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I. EXECUTIVE SUMMARY

Successor Applicant:	Fifty, LLC
LMA No. & Date of Filing:	G-849, filed February 8, 2006; Remanded October 26, 2006
Zoning and Use Sought:	Zone: RT-8 Use: 39 Townhouses (including 5 MPDUs)
Current Zone and Use:	Zone: R-90 Current Use: Single-family, detached residences
Location:	North side of Darnestown Road, approximately 400 feet west of its intersection with Travilah Road, in Rockville, Maryland
Applicable Master Plan:	Shady Grove Study Area Master Plan, Approved and Adopted 1990
Acreage to be Rezoned:	Approximately 4.91729 acres (214,197 sq. ft.)
Right-of-Way to be dedicated:	Approximately 15,080 square feet along Darnestown Road, the final amounts to be determined at Subdivision
Density Permitted in RT-8 Zone:	9.76 DU/acre (per Zoning Ordinance §59-C-1.74, when MPDUs are included) = 48 Dwelling Units (4.92 acres X 9.76 DUs/acre = 48 DU maximum)
Density Planned:	7.93 per acre (<i>i.e.</i> , 39 Dwelling Units on 4.92 acres)
Bldg. Coverage Allowed/Planned:	40% Maximum per §59-C-1.74 / 25% planned
Green Space Required/Planned:	45% Minimum per §59-C-1.74 / 55% planned
Parking Spaces Required/Planned:	78 required (2 spaces per d/u) / 146 off-street, and 18 on-street planned
Building Height Limits:	35 feet maximum allowed / 35 feet planned
Traffic Issues:	None raised
Storm Water Drainage:	Storm water management concept plan has been approved by DPS. Plans will be finalized at Site Plan and Subdivision Review
Environmental Issues:	The Site is not in a Special Protection Area or Primary Management Area, and has no streams, wetlands or extensive areas of steep slopes. About 18,000 square feet of the site will be a Conservation Easement
Consistency with Master Plan:	Project is consistent with purpose and objectives of the Shady Grove Study Area Master Plan
Noise Issue:	This case was remanded because of Council concerns about potential noise from the Public Service Training Academy (PSTA) adjacent to the property. All those reviewing the modified plan concluded that the noise issue had been appropriately addressed
Opposition Concern:	Possible effect on property values by having a townhouse community next door and possible noise. No evidence was introduced to establish a negative effect on property values, and noise will be buffered
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval

II. STATEMENT OF THE CASE

Application No. G-849, filed on February 8, 2006 by former Applicant Winchester Homes, Inc., requests reclassification from the R-90 Zone to the RT-8 Zone of 4.91729 acres of land on the north side of Darnestown Road, approximately 400 feet west of its intersection with Travilah Road, comprising properties located at 10113, 10119, 10123, 10127, 10131, 10201, and 10207 Darnestown Road, Tax Account Numbers 9-1-772871, 9-1-776297, 9-1-772882, 9-1-769463, 9-1-769452, 9-1-778593, 9-1-776286, 9-1-778525, 9-1-778514 and 9-1-778503, Rockville, Maryland, in the 9th Election District.

The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits Schematic Development Plan (SDP), with binding limitations with respect to land use, density and development standards or staging. The SDP for the proposed developments calls for 39 townhouse units, five of which would be moderately priced dwelling units (MPDUs).

The application was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission (“M-NCPPC”) who, in a report dated June 9, 2006, recommended approval. The Montgomery County Planning Board (“Planning Board”) originally considered the application on June 22, 2006 and, by a vote of 3 to 1, recommended approval, but indicated its concern about the need for “noise mitigation for the areas adjoining the Public Service Training Academy [PSTA].”

After a public hearing on June 26, 2006, and supplemental filings, the Hearing Examiner recommended approval in a report dated October 13, 2006. The case was remanded by the Council to the Planning Board on October 26, 2006, also because of the noise concerns. The remand order directed the Planning Board to “undertake the following:”

1. A more detailed analysis of activities currently taking place on the site of the Public Service Training Academy (PSTA) adjacent to the property proposed for rezoning, as well as planned future activities at the Training Academy.

This analysis should examine whether the existing and planned future activities at the Training Academy are compatible with the construction of a residential development on the subject property at the proposed density, and whether either the residents of the new development or the Training Academy would be adversely affected over the long – term by the close proximity of the two uses. This analysis should also include a detailed review of the location of the various existing and proposed facilities on the Training Academy site, and their distances from the closest homes proposed on the subject property.

2. A more detailed analysis, particularly in light of the investigation called for under item 1, above, of whether the density and placement of homes shown on the Development Plan proposed in this case is appropriate at this location, abutting the Training Academy.
3. A more extensive analysis of noise impacts on the subject site from the Training Academy, including anticipated noise impacts from the expanded facilities and activities that have already been approved for the Training Academy.
4. A supplemental recommendation to the District Council on the merits of the subject Local Map Amendment application.

The remand order further instructed the Hearing Examiner, upon receipt of the Planning Board's new analysis and recommendations, to reopen the record, provide for public comment or an additional hearing and to submit a supplemental report and recommendation. Given the extensive changes proposed by the current Applicant, the Hearing Examiner elected to hold an additional public hearing.

The original Applicant, Winchester Homes, Inc, withdrew after the remand, and the new Applicant is "Fifty LLC," which is a part owner of the site, and acts with permission of the other owners of the site (Exhibits 54(a), (b), (e) and (f), and 78(b), (c) and (d)). The development will be called "Darnestown at Travilah." The new Applicant revised the proposed arrangement of the townhouses on site and added a berm, topped by a fence, between the proposed townhouses and the PSTA, as well as other screening and noise reduction measures. Additional expert analysis of the noise situation was obtained, and the whole matter was re-reviewed by Technical Staff and the Planning Board. The revised SDP proposed twelve binding elements when reviewed by Technical Staff.

On December 1, 2008, Technical Staff issued a report (Exhibit 64) recommending approval of the revised Schematic Development Plan, but with the transformation of all but four of the binding elements into “Design Elements to be addressed at site plan.”³ On December 11, 2008, the Planning Board voted unanimously to recommend approval of the revised SDP, but with additional changes to the proposed binding elements. The Planning Board agreed with Technical Staff’s recommendation regarding binding elements, but also recommended deletion of one proposed binding element and the transformation of all but two of the remaining ones into “Design Elements to be addressed at site plan,” leaving an SDP with two binding elements. These changes were intended to maintain the Planning Board’s flexibility in approving or imposing design changes during site plan.

A remand hearing was held, as scheduled, on December 22, 2008.⁴ Applicant called four witnesses, and the only opposition testimony came from the next-door neighbor who felt that the construction of townhouses might lower the property value of his residence, which also houses his dance studio.⁵ Martin Klauber, Esquire, the People’s Counsel, participated in support of the revised application.

The record was held open after the hearing for Applicant to file additional exhibits by January 9, 2009, and for any commentary thereon by January 16, 2009. Applicant timely filed additional exhibits, including alternative site plans and covenants, varying only in the number of proposed textual binding elements (Exhibit 78 and its subparts).⁶ No further commentary was received from any party, and the record closed, as scheduled, on January 16, 2009.

For the reasons discussed below, the Hearing Examiner recommends approval of the rezoning application, as set forth in SDP Alternate B (Ex. 78(f)) and Declaration of Covenants (Ex. 78(m)).

³ The Staff Report is quoted and paraphrased liberally in this report.

⁴ References to the Remand Hearing on December 22, 2008, are denoted “Remand Tr. xx,” while references to the original hearing on June 26, 2006, are denoted “Tr. xx.”

⁵ This and his other concerns, expressed earlier in this case, will be discussed in Part III. K. of this report.

⁶ To give the Council the option of three or thirteen binding elements, the Hearing Examiner had the Applicant submit two alternative SDPs (Alternate A-Exhibit 78(e) and Alternate B –Exhibit 78(f)) and corresponding covenants (Alternate A -Exhibit 78(g) and Alternate B Exhibit 78(m)), which are identical except that Alternate A lists all thirteen elements as binding, while Alternate B lists three binding elements and 10 “Design elements.”

III. FINDINGS OF FACT

For the convenience of the reader, the findings of fact are grouped by subject matter. Any conflicts in the evidence are resolved under the preponderance of the evidence test.

A. Subject Property

The subject property consists of ten parcels with a combined area of approximately 4.92 acres. The site is located on the north side of Darnestown Road between its intersections with Travilah Road and Key West Avenue, and has approximately 757 feet of frontage on Darnestown Road. The topography reflects a decrease in elevation from the northeast corner of the site to the southwest corner, adjacent to Darnestown Road. The property is currently developed with single-family detached dwellings of various types and sizes, and has seven individual driveways accessing Darnestown Road. The site contains a few mature trees, but no wooded areas that qualify as forest.

To the north, the subject property abuts a county-owned Public Service Training Academy (“Training Academy” or “PSTA”) that serves as a centralized location for specialized training of public safety employees, particularly police officers and fire fighters. Since 2001, the Training Academy has also been used for staging and training related to homeland security. It includes classroom space, an outdoor course for driver training, an outdoor space dedicated to training fire fighters, a canine training facility and an unpaved area used as a helicopter landing site.

In early 2006, the Planning Board approved a proposal to develop additional facilities at this site, including an expansion of the academic building, construction of a new fire station, construction of a new canine support facility with 1,350 square feet of offices and kennels, paving the helicopter landing site, and adding 220 parking spaces to the existing 107 spaces. *See* Exs. 42(a) and (b). As will be discussed below in connection with the “surrounding area,” plans are underway to relocate the PSTA, and many of the improvements approved in 2006 have not taken place.

To the west, the subject property abuts a medical office building in the O-M Zone. To the east it abuts a single-family, detached dwelling in the R-90 Zone that has a residential unit upstairs, and a dance studio operating by special exception on the ground level. It is owned by Schain Lolatchy, the only opponent to this development.

The general location and shape of the subject property and the PSTA are shown in the Vicinity Map, attached to the remand Technical Staff report (Exhibit 64) and reproduced below:

Vicinity Map with Local Map Amendment G-849 and PSTA



Photographs of existing structures on the subject property are shown on the next page, following the key map below (Exhibit 69) which indicates, by numbers and arrows, the locations from which the photos were taken. The subject site is outlined in black.

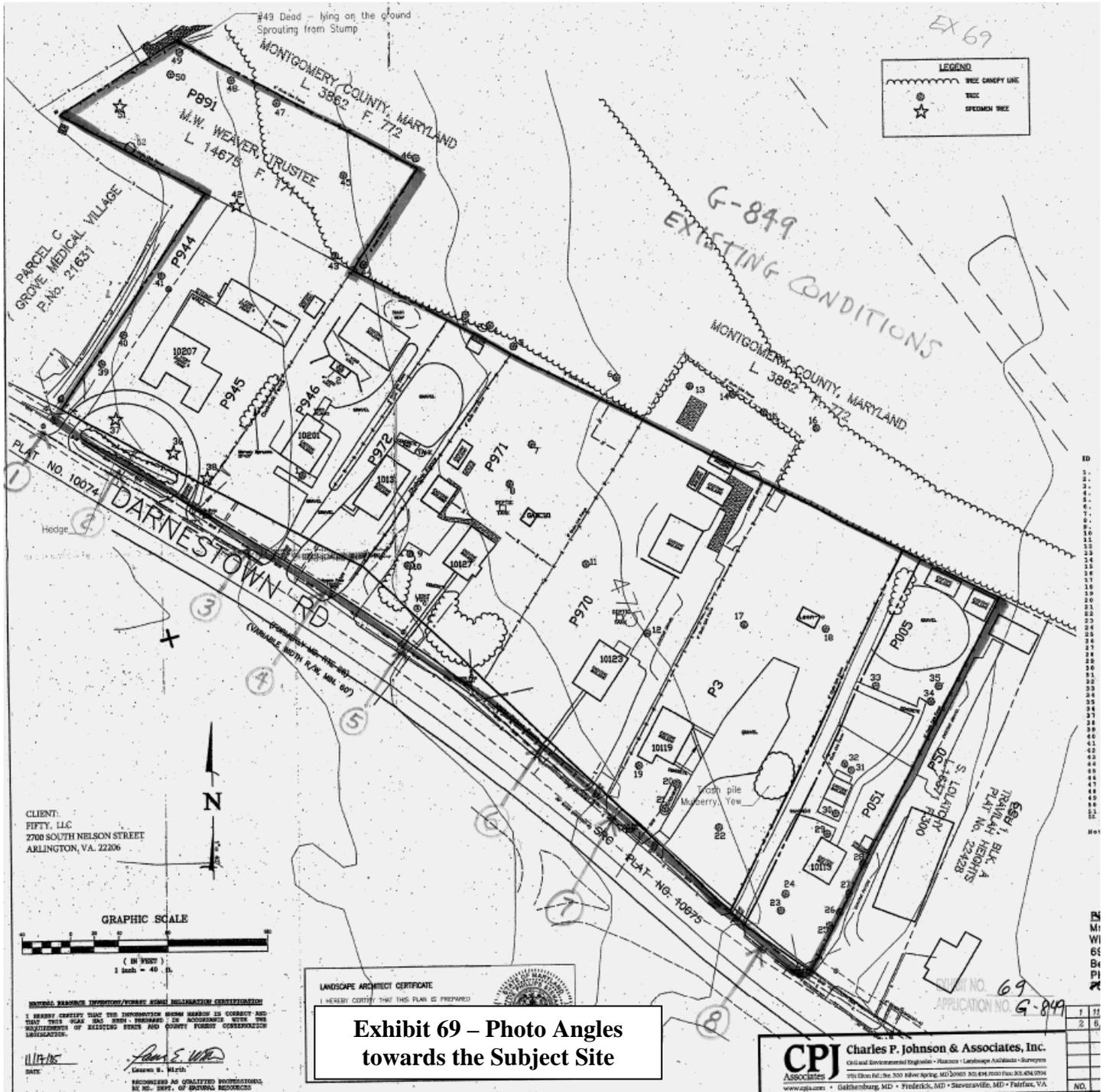


Exhibit 69 – Photo Angles towards the Subject Site



Photographs of existing structures across Darnestown Road from the subject property are shown on the next page, following the key map below (Exhibit 70) which indicates, by numbers and arrows, the locations from which the photos were taken:

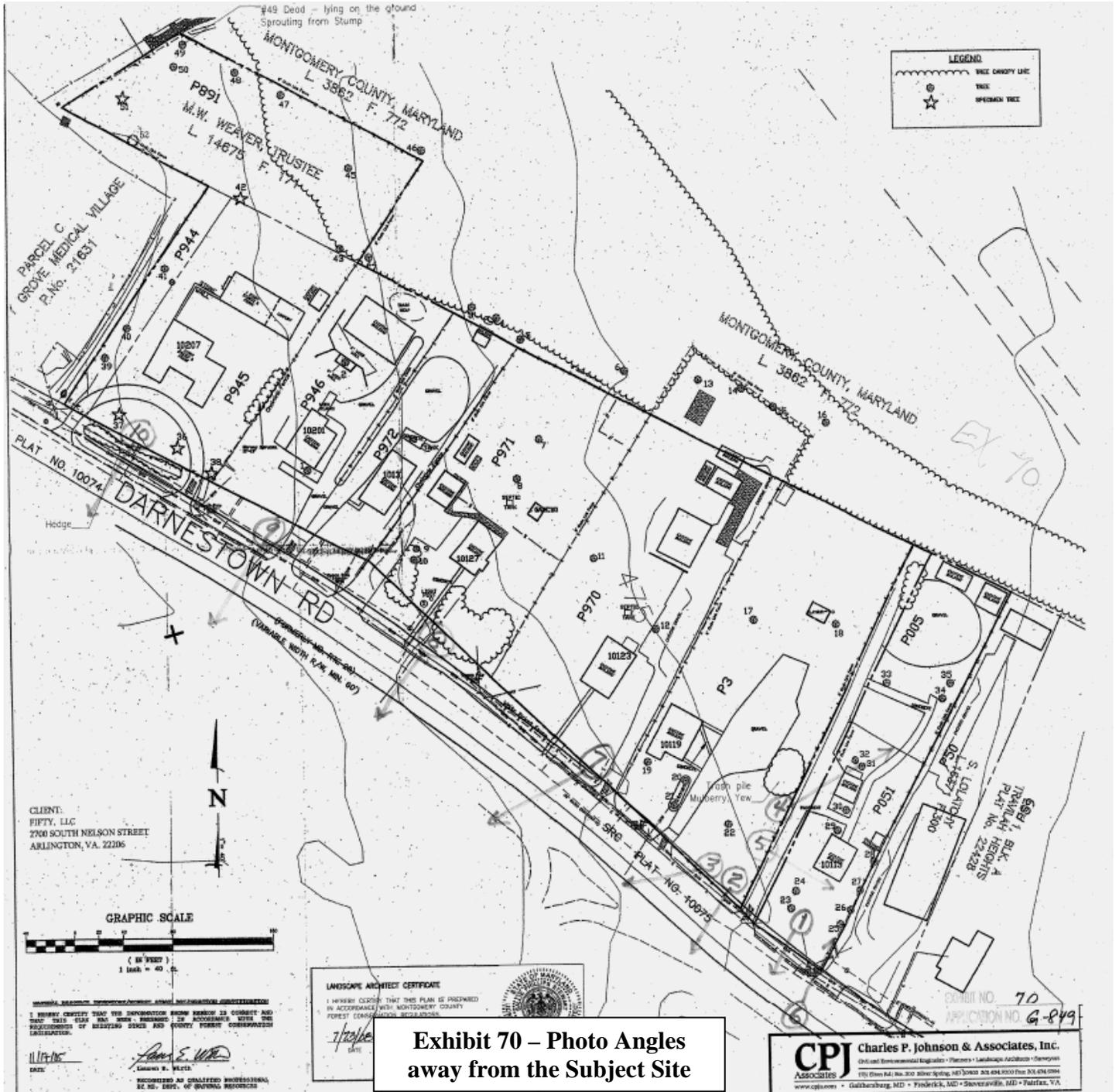


Exhibit 70 – Photo Angles away from the Subject Site



Ex. 70 - #1



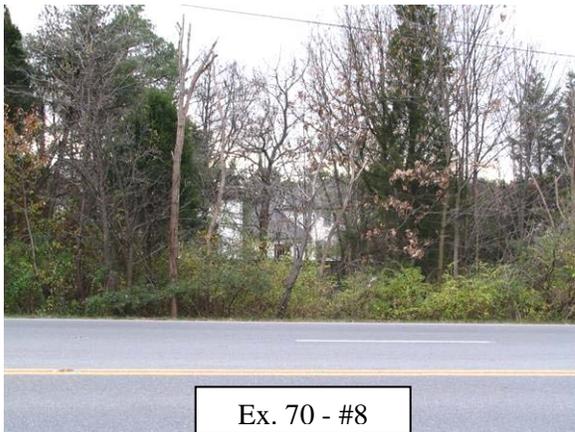
Ex. 70 - #2



Ex. 70 - #3



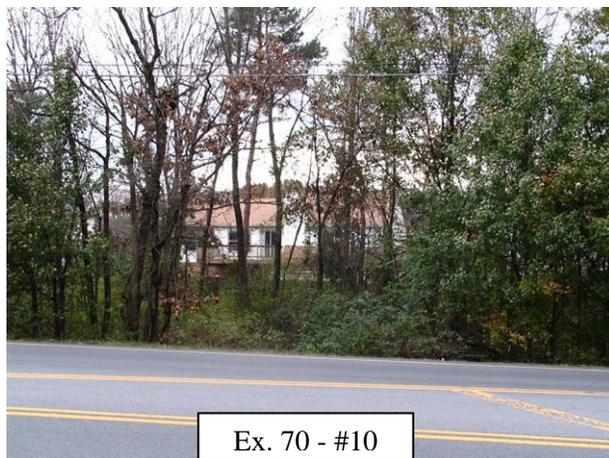
Ex. 70 - #7



Ex. 70 - #8

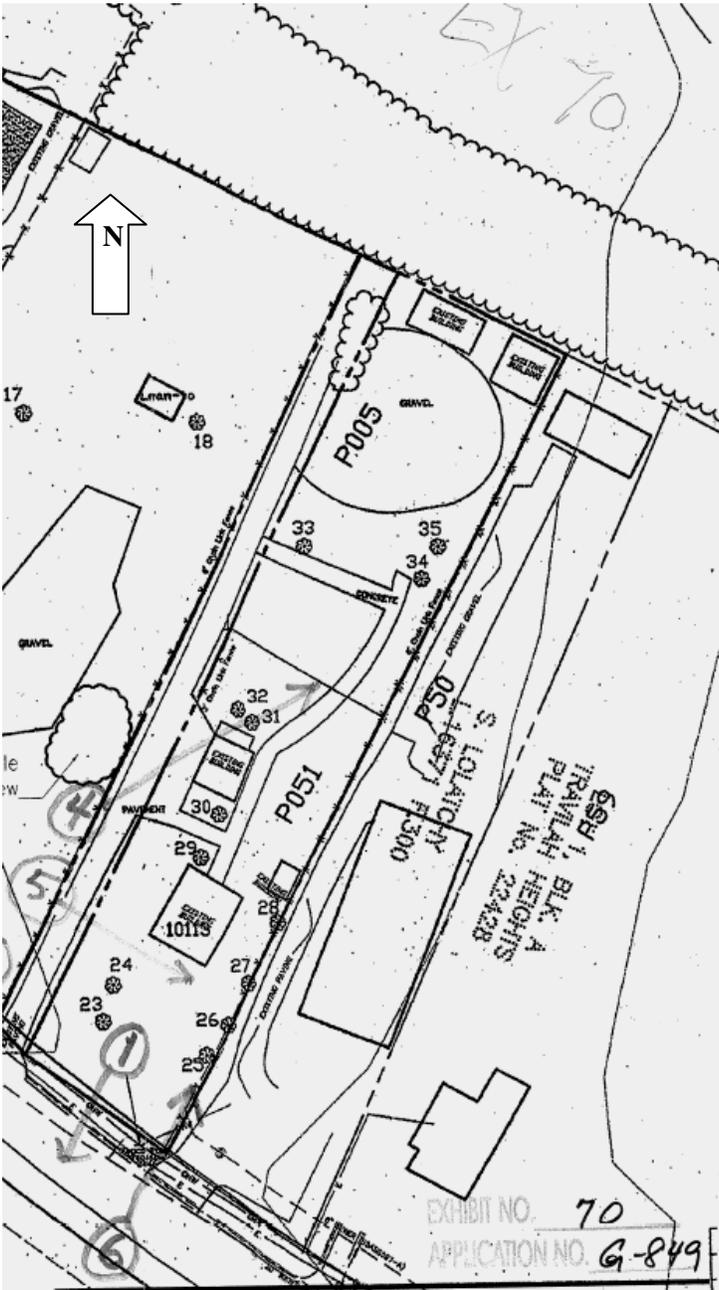


Ex. 70 - #9



Ex. 70 - #10

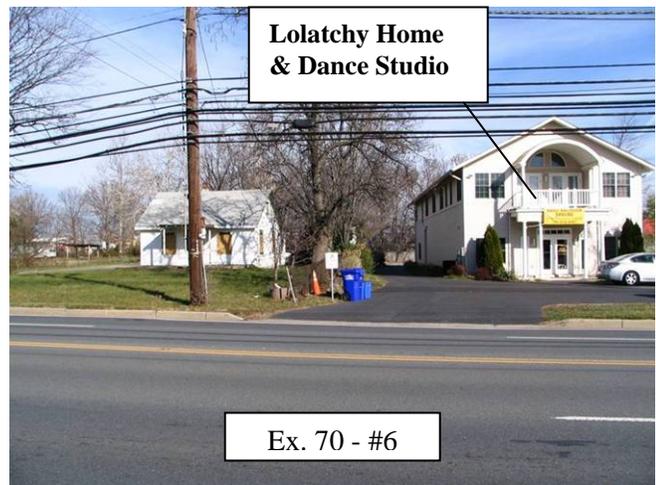
The first two photographs shown below (Ex. 70, #s 4 and 5) were taken from the subject site, at the locations depicted in the eastern portion of the Exhibit 70 key map, displayed below. The final photograph on this page (Exhibit 70, #6) shows the front view of Lolatchy residence from Darnestown Road, as well as the easternmost house on the subject site.



Ex. 70 - #4

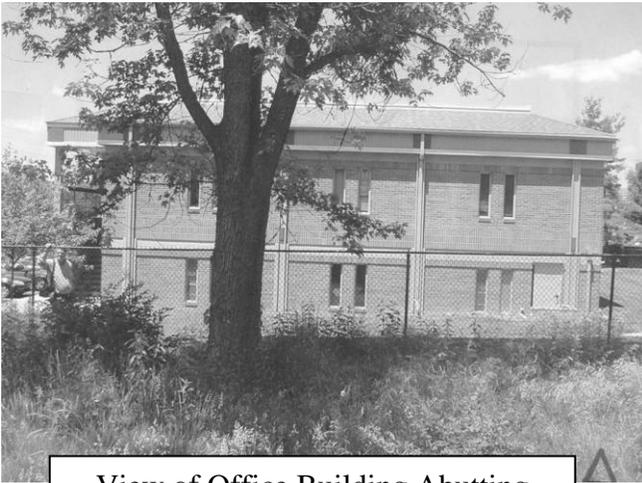


Ex. 70 - #5

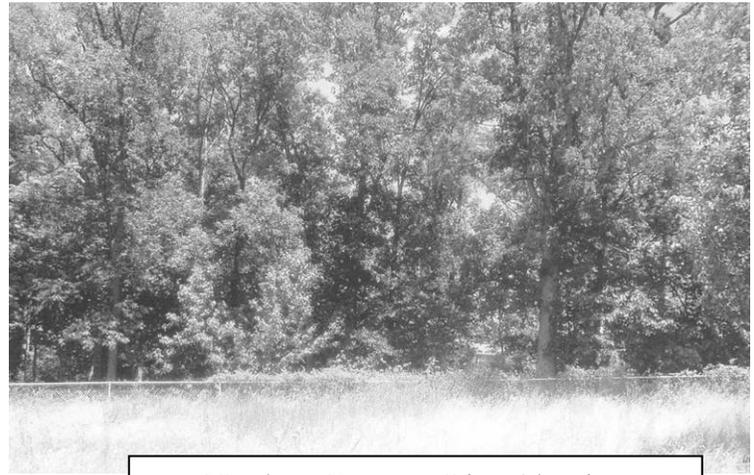


Ex. 70 - #6

Two photographs reproduced below from the original Hearing Examiner's report, complete the picture of the immediate vicinity of the site looking in all directions:



View of Office Building Abutting Site to West, Ex. 37, Photo A

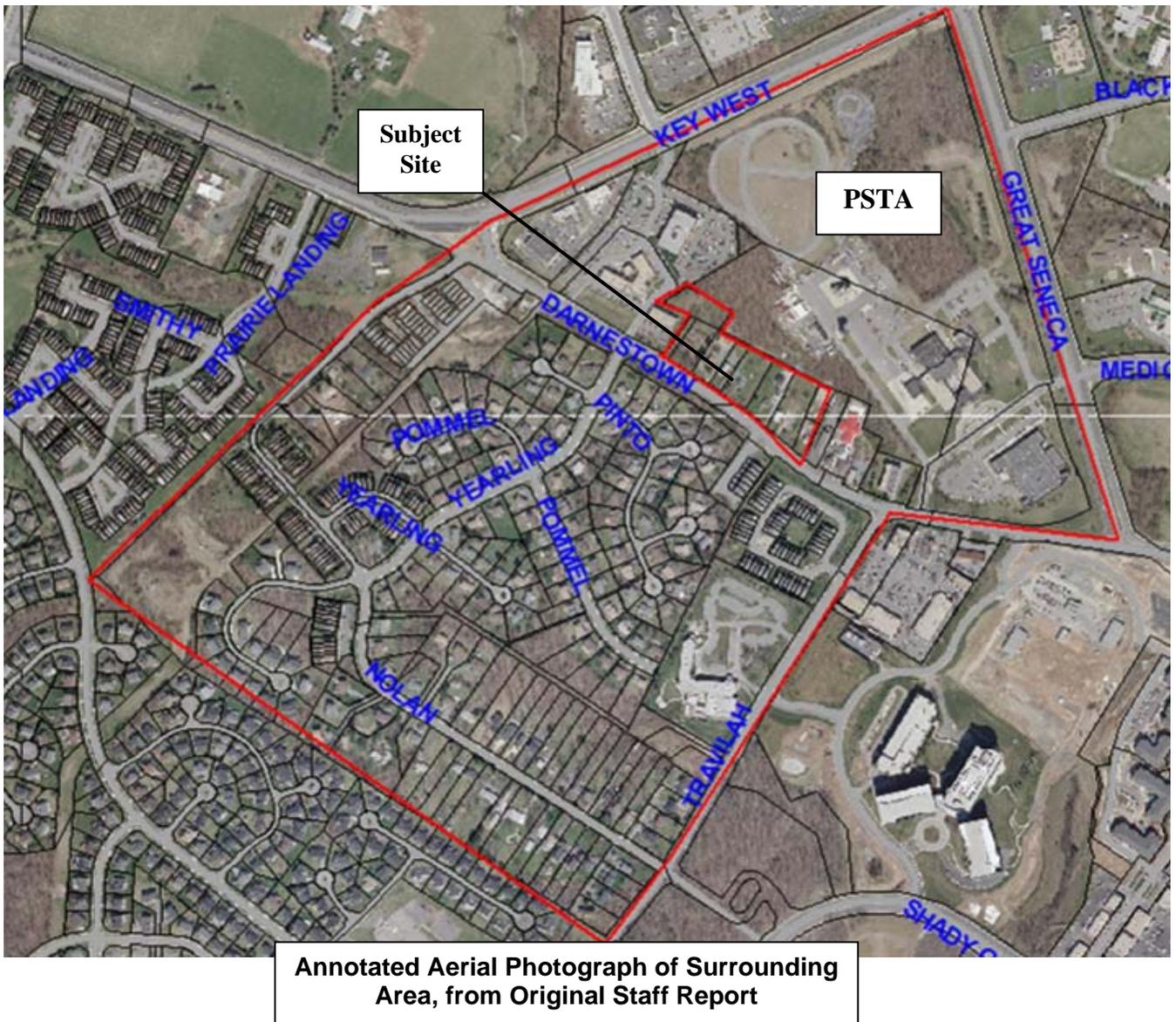


Northern Property Line Abutting Training Academy, Ex. 37, Photo D

B. Surrounding Area

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. In the present case, Technical Staff defined the surrounding area as bounded generally by Key West Avenue (MD 28) on the north and west, Great Seneca Highway (MD 119) on the northeast, Travilah Road on the southeast, the southern boundary of the BAI-Nola Woods Subdivision on the south, and the western boundary of the Hunting Hill Woods Subdivision on the west.

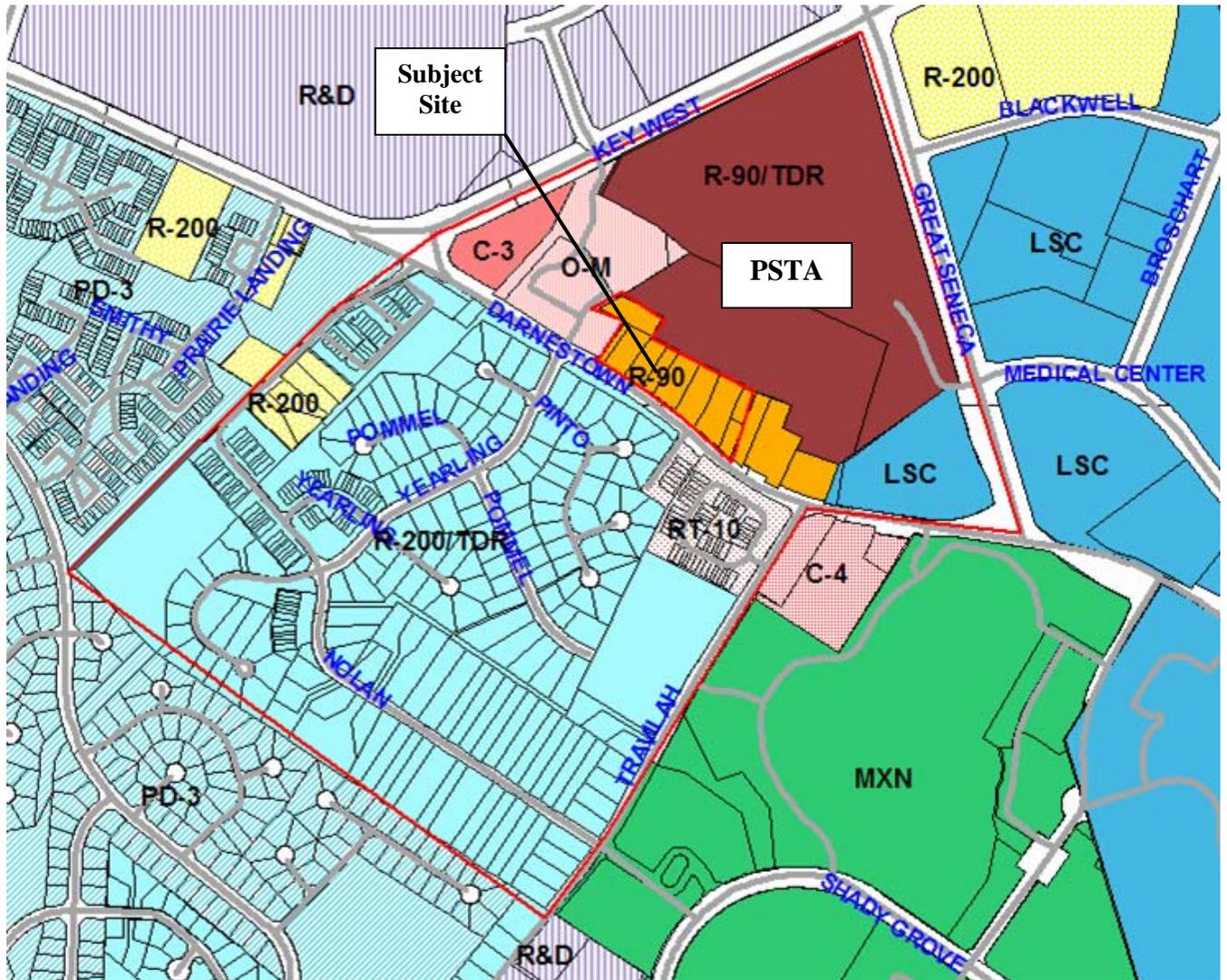
Applicant's land planner, Alfred Blumberg, accepted the same definition (Remand Tr. 29), and the Hearing Examiner finds that Technical Staff's suggested definition appears to include the area which would likely be impacted by the proposed development. Accordingly, the Hearing Examiner designates the surrounding area for this case as the area described above, per the recommendation of Technical Staff. This area is shown on the aerial photograph on the next page.



The surrounding area, as described above, contains a mix of residential, institutional and office uses in the R-90, R-90/TDR, R-200, R-200/TDR, RT-10, O-M, C-3 and LSC Zones. The residential uses, made up mostly of single-family detached homes in the R-200 and R-200/TDR Zones, and townhouses in the RT-10 Zone, are located in the southern portion of the neighborhood, south of Darnestown Road. A major part of the northern portion of the neighborhood is occupied by the PSTA, in the R-90/TDR Zone. The northern portion of the neighborhood also contains a small retail center in the C-3 Zone, at the intersection of Darnestown Road and Key West Avenue, a medical office building in the O-M Zone, adjacent to the site, and the Maryland Technology and Development Center, in the

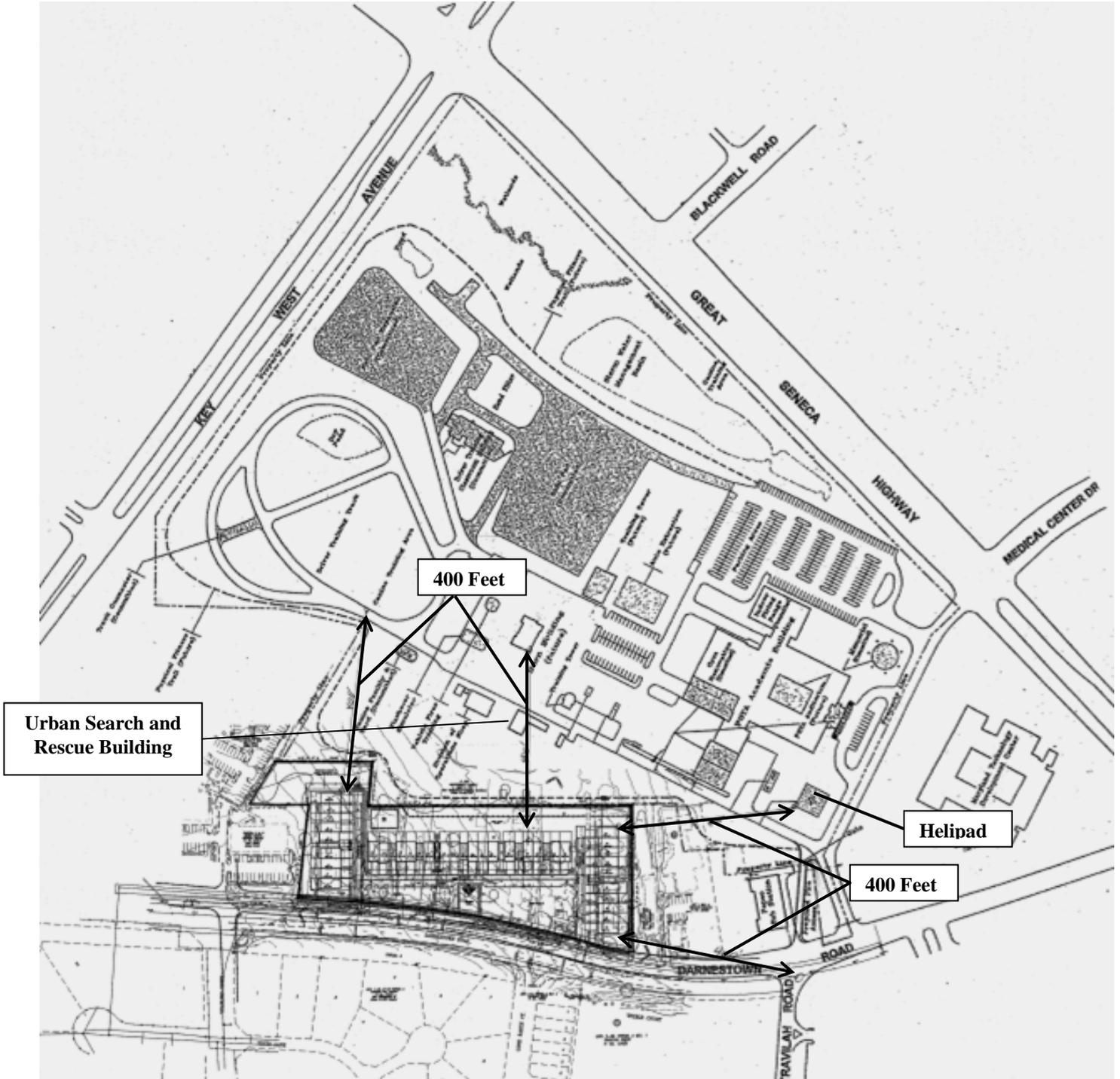
LSC Zone at the northwest corner of Great Seneca Highway and Darnestown Road. Immediately to the east of the subject site are the adjacent residence/dance school special exception, a large child day care/school special exception abutting the residence/dance school, and a PEPCO substation, all in the R-90 Zone.

The relationship of the subject property to surrounding land use and zoning patterns may be seen on the following zoning map excerpted from the original Staff Report:



The proximity of the PSTA to the subject site was the main reason for the remand in this case, so its current status and likely future are important to this evaluation on remand. The current status of

Also, below is a diagram (Exhibit 74) showing the same PSTA Master Site Plan, with the subject site superimposed on it and some distances drawn in, to give a sense of how far away from the site noisy activity might occur.



As can be seen from the two exhibits, much of what actually occurs at the PSTA is quite far away from the subject site. Noise levels from studies conducted on site will be discussed in Part III. H. of this report, but the noise issues may end up being a moot point because of the real possibility that the PSTA will be relocated.

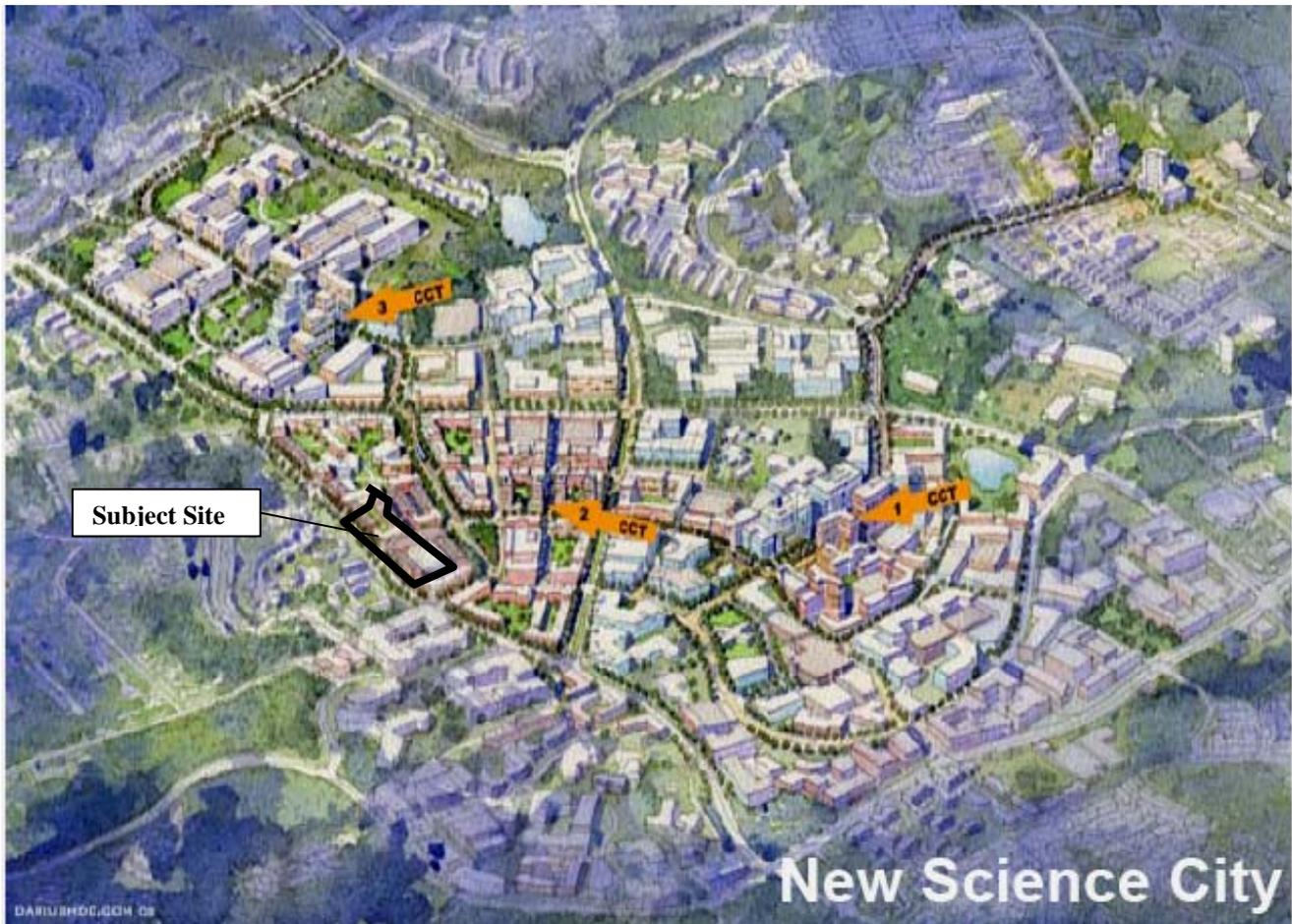
This possibility was discussed extensively in both the Remand Technical Staff report (Exhibit 64, pp. 3, 11-13), and in an Addendum to Applicant's Land Use Report (Exhibit 57(b), pp. 1-5). Attached to the Addendum are copies of the Montgomery County Executive's August 2008, "Montgomery County Property Use Initiative" and Technical Staff's September 24, 2008, memorandum to the Planning Board on the status of the Gaithersburg West Master Plan, which ultimately may replace the 1990 Shady Grove Study Area Master Plan currently applicable to the subject site. As summarized in the Addendum to Applicant's Land Use Report,

In August 2008, the Montgomery County Executive's office released the "Montgomery County Property Use Initiative" (copy attached). That report summarizes the County Executive's decision to "...comprehensively evaluate the entire strategy as to how and where to invest a substantial number of the County's valuable resources, advance our key economic priorities and move forward the implementation of the new Shady Grove Sector Plan to create thousands of new housing units near Metro."

The very first problem defined by the Executive was that "Our Public Safety Training Academy has severe space limitations and is in need of tens of millions of dollars in improvements just to stay at its current location."

One of the critical conclusions reached in the Executives analysis is to relocate the Public Service Training Academy (PSTA) to the Webb Tract on Snouffer School Road, abutting the Montgomery County Airport. Specifically identified for such relocation are the "PSTA Driving Tracks, Urban Search & Rescue, Burn Building, Classrooms, Indoor Firing Range and Gym". The Helipad is proposed for relocation to either the Webb tract or the Airpark. The proposed Travilah Fire Station would still be constructed on the PSTA site along Great Seneca Highway [i.e., further away from the subject site] to provide local fire protection for the surrounding Travilah area. [Emphasis added.]

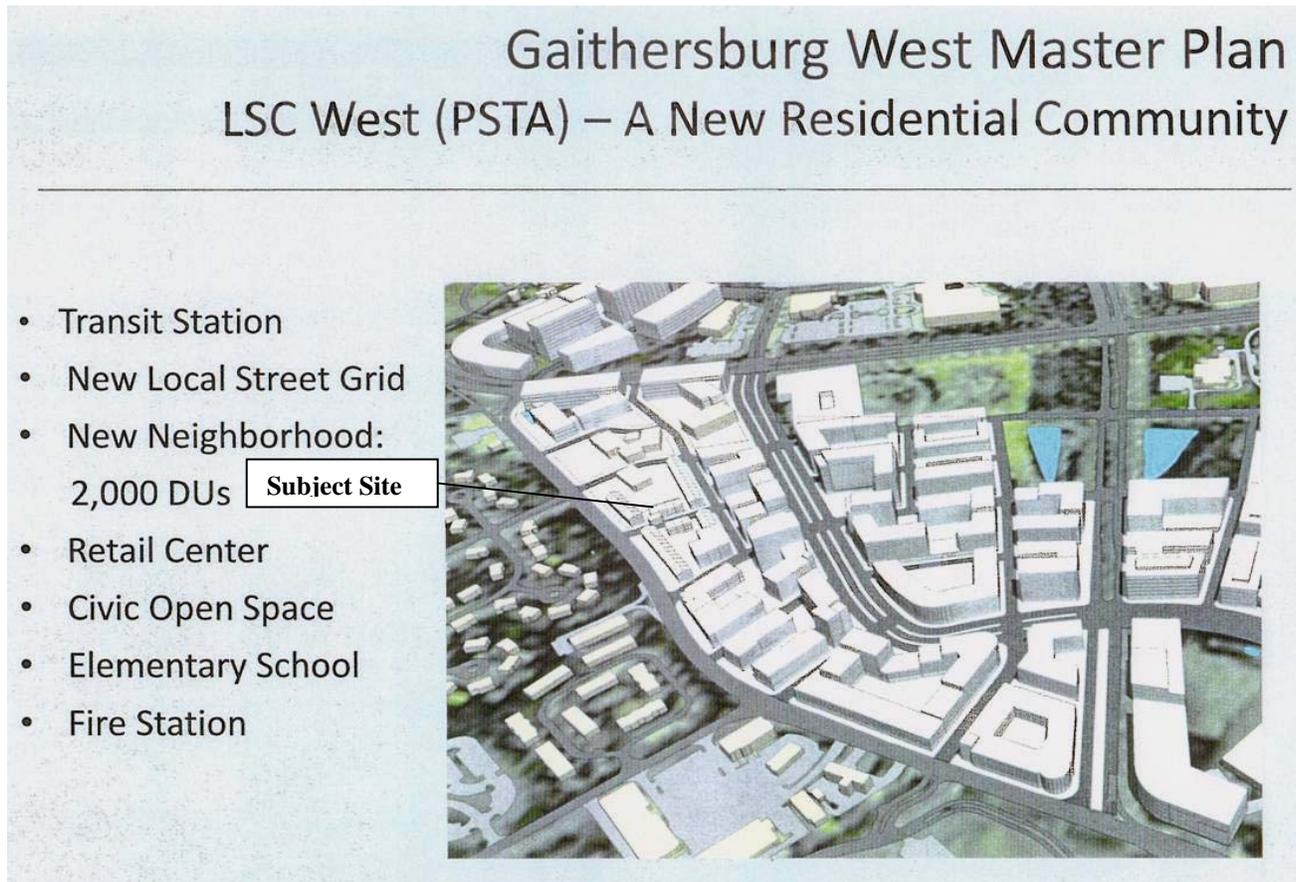
The Executive's proposal would utilize the PSTA site as part of a "New Science City," which would integrate mixed-use residential uses with the life science center developing in the area. Page 5 from the Executive's proposal is shown on the following page:



Applicant's land planner, Alfred Blumberg, noted that the illustration of the New Science City, contained on page 5 of the Executive's proposal, shows the existing single-family houses on the southwest side of Darnestown Road and townhouses on the northeast side, thus anticipating that the subject site would be used for the G-849 townhouses in conjunction with the new science center. Mr. Blumberg opined that the primary reason is that there needs to be a transition between the New Science City (or whatever use is placed on the PSTA property) and the existing single-family detached homes on the other side of Darnestown Road. Remand Tr. 62.

Technical Staff's September 24, 2008, Memorandum to the Planning Board on the status of the Gaithersburg West Master Plan (at p. 8) agrees with the County Executive's conclusion that the PSTA should be moved, stating "From a land use perspective, staff has long believed that the PSTA is no longer properly located. . . . Staff considers the PSTA site to be an excellent location for a new,

transit-served residential community.” Thus, if the PSTA is in fact relocated, the best indication from the Technical Staff’s September 24, 2008, memorandum to the Planning Board is that it will be replaced with a residential or mixed-use development. Moreover, as recently as December 2, 2008, when Technical Staff met with the community to discuss their plans for the area, the document they produced for that meeting (Exhibit 66(c)) shows a redevelopment of the PSTA campus and a townhouse development on the subject site.



The impact of the likely removal of the PSTA was further discussed in the Remand Staff Report (Exhibit 64, p. 13 and the Environmental Planning Staff Memorandum attached to the Remand Staff Report):

* * *

The second part of the remand is to evaluate any future, potential noise impacts of PSTA operations on the residential use of the subject parcel.

According to the applicant, public pronouncements by the County Executive's Office, the County Council, and from staff briefings to the Planning Board make it clear that the PSTA will eventually move to another location, making the issue of noise compatibility moot. The PSTA is unlikely to add operations to the current facility closer to the subject site as that portion of the PSTA is currently developed. If those uses described in the PSTA's Mandatory Referral were as noted below we still believe the PSTA is compatible with the subject Local Map Amendment.

Even if the PSTA were to remain at its present location, Technical Staff concludes that “[t]he PSTA is unlikely to add operations to the current facility closer to the subject site [, and] . . . the PSTA is compatible with the subject Local Map Amendment.” Exhibit 64, p. 13.

C. Zoning History

The subject property was classified under the R-R Zone (now R-200) in the 1958 Countywide Comprehensive Zoning. Sectional Map Amendment (SMA) G-502 reclassified the site from R-200 to R-90 in 1986. In 1987, it was reclassified to R-90/TDR by SMA G-568. It was reclassified back to the R-90 Zone by SMA G-725 in 1996, and the R-90 Zone was reconfirmed by SMA G-800 in 2002. Thus, the site is presently in the R-90 Zone.

D. Proposed Development and the Revised Schematic Development Plan

The Applicant proposes to raze the existing structures on the site and build a townhouse community with a maximum of 39 units, including the 12.5 percent Moderately Priced Dwelling Units (“MPDUs”) required under Chapter 25 of the Montgomery County Code. The layout shown on the revised Schematic Development Plan (“SDP”) is illustrative and may change at later stages of review, if the rezoning request is granted. Applicant’s current plan, like its pre-remand plan, calls for 34 market-rate units, each with a two-car garage and two driveway parking spaces, and five MPDUs, each with a one-car garage and one driveway parking space. However, that is where the similarity

The green area will incorporate a seating area and an open play area for children. In addition, a formal tot-lot is proposed near the northwest corner of the property, far removed from Darnestown Road, and a Category II Forest Conservation Easement is proposed in the northwest corner of the site. There will be two vehicular access points to the subject site and a private internal road with 18 parking spaces. Thus total parking will be 164 spaces, which is more than double what is required under Zoning Ordinance §59-E-3.7. There are also two potential pedestrian access points to the PSTA site, in case it is redeveloped. These features can best be seen on the Illustrative Landscape Plan (Exhibit 75):



Applicant has also proposed an 8-foot high forested berm, topped with a 6-foot high solid wood fence to serve as a visual and noise barrier between the proposed townhouses and the PSTA. The berm and fence will be discussed in Part III. H. of this report. As stated by Technical Staff (Exhibit 64, p.7):

. . . the revised Schematic development plan offers improved on-site circulation, less impervious surface, more landscaping, and more screening and buffering features than that previously proposed.

E. The Binding Elements

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding must be set forth in a Declaration of Covenants to be filed in the county land records if the rezoning is approved. The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment.

One of the issues in this case is whether the binding elements should consist of the thirteen elements Applicant is willing to be bound by or just two of those binding elements, as recommended by the Planning Board (Exhibit 65) and strongly advocated by the People’s Counsel (Remand Tr. 165). The Planning Board’s recommendation to reduce the number of binding elements and include the remaining elements as nonbinding design elements⁷ was intended to maintain its flexibility in approving or imposing design changes during site plan review.

At the Hearing Examiner’s suggestion, one more textual binding element was added to the two recommended by the Planning Board, because it was already indicated as binding in the Development Standards Table on the SDP, and it made sense to have that table consistent with the formal binding elements to be included in the covenants. The additional binding element is:

⁷ The Planning Board also recommended elimination of the 12th element, which committed Applicant to include in Homeowner Association documents that parking by its residents is not permitted on Parcel 50 (the adjacent lot to the east, which is currently owned by Schain Lolatchy).

“Maximum density of 39 one-family attached dwelling units including a minimum of 12.5% MPDUs, and maximum building height of 35 feet.”

To give the Council the option of three or thirteen binding elements, the Hearing Examiner had the Applicant submit two alternative SDPs (Alternate A-Exhibit 78(e) and Alternate B –Exhibit 78(f)) and corresponding covenants (Alternate A -Exhibit 78(g) and Alternate B Exhibit 78(m)), which are identical except that Alternate A lists all thirteen elements as binding, while Alternate B lists three binding elements and 10 “Design elements.” Having considered this issue, the Hearing Examiner joins in the recommendation of the Planning Board and the People’s Counsel that the Council approve SDP and Covenant Alternate B (Exhibits 78(f) and (m)).

The Hearing Examiner reaches this conclusion for a number of reasons:

1. The Technical Staff, the Planning Board and the People’s counsel all advocated limiting the binding elements to give the Planning Board flexibility at Site Plan review;
2. The language of Zoning Ordinance §59-H-2.53, which defines the “Optional Method” of rezoning, appears to limit binding elements to three categories – the development standards, the uses, and if there will be staging of the development, the staged development program. Items such as architectural design, landscaping, fences, or other design features and promises do not fall into these categories, and they are therefore, at least arguably, outside the permitted application of a “binding element.”
3. While one can argue about the interpretation of §59-H-2.53, the practical fact is that, in this particular case, there is a strong need to leave the Planning Board with great flexibility because, as discussed in Part III. B. of this report, it is very unclear whether the PSTA will continue to be a next-door neighbor to the subject site; nor has it been fully determined what kind of development may replace it. If the PSTA is replaced with a residential development, with low intensity uses adjacent to the subject site, then it probably would not make any sense to have a large berm and sound wall separating the subject site from its neighbors to the north. Remand Tr. 74.

The graphic portion of the SDP Alternate B (Exhibit 78(f)) in this case is reproduced on the bottom half of page 23 of this report. The textual elements (binding and design) of that SDP and the plan for the berm and fence are reproduced below and on the pages that follow:

BINDING ELEMENTS – IN ADDITION TO THOSE SHOWN IN THE DEVELOPMENT STANDARDS TABLE:

- 1. The Applicant agrees to dedicate its proportionate share of the necessary right-of-way width along Darnestown Road, as recommended in the Shady Grove Study Area Master Plan, adopted in July 1990.
- 2. Applicant agrees that an eight-foot shared path will be located within the public right-of-way, final determination at time of site plan.
- 3. Maximum density of 39 one-family attached dwelling units including a minimum of 12.5% MPDUs, and a maximum height of 35 feet..

DESIGN ELEMENTS

- 1. All units, including MPDUs, to have brick front facades. The two units with sides facing Darnestown Road shall also have brick facades.
- 2. Landscaping to be provided along the boundary of the property. Plant material and location to be determined at Site Plan review.
- 3. Landscape design along Darnestown Road to include, but is not limited to, intermittent masonry walls and/or piers, decorative fencing and screening landscape materials. The final landscape design shall be determined at time of Site Plan.
- 4. Applicant agrees to provide on the Property a minimum of 18,000 square feet of the required .74 acre (or 32,234 sqft.) Conservation Easement as a Category II Conservation Easement The actual Forest Conservation Areas to be determined at time of site plan.
- 5. Applicant will provide along the property's northern boundary line, adjacent to Parcel 925, a soil berm that is approximately 8' at its peak, and tapers to grade at either end, the extent of such berm to be determined at time of site plan. A 6' fence, constructed of wood or other appropriate material shall be provided on the berm (if such berm is deemed appropriate at time of site plan), with final design and location determined at time of site plan.
- 6. Applicant shall include notification in sales contracts to initial homebuyers, and in Homeowner Association Documents to Property's adjacency to the existing County Public Safety Training Academy, if applicable, which has approved uses, including, but not limited to a fire and rescue station, helipad, driver training course, burn building, an urban search and rescue area and canine training unit.
- 7. Building shell will be designed to achieve an average projected interior DNL of 45dB or lower in habitable rooms. The average projected ground-level exterior DNL will not exceed 65 dB in unit rear yards, the tot lot, and the seating area along Darnestown Road.
- 8. Applicant agrees to plant 6-8 foot evergreen trees along the Property's eastern boundary line, adjacent to Parcel 50. Exact location of evergreen trees shall be determined at time of Site Plan.
- 9. Applicant agrees to install a minimum 6 foot high wood fence along its eastern property line, adjacent to Parcel 50. The fence shall begin where the existing wood fence on Parcel 50 ends and shall extend, at a minimum, to the end of Lot 39. The exact fence location shall be determined at time of Site Plan.
- 10. Applicant agrees to include in Homeowner Association documents that parking by its residents is not permitted on Parcel 50.

521,650

GENERAL NOTES

1. Boundary Information from survey by Charles P. Johnson & Assoc.				
2. Topography Information by McKenzie Snyder Inc. 12/27/07 2' contour Interval				
3. Water/Sewer Category W-1, S-1				
4. Maryland State Plane Datum used.				
5. The Proposed Land Use - Residential w/Single Family Attached dwellings.				
6. The layout meets the requirements of 59-C-1.722 of the Montgomery County Zoning Ordinance.				
7. The site is within Shady Grove Master Plan approved and adopted 1980. Planning area # 20.				
8. The site drains to Muddy Branch Watershed. Class I-P.				
9. NRI/FSD # 420061040 approved 11/21/05. Recertification - 8/21/08 Expiration 8/21/10.				
10. There are no Wetlands, 100-YR Floodplain, Historic sites, or Critical Habitats located within the site.				
11. Existing Structures are to be removed and Existing Wells to be abandoned.				
12. All Interior Lot Lines and Utilities are subject to change during Site Plan approval.				
13. The site will be constructed in one Phase.				
14. SWM Quality to be provided On-Site. SWM Concept Plan No. 222465 approved 5/31/06				

SITE DATA

Area Tabulations				
Gross Tract Area		214,197 sqft		or 4.92 Ac.
Darnestown Road Dedication		15,080 sqft		or 0.35 Ac.
Net Tract Area		199,117 sqft		or 4.57 Ac.
Zoning				
Existing		R-90		
Proposed		RT-8.0		

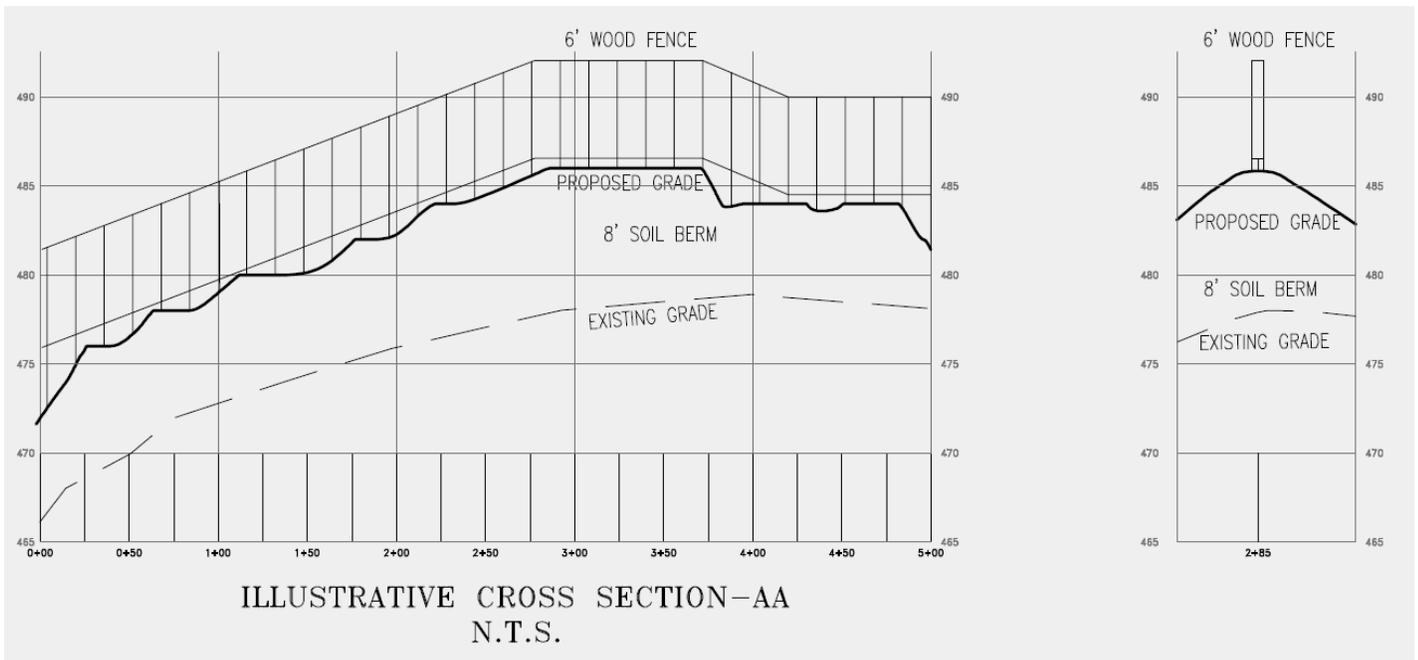
DEVELOPMENT STANDARDS

	PERMITTED/REQUIRED	PROPOSED	BINDING
Land Use	Townhouse	Townhouse	100% Townhouse
Minimum Tract Area	20,000 sqft or 0.46 Ac.	214,197 sqft or 4.92 Ac.	-
Maximum Density	9.76 du/Ac or 48 Lots	39 Lots	39 du, Including 12.5% MPDUs
Moderately Priced Dwelling Units	12.50%	12.50%	12.50%
Building Setbacks			
Front	N/A	0'	
Side	N/A	0'	
Rear	N/A	0'	
From any Detached Dwelling lot in a one-family detached residential zone	30'	30'	-
From any Public Right of Way	25'	25'	-
From an Adjoining Lot			
Side	10'	10'	-
Rear	20'	20'	-
Maximum Building Height			
Main Building	35'	35'	35'
Accessory Building	25'	25'	
Building Coverage - Tract	40% max	25%	
Green Area	45% min	55%	

PARKING TABULATIONS

Parking Required	39 units x 2 du = 78 sp		
Parking Provided			
34 Market rate w/2-car garages		68 sp	
34 Market rate w/2 spaces in driveway		68 sp	
5 MPDUs w/1-car garage		5 sp	
5 MPDUs w/1 space in driveway		5 sp	
On-Street parking		18 sp	
Total		164 spaces	

RECREATION TABULATIONS					
Housing Type 39 Townhouses	Tots	Children	Teens	Adults	Seniors
Demand per 100 du/TH	17	22	18	129	9
Demand TH (0.39)	6.63	8.58	7.02	50.31	3.51
Supply					
Pedestrian System	0.66	1.72	1.4	22.64	1.58
(2) Seating Areas	2	2	3	10	4
(1) Open Play II	3	4	4	10	1
(1) Tot Lot	9	2	0	4	1
Total	14.66	9.72	8.4	46.64	7.58
Percentage	221%	113%	120%	93%	216%



Under the recommended SDP (Exhibit 78(f)), the following items are binding elements as shown on the face of the plan and in the executed covenants (Exhibit 78(m)):

Binding Elements:

- a. The Applicant agrees to dedicate its proportionate share of the necessary right-of-way width along Darnestown Road, as recommended in the Shady Grove Study Area Master Plan, adopted in July 1990.
- b. Applicant agrees that an eight-foot shared path will be located within the public right-of-way, with final determination at time of Site Plan.
- c. Maximum density of 39 one-family attached dwelling units including a minimum of 12.5% MPDUs, and maximum building height of 35 feet.

The ten proposed design elements, which are reproduced on the page 27, above, provide parameters for elements such as brick facades; landscape buffers; landscape design along Darnestown Road; on-site forest conservation; the proposed berm and noise wall; fencing; notification to potential homebuyers concerning the PSTA; parking restrictions; and compliance with county guidance regarding interior and exterior noise levels.

The binding and design elements were intended, at least in part, to respond to concerns raised by Technical Staff during its review of this application. Fencing and evergreen plantings promised along the eastern property line were a response to the Hearing Examiner's concern about compatibility with the adjacent residence/dance studio. It should be noted that approval of the requested rezoning would allow *up to* 39 dwelling units on the site, since the binding element regarding density is a maximum figure, leaving open the possibility that the Planning Board may require a reduction in the number of units at a later stage of review.

F. Master Plan

The subject property is located within the area covered by the *Shady Grove Study Area Master Plan, Approved and Adopted 1990* (the "Master Plan"). The Master Plan addresses the properties comprising the subject site in its discussion of the Training Academy, noting that the entire Darnestown Road frontage south of the Training Academy was divided into numerous parcels, each

with its own driveway onto Darnestown Road. *See* Master Plan at 67, as cited in Pre-Remand Staff Report (Exhibit 25) at p. 11. The Master Plan identified a need to “promote the coordinated development of the Darnestown Road frontage in light of the fragmented ownership pattern.” *Id.*

The Master Plan sought to encourage joint redevelopment of the frontage parcels by designating the area as suitable for residential development at a density of eight units per acre. *Id.* The properties comprising the subject site are shown on the Master Plan’s Land Use Map for residential development at a density of seven to ten units per acre, and on the Master Plan’s Zoning Map as R-90/RT-8. *Id.* The Master Plan’s “Zoning Implementation Strategy” table indicates that the site is appropriate for rezoning to RT-8 if parcels are assembled. *Id.*

One element of the Master Plan that Staff did not address is its recommendation that a density of eight units per acre be permitted on the properties comprising the subject site “only if access is from a new frontage service road along” Darnestown Road. Master Plan, pp. 67 – 68. The site layout and access are conceptual at this point, but as noted earlier, the submitted SDP shows two points of access via driveways connecting directly to Darnestown Road (*i.e.*, not through a service road). Applicant’s pre-remand land planner, Mr. Watkins, opined that the access would satisfy the purpose of a frontage road by limiting the site to two points of access. Tr. at 119. The post-remand site plan also has only two access points. Moreover, its main internal road parallels Darnestown Road and will serve as a kind of service road, unlike the pre-remand plan.

The Master Plan’s general goals include providing for a broad mix of residential units, including affordable housing, and providing a sense of community identity for both existing and future residences. Master Plan at pp. 3, 23, cited in Ex. 21(a) at pp. 6-7. Mr. Watkins opined that the proposed development would be consistent with these goals. He calculated that with the proposed development in place, the 303 dwelling units in the surrounding area would consist of 153 single-family detached homes and 150 single-family attached homes, providing a good balance.

Technical Staff opined that the proposed rezoning and development would be consistent with the land use and zoning recommendations in the Master Plan, and that the subject site is appropriate for residential development under the RT-8 Zone. The Hearing Examiner agrees, and notes that the proposed development also appears to be consistent with both the County Executive’s and the Technical Staff’s concept for the use of the site under the revised Master Plan being developed and under plans to relocate the PSTA, as discussed in Part III. B. of this report.

G. Development Standards for the Zone

As shown in the table below, excerpted from the Remand Staff Report (Exhibit 64, p. 10), both the pre-remand and the post-remand proposed developments would be consistent with the applicable development standards for the RT-8 Zone.

TABLE 1—DEVELOPMENT STANDARD

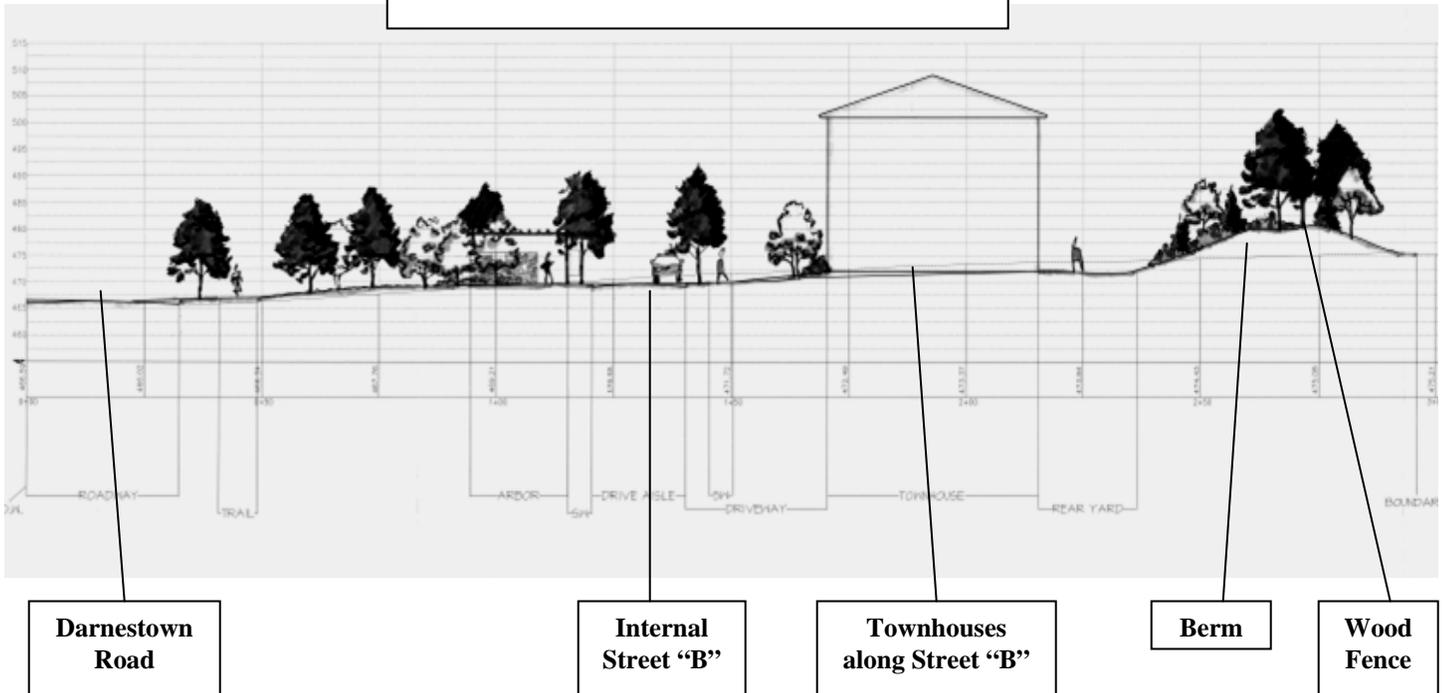
Current Development Standards: RT-8 (59-C-1.73)	Required	Proposed (Original SDP)	Proposed (Revised SDP)
Minimum Lot Area	20,000 SF	214,197 SF (4.92) AC	214,197 SF (4.92) AC
Maximum Density du/ac	8 DU/AC (39 units)	8 DU/AC (39 units Max including 12.5% MPDUs)	8 DU/AC (39 units Max including 12.5% MPDUs=5 units)
Maximum Building Height	35 FT	35 FT	35 FT
Minimum Building Setback			
• From one family detached	30 FT	30 FT	30 FT
• From any public street	25 FT	25 FT	25 FT
• From an adjoining lot			
○ Side (end unit)	10 FT	10 FT	10 FT
○ Rear	20 FT	25 FT	20 FT
Maximum Building Coverage (59-C-1.74(c))	40%	20%	25%
Minimum Green area(59-C-1.74(d))	45%	53% Min	55%
Minimum Parking	2/DU-78 spaces	166 spaces	164 spaces

In addition, the row design of the development is consistent with the requirements of Zoning Ordinance §59-C-1.722, in that there are no more than eight townhouses in any one attached row, and the front building line is varied by no less than two feet, at least every third townhouse.

H. Noise

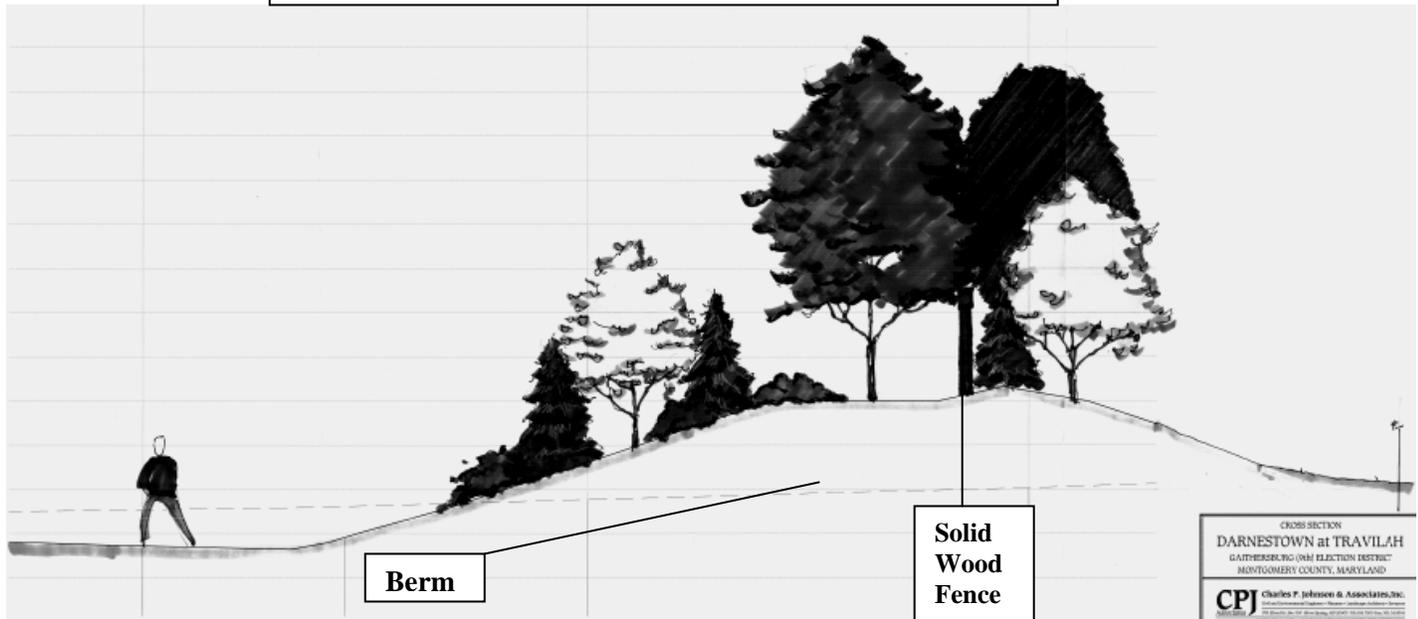
The Applicant’s noise-related evidence prior to the remand focused mainly on roadway noise emanating from Darnestown Road. Those pre-remand noise studies had to be redone for two reasons. First, the Council’s Remand Order, quoted in Part II of this report, required more detailed analysis of the noise impacts from the PSTA, and second, following the remand, the arrangement of the residential units and other features on the subject site was dramatically changed, requiring a new analysis of the noise impacts from Darnestown Road traffic, as well as the PSTA. In addition, Applicant added a proposed eight-foot tall, landscaped berm, topped with a six-foot tall solid wood noise wall or fence,⁸ along the northern border of the site, to insulate residents from noise generated by the PSTA. The proposed berm and wall were depicted in two cross-sections of the site provided by Applicant (Exhibits 76 and 77), which are shown below:

Exhibit 76 – Eastern Cross-Section of Site



⁸ The terms “noise wall” and “fence” are used interchangeably when referring to the solid wood fence which will top off the planned berm, because acoustical experts use the term “wall” when referring to a fence or wall that is “acoustically solid,” whether it is composed of concrete, wood or metal, while “to an acoustical person a fence means it has some sort of gaps in it.” Remand Tr. 103, testimony of acoustical engineer, Gary Ehrlich.

Exhibit 77 – Eastern Cross-Section of Berm and Fence



The new noise analyses performed by Applicant’s noise expert are contained in two reports by “Hush Acoustics, LLC,” Exhibit 54(k), with regard to Darnestown Road noise, and 63(a), with regard to PSTA noise. These studies were discussed in some detail during the remand hearing (testimony of Gary Ehrlich, Applicant’s expert in acoustical engineering, Remand Tr. 100-140) and were analyzed at length in the Remand Staff Report. *See* Exhibit 64, pp. 11-16, and the November 20, 2008, Memorandum of Environmental Planning Staff, attached to the Remand Staff Report.

Mr. Ehrlich testified that the current plan improves the previous plan from an acoustical perspective in a number of ways. The units in the middle of the site are farther from Darnestown Road, and the rear yards are shielded from noise from Darnestown Road by the townhouses themselves. Moreover, the addition of a landscaped berm and six-foot noise wall on the northeast side of the property shields it from noise generated by the PSTA.

Mr. Ehrlich described the two noise studies he conducted following the remand. One was regarding Darnestown Road highway noise, and the other was addressing noise from the PSTA. In

terms of the PSTA noise, Mr. Ehrlich installed sound level meters in two locations, at the border between the PSTA and the subject property and left them there for a typical two week period.

Mr. Ehrlich programmed the meters to log the sound level every minute, so there are thousands of minutes of data, and the sound level meters logged the maximum and average sound level each minute. In addition, the meters were programmed to record an actual audio file that can be listened to on a computer whenever the sound level got above a threshold of 70 decibels. It could not be set at a lower threshold because there is a lot of background sound from sirens on Darnestown Road, thunder, birds and the like, which are in the range of 65 decibels. Thus, sounds below 70 decibels are not that significant relative to what is going on in the environment.

Mr. Ehrlich indicated that when he originally did the PSTA noise analysis, he referred to the Technical Staff transportation noise guidelines,⁹ which measure a 24-hour average sound level, called the DNL.¹⁰ Technical Staff recommended that, for the PSTA noise analysis, he should instead use the Montgomery County Noise Ordinance as the standard, so that is what is reflected in the most current PSTA noise analysis. The Noise Ordinance, Chapter 31-B of the County Code, includes a

⁹ The noise guidelines referred to during this proceeding are contained in a document entitled “Staff Guidelines for the Consideration of Transportation Noise Impacts in Land Use Planning and Development”, June 1983 (the “Transportation Noise Guidelines”), which were prepared by Technical Staff’s Environmental Planning Division. *See* Ex. 42(f). The Transportation Noise Guidelines suggest maximum acceptable noise levels that are based on the effects of noise exposure on health, welfare and quality of life; consistency with federal, state and local noise standards; and the relation of noise standards to the existing noise environment in Montgomery County. *See* Ex. 42(f) at 7. These guidelines are used by Environmental Planning Staff in making recommendations to the Planning Board regarding site plans, subdivision plans, zoning cases and master plans. *Id.* at 6. The objective of the guidelines is “to foster and encourage noise-conscious development which protects public health and welfare and provides a better quality living environment.” *Id.* at 5. Staff attempts to achieve this objective “without denying development or significantly reducing density in noise-impacted areas,” but “in some extreme cases where noise impact abatement options are very limited, the staff may recommend denial of some or all units proposed in a development or site plan.” *Id.*

The Noise Guidelines make recommendations for maximum exterior noise impacts at the building line for noise-sensitive uses such as residences. They specify three acceptable noise levels, which vary depending on the setting: 55 dBA in permanent rural areas with residential zoning of five or more acres per dwelling unit; 60 dBA in “most areas of the County where suburban densities predominate”; and 65 dBA “in the urban ring, freeway and major highway corridor areas, where ambient levels are such that application of a stricter guideline would be infeasible or inequitable.” *Id.* at 8. The Noise Guidelines acknowledge that noise at this level significantly interferes with activities occurring outdoors, and indoors if the windows are open, but states that “available evidence indicates hearing is adequately protected.” *Id.* The Pre-Remand Staff Report in this case indicates that at this location, Staff applies the 65-dBA limit. *See* Ex. 25 at 18. The Noise Guidelines provide for a waiver of exterior noise guidelines for residential areas under certain circumstances, including (i) in areas where land use is not based on outdoor activities and internal ventilation permits year-round closing of windows; and (ii) if all feasible exterior noise attenuation measures cannot protect noise-sensitive rooms on upper floors, e.g. bedrooms. *See* Ex. 42(f) at 10. In such cases, an interior guideline of 45 dBA will be used. *See id.*

¹⁰ The day-night average Mr. Ehrlich calls “DNL” is referred to as $L_{dn} = xx$ dBA in the Transportation Noise Guidelines.

maximum allowable sound level of 65 decibels during the day time in residential zones and 55 decibels at night in residential zones. Those are readings external to the structures because there is no requirement governing internal noise in the Noise Ordinance. The Technical Staff Transportation Noise Guidelines set both outdoor and indoor standards, which are 65 decibels DNL outdoors, a 24 hour weighted average, and 45 decibels indoors, again a DNL, which is very different from a 65 decibel instantaneous limit outdoors, as specified in the Noise Ordinance.

Mr. Ehrlich also did a full noise analysis referencing those 65 decibel DNL and 45 decibel DNL transportation policy limits for the PSTA, and he found that there is no impact from PSTA in those terms. The maximum DNL noise level was in the ballpark of 60 decibels.

According to Mr. Ehrlich, approaching the PSTA property from the subject property, you go through a forested area. For the most part, the noise sources that are of interest are in the Urban Search and Rescue area, which is immediately abutting the subject property, and the small access road just to the northeast of that where they do the fire truck driving tests, and they occasionally sound horns. Noise in the Urban Search and Rescue Building comes from the use of concrete anchor shots and from cutting through roofs using saws and the like, but those uses are all very infrequent.

In terms of the two week noise monitoring period, Mr. Ehrlich logged 193 events that produced audio recordings over 70 decibels from all sources, including sirens, birds, thunder, et cetera, and of those 193 only 18 were in any way attributable to the PSTA. Thus, about nine exceedances per week could be identified as being from the PSTA, and typically, they lasted two or three seconds. Some recorded events, such as sirens on Darnestown Road were long, but in terms of the events associates with the PSTA, they were all very short events. Some of them were just a single impulse like that concrete anchor shot, which just sounds like a pop, and some of them were horn tooting lasting two or three seconds. PSTA does not have an outdoor shooting range; they have an indoor shooting range, but there is no reason to think that it is noisy based on the sound level data.

There were no PSTA exceedances at night, but one of them was at 7:55 a.m. on a Saturday, which is technically “night” because the Saturday definition of night lasts until 9 a.m. Thus, of those 18 events, one was minimally during the nighttime by strict definition of the Code. If the sound level from some nighttime PSTA related activity were in the range of 65 to 70 decibels, the addition of the proposed 14-foot berm/wall combination would easily reduce that 5 decibels, which would push it under the County Noise Ordinance limit of 65 decibels.

Chief Clemens of the PSTA gave Mr. Ehrlich a list of activities that occurred during the noise monitoring period, but he didn’t see any exceedances above 70 decibels associated with them. Based on these findings, Mr. Ehrlich opined that from an acoustical perspective, the PSTA is compatible with proposed residential development. He noted that the types of noises that you hear are pretty representative of what you would hear in a residential community, like occasional power tool use or even a siren going by. The sirens on the PSTA occur at distances similar to those of sirens that would go by a residential neighborhood, and the types of sounds generally heard are essentially representative of what would occur in a residential neighborhood.

Mr. Ehrlich further testified that the mandatory referral allowing an expansion of the PSTA would not have significant impact on his noise analysis. One of the uses that was proposed was paving and making other upgrades to the helipad. From an acoustical perspective, that is a non-issue since paving the helipad would not vary the amount of noise associated with the helicopter landing.

Another change is the proposed addition of a fire station; again, that is a relatively typical use. Usually, fire stations are not that far from residential communities that they serve. In this case, it would be a couple hundred feet from the townhouses, which would not be that unusual.¹¹ There is also a “committed” K-9 facility on the Mandatory Referral Master Plan for the PSTA Site, but Mr. Ehrlich was told by Chief Clemens that the dogs that are trained for this type of facility are trained to

¹¹ If the County Executive’s plans come to fruition, the fire station would actually be located much further away, along Great Seneca Highway, as shown on page 8 of the Montgomery County Executive’s August 2008, “Montgomery County Property Use Initiative” (attached to the Addendum to Applicant’s Land Use Report (Exhibit 57(b))).

sniff out and locate victims, not to bark, so it is nothing like a kennel use. There is already a K-9 facility on the property.

Although there is no Noise Ordinance requirement limiting indoor noise, the 14-foot berm and fence combination will provide protection for the ground level and one floor up from PSTA noise, given the location of the Urban Search and Rescue area, which is the chief source of noise from the PSTA. The nearest unit (#25) is about 250 feet from the Urban Search and Rescue area. Moreover, PSTA outdoor noise on the loudest day averaged 62 decibels DNL outdoors, so indoors it would be in the high 30s to low 40s, but certainly no more than the Transportation Noise Guideline of 45 decibels DNL indoors.

According to Mr. Ehrlich, for the townhouses facing the PSTA, the outdoor day/night average sound level will not exceed roughly 62 decibels, and typical building construction would easily be able to reduce that to 45 decibels indoors. Thus, the noises from the PSTA are not high enough to require above-standard construction to meet interior noise levels of 45 decibels.

In Mr. Ehrlich's opinion, from an acoustical perspective, the PSTA, even if expanded, would be compatible with the proposed residential development. He also opined that, if the PSTA were redeveloped as a residential use or a mixed residential/commercial use, it would still be compatible. If there were an adjacent commercial use, having a berm there would be a perfectly appropriate situation. If it were a residential use, the berm would be unnecessary.

Turning to the issue of noise from Darnestown Road, Mr. Ehrlich noted that the 65 decibel DNL outdoor noise standard of the Transportation Noise Guidelines is typically applied in outdoor use areas such as rear yards, and on this site, the focus is on the rear yards of the townhouses oriented perpendicular to Darnestown Road.

The outdoor use areas would also include rear yards oriented away from Darnestown Road, but those are significantly shielded from Darnestown Road to the point that the sound levels are way below the County criteria, as is the Tot Lot between townhouses 10 and 11. Mr. Ehrlich's DNL

construction would typically be necessary, such as limiting the types of windows and doors to reduce sound ratings. Mr. Ehrlich also doubts any upgrades would be required for any lots other than the four or five that are closest to Darnestown Road, even though some of them might slightly exceed the 65 decibel figure. Nevertheless, Applicant has agreed in Design Element No. 7 on the SDP (Exhibit 78(f)) that:

Building shell will be designed to achieve an average projected interior DNL of 45dB or lower in habitable rooms. The average projected ground-level exterior DNL will not exceed 65 dB in unit rear yards, the tot lot, and the seating area along Darnestown Road.

Mr. Ehrlich concluded that the proposed project will meet the Park and Planning standards with regards to noise, and that the subject townhouse community is compatible with the adjacent users from a sound perspective. Moreover, the proposed berm and wall, and the property design, will reduce the noise generated and emanating from the PSTA to below 65 decibels outdoors. He believes that for ground level listeners, the sound level would be less than 65 decibels in all the unit rear yards, and interior noise levels on all floors can be reduced to below 45 decibels on both sides of the project.

Technical Staff agreed with these conclusions. As stated on Page 1 of the November 20, 2008, Memorandum of Environmental Planning Staff, attached to the Remand Staff Report (Exhibit 64), and quoted therein at pp. 14-15,

The Environmental Planning Staff has reviewed the Remand of Zoning Application G-849 referenced above. In staff's professional judgment, sufficient evidence has been presented to make an affirmative finding that the residential use proposed in the zoning application is compatible with existing and planned PSTA operations. The principal reasons supporting this conclusion include:

- 1) The small number and percentage of peak noise events coming from PSTA operations as compared with others in the ambient environment;
- 2) The compatibility or *fit* of such sounds with others in the ambient environment (i.e., they are common, not unique; no discrete tonal qualities; not dominant by peak or number); and

- 3) The application has added significant mitigation to PSTA noise through a commitment to construct a landscaped noise berm/barrier. The ground floor of the townhouses can expect a minimum reduction of at least half of the perceived loudness.

In summary, noise from PSTA operations is deemed to be an acceptable impact to the proposed residential development on the subject site. [Emphasis added.]

Technical Staff made similar findings with regard to the Darnestown Road noise and the effects of the site redesign (Exhibit 64, p. 13):

Furthermore, the site was redesigned to provide greater noise compatibility from Darnestown Road, which the noise analysis indicates is the louder and most prevalent noise source affecting the property. This is a clear improvement from the application as it was originally proposed. The design of this new plan has more units parallel to Darnestown Road, creating a de facto noise barrier which tucks activity areas behind the dwelling units (decks, rear yards), and enhances the areas for privacy and quiet enjoyment at both the ground and upper floor areas. For those units that are perpendicular to Darnestown Road, the rear yards will have noise mitigation walls (wing walls) that face Darnestown Road and extend perpendicular to Darnestown Road. The applicant has considered architecturally-integrated walls/bump-outs – wing walls - (functioning as noise barriers) into the townhouse design to affect multi-story noise mitigation. This detail can be further evaluated in later stages. An additional community gathering area is planned central to the site: a noise wall is proposed to surround this area on three sides from the Darnestown Road side.

Both Technical Staff and the Planning Board agreed (Exhibit 65, pp. 1-2, paraphrasing Exhibit 64, p. 16):

The applicant has also submitted a significantly improved schematic development plan that depicts a coherently organized site design to mitigate potential off-site impacts, both from Darnestown Road and activities at the training academy. The revised plan represents a superior esthetic appeal and a more efficient on-site circulation than the previous plan. The revised plan, coupled with the applicant's written response and the noise analysis report, sufficiently addresses the four elements of the remand order. The proposed project would be appropriate for the site and would be compatible with existing development and future lands uses planned for the area. [Emphasis added.]

Based on the overwhelming evidence in this record, the Hearing Examiner agrees with the conclusions of Technical Staff and the Planning Board.

I. Public Facilities

Under the County's Adequate Public Facilities Ordinance ("APFO," Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, area schools, water and sewage facilities, and police, fire and health services will be adequate to support a proposed development, and in turn, whether the proposed development would adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that the County Council sets in its Growth Policy.

Zoning Ordinance §59-H-2.4(f), as amended by Zoning Text Amendment 07-17,¹² requires Applicant to produce "[s]ufficient information to demonstrate a reasonable probability that available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application is submitted." In this case, the application was submitted on February 8, 2006, so the 2003-05 Annual Growth Policy – Policy Element, Resolution No. 15-375, adopted October 28, 2003, applies to this rezoning application. On the other hand, Applicant's subdivision application, when it is filed, will be governed by the then current Growth Policy.

While the final test under the APFO is carried out at subdivision review, the District Council must first make its own evaluation as to the adequacy of public facilities in a rezoning case, because the Council has primary responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of the Council's review, and the fact that the Council's review is much broader at the zoning stage than what is available to the Planning Board at subdivision, a process designed to more intensively

¹² Ordinance No: 16-14, effective March 17, 2008.

examine the “nuts and bolts” of a development. The District Council is charged at the zoning stage with determining whether there is a reasonable probability that available public facilities and services will be adequate to serve the proposed use. Technical Staff, in its Remand Staff Report (Exhibit 64, p. 16), states only the following with regard to public facilities, “There is no change from the previous findings of adequacy in terms of water and sewer services, transportation and school capacity (see attached letters and e-mail communications).”

With regard to other public facilities, Applicant’s post-remand land planner, Alfred Blumberg, testified that this application would be in compliance with public facilities requirements for utilities and public safety, both fire and police. Remand Tr. 72. Moreover, the current Growth Policy provides, “The Planning Board and staff must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated.” Growth Policy, Resolution 16-376 (adopted 11/13/07), pp. 22-23. This statement is consistent with previous Growth Policies in this regard. Since there is no evidence of a local area problem with respect to police stations, firehouses, and health clinics, the Hearing Examiner finds them to be adequate. Transportation, water and sewer service, and schools are discussed individually below.

1. Transportation

When this application was filed, and at the time this case was previously reviewed by the Council in 2006, zoning and subdivision applications were subject to only one transportation test, Local Area Transportation Review (“LATR”). Under the current Growth Policy, there are two transportation tests, LATR and Policy Area Mobility Review (“PAMR”). However, Zoning Ordinance §59-H-2.4(f), quoted above, provides that we must apply only the Growth Policy in effect when this application was filed. As a result, Technical Staff does not discuss PAMR in its reports regarding this rezoning application. However, because the new Growth Policy, including PAMR,

will apply at subdivision, the Hearing Examiner asked Applicant's transportation expert, Glenn Cook, to discuss its application in this case.

As stated by Mr. Cook (Remand Tr. 144-149), any project that generates 30 or more trips is required to comply with the PAMR guidelines. Since this project would generate 32 trips during the evening peak hour, PAMR does apply.

This property is located in the R&D Village Policy Area which, for 2009, requires a 35 percent mitigation of the trips that the project would be generating. That would mean that Applicant would have to mitigate 12 of the trips (*i.e.*, 35% of 32 trips) that will be generated. Mr. Cook believes that the Planning Board recently adopted a rule allowing developments to pay a fee in lieu of mitigation, for any project that has a mitigation requirement of less than 30 trips. In this particular case, the proposed development has a mitigation requirement of 12 trips, so Applicant could meet the PAMR requirements by paying 12 times the \$11,000 fee per trip for this policy area, or by taking some other mitigation measure. The payment of this fee would be conditioned at preliminary plan, with the payment due at the building permit stage. In Mr. Cook's professional opinion, this project meets applicable requirements relating to transportation.

As to LATR, Mr. Cook testified that his original traffic impact study was for 42 townhouse units. He did a revised traffic study dated June 12, 2006 (Exhibit 26(a)), which was for 39 townhouse units. That study showed that the proposed development would meet the requirements of the Local Area Transportation Review. Since there will still be 39 units in the revised SDP, the same findings would apply. The critical lane volume (CLV) standard for the R&D village policy area remains unchanged at 1450 CLV, and Applicant is still well within that threshold.

Technical Staff also made no changes in its pre-remand LATR analysis when it filed its Remand Staff Report (Exhibit 64). This outcome is sensible since the number and type of proposed units has not changed. Hence, the demand on transportation facilities should be unchanged. The discussion below therefore addresses the transportation analysis submitted prior to the remand.

The Planning Board recognizes its LATR Guidelines as the standard to be used by applicants in the preparation of reports to the Hearing Examiner for zoning cases. LATR Guidelines at 1. LATR involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the peak hours of the morning and evening peak periods (6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.).

Applicant performed a traffic study as required in this case, taking into account existing roads, programmed roads and available or programmed mass transportation, as well as existing traffic, traffic anticipated from nearby development that is approved but unbuilt (“background” traffic), and trips expected to be generated by the proposed development. With 39 dwelling units, the proposed development would be expected to generate a total of 19 vehicle trips during the weekday morning peak hour and 32 trips during the weekday evening peak hour. The traffic study concluded, and Technical Staff agreed, that with the proposed development in place, critical lane volumes (“CLVs”) at the key intersections studied would remain below the CLV standard of 1,450 for the R&D Village Policy Area. *See Ex. 26(a) at 2; Pre-Remand Staff Report at 14-15.* The Hearing Examiner notes, moreover, that based on the traffic study, the proposed development would add only a small number of CLV movements to three of the four intersections studied, and would add no CLV movements to the only intersection that approaches the CLV limit for the planning area, Darnestown Road and Travilah Road. *See Ex. 26(a) at 14.*

Technical Staff recommended several conditions as part of the APF test for transportation requirements related to approval of the proposed rezoning:

1. Limit development to a total of 42 townhouses (the number requested in the original application).
2. Dedicate a minimum of 100 feet from the opposite right-of-way line for Darnestown Road.
3. Provide a four-foot sidewalk along the internal Street “A” for its entire length.
4. Provide lead-in sidewalks from Darnestown Road to internal sidewalks at the site access points.
5. Satisfy all requirements by State Highway Administration and Department of Public Works and Transportation.

In a supplemental submission, Technical Staff indicates that with the exception of the right-of-way dedication, the other recommended transportation conditions are to be addressed at preliminary plan and site plan, if the application moves forward. *See* Ex. 34. The Applicant has agreed to dedicate the necessary right-of-way along Darnestown Road as a binding element of this application.

The original application in this case did not include the proposal for a center turn lane to allow left turns into the site from Darnestown Road. Transportation Staff concluded, based on that original application, that the two right-in/right-out access points proposed would provide safe and adequate access. Pre-Remand Staff Report at 14. Prior to the remand, Applicant revised its SDP to include a proposal for a center left turn lane on Darnestown Road, which would allow left turns to access the site from Eastbound Darnestown Road. In a supplemental submission prior to the remand, Transportation Staff confirmed that the revised traffic study did not affect its findings about the proposed development, and that a proposed center turn lane, allowing left turns into the site, did not alter its analysis. *See* Ex. 26(b). This part of the proposal does not appear in the current SDP, but it may be considered at subdivision, since access to the site will be a part of that review.

In sum, the Hearing Examiner finds that Applicant has demonstrated a reasonable probability that available transportation facilities and services will be adequate to serve the proposed use.

2. Utilities

Technical Staff stated in its pre-remand report that water and sewer are available at the site, and that the proposed rezoning would not affect water or sewer service in the area. *See* Pre-Remand Staff Report at p.14. As mentioned above, Technical Staff did not change that analysis in its Remand Staff Report (Exhibit 64, p. 16). Applicant's post-remand land planner, Alfred Blumberg, also

testified that this application would be in compliance with public facilities requirements for utilities. Remand Tr. 72. The Hearing Examiner so finds.

3. Schools

The subject property is located within the Stone Mill Elementary School, Cabin John Middle School and Wootton High School service areas. Bruce H. Crispell of the Montgomery County Public Schools (“MCPS”) reported in a Memorandum dated November 19, 2008 (attached to Exhibit 64) that the proposed 39 dwelling units are expected to generate approximately nine elementary, seven middle and four high school students, a slightly different prediction than the pre-remand letter (Exhibit 42(c)). According to the latest information, enrollment at Stone Mill Elementary School is projected to remain within capacity for the six-year forecast period; Cabin John Middle School is undergoing modernization in 2009 and 2010 and is projected to have space available when this project is completed in August 2011; enrollment at Wootton High School currently exceeds 105 percent of capacity and is projected to exceed capacity in the future. Therefore, a high school facilities payment is required to obtain subdivision approval in this cluster, pursuant to ¶S5 (at p. 20) of the 2007-2009 Growth Policy, Council Resolution 16-376.

J. Environment and Stormwater Management

Prior to the remand of this case, Applicant indicated that it would provide for 20,000 square feet of reforestation on site, and the remainder to take place off-site. This was less than the half acre commitment Applicant had made earlier to the Planning Board. Nevertheless, the pre-remand Hearing Examiner found this minor discrepancy to be immaterial because the Planning Board retains the authority to require a full half-acre of on-site forest conservation when it reviews the Final Forest Conservation Plan at site plan and subdivision.

Following the remand, the proposed arrangement of the site was significantly revamped, as previously described. Applicant's August 2008 preliminary forest conservation plan (Exhibit 66(f)), submitted after the remand in this case, proposes to provide approximately 0.41 of an acre (18,000 square feet) of afforestation on site and meet the remaining 0.28-acre requirement by planting off site. The on site forest would be placed in a Category II Forest Conservation Easement, which would give residents access to it. Technical Staff does not address this issue in the text of its Remand Report (Exhibit 64), but it does attach a November 20, 2008 e-mail from its Environmental Planning Division stating that "[t]here is no issue with the PFCP ... [because] the FCP would be dealt with at the time of preliminary plan." The Hearing Examiner agrees that review and approval of the final forest conservation plan is a matter for the Planning Board at site plan and subdivision.

The subject site is not within a Special Protection Area or Primary Management Area, and has no streams, wetlands or extensive areas of steep slopes. Staff, in its Pre-Remand Report (at p. 17) notes that underlying hard bedrock at the surface may be a limiting factor for tree growth on the property, and may require adding soil or other special tree protection measures to enhance growth or guarantee long-term sustainability.

The Applicant submitted a stormwater management concept plan prior to the remand and received concept-level approval from the Department of Permitting Services (DPS). See Ex. 24(b). Some changes had to be made due to the rearrangement of the site after the remand, and Applicant submitted a revised stormwater management concept plan in July of 2008 (Exhibit 66(e)). According to Applicant's civil engineer, David O'Bryan, the new plan is very similar to the old one, but the locations of its elements have been rearranged. Remand Tr. 96. The revised stormwater management concept plan was approved by DPS on December 11, 2008 (Exhibit 66(b)).

Given this record, the Hearing Examiner finds no environmental concerns in this case.

K. Community Opposition

The only opposition in the record is the testimony of Schain Lolatchy, who owns and resides on the property abutting the subject site to the east. Mr. Lolatchy and his family have their residence on the upper floor of the building, and Mr. Lolatchy operates a small dance studio on the lower level, pursuant to a special exception for a major home occupation. Mr. Lolatchy's lot is long and narrow, and at its closest point, his house appears to be less than 15 feet from the boundary with the subject site (based on Hearing Examiner's scaling off the distance on the SDP).

Mr. Lolatchy opposes the proposed rezoning because he believes that the proposed development would have three adverse effects on his property:

1. Decrease in property value.
2. Noise from the large number of residents that 39 dwellings would introduce.
3. Problems with overflow parking spilling over into his parking lot.

Mr. Lolatchy feels that the proposed development would exacerbate problems he already has stemming from noise generated by helicopters at the Training Academy (which he describes as a weekly event), noise from a child day care center next door to the east, which has 100 children outside in the afternoon, and cars leaving the child day care center that use his parking lot to turn around and go east on Darnestown Road, because they are not permitted to turn left from the day care center's lot.

Subsequent to the original hearing in this case, Hearing Examiner Carrier initiated a telephone conference call among the Applicant, Applicant's counsel, Mr. Lolatchy, the People's Counsel and the Hearing Examiner. The purpose of the call was to discuss what type of buffering Mr. Lolatchy might find helpful in reducing his concerns about possible adverse effects from the proposed development. Mr. Lolatchy reiterated the concerns he voiced at the hearing, and appeared to be skeptical that any form of buffering would reduce his concerns.

Although a follow-up meeting between Mr. Lolatchy and the Applicant did not take place, the Applicant revised the SDP to add design elements 8, 9 and 10, which provide for fencing and evergreen trees along the property line shared with Mr. Lolatchy, and specify that the homeowners' association documents will prohibit parking on Mr. Lolatchy's property. See the revised SDP, Exhibit 78(f). Mr. Lolatchy submitted a comment letter (Exhibit 49) in which he reiterated his opposition to the proposed zoning, on grounds that his property will be substantially reduced in value if the project goes forward. He acknowledged, however, that planting trees that would grow to a height of 30 feet would potentially help alleviate some of the noise issue. He also noted that Mr. Lyons of Winchester Homes had agreed not to allow contractors or utility vehicles to go through Mr. Lolatchy's property.

Mr. Lolatchy also testified at the remand hearing (Remand Tr. 87-92). He still opposes the project because he fears that the construction of townhouses might lower the property value of his residence, which also houses his dance studio. When asked by the Hearing Examiner whether he had any evidence upon which to base such fear, he indicated that he did not.

Mr. Lolatchy's other concern was that his property might be damaged during construction, as it was when his neighbor to the east of him, the Academy Child Development Center, was constructed. [Applicant's counsel responded that, given the size of the property, 4.92 acres, there will be space on the subject site for staging the construction.]

The Hearing Examiner finds that Mr. Lolatchy's fears about a diminution of his property values have not been supported by any credible evidence that his fears will be realized if this project proceeds to fruition. The decision on a zoning application "is not a plebiscite," and generalized fears in the community cannot overcome actual evidence. *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970).

Moreover, the Hearing Examiner finds that other concerns raised by Mr. Lolatchy – noise, problems with overflow parking and potential harm to his property during the construction process –

have been appropriately addressed by the three design elements mentioned above and by the provision of more than double the number of required parking spaces on the subject site.

IV. SUMMARY OF HEARINGS

Original Hearing (June 26, 2006):

A. Applicant's Case in Chief

1. Gary Ehrlich, acoustical engineer (Tr. at 14 – 63):

Mr. Ehrlich was designated an expert in acoustical engineering. His role in this case was to evaluate outdoor noise levels at the subject site and design appropriate noise mitigation measures. Mr. Ehrlich noted that Montgomery County's noise guidelines – guidelines established at the staff level, by the Environmental Planning Division – specify that the average sound level should not exceed 65 decibels in private outdoor areas. He testified that the development depicted on the proposed site plan can meet that standard with the use of noise mitigation walls in three general locations: a five-foot wall on lot 1, shielding lots 1 and 2; a five and a half foot wall on lot 25, shielding lots 25 and 26; and a five and a half foot wall to shield the center seating area. Tr. at 18-19. The noise fences would be solid wood, board on batten fences.¹³ He opined that there is enough space on the site to build the proposed fences. [The Hearing Examiner notes that Mr. Ehrlich's analysis and opinion are based on the site layout shown on the current SDP, which may change significantly during later stages of review.]

Mr. Ehrlich noted that Technical Staff agreed, in an email submitted into the record at the hearing, with his conclusion that the proposed noise walls would result in the project satisfying the 65-dB guideline. Tr. at 20. He explained Staff's use of the term "localized" mitigation by stating that each of the walls is intended to reduce noise levels in a specific area where people would use the

¹³ The "battens" are narrower pieces of wood that cover the boards so daylight cannot be seen between them.

outdoor space. Tr. at 24 – 25. They are designed for localized effect, not general -- noise does not need to be reduced along the roadways, for example, because people don't sit in lawn chairs in the road. The noise wall locations shown on the site plan are intended to reduce noise exposure in specific outdoor activity areas (rear yards and the common seating area) where Mr. Ehrlich's noise contour projection anticipates noise levels above 65 dBa. Tr. at 38-40. With the noise walls in place, Mr. Ehrlich's "post-mitigation" noise contour shows each of these areas with noise levels below 65 dBa. The noise reductions are projected as a range, because the actual noise level would depend on where a person is standing in the back yard – the closer one is to the noise wall, the lower the noise level will be. Tr. at 57-58.

Mr. Ehrlich did not propose any mitigation for other areas that are expected to have noise levels above 65 dBa, such as the small yard areas in front of townhouses, because those are not considered noise-sensitive areas where people spend time, like backyards. Tr. at 40-41. Moreover, it would be problematic – and unattractive – to install 5- to 6-foot walls alongside front yards, potentially crossing over or interrupted by sidewalks. Thus, noise mitigation walls are proposed only for units whose *back yards* would otherwise be subjected to noise levels over 65 dBa.

To determine what areas of the subject site would require noise mitigation, Mr. Ehrlich's company set up two sound level monitors, one closer to Darnestown Road and the other farther away. The data collected from these monitors allowed them to create a map showing which areas on the proposed site plan would be exposed to exterior noise over 65 dBa. The primary focus was noise from Darnestown Road, but the monitoring data also showed that the exterior sound level on the side of the property closest to the Training Academy was roughly 55 dBa, which does not call for any mitigation.

In response to questioning by the People's Counsel, Mr. Ehrlich stated that in his discussions with Technical Staff about the scope of the noise monitoring, the question of noise from intermittent helicopter flights at the Training Academy was not raised. He would be able to do an acoustical

study of the noise such flights would generate on the subject site if he had information such as how often they land, their flight altitude, what model helicopters are used and what routes they take. He could then run a noise model to predict the noise impacts. He has not been asked to do that in this case.

In response to further questioning by the People's Counsel, Mr. Ehrlich noted that typically, measures planned to reduce interior noise levels are discussed at one of the later stages in the approval process, when the developer applies for a building permit. At that point, with architectural plans available, Mr. Ehrlich considers it appropriate to talk about interior noise reduction measures. At the zoning stage, he finds it inappropriate to proffer to meet certain sound ratings for windows and doors, because those ratings are not very meaningful without architectural plans showing the layout of the proposed units. Tr. at 25-26.

Mr. Ehrlich testified that as a general rule, if the exterior noise level is 65 dBa or less, no special noise mitigation measures are needed to achieve an interior noise level of 45 dBa or lower – standard construction methods will achieve an interior noise level at least 20 dBa below the outside noise level. Where the exterior noise level is above 65 dBa, Mr. Ehrlich stated that “modest upgrades” in construction materials can be used to achieve an interior noise level of 45 dBa or less. He stated that noise mitigation involves three basic elements: the walls, the doors and the windows. If the walls are going to be made of brick or covered with siding, that generally is sufficient. Otherwise, the most cost effective upgrade that would work acoustically is to use “resilient channels” to hang the interior layer of wall board. Windows come with a “sound transmission class,” or STC, rating. A typical window would have an STC of 25 to 26. Modestly upgraded windows would have a rating of 27 to 28, and windows are also available “off the shelf” with a rating of 29 to 30. Tr. at 27. For this project, Mr. Ehrlich anticipates that for those units in areas with exterior noise of 65 dBa or greater, standard windows would be sufficient in many rooms, and rooms with larger windows might need windows with an STC rating of 27 to 28. Tr. at 28, 30. He noted that windows with an STC

rating of 28 would not significantly increase the cost of a project. Tr. at 35. Mr. Ehrlich described doors as the “weak link” acoustically. Tr. at 28. A typical door might have an STC rating of 23 to 25. Modestly upgraded doors might have an STC rating of 26 to 27, which he anticipates would be adequate for this project. Tr. at 28.

Mr. Ehrlich explained that the regulations and guidelines do not spell out precisely whether the 65 dBA standard is to be measured at ground level, or at window height. He stated that the industry standard is to consider noise levels at a height five feet above ground level. Tr. at 29.

On re-direct, Mr. Ehrlich noted that he understands there have been no complaints about helicopter noise during the 20 years that helicopters have been landing at the Training Academy. Tr. at 33-34. He acknowledged that helicopters make noise when they land, but identified the salient question as whether or not they cause annoyance. He suggests that if they arrive at 2:00 in the afternoon and stay for five or ten minutes, most people would not consider that a significant annoyance. Mr. Ehrlich noted the descriptive information about helicopter activity in the recent Mandatory Referral Staff Report. When asked, he estimated that the Training Academy’s helicopter pad is located approximately 300 feet east of the subject property.

Environmental Planning Staff noted that the current layout of the proposed development does not allow space for the use of earth berms or boundary noise walls, which Staff considers the preferred noise mitigation option. When asked to comment on this, Mr. Ehrlich stated that from an acoustical perspective, it would be easy to put up a wall along the entire site frontage. However, in this case that would involve entering or crossing property that is encumbered with easements, which creates civil engineering problems. Tr. at 46-47. As a result, creating space for a continuous noise wall across the entire site frontage would require reducing the number of units to move back, away from the easements. Mr. Ehrlich stated that typically, developments along a road like Darnestown Road tend to have smaller noise walls to shield individual backyards, rather than major walls along

the entire frontage. *Id.* at 48. He opined that earthen berms and walls have very similar noise mitigation effects.

2. Michael J. Watkins, land planner (Tr. at 84 –134):

Mr. Watkins was designated an expert in site development and land planning. He first described the location of the subject site and his recommended “surrounding area” designation. His notion of the relevant surrounding area was almost identical to Technical Staff’s, except that included a small area classified under the C-4 Zone that Staff had excluded. Mr. Watkins included it because it was included in the surrounding area that was considered in an earlier rezoning case for land adjacent to the subject site, and he feels that it frames the area now proposed for rezoning. *Tr.* at 89.

Mr. Watkins identified a series of photographs showing nearby land uses and existing conditions on the subject site. He described existing development in the area, including the zoning and, for residential developments, the density. These include the Training Academy to the north, in the R-90 Zone; the dance studio/residence abutting to the east in the R-90 Zone; a child day care center east of that property, also in the R-90 Zone; and a PEPCO substation at the corner of Darnestown and Travilah Roads. On the south side of Darnestown Road near Travilah Road is Travilah Crest, which was developed under R-T 10 zoning with 49 townhouses and an effective density of 8.27 units per acre. Parts of this development face Darnestown Road and parts face away from the road, but the homes closest to the road are separated from it by a buffer area owned by the homeowner’s association. Adjacent to that site to the west is a property classified under the R-T 6 Zone, which has six townhouses on one acre of land. On the south side of Darnestown Road, opposite the subject site, are two subdivisions: Hunting Hill Woods, developed under the R-200/TDR cluster option, which has a mix of single-family detached and attached dwelling units, but only single-family detached homes visible from Darnestown Road; and Bai-Nola Woods, developed with single-family homes under the R-200/TDR Zone. [The Hearing Examiner notes that densities were not provided for these developments, but with all detached homes in one, and a large percentage

of detached homes in the other, the density can safely be assumed to be substantially lower than the surrounding townhouse communities.] Opposite the corner of Key West Avenue and Darnestown Road is Potomac Corner, a townhouse development in the R-200/TDR Zone with 29 units and an effective density of 7.25 units per acre.

Mr. Watkins conceded that all of the developments confronting the subject property on the west side of Darnestown Road were developed with distinct buffer areas along Darnestown Road – separate parcels owned by the relevant homeowner’s association, which are left in a vegetated state to serve as a buffer from the road. Tr. at 94-98.

Mr. Watkins reviewed a series of photographs showing the view from the subject property in various directions. Tr. at 98-100. He then described the subject property itself, which contains 4.92 acres of land, with approximately 769 feet of frontage on Darnestown Road. He noted that at this location, Darnestown Road is no longer Maryland State Route 28. It is now a county road. It is recommended in the applicable master plan for a right-of-way of 100 feet, and the proposed Schematic Development Plan includes a dedication to provide for that width. The topography reflects a drop in elevation from 478 feet in the northeast corner of the property to 454 feet in the southwest corner. The site, having been combined from several separate parcels, currently has seven curb cuts along Darnestown Road. These would be reduced to two under the proposed SDP. The proposed development would also add stormwater management, which currently does not exist on the site. The site has no existing forest.

Mr. Watkins noted that the proposed development would satisfy all of the development standards for the RT-8 Zone, including density and setbacks from residentially zoned properties. Both the Training Academy site and the adjacent property to the east are zoned R-90, requiring a 30-foot side building line setback. Mr. Watkins noted that the binding elements commit the Applicant to a limit of 20 percent building coverage, well below the maximum for the zone of 35 percent, and a

minimum green area of 53 percent, slightly higher than the minimum for the zone, which is 50 percent.

With regard to screening, Mr. Watkins pointed out that landscape buffers along the property boundary are a binding element. This represents a commitment to having some buffer, so that the individual lot lines do not extend all the way to the property line for the site. He considers it more effective to have a buffer area owned and maintained by the homeowner's association than to extend the lot lines further and put easements on them.

Mr. Watkins noted that the binding elements limit the use to a maximum of 39 townhouses, all with brick front facades, and provide for distribution of the required 12.5 percent MPDUs throughout the site. The binding elements also provide specifications for landscape design along Darnestown Road that are designed to provide the flexibility to use wooden fences or masonry walls for noise mitigation, and to require landscape elements to enhance the appearance of the roadway frontage.

Turning to the purpose clause for the R-T Zone, Mr. Watkins reviewed the Master Plan, which encouraged the joint redevelopment of parcels along this stretch of Darnestown Road at a density of eight units per acre, provided that access is from a new frontage service road along Darnestown Road. He noted that the Applicant has assembled as many parcels as possible, and proposes a density of eight units per acre. With regard to the frontage road recommendation, Mr. Watkins opined that the access and circulation plan proposed here would be functionally equivalent to a frontage road, because access to and from Darnestown Road would be limited to two locations. He suggested that frontage roads may have either one or two points of ingress and egress.

Mr. Watkins opined that the proposed development is appropriate for the subject site, in light of the densities of existing developments in the surrounding area, and would be in the public interest. He opined that the development would be compatible with its surroundings, particularly with buffer areas to the east, west and north, noting that with the exception of the medical office building to the

west, all of the adjacent properties are zoned for residential use. He added that he was given a tour of the Training Academy site, and remains persuaded that the proposed development would be appropriate at this location. With regard to the concerns voiced by Mr. Lolatchy, Mr. Watkins declined to specifically opine as to whether the proposed development would result in a decrease in Mr. Lolatchy's property value. He suggested that a high-rise development would be detrimental, but that a townhouse development proposes a similar and compatible residential use. Tr. at 124.

As for the noise walls on Darnestown Road that Mr. Lolatchy mentioned, Mr. Watkins noted that there are noise walls farther west on Darnestown Road, where it is designated a major highway, MD Route 28. He feels that a frontage noise wall would be inappropriate for the subject site, where Darnestown Road is considered an arterial road. Tr. at 126-27.

Addressing forest conservation, Mr. Watkins explained that the Applicant has an afforestation requirement of 0.74 acres in this case, but would not normally be required to satisfy it on site. Tr. at 131-32. He noted that 0.74 acres equates to 32,234 square feet, and the area shown on the submitted SDP shows 24,267 square feet of forest conservation, which equates to 75 percent of the afforestation requirement. Tr. at 132. [The Hearing Examiner notes that the binding elements require a minimum of 20,000 square feet of afforestation on site. *See* Ex. 44(d).]

3. Scott Rosen, civil engineer (Tr. at 134 – 137):

Mr. Rosen was designated an expert in civil engineering. He testified that his office prepared a stormwater management concept plan for the proposed development. Applicant's counsel interjected that the concept plan has been approved by DPS. Tr. at 136-37. Mr. Rosen stated that the approval did not contain any conditions or suggest a need for waivers. He added that water service is available to serve the proposed development on Darnestown Road.

4. Glenn Cook, traffic engineer (Tr. at 137 – 144):

Mr. Cook was designated an expert in transportation planning and traffic engineering. His firm prepared an original and a revised traffic study for this application. The original study was

based on a proposal for 42 townhouses, and it assumed that access along Darnestown Road would be right in, right out. That study concluded that the proposed development would not have a negative impact on the area road system. The second report addressed the current proposal, with a maximum of 39 townhouses, and took into account the Applicant's proposal to create a center turn lane on eastbound Darnestown Road, which would allow left turns into the property from one driveway. Tr. at 139. No left turns would be permitted out of the site, for safety reasons. The construction of the center turn lane would be at Applicant's cost. Mr. Cook expects the proposed center turn lane to be approved if the project goes forward. In the event that it is not approved due to concern about widening the road, he suggested that the Applicant could extend an existing center turn lane located about 300 feet west of the site (at Yearling Drive) to provide access to the subject site. He added, moreover, that a center turn lane would be just a convenience for the residents, not a safety measure, so if the center turn lane is not approved, the development would still have safe access with the right-turn-only curb cuts.

Mr. Cook described the proposed project as a very low traffic generator, with approximately 30 trips during the peak hour. He noted that the proposal would "clean up" the site frontage by reducing the number of curb cuts from seven to two. He opined that as proposed, vehicular and pedestrian access would be safe, adequate and efficient. Tr. at 143.

With regard to the concern voiced by Mr. Lolatchy concerning sight distance from his driveway, Mr. Cook stated that a structure would have to be within 42 feet of the travel lane at Darnestown Road in order to obstruct the sight lines from his driveway. Thus, it would have to be almost at the front edge of Mr. Lolatchy's property. Tr. at 144.

5. Daniel Lyons, Applicant's representative. Tr. at 144-47.

Mr. Lyons is a development manager with Winchester Homes, and has a background in urban planning and real estate development. His role in this project includes acting as a liaison with the community and staff. Mr. Lyons acknowledged that he is not an expert in real estate valuation, nor is

he an appraiser or real estate agent, but based on his experience as a developer, Mr. Lyons opined that the proposed development would not adversely affect the value of Mr. Lolatchy's adjacent property. Mr. Lyons interpreted Mr. Lolatchy's comments about a Winchester home representative to mean that someone from Winchester told Mr. Lolatchy that he would be able to realize additional value from the sale of his property if it were included in the present rezoning, not that his property would decrease in value if the rezoning went forward without him.

Mr. Lyons also stated, on behalf of the Applicant, that he is comfortable with a new binding element, which was proffered during the hearing, to guarantee interior noise levels no higher than 45 dBa. Tr. at 147.

B. Opposition

Schain Lolatchy has his home and operates a dance studio in the building adjacent to the subject site to the east. He obtained a special exception for the dance studio, which is on the lower level, and lives on the upper level with his family. Mr. Lolatchy testified that the investors who brought the five properties comprising the subject site "pestered" him numerous times to get him to sell his property. Tr. at 65. He alleged that threats were made to "make sure that my property will remain worthless." Tr. at 66. He further testified that when Winchester Homes became involved in the project, a Winchester representative who was trying to buy his property told him that with the proposed development in place, Mr. Lolatchy's property would be worthless, because its shape would limit its use to one single-family home, and it would be worth less for that use with townhouses next door. Mr. Lolatchy confirmed this prediction with various real estate agencies. As a result, he objects to the proposed rezoning on the basis that it would lower the value of his property.

Mr. Lolatchy is concerned that if a noise barrier were built along the front of the subject property, it would block the sight distance from his property (which is already poor with the tall,

uncut grass on the site). He noted that there are already three long, high noise walls on Darnestown Road in the area. Tr. at 67.

Mr. Lolatchy is also concerned about noise impacts of the proposed development on his property. He stated that the property adjacent to the east has a day care center, operating by special exception, which has well over 100 children outside in the afternoons. He was required (presumably by the Board of Appeals) to make his building soundproof, and the noise from the children is still very loud. He also suffers from noise from the Training Academy, where activities start at 6:00 a.m. Mr. Lolatchy testified that helicopters land about once a week, sometimes twice, and they shake his entire building. Tr. at 68. He has lived at this location since 1999, and stated that the frequency of helicopter landings has been steady during that period, except for the sniper crisis, when they were taking off every two or three hours.

Traffic is an additional concern for Mr. Lolatchy. He testified that the day care center parking lot has a “no left turn” restriction, so cars leaving that site make a U-turn in Mr. Lolatchy’s parking lot, then turn left on Darnestown Road. He says that the signs he has posted make no difference. He foresees the same kind of thing happening if the proposed development is built with 39 townhouses – every time someone has a party, the cars will park on his property.

Under questioning from Applicant’s counsel, Mr. Lolatchy agreed that the houses currently on the subject site are abandoned eyesores. He believes, however, that the site can be redeveloped with beautiful single-family detached homes, like other developments on Darnestown Road.

C. People’s Counsel

In an opening statement, the People’s Counsel, Martin Klauber, stated that he participated in this hearing to try and clarify the record concerning noise mitigation, in light of Environmental Planning Staff’s failure to reach a conclusion as to whether the proposed development would satisfy county noise regulations prior to the Planning Board’s consideration of this case, and resulting

confusion during the Planning Board hearing. Tr. at 10-11. Mr. Klauber maintained that compliance with noise regulations is an issue for site plan review, not for the zoning stage of a proposed development. He noted, however, that the Planning Board had made it an active issue.

In closing remarks, Mr. Klauber argued that Mr. Ehrlich's testimony and the results of his noise study demonstrated that (i) there is enough space on the subject site to mitigate the effects of noise emanating from Darnestown Road; and (ii) interior noise is capable of being reduced by means that may be explored in greater detail at a later step in the regulatory process, if the proposed rezoning is granted. Tr. at 75. Moreover, he concluded, the record indicates that the Applicant is well aware that the county's noise regulations not only must be satisfied but can be. On that basis, Mr. Klauber recommended approval of the rezoning request.

Remand Hearing (December 22, 2008):

All parties agreed at the inception of the hearing that the testimony and exhibits from the original hearing will all be considered to be still in the record of this case, although some, such as the revised SDP, may be superseded by new exhibits. Remand Tr. 7. Since the new Applicant, Fifty, LLC, does not own all of the property in the subject site directly, Applicant's counsel agreed to supplement the record showing that Fifty, LLC has a financial, contractual or proprietary interest in parts of the site it does not own, as required by Zoning Ordinance §59-H-2.1.¹⁴ Remand Tr. 150-152.

Applicant's counsel expressed Applicant's willingness to keep all the proposed elements as binding, or to reduce them to two binding elements as suggested by the People's counsel and recommended by the Planning Board. The remainder would be relabeled as "Design Elements." The Hearing Examiner suggested that a third textual binding element should be added to include the limitations of the development to 39 townhouses with a minimum 12.5% MPDUs and a maximum height of 35 feet, as already indicated in the Development Standards Table on the SDP. Remand Tr.

¹⁴ Applicant did so, following the hearing, in Exhibits 78(b), (c) and (d).

11-15. At the end of the hearing, it was agreed that Applicant would submit two alternative SDPs with matching alternative covenants, one would include all the elements as binding, and the other would have three binding elements, with all the rest being designated “design elements” to allow flexibility at site plan, as the Planning Board recommended. Remand Tr. 153-162.

Applicant called four witnesses at the remand hearing, Al Blumberg, Land Planner & Site Designer; David O’Bryan, Civil Engineer; Gary Ehrlich, Acoustical Engineer; and Glen Cook, Transportation Planner. The only opposition testimony came from the next-door neighbor on the east, Schain Lolatchy, whose home also houses his dance studio. Martin Klauber, Esquire, the People’s Counsel, participated in support of the revised application, but did not call any witnesses.

A. Applicant’s Case in Chief

1. Alfred S. Blumberg (Remand Tr. 20-87; 141-143):

Alfred Blumberg testified as an expert in land planning and site design. He indicated that the site itself has not changed since the initial hearing in the case, but the schematic development plan has been changed considerably. Mr. Blumberg described the site, which has 757 feet of frontage along Darnestown Road, and introduced a series of photographs of the area and key maps (Exhibits 69 and 70), indicating the locations of the photos. He also produced an aerial photo (Exhibit 71) showing the site and the surrounding area, as defined in the previous Technical Staff report and hearing. He saw no reason to change the definition of the surrounding area.

Mr. Blumberg also described the surrounding area using an annotated zoning map (Exhibit 72). He noted that the Public Service Training Academy was established in 1973, and the Montgomery County Planning Board, in 2006, considered a mandatory referral proposing some improvements proposed to the PSTA. Exhibit 73 is the PSTA Master Plan, and it shows existing and proposed facilities.

There is currently one point of access off of Great Seneca Highway to the PSTA, as another access driveway that came off of Darnestown Road has been chained off. As you come in off of Great Seneca Highway, on the left is the Maryland Technology Development Center and then to the right is the 52-acre Public Service Training Academy. There is and has been since the '70s a helicopter landing area on flat grass. It was proposed in 2004 that it would be paved, but that has not been done. There was also proposed that a new fire station would be constructed to serve the larger community along the southwest side of the property. The PSTA Plan says the new fire station was "committed," but it's never been built.

Another expansion is for a gymnasium and training tower, an automobile extraction area where the firemen practice opening up cars and unstrapping anybody who would be trapped in there. There's a burn building, where they actually have a gas fire in the building, and then the firemen train going through there. The burn building is the highest elevation on the site. Closest to the subject property on the southwest side is the Urban Search and Rescue Building, a structure constructed for training in a collapsed building. Behind it is an area that looks like a just a jumbled dumping area of concrete, but it's actually a carefully constructed set of concrete and wood to replicate a collapsed building. They use that to train the dogs and the people involved with the collapsed building.

The PSTA Plan also shows a future K-9 training area in the extreme westerly portion of the property. A driver training track and a "skid pad" have been built to train both fire and police in the extreme northeast section of the PSTA.

There is a ridge that runs parallel to the southwestern property line of the PSTA; it goes through the burn building and comes back out to the academic building. Everything from that ridge on the southwest side drains towards the subject property and everything on the northeast side it falls away from the subject property. From the subject property you can see some of the uses on the southwest side, but anything on the northeast side, including the driver training, the skill pad and the skid path, you can't see or hear because they are far away and out of sight. Remand Tr. 39-40.

Exhibit No. 74 is that same Public Service Training Academy illustration, but with the proposed schematic development plan superimposed on the western side of the property. Mr. Blumberg measured some of the distances from the proposed homes to various uses on the training academy. On the western side of the property from the nearest home on the western side of the subject property to the K-9 training area and the driver training track is 400 feet. There are a number of townhouses that run parallel to the western property line of the training academy and run parallel to Darnestown Road, and the average distance between those units and the property line is some 60 feet. The nearest unit (#25) is 400 feet from the burn building, which is at the high point of the property, and is about 250 feet from the collapsed building. It is 400 feet from the helipad to unit number 30 which is in the northeast corner of the subject property. According to Mr. Blumberg, the heliport is not used very frequently – the average is about 10 times a year.

Mr. Blumberg used a rendered illustrative landscape plan (Exhibit 75) to demonstrate changes that have been made to the proposal since it was last before the Council. The development plan proposes only two points of access, while there are currently seven driveways on the property. There is an internal driveway system on the subject property, which acts as a service road in that it gives access to all the properties. Each of the 39 homes has a driveway to access the garages associated with those homes from the service road.

One of the big changes from the previous schematic development plan was the simplification and reorientation of the units towards Darnestown Road. In the prior application, there were four clusters of town homes set at various angles perpendicular and parallel to Darnestown Road, which then had an internal driveway system to get to each of those. Thus, each of the clusters basically was surrounded by either driveway or a through private street. There were really no private areas associated with those town homes, whereas in this revision, all the town homes have a backyard which is oriented away from Darnestown Road, away from the noises and creating a private space for these units.

Circulation has been simplified and improved. There's just a direct driveway service road parallel to Darnestown Road, serving each of the units, whereas the previous plan had a street around the far edges of the property and then internally private alleys. The green area has also been increased from 53% to 55%.

Applicant has proposed a berm that goes up to as high as eight feet and tapers down on either side. The 8-foot berm is topped with a 6-foot fence along the length of the property adjacent to the PSTA. Whereas there was no noise attenuation or even visual attenuation proposed in the previous plan, the new plan provides a noise barrier consisting of a berm with a wall on top, or fence on top (up to a maximum height of 14 feet), to separate the site from the PSTA. The berm would run from Unit #13 past Unit #39. It doesn't protect either of the rows of townhouses on the west and east, but on the west is a forest conservation area. Significant trees will be preserved in a Category 2 conservation easement, and that provides some attenuation from the academy property. On the east, the fence (but not the berm) will be extended on the eastern side of the property all the way to the property line.

Mr. Blumberg further testified that there will be 164 parking spaces provided, which includes two garage parking spaces in each of the non-MPDU units. This plan illustrates five MPDUs, 12 1/2 percent of the 39, which will have a single-car garage and a single driveway parking or access area. Each of the standard or market rate units would have a two-car garage and two parking spaces in the front in the driveway, as well as 18 parallel parking spaces along the street, so that there are parking spaces for a party or visitors to park on the street and not in someone's private property. It will be more than twice the required parking.

The proposed amenities have increased over the prior plan and include a tot lot, a sitting area near where the central mailboxes will be located, and a wall adjacent to them for purposes of noise attenuation from Darnestown Road, an open play area in the forefront of the property, so that the plan creates a nice open space for each of the units between Darnestown Road and the fronts of units.

The forest conservation is going to be a Category 2 ,which would allow access and utilization so if someone wanted to have a picnic, there would be a little area in which you could walk and get access to for recreational purposes.

Exhibit 76 is a cross section, looking west, that goes all the way from Darnestown Road on the left across the front of the property to the townhouses. Then it extends towards the PSTA, showing the 8-foot berm with landscaping and a fence. Exhibit No. 77 is an enlargement of the berm and fence behind the units.

Mr. Blumberg opined that there is a compatible relationship between the proposed townhouses and the uses that exist currently on the training academy. In theory, the activities on the training academy site should not cause any noise impacts on the abutting property. But in fact, there are some noises that exceed the noise regulations or the noise limits. And that's the reason Applicant implemented the berm and fence. Most of the proposed uses from the mandatory referral of the PSTA which have not yet been implemented, are farther away from the subject property. So in his opinion, the proposed use here on that southwest edge of the training academy property would continue to be compatible with the development even if it were expanded as proposed in that mandatory referral.

None of the proposed changes will modify compatibility with the other properties around the site. The relationship to properties to the east and west have remained the same. If anything, the relationship to the properties to the south in the single-family residential area on the other side of Darnestown Road have been improved. Units have been all moved further away from Darnestown Road and therefore further away from the existing single-families on the other side of Darnestown Road. Based upon the design and the impacts and the surrounding development, it's Mr. Blumberg's opinion that this proposed development will be compatible with the surrounding land uses, existing and even proposed on the PSTA.

Mr. Blumberg noted that the previous Hearing Examiner found the development to be consistent with the Master Plan and in compliance with the Montgomery County Zoning Ordinance.

What was not on the table at that time were new proposals discussed in Mr. Blumberg's Addendum to zoning analysis dated October 2008 (Exhibit 57(b)). Attached to that was a copy of the County Executive's recommendation dated August 2008 called Property Use Initiative. The Executive is saying that there's not enough room to expand to the uses that are really needed for the training academy at this location and it should be relocated, with its present site incorporated into a "new science city." The illustration of new science city contained on page 5 of the Executive's proposal, shows the existing single-family houses on the southwest side of Darnestown Road and townhouses on the northeast side. Thus they are anticipating that the subject site would be used for townhouses in conjunction with the new science center. Mr. Blumberg opined that the primary reason is that there needs to be a transition between new science city or whatever happens on the PSTA property and the existing single-family detached on the other side of Darnestown Road.

Park and Planning is also undertaking a study of the Western Gaithersburg Master Plan area including the subject property and the new science city, as it is called in the County Executive's document. The technical staff report regarding the Gaithersburg West Master Plan is included as an attachment to Exhibit 57(b), and there is a Memorandum dated November 21, 2009, from the "Vision Division" of Park and Planning's staff which recommends approval because it's both appropriate and compatible for townhouse development on the subject property vis-à-vis both the existing PSTA, the expanded academy uses or the redevelopment of the property either as envisioned by the County Executive or by the early Park and Planning documents.

Moreover, as recently as December 2, 2008, Technical Staff met with the community to discuss their plans, and the document they produced for that meeting (Exhibit 66(c)) shows townhouses on the subject site.

Mr. Blumberg opined that the proposal meets all three criteria of the RT-8 Zone purpose clause, even though it need only meet one of them to qualify. It is recommended in the master plan; it is transitional; and it is appropriate at this location. It also meets all the standards of the RT-8 Zone. As far as the public facilities, this is the same number of units as had been recommended for approval in the earlier iteration. For utilities, schools, public safety, both fire and police, as well as transportation in the area, this application would be in compliance with public facilities requirements. The only change is that public schools reduced the estimated total number of schoolchildren expected from the project. Mr. Crispell's memo of November 19, 2008 says there would be 9 elementary school students, 7 middle school students and 4 high school students generated. Mr. Crispell's memo, attached to technical staff report, Exhibit 64, finds that there's no problem with school capacity, except at the high school level, which exceeds 105 percent of capacity, so a high school facilities payment would be required.

Mr. Blumberg concluded that this proposed use will be compatible at this location given existing development adjacent on the academy property or the redevelopment of the academy property as recommended at this point. He also finds that this is an appropriate location vis-à-vis the transitional nature of the property between the single-family detached on the other side of the Darnestown Road and the more intensive uses on the north side in the academy property. Mr. Blumberg opined that it is compatible and appropriate and in compliance with the master plan. It also meets or exceeds all the development standards and all other regulations of the zone. He feels that the proposed use is in the public interest in that it meets the functions as recommended by the master plan and provides for additional housing which will be needed to support the life science center.

Mr. Blumberg stated that if the academy property is redeveloped as talked about by Technical Staff and the County Executive, there may be no need for a berm and fence to attenuate noise, depending on the nature of the redevelopment. Applicant wants to make sure that there are

provisions made for pedestrian connectivity between the subject property and the future redevelopment of the academy property, including the implementation of a transit stop. Therefore, the illustrative development plans show two potential pedestrian connections into the academy property. This would allow the residents of the subject property to walk to the transit station that's being proposed as the center point of the redevelopment of the academy property. If the PSTA site development ends up with 8-story apartment buildings next door, Applicant may want to maintain the berm. However if it's lower density, residential or other townhouses, then certainly there's no need for the berm.

There would also be improved pedestrian access by the construction of sidewalks (a shared public path) along Darnestown Road.

Responding to a question from Mr. Lolatchy, Mr. Blumberg testified that the intent of the revised SDP is to treat the eastern property line the same way that it was agreed upon to treat it in the previous plan, and to provide a wall or fence and landscaping to buffer the use.

Mr. Blumberg further testified that a preliminary forest conservation plan was prepared for this property, and it proposes 18,000 square feet (about 0.41 acres) in the northwest corner to be in a Category 2 Forest Conservation Easement, with 0.28 acres of offsite planting. At Technical Staff's request, the area of the berm and fence were kept out of the easement. The final forest conservation plan will be reviewed by the Planning Board at site plan.

2. David O'Bryan (Remand Tr. 92-97):

David O'Bryan testified as an expert in civil engineering. He stated that his storm water management concept plan (Exhibit 66(e)) had been approved by the County in a letter from DPS (Exhibit 66(b)). Mr. O'Bryan indicated that the storm water management plan had not changed appreciably since the original hearing. He also testified that water, sewer, gas and all the utilities are available to serve the proposed development.

3. Gary Ehrlich (Remand Tr. 100-140):

Gary Ehrlich testified as an expert in acoustical engineering. The current plan improves the previous plan from an acoustical perspective in a number of ways. The units in the middle of the site are farther from Darnestown Road, and the rear yards are shielded from noise from Darnestown Road by the townhouses themselves. That's the main change, and the other change is the addition of a landscaped berm and six-foot noise wall (or fence) on the northeast side of the property abutting the PSTA. The noise wall could be an acoustically solid wood wall or a concrete wall or steel or any other materials, whereas to an acoustical expert, a fence means it has some sort of gaps in it. The planned fence or wall will be of solid construction.

Mr. Ehrlich conducted two studies as a result of the remand. One was regarding Darnestown Road highway noise, which wasn't technically a remand issue, and the other was addressing noise from the PSTA. In the original application, Mr. Ehrlich did not focus on PSTA noise. For the original application, it was all about Darnestown Road noise, and that analysis changed because the site was reconfigured. In terms of the PSTA noise, Mr. Ehrlich installed sound level meters in two locations, at the border between the PSTA and the subject property and left them there for two weeks.

Mr. Ehrlich programmed the meters to log the sound level every minute, so there are thousands of minutes of data, and the sound level meters log the maximum and average sound level each minute. In addition, the meters were programmed to record an actual audio file that you can listen to on a computer whenever the sound level got above a threshold of 70 decibels. It could not be set at a lower threshold because there is a lot of background sound from sirens on Darnestown Road and thunder and birds, such that sounds that are in the range of 65 and 70 aren't that significant relative to what's going on in the environment.

Mr. Ehrlich indicated that when he originally did the PSTA noise analysis, he started referring to the Technical Staff guidelines, which is a 24-hour average sound level called the "DNL." Technical Staff recommended that he use the Montgomery County Noise Ordinance as the standard so that is

what is reflected in the most current PSTA noise analysis. The noise ordinance, Chapter 31-B of the County Code, includes a maximum allowable sound level of 65 decibels during the day time on residential zones and 55 decibels at night in residential zones. Those are readings external to the structures because there's no requirement governing internal noise in the Noise Ordinance. The Technical Staff guidelines set both outdoor and indoor standards, which are 65 decibels DNL, a 24-hour weighted average and 45 decibels indoors, again a DNL, which is very different from a 65 decibel instantaneous limit outdoors, as specified in the Noise Ordinance.

Mr. Ehrlich also did a full noise analysis referencing those 65 decibel and 45 decibel policy limits for PSTA, and he found that there's no impact from PSTA in those senses. The maximum noise level was in the ballpark of 60 decibels in terms of DNL.

According to Mr. Ehrlich, approaching the PSTA property from the subject property, you go through a forested area. For the most part, the noise sources that are of interest are the Urban Search and Rescue area, which is immediately abutting the subject property, and the small access road just to the northeast of that where they do the fire truck driving tests, and they occasionally sound horns. Noise in the Urban Search and Rescue Building comes from the use of concrete anchor shot and cutting through a roof using saws and the like, but those uses are all very infrequent.

In terms of the two week noise monitoring period, Mr. Ehrlich logged 193 events that produce audio recordings over 70 decibels from all sources, including sirens, birds, thunder, et cetera, and of those 193, only 18 were in any way attributable to the PSTA or sounds like they appear to be from the PSTA over two weeks. Thus, about nine per week could be identified as being from the PSTA, and typically, they lasted two or three seconds. Some events are very long, like when there's a siren on Darnestown Road, but in terms of the events associated with the PSTA, they're all very short events. Some of them were just a single impulse like that concrete anchor shot which just sounds like a pop. And some of them were horn tooting, so they are in the ballpark of two or three seconds.

Those are the main uses that he focused on. They don't have an outdoor shooting range; they have an indoor shooting range, but there's no reason to think that it's noisy based on the sound level data.

Chief Clemens of the PSTA gave me Mr. Ehrlich a list of activities that occurred during the noise monitoring period, but he didn't see any exceedances above 70 decibels associated with them. Based on these findings, Mr. Ehrlich opined that from an acoustical perspective, the PSTA is compatible with proposed residential development. He noted that, as Mr. Federline of Technical Staff pointed out in his report, the types of noises that you hear are pretty representative of what you would hear in a residential community, like occasional power tool use or even a siren going by. The sirens on the PSTA are in the same ballpark of distances of sirens that would go by a residential neighborhood, so the general fit of the types of sounds are pretty representative of what you would have in a residential neighborhood.

Mr. Ehrlich further testified that the mandatory referral allowing an expansion of the PSTA would not have significant impact on his noise analysis. One of the uses that was proposed was paving and making other upgrades to the helipad. From an acoustical perspective, that's a non-issue since it won't change the amount of noise associated with the helicopter landing; whether it's landing on concrete or grass, it's the same thing. Also, there were no noise complaints logged from the helicopter. Another change is the proposed addition of a fire station; again, that's a relatively typical use. Typically fire stations aren't that far from residential communities that they serve. In this case, it would be a couple hundred feet from the townhouses, which wouldn't be that unusual. There's also a committed K-9 facility, but he was told by Chief Clemens that the dogs that are trained for this type of facility are trained not to bark. They're trained to sniff out and locate victims. So it's nothing like a kennel use. There is already a K-9 facility already on the property.

In Mr. Ehrlich's opinion, from an acoustical perspective, the PSTA, even if expanded, would be compatible with the proposed residential development. He also opined that, if the PSTA were redeveloped as a residential use or a mixed residential/commercial use, it would still be compatible.

If there were a commercial use, having a berm there would be a perfectly appropriate situation. If it were residential use, it would be unnecessary, but there's nothing bad from an acoustical perspective having a berm where it's unnecessary.

The Montgomery County Staff Guidelines for the Consideration of Transportation Noise Impacts and Land Use Planning and Development, June 1983, impose two requirements – that the day/night average sound level or the DNL not exceed 45 decibels indoors, or 65 decibels outdoors. The outdoor noise standard is typically applied in outdoor use areas such as rear yards, and on this site, the focus is on the rear yards of the townhouses oriented perpendicular to Darnestown Road. That's the document (Exhibit 42(f)) staff would use when evaluating highway noise impacting a proposed land use development.

The outdoor use areas would include rear yards oriented away from Darnestown Road, but those are significantly shielded from Darnestown Road to the point that the sound levels are way below the County criteria, as is the lot between townhouses 10 and 11. Mr. Ehrlich's conclusions are summarized by Figure 6 in his report dated June 17, 2008 (Exhibit 54(k)), which is the most current highway noise analysis. Exhibit 63(a) is the most current PSTA noise analysis. Figure 6 of the highway noise analysis shows that the sound level at the most impacted townhouses, which are townhouses numbered 1, 2, 38 and 39, will reach as high as 69½ to 70 decibels, DNL and that's at the loudest floor. Those are the two most impacted residences, and that sound level can be used in the future to predict indoor noise levels once an architectural type is proposed farther along in the development process.

To address this noise, noise walls are proposed. One wall is proposed at unit 39, and an L-shaped wall is proposed at unit 1. A V-shaped wall is proposed at the seating area in the middle of the site. Each of these walls is 6 feet tall and with them the noise level will be under 65 decibels in each of the rear yards and also in the seating area. In Mr. Ehrlich's professional opinion, the project as proposed satisfies the Montgomery County guidelines for exterior noise levels.

As to indoor noise levels, typical building construction will reduce noise levels by 19 to 27 decibels. If a building reduces the noise level by 20 decibels, and the goal is 45 inside, that means with 65 decibels outside, the interior will be down to the required 45 decibel interior standard. If the exterior noise is up to 70 decibels, very modest upgrades to standard construction would be typically necessary, such as limiting the types of windows and doors to reduce sound ratings. But that's definitely within the range of standard construction with very modest upgrade.

The sound walls on both sides of the project will not affect the top floor, but given the location of the Urban Search and Rescue area, the 14-foot wall berm combination will provide protection for the ground and first floor up. Mr. Ehrlich added that there is no Noise Ordinance requirement for indoor noise. It's just the Noise Ordinance requirement of 65 decibels outdoors at any location.

Moreover, PSTA outdoor noise on the loudest day averaged 62 decibels outdoors, so indoors it would be in the high 30s to low 40s, but certainly no more than the staff limit of 45 decibels indoors. There were no PSTA exceedances at night, but one of them was at 7:55 a.m. on a Saturday, which is technically night because the Saturday definition of night doesn't end until 9 a.m., and the weekday definition doesn't end until 7 a.m. Thus, of those 18 events, one was during the nighttime by strict definition of the code. If the sound level from some nighttime PSTA related activity were in the range of 65 to 70 decibels, the addition of the proposed noise mitigation, which is an 8 foot berm and a 6 foot wall, would easily reduce that 5 decibels, because once you introduce a barrier to break that line of sight, you at least reduce the noise level by 5 decibels. That would push it under the County Noise Ordinance limit of 65 decibels. Mr. Ehrlich stated that he did not select a quiet PSTA period to review, and no one suggested that the two week monitoring period there was atypical.

According to Mr. Ehrlich, for the townhouses facing the PSTA, the day/night average sound level won't exceed roughly 62 decibels, or a little bit less based on the increased distance. So typical building construction would easily be able to reduce that to 45. Upgrades would only be necessary on the units facing Darnestown Road in order to meet that Staff policy of 45 decibels. In other

words, the noises from the PSTA are not high enough to require above the standard construction to meet interior noise levels of 45 decibels. He also doubts any upgrades would be required for any lots other than the four or five that are closest to Darnestown Road, even though some of them might slightly exceed the 65 decibel figure.

Mr. Ehrlich concluded that the proposed project will meet the Park and Planning standards with regards to noise, and that the subject townhouse community is compatible with the adjacent users from a sound perspective. Moreover, the proposed berm and wall, and the property design, will reduce the noise generated and emanating from the PSTA to below 65 decibels. He believes that for ground level receivers, the sound level would be less than 65 decibels in all the unit rear yards, and interior noise levels on the third floor can be reduced to below 45 decibels, regardless of whether or not you're talking about highway noise or PSTA noise.

4. Glenn Cook (Remand Tr. 144-149):

Glenn Cook testified as an expert in traffic engineering and transportation planning. He noted that his original traffic impact study was for 42 townhouse units. He did a revised traffic study which is part of the record dated June 12, 2006 (Exhibit 26(a)), which was for 39 townhouse units. That study showed that the proposed development would meet the requirements of the local area transportation review requirement. Since there will still be 39 units in the revised SDP, the same findings would apply. The critical lane volume (CLV) standard for the R&D village policy area remains unchanged at 1450 CLV, and Applicant is still well within that threshold.

Mr. Cook further testified that he had looked at the impact of the Policy Area Mobility Review (PAMR) in this case. Any project that generates 30 or more trips is required to comply with the PAMR guidelines. Since this project would generate 32 trips during the evening peak hour, PAMR does apply.

This property is located in the R&D Village Policy Area which, for 2009, requires a 35 percent mitigation of the trips that the project would be generating. That would mean that Applicant

would have to mitigate 12 of the trips that will be generated. Mr. Cook believes that the Planning Board recently adopted a rule allowing developments to pay a fee in lieu of mitigation, for any project that has a mitigation requirement of less than 30 trips. In this particular case, the proposed development has a mitigation requirement of 12 trips, so Applicant could meet the PAMR requirements by paying 12 times the \$11,000 fee per trip for this policy area, or by taking some other mitigation measure. The payment of this fee would be conditioned at preliminary plan, with the payment due at the building permit stage. In Mr. Cook's professional opinion, this project meets applicable requirements relating to transportation.

B. Opposition

Schain Lolatchy (Remand Tr. 87-92):

Schain Lolatchy, who owns the adjacent property to the east of the subject site, testified that he opposed the project because he feared that the construction of townhouses might lower the property value of his residence, which also houses his dance studio. When asked by the Hearing Examiner whether he had any evidence upon which to base such fear, he indicated that he did not.

Mr. Lolatchy's other concern was that his property might be damaged during construction, as it was when his neighbor to the east of him, the Academy Child Development Center, was constructed. [Applicant's counsel responded that, given the size of the property, 4.92 acres, there will be space on the subject site for staging the construction.]

C. People's Counsel

Martin Klauber, Esquire, People's Counsel (Remand Tr. 164-166):

Martin Klauber, the People's Counsel, stated that although he neither supported nor opposed the original version of this project, he now "is in full support of the requested reclassification." He emphasized that the binding portion of the SDP should be limited to the three binding elements

specified in Alternate B (Exhibit 78(f)) because uncertainty with regard to the future of the adjacent PSTA and the new Master Plan now under consideration establishes the need for flexibility when the Planning Board considers this matter at site plan. The remaining textual elements are properly set forth as “design elements” rather than as binding elements.

V. ZONING ISSUES

Zoning involves two basic types of classifications: Euclidean zones and floating zones. The term “Euclidean” zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development such as permitted uses, lot sizes, setbacks and building height.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed development will be consistent with the purpose and regulations of the proposed zone and compatible with the surrounding development. *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967). Any zone must also be consistent with a coordinated and systematic development of the regional district and in the public interest, as required by the *Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28)*, *Md. Code Ann.*, § 7-110.

Montgomery County has many floating zones, including the R-T Zone. The R-T Zone contains development standards and a post-zoning review process that delegate to the Planning Board site specific issues such as building location, landscaping and screening. We turn now to the three areas of Council

review discussed above, the purposes and requirements of the proposed zone, compatibility with land uses in the surrounding area, and relationship to the public interest.

A. The Purpose Clause and Requirements of the Zone

The intent and purpose of the R-T Zone, as stated in Code §59-C-1.721, is set forth below.

The purpose of the R-T Zone is to provide suitable sites for townhouses:

- (a) *In sections of the County that are designated or appropriate for residential development at densities allowed in the R-T Zones; or*
- (b) *In locations in the County where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.*

It is the intent of the R-T Zones to provide the maximum amount of freedom possible in the design of townhouses and their grouping and layout within the areas classified in that zone, to provide in such developments the amenities normally associated with less dense zoning categories, to permit the greatest possible amount of freedom in types of ownership of townhouses and townhouse developments, to prevent detrimental effects to the use or development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole. The fact that an application for R-T zoning complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the resulting development would be compatible with surrounding land uses and, in itself shall not be sufficient to require the granting of the application.

The R-T Zone may be applied (1) in areas that are designated for R-T Zone densities (implying a master plan designation); (2) in areas that are appropriate for residential development at densities that are allowed in the R-T Zones; or (3) where there is a need for buffer or transitional uses. While the Zoning Ordinance requires that only one of these three alternative criteria be satisfied, the Hearing Examiner agrees with Applicant's land planner, Alfred Blumberg, that in this case, all three have been satisfied. Remand Tr. 67-68.

As discussed in Part III. F. of this report, the RT-8 Zone is recommended for this site in the 1990 Shady Grove Study Area Master Plan; it is appropriate for residential development at the

density permitted in the RT-8 Zone because the site can accommodate a townhouse development compatible with surrounding area land uses and sufficiently insulated from noises generated by the PSTA; and it will serve as a transition between the PSTA use (or a new residential/commercial development to the north) and the townhouse and single-family uses south of Darnestown Road. As stated by Applicant's land planner, Alfred Blumberg, in his Post-Remand Land Use Report (Exhibit 54(i), p.14),

The PSTA is an active institutional use housing a myriad of uses and activities. The Hunting Ridge residential development on the south side of Darnestown Road has single family detached homes backing to Darnestown Road. The proposed townhome development will provide a logical transitional use between the two uses.

The pre-remand Hearing Examiner had found that the pre-remand application only marginally satisfied the intent of the R-T Zone to provide amenities normally associated with less dense zoning categories. Following the remand, however, the site layout was significantly redesigned, and the present SDP (Exhibit 78(f)) does propose more amenities for the residents, including a large open play area and a seating area in the front, a Tot Lot to the rear, and a Category II Forest Conservation Easement in the northwest corner, to which the residents will have access. Both Technical Staff and the Planning Board agreed (Exhibit 65, pp. 1-2, paraphrasing Exhibit 64, p. 16), "The revised plan represents a superior esthetic appeal and a more efficient on-site circulation than the previous plan." While much will depend on what the Planning Board approves at site plan, if the application goes forward, the Hearing Examiner finds that the current layout proposed by Applicant does provide for the "amenities normally associated with less dense zoning categories."

It is also the intent of the R-T Zone "to prevent detrimental effects to the use or development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole." Mr. Lolatchy, owner of the adjacent property to the east, fears that the construction of a townhouse development on the subject site would be detrimental to the use of his property due to noise and traffic, and would cause

its monetary value to decrease. However, his expectation of a decrease in property value is based on hearsay statements of real estate agents with whom he discussed the matter, and with a hearsay statement allegedly made during an earlier conversation with a representative of the pre-remand Applicant, Winchester Homes.

The Winchester Homes representative at the pre-remand hearing, Mr. Lyons, presented credible testimony, based on his experience in land development, that Mr. Lolatchy's property value would not decrease as a result of the proposed development. Lacking any expert testimony or written study on this point, the Hearing Examiner relies principally on the greater credibility of Mr. Lyons' direct testimony, compared with the hearsay testimony offered by Mr. Lolatchy.

This conclusion is bolstered by the common-sense observation that Mr. Lolatchy's property is already located on a block with several non-residential uses, and that the lots comprising the subject property are currently occupied by dilapidated buildings, which are eyesores. Moreover, the Applicant has committed to providing buffering along the eastern property line, between the subject site and Mr. Lolatchy's property, in the form of a wooden fence at least six feet high, plus 6 to 8-foot evergreens. *See* Design Elements 8 and 9 on Exhibit 78(f). The Applicant has further committed (Design Element 10) to include in homeowner's association documents a provision prohibiting parking on Mr. Lolatchy's property.

As discussed at some length in Part III. K. of this report, the Hearing Examiner finds that Mr. Lolatchy's fears about a diminution of his property values have not been supported by any credible evidence that his fears will be realized if this project proceeds to fruition. Moreover, the Hearing Examiner finds that other concerns raised by Mr. Lolatchy – noise, problems with overflow parking and potential harm to his property during the construction process – have been appropriately addressed by the three design elements mentioned above and by the provision of more than double the number of required parking spaces on the subject site.

There is no evidence to suggest that the proposed development would have any adverse effect on other adjacent or confronting properties or the neighborhood in general. The proposed townhouse development would blend well with the mix of residential and non-residential uses in the surrounding area, and would be very unlikely to adversely affect either the medical office building adjacent to the west, or the Training Academy to the north, both of which have more intense levels of activity than would be expected from the proposed development. If the PSTA is moved and replaced with a residential or a mixed residential/commercial community as has been discussed in Part III. B. of this report, the proposed townhouses would still fit in well with the surrounding development. As stated in the Planning Board's letter recommending approval on remand (Exhibit 65), "The proposed project would be appropriate for the site and would be compatible with existing development and future lands uses planned for the area."

Some of the residential uses across Darnestown Road are lower in density than the development proposed here, but any possible adverse impact from the proposed development would be mitigated by the width of the road, substantial vegetative buffering on the south side of Darnestown Road, and landscape buffering planned along the subject site's frontage.

For all of the above reasons, based on the preponderance of the evidence, the Hearing Examiner concludes that the proposed rezoning and development would be consistent with the intent and purpose of the RT-8 Zone. The requirements of the RT-8 Zone were discussed in Part III. G of this report. As noted there, the proposed development is consistent with all the development standards of the RT-8 Zone.

B. Compatibility

An application for a floating zone reclassification must be evaluated for compatibility with existing and planned uses in the surrounding area. The issue of compatibility was discussed both by Applicant's land planner, Alfred Blumberg, and by Technical Staff.

Mr Blumberg opined, in his Addendum to Applicant’s Land Use Report (Exhibit 57(b), pp. 5-8) that “the townhome community proposed in Local Map Amendment G-849 is compatible with the current PSTA and with any redevelopment of the PSTA site.” His rationale follows:

The subject property will play an important transitional role between the existing one-family residential development south of Darnestown Road and the future redevelopment of the PSTA site. Both the newly proposed Gaithersburg West Master Plan and the County Executive’s Property Use Initiative support the redevelopment of the PSTA property. Both documents propose the redevelopment of the PSTA site with high density, mixed use employment and residences. Both also propose a transit stop in the center of the site, surrounded by a new, transit-served community. The Planning Board Staff emphasizes the residential component somewhat more than the Executive, but that is mostly a matter of degree.

* * *

This proposed development will complement and complete the residential orientation of the portion of Darnestown Road between Travilah Road and Key West Avenue. This proposed development will complete the transition between the existing one-family residential development on the south side of Darnestown Road and either the PSTA activities or the proposed redevelopment of the PSTA site.

The proposed SDP proposes a bermed and fenced buffer between the proposed townhomes and the PSTA property. This buffer will prove beneficial whether the PSTA remains or relocates. It will provide a separation between the subject site and any future higher density residential or commercial development resulting from the redevelopment of the PSTA site. With the buildings and traffic oriented towards Darnestown Road, the proposed development will be more related to this residential portion of Darnestown Road than to the PSTA or any high-density redevelopment of that abutting property.

Technical Staff and the Planning Board agreed (Exhibit 65, pp. 1-2, paraphrasing Exhibit 64, p. 16):

The revised plan, coupled with the applicant’s written response and the noise analysis report, sufficiently addresses the four elements of the remand order. The proposed project would be appropriate for the site and would be compatible with existing development and future lands uses planned for the area.

As discussed at length in Part III. H. of this report, the noise studies and the analysis thereof by both Applicant’s acoustical expert and Technical Staff, answer the questions raised by the Council

in its remand order and demonstrate that the proposed townhouse development can appropriately exist adjacent to the PSTA or a combined residential/commercial use, if that replaces the PSTA.

Based on this record, the Hearing Examiner agrees with the findings made by the Planning Board and Technical Staff that the requested reclassification to the RT-8 Zone, and the development proposed, would be compatible with existing and proposed land uses in the surrounding area.

C. Public Interest

The applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.”
[*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities or the environment. Additional issues affecting the public interest may also be considered.

Technical Staff opined that the proposed development would be consistent with the 1990 Shady Grove Study Area Master Plan, and the Hearing Examiner agrees, based on the discussion contained in Part III. F. of this report.

The Master Plan recommends reclassification of the parcels comprising the subject property (as well as additional nearby parcels) to the RT-8 Zone as an incentive for the consolidation and coordinated development of these parcels. The properties comprising the subject site are designated on the Master Plan's Land Use Map for residential development at a density of seven to ten units per

acre, and on the Master Plan's Zoning Map as R-90/RT-8. The proposed development would also serve the Master Plan's general goals of providing for a broad mix of residential units, including affordable housing, and providing a sense of community identity for both existing and future residences. As the Applicant's land planner pointed out, the proposed development would contribute to a good balance between detached and attached single-family homes in the surrounding area.

Based on the preponderance of the evidence, the Hearing Examiner concludes that the requested reclassification and proposed development would substantially comply with the objectives and recommendations of the Master Plan.

Public facilities were discussed at length in Part III. I. of this report. The evidence indicates that enrollment at the elementary and middle school levels will be within capacity. While enrollment at Wootton High School currently exceeds 105 percent of capacity and is projected to exceed capacity in the future, the remedy specified in ¶S5 (at p. 20) of the 2007-2009 Growth Policy is a high school facilities payment to obtain subdivision approval. Moreover, the maximum of 39 dwelling units proposed here is expected to generate only four high school students. Under these circumstances, the minimal evidence of potential adverse effects on school overcrowding is not sufficient to warrant denial of the application. The evidence also demonstrates that the proposed development would not have any adverse effect on public roads, utilities or other public services.

Based on this record, the Hearing Examiner concludes that the proposed reclassification and development would have no adverse effect on public facilities warranting denial of the application.

For the reasons discussed in Part III. J. of this report, the Hearing Examiner finds that the proposed development would have no adverse effect on the environment. The Site is not in a Special Protection Area or Primary Management Area, and has no streams, wetlands or extensive areas of steep slopes. A Stormwater Management Concept Plan has been approved by DPS, and a Preliminary Forest Conservation Plan has been proposed. Stormwater management and forest conservation will be reviewed by the Planning Board at site plan and subdivision.

Finally, Technical Staff and the Planning Board both recommended approval of the post-remand SDP, finding that the current plan is a significant improvement over the pre-remand plan, and that all the concerns raised by the Council in its remand order have been appropriately addressed. The Hearing Examiner agrees.

This is not a case where the District Council is responsible for approving a binding Development Plan. The submitted SDP has an illustrative layout that is subject to change at later stages of review, provided that the binding elements are followed. In this case, the District Council is responsible for deciding whether the application of the requested zone is appropriate at this location, taking into account the binding elements shown on the SDP. The Hearing Examiner concludes, after a careful review of the record, that the requested reclassification is appropriate for the subject site, and that a development of no more than 39 townhouses can be built on the subject site in a way that will be compatible with its surroundings and in the public interest.

For all of the above reasons, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification bears sufficient relationship to the public interest to warrant its approval.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I reach the following conclusions:

1. The application satisfies the requirements and the purpose clause of the RT-8 Zone;
2. The application proposes a form of development that would be compatible with existing and planned land uses in the surrounding area; and
3. The requested reclassification to the RT-8 Zone bears sufficient relationship to the public interest to justify its approval.

VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-849, seeking reclassification from the R-90 Zone to the RT-8 Zone of 4.91729 acres of land on the north side of Darnestown Road, approximately 400 feet west of its intersection with Travilah Road, comprising properties located at 10113, 10119, 10123, 10127, 10131, 10201, and 10207 Darnestown Road, Tax Account Numbers 9-1-772871, 9-1-776297, 9-1-772882, 9-1-769463, 9-1-769452, 9-1-778593, 9-1-776286, 9-1-778525, 9-1-778514 and 9-1-778503, Rockville, Maryland, in the 9th Election District, be approved in the amount requested and subject to the specifications and requirements of the final Schematic Development Plan, Exhibit 78(f); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan within 10 days of approval, in accordance with § 59-D-1.64 of the Zoning Ordinance, and provided that the Declaration of Covenants (Exhibit 78(m)) is filed in the County land records in accordance with § 59-H-2.54 of the Zoning Ordinance.

Dated: February 25, 2009

Respectfully submitted,

Martin L. Grossman
Hearing Examiner