

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
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IN THE MATTER OF:
NICHOLS DEVELOPMENT COMPANY LLC

Applicant

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Steve Bolen
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Scott Everett Scoville
Daniel Sellman

Opposing the Application

Liahona Crompton

Neither in Support or Opposition

Before: Lynn A. Robeson, Hearing Examiner

Local Map Amendment
Application No. H-119

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

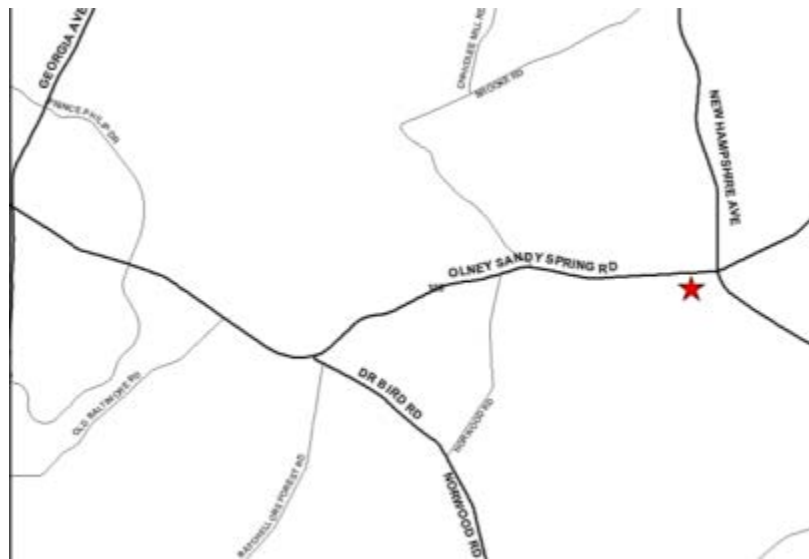
	Page No.
I. CASE SUMMARY	3
II. INTRODUCTION	5
III. PROCEDURAL HISTORY	5
IV. FACTUAL BACKGROUND.....	8
A. SUBJECT PROPERTY	8
B. SURROUNDING AREA	9
C. PROPOSED DEVELOPMENT AND FLOATING ZONE PLAN	10
D. MASTER PLAN	13
E. ADEQUACY OF PUBLIC FACILITIES	21
1. Traffic Issues	21
a. Local Area Transportation Review.....	21
b. Queueing/Congestion	23
2. Stormwater Management	29
F. ENVIRONMENT	30
G. COMMUNITY CONCERNS	32
V. FINDINGS AND CONCLUSIONS	33
A. THE “NECESSARY FINDINGS” REQUIRED (§59.7.2.1.E.2)	33
B. THE INTENT AND STANDARDS OF FLOATING ZONES (§59-5.1.2)	35
C. ELIGIBILITY FOR A FLOATING ZONE (§59-5.1.3)	37
D. COMPLIANCE WITH PURPOSES OF THE RESIDENTIAL FLOATING ZONE (§59-5.2.2)	38
E. COMPLIANCE WITH THE DEVELOPMENT STANDARDS OF THE TF 10.0 ZONE.....	39
F. SILVER SPRING/ASHTON OVERLAY ZONE	41
VI. RECOMMENDATION	42

I. CASE SUMMARY

Applicant: Nichols Development Company LLC (Nichols or Applicant).

Property: Five parcels: Parcel P393, Tax Map JT42, located at 100 Olney-Sandy Spring Rd; Parcel P447, Tax Map JT42, west side of Porter Road; a 4,290-Square-foot portion of Parcel 395, Tax Map JT42, located at 12 Olney-Sandy Spring Road; Lot 2, in the Edward C Thomas Subdivision, located at 17825 Porter Road, Lot 3, in the Edward C Thomas Subdivision, no address.

Location: Approximately 200 feet west of the intersection of Olney-Sandy Spring Road (Md. 108) and New Hampshire Avenue, shown on the following vicinity map (Exhibit 23, p. 1):



Acreage: 2.57 acres tract area; 2.379 site area.

Current Zoning: R-90 and CRT C-.075 R-0.25 H-35.

Proposed Zoning: TF 10.0 (Townhouse Floating).

Current Use: One single-family home.

Proposed Use: 20 townhouse living units/3 MPDUs provided off-site on adjacent property.

Current Density Permitted: 4.84 dwelling units per acre for R-90 parcels; CRT zone permits

	.75 FAR for commercial and .25 FAR for residential density.
Density Proposed:	9 dwelling units per acre. ¹
Environmental Issues:	The Applicant proposes two alternative Floating Zone Plans (FZPs). Portions of the FZP preferred by the Applicant (FZP A) encroach into the stream valley buffer. The Applicant believes that FZP A results in superior design of the open space and still protects the environment. Plan B removes all encroachments from the stream valley buffer.
Master Plan:	The <i>1998 Sandy Spring/Ashton Master Plan</i> recommends single-family detached dwellings at a density of 1.5 to 5 units per acre in the R-90 Zone for the property. The parties disagree on whether height, density, and scale of the development comply with these recommendations and the Plan's general objective to create a "rural" village within the Ashton Village Center.
Neighborhood Response:	Support and opposition. Supporters believe the residential townhomes are needed to redevelop an abandoned restaurant on adjacent property (not part of the application) owned by the same developer. They believe it will revitalize the Ashton Village Center. The Sandy Spring Civic Association, the Sandy Spring Ashton Rural Preservation Consortium, the Spring Lawn Farm Homeowner's Association and individuals oppose the application because it does not comply with the Master Plan. They feel it will exacerbate existing traffic (queuing) problems on Md. 108 and existing stormwater management problems on properties adjacent to the south.
Water/Sewer:	Public Water/Sewer Category S-6; recommended in the Master Plan for Sewer Category S-1.
Technical Staff Recommends:	Approval of Floating Zone Plan A
Planning Board Recommends:	Approval (did not consider alternative FZPs)
Hearing Examiner Recommends:	Approval of Floating Zone Plan A
District Council votes required for approval:	5

¹ The calculation of density is explained in Part V.E of this Report.

II. INTRODUCTION

This case requires the Council to decide whether 4-story townhomes at approximately 9 dwelling units per acre constitute a “rural” village center as that term is used in the *1998 Sandy Spring/Ashton Master Plan* (Master Plan or Plan).

The Hearing Examiner finds that the application does substantially conform to the Master Plan when the term “rural” is viewed in context with the Plan’s goals for the village centers. In an attempt to balance environmental and urban design goals, Nichols has submitted two alternative Floating Zone Plans (FZPs) (Exhibits 92(d) and (e)). The Hearing Examiner recommends approval of FZP A (Exhibit 92(d)) because it removes encroachments from the higher priority portion stream valley buffer while permitting more contiguous open space and better urban design.

III. PROCEDURAL HISTORY

Filed on February 22, 2017, the Applicant, Nichols Development Company LLC. (Nichols or Applicant) seeks rezoning from the R-90 and CRT C-0.75 R-0.25 H-35 to the TF 10.0 Zone of five parcels at 100 Olney Sandy Spring Road, 12 Olney-Sandy Spring Road, and 17825 Porter Road, Sandy Spring, Maryland. The property is further identified as Parcel P393, Tax Map JT42, Parcel P447, Tax Map JT42, Part of Parcel 395, Tax Map JT42, and Lots 2 and 3 of the Edward C. Thomas Subdivision (Tax Account Numbers 08-00720560, 08-00711190, 08-00720558, 08-00711202, 08-00720718) in the 8th Election District.

OZAH scheduled the public hearing on the application for June 12, 2017. Exhibit 20. Staff of the Montgomery County Planning Department (Planning Staff or Staff) issued its report on May 12, 2017. Exhibit 23. Staff recommended approval of the application but requested the Applicant to add a binding element to the FZP: “The maximum number of townhouses on the Subject Property will not exceed 20.” *Id.*, p. 8. Staff also found that the terminus of the access road (Porter Road), three townhouses, and stormwater management facilities encroached into the stream valley

buffer “without justification.” *Id.*, p. 17. Staff recommended deferring further redesign to preliminary and site plan approval to address these issues. *Id.* The Planning Board recommended approval of the application. Exhibit 30. Due to the encroachment into the stream valley buffer, the Board discussed several versions of the FZP that might minimize the encroachment. *Id.* The Board did not resolve the issue, deferring further review to site plan. *Id.*

The public hearing convened as scheduled on June 12, 2017. Frederick and Theda Meyer, adjacent property owners, appeared in opposition to the application, expressing concerns about increased stormwater runoff from the property.² T. 60-63. Three individuals appeared to support the application. T. 32-48. When questioned whether the encroachment into the stream valley buffer met the requirements of the Zoning Ordinance, the Applicant submitted an environmental strategy to address mitigation for the impacts. Exhibit 34. The Hearing Examiner referred this to Staff for comment. Exhibit 36(a).

Before the record closed, several individuals contacted the Office of Zoning and Administrative Hearings (OZAH) to advise that they had not known of the public hearing and that the required signs were not posted on the subject property. Exhibits 38, 39, 41, 52. Ms. Nancy Fennell submitted photographs of the property as of June 12, 2017, to demonstrate that signs were not posted. Exhibit 41(a) and (b). She also asked to be made a party to the case. Exhibit 43. The Applicant acknowledged that the signs had been down periodically, but characterized the length of time as insignificant. Exhibit 49. Because the Applicant could not prove how long the signs had been down, the Hearing Examiner ordered that there be a second public hearing. The Applicant motioned for reconsideration of this order, which the Hearing Examiner denied. Exhibits 51, 52, 53, 59. While these motions were pending, Staff responded to the Hearing Examiner’s question regarding Nichols’ proposed environmental strategy, stating that “[w]e are

² Mr. Meyer later withdrew his opposition to the project without explanation. Exhibit 62.

not able to envision why this encroachment is unavoidable since it seems rather simple to shift the stick of townhomes northward as shown on the original application design.” Exhibit 48(a). Staff subsequently clarified that the Planning Board had the ability to interpret the Environmental Guidelines broadly to achieve good urban design. Exhibit 48(b).

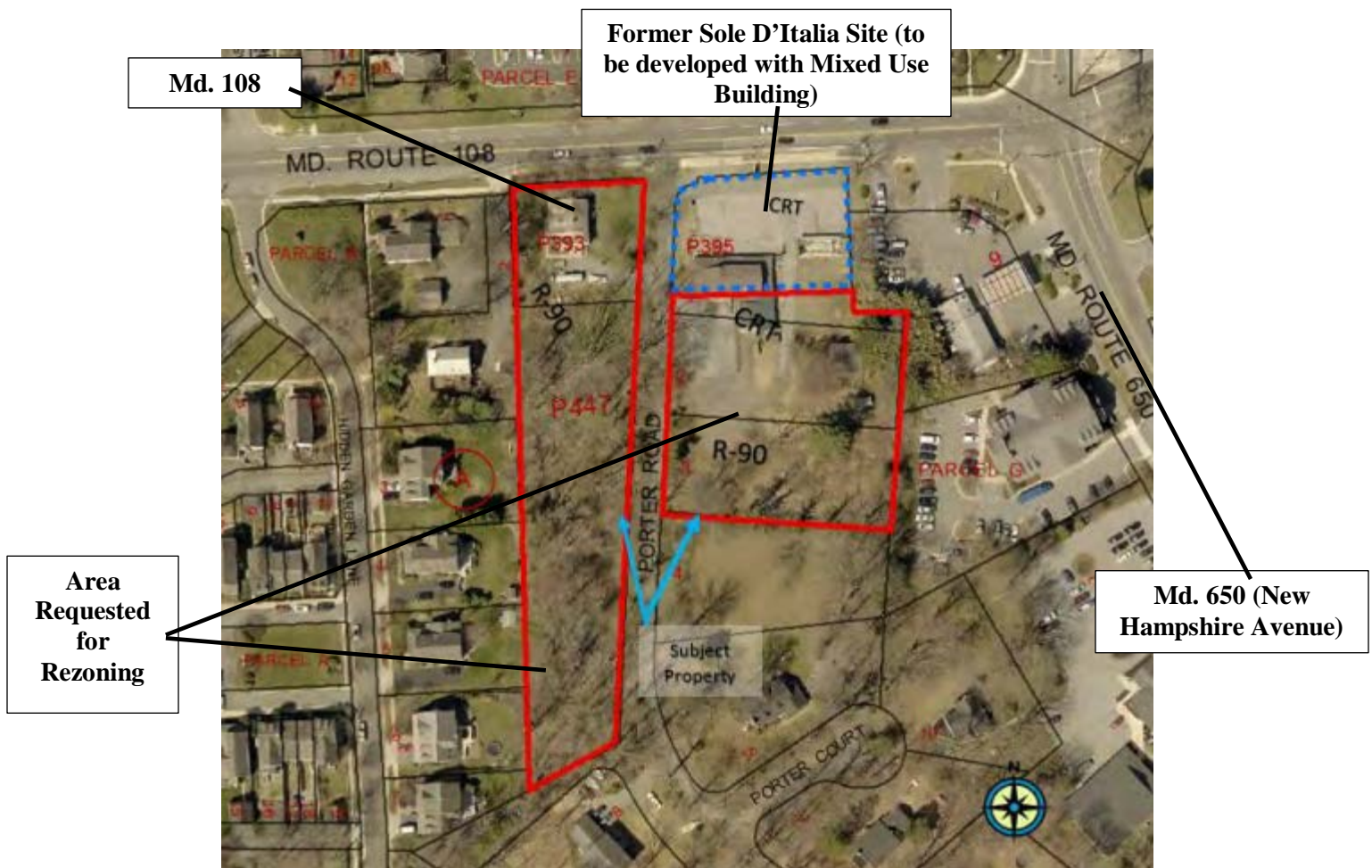
OZAH scheduled a second public hearing for Monday, September 11, 2017. Exhibit 61. Shortly before this hearing, the Applicant submitted two alternative FZPs: FZPs A and B. Exhibits 72(c) and (d), respectively. The Hearing Examiner referred the FZPs to Staff for comment. Exhibit 75. Staff filed a response endorsing FZP A. Exhibit 75(a).

At the second public hearing, five individuals testified in support of the application and five testified in opposition, as well as the experts called by the Applicant. Their testimony is summarized in this Report where relevant. After numerous individuals expressed concern that the development would exacerbate existing delays and create unsafe traffic conditions in front of the property, the Hearing Examiner asked Staff to what extent those concerns would be studied during preliminary plan review. Exhibit 81. Staff responded on September 20, 2017. Exhibit 88. During the public hearing, the Applicant agreed to include two additional binding elements—one limiting the height of the townhomes fronting Md. 108 to 35 feet and one committing to provide landscape or other screening to buffer the development from homes adjacent to the northwest boundary of the site. T. 86, 260. The Applicant filed revised FZPs (for both alternative FZPs) that included these binding elements. Exhibits 92(d) and (e). It also submitted an Open and Environmental Space Plan, Fire Access Plan, and Stormwater Management Strategy Plan for each alternative FZP. Exhibit 84. Parties commented on Staff’s response explaining the extent to which traffic would be reviewed at the time of preliminary plan, and the record closed as scheduled on October 2, 2017. Exhibits 93-95.

IV. FACTUAL BACKGROUND

A. Subject Property

The site consists of five parcels with a tract area of approximately 2.57 acres. The existing zoning is a mix of R-90 and CRT C-0.75 R-0.25 H-35. Nichols proposes redevelopment of adjacent property with a mixed use building *in tandem* with the townhomes proposed here. The site proposed for the mixed use building contains an abandoned restaurant, formerly known as Sole D'Italia. Exhibit 23. The bulk of the subject property lies vacant, except for a single-family detached home on Parcel 393. The property slopes downward from Md. 108 toward the stream valley buffer in the southern portion of the site, which contains a perennial stream on its west side. T. 232, 259. An aerial from the Staff Report shows the subject property (in red) and its relationship to the former Sole D'Italia site (in blue.) Exhibit 23, p. 4, shown below):



Porter Road bisects the northern half of the property before connecting to Porter Court to the south. The existing Porter Road is a public road that has been privately maintained by those who reside in the Edward C. Thomas subdivision, which includes adjacent properties to the south. T. 184.

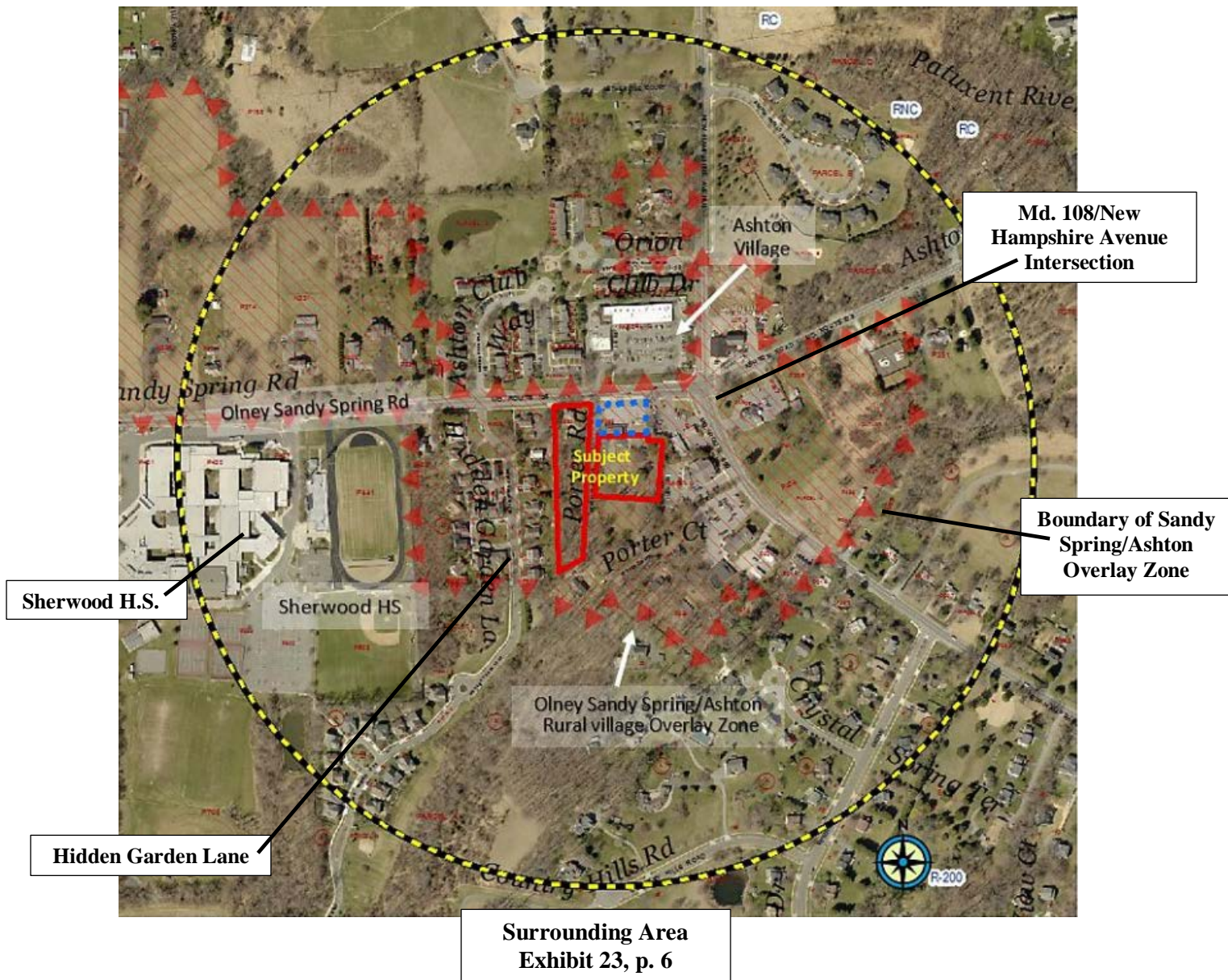
B. Surrounding Area

The surrounding area in a Floating Zone case includes the area that will be most directly impacted by the proposed development. It is identified and characterized to assess whether the new development will be compatible with that area.

Planning Staff identified the surrounding area as a sphere within a 1,500 foot radius of the subject property. Exhibit 23, p. 5. Staff concluded that the western portion consists of single-family detached dwellings in the RNC (Rural Neighborhood Cluster) zone, along with Sherwood High School, an institutional use. The central and eastern parts of the neighborhood include a mix of single-family attached and detached homes in the R-90, R-200, RE-2, RNC, and PD-5 zones. Properties located near the intersection of New Hampshire Avenue and Olney-Sandy Spring Road are zoned CRT. *Id.* According to Staff, the surrounding area includes 75% of the properties within the Sandy Spring/Ashton Overlay Zone. *Id.*

After testimony regarding traffic impacts of the use at the September 11th public hearing, the Hearing Examiner agrees that Staff's defined area is appropriate because it captures the homes along Hidden Garden Lane and Ashton Club Way. Beginning at the western side of the defined area, she finds that land uses south of Md. 108 transition from an institutional use (the high school) to smaller single-family homes along Hidden Garden Way, to auto-oriented commercial uses east of the property. North of Md. 108, uses transition from the larger single-family detached homes in the RNC Zone to townhouses of 2-3 stories in the PD-5 Zone to auto-oriented commercial uses at the intersection of Md. 108/New Hampshire Avenue. Commercial uses at the intersection of

Md. 108/New Hampshire Avenue include a shopping center, a gas station, a CVS and a bank. T. 18, 106; Exhibit 23, p. 4. Further east, the area contains primarily single-family detached homes. Exhibit 23, p. 4. An aerial map from the Staff Report depicts this area (Exhibit 23, p. 6, shown below):



C. Proposed Development and Floating Zone Plan

A Floating Zone Plan must show details of the proposed development, including building locations, height, preliminary stormwater management strategies, and on-site circulation. *Zoning*

Ordinance, §59-7.2.1.B.2. An FZP may also include binding elements that permanently restrict future development of the property. *Zoning Ordinance*, §59-1.4.2. Binding elements may restrict building types, density, or height, among other aspects of the development. *Id.*

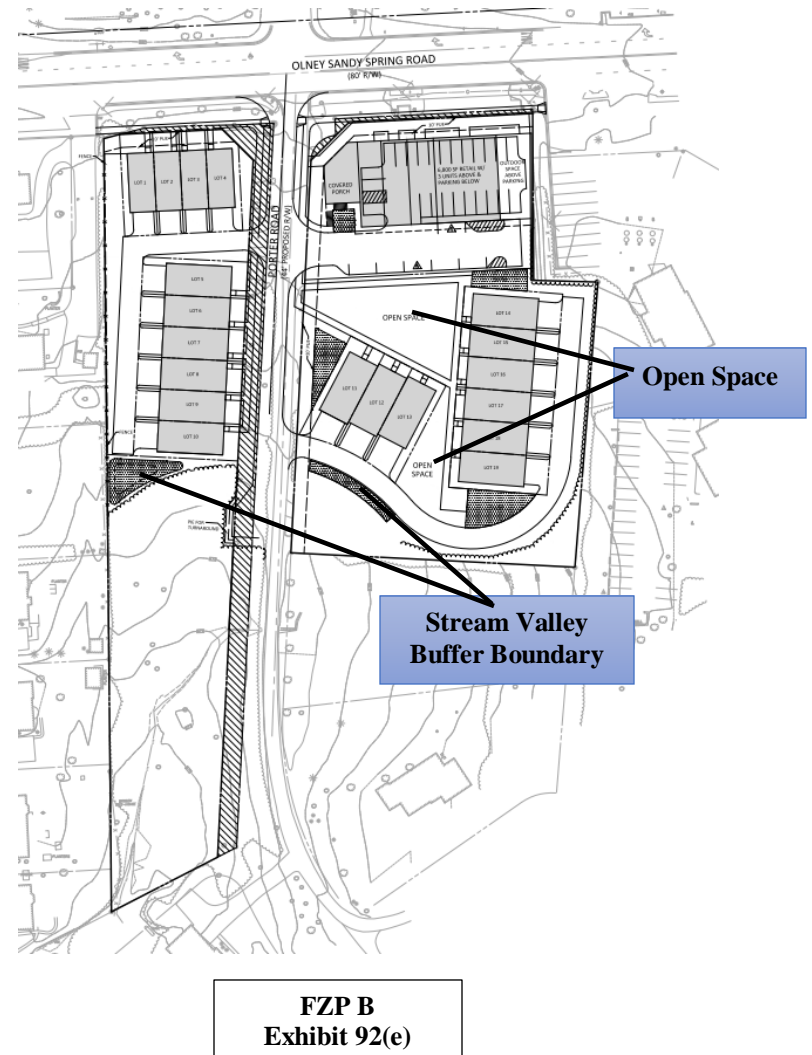
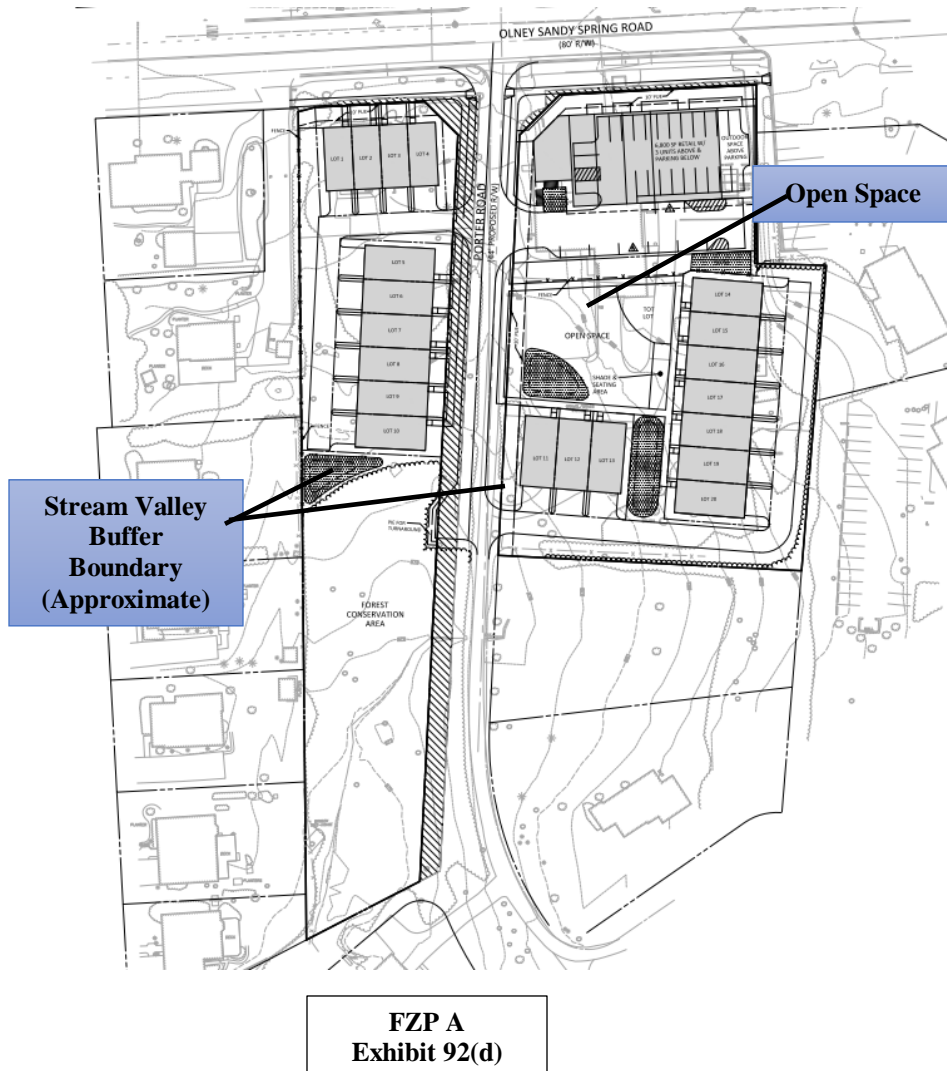
Nichols proposes to build 20 townhouse units on the subject property. Parking for the townhomes is rear-loaded, with a total 40 spaces located in garages and driveways. Exhibits 92(d) and (e), T. 277.

The alternative FZPs (shown on the next page) differ in two major respects. FZP A (1) removes most encroachments from the western side of the stream valley buffer except for those needed for Porter Road and (2) provides a larger contiguous area of open space. T. 151-152. FZP B removes all of the encroachments from both sides of the stream valley buffer, but the open space is smaller and divided. T. 152-154.

Binding elements limit the development to 20 townhomes and prohibit all other uses permitted in the TF 10.0 Zone. Exhibits 92(d) and (e). Building heights are limited to 40 feet, except for townhomes fronting on Md. 108, which are limited to 35 feet. *Id.*; T. 260. According to Mr. Josh Sloan, Nichols' expert in land planning, the units south of Md. 108 will appear to be 30-35 feet high because the property slopes downward from the road by approximately 10 feet. T. 259-260. Minimum setbacks are shown below (Exhibits 92(d) and (e)):

From any detached dwelling lot or land classified in a one family detached residential zone (side setback between lot and site boundary)	8 ft.
From any public street	7 ft.
From an adjoining lot	
Side (end unit)	4 ft.
Rear	18 ft.
Rear setback, alley	4 ft.
Rear setback between lot and site boundary	10 ft.

Nichols plans to develop a 6,800-square foot mixed use building on the adjacent property, which will have commercial retail on the first floor and three residential apartments above. T. 12, 106. A binding element on both alternative FZPs states that the three residential apartments in



the mixed use building will fulfill the MPDU requirements for this project. Exhibits 92(d) and (e). The commercial building will have a total of 30 parking spaces, four above the Code requirements. T. 350; Exhibits 92(d) and (e). Because the grade slopes away from Md. 108, the majority of spaces in the mixed use building will be underground. T. 23.

D. Master Plan

The most controversial issue in this case is whether the application conforms to the 1998 *Sandy Spring/Ashton Master Plan* (Master Plan or Plan.)³ The Plan's primary goal is to preserve the rural character of the Sandy Spring/Ashton area. *Plan*, p. xii. This property lies within the area designated by the Plan as the "Ashton Village Center." For the existing R-90 portion of the site, the Plan recommends development of single-family detached homes at densities between 1.5 to 5 dwelling units in the R-90 Zone. *Plan*, pp. 28, 30, 31, 33. The Plan recommends commercial office uses in the C-1 Zone for the parcels currently zoned CRT. *Plan*, p. 33; Exhibit 23, p. 5. A small portion of this property was part of a larger parcel designated as "Kimball's Market." Exhibits 92(a), 94(b). The Plan recommends a commercial expansion of Kimball's Market because it "contributes significantly" to the sense of community. *Plan*, pp. 38-39. Concerned that the Ashton Village Center would succumb to the "constant pressure" to suburbanize, the 1998 Plan sought to maintain the Center's existing scale by reconfirming the land use recommendations from the 1980 Master Plan, except where the 1998 Plan changed those recommendations. The 1998 Plan characterized the land use recommendations as "limited commercial use and moderate- to low- density residential uses." *Plan*, p. 38.

The Plan identifies the village centers of Sandy Spring and Ashton as one element of the rural character of the area. *Id.*, p. xiii. It envisioned the villages as "identifiable centers of

³ Different sections of the Zoning Ordinance require the application to conform substantially to applicable master plan. See, *Zoning Ordinance*, §§59-7.2.1.E.2.a, 59-5.1.2.A.1, 59-4.9.14.D.2.c. To simplify this Report, conformance to the master plan will be discussed here. Environmental goals of the Master Plan are addressed in Part IV.E of the Report.

community activity.” *Plan*, p. 4. The Plan sought to revitalize the village centers by encouraging redevelopment with additional “community-serving” commercial uses on a small scale. *Plan*, pp. 8, 31. To ensure the “small scale” of new development envisioned, the Plan recommended urban design guidelines and an overlay zone to enable the flexibility to implement these guidelines. *Plan*, pp. 31. The guidelines include the following (*Plan*, pp. 29-32, emphasis in original):

- **Apply the new Sandy Spring/Ashton Rural Village Overlay Zone to allow additional flexibility in development while providing the option of design review to ensure conformance with this Plan...**
 - **Encourage development and revitalization of the village centers.** This Plan recognizes that incentives to property owners are an important part of revitalizing the village centers. Providing for increases in commercial density is one way of encouraging redevelopment. However, in these village centers such increases need to be balanced with the Plan intent to maintain the small scale of the existing centers.
- * * *
- **In combination with the above flexibility provisions, this Plan recommends the following development guidelines which, with design review, will help ensure that new development maintain the small scale envisioned for the village centers:**
 - Encourage the use of traditional village design, such as height limits compatible with the Sandy Spring Historic District and buildings facing the main road.
 - Encourage “active fronts” on buildings, such as porches and street entrances.
 - Encourage a land-use mix of stores and homes by maintaining the existing mix of commercial and residential zoning within the village centers.
 - Create pedestrian “traffic” with uses and designs that invite frequent visits by all members of the community.
 - Encourage stores and other uses that provide services to local residents and are at a compatible scale.
 - Encourage use of the Sandy Spring Historic District as a source for design.
 - Create small parking areas that are well-landscaped, preserve trees, and compatible with nearby uses both day and night.
 - Place most off-street parking out of view of the common space and active fronts, rather than between buildings and the street....

In 2016, the District Council amended the Sandy Spring/Ashton Overlay Zone to permit heights of 40 feet if the Planning Board determines (at site plan) these would be compatible with

the surrounding area and further the intent of the Master Plan. *Ordinance No. 16-18*, §1; *Montgomery County Zoning Ordinance*, §4.9.14.D.2. The Council also reduced the minimum lot size for townhouses from 3,000 square feet to 900 square feet. *Id.*

Nichols believes that the increased density proposed here conforms to the Plan's overall goal to maintain the rural scale of the village centers, despite the Plan's explicit recommendations for less intense development. Nichols relies on the "Notice to Readers," contained in most Master Plans, warning that the specific recommendations of a Master Plan may become less relevant over time where circumstances have materially changed. *Plan*, p. vii. Mr. Sloan testified that, with the passage of time, development should conform to the general objectives of the Plan rather than site-specific recommendations. T. 246. Nichols argues that there have been many changes since adoption of that the Plan could not have envisioned (Exhibit 92(a), p. 3):

1. The expansion of commercial zoning intended to revitalize the village center has not preserved previous commercial uses or attracted new community serving businesses;
2. The zoning and density did not provide the necessary incentives to create development patterns that would support a walkable, active, mix of uses that would traditionally anchor a rural village.
3. New stormwater technologies and market demand for different building types have necessitated newer designs for developments.

In this vein, Mr. Sloan opined that the recommendation to expand commercial zoning near Kimball's Market demonstrates that the Plan recognized the need for additional density to support the village center. T. 247-248, 251. The fact that part of the Kimball's Market property will revert to residential will "support the revitalization of the commercial uses that have struggled to survive for many years." *Id.*

Nichols defines "low to moderate" density by reference to the townhouse zones in the 2014 Zoning Ordinance, rather than the specific land use recommendations contained in the Master Plan. Eight or nine units per acre now falls within the density permitted by the Townhouse Low Density Zone. T. 250; *see, Zoning Ordinance*, §59-4.4.11.B.2. The Townhouse Medium Density Zone

permits approximately 12 units per acre. *Zoning Ordinance*, §59-4.4.12.B.2. T. 250-251. The Applicant also argues that the land use proposed (i.e., townhomes) conforms to the Plan because townhouse units could be built on the property under the existing zoning and there are townhouses elsewhere in the area. T. 247. Mr. Sloan opined that Nichols could develop approximately 11 dwelling units (approximately 4-5 single-family detached and 6 townhomes) at a yield of approximately 5 dwelling units per acre.⁴ T. 250. In Mr. Sloan's opinion, the density increase supports the mix of uses needed to achieve the "rural village center," unlike other areas designated in the Master Plan as "rural neighborhoods." T. 83, 251.

Mr. Sloan testified that the townhouse units must be 4-stories (35 to 40 feet high) to meet the urban design goals of the Master Plan. The 4-story townhouse is a newer building typology that permits rear-loaded parking. Rear-loaded parking enables developments to have active street fronts, more pedestrian connections and open space, and less visible parking. T. 259-261. Even though these townhomes may be higher than others in the surrounding area, the property's slope downward from Md. 108 will mitigate the 40-foot height of the units south of Md. 108 and make them appear to be 30-35 feet. T. 260. Nor did he feel that the townhouses would contribute to the "suburbanization" of the village the Plan sought to avoid. He opined that "suburbanization" refers to large lot, auto-oriented, single-use development, such as the CVS located on the northeast quadrant of the Md. 108/New Hampshire Avenue intersection. T. 252-253, 257. In his opinion, "revitalization" of the Ashton Village Center will occur through new building forms and urban design that create a mix of uses that promote walkability, connectivity, and activity to bring life to the Village Center. Exhibit 92(a); T. 265.

Those in opposition believe that the Master Plan's recommendation of between 1.5 to 5

⁴The site area is 2.379 acres. Exhibit 92(d). Eleven units divided by that acreage is approximately 5 units per acre ($11/2.379=4.623$.)

single-family detached dwelling units per acre defines the term “village center.” Several, including the Sandy Spring Civic Association and the Sandy Spring Ashton Rural Preservation Consortium (SSARPC), argue that the proposed density does not fulfill the Plan’s goal to maintain the existing, rural scale of the area. T. 203, Exhibits 30(a), 43, 61. Mr. Walt Fennell stresses that the Master Plan’s repeated use of the term “rural” (by his count, at least 600 times) and the warning against “suburbanization” underscore the Plan’s primary goal to maintain the mix of uses recommended by the Plan. T. 201. He estimates that the proposed density will result in a 10% increase within the surrounding area and a 20% density increase in the immediate area, although he does not define the latter. T. 205-207.

Nor do opponents believe that the building type and height meet the goals of the Master Plan. Some feel that rows of townhomes reduce the “open space” and rural vistas encouraged by the Plan. T. 201. Mr. Walt Fennell stated that the height is far greater than anything else in the area. The townhomes within the surrounding area are two-stories and the retail is one-story. T. 207. Townhomes being built elsewhere in Sandy Spring are three stories, and the difference in height is “noticeable,” even though the roofs aren’t in place yet. T. 207-208. The SSARPC argues that the townhomes should be shorter and fewer to match the “tone and feel” of existing development. Exhibit 30(a). Some in opposition interpret the Plan to mean that the 30-foot height limit for commercial properties implicitly requires residential properties to be lower, as that is a more common development scenario. Exhibit 95.

The opposition disagrees that more density is needed to “revitalize” the Village Center. They argue that commercial uses have recently developed in the area without the need to approve more density. Exhibit 95. They ascribe the approval of the CVS, an auto-oriented use, to a “lack of community engagement” rather than proof that the Plan’s recommendations have become invalid over time. Exhibit 94(b). Some attribute the decline of small businesses to the lack of

adequate parking rather than a failure of the Master Plan. *Id.* Several contend that changes in density shouldn't be approved solely to redevelop the Sole D'Italia site. T. 202; Exhibits 94(b), 95(a). They note that the Plan cautions that increased density should be "balanced with the Plan's intent to maintain the existing scale..." Exhibit 43. Some remain skeptical that the site design placing open space in the middle will encourage "connectivity" to other parts of the village center because the development is self-contained and there are no crosswalks on Md. 108. Exhibits 93(a), 94(b). Finally, those in opposition believe that the Council should adhere to the specific recommendations for the property in the Master Plan because they relied on the Plan's representations when purchasing their property. Exhibit 93(a).

The Hearing Examiner understands the consternation of those in opposition that 4-story townhomes at 9 units per acre can be characterized as a "rural village." The term "rural," however, may evoke many, varied connotations in the minds of laypersons.⁵ The Hearing Examiner must interpret the Plan in context of the goals it seeks to achieve and the way it defines those goals. When she views the Plan's goal for "small scale" new development, the urban design guidelines intended to maintain that scale, the recommendations for this site, and the function of the Village Center envisioned by the Plan, she finds that FZP A (Exhibit 92(d)) *does* conform to the Plan.⁶

The interpretation of "low to moderate" density must be read in context with changes that have occurred in the almost 20 years since its adoption. The density proposed here (i.e., around 9 units per acre) is now characterized as "low density" under the 2014 Zoning Ordinance. The Master Plan's recommendation for R-90 Zoning supports a finding that the density proposed here meets the Master Plan, given the passage of time. The R-90 Zone is *not* a rural zone. Rather, it is

⁵ Some of these colloquial images may conjure less density than the Master Plan's recommendations of 5 dwelling units per acre.

⁶ The Hearing Examiner does not find that FZP B conforms to the Master Plan because of the lack of contiguous open space, which constrains the interactive connectivity of the internal layout of the site.

one of the more intense single-family detached zones under both the 2004 and 2014 Zoning Ordinances. Thus, the Plan never envisioned the lowest densities here that are associated with the rural neighborhoods identified elsewhere in the Plan. The area recommended for the C-1 (commercial/office) Zone on the eastern side of the property has been rezoned to permit mixed use development under the CRT Zone, which may include multi-family units. Exhibit 23, p. 5; *Zoning Ordinance*, §49-4.1.5. These recommendations reinforce that a purely rural environment was not intended for the village centers.

Even though almost double the density recommended, the Hearing Examiner finds that the proposed development achieves the “small scale” called for in the Plan because it incorporates many of the design features intended to implement this scale. Rear-loaded parking increase the amount pedestrian/open space and activates street fronts. It provides walkable connections within the development, a contiguous area of useable open space, and a pedestrian connection along Md. 108 to other areas of the community.

The scale of the townhouses are mitigated not only by the design of the development, but by binding elements and the site’s topography. A binding element limits the height of the homes fronting Md. 108 to 35 feet, the maximum permitted in the R-90 Zone. Because the property slopes away from Md. 108 by approximately 10 feet, the Hearing Examiner finds credible Mr. Sloan’s testimony that the remaining homes will appear to be between 30 and 35 feet in height. T. 259.

The Plan’s overarching goal for the village centers is that they function as “identifiable centers of community activity.” *Plan*, p. 4. The Hearing Examiner agrees that there are many tools available today that did not exist when the Plan was adopted to ensure the small scale, interactive community envisioned by the Plan. Changes to the Sandy Spring Overlay Zone permit much smaller lot sizes and higher heights for townhomes than elsewhere in the County. To

implement the urban design goals of the Master Plan, the Overlay Zone specifically requires parking to be designed to “maintain a pedestrian-friendly street orientation.” *Zoning Ordinance*, §59-4.9.14.C.1.e.i. Mr. Sloan opined that the new 4-story building typology enables the Applicant to meet the urban design goals in the Plan. T. 260. As reflected in this proposal, these tools provide a pedestrian connection to the site of the proposed mixed-use building, places for the community to interact internally, and support for other retail community serving businesses in the village center that did not exist when the Plan was adopted. Those in opposition may be correct that this project will not immediately turn the area into a walkable neighborhood, but it does provide the pedestrian connections and mix of uses that may begin to achieve these goals.

The Hearing Examiner is not persuaded by the opposition arguments that the existing center doesn’t need to be revitalized because the area has sufficient commercial uses. The Plan encouraged community-serving business uses. The auto-oriented commercial uses at the intersection of Md. 108/New Hampshire Avenue do not generate the community interaction sought. These uses, which are on all four quadrants of the intersection, embody the suburbanization the Plan sought to avoid. T. 263-265.

The Applicant attributes the failure to generate community serving business to the lack of residential density, a position refuted by the opposition. The Hearing Examiner does not speculate why the area has not developed with the type of business envisioned by the Plan. Nothing in this record reveals the exact mix or amount of residential or commercial density needed to achieve this goal. The Plan’s vision, however, is more than a particular ratio of residential and commercial density. The Plan stresses creation of an interactive community on a small scale. This development meets the urban design guidelines intended to create a smaller scale of development. It uses the flexible development standards available to create pedestrian connections and useable open space where people may interact. Binding elements and the property’s topography mitigate

the height of the building type. If the adjacent retail is developed *in tandem* with the townhomes, it will add to a mix of uses where the community may interact. All further the Plan's goal to create a lively, active, interconnected village.

E. Adequacy of Public Facilities

There are multiple places where the 2014 Zoning Ordinance requires a determination that public facilities are adequate to support the proposed development at the rezoning stage.⁷ While the Planning Board makes the final decision whether public facilities are adequate during preliminary plan review, the District Council must first make its own evaluation as to the adequacy of public facilities in a rezoning case. *Zoning Ordinance*, §§59-5.1.2.A.2, 59-7.2.1.E.2.e.

1. Traffic Issues

a. Local Area Transportation Review

The Planning Board's Local Area Transportation Review Guidelines (LATR) are the principle tool used to determine whether there is sufficient roadway and transit capacity to serve a new development.⁸ Developments that are expected to generate fewer than 50 total weekday peak hour person trips are exempt from LATR review.⁹

The Applicant's expert in transportation planning and traffic engineering, Mr. Shahriar Etemadi, testified that the residential townhouses on the subject property (excluding the proposed commercial) will generate 14 person trips in the morning peak hour and 16 person trips in the evening peak hour. T. 112. Therefore, Mr. Shahriar opined that the development is exempt from

⁷ Because multiple sections require a review of the adequacy of public facilities, To avoid repetitiveness, these are addressed in this section. *See, Zoning Ordinance*, §§59-5.1.2.A.2, 59-7.2.1.E.2.e.

⁸ *See, Memorandum from E. Graye to the Planning Board*, May 25, 2017, Attachment "Local Area Transportation Review Guidelines, Spring 2017." The LATR Guidelines are promulgated by the Planning Board to implement the Subdivision Staging Policy adopted by the District Council. The Council adopted a new Subdivision Staging Policy (SSP) in November, 2016. While the Planning Board has not finalized the LATR Guidelines for the 2016 SSP, it requires applicants to follow the guidelines set forth in a memorandum dated May 25, 2017, available at http://www.montgomeryplanningboard.org/agenda/2017/documents/REVISED_item10_2017LATRGuidelinesConti_nuatonStaffReport5-25-2017.pdf.

⁹ A "person trip" is the number of trips generated by any mode of transportation (e.g., auto, transit, non-motorized) multiplied by the mode share for each mode. *Id.*

LATR. T. 113.

Nevertheless, the Applicant had to conduct traffic counts in order to meet one of the prerequisites for filing an FZP application. *Zoning Ordinance*, §59-D-5.1.3.D. The Zoning Ordinance requires the Applicant to demonstrate that “[a]ll signalized intersections within ¼ mile of the site boundary are operating below the applicable congestion standard.” *Id.* The Applicant conducted traffic counts at the intersections of Md. 108/New Hampshire Avenue and Sherwood High School/Md. 108 in January, 2017. Because the eastbound lane configuration at Md. 108/New Hampshire Avenue can cause delays (Exhibit 21(b), discussed in the next section), the Applicant used both the standard method and a method incorporating existing lane configuration to determine the CLV (Ex. 23):

Intersection	Existing Condition		Congestion Threshold
	AM	PM	AM and PM
Olney-Sandy Spring/Ashton Road (MD 108) and New Hampshire Avenue (MD 650)	934	1195	1350
Olney-Sandy Spring/Ashton Road (MD 108) and Sherwood High School Entrance	948	930	1350

These traffic counts did not include development that has been approved, but not built. T. 311. Mr. Etemadi stated that it would take the addition of approximately 300-400 trips to reach the congestion threshold. T. 116.

Staff advises that it will review the validity of the traffic counts at the time of preliminary plan, as the counts submitted by the Applicant were “substantially” lower than counts done by the SHA in November, 2015. Exhibit 23, pp. 15-16. Mr. Etemadi opined that this was unnecessary, because January counts are typically lower than counts taken in November. T. 113-114. Ms. Katherine Wheeler questioned whether the Mr. Etemadi’s counts for the Md. 108/New Hampshire Avenue intersection were artificially low because traffic does not get through the intersection in one light cycle. T.333. She has observed cars that weren’t able to make a left turn onto New

Hampshire Avenue within one light cycle. T. 333-334.

Based on the expert evidence and testimony presented, the Hearing Examiner finds that the subject property (*residential component only*) will generate fewer than 50 trips and is therefore exempt from LATR at the time of rezoning. The testimony that the counts may be artificially low is anecdotal, although the Hearing Examiner does not doubt that Ms. Wheeler accurately portrayed her experience. Further, the CLV counts were adjusted to account for the operational problems at the intersection. It is more appropriate to review any unresolved LATR issues at preliminary plan because the traffic impact of the entire project (both mixed use and residential) will be reviewed together and necessary mitigation can be comprehensively addressed.

b. Queueing/Congestion

Of more concern is the impact of traffic from the development on existing queues occurring on Md. 108 in front of the property.¹⁰ The Hearing Examiner finds credible the testimony and evidence presented by the opposition that east and westbound queues at the Md. 108/New Hampshire intersection frequently extend beyond the property's frontage. This makes it difficult to enter and exit Md. 108 from Porter Road and Hidden Garden Lane.

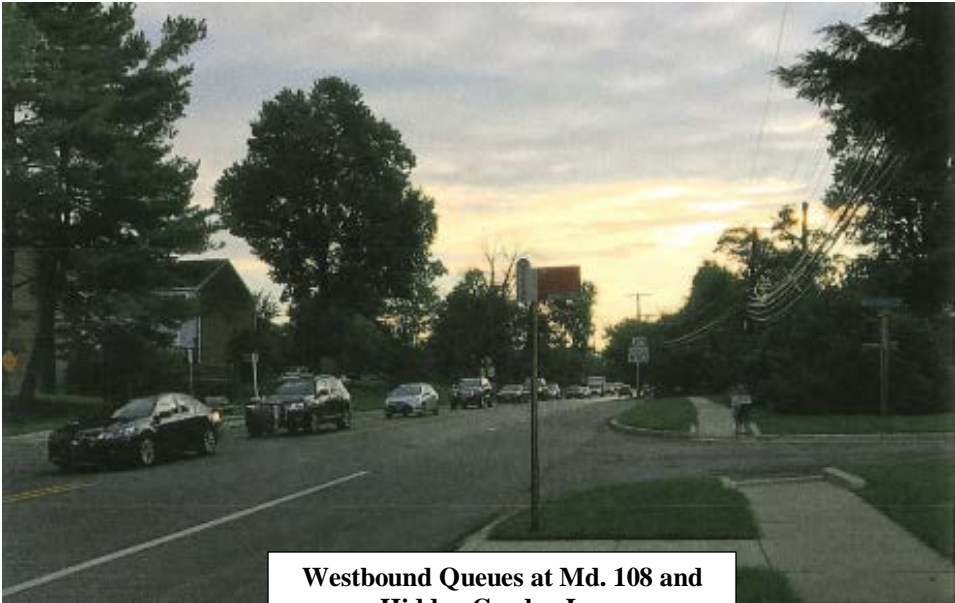
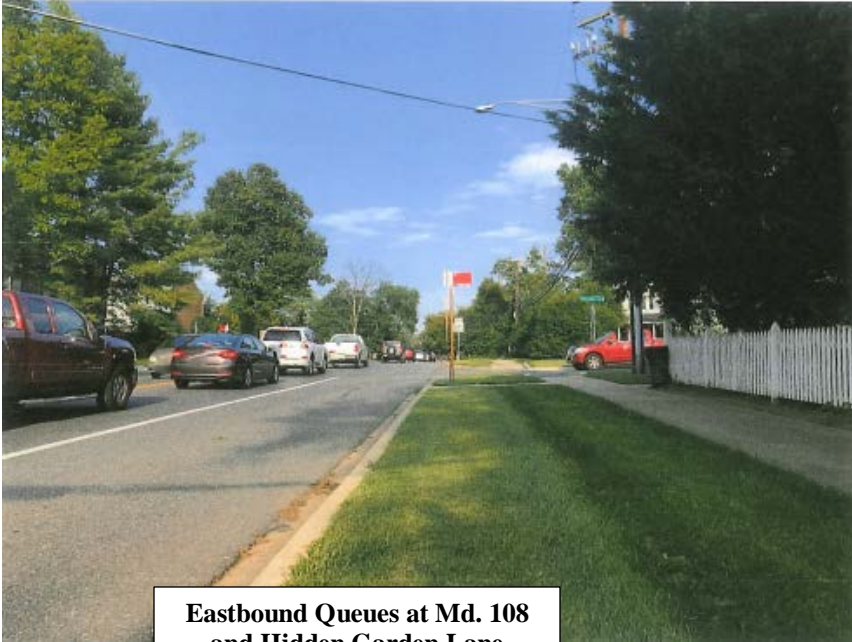
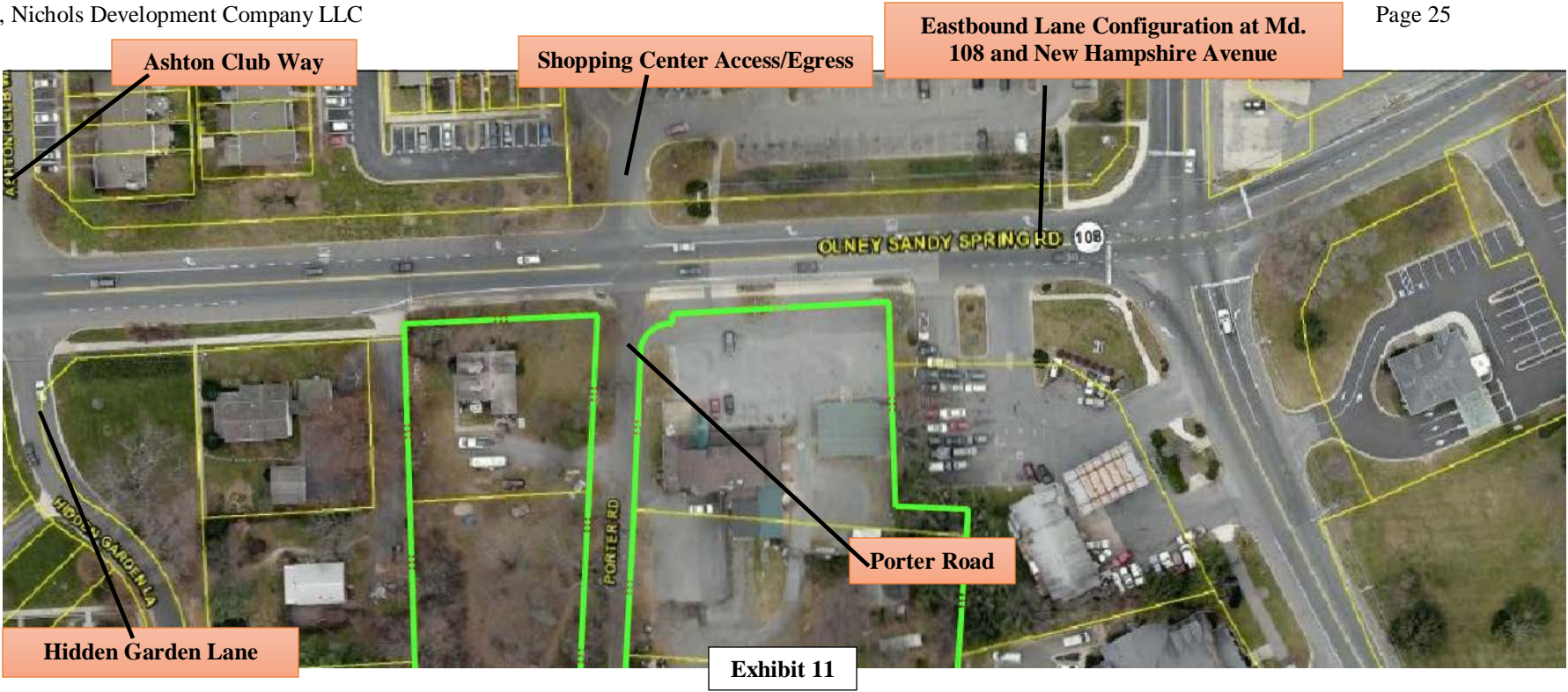
Residents testified that extended queues on Md. 108 and the number of unsignalized intersections between the lights at Md. 108/New Hampshire Avenue and Sherwood High School make it difficult to turn right or left onto Md. 108. These unsignalized intersections include an ingress/egress to a shopping center directly across Md. 108 from the subject property, Porter Road, Hidden Garden Lane, and Ashton Club Way. T. 196, 213-214, 346. The eastbound queues on Md. 108 frequently extend past both Porter Road and Hidden Garden Lane. T. 331, 210-215; Exhibit 80. Ms. Kathleen Wheeler, President of the Spring Lawn Homeowner's Association,

¹⁰ Traffic safety, delays, and congestion issues may be considered at the rezoning stage because they are part of the determination that the project is compatible with adjacent property and the surrounding area. *Montgomery County v. Laughlin*, 255 Md. 724 (1969),

testified that eastbound queues from the intersection can extend all the way to Olney at times. T. 333. Mr. Scott Scoville, who lives on Porter Road, testified that eastbound queueing, combined with the heavy volume of traffic travelling west, made it “almost impossible” to make a left turn from Porter Road onto Md. 108. T. 178. An aerial photograph of the intersection (Exhibit 11) and photographs of existing queues (Exhibit 80) are shown on the following page.

Even when right turn lanes onto Md. 108 are provided, residents testified that it can be dangerous making a right turn to enter the eastbound queue. Ms. Nancy Fennell, who lives on Hidden Garden Lane, testified that she has almost been rear-ended trying to use the right-turn lane to enter the queue. When a car stops to create a gap for her to enter, vehicles behind the stopped car try to pass on the right. T. 346. A resident of Hidden Garden Lane expressed skepticism that people would actually visit the proposed retail on Porter Road because it is so difficult to access or exit Md. 108. T. 196-197.

Individuals who live along Porter Road and Hidden Garden Lane testified that the traffic signal at Sherwood High School causes westbound queues on Md. 108. T. 213, 342. In addition to queuing during peak periods, the volume of traffic from Sherwood High School makes it difficult to enter or exit Md. 108, particular at the open and close of the school at 7:45 a.m. and 2:30 p.m. T. 195-196. Some residents expressed concern that queues on Md. 108 would result in lengthy queues on Porter Road. T. 337-338. The abandoned restaurant had access along its frontage; now cars will be funneled through a single access point. *Id.* Ms. Wheeler disputed Mr. Etemadi’s opinion that the Md. 108/New Hampshire intersections operates within acceptable CLV levels. She has observed cars failing to make it through the light when turning left onto southbound New Hampshire Avenue (the left does not have a green arrow.) T. 334. She questions whether the CLV counts by Mr. Etemadi are artificially low because cars are not getting through the intersection. T. 331-334.



Many felt that this project, along with other infill developments near the subject property, will have a cumulative impact on traffic that goes unaddressed. Exhibit 93(a); T. 207, 214-215, 219. There are two townhouse developments (at least one is another 20-unit subdivision) underway in Sandy Spring as well as a church. Those in opposition would like to see traffic needs addressed comprehensively. *Id.* They would like the County to provide better pedestrian and bike connectivity to walk or bike between Olney and Ashton. T. 198.

Nichols acknowledges that the lane configuration for eastbound traffic at the Md. 108/New Hampshire Avenue intersection causes some queueing. Exhibit 21(b), p. 3. Because the right-hand turn lane is short, traffic turning right can't reach the designated lane. Instead, it queues in the single lane just before the intersection. *Id.* Even when traffic can proceed, traffic turning left queues and forces the through and right-turning traffic to use the right turn lane, also causing delays. *Id.* There is no green arrow for those making lefts onto New Hampshire Avenue. T. 334.

Nevertheless, Mr. Etemadi believes that the CLV counts accurately reflect that the intersection is operating at acceptable levels. Due to the problems caused by the lane structure, Staff requested that he calculate the CLV three different ways, one of which incorporated existing lane configurations. Exhibit 21(b). The intersection operates at LOS C, which demonstrates that queues dissipate in one light cycle, in his opinion. T. 330, 342.

Mr. Etemadi acknowledged that existing conditions may not be ideal. T.335-336. In his opinion, however, traffic generated by the residential townhomes is so low compared to current volumes that its impact on existing traffic conditions will be statistically insignificant. *Id.* Traffic volumes on Md. 108 are 1,000 vehicles in the morning peak and 1,300 in the evening peak. The townhomes will generate 9 vehicle trips in the morning peak hour and 10 in the evening peak hour, or one car every 6 minutes. T. 295-296. According to his preliminary estimates, 60% of the traffic will be coming from or going to the west. The balance will be distributed to the east, north, or

south. T. 300. This means that 6 trips will come from the west and turn right into the site in the evening peak hour and 4 will come from the east and turn left into Porter Road. This translates into approximately 1 car every 15 minutes making a left turn into Porter Road. T. 300. In his opinion, that the impact of 10 trips on total volumes is so small that there is “no methodology” to quantify the amount of additional congestion, delay or queueing.¹¹ T. 297.

Mr. Etemadi also pointed out that the unsignalized intersections between the Md. 108/New Hampshire Avenue and Sherwood High School intersections have deceleration and acceleration lanes along Md. 108 to reduce congestion, although those in opposition contend these can still be dangerous. T. 298, 300-301. The shopping center has two access points on New Hampshire Avenue as well as the one on Md. 108. In his opinion, traffic heading north/south on New Hampshire or east on Md. 108 will most likely use the New Hampshire Avenue access points. T. 298-299.

Mr. Etemadi hasn’t analyzed whether queues on Md. 108 would cause queueing on Porter Road. He does not believe, given the rate per hour of the trips, that queues on Porter Road would exceed more than 3 vehicles. T. 326-327.

Staff advised that traffic review at the preliminary plan will require the Applicant to study the project’s impact on eastbound queueing in front of the property because of the site’s proximity to the Md. 108/New Hampshire intersection. Exhibit 88. Staff felt it unlikely that it will be necessary to study the queues on Porter Road, although they will review the issue again at preliminary plan. *Id.* Staff acknowledged that the cumulative impact of other townhouse developments in the area would not be captured under the LATR Guidelines. *Id.*

Staff also stated that Nichols will not have to submit a traffic study if it submits a

¹¹ There was some testimony from Mr. Etemadi that the impact of the combined townhouse and mixed-use building is also statistically insignificant. It is not reproduced here because the combined uses are not before the Hearing Examiner and the estimates were not based on a queueing study. T. 303-307.

preliminary plan solely for the townhouses. If the preliminary plan is submitted for both the townhouses and the retail/apartments, a traffic study will be required. Staff did not expect to credit trips for the abandoned restaurant (thereby potentially exempting the development from LATR review) due to the length of time the restaurant had been abandoned. *Id.* Nichols represents that the preliminary plan will include both the residential townhomes and mixed-use building. Exhibit 92(a).

The Hearing Examiner must balance the weight of the evidence when determining whether a proposed development is compatible with existing and approved adjacent development. *See, Zoning Ordinance*, §§59-7.2.1.E.2.e; 59-7.1.1.¹² The Hearing Examiner finds that eastbound queues at the intersection of Md. 108/New Hampshire Avenue frequently extend past the property's frontage and can make it difficult to exit and enter Md. 108. She also finds that westbound queues extend past the property's frontage at certain times of the day. At present, however, there are no studies that systematically assess the current queueing conditions. Thus, the Hearing Examiner has nothing quantifiable to analyze the duration of the queues, how frequently they occur, whether there are sufficient gaps to access Md. 108, and the extent of any unsafe conditions that the proposed development may generate.

Testimony and evidence of delays and queuing must be weighed against expert testimony that the impact of the *residential townhomes only* will be statistically insignificant on existing conditions, even though these conditions are not ideal. This is supported by the low rate of trips during the peak hour and the low CLV counts. The testimony that the CLV counts could be artificially low is anecdotal because it's based on a single incident. Testimony raising concerns about queues on Porter Road is likewise speculative at this time, although the Hearing Examiner

¹² *See, e.g., Montgomery County v. Laughlin*, 255 Md. 724, 259 A.2d 293 (1969)

understands the basis for these concerns. Finally, the Hearing Examiner has no authority in a rezoning case to address comprehensively the impact of infill developments under construction in the area, unless the trips are included as pipeline development in a full LATR traffic study.

The Hearing Examiner recommends approval of the application despite the fact that existing traffic conditions can be problematic. A major factor in her recommendation is the representation of the Applicant that the preliminary plan will include both the residential and commercial development, thereby subjecting the application to a full traffic study, and the representations of Planning Staff that (1) it will require the Applicant to study the impact of the development of on eastbound queues, and (2) the Applicant will not receive credit for trips generated by the former restaurant.

2. Stormwater Management

Initially, both owners of adjacent property to the south opposed the application because stormwater from the property drains onto their properties. Theda and Frederick Meyers withdrew their opposition without explanation. Exhibit 62(a). Mr. Scott Scoville, the owner of the property on Porter Road bordering the southwest side of the site, does not believe that the SWM plan on eastern side is adequate given the amount of water that is currently draining to the southern properties. T. 181, 240-241. Mr. Scoville is in residential construction and worked with the WSSC to build the sewer line. T. 241. Nichols preliminary stormwater management strategy cannot be accomplished because the FZP (Exhibit 33) presented at the hearing had the storm drain connected to the sewer manhole, which is prohibited. T. 236. Nichols will not be able to connect to the storm drain on Hidden Garden Lane because the grade goes uphill. T. 279.

Nichols agrees that there is no existing stormwater management on the site because subdivision was recorded before current regulations were adopted. T. 232. Upon review, Mr. Sloan agreed that the manhole connection shown on the FZPs was for sewer. He testified that

there is a separate stormwater system that they can tie into along Hidden Garden Lane, although this development is designed to treat the stormwater on-site. T. 276. The stormwater strategy is not fully engineered at present, but the development can't proceed without providing stormwater management. T. 280. He expects that Mr. Scoville will see improvement in the stormwater runoff, although he may still have some impacts from the perennial stream in the stream valley buffer. T. 238-240.

After the public hearing, Nichols submitted a supplement to the preliminary stormwater management concept. It agreed with Mr. Scoville that the road grade along Hidden Garden Lane was above the stream valley, but stated that grades adjacent to the road are lower. It concluded that, "a storm drain system can cross below the road, if necessary." Exhibit 82(a).

The stormwater management concept plan need not be completed at the rezoning stage. The evidence shows that stormwater management can be treated in accordance with current regulations and the overflow may be released to an off-site facility (although not the one initially identified in the stormwater management strategy.) The Hearing Examiner finds that there is sufficient evidence at the rezoning stage that stormwater management facilities will be adequate to serve the use.

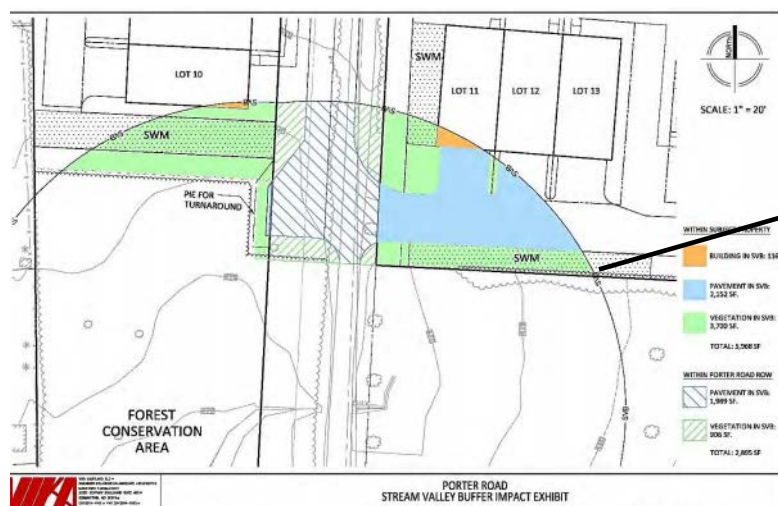
Staff concluded that other public facilities (i.e., fire and police, utilities, and schools) are adequate to serve the proposed development. Exhibit 23, pp. 16-17. Based on Staff's finding, and having no no evidence to the contrary, the Hearing Examiner finds that these public facilities are adequate to serve the use.

F. Environment

Both the Master Plan and Zoning Ordinance seek to protect the environment. One of the purposes of the floating zones is to ensure that "development satisfies basic sustainability requirements, including open space standards and environmental protection and mitigation..."

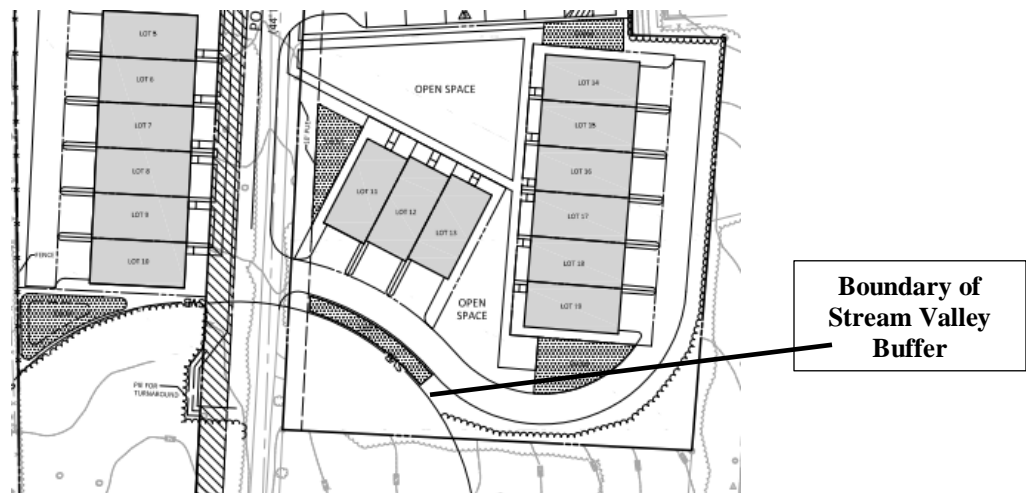
Zoning Ordinance, §59-5.1.2.B.3. In addition, the Master Plan identifies the area south of Md. 108 and west of New Hampshire Avenue as the headwaters of the Northwest Branch. *Plan*, p. 67. Because water quality in the Northwest Branch is very high, the Master Plan “[e]ncourages the provision of undisturbed and completely forested stream buffers.” *Id.* at 67.

After some tug of war between the desire for good urban design and the environmental goals of the Master Plan, the Applicant has proposed two alternative FZPs, both of which have less environmental impact on the stream valley buffer than an earlier version of the FZP (Exhibit 33). FZP A removes almost all of the encroachments on the western side of the stream valley buffer, except those needed for the public road. FZP B removes all encroachments from the stream valley buffer. T. 151-154. Staff recommended approval of FZP Plan A because it provided a superior urban design and more useable open space, while minimizing encroachments into the higher priority area of the buffer. Exhibit 75(a). Mr. Sloan opined that Plan A provided better active recreational space, a sense of community, and formal character typical of a traditional village center. Mitigation for the encroachment to the east side of the buffer (in Plan A) will still improve the water quality of the stream. T. 269. Graphics demonstrate the difference between the FZPs (Exhibits 23, 72(b), 92(e)):





FZP A
Exhibit 92(d)



FZP B
Exhibit 92(e)

Based on Staff's recommendation and the expert testimony in the record, the Hearing Examiner finds that FZP A meets the environmental goals of the Master Plan and the intent clause of the floating zones. She finds that FZP B does not fulfill the goals of the Master Plan to create an interactive community, as explained earlier.

G. Community Concerns

The bulk of the concerns of the opposition have been summarized in Parts IV.D and E of this Report. Mr. Scott Scoville, who lives adjacent to the property's southern boundary, believes that Porter Road was created to serve the original subdivision of single-family detached homes rather than townhouses. T. 183-184; Exhibit 79. Those within the subdivision have privately

maintained Porter Road. T. 186.

Many of those in support wish to see the Sole D 'Italia site redeveloped because it is an eyesore. They want another gathering place within the village. T. 35, 40-41, 42-43, 162-173. Some felt the townhomes will create more affordable and diverse housing types, although they could not say what the prices would be. T. 165-166, 224-225. Another individual that owns a business in the village would like to see a place where his employees can live and work in a sustainable community. T. 227. Several ascribed traffic problems to larger lot subdivisions elsewhere that should not prevent redevelopment of the site. T. 170-172, 190-192, 224.

V. FINDINGS AND CONCLUSIONS

A floating zone is a flexible zoning device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed development will meet the standards in the Zoning Ordinance and that it will be consistent with a coordinated and systematic development of the regional district, as required by the State law. *Maryland Land Use Article, Code Ann.* §21-101(a)(4)(i). An analysis of whether this application meets all applicable standards follows.¹³

A. The “Necessary Findings” Required (§59.7.2.1.E.2)

For a Floating zone application the District Council must find that the floating zone plan will:

a. substantially conform with the recommendations of the applicable master plan, general plan, and other applicable County plans;

Conclusion: For the reasons stated in Part IV.D. of this Report, the Hearing Examiner finds that

¹³ Section 59-7.3.1.E.1.f is the only “necessary finding” that does not apply in this case. That section requires an application for commercial zoning on residential property to be compatible with the surrounding area. As this application is for a residential zone, it does not apply.

the FZP A will substantially conform to the recommendations of the applicable master plan.

b. further the public interest;

Staff determined that the FZP furthered the public interest because the infill development is compatible with the existing and future development in the surrounding area while maintaining the preservation of historic and environmental resources. Exhibit 23, p. 29. Mr. Sloan testified that the street improvements along the property frontage, dedication of right-of-way, and utility connections (if property to the south develops) will further the public interest. T. 92-93.

Conclusion: The “public interest” refers to the adequacy and connectivity of public facilities, as well as compliance with adopted County plans and policies. *Md. Land Use Code Annot.* §21-101. The Applicant presented expert testimony that there is enough right of way to accommodate the sidewalk and streetscape and a right turn lane if required by SHA. T. 255. The Hearing Examiner has already concluded that the public facilities are adequate to support the use and that the application substantially conforms to the Master Plan. This criteria is met.

c. satisfy the intent and standards of the proposed zone and, to the extent the Hearing Examiner finds it necessary to ensure compatibility, meet other applicable requirements of this Chapter;

Conclusion: For the reasons in Parts V.B, D, E, and F of this Report, the Hearing Examiner finds that the proposed FZP will satisfy the intent and standards of the proposed zone.

d. be compatible with existing and approved adjacent development;

Staff found that the original FZP was compatible with adjacent property because it complemented the mix of uses in the Ashton Village Center. Exhibit 29, pp. 29-30. Mr. Sloan opined that the project is compatible with single-family detached homes adjacent to the northwest property line because they are both oriented side by side and are separated by a distance of approximately 70-90 feet. T. 54. Those in opposition believe that the height, density, scale and building type are out of line with existing commercial and residential development, as discussed

above.

Conclusion: The Hearing Examiner finds that the 4-story townhouses are a compatible transition between the adjacent single-family detached homes to the west and the commercial uses to the east. The building orientation and distance mitigate the height and bulk of the townhomes. These are joined with binding elements that require the Applicant to (1) screen the townhomes from the single-family homes, and (2) limit the height of the townhomes fronting Md. 108 to 35 feet. Townhomes south of those fronting the road will appear to be 30-35 feet high. To the east, the adjacent property is the abandoned Sole D'Italia site. While not approved, expert testimony demonstrates that the proposed redevelopment of that site will be compatible with this development (discussed in Part V.D.)

e. generate traffic that does not exceed the critical lane volume or volume/capacity ratio standard as applicable under the Planning Board's LATR Guidelines, or, if traffic exceeds the applicable standard, that the applicant demonstrate an ability to mitigate such adverse impacts; and

Conclusion: The Hearing Examiner has already found that the proposed townhomes will not generate traffic that exceeds the maximum amount permissible under the Planning Board's LATR Guidelines. She bases her recommendation of approval on the Applicant's representation that both the commercial and retail developments will be included in the preliminary plan application and that Staff will require a queuing study and full traffic study at that time.

B. The Intent and Standards of Floating Zones (§59-5.1.2)

All applications for floating zones must fulfill the purpose of the zones included in the Zoning Ordinance. These standards are set forth in *Zoning Ordinance*, §59.5.1.2:

The Residential Floating...zones are intended to provide an alternative to development under the restrictions of the Euclidean zones mapped by Sectional Map Amendment (the Agricultural, Rural Residential, Residential, Commercial/Residential, Employment, Industrial, and Overlay zones). To obtain a Floating zone, an applicant must obtain approval of a Local Map Amendment under Section 7.2.1. The intent of the Floating zones is to:

- A. *Implement comprehensive planning objectives by:*
1. *furthering the goals of the general plan, applicable master plan, and functional master plans;*
 2. *ensuring that the proposed uses are in balance with and supported by the existing and planned infrastructure in the general plan, applicable master plan, functional master plan staging, and applicable public facilities requirements; and*
 3. *allowing design flexibility to integrate development into circulation networks, land use patterns, and natural features within and connected to the property; and*

Conclusion: The Hearing Examiner has already found that the application conforms to the goals of the Master Plan and will be served by adequate public facilities. The Applicant presented expert testimony that the building type and topography of the site have been used to accomplish the type of development recommended by the Master Plan, protect the highest priority area of the stream valley buffer, and provide a right-turn lane (if required) as well as streetscape improvements on Md. 108. The Hearing Examiner finds that the development satisfies this criteria.

- B. *Encourage the appropriate use of land by:*
1. *providing flexible applicability to respond to changing economic, demographic, and planning trends that occur between comprehensive District or Sectional Map Amendments;*
 2. *allowing various uses, building types, and densities as determined by a property's size and base zone to serve a diverse and evolving population; and*
 3. *ensuring that development satisfies basic sustainability requirements including:*
 - a. *locational criteria,*
 - b. *connections to circulation networks,*
 - c. *density and use limitations,*
 - d. *open space standards,*
 - e. *environmental protection and mitigation; and*

Staff concluded that the application responds to changing economic, demographic and planning trends. Exhibit 23, p. 20. Staff reasoned that the development will provide residential uses within walking distance of the village center, and if developed with the proposed mixed-use building, will better serve the multiple needs of Ashton residents. *Id.*

Conclusion: The Hearing Examiner finds that the proposed development will fulfill this purpose

of a floating zone. The Hearing Examiner has already found that the development incorporates modern building types and flexible design tools to achieve the goals of the Master Plan. Floating Zone Plan A meets the open space standards, density and use limitations and will provide a sidewalk connection along Md. 108 to the adjacent mixed-use building needed for a sustainable development. FZP A protects the most important part of the stream valley buffer will providing more useable open space.

C. Ensure protection of established neighborhoods by:

- 1. establishing compatible relationships between new development and existing neighborhoods through limits on applicability, density, and uses;*
- 2. providing development standards and general compatibility standards to protect the character of adjacent neighborhoods; and*
- 3. allowing design flexibility to provide mitigation of any negative impacts found to be caused by the new use.*

Conclusion: The Hearing Examiner has already found that the development is compatible with adjacent uses through urban design and binding elements that require screening from adjacent property and which limit the height of the units fronting Md. 108. Staff concluded that the ample landscaping and forested area will be compatible with the existing character of the area and the existing streetscape will be enhanced. Exhibit 23, pp. 22-23. In Part V.D. of this Report, the Hearing Examiner finds that the proposed use will be compatible with the surrounding area. The Hearing Examiner finds that this requirement has been met.

C. Eligibility for a Floating Zone (§59-5.1.3)

Where, as here, the property has not been recommended for a floating zone in the Master Plan, Section 59-5.1.3 of the Zoning Ordinance sets up a series of tests to determine whether the requested Floating zone may be applied to the site in question. Planning Staff determined that the application met all the prerequisites to file a floating zone application. Exhibit 23, p. 24. Only one of the pre-requisites is questioned in this case—whether the CLV counts performed by the Applicant support its conclusion that all intersections within ¼ mile of the site are operating below

the applicable congestion standard. The Hearing Examiner found that the Applicant satisfied this pre-requisite in Part IV.E.1 of this Report. Based on the uncontroverted evidence from Staff regarding the remaining pre-requisites, the Hearing Examiner finds that the application meets all of the eligibility requirements for a floating zone application. Exhibit 23, pp. 14-15.

D. Compliance with the Purposes of the Residential Floating Zone (§59-5.2.2)

Zoning Ordinance §59-5.2.2 specifies the purposes of the residential floating zones:

Section 5.2.2. Purpose

The purpose of Residential Floating Zones is to:

- A. allow flexibility in residential development, including site layout, lot size, and placement;*
- B. allow residential development of a certain size to provide limited accessory commercial uses for the daily needs of the community; and*
- C. provide residential development that is compatible with the surrounding neighborhood.*

Conclusion: The flexibility provided by the 4-story townhouse type and smaller lot sizes have already been discussed. There are no accessory commercial uses on the subject site, although Nichols proposes to develop the adjacent CRT-zoned property with commercial retail and residential apartments.

The Hearing Examiner finds that the development will be compatible with the surrounding area, as did Planning Staff. From the west, the Hearing Examiner characterized the surrounding area as a transition from institutional uses and larger lot single family residential to two-story townhouses in the PD-5 Zone and smaller residential dwellings in the R-90 Zone. Auto-oriented commercial uses are to the immediate north and east of the property.

The Hearing Examiner finds that FZP A forms a compatible transition between the residential and institutional uses to the west and the auto-oriented commercial uses to the east due to the binding element limiting the height of the townhomes fronting Md. 108 and expert testimony that the remaining homes will appear to be between 30 and 35 feet. Exhibits 92(d) and (e), *Zoning*

Ordinance, §4.4.8.B.3. Townhouses already exist in the surrounding area, although not of the same building type. The building type proposed accomplishes many of the Master Plan's guidelines for the village centers by reducing surface parking, consolidating open space, and creating a walkable streetscape along Md. 108, all contributing to the compatibility of the development with the surrounding area. The flexible design permits development to protect the highest priority area of stream valley buffer on the property, minimize environmental impact of the development and provide more useable open space.

**E. Compliance with the Development Standards of the TF 10.0 Zone
(§§59-5.2.3 to 5.2.5)**

1. *Density*: At the hearing, Mr. Sloan approximated the density proposed to be 8 dwelling units per acre. T. 250. Staff treated the entire site as being residentially zoned, in which case density is calculated based on the site area. Exhibits 23, p. 25, 92(d) and (e); *Zoning Ordinance*, §59-5.2.5.A.1.b. Based on the site area, the density proposed is 9 units per acre.¹⁴ As either is less than the density permitted, the application meets this development standard.

2. *Land Use, Building Type, Setbacks, Lot Size and Height*: The remaining development standards are dictated by the TF Zone or the Sandy Spring/Ashton Overlay Zone. *Zoning Ordinance*, §§5.2.3 – 5.2.5; 59-4.9.14. These are outlined in the table below and on the following page (Exhibits 23, p. 25, 92(d) and (e), T. 90:

Standard	Required/Allowed	Provided
Land Use (§59-5.2.3.A.)	All uses permitted in the TLD Zone	Townhouse Living Units are permitted in TLD Zone
Building Type (§59-5.2.4.A)	Townhouse building type permitted	Townhouse building type only, restricted by binding element
From adjacent residential properties	Set by Floating Zone Plan	8 feet

¹⁴ During the public hearing, Mr. Sloan may have based his estimate of the density on the tract area of the site. Using the tract area, the density is 8 units per acre (i.e., $20/2.57=7.78$). The density applied to the site area is 9 units per acre ($20/2.379=8.4$.)

Standard	Required/Allowed	Provided
Lot Size (§59-4.9.14.D.2.b)	900 square feet	900 square feet
Building Height (§59-4.9.14.D.2.c)	40 feet (with site plan approval)	40 feet; except units fronting Md. 108 are limited to 35 feet with binding element.
Building Height Compatibility (§59-4.1.8.B.2)	structures may not protrude beyond a 45 degree angular plane projecting over the subject property	Project complies
Open Space	10%	10% (10,361 square feet)

E. General Requirements

1. Parking, recreation facilities, screening, and landscaping must be provided under Article 59-6 as required for the Euclidean zone that establishes uses under Section 5.2.3 for each applicable residential or commercial area.

Both FZPs provide 40 parking spaces for the residential units, the minimum number required by the Zoning Ordinance. Exhibits 23, p. 25, 92(d) and (e); *Zoning Ordinance*, §§59-5.2.5.E, 59-6.2.4. The mixed use building includes 30 parking spaces, four more than the minimum required. T. 350; Exhibits 92(d) and (e). Many in opposition were concerned that there are too few spaces to support the townhomes when residents have gatherings and need more than two parking spaces. T. 349-350. They believe that the parking for the mixed use building would be too low because other restaurants in the area have to use off-site overflow parking at peak times. T. 350.

Nichols stated there is a possibility that it could provide overflow parking on property adjacent to the subject property fronting on New Hampshire Avenue. They will not know whether they could provide a pedestrian connection between the two until the grading plan is completed. Nichols also offered the possibility of an arrangement for shared parking with the mixed-used building adjacent to the subject site. T. 349, 354.

The Hearing Examiner finds that it is premature to determine whether parking will be

adequate for the combination of uses because the exact uses and square footages of the retail building have not been determined. T. 351. Neither is there enough information on parking problems at other restaurants to determine whether those situations are comparable to this development. The record demonstrates that there are several possibilities to accommodate visitors to individual townhouse units. At present, the evidence that parking is insufficient is speculative. Because the FZPs show the required minimum number of spaces, the Hearing Examiner finds that the parking will meet the requirements of Article 6 of the Zoning Ordinance. The remaining provisions of Article 6 may be addressed at the time of site plan.

2. The floating zone plan may provide for additional parking, open space, recreation facilities, screening, or landscaping or further restrict lighting to allow the District Council to make the necessary findings of approval under Section 7.2.1.

The FZPs do not provide for overflow parking at present, although the Hearing Examiner strongly encourages the Applicant to explore the possibilities presented at hearing.

F. Silver Spring/Ashton Overlay Zone

In addition to the proposed floating zone, the development must meet the purpose and development standards of the Silver Spring/Ashton Overlay Zone. The purpose of the Overlay Zone is to (§59-4.9.14.A):

- 1. Preserve and enhance the rural village character of the Sandy Spring and Ashton village centers by ensuring an attractive and traditional pattern of houses, commercial establishments, open spaces and their relationship to roadways.*
- 2. Encourage a compatible relationship between new or expanded houses or business and traditional neighboring structures that reflects the best of local village character, particularly in terms of scale, siting, design features, and orientation to the site.*

Staff concluded that the development met this standard with reference primarily to the adjacent mixed use building. Exhibit 23, p. 25. Mr. Sloan opined that FZP A created a traditional village center with a design that provided open space, active recreation, a sense of community, and

formal character that a traditional village center would have. T. 269. Mr. Courtenay Wallace, an architect, testified the mixed-use building design is compatible in scale with the townhouses. T. 109. The commercial building will mirror residential architectural features found in the area and will appear to be two stories from the front. T. 106-107. He opined that the height of the townhomes will be “contextually similar” to the townhomes. T. 110. Elevations depicting the proposed mixed-use building and the townhomes are shown below (Exhibit 23, p. 26):



PROPOSED MIXED-USE RENDERING



PROPOSED TOWNHOUSE RENDERING

PROPOSED MIXED-USE ELEVATION
1" = 30'

Conclusion: The Hearing Examiner has already concluded that the application achieves the goal for the village centers defined by the Master Plan and that it will be compatible with the surrounding area. Based on Mr. Wallace’s testimony, she further finds that it will be compatible with the adjacent mixed use building and meets the purpose clause of the Overlay Zone.

Staff concluded that the project meets the remaining development standards in the Overlay Zone. Exhibit 23, pp. 25-29. Having no evidence to the contrary, the Hearing Examiner finds that the proposed development meets the remaining standards of the Overlay Zone.

VI. RECOMMENDATION

Based upon the foregoing, I recommend that Local Map Amendment Application No. H-

119, requesting reclassification from the existing R-90 and CRT C-0.75 R-0.25 H-35 Zones to the TF 10.0 Zone, of property located at 100 Olney Sandy Spring Road, 12 Olney-Sandy Spring Road, and 17825 Porter Road, Sandy Spring, Maryland, in the 8th Election District (Tax Account Numbers 08-00720560, 08-00711190, 08-00720558, 08-00711202, 08-00720718) be **approved** in the amount requested and subject to the specifications and requirements of Floating Zone Plan A, Exhibit 92(d); provided that the Applicant files an executed covenant reflecting the binding elements in the land records and submits to the Hearing Examiner for certification a true copy of the Floating Zone Plan approved by the District Council within 10 days of approval, as required by §§59-7.2.1.H.1. of the Zoning Ordinance.

Dated: November 8, 2017

Respectfully submitted,

A handwritten signature in dark ink, consisting of a stylized 'L' and 'R' followed by a long horizontal flourish.

Lynn A. Robeson
Hearing Examiner