

**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
(240) 777-6660
<https://montgomerycountymd.gov/ozah/>**

IN THE MATTER OF:

ELP Bethesda at Rock Spring
Applicant

Steven Montgomery
Carl Wilson
Timothy Hoffman
Trini M. Rodriguez

For the Application

Pat Harris, Esquire
Attorney for the Applicant

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OZAH Case No. LMA H-135

Before: Lynn Robeson Hannan, Hearing Examiner

HEARING EXAMINER’S REPORT AND RECOMMENDATION

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I. CASE SUMMARY

Applicant: ELP Bethesda at Rock Spring

LMA No. & Date of Filing: H-135, filed December 20, 2019.

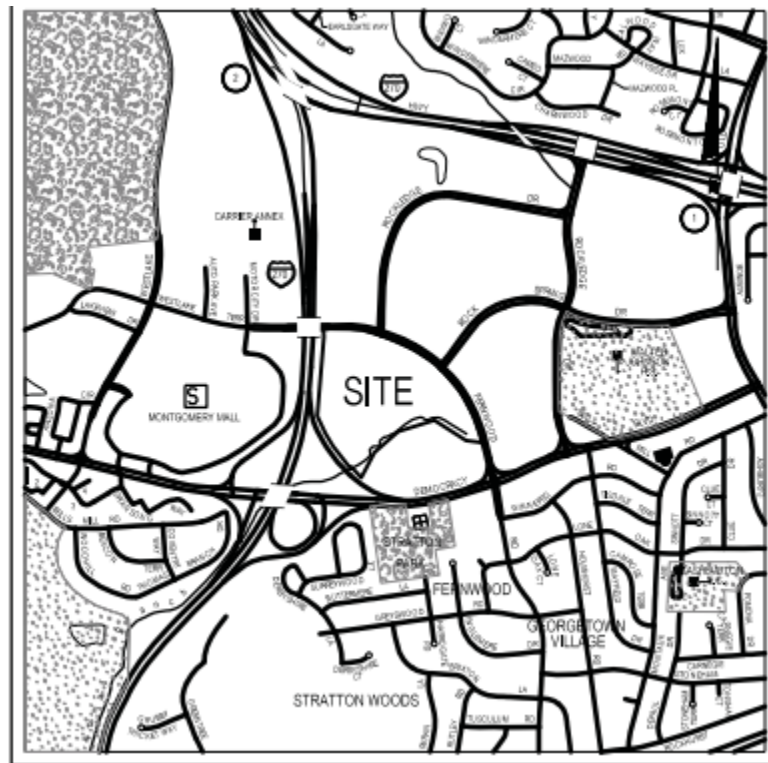
Current Zone: CR-1.5, C-0.75, R-0.75, H-150.

Current Use: Headquarters of Marriott International

Zoning Sought: CRF-1.5, C-0.75, R-1.5, H-150 (Commercial/Residential Neighborhood Zone).

Use Sought: Continuing care retirement community with up to 1,300 independent dwelling units, 210 assisted living/memory care units, and 50 skilled nursing units.

Location: 10400 Fernwood Road, Bethesda, MD on the southern and western sides of Fernwood Road east of the I-270 Spur



Acreage to be Rezoned: 33.64 acres +/- (Net Lot Area).

Density Permitted/Proposed: 1.5 FAR/1.5 FAR.

Open Space Required/Proposed: 10% Public Open Space (3.36 acres)/Approx. 30% (10 acres, including 1.5-acre park).

Maximum Building Height:	150 feet; no change from height permitted under existing zoning.
MPDUs:	15%, to be provided in accordance with law at the time of final plan approval).
Environmental Issues:	None; project reduces existing amount of impervious area in environmental buffer and will include stream restoration in future approvals.
Conformance with Master Plan:	Conforms with the Rock Spring Sector Plan, approved and adopted December 2017
Neighborhood Response:	No Opposition
Traffic Issues:	None
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval
District Council Votes Needed to Approve:	5

II. STATEMENT OF THE CASE

ELP Bethesda at Rock Spring LLC (ELP or Applicant) filed Local Map Amendment (LMA) Application No. H-135 on December 20, 2019. The application seeks to rezone approximately 33.64 acres of land from the CR-1.5, C-0.75, R-0.75, H-150 to the CRF (Commercial Residential Floating Zone) 1.5, C-0.75, R-1.5, H-150. Exhibit 2. The subject property is situated east of the I-270 Spur and south and west of Fernwood Road. Located at 10400 Fernwood Road, Bethesda, MD the property is further described as Rock Spring Center Pt. Pars 6 & 12 (Tax Acct. No. 04-01567726). Ex. 25.

ELP submitted a revised Floating Zone Plan (FZP) on March 3, 2020. Exhibit 42. On March 12, 2020, OZAH noticed a public hearing (Exhibit 49) scheduled for April 17, 2020. Staff of the Montgomery County Planning Department (Planning Staff or Staff) issued reports recommending approval of the LMA and the associated Preliminary Forest Conservation Plan (PFCP) on March 16, 2020. Exhibits 51, 52. At its meeting on March 26, 2020, the Planning Board recommended approval of the LMA and approved the PFCP. Exhibits 54, 55.

The public hearing proceeded as scheduled.¹ No one appeared in opposition to the application.

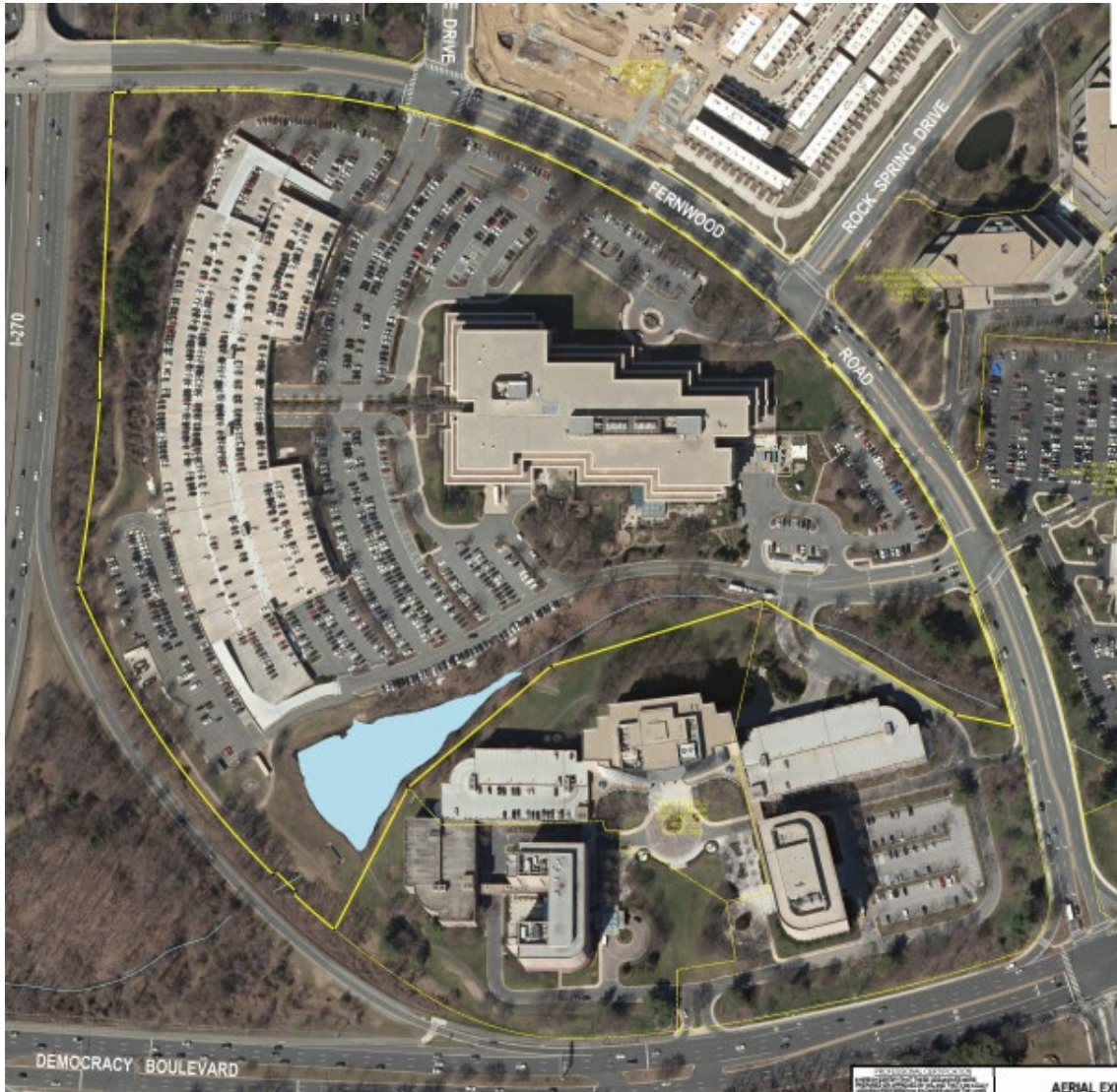
III. FACTUAL BACKGROUND

A. Subject Property

The subject property consists of a 33.64 (net) acres and is bounded on the west by the eastern leg of the I-270 spur, Fernwood Road on the north and east, and an office park (just north of Democracy Boulevard) to the south. Part of the Rock Spring Office Park, the property currently

¹ Due to the COVID-19 pandemic and the Governor of Maryland's Executive Orders prohibiting gatherings of more than 10 individuals, the public hearing was held remotely via Microsoft Teams. A link and phone number for the public to join the hearing were published on OZAH's website. Hearing exhibits were also published on OZAH's website prior to the hearing to permit the public to participate.

serves as the headquarters of Marriott International.² Existing improvements include a 775,000 square foot office building, surface parking and an above-ground garage. The Applicant provided an aerial photograph of existing development (Exhibit 16, below):



Staff advises that the Thomas Branch stream runs along the southern portion of the property with associated wetlands and floodplains. Some slopes exceeding 25% are located primarily in the southern and western parts of the site. While there are no forested areas, there are several specimen

² Marriott will be relocating to a new headquarters building in Bethesda. ELP currently owns the subject property. T. 12.

trees located on the property. Exhibit 52, p. 4.

B. Surrounding Area

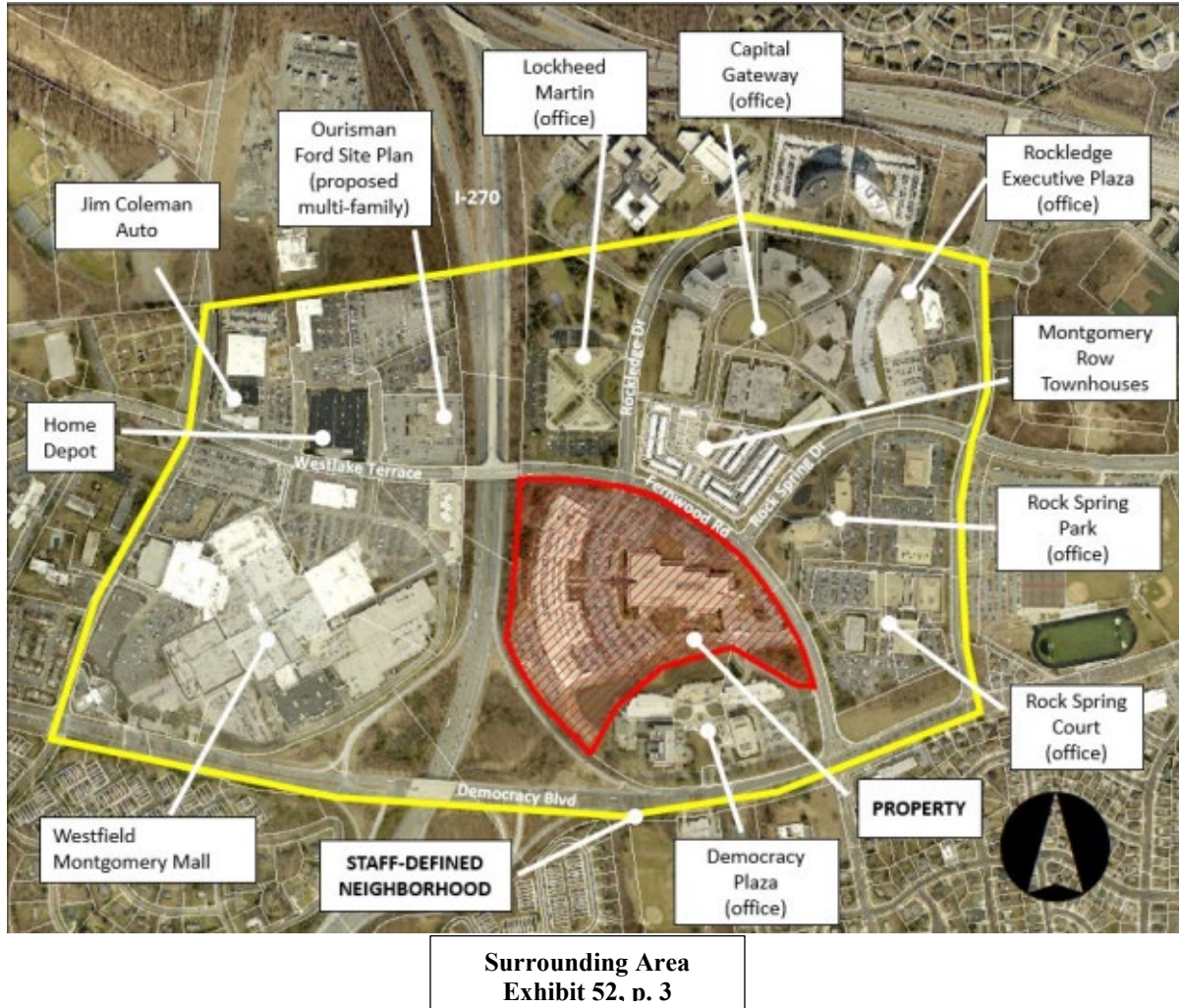
The surrounding area is typically identified in an application for a Floating Zone. The boundaries are defined by the properties that will experience the direct impacts of the use. This area is then characterized to determine whether the uses proposed will be compatible in character to those in the impacted area.

Staff and the Applicant agree that the surrounding area for the subject property is bounded by Rockledge Boulevard to the east, Rockledge Drive to the north, Westlake Drive to the west and Democracy Boulevard to the south. Exhibit 52, p. 3. Staff characterized the neighborhood as primarily commercial in character, including office buildings, Westfield Montgomery Mall, a hotel, a Home Depot and a car dealership. Exhibit 52, p. 3. It also includes one existing residential development, the Montgomery Row townhouse community, across the street from the Property on Fernwood Road. There are several approved but no yet constructed residential developments in the area: (1) a 343-unit multi-family at Westfield Montgomery Mall and (2) a 717-unit multi-family development on the former Ourisman Ford site. *Id.* The Staff Report includes an aerial photograph (Exhibit 52, p. 3, on the next page) showing the boundaries of the surrounding area.

The Applicant's expert in land planning, Ms. Trini Rodriguez, characterized the existing land uses in the surrounding area as heavily suburban/commercial. In her opinion, land uses in the surrounding area are gradually evolving into the mixed use, connected community envisioned by the Rock Spring Sector Plan. This is reflected by the recent residential developments that have been approved but not yet constructed. T. 33-34.

The Hearing Examiner accepts the delineation of the surrounding area proposed by Planning Staff and the Applicant. She agrees with the Applicant that the surrounding area is currently heavily suburban, with office and retail commercial uses but is gradually transitioning to the mixed use

concept envisioned by the Sector Plan as described later in this Report.



C. The Applicant's Proposal

ELP is a subsidiary of Erikson Living Properties, which has developed, owned and operated continuing care retirement communities for 36 years. T. 12, 16. The facilities focus not just on housing, but the health and wellness of residents. T. 15. The average age of residents is in the low 80's; ELP designs campus-type facilities to reduce the need for cars. T. 16. There is a very strong demand for these facilities in this area, which drives the size of this community. T. 17.

The Applicant proposes to redevelop the property with a continuing care retirement community containing up to 1,300 independent living units, 210 assisted living/memory care units, and 50 skilled nursing units in six buildings. Exhibit 42. Except for the marketing center, which is

one story, the buildings will range in height between 7 and 13 stories. T. 39-40. ELP may develop up to 15,000 square feet of retail along Fernwood Road, although it is likely that the amount will be lower. T. 40. The project will provide the equivalent of 15% MPDUs, the minimum required. T. 9-10; *Montgomery County Code*, §25A-5(d)(1). The exact location and method of providing these units will be determined later in the development process.³ At full build-out, ELP expects to employ approximately 650 individuals. T. 19. Eighteen hundred parking spaces will be on-site, almost half of which will be underground. T. 41. ELP plans to retain part of the existing garage and add four-stories living space above it. T. 25-26.

The project will be developed in several phases that will occur with market demand. T. 22. The first phase will begin with the marketing center, which will open prior to construction. Two additional buildings of 170-180 independent living units will follow with associated amenities. T. 21-22. Phase II will bring the number of independent dwelling units to a total of approximately 600. Phase III will include assisted living/memory care and skilled nursing care. Phase IV will add the balance of independent living units. T. 20-25.

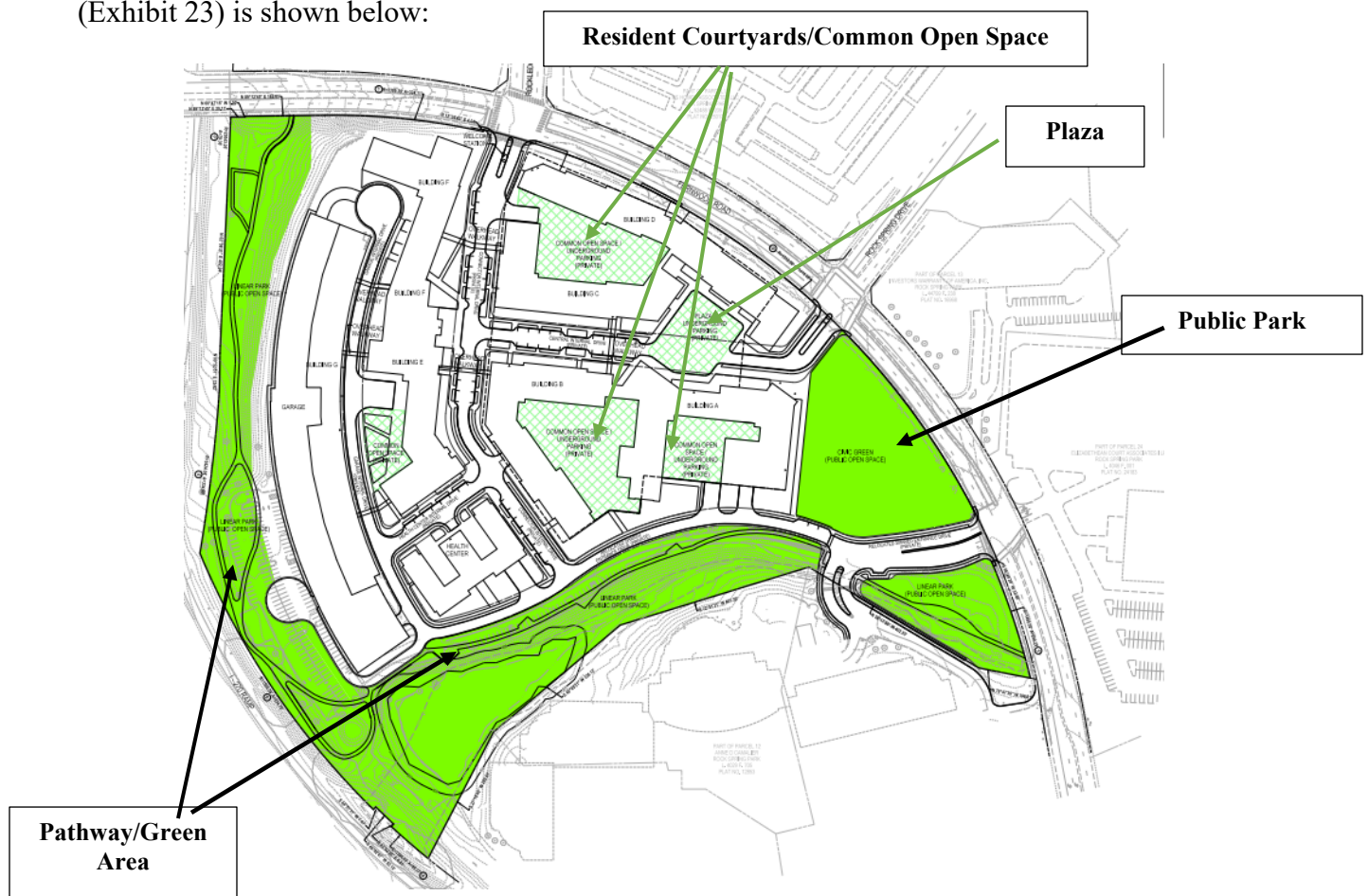
1. Floating Zone Plan

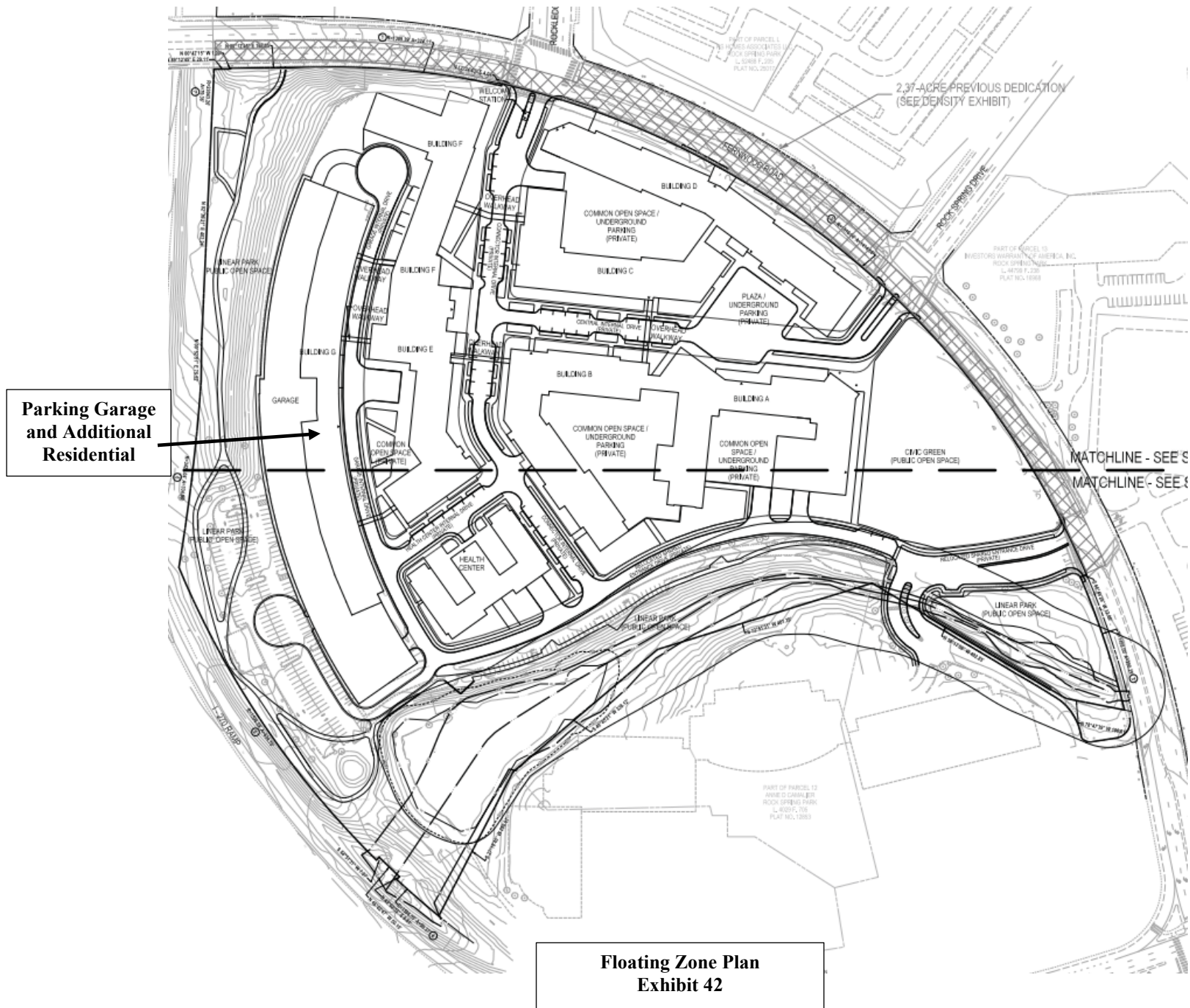
Under Zoning Ordinance §59-7.2.1.B.2.g., every application for rezoning to a Floating Zone must be accompanied by a “Floating Zone Plan” (FZP) that contains required information and often a list of “binding elements” that restrict future development of the property. The Applicants have submitted the required plan. Exhibit 42. An excerpt of the FZP showing the proposed building layouts, drive aisles, road reservations, and environmental areas is reproduced on the following pages. Except for “binding elements”, the development layout shown on the FZP is illustrative and

³ The Planning Department is considering changes to the current MPDU law (Montgomery County Code, §25A-5(d)(1) as it applies to continuing care retirement communities. ELP will provide the requisite number of MPDUs in accord with the law in effect at later (*i.e.*, sketch or preliminary plan) phases. Changes being considered include, without limitation, provision of off-site units and fees in lieu of actual housing units. T. 10.

may change in the future. An excerpt from the FZP showing the overall development (Exhibit 42) is shown on the following page.

Ms. Rodriguez testified that the interior streets are designed in a compact, urban “grid” pattern. There is a central plaza in the middle of the project and buildings wrap around several courtyards designed for use by residents. The compact configuration of buildings permits a “green necklace” of open space and streetscape improvements surrounding the project. According to Ms. Rodriguez the “green necklace” will have 8.5 acres of pathway around the west and south sides of the property culminating in a 1.5 acre public park located on the east side along Fernwood Road. The FZP proposes streetscape improvements and a “road diet” for Fernwood Road. A “road diet” eliminates unnecessary vehicular capacity and replaces it with enhanced streetscape and a bike path to encourage multi-modal rather than vehicular travel. T. 51. An excerpt from the open space plan (Exhibit 23) is shown below:





2. Binding Elements

The FZP includes three binding elements (Exhibit 42):

1. Provide 1.5 acres of contiguous open space along Fernwood Road, to be improved as a park.
2. Provide a minimum of 5,000 square feet of retail space.
3. Provide at least one major public facility that meets master plan guidance, as defined in Section 4.7.3.A of the Zoning Code, with details determined by the Planning Board at Sketch and Site Plan review.

D. Environment

The Thomas Branch stream and associated wetlands and environmental buffer run along the southern property boundary. Currently, approximately 1.2 acres of impervious area (including the southern entrance, an access road, and a bridge into the property to the south) encroach into the stream valley buffer. While the access to the southern property must remain, the portion west of the bridge has been removed from the stream valley. This will reduce the encroachment into the buffer to approximately ½ of its existing size. Exhibit 52, p. 12.

The Planning Board has approved a Preliminary Forest Conservation Plan (PFCP) and variances for removal of certain of the specimen trees. Exhibits 54, 55. Because the Planning Board's Environmental Guidelines discourage any encroachment into the buffer, Staff advises that "subsequent regulatory applications must include measures to enhance the stream buffer function, including restoring areas where impervious surfaces are being removed, managing invasive species, and planting buffer areas with native species where not in conflict with other easements." *Id.* This is a condition of approval for the Preliminary Forest Conservation Plan. Exhibit 54.

E. Community Concerns

There is no comment from the community, either for or against, in the record of this case.

IV. FINDINGS AND CONCLUSIONS

A floating zone is a flexible device that allows a legislative body to establish development standards and uses for a zoning district before "attaching" it to properties. The zone may be applied

to properties with the approval of an LMA.

To approve an LMA, the District Council must find that the proposal will meet the standards required by the Zoning Ordinance and that it will be consistent with the coordinated and systematic development of the Regional District. *See, Md. Land Use Art.*, §21-101(a) and (b). While many of the site specific requirements for development are addressed by later approvals, the Zoning Ordinance contains various standards that the Council must decide. Section 59.7.2.1.E. establishes a set of “Necessary Findings” the Council must make for any Floating Zone application. These standards incorporate the requirements of other sections of the Zoning Ordinance, and most fall within one of three main categories: (1) conformance with the Sector Plan, (2) compatibility with the surrounding area and adjacent properties, and (3) whether the project is supported by adequate public facilities.

A. The “Necessary Findings” Required by Zoning Ordinance §59.7.2.1.E.2.

1. Substantial Conformance with the Master Plan

Several sections of the Zoning Ordinance require an applicant to demonstrate that the proposed rezoning conforms to the applicable Master Plan:

Section 7.2.1.E.2.a. 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;

* * *

Section 59-7.2.1.E.1.b: ...further the public interest...⁴

* * *

⁴ OZAH has interpreted the “public interest” to be conformance to adopted County plans and policies and whether there are adequate public facilities to support the use. In addition to conformance with the Sector Plan and the adequacy of public facilities, Staff found that it meets the public interest because it will provide residential development without burdening schools, reduces the amount of traffic from the site, adds 650 jobs, and “provide a significant residential infill development in a location proximate to a rich array of goods and services.” Exhibit 52, p. 11. To the extent that these are not already encompassed within conformance to County plans and policies, the Sector Plan, and the adequacy of facilities, the Hearing Examiner accepts this rationale.

Section 59-7.2.1.c: ...satisfy the intent and standards of the proposed zone...

* * *

Section 59-5.1.2.A.1. (Intent of Floating Zones): Implement comprehensive planning policies by... furthering the goals of the general plan, applicable master plan, and functional master plan...

Conclusion: The subject site lies within the area covered by the *2017 Approved and Adopted Rock Spring Sector Plan* (Sector Plan or Plan).⁵ Cognizant that the market for office space was declining, the Sector Plan sought to supplement and refine the goals of the prior Master Plan by (1) adding residential and retail uses, (2) preserving publicly accessible open space, (3) providing paths to link open space with other areas of the office park, public facilities, and residential neighborhoods, and (4) integrating transit stations and rights-of-way into future development. *Sector Plan*, p. 5. The Plan tried to shed the area's more suburban past by implementing four "overarching" goals for land use and design, the environment and sustainability, public facilities, and transportation and connectivity. *Plan*, p. 20. The Plan envisioned a a greater mix of land uses and amenities for businesses and residents. It recommended achieving a sustainable environment by creating a larger tree canopy and reducing reliance on vehicular transportation, which overlaps with the Plan's "connectivity" goal to create safer, "low-stress" pedestrian and bicycle connections. The Sector Plan's vision for community facilities was to include more publically accessible green spaces. *Id.*

Key to redevelopment of the area is the Plan's focus on a central "spine" along Fernwood Road and Rock Spring Drive. *Plan*, 18. The Plan divided the larger Sector Plan area into three clusters central to this spine. The subject property lies within the "Rock Spring Central/Mixed-Use Business Campus" cluster, which includes the office park where Marriott is now located. *Plan*, pp. 18-19. The Plan recommended the property's existing CR zoning with a notation that a floating

⁵ The public benefits for CR-Zoned property recommended by the Sector Plan are discussed in Part IV.D.2 of this Report.

zone may be appropriate for the property. *Plan*, pp. 34-35. According to Staff, this recommendation was “for the purpose of providing options and flexibility for infill or redevelopment in the future should circumstances change for the office buildings.” Exhibit 52, p. 9.

Staff found that the continuing care retirement community proposed by the FZP meets the Sector Plan’s goals by (Exhibit 52, pp. 8-9):

- Adding a new type of residential infill development to area’s existing mix of uses, helping to reshape the area into a more well-integrated community.
- Increasing publicly accessible green spaces within the Plan area by providing a 1.5-acre civic green/park and a walking trail open to the public and an enhanced streetscape for pedestrians and bicyclists.
- Concentrating new activity along the “central spine” (Fernwood Road/Rock Spring Drive as the proposed buildings and the civic green will line the Property frontage along Fernwood Road.
- Helping to create a safe, low stress pedestrian and bicycle network with proposed streetscape improvements along Fernwood Road.

Ms. Rodriguez opined that the FZP conforms to the Sector Plan for similar reasons.

According to her, the Plan recommended a floating zone because the Council knew that it would be difficult to repurpose the site. T. 46. The internal grid design generates an urban landscape and eliminates surface parking, another goal of the master plan. T. 45. The green pathway adds connectivity for pedestrians, along with the 1.5-acre civic park, which is a major public amenity recommended by the Plan. The park will be open to the public and designed for multi-generational use. T. 45-47.

Conclusion: Based on this evidence, the Hearing Examiner agrees with Staff and the Applicant FZP conforms to the Sector Plan not just in terms of the zoning requested, but achieves the Plan’s broader goals as well. It clearly adds significant green space (more than the minimum required by the zone) that is accessible to the public, includes safe pedestrian and bicycle connections, adds to the existing mix of uses without burdening public schools, and significantly reduces the amount of impervious area within the environmental buffer. The residential use, streetscape improvements

and “road diet” along Fernwood Road, and additional multi-modal connectivity will meet the Sector Plan’s goal to achieve a well-integrated, mixed use community.

2. Compatibility

Several sections of the Zoning Ordinance require the District Council to analyze the compatibility of the proposed FZP with adjacent uses and the surrounding area. The application must:

Section 7.2.1.E.1.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;

* * *

Section 5.1.2.C. (Intent of Floating Zones). 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.***

* * *

Section 5.3.2.C. (Purpose of Commercial/Residential Zones). The purpose of the Commercial/Residential Zones is to ... provide mixed-use development that is compatible with adjacent development.

Section 7.2.1.E.1.d. be compatible with existing and approved adjacent development...⁶

* * *

Staff found that the FZP would be compatible with existing and approved adjacent development (Exhibit 52, p. 13):

The proposed rezoning will comply with the overall density and height recommended in the Rock Spring Sector Plan. The change requested in this

⁶ Section 59.7.2.1.E.1.f. requires a non-residential floating zone to be compatible with the surrounding area when it would replace a Residential detached zone. As the existing zone is CR, this criteria does not apply.

Application is an increase in the amount of residential, but not overall, density. The scale of the proposed use is compatible with the scale of development in the surrounding office park and as envisioned in the Sector Plan. The proposed use of the Property as a CCRC is consistent with the continued evolution of the area from an office park to a mixed-use neighborhood. The Project will provide an improved streetscape along Fernwood Road, thus framing the street in a more relevant, urbanized style that will be an improvement over the 1970s office park aesthetic of Rock Spring. At the same time, the Project will provide a generous amount of publicly accessible open space that will improve the aesthetics and livability of the Neighborhood.

Staff also concluded that the proposed continuing care retirement community is at a “scale and density” consistent with the existing office buildings in the Staff-defined neighborhood and the propose residential developments...” Exhibit 52, p. 14.

Ms. Rodriguez opined that the clear and compatible boundaries that define the site, along with the streetscape improvements to enhance the Sector Plan’s “central spine” will create compatible relationships with adjacent uses. The Sector Plan intended the spine to be the key to a more urban framework; the FZP implements this. T. 54-55.

Conclusion: The Hearing Examiner finds that the proposed development will be compatible with adjacent properties and the surrounding area. As Staff points out, the overall FAR will not change; only the commercial/residential FAR will change to add a new use to the surrounding area as called for by the Sector Plan. The “green necklace” surrounding much of the property will provide not just a recreational facility for the public, but a buffer from adjacent land uses. Streetscape and multi-modal transportation along Fernwood Drive adds to the connectivity and updates the existing streetscape. The FZP uses the design flexibility of the CRF Zone to orient the buildings in a compact grid pattern, leaving space to provide significant public benefits, including the pathway and civic park.

3. Adequate Public Facilities/Public Interest

Several sections of the Zoning Ordinance require an applicant for a Floating Zone to demonstrate that public facilities will be adequate to serve the property. The Council must find that

the application meets the following standards:

Section 7.2.1.E.1.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...

* * *

Section 7.2.1.E.1.b: further the public interest...

* * *

Section 7.2.1.E.1.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;

* * *

Section 5.1.2.A.2: (Intent of the Floating Zones). ...“implement comprehensive planning objectives by...ensuring that the proposed uses are in balance with and supported by the existing and planned infrastructure...”

Conclusion: The Hearing Examiner finds the Applicant adequately demonstrated that public facilities will be adequate to serve the use. The uncontroverted evidence demonstrates that changing the use from office to a continuing care retirement community will *reduce* the amount of traffic generated by the development. A table from the Traffic Statement illustrates this (Exhibit 12, Exhibit 2):

<u>TRIP GENERATION TOTALS</u>		MORNING PEAK HOUR			EVENING PEAK HOUR		
		IN	OUT	TOTAL	IN	OUT	TOTAL
<i>Proposed</i>							
	1,560 Units Continuing Care Retirement Community	142	76	218	97	153	250
<i>Existing</i>							
	775,000 sq. ft. General Office Building	649	106	755	127	669	796
Total Difference (Proposed - Existing)		-507	-30	-537	-30	-516	-546

2. Other Public Facilities

Mr. Timothy Hoffman, the Applicant's expert in civil engineering, testified the existing gas, water, sewer, utility, police and fire services are adequate to serve the proposed development. T. 62. The Applicant submitted a stormwater management strategy that has been vetted and accepted by the Department of Permitting services. T. 60-62.

B. The Intent and Standards of the Zone (Section 59-7.2.1.E.2.c)

Section 59-7.2.1.E.2.c of the Zoning Ordinance requires the District Council to find that the FZP "satisfy the intent and standards of the proposed zone." The Zoning Ordinance includes an "intent" clause for all Floating Zones and a "purpose" clause for particular the zone requested. Some of the intent or purpose clauses have already been analyzed above. The balance of the intent findings for Floating Zone and the purposes of the CRF Zone, are examined here.

1. Intent of Floating Zones (Section 59-5.1.2)

The intent of Floating Zones is to ensure (1) the FZP complies with the Master Plan, (2) is supported by adequate public facilities, and (3) achieves the following goals:

Section 59-5.1.2.A.3 ... The intent of the Floating zones is to:

A. Implement comprehensive planning objectives by...

3. allowing design flexibility to integrate development into circulation networks, land use patterns, and natural features within and connected to the property...

Staff concluded that: "The Project is designed to promote the sense of a street grid, although vehicles outside the CCRC are unlikely to circulate through the Property given that it provides no connection to any public street..[t]he Project incorporates restoration of the Thomas Branch stream into the proposed development and adds a linear open space with a walking trail adjacent to the stream." Exhibit 52, pp. 11-12. Ms. Rodriguez testified that the "road diet" along Fernwood Road will add bike lanes and incorporate streetscape improvements. T. 50.

Conclusion: It is obvious to the Hearing Examiner that the project utilizes design flexibility to implement compact development in a grid pattern that enables the Applicant to preserve and enhance environmental features and non-vehicle transportation modes surrounding the development. Staff confirms that almost one-half acre of existing impervious area will be removed from the environmental buffer. Exhibit 52, pp. 12-13. The project will incorporate 8.5 acres of green space along the environmental buffers including a walking path open to the public and a 1.5 acre civic park open to the public. The streetscape improvements and road diet along Fernwood contribute to the central spine through the area envisioned by the Sector Plan.

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 advises that: 'The proposed use takes full advantage of the Property's prime location to introduce a residential use to an aging office park where the existing supply of office space surpasses the demand. At the same time, the Project will decrease impact on the public roads while not burdening the public school system.'" Exhibit 52, p. 12-13. Staff determined that the project satisfies sustainability requirements because the PFCP not only complies with the County's Forest Conservation law but will also significantly reduce existing impervious area in the environmental buffer. *Id.* According to Ms. Rodriguez, will also restore the stream in the southern portion of the site.

Conclusion: The Sector Plan itself recognizes the declining demand for single-use suburban office parks. The uncontroverted testimony from ELP demonstrates that there is a strong demand for continuing care retirement communities like the one presented here. The CRF Zone requested provides an opportunity to repurpose the existing use to one driven by changing demographics in a manner consistent with the integrated, mixed-use neighborhood envisioned by the Sector Plan. The FZP does not change the overall density already approved by the Sector Plan and utilizes that density in a more sustainable way by decreasing imperviousness in sensitive areas and providing more open space. The FZP meets this intent of the CR Floating Zones.

2. Purpose of the Commercial/Residential Floating Zones (Section 59-5.3.2)

Section 59-5.3.2 of the Zoning Ordinance describes the purpose of the Commercial Residential Floating Zones.

Section 5.3.2. Purpose

The purpose of the Commercial/Residential Floating zones is to:

- A. allow development of mixed-use centers and communities at a range of densities and heights flexible enough to respond to various settings;***
- B. allow flexibility in uses for a site; and***
- C. provide mixed-use development that is compatible with adjacent development.***

Ms. Rodriguez pointed out that the FZP fulfills the purpose of the CRF Zone because the property is already zoned CR. T. 53. Staff found that the FZP will “increase the amount of residential density allowed on the Property to build a CCRC, which will add to the diversity of uses in the Rock Spring community.” Exhibit 52, p. 13.

Conclusion: The Hearing Examiner already found that the FZP furthers the purpose of Section 5.3.2.C. The Hearing Examiner agrees with Staff that the FZP in this case meets the remaining purposes of the Commercial Residential Floating Zones. The cap on height and density does not change what is currently approved by the Sector Plan. The CR Zone requested only adds the flexibility to increase the residential component to diversify the land use mix in the area by permitting a project that is residential with an employment component.

C. The Applicability of the Zone (Section 59-5.1.3)

Section 59.5.1.3. of the Zoning Ordinance sets up a series of threshold tests to determine whether a particular site may apply for a Floating Zone. Each subsection is listed below, followed by the Hearing Examiner's finding on each:

Section 59.5.1.3. A. A Floating zone must not be approved for property that is in an Agricultural or Rural Residential zone.

Conclusion: The subject property is currently within the CR Zone; therefore, this provision does not apply.

Section 59.5.1.3. B. If a Floating zone is recommended in a master plan, there are no prerequisites for an application. For properties with a master plan recommendation for a Floating zone for which an application can no longer be made as of October 30, 2014, the following table identifies the equivalent Floating zones for which an applicant may apply:

* * *

Conclusion: Staff determined that there are no prerequisites for this application because the Sector Plan recommended the property a CR Floating Zone. Exhibit 52, p. 13. Upon review of the Sector Plan, the Hearing Examiner agrees with Staff that it intended to recommend a floating zone for this property, and so finds. There are no prerequisites for this FZP.

D. Development Standards and Uses Permitted in the CRF Zone (Division 59-5.3)

1. Uses Permitted (Section 59-5.3.3)

Section 59-5.3.3 of the Zoning Ordinance permits “only” those uses permitted in the CR Zone in the CRF Zone. Staff advises that the continuing care retirement community proposed here constitutes a “residential care facility (over 16 persons) under Section 59.3.3.2.E.2.c of the Zoning Ordinance. Exhibit 52, p. 14.

Conclusion: The Hearing Examiner agrees with Staff that the proposed use is a residential care facility for over 16 persons. These are permitted in the CR Zone and therefore, the CRF Zone. *Zoning Ordinance, Section 59.3.1.6.*

2. Development Standards of the CRF Zone

Section 5.3.4. Building Types Allowed

A. Any building type is allowed in the Commercial/Residential Floating zones.

Conclusion: Because “[a]ny building type” is permitted in the CRF Zone, the FZP meets this standard.

Section 5.3.5. Development Standards.

Section 59.5.3.5.A-D (Density, Parking, Setbacks and Height, Open Space)

Staff found that the FZP meets the development standards of the CRF-1.5, C-0.75, R-1.5, H-150 Zone, (Zoning Ordinance, §59.5.3.5), as demonstrated in the table from the Staff Report (Exhibit 52, p. 14, on the next page).

Conclusion: The FZP demonstrates that the subject property can meet parking, open space, screening, and landscaping requirements on-site. Final layout of the parking, open space, screening and landscaping will be determined at the time of sketch plan and site plan approval.

Section 59.5.3.5.E (Development Standards/Public Benefits)

The Zoning Ordinance requires developments above 0.5 FAR in the CRF Zone to provide public benefits. The Sector Plan also requires CRF-Zoned properties to provide a “major public benefit” as well. *Sector Plan*, p. 35. Staff summarized the hierarchy of major public benefits recommended by the Sector Plan as follows (Exhibit 52, p. 10):

- Dedication of land for needed school site as the highest priority public benefit.
- Providing 15% MPDUs is the highest priority public amenity for new residential development, unless the Property is required to dedicate land for a school or athletic field.
- Other major public facilities including land for parks and school athletic fields, dedications for the North Bethesda Transitway, a library, a recreation center, County service center, public transportation or utility upgrade.
- Diversity of uses and activities.
- Connectivity and mobility.

- Reuse of existing building. (p. 81).

Section 5.3.5. Development Standards for CRF Zone

	Required/Allowed Zoning Ordinance Development Standards	Proposed
Site Area		
Gross Tract Area:		36.0152 acres / 1,568,822 s.f.
Previously Dedicated ROW:		2.3719 acres / 103,320 s.f.
Net Lot Area:		33.6433 acres / 1,465,502 s.f.
Existing Zone	CR 1.5, C-0.75, R-0.75, H-150	CRF 1.5, C-0.75, R-1.5, H-150
Density of Development Max.: (59.5.3.5.A)	2,353,233 s.f. (1,568,822 x 1.5)	2,353,233 s.f.
Independent Living		1300 units
Assisted Living		160-210 units
Skilled Nursing		30-50 units
Indoor Amenity Space		100,000 to 130,000 s.f.
Retail		5,000 to 15,000 s.f.
Building Height Max. (59.5.3.5.B)	150'	150'
Public Open Space Min. (59.6.3.1)		
10% of net area under application (59.4.5.4.B.1) (5% of public open space may be a café)	3.36 acres	Min. 10 acres (Incl. min. 1.5 acres in civic green)
Civic Green		1.5 acres
Linear Park		8.45 acres (2900 linear feet)
Outdoor Café Plaza		0.05 acres
Screening, recreational facilities and landscaping	As required by 59-6	Project will comply with 59-6
Common Open Space (59.3.5.D.2.b)	N/A	Min. 2.50 acres
Parking		
Vehicle Parking (59.6.2.4.B)	0.5-1 space per independent living unit, 1-1.5 spaces per residential care facility unit, 1-5 spaces per 1000 g.s.f. recreational facilities	Approx. 1800 spaces
Bicycle Parking (59.6.2.4.C)	0.25 per 1000 s.f. / 50 spaces max.	50 spaces
Motorcycle/Scooter Parking (59.6.2.3.C)	2% of the number of vehicle spaces must be provided for motorcycles spaces in facilities with more than 50 parking spaces. Max. of 10 motorcycle spaces required.	10 spaces
Spaces for Charging Electric Vehicle (59.6.2.3.E)	Min. of 1 space/ 100 parking spaces provided in a facility must be converted to a station for charging electric vehicles.	Approx. 18 spaces
Building Setbacks Min. (59.5.3.5.B)		
Front Setback from Fernwood Drive	0'	15'-40'
Side Setback from I-270	100'	100' Min.

Compliance with Development Standards Exhibit 52, p. 14

At Staff's recommendation, the Applicant has incorporated a binding element requiring it to provide the civic park as a major public benefit. Exhibits 42, 52, p. 10. Staff advises that it has asked the Applicant to explore ways to contribute to a school site but leaves the final decision on what major public benefits will be required to sketch plan approval by the Planning Board. *Id.* According to Staff, the Applicant proposes additional public benefits including transit proximity, architectural elevations, exceptional design, building reuse, public open space, enhanced

accessibility for the disabled, structured parking and habitat preservation and restoration. *Id.*

Conclusion: With the binding element ensuring the provision of the civic park, the FZP demonstrates that a major public benefit will be provided at the rezoning stage. This may be refined further at later stages of the development process.

Based on the undisputed evidence at this stage, the Applicant's proposal will be able to meet the requirements for parking, recreation, screening and landscaping, and public benefits, subject to review and modification details at subsequent stages of the development process.

V. RECOMMENDATION

For the foregoing reasons, the Hearing Examiner concludes that the proposed reclassification and Floating Zone Plan will meet the standards set forth in the Zoning Ordinance and that it will be consistent with a coordinated and systematic development of the Regional District under State law. Therefore, I recommend that Local Map Amendment Application No. H-135, requesting reclassification from the existing CR-1.5, C-0.75, R-0.75, H-150 to the CRF-1.5, C-0.75, R-1.50, H-150 be **approved** in the amount requested and subject to the specifications and requirements of the Floating Zone Plan (Exhibit 42), provided that the Applicant files an executed Declaration of Covenants (Exhibit 39) 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, in accordance with §§59.7.2.1.H.1.a. and b. of the Zoning Ordinance.

Issued: May 8, 2020.

Respectfully submitted,



Lynn Robeson Hannan
Hearing Examiner

**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
(240) 777-6660
<https://montgomerycountymd.gov/ozah/>**

IN THE MATTER OF:

ELP Bethesda at Rock Spring
Applicant

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OZAH Case No. LMA H-135

Before: Lynn Robeson Hannan, Hearing Examiner

ORDER RE-OPENING AND CLOSING THE RECORD

ELP Bethesda at Rock Spring LLC (ELP or Applicant) filed Local Map Amendment (LMA) Application No. H-135 on December 20, 2019. The Hearing Examiner recommended approval of the application on May 8, 2020. On June 2, 2020, the Applicant submitted a revised Floating Zone Plan adding a binding element restricting the use to a continuing care retirement community subject to the occupancy requirements in Section 59.3.3.2.E. of the Montgomery County Zoning Ordinance. Exhibit 60(a). The additional binding element states (*Id.*):

4. The project will satisfy the use restrictions of a residential care facility pursuant to Zoning Ordinance Section 3.3.2.E.

The use restrictions under that section of the Zoning Ordinance limit occupancy as follows:

iii. Occupancy of a dwelling unit is restricted to the following:

- (a) a senior adult, as defined in Section 1.4.2, Defined Terms;
- (b) other members of the household of a senior adult, regardless of age;
- (c) a resident care-giver, if needed to assist a senior resident; or
- (d) a person authorized to occupy housing provided under any federal or state program that is specifically designed and operated to assist seniors as defined in that program.

(e) If imposing age restrictions that would limit occupancy otherwise allowed by this Subsection, the facility must only impose age restrictions that satisfy at least one type of exemption for housing for older persons from the familial status requirements of the federal "Fair Housing Act," Title VIII of the Civil Rights Act of 1968, as amended, or the state Fair Housing Act, Subtitle 7 of Title 20 of the Annotated Code of Maryland, State Government Article, as amended.

There was ample evidence in the record that the Applicant intended to develop a continuing care facility for seniors. Exhibit 52, T. 13, 15-17, 48. The revised FZP and covenants only confirm the Applicant's intended use and makes it binding on future approvals. It does not change the substance of the Hearing Examiner's Report recommending approval issued on May 8, 2020. As a result, the Hearing Examiner determines that the revised plans are a technical correction to clarify the binding nature of the proposed use.

For this reason, the Hearing Examiner reopens the record solely to receive the Applicant's e-mail submitting the revised documents (Exhibit 59), and the revised FZP (Exhibit 60) and revised covenants containing the additional binding element (Exhibit 61). The record closes immediately as of June 2, 2020, the date of receipt.

Issued this 2nd day of June, 2020.



Lynn Robeson Hannan
Hearing Examiner

COPIES TO:

Pat Harris, Esquire
Attorney for the Applicant
Emily Tettlebaum, Planning Department

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
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IN THE MATTER OF:

ELP Bethesda at Rock Spring
Applicant

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OZAH Case No. LMA H-135

Before: Lynn Robeson Hannan, Hearing Examiner

SUPPLEMENTAL HEARING EXAMINER'S REPORT AND RECOMMENDATION

I. BACKGROUND

ELP Bethesda at Rock Spring LLC (ELP or Applicant) filed Local Map Amendment (LMA) Application No. H-135 on December 20, 2019. It seeks to rezone approximately 33.64 acres of land from the CR-1.5, C-0.75, R-0.75, H-150 to the CRF (Commercial Residential Floating Zone) 1.5, C-0.75, R-1.5, H-150. Exhibit 2. Located at 10400 Fernwood Road, Bethesda, MD, the property is further described as Rock Spring Center Pt. Pars 6 & 12 (Tax Acct. No. 04-01567726). Ex. 25.

In a Report and Recommendation issued on May 8, 2020, the Hearing Examiner recommended approval of the application. On June 2, 2020, the Applicant submitted a revised Floating Zone Plan and draft covenants. Exhibits 59-61. The revised documents add a binding element restricting the use to a continuing care retirement community subject to the occupancy

requirements in Section 59.3.3.2.E. of the Montgomery County Zoning Ordinance. Exhibits 60(a), 61. The additional binding element states (*Id.*):

4. The project will satisfy the use restrictions of a residential care facility pursuant to Zoning Ordinance Section 3.3.2.E.

The use restrictions under that section of the Zoning Ordinance limit occupancy as follows:

iii. Occupancy of a dwelling unit is restricted to the following:

- (a) a senior adult, as defined in Section 1.4.2, Defined Terms;
- (b) other members of the household of a senior adult, regardless of age;
- (c) a resident care-giver, if needed to assist a senior resident; or
- (d) a person authorized to occupy housing provided under any federal or state program that is specifically designed and operated to assist seniors as defined in that program.
- (e) If imposing age restrictions that would limit occupancy otherwise allowed by this Subsection, the facility must only impose age restrictions that satisfy at least one type of exemption for housing for older persons from the familial status requirements of the federal "Fair Housing Act," Title VIII of the Civil Rights Act of 1968, as amended, or the state Fair Housing Act, Subtitle 7 of Title 20 of the Annotated Code of Maryland, State Government Article, as amended.

Montgomery County Zoning Ordinance, §59.3.3.2.E.2.c.ii.(h). The Hearing Examiner reopened the record on June 2, 2020, to receive the revised FZP and covenants. Exhibit 62. The record closed immediately upon receipt. *Id.*

II. FINDINGS

There is ample evidence in the record that the Applicant intends to develop a continuing care facility with occupancy restricted to seniors. Exhibit 52, T. 13, 15-17, 48. The revised FZP and draft covenants only confirm the Applicant's intended use and clarify that it will be binding on future approvals. It does not change in any way the substance of the Hearing Examiner's Report recommending approval issued on May 8, 2020. As a result, the Hearing Examiner determines

that the revised plans are a technical correction to clarify the binding nature of the proposed use.

The Hearing Examiner finds that this application continues to meet all standards for approval under the Montgomery County Zoning Ordinance and State law. The foundation of the Hearing Examiner's recommendation to approve the application was that the use would be a continuing care retirement community subject to the occupancy limits stated. Exhibit 52, T. 13, 15-17, 48. The same is true of Planning Staff's Report and Recommendation, (Exhibit 52), the Planning Board's recommendation (Exhibit 55) and the testimony and evidence presented at the OZAH public hearing. The amendment has no substantive effect on the Hearing Examiner's recommendation issued on May 8, 2020.

III. RECOMMENDATION

For the foregoing reasons, the Hearing Examiner concludes that the proposed reclassification and Floating Zone Plan will meet the standards set forth in the Zoning Ordinance and that it will be consistent with a coordinated and systematic development of the Regional District under State law. Therefore, I recommend that Local Map Amendment Application No. H-135, requesting reclassification from the existing CR-1.5, C-0.75, R-0.75, H-150 to the CRF-1.5, C-0.75, R-1.50, H-150 be approved in the amount requested and subject to the specifications and requirements of the Floating Zone Plan (Exhibit 60), provided that the Applicant files an executed Declaration of Covenants (Exhibit 61) 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, in accordance with §§59.7.2.1.H.1.a. and b. of the Zoning Ordinance.

Issued this 2nd day of June, 2020.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'LH', with a long horizontal line extending to the right.

Lynn Robeson Hannan
Hearing Examiner