

**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**

IN THE MATTER OF:

Kingsview Station, A Joint Venture
Applicant

Clark Wagner
Timothy Longfellow
Kevin Foster

For the Application

Elizabeth Rogers, Esquire
Attorney for the Applicant

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OZAH Case No. H-131

Before: Lynn Robeson Hannan, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. SUMMARY

Applicant:	Kingsview Station, A Joint Venture
LMA No. & Date of Filing:	H-131, filed March 6, 2019.
Current Zone:	R-200 and R-200/TDR 6.0 Zones.
Current Use	Unimproved except for a partial extension of Liberty Mill Road and transmission lines.
Zoning Sought:	CRNF-1.0, C-0.25, R-0.75, H-55 (Commercial/Residential Neighborhood Floating Zone).
Use Sought:	61 townhouse dwelling units; 12,000 square feet of commercial space.
Location:	6 parcels (N210, P. 220, P. 274, Pt. P. 322, Pt. P. 330, P. 536 and Liberty Mill Road R.O.W) located in the southeast quadrant of the intersection of Clopper Road (Md. 117) and Germantown Rd. (Md. 118), shown on the vicinity map below (Ex. 50):



Acreage to be Rezoned:	10.27 acres +/-.
Density/Height Proposed:	Total of 1.0 FAR, 0.75 FAR Residential, 0.25 FAR Commercial; height of 50 feet.
Open Space Required:	10% Common Open Space/10% Public Open Space.

Open Space Proposed:	10% Common Open Space/10% Public Open Space.
Maximum Building Height:	50 feet.
MPDUs Required/Provided:	12.5% (8 MPDUs)/ 12.5% (8 MPDUs).
Environmental Issues:	Adequacy of Stormwater Management/Accuracy of NRI/FSD.
Consistency with Master Plan:	Consistent with the 1989 Germantown Master Plan.
Neighborhood Response:	No Opposition.
Traffic Issues:	None.
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval

II. STATEMENT OF THE CASE

Kingsview Station, A Joint Venture (Kingsview or Applicant) filed LMA Application No. H-131 on March 6, 2019. The application asks to rezone approximately 10.27 acres of property from the R-200 and R-200/TDR 6 (Residential) Zones to the CRNF (Commercial Residential Neighborhood Floating Zone) 1.0, C-0.25, R-0.75, H-55. Exhibit 1. The subject property consists of six parcels (N210, P. 220, P. 274, Pt. P. 322, Pt. P 330, P.536 and the Liberty Mill Road right-of-way). The property is in the southeast quadrant of the intersection of Germantown Road (Md. Rte. 118) and Clopper Road (Md. Rte. 117).

Kingsview submitted revised plans on August 14, 2019, and September 16, 2019. Exhibits 37, 38. Notice of the public hearing (Exhibit 39) to be held on December 16, 2019, was mailed out and posted on OZAH's website on November 14, 2019. After noticing the public hearing, OZAH was advised that the Planning Board did not have enough time to issue its written recommendation on the application within the time required by the Zoning Ordinance.¹ With the consent of the Applicant, the public hearing was postponed to January 3, 2020.

The public hearing proceeded as rescheduled. The Applicant presented three expert witnesses and a representative of Applicant. The record was left open until January 24, 2020, to receive additional information from the Planning Board on the accuracy of the delineation of the environmental buffers, the Planning Board's resolution approving the Preliminary Forest Conservation Plan (PFCP), and additional information on the Applicant's stormwater management strategy. Information on the environmental buffer and the stormwater strategy were provided prior to January 24, 2020. The PFCP was issued on February 3, 2020. The Hearing Examiner re-opened

¹ Section 59.7.2.1.D.2.b of the Zoning Ordinance requires the Planning Board to issue its written recommendation on a Local Map Amendment application at least 7 business days before the public hearing.

the record to include the Planning Board's resolution approving the PFCP and the record closed on February 3, 2020.

III. FACTUAL BACKGROUND

A. Subject Property

The subject property contains six parcels (identified above) totaling 10.27 acres in the southeast quadrant of the intersection of Clopper and Germantown Roads. The Staff Report contains an aerial photograph of the subject property (Exhibit 44, p. 4), below):



Mr. Kevin Foster, the Applicant's expert land planner, testified that Germantown Road initially extended to the middle of the property. That road was relocated many years ago and the right of way became what is now called Liberty Mill Road, which terminates in a cul-de-sac in the middle of the property. T. 15; Exhibit 44, p. 4. PEPCO transmission lines bisect the property. The lines do not provide local service. PEPCO owns adjacent land to the north. T. 15-16. Adjacent developed uses include a Park and Ride lot, gas station and service use to the east, a fire station to the west, townhouses and a community center to the north, and multi-family to the south. Exhibit 44, p. 4.

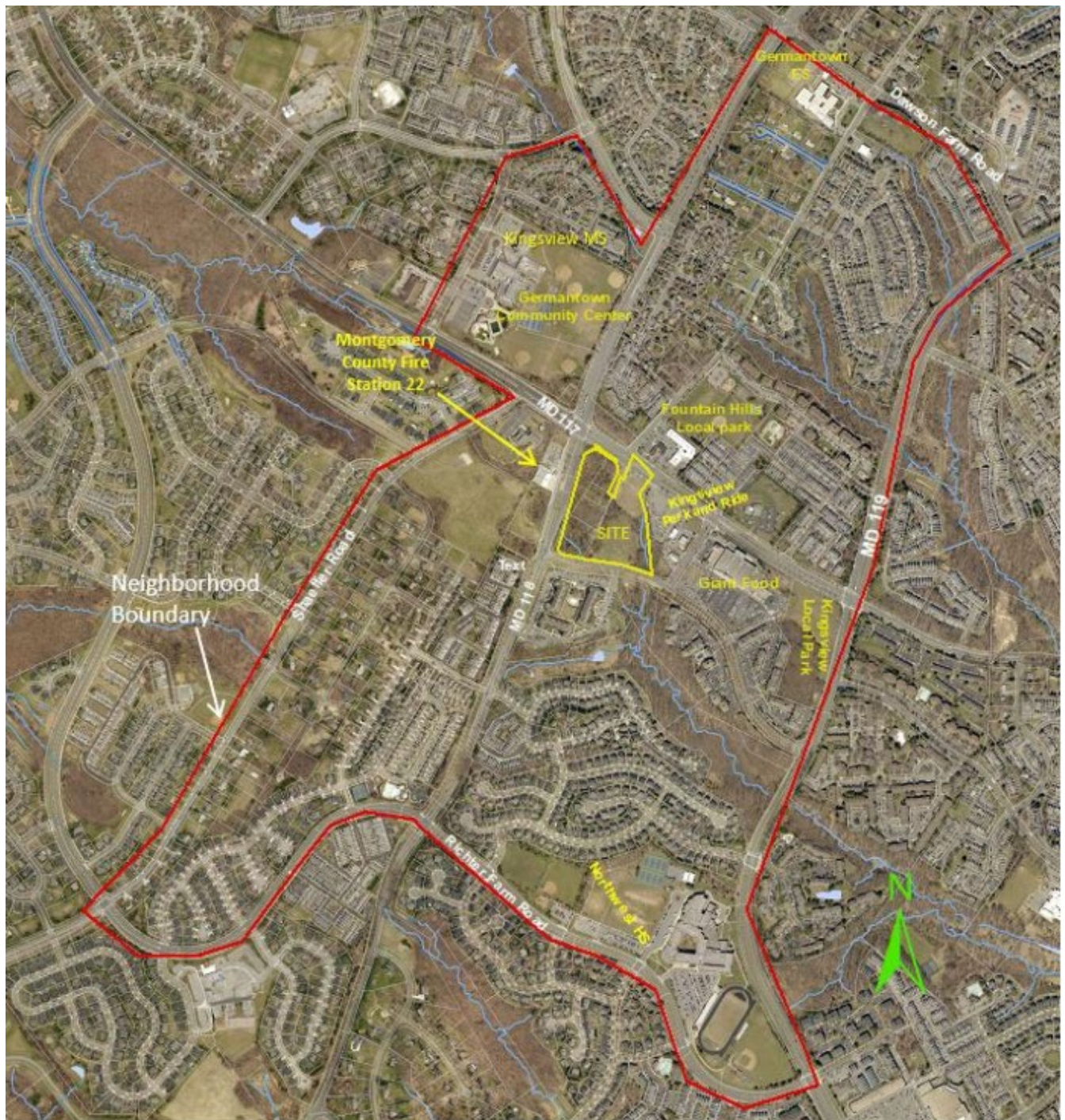
The remaining portions of the property are vacant. The center of the property contains a field, which is surrounded by two stream valleys along the east and west sides of the property. The bulk of the property is zoned R-200, although there is a portion of R-200/TDR 6 in the lower southwest corner. T. 21-22.

B. Surrounding Area

A "surrounding area" is identified and characterized in a Floating Zone case to assess the compatibility of the use with the properties that will be directly impacted. The area identified is then characterized to measure whether the uses proposed will be compatible with the existing character of the area.

Staff and the Applicant agree that the surrounding area for the subject property is bounded by Shaeffer Road, Kingsview Road, and MD 117 to the west; Dawson Farm Road to the north; MD 119 to the east; and Richter Farm Road to the south. An aerial view of the surrounding area from the Staff Report (Exhibit 44, p. 5) is on the following page.

Staff characterized the area as "primarily residential", with a variety of residential densities and building types. These include townhouses, multi-family buildings, and single-family detached homes. Although primarily residential, Staff found that the neighborhood includes a mix of



Surrounding Area
Exhibit 44, p. 5

commercial and institutional uses as well as public facilities and local parks. Exhibit 44, p. 5. Mr.

Foster testified that the surrounding area was somewhat large, but Staff wished to use easily

ascertainable boundaries. T.23. He characterized the larger surrounding area as “very residential”. T. 24. The area immediately surrounding the subject property, however, includes the Kingsview Village Center, multi-family apartments to the southeast, a fire station across Germantown Road to the west, a Board of Education property to the north across Clopper Road, and a park and ride, small retail strip center and gas station to the east. Elementary and middle schools, and a community center are on the northeast corner of Germantown and Clopper Road. According to Mr. Foster, this mix of uses is more varied than those commonly found in a village center, which typically has residential and commercial uses. T. 25-26.

The Hearing Examiner accepts the delineation of the surrounding area proposed by Planning Staff and the Applicant. While large, the physical barriers of roadways clearly define the direct impact of the proposed development. She agrees with the Applicant that the surrounding area is primarily residential but finds that the immediate environs are a mix of residential, commercial retail, public, and institutional uses. The residential portion of the surrounding area is a mix of multi-family, townhouse, and single-family detached units.

C. The Applicant’s Proposal

The Applicant proposes to develop 61 townhouse units and 12,000 square feet of retail in two buildings of 6,000 square feet each. Exhibit 43. The project will include 8 moderately priced dwelling units, the minimum number required (*i.e.*, 12.5%).

Mr. Foster testified that a mix of town homes and commercial were the most appropriate uses for the site due to physical and environmental constraints. The division of the property created by the stream valley buffers and the road make it difficult to place multi-family buildings because they require larger buildable plates. The townhouse design used in the FZP can be adjusted to fit irregularly shaped building areas. T. 73. The Applicant felt that commercial is best suited for the area close to the intersection of Clopper and Germantown Roads because it had high visibility and

is not suited for residences due to noise and traffic from the roads. *Id.*

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 37(c). An excerpt of the FZP showing the proposed building layouts, drive aisles, road dedications, and forest conservation areas is reproduced on the following page. Except for “binding elements” listed on the FZP, the development layout shown is illustrative and may change in the future.

The commercial buildings are sited along the Clopper Road frontage. The commercial building (designated Building A-1) is in the southeast corner of the intersection of Clopper and Germantown Roads to create an identifiable entrance to the project. Exhibit 37(c).

The residential units are located away from Clopper Road but do abut Germantown Road on the west and a Park and Ride and service station to the east. The dwelling units will have rear entry garages and will front on open space. Exhibit 44, p. 7. Staff advises that the project will be constructed in a single phase. *Id.*

2. Binding Elements

The FZP includes three binding elements, which are self-explanatory (Exhibit 37(c)):

1. The maximum number of townhouses on the Subject Property will not exceed 61.
2. The maximum total floor area of the commercial buildings will not exceed 12,000 square feet.
3. The maximum building height for the project will not exceed 50 feet.

Transmission Lines

Western Stream Valley

– Eastern Stream Valley

**Through Connection of
Liberty Mill road**

**Floating Zone Plan
Exhibit 37(c)**

D. Environment

Some environmental issues arose at the public hearing. One involved the accuracy of the environmental buffers shown on the FZP. The other centered on whether Kingsview's stormwater management strategy, which required stormwater facilities to encroach into the buffers, would meet County requirements.

There are two streams in the southwest and southeast portions of the property, one of which includes a significant wetland. Staff wrote (Exhibit 44, p. 16):

A large wetland is located in the northeastern quadrant of MD 118 and Leaman Farm Road. This wetland and associated streams are connected by storm drains to a stream system that originates on the side of MD 118 and continues south of Leaman Farm Road. The 1989 Germantown Master Plan identifies this stream system as important for protection...This wetland, as well as the other sensitive areas and their buffers should be left in an undisturbed condition.

Staff further stated that the application was "generally" in compliance with all applicable requirements of environmental laws. Exhibit 44, pp. 17, 19. The preliminary stormwater strategy shows stormwater management facilities that encroach into the environmental buffer, a practice that is normally avoided unless absolutely necessary. Exhibit 66.

Testimony at the public hearing revealed that the Planning Department initially approved a Natural Resources Inventory (NRI) in 2018 that did not show the full length of a stream in the southeastern corner of the property. Exhibit 21. In July 2019, Planning Staff, after a field inspection, determined that the stream extended further north than shown on the NRI. The additional portion increased the area of the environmental buffer. Kingsview argues that the stream discovered during the field inspection need not be shown on the NRI because it is "ephemeral" (*i.e.*, created by stormwater runoff) and not "intermittent", which is fueled by groundwater. Exhibit 21, T. 42. The record doesn't explicitly reveal whether Planning Staff determined that the stream was ephemeral or intermittent, however, the environmental buffer shown on the FZP is larger than shown on the original NRI. *Compare*, Exhibit 37(c) and 21.

The Applicant testified that it asked the Planning Department to allow stormwater management facilities in the buffer as a “compromise” because the Planning Department did not identify the full length of the stream when it approved the NRI/FSD T. 132. The Planning Board approved the PFCP at a meeting on December 5, 2019, with the stormwater facilities encroaching into the environmental buffer. Exhibit 73. The approval was subject to the following conditions (*Id.*):

- v. Stormwater management and grading to be removed from the environmental buffers, to the extent practicable.

With this condition, among others, the Board found that the development would not degrade the existing wetlands and met all environmental requirements. *Id.*

While the NRI typically requires streams and buffers to be field-verified, the Planning Department did not require the Applicant to revise its NRI to field verify the larger buffers. Exhibit 69. Kingsview advises that the a revised NRI was not required because the Planning Board had already approved the PFCP showing the facilities in the buffer. Exhibit 69. When asked about the accuracy of the environmental buffer shown on the FZP, Staff responded (Exhibit 69):

During the NRI/FSD process the applicant is required to delineate wetlands and their buffers. Staff then field verifies these locations. When streams and wetlands were found in excess of the NRI/FSD, there was no revision with a field verified wetland delineation. Staff made a reasonable determination of the revised buffer based on site visits and desktop tools.

Because the Applicant’s stormwater strategy plan shows facilities within the environmental buffer, the Hearing Examiner referred the stormwater management strategy to DPS for a preliminary determination whether it could approve the stormwater management strategy shown on the FZP. DPS responded that they were unable to determine whether the strategy would be acceptable (Exhibit 66):

You asked whether DPS would be likely to allow stormwater management practices to be located within a stream valley buffer. The “Stormwater Strategy” plan does not appear to show any practices within a stream valley buffer, however there are practices shown within what is labeled as “EB” which I assume is an environmental buffer. The legend on the plan does not address this abbreviation. While DPS does not generally allow stormwater practices to be located within a stream valley buffer

or an environmental buffer, we MAY allow them in these locations if absolutely necessary and with permission from MNCPPC. MNCPPC is the lead on these buffers. DPS would prefer to see the stormwater management practices located outside these buffers.

As to the plan in general, there is too little information available at this time to allow me to say with any degree of certainty that the proposed stormwater management practices are located in areas that receive required runoff, are sized to provide required runoff treatment, or are feasible to construct.

The plan proposes a Gravel Wetland which requires certain hydrology in order to be feasible, and DPS discourages these in close proximity to proposed residential units. In addition, MDE guidance places restrictions on the use of these practices. We would need to see a geotechnical study in order to determine whether the practice would be feasible where shown.

The plan shows proposed permeable paving, presumably as a stormwater management practice. A geotechnical evaluation is needed in order to determine whether or not this would be feasible.

Without additional information I am unable to say whether or not the proposed stormwater strategy would be acceptable to DPS or whether or not it would be adequate to meet the full stormwater runoff treatment requirements. Since it appears that the project would not meet the definition of a “redevelopment” project, DPS would require full stormwater compliance to be demonstrated at the time of stormwater management concept review. DPS would not support the subdivision if full stormwater runoff treatment compliance could not be demonstrated and a waiver of stormwater management treatment requirements was requested.

The Hearing Examiner requested the Applicant to provide a supplemental statement to address DPS’ comments. The Applicant’s statement advised the stormwater facilities were of enough quantity and size to meet current requirements. Mr. Timothy Longfellow, the Applicant’s civil engineer, stated that preliminary information on infiltration rates and groundwater levels for the micro bioretention and permeable pavement sections showed that they would be adequate to treat runoff. According to him, a “submerged gravel wetland facility is proposed in an area where high ground water elevations were observed.” Exhibit 77. Therefore, Mr. Longfellow concluded, the size of the drainage area and ground water table create enough hydrology to support the wetland. *Id.* As to encroachment of stormwater facilities into the environmental buffer, Mr. Longfellow stated that the project would not need environmental or stormwater management waivers because the Planning Board had already approved the encroachments in the PFCP (Exhibit 72):

With MNCPPC approval, as the lead agency on these matters, MCDPS will be in a position

to accept the placement of the facilities in those areas. While this is not the typical approach, MNCPPC and MCDPS have approved this condition on other projects in Montgomery County and it will certainly not be created a new precedent.

The Hearing Examiner conclusions regarding the environment and adequacy of stormwater management are in Parts IV.A.3.c and IV.B.2 of this Report, below.

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 a Local Map Amendment.

For approval, 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, as set forth below.

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.1.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...

* * *

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 *1989 Germantown Master Plan* (Master Plan or Plan). The Plan's central goal is to provide a "greater sense of community" within Germantown, in part by providing an "appropriate mix" of housing choices. *Master Plan*, p. 1. The Plan recommended increasing the number of single-family detached units and decreasing the number of single-family attached units or townhouses. *Id.*, p. 3. When the Plan was adopted, 18% of the single-family dwellings in the relevant analysis area were detached and 54% were townhouses. The Plan recommended altering the percentage to 29% single-family detached and 31% townhouses. *Id.* The Master Plan sought to provide a greater sense of community not only by balancing the mix of housing types. It recommended "townscape design" guidelines that focused on creating linkages between village centers and neighboring areas and using wider roads to create visual and acoustical buffers between land uses. *Plan*, p. 17.

The subject property falls primarily within the eastern portion Analysis Area CL-6 of the Master Plan. *Id.* For that analysis area, the Plan recommended development of 170,000 square feet of retail for the Kingsview Village Center and multi-family residential at 11 dwelling units per acre for this area. *Id.*, p. 64-65. It also recommended 2 acres for local commercial uses. *Id.* The southwestern corner of the subject property was recommended for the R-200/TDR Zone. The

“townscape design” recommendations provided that residential and road improvements adjacent to the Kingsview Village Center should support pedestrian access to the Center. *Plan*, p. 17.

Staff concluded that the FZP met the goals of the Master Plan because the total number of units proposed falls below the number of residential units recommended by the Plan. Staff concluded that, “[w]hile the proposal does not include garden apartments, as originally recommended, the attached units proposed will contribute to an overall mix of attached and garden apartment units in the analysis area, which is consistent with the Master Plan recommendation and desirable.” Exhibit 44, p. 11.

In Mr. Foster’s opinion, development of the subject property fills in the “hole in the donut” of the Kingsview Village Center by extending retail along Clopper Road and fulfilling the residential recommended for the balance of the property. The Master Plan recommended 170,000 square feet for the retail. Currently, the Center consists of 110,000 square feet; the additional 12,000 square feet proposed in the FZP will increase the amount of retail closer to the Plan’s goal. T. 87.

Mr. Foster testified that the residential portion also fulfills the goals of the Master Plan. As now developed, the housing mix in Analysis Area CL-6 is 7% townhouses, 11% single-family detached homes, and 82% multi-family units. T. 37. A higher percentage of multi-family would be expected near a village center. The FZP adds 60 townhouse units into the mix, bringing the percentage of single-family attached units to 15 percent, closer to the mix recommended by the Master Plan. *Id.*

In his opinion, the evolving design of townhouse units better contributes to the sense of community sought by the Plan. Older townhouses had garages and parking areas in front of the units. As planning has evolved, townhouses have been used as a tool to build communities by loading garages in the rear and creating a significant streetscape and open space. T. 37. The newer

design permits a pedestrian scale to the street and a generates a “neighborhood feel.” T. 38.

In his opinion, the FZP furthers the townscape design goals of the Plan by placing residential units next to a park and ride, facilitating access to transit. T. 38. Consistent with the Plan’s recommendation, sidewalks will provide pedestrian access to the Kingsview Village Center. It fulfills the townscape design goals also by connecting Liberty Mill Road between Clopper Road and Leaman Farm Road. Finally, it dedicates land to the full 150-foot right of way to Clopper Road, and there will be some right-of-way dedication on Md. Rte. 118. T. 68

Conclusion: The Hearing Examiner agrees with Staff and the Applicant that the proposed development conforms with the Master Plan. As Mr. Foster phrased it, this mixed use development will fill in the “hole in the donut” of the Kingsview Village Center with a use mix that approximates the vision of the Plan, as the actual mix has evolved and given the site constraints. While not multi-family as the Plan recommended, the percentage of multi-family in the analysis area is already high. This balances the mix with unit types that more closely conform to the overall goals sought by the Plan.

The development also fulfills the townscape design goals of the Plan. It provides a pedestrian linkage to the existing park and ride, thus enabling residents to travel without getting in their cars. It also will have pedestrian linkages to the Kingsview Village Center, another recommendation of the Plan, and completes an unfinished road linkage by connecting Liberty Mill Road to Clopper and Leaman Farm Roads.

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...

* * *

Section 7.2.1.E.1.f: when applying a non-Residential Floating zone to a property previously under a Residential Detached zone, not adversely affect the character of the surrounding neighborhood.

Staff found that the FZP would be compatible with existing and approved adjacent development and the surrounding area because the unit types complement the existing housing mix in the surrounding area, and are similar in design, height and massing with surrounding developments. Exhibit 44, pp. 20, 21, 23. Mr. Foster opined that the project would complement the scale and architecture of adjacent developments. The building height and setbacks will be like those of the existing buildings in the area. T. 87. The development will contribute to the diversity of housing in the village center by providing townhomes where the majority of residential is multifamily and will provide additional residents to support the existing commercial. T. 96-97. The commercial portion acts as an extension of the Kingsview Village Center. It is located near the busiest intersection and will buffer the activity and noise of the roads from the residents. T. 73-

74.

Mr. Foster noted the townhouse units are flexible enough to make the different uses internally compatible and protect existing environmental resources. The floating zones allow the flexibility in design to integrate development with the road network, create open space, and preserve environmental areas in a way that is internally and externally compatible with other uses. T. 84.

The Staff Report noted that “the electric transmission lines traversing the Property from north to south should be addressed for potential esthetic and safety impacts on the development and in particular, on the dwellings that would be in close proximity to the power lines.” Mr. Foster testified that PEPCO requires the building faces to be setback at least 10 feet horizontally from any wires. Under the FZP, the building faces are setback 20 from the wires, more than meeting this requirement. T. 80.

Conclusion: The Hearing Examiner finds that the proposed development will be compatible with adjacent properties and the surrounding area. She further finds that the FZP utilizes the design flexibility provided by the Floating Zones to integrate development compatibly with environmental and physical constraints within the development. The commercial area is appropriately located near the busiest intersection and will buffer the residential from noise and activity from the Clopper and Germantown Roads. Staff found that the size, height, and scale of the development is compatible with the surrounding area. The proposed commercial will complement the existing commercial in the Kingsview Village Center. At the same time, the residential units balance the mix of housing in the area at an appropriate scale with surrounding uses.

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 has provided enough evidence at the rezoning stage that public facilities will be adequate to serve the use.

a. Traffic

Under the above criteria, the District Council must find that the application either meets the criteria in the Planning Board's Local Area Transportation Review (LATR) Guidelines or be able to mitigate traffic impacts where they do not meet the required levels.

The Applicant in this case submitted a traffic study under the LATR Guidelines. Exhibit 62. Critical Lane Volumes (CLVs) of all intersections fall below the maximum threshold of 1350 for that policy area (Exhibit 44, p. 13, shown on the following page). Having no evidence to contravene the Traffic Study submitted by the Applicant, the Hearing Examiner concludes that there is adequate traffic and transit capacity to serve the proposed development.

b. Other Public Facilities

Staff determined that water and sewer, public school, and fire and police facilities are

Table 2: CLV Intersection Analysis

Intersection	CLV Standard	AM Peak Hour Delay			PM Peak Hour Delay		
		Existing	Back-ground	Total	Existing	Back-ground	Total
1. MD 118 (Germantown Rd) / MD 117 (Clopper Road)	1350	1026	1029	1031	1131	1141	1146
2. MD 117 / Liberty Mill Road (Site Access)	1350	620	663	644	550	567	586
3. MD 117 / Kingsview Village Avenue / Village Fountain Drive	1350	717	729	736	783	797	805
4. MD 119 (Great Seneca Highway) / MD 117	1350	1104	1109	1110	1076	1102	1116
5. MD 118 / Proposed Site Access	1350	N/A	N/A	519	N/A		351
6. MD 118 / Leaman Farm Road	1350	900	906	907	646	660	662
7. Leaman Farm Road / Proposed Site Access / Driveway	1350	219	219	223	292	292	306
8. Leaman Farm Road / Kingsview Village Avenue	1350	219	219	223	394	394	399

**CLV Volumes from Staff
Report
Exhibit 44, p. 13**

adequate to serve the use. Exhibit 44, p. 14. Mr. Longfellow testified that the site is already adequately served by other public facilities, including public water, gas, electric, telephone, and cable. T. 59. Staff advises that fire service is located at 13900 Old Columbia Pike in Burtonsville, and the 3rd District Police Station is located approximately 6 miles from the site. Exhibit 40(b), p. 9. Mr. Foster testified that there is adequate school capacity for the residential portion of the project. T. 93. Nothing in this record contradicts this testimony and evidence. The Hearing Examiner finds that these public facilities are adequate to serve the use.

c. Stormwater Management

Conclusion: At the rezoning stage, a detailed stormwater management plan is not required. Instead, the Applicant must submit a preliminary stormwater management strategy to demonstrate that development under the FZP can be supported in compliance with existing regulations.

Kingsview addressed some of DPS' comments in its Supplemental Statement (Exhibit 72). According to Kingsview, their preliminary review showed "good" infiltration rates in micro bioretention and permeable pavement areas. It also advised that the hydrology will support the submerged gravel wetland due to high ground water levels and the size of the drainage area. They further point out that the Planning Board is the lead agency on disposition within the environmental buffers, as confirmed by DPS. While the strategy may not be typical or preferred, there is nothing in this record to indicate that it cannot be approved. DPS also reassures that it will not support approval of a subdivision or site development plan without full compliance with stormwater management regulations. Based on this record, the Hearing Examiner finds that the Applicant has submitted enough evidence at the rezoning stage to find that stormwater management facilities meeting current regulations may be approved on the site.

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. The balance of the intent findings for Floating Zone and the purposes of the CRTF Zone, are discussed below.

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 achieve 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...

Conclusion: Staff concluded that the FZP meets this goal because it will provide “safe and convenient roadway, and internal circulation systems including sidewalks and pathways.” Exhibit 44, p. 17. Mr. Foster testified that the FZP uses the flexibility of the floating zones to integrate development with the existing site constraints. T. 84. The Hearing Examiner finds that the FZP meets this intent of the Floating Zones.

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***

Conclusion: Staff determined that the FZP met this objective by introducing a use mix that responds to the changing character of the area in terms of economics, demography and planning trends. Exhibit 44, p. 18. Mr. Foster testified that the Master Plan analysis area has developed with a very high percentage of multi-family; this application brings the mix closer to the Master Plan goals. He also testified that the evolving design of townhouses is now used to create a community-oriented development and provides flexibility to address site constraints in a compatible manner. He opined that the proposed development is sustainable because it will occur where infrastructure already exists and offers pedestrian connections to transit available at the park and ride. T. 85-86.

The Hearing Examiner agrees with Staff and the Applicant that the FZP will fulfill this intent of the Floating Zones. As Mr. Foster pointed out, the housing mix in Germantown has

changed since adoption of the Master Plan in 1989. The FZP will bring that proportion of units mixes closer to the Master Plan goals. The evolution of townhouse design has cured some of the ills that the Master Plan sought to avoid and will generate communities connected both by pedestrian walkways, transit, and road networks. The townhouse unit type uses a smaller building pad, conserving environmental areas and providing roads, sidewalks, and open space. The location of the property also furthers the goals for sustainable communities by developing residences close to a transit connection.

While there were some questions regarding the measure of environmental mitigation and protection, rezoning is an early stage of the development process. The environmental buffer shown on the PFCP treats the full extent of the stream as intermittent, while the boundaries of the buffer are “reasonably” accurate. The Planning Board conditioned its approval on reducing the encroachment into the buffers to the extent practicable, and Staff advises that this will be further refined during the development process. Exhibit 70. Without further evidence that the FZP does not adequately protect the environment, the Hearing Examiner finds that this purpose of the Commercial/Residential Floating Zones has been sufficiently met at the rezoning stage.

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.***

Conclusion: The Hearing Examiner already found that the FZP is compatible with adjacent development, utilizes the design flexibility allowed to accommodate site constraints, and provide mixed use development that is compatible with adjacent development. The commercial portion

extends and complements the existing Village Center and buffers the residences to the south from noise and activity at the intersection of Germantown and Clopper Roads. The FZP fulfills this purpose.

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 site may apply for a Floating Zone. Relevant subsections are listed below, followed by the Hearing Examiner's finding on each:²

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:³

* * *

Conclusion: Staff advises that no prerequisites for the application are required because the property was recommended for the PD-11 Zone in the Master Plan. *Id.*, p. 20. The 2014 Zoning Ordinance designates the CRNF Zone as the equivalent of the PD-11 Zone, and the FZP proposes under 11 dwelling units per acres. T. 27-28. The Hearing Examiner agrees with Staff that there are no prerequisites required for this FZP.

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

1. Uses Permitted (Section 59-5.3.3)

The CRNF Zone permits only those uses allowed by the CRN Zone. *Zoning Ordinance*, §59.3.3.3.A.1.

Conclusion: The CRN Zone permits townhouse living and a variety of commercial retail uses. The FZP meets this standard.

² The applicability requirements distinguish between floating zone applications that have been recommended by a Master Plan and those that have not. As the floating zone in this case was recommended by the Master Plan, this Report does not address the remaining applicability requirements in Section 59.5.1.3.C.

³ Section 59.5.1.3.A prohibits the Council from approving a floating zone on property in the AR or Rural Residential Zone. As the existing zone here is Residential, that section does not apply.

2. Development Standards of the CRTF Zone

Section 5.3.4. Building Types Allowed

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

Conclusion: As “any” building type is permitted, the buildings proposed clearly meet this standard.

Section 5.3.5. Development Standards

Staff found that the FZP meets the development standards of the CRNF-1.0, C-0.25, R-0.75, H-55 Zone, (Zoning Ordinance, §59.5.3.5), as demonstrated in the table from the Staff Report (Exhibit 44, p. 22, below):

Table 3: Development Standards-CRNF Zone			
	Section	Required	Proposed
Maximum Residential Density	5.3.5.A.1	11 d.u./acre based on Master Plan recommendation 170000 SF maximum/ Master Plan Village Center	1.0 FAR Residential (or 447,800 square feet)
Maximum Commercial Density	5.3.5.A.1		0.25 Commercial FAR (or 111,950 square feet)
Setback and Height from site Boundary		Per Master Plan Village Center	50 feet (binding element)
<ul style="list-style-type: none"> Minimum Setback Maximum Height 	4.1.8.B.2	Established by Floating Zone Plan	
Minimum Lot Size	5.2.5.C	Established by Floating Zone Plan	10. 07 Sq. ft
Minimum Open Space	5.2.5.D	10% Common open space	10 % public open space 10 % Common open space
Minimum Parking	5.3.5.D/6.2.4	Will be determined at site plan	Will be determined at site plan

A. Density

1. If a Floating zone is recommended in a master plan, density must not exceed that recommendation.

Conclusion: The Master Plan recommended a density of 11 dwelling units per acre and up to 170,000 square feet of commercial for the Kingsview Village Center. The FZP proposes a density under 11 dwelling units per acre. The additional commercial brings the total for the Kingsview Village Center well under the amount recommended by the Master Plan. This FZP meets the density permitted by the CRNF Zone.

B. Setback and Height

- 1. If a Floating zone is recommended in a master plan, height must not exceed that recommendation.***
- 2. Setbacks from the site boundary and maximum height are established by the floating zone plan. All other setbacks are established by the site plan approval process under Section 7.3.4.***
- 3. Height must satisfy the compatibility standards for the applicable building type under Section 4.1.8.B.***

Conclusion: The Master plan did not recommend a height limit for development on the property.

Mr. Foster testified that the height limit for the PD-11 Zone under the 2004 Zoning Ordinance was 50 feet. After discussions with Planning Staff, they felt that a 50-foot height would still allow four stories and a gable roof. T. 91. The 50-foot height is a binding element of the FZP. T. 92.

The Hearing Examiner agrees that using the height limits applicable when the Master Plan was adopted is a fair comparison to determine the Plan's intent. For the number of units proposed here, the 2004 Zoning Ordinance limited building height in the PD Zones to four stories. *2004 Zoning Ordinance*, §59-C-7.131. Mr. Foster testified that a 50-foot height would still allow four stories. T. 91. T. 92. While the CRNF Zone may permit a maximum height of 55 feet, the Applicant has limited the height to 50 feet by a binding element. *Id.*

Setbacks from the site perimeter are established by the FZP. Both Staff and the Applicant have submitted testimony and evidence finding that the setbacks are compatible with the surrounding area and adjacent properties, summarized above. The height compatibility requirements in Section 59.4.1.8.B may be addressed at site plan. The Hearing Examiner agrees that the FZP meets the development standards of the CRNF Zone.

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-131, requesting reclassification from the existing R-200 and R-200/TDR 6 Zones to the CRNF-1.0, C-0.25, R-0.75, H-55 of six parcels (N210, P220, P 274, Pt. P322, Pt. P 330, P.536 and the Liberty Mill Road R.O.W (Tax Account Nos. 06-01483728, 06-02687740, 06-00396261, 06-0040561, 06-00396215, 06-03282924), be **approved** in the amount requested and subject to the specifications and requirements of the Floating Zone Plan (Exhibit 37(c)), provided that the Applicant files an executed Declaration of Covenants (Exhibit 52) 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: February 19, 2020.

Respectfully submitted,



Lynn Robeson Hannan
Hearing Examiner