

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

IN THE MATTER OF:
GERMANTOWN STATION, LLC
Applicant

Michael Fisher
James Belcher
Daniel Pino
Craig Hedberg
For the Application

Jody Kline, Esquire
Attorney for the Applicant

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Zoning Application No. G-833

Before: Martin L. Grossman, Hearing Examiner

**HEARING EXAMINER’S REPORT AND RECOMMENDATION
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I. EXECUTIVE SUMMARY

Applicant:	Germantown Station, LLC
LMA No. & Date of Filing:	G-833, filed November 11, 2004; Revised December 4, 2004
Zoning and Use Sought:	Zone: R-T 8 Use: 29 Single Family Townhouses (including 4 MPDU's)
Current Zone and Use:	Zone: I-3 & R-200 Current Use: Unimproved
Location:	Just south of, and adjacent to, the CXS Tracks, north of Lullaby Road and west of Farther Hurley Boulevard.
Applicable Master Plan:	<i>1989 Germantown Master Plan</i>
Acreage to be Rezoned:	Approximately 4.5668 acres (199,069 sq. ft.)
Density Permitted in R-T 8 Zone:	8 units per acre = 36 Dwelling Units on 4.5668 acres
Density Planned:	6.4 units per acre (<i>i.e.</i> , 29 Dwelling Units on 4.5668 acres)
Bldg. Coverage Allowed/Planned:	35% Maximum (69,674 sq.ft.) / committed to 20% maximum
Green Space Required/Planned:	50% Required (99,534 sq.ft.) / 60% planned; 55% committed
Parking Spaces Required/Planned:	58 required (2 spaces per unit) / 124 planned (4.28 per unit)
Building Height Limits:	35 feet maximum allowed / 35 feet planned
Traffic Issues:	No apparent traffic problems
Storm Water Drainage:	All required Stormwater Controls will be provided on site
Consistency with Master Plan:	The Master Plan recommends the current I-3 and R-200 Zones, but recent development in the area is more compatible with an entirely residential development.
Neighborhood Response:	General support from the neighborhood, which prefers the planned townhouses to the previously planned office building.
Main Issues in Case:	Whether rezoning to R-T 8 should be approved despite the contrary land use recommendation of the applicable Master Plan and whether noise from the adjacent CSX tracks would render the site inappropriate for development in the R-T 8 Zone?
Planning Board Recommends:	Approval, with a caveat that the subject proposal is "unique" and that the Board "is not encouraging other Germantown-area landowners with employment-zoned land to request zoning changes for uses other than employment."
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval

II. STATEMENT OF THE CASE

Application No. G-833, filed on November 11, 2004 and revised on December 4, 2004, by Applicant Germantown Station, LLC, requests reclassification from the existing I-3 (Technology and Business Park) and R-200 (Residential- single family) Zones to the R-T 8 Zone (Residential Townhouse, with maximum of 8 units per acre) of 4.5668 acres of land. The matter was originally calendared for a hearing on March 28, 2005, but at Applicant's request (Exhibit 33), the hearing was continued until June 17, 2005, and notice to that effect was issued (Exhibit 34).

The subject site (Tax Account Nos. 02-00016426 and 02-03328572) is comprised of Part of Parcel 807 and Parcel 730, and it is located just south of, and adjacent to, the CXS Right-of-way, north of Lullaby Road and west of Farther Hurley Boulevard, in Germantown. The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits the filing of a Schematic Development Plan (SDP), containing binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development with “[n]ot more than 29 (twenty-nine) one-family attached [dwelling] units [, including MPDU’s].”

The application was reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission (“M-NCPPC”), who, in a report dated May 23, 2005 (Exhibit 36), recommended approval.¹ The Montgomery County Planning Board (“Planning Board”) considered the application on June 2, 2005 and unanimously recommended approval, as stated in the Board’s Memorandum of June 6, 2005 (Exhibit 40). The Board added the caveat that the subject proposal is “unique” and that the Board “is not encouraging other Germantown-area landowners with employment-zoned land to request zoning changes for uses other than employment.”

A public hearing was convened on June 17, 2005, at which time the Applicant presented the testimony of four witnesses. There was no opposition at the hearing, and there were no letters of opposition filed in the record, although some concerns were expressed by the Gaithersburg-Germantown

¹ The Technical Staff Report is quoted and paraphrased frequently herein.

Chamber of Commerce, in a letter to the Chairman of the Planning Board dated March 7, 2005, about the proposed conversion of the land use from an employment-generating office building to a residential use. Attachment C to Exhibit 36. On the other hand, the application received support, by letter and e-mail, from three local citizen associations (the Village at Oak Hill Community Association; the Germantown Alliance; and the Germantown Citizens Association). See Exhibits 45, 46 and 47.

The hearing was completed on June 17, 2005, and the record was held open until July 1, 2005 to allow Applicant time to file a revised SDP and additional materials. Applicant filed the revised materials, as well as the new SDP (Exhibit 56(a)), and the record closed on July 1, 2005. It was reopened briefly on August 3, 2005, to allow admission of the above-mentioned March 7, 2005 letter from the Gaithersburg-Germantown Chamber of Commerce (Exhibit 59). It was reopened again on August 12, 2005, at Applicant's request, to allow submission of a corrected SDP (Exhibit 61(a)) and a revised Forest Conservation Plan (Exhibit 61(b)). Notice of the changes was issued and the record was held open until August 22, 2005 for any comment from interested parties. None was received.

The only significant issues in this case are whether rezoning to R-T 8 should be approved despite the contrary land use recommendation of the applicable Master Plan and whether noise from the adjacent CSX tracks would render the site inappropriate for development in the R-T 8 Zone. On balance, the Hearing Examiner concludes that development in the R-T 8 Zone would be appropriate.

III. FINDINGS OF FACT

A. Subject Property

The subject site is a dagger-shaped² strip of land adjacent to the CXS right-of-way in Germantown. The dagger points in a northwesterly direction, with its butt end (*i.e.*, extreme eastern portion) fronting on Farther Hurley Boulevard (about 130 feet of frontage), and the southern side of

² Both the Applicant and Technical Staff describe the subject site as "trapezoidal." Exhibit 30, page 1 and Exhibit 36, Page 2. Since the shape of the property does not meet the definition of trapezoidal, that term is not used herein. Instead, the subject site is described as "dagger-shaped," in this report, because that is what it most closely resembles to the Hearing Examiner.

its handle fronting on Lullaby Road (about 600 feet of frontage). Exhibit 12. The shape and location of the site can be seen on the following aerial photo (Part of Exhibit 10):



The vast majority of the 4.5668 acre tract is in the I-3 Zone; however, a small (0.12 acre), triangular shaped piece, on the southern side of the site, was after-acquired by the Applicant in a land swap with a neighbor, and it retains its R-200 classification. Tr. 17-19. The small R-200 triangle has been drawn in and labeled on the aerial photo above.

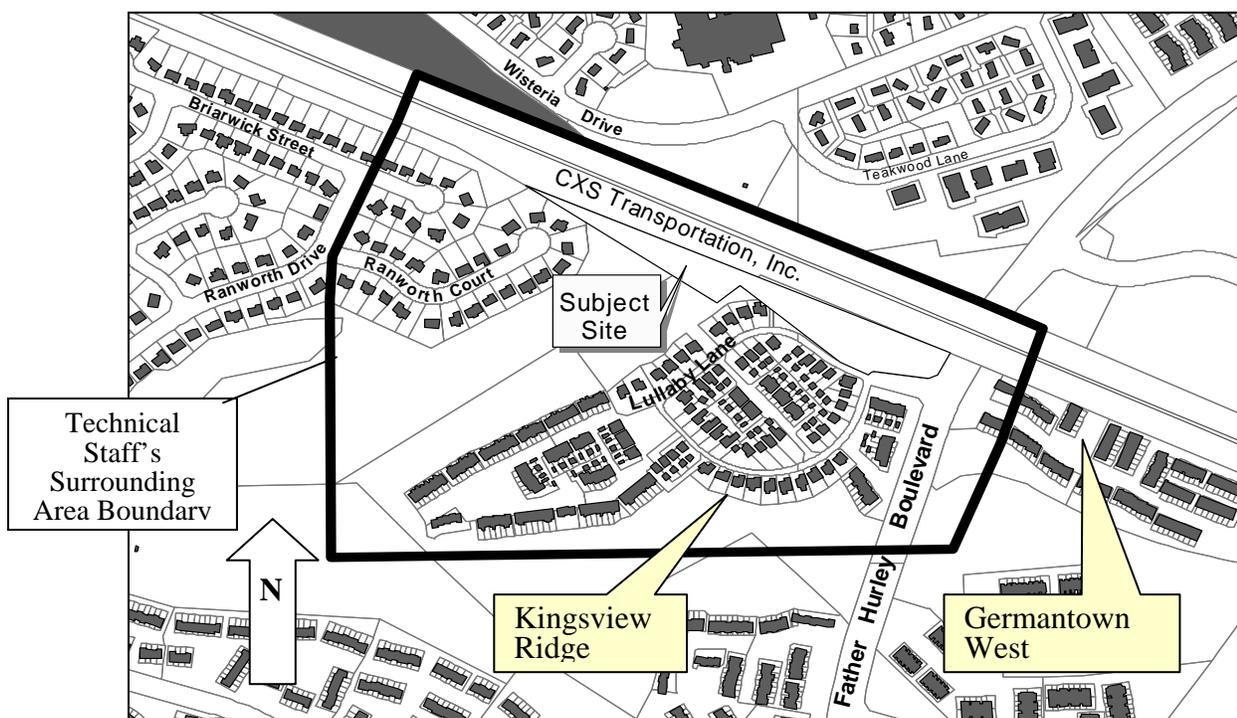
There are no existing improvements on the site. According to Technical Staff, the topography is such that it slopes upward from west to east and downward from Lullaby Road towards the railroad right of way. A sediment control permit was issued for the site, pursuant to which the eastern half of the property has been cleared and graded, and a retaining wall was constructed at the northern property line where it adjoins the CSX Railroad right-of-way. Land Planning Report, Exhibit 12. The western half of the property is forested with steep slopes, descending to the west. The area identified as a forest retention area has been preserved undisturbed, and a broad swale runs along the

back half of the property. Exhibit 12. Technical Staff notes that there are no historic structures or sites located on the property.

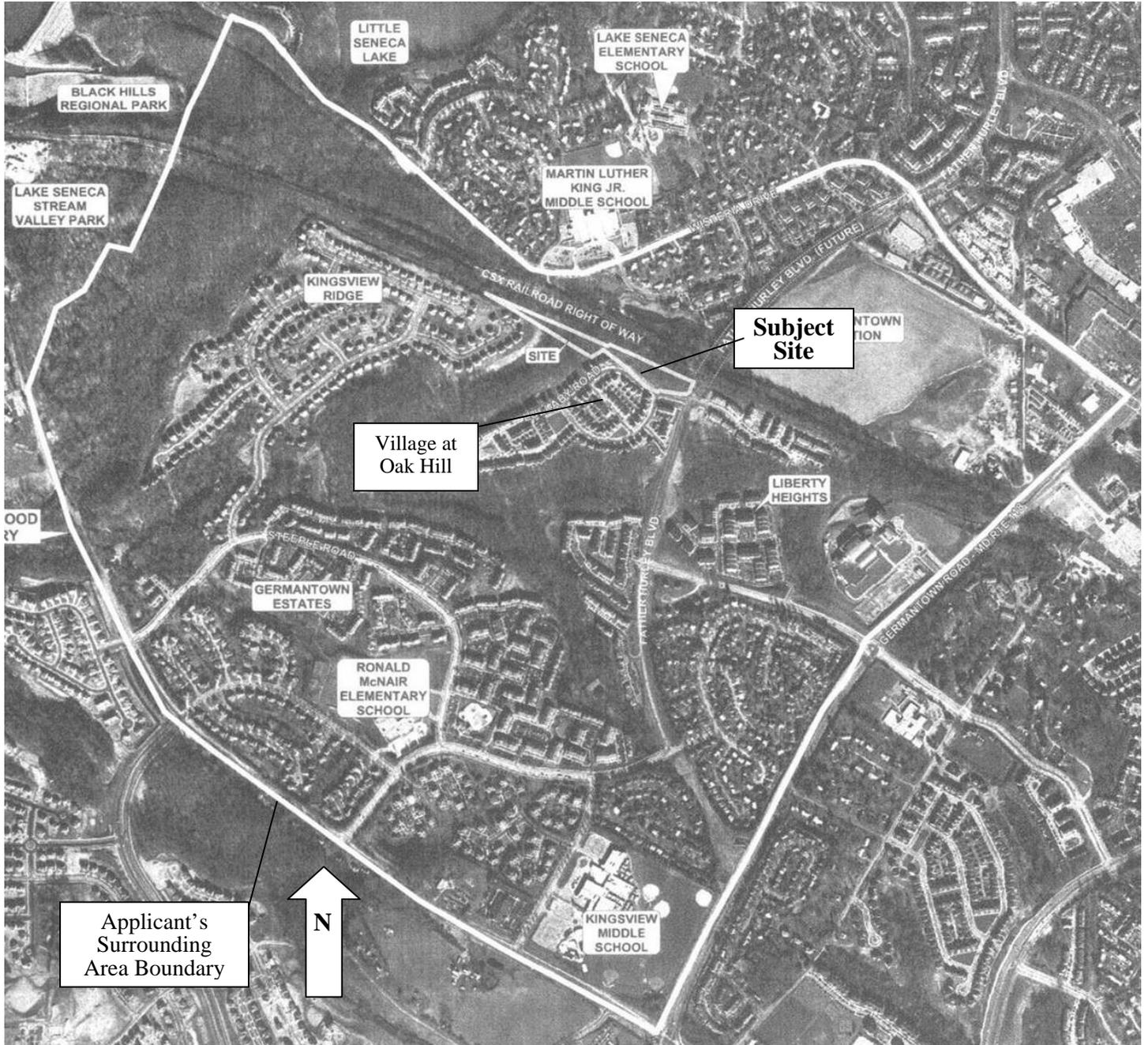
Because Applicant originally intended to erect an office building on the subject site, it obtained site plan approval from the Planning Board for a 27,000 square foot office building. Applicant now feels that the proposed townhouse community would be a more compatible development.

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. Technical Staff recommends describing the “surrounding area” as bounded by the CSX Right-of-way to the north, the properties fronting along Father Hurley Boulevard to the east, the properties in the Kingsview Ridge subdivision to the south, and Ranworth Drive to the west. Staff’s “surrounding area” can be seen on the following map from page 3 of the Technical Staff report (Exhibit 36).



The Applicant suggested a broader definition of the surrounding area, as shown on its aerial photo, Exhibit 10, which also shows the surrounding developments, most of which are residential.



Applicant's land use expert, James Belcher, testified that, in his opinion, the surrounding area, as outlined on the aerial photo, is bound on the east by MD Route 118 (Germantown Road), on the north by Wisteria Drive, on the west by [Little Seneca Creek] in Black Hills Regional Park, and

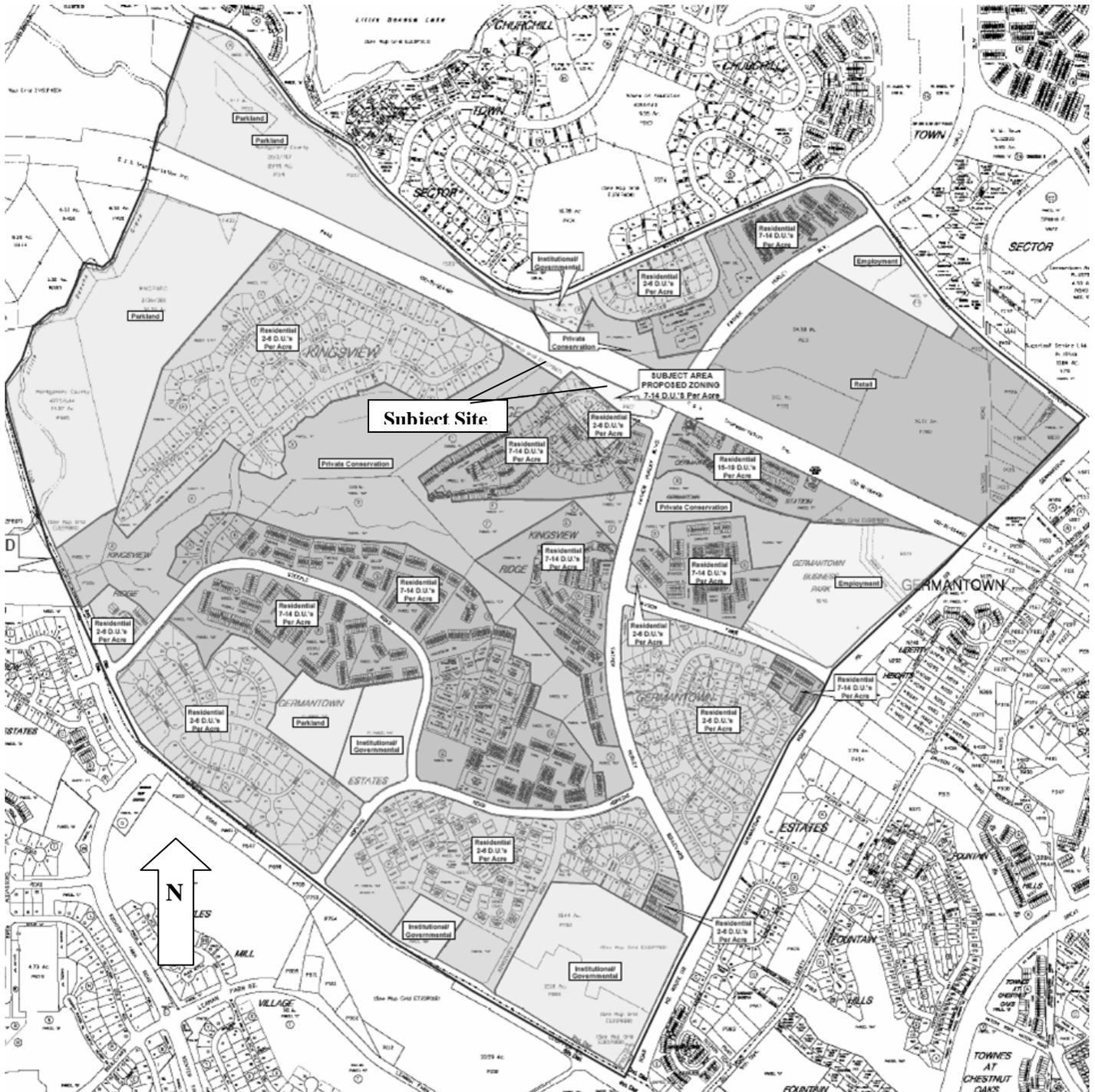
on the south, by Clopper Road. Tr. 47-48. The Hearing Examiner will accept Applicant's definition of the "surrounding area" because it is identical to the one that was recommended by the Hearing Examiner and accepted by the Council in Local Map Amendment (LMA) G-723,³ where the Council rezoned the confronting property (across Father Hurley Boulevard) from I-3 to PD-15 so that a large townhouse community could be developed.

The surrounding area contains a mixture of land uses and densities. Immediately to the north of the subject site is the CSX Right-of-way. Northeast of the site, across Father Hurley Boulevard and north of the CSX tracks, is Fairfield at Germantown, a development including 620 residential units and 250,000 square feet of office/retail use. Exhibit 36. Immediately to the east of the subject site, across Father Hurley Boulevard and adjacent to the CSX tracks, is the townhouse community in the PD-15 Zone which was mentioned above. Further to the east, at the eastern border of the described neighborhood, lies the Germantown Business Park, a property that has been approved for development under the I-1 and O-M zones. Exhibit 12. Immediately to the south of the subject site is the Village at Oak Hills. It is part of the Kingsview Ridge subdivision, which is a mix of single family homes and townhouses in the R-200 and R-90 Zones. The Kingsview Ridge subdivision also extends further south and west of the subject site with a development of single-family detached homes. Further south is the Germantown Estates subdivision, developed with townhouses in the R-90 zone. There are also other subdivisions developed in the R-T 6.0 and the R-200/TDR zones.

The subject property is part of Kingsview Village, as designated in the Germantown Master Plan. Kingsview Village is characterized by mixed-use, residential development containing a blend of single-family detached homes, townhouses and multi-family units. The densities of the surrounding developments range from two dwelling units per acre in the development to the southwest of the subject property, to 11.9 dwelling units per acre in the property to the east of Father Hurley Boulevard. The

³ The Hearing Examiner takes administrative notice of the Council's Resolution 13-618, dated July 23, 1996, and the Hearing Examiner's report in LMA G-723.

properties further south and to the west of Father Hurley Boulevard reflect densities ranging from 5.9 to 20.9 dwelling units per acre, having been subdivided for development with a mix of townhouses and multi-family uses. Exhibit 12. This mixed-use surrounding area is also depicted on Exhibit 43, which is displayed below.



C. Zoning History

Technical Staff recites the Zoning History of the site as follows:

1. Comprehensive Zoning

- a. SMA G-652: I-3 Zone enacted and mapped (02/13/1990)
- b. SMA G-569 R-200 reconfirmed (07/10/87)
- c. SMA G-539 R-200 reconfirmed (06/23/87)
- d. SMA G-404 R-200 reconfirmed (03/22/84)
- e. SMA F-939 R-200 reconfirmed (09/03/74)
- f. 1958 County-wide Comprehensive Zoning: R-R (R-200) Zone Mapped

2. Local Map Amendment Applications: None on the subject site.

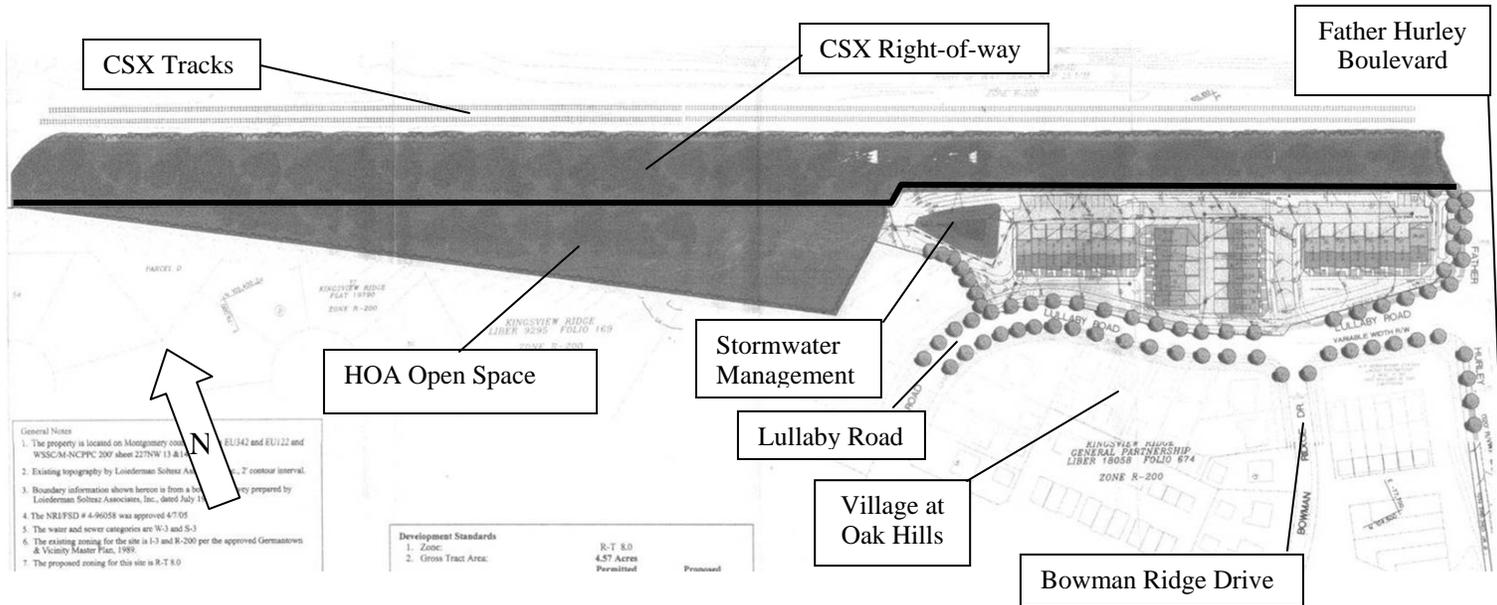
The subject site itself is part of a 21 acre tract owned by Applicant. Tr. 14. It had been zoned R-200, going back to 1958, but after the Applicant bought the tract in 1989, it was rezoned in its entirety to I-3 by Sectional Map Amendment G-652, filed in conjunction with the 1989 Germantown Master Plan. Tr. 17 and Exhibit 12. A 12.8 acre portion of that tract (the portion east of Farther Hurley Boulevard and south of the CXS tracks) was rezoned to PD-15 in 1996 by Local Map Amendment (LMA) G-723, as noted above. In that case, the Hearing Examiner's Report, July 3, 1996 (page 11), states that "The Planning Board now considers the site less critical for employment uses than other locations in the Germantown employment corridor along I-270."

The subject site, which is across Father Hurley Boulevard from the townhouse development that grew out of LMA G-723, remains in the I-3 Zone, except for the small triangle of property which Applicant acquired in a land-swap subsequent to the sectional map amendment. As mentioned above, that 0.12 acre sliver of land is in the R-200 Zone. Tr. 18-19.

D. Proposed Development and the Noise Issue

The Applicant seeks to have the subject site reclassified from its current I-3 and R-200 Zones to the R-T 8 Zone so that it can construct a maximum of twenty-nine (29) residential townhouse units, including four moderately priced dwelling units (MPDU's), with parking for

124 vehicles on the 4.5668 acre subject site. An overview of the project, which the Applicant has named “Gateway Park” on the SDP,⁴ can be seen in the illustrative diagram below, taken from a rendered version of the SDP (Exhibit 44):



As can be seen from this site layout, the proposed development has two distinct halves, separated by a stormwater management facility. The eastern half (*i.e.*, the handle of the dagger) has all the structures and impervious surfaces, while the western half (*i.e.*, the blade) has most of the green space, much of it in a Forest Conservation Easement. That western green space is labelled “HOA Open Space” on the SDP, and no construction is permitted in that area because of a stream valley buffer and the forest conservation area. Tr. 56-58. The green space to the north of the solid black line on the above site layout is in the CSX Right-of-way.

Applicant does intend some green public use areas on the eastern half of the project, consisting mostly of two triangular green spaces adjacent to Lullaby Road, one with 4,787 square feet of space and the other with 4,031 square feet (Exhibit 61). As will be seen below, Applicant has also agreed to a binding element restricting use of the open space on the western half of the site to construction of a

⁴ The project has been variously referred to in the exhibits as “Germantown Station,” “Gateway Park,” and “Gateway West.” In its letter of March 7, 2005, the Gaithersburg-Germantown Chamber of Commerce refers to the site as “the Village at Oak Hills,” which is actually an existing residential community immediately to the south of the subject site. Applicant has contemplated having its development join the Oak Hills Homeowners Association.

pedestrian path so that residents can access and enjoy the large green area. Applicant indicates on the SDP that it plans to have 60% green space (although Applicant commits to 5% less, a minimum of 55%, in its binding elements). Individual units will have green space also in their yards (Tr. 57), and streetscape amenities include landscaping, sidewalks, and street trees. Exhibit 36.

The proposal counts four parking spaces for each individual market unit, with two spaces in each rear-loading garage and two tandem spaces on each driveway, for a total of 100 spaces. For additional visitors to the development, and the MPDUs, 24 surface parking spaces are provided, bringing the total parking to 124 spaces. According to Technical Staff, there is no street parking available on this section of Lullaby Road. Vehicular access to the site will be from Lullaby Road at Bowman Ridge Drive.

It is Applicant's objective to keep the architecture compatible with nearby communities. The townhouses will be 2½ stories tall, and the units facing Lullaby Road will have garages to the rear, along the railroad, so their parked cars will not be visible from Lullaby Road. Tr. 36-37. The 24 street parking spaces are also located between the railroad and the rear of the units. The MPDU units are designed with two "back-to-back" dwelling units per structure, located in two individual structures numbered 9-10 and 28-29. Tr. 35-38. These units do not include the rear-entry parking provided for the other units, but as mentioned, there is additional parking provided by surface parking spaces located as close to the buildings as possible.

The property has an approved Stormwater Management Plan. There is an existing sediment trap in the middle of the site where the future stormwater management pond will be located. Exhibit 12.

As mentioned in Part II of this report, one significant issue in this case is whether location of the planned townhouse units so close to the CSX tracks will expose future residents to excessive noise, thus rendering the site inappropriate for development in the R-T Zones. To meet this issue, Applicant employed an acoustical consulting firm, Polysonics Corporation, to analyze the potential noise problem. Their analysis is included in the record as Exhibit 14, "Transportation Noise Analysis."

Polysonics' study included a 24 hour survey of noise created by trains passing the subject site (and analyzed anticipated highway traffic noise, as well). During that period, 26 freight trains and 20 MARC trains were documented to travel past the site. Five of the freight trains and five of the MARC passenger trains passed by the property during the nighttime hours of 10:00 p.m. to 7:00 a.m. Because no grade crossings are located within close proximity to the site, Polysonics found that train whistles are not a contributing factor to noise impact on the site. Also, the section of track located adjacent to the site is straight, and individual track segments are welded, rather than bolted, together.

The results of the analysis indicate that future "unmitigated" ground noise levels exceeding 60 dBA will impact the entire Gateway West site. Polysonics therefore concluded that mitigation measures such as noise barriers will be required if there will be outdoor activity areas such as rear yards, patios, or courtyards planned for the property. However, they noted that "significant shielding from proposed buildings to potential outdoor recreational areas is expected [and the] proposed buildings, located between the railway or roadway and the impacted outdoor activity areas, will effectively serve as noise barriers." Polysonics also recommended that the existing privacy fence, located adjacent to the railway, be modified by closing all gaps, if it is to be utilized for noise mitigation.

Montgomery County noise code requires residential interior noise levels to meet 45 dBA levels. According to the Polysonics report, a residential unit of good quality construction in today's market will reduce outside noise levels as high as 65 dBA to a recommended level of 45 dBA indoors without modification. If necessary, interior noise levels of 45 dBA can be achieved with modified windows, doors, and wall constructions as necessary for impacted townhomes. Polysonics recommended a refined acoustical analysis to determine building mitigation effects once building elevations and grading plans become finalized. Polysonics added that because none of the proposed townhomes is located within 100 feet of the rail line, there should not be excessive vibration transmitted through the ground from the tracks.

James Belcher, Applicant's land use expert, testified that limited space on the subject site would not permit all of the units to be arranged perpendicular to the tracks, which also would have helped to reduce the noise impact. Tr. 56-58. Michael Fisher, a partner in Applicant, admitted that noise from the railroad has been a concern, but he testified that the noise can be mitigated through architectural design, according to acoustical experts (*i.e.*, Polysonics Corporation.). When asked about exterior noise, Mr. Fisher replied that Applicant would build a six foot tall board-on-board fence along the northern property line parallel to the railroad tracks. The fence, combined with the topography and the grading, would be sufficient to break up that noise and lower the decibel level to acceptable amounts, according to the sound engineer. Tr. 38-43.

The property had been graded, and it is approximately 12-14 feet above the railroad grade. The six foot tall board-on-board fence would be erected near the high point of the site, creating a sound barrier. From Applicant's property line to the center of the two railroad beds is a 100 foot distance within the CSX right-of-way. In that 100 feet, there are railroad tracks and a large wooded area, which is about 75-80 feet wide, and it provides additional noise buffering. Tr. 38-43. See Exhibit 44, reproduced on page 11, above.

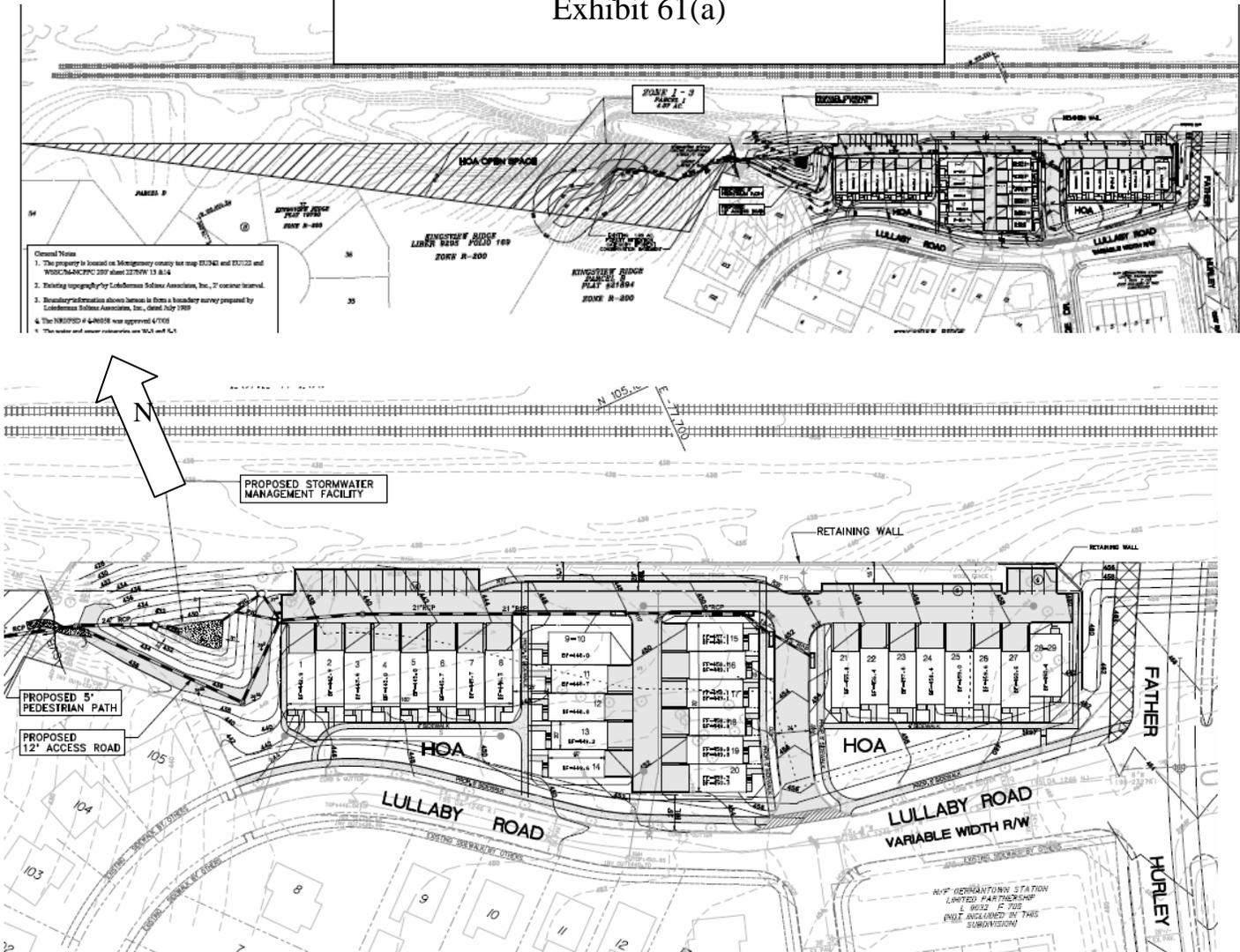
Although the potential of noise from the nearby CSX railroad concerns the Hearing Examiner, it is evident from the Polysonics report that appropriate sound mitigation measures can be taken to insure that noise from the trains does not exceed County standards. Moreover, residential developments have been approved just as close to the tracks on either side of the subject site (See aerial photo on page 9, above, and Exhibit 43 on page 11, above), so apparently the railroad noise can be sufficiently buffered. It thus does not appear that the potential for train noise should preclude rezoning the subject site for residential use; however, the Planning Board should certainly look into this issue at Site Plan review to assure that appropriate sound mitigation measures are taken. The Technical Staff report (Exhibit 36) indicates that steps to deal with the noise problem will be considered at that time.

If rezoning is approved, then the proposal will have to go through review and approval of a Preliminary Plan of Subdivision and a Site Plan review. No phasing schedule for construction of the development is proposed (Exhibit 15), and there are no historic resources on the property.

E. Schematic Development Plan and 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. The site layout on the revised SDP (Exhibit 61(a)) is illustrative, and it is shown below, followed by a blowup of the housing portion of the site:

Illustrative Site Layout of Revised SDP – Exhibit 61(a)



In addition to the illustrative graphic on the SDP, there is a section of the SDP which describes the development's "General Notes" and "Binding Elements:"

General Notes

1. The property is located on Montgomery county tax map EU342 and EU122 and WSSC/M-NCPPC 200' sheet 227NW 13 &14
2. Existing topography by Loiederman Soltesz Associates, Inc., 2' contour interval.
3. Boundary information shown hereon is from a boundary survey prepared by Loiederman Soltesz Associates, Inc., dated July 1989
4. The NRI/FSD # 4-96058 was approved 4/7/05
5. The water and sewer categories are W-3 and S-3
6. The existing zoning for the site is I-3 and R-200 per the approved Germantown & Vicinity Master Plan, 1989.
7. The proposed zoning for this site is R-T 8.0
8. The project lies within the Germantown & Vicinity Master Plan, Planning Area 19 and is also in the Little Seneca Creek Watershed
9. There are no designated historic sites associated with this property
10. Utility Companies for the site are as follows:

Electric	Potomac Electric Power Company
Telephone	Verizon
Gas	Washington Gas
Cable Television	Comcast (Former Cable TV Montgomery)
Water	Washington Suburban Sanitary Commission

DEVELOPMENT STANDARD	PERMITTED/ REQUIRED	BINDING ELEMENT
1. Land Use	As Per Sec. 59-C-1.7 (R-T 8.0)	Exclusively one-family attached dwelling units
2. Density	8 d.u./acre (36 one-family attached units)	Not more than 29 one-family attached units
3. Building coverage	35% or 69,674 SF	Not more than 20%
4. Green space	50% or 99,534 SF	Not less than 55%
5. Setbacks	To be determined at Site Plan review.	No proposed building shall be closer than 50' to any existing building.
6. Use of forest conservation area	See Sec. 59-C-1.7	In the area designated no use shall occur except construction, maintenance and use of a pedestrian pathway for use by residents of the community, the location and surface material of which shall be determined at site plan review.
7. Use of area adjacent to Father Hurley Boulevard	See Sec. 59-C-1.7	In the area designated no use shall occur except installation of streetscape improvements as required at the time of site plan review.

Those elements designated by the Applicant as binding must also be set forth in a Declaration of Covenants to be filed in the county land records if rezoning is approved. The Applicant has filed the executed Declaration of Covenants in the administrative record of this case as Exhibit 58 (a).

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. The Binding Elements in this case would give the Planning Board some flexibility to make revisions because, the density, building coverage and green space Binding Elements are expressed in maximums and minimums, rather than absolute values.

In addition to the General Notes and Binding Elements, the revised SDP contains a description of the Development Standards for the Zone, which is set forth below.

Development Standards		
1. Zone:	R-T 8.0	
2. Gross Tract Area:	4.57 Acres	
	Permitted	Proposed
3. Density of development 8 DU/Ac.	36	29
		(Including MPDU's)
4. Parking	Required	Provided
▪ Residential (29 units) 2/D.U.	58	50
▪ Tandem Spaces		50
▪ Surface Parking		24
Total	58	124
	Permitted	Proposed
5. Building Height	35'	35'
6. Building Row Design	8 maximum	8 maximum*
	3 minimum	3 minimum
7. Building Setbacks	Required	Provided
From public street	25'	25'
Side (end unit)	10'	10'
Rear	20'	20'
8. Maximum building coverage	35%	20%
9. Minimum Green Area	50%	60%
* At time of Site Plan review, compliance with Section 59-C-1.722 will be assured resulting in a relocation of a dwelling unit if necessary.		

The Applicant in the present case has proposed binding elements which limit development to a maximum of 29 one-family attached units, with a maximum building coverage of 20%, and a minimum green area of 55%. Binding elements also require that Applicant not erect any building within 50 feet of an existing building, that construction in the open space on the western half of the site be restricted to construction of a pedestrian path so that residents can access and enjoy the large green area, and that only streetscape improvements may be erected in a designated area on the eastern side of the site, along the future extension of Father Hurley Boulevard.

F. Master Plan

The subject property is located in the area covered by the *Germantown Master Plan*, approved and adopted in 1989. Technical Staff correctly observes that the proposed schematic development plan does not conform to the land use and zoning recommendations in the Master Plan. The Master Plan specifically refers to the Kingsview Village Analysis Area on Page 70, Figure 21, identifying the subject site as “KI-B” and recommending the I-3 Zone for the site (Page 71). Moreover, the Master Plan’s objectives include increasing employment opportunities and reducing the number of single-family attached units as a total percentage of all housing units in Germantown in order to alleviate what it characterized as a “very monotonous, generally undifferentiated townscape” (Page 30). Neither of these objectives will be advanced by the subject proposal.

On the other hand, it also must be remembered that the Master Plan is only a guide, and compliance with its recommendations is not mandatory unless the Zoning Ordinance makes it so. See *Richmarr Holly Hills, Inc. v. American PCS, L. P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997). Since the provisions of the R-T 8 Zone (Zoning Ordinance §§59-C-1.7, *et seq.*) do not require compliance with the Master Plan, the question of whether or not to reject a requested

reclassification due to lack of Master Plan compliance becomes a policy issue, and not a legal question.⁵

What is the correct policy decision regarding the proposed rezoning? Both the Planning Board and the Technical Staff recommended approval of this application, apparently feeling that circumstances have changed significantly since the Master Plan was adopted in 1989. Technical Staff points out that job growth is expected to exceed household growth in Germantown around 2015, and that the employment yield from erecting an office building at this site would generate only 100 jobs, representing a small fraction of the 78,000 jobs that Germantown is ultimately projected to have. Staff also observes that the desired mix of housing in Germantown will be difficult to achieve due to limitations of uncommitted land parcels and market trends.

Even more important, in the Hearing Examiner's estimation, is the growth of residential land use in the immediate area of the subject site. The area designated "KI-B" on the Master Plan includes not only the subject site, but also the confronting land east of Farther Hurley Boulevard, adjacent to the CSX railway, and that land was reclassified by the Council to the PD-15 Zone in 1996. It is now the site of a townhouse community. That PD-15 residential development just to the east of the subject site was built after the Master Plan's adoption, as was the Village of Oak Hill residential development immediately to the south of the subject site. Tr. 79. Thus, developments since the Master Plan's adoption have made the subject site much more compatible with a residential zone than with an I-3 zone.

Applicant's land use expert, James Belcher, testified that the recommendations of the 1989 Germantown Master Plan must be looked at in the context of subsequent development in the area. Tr. 79. The Hearing Examiner agrees, and joins in the affirmative recommendations of Technical Staff

⁵ Because the Planning Board recommended approval, a simple majority of 5 members of the Council is required for approval pursuant to Zoning Ordinance §59-H-8.2(b).

and the Planning Board. Given the surrounding development, an office building in the I-3 Zone would not be nearly as compatible as the proposed townhouse development in the R-T 8 Zone.

G. Special Regulations and Development Standards of the Zone

Special regulations for the R-T 8 Zone are spelled out in Zoning Ordinance §59-C-1.72, beginning with the stated “Intent and Purpose” of the Zone in §59-C-1.721. The issue of whether the subject application comports with the intent and purpose of the R-T 8 Zone is discussed later, in Part V.A. of this report. We turn now to the other regulations of the Zone.

Although one stated intent of the R-T Zone is “to provide the maximum amount of freedom possible in the design of townhouses and their grouping,” the Zone nevertheless has special row design requirements for townhomes. Zoning Code §59-C-1.722. The maximum number of townhouses in a group is eight, and three continuous, attached townhouses is the maximum number permitted with the same front building line. Variations in the building line must be at least 2 feet.

Applicant’s illustrative SDP shows that these requirements have been met, for the most part. The proposed development is comprised of four “sticks” of townhouses. None of them exceed eight structures, which Applicant refers to as “footprints” (Tr. 36-37), but one of the groupings contains a double MPDU unit (28-29), which brings the total number of townhouses in that stick to nine units. Zoning Ordinance §59-C-1.722(a) does not limit the number of “footprints” in a row; it limits the number of “townhouses” in “any one attached row.” Since the SDP site layout is only illustrative, and Applicant’s binding elements require a maximum (not an exact number) of 29 units, the Hearing Examiner does not feel that rezoning should be denied on that basis. Moreover, Zoning Ordinance §59-C-1.74(d)(2) permits this requirement to be waived to accommodate increased density necessitated by the inclusion of MPDU’s. Technical Staff and the Planning Board should examine, at Site Plan review, whether the density has been increased so as to make this waiver provision applicable, or whether units must be rearranged or the number cut back to insure compliance with

the ordinance.⁶ All the groups show the required two-foot variation in their front building lines. The proposed density for the submitted development is approximately 6.35 dwelling units per acre (29 units / 4.5668 acres), though a density of 8 dwelling units per acre is permitted in the Zone.

Zoning Ordinance §59-C-1.723 is inapplicable because Applicant has not sought to combine R-T Zoned tracts with different residential zones; rather, Applicant seeks to have the entire subject site reclassified into the R-T 8 Zone. The Development Standards for the R-T 8 Zone are spelled out in Zoning Ordinance §59-1.73. As shown in the table below, the proposed development would meet or exceed the applicable development standards for the R-T 8 Zone.

Development Standards for R-T 8 Zone -- Code §§ 59-C-1.731 - 1.735

Development Standards for R-T 8 Zone		
Standard	Permitted/Required	Proposed
Minimum tract area	20,000 sq. ft. (0.46 ac.)	199,069 sq .ft. (4.5668 ac.)
Maximum density	8 units/ acre (36 max)	6.35 units/ acre (29 max)
Building setback requirements		
- Public street	25 feet	25 feet
- From adjoining lots (Side)	10 feet	10 feet
- From adjoining lots (Rear)	20 feet	20 feet
- From adjacent single family detached or land classified in a one-family, detached residential zone	30 feet	50 feet min
Maximum Building Height	35 feet	35 feet max
Minimum Green Area	50 percent	55 % min/ 60% planned
Maximum Building Coverage	35 %	20% max
Minimum Parking	2 spaces/ unit (58)	4.28 spaces/unit (124)

⁶ A notation on the SDP gives Applicant’s assurance of compliance with the row requirements at Site Plan review.

H. 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 will 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 are set by the County Council in the Annual Growth Policy ("AGP") and biennially in the two-year AGP Policy Element.

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 the 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 scope of Council's review is much broader at the zoning stage than that which is available to the Planning Board at subdivision, a process designed to more intensively examine the "nuts and bolts" of public facilities.

1. Transportation

Subdivision applications are subject to Local Area Transportation Review ("LATR") requirements.⁷ LATR generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion during the peak hour of the morning and evening peak periods. As of July 1, 2004, an LATR traffic study is not required unless a proposed development would generate 30 or more peak-hour automobile trips.

⁷ The Policy Area Transportation Review (PATR) was eliminated by the Council in the FY 2003-05 Policy Element of the new AGP, for cases in which a completed application for subdivision is filed on or after July 1, 2004, and the PATR will therefore not be considered in this report.

Applicant employed Craig Hedberg, an expert in transportation planning, to evaluate the impact of the proposed development on area roadways. Mr. Hedberg used LATR procedures and the associated trip generation rates for a 29 unit townhouse development to project peak hour traffic that would be produced by the planned development. Based on this analysis, he projected that peak hour trips were a maximum of 24 trips in the p.m. peak hour and 14 trips in the a.m. peak hour. Tr. 88-91.

Mr. Hedberg testified that the trip level falls below the 30 trip criterion which would require a traffic study under Local Area Transportation Review, so all that is necessary at the time of subdivision would be the transportation statement. Nevertheless, for comparative purposes he looked at what traffic an office building, such as the one that had been approved for this site, would have generated, if built. He found that the office use would have generated 59 peak hour trips in the p.m. and 38 peak hour trips in the a.m., more than twice as much as the currently planned 29 unit townhouse community. Transportation Planning Staff agreed that an LATR traffic study was not needed in this case.

In Mr. Hedberg's professional opinion, the connection to the public road system and the way the development has been set up for circulation purposes is safe, adequate, and efficient for the proposed use. There are linkages for the pedestrian network, and the entrance roadway will align with the existing road to the south which is the way an intersection should be set up. It will be safe for pedestrian as well as for vehicular traffic. Tr. 88-91. Transportation Planning staff agreed that both vehicular and pedestrian systems are safe and adequate. Exhibit 36, Attachment A. The Hearing Examiner so finds based on the undisputed evidence.

2. Utilities

Technical Staff stated in its report that the subject site is served by public water and sewer systems, in service categories W-3 and S-3, respectively, and that local service is deemed adequate.

See Staff Report at 6. Daniel Pino, Applicant's expert in civil engineering, testified that the property is served by adequate public facilities, including public water and sewer services. Tr. 85.

3. Schools

James Belcher testified that this project will be served by the Ronald McNair Elementary School, Kingsview Middle School, and the Northwest High School. Collectively they all are within the Northwest Cluster, and the current Annual Growth Policy (AGP) school tests finds capacity adequate within that cluster. Tr. 77. All three schools have some form of renovations pending, some to be placed in use as early as this summer through the next fiscal year. This testimony is supported by the March 3, 2005 letter of Joseph J. Lavorgna, the Director of Planning and Capital Programming for the Montgomery County Public Schools. Exhibit 36, Part of Attachment C.

Mr. Lavorgna stated in his letter that the proposed development will generate approximately 8 elementary, 3 middle and 5 high school students. The subject property is located within Ronald McNair Elementary School, Kingsview Middle School, and the Northwest High School service areas. As of the date of Mr. Lavorgna's letter, all three were over capacity, as measured by MCPS; however, in August of 2006, a new elementary school opens in the area; in August of 2005, a new Middle School opens; and in August of 2006, a 30 room addition to the high school will open. Mr. Lavorgna concludes that the current AGP schools test finds capacity to be adequate in the Northwest cluster. The Hearing Examiner concludes that the relevant schools are crowded, but not over capacity using the Council's yardstick, and in any event, more capacity will be add to all three schools shortly.

I. Environment

There were no environmental issues raised in this case. The Department of Permitting Services (DPS) approved Applicant's stormwater management concept plan on June 10, 2005, without the need for any waivers. Exhibit 52. Engineer Daniel Pino testified that it fully covers

the three aspects of stormwater management, recharge of ground water, water quality and water quantity. Recharge will happen in either of two places. These will be underground structures, one approximately in front of units 21 and 22 on Exhibit 44 and the other one approximately in front of units 1 and 2. The water quality and the water quantity controls will be done in a surface stormwater management facility. The bottom of the stormwater management facility will be a sand filter, and above the sand filter will be controls for the quantity of water. According to Mr. Pino, all the standards were met. Tr. 84.

Mr. Pino also testified that a forest conservation plan, meeting all the County and Park and Planning's criteria for conservation, has been submitted and that all of Applicant's forest conservation will be on site. Tr. 83. Environmental Planning Staff confirms that Applicant has submitted a revised Forest Conservation Plan (Exhibit 61(b) for the subject site, and indicates that the Planning Board "will take action on the forest conservation plan with the preliminary plan of subdivision." Exhibit 39.

Considering the record, the Hearing Examiner finds no evidence of adverse environmental impact from the proposed 29 unit townhouse development.

J. Community Concerns

There was no community opposition in this case. Actually, the application received support, by letter and e-mail, from three local citizen associations (the Village at Oak Hill Community Association; the Germantown Alliance; and the Germantown Citizens Association). See Exhibits 45, 46 and 47. Some concerns were expressed by the Gaithersburg-Germantown Chamber of Commerce, in a letter to the Chairman of the Planning Board dated March 7, 2005, about the proposed conversion of the land use from an employment-generating office building to a residential use. Attachment C to Exhibit 36.

Community-Based Planning Staff addressed that issue in their report (Attachment A2 to Exhibit 36), stating that "job growth will exceed household growth in 2015." Moreover, the I-3 classification

recommended in the Master Plan “relied upon obtaining access [to the site] through other industrially zoned land also bordering the CSX rail line. This access was ultimately unavailable which rendered the related parcel unsuitable for employment.” Attachment A2, page 3. Staff also noted that locating an office building on the site would not produce many jobs. Given these factors, and the expressed preference of nearby residents for a townhouse community on the subject site, Staff so recommended.

The Planning Board, in endorsing this recommendation, cautioned that,

the Board is not encouraging other Germantown-area landowners with employment-zoned land to request zoning changes for uses other than employment. The subject proposal is unique, given its location and the Germantown area’s current development climate.

The Hearing Examiner agrees. Whatever the original merit of classifying the subject site I-3, the existence of so much nearby residential development now calls for the kind of residential development being proposed.

IV. SUMMARY OF HEARING

Applicant called four witnesses, Michael Fisher, a partner in the Applicant, Germantown Station, LLC, James Belcher, an expert in land use planning, Daniel Pino, an expert in civil engineering, and Craig Hedberg, an expert in transportation planning. There were no other witnesses at the hearing.

1. Michael Fisher:

Michael Fisher testified that he is a partner (with his father) in the Applicant, Germantown Station, LLC. In 1989 Applicant purchased a 21 acre tract, which included the subject site. Tr. 14. After the Applicant bought the tract in 1989, it was rezoned in its entirety from R-200 to I-3. Tr. 17. The 21 acre tract also included the property across (*i.e.* east of) Farther Hurley Boulevard, adjacent to the CSX Right-of-way. That property, which was later rezoned to PD-15, is now a townhouse development with 111 dwelling units. The vast majority of the 4.5668 acre subject site remains in the I-3 Zone; however, a small (0.12 acre), triangular shaped piece, on the southern

side of the site, was acquired by the Applicant after the 1989 rezoning, in a land swap with a neighbor, and it retains its R-200 classification. Tr. 17-19. That small triangle of property is located on the southwestern side of the site.

In 2000 to 2001, Applicant applied for and eventually received approval of a 27,000 square foot professional building on the subject site under the existing I-3 zone. Mr. Fisher met with neighbors to get their support, and they (residents in the Village at Oak Hill development immediately to the south of the subject site) expressed a preference for the property being developed residential. Applicant felt that the office building would be speculative since it had limited access. It therefore tried to market the property to potential office users. Applicant did not receive any office inquiries because the access was not desirable, and therefore decided to build a residential development instead of an office building. Tr. 17-20.

Applicant drafted a townhouse plan very similar to the currently proposed project. The neighbors in the Oak Hill community expressed support, as long as adequate parking, trash collection and landscaping were provided, and the units were compatible with their units, so that they would not negatively affect their values. Their community has both single family detached and attached residences. Tr. 21. Exhibit 45 is a letter of support from Oak Hill. The Oak Hill Homeowners Association even asked that Applicant's project join their association. They also expressed a preference for the townhouse development instead of a "two-over-two," multi-family development. Tr. 22-25.

The Germantown Alliance and the Germantown Citizen's Association also support the project, as evidenced in Exhibits 46 and 47. Tr. 26-28. The Gaithersburg-Germantown Chamber of Commerce expressed concern about land designated for employment generation being converted to residential use. Mr. Fisher responded that he had no success over a nine month period in marketing the office building use, and that there is plenty of office space available in Germantown. Moreover,

the communities surrounding the subject site have all expressed a preference for a residential development. Tr. 29-35.

Mr. Fisher further testified that the existing Oak Hill neighborhood has a combination of about 80-90 percent townhouses and 10 percent single family. All their townhouses have two car garages in the rear of the units. Applicant wants to provide “a nice gateway for the community.” All the units would front Lullaby Road, and Applicant would be providing a green area in front of small courtyards. It is also Applicant’s objective to keep the architecture compatible. Also, one of the concerns of the citizens was that they wanted to see front stoops similar to theirs, which give them more of a colonial look. Applicant’s plan reflects that. Applicant will provide two-car, rear-loading garages, and the driveways are all hidden. They’re to the rear of the units along the railroad, so no parked cars will be visible from Lullaby Road. There would be two interior parking spaces in each market unit and two driveway spaces. The driveways are a minimum of 18 feet deep to provide two driveway spaces. That amounts to four parking spaces per market townhouse unit. Applicant also provided for 24 street parking spaces, and those are between the railroad and the rear of the units. The exterior facades will be compatible with the existing townhouses. The plan is to have 27 building footprints, for 29 units, meaning that there will be two back-to-back unit combinations occupying two of the building footprints for the four MPDU’s. Tr. 35-38.

Mr. Fisher admitted that noise from the railroad has been a concern, but acoustical experts from Polysonics indicate that the noise can be mitigated through architectural design, and that noise therefore would not be a problem. When asked about exterior noise, Mr. Fisher replied that Applicant would build a six foot tall board-on-board fence along the northern property line parallel to the railroad tracks. The fence, combined with the topography and the grading, would be sufficient to break up that noise and lower the decibel level to acceptable amounts, according to the sound engineer.

The property had been graded, and it is approximately 12-14 feet above the railroad grade. The six foot tall board-on-board fence would be erected near the high point of the site, creating a natural sound barrier. From Applicant's property line to the center of the two railroad beds is a 100 foot distance within the CSX right-of-way. In that 100 feet, there are railroad tracks and a large wooded area, which is about 75-80 feet wide, and it provides additional noise buffering. Tr. 38-43.

2. James Belcher:

James Belcher testified as an expert in land use planning. He agreed with the Hearing Examiner's description of the property as "dagger-shaped", and stated its location as south of the existing CSX Railway right-of-way, west of Father Hurley Boulevard, and north of a subdivision street called Lullaby Road. It consists of two existing zones, I-3 and R-200. It is 4.45 acres of I-3 zone and a .12 acres of R-200 zone, the small triangular shaped piece at the southern portion of the site that was referenced to earlier. Tr. 47.

Mr. Belcher, testified that, in his opinion, the surrounding area, as outlined on the aerial photo, is bound on the east by MD Route 118 (Germantown Road), on the north by Wisteria Drive, on the west by [Little Seneca Creek] in Black Hills Regional Park, and on the south, by Clopper Road. This is shown by a yellow marking on an aerial photo, Exhibit 49 [and Exhibit 10] Tr. 47-48. His definition of the surrounding area is broader than that used by Technical Staff in order to show the transitional nature of the proposed development between the railroad tracks and higher density developments on the north and the single-family homes to the south. Tr. 50-51. Those single family detached homes are located mostly in Kingsview Ridge Subdivision, part of which is to the southwest of the subject site. There is also a small pocket of single family homes immediately to the south of the site across Lullaby Road, and additional single-family homes are located between Father Hurley Boulevard and Germantown Road to the southeast. Further south, just north of Clopper Road, and west of Kingsview Middle School, are additional single-family homes. Tr. 51-52.

In Mr. Belcher's opinion, the subject property serves as a transition between the industrial and commercial uses to the north and the detached single-family homes to the south. Tr. 50-51.

Mr. Belcher further described the site, testifying that the western portion is completely wooded, as well as the majority of the south side of the CSX right-of-way, all of which is proposed to be maintained. Applicant proposes 29 dwelling units, four of which are MPDU's, as described earlier, with two back-to-back units in two locations, lots 9 and 10 and lots 28 and 29, with two-car integral garages and two-car driveways located away from the adjacent development to the south on Lullaby Road. Tr. 53-55.

The required parking for the 29 units, at two spaces apiece, is 58 spaces. Applicant provides 132 spaces, including visitor spaces on site.⁸ Pedestrian connections and sidewalks are also provided through the site in many locations. Vehicular access is through an entrance drive that extends from the existing Bowman Ridge Drive intersection with Lullaby Road, which will provide access to the individual units. Tr. 54.

The units have been organized to try and attenuate the noise and create quiet zones on the property by arranging the groupings perpendicular to the tracks, where possible. Those that are parallel to the railroad tracks are further separated by the drive aisle parking spaces and the tandem driveway spaces. So, the units have been pushed back as far as the setbacks of Lullaby Road will allow away from the CSX Railway. The configuration of the site would not allow all the units to be made perpendicular to the tracks. Building is not permitted in the center of the site, which is reserved for stormwater management, and Applicant can't build in the western area of the site because it is a stream valley buffer and a forest conservation area; however, in Mr. Belcher's opinion, there is adequate green space throughout. Home owners will have their fee simple townhomes, so they have their own individual lots, their yards, and the green space run along Lullaby Road. Tr. 56-58.

⁸ It turned out that Mr. Belcher was incorrect in stating there would be 132 spaces. Actually, there will be a total of 124 spaces under the SDP, still more than twice what is required.

A path system will be set up from the internal sidewalk system around the storm water management facility, and into the western portion of the site, available to the residents as a nature trail. Tr. 60. The two larger open space green areas north of, and adjacent to, Lullaby Road are intended for recreation open space for the benefit of the residents. Tr. 63

There are five proposed binding elements. The first one is that the development be exclusively one family attached dwelling units. The second binding element is under the category of density, that there would not be more than 29 one-family attached units. The third binding element provides that Applicant would not have more than 20 percent of building coverage on the site. Binding element number four provides for no less than 55 percent green space on this site. That is a revision per Park and Planning's request at the Planning Board hearing. The fifth binding element, which is also as a result of the Planning Board hearing, provides that no proposed building shall be any closer than 50 feet to any existing building. Tr. 64-65.

Mr. Belcher further testified that the 1989 Germantown Master Plan recommends the I-3 zone on this parcel as part of the larger 21 acre parcel that previously existed. It was recommended for I-3. In his opinion, this site is definitely more appropriate for residential development at this density, given its proposed compatibility with the existing surrounding land uses. Also, the appropriateness of attached housing was demonstrated in 1996 with the zoning case, G-723, the PD-15 parcel to the east of Father Hurley Boulevard, which represents a very similar situation, south of the railroad tracks with a transitional use therein. Mr. Belcher also opined that the rezoning from I-3 to townhouses would not do any damage to the now 16 year old Germantown Master Plan, and is not inconsistent with the spirit or the goals of what the plan was trying to accomplish. Tr. 65-66.

Mr. Belcher also testified that the proposed development would satisfy the purpose clause of the RT-8 Zone. Sub-paragraph (b) of the purpose clause allows for buffering or transitional

uses between commercial, industrial, high density apartment uses and low density single family units. The proposed development in this location does just that -- serving as a transition from the higher density residential and commercial uses to the north of the site, north of the railroad tracks, to the existing single family developments to the south and west of the proposed site. Tr. 67.

The railroad itself is an industrial use. Tr. 69. The neighbors to the south would like to have a townhouse development in order to create a wall to buffer the noise of the railroad tracks from their single family homes. Tr. 68.

According to Mr. Belcher, the project will satisfy the development standards, and the binding elements, in two cases, bind Applicant more stringently than the regulations would require, particular with regard to the green area. The minimum is 50 percent required. Applicant proposes 60 percent green space, but is binding itself to no less than 55 percent. Applicant is also binding itself to no proposed building being any closer than 50 feet to any existing building. Tr. 72.

In Mr. Belcher's opinion, this development is very compatible with the existing development in that it actually becomes a part of the confronting community to the south. All of the green space, circulation systems and recreation uses associated with this project, as well as the existing project, will become intermingled. Moreover, this particular project provides a buffer to the existing development from the industrial use to the north. The proposed densities at 6.4 units per acre are right in the middle of where the existing densities are, as shown in Exhibit 43, the existing land use plan. Tr. 74-75.

Mr. Belcher further testified that this project will be served by the Ronald McNair Elementary School, Kingsview Middle School, and the Northwest High School. Collectively they all are within the Northwest Cluster, and the current Annual Growth Policy (AGP) school tests finds capacity adequate within the Northwest Cluster. The school board memo does indicate that they are currently over-crowded, but they did conclude at the end of that memo that there is adequate

capacity within the cluster. All three schools have some form of renovations pending, some to be placed in use as early as this summer through the next fiscal year. Tr. 77.

Applicant's storm water management concept plan was approved by DPS. Tr. 78.

According to Mr. Belcher, the recommendations of the 1989 Germantown Master Plan must be looked at in the context of subsequent development in the area of the subject site. The PD-15 residential development just to the east of the subject site came after the Master Plan's adoption, as did the residential development immediately to the south of the subject site. Thus, developments since the Master Plan's adoption have made the subject site much more compatible with a residential zone than with an I-3 zone. Tr. 79.

Mr. Belcher also opined that the proposed development is consistent with the public interest in that it provides for a flexibility of residential unit types in the area. Given, the configuration of the site, the townhomes are the best use for this site, but it is in the interest of the County that the existing residents to the south of the site be protected from the industrial use to the north. They have expressed their desire that the form of development be attached dwelling units, rather than an office building or a condominium type regime. Tr. 80.

3. Daniel Pino:

Daniel Pino testified as an expert in civil engineering. Tr. 80-87. In his opinion, a wood chip path on the western part of the site would not disturb any trees. Applicant will fully comply with and satisfy the requirements of the forest conservation law. Applicant has prepared a forest conservation plan which meets all the county and Park and Planning's criteria for conservation. All of Applicant's conservation will be on site.

Applicant also has approval from the Department of Permitting Services for storm water management concept plan. It covers the three things you need to take care of, a recharge of ground water, water quality and water quantity. Recharge will happen in either of two places.

These will be underground structures, one approximately in front of units 21 and 22 on Exhibit 44 and the other one approximately in front of units 1 and 2. The water quality and the water quantity controls will be done in a surface storm water management facility. The bottom of the storm water management facility will be a sand filter, and above the sand filter will be controls for the quantity of water. According to Mr. Pino, all the standards were met. Applicant has an approval letter from DPS dated June 10, 2005 (Exhibit 52).

Mr. Pino also testified that there is both water and sewer service on Lullaby Road, and that system is adequate for the subdivision. Since Lullaby Road is a public right-of-way, Applicant will have the right to tap into the system.

If zoning is approved, the application will go back to Park and Planning for a preliminary plan of subdivision. Once that is approved, Applicant will go to a site plan review, which will also be publicly heard and documented. After that, Applicant will begin record platting and preparing final engineering documents. Permits will be obtained from Department of Permitting Services to construct all structural sites.

Mr. Pino opined that the project will satisfy all the County's requirements.

4. Craig Hedberg:

Craig Hedberg testified as an expert in transportation planning. Tr. 88-91. He initially developed the projected peak hour trip generation figures for the subject rezoning using an assumption of 30 dwelling units, rather than the 29 presently planned. Using local area review procedures and the associated trip generation rates, the projected peak hour trips were a maximum of 24 trips in the p.m. peak hour and 14 trips in the a.m. peak hour.

Mr. Hedberg testified that the trip level falls below the 30 trip criteria, which would require a traffic study under local area transportation review, so all that is necessary at the time of subdivision would be the transportation statement. Nevertheless, for comparative purposes he

looked at what the approved 27,000 square feet of office space would generate. He found that the presently planned 29 dwelling units would generate less than half the peak hour trips than would be generated by the office building. The office use was projected to generate 59 peak hour trips in the p.m. and 38 peak hour trips in the a.m.

In Mr. Hedberg's professional opinion, the connection to the public road system and the way the development has been set up for circulation purposes is safe, adequate, and efficient for the proposed use. There are linkages for the pedestrian network, and the entrance roadway will align with the existing road to the south, which is the way an intersection should be set up. It will be safe for pedestrian as well as for vehicular traffic.

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, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967), and that it will 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 Zones. The R-T 8 Zone contains development standards and a post-zoning review process that generally delegate to the Planning Board the details of site specific issues such as building location, stormwater control, vehicular and pedestrian routes, landscaping and screening. The Council has a broader and more discretionary role in determining whether to approve a re-zoning.

When the reclassification sought by an applicant is recommended by the applicable Master Plan, approval of the rezoning by the Council requires an affirmative vote of 5 Council members; however, when the Master Plan does not recommend the reclassification sought, the Zoning Ordinance requires an affirmative vote of 6 members of the Council for approval, unless the Planning Board has recommended approval. Zoning Ordinance §59-H-8.2(b). As mentioned earlier, the *Germantown Master Plan*, approved and adopted in 1989, does not recommend the R-T Zone for the subject site, but the Planning Board did recommend approval, and therefore a simple majority of 5 members of the Council is required for approval pursuant to Zoning Ordinance §59-H-8.2(b).

As discussed in Part III.F. of this report, compliance with Master Plan recommendations is not mandatory in this case because the R-T Zone does not require it; rather, the courts have held that the Master Plan should be treated only as a guide in rezoning cases like this one. See *Richmarr Holly Hills, Inc. v. American PCS, L. P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997).

In order to determine whether or not that guidance should be followed in this case, we return now to the three areas of Council review discussed above, the purpose and requirements of the zone, compatibility with existing and planned land uses in the surrounding area, and relationship to the public interest.

A. The Purpose Clause

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.

As is evident from the statutory language, 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.

The relevant Master Plan did not designate the subject site for the R-T Zone, and thus the Purpose Clause cannot be satisfied under that criterion. However, there are three alternative methods of satisfying the Purpose Clause, and an Applicant is required to satisfy only one of them. Accordingly, the Purpose Clause may also be satisfied by development in areas “*appropriate for residential development at densities allowed in the R-T Zones*” or in areas “*where there is a need*

for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.”

The evidence in this case supports Applicant’s contention that the subject site satisfies both the “appropriateness” criterion and the “transitional” criterion. The proposed townhouse development would be surrounded on three sides by residential developments, two of which include large townhouse communities (the Village at Oak Hill immediately to the south has both single-family homes and townhouses, and the townhouse development due east of the subject site, across Father Hurley Boulevard, is all townhouses). Immediately to the southwest of the site is the Kingsview Ridge development of single-family detached residences. Other residential developments within the “surrounding area” include Germantown Estates and Liberty Heights, all visible in the aerial photo on page 7 of this report, and in Exhibit 43 on page 9. Thus, the proposed development will be appropriate in that its use will be compatible with surrounding uses. Also, Applicant intends to make the architecture of the planned townhomes compatible with the architecture of the nearby residences. Tr. 35-38.

The proposals would provide plenty of open space on the west end of the site and will offer the townhouses in fee simple, consistent with the stated intent of the R-T Zone “*to permit the greatest possible amount of freedom in types of ownership of townhouses.*” The site would also provide much more parking than required, and the proposed development would not generate enough peak hour trips to create traffic problems for the neighbors.

The one issue regarding appropriateness concerns the level of noise from the CSX railway operation immediately to the north of the subject site. This issue was analyzed at some length in Part III.D. of this report, and the Hearing Examiner concluded that the anticipated noise levels could be adequately buffered by Applicant, the details to be worked out at site plan. The residential communities on either side of the subject site must have faced and overcome the same problem since

they are also adjacent to the CSX Right-of-way. A finding of appropriateness in this case is thus buttressed by the fact that the Council previously approved the confronting sites for townhouse and mixed residential developments.

The presence of the adjacent railroad also supports Applicant's argument that its proposed development will serve as a transition or buffer between the commercial/industrial/high-density residential uses to the north (*i.e.* the railroad and the "Fairfield at Germantown" development⁹) and the single family detached homes to the south, southwest and southeast of the site. Tr. 67. Technical Staff agreed that Applicant had met both the appropriateness test and the transitional test of the Purpose Clause (Exhibit 36 at page 8):

The present application satisfies the purpose clause that requires RT-8 Zones be located 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. The subject site is appropriate for residential development at densities that are allowed in the R-T 8 Zones. The proposal will also provide a transition between the railroad tracks and the residential development south of the tracks. The proposed density of 6.3 residential units per acre is less than the existing adjacent townhouse development density across Father Hurly Boulevard and higher than the adjacent single-family detached homes to the south along Lullaby Road.

The Hearing Examiner agrees. The undisputed evidence supports the conclusion that the proposed development satisfies the Purpose Clause of the R-T 8 Zone. It also meets all the development standards and special regulations of the Zone, as demonstrated in Part III. G. of this report.

B. Compatibility

An application for a floating zone reclassification must be evaluated for compatibility with existing and planned uses in the surrounding area. Technical Staff observed that (Exhibit 36, p. 11):

The proposal is compatible with the existing and proposed uses and residential development in the immediate vicinity. Land use in the surrounding neighborhood area is mixed residential including single family detached, townhouses and multi-family units under several zoning classifications and constructed at densities ranging from 2 dwelling units per acre to 11.9 dwelling units per acre.

⁹ That development includes 620 residential units and 250,000 square feet of office/retail use. Exhibit 36, page 3.

Technical Staff also opined that the proposal provides sufficient building setbacks, height limits, residential design and landscaping similar to existing approved development in the neighborhood to ensure compatibility with the surrounding residences, including some nearby single-family detached homes. Exhibit 36, page 11. Applicant suggests that the proposed development will become “a virtual extension of the adjacent developments and help complete a unified and cohesive neighborhood.” Exhibit 30, page 5. The Hearing Examiner agrees. For these reasons, and those set forth in the previous section discussing the Purpose Clause of the R-T 8 Zone, the Hearing Examiner finds that the proposed townhouse development on the subject site would be compatible with existing and proposed development in the 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. The Master Plan and the recommendations of the Planning Board and Technical Staff were considered in Part III.F. and Parts V.A. and B. of this report. The Master Plan does not recommend the zoning change sought by Applicant, but the value of its recommendation has been undermined by development in the area subsequent to its adoption. The Planning Board and its Technical Staff support the proposed rezoning, believing that the

development will be compatible with surrounding uses and compliant with the purposes and standards of the R-T 8 Zone.

The impact on public facilities was discussed in Part. III. H. of this report. The evidence indicates that the 29 dwelling units proposed here are expected to generate eight elementary school students, three middle school students and five high school students. James Belcher testified that this project will be served by the Ronald McNair Elementary School, Kingsview Middle School, and the Northwest High School. Collectively they all are within the Northwest Cluster, and the current Annual Growth Policy (AGP) school tests finds capacity adequate within that cluster. Tr. 77. This testimony is supported by the March 3, 2005 letter of Joseph J. Lavorgna, the Director of Planning and Capital Programming for the Montgomery County Public Schools. Exhibit 36, Part of Attachment C.

As of the date of Mr. Lavorgna's letter, all three schools were over capacity, as measured by MCPS; however, in August of 2006, a new elementary school opens in the area; in August of 2005, a new Middle School opens; and in August of 2006, a 30 room addition to the high school will open. Mr. Lavorgna concludes that the current AGP schools test finds capacity to be adequate in the Northwest cluster. The Hearing Examiner finds that the relevant schools are crowded, but not over capacity using the Council's yardstick, and in any event, more capacity will be add to all three schools shortly.

Turning to transportation facilities, the evidence is that the proposed development will not cause any adverse effects on local traffic and safety. Local Area Transportation Review ("LATR") generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion during the peak hour of the morning and evening peak periods. As of July 1, 2004, an LATR traffic study is not required unless a proposed development would generate 30 or more peak-hour automobile trips. As discussed in Part III. H., above, the proposed townhouse

development will generate only 24 trips in the p.m. peak hour and 14 trips in the a.m. peak hour. Tr. 88-91. According to Applicant's transportation planning expert, Craig Hedberg, an office building on the site would generate more than twice that traffic. Mr. Hedberg and Transportation Planning staff agree that both vehicular and pedestrian systems are safe and adequate. Exhibit 36, Attachment A. The Hearing Examiner so finds based on the undisputed evidence.

There were no environmental issues raised in this case. The Department of Permitting Services (DPS) approved Applicant's stormwater management concept plan on June 10, 2005, without the need for any waivers. Exhibit 52. Engineer Daniel Pino testified that it fully covers the three aspects of stormwater management, recharge of ground water, water quality and water quantity Tr. 84.

Mr. Pino also testified that a forest conservation plan, meeting all the County and Park and Planning's criteria for conservation, has been submitted and that all of Applicant's forest conservation will be on site. Tr. 83. Environmental Planning Staff confirms that Applicant has submitted a revised Forest Conservation Plan for the subject site, and indicates that the Planning Board "will take action on the forest conservation plan with the preliminary plan of subdivision." Exhibit 39. Considering the record, the Hearing Examiner finds no evidence of adverse environmental impact from the proposed 29 unit townhouse development.

For all of these reasons, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification and development would have no adverse effects on public facilities or the environment, and that approval of the requested zoning reclassification would be in the public interest.

VI. CONCLUSIONS

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

1. The application has satisfied the requirements of the R-T 8 Zone and its Purpose Clause because it has demonstrated that the development, as currently planned, will be “appropriate” for the R-T 8 Zone and because it will serve as a transition between commercial/industrial/high-density residential uses to the north and single-family detached uses to the south of the site;
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 R-T 8 Zone has been shown to be in the public interest.

VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-833, requesting reclassification from the I-3 and R-200 Zones to the R-T 8 Zone of 4.5668 acres of land, known as Parcel 730 and part of Parcel 807, located south of, and adjacent to, the CXS Right-of-way, north of Lullaby Road and west of Farther Hurley Boulevard, in the 2nd Election District, in Germantown be **approved** in the amount requested and subject to the specifications and requirements of the final Schematic Development Plan, Exhibit 61(a); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance.

Dated: August 24, 2005

Respectfully submitted,

Martin L. Grossman
Hearing Examiner