the landscaped edges shown in the photographs below are approximately 20 feet, much less than the width of the screening proposed by the Applicant. 10/20/16 T. 232.



**Photos of Bethesda Landscapes  
Exhibit 79**

Mr. Iraola testified that views of the rear of the building will be limited by the landscaping, grade, and the Grosvenor Heights homes immediately to the south of the property. He opined that hollies located along the southwestern corner of the building would obscure views of the rear of the building from the bike trail. Any views of the rear of the building would be even more obscured from the confronting homes along Fleming Avenue. 10/20/16, T. 111-112. An exhibit prepared by the Applicant illustrates the landscaping along the southern property line (Exhibit 83).



**Landscaping Along Southern  
Property Line (Ex. 83)**

The photometric study demonstrates that illumination from exterior lighting will not exceed 0.1 footcandles at the southern property line or 0.5 footcandles at any property line. Exhibit 8. Ms. Russell testified that all lighting will use full cut-off fixtures, so there will be no light crossing the parking lot. 10/20/16 T. 130-131.

The Applicant proposes a freestanding 96" x 20" monument sign at the Grosvenor Lane driveway entrance. A conceptual rendering of the proposed monument sign is included in the Staff Report (Exhibit 43), shown below:



### 3. Operations

Mr. Andrew Teeters, Vice President of Shelter Development, testified regarding the proposed operations of the facility. Residents are typically in their 80's and have lived three to five miles from the facility. T. 19. They need help with some activities of daily living. The facility provides three meals a day, along with housekeeping, linen services, and transportation. T. 19-20. Caregivers are available to assist with bathing, dressing, grooming, and toileting. T. 20.

Dining is provided in common dining areas that are centrally located and offer three meals per day. They have a breakfast café and pub, where there is a daily happy hour. Other services and activities include a fitness center, wellness programs, a computer center and activity rooms. Brightview strives to give a sense of socialization and interaction with others so that residents are

not isolated. Units do not have full kitchens, but will have microwaves, a sink and a small refrigerator. T. 20.

Employees arrive in three shifts. The earliest shift runs from 7:00 a.m. to 3:00 p.m. and will have 25 employees. The second shift is from 3:00 p.m. to 11:00 p.m., with 15 employees. The night shift goes from 11:00 p.m. to 7:00 a.m. and will have 5 employees. Approximately 5 managerial employees will arrive at 9:00 a.m. and leave at 5:00 p.m. 11/20/16 T. 32. Employees who service the amenities, such as a beauty salon, are included in the shift numbers. 11/20/16 T. 35-36.

Mr. Teeters testified that there will be approximately 3-4 food deliveries a week, 1-2 linen deliveries per week, 2 trash pick-ups, and typical FedEx and UPS deliveries. Brightview will have one 15-person passenger van that will make 1-2 excursions per day. These are typically between 10:00 a.m. and 4:00 p.m. 11/20/16 T. 37-37. He agreed to a condition requiring Brightview to implement a policy through its employee manual prohibiting the shuttle bus from idling while stopped at the facility. 10/24/16 T. 111.

#### **D. Environmental Issues**

There are no major environmental issues raised in this case. Staff advises that (Exhibit 43, p. 20):

The site contains no streams or their buffers, wetlands or their buffers, steep slopes associated with a stream buffer, or known habitats of rare, threatened or endangered species...The property drains to the Rock Creek watershed, which is not in a Special Protection Area or Primary Management Area. The property adjacent to the east includes a historic resource identified as the Wild Acres/Grosvenor Estate, Resource #30/15. A Preliminary Forest Conservation Plan (PFCP) submitted as part of this application is in conformance with the *Environmental Guidelines*.

## **1. Forest Conservation**

The Applicant's Preliminary Forest Conservation Plan (PFCP) was approved by the Planning Board on September 19, 2016. Exhibit 84(f). It establishes a .33-acre Category I Forest Conservation Easement along the site's northern frontage on Grosvenor Lane. It also mandates improvements to the existing Category I easement on the Grosvenor mansion property adjacent to the east. These improvements include removal of invasive species (i.e., bamboo) and supplemental planting. 10/20/16 T. 123-124; Exhibit 84(f). The Applicant states that revisions to the conditional use plan submitted at OZAH's public hearing do not conflict with the approved PFCP. Forest conservation was not a significant source of dispute in this case. Pursuant to the Planning Board's approval, the Applicant must obtain approval of a Final Forest Conservation Plan prior to any land-disturbing activities. Exhibits 52, 84(f).

## **2. Stormwater Management**

Mr. Johnson testified that the bulk of the stormwater management on the site would be treated in bio-retention facilities located in the southeastern corner of the property. Staff did not address stormwater management in its report because the Planning Board will determine the adequacy of these facilities at preliminary plan approval. Exhibit 43, p. 31. Staff did indicate that a preliminary review suggested that stormwater management would be adequate for the facility as proposed. *Id.*

## **E. Community Response**

The Applicant and several community organizations have worked closely with each other on this application. Initially, three homeowners associations opposed the application: WMCA, Grosvenor Homeowners Association, and FCPA. Another informal group of neighbors whose

homes confront the property along Fleming Avenue, and several individuals also opposed the application.

After expressing their initial opposition, the Applicant worked with WMCA, FPCA and the neighbors across Fleming Avenue to address their concerns. At the public hearing, Mr. Jeff Klein, on behalf of FPCA, testified, “Shelter’s latest proposal largely works for the community, but there’s one exception.” 10/20/16 T. 184. Mr. Klein explained that FPCA believes there is a need for a minimum 50-foot landscaped buffer between the Fleming Avenue right-of-way and the proposed building. The details of FPCA’s position and their proposed solution is included in Part III.A.4 of this Report. The WMCA also indicated that the revised conditional use site plan and landscaping plan met their concerns, with the conditions agreed to with the Applicant, and provided the conditions were carried out. Exhibit 94.

Concerns originally by the opposition included the safety of area roadways caused by traffic from the proposed development in combination with the Grosvenor Heights development under construction. Several asserted that commuters use the cross-streets as a “cut-through” to the Metro Station and Old Georgetown Road to avoid some of the congestion on Old Georgetown Road. Exhibits 38-40, 43, Attachment 6, 54; 10/24/16 T. 9-14, 19-25. The Grosvenor Homeowners Association believed that this approval should be delayed until the Grosvenor Heights development has been completed. That way, they believe, the actual traffic impact of the Grosvenor Heights can be measured before more development is approved.

Several of those in opposition felt that the building proposed was too large for the size of the lot, and therefore, incompatible with the neighborhood. Both WMCA and FPCA asserted that the screening initially proposed was inadequate to buffer the use. The Applicant agreed to several

conditions of approval jointly with both the WMCA and the FPCA. These are discussed in Part III.E of this Report.

Ms. Cacho and Ms. Faraclas both opposed the application because they believe that traffic from the facility will make existing neighborhood streets unsafe. Ms. Cacho testified that traffic is already bad at this location. She is concerned that traffic will get even worse, particularly as there is a newly developed park on the Fleming Avenue side of the area. According to her, traffic congestion is so bad it's hard to get out of her driveway during the weekday peak hour. She does not feel another assisted living facility in the neighborhood is needed because the Bethesda Health and Rehabilitation Center is within ¼ mile and the Maplewood Assisted Living Facility is ½ mile away. 10/24/16 T. 13-14.

Ms. Faraclas testified that many individuals use east-west side streets in the area to avoid major signalized intersections on Old Georgetown Road. She stated that the street she lives on, Lone Oak Drive East, does not have sidewalks and children and parents waiting for school buses have to stand in the street. She believes that the proposed use will add to the cut-through traffic. 10/24/16 T. 19-35.

As noted, some organizations that initially opposed the proposal no longer do so, provided the conditions of approval agreed to with the Applicant are imposed on the conditional use. The Hearing Examiner includes most of these conditions, with some wording changes, for the reasons explained in Part III.E of this Report.

### **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 residential care facility for more than 16 persons. *Montgomery County Zoning Ordinance*, §59.3.3.2.E.2.c.

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>3</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: No previous approvals for this site exist. Exhibit 43, p. 22.

***b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds***

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<sup>3</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.

**necessary to ensure compatibility, meets applicable general requirements under Article 59-6;<sup>4</sup>**

**Conclusion:** This subsection requires an analysis of the development standards of the R-90 Zone contained in Article 59-4; the use standards for a residential care facility for more than 16 persons 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 Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds 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 *1992 North Bethesda/Garrett Park Master Plan* (Master Plan or Plan). The Plan articulates several broad goals for the area, although it does not contain site specific recommendations for the property. It also articulates specific guidelines for approval of conditional uses (formerly special exceptions) and establishes environmental goals that impact this property.

Staff concluded that the application further the Plan's broader objectives and meets both the guidelines for conditional uses and environmental goals. The reasons for their conclusion are addressed at length in the Staff Report. Exhibit 43, pp. 14-17. Staff's rationale plus the Applicant's testimony and evidence from the hearing, are summarized below.

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<sup>4</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). The Hearing Examiner advised the parties of this amendment to the Zoning Ordinance and that the changed language would apply to this case. He also gave the parties an opportunity to comment. Tr. 12/3/15 12-13; Tr. 12/7/15 9. To the recollection of the Hearing Examiner, no party objected to applying the amended Zoning Ordinance language to this case.

A broad goal of the Plan is to direct development near transit stations and areas best served by “transportation infrastructure.” *Plan*, p. 33, 35. Staff found that the proposed development accomplishes this because it is located near the Grosvenor Metro Station and is served by Ride-On Bus Route 6. Mr. Lenhart testified that Route 6 loops between the Parkside condominiums and the subject property, and stops at the Grosvenor Metro Station. 10/24/16 T. 56; Exhibit 43, p. 14.

The Plan lists several housing objectives. Detailed in the Staff report, generally the objectives are to (1) preserve and promote a wide variety of different housing types dispersed through the area, (2) encourage elderly housing along bus routes, (3) increase pedestrian connections between housing types, and (4) house special populations through the conditional use process. *Id.* at 17-18.

Staff concluded that the proposed development met the Plan’s housing objectives. Because assisted living facilities are classified as “group living” under the Zoning Ordinance, assisted living would add variety to the predominance of single-family homes. Staff found that the development will increase housing choices for elderly citizens within the defined neighborhood. They also determined that the use would add a pedestrian link (i.e., the Bethesda Trolley Trail) between single-family homes, the facility, and the neighborhood. Mr. Iraola testified that the application meets the Plan’s goal to site elderly housing along bus routes. 10/20/16 T. 75-76.

Staff found that the development will further another of the Plan’s broad goals: The Plan seeks to protect and reinforce the integrity of the surrounding neighborhood. Exhibit 43, p. 14. Staff reasoned that the same design characteristics that made the use compatible with the neighborhood (discussed below in Part III.A.4 of this Report) reinforce the neighborhood’s existing residential character. *Id.*

The Plan also sets out five “guiding principles” for conditional uses. These include:

- Avoid excessive concentration of special exception and other nonresidential land uses along major highway corridors.

Neither Staff nor the Applicant consider Grosvenor Lane to be a major highway corridor.

*Id.* at 15. Mr. Iraola testified that Grosvenor Lane is classified as a primary residential street and Fleming Avenue is classified as a secondary residential street. 10/20/16 T. 79.

- Avoid over-concentration of commercial service or office-type special exception uses in residential communities.

Both Staff and the Applicant's expert in land planning determined that this guideline had been met because the use is classified as a residential use in the Zoning Ordinance. Exhibit 43, p.

15. Mr. Iraola further noted that it is located in the southeast edge of the surrounding residential neighborhood, thus avoiding any overconcentration of uses within the area. 10/20/16 T. 79.

- Protect major highway corridors and residential communities from incompatible design of special exception uses.
  - Any modification or addition to an existing building to accommodate a special exception use should be compatible with the architecture of the adjoining neighborhood and should not be significantly larger than nearby structures.

Staff found that this project does not propose a modification or addition to an existing building, so this guideline doesn't apply to the application. Exhibit 43. Nevertheless, the Applicant presented extensive testimony that the use will be compatible with the neighborhood because of the site layout, architectural design, and landscaping. The compatibility of the use with its environs is discussed in detail in Part III.A.4 of this Report.

- Front yard parking should be avoided because of its commercial appearance; however, in situations where side or rear yard parking is not available, front yard parking should be allowed only if it can be comprehensively landscaped and screened.

The majority of spaces (i.e., 41 spaces) will be in an underground garage. The facility does propose 14 spaces around the "loop" driveway in the front yard. Staff found that the landscaping, setbacks, and topography minimized impacts from front yard parking. The retained forest along

the northern property line will screen the parking from Grosvenor Lane. The parking spaces are setback 80 feet from Fleming Avenue (the driveway is setback 42 feet.) Exhibit 43, p. 15.

- Support special exception uses that contribute to the housing objectives of this Plan. In general, the Plan endorses meeting special population needs through provision of elderly housing and group homes that are compatible with nearby land uses.

Staff concluded that the application furthers this guideline by providing 98 assisted living units for seniors and 29 units for elderly memory care patients. Staff advises that there is only one other elder care facility in the defined neighborhood (i.e., Bethesda Health and Rehabilitation Center.) Exhibit 43 at 16. The compatibility of the use is discussed in Part III.A.4 of this Report.

- Support special exception uses that contribute to the service objectives of the Plan...In general, the Plan endorses provision of child day care, group homes, elder day care, and nursing homes.

According to Staff, the Plan furthered this guideline because assisted living is similar to elder day care and nursing homes.

The major environmental objective of the Master Plan is to maintain a “green infrastructure.” *Id.* at 17. It seeks to preserve existing woodland and specimen trees and encourage reforestation. The Plan specifically designates Grosvenor Lane as a “Green Corridor.” The purpose of this policy is to “ensure the identity and integrity of residential areas along major roadways, and to strengthen community identity by creating attractive transportation corridors.” *Plan*, p. 250.

Staff found that retention of .33 acres of existing forest along Grosvenor Lane met the Plan’s objective to create “Green Corridor” along that road. The work to be done on the Grosvenor mansion property to the east met the Plan’s broader goal to preserve existing woodland and encourage reforestation.

Mr. Iraola agreed that the proposed assisted living facility substantially conforms to the Master Plan. In addition to the items addressed by Staff, he testified that the Applicant will provide the shared use path called for in the *2005 Countywide Bikeways Functional Master Plan*. That plan recommends a 10-foot wide shared use path on the east side of Fleming Avenue, abutting the side, otherwise known as the Bethesda Trolley Trail. 10/20/16 T. 251.

Based on the testimony and evidence before her, the Hearing Examiner agrees with the Applicant and Staff that the proposed development complies with both the North Bethesda Master Plan and the Countywide Bikeways Functional Master Plan. The development will be near (i.e., approximately 1 mile) Grosvenor Metro station and easily accessible by bus. It will further the Plan's housing goals by (1) providing a different housing option than the predominant single-family homes in the area, (2) provide an option for elderly housing adjacent to a bus stop on Grosvenor lane, (3) implement a section of the shared use Bethesda Bike Trail, and (4) provide a home for special populations including both those that need assistance with daily living and memory care.

The proposed development also meets the Plan's environmental goals. Nothing in the record contravenes the opinions of Staff and the Applicant's expert that retention of the .33 acres of forest along Grosvenor Lane achieves the Plan's "Green Corridor" policy. The Applicant's land planning expert and Staff agree that preservation of the existing forest along Grosvenor and improvements to the existing forest conservation easement on the Grosvenor mansion property meet the Plan's broader goal to preserve existing woodland and encourage reforestation.

The weight of evidence clearly supports a conclusion that approval of this application conforms to the Plan's specific guidelines for conditional uses. Both Staff and the Applicant's expert conclude that Grosvenor Lane is not a major highway. Thus, the first guideline, which

discourages excessive concentrations along major highways, is not applicable. Even if it were, however, there is no evidence that this will create any overconcentration of conditional uses at all, as there are only two major conditional uses in the defined neighborhood (i.e., Wildwood Manor Swimming Pool and the Bethesda Health and Rehabilitation Center.)

The second guideline seeks to avoid an over-concentration of commercial service or office-type special exception uses. Staff and Mr. Iraola based their conclusion that the use is residential on the classification assigned by the Zoning Ordinance. This is a reasonable interpretation. Mr. Iraola opined that, even if it were commercial, it does not result in an over concentration of conditional uses because it's on the edge of the neighborhood. The only evidence indicating that the use is commercial is testimony from Ms. Cacho, who felt that the use is "commercial" because it has employees that provide services to residents. 10/24/16 T. 15.

The Hearing Examiner agrees with Staff that the use is residential rather than commercial. Staff correctly points out that a "residential care facility" is listed as a subset of "group living" under the Zoning Ordinance. "Group living" is defined as the "*residential* occupancy of a structure by a group of people that does not meet the definition of any Household Living use under Section 3.3.1." *Zoning Ordinance*, §59-3.3.2.A. Aside from the Zoning Ordinance, the general definition of "residence" is "the act or fact of dwelling in a place for some time." "RESIDENCE." *MERRIAM-WEBSTER.COM*. *MERRIAM-WEBSTER*, N.D. WEB. 2 DEC. 2016. Mr. Teeters testified that employees do not provide services to the public. 10/24/16 T. 35. Thus, their only function is to provide services necessary for individuals to reside permanently within the facility. The Hearing Examiner finds that the standard discouraging an over-concentration of commercial uses does not apply to an assisted living and memory care facility.

The third guideline for conditional uses in the Master Plan, to protect major highway corridors and residential communities from incompatible design, has two subsets. The first governs modifications or additions to existing buildings, which is not applicable here.

The second subset governs the compatibility of front yard parking, requiring it to be “comprehensively landscaped and screened.” *Plan*, p. 38. The Hearing Examiner agrees with Staff that the landscaping and site topography will adequately screen the parking facility. The landscaping proposed between the parking area and Fleming Avenue greatly exceeds what is normally required under the Zoning Ordinance. Nor is there any evidence to controvert Mr. Iraola’s and Mr. Johnson’s testimony that the lower elevation from Fleming Avenue will screen activity from the parking area. The Hearing Examiner finds that the use as proposed meets the Plan’s third guideline for conditional uses.

The fourth guideline for conditional uses in the Master Plan encourages support for those uses that contribute to the Plan’s goals for housing, provided that they are compatible with nearby land uses. The testimony and evidence demonstrate that the use will diversify housing options in the area, particularly for the elderly and disabled. The Hearing Examiner also finds that the development is compatible with nearby land uses, for the reasons stated in Part III.A.4 of this Report.

The final guidance for conditional uses from the Master Plan encourages support of those uses that contribute to the service objectives of the Plan. The evidence is uncontroverted that the assisted living and memory care facility will support the service objectives of the plan, which include both elder day care and nursing homes. The Hearing Examiner finds that this guideline is met by the application as proposed, with the conditions in Part IV of this Report.

***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 the preceding section. 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 proposed building, including its height, density and architecture; traffic generation; and other issues discussed in other sections below. The compatibility of the proposed development is discussed in Part III.A.4 of this Report.

In order to determine the compatibility of the proposed use, however, the Hearing Examiner must first define the character of the neighborhood in order to assess whether the impact from this use will adversely affect or alter that character. The Hearing Examiner does so here.

Because the homes in Grosvenor Heights have already been approved and road improvements for the townhouses have been constructed, the Hearing Examiner includes that development in the “characterization” of the neighborhood. The Hearing Examiner agrees that the neighborhood is predominantly residential single-family attached and detached homes, but finds that the intensity of the residential uses increase toward the southeastern portion of the area, in the single-family attached homes in the Grosvenor Heights development. Institutional and services uses, such as the swimming pool, rehabilitation center, and the holding school, are sporadically located throughout the area.

***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: Technical Staff reports that there are four existing conditional uses or special exceptions within the neighborhood—the Bethesda Health and Rehabilitation Center, the Wildwood Manor swimming pool, a Verizon dial center, and an accessory apartment. Staff concluded that this assisted living facility would not alter the existing residential character of the area because it complied with the Master Plan, the prior special exceptions were deemed to be compatible with the neighborhood, the rehabilitation center is a residential use with inherent non-residential components (i.e., employees deliveries), and the overall design of the proposed facility is compatible with the neighborhood. Exhibit 43, p. 30.

The Hearing Examiner finds that the addition of the proposed facility will not increase the intensity of the special exceptions in the area for slightly different reasons. As stated previously, she agrees with Staff that the proposed development complies with the Master Plan. In addition, the existing special exceptions are dispersed throughout the western half of the surrounding neighborhood. This is the only conditional use in the eastern half of the neighborhood. Three of the four special exceptions are residential in nature or support residential uses. The accessory apartment is purely residential, the rehabilitation center is residential with some inherent non-residential characteristics, and the swimming pool is a recreational use that traditionally supports residential neighborhoods. The residential nature of the existing special exceptions combined with the extent to which the landscaping, site design, and operational limitations mitigate the non-residential aspects of this facility, supports a finding that this facility will not alter the character of the neighborhood.

## **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: Staff advises that the property will need to be subdivided. Therefore, a detailed analysis of whether public facilities are adequate will be determined by the Planning Board at preliminary plan. Exhibit 43, p. 31. Nevertheless, Staff stated that they had done a preliminary assessment, which indicated that public facilities will be adequate to serve the use. Mr. Lenhart, the Applicant's expert in transportation engineering and planning, testified that the proposed use will meet the required traffic tests, as discussed below.

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

The Planning Board's Guidelines (Guidelines) for Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR), adopted January 24, 2013, in large part govern whether transportation facilities are adequate to serve the use.

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) during morning and evening weekday peak hours. LATR projects the impact of trips to be generated by the proposed development, taking into account existing developments

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.

Mr. Lenhart submitted the required Traffic Exemption Statement. Exhibit 36(a). He testified that he used three sources to analyze number of trips that would impact weekday peak periods. The LATR Guidelines contain specific traffic rates to estimate peak hour trips for assisted living facilities. This formula assigns 0.03 trips per bed in the morning peak hour and .06 trips per bed in the evening peak hour. Using this formula, the facility will generate 3 morning peak hour trips and 6 evening peak hour trips. Exhibit 36(a), p. 1.

Mr. Lenhart testified that when he looked at staffing and shifts, he anticipated the use may generate more than number of trips estimated using the formula in the LATR Guidelines. He projected peak hour trips by applying the trip generation rate for assisted living facilities from the Institute of Transportation Engineers Trip General Manual (ITE Manual). He explained that the ITE Manual rates are based on empirical studies performed at assisted living facilities. These studies found a direct correlation between the number of beds and trips generated by these facilities. The trip generation rates account for trips generated from all sources, including without limitation, visitors, service people, staff, and deliveries. Because of the correlation between beds and trips, the rates are based on the number of beds in the facility. 10/24/16 T. 46-47. Based on the ITE Manual rates, there will be 15 morning peak hour rates and 23 evening peak hour rates. 10/24/16 T. 23.

Mr. Lenhart testified that the shift times and staffing levels indicate that the peak hour for this facility will be around 7:00 a.m. on weekdays, when the five employees on the night shift will

leave and the 25 employees on the morning shift will arrive. The five management employees (in addition to shift employees) do not affect this peak hour because they will not arrive until 9:00 a.m. According to Mr. Lenhart, even though there are 30 people arriving and leaving at the morning shift change, there will be fewer than 30 vehicle trips arriving and departing because many of the employees will carpool or take transit to work. In this case, there is a bus stop directly in front of the facility for Ride-On Route 6, which connects to the Grosvenor Metro station. The stop times in front of the facility correspond with the shift changes, making this a convenient commute option. He opined that there will be more than 15 but less than 30 peak hour trips. 10/24/16 T. 49-59.

Transportation Policy Area Review (or TPAR) tests the roadway and transit capacity in a larger traffic “policy area.” The subject property is located in the North Bethesda Policy Area. Roadway capacity in the policy area is adequate, but transit capacity is not. Therefore, the facility will have to pay an additional 25% of the transportation impact tax prior to issuance of a building permit. 10/24/16 T. 45.

#### **b. Other Public Facilities**

The adequacy of other public facilities, including schools, police and fire protection, water, sanitary sewer and storm drainage are adequate to serve the proposed facility, will also be evaluated in detail at the time of preliminary plan but may reviewed on a preliminary basis here. Evaluation of public facilities is controlled by Subdivision Staging Policy 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.” Mr. Iraola opined that police and fire facilities will be adequate to serve the use. The nearest police station is located at

7359 Wisconsin Avenue. The nearest fire house is the Bethesda Station at 6700 Democracy Blvd and Suburban Hospital, which is 2.5 miles away. 10/20/16 T. 89-90. Mr. Johnson testified that stormwater management will be provided through a series of bio-retention facilities and some porous pavement on the north side for the parking. Approximately 67% of the environmental site design volume will be treated on-site. Remainder will be treated in a filter at the southern end of the property. All runoff is discharged at the southeast end of the property, where their storm drain will connect to the storm drain system recently constructed for Grosvenor Heights. 10/20/16 T. 56. There are existing water and sewer lines that serve the property. The water and sewer categories are W1 and S1, respectively, enabling the proposed development to continue to be served by those lines. *Id.*

While not a mandatory part of the Hearing Examiner's review, the adequacy of public facilities may, at times, impact the compatibility of the use with the surrounding neighborhood. Based on the evidence and testimony before her, there is no basis to find that facilities will *not* be adequate to serve the use. Therefore, at present, the development as proposed will not adversely impact the surrounding neighborhood due to a lack of adequate public facilities.

### **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 conditional use. 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 adverse effect causes “undue” harm to the surrounding neighborhood.

Technical Staff listed the following physical and operational characteristics that are necessarily associated with (*i.e.*, inherent in) a residential care facility for over 16 persons (Exhibit 43, p. 31):

- 1) Buildings and related outdoor recreational areas or facilities;
- 2) Parking facilities;
- 3) Lighting;
- 4) Vehicular trips to and from the site by employees, visitors, residents, delivery vehicles and waste removal;
- 5) Noise generated by equipment for the facility and by occasional outdoor activities of residents and their visitors; and
- 6) Driveway impacts.

Staff concluded that the proposed use does not have any non-inherent operational or site conditions (Exhibit 43, p. 31):

Staff has not identified any non-inherent adverse impacts from the proposed use. There is no expected undue harm to the neighborhood either as a result of any non-inherent adverse effect, or a combination of inherent or non-inherent adverse effects.

Mr. Iraola opined that the use as proposed had no non-inherent adverse impacts. In his opinion, the building preserves the residential character of the area. The site design retains existing vegetation, expands building setbacks and landscape buffers, and reduces the perceived height from Fleming Avenue. The outdoor terrace along south side is located behind a landscape buffer for additional privacy. Parking facilities are largely underground. Those above ground are screened both by topography and significant landscaping. The Applicant proposes to use the existing driveway access, and therefore, there are no additional driveway impacts. 10/20/16 T. 85-88.

FPCA did not present any evidence explicitly alleging that the site or the use has a non-inherent characteristic that would cause an adverse impact on the surrounding area. Nevertheless, they did submit a report comparing this facility with other Brightview assisted living facilities and the Bethesda Health and Rehabilitation Center. From this report, FPCA argues that the subject property is denser and has less screening than a typical assisted living facility. *See*, Exhibit 38(a). Because the FPCA report goes primarily toward compatibility, it is summarized in detail in the next section.

To the extent the submittal by FPCA suggests density of the site is a non-inherent characteristic, the Hearing Examiner finds it unpersuasive. The report focuses only on Brightview facilities, some of which are not even located in Maryland. The report does not include information on the zoning of the facility, nor does it characterize the surrounding area. For these reasons, the information is too anecdotal to support a finding that the density proposed here is non-inherent.

From all of the testimony and evidence in the record, the Hearing Examiner finds that the facility as proposed has *no* non-inherent operational or site characteristics that would adversely impact the surrounding neighborhood. One of the inherent impacts, the larger building, is

significantly mitigated by existing physical conditions, including retention of the forest along Grosvenor Lane, the site's topography, and existing landscaping. The grade, which slopes from Fleming Avenue to the southeast, reduces the perceived height of the building. The building setbacks, step-back and the significant landscaping also mitigate much of the visual impact of the use. Another inherent characteristic, parking, will be located mostly below grade. The surface parking will be screened both by the site's topography and enhanced landscaping. Noise from the generator will be mitigated by its location underground and many of the resident's activities occur inside the building. Noise from other activities, such as deliveries and trash collection, will occur on the eastern side of the building. The photometric plan demonstrates that the lighting for the property will meet the requirements of the Zoning Ordinance.

There must first be a non-inherent adverse impact from the use before the Hearing Examiner may enquire whether the use will cause "undue" harm to property values in the surrounding area. Because the Hearing Examiner finds there is no non-inherent impact, she could stop her analysis here. There is, however, extensive testimony and evidence in the record that the facility will *not* adversely affect property values. Therefore, even if there were a non-inherent adverse impact of the use, the record does not reveal that it would be detrimental to the economic values of the surrounding homes.

Mr. Donald Boucher submitted an Evaluation Report to support his expert opinion that the proximity of the facility will not unduly impair property values. He identified other assisted living facilities in down-county (Montgomery County) locations, which are more relevant than the Brightview facilities included in FPCA's submittal. He performed a "paired sales analysis" for properties located in proximity to these facilities. The paired, or matching, sales analysis compares sales of homes "proximate" to assisted living facilities with the sales of nearby homes that are not

similarly proximate. The comparable sales prices are adjusted for other factors, such as number of bedrooms and bathrooms or lot size, to isolate the impact on value due to proximity to an assisted living facility. Exhibit 20, p. 20. For his analysis, Mr. Boucher searched comparable sales back to 2010. 12.20/16 T. 148. He concluded that there was no evidence that proximity to a nursing home affected the sales prices of homes. *Id.* at 149.

The Evaluation Report includes 4 paired sales analyses. The first compares sales of homes proximate to the Bethesda Health and Rehabilitation Center. A home proximate to the center, at 5818 Cheshire Drive, sold on June 8, 2015, for \$1.3 million. He compared this sale to three sales of homes of similar size and style nearby. The adjusted sales prices of those homes ranged between \$1,275,500 and \$1,262,500. He opined that the home on Cheshire Drive sold for a premium of between \$37,000 and \$42,500, or around +3% of the comparable sales. Exhibit 20, p. 23.

The second paired sales analysis compared a 2011 sale for \$910,000 of a house adjacent to the Carriage Hill nursing home and rehabilitation center at 5215 Cedar Lane in Bethesda. The rear of the home faces the rear of the rehabilitation center. The adjusted sales price of four comparable (but non-proximate) homes ranged from \$919,400 to \$941,000. *Id.* at 25. The report suggests that property's proximity to the nursing home adversely impacted the sales price by 1% to 3.4%+/-, although the listing agent stated that proximity did not have an impact on the sales price and this issue was not raised in contract negotiations. Exhibit 20, p. 25.

His third paired sales analysis is a home located directly to the rear of the Manor Care nursing home and rehabilitation center at 6530 Democracy Boulevard in Bethesda. The home, located at 6511 Winnipeg Road, sold for \$722,500 on April 30, 2013. Adjusted sales prices for nearby homes ranged from between \$720,000 to \$728,000. The difference in prices reflected a

range of +\$2,000 to -\$5,500. Discussions with the sales agent revealed that some buyers had objected to the proximity of the home and some did not. Overall, the agent felt that it did not have any adverse effect on the purchase price. *Id.* at 27.

Mr. Boucher's report included a fourth paired sales analysis for a home located just east of, and across, Haverhill Drive from the Kensington Park Senior Living and Rehabilitation facility at 3620 Littledale Road. In addition to adjusted sales of comparable homes, he looked at an active listing of a home at 3619 Littledale Road that was directly across the street from the facility. *Id.* at 27. The adjusted sales prices of comparable sales were between \$824,500 and \$842,000. The differential between the sale of the Haverhill home and the comparable ranged between +\$8,500 and -\$9,500, or under 1%. The real estate agent for the active listing informed Mr. Boucher that the house, listed at \$799,000, was overpriced, which was the reason it hadn't sold. *Id.* At the public hearing, Mr. Boucher updated his report on the actual sale of the active listing on Littledale Road. He reported that the actual sales price was \$749,000. The listing agent stated that proximity to the assisted living facility did not factor into the sales price; in fact, the agent stated that the purchasers were unaware the facility was there. 10/20/16 T. 163. Mr. Boucher's supplemental report states that the Littledale Road sale is important because the house directly faced the facility across the road, similar to the Fleming Avenue houses. Exhibit 78. In this regard, Mr. Boucher opined that having the rear of a house face an assisted living facility was more detrimental than having the front of the house face the facility because homeowners tend to live in their back yards. 10/20/14 T. 156.

Based on the paired sales analysis, the Evaluation Report concludes:

The matched paired sales analyses of the four properties discussed above (see addendum for the detailed analysis of each property) indicates the proximity of the house to existing assisted senior living facilities affected the property prices in a range of 3.0% positively to 3.4% negatively. This is considered to be a relatively

nominal percentage range which is insignificant resulting in an analysis that would be considered trustworthy.

The adjustment process was undertaken in the same manner and using the same adjustments that I would typically use in any appraisal I did in the areas of the properties being analyzed. The results are considered to be within a reasonable margin of error for real property valuations, which is generally considered to be 5%+/- for residential property valuations.

Therefore, based on the paired sales analysis, my discussions with real estate agents and considering the days on the market for each of the four subject properties as compared to the days on the market for the comparables used in the analyses, it is my opinion that proximity to existing nursing homes and senior rehabilitation facilities has no adverse economic value impact on nearby properties which includes marketability.

Mr. Boucher opined the changes to the conditional use plan and landscape plan only reinforce his conclusion that the assisted living facility would not devalue nearby properties. With the additional landscaping, confronting owners will have only a “peak” at the building, which wouldn’t affect property values. 1/20/16 T. 170. Having some visibility doesn’t necessarily affect the value of confronting homes—the adjacent Grosvenor Heights homes are listed for between \$1.475 and \$1.795 million. *Id.* T. 170. In his opinion, the proposed facility will have no more impact on property values than by-right single-family detached homes in the R-90 Zone. If new homes were oriented toward Fleming, you might have more impact from car lights leaving driveways. *Id.* at 174.

For these reasons, the Hearing Examiner finds that there are no non-inherent adverse impacts from the development proposed in this application. Even if there were, the evidence would not support a finding that the use as proposed would have caused “undue” harm to the economic value of property in the surrounding area.

#### **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 an examination of the compatibility of the use with the character of the residential neighborhood in which it is located. This question 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.

The compatibility of the proposed development with the surrounding area, and in particular homes fronting Grosvenor Lane and Fleming Avenue, is the most controversial issue in this case. Staff concluded that the intermediate site design, which did not include an additional 10-foot setback along the southern half of the building facing Fleming Avenue or the additional landscaping, was compatible with the neighborhood (Exhibit 43, p. 33):

The proposed building will be compatible with the character of the surrounding residential neighborhood. The building's Craftsman style architecture will complement the residential character of the nearby existing houses and the houses under construction on the abutting EYA property. The building's orientation places a smaller façade along Fleming Avenue reducing the visual impact of the building's overall mass. The Fleming Avenue façade also includes step-downs to reduce the building height to two stories at the north and south ends creating a visual break and thus reducing the perceived size of the façade along that frontage. The topography of the Property will also minimize the perception of the building's height from most vantage points, and will allow most of the onsite parking to be accommodated below ground. A 28-foot landscape buffer will be planted along the Property's western lot line to screen the views of the proposed building from Fleming Avenue. The proposed 40-foot building setback on the east side of the Property and the expanded forest conservation easement on the historic Grosvenor mansion property will provide a sufficient buffer between the mansion and the proposed assisted living facility. The forest retention area on the north side of the Property will obscure views of the building from Grosvenor Lane. The proposed facility will have two outdoor recreational spaces for residents. A patio on the south (rear) side of the building will be the primary outdoor amenity space for residents. The west wing of the building will shield the outdoor patio area from view of the single family homes on the west side of Fleming Avenue. Landscaping will buffer the patio area from the new residences to the south.

The Applicant's experts in land planning, architecture, and landscape architecture, all opined that the revised conditional use plan would be compatible for several reasons. The site layout uses existing physical features of the site to minimize its impact. *See, e.g.*, 10/20/16 T. 81-85. These include (1) the site's topography, which minimizes the perceived height of the building and screens the activities in the driveway, (2) retention of existing forest and mature trees to buffer and screen the use, and (3) maintaining the existing access driveway.

Mr. Iraola testified that other design characteristics create a compatible relationship with the surrounding area. The building has been designed with the bulk of the façade facing the forest conservation easement along Grosvenor Lane. The shorter façade (to the west) is setback from Fleming Lane by 38-48 feet and is heavily screened. The varied façade also adds interest to the building. Most of the parking (i.e., 37 of 51 spaces) are located below grade. Access to the underground parking is on the east side of the building, "well away" from the existing neighborhood. 10/20/16 T. 83. Similarly, the service area and loading design are located in the same side to mitigate the impact on the neighborhood. The use will also enhance mobility between different uses in the area because it will implement the Bethesda Trolley Trail, creating access to the larger area. It also adds a sidewalk connection to the street. 10/20/16 T. 81-85.

Ms. Zonaiya testified that the building's architecture is compatible with the neighborhood. The architecture mirrors the Craftsman style. Materials and architectural elements, such as shake single siding, windows and window pairings, the roof, and brackets are reminiscent of that style. The façade has some stone elements because a portion of the Grosvenor mansion next door includes those elements. They have used earth tones to blend with the forested nature of the site. 10/20/16 T. 108-109

In Ms. Zonaiya's opinion, the interior layout blends compatibly with the neighborhood. Gathering areas and amenity spaces are in the center of the building, screened from Fleming Avenue. None of the bedrooms have overhead lighting. All bedrooms will have blinds at every window. Those viewing the facility from outside will see nothing different from any other residential building. 10/20/16 T. 109-110.

Other physical aspects of the development generate compatibility with the surrounding area, in Ms. Zonaiya's opinion. Even though generators are typically located outside, the Applicant has located the generator below grade in the parking garage to mitigate any noise. They have also incorporated mufflers to minimize the noise from the exhaust. *Id.* T. 11-12. Roofs have been designed with slopes that create "roof wells" to hold and screen the mechanical equipment. *Id.* T. 113-114. As described earlier in this Report, Ms. Russell testified that the combination of enhanced landscaping and topography will screen all three levels of the building, although it wouldn't be totally obscured from view.

At the public hearing, Mr. Klein, on behalf of FPCA, acknowledged that the revised application was largely acceptable, except that FPCA believes that a minimum of 50 feet of landscaping along Fleming Avenue is needed for the facility to be compatible with their homes.

Mr. Klein based his belief the report submitted by FPCA comparing setbacks and screening of other Brightview facilities in Maryland and Virginia with this application. Exhibit 38(a). FPCA alleges that the site is much more compact and dense (in terms of bedrooms per acre) than other Brightview assisted living facilities as well as the Bethesda Hospital and Rehabilitation Center. Exhibits 39(a), 38(a) and 39(a). They further distinguish this site from other assisted living developments because it is located on a residential street near homes that front directly to the side of the facility. *Id.*

Mr. Klein testified that four of the nine acres comprising the Bethesda Health and Rehabilitation Center are undeveloped. According to him, there is 100-300 feet of landscaping or forest easement in the front of that facility. The rear of the property has a forest easement 53 to 180 feet in width. T. 186-190. The comparison of setbacks, density, and screening of the four properties included in the FPCA report are summarized as follows (Exhibit 38(a)):<sup>5</sup>

1. Brightview Woodburn (Fairfax County, VA)

- a. Square feet per bed = 2,597
- b. Orientation of surrounding homes: “Some” homes are located to the side and rear of the facility. The front of only one of these homes faces the rear of the building across street.
- c. Screening/setbacks from facility: The home confronting the rear of the building is across a street, separated by “over 200 feet” of mature trees. No other screening statistics are given.
- d. Road Access: 4-lane road (Gallows Road).

2. Brightview Falls Grove (9200 Darnestown Road, Rockville, MD)

- a. Square feet per bed: 1,568
- b. Orientation of surrounding homes: No homes face the facility directly. The sides of homes across Darnestown Road face the front of the facility. The rear facades of abutting homes face the rear of the facility.
- c. Road access: Four lanes (Darnestown Road).
- d. Screening/setbacks from facility: Lot lines of homes to the rear of the facility are 97 feet from the building, behind evergreens. No measurement of the size of the landscaped area to the rear is given nor is there any information on setbacks of homes/lots to the side of the facility.

3. Brightview Great Falls (Virginia)

- a. Square feet per bed: 1,668
- b. Orientation of surrounding homes: Adjacent to a commercial center; “few homes” surround the facility.
- c. Road access: Not given.
- d. Screening/setbacks from facility: No measurements of setbacks or size of the landscaped area is given.

4. Bethesda Health and Rehabilitation Center

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<sup>5</sup> The Hearing Examiner extrapolated information from the FPCA’s report to calculate density by square feet of land area per bed, as that is the method used in the Montgomery County Zoning Ordinance.

- a. Square feet per bed: 1,960
- b. Orientation of surrounding homes: The rear of three single-family homes front the side of the facility. Four single family homes do not confront the building, but rather a large lawn and “numerous trees.” Exhibit 38(a). Neighbors across Grosvenor face the property
- c. Road access: Driveway to Grosvenor Lane.
- d. Screening/setbacks from facility: No measurements for abutting properties. Neighbors across Grosvenor are more than 350 feet away, separated by a large lawn. The seven abutting homes do not face into a wall of the facility. Their back yards abut the forest conservation easement and the infill development along Grosvenor has views of the large lawn and “dense screening.”

Based on the properties listed above, Mr. Klein felt that “typical” screening for assisted living facilities have at least 40-100 foot wide landscaping swaths. In the rare case (in his view) Mr. Boucher’s Evaluation Report shows a loss of property value if this isn’t present. While the Applicant’s Evaluation Report says it’s not significant, to them, a \$10,000 to \$30,000 reduction in value is significant. They believe that the additional screening is important because of the building is much larger than neighboring houses but setback approximately the same distance from the street. The additional screening will aid in minimizing impacts of the operations, including the noise from the generator, lights and activity during the shift changes. Mr. Klein also is concerned that neighbors along Fleming Avenue will see the rear of the building. 10/20/16 T. 193. He feels that the Applicant can’t completely screen the “back alley” in the rear. *Id.*

To achieve the amount of landscaping Mr. Klein feels appropriate, he and the Applicant propose to replace the parking spaces shown in the right-of-way with an additional row of street trees. Currently, the County plans to build out the 20-foot paved section of Fleming Avenue to 29.5 feet. Approximately 9.5 feet of right-of-way are planned for on-street parking spaces. With the 10-foot bike trail, there will be 39.5 feet of asphalt on a small residential street, Mr. Klein believes. They believe the County has a lot of discretion to use the right-of-way for something

else. Using the 9.5-foot portion of the right-of-way for trees rather than parking would shade the bike path and provide additional screening for the FPCA.

On rebuttal, Mr. Iraola testified that homes confronting the property along Fleming Avenue will *not* have a clear view of a “back alley” behind the facility because of the landscaping, depressed grade, and the Grosvenor Heights homes along the southern property line. 10/24/16 T. 111-112. Mr. Johnson testified that it may be possible to install an additional row of street trees within the right of way if the bike trail is moved west toward Fleming Avenue. Mr. Lenhart testified, however, that a 20-foot paved right-of-way would not allow fire equipment to enter Fleming Avenue unless on-street parking is prohibited. 10/24/16 T. 78-79.

Ms. Faraclas and Ms. Cacho raised concerns that traffic to and from the facility would be incompatible and dangerous to those on local side streets, some of which have no sidewalks. Ms. Faraclas testified that children waiting for the school bus have to wait in the streets because some of the streets do not have sidewalks. Mr. Lenhart testified, however, that the shift changes proposed will not conflict with school bus pick-up and drop-off times. 10/24/16 T. 54-55.

The Hearing Examiner finds from the testimony and evidence in this case that the revised conditional use site plan is compatible with the surrounding area without the additional screening in the right-of-way advocated by FPCA. The Hearing Examiner has no authority over the use of the right-of-way, and must base her decision on the conditional use plan as submitted. She agrees with the Applicant’s experts and Staff that the topography of the site mitigates many of the impacts from the larger size of the building, particularly its height. The existing forest along Grosvenor Lane buffer the longest building façade from Grosvenor. The shorter façade along Fleming will have variable setbacks and step backs. The setbacks and landscaping along Fleming Avenue greatly exceed what is required in the Zoning Ordinance and will mitigate the view of all three

levels of the building. The grade and landscaping also screen the view of activities in the front loop drive. The Craftsman-style architecture and building materials are residential in character and blend well with forest to be retained. The internal layout of the facility, with activities centrally located, will preserve a residential character for those viewing the exterior of the building.

As to safety of traffic from the proposed use, Mr. Lenhart testified that the shift changes do not correspond with school bus pick-up and drop-off times. The condition proposed by FPCA, restricting service traffic to Grosvenor Lane, will reduce the impact of the of delivery trucks on the local side streets.

The Hearing Examiner doesn't find the report submitted by FPCA compelling evidence that a mandatory 50-foot landscaped strip is required for compatibility with an assisted living facility. As noted, it compares only *Brightview* facilities, many of which are not located in or near the surrounding neighborhood, or even in Maryland. Compatibility is determined by reference to the character of the surrounding area rather than the identity of the developer. The report does not characterize the zoning or neighborhoods surrounding the assisted living facilities—larger setbacks may be more typical in less densely zoned areas. Not all information is given for each property include in the report and there are only sporadic sites as to the origin of the information. Further, some of the facilities listed have densities (in square feet of land area per bed) that do not greatly exceed those proposed here. Moreover, it is not clear whether the densities listed in FPCA's report are based on net lot area, as is required for this facility. For these reasons above, the Hearing Examiner finds that the plan as revised is compatible with the surrounding area.

The question of whether additional landscaping should be installed within the right-of-way in lieu of vehicle parking spaces is not before the Hearing Examiner. It is not shown in the conditional use site plan, nor does the conditional use process govern the use of the right-of-way,

which is determined at the time of preliminary plan. The parties may pursue the additional row of street trees at that time. Because the questions is not properly before her and is unrelated to this proceeding, she does not impose the condition proposed by FPCA requiring the Applicant to cooperate with FPCA to use the right-of-way for landscaping. The Hearing Examiner does, however, require the Applicant to file any revisions to the conditional use site plan necessary after the preliminary plan with OZAH.

***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.

#### **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 concluded that the application meets the development standards of the R-90 Zone and included a table comparing the minimum development standards to what is provided on the conditional use site plan. The table is reproduced on the following page. Exhibit 43, p. 24. The Applicant's expert in civil engineering, Mr. Johnson, also testified that the development meets all of the standards of the underlying zone. 10/20/16 T. 45-45.

Based on this evidence, and having no evidence to the contrary, the Hearing Examiner concludes that the use as proposed meets all standards of the R-90 Zone.

Section 4.4.8.B. R-90 Zone, Standard Method Development Standards<sup>1</sup>

	Required / Allowed	Proposed
<b>1. Lot and Density</b>		
<b>Lot (min)</b>		
Lot area	9,000 SF	116,168 SF
Lot width at front building line	75'	345'
Lot width at front lot line	25'	314'
<b>Density (max)</b>		
Density (units/acre)	4.84	Density based on the number of beds rather than units/ acre <sup>2</sup>
<b>Coverage (max)</b>		
Lot	30%	21%
<b>2. Placement</b>		
<b>Principal Building Setbacks (min)</b>		
Front setback	30'	134'
Side street setback, abutting lot fronts on the side street and is in a Residential Detached zone	30'	38'
Side setback	8'	40'
Sum of side setbacks	25'	78'
Rear setback	25'	37'
<b>3. Height</b>		
<b>Height (max)</b>		
Principal Building, measured to mean height between the eaves and ridge of a gable, hip, mansard, or gambrel roof	30', or 40' with site plan approval <sup>3</sup>	40'
<b>4. Form</b>		
<b>Allowed Building Elements</b>		
Porch/Stoop	yes	yes
Balcony	yes	yes

<sup>1</sup> For a "Detached House or a Building for a Cultural Institution, Religious Assembly, Public Use, or a Conditional Use allowed in the zone."

<sup>2</sup> Under Section 3.3.2.E.2.c.ii(d), density for this Residential Care Facility (Over 16 Persons) is based on the number of beds rather than dwelling units. See page 22 of this report.

<sup>3</sup> Under Section 4.4.8.B.3.a, "in a development with a detached house building type, height may be increased to 40' if approved by the Planning Board in a site plan under Section 7.3.4." Based on the fact that the zoning code contains other references to the "detached house building type" where it is intended to encompass a "detached house or a building for a cultural institution, religious assembly, public use, or conditional use allowed in the zone," and that these building types are generally subject to the same development standards, Staff interprets this Section to allow this building for a conditional use to go up to 40' in height with site plan approval.

**Table Comparing Development Standards of the R-90 Zone with  
the Development Standards Proposed**  
**Exhibit 43**

**C. Use Standards Specific to a Residential Care Facility (Section 59-3.3.2.E.2.c.)**

The specific use standards for approval of a residential care facility are set out in Section 59-3.3.2.E.2.c.ii of the Zoning Ordinance.

*ii. Where a Residential Care Facility (Over 16 Persons) 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:<sup>6</sup>*

*(a) The facility may provide ancillary services such as transportation, common dining room and kitchen, meeting or activity rooms, convenience commercial area or other services or facilities for the enjoyment, service or care of the residents. Any such service may be restricted by the Hearing Examiner.*

Conclusion: Mr. Teeters testified that the facility would provide ancillary services, including a shuttle bus, a common dining room, activity rooms and other services, such as a fitness center. Staff did not recommend restricting these activities. Exhibit 43, p. 22. Ms. Cacho and Ms. Faraclas expressed a concern that traffic related to these ancillary services would be unsafe on residential side streets. Mr. Lenhart and Mr. Teeters, however, testified that (1) these activities are not open to the public, (2) that staffing for these activities are already included in the number of employees for shifts, and (3) that these activities do not alter the projected trip generation for the use. 10/24/16 T. 46-48. Ms. Cacho's and Ms. Faraclas' concern is addressed by the condition proposed by FPCA prohibiting trucks making deliveries to the facility from using side streets.

The neighbors across Fleming Avenue did propose one other condition relating to the ancillary services to which the Applicant has agreed: Idling of the shuttle bus while picking up and discharging passengers will be prohibited. Mr. Teeters stated that they would make this a condition a policy on operation of the shuttle bus in their employment manual. 10/24/15 T. 116.

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<sup>6</sup> The only relevant subsections are Sections 59.3.3.2.E.2.c.ii.(a), (d), (e) and (i). Subsections (b), (c), (f), (g), (h), and (j) are not applicable to the proposed use.

The Hearing Examiner agrees to impose the condition prohibiting idling of shuttle busses on the property as recommended by the Planning Board.

*(d) Where facility size is based on the number of beds, not dwelling units, the following lot area is required:*

\* \* \*

*(2) In all other zones, the minimum lot area is 2 acres or the following, whichever is greater:*

\* \* \*

*(i) in the R-60, R-90, and R-40 Zone: 800 square feet per bed;*

Conclusion: After dedication, the net lot area will be 2.67 acres or 116,305 square feet. With the 104 beds proposed, the use will have 1,117 square feet per bed. Exhibit 72. The acreage exceeds 2 acres. This requirement has been met.

*(e) The minimum side setback is 20 feet.*

Conclusion: Staff advises that the setback from the eastern property line is 40 feet. Exhibit 43, p. 23. The closest building setback to the west (Fleming Avenue) is 38 feet, increasing to 48 feet along the southern portion of the western frontage. T. 46. This standard has been met.

*(i) Height, density, coverage, and parking standards must be compatible with surrounding uses; the Hearing Examiner may modify any standards to maximize the compatibility of the building with the residential character of the surrounding neighborhood.*

Conclusion: The Hearing Examiner evaluated compatibility with surrounding uses in his discussion of the compatibility finding required by §59-7.3.1.E.2. That discussion is incorporated herein. As stated there, the Hearing Examiner finds that the proposed use, as represented in the conditional use site plan (Exhibit 93) and the other revised plans filed by the Applicant at the public hearing will be compatible with surrounding uses.

#### **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>7</sup> Technical Staff found that “. . . the following Sections apply: Division 6.2 Parking, Queuing and Loading; Division 6.4. General Landscaping and Outdoor Lighting; Division 6.5. Screening, and Division 6.7. Signs. Unless otherwise noted, any sub-sections not listed were considered not applicable to the Application.” Exhibit 43, p. 25. This Report analyzes whether the application meets these requirements below.

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

Conclusion: Parking, queuing and loading standards are governed by Division 6.2 of the Zoning Ordinance.<sup>8</sup> For residential care facilities, the required number of vehicle parking spaces is based on the number of beds and the maximum number of employees on a shift. Zoning Ordinance §59-6.2.4.B. The applicant must provide 0.25 spaces per bed and 0.50 spaces per employee. Staff advises number of employees is based on the time when the most employees are present. Staff concluded that the facility must provide 41 spaces. While no bicycle spaces are required, there will be four of these spaces outside the main entrance and 4 in the garage. The facility as proposed will provide 51 vehicular parking spaces; exceeding the Zoning Ordinance requirements. Exhibit 43, p. 25.

Section 6.2.5.K imposes requirements on parking areas that support conditional uses in

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<sup>7</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).

<sup>8</sup> Divisions 6.2.5, 6.2.6, and 6.2.8 govern the design of vehicle parking spaces, bicycle parking spaces and loading areas. Some of the standards have detailed requirements related to the dimensions and configuration of parking and bicycle spaces. Technical Staff concluded that the plan proposed met all of the technical requirements of the Zoning Ordinance. As there is nothing in the record to the contrary, these sections are not repeated here and the Hearing Examiner finds that these standards have been met.

residential zones, such as this application:

*K. Facilities for Conditional Uses in Residential Detached Zones*

*Any off-street parking facility for a conditional use that is located in a Residential Detached zone where 3 or more parking spaces are provided must satisfy the following standards:*

*1. Location*

*Each parking facility must be located to maintain a residential character and a pedestrian-friendly street.*

Staff concluded that the plan reviewed by the Planning Board (before landscaping had added to the plan submitted to the Hearing Examiner) met these requirements:

As previously described, the majority of parking for this facility will be provided below-grade and will not be visible. The 14 surface spaces that will be provided in front of the building will be set back 82 feet from Grosvenor Lane and will be screened by the forested area on the north side of the Property. The parking facility will be screened with landscaping to the east and west. The driveway and loading dock are positioned to minimize disturbance of surrounding residential properties.

The Hearing Examiner agrees with Staff that the location of the 14 surface parking spaces will maintain the residential character and a pedestrian-friendly street. The setback from Grosvenor Lane is significant and the intervening forested area further screens the surface parking. The enhanced landscaping (far in excess of what is required) as well as the site's topography screens the parking from Fleming Avenue.

Section 6.2.5.K also imposes special setbacks for surface parking in conditional uses adjacent to properties in residential zones. These are:

*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.*

*c. In addition to the required setbacks for each parking facility:*

- i. the required side and rear parking setbacks must be increased by 5 feet for a parking facility with 150 to 199 parking spaces; and*
- ii. the required side and rear parking setbacks must be increased by 10 feet for a parking facility with more than 199 parking spaces.*

Staff concluded that the conditional use plan meets these standards. The parking must be setback at least 16 feet (because the required minimum side setback in the R-90 Zone is 8 feet). Staff advises that the loading area is setback 16 feet from the eastern property line and the surface parking area is setback 42 feet from the western property line along Fleming Avenue. The Hearing Examiner finds that these standards have been met. Exhibit 43, p. 26.

Section 6.2.9.C of the Zoning Ordinance sets minimum landscaping and screening standards for surface parking areas with 10 or more spaces on property that abuts properties in single-family detached zones:

C. Parking Lot Requirements for 10 or More Spaces

1. Landscaped Area

- a. A surface parking lot must have landscaped islands that are a minimum of 100 contiguous square feet each comprising a minimum of 5% of the total area of the surface parking lot. Where possible, any existing tree must be protected and incorporated into the design of the parking lot.
- b. A maximum of 20 parking spaces may be located between islands.
- c. A landscaped area may be used for a stormwater management ESD facility.

2. Tree Canopy

Each parking lot must maintain a minimum tree canopy of 25% coverage at 20 years of growth, as defined by the Planning Board's Trees Technical Manual, as amended.

3. Perimeter Planting

- a. The perimeter planting area for a property that abuts an Agricultural,

Rural Residential, or Residential Detached zoned property that is vacant or improved with an agricultural or residential use must:

- i. be a minimum of 10 feet wide;
- ii. contain a hedge, fence, or wall a minimum of 6 feet high;
- iii. have a canopy tree planted every 30 feet on center; and
- iv. have a minimum of 2 understory trees planted for every canopy tree.

Staff concluded that the previous version of the conditional use plan (i.e., the one reviewed by the Planning Board) met these requirements:

The 80-foot wide swath of retained forest along Grosvenor Lane will function as the perimeter planting area to the north of the parking lot. A proposed evergreen hedge to the north of the parking lot will provide additional screening. To the east, the drive aisle will be buffered by a 6-foot planting bed, and canopy trees will be planted along the drive aisle adjacent to retained trees. The dumpster and loading area on the east side of the building will be screened by a substantial planting bed, including a mixed evergreen hedge. Canopy trees and a mix of evergreens and flowering shrubs within a 28-foot planting bed will screen views of the parking area from the west.

There is nothing in the record contrary to Staff's determination that the requirements of the applicable sections of Article 6 have been met, particularly as more landscaping has been added to the landscape plan. Based on the record before her, the Hearing Examiner finds that the proposed development meets these standards.

## **2. Site Landscaping and Screening**

Conclusion: 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."* In this case, screening is required along the southern property line, which will abut the homes in the Grosvenor Heights subdivision. Exhibit 43.

The mandatory screening requirements are included in §59-6.5.3.C.7 of the Zoning Ordinance. The Zoning Ordinance gives two options for conditional uses in the R-90 Zone. Both options require a particular number of shrubs and bushes for every one hundred feet. Option A permits landscaped buffers to be 8-feet wide with a 4-foot wall or fence and mandates the number trees and shrubs that must be planted within the 8-foot wide landscaped strip. Option B does not require a fence, but the buffer must be 12 feet wide, and have a specified number of trees and shrubs for every 100 feet in length.

Staff advises that the conditional use plan meets the minimum screening requirements along the property's southern boundary with the Grosvenor Heights subdivision. The Hearing Examiner accepts Staff's assessment, as the evidence demonstrates that the landscaping proposed exceeds those requirements. Therefore, she finds that the proposed use meets the landscaping and screening standards required by Division 59-6.5 of the Zoning Ordinance.

### **3. Outdoor Lighting**

Conclusion: The outdoor lighting proposed for the conditional use was discussed in Part II.C.2. of this Report and Decision. Permissible levels of illumination are capped at 0.5 footcandles along the property line. For conditional uses, the permissible lighting level is reduced to 0.1 footcandles along a property line that abuts single-family detached homes (Zoning Ordinance, §6.4.4.E):

*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 Applicant represents the proposed lighting will meet the specified design standards, and the proposed fixture mounting heights are all under the maximums allowed by the Zoning Ordinance. Exhibit 43, p. 27. Staff advises that illumination levels along the southern property line are at 0.0 footcandles. The Hearing Examiner notes that illumination levels along the Fleming Avenue property line are at 0.1 footcandles, much less than the 0.5 footcandles permitted along Fleming Avenue. Exhibit 8.

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.

#### **4. Signage**

Signage for the property is governed by Division 6.7 of the Zoning Ordinance. Typically, signs in residential zones are limited to two square feet. *Zoning Ordinance*, §6.7.8.A. Section 6.7.8.B, however, permits additional sign area for new subdivisions:

##### *B. Additional Sign Area*

##### *1. Subdivision and Multi-Unit Development Location Sign*

*Additional sign area is allowed for a permanent location sign erected at any entrance to a subdivision or Multi-Unit development if the sign is a ground sign or wall sign located at an entrance to the subdivision or building.*

- a. 2 signs are allowed for each entrance.*
- b. The maximum sign area is 40 square feet per sign.*
- c. If the driveway entrance to the subdivision or development is located in the right-of-way, a revocable permit issued jointly by the Sign Review Board and the appropriate transportation jurisdiction must be obtained to erect the sign.*
- d. The maximum height of a sign is 26 feet.*
- e. The sign may be illuminated (see Section 6.7.6.E).*

**Conclusion:** The signage concept proposed by the Applicant was described and depicted in Part

II.C.2 of this Report and Decision. While Staff advised that the sign will require a variance, the Hearing Examiner concludes that it does not under Section 6.7.8.B of the Zoning Ordinance. *See Hearing Examiner's Report and Decision*, Case No. CU 16-01, Brandywine Senior Living Facility at Potomac, LLC. The Applicant has presented only a concept of the sign and further permitting is required. *See, Zoning Ordinance*, §§7.4.3 and 7.4.4. The Hearing Examiner will require, through conditions of approval, that the Applicant work with WMCA in the final design and lighting of the sign, and that the sign obtain the appropriate permits from the either DPS or the Sign Review Board, if it is determined that a variance is required.

### **E. Proposed Conditions**

Shelter has agreed to several conditions proposed by WMCA and FPCA. Some of these conditions cover the same subject and overlap. WMCA's first two conditions specify particular plantings to screen the use:

1. Shelter Development will add broadleaf evergreens – i.e., hollies – just north of the northern parking spaces and northwest curve of the oval driveway between Grosvenor Lane and the Shelter Development/Brightview facility/building. Shelter Development will assure that these plantings continue along the entire length of this parking area and these parking spaces, as well as along the curved part of the oval driveway. Sufficient larger hollies (i.e., Nellie Stevens hollies), smaller hollies (i.e., Blue Princess hollies), and appropriate additional plants will be planted to help assure adequate green screening/buffering along Grosvenor Lane – a Green Corridor – and for our homes that are directly across Grosvenor Lane. Shelter Development will continue to consult with WMCA, and WMCA will provide appropriate input, as details are worked out.
2. Shelter Development will assure that adequate, appropriate canopy and understory plants are planted at the northwest corner of the property (at the southeast corner of Grosvenor Lane and Fleming Avenue) to help assure adequate green screening/buffering along Grosvenor Lane and for our homes. We recommend including flowering trees such as white Natchez crape myrtle, as appropriate. Shelter Development will continue to consult with WMCA, and WMCA will provide appropriate input, as details are worked out.

Normally, these conditions would be redundant due to other conditions placed on conditional use approvals. Compliance with the approved planting or landscape plan is typically made a condition of approval of a conditional use:

Physical improvements to the Subject Property are limited to those shown on the Conditional Use Site Plan (**Exhibit \_**) and the related Landscape Plan (**Exhibit \_\_\_\_\_**.)

Therefore, any deviations from an approved landscape plan without prior approval would be a violation of the conditional use approval enforceable by DPS. This arguably moots the need for WMCA's proposed condition.

In this case, however, the Hearing Examiner will include WMCA's proposed condition on the approval of this application because Ms. Russell testified that not all of the landscaping has been specified in the revised plan presented at the hearing. (10/20/16 T. 223).<sup>9</sup>

Both the FPCA and WMCA propose conditions governing extended maintenance of the landscaping shown in the Landscape Plan. WMCA believes that their Condition No. 3 is more appropriate than the FPCA's Condition No. 1. Exhibit 94. WMCA's condition defines in more detail the duties required for maintenance, monitoring, and management of the landscaping. It appears to impose the same 2-year maintenance obligations applicable to the Category I conservation easements on the balance of the on-site landscaping:

3. Shelter Development will adequately maintain, manage, and monitor trees and shrubs added between Grosvenor Lane and the facility/building (that are outside the Category 1 Conservation Easement/Area, which is covered by other requirements) for a period of (at least) two years. This includes (but is not limited to) planting healthy plants, watering, fertilizing, controlling competing vegetation, and protecting plants from disease, pests, and mechanical injury during the initial planting and through the maintenance and management period as necessary.

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<sup>9</sup> Because it is the Hearing Examiner that imposes the conditions, some of the pronouns in the conditions proposed have been removed from the conditions actually imposed on the conditional use in Part IV of this Report. For example, the Hearing Examiner has modified the third full sentence of Condition No. 1 recommended by WMCA to read as follows: "Sufficient larger hollies (e.g., Nellie Stevens hollies), smaller hollies (e.g. Blue Princess hollies), and some green screening/buffering along Grosvenor Lane – a Green Corridor –for homes that are directly across Grosvenor Lane shall be provided," deleting the term "our" in front of the word "homes."

Shelter Development will monitor the plantings for the duration of the maintenance and management period and will replace any trees and shrubs that die within this period, as appropriate for the site and current conditions.

FPCA's condition would impose a permanent requirement to maintain the on-site landscaping without defining what this entails (Exhibit 84(d)):

1. Ensure continuous maintenance of all landscaping, which shall include the timely replacement of any required plantings that fail to survive, for as long as the Conditional Use is in place.

Again, both conditions may be unnecessary because of the standard requirement (above) that the Applicant comply with the approved landscape plan. The Hearing Examiner will include the FPCA's condition in this case because the landscaping and planting shown on the conditional use site plan is critical to Hearing Examiner's conclusion that the use is compatible with the surrounding area. The standard condition contains no *explicit* requirement that landscaping be maintained.

The Hearing Examiner finds it more appropriate to impose a permanent requirement to maintain the landscaping, rather than the 2 years proposed in WMCA's condition. Again, this stems from the importance of the revised landscape plan to the Hearing Examiner's finding of compatibility. She further finds that the more generic term used by FPCA (i.e., "maintenance") adequately captures the Applicant's responsibilities with regard to the landscaping shown on the plan. The dictionary defines the verb "maintain" as, "preserve from failure or decline." "MAINTAIN." *MERRIAM-WEBSTER.COM*. MERRIAM-WEBSTER, N.D. WEB. 12 DEC. 2016. Given that the setback from Fleming Lane is less robust than the 134-foot setback from Grosvenor Lane, she finds that an explicit permanent maintenance requirement is warranted in this case.

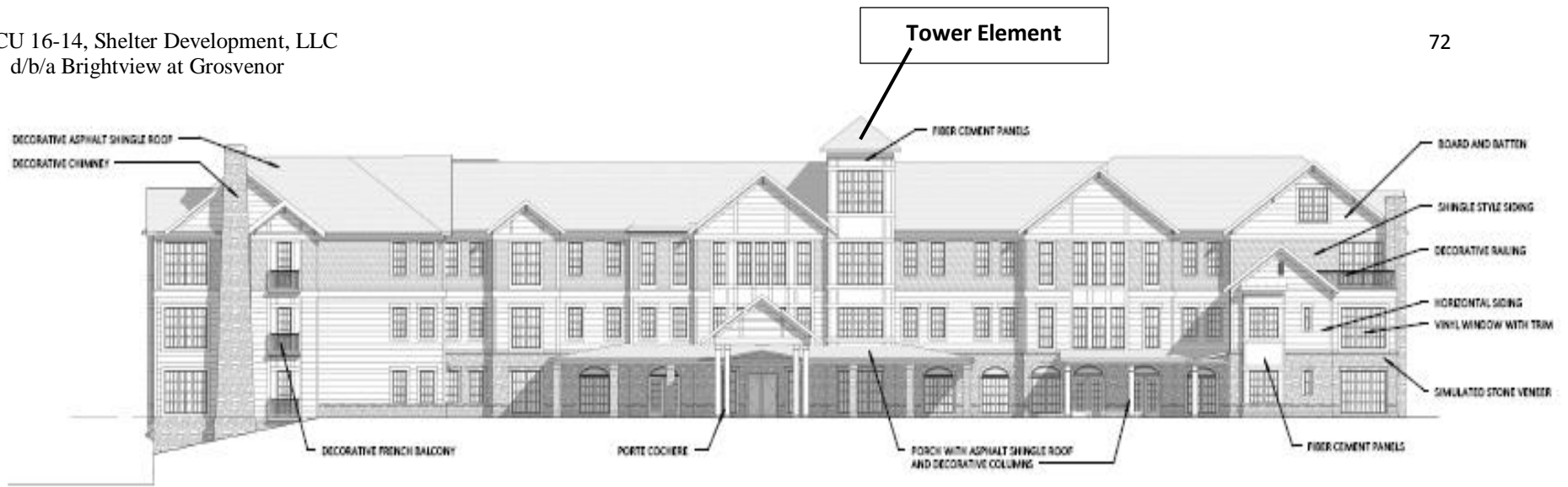
WMCA's fourth agreed-upon condition would prohibit a four-story tower in the center of the building shown on the conditional use plan presented to the Planning Board on September 15, 2016. The "tower element" referred to in WMCA's condition is shown on the following page.

The Hearing Examiner hesitates to impose a condition referring back to a prior version of the conditional use site plan because it is more difficult for the Department of Permitting Services to enforce the condition, should it become necessary. Rather than simply looking at this opinion, which is published on OZAH's website, DPS inspectors would have to delve into the official file to determine exactly what plan was presented to the Planning Board on September 15, 2016.

Normally, the condition relating to a tower element would be subsumed in the typical condition binding the Applicant to its representations identified in the Hearing Examiner's report. In this case, however, no elevations have been submitted of the current conditional use building, presumably because many of the changes occurred shortly before OZAH's public hearing. Because there are no elevations of the north façade that are binding on the Applicant, the Hearing Examiner will impose a slightly revised version of WMCA's condition, prohibiting the tower element identified on page 72 of this Report.

The same concern regarding ease of enforcement applies to WMCA's fifth condition, which prohibits the building from being any closer to Grosvenor Lane than shown in the conditional use plan presented to the Planning Board on September 15, 2016. The Hearing Examiner has compared the final revised conditional use plan (Exhibit 93) and the plan presented to the Planning Board (Exhibits 43, 55). Both show that the closest building setback to Grosvenor Lane is 134 feet. As a standard condition of approval already mandates that the Applicant build only in accordance with the approved conditional use site plan (Exhibit 93), the Hearing Examiner does not impose WMCA's fifth condition because it is redundant.

WMCA's sixth condition, relating to the signage along Grosvenor Lane, remains appropriate to include as a condition of approval and the Hearing Examiner includes it in Part IV of this Report.



FPCA's second proposed condition imposes an obligation on the Applicant to work with FPCA to obtain preliminary plan approval for an additional row of street trees in the Fleming Avenue right-of-way. Unfortunately, the Hearing Examiner has no jurisdiction to impose this condition, although this does not prevent the parties from continuing their cooperation during preliminary plan review. Further, the Hearing Examiner has already found that the existing landscaping, site topography and layout more than adequately screens the use. MCDOT has jurisdiction over the right-of-way, and its use will be determined during preliminary plan review. Further, the Hearing Examiner has no evidence before her that MCDOT would approve eliminating parking in the right-of-way or that such a proposition would be safe. Mr. Lenhart testified that reducing the planned pavement width on Fleming Avenue at the intersection with Grosvenor Lane would not allow emergency vehicles to access Fleming Avenue unless parking is restricted. There is nothing in the record to indicate that parking will be restricted. While she understands that this issue is very important to FPCA, the Hearing Examiner must leave the decision on the use of the right-of-way to the preliminary plan process.

The balance of the conditions agreed to by Shelter and FPCA are appropriate and further address the concerns raised by Ms. Faraclas and Ms. Cacho. A requirement that delivery trucks use residential side streets is appropriate given Ms. Faraclas' testimony that there are no sidewalks on many of the side streets.

#### **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, the application of Shelter Development, LLC d/b/a/ Brightview Grosvenor for a conditional use under Section 59-3.3.2.E.2.c. of the Zoning Ordinance to build and operate a residential care

facility for more than 16 persons at 5510 Grosvenor Lane, Bethesda, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Applicant shall be bound by the testimony of its witnesses and the representations of its counsel identified in this Report and Decision.
2. Physical improvements to the Subject Property are limited to those shown on the Conditional Use Plan (Exhibit 93) and Landscape Plan (Exhibit 84(c)).
3. No more than 104 residents may reside at the proposed facility.
4. The living units must not have full kitchens.
5. Fewer than 30 employee vehicular trips may occur during either of the weekday peak periods of 6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.
6. No more than 30 employees may work on-site at any one time.
7. The architecture of the building must be consistent with the architectural renderings submitted with the conditional use application.
8. Waste pick-up and truck deliveries (excluding mail and parcel deliveries) are prohibited between 7:00 p.m. and 9:00 a.m., and on weekends.
9. Parking spaces in the surface parking lot (excluding the ADA spaces) must be reserved for visitors, and wayfinding signage must be provided to direct overflow visitor parking to the garage. All employees must park in the garage.
10. The Applicant must obtain approval of a Preliminary Plan of Subdivision per Chapter 50 of the Montgomery County Code. Any changes to the approved site plan (Exhibit 93) necessitated by approval of the preliminary plan must be filed with OZAH.
11. At the time of Preliminary Plan, the Applicant must address improvements to Fleming Avenue, as described in the Staff Report (Exhibit 43), subject to Montgomery County Department of Transportation approval.
12. The Applicant must provide two inverted-U bike racks (or equivalent approved by Staff that conform to American Pedestrian and Bicycle Professionals Guidelines) intended for employees to store four bicycles in the underground parking garage near the garage entrance in a well-lit area.
13. The Applicant must comply with all conditions of the approved Preliminary Forest Conservation Plan (Exhibit 84(f)).

14. Prior to any land-disturbing activities, the Applicant must receive approval of a Final Forest Conservation Plan by the Montgomery County Planning Board.
15. Smoking on the Fleming Avenue side of the building is prohibited.
16. Shuttle bus idling on the property is prohibited.
17. The generator must be located below-grade.
18. The Applicant will include broadleaf evergreens – i.e., hollies – just north of the northern parking spaces and northwest curve of the oval driveway between Grosvenor Lane and the Shelter Development/Brightview facility/building. The Applicant will assure that these plantings continue along the entire length of this parking area and these parking spaces, as well as along the curved part of the oval driveway. Sufficient larger hollies (i.e., Nellie Stevens hollies), smaller hollies (i.e., Blue Princess hollies), and appropriate additional plants will be planted to help assure adequate green screening/buffering along Grosvenor Lane – a Green Corridor – and for the homes that are directly across Grosvenor Lane. The Applicant will continue to consult with WMCA, and WMCA will provide appropriate input, as details of the landscaping are worked out.
19. The Applicant will assure that adequate, appropriate canopy and understory plants are planted at the northwest corner of the property (at the southeast corner of Grosvenor Lane and Fleming Avenue) to help assure adequate green screening/buffering along Grosvenor Lane and for the homes confronting the property across Grosvenor Lane. Flowering trees such as white Natchez crape myrtle, as appropriate, are recommended. The Applicant will continue to consult with WMCA, and WMCA will provide appropriate input, as details on the landscaping are worked out.
20. The Applicant shall not construct the previously proposed four-story “tower element,” identified on page 72 of this Report. No part of the structure/building facing Grosvenor Lane will exceed three stories (with pitched roof).
21. The Applicant will work with WMCA to agree on the size, design, and any lighting for a Brightview entrance sign on Grosvenor Lane that is appropriate for the surrounding residential area.
22. The Applicant will ensure continuous maintenance of all landscaping, which shall include the timely replacement of any required plantings that fail to survive, for as long as the Conditional Use is in place.
23. The Applicant shall include a provision in all service contracts or arrangements, including but not limited to trash and delivery services, that access to the property must be via Grosvenor Lane to either Old Georgetown Road or Rockville Pike, and that the contracted services shall not use secondary residential streets in the

surrounding neighborhoods (that is, the area bounded by Interstate 270, Interstate 495, and Old Georgetown Road).

24. To the extent practicable, the Applicant shall install the landscaping along the western frontage as early in the development process as possible and retain the existing landscaping along the western frontage for as long as possible.
25. The Applicant shall preclude any construction activity associated with the project from starting prior to 7:00 a.m., including off-site queuing and the arrival of trucks, equipment or workers. The Applicant shall avoid, to the extent reasonably practicable, the commencement of any construction activity that generates high levels of noise or vibration until 8:00 a.m.
26. The Applicant must obtain a sign permit issued by the Department of Permitting Services or the Sign Review Board, as appropriate, 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.
27. The Applicant must operate this facility in accordance with all applicable County noise regulations, and if found in violation any such regulation, it must immediately take appropriate steps to ensure future compliance.
28. 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 21st day of December, 2016.



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Lynn A. Robeson  
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