

**SUPPLEMENTAL WRITTEN SUBMISSION OF
JAMES G. TOUHEY, JR.**

**Re: Notley Road, Local Map Amendment No. H-159 &
Preliminary Forest Conservation Plan No. F20250680,
OZAH Case No. H-159**

In this supplemental submission, I will address three subjects that were not addressed in my written statement dated December 2, 2025 (Exhibit 85).

The first concerns several of the specific Prerequisites under Zoning Code Section 59-5.1.3.D that the Planning Staff found were satisfied in this case. The second concerns the expert testimony of the Applicant’s civil engineer relating to stormwater management and storm drainage. The third concerns discrepancies and deficiencies contained in the Applicant’s Simplified Natural Resources Inventory (SNRI) and revised Preliminary Forest Conservation Plan (revised PFCP).

1. Planning Staff’s Findings of Fact and Conclusions Pertaining to Zoning Code’s Section 59-5.1.3.D Prerequisites

Section 59-5.1.3.C.2.b.i &.ii of the Zoning Code provides that when a floating zone is not recommended in a master plan, and a Commercial/Residential Neighborhood Floating Zone (CRNF) is requested for a property with a residential base zone, “the property must front a non-residential street,” and a minimum of two of the Prerequisites for each of the three Categories listed in Section 59-5.1.3.D (Transit & Infrastructure; Vicinity & Facilities; and Environment & Resources) must be satisfied.

Here, as shown at pages 24 to 25 of the Planning Staff’s Report, which is included in the public record as Exhibit 56, the Staff found that the Applicant had satisfied two, and only two, Prerequisites in each of the three requisite categories listed in Zoning Code Section 59-5.1.3.D (or a

total of six specific Prerequisites).¹ The Applicant never submitted written objections with the Planning Board objecting to any of the Planning Staff’s findings or conclusions, including its findings as to which of the Prerequisites had been satisfied.²

The upshot, I respectfully suggest, is that by failing to object in writing to any of the Planning Staff’s findings and conclusions the Applicant has effectively forfeited or waived the right to argue that it satisfies any Prerequisites other than the six specific ones that the Planning Staff found were satisfied.

I further respectfully submit that if it can be shown that any one of these six specific Prerequisites in fact is not satisfied, the Applicant’s rezoning application must be denied. See Section 59-5.1.3.C.2.b.ii (application must satisfy minimum of two prerequisites in each of requisite three categories). As will be demonstrated in the following discussion, the application fails to satisfy not just one, but several of the six Prerequisites (i.e., the bare number necessary) that the Planning Staff found were satisfied.

¹ The Planning Board’s Administrative Procedures for Development Review require that the Planning Staff issue a technical report not less than 10 days before the Planning Board meeting at which the application is scheduled to be acted upon, and further require that this report contain the “staff’s findings of fact and conclusions regarding each applicable requirement of law related to the plan under applicable sections of . . . Chapter 59, and the basis for each finding and conclusion.” Montgomery County Planning Board Regulation No. 12-23, Administrative Procedures for Development Review, 50/59.10.01.06.D.1(f).

² The Board’s Administrative Procedures provide that an applicant “may submit objections to any findings or conclusions in a staff report that is scheduled for Board action no later than noon on the business day prior to the scheduled Board meeting that includes the application or as set forth in the Board’s Rules of Procedure. Each objection must be made in writing to the Board Chair and must clearly identify and fully explain the basis for each disagreement.” Administrative Procedures for Development Review, supra, 50/59.10.01.06.D.4.

Turning to the Prerequisites in the first category, Transit & Infrastructure, as has been noted, the Planning Staff's Report found the Applicant's rezoning application satisfied only two of the Prerequisites in this category. I will focus on the first of the two Prerequisites that the Staff found was satisfied in this category.

At page 24 of its report the Staff found that the Applicant had satisfied a Transit & Infrastructure Prerequisite which it quoted as follows:

The site has frontage on and vehicular, bicycle, and pedestrian access on at least two roads, at least one of which is nonresidential.

Exhibit 56 at p. 24 (quoting Zoning Code Section 59-5.1.3.D).

However, elsewhere in its Report (specifically, at p. 9) the Planning Staff acknowledged:

While the Subject Property has frontage along New Hampshire Avenue, the existing driveway access will be removed, and no proposed access will be provided from this roadway.

The Staff Report also noted (at p. 11):

The Project proposes consolidating all existing curb cuts to two, with all new access points on Notley Road.

The Applicant concedes that the Site will not continue to have vehicular access to two roads if its rezoning application is approved. Instead, as the Applicant acknowledges, vehicular access to the Site will be limited to only Notley Road, and the currently existing vehicular access to a second road, i.e., New Hampshire Avenue, will be eliminated.

The Applicant maintains that in order to satisfy the Code's two-road-vehicular-access Prerequisite, vehicular access to at least two roads must exist only currently, and that it need not continue to exist in the

future, so that the proposed project can itself eliminate the existing vehicular access to two roads, and reduce future vehicular access to only one road, as the Applicant's proposed project does here.

With all due respect, the Applicant's proffered interpretation of the Zoning Code's two-road-vehicular-access Prerequisite is legally untenable. This is because the Zoning Code itself prescribes a rule of interpretation for instances when the Code uses the present tense. See Zoning Code Section 59-1.4.1.F ("The present tense includes the future tense.").

Thus, when the Code specifies that "the site has . . . vehicular . . . access to at least 2 roads," this language must be interpreted to mean not only that such access must currently exist, but also that it must continue to exist in the future. It follows that the two-road-vehicular-access Prerequisite cannot be satisfied where, as here, the currently existing vehicular access to at least two roads will be eliminated by the very project for which approval is being sought, leaving future vehicular access to only one road.

In support of its argument that vehicular access to at least two roads must exist only currently, the Applicant has relied extensively on the Matter of Corso Chevy Chase, LMA H-148. The Applicant's reliance on Corso is entirely misplaced. In Corso, unlike here, the Planning Staff found that the applicant had satisfied three of the Prerequisites within the Transit & Infrastructure Category, not just two as the Staff did here. See Exhibit 97(b) (Planning Staff Report in Corso Chevy Chase LMA H-148 at p. 27).

Since the applicant in Corso needed to satisfy only two Prerequisites within the Transit & Infrastructure Category, and the Planning Staff found it had satisfied three of these Prerequisites, it was entirely unnecessary for the Planning Staff to determine whether the application did in fact satisfy the two-road-vehicular-access Prerequisite, and the Planning Staff's inexplicable assertion that it did therefore was entirely gratuitous.

Moreover, both the Hearing Examiner and the District Council concluded in Corso that it was unnecessary to decide whether the requisite number of Section 59-5.1.3.D prerequisites had been satisfied because no one was contesting the issue. See Exhibit 71(f) (Hearing Examiner’s Corrected Report and Recommendation at 33); Exhibit 57(h) (District Council’s Resolution 20-197 at 7).

Finally, a careful reading of the record in Corso reveals that the site at issue there never had vehicular access to two roads. Instead, at the time of the application’s submission and while it was under review, the Corso Chevy Chase site had vehicular access to only one road (namely, Connecticut Avenue). Moreover, under the developer’s proposal, the site would continue to have vehicular access only to Connecticut Avenue in the future. Thus, under no plausible interpretation of Section 59-5.1.3D could its two-road-vehicular-access Prerequisite be deemed to have been satisfied in Corso.

Instead, it is respectfully suggested that what the Planning Staff did in Corso when discussing Connecticut Avenue, which it noted was a nonresidential street, was to conflate the separate provision under Section 59-5.1.3.C.2.b.i (requiring that the property “front a nonresidential street”) with the two-road-vehicular-access Prerequisite under Section 59-5.1.3.D, which the site obviously did not satisfy. The Applicant essentially is doing the same thing in this case.³

³ The Applicant initially argued that it satisfied Section 59-5.1.3.C.2.b.i’s nonresidential-street-frontage requirement because the Site fronts on New Hampshire Avenue, which is a nonresidential street. See Exhibit 68, powerpoint slide 41. More recently, however, the Applicant has made much of the recent reclassification of Notley Road from a “Neighborhood Connector” to an “Area Connector.” See Exhibit 68(a) (excerpts of 2025 Technical Update to County’s Master Plan of Highways and Transitways). The Applicant has yet to explain the import of this change in Notley Road’s classification. The Zoning Code, however, defines the term “residential street” to mean “a right-of-way with a classification of Neighborhood Connector,” whereas it defines the term “nonresidential street” to mean “a right-of-way with a classification of . . . Area Connector . . .” Section 59-1.4.2.R & .N. Thus, because Notley Road now is classified as a

For all these reasons, Corso cannot be read as having authoritatively adopted or endorsed the Applicant's proffered interpretation of the Zoning Code's two-road vehicular access Prerequisite, which should be rejected out of hand.

Turning next to the two Prerequisites that the Planning Staff found were satisfied in the Vicinity & Facilities Category, it is respectfully submitted that neither is in fact satisfied here.

The first such Prerequisite that the Staff found was satisfied reads as follows:

The site is adjacent to a pedestrian route that provides access to an existing grocery store or County-permitted farmer's market within ¼ mile.

Exhibit 56 at 25 (quoting Zoning Code Section 59-5.1.3.D).

The Staff's report explained the basis for its finding that this Prerequisite supposedly was satisfied as follows:

"nonresidential street," the Applicant appears to be laying the groundwork to argue that the Property's frontage along Notley Road itself satisfies the requirement under Section 59-5.1.3.C.2.b.i that a property "must front on a nonresidential street." This new argument would stretch the concept of CRNFs even further beyond the breaking point than does the Applicant's original argument since many properties front Notley Road along its entire length; if that were sufficient to satisfy Section 59-5.1.3.C.2.b it could lead to the creation of numerous CRNFs located even deeper within Colesville's residential neighborhoods. Clearly, when it amended the Zoning Code in 2014 to establish CRNFs and similar floating zones the County Council did not envision such an eventuality. See, e.g., Exhibit [__], Zoning FAQs – Montgomery Planning (noting that to be considered for rezoning as a CRNF or similar floating zone, a property must "front a nonresidential street," and asserting that "[t]his means that these floating zones . . . cannot be applied for in the middle of a residential neighborhood").

The Property fronts on New Hampshire Avenue with an existing sidewalk that connects to the Colesville Center, a strip shopping center, located just under ¼ mile from the Site. Within the Colesville Center is a Giant Food grocery store and other neighborhood retail stores and restaurants.

Exhibit 56 at p. 25.

This analysis is fatally flawed. The Code’s plain language requires that the ¼ mile distance of the pedestrian route be measured not from the site to a shopping center in which a grocery store is located, but instead from the site to the grocery store itself.

As the Staff’s Report notes, Colesville Center is a “strip shopping center.” Starting at its east end, one must walk past eleven storefronts before reaching the Giant Food grocery store. These are (beginning at the shopping center’s east end) a vacant storefront formerly occupied by a bank, then a Ledo Pizza Restaurant, a hair salon, a sushi restaurant, a tobacco store, a karate studio, a sewing/fabric store, a wine and beer store, a Greek restaurant, a beauty supply store, and another vacant storefront formerly occupied by a bakery/bread shop.

The Applicant takes the same tack as the Planning Staff did in its report, arguing that the grocery-store Prerequisite is satisfied because “[t]he Colesville Center,” i.e., the shopping center in which the Giant Food grocery store is located, “is less than ¼ mile (1,320’) from the site with a sidewalk along New Hampshire Avenue.” See Exhibit 76, powerpoint slide 13 (emphasis added). This same powerpoint slide documents that the distance between the Site and the shopping center’s east end is “1,317.8” feet (i.e., just 2.2 feet short of ¼ mile).

The point at which the Applicant’s measured distance ends is the corner of the same storefront described above which was previously occupied by a bank but is now vacant. As I can personally attest since I have walked the route many times and I regularly shop at the Giant Food grocery store, one must walk an additional 280 feet beyond this point, passing all eleven

storefronts described above, before reaching the Giant Food grocery store's nearest corner; one must then walk another 130 feet to reach the store's only operable entryway for customers, bringing the total length of the pedestrian route between the Site and the grocery store to well more than the ¼ mile limit that the Zoning Code's language plainly imposes.

The only other Prerequisite within the Vicinity & Facilities Category that the Planning Staff's Report found was satisfied was the one which requires the site to be "adjacent to a pedestrian route that provides access to existing public park and recreation facilities that satisfy a minimum of 30% of the recreational demand under the Planning Board's recreational Guidelines, as amended, within . . . ¾ mile." Exhibit 56 at p. 25 (quoting Zoning Code Section 59-5.1.3.D).⁴

The Planning Staff explained (at page 25 of its report) that this Prerequisite supposedly was satisfied because:

The Project is adjacent to Colesville Manor Neighborhood Park, which is well within the ¾-mile requirement. Colesville Local Park is also within a ¾ mile radius of the Site. These parks satisfy 30% of the recreational demand for the Project.

Again, the Planning Staff's analysis is inconsistent with what the Zoning Code's language actually says, which is not that the site must be "adjacent to or located within a ¾ mile radius of public park and recreational facilities," but instead that the site be "adjacent to a pedestrian route that provides access to [such] facilities," and that the length of the route may not exceed "¾ mile."

Thus, for this Prerequisite to be satisfied, (1) an actual "pedestrian route" must exist that provides access to the park facilities from the site, and (2) its length may not exceed ¾ of a mile. Here, although Colesville Manor Neighborhood Park is adjacent to the Site, no

⁴ The ellipsis indicates the omission of an extraneous letter/word (i.e., the letter or indefinite article "a") that the Planning Staff inserted into its quotation of the Code's language.

pedestrian route currently exists providing safe access from the Site to the park.

That no safe pedestrian route currently exists between the Site and Colesville Manor Neighborhood Park is not in dispute. Indeed, the Applicant admitted as much in a letter its counsel sent to the Chair of the Planning Board on October 20, 2025. See Exhibit 56(j) (Letter from Elizabeth Rogers to Artie Harris at p. 16) (“With no sidewalk along the Property Frontage, there is currently no safe pedestrian access to Colesville Manor Neighborhood Park.”) (emphasis added).⁵

As for Colesville Local Park, while a safe pedestrian route between the Site and this park does currently exist, the length of that route far exceeds the Zoning Code’s ¾ mile limit. This is because the Colesville Local Park is situated on the opposite side of New Hampshire Avenue from the Site, and no signalized intersections or crosswalks currently exist on New Hampshire Avenue between the Site and the park to allow pedestrians to safely cross New Hampshire Avenue and access the park from the Site.

Instead, to walk to Colesville Local Park from the Site, pedestrians currently must walk south along New Hampshire Avenue to Midland Road, where they then can safely cross New Hampshire Avenue at the signalized intersection and crosswalk located there, then walk north along New Hampshire to Hobbes Drive, and then walk down Hobbes Drive to reach the park. The length of this pedestrian route from the Site to the park is approximately 0.8873 miles, far exceeding the Code’s ¾ mile maximum.

⁵ **The Applicant has never argued that a route that is unsafe for pedestrians to use to access the park qualifies as a “pedestrian route” within the meaning of Section 59-5.1.3.D, nor could it plausibly do so since many of those walking to the park would be children. As the Hearing Examiner is aware, moreover, there already is evidence in the record of a tragic incident that occurred when the son of a current resident was severely injured by a hit-and-run driver on Notley Road.**

Nor can the Applicant now plausibly argue that the Code's pedestrian-route-to-park-facilities Prerequisite is satisfied because once its application is approved, pedestrian access to Colesville Manor Neighborhood Park will be provided where none currently exists, and the pedestrian route from the Site to Colesville Local Park will be shortened to within $\frac{3}{4}$ mile once a signalized intersection and crosswalk are installed at the intersection of Notley Road and New Hampshire Avenue.

It should not escape notice that such an argument is the exact obverse of the argument that the Applicant has been pressing regarding how the Code's two-road-vehicular-access Prerequisite should be interpreted. But in all events, as already has been demonstrated in the discussion of that Prerequisite, when speaking in the present tense the Zoning Code's provisions must be interpreted to include both the present and future tenses. See Zoning Code Section 59-1.4.F.1.

It follows that for the Code's pedestrian-route-to-park-facilities Prerequisite to be satisfied, the conditions that it provides must exist -- i.e., that there be an actual "pedestrian route providing access to the park," and that the length of the route not exceed " $\frac{3}{4}$ mile" -- must exist both now and in the future. That test is not and cannot be satisfied here.

Finally, I will briefly address the first of the two Prerequisites that the Planning Staff found were satisfied in the Environmental and Resources Category. This Prerequisite reads as follows:

The limits of disturbance for the development will not overlap any stream, floodplain, wetland, or environmental buffer or any slopes greater than 25% or slopes greater than 15% where erodible soils are present.

Exhibit 56 at p. 25 (quoting Zoning Code Section 59-5.1.3.D).

According to its plain language, this Prerequisite can be satisfied only if a development's limits of disturbance do not overlap "any stream." Id. (emphasis added). On its face this language does not appear to be limited to "perennial and intermittent streams," and instead can be read to encompass streams of all types, including "ephemeral streams."⁶ Accordingly, it is respectfully submitted that this Prerequisite at least arguably is not satisfied where, as here, a development's limits of disturbance overlap one or more ephemeral streams.

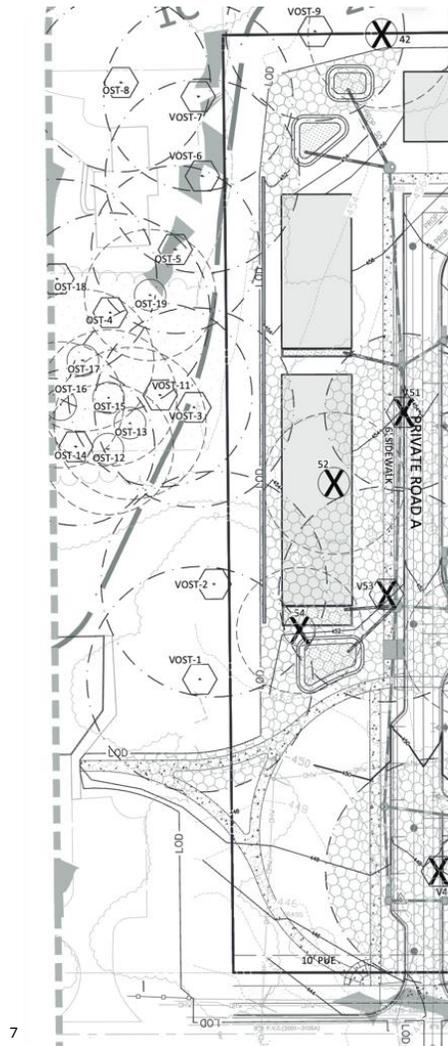
There is ample evidence in the record showing that the development's limits of disturbance do in fact overlap multiple ephemeral streams that form on the Subject Property during moderate-to-heavy storm events. During such events, these ephemeral streams flow onto adjacent properties located to the west of the Subject Property, as well as into the Notley Road right-of-way. See Exhibit 94(a), illus. A.2 (diagram prepared by Mr. Toni Deboeck showing paths of runoff that flow in channels off Subject Property onto adjacent properties to west and into Notley Road right-of-way during moderate-to-heavy storm events).

There also is ample evidence in the record that the development's limits of disturbance overlap several of these ephemeral streams. Compare, e.g., Exhibit 94(a), illus. A.2 (Mr. Deboeck's diagram), with

⁶ "Ephemeral streams" are streams that are "above the groundwater table and convey flow only during, and for a short duration after (generally less than 48 hours), and in direct response to, a precipitation event." Guidelines for Environmental Management of Development in Montgomery County (July 2021) (hereafter "Environmental Guidelines") at p. 52 (glossary of terms). They "do not include roadside ditches." Ibid. "Perennial streams," on the other hand, "typically have continuous baseflow from the groundwater table, which is generally located above the streambed throughout the year." Id. at 53. "Intermittent streams" are streams that "typically have baseflow at least once a year," "[t]ypically in the winter and spring, [when] the groundwater table is elevated, increasing the likelihood that the groundwater level is higher than the bed of the stream channel." Ibid.

Exhibit 56(b) (copy of Applicant’s revised PFCP attached to Planning Staff’s Report) (depicting development’s limits of disturbance, including a thorn-shaped protrusion that extends across the property line dividing the Subject Property and Colesville Manor Neighborhood Park).⁷

⁷ A detail taken from Exhibit 56(b) is reproduced immediately below:



Among the additional photographs that I have submitted for inclusion in the record are several that depict the ephemeral stream that forms during moderate-to-heavy storm events and flows along the property line that separates Colesville Manor Neighborhood Park and the Subject Property. See Exhibit [] (Additional Touhey Photographs, Tabs 2J through 2O). The

2. Mr. Kelso's Expert Testimony Regarding Stormwater Management and Storm Drainage

During its case-in-chief, the applicant offered the testimony of Logan Kelso, the civil engineer who prepared the "Stormwater Management Concept Plan" that comprises Section IV.E.2 of the Applicant's Updated Land Use Report (Exhibit 81 at pp. 8-9), as well as the Applicant's "Schematic Stormwater Management Layout" (Exhibit 45).

Nowhere in his testimony or in any of these materials did Mr. Kelso specify the dates on which he visited the Subject Property to conduct field work to support his analyses or professional opinions on the subject of stormwater management or storm drainage, or indicate whether he has ever actually observed how, how much, and to where stormwater actually flows off the Subject Property during moderate-to-heavy storm events.

It is therefore respectfully submitted that the opinions that Mr. Kelso has expressed on the subject of stormwater management and storm drainage -- including his description of how stormwater from the eastern side of the Subject Property supposedly sheet flows into the New Hampshire Avenue right-of-way⁸ -- lack any proper foundation, and are entitled to no weight whatsoever.

In any event, Mr. Kelso readily acknowledges that the Site currently consists almost entirely of permeable surfaces that the Applicant proposes to completely clear and cover with impervious surfaces consisting of 130 densely packed townhouses and a network of paved private roads, alleys, driveways, and parking areas. See also Exhibit 18 (Applicant's SNRI describing current site conditions of Subject Property)

limits of disturbance for the aforementioned thorn-like protrusion overlap this stream.

⁸ See, e.g., Exhibit 81 at 8-9 ("[W]ater currently sheet flows off the property uncontrolled into the . . . New Hampshire Avenue right-of-way . . .") (emphasis added).

(“The site is predominantly maintained lawn with substantial individual landscape trees surrounded by landscape beds.”) (original typeface altered).

The problems associated with the replacement of an undeveloped piece of land’s permeable surfaces with densely packed impervious surfaces are two-fold: first, the amount of surface water runoff from the site is greatly increased; second, and relatedly, the site’s groundwater recharge is greatly diminished because its permeable surfaces have been replaced with the impervious surfaces which prevent the infiltration of rainwater through the soil. See generally Vol. 1, 2000 Maryland Stormwater Design Manual, Section 1.1, Fig. 1.1 at p. 1.3 (“Surface runoff is minimal in an undeveloped site, but dominates the water balance at a highly impervious site.”); id. at p.1.4 (“Roof tops, roads, parking lots, driveways and other impervious surfaces no longer allow rainfall to soak into the ground.”).⁹

During his direct testimony, Mr. Kelso described the strategy he has devised to deal with the first problem, i.e., surface runoff to the Notley Road right-of-way and adjacent properties to the west of the subject property, but he failed to discuss the second problem, i.e., decreased groundwater recharge at the site.

When describing his strategy for dealing with the first problem, Mr. Kelso initially maintained that most of the Subject Property drains toward the east, but he was forced to admit during cross-examination that in fact most of it drains to the west. (In fact, the Applicant’s own submissions document that 70 percent of the Subject Property’s area drains to the west, while only 30 percent of it drains to the east. See, e.g., Exhibit 18 (Applicant’s SNRI).)

⁹ **I note that my wife and I are adversely affected by both problems, as surface runoff from the Subject Property during moderate-to-heavy storm events already has caused severe erosion, which the proposed project will exacerbate, along the stream that flows through our property; and a reduction in groundwater recharge on the site will cause reduced flow in the stream (which flows year-round and is fed by groundwater) and also could cause our private well (which also is fed by groundwater, and is our only source of drinking water) to run dry.**

What is more, based on my own observations, very little, if any, runoff from the Subject Property currently flows into the New Hampshire Avenue right-of-way. Instead, the bowl-like contours along the Subject Property's east side prevent almost all surface runoff from reaching the New Hampshire Avenue right-of-way. Instead, this runoff pools inside the Subject Property's eastern edge where it eventually soaks through the soil, contributing to current groundwater recharge at the site.¹⁰

¹⁰ I have marked up a detail of Figure 11 taken from the Planning Staff's Report (Exhibit 56) to show where most the stormwater runoff from the east side of the Subject Property pools before it can enter the New Hampshire Avenue right-of-way. This marked-up detail is reproduced immediately below:



Figure 11: Subject Property Topography

Further, among the additional photographs I have submitted for inclusion in the record are several which show the small trickle of runoff that flows into the New Hampshire Avenue right-of-way. See Exhibit [__] (Additional Touhey Photographs, Tabs 2Q through 2S). Finally, it should be noted the volume of stormwater runoff that does reach the New Hampshire Avenue right-of-way is dwarfed by the volume of stormwater that flows off the Subject Property and eventually enters the stream that crosses my property just a few feet above the point the stream enters my property. See id. (Tabs 2A through 2I) (photograph showing volume of runoff

If the Hearing Examiner has any doubts about what I have just described, then I urge her to exercise her authority under OZAH Rule 4.2(i)(i)-(v) to visit the site so she can observe the site's topography and see for herself where and how stormwater currently flows from the site's western side in ephemeral streams that form during moderate-to-heavy storm events, and how water from the east side of the property's drainage divide pools inside the eastern end of the property and then soaks into the soil there.

As noted, neither Mr. Kelso's testimony nor any of the materials he prepared even mentions the current amount of groundwater recharge on the site or what steps could be taken to mimic it if the property is developed along the lines that the Applicant is proposing.

Mimicking the pre-development groundwater recharge on the site is one of the general performance standards that stormwater management for a project must be able to achieve under Maryland law.¹¹ During its case-in-chief, however, the Applicant adduced no proof addressing this requirement and whether it was achievable. This constitutes a failure of proof on the issue which, it is respectfully submitted, the Applicant cannot now rectify by addressing it in its rebuttal case.

Returning to Mr. Kelso's strategy for dealing with the surface runoff that he acknowledges already is occurring to the west of the Subject Property: in a nutshell, his strategy for dealing with that problem is to regrade the property, catch rainwater that now runs off to the west, store it in

entering stream just above my property line, followed by series of photographs of this flowage working backward toward Subject Property). The two sets of photographs depicting the flow of runoff into the New Hampshire Avenue right-of-way and the flow that enters the stream just before it enters my property were taken only a few minutes apart.

¹¹ See Vol. 1, 2000 Maryland Stormwater Design Manual, Section 1.2. Standard No. 3 at p. 1.13. (Supp. 1 2010) ("At a minimum, the annual recharge from post-development site conditions shall mimic the annual recharge from pre-development site conditions.").

underground vaults,¹² then gradually release this water and redirect it through a closed system of storm drains that will convey it to the east side of the site where, after crossing under New Hampshire Avenue, it will be discharged into a storm drain owned by the Maryland State Highway Administration (SHA) and ultimately be conveyed to an SHA-owned pond.¹³

This, I respectfully suggest, is a complete nonstarter. Even if it were technically feasible (which the Applicant has not even attempted to show and the Planning Staff did not even purport to analyze), it still would be an

¹² It is noteworthy that these underground vaults were neither mentioned nor depicted in any of the materials Mr. Kelso prepared for submission as part of the Applicant’s rezoning application (i.e., Exhibits 81 at 8-9 & Exhibit 45) and that he only belatedly described them in the vaguest of terms during his direct testimony at the hearing on December 2, 2025.

¹³ The small SHA-owned pond to which Mr. Kelso envisions the Site’s stormwater runoff will be conveyed apparently is one that is located in the Paint Branch Farms subdivision of Colesville just south of Notley Road about 700 feet to the east of Notley Road’s intersection with New Hampshire Avenue. If my surmise about which pond Mr. Kelso was alluding to is correct, its location is depicted as just within the eastern boundary of the Applicant’s “Surrounding Neighborhood Plan,” a marked-up detail from which is reproduced immediately below:



Notably, this SHA pond lies just outside the Planning Staff’s delineation of the Surrounding Neighborhood. See Exhibit 56 at page 5, Figure 2.

untenable strategy. Little, if any, stormwater runoff currently is draining from the Subject Property into the New Hampshire Avenue right-of-way. And what Mr. Kelso is proposing be done is to redirect the flow of surface water that currently drains off the Subject Property's western side, convey this water to the Subject's Property's eastern side, and then discharge it into the SHA's storm drainage system. This, I respectfully submit, is legally impermissible. See Exhibit 90(g), Excerpt from MDOT SHA Highway Drainage Manual (September 2023) Paragraph 1.5 ("No property owner . . . has the autonomous right to substantially change the volume or direction of the natural flow of surface water.").

In any event, the SHA's storm drain system is a public facility which the Applicant, at the rezoning stage of the process, has the burden of demonstrating is adequate to serve the proposed development and not be overwhelmed by it. See Exhibit [___] at p. 5 (County Council Resolution No. 20-616, Opinion in Glenmont Forest Investors LP, No. H-149 (Sept. 24, 2024) ("The District Council must . . . find that the public facilities will be adequate to serve the FZP. While a more detailed review will occur later in the public development process, a threshold analysis must be performed at the rezoning stage.").

Here, none of the Applicant's submissions addressed whether the SHA's system has the capacity to receive the volume of stormwater runoff that Mr. Kelso is proposing to redirect and release into it. It is respectfully submitted that this too constitutes a failure of proof during the Applicant's case-in-chief that the Applicant cannot cure now by attempting to address it during rebuttal.

Most important, however, consideration of whether the Applicant's strategy to manage stormwater and storm drainage is even feasible should not be postponed until later phases in the development process, which is what the Applicant is proposing be done (with the Planning Board's and the Planning Staff's connivance). See Exhibit 81 (Applicant's Updated Land Use Report at p. 9) ("[T]he Planning Board will be responsible for determining whether Adequate Public Facilities ('APF') exist to support the proposed development of the Property at the time of the Preliminary Plan."); Exhibit 56 (Planning Staff's Report at p. 18) ("[T]he

Applicant is proposing to address drainage issues through grading and storm drain extension to redirect the movement of water. The storm drain capacity and design have not been evaluated at this time, nor has a grading plan been established.”); id. at p. 19 (“Stormwater management will be addressed through future reviews, when additional details about the design are known. Likewise, runoff examination will be studied as details about grading, stormwater, and storm drain capacity are established.”).

Such later phases of the development process all occur only after the District Council already has acted on the rezoning application, by which time it will be too late for the District Council to consider whether compliance with applicable environmental and other legal and regulatory requirements is even achievable.

These issues, it is respectfully submitted, go to the heart of whether a development of the proposed density should be allowed to proceed where the Applicant is proposing to put it. And it is further respectfully submitted that issues of such import are properly within the province of the District Council to decide, and that they should be carefully considered here and now so that the District Council can make a fully informed decision about whether the Applicant’s rezoning application should be approved. See Exhibit [] at p. 5 & n.3 (County Council Resolution No. 20-616 in Glenmont Forest Investors LLP).¹⁴

¹⁴ As stated in County Council Resolution No. 20-616:

The adequacy of [public] facilities is part of the Council’s determination that an application will be “in the public interest . . .” and that “it will be consistent with a coordinated and systematic development of the Regional District” under State law. Zoning Ordinance, §59-7.2.1.E.2.b; Md. Land Use Art., §21-101(a) and (b). The intent of the Floating Zones is to “implement comprehensive planning objectives by . . . ensuring that the proposed uses are in balance with and supported by the existing and planned infrastructure . . .” Zoning Ordinance, §59-7.2.1.E.2.b; 59-5.1.2.A.2.

3. Discrepancies and Deficiencies in the Applicant's SNRI and Revised PFCP

Lastly, I turn to discrepancies and deficiencies contained in the Applicant's SNRI (Exhibit 18) and Revised PFCP (Exhibits 39(a)-(c) & Exhibit 56(b)).¹⁵

The first thing to be noted about these documents is that they all appear to have been prepared by the same registered landscape architect, Chandra Beaufort, whose field work formed the basis for their contents. For reasons that have not been explained, however, the Applicant chose not to call Ms. Beaufort as a witness during this hearing, instead calling another landscape architect, Joshua Sloan, who did not prepare these documents and whose testimony about them during the Applicant's case-in-chief was perfunctory at best. See Exhibit 52 (Applicant's Pre-Hearing Statement at p. 12 (identifying Mr. Sloan and summarizing his expected expert testimony)).

The second thing to be noted is that while the Applicant's SNRI (Exhibit 18) bears Ms. Beaufort's signature and professional seal, she neither signed nor applied her professional seal to any of the documents comprising the Applicant's Revised PFCP. See Exhibits 39(a)-(c) & Exhibit 56(b).

It is respectfully submitted that the Applicant's Revised PFCP therefore should be stricken from the record and that the Applicant's rezoning

Id. at 5 n.3 (emphasis added).

¹⁵ The Applicant's Revised PFCP consists of three sheets (Exhibits 39(a), 39(b) & 39(c)), which the Applicant has described as the cover sheet, the approval sheet, and the composite sheet, respectively. A duplicate copy of the composite sheet was attached to the Planning Staff's Report. See Exhibit 56(b). The Applicant's Revised PFCP, which was submitted to the Planning Department on or about August 19, 2025, superseded and its original PFCP, which the Applicant submitted to the Planning Department on or about May 23, 2025.

application then should be denied because the Applicant has failed to comply with the submission requirements for a floating zone plan. See Montgomery County Code Section 22A-11(a)(2) (“The forest conservation plan must be submitted and reviewed in conjunction with the review process for a . . . floating zone plan”); OZAH Rule 1.4 (“All professionally prepared plans must be signed and sealed by the professional who prepared them, in accordance with state law.”); Montgomery County Planning Board Regulation No. 12-23, Administrative Procedures for Development Review, 50/59.10.01.05.B.4 (“Plan drawings must . . . include . . . proper certification by a licensed professional or other qualified preparer.”).

Turning now to the Applicant’s SNRI (Exhibit 18), a “[n]atural resources inventory” or “NRI” is defined as “the collection and presentation of environmental information for a property according to the guidelines specified in [the Planning Board’s forest conservation] regulations and in the latest version of the [Planning Board’s] environmental guidelines.” COMCOR 22A.00.01.03(40); see also id. 22A.00.01.06.A & (11) (an NRI must contain “a complete analysis of existing natural resources” covering “the development site and the first 100 feet of adjoining land or the width of the adjacent lot, whichever is less,” and must include, among other things, “[the] aerial extent of forest and tree cover which includes the outside perimeter of the canopy of individual trees”).

The Applicant’s SNRI, which was designated NRI/FSD No. 420251460, bears an e-file stamp reflecting that it was approved by the Montgomery Planning Department on May 22, 2025. See Exhibit 18.¹⁶ It contains a Site Description which states in relevant part:

¹⁶ Copies of the approved SNRI, as well as a letter from the Planning Department dated May 22, 2025, advising Ms. Beaufort that the Applicant’s SNRI had been approved, are publicly available on the Planning Department’s Development Activity Information Center (DAIC) website. However, the DAIC website provides no access to the application form by which the Applicant submitted its original draft SNRI to the Planning Department, the original or first revised SNRI drafts, comments that the Planning Department sent to the Applicant about the original and first revised drafts, other communications that may have

There are tree plantings within the Subject Property, however none of the areas met the technical definition of forest due to no forest structure and maintenance as landscape beds. Therefore, no forest was identified during the on-site investigation.

Id. (original typeface altered).

Paragraph 14 of the SNRI's General Notes goes on to state:

There are no areas of existing forest on the Subject Property; there is existing forest within 100' of the Subject Property in the Colesville Manor Neighborhood Park, the adjacent property to the west of the Subject Property.

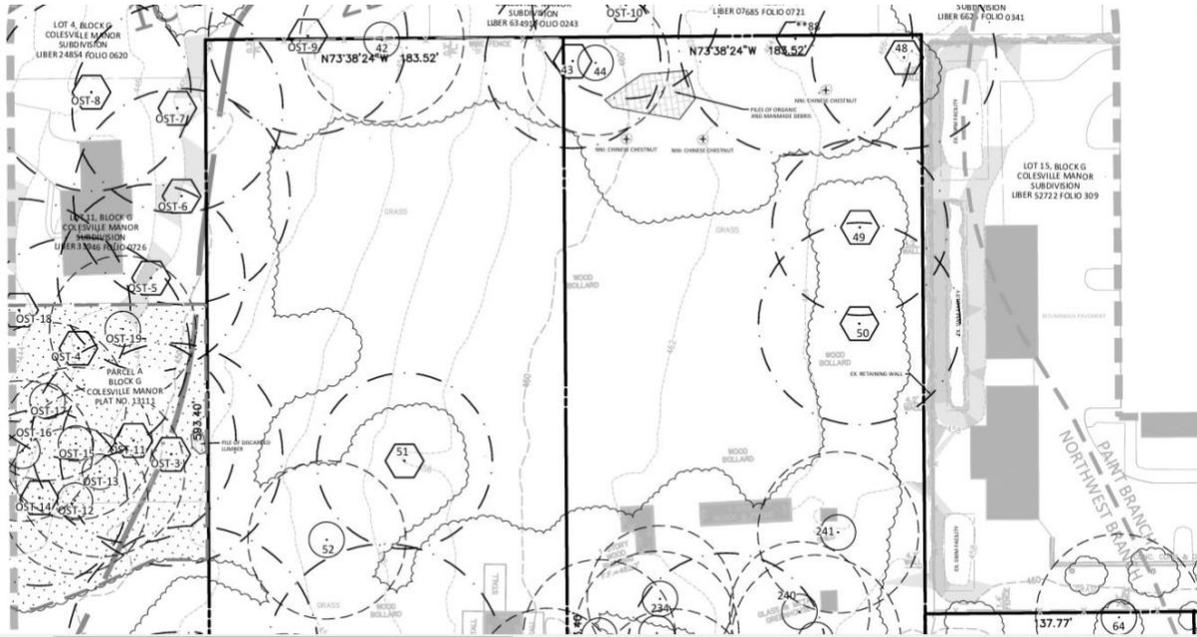
Id. (original typeface altered).

The Applicant's SNRI visually depicts the extent of the existing forest that is located within 100 feet of the Subject Property in the Colesville Manor Neighborhood Park by superimposing dark gray pin dots surrounded by a narrow light gray broken line over and around the area.

The Applicant's SNRI depicts the southern boundary of the existing forest within the park as following the tree canopy line (represented in the SNRI by a thin black scalloped line). Once this boundary line of existing forest reaches the property line dividing the park and the Subject Property, however, it abruptly stops following the tree canopy line (which continues beyond the property line) and instead proceeds straight up the property line dividing the Subject Property and Colesville Neighborhood Park.

been exchanged between the Applicant's representatives and the Planning Department relating to the Applicant's SNRI, or any internal documents relating to the Planning Department's review of the SNRI. To date, my efforts to obtain copies of these records through a Maryland Public Information Act (MPIA) request have been unsuccessful.

A detail of the Applicant’s SNRI depicting the existing forest within the Colesville Manor Neighborhood Park and then ending at the property line between the park and the Subject Property is reproduced immediately below:



In its later submissions, the Applicant takes the position that the Planning Department’s approval of this SNRI establishes that the Subject Property contains no forest.¹⁷ What none of the Applicant’s submissions in this case mention, however, is that the Planning Department previously had approved another Natural Resources Inventory covering several of the individual parcels that now comprise the Subject Property. This earlier NRI was submitted in connection with the proposed development of the

¹⁷ For example, after noting the Planning Department’s approval of SRNI, the Applicant’s PFCP cites the SRNI for the proposition that “there are no areas of existing forest as defined by Montgomery County forest legislation located on the Subject Property.” Exhibit 39(a) (general notes 7 & 15; original typeface altered). See also Exhibit 52 (Applicant’s Pre-Hearing Statement at p. 6) (“The approved Natural Resources Inventory (‘NRI’) plan confirmed that there is no existing forest on the Property.”); Exhibit 76 (slide 16) (“Per the approved NRI, there is no forest present on site.”).

Silver Spring Senior Living Facility (known today as Wilshire Estates). See Exhibit [__] (NRI/FSD No. 420150440) (hereafter referred to as the Wilshire Estates NRI).¹⁸

As the Applicant acknowledges, the Wilshire Estates site abuts the Subject Property. See Exhibit 81 (Applicant’s Updated Land Use Report at p. 3 (“Abutting the Property to the north is the senior living facility known as Wilshire Estates, which is zoned R-200.”). Of the seven individual parcels that comprise the Subject Property, five are adjacent to the Wilshire Estates site. See Exhibit 30 (Applicant’s Identification Plat).

At the time the Wilshire Estates NRI was prepared, one of these five adjacent properties was owned by John J. Gude, Jr., having been acquired by him by deed dated June 10, 2005 (Liber MQR 30079, Folio 567). By deed dated November 25, 2024 (Book 68666, Page 273), the Applicant (Notley Assemblage LLC) acquired this parcel (designated in the aforementioned deed as “Parcel 2”) from Mr. Gude’s estate, together with another parcel (designated as “Parcel 1”).¹⁹

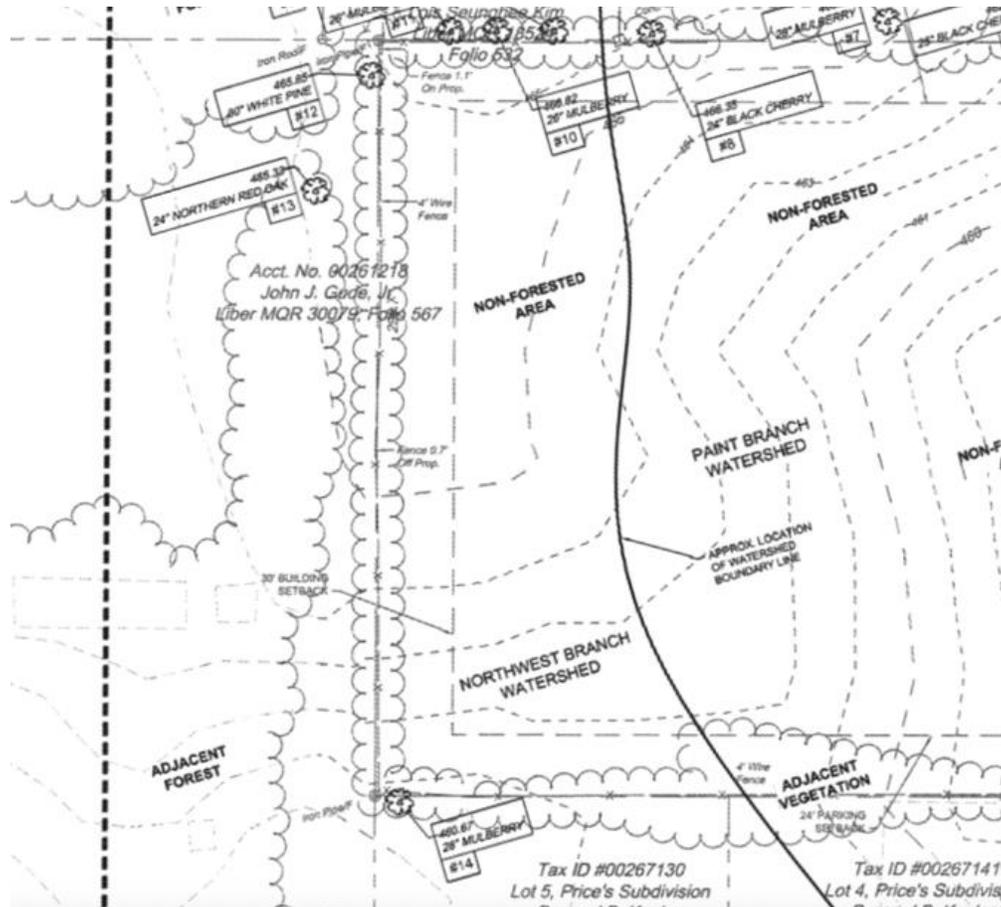
In accordance with the applicable Planning Board regulations, the Wilshire Estates NRI analyzed the existing natural resources, including the aerial extent of forest, not only on the Wilshire Estates development site, but also on the first 100 feet of adjoining land around the site’s perimeter. This adjoining land included “Parcel 2,” which was then owned by Mr. Gude but later sold by his estate to the Applicant, and now forms a part of the Subject Property.

Although the Wilshire Estates NRI represented that the Wilshire Estates proposed development site contained no existing forest, it also

¹⁸ Notably, the Applicant’s counsel in the instant matter also appeared as counsel for the developer in the Wilshire Estates matter. See In the Matter of Hawthorne Development LLC, Board of Appeals Case No. S-2882 & OZAH Case No. 15-07.

¹⁹ “Parcel 1” is situated adjacent to Colesville Manor Neighborhood Park and lies between the park and “Parcel 2.” See Exhibit 30, supra.

represented that Mr. Gude’s parcel did contain forest. A detail of the portion of the Wilshire Estates NRI depicting the aerial extent of forest on that part of Mr. Gude’s parcel which was situated within 100 feet of the development site is reproduced immediately below:



It is noted that the forest that is depicted as existing within Mr. Gude’s parcel (now Notley Assemblage LLC’s “Parcel 2”) is surrounded by a thin scalloped black line that extends past the NRI’s 100-foot study limit (represented by a thick broken black line running north to south), and that after crossing the study limit boundary this forested area continues on a westerly course in the direction of Notley Assemblage LLC’s “Parcel 1” and Colesville Manor Neighborhood Park.

The scalloped line surrounding this forested area appears to correspond to the scalloped line that Applicant’s SRNI uses to represent the tree canopy line within the Subject Property. Compare Exhibit 18 (Applicant’s

SNRI), with Exhibit [__] (Wilshire Estates NRI). The Applicant’s SNRI depicts this tree canopy line as running continuously from the point where the southern boundary of forest within the Colesville Manor Neighborhood Park ends at the property line between the park and the Subject Property, and the point where the Wilshire Estates NRI depicts forest as existing within the Gude parcel (now the Notley Assemblage LLC “Parcel 2”).

It is respectfully submitted that a comparison of the Wilshire Estates NRI, which the Planning Department approved on October 21, 2014, and the Applicant’s SNRI, which was submitted a little more than ten years later, calls into question the accuracy of the information contained in the latter submission and specifically representation it contains that no forest exists within the Subject Property.

If the Subject Property does in fact contain existing forest, it follows that much of the data that the Applicant submitted to the Planning Department as part of its Revised PFCP (Exhibits 39(a)-39(c) & Exhibit 56(b)) also is inaccurate.²⁰

But completely apart from whether the Subject Property does in fact contain existing forest, another glaring discrepancy involving the calculation of the Site’s “net tract area” separately calls into question the accuracy of the Applicant’s Revised PFCP. The worksheets included in the Applicant’s Revised PFCP calculated the Site’s “net tract area” to be 9.67 acres by adding together the Site’s “total tract area” (8.97 acres) and what were described as “additions to tract area (off-site work, etc.; construction required by this plan)” (0.70 acres). Id. (original typeface altered).

²⁰ As noted, the Applicant’s Revised PFCP cites the approved SNRI as establishing that the Subject Property contains no existing forest. The Applicant’s Revised PFCP also includes worksheets used to calculate forest conservation requirements for the Site. These worksheets contain entries also representing that there is no existing forest cover on the site and that no forest area is to be cleared. See Exhibit 39(a) (Revised PFCP cover sheet).

These figures were identical to those that previously appeared in the Applicant’s Original PFCP, which was submitted to the Planning Department on or about May 23, 2025. Compare Exhibit 39(a) (Applicant’s Revised PFCP cover sheet, FCP worksheets), with Replaced Exhibit 13(a) (Applicant’s Original PFCP cover sheet, FCP worksheets).

At the time the Applicant’s Original PFCP was submitted, however, the Applicant had not yet proposed building a sidewalk from well inside Colesville Manor Neighborhood Park to connect the park to the interior of the proposed townhouse project. Consequently, the Applicant’s Original PFCP did not include the area encompassing the thorn-shaped expansion of the project’s limits of disturbance deep into the park, which later was included in the Applicant’s Revised PFCP. Compare Replaced Exhibit 13(c) (Applicant’s Original PFCP composite sheet), with Exhibit 39(c) (Applicant’s Revised PFCP composite sheet).

It is respectfully submitted that the expansion of the project’s limits of disturbance to inside Colesville Manor Neighborhood Park should, at the very least, have resulted in a substantial increase in the figure that previously had been reported for “additions to tract area (off-site work, etc.; construction required by this plan.)” No such increase was made in the worksheets contained in the Applicant’s Revised PFCP, leaving the substantial increase the project’s limits of disturbance for offsite work completely unaccounted for.

In view of the foregoing, it is respectfully submitted that the Hearing Examiner should consider referring questions concerning the accuracy of both the Applicant’s SNRI and its Revised PFCP to the Planning Staff. More pointedly, the Hearing Examiner should consider inquiring whether the Applicant’s SNRI or Revised PFCP contain any “materially inaccurate, misleading or false information”?²¹

²¹ **See Planning Board’s Administrative Procedures for Development Review, supra 50/59.10.01.05.D.1:**

Inaccurate, misleading or false certifications. At any point in the review process, if the staff finds that information certified by an applicant or a licensed professional is materially

When such questions have arisen in the past, they have been referred by the Hearing Examiner to the Planning Staff. See, e.g., Exhibit 71(e) at p. 6 (County Council Resolution No. 19-402, Application No. H-131, Kingsview Station) (March 31, 2020) (alluding to evidence suggesting Planning Department may have approved the applicant's PFCP that permitted encroachment into environmental buffer as a "compromise" for a mistake it made earlier in approval process); Exhibit 71(g) at pp. 1, 12-13 (Hearing Examiner's Report and Recommendation in Matter of Kingsview Station, OZAH Case No. H-131 (Feb. 19, 2020) (noting that record was held open to receive Planning Staff's responses after questions had arisen as to accuracy of applicant's delineation of environmental buffer).

Referring questions concerning the accuracy of the Applicant's submissions to the Planning Staff is particularly warranted here where the Applicant chose not to call as a witness the licensed professional who prepared the submissions at issue, and one of these submissions did not bear this professional's signature or professional seal.²²

inaccurate, misleading or false, staff must report the matter in writing to the Director. The Director must review the report, give the applicant or professional an opportunity to respond in writing, and consider any other relevant information. If the Director finds that the applicant or professional submitted materially inaccurate, false, or misleading information, the Director must reject the application and take appropriate action, which may include reporting the facts to the appropriate licensing board.

²² The Hearing Examiner also should consider requesting that the Planning Staff disgorge all public records relating to the submission, review, and approval of the Applicant's SNRI. As noted, my efforts to obtain copies of these public records through an MPIA request have been unsuccessful.

CONCLUSION

For the reasons stated and upon the authorities cited, the Applicant's rezoning application should be denied.

DATED this 27th day of February 2026.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "James G. Touhey, Jr.", written in a cursive style.

JAMES G. TOUHEY, JR.