

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-  
WASHINGTON REGIONAL DISTRICT IN  
MONTGOMERY COUNTY, MARYLAND  
Office of Zoning and Administrative Hearings  
Stella B. Werner Council Office Building  
100 Maryland Avenue, Room 200  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF:**  
**KENSINGTON HEIGHTS 2, LLC**  
Applicant

Sterling Mehring  
Alfred S. Blumberg  
Curt Schreffler  
Michael Lenhart  
David Ritchie  
For the Application

Steven A. Robins, Esquire  
Martin J. Hutt, Esquire  
Attorneys for the Applicant

\*\*\*\*\*

Zoning Application No. G-879

Donna Savage, on behalf of the Kensington  
Heights Citizens Association  
Margaret Podolak

Community Participants Not in Opposition<sup>1</sup>

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Martin Klauber, Esquire  
Peoples Counsel

Conditionally in Support of the Application<sup>2</sup>

\*\*\*\*\*

Jane Folsom  
Alene Whitten  
Phyllis Whitten

Community Participants in Opposition

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Before: Martin L. Grossman, Hearing Examiner

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

<sup>1</sup> These community participants indicated they had concerns, but did not oppose the rezoning application. Tr. 171 and Exhibit 42. Only those individuals who offered testimony are listed in the caption. The hearing was completed on November 6, 2009, and references to the hearing transcript will be in the format "Tr. xx." A second hearing day was held on June 18, 2010, solely to take evidence issues related to the surveyed boundaries of the site. That transcript will be referenced as "6/18/10 Tr. xx."

<sup>2</sup> The People's Counsel's support was linked to there not being access to Wheaton Plaza directly from the subject site. He also asked that issues related to removal of the on-site landfill be appropriately addressed at site plan review. Tr. 174 -175.

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## I. EXECUTIVE SUMMARY

Applicant:	Kensington Heights 2, LLC
LMA No. & Date of Filing:	G-879, filed December 1, 2008
Zoning and Use Sought:	RT-8; Use: 11 Townhomes and 3 single-family, detached homes
Current Zone and Use:	R-60; Current Use: Undeveloped site of excavation fill
Location:	2609 McComas Avenue, Kensington, Maryland, abutting the southern property line of Wheaton Plaza
Applicable Master Plan:	<i>1990 Wheaton Central Business District and Vicinity Sector Plan</i>
Acreage to be Rezoned:	1.806 acres (78,672 sq. ft.) <sup>3</sup>
Right-of-Way to be dedicated:	Applicant proposes to dedicate 968.5 square feet along McComas Avenue, with the precise amount to be determined at Subdivision
Density Permitted in RT-8 Zone:	8 dwelling units/acre per Zoning Ordinance §59-C-1.73
Density Planned:	7.75 dwelling units per acre ( <i>i.e.</i> , 14 Dwelling Units on 1.806 acres)
Bldg. Coverage Allowed/Planned:	35% Maximum per §59-C-1.73 / 25% max. per binding element
Green Space Required/Planned:	50% Minimum per §59-C-1.73 / 50% minimum per the SDP
Parking Spaces Required/Planned:	28 required (2 spaces per unit) / 46 planned
Building Height Limits:	35 feet maximum allowed / 35 feet maximum planned
Environmental Issues:	The Site is not in a Special Protection Area. There are no streams, wetlands, floodplains, forests or highly erodible soils on site. Neighborhood concerns are discussed below.
Consistency with Master Plan:	The project does not directly comply with the PD-9 recommendation of the Sector Plan, but is consistent with its purpose and objectives, and both Technical Staff and the Planning Board noted that the density permitted in RT-8 Zone was analogous to density permitted in the PD-9 Zone.
Neighborhood Response:	The Kensington Heights Citizens Association (KHCA) did not oppose the rezoning, but expressed concerns about stormwater management and removal of the hill on the site, which is comprised of excavation fill. KHCA also wanted a binding element, to which Applicant agreed, requiring that any residences at the McComas property line would be single-family detached units. Others had concerns about access to Wheaton Plaza and the dispute over the correct borders of the property. All these issues were addressed.
Technical Staff Recommends:	Approval
Planning Board Recommends:	Approval
Hearing Examiner Recommends:	Approval

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<sup>3</sup> Two issues arose regarding the acreage of the subject site, both of which are discussed in this report. The first was whether the Applicant had amended the application so as to increase the area proposed to be reclassified, an action which is not permitted by Zoning Ordinance §59-H-2.24. The second issue concerned whether the property boundaries claimed by the Applicant were accurate. After carefully reviewing the record and holding a second hearing day solely to address the boundary question, the Hearing Examiner concluded that the record supported Applicant's argument on both issues.

## II. STATEMENT OF THE CASE

Application No. G-879, as amended and corrected by Applicant Kensington Heights 2, LLC,<sup>4</sup> requests reclassification of 1.806 acres (78,672 square feet) of unimproved land located at 2609 McComas Avenue, Kensington, Maryland, from the existing R-60 Zone to the RT-8 Zone. The property, which consists of Part of Lot 16, Block E, Kensington Heights Subdivision, is situated just south of Wheaton Plaza Shopping Center (also now known as “Westfield Wheaton Shopping Center” and “Westfield Wheaton Mall”). The tax account number is 13-01199036.

The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development that consists of eleven (11) new townhomes and three (3) single-family detached homes. The proposal is set forth in a revised Schematic Development Plan (SDP), Exhibit 63(a), which contains an illustrative diagram and a specification of the binding elements, as well as other information regarding the development.

The application initially had requested rezoning to the RT-10 Zone, with a plan to build 15 townhouses and two (2) single-family detached homes (Exhibit 8), but after consultation with Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), Applicant requested a postponement of the hearing (Exhibit 25) and amended its application to request rezoning to the RT-8 Zone, with 11 townhouses and 3 single-family detached homes. *See* Exhibits 27(a) and (c), later corrected in Exhibit 63(b).

Technical Staff reviewed the revised plans, and in a report dated October 19, 2009, recommended approval (Exhibit 33). The Planning Board considered the revised application on

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<sup>4</sup> The application was filed on December 1, 2008, amended on June 18, 2009 to reduce the re-zoning request from RT-10 to RT-8 (Exhibit 27(a)), and corrected on November 20, 2009 (Exhibit 63(b)), to show the full amount of acreage to be rezoned (1.806 acres). That amount, which was determined by survey, was specified in the Plat (Exhibit 5) submitted as part of the initial application, but was not reflected in the language on the initial application form (Exhibit 1). Thus, a “corrected amended” application form was submitted after the issue was explored at the Nov. 6, 2009 hearing. Tr. 12-31.

October 29, 2009, and by a vote of 4 to 0, recommended approval, as set forth in a memorandum dated October 30, 2009 (Exhibit 43). The Planning Board agreed with its Technical Staff that the application satisfied all of the criteria for reclassification to the RT-8 Zone. In doing so, the Planning Board addressed concerns in the community about the removal of materials which had been deposited on this site during the excavation of Wheaton Plaza (Exhibit 43, p. 2):

The Board clarified that the developer would not be permitted to develop unsafe land. Any fill material removed would have to be accomplished using environmentally sensitive techniques. The developer will have to demonstrate at subdivision and again at the building permit stage that removal of the fill would not have public health impacts.

No opposition was received from the community prior to the public hearing, but there were some expressions of concerns received. Two neighbors wrote in to raise concerns about water runoff and about general issues of development design. Exhibits 24 and 44. The Kensington Heights Citizens Association (KHCA) did not oppose the rezoning, but expressed concerns about stormwater management and removal of the hill on the site, which is comprised of excavation fill. KHCA also wanted a binding element, to which Applicant later agreed, requiring that any residences at the McComas property line would be single-family detached units. Exhibit 42.

A public hearing was duly noticed and convened on November 6, 2009, at which time the Applicant presented evidence and testimony in support of the application. Martin Klauber, the former People's Counsel, participated in the hearing, but he did not call any witnesses. The Kensington Heights Citizens Association submitted its testimony in writing to all parties in advance of the hearing because its representative, Donna Savage was scheduled to be out of town on the hearing date. Exhibit 42. Three other community witnesses testified at the hearing to express their concerns, one of whom (Alene Whitten) testified against the rezoning. Jane Folsom, who had merely expressed concerns at the hearing, sent a letter after the hearing expressing her opposition, asserting lack of compatibility and the need for pedestrian access from the development to Wheaton Plaza. Exhibit 84.

After the hearing was completed, the record was held open for additional filings by the

Applicant and for responses thereto by Technical Staff and interested parties. When Applicant made its submissions, it included a revised SDP (Exhibit 63(a)) which had some changes that were unexpected, including a relocation of the stormwater management facility to the southwest corner of the site, where a single-family detached dwelling had been sited on the SDP presented at the hearing (Exhibit 27(a)). This change caused the Hearing Examiner to ask Technical Staff for further review. Exhibit 74.

On January 15, 2010, Technical Staff responded saying that although Staff found the new layout to be “not as appealing” as the previous SDP site layout, Staff determined that it was acceptable, and because the SDP layout is illustrative, the final site layout would be determined at subsequent stages in the development process (*i.e.*, at site plan and subdivision reviews). Exhibit 78. Staff also agreed to the other changes in the SDP, including binding elements that limited the number of dwelling units to 14 and required that any units fronting on McComas Avenue be one-family detached units. Technical Staff did express reservations about the addition of a non-binding note specifying that no pedestrian sidewalk access to Wheaton Plaza was being proposed, but Staff supported the SDP nevertheless because the note was non-binding and connectivity issues would be examined at site plan review.

Nevertheless, the Hearing Examiner remained concerned about questions relating to the correct boundaries of the subject site, since the Applicant had presented three different figures for the size of their property. The Hearing Examiner therefore ordered the Applicant to present an affidavit from a licensed surveyor explaining the discrepancies. Ex. 86. On March 5, 2010, Applicant filed an affidavit signed by David John Ritchie, a professional surveyor licensed in the State of Maryland. Ex. 90(a).

Applicant’s surveyor swore that the kind of discrepancies evidenced in this case were common and inconsequential; however, confronting neighbor, Alene Whitten, argued that the surveyor had not sufficiently explained the reasons for the discrepancy. Exhibit 91. Moreover, as will be discussed in more detail later in this report, James Schmidt, an adjoining property owner, questioned the accuracy of the survey regarding the property line separating the subject site from his property. Exhibit 80(a).

The Hearing Examiner gave Applicant an opportunity to obtain written agreements with the adjoining property owners assenting to the survey as accurately determining the property line they share with the subject site. Applicant was unable to obtain such an agreement (Exhibit 101), and the Hearing Examiner, fearing that property owned by abutting neighbors might be inadvertently rezoned, scheduled an additional day of hearings solely to address the property boundary issues. Notice was sent directly to all adjoining and confronting landowners and was duly published in two newspapers. Exhibits 104 – 107. The notice stated, *inter alia*, “all parties are invited to produce expert testimony regarding the sufficiency of the survey data provided by Applicant and/or to provide additional evidence or expert opinions on the issue.” Exhibit 104.

The hearing relating to the survey and boundary issues was held, as scheduled, on June 18, 2010. Applicant presented expert evidence from his land surveyor, David John Richie, in support of his survey results. No adjoining land owners appeared at the hearing. Confronting neighbors Alene Whitten and Phyllis Whitten did appear and testify, but they presented no expert testimony or other evidence sufficient to outweigh the expert surveyor’s testimony on the survey and boundary issues. A brief note dated June 17, 2010 (Exhibit 108) was received at the hearing from adjoining land owner James Schmidt, but it also did not contain any evidence probative of the issue at hand.

At the request of the Whittens, the Hearing Examiner left the record open after the survey hearing to allow comments from other parties who did not attend the hearing. The time was further extended to allow the Whittens and other parties access to the hearing transcript. Nevertheless, the only additional comments were filed the Whittens (Exhibit 115) and Applicant (Exhibit 116). The record closed on July 9, 2010.

After a careful review of the entire record, the Hearing Examiner finds that Applicant’s proposal meets the standards for reclassification of the subject site to the RT-8 Zone; that the planned development will be compatible with the community; and that rezoning will be in the public interest.

### III. FINDINGS OF FACT

#### A. Subject Property

##### 1. Location and Description of the Subject Site:

The subject property (Part of Lot 16, Block E, Kensington Heights), which has an area of about 78,672 square feet (1.806 acres), is bordered by Westfield Wheaton Mall on the north and McComas Avenue on the south. About 100 feet to the west is Melvin Grove Court<sup>5</sup> and 100 feet to the east is Littleford Lane. It is equidistant (about 2,000 feet) from Drumm Avenue on the west and Georgia Avenue (MD. 97) on the east, as shown below in the Vicinity Map from the SDP (Exhibit 63(a)):



<sup>5</sup> Melvin Grove Court is misspelled in the above map as “Merlin Grove Ct.”



The subject site is rectangular in shape, measuring about 200 feet wide and 400 feet deep, with approximately 200 feet of street frontage along McComas Avenue, which will provide the sole vehicular access to the site. This site is not in a special protection area or a primary management area.

Tr. 62. According to Technical Staff, the site is just within a half-mile of the Wheaton Metrorail Station. It takes about 15 minutes to walk there. Tr. 115. Staff describes the property as follows (Exhibit 33, p. 4):

The subject property is currently zoned R-60 and is undeveloped. It is the only undeveloped property on the block. However, the property contains a large dirt stockpile area that was created during the expansion of the Wheaton Plaza Shopping Center. Because of the stockpiling activity, the site's topography has a sharp 22 percent grade, resulting in a man-made grassy hill on the property.

Applicant's engineer, Curt Schreffler, testified that the elevation of that mound at approximately its highest point in the center of the site is 438 feet above sea level, compared to 420 feet for the adjoining properties to the east and west. Tr. 54-55.

The grassy hill or "large dirt stockpile" is evident in the following photograph of the site (Exhibit 57(a)), taken by Applicant's land use expert, Alfred Blumberg:



## 2. Issue Regarding Change in Acreage as Listed on the Initial Application Form:

Two issues arose in this case regarding the acreage of the subject site. The first was that the initial application form (Exhibit 1) and the amended application form (Exhibit 27(a)) listed the size of the property as 1.76 acres (76,666 square feet), which is smaller than the amount of land that Applicant actually seeks to rezone, 1.806 acres (78,672 sq. ft.), as determined by a survey of the site. Zoning Ordinance §59-H-2.24 provides, “*After acceptance for filing, an application for a map amendment shall not be modified or amended so as to increase the area proposed to be reclassified or as to the class of zone requested.*”

Thus, if this difference were actually an increase in the amount sought in the “application,” the change would not be permitted; however, the initial application also included an Identification Plat (Exhibit 5) which specified that the larger figure referred to the survey results and the smaller figure to the number specified in a deed to the property. The Hearing Examiner found that, pursuant to Zoning Ordinance §59-H-2.4, the term “application” is broader than just the application form. It included both documents (as well as other items), and thus the Applicant was not seeking to enlarge the area to be rezoned, but rather had referenced it by the two figures mentioned. Tr. 27-31. In order to avoid confusion, the Hearing Examiner directed Applicant to file a corrected application form to reflect the correct acreage, which Applicant did in Exhibit 63(b).

## 3. Issue Regarding the Correct Size and Boundaries of the Subject Site:

The second issue concerned whether Applicant’s survey fairly represented the actual property owned by the Applicant and did not include any part of the abutting land owned by the neighbors.

Zoning Ordinance §59-H-2.1 provides, in relevant part,

*Proposals for a local amendment of the zoning map may be made only by any governmental agency or by a person with a financial, contractual or proprietary interest in the property to be affected by the proposed amendment.*

It is therefore important to establish in the record whether Applicant has “a financial, contractual or proprietary interest” in the entire property it seeks to have rezoned. Moreover, an incorrect specification of the property lines might lead to mistaken rezoning of property belonging to the adjoining property owners.

Confusion was created in this case because the Applicant had presented three different figures for the size of its property. The initial application form recited that the property consisted of “1.76 acres or 76,666 square feet.” Exhibit 1. This figure was based on a “metes and bounds” description for Part of Lot 16, Block E (Exhibit 6), which concluded that the property contained “76,665.60 square feet (1.7602 acres), more or less.” This description was premised on the tax records, not on the actual surveyed size of the property. Exhibit 90(a), pp. 3-4, ¶ 12(a).

At the hearing on November 6, 2009, it was revealed by Applicant that there was a discrepancy between the figures contained in the application form (Exhibit 1) and a survey result embodied in the certified Identification Plat (Exhibit 5), also filed as part of the application. Tr. 12-15. Exhibit 5 lists the survey result as “78,672.18 SQ. FT (1.8060 AC.) (SURVEY)”. The same document also lists the figure, “76,665.6 SQ. FT (1.76 AC.)” as the figure purportedly on the deed.

Moreover, it turned out that the figure listed in Exhibit 5 as being the acreage from the deed is not. It is the figure from the metes and bounds description in Exhibit 6, but it does not match the figure contained in “Exhibit A” to the deed (Exhibit 76(a)). That figure is “78,196 square feet or 1.79513 acres of land, more or less.” To complicate matters further, Applicant supplied another metes and bounds description in Exhibit 63(e) to accompany its amended application (Exhibit 63(b)). That description concludes that the area in question is “78,672.18 square feet (1.8060 acres) of land, more or less.” That figure matches the one on the “survey” data from Exhibit 5 and on the amended application form (Exhibit 63(b)), but not the one on the deed (Exhibit 76(a)), nor the one on the Exhibit 6 metes and bounds description.

Thus, there are at least three different area measurements in the record for the subject site, two of which do not precisely match the description in the deed. Although Applicant affirmed in its “Corrected Amended Application” form (Exhibit 63(b)), that “it is the owner of the entire 1.8060 acre property . . .,” the Hearing Examiner felt that additional evidence was needed to make a fair determination of the boundaries of the property subject to the application. Applicant was therefore ordered to file an affidavit from a licensed surveyor explaining the discrepancies. Exhibit. 86. On March 5, 2010, Applicant filed an affidavit signed by David John Ritchie, a professional surveyor licensed in the State of Maryland. Exhibit 90(a).

Applicant’s surveyor in his affidavit swore that the kind of discrepancies evidenced in this case were common and inconsequential; however, confronting neighbor, Alene Whitten, argued that the surveyor had not sufficiently explained the reasons for the discrepancy. Exhibit 91. Moreover, James Schmidt, an adjoining property owner to the west of the site, questioned the accuracy of the survey regarding the property line separating the subject site from his property, as buttressed by a photograph reproduced below (Exhibit 80(a)):



All parties agreed that the fence between the subject site and Mr. Schmidt's property is located west of the actual property line (*i.e.*, on Mr. Schmidt's property). However, the SDP shows Mr. Schmidt's garage to be about eight feet from the shared property line, while Mr. Schmidt observes in his letter, "If a line is drawn North from [the iron pipe identifying the southwest property corner], paralleling the fence, the existing garage will fall approximately 10'2" West of the common property line."

In order to resolve these boundary issues and to give the adjoining property owners an opportunity to present evidence on these points, the Hearing Examiner formally noticed and held an additional hearing day on June 18, 2010, which addressed solely the boundary and survey issues. Unfortunately, none of the adjoining property owners appeared for the hearing.

The testimony presented by the two confronting property owners who did appear, Alene and Phyllis Whitten, was insufficient to outweigh the expert surveyor's testimony on the survey and boundary issues. The only expert evidence was presented by Applicant's licensed surveyor, David John Ritchie, who explained that the iron pipe identified by Mr. Schmidt actually did not mark the property line separating Mr. Smith's property from the subject site. Rather, it was about seven feet northeast of the corner monumentation he had found when he did the survey in 2006. Mr. Ritchie located a number of markers around the site marking the actual property lines, which were as he had listed them in his survey and affidavit. 6/18/10 Tr. 24-25. Mr. Ritchie confirmed that the size and boundaries of the subject site were, as he had determined them in his survey, 1.8060 acres. 6/19/10 Tr. 68.

The fundamental argument of the Whittens is that the deed established the area of the property and in this case, and the deed records the size of the parcel at 1.79 acres (78,196 square feet ),<sup>6</sup> not

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<sup>6</sup> The initial ID Plat (Exhibit 5) incorrectly attributed the still smaller figure for the area of 1.76 acres to the deed. That figure was actually from the tax records. The language on the ID Plat was corrected in Exhibit 47 to show that that figure came from the tax records. The deed in question specifies the area as 1.79 acres.

1.8060 acres (78,672.18 square feet). Phyllis Whitten questions whether the “the technical evidence” presented in this case (*i.e.* the expert surveyor’s testimony) can outweigh the real estate documents (*i.e.*, the deeds) that are on file with the County. 6/18/10 Tr. 76.

The Hearing Examiner finds that Ms. Whitten has missed the point – the surveyor’s testimony doesn’t outweigh the deed; it explains that the deed’s figure of 78,196 square feet “more or less” is essentially the same as the final survey figure of 78,672.18 square feet, given the small size of the discrepancy and the nature of professional surveying standards. The Hearing Examiner accepts the expert’s testimony that the difference of 476 square feet between the deed’s figure and his survey result is *diminimus* and within the range of professional differences in surveys. 6/18/10 Tr. 27 and Exhibit 90(a), pp. 4-5, ¶ 13. Not only is the difference very small, but the acreage figure of the 2006 deed conveying the property was qualified, as noted above – “78,196 square feet or 1.79513 acres of land, more or less.” Exhibit 76(a), Emphasis added.

While the difference in the figures contained in the tax records is somewhat larger, Mr. Ritchie believes that those figures on the tax records, from which the initial 1.76 acre figure came, were the result of somebody measuring incorrectly because their instrumentation at that point was not as good as present day. 6/18/10 Tr. 27-30.

When asked by the Hearing Examiner what accounted for the three different figures given in this case, Mr. Ritchie testified (6/18/10 Tr. 26-27):

Surveyed areas are consistently different than what's deeded.

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The differences between surveys is techniques in surveying and equipment used and a lot of times, the time frame between. We have a much more accurate way of measuring distances now than they did back in even the '60s and '50s and, you know, the original Lot 16 was subdivided back in 1890 so just, it's all the differences between technique and equipment.

Mr. Ritchie stated that he uses state-of-the-art surveying equipment consistent with other

companies in the area in the profession, and as is customary, he employs a two-man field crew. Mr. Ritchie further testified that the monumentation he found on the subject site (iron pipes and rebars) is indicated by small circles along the property line and noted by brief annotations on Exhibit 5. The pipes, rebars and caps were consistent with the record plats of the adjoining properties. To make sure that the monumentation he found correctly reflected the property lines, he located other monumentation randomly throughout the neighborhood to establish control coordinates. From those known points, the location of which was confirmed using GPS technology, he then determined the locations on the property to be surveyed. 6/18/10 Tr. 38-39; 49-50.

Based on his survey, Mr. Richie testified, “In my professional opinion, the land requested to be re-zoned by this local map amendment does not include any portion of the adjoining properties.”

6/18/10 Tr. 37. This expert testimony was unrebutted, and the Hearing Examiner finds that the evidence overwhelmingly supports Applicant’s claim that it has a property interest in all of the land it seeks to rezone, and that none of it belongs to the adjoining property owners.

### **B. Surrounding Area**

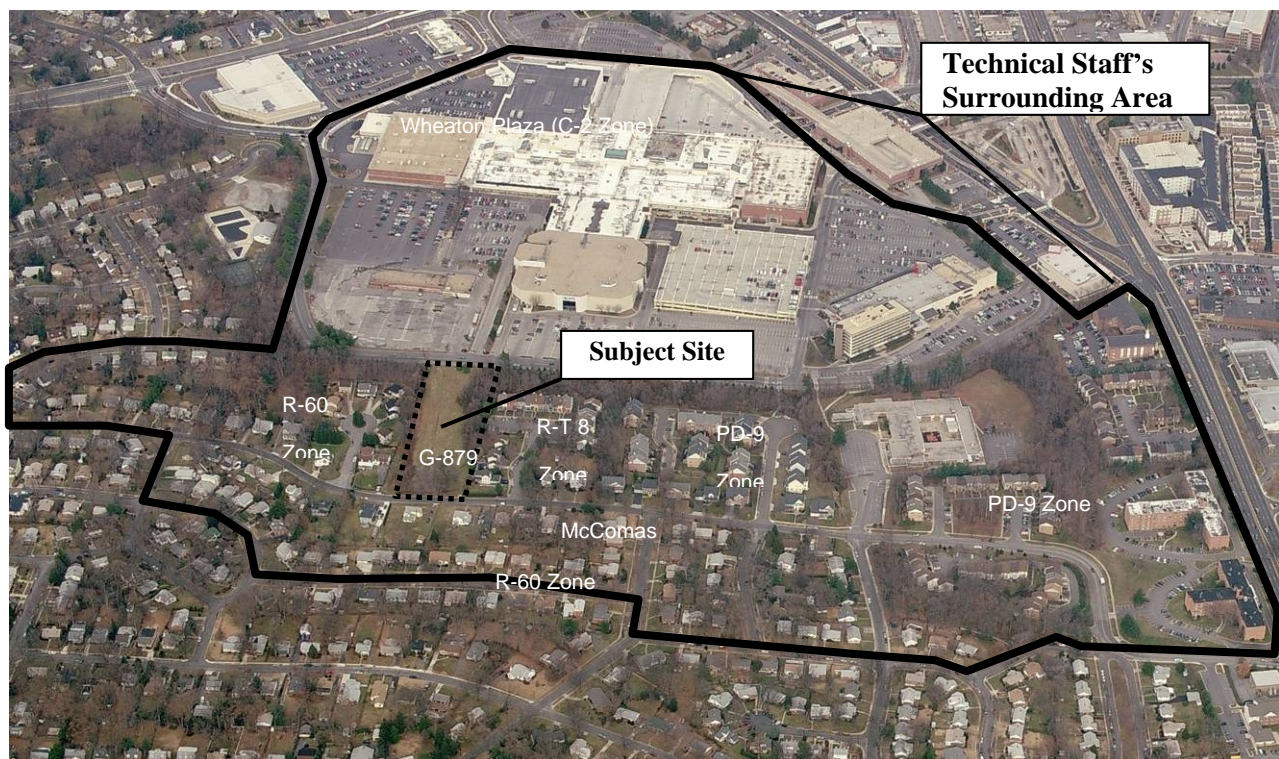
The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development.

Technical Staff proposed to define the surrounding area as bordered by Wheaton Plaza to the north, Georgia Avenue to the east, Kimberly Street and Calgary Avenue to the south, and the Wheaton Plaza ring road to the west. Exhibit 33, p. 5. It is depicted by a solid line on the aerial photo map found on page 5 of the Technical Staff report and reproduced on the next page. Applicant’s land planner, Al Blumberg, proposed to define the surrounding area with slightly different boundaries, as



shown by a red line on Exhibit 55 (not reproduced here). Mr. Blumberg's defined area extends a bit further to the north than Technical Staff's, and Staff's defined area extends a bit further to the west and south.

Mr. Blumberg indicated that these differences were not significant and would not affect the compatibility analysis. Tr. 117. The Hearing Examiner agrees, but concludes that Staff's definition is preferable. The definitional differences at the northern extreme of the surrounding area will have no impact because the vast bulk of Wheaton Plaza intervenes. On the southern end, however, the Hearing Examiner agrees with Staff's definition since it extends south to Calagary Avenue and Kimberly Street, the first streets south of McComas Avenue, which may experience some minor traffic impacts from the development. Thus, the Hearing Examiner accepts Technical Staff's definition of the surrounding area, as depicted below:



The immediate area around the subject site can be seen in an aerial photograph provided by Applicant (Exhibit 52), a portion of which is reproduced on the next page:





Technical Staff describes the surrounding area as made up of a mix of commercial uses and residential developments of varying housing types (Exhibit 33, p. 5):

Wheaton Plaza, a large commercial shopping center developed under the C-2 Zone, makes up the entire northern half of the surrounding area. Below the shopping center is a transitional block along the north side of McComas Avenue (where the subject property is located) that contains a mix of single-family detached housing and townhomes. This transitional block has developed under R-60, R-T 8, and PD-9 zoning. South of McComas Avenue, the predominant land use is single-family detached housing, developed under the R-60 Zone. More townhomes and higher-density apartments are located along Georgia Avenue.



Mr. Blumberg also described the block where the subject site is located, between the southern end of Wheaton Plaza and McComas Avenue, as “a transitional block.” Tr. 117. To the west of the subject site are single-family, detached homes in the R-60 Zone. Most significantly, the property immediately to the east of the subject site is zoned RT-8, the very zoning classification that Applicant seeks. It is composed of townhouses on the side adjacent to Wheaton Plaza and single-family detached homes to the south, precisely the configuration suggested by Applicant for its property. Further to the east of the property with the existing RT-8 classification are townhouses and single-family, detached homes in the PD-9 zone, also arranged with the same configuration (townhouses on the north and detached homes on the south). As noted by Mr. Blumberg, “between the bulk of the residential development to the south and the intense activity of the mall is this transitional block that acts as a separator or a transition between the commercial activity and the residential neighborhood to the south.” Tr. 118.

Two photos are reproduced below to show nearby homes and the street. The photo on the left (Exhibit 57(b)) shows the western portion of the site and two nearby homes. The photo on the right (Exhibit 61(b)) shows McComas Avenue, looking west towards Melvin Grove Court, with the subject site mostly out of view on the right.



### **C. Zoning History**

The zoning history of the subject site and its adjacent block was provided by Technical Staff (Exhibit 69):

. . . [T]he property has retained the R-60 zoning classification continuously since 1958, the year of the zoning ordinance rewrite and corollary comprehensive rezoning of the County involving the combining of Upper Montgomery County with the then-regional district of Montgomery County. In October of 1978, a sectional map amendment (SMA G-137) rezoned certain properties in the Wheaton Central Business District area, but the subject property was not affected and retained R-60 zoning.

Although the property is zoned R-60, the 1978 Wheaton Sector Plan first recommended the site as suitable for the PD-9 Zone. In fact, in the 1978 Sector Plan a large stretch of the northern side of McComas Avenue was mentioned as suitable for PD-9 zoning. In the time period between the adoption of the 1978 and 1990 Wheaton Sector Plans, much of the northern side of McComas Avenue developed in a piecemeal fashion under both R-T 8 and PD-9 zoning. The 1990 Sector Plan retained the recommendation that the subject property was suitable for PD-9 zoning.

### **D. Proposed Development**

The Applicant proposes to level the existing hill of the site and construct 11 townhouses and three single-family detached houses. Applicant's vision for the project was discussed by its managing partner, Sterling Mehring, who testified that his plans were based on the Sector Plan, which contemplates a mix of housing types and a transition from the intense C-2 zoning on the north to the R-60 zoning which is to the west and to the south. Also, the Planning Board clearly preferred the maintenance of a single-family streetscape along McComas, with townhomes behind. Tr. 37.

Technical Staff characterized Applicant's proposal with similar language (Exhibit 33, p. 6):

The proposal maintains the established pattern of single-family detached homes fronting on McComas Avenue. The proposal places townhomes closer to the rear of the property, behind the single-family detached housing and abutting Wheaton Plaza.

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### **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

(SDP) 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 on the SDP must be set forth in a Declaration of Covenants to be filed in the county land records if the rezoning is approved. The Applicant's final SDP (Exhibit 63(a)), which was revised after the hearing and approved by Technical Staff (Exhibit 78), sets forth the four binding elements for the development as follows:

## BINDING ELEMENTS

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1. Vehicular access to this site shall be limited to McComas Avenue.
2. Building coverage shall not exceed 25% of the gross tract area.
3. The maximum number of dwelling units shall be 14. The final number of dwelling units will be established at site plan review.
4. Any units that have frontage on McComas Avenue shall be one-family detached homes.

Applicant has also filed an executed copy of the Declaration of Covenants in the record of this case as Exhibit 63(f), and it contains the specified binding elements, as required. 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 schematic development plan amendment.

The graphic portion (*i.e.* site layout) of the revised SDP (Exhibit 63(a)), is illustrative (except as specified in the binding elements), and it is reproduced on the next page. The plan shows three single-family detached homes located generally on the southern and western sides of the site, adjoining the R-60 zoned land to the south and west, and townhouses on the east and north, adjoining the RT-8 zoned land to the east and the C-2 zoned land to the north.



It should be noted that Stormwater management facility located in the southwest corner of the site may be moved elsewhere on the site at site plan and subdivision reviews. However, if it is moved and replaced with a dwelling unit at that location along McComas Avenue, the dwelling unit would have to be a single-family detached home, pursuant to the binding elements. Moreover, wherever it is located, Applicant plans for it to be an underground facility, so that the area will not be unattractive.

Tr. 68-69.

The SDP also contains Site Data and Development Standards:

## SITE DATA

1.	Gross Tract Area:	1.8060 Acres (78,672.18 sq.ft.)
2.	Area of Proposed McComas Avenue Dedication:	0.022 Acres (968.5 sq.ft.)
3.	Net Tract Area:	1.784 Acres
4.	Existing Zoning:	R-60
5.	Proposed Zoning:	RT-8
6.	Number of Units Proposed:	14
7.	Proposed Unit Types:	
	a.	Single Family Detached = 3 Units (R-60 Zone standards)
	b.	Single Family Attached = 11 Units
8.	Number of MPDU's Required:	0
9.	Off-Street Parking Required:	28 Spaces (2.0 Spaces / Unit)
10.	Off-Street Parking Proposed:	46 Spaces, as follows:
	-	S.F. Detached = 4 sp. / unit X 3 units = 12 spaces (2 in garage, 2 in driveway)
	-	S.F. Attached = 2 sp. / unit X 11 units = 22 spaces (2 in garage)
	-	Parking Bays = 12 spaces
	Total	46 spaces

## DEVELOPMENT STANDARDS

STANDARD	PERMITTED / REQUIRED	PROPOSED
Minimum Tract Area	20,000 sq.ft.	78,672.18 sq.ft. (1.8060 ac.)
Maximum Density	14 DU (8.0 DU / Ac.)	14 DU (8.0 DU / Ac.)
Setbacks for Townhouses		
From SFD Zone	30'	30'
From Public Street	25'	100'
From Adjoining Lot		
End of Proposed Unit	10'	10'
Rear of Proposed Unit	20'	20'
Building Restriction Lines for Single Family Detached Lots (R-60 Standards)		
From Street R/W	25' min.	25' min.
Side Yard	8' min. / 18' total	8' min. / 18' total
Rear Yard	20' min.	20' min.
Maximum Building Height	35 feet	35 feet
Maximum Building Coverage	35% of Tract	Not more than 25% of Tract
Minimum Green Area	50% of Tract	Not less than 50% of Tract
Off-Street Parking	2.0 Spaces / Unit (28 spaces)	3.3 Spaces / Unit (46 spaces)

The final items on the SDP are the General Notes, reproduced below:

GENERAL NOTES	
1.	Existing boundary, topography, utility and surface feature information provided by CAS Engineering, Mt. Airy, Md.
2.	There are no known historic resources on this property.
3.	This property is not within a Special Protection Area.
4.	The site layout shown on this Schematic Development Plan is illustrative, and the Applicant acknowledges that the building coverage, the green area, and the number, size and layout of the units may have to be revised at Preliminary and / or Site Plan stage.
5.	No pedestrian sidewalk access to Wheaton Plaza is being provided or proposed per the direction of the community.

The fifth general note was added by Applicant to address concerns expressed by the People's Counsel and a number of community residents who fear that a pedestrian connection to Wheaton Plaza would bring crime into their neighborhood. Tr. 38-41. It is non-binding and this plan can be changed by the Planning Board at Site Plan review, but Applicant's land planner, Alfred Blumberg, testified that such a connection is unlikely because of the large difference in elevations between the subject site and Wheaton Plaza and because there is no sidewalk to connect it to in this area of the Wheaton Plaza site. Tr. 120-121.

The closest existing home will be 50 feet from the nearest proposed townhouses. Tr. 126.

As proposed, all units will have front entry, two-car garages. The three single-family detached homes, in addition to the two-car garages, will have driveways deep enough to accommodate additional parking for two extra cars. Twelve guest parking spaces are also planned within the development. Thus, the parking count for the development is 40 spaces, 12 spaces more than required by the ordinance, even without counting the six extra driveway spaces. Exhibit 33, p. 6.

Internal vehicle circulation will be provided by a private street. Pedestrian access is provided through lead-in sidewalks. Vehicular access will be limited to McComas Avenue. One concern raised

by confronting neighbor, Alene Whitten, was that the sight distances from the access road west along McComas Avenue will not be great enough for safety because there is a “blind curve” just before Melvin Grove Court. *See* Tr. 156 and photo reproduced on page 18 of this report. However, Applicant’s traffic engineer, Michael Lenhart, testified that the sight distance is more than adequate.

Mr. Lenhart stated that he measured the sight distances at the proposed entrance into the subject property and found them to be around 200 feet in both directions. The American Association of State Highway Transportation Officials (AASHTO) produces the guidelines that jurisdictions utilize in designing highway facilities. It shows that for the 25 miles per hour speed limit posted on this road, you would need 155 feet of sight distance for a vehicle to come to a safe stop. Because there is about a 200-foot sight distance in either direction, the access sight distances exceed the AASHTO minimum requirement. Tr. 88. Moreover, Transportation Staff found that the proposed access and vehicular/pedestrian circulation are safe and adequate, with final refinement to be considered at site plan review. Exhibit 33, p. 16. There is no contradictory expert evidence on the point, and the Hearing Examiner therefore finds that the planned access location is not unsafe.

#### **F. Development Standards for the Zone**

Special regulations for the RT-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 RT-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 are 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. As mentioned above, the proposed development has three "sticks" of townhouses, none of them exceeding five units. The one group with more than three units shows the required two-foot variation in their front building lines.

The Development Standards for the RT-8 Zone are spelled out in Zoning Ordinance §59-C-1.73. As shown in the table below from the Technical Staff report (Exhibit 33, p. 10), the proposed development would meet or exceed the applicable development standards for the RT-8 Zone.

<i>Development Standard</i>	<i>Permitted/Required</i>	<i>Proposed</i>	<i>Applicable Zoning Provision</i>
<i>Minimum Tract Area</i>	<i>20,000 sq ft (0.46 acres)</i>	<i>76,665 sq ft (1.76 acres)</i>	<i>§59-C-1.731(a)</i>
<i>Maximum Density</i>	<i>8 dwelling units per acre</i>	<i>Up to 8 dwelling units/ acre</i>	<i>§59-C-1.731(b)</i>
<i>Building Setback from Land Classified in One-family Detached Zone</i>	<i>30 ft</i>	<i>30 ft</i>	<i>§59-C-1.732(a)</i>
<i>Building Setback from Public Street for Townhouses</i>	<i>25 ft</i>	<i>105 ft</i>	<i>§59-C-1.732(b)</i>
<i>Building Setback from an Adjoining Side Lot</i>	<i>10 ft</i>	<i>18 ft</i>	<i>§59-C-1.732(c)(1)</i>
<i>Building Setback from an Adjoining Rear Lot</i>	<i>20 ft</i>	<i>25 ft</i>	<i>§59-C-1.732(c)(2)</i>
<i>Building Setback from Public Street for Single-Family Houses</i>	<i>25 ft</i>	<i>33 ft</i>	<i>§59-C-1.71(a) Footnote 1</i>
<i>Building Side yard Setback for Single-Family Houses</i>	<i>8 ft</i>	<i>10 ft</i>	<i>§59-C-1.71(a) Footnote 1</i>
<i>Max Building Height</i>	<i>35 ft</i>	<i>No more than 35 ft</i>	<i>§59-C-1.733(a)</i>
<i>Maximum Building Coverage</i>	<i>35 percent</i>	<i>25 percent</i>	<i>§59-C-1.34(a)</i>
<i>Minimum Percentage of Green Area</i>	<i>50 percent</i>	<i>Not less than 50 percent</i>	<i>§59-C-1.34(b)</i>
<i>Parking</i>	<i>2 spaces per du = 28 spaces</i>	<i>40 spaces (46 with the 6 extra driveway spaces)</i>	<i>§59-C-1.735 and §59-E-3.7</i>



As can be seen from this diagram, the specific recommendation for the site is the PD-9 Zone. Since the subject application seeks to have the property rezoned to RT-8, it is obviously not consistent with the specific PD-9 zoning recommendation of the Master Plan. However, this fact does not automatically rule out this application because explicit consistency with the Master Plan is not a statutory requirement of the RT-8 Zone.<sup>7</sup> *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 530, 814 A.2d 469, 478 (2002), citing *Richmarr v. American PCS*, 117 Md. App. 607, 635-51, 701 A.2d 879, 893-901 (1997). Nevertheless, consistency with the Master Plan's recommendations, goals and objectives is still considered as part of the evaluation of public interest made in every re-zoning case.

One of the main objectives of the Sector Plan (at p. 27) is to “Maintain Wheaton’s residential character by continuing to promote a balance of housing with the development of other uses.” To accomplish this, the Sector Plan recommends (at p. 27) “Encourag[ing] the development of new housing in a range of types, prices, and rents, especially within walking distance of the Metrorail and Metrobus stations . . .to help reinforce Wheaton as a lively area, especially during evenings.” Specifically, the zoning recommended in the Sector Plan continues the trend from the 1978 Wheaton Sector Plan and “recommends the use of Townhouse and Planned Development zoning [to] encourage [...] a variety of housing types on individual parcels.”

Applicant’s land use expert, Al Blumberg, pointed out that the PD-9 zoning is not practical for this property because the PD-9 Zone has a requirement that only single-family detached homes may be

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<sup>7</sup> Precisely what is meant by the term “consistent with” in the context of master plans has been the subject of both litigation and legislation. In *Trail v. Terrapin Run*, 403 Md. 523, 548, 569 and 573-574; 943 A.2d 1192 (2008), the Maryland Court of Appeals held that legislative words such as “conform to” a master plan and “consistent with” a master plan were intended to convey the concept of being generally “in harmony with” the master plan, unless the legislation specified otherwise. Subsequently, the Maryland legislature enacted the *Smart, Green, and Growing - Smart and Sustainable Growth Act of 2009*, effective July 1, 2009. That Act amended Md. Ann. Code Art. 66B, § 1.02, in an attempt to define the term “consistent with” to strengthen master plan impact on land use; however, by its terms, the statute does not apply to rezoning applications because they do not constitute an “action” under the legislation. The Hearing Examiner thus concludes that that 2009 legislation does not apply to the instant rezoning application, and even if it did apply to rezonings, it would not determine the outcome in this case because, as mentioned above, consistency with the master plan is not a statutory requirement for the zone sought by Applicant.

located within 100 feet of other properties zoned for single family detached homes. Given the small size of this site, that would eliminate more than 50 percent of the property for the use as townhomes. Thus, the PD-9 Zone is not appropriate and or practical for the utilization of the site.

In Mr. Blumberg's opinion, the RT-8 is in substantial compliance with the Sector Plan because there is only a one unit difference between the PD-9 density recommended in the Sector Plan and the RT-8 Applicant seeks. Given the direction of the Sector Plan to encourage residential development in close proximity to Metro and in close proximity to shopping opportunities, and considering the limits of the PD-9 Zone which would prevent townhouses close to the R-60 Zone, the site is actually better off with the RT Zone than with the PD-9. More of the objectives and goals of the Sector Plan can be met with the RT-8 Zone than with the PD-9 Zone, as evidenced by two sentences from the Sector Plan's Urban Design Guidelines (Page 36). It says that the character and scale of existing low density residential communities must be protected. Therefore, Applicant is proposing single-family detached along the north side of McComas. Second, it is important to create adequate transition in densities and massing so that new development is sensitive to existing buildings. The design of the schematic development plan provides that transition in densities. Tr. 124-131.

Technical Staff found that "the proposed R-T 8 Zone is consistent with the Sector Plan recommendation because of its analogous nature to the PD-9 Zone." Exhibit 33, p. 8. Staff agreed with Mr. Blumberg's observation that the PD-9 Zone's setback requirements specified in Zoning Ordinance §59-C-7.15(b)(1), combined with the narrow width of this site (approximately 200 feet wide), could hinder the overall site design and mixture of unit types provided, thereby running counter to the Sector Plan's goal of providing a variety of housing near the Metrorail station. "Based on the Sector Plan's guidance, staff finds that the analogous density and housing mixture provided through R-T 8 zoning, and the consistency in zone designation between adjacent developments, is consistent with the Wheaton Sector Plan." Exhibit 33, p. 8.

The conclusion of Technical Staff and Mr. Blumberg is buttressed by the Sector's Plan's own "Land Use Plan," located at page 28 of the Sector Plan. It calls for residential development of medium density on the subject site, which is the same designation it provides for the adjoining RT-8 development to the east of the site and the PD-9 development to the east of that. In sum, Applicant's proposed development on the subject property will be a medium density residential housing development that will provide transition to the adjacent commercial areas and is consistent with the overall goals of the Sector Plan. Given this record, the Hearing Examiner finds that although the proposed development would not comport with the specific zone recommendation for the site, it would accomplish the goals and objectives of the Sector Plan for this area.

#### **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 other 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 its 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 the primary responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Planning Board's process at subdivision is designed to more intensively examine the "nuts and bolts" of public facilities.

At this stage, Zoning Ordinance §59-H-2.4(f) 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 December 1, 2008, so the 2007-2009 Growth Policy adopted November 13, 2007 (Resolution 16-376) will apply to the rezoning determination.

The 2007-2009 Growth Policy provides, at pp. 22-23, “[t]he 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.” There is no such evidence in this case. On the contrary, the evidence is that police and fire stations are nearby. Tr. 134-135.

Public facilities for transportation, schools and utilities, including water and sewer service, are treated under separate headings, below.

#### 1. Transportation

Michael Lenhart, Applicant’s expert in traffic engineering and transportation planning, testified that his revised traffic statement (Exhibit 53) reflects the current application for RT-8, with 11 townhomes and three single-family homes. Tr. 80-107. The development will generate eight trips in the morning peak hour and twelve trips in the evening peak hour. Because it will generate fewer than 30 trips during the peak hours, the County’s local area transportation review (LATR ) requires Applicant to provide a traffic statement, but not a complete traffic study.

The traffic statement points out that the PAMR requirement for the Kensington, Wheaton area is a 10 percent trip mitigation for FY '10. The site generates 12 peak hour trips, and therefore, it needs to mitigate 1.2 trips in the evening peak hour. Because this site is located within a half mile radius of the Wheaton metro station, it provides higher transit service or lower vehicular trip generation than elsewhere in the County. After consulting with Technical Staff, it was determined, based on County data, that this site would generate roughly 25 percent fewer vehicular trips than a

comparable site using the Countywide standard. Therefore, the location of this site, alone, produces a 25 percent mitigation and more than satisfies the 10 percent PAMR mitigation requirements.<sup>8</sup>

That procedure has been used on prior cases, and has been reviewed and approved by Staff and the Planning Board. So, the traffic statement essentially shows that the development satisfies both the LATR and PAMR requirements. Tr. 87.

In Mr. Lenhart's opinion, the proposed rezoning will not adversely impact the surrounding area from the standpoint of traffic conditions, and from a transportation planning perspective is compatible with the surrounding area. He also opined that the proposed access to the site as reflected on the schematic development plan is adequate and safe, and that the transportation related public facilities are adequate to accommodate this rezoning change and use. Because the RT-8 Zone is very similar in density to the PD-9 Zone recommended in the Sector Plan, Mr. Lenhart testified that the RT-8 Zone will not generate any different traffic than would occur under the PD-9. Tr. 92.

In his professional opinion, the onsite parking will be adequate as proposed to accommodate the use, and the proposed vehicle circulation systems and points of access are safe, adequate and efficient for both vehicular and pedestrian traffic. The granting of the requested rezoning will not have any adverse impact on the public transportation facilities. Tr. 93-94.

Transportation Planning Staff, in a memorandum appended to the Staff report (Exhibit 33, Attachment 4), agreed that an LATR traffic study was not needed in this case and found that "the transportation network [is] adequate to support the rezoning." Transportation Planning Staff recommended that, at subdivision, the development be limited to 11 townhouses and three single-family detached units; that right-of-way be dedicated along McComas Avenue;<sup>9</sup> and that there be a

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<sup>8</sup> Although the Technical Staff report (Exhibit 33, p. 16) refers to a 15% PAMR mitigation requirement, Mr. Lenhart testified that is because the FY '09 PAMR mitigation requirement was 15 percent. Tr. 89. It has since been changed to 10%, as evidenced in Exhibit 54 (Table 2), but the fact is that this project meets 25%, so it satisfies both the FY 09 and FY 10 standards. Tr. 91.

<sup>9</sup> Applicant's engineer, Curt Schreffler, testified that Applicant proposes an additional five feet to be dedicated along



pedestrian connection to Wheaton Mall. As previously discussed, there is significant community opposition to such a connection, and a non-binding note to that effect was included on the SDP. A final determination in this regard will be made at site plan and subdivision review. Transportation Staff accepted Mr. Lenhart's transportation studies, and determined that both LATR and PAMR were satisfied.

Based on this record, the Hearing Examiner finds that transportation facilities are adequate and will not be adversely affected by the proposed development.

## 2. Utilities

Applicant's engineer, Curt Schreffler, testified that the site is located in a well-developed area, and therefore public utilities exist in the adjacent street, including gas, electric, communication, water, sewer, and storm drain. Those utilities are available to serve this development. Tr. 60. In his opinion, the public utilities and facilities are sufficient to accommodate the proposed development. Tr. 63. Also, from a civil engineering perspective, the development will have no adverse impact on the associated public facilities. Tr. 65.

Technical Staff stated in its report that the proposal will not have any adverse impacts on public facilities and noted (Exhibit 33, p. 16):

The rezoning application and schematic development plan were reviewed by the Washington Suburban Sanitary Commission (WSSC). WSSC found that the reclassification from the R-60 Zone to the R-T 8 Zone and the subsequent proposed development would not burden the water or sewer systems of the area.

Based on this evidence, the Hearing Examiner finds that the property will be served by adequate utilities and other services.

## 3. Schools

Technical Staff advises that the schools serving the subject property are located within the

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the approximately 200 feet of McComas Avenue frontage during record plat process, with the total amount of dedication being about 1,000 square feet. It is listed in the schematic development plan as 968 square feet. This is in accordance with the Master Plan to provide for a 60 foot right-of-way. Tr. 60-61.



Albert Einstein Cluster. Staff notes, “MCPS [Montgomery County Public Schools] finds that there is adequate capacity to accommodate the proposed development.” Exhibit 33, p. 17. Technical Staff based this statement upon a March 26, 2009 letter from Bruce H. Crispell, the Director of Long-range Planning for the Montgomery County Public Schools. His letter is appended to the Technical Staff report, Exhibit 33, as Attachment 5.

Mr. Crispell’s letter is based on the assumption of a 17 unit development, which he stated would generate approximately 7 elementary, 2 middle and 3 high school students. The actual development will be smaller, so Mr. Crispell’s conclusion of adequate capacity for the larger development *a fortiori* means there will be capacity for the smaller development now planned.

The subject property is served by the Oakland Terrace Elementary School, the Newport Mill Middle School and the Albert Einstein High School. Mr. Crispell notes in his letter that Albert Einstein High School is part of the “Downcounty Consortium,” where students may choose to attend their base area high school or one of four other high schools in the Consortium.

Mr. Crispell reports that enrollment at Oakland Terrace Elementary School currently exceeds capacity and is projected to exceed capacity in the future. To address this situation, a new school, Downcounty Consortium Elementary School #29 is scheduled to open in August 2012. That time period would coincide well with the timeframe for the development suggested by Applicant’s land planner, Al Blumberg, who testified that there should be school capacity at the same time that there is need for capacity generated by this proposal. Tr. 134.

Mr. Crispell’s letter reported that enrollments at both the Newport Mill Middle School and the Albert Einstein High School are currently within capacity and are projected to stay within capacity.

Mr. Crispell concludes that “[t]he current Growth Policy school test (FY 2009) finds capacity adequate in the Einstein cluster.”

Given Mr. Crispell's conclusion and the plan to add another elementary school, the Hearing Examiner finds that there is sufficient school capacity for the proposed development.

### **I. Environment**

Technical Staff reports that a Natural Resources Inventory/Forest Conservation Plan (NRI/FSD) was approved on August 31, 2007 by Environmental Staff. The property is not located within a special protection area or primary management area, and there are no streams, wetlands, floodplains, environmental buffers, highly erodible soils or forest on the site. Exhibit 33, pp. 17-18.

There are steep, man-made, slopes occurring on the property, which were created when the property was used as a stockpile area for excavated material during the expansion of Wheaton Plaza. Mr. Schreffler described the elevation on the property created by the man-made hill and Applicant's plans to level it. Tr. 54-66.

The elevation of the mound at approximately its highest point in the center of the site is 438 feet above sea level. Applicant plans to remove about 15 feet of that fill material, and the final elevation at that same location will be 423.5 feet. The corresponding elevations from that high point to the east and to the west, on the adjoining properties are 420 feet. Thus, once that hill is removed, moving from east to west traversing the site will be from 420 up to 423 and back down to 420. So, it will be gradual. The site will also slope down to the existing grade of McComas Avenue, which is 416 feet. It will slope up onto the Wheaton Plaza property in the back, and the site overall will have relatively normal grades. The elevation at the property line of Wheaton Plaza's property will be approximately 424 feet when the grading is done. Tr. 54-55. From McComas to the Wheaton Plaza's property line, will be approximately eight feet of slope over a distance of approximately 400 feet. That is an average of approximately 2 percent, which is typical and a very gradual slope, according to Mr. Schreffler. Tr. 66.

1. Stormwater Management:

The existing elevation of the hill and its future elevation relate directly to the question of stormwater management. There have been concerns raised by neighbors on both sides of the site about stormwater run-off onto their properties from the large hill on the site. Mr. Schreffler believes that the drainage was affected by the placement of the fill material which impacted the natural drainage patterns.

Mr. Schreffler introduced a revised storm water management concept plan (Exhibit 50), which has been submitted to the Department of Permitting Services, but has not yet been approved. Tr. 56-59. He testified that stormwater management consists of quality and quantity control, and that will be accomplished through a series of underground pre-treatment devices, storage chambers and filter devices. It will treat the run-off from all impervious areas, parking, the roadway and the rooftops for quality control or removal of pollutants. And also, as a quantity storage, it will slow the run-off and release it at a pre-developed rate.

In addition, there will be stormwater management dry wells which are essentially gravel pits located throughout the site to capture certain amount of roof run-off and provide water quality treatment and ground water recharge as required by the ordinance.

The hill will be removed, and along the westerly property line, as indicated on the plan, there will be a two foot to three foot high retaining wall which will serve to stop run-off and direct it to the public right-of-way and into the storm drain system. He is proposing several inlets along that easterly property line to capture run-off on that side, drain that area and pipe it to the public storm drain underneath McComas Avenue.

The amount of run-off is going to be the same, but it will be controlled and sent to the storm drain under McComas. As a result, there will be less runoff to the properties that adjoin to the east and west. Mr. Schreffler also reassured the confronting neighbor that water from the site will not cross

McComas, jump the curb and get onto the properties on the south side of McComas. Tr. 72.

In Mr. Schreffler's professional opinion, the onsite stormwater management system will be adequate and will meet or exceed all State and County requirements. In addition to those requirements, it also provides for control of the ten and hundred year storm events. If the rezoning is granted, there will be no adverse impact on the surrounding area from the standpoint of stormwater drainage, storm water management or sediment control, and actually there will be a localized improvement to the neighbors to the east and west. Moreover, the proposed development's design will tend to prevent erosion of the soil and preserve any natural vegetation and other natural features of the site where practical. Tr. 64.

Approval of the stormwater management plan is not required until subdivision, and DPS has not yet approved the SWMCP for this project. Nevertheless, the Hearing Examiner finds that Applicant has at least demonstrated that a stormwater management plan can be employed for the proposed development which will not have adverse effects on the environment or the adjacent community.

## 2. Forest Conservation:

M-NCPPC's Environmental Staff reviewed the application in its memorandum of September 24, 2009, which is Attachment 6 to the Technical Staff report (Exhibit 33). It recommended approval of the rezoning application. In doing so, Staff specified that a forest conservation plan will be required with the submission of the preliminary plan of subdivision to maximize tree retention and planting. Staff also noted that Applicant will be required to demonstrate appropriate removal of the hill on the site, in accordance with subdivision regulations.

## 3. Safe Removal of the Hill:

Community concerns about their safety during removal of unidentified materials from the hill were addressed by Applicant's Managing Partner, Sterling Mehring, by Mr. Schreffler and by the

Planning Board.

Mr. Mehring, testified that he had a soil study done on the site. Test pits were dug into the undisturbed soil and several samples were taken in different places. They didn't find very much debris, nor any toxic materials. Tr. 43-44.

Mr. Schreffler testified that the project is subject to various sections of the County Code, including Sections 8-29 and 50-32, which are going to have to be adhered to during the design and construction process to make sure that unsafe materials are properly removed from the site and that no hazard is created for the general public or the adjacent neighbors. Tr. 62. He stated that there will be sediment control measures for the future development of the site, pursuant to an approved sediment control plan and a county permit, to control erosion and the run-off of sediment from the site during the construction process. Tr. 60.

The Planning Board also addressed concerns in the community about the removal of materials which had been deposited on this site during the excavation of Wheaton Plaza (Exhibit 43, p. 2):

The Board clarified that the developer would not be permitted to develop unsafe land. Any fill material removed would have to be accomplished using environmentally sensitive techniques. The developer will have to demonstrate at subdivision and again at the building permit stage that removal of the fill would not have public health impacts.

Based on this record, the Hearing Examiner is satisfied that any environmental concerns on the subject site are being appropriately addressed. Questions relating to the method for safely leveling the hill are clearly not part of the re-zoning process, but will be fully addressed at later stages of the development.

## **J. Community Concerns**

As discussed at the beginning of this report, no opposition was received from the community prior to the public hearing, but there were some expressions of concern received. Two neighbors wrote in to raise concerns about water runoff and about general issues of development design. Exhibits 24 and 44.

The Kensington Heights Citizens Association (KHCA) did not oppose the rezoning, but expressed concerns about stormwater management and removal of the hill on the site, which is comprised of excavation fill. KHCA also wanted a binding element, to which Applicant later agreed, requiring that any residences at the McComas property line would be single-family detached units. Exhibit 42.

Jane Folsom, who had merely expressed concerns at the hearing, sent a letter after the hearing expressing her opposition, asserting lack of compatibility and the need for pedestrian access from the development to Wheaton Plaza. Exhibit 84. Ms. Folsom also feels that there are not enough parks in the neighborhood.

Margaret Podolak testified she and her husband object to any pedestrian access between the subject site and Wheaton Plaza shopping mall. Tr. 171. As was discussed above, other neighbors shared that concern (except Ms. Folsom, who took the opposite view).

Alene Whitten raised concerns in her testimony about the proposed density of the property, the environmental suitability of this site for development, stormwater management, pedestrian access to Wheaton Plaza, traffic safety, the proposed design of the site, which she says limits flow and circulation between adjoining properties, and the correct boundaries of the subject site. Tr. 152-170 and 6/18/10 Tr. 78-82. Her sister, Phyllis Whitten, also expressed her concerns about the boundary issues (6/18/10 Tr. 70-77), as did adjoining neighbor, James Schmidt. Exhibit 80(a). Similar concerns were raised by other neighbors in e-mails.

All these issues are discussed at length in other parts of this report. The boundary issues were discussed in detail in Part III. A. 3. The safe removal of the hill, which is matter to be thoroughly addressed at site plan, subdivision and permitting reviews, was discussed in Part III. I. 3. Stormwater management is a matter for site plan and subdivision review, and it was discussed in Part III. I. 1. The unrebutted evidence is that the proposed development, because of removal of the hill, will reduce

runoff onto adjoining properties. The question of pedestrian access to Wheaton Plaza was discussed in Part III. E., as were the safety of the proposed access road and the sight distances from its entry point onto McComas Avenue. These matters are also subject to review at site plan and subdivision. Compatibility and density will be discussed in part V. B. of this report.

The decision on a zoning application “is not a plebiscite.” *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). It is not the Hearing Examiner’s function to determine which position is more popular, but rather to assess the Applicant’s proposal against the specific criteria established by the Zoning Ordinance, and to evaluate compatibility and the public interest. The evidence produced by both sides must be considered in that analysis, but the facts and the law ultimately determine whether a rezoning application should be granted. As discussed in Part V of this report, the Hearing Examiner finds that the amended application satisfies the criteria for rezoning the subject site to the RT-8 Zone.

#### **IV. SUMMARY OF HEARING**

The hearing was held on November 6, 2009. At the beginning of the hearing, an issue arose as to whether Applicant was seeking to enlarge the size of area to be rezoned following its initial application. After considerable discussion on the record, the Hearing Examiner concluded that the Applicant was not seeking to enlarge the area to be rezoned, because under Zoning Ordinance §59-H-2.4, the term “application” is broader than just the application form. It included both the application form and the Identification Plat (as well as other items), as discussed in Part III. A. 2 of this report. Tr. 12-31. Also, in view of discrepancies in the acreage figures provided by Applicant, the Hearing Examiner asked Applicant’s counsel, when Applicant submitted its corrected application, to include a statement showing that, in fact, Applicant is the owner of that entire lot including the full amount surveyed. Tr. 47.

Applicant called four witnesses, Sterling Mehring, Applicant's managing partner; Curt Schreffler, a civil engineer; Michael Lenhart, a transportation planner; and Alfred S. Blumberg, a land planner. Martin Klauber, the People's Counsel, participated in the hearing, but he did not call any witnesses.

The following community witnesses appeared at the hearing: Jane Folsom, Alene Whitten and Margaret Podolak. The Kensington Heights Citizens Association submitted its testimony in writing to all parties in advance of the hearing because its representative, Donna Savage was scheduled to be out of town on the hearing date. Exhibit 42.

For reasons described elsewhere in this report, an additional hearing date had to be established solely to address concerns about the boundaries and area of the subject site. It was held, as scheduled, on June 18, 2010. Applicant presented expert evidence from its land surveyor, David John Richie, in support of his survey results. No adjoining land owners appeared at the hearing. Confronting neighbors Alene Whitten and Phyllis Whitten did appear and testify. A brief note dated June 17, 2010 (Exhibit 108) was received at the hearing from adjoining land owner James Schmidt, but it did not contain any evidence probative of the issue at hand.

At the conclusion of the survey hearing, the Hearing Examiner granted the Whittens' request for a comment period by interested parties.

For ease of presentation, the testimony in the two hearings is not summarized separately, but rather testimony at the second hearing is annotated showing the date presented.

### **A. Applicant's Case in Chief**

#### **1. Sterling Mehring (Tr. 34-48):**

Sterling Mehring (Applicant's managing partner) testified that he is a developer and a real estate broker. He has developed other properties in the area. His vision for the property is formed by the Sector Plan, which contemplated a mix of housing types, a transition from the intense C-2 zoning



in the back to the R-60 zoning which is to the west and to the south. Also, it was an easy observation of what has been approved in the past that the Planning Board seemed to prefer the maintenance of a single-family streetscape as you come down McComas, with townhomes behind.

He contemplates a homeowners association for the project if it is approved, and the homeowners association would have responsibility to maintain any open space area in accordance with any approved site plan.

Mr. Mehring does not propose any connection between the subject property and Wheaton Plaza because it was apparent from his meetings with the community that they did not want it. There are already two pedestrian accesses along Torrance Avenue. [Applicant's counsel indicated he was willing to amend the schematic development plan's non-binding notes to say that no pedestrian access was provided by this Applicant at the request of the community.]

Mr. Mehring believes the development would be in the public interest for the reasons suggested in the Sector Plan – encouraging growth where the services are already available, closer to transportation. Mr. Mehring agreed that Applicant would be bound by the binding elements.

On cross-examination, Mr. Mehring testified that he had a soil study done. Test pits were dug into the undisturbed soil and several samples taken in different places. They didn't find very much debris, nor any toxic materials. Tr. 43-44.

## 2. Curt Schreffler (Tr. 49-80):

Curt Schreffler testified as an expert in civil engineering. He surveyed the property in detail including boundaries, topographic, tree and utility surveys, and he prepared a storm water management concept plan (SWMCP) for the property. He worked with the land planner in doing the engineering analysis that is part of the subject application.

Mr. Schreffler described the elevations on the property. He noted that during construction of a Hecht's department store, this area was used to deposit excess fill material, which created a large

mound on the property. The elevation of that mound at approximately its highest point in the center of the site is an elevation of 438 feet above sea level. Applicant plans to remove about 15 feet of that fill material, and the final elevation at that same location is 423.5 feet. The corresponding elevations from that high point to the east and to the west, on the adjoining properties are 420 feet. Once that hill is removed, moving from east to west traversing the site will be from 420 up to 423 and back down to 420. So, it will be gradual. The site will also slope down to the existing grade of McComas Avenue, which is 416 feet. It will slope up on to the Wheaton Plaza property in the back, and the site overall will have relatively normal grades. The mountain will disappear. The elevation at the property line of Wheaton Plaza's property will be approximately 424 feet when the grading is done. Tr. 54-55. From McComas to the Wheaton Plaza's property line, it's approximately eight feet of slope over a distance of approximately 400 feet. So, that's actually an average of approximately 2 percent, which is typical and a very gradual slope. Tr. 66.

Mr. Schreffler introduced a revised storm water management concept plan (Exhibit 50). He testified that storm water management consists of quality and quantity control, and that is accomplished through a series of underground pre-treatment devices, storage chambers and filter devices. It will treat the run-off from all impervious areas, parking, the roadway and the rooftops for quality control or removal of pollutants. And also, as a quantity storage, it will slow the run-off and release it at a pre developed rate.

In addition, and as indicated in orange on the Exhibit 50, there are storm water management dry wells which are essentially gravel pits located throughout the site to capture certain amount of roof run-off and provide water quality treatment and ground water recharge as required by the ordinance.

There have been concerns raised by at least one neighbor to the west about run-off in that direction off of the large hill on the site. The hill will be removed, and along the westerly property line, as indicated on the plan, there will be a two foot to three foot high retaining wall which will

serve to stop run-off and direct it to the public right-of-way and into the storm drain system.

There have also been concerns raised by at least one neighbor to the east about run-off from the big hill. Mr. Schreffler believes that the drainage was affected by the placement of the fill material which impacted the natural drainage patterns. He is proposing several inlets along that easterly property line to capture that run-off, drain that area and pipe it to the public storm drain in McComas.

The amount of run-off is going to be the same, but it will be controlled and sent to McComas. As a result, there will be less runoff to the properties that adjoin to the east and west. This plan has been submitted to the Department of Permitting Services for review, but they have not yet acted on it. Tr. 56-59.

DPS's policy for stormwater management facilities for townhomes and single-family home communities is to provide storm water management via a surface pond. Mr. Schreffler feels that surface ponds tend to be unsightly because vegetation grows and can't be mowed since the area is often wet at the bottom. Applicant felt very strongly that in this urban setting it was inappropriate to have that sort of facility in this community. DPS finally agreed about using underground facilities on the site. So, this particular system is a series of vaults and chambers that are buried and out of sight. The water goes to the underground chamber, and then it's ultimately directed to an underground public storm drain system in McComas. Tr. 68-70. Water from the site is not going to cross McComas, jump the curb and get onto the properties on the south side of McComas. Tr. 72.

In his professional opinion, the onsite storm water management system will be adequate and will meet or exceed all State and County requirements. In addition to those requirements, it also provides for additional control of the ten and hundred year storm events. If the rezoning is granted, there will be no adverse impact on the surrounding area from the standpoint of storm water drainage, storm water management or sediment control, and actually there will be a localized improvement to the neighbors to the east and west. Tr. 64.

There will also be sediment control measures for the future development of the site, pursuant to an approved sediment control plan and a county permit, to control erosion and the run-off of sediment from the site during the construction process. Tr. 60. The project is subject to various sections of the County Code, including Sections 8-29 and 50-32, which are going to have to be adhered to during the design and construction process to make sure that there isn't any unsafe material being improperly removed from the site or creating any hazard to the general public or the adjacent neighbors. Tr. 62.

According to Mr. Schreffler, the site is located in a well-developed area, and therefore public utilities exist in the adjacent street, including gas, electric, communication, water, sewer and storm drain. Those utilities are available to serve this development. Tr. 60. In his opinion, the public utilities and facilities are sufficient to accommodate the proposed development. Tr. 63. From a civil engineering perspective, the development will have no adverse impact on the public facilities. Tr. 65.

Mr. Schreffler also testified that Applicant proposes an additional five feet to be dedicated along the approximately 200 feet of McComas Avenue frontage during record plat process, with the total amount of dedication being about 1,000 square feet. The schematic development plan lists the proposed dedication as 968 square feet. This is in accordance with the master plan to provide for a 60 foot right-of-way. Tr. 60-61.

At preliminary plan of subdivision, the stormwater management concept plan would be reviewed and approved. Access to Wheaton Plaza would be addressed and the dedication along McComas would be confirmed. Forest conservation requirements would be addressed, as would any proposed sidewalks along McComas Avenue.

Mr. Schreffler further testified that he did a natural resource inventory, forest and delineation (NRI/FSD) plan, and it was approved by Maryland-National Capital Park and Planning Commission on August 31, 2007. This site is not in a special protection area or a primary management area. Tr. 62. If the rezoning is approved, the proposed development design will tend to prevent erosion of the

soil and preserve any natural vegetation and other natural features of the site where practical. Tr. 64.

3. Michael Lenhart (Tr. 80-107):

Michael Lenhart testified as an expert in traffic engineering and transportation planning. He used an aerial photo to describe the location of the property (Exhibit 52). He also introduced Exhibit 53, a revised traffic statement, which reflects the current application, RT-8 with 11 townhomes and three single-family homes. The development will generate eight trips in the morning peak hour and twelve trips in the evening peak hour. According to the County road policy, the local area transportation review (LATR ) requires Applicant to provide a traffic statement. That traffic statement looks at the traffic generated by the site, and if it generates more than three trips but less than 30 trips, and if it's in an area designated by the policy area mobility review (PAMR) as acceptable with partial mitigation and it falls between 3 and 30 peak hour trips, then the site is a type three application. The traffic statement identifies this as a type three application. It is exempt from an LATR traffic study because it generates between 3 and 30 trips.

The traffic statement points out that the PAMR requirement for the Kensington, Wheaton area is a 10 percent trip mitigation for FY '10. The site generates 12 peak hour trips, and therefore, it needs to mitigate 1.2 trips in the evening peak hour. Because this site is located within a half mile radius of the Wheaton metro station, it provides higher transit service or lower vehicular trip generation than elsewhere in the county. After consulting with Technical Staff, it was determined, based on County data, that this site would generate roughly 25 percent less vehicular traffic than a comparable site using the Countywide standard. Therefore, just the location of this site satisfies 25 percent mitigation and PAMR. Since it only needs a 10 percent mitigation, it exceeds the PAMR mitigation requirements.<sup>10</sup>

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<sup>10</sup> Although the Technical Staff report (Ex. 33, p. 16) refers to a 15% PAMR mitigation requirement, Mr. Lenhart testified that is because the FY '09 PAMR mitigation requirement was 15 percent. It has since been changed to 10%, as evidenced in Exhibit 54 (Table 2), but the fact is that this project meets 25%, so it satisfies both the FY 09 and FY 10 standards.

That procedure has been used on prior cases, and has been reviewed and approved by Staff and the Planning Board. So, the traffic statement essentially shows that the development satisfies both the LATR and PAMR requirements.<sup>11</sup>

Mr. Lenhart testified that he also measured sight distances at the proposed entrance into the subject property. The American Association of State Highway Transportation Officials (AASHTO) produces the guideline for design criteria that jurisdictions utilize in to design highway facilities. It shows that for 25 miles per hour posted speed, you would need 155 feet of sight distance for a vehicle to come to a safe stop. Applying that to the subject property, a vehicle exiting onto McComas Avenue from the development would need greater than 155 feet of sight distance for a car traveling on McComas to come to a safe stop. Because there is in excess of 200 feet sight distance in either direction, the access exceeds the AASHTO minimum requirement. The AASHTO sight distance requirement is 200 feet for 30 mile per hour design speed.

In Mr. Lenhart's opinion, the proposed rezoning will not adversely impact the surrounding area from the standpoint of traffic conditions, and from a transportation planning perspective is compatible with the surrounding area. He also opined that the proposed access to the site as reflected on the schematic development plan is adequate and safe, and that the transportation related public facilities are adequate to accommodate this rezoning change and use. Mr. Lenhart noted that the site is recommended in the Sector Plan for PD-9 Zone, and Technical Staff pointed out that the RT-8 Zone is very similar in density in terms of the development that could occur on the site. So, from a transportation perspective, the RT-8 really won't generate any different traffic than what would occur under the PD-9. Thus, from a transportation planning perspective, the proposed rezoning is consistent with the recommendations contained in the Sector Plan. In his professional opinion, the onsite

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<sup>11</sup> Mr. Lenhart pointed out an error in the October 19, 2009 Staff report, on page 27, which contains the report of Transportation Planning Staff. The Table listing site trip generation should show a total of 12, not 14, evening peak hour trips. Tr. 87.

parking will be adequate as proposed to accommodate the use, and the proposed vehicle circulation systems and points of access are safe, adequate and efficient for both vehicular and pedestrian traffic. The granting of the requested rezoning will not have any adverse impact on the public transportation facilities.

4. Alfred S. Blumberg (Tr. 108-146):

Alfred Blumberg testified as an expert in land planning. He introduced photographs he took of the subject site (Exhibits 57(a), (b) and (c)) and discussed the site and the adjoining properties. Mr. Blumberg noted the location of the Metro station, and indicated that he walked from the site to the Metro in about 15 minutes, and back by a different route in 20 minutes.

Mr. Blumberg used a surrounding area map (Exhibit 55) to describe the surrounding area, including Wheaton Plaza, now Westfield Shopping Mall, or Wheaton Mall, which is adjacent to the subject site, along the mall's southern border.

Wheaton Mall is also in C-2 general commercial. McComas Avenue goes out to the east and intersects with Georgia Avenue. The surrounding area as he defined it is only a little bit different than the surrounding area defined by the Technical Staff. His surrounding area went up to Georgia Avenue on the east, Viers Mill Road on the northeast, University Boulevard on the northwest and then the edge of the sector plan area along Drum and Coronado and Calgary Drive. He included those lots which were abutting the south side of McComas Road out to Georgia Avenue. Technical Staff's surrounding area bit into the shopping center and excluded the office buildings and peripheral uses around the edges of the mall, and went a little bit further to the south, closer to Calgary or even Jennings Road to the south of the subject property. Mr. Blumberg felt, because the circulation pattern is primarily east and west through there, that only those lots abutting the south side of McComas should be included in the surrounding area. But, the surrounding areas of both staff and his are pretty similar, and it would not make a difference to his analysis if the Staff's surrounding area were used.

As part of that surrounding area, this block between the southern end of the mall and McComas Avenue is a transitional block. Hence, the property immediately to the east is zoned RT-8,<sup>12</sup> further to the east is zoned PD-9, and still further to the east is the Steven Mills Elementary School, a special school. Then further to the east is PD-9, and on the south side of McComas is PD-11. There are multi-family residential R 20 zone and some more RT-12.5 along Georgia Avenue. Between the bulk of the residential development to the south and the intense activity of the mall is this transitional block that acts as a separator or a transition between the commercial activity and the residential neighborhood to the south.

The RT-8 which is immediately to the east was rezoned by local map amendment G-323 in 1982 and the PD-9 further to the east along Torrance was rezoned by local map amendment G-505 in 1986. So, this transition between the commercial center of the mall and the existing residential to the south has been going on for the better part of 20 years.

The schematic development plan was designed in a manner to try to replicate the development scenario layout which has all single-family detached homes fronting along McComas Avenue, that is the north side of McComas Avenue, and then townhouses behind. This places townhouses closer to the mall, and single-family detached facing McComas Road facing the other single-family detached on the south side of McComas Avenue. As one travels along McComas Avenue, one sees primarily single family detached homes along either side. The schematic development plan has proposed to replicate that pattern. Moreover, the elevations and slopes on the site will match the slopes to the east and west of the site.

The mall ring road and the mall properties will be sitting at a much higher elevation than the subject property, which is another reason that there is no pedestrian connection between the two. That would require stairs going up there about 30 steps to reach the mall, and it certainly would not meet

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<sup>12</sup> The transcript indicates that Mr. Blumberg referred to this Zone as R-10 (Tr. 117) and RT-10 (Tr. 118), before he later correctly indicated that the properties immediately to the east of the site are zoned RT-8. Tr. 119.



any handicap accessibility requirements. There is also no sidewalk along that portion of the ring road just north of the subject property, so there is nothing to connect to. Tr. 120-121.

Mr. Blumberg testified that there will be three single-family detached and eleven townhomes in the proposed development. All of the dwelling units are planned for two-car, front-loading garages. Although the Sector Plan proposes PD-9 zoning for this property, that is not practical because the PD-9 Zone has a requirement that only single-family detached may be located within 100 feet of other properties zoned for single-family detached homes. That would eliminate more than 50 percent of the property for the use as townhomes. Thus, the PD-9 Zone is not appropriate and or practical for the utilization of the site. R-60 single-family houses are on the west side of the subject property, so Applicant tried to maximize the single-family detached and open space areas on that west side to provide as much unit compatibility as possible adjacent to that R-60 zoning category. To the east of the site, the land is zoned RT-8, the same category that Applicant is requesting on the subject property. There are three single-family homes abutting the subject property just to the east that front onto Littleford Lane. There are townhouses around the end of Littleford Lane, closer to the Wheaton Mall. Thus, they used a very similar approach to the development that is intended by Applicant, which is to put the single families along McComas and put the townhouses behind. It's 65 feet from the back of the proposed townhouse to the back of the existing single-family homes to the east. It's 50 feet to the closest detached home and townhouses on the west.

In Mr. Blumberg's opinion, from a compatibility point of view, this layout is the best configuration for fitting in with the surrounding development. Technical staff agreed with that analysis as well.

The proposed zoning plan from page 47 of the 1990 Wheaton CBD Sector Plan was marked as Exhibit 59. The Sector Plan identifies two properties along that transitional block as being suitable for PD-9. It includes the subject property and also includes the Stephen Knolls Special Elementary

School. The other properties beyond those are already redeveloped. There are single family R-60 to the west of the subject site and townhouses and single family to the east. In Mr. Blumberg's opinion, the RT-8 is in substantial compliance with the Sector Plan because there is only a one unit difference between the PD-9 density recommended in the Sector Plan and the RT-8 Applicant seeks. Moreover, the RT-8 Zone does not require specific compliance with the recommendations of the Sector Plan.

Given the direction of the Sector Plan to encourage residential development in close proximity to Metro and in close proximity to shopping opportunities, and considering the limits of the PD-9 Zone which would prevent townhouses close to the R-60 Zone, the site is actually better off with the RT Zone than with the PD-9. More of the objectives and goals of the Sector Plan can be met with the RT-8 Zone than with the PD-9 Zone, as evidenced by two sentences from the Sector Plan's Urban Design Guidelines (Page 36). It says that the character and scale of existing low density residential communities must be protected. Therefore, Applicant is proposing single-family detached along the north side of McComas. Second, it's important to create adequate transition in densities and massing so that new development is sensitive to existing buildings. The design of the schematic development plan provides that transition in densities.

In Mr. Blumberg's opinion, the site was designated by the Sector Plan for the proposed zone because it was designated for a townhouse use. [The Hearing Examiner indicated that he disagreed since it did not designate an RT Zone.] Section 59-C-1.72 can also be satisfied if the site is appropriate for residential development at densities allowed in the RT zone or if it is in a location in the county where there's a need for a buffer or transitional use between commercial, industrial or high density apartment uses and low density one family uses. Mr. Blumberg testified that this application also meets those segments of the purpose clause of the zone.

It's appropriate at this location because of the abutting developments on either side and the location in this transitional block. It's an appropriate location for this design and density, and it's an

appropriate location for the zone. The whole purpose of the transitional block is to provide that transition between the mall and the Kensington Heights residential neighborhood. So, it meets at least, two of the three, if not three of those criteria of the zone.

As far as the row design, Applicant will add the two foot offsets to the row of five townhouses. The application will meet or exceed all of the development standard requirements for development of this property as shown on the schematic development plan.

As far as public facilities are concerned, the schools have been identified as in the Albert Einstein school cluster, and as illustrated in the letter from Bruce Crispell, which is attached to the back of the Technical Staff report, the school cluster is found to be adequate. It does not exceed the 105 percent enrollment which would require a payment, and is therefore adequate. There's an addition to this program for one of the schools, as referenced on page 28 of the Technical Staff report. That will be online before this development is occupied because it will be at least two years from approval before the development will be constructed.

There are two fire stations in close proximity. One is just north of University Boulevard and east of Georgia which is the Wheaton fire station, fire and rescue station number two, which is located on Grandview Avenue. The Kensington fire station, number five, is located at Connecticut Avenue near University intersection. The nearest police station is located in Glenmont about three miles to the north. And, as Mr. Schreffler testified, public water, sewer, electric are all adequate to serve this proposed development. So, public facilities are adequate to accommodate the proposed development.

As far as the public interest is concerned, the application meets the objectives and goals of the sector plan, and it is within a half a mile, approximately a 15 to 20 minute walking distance from the Metro station. The smart growth policies of the County and state to have residential development in close proximity to retail as well as the public transit are all met with this application. Mr. Blumberg opined that the development of this property residentially would be in the public interest.

Each of the townhouses is proposed to have a two-car garage. There will also be two-car garages associated with each of the three single-family detached homes. In addition, there will be twelve additional guests and visitor parking spaces. Three located on the western edge, three located on the eastern edge and then six in approximately the middle. The total parking is 40 parking spaces. If the space in the driveways is added, the total parking spaces including those parking spaces in the driveways, would be 46, four for each of the three single family detached, two for each of the townhouses and then the 12 guest or visitor parking spaces.

Mr. Blumberg also testified that the internal private street will be adequate for emergency vehicles, and it was designed in conformance to the Montgomery County Fire and Rescue Department design standards for radial and turning distances and access to each of the units. So, it meets all of the county standards for emergency access. In his opinion, the onsite circulation system is safe and adequate for both pedestrians and vehicles.

In terms of the requirements of Section 59-H-2.53, the schematic development plan is in compliance. Mr. Blumberg also agrees with the findings and recommendations of the Planning Board.

5. David John Ritchie (6/18/10 Tr. 11- 69):

David John Ritchie testified as an expert in land surveying. He stated that he has the highest level of surveying license issued by the State of Maryland, that of professional land surveyor. As such, he has conducted hundreds of surveys. He testified that he did a boundary survey of the subject site, and its results are accurately reflected in the Identification Plat (Exhibit 5) which he had certified. In his opinion as a licensed professional land surveyor, he correctly located each of the boundary lines of the subject property.

Mr. Ritchie described the survey process (6/18/10 Tr. 22-24):

In 2006, we were contracted to do a boundary topographic survey on the subject property. First, once we're contracted, we do research for the deeds, plats of the subject property and the adjoining properties. From that, we prepare a deed plat which is a compilation of the deeds and records plats so that we get a field

configuration of the lots and that the field crew has some basis to look for property monumentation in the field. That monumentation being iron pipes, stones, concrete monuments, rebar caps.

And at that time, we make a site visit with the crew and they search for these monumentations. They'll locate them through angle and distance and then bring the information back. I'll process that into a drawing and then compare the field locations of the monumentation to the record plats and the deeds. At that point, make a final determination of the property lines between the two plats and then just prepare the final product which was, in this case for us, was the plat survey.

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Monumentation is anything that would define the boundary lines of the property as in iron pipes, rebars, stones, concrete monuments.

Mr. Ritchie further testified that the monumentation he found on the subject site (iron pipes and rebars) is indicated by small circles along the property line and noted by a brief annotation on Exhibit 5. The pipes, rebars and caps that were consistent with the record plats of the adjoining properties.

When asked by the Hearing Examiner what accounted for the three different figures given in this case, Mr. Ritchie testified (6/18/10 Tr. 26-27):

Surveyed areas are consistently different than what's deeded.

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The differences between surveys is techniques in surveying and equipment used and a lot of times, the time frame between. We have a much more accurate way of measuring distances now than they did back in even the '60s and '50s and, you know, the original Lot 16 was subdivided back in 1890 so just, it's all the differences between technique and equipment.

In his opinion, the 476 square foot, plus or minus, difference between surveys, is within a range of professional disagreement for surveys. He believes that the difference with the tax records from which the initial 1.76 acre figure came, was the result of somebody measuring incorrectly because their instrumentation at that point was not as good as present day; however, he is not sure where the tax record figure came from. 6/18/10 Tr. 27-30.

When asked about the pipe Mr. Schmidt had referenced on his property, Mr. Ritchie testified that it did not actually mark a property line and that it was about seven feet northeast of the corner monumentation he had found when he did the survey in 2006. The correct corner monumentation is noted on the ID Plat as Point 749, with the notation "OIPF," which stands for "open iron pipe found." Moreover, he found additional monumentation along the western property line consistent with his survey. 6/18/10 Tr. 32-35, 57-58. To make sure that the monumentation he found correctly reflects the property lines, he locates other monumentation randomly throughout the neighborhood to establish control coordinates. From those known points, the location of which is confirmed using GPS technology, he then determines the locations on the property to be surveyed. 6/18/10 Tr. 38-39; 49-50.

Mr. Ritchie stated that he uses state-of-the-art surveying equipment consistent with other companies in the area in the profession, and as is customary, he employs a two-man field crew. Based on his survey, Mr. Ritchie testified, "In my professional opinion, the land requested to be rezoned by this local map amendment does not include any portion of the adjoining properties." 6/18/10 Tr. 37.

On cross-examination, Mr. Ritchie indicated that the only figure for area of the site that he saw on a deed indicated 1.79 acres, and that is the current deed. That measurement resulted from an earlier VIKI survey. There is no subdivision plat for this lot. 6/18/10 Tr. 43-44.

He also noted that when he returned to the site on March 18, 2010, the iron pipe marking the southwest corner of the site in 2006 was missing, so he replaced it. 6/18/10 Tr. 66-67.

On redirect, Mr. Ritchie testified that the subject site he surveyed does not include and part of the County's right-of-way [along McComas Avenue]. 6/18/10 Tr. 68.

### **B. The People's Counsel**

Martin Klauber, Esquire, the former People's Counsel, did not call any witnesses; however, he participated in the hearing and conditionally supported the rezoning. Mr. Klauber

noted at the beginning of the hearing that with the addition of binding elements limiting the number of units to 14 and specifying that only single-family detached units would be placed abutting McComas Avenue, he supported the rezoning. Tr. 31-32. The People's Counsel's support was also linked to there not being access to Wheaton Plaza directly from the subject site, and he asked that issues related to the on-site landfill be appropriately addressed at site plan review. Tr. 174-175.

### **C. Community Response**

#### **1. Donna Savage, on behalf of the Kensington Heights Citizens Association (Exhibit 42):**

The Kensington Heights Citizens Association submitted its testimony in writing to all parties in advance of the hearing because its representative, Donna Savage was scheduled to be out of town on the hearing date. KHCA did not oppose the rezoning, but expressed concerns about stormwater management and removal of the hill on the site, which is comprised of excavation fill. KHCA also wanted a binding element, to which Applicant later agreed, requiring that any residences at the McComas property line would be single-family detached units. Exhibit 42.

#### **2. Jane Folsom (Tr. 146-151):**

Jane Folsom testified that she lives at 2704 Calgary Avenue, which is just a short distance from the site. She is interested in the environmental issues and the issues of storm water management. Ms. Folsom stated (Tr. 148):

I can't object to the designation of this property for development. I can only say things like try to keep as many trees as possible because the trees are a much better cleanser of the ground water. And, try to keep as little, try to use things like rain gardens, even rain gardens on a roof.

She felt that the traffic expert was perfectly correct in his data, but he didn't look at the bigger picture. McComas Avenue is used by residents of other streets to get to stores. Ms. Folsom also would have liked to have seen the subject site as a park.

3. Alene Whitten (Tr. 152-170; 6/18/10 Tr. 78-82):

Alene Whitten testified that she lives at 2700 McComas Avenue, directly across the street from the subject property. She has several concerns about the zoning and development of this property, including density, stormwater management and access to McComas Avenue. She would like to make sure that basic health and safety issues, including especially the environmental suitability of this site for development, are adequately addressed in the process.

Ms. Whitten noted the steep manmade slope on the property, which she referred to as a landfill. Although some of the reports refer to dirt, soil or stockpile, she feels that the steep hill is composed of unknown and untested excavation materials, waste and possibly toxic and contaminated soil from the adjacent Wheaton Westfield mall site. Her fear is that if the development process does not take into account how to remediate any environmental concerns connected with this property, the neighborhood could be exposed to serious health risks.

She noted that the previous use of the mall site was as an auto racetrack. Lead, asbestos, oil and other unknown hazards all possibly contaminate the soil in the site. She wanted to make sure that the process recognizes from the start the serious environmental issues presented here before the applicants start disturbing the large land mass of previously discarded materials that are currently covered in grass and trees. She also feels that an analysis needs to be done of the deposited soils to determine if the site is suitable for habitation. The reports appear to suggest that just removing some dirt will alleviate any problem. As a neighbor, she is concerned about how she will be protected from possible environmental contamination if removal is permitted and what harm vibration of the heavy trucks in the neighborhood will cause to nearby older homes.

In addition to health concerns, she observed that Kensington Heights, though not a part of the historic town of Kensington, contains many old and historic homes. The special character of the neighborhood as it developed over the years is residential in nature and the current zoning reflects



that focus. She is concerned that the design of the so-called transitional neighborhoods limit flow and circulation between adjoining properties. This development would only have one point of ingress and egress, McComas Avenue, a residential street that increasingly is becoming an alternative throughway to University Boulevard to the north. Because there are no alternate methods of circulation from the proposed development through the mall or through the neighborhood, increased scrutiny should be given to whether this narrow and challenging piece of property should be granted the requested zoning at all.

Ms. Whitten also had safety concerns. She noted that the distance between Melvin Grove and Littleford Lane is only 400 feet in total, and the Melvin Grove is behind the blind curve. She therefore questioned the expert's testimony of 150 feet of sight distance for the site's proposed access, and indicated that there was a large number of accidents there.

Ms. Whitten indicated her concern over stormwater management. She reported that neighbors on all sides currently experience severe water run-off damage from the site, and she feels that the developer should not obtain any exemptions from all current and future applicable requirements. When the Hearing Examiner pointed out that the exemption Applicant obtained was just not to have a pond, but to have an underground treatment facility, Ms. Whitten indicated she did not object to that. Ms. Whitten identified a number of photographs of the area.

Finally, Ms. Whitten stated that she would prefer there not be pedestrian access to Wheaton Plaza from the site because they've had a lot of people arrested there. She does not see any benefit of access to all the residents on McComas.

Alene Whitten testified again at the hearing regarding the survey and boundaries. She indicated she was confused by the surveyor's testimony that he replaced a marker that had been missing when he returned to the property. She testified that she had not seen that marker before, and she found it "very curious." [The Hearing Examiner pointed out that the referenced marker at the

southwest corner did not suddenly appear for the first time in March of 2010, since it was indicated in the ID plat (Exhibit 5) filed as part of the application. It was not a change.]

Ms. Whitten concluded by saying that “things have changed” and that the rezoning should be denied. “I don't feel that they have proved, number one, that they own all of this land and that it would be a good use for this land.” 6/18/10 Tr. 82.

4. Margaret Podolak (Tr. 171):

Margaret Podolak testified that she lives at 2605 McComas Avenue. She and her husband object to any pedestrian access between the subject site and Wheaton Plaza shopping mall.

5. Phyllis Whitten (6/18/10 Tr. 70-77):

Phyllis Whitten testified that her family owns the confronting property at 2700 McComas Avenue. She stated that she is licensed to practice law in the District of Columbia and California and is a licensed real estate agent in Maryland and in the District of Columbia. She personally researched the deeds in this matter and requested that official notice be taken of the deed in this matter, which specified an area of 1.79 acres. When asked by the Hearing Examiner, Ms. Whitten indicated that she is testifying as a layperson, not an expert.

Ms. Whitten argued that the deed established the area of the property, not Applicant's survey. She also mentioned that the notice sign specified 1.76 acres, which is what the tax records indicate. [The Hearing Examiner responded that he did not think the minor discrepancy in the notice sign (1.76 acres v. 1.8 acres) was of any moment here given that all the confronting and adjacent landowners have been notified directly by written notice and by publication in newspapers about this very question, and this proceeding was set up to answer the property boundary question and to give them the opportunity to be heard on the question.] 6/18/10 Tr. 73-74.

Phyllis Whitten summarized that the point of her testimony is that she questions whether the “the technical evidence” presented in this case can outweigh the legal documents, the real estate

documents that are on file with the County. 6/18/10 Tr. 76.

## 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 RT-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 rezoning.

As mentioned in Part III.G. of this report (pp. 26-29), compliance with Sector Plan recommendations is not mandatory in this case because the R-T Zones do not require it; rather, the

courts have held that the Master Plan or Sector Plan should be treated only as a guide in rezoning cases like this one. As stated in *Trail v. Terrapin Run*, 403 Md. 523, 527, 943 A.2d 1192, 1195 (2008),

We also acknowledge our statement in *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 530, 814 A.2d 469, 478 (2002) (citing *Richmarr*, 117 Md. App. at 635-51, 701 A.2d at 893-901, [1997] that:

We repeatedly have noted that [master] plans, which are the result of work done by planning commissions and adopted by ultimate zoning bodies, are advisory in nature and have no force of law absent statutes or local ordinances linking planning and zoning. Where the latter exist, however, they serve to elevate the status of comprehensive plans to the level of true regulatory device.<sup>13</sup>

We return now to the three areas of Council review discussed above – the purpose and requirements of the zone, compatibility with land uses in the surrounding area, and relationship to the public interest.

### **A. The Purpose and Requirements of the Zone**

The intent and purpose of the R-T Zones, as stated in Code §59-C-1.721, are 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*

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<sup>13</sup> Because the proposed RT-8 Zone does not require conformance with the Sector Plan, this case is not affected by legislation aimed at modifying *Terrapin Run*'s interpretation of the word, "conform."

*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 RT-8 Zone, and thus the Purpose Clause cannot be satisfied under that criterion.<sup>14</sup> 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” and the “transitional” criteria. In this regard, Applicant’s land use planner, Al Blumberg, testified that the development is appropriate at this location because it is compatible with the abutting developments on either side and because of the location of this transitional block. As

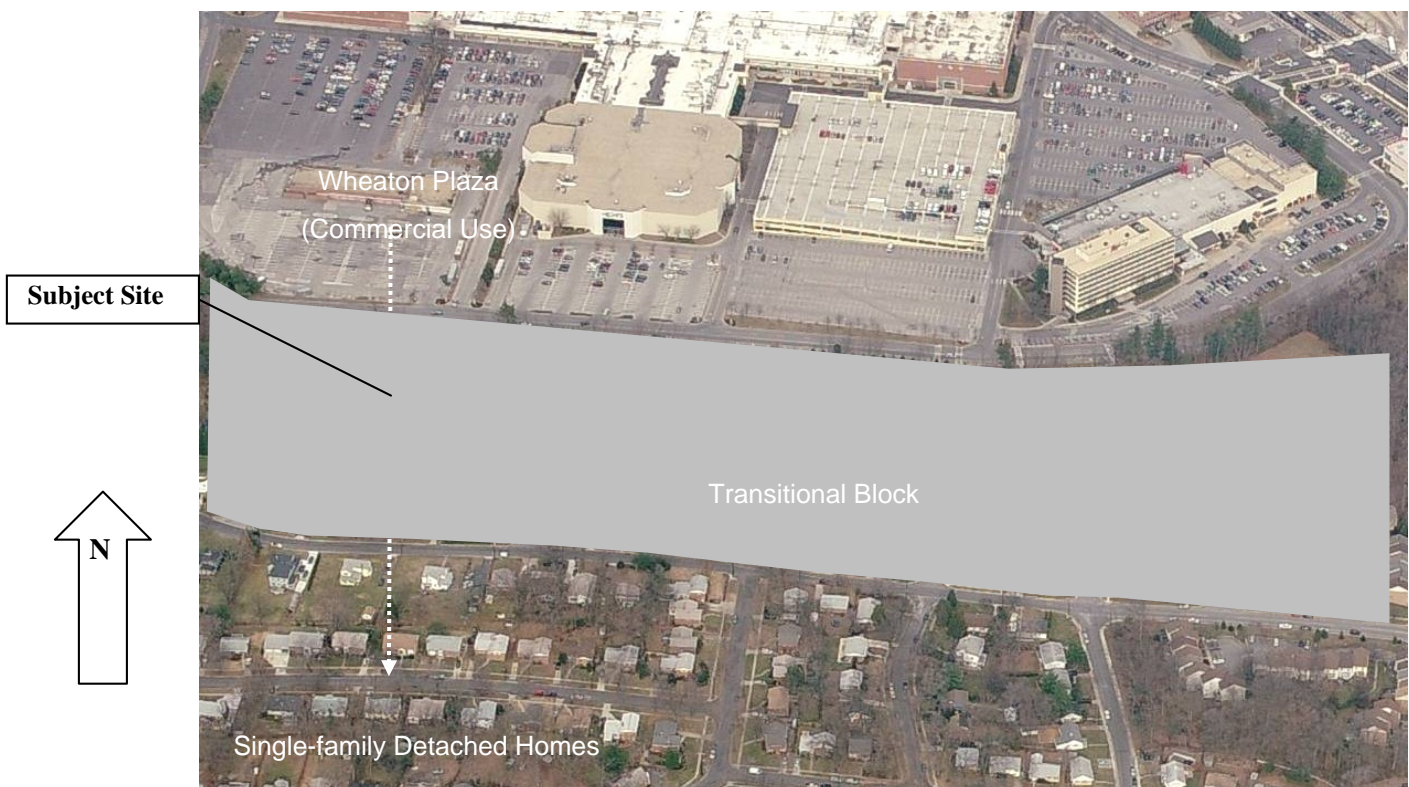
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<sup>14</sup> Applicant argues that its proposal does satisfy the “designated” prong of the statutory test because the proposed density and residential use will be the same as the PD-9 Zone, which is the zone that was actually recommended in the Sector Plan. Tr. 131-132. Technical Staff agreed for the same reasons. Exhibit 33, pp. 11-12. While this interpretation is arguable because the language of the statute could be read as allowing the term “designated” to refer to the density allowed in the RT Zone, not just to the RT Zone itself, the Hearing Examiner feels that a better interpretation of the term “designated” is that it is referring to the RT-Zone, while the term “appropriate” is referring to the densities allowed in the RT Zones. As discussed in the above text, this difference in interpretation of an ambiguous statute does not affect the outcome of the case because the statutory test may be satisfied by meeting any one of the three alternative criteria.

stated by Mr. Blumberg, “it is an appropriate location for this density. It's an appropriate location for this design and it's an appropriate location for the zone. . . . The whole purpose of the transitional block is to provide that transition between the mall and the Kensington Heights residential neighborhood. So, it meets at least, two of the three, if not three of those criteria of the zone.” Tr. 132-133.

The density proposed by Applicant is 7.75 dwelling units per acre (*i.e.*, 14 Dwelling Units on 1.806 acres). Technical Staff found that the residential density proposed is appropriate because it is close to the densities of the nearby residential developments on the block and because “the site is designed in a way that matches single-family homes to its R-60 neighbors and townhouses to its R-T 8 neighbors. Additional factors, such as the site being in close proximity to the Wheaton Metrorail Station and that the proposal does not generate many peak-hour trips, lead to a conclusion that the proposed density is appropriate for the area.” Exhibit 33, p. 14.

Technical Staff used the following annotated aerial photograph to illustrate that the proposed development would also satisfy the “transitional” criterion (Exhibit 33, 13):



As stated by Technical Staff (Exhibit 33, p. 12):

To satisfy the transition prong of the R-T Zone special regulations, the applicant must show that a need exists for a transition between commercial, industrial, or high-density apartment use and low-density single-family housing. The applicant's position is that the subject site is suitable because it will contribute to an existing transitional block from the Wheaton Plaza commercial shopping center to the single-family detached homes to the south of the site. Staff agrees. Here, the applicant satisfies this standard because Wheaton Plaza is a commercial use and the subject property is located between Wheaton Plaza and an area of single-family detached homes to the south. The entire block along the northern side of McComas Avenue has developed with single-family homes facing the McComas Avenue street frontage and more clustered homes with increased density closer to Wheaton Plaza. A need has clearly been established in the past for an appropriate transitional block at this location. The subject property should complete the transition along the northern side of McComas Avenue. The following picture illustrates this point.

The Planning Board agreed (Exhibit 43), as does the Hearing Examiner. Given the adjacent developments, especially the RT-8 development adjoining to the east, the subject development, at the proposed density of 7.75 dwelling units per acre, is clearly appropriate for the area. Moreover, the townhouses to be located in the northern and eastern parts of the development will serve as a transitional buffer for the existing single-family detached homes. The purpose clause of the RT-8 Zone is therefore satisfied.

The intent clause of the R-T Zones will also be fulfilled. The R-T Zone will allow much more freedom of design than the PD-9 Zone because development under the PD-9 is restricted by the PD-9 Zone's setback requirements, as applied to the narrow width of this site. Zoning Ordinance §59-C-7.15(b)(1). Also, by designing the townhouse units in small rows of three, with the only row of five abutting the Wheaton Plaza property, and by restricting any dwelling units abutting McComas Avenue to single-family detached units, Applicant will prevent detrimental effects on the adjacent properties in the neighborhood.

Applicant's proposal also meets and even exceeds all the development standards and special regulations of the RT-8 Zone, as demonstrated in Part III. F. of this report. Most significantly, the maximum amount of building coverage is specified in the Zoning Ordinance as 35 percent in the RT-

8 Zone, and Applicant is binding itself to no more than 25 percent building coverage, considerably less than the maximum permitted.

In sum, the subject application meets the purpose and requirements of the RT-8 Zone.

### **B. Compatibility**

An application for a floating zone reclassification must be evaluated for compatibility with land uses in the surrounding area. For the reasons discussed in the preceding section, Applicant has demonstrated compatibility with the surrounding area. Technical Staff agrees (Ex. 33, pp. 6 and 15):

Given the narrow shape of the site, the general layout is compatible with neighboring patterns of development. The smaller groupings of townhomes on the east side of the site are in scale with abutting single-family detached homes. Further, the smaller groupings break the mass of what was originally proposed as a larger townhouse row. The row of five townhouses at the rear of the site (closest to Wheaton Plaza) provides a clear termination of the proposed private road and fits within an already existing transitional block that provides a buffer between Wheaton Plaza and the single-family homes on the south side of McComas Avenue.

\* \* \*

The proposal is compatible with adjacent development in the surrounding area. A good portion of the surrounding area is comprised of existing single-family detached housing and townhouses. Almost the entire northern side of McComas Avenue contains a mixture of single-family detached houses and townhomes. The proposal provides for a similar mixture of housing types in a design comparable to adjacent properties along McComas Avenue. As proposed, the development will continue the pattern of single-family detached homes facing McComas Avenue. Additionally, the proposal will locate the more densely clustered townhomes towards the rear of the property, contributing to an existing transition between Wheaton Plaza and the single-family detached homes on the opposite side of McComas Avenue.

Comparative density is also an important factor in determining compatibility with adjacent properties. The proposal will be similar to the prevailing density of the northern portion of McComas Avenue. Other factors, such as building heights, materials, and the exact number of dwellings, will be further refined at the site plan stage to ensure compatibility.

The Applicant has also gone a long way towards alleviating the concerns about compatibility raised by the community by agreeing to limit the number of dwelling units to a maximum of 14 and specifying that any units that have frontage on McComas Avenue “shall be one-family detached homes.” Binding Element 4.



Although Alene Whitten and Jane Folsom raised concerns about the compatibility of a development of the density proposed, the PD-9 Zone recommended by the Sector Plan permits a base density of nine dwelling units per acre, which is greater than the 7.75 density proposed here. Zoning Ordinance §59-C-7.14. Moreover the PD-9 Zone requires that a minimum of 25% of the dwelling units be townhouses or attached. Zoning Ordinance §59-C-7.131. Thus, the Sector Plan's PD-9 Zone recommendation is, in effect, a determination that townhouses are not, *per se*, incompatible with the neighborhood.

Based on this record, the Hearing Examiner agrees with the findings made by Technical Staff that the proposed reclassification to the RT-8 Zone and the proposed development would be compatible with development 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 or Sector Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment, and factors such as the location near public transportation, especially a Metro station.

The Sector Plan and the recommendations of the Planning Board and Technical Staff were considered, at length, in Part III.G., and Parts V. A. and B., of this report. The Sector Plan does not specifically recommend the zoning change sought by Applicant, but the requested rezoning is

consistent with its objectives and general language. 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 RT-8 Zone.

The impact on public facilities was discussed in Part. III. H. of this report. The evidence indicates that, although the local elementary school experiences some overcrowding, a new school is scheduled to open in the same general time frame that the proposed development would be completed. Moreover, “[t]he current growth policy school test (FY 2009) finds capacity adequate in the Einstein Cluster.” *See* March 26, 2009 letter from Bruce H. Crispell, the Director of Long-range Planning for the Montgomery County Public Schools (Attachment 5 to the Technical Staff report, Exhibit 33). Given Mr. Crispell’s conclusion and the plan for added capacity for elementary school students, the Hearing Examiner finds that there is sufficient school capacity for the proposed development.

The evidence also supports the conclusion that the impact on local traffic from this development would be minimal and will clearly meet LATR and PAMR standards. Evidence was also presented that the proposed development would have no adverse effect on utilities or other public services.

The potential for any adverse environmental impact was discussed in Part III. I. of this report. As noted there, the site is not in a special protection area, and a forest conservation plan will be required at subdivision to maximize tree retention. A stormwater management concept plan has been submitted to DPS, and it will be reviewed at subdivision. Neither Technical Staff nor the Planning Board noted any adverse effect on the environment; nor is there any other such evidence of record despite concerns raised by the neighbors about the safe removal of the man-made hill on site. That issue is more properly addressed later in the development process. Moreover, the undisputed evidence is that removal of the hill on the site will reduce stormwater runoff onto adjoining properties.

Technical Staff concluded that the proposed development would be in the public interest because “. . . the proposal furthers the general intent of the 1990 Wheaton Sector Plan and is consistent with its objectives and general language. . . . The proposal will not have any adverse impacts on public facilities, and the property’s proximity to the Wheaton Metrorail station makes it an ideal location for townhouse development. For these reasons, the application bears a sufficient relationship to the public interest to justify its approval.” Exhibit 33, pp. 15-16.

It is the Hearing Examiner’s conclusion that this proposal minimizes adverse impacts on the community, provides a buffer from commercial development for the nearby single-family detached homes, and establishes a walkable community with easy and quick pedestrian access to Metro and the nearby shopping mall.

For all of these reasons, as more fully discussed in Parts III. G., H., I., and J. of this report, 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 RT-8 Zone and its Purpose Clause;
2. The application proposes a form of development that would be compatible with land uses in the surrounding area; and
3. The requested reclassification to the RT-8 Zone has been shown to be in the public interest.

## VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-879, requesting reclassification of 1.806 acres (78,672 square feet) of unimproved land, known as Part of Lot 16, Block E, Kensington Heights Subdivision, and located at 2609 McComas Avenue, Kensington, Maryland, from the existing R-60 Zone to the RT-8 Zone, be **approved** in the amount requested and subject to the specifications and requirements of the revised Schematic Development Plan, Exhibit 63(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 and that the revised Declaration of Covenants (Exhibit 63(f)) is filed in the County land records in accordance with § 59-H-2.54 of the Zoning Ordinance and proof thereof submitted to the Hearing Examiner within the same timeframe.<sup>15</sup>

Dated: August 18, 2010

Respectfully submitted,

Martin L. Grossman  
Hearing Examiner

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<sup>15</sup> The Hearing Examiner believes that, pursuant to Zoning Ordinance §59-H-8.2(b), a five-member majority of the Council will be required to approve this application. Although the RT-8 classification is not recommended by the Sector Plan, the Planning Board recommended approval. §59-H-8.2(b) provides:

*(b)A resolution granting a classification that is not recommended for the subject property by an approved and adopted master or sector plan or functional master plan requires the affirmative vote of 6 members of the district council. However, if the Planning Board recommends approval of the classification, the resolution requires the affirmative vote of only 5 members.*