

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  
100 Maryland Avenue, Room 200  
Rockville, Maryland 20850  
(240) 777-6660  
[www.montgomerycountymd.gov/mc/council/hearing.html](http://www.montgomerycountymd.gov/mc/council/hearing.html)

IN THE MATTER OF:  
PORTEN COMPANIES, INC.,

Contract Purchaser, Applicant

Alfred Blumberg, AICP  
Daniel E. Pino, P.E.  
Andrew T. Der  
J. Patrick Klima  
Robert M. Brennemen, P.E.  
C. Craig Hedberg  
Ramon Sobrino, A.I.A.

For the Application

Yum Yu Cheng and Barbara Sears,  
Attorneys for the Applicant

Zoning Application No. G-834

\* \* \* \* \*

Dr. Malcolm D. Rivkin  
Dr. David Haos  
David Gillis  
Lisa Goodman

In Opposition to the Application

David C. Gardner, Attorney for the  
Orchard Knolls Homeowners Association  
and neighboring property owners, in  
Opposition to the Application

\* \* \* \* \*

Before: Philip J. Tierney, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

**TABLE OF CONTENTS**

**I. SUMMARY ..... 3**

**II. STATEMENT OF THE CASE..... 4**

**III. FINDING OF FACTS..... 4**

**A. SUBJECT PROPERTY.....4**

**B. ZONING AND PLANNING HISTORY.....6**

**C. SURROUNDING AREA.....9**

**D. PROPOSED DEVELOPMENT .....15**

        1. LAND USE AND BULK.....15

        2. AMENITIES .....20

        3. BINDING ELEMENTS .....21

        4. DENSITY .....23

**E. PUBLIC FACILITIES .....24**

        1. TRANSPORTATION .....25

        2. UTILITIES.....27

        3. SCHOOLS .....27

**III. SUMMARY OF TESTIMONY ..... 27**

**A. APPLICANT’S CASE IN CHIEF .....27**

**B. OPPOSITIONS CASE IN CHIEF .....44**

**C. APPLICANT’S REBUTTAL CASE .....52**

**IV. ZONING ISSUES ..... 53**

**A. PURPOSE CLAUSE.....53**

        1. TRANSITION.....54

        2. DESIGNATION.....54

        3. APPROPRIATE.....54

**B. COMPATIBILITY .....56**

**C. MASTER PLAN .....57**

**D. PUBLIC INTEREST .....58**

**V. CONCLUSIONS..... 59**

**VI. RECOMMENDATION ..... 59**

## I. SUMMARY

The Applicant requests rezoning from the R-200/TDR Zone to the RT-8 Zone of 5.288 acres of land located on Darnestown Road at the northern edge of the North Potomac Community within the Potomac Subregion. The Applicant proposes to build townhouses between Fire Station No. 31 and a single row of single-family detached homes. The Applicant filed under the optional method, which allows limitations to be placed on density, land use, building standards and staging. The application includes binding elements that include a number of amenities.

Under the RT-8 Zone, the Applicant must show that the site is either designated for the zone, or there is a need for a transition, or the proposal is appropriate given the location and density sought. The Applicant failed to establish any of these alternative eligibility requirements. The site is not designated on the master plan for the RT-8 Zone and the site does not meet the requirements for a transition. Lastly, the Applicant failed to show that the proposal is appropriate for the location and density sought.

The Applicant submitted an illustrative plan showing 39 units. If the District Council is to make a determination about the appropriateness of townhouses at this location, it needs to know what the density will be. In the absence of a density limitation, the Council is required to evaluate this request based on the maximum potential density. The maximum potential development under the RT-8 Zone is 42 units, which is 4.2 times the planned density for the site and 2.6 times the prevailing density of the adjacent residential community. A density of 42 units is inconsistent with density recommended by the master plan and incompatible with the prevailing density of the adjacent community.

The record supports conclusions that the proposed zoning is inappropriate, incompatible, and inconsistent with the master plan and not in the public interest. The hearing examiner's recommendation is to deny the application.

## II. STATEMENT OF THE CASE

Application No. G-834, filed on January 6, 2004, requests reclassification from the R-200/TDR Zone to the R-T 8 Zone of 5.288 acres of land known as P-426 and located at 12024 Darnestown Road, Gaithersburg, Maryland, in the 6th Election District.

The Technical Staff of the Maryland-National Capital Park and Planning Commission (“MNCPPC”) initially reviewed the application and recommended approval in a report dated July 1, 2005. The full Planning Board considered the application on July 7, 2005 and, by a vote of 3 to 2, recommended approval. The staff report was revised by a supplemental report, dated on July 14, 2005.

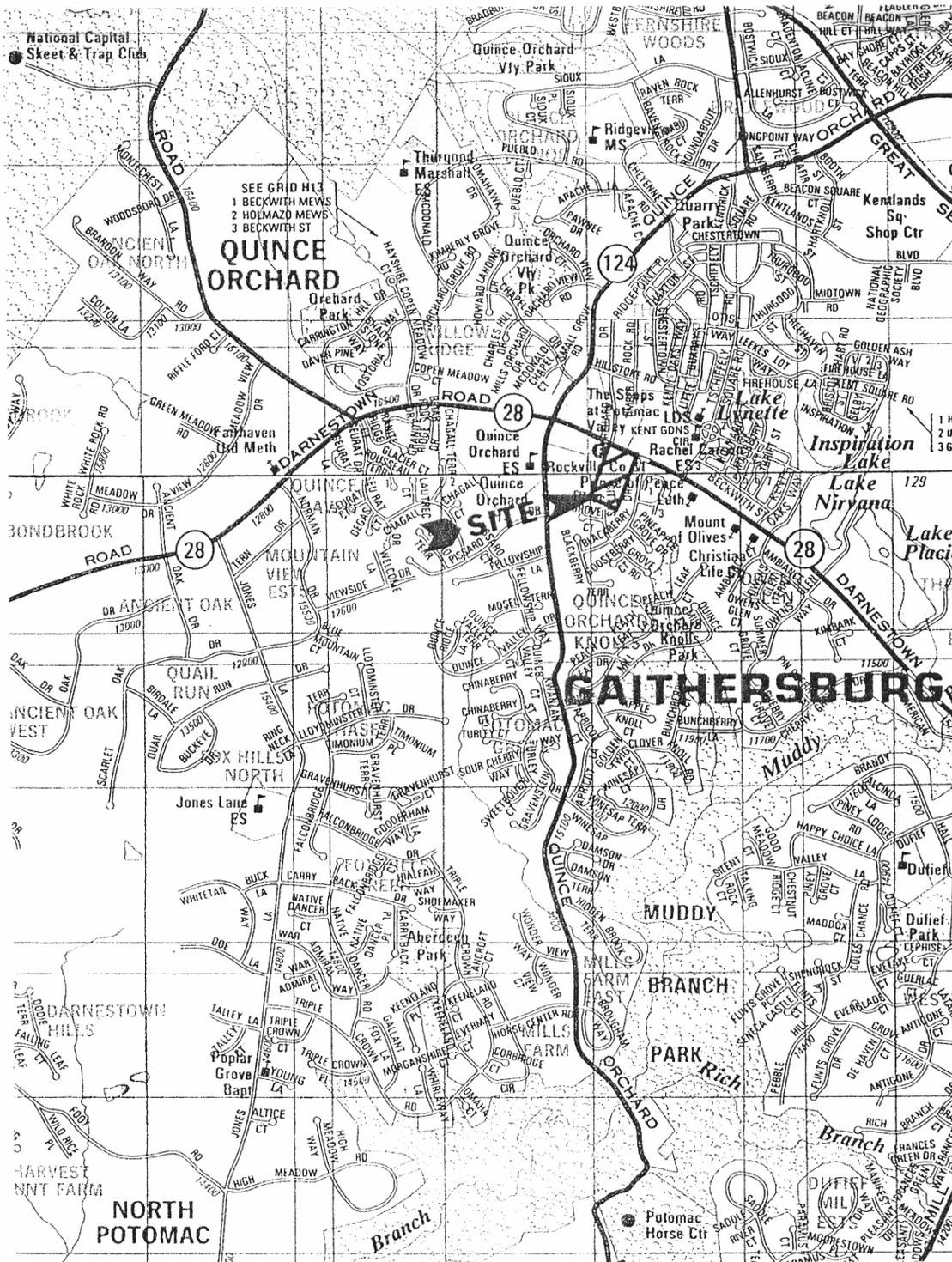
A public hearing consumed two full days of testimony on July 18 and 19, 2005, at which time evidence was presented both in support of and in opposition to the application. The record was initially to close on July 29, 2005. However, the closing of the record was extended at the request of the parties and closed on August 18, 2005.

## III. FINDING OF FACTS

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

### A. SUBJECT PROPERTY

The subject property is located on the south side of Maryland Route 28, also known as Darnestown Road, about 1,000 feet east of its intersection with Quince Orchard Road. The property is located at the northern tip of the emerging community of North Potomac. It lies directly south of the City of Gaithersburg. The property is rectangular in shape and measures 5.288 acres or 230,345.28 square feet. The site possesses 325 feet of frontage along Darnestown Road and extends about 700 feet in depth. The location and shape of the site are depicted on the next page.



Taken from:  
 Montgomery Co. ADC Map  
 (Scale: 1" = 2000')  
 copyright ADC The Map People Permitted Use #20405110

**Potomac Gardens**  
 Montgomery County, Maryland

**NRI/FSD REPORT**  
 Figure 1

The site is currently used as a horticultural nursery operating as the Potomac Garden Center. The topography rises to the south, or the rear of the property, and is about 10 to 15 feet higher than the front of the property. Access to the site is by way of a single driveway from Darnestown Road on the west side of the site. The site is densely packed with a large retail building, the access driveway and associated parking areas, about 20 greenhouses, and storage of landscape contractor materials and equipment. The nursery is screened from adjacent residential homes by berms, a fence of 8 or 9 feet in height and evergreen trees planted on top of the berms.

There is a drainage swale in the northeast corner of the site that catches runoff from a culvert under the newly improved Route 28 and drainage extends through the site in a southeast direction to the Muddy Branch stream. The drainage swale is classified under MNCPPC Environmental Guidelines as a protected stream valley buffer. The buffer area constitutes about 1.5 acres or about 30% of the site. A natural features map appears on the next page.

#### **B. ZONING AND PLANNING HISTORY**

The 1954 Regional District Zoning applied the Rural-Residential (R-R) zone to this area of the County and classified the property for half-acre residential density. The Board of Appeals approved the use of the site as a horticultural nursery in 1971 in case BA-3051. The Board approved several modifications since that time that allow for offices and retail sales. A complaint is currently pending before the Board regarding the greenhouses which are alleged to be unlawful.

In 1973 the old R-R zone was replaced by the R-200 Zone but left residential land uses and density essentially the same as under the previous zoning. This zoning was changed by comprehensive zoning in 1982 when the R-200/TDR zone was applied and permitted development of the site and adjacent properties at a density of 3 dwellings per acre, provided the TDR option was applied and the land included at least 10 acres.

The property lies within an area governed by the recommendations of the Potomac Subregion Master Plan, approved and adopted in 2002. The Subregion is divided into four community areas: Potomac on the east, Travilah in the middle south, Darnestown in the west, and North



of any community in the Potomac Subregion. It is the most densely populated as it straddles the two adjacent planning areas, Travilah and Darnestown. The population density of North Potomac is 3,361 people per square mile, while Travilah is only 421 and Darnestown is even more rural at 272. North Potomac has a population base and infrastructure to support more residential development. These areas are depicted below.

**Community Areas**

**Map 2**



The 2002 master plan review did not include the subject property because it was being used as a nursery and the owner did not participate in the plan review. The master plan contains the following comments:

The land use and zoning recommendations for the Subregion highlight those parcels or areas recommended for a change in use or density....Each site was evaluated in the context of the overall objectives of this Plan, as well as for compatibility with the surrounding community. Environmental constraints, types of uses, buffering, access, and the comparative density of nearby properties were considered in determining compatibility.

This Plan supports the retention and reconfirmation of existing zoning for all developed, underdeveloped, and undeveloped land in the Subregion, except for those sites recommended for change in the Plan. [Ex. 35 (b), p. 40, emphasis supplied]

\* \* \*

This plan amends the 1980 Master Plan for the Potomac Subregion, as amended, including the 1982 Amendment Designating Receiving Areas for the Transferable Development Rights. This plan designates several parcels of land for TDR receiving areas and removes the designation from others. Receiving areas may be permitted to develop to a specified density greater than the base zoning. Unless amended by this master plan, these specified densities remain as designated in the 1982 Amendment. [Ex. 35 (b), p. A-1, emphasis supplied]

The quoted master plan language makes clear that the comparative density of nearby properties was an important factor in recommending change, and specified densities for other properties remains unchanged. The master plan continues to recommend R-200/TDR Zoning for the property. The proposed zoning recommendations are depicted on a map and accompanying text reproduced on page 10. Four changes in the North Potomac community are highlighted in numbers 6-9.

### **C. SURROUNDING AREA**

The surrounding area must be identified in a floating zone case so that compatibility and other issues can be properly evaluated. The “surrounding area” is defined less rigidly in connection with a floating zone application than the zoning neighborhood of a Euclidean zone application.

# EXISTING AND PROPOSED ZONING

## PROPOSED ZONING RECOMMENDATIONS

MAP B

**Potomac**

1. Rezone the Cabin John Center from C-1 and R-90 to RMX-2C and RT-15 to create a mixed-use neighborhood convenience Center.
2. Rezone Fortune Parc to the I-3 zone ( optional method ), to allow mixed-use development.
3. Rezone Normandie Farm from RE-2/TDR to allow development of a Country Inn.
4. Rezone the Giancola quarry from R-200 to R-200/TDR-8 to allow a compatible alternative use.
5. Rezone the Stoneyhurst quarry from R-200 to RMX-1/TDR-6 to allow a compatible alternative use.

**TRAVILAH**

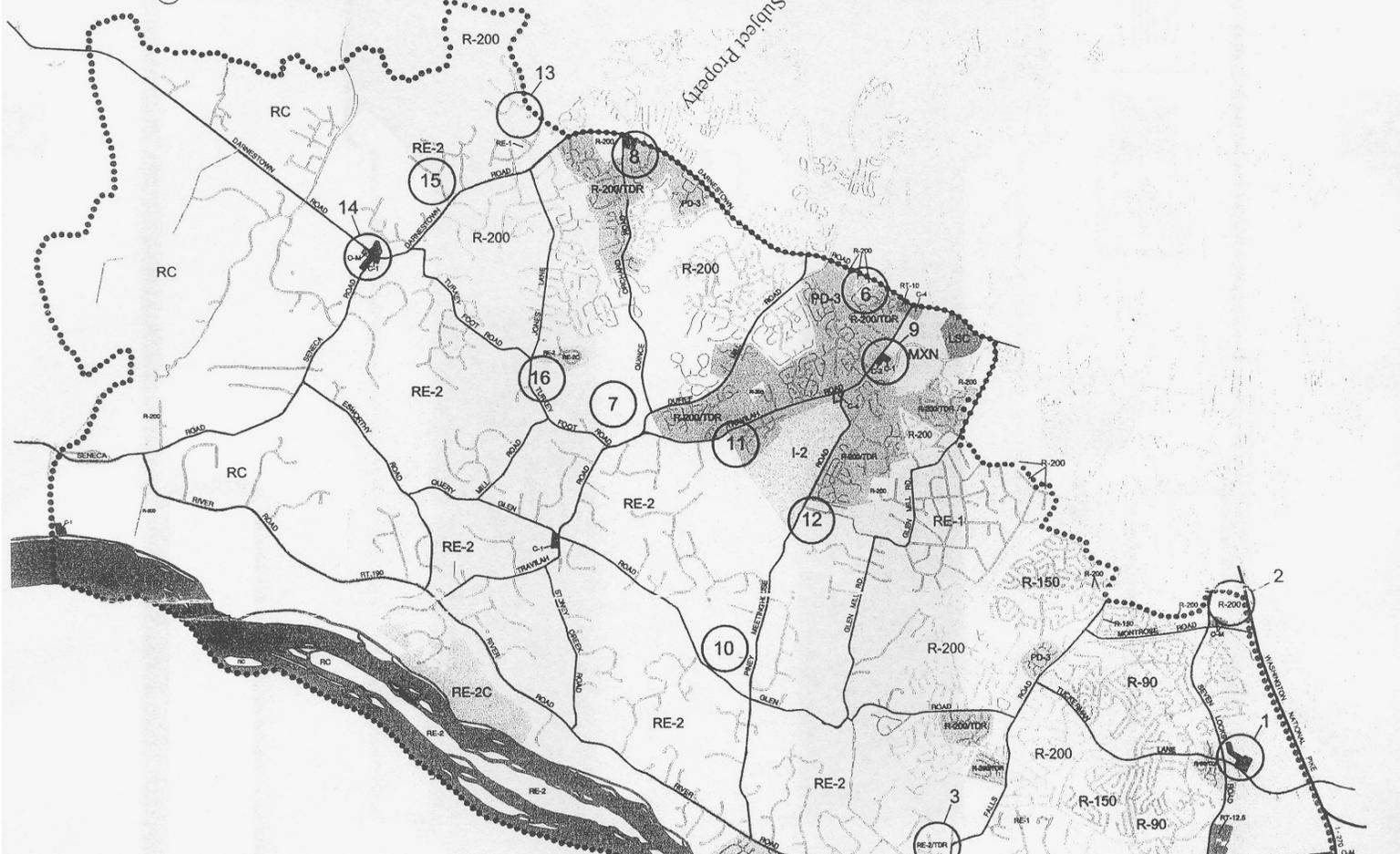
10. Rezone Lower Greenbriar properties from RE-2 to RNC.
11. Correct zoning anomaly on Johnson Property.
12. Rezone parcels 684, 525, 560 and 450 from RE-2 to RE-2C.

**North Potomac**

6. Rezone the Country Corner site from R-200 to R-200/TDR-10.
7. Rezone the Hanson Farm from RE-2 to PD-2 to encourage a compact development pattern that allows expansion of the adjacent stream valley park.
8. Rezone the Lamari and Navelanko sites from R-200/TDR to O-M with CT standards to allow compatible redevelopment.
9. Rezone the Rickman site from C-1, C-2, R-200 and R-200/TDR to R&D to allow compatible commercial development.

**Darkestown**

13. Consolidate the Ancient Oak subdivision into the Subregion Master Plan and rezone from R-200 and RC to RE-1.
14. Designate an overlay zone in Darkestown Village to protect its existing character and to permit limited development with site plan review.
15. Correct zoning anomaly at Haddonfield Lane.
16. Correct zoning anomaly at High Meadow Road.



In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. In the present case, Technical Staff and the Applicant recommend designating a surrounding area as generally bounded by Quince Orchard Road on the west, Hillstone Road and a line extending to Tschiffely Square Road on the north, Tschiffely Square Road on the east, and the Orchard Knolls subdivision to the south and east.

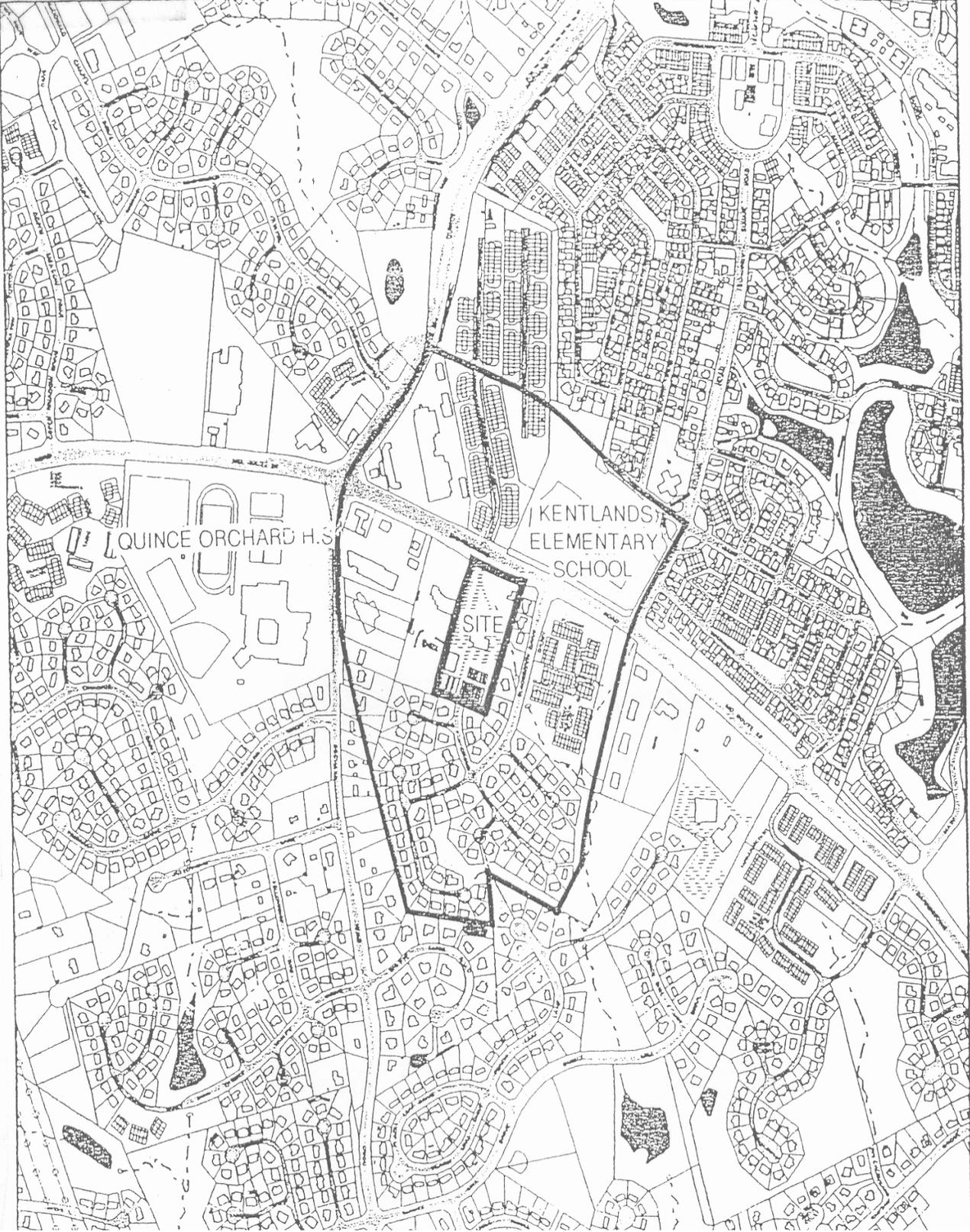
The Staff's recommended area forms a logical boundary given the size of the property and the proposed use. An argument could be made that the northern boundary should be the dividing line between the North Potomac community and the City of Gaithersburg since they are governed by different zoning regulations and Route 28 forms a substantial demarcation line. Nevertheless, the area within the City of Gaithersburg is developed and these land uses generate impact that should be included in this analysis. Therefore, the Staff's recommended area will be used for the evaluation of the proposed rezoning. The surrounding area is depicted on page 12.

The Applicant also used an area of "Neighborhood Development" which includes all land uses within a ½ mile radius of the site, Ex. 36. This area was used by the Applicant for evaluation of issues dealing with compatibility and compliance with the RT-Zone purpose clause. The Applicant also extended the analysis area to include uses well outside the North Potomac community. While the RT-Zone is a floating zone, there is nothing in the past history of the evaluation of these zoning categories that justify the use of alternative analysis areas to evaluate different critical issues. This approach creates a muddled record and is inconsistent with past practice. Once a surrounding area is established based on sound reasons, it should be the only analysis area used for the evaluation of the application. For purposes of this case, the Applicant's novel approach is rejected and the analysis will be limited to the defined surrounding area.

The land use and zoning pattern of the area reflects a predominantly single-family detached residential character supplemented with a mixture of two townhouse areas, institutional uses and shopping areas. Maryland Route 28 has been recently upgraded to major highway consisting of 4 lanes within a 150-foot right of way divided by a median strip. The improved road contains left turn storage lanes and acceleration/deceleration lanes along the sides.

# G - 834 SURROUNDING AREA

# ATTACHMENT 1

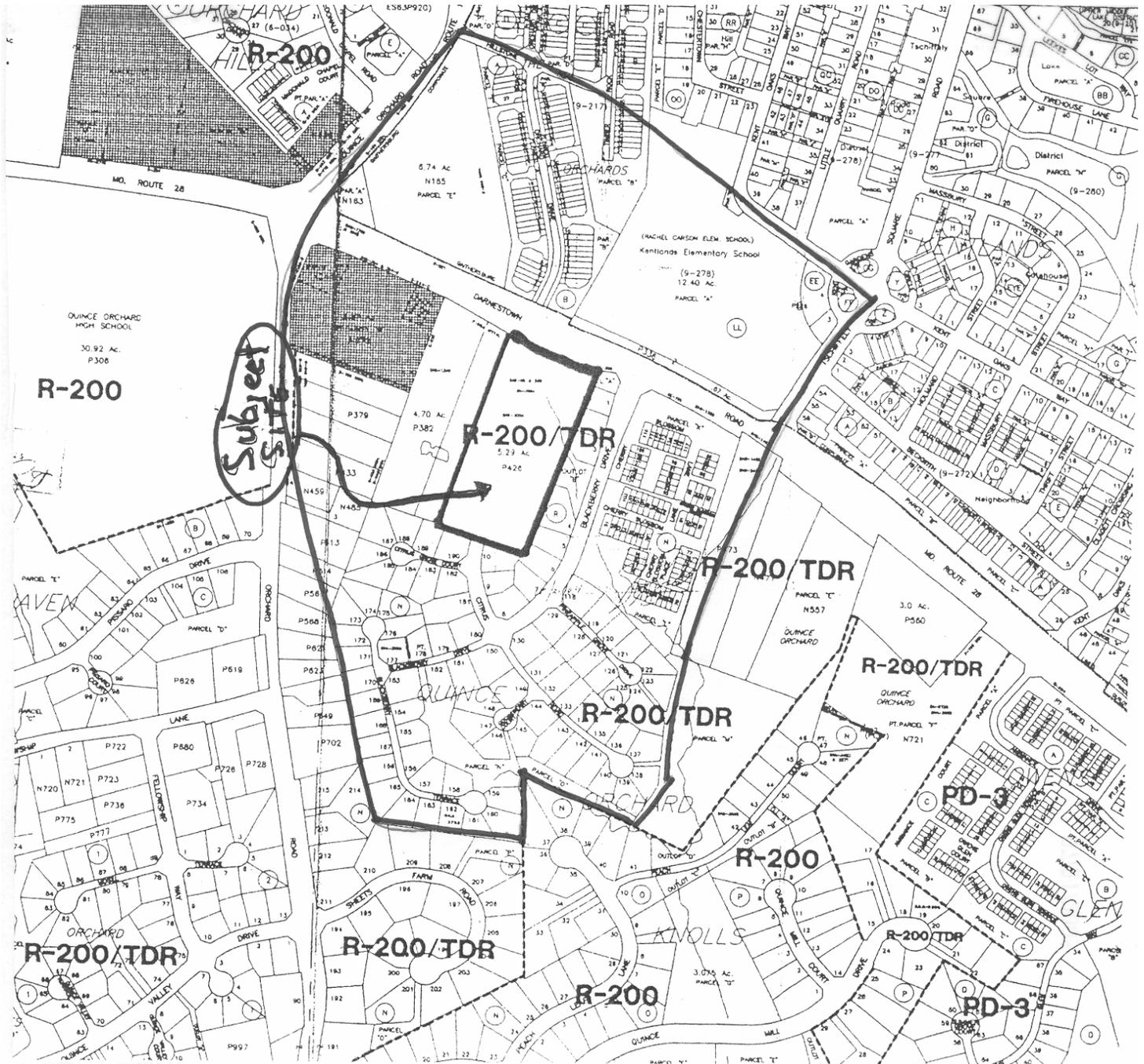


About one-third of the surrounding area is located on the north side of Route 28 and in the City of Gaithersburg. The Orchards townhouse community is located directly opposite the subject property and was developed in the late 1960s under Gaithersburg's RP-T Zone, which at the time permitted a density of 15 dwelling units an acre but was later reduced to 9 dwelling units per acre. The record is silent as to the actual density of this project and the amount of townhouses within the surrounding area located north of Route 28. To the east of the Orchards is the Kentlands Elementary School, also known as the Rachel Carson Elementary School. To the west of the Orchards is the recently expanded and renamed shopping center known as "The Shops of Potomac Valley".

About two-thirds of the surrounding area is located on the south side of Route 28. This area includes the subject property, which is bordered on two sides by the 150 home Orchard Knolls residential community. Access to this community is by way of Blackberry Drive. The east side of Blackberry Drive contains a cluster of 67 townhouses that was built as an early part of the Orchard Knolls subdivision. These townhouses are developed on about the same elevation as the single family detached homes. The townhouses are separated from the nearby single-family detached homes by a road and 60 foot right of way. A distance of about 135 feet also separates the townhouses from the closest single family detached home. The townhouses are integrated into the community as part of the prevailing R-200/TDR zoning scheme. The remaining 83 units are single-family detached homes located on lots of about one-third of an acre on the average. The entire subdivision was planned and built under the R-200/TDR zone and reflects a density of 3 dwelling units per acre.

Immediately west of the subject property is a 4.7 acre parcel also classified under the R-200/TDR Zone and used as Fire Station No. 31. Bordering on the west side of the fire station is a mix of retail shops, offices and fast food restaurants also known as the Shops of Potomac Valley. Quince Orchard Road forms part of the western boundary of the surrounding area. The surrounding area's zoning pattern is depicted on page 14

### Zoning Vicinity Map



#### **D. PROPOSED DEVELOPMENT**

The Applicant proposes to build townhouses on the subject property under the optional method of application that allows restrictions on land uses, density, bulk, and staging under a schematic development plan (SDP) accompanied with binding elements. The proposed development is described under four categories: land use and bulk; amenities; binding elements; and density.

##### **1. LAND USE AND BULK**

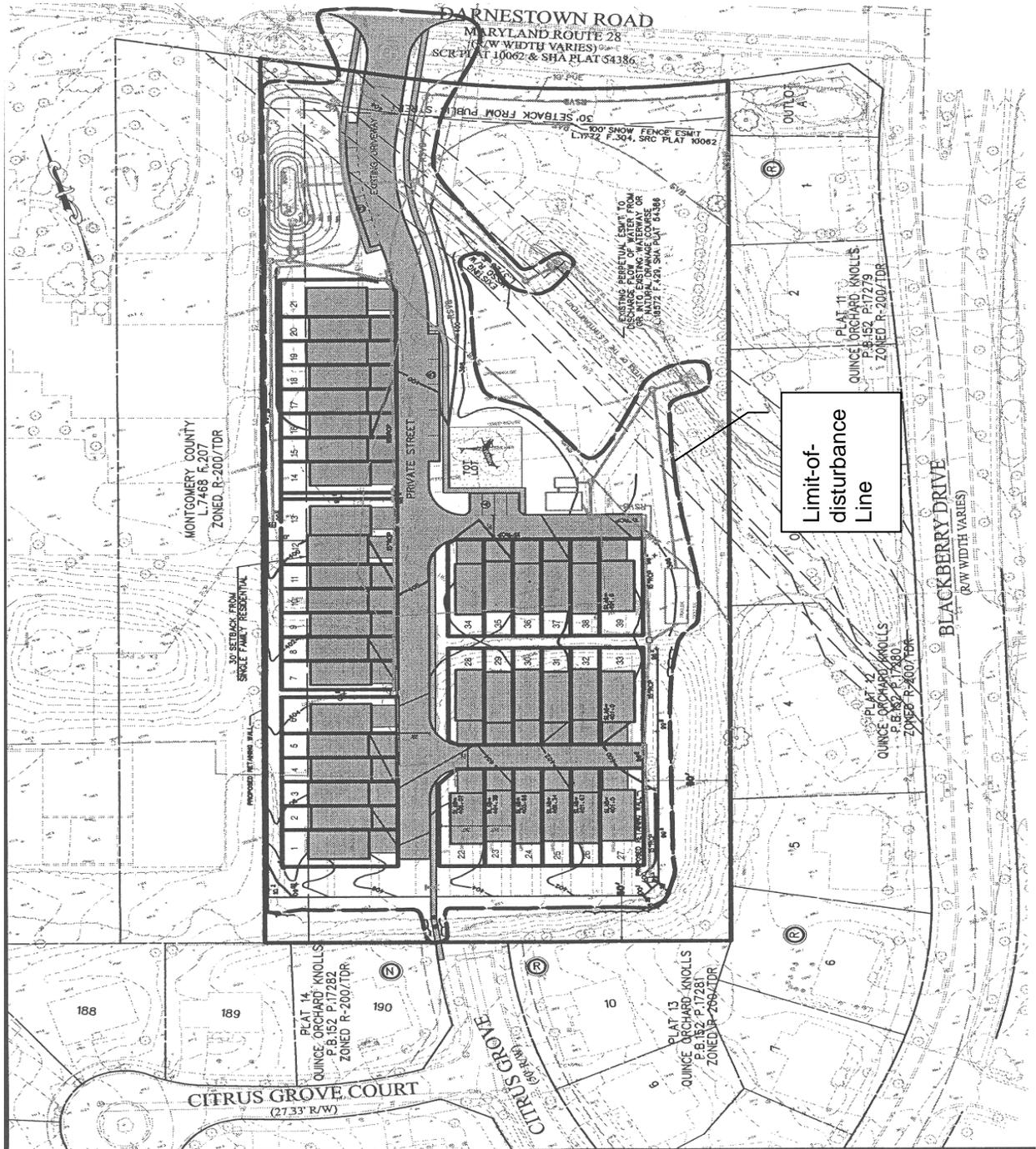
The SDP is largely illustrative regarding the location and density of the development. Under this Illustrative plan, the Applicant proposes to develop the site with 39 residential townhouses. Three rows of six units each would extend horizontally in an east-west direction at the southern portion of the property. The remaining 21 units would be located along the western edge of the site. These units would be divided into three separate clusters of townhouses containing 6, 7 and 8 units. Corner townhouse units would be 24 feet wide and would contain two-car garages. Interior units would be 20 feet wide and would contain one-car garages. The height of the townhouses would be 42 feet at the roof peak although the townhouses would comply with the overall average building height of 35 feet or three stories. The SDP is depicted on page 16.

The southern end of the site is currently elevated between 10 and 15 feet above neighboring properties to the east and south. The areas along the eastern and southern portions of the property contain berms, trees planted on the berms, and an 8 or 9-foot fence is located behind the trees. The Applicant's construction plans call for the removal of fill located in the southern end of the property, restoration of the soils and return of fill to the area to maintain the elevation, berms, fence and trees

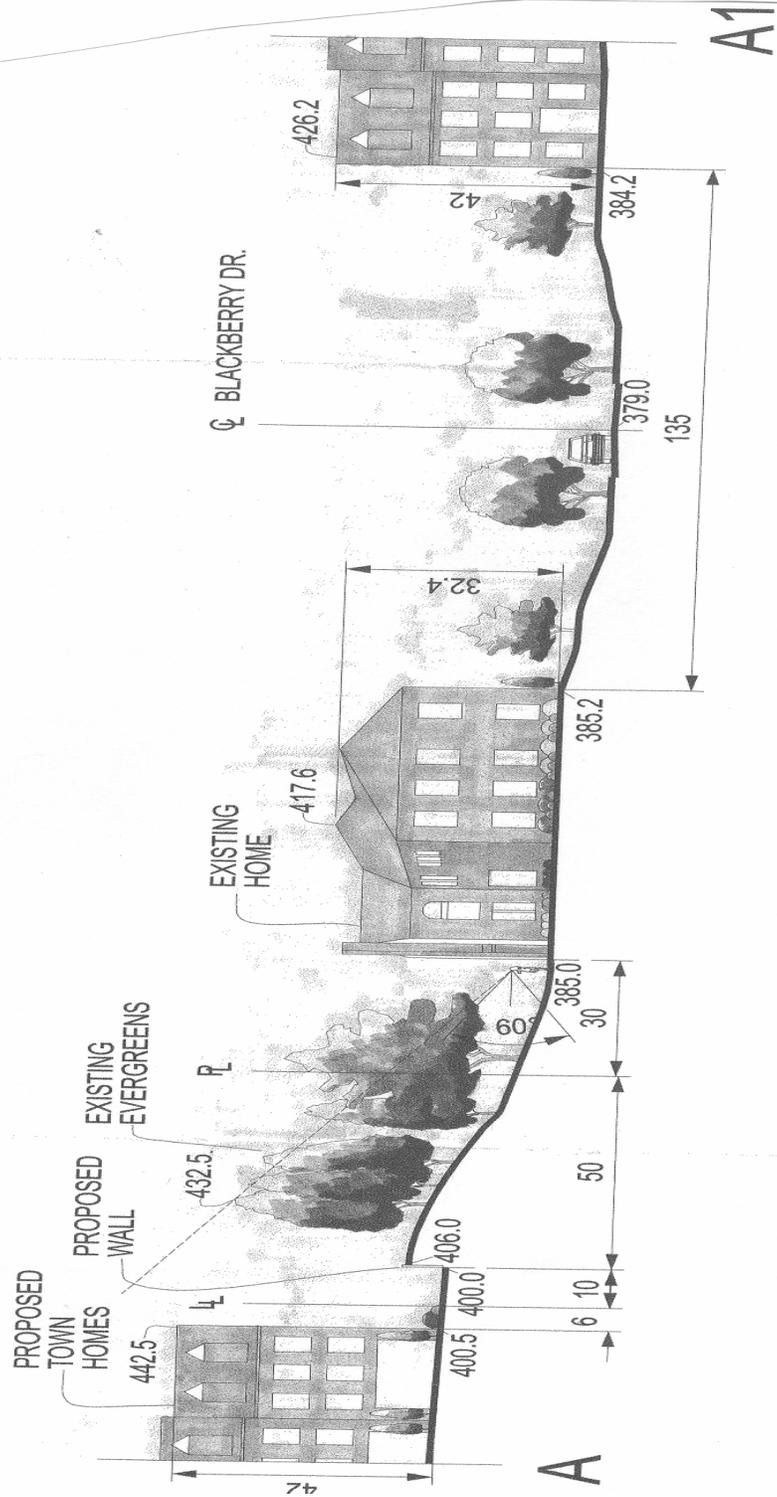
Excavation of land along the eastern portion of the site will also result in a 5-foot drop in the height of the proposed townhouses at this location. As a binding element of the SDP, the grading of the site will leave intact portions of the site included in a "limit of disturbance" area. Within this area, the Applicant will provide a 60-foot set back from the property line to the nearest townhouse. As a result, the townhouse proposed to be closest to the nearest adjacent single family detached

home will be separated from the home by 96 feet. The distances between several adjacent homes and the proposed townhouses are depicted on pages 17, 18, and 19.

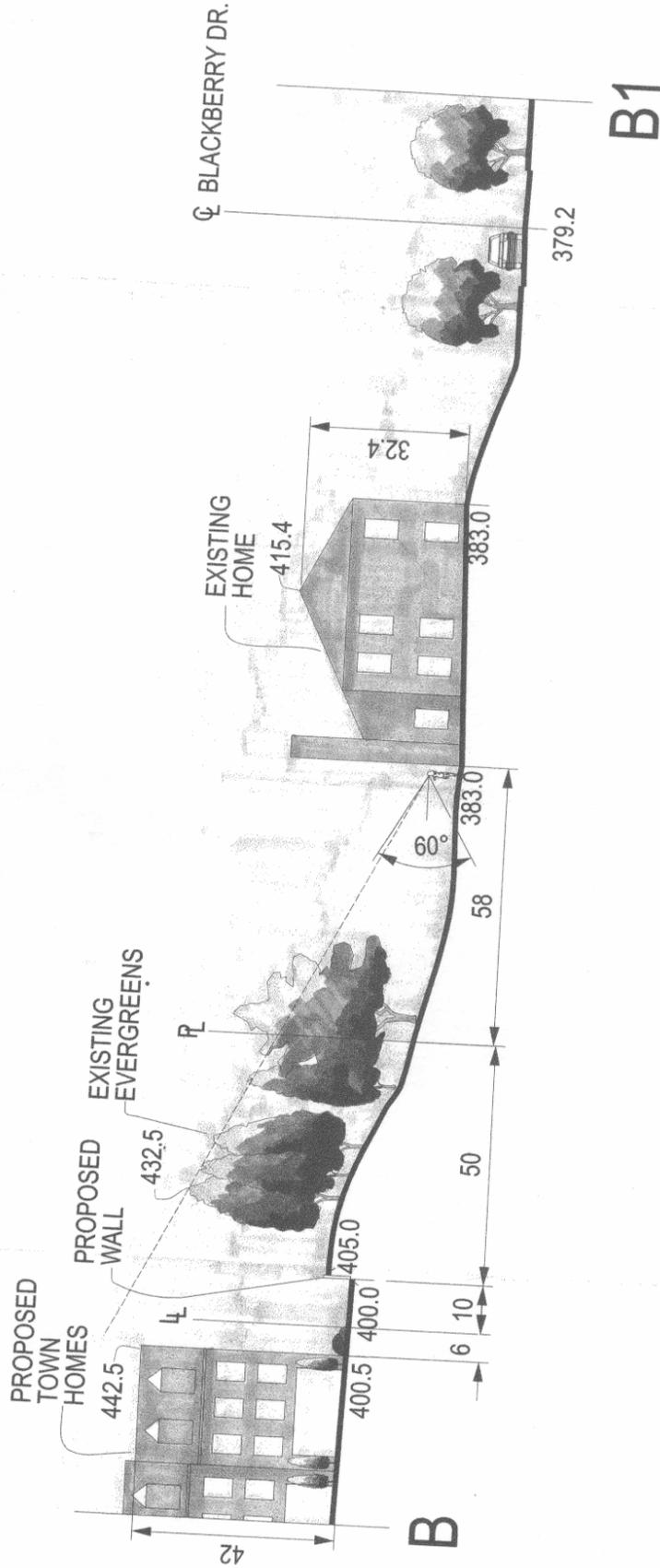
The Applicant contends that the screening renders the proposed townhouses almost invisible from the adjacent homes. The Opposition contends that there are gaps in the trees and the townhouses will be visible and they will constitute a watchtower hovering over the backyards, bedrooms and bathrooms of adjacent homes and invading the privacy of these homes. The Applicant



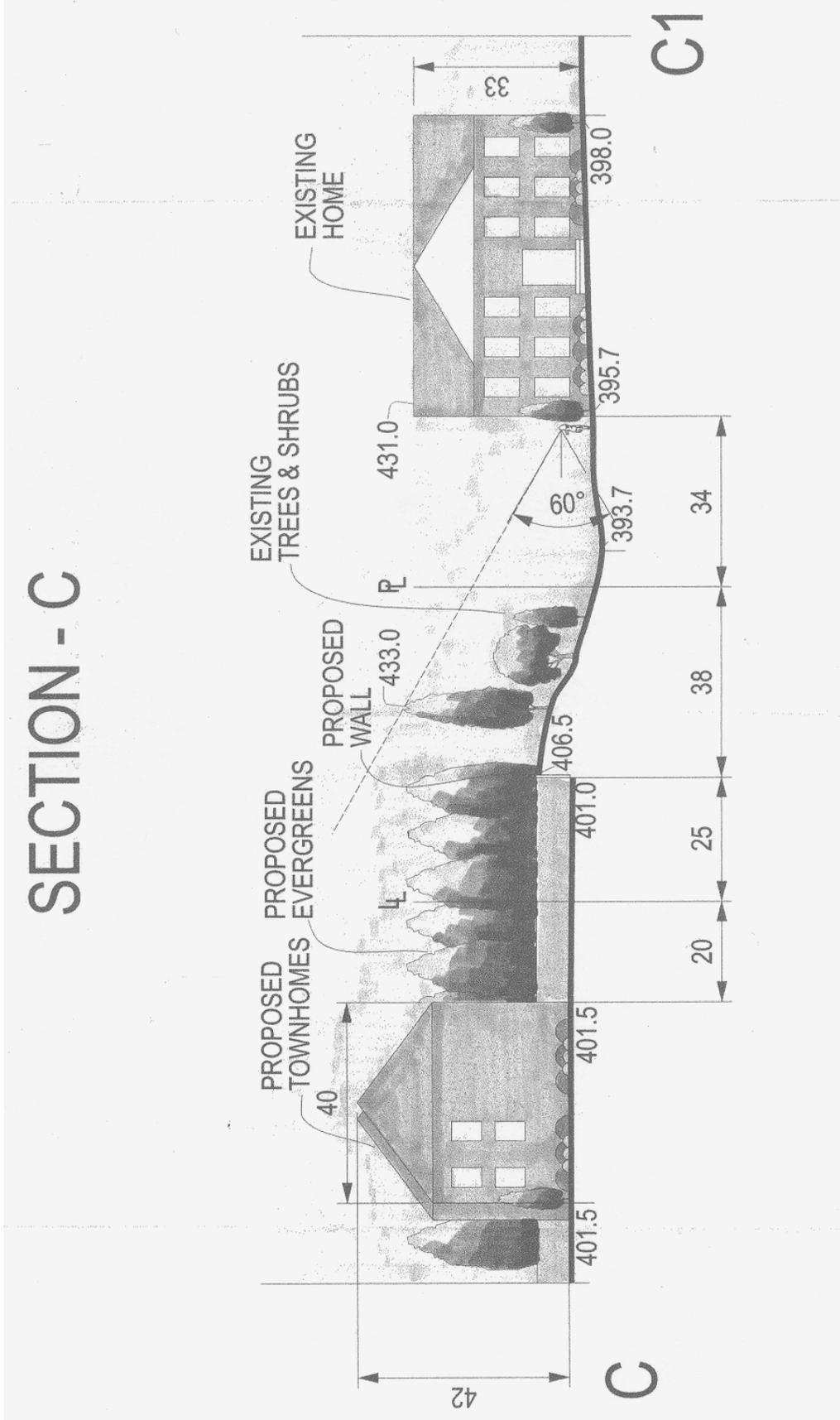
# SECTION - A



# SECTION - B



# SECTION - C



responded to this criticism by revising the binding elements to include a second row of trees in the screening area. Since this revision occurred after the hearing, the record is unclear as to whether the gaps in the trees will be completely closed by the second row of trees.

## 2. AMENITIES

Stream valley buffer areas in which no development is permitted occupy a 1.5-acre portion of the site. The Applicant proposes to cross a small portion of the buffer area for road access and will dedicate additional conservation areas in the northeast corner.

The site has an existing impervious area that consumes about 60% of the land. The site is divided into three drainage areas. In the first area, water flows in the southern end of the property to adjacent land and lots 190 and 10 on Citrus Grove Road. A second drainage area flows east to adjacent lots 4, 5, and 6 located on Blackberry Drive. The final third of the property drains to the existing stream that runs through the property. The illustrative plan for the proposed development will reduce the impervious surface to less than 40 % of the site.

Under current site conditions, there is no on site storm water management. Under the proposed development, the storm water management concept plan shows significant improvement in the reduction of water flow and velocity within the site and with respect to adjacent properties. To meet the requirements of the storm water regulations, the plan must address three areas: recharge of groundwater, water quality and water quantity. The concept plan divides the site into two areas for storm water management. The plan will reduce runoff, reduce the size of the floodplain and provide for stream restoration to slow velocity. In the northern portion of the site, water is proposed to be directed to a storm water management pond through surface sand filters and this process will recharge the groundwater and provide water quality and quantity controls. The outfall from this process will enter the existing stream. In the eastern portion of the site, water will be collected and taken to a recharge trench and then to an underground system with outfall to the existing stream.

Existing site runoff constitutes a drainage area of 1.26 acres and its flow represents a 10-year storm of 5.75 cubic feet per second (c.f.s.), Ex. 41. After the proposed development, under the illustrative plan the site runoff is expected to be reduced to a drainage area of 0.47 acres and a 10

year flow of 0.62 c.f.s., Ex. 42. With respect to the impact on adjacent lot 5, the total area that drains from adjacent areas through the subject property to lot 5 is 1.84 acres and a flow of 5.6 c.f.s. Drainage that is directly attributable to the subject property and goes to lot 5 is 0.76 acres and a flow of 3.52 c.f.s. See, Ex. 72. After the implementation of the storm water management plan, under the illustrative plan the total drainage area will be reduced from 1.84 acres to 1.41 acres and flow will be reduced from 5.6 c.f.s. to 2.54 c.f.s. The drainage from the subject property to lot 5 will be reduced from 0.76 acres to 0.33 acres and flow is expected to be reduced from 3.52 c.f.s. to 0.41 c.f.s., Ex. 73.

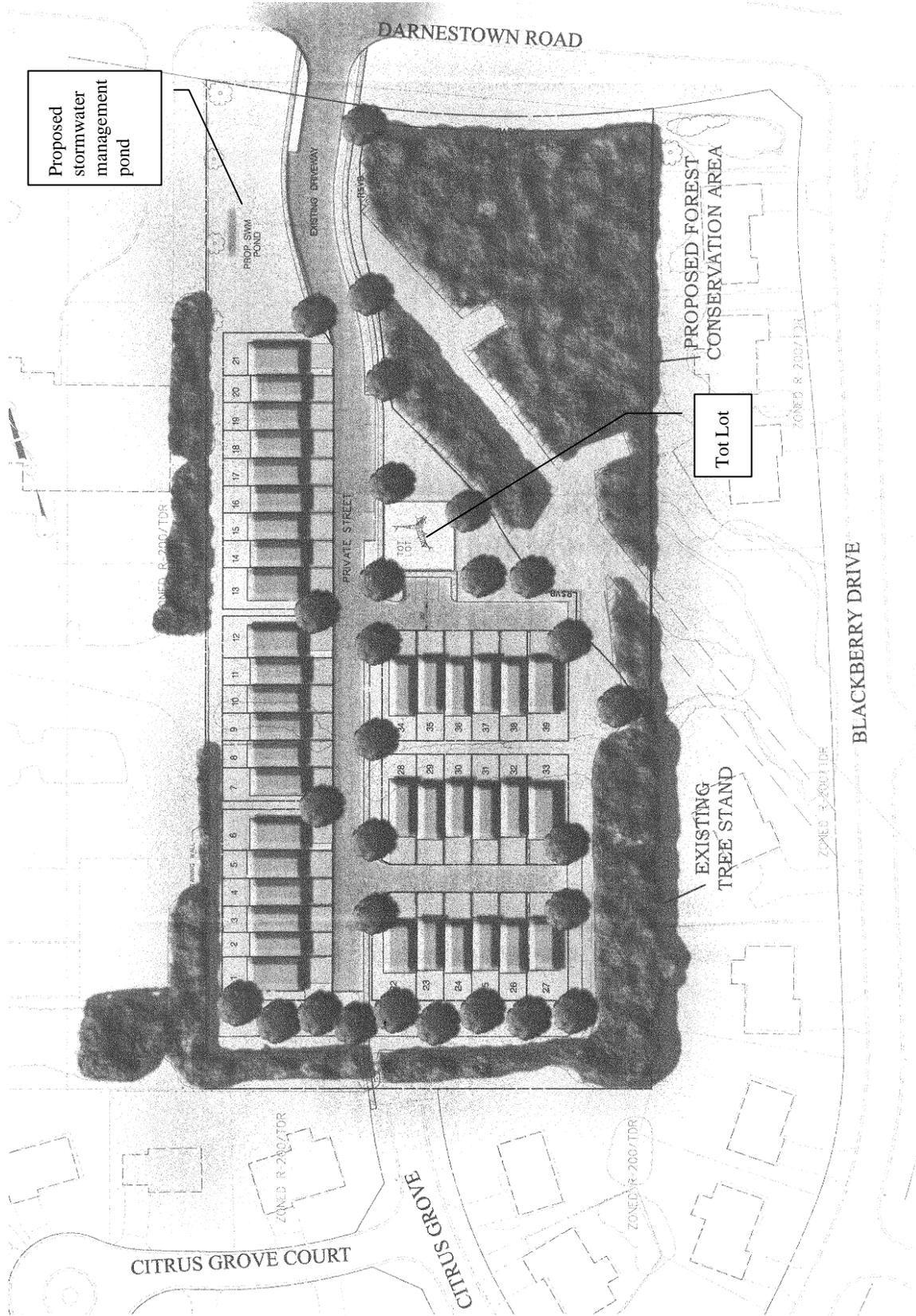
While the concept plan has received provisional approval by the Department of Permitting Services (DPS), Ex. 23 (c), the proposed recharge trench might not be acceptable and the trench may have to be reduced when final engineering is done. The final plan approval stage usually occurs when the preliminary plan and site plan are reviewed.

A noise impact study was conducted by the Applicant to determine compliance with applicable noise standards. A board on board fence will mitigate noise levels from traffic along Route 28. With this mitigation and the location of the proposed townhouses, noise levels will be within acceptable levels. An illustrative SDP shows the conservation areas, storm water management pond, and vegetative buffer on page 22

### **3. BINDING ELEMENTS**

The Applicant submitted six binding elements to restrict development in certain respects. These elements provide the following:

- (a) Access from MD Route 28 will be right-in right-out only.
- (b) The required distance between the closest lot line of the proposed townhouses and the southern and eastern property lines will be a minimum of 60 feet (no buildings or structures will be located in this area; storm drain, utilities, and retaining walls will be allowed as generally shown on the illustrative plan, as well as landscaping).
- (c) In the area between the Limit of Disturbance (LOD) line and the southern and eastern property lines adjacent to the proposed townhouses as shown on the SDP (the "Non-Disturbance Area"), the existing grade, berm, and landscaping will be preserved and maintained. Diseased or hazardous trees or limbs may be removed to prevent personal injury or property damage. Dead trees or undergrowth may be replaced with similar new plantings. Noxious weeds (limited to those weeds defined as "noxious" under Maryland State or Montgomery County laws or regulations and



“exotic or invasive plants” in the Montgomery County *Trees Technical Manual*) may be removed as required by law. Applicant shall not construct any fence or walking path in the Non-Disturbance Area with the exception of the pedestrian connection to be provided to Citrus Grove Road from the proposed development.

(d) In the Non-Disturbance Area, the existing landscaping will be supplemented by another row of evergreen similar in type as the existing trees and by other landscaping features, as feasible, to create enhanced screening.

(e) A landscape easement will be placed on the Non-Disturbance Area requiring the homeowner association governing the development on the subject site to perpetually preserve, maintain, and replace the existing landscaping as necessary in accordance with standard horticultural practices. The easement will constitute a covenant running with the title of the land and bind the grantor, its heirs, successors and assigns.

(f) A pedestrian connection will be provided to Citrus Grove Road from the proposed development. [Ex. 81, Declaration of Covenants, Revised Draft (8/16/05), p. 5].

#### 4. DENSITY

Density is a critical factor since the master plan used comparative density with nearby properties in selecting properties recommended for zoning change. Expert land planning witnesses for both sides testified that the subject property, if developed under the current zoning, would yield about 10 single family detached homes. The Applicant presented evidence showing the impact of site development based on a range of densities between 39 and 42 dwelling units.

The Applicant did not specify the number of moderately priced dwelling units (MPDUs) that would be provided, although it was acknowledged that MPDUs would be required for this development unless a waiver is sought and approved. The Applicant's evidence indicated that it plans to comply with the MPDU requirements and would comply with any preliminary plan of subdivision stage determination about the number of MPDUs required. The Applicant has neither sought a waiver from the MPDU requirement nor indicated that a waiver would be sought.

The evidence indicates that the MPDU requirement could produce a total density (market rate units and MPDUs) between 47 and 51 units depending on whether the Applicant uses the MPDU density bonus. The Applicant's expert land planner indicated that the maximum theoretical development of the site using the MPDU bonus could generate 51 units although constraints of the

site mean these units would be very small. The Opposition's expert land planner indicated that the minimum level of development with MPDUs would yield about 47 units.

The Applicant did not include density as a binding element of the SDP. The Technical Staff did not evaluate comparative density or the potential for MPDUs. The environmental constraints of the site raise questions about whether MPDUs will be permitted at this location even if a waiver is not sought. The law governing MPDUs provides for the reduction or elimination of MPDUs if the Planning Board determines that they interfere with environmental objectives. Mont. Co. Code §25/a-5(d). In the current posture of the case, the MPDU issue will not be addressed until a post zoning stage if the application is approved. Given the uncertainty about the location and number of MPDUs, the application must be evaluated on the basis of 42 units as the maximum density permitted under the RT-8 Zone.

At 42 units, the proposed zoning would be 4.2 times the planned density of the site and the adjacent fire station. It would be 2.6 times the density of the adjacent Orchard Knolls community. Density will be further compacted on the site by virtue of the fact that 1.5 acres cannot be developed. This means that the townhouse density will be concentrated on only 3.788 acres. This factor will increase the appearance of density to about 9 dwelling units per acre for the adjacent community.

#### **E. PUBLIC FACILITIES**

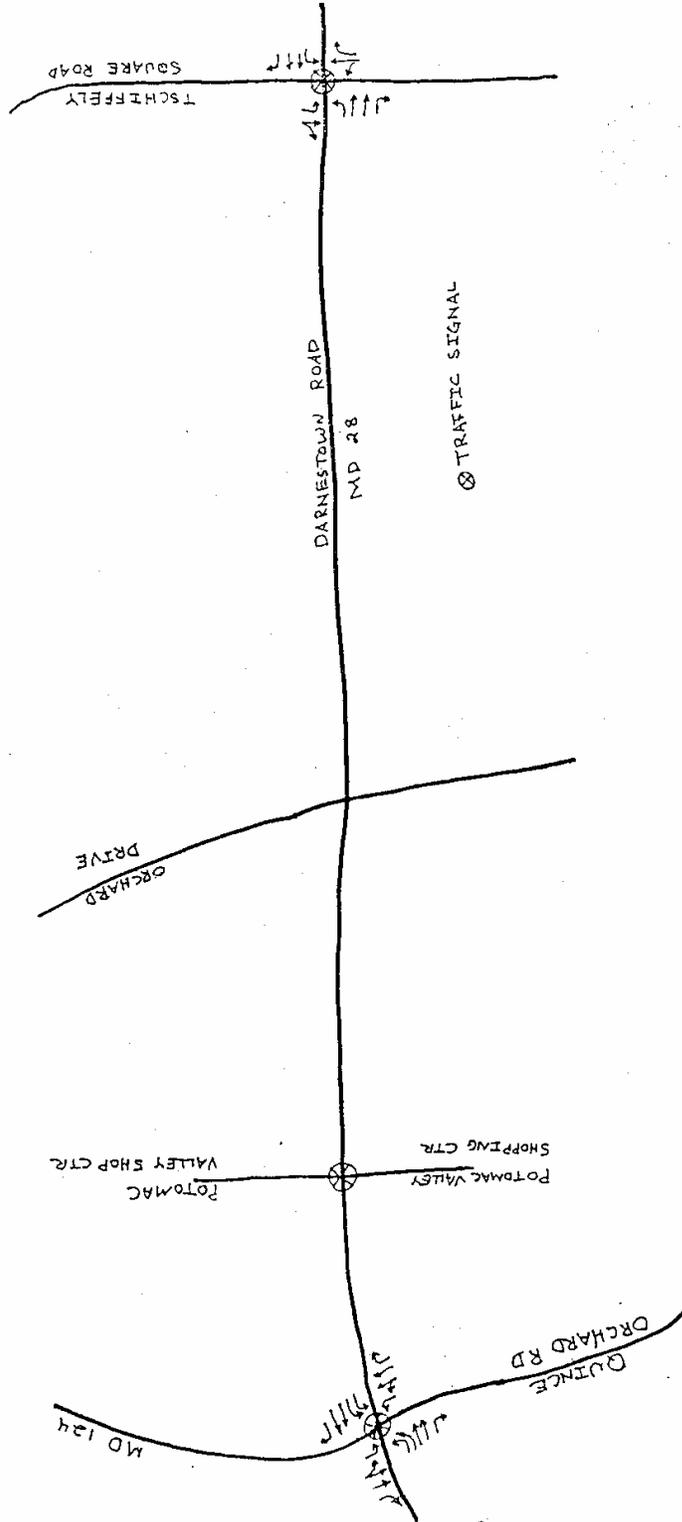
Under the County's Adequate Public Facilities Ordinance ("APFO"), See, Mont. Co. Code §50-35(k), the Planning Board has the responsibility, when it reviews a preliminary plan of subdivision, to assess whether public facilities will be adequate to support a proposed development. The Planning Board's application of the APFO is limited by parameters that the County Council sets each year in the Annual Growth Policy. While the ultimate test under the APFO is carried out at subdivision review, evidence concerning adequacy of public facilities is relevant to the District Council's determination in a rezoning case as to whether the reclassification would serve the public interest. The preponderance of evidence supports a factual conclusion that the development of the site with up to 42 townhouses will not cause an adverse impact on public facilities or services.

## 1. TRANSPORTATION

The Applicant submitted evidence to show that the proposed development of up to 42 townhouses would not generate an adverse impact on transportation services or facilities. Darnestown Road anchors the road network and it is now improved to a four lane divided highway in the vicinity of the site. There are three signalized intersections along Darnestown Road that are near the site. These intersections include from west to east: Quince Orchard Road, the access to the Shops of Potomac, and Tschiffely Square Road. The intersection at Tschiffely Square Road has been recently improved to include a jug handle turn that allows traffic from Blackberry Drive to make a right turn and then curve onto Tschiffely Square Road to make a left turn onto Darnestown Road to proceed west without having to make a U turn. The intersections are depicted on page 26.

The access to the subject property from Darnestown Road is opposite of Orchard Drive, which provides access to the Orchards townhouse community located north of the site. This intersection is not signalized, and Darnestown Road contains a medium strip at this point that prohibits any left turning movements into or out of the site. Site access is limited to right turn in and right turn out. Commuter traffic returning from the east will need to continue past the site and make a U turn at the Shops of Potomac intersection or at Quince Orchard Road and proceed back east to the site access point. Likewise, traffic intending to head west must exit the site heading east and negotiate the left hand turning movement at Tschiffely Square Road to head west.

A critical lane volume analysis at all three intersections indicated that all intersections operate within acceptable levels of service and will continue to do so with the addition of background traffic and the traffic generated by 42 townhouses on the site, Ex. 18 (c). p.11, Table C. Indeed, traffic volumes will decrease from levels generated by the current use. The Applicant's expert in traffic and transportation matters concluded that all turning movements by traffic generated by the site can be safely executed. He acknowledged that Darnestown Road, before recent improvements, reflected 15 accidents in the most recent data available. The Opposition submitted some anecdotal evidence of accidents and fatalities although the dates of these accidents were not reported. The Applicant's evidence provided un rebutted testimony that the improvements to Darnestown Road have removed



NOT TO SCALE  
 USE WITHOUT INT. TRANS. SOL. (ITS), INC.  
 AUTHORIZATION PROHIBITED

EXISTING LANE CONFIGURATIONS

EXHIBIT 2

I NTEGRATED  
T RANSPORTATION  
S OLUTIONS, INC.

the hazards that most frequently caused accidents along the road. Other evidence indicates that access to the site will meet all design safety standards.

## **2. UTILITIES**

The proposed development will be served by adequate utilities. Water and sewer facilities are in close proximity to the site. A 24-inch sewer line is located along the stream that extends through the site. Water and sewer facilities are located to the south with the Orchard Knolls subdivision. Water, gas, electric, phone and cable facilities are all located along Route 28.

## **3. SCHOOLS**

The Applicant and the Technical Staff concluded that schools will be adequate assuming development of 42 townhouses which would generate 10 elementary school children, 4 middle school children and 7 high school students. These students would attend Kentlands Elementary School, the new Quince Orchard Middle School and Quince Orchard High School. The Montgomery County Public School staff conducted an analysis of school impact under the test and methodology prescribed in the growth policy, and concluded that there are no clusters where development should be subject to the school facilities payment or to a moratorium. All schools have been determined to have adequate capacity to support additional development. See Ex. 37.

# **III. SUMMARY OF TESTIMONY**

The summary of testimony consists of the Applicants Case in Chief, the Opposition's Case in Chief, and the Applicant's Rebuttal. All testimony was under oath.

## **A. APPLICANT'S CASE IN CHIEF**

Alfred S. Blumberg was designated an expert witness in land use planning. He prepared a study for the use of the subject property under the RT-8 Zone. He also prepared a land use and zoning analysis that was submitted as part of the present application, Ex. 18 (a) as was supplemented by Ex. 19(f) and 23(g).

Mr. Blumberg described the subject property. He acknowledged that the property was never designated for the RT-8 Zone by the master plan. The site contains plant materials for retail sale and equipment for landscape contractor operations. This includes greenhouses, storage of

trucks, equipment, mulch, sand and gravel. The rear of the site rises about 10 to 15 feet higher than the front of the property. The site was used as a depository for construction fill during the construction of Metro in the 1970's and this fill accounts for the rise in topography. The site is also on a higher level than the adjacent residential uses. The existing greenhouses on the site are about 8 feet high and are located on this higher plateau area. They are screened from nearby homes by a 9-foot fence and extensive evergreen trees located along the perimeter. The subject property could be developed with about 10 single family detached homes under the current zoning.

Mr. Blumberg described the surrounding area and the land use pattern. The area is bounded by Quince Orchard Road on the west, Fieldstone Road on the North, Tschiffely Square Road on the East and Orchard Knolls subdivision on the south. This is the same area as recommended by Technical Staff. Located north of the site is the newly improved Route 28, which is a major highway within a 120-foot right of way and is paved to a four-lane width as it passes the subject property. There is a median strip in the road that limits access to the site to eastbound traffic only. Located directly north of the site is the townhouse community known as the Orchards that was developed before 1971 under Gaithersburg's RPT Zone, which in the 1970s may have permitted 15 dwelling units per acre, but under today's regulations only permits up to 9 dwelling units per acre. He does not know the density of the development. Located north east of the site is the Kentlands Elementary School also known as the Rachel Carson Elementary School.

Mr. Blumberg explained that west of the site is Fire Station Number 31, which was built in 1987, and a storage area for emergency equipment connected with the collapsed building rescue squad. The collapsed building rescue facility is about 8,000 square feet in size. The fire station is located on 4.7 acres and about 54 feet from the closest proposed townhouse. The fire station is staffed with eight people who work 24 hour a day shift with 1 day on and 2 days off. In 2004, there were 2,700 rescue calls and 1,300 fire calls for a daily average of 7.4 and 3.5 respectively. The siren use depends on time of day and traffic. This is a staging area for emergency personnel to respond to collapsed building during earthquakes, hurricanes or other disasters.

Mr. Blumberg testified that a commercial shopping center known as Potomac Valley Center, which occupies both the northeast and southeast quadrant of the Quince Orchard Road/Route 28 intersection, is located further west. This center has a number of restaurants, two gas stations, and a CVS drug store. The Quince Orchard Library is located south of the shopping center. The Quince Orchard High School is located in the Southwest quadrant of the intersection. Johnson's nursery occupies the northwest quadrant of the intersection.

Mr. Blumberg indicated that the Orchard Knolls subdivision was developed as a 150 dwelling unit project under the R-200/TDR Zone with a mixture of single family detached units and 67 townhouses. The townhouses were developed at a density of 8.8 dwelling units per acre and are located along the east side of Blackberry Drive, the main access to the subdivision from Route 28. Blackberry Drive is also east of the subject property and connects with Citrus Grove Drive a road developed with single-family detached homes along both sides of the road. This road dead-ends at the southern end of the site.

Mr. Blumberg testified about an illustrative development plan showing 39 townhouses clustered in three rows of 6 units each and another row along the west side with 21 units, Ex. 33. The units are proposed to have two car garages and driveways deep enough to accommodate additional parking. The only access to the site is proposed along the existing driveway from Route 28. He explained that the maximum development would be only 42 dwelling units but the site was restricted by a stream valley buffer requirement that will consume about 1.5 acres of the site. The stream valley buffer is related to a drainage outfall on the northeast corner of the site that extends through the site to the Orchard Knolls subdivision. He conceded that the access road will infringe slightly into the stream valley buffer but this infringement is more than offset by the conservation area proposed for the northeast corner.

Mr. Blumberg explained that the proposed development was filed under the optional method of application, which permits binding elements in a schematic development plan (SDP). The SDP allows the developer to restrict the form of development. In this case, the Applicant has

proposed three binding elements: limit access to Route 28; provide a pedestrian connection to Citrus Grove Drive; provide a 60 foot setback from the property line to the nearest townhouse.

Mr. Blumberg indicated that substantial distances would separate the proposed townhouses from existing single family detached home in Orchard Knolls. For example, for home located on Blackberry Road, lot 4 would enjoy a 96-foot separation. The home on Citrus Grove Road, Lot 10 would enjoy 117-foot separation from the nearest townhouse. Ex. 34 shows the separation in an illustrative SDP and shows a comparison with the separation from the existing townhouses on the east side of Blackberry Road where lot 4 is separated by 135 feet from the nearest townhouse.

Mr. Blumberg concluded that the proposed development would be compatible with the master plan recommendations for this area of the county. He reviewed the objectives and goals of the master plan. The subject property is not included for any specific recommendation because the property owner did not participate in the master plan review and the technical staff drew the assumption that the current special exception use would continue on the property for the foreseeable future.

Mr. Blumberg stated that there are two versions of the master plan. The version that has been available for some time is the Planning Board Draft, dated October, 2001, as supplemented by the District Council Resolution 14-1170, dated March 5, 2002, Ex. 35 (a). Recently, an interim edition of the master plan, dated August 2002, was released in May, 2005, Ex. 35 (b). The master plan cites the seven vision of the Maryland Planning Act of 1992 and he concluded that the proposed development is consistent with all seven visions. The proposal implements the smart growth initiative to concentrate growth in those regions of the county where public facilities are located. Currently the stream valley buffer located on the site is unprotected but it will be protected by the proposed development. The surrounding area is a population center with water and sewer facilities, schools, roads and infrastructure necessary to support residential development.

Mr. Blumberg testified that the proposed development was compatible with the environmental and design principles of the master plan. The proposal would encourage ecologically sensitive and energy efficient development, as it will use existing infrastructure. Currently the site is

used in a manner where about 60% of the site has impervious surfaces. Under the proposed development, this impervious area will be reduced to less than 40%. In addition, the stream valley buffer will be preserved and enhanced. The site does not have a storm water management system in place. Under the proposed development, a storm water management system will be installed that will improve downstream runoff conditions.

Mr. Blumberg stated that the proposed development will implement other master plan goals and objectives by promoting transit use, walking and biking. The site is close to retail uses and schools. There are several bus routes along Darnestown Road that would serve the proposed development. The conversion of the property to residential use would also remove a special exception use and further a master plan goal to avoid excessive concentration of special exception uses along the major transportation corridor. He conceded that the right turn in right turn out turning movements would require returning commuters to drive to the Quince Orchard intersection and take a U turn to get back into the site.

Mr. Blumberg indicated that some 16 specific properties were examined during the master plan review and were the subject of recommendation to modify the zoning. In virtually all of these properties, the owners participated in the master plan review. He cited several that recommended similar uses to the one proposed here. The Stoneybrook quarry occupies a 13.3-acre site and is proposed for townhouses that would be located adjacent to single family detached homes and a fire station. Another site, the Giancola quarry, involves 4.87-acres and is recommended for 40 townhouses at a density of 8 dwelling units an acre under the R200/TDR Zone with a waiver of having to provide single family detached units.

Mr. Blumberg stressed that North Potomac covers only seven square miles, as it is located between Route 28, and the cities of Rockville and Gaithersburg. However it has the largest population density of any community of the Potomac Subregion. It is the most densely populated as it straddles the two adjacent planning areas, Travilah and Darnestown. North Potomac is fundamentally different from the rest of Potomac. The population density of North Potomac per square mile is 3,361, while Travilah is only 421 and Darnestown is even more rural at 272. North Potomac has the

population base and the infrastructure to support more residential development and the proposed development is compatible with the master plan.

Mr. Blumberg presented some examples of properties in the North Potomac area where similar development was judged consistent with the master plan. The County Cleaners site is 4.1-acre parcel located at the intersection of Route 28 and Key West Boulevard. Its current use includes a horticultural nursery. The master plan recommends its development with 38 townhouses under the R200/TDR Zone at a density of 10 dwelling units per acre and with a waiver of any single family detached units. The Lamari parcel involves 3 lots south of the Library and is recommended for the O-M Zone. He concluded that the proposed development is very compatible with the master plan. He also contended that the master plan does not specify density levels for the R200/TDR Zones and the subject property could be developed with 11 dwelling units an acre under its current zoning if could be part of an assemblage of 10 acres or more.

Mr. Blumberg also took issue with the restrictive interpretation of the master plan. Appendix A of the Master Plan contains language that was not included in the draft plan or the District Council's resolution. The language provides as follows:

This plan amends the 1980 Master Plan for the Potomac Subregion, as amended, including the 1982 Amendment Designating Receiving Areas for the Transferable Development Rights. This plan designates several parcels of land for TDR receiving areas and removes the designation from others. Receiving areas may be permitted to develop to a Specified density greater than the base zoning. *Unless amended by this master plan, these specified densities remain as designated in the 1982 Amendment.* [Ex. 35 (b), p. A-1]

Mr. Blumberg contended that the TDR option was not viable for the subject property because it requires 10 acres or more and the site only has 5 acres without any adjacent undeveloped properties with which it could be assembled. He recalled a conversation with the Technical Staff's Callum Murray where Mr. Murray indicated that the intent of the master plan was to limit density on the subject property to R200/TDR-at 3 dwelling units per acre. He disagrees with this conclusion, as the documents do not support this interpretation.

Mr. Blumberg opined that the proposed development satisfies the purpose clause of the RT-8 Zone because the site is appropriate for residential development at densities allowed in the

RT Zones given of the character of existing development in the surrounding area which includes townhouses to the north and east. The townhouses to the east are developed at a density of 8.8 dwelling units per acre. The townhouses on the north side of Route 28 are developed at 9 dwelling units per acre. In addition there are schools and retail uses in the immediate area and an institutional use abuts the site to the west.

Mr. Blumberg also concluded that the development of the site under the RT-8 Zone would satisfy a need for a buffer or transitional used between commercial, industrial, or high-density apartments and low-density single family uses. The adjacent fire station contains a large industrial type building and extensive paving. This use can be perceived to be an industrial use. He conceded on cross examination that the fire station was not an industrial use but contended that the District Council has applied transitional standard in manner where the RT-Zone was applied to a location found to be appropriate and a need for a transition from institutional uses to single family, Ex. 45, Application G-805. He also conceded that the Technical Staff considered the distance between existing townhouses in Orchard Knolls and the single family homes to be an important criteria for the appropriateness of townhouses. The distance between the Orchard Knolls townhouses and single family homes is about 140 feet.

Mr. Blumberg concluded that the proposed development would be compatible with land uses in the surrounding area. He presented a larger neighborhood development area, Ex. 36, to illustrate his opinion about compatibility. He indicated that the compatibility analysis involves about a ½ mile radius from the site except that residential areas to the south are cut off. The area to the west includes the fire station, the collapse-building rescue, Kentlands Elementary School, the Orchards townhouse community, the Shops at Potomac Valley, Quince Orchard High School, Johnson's Garden Center, and Safeway Shopping Center. The area to the east extends to the Lakeland's community and includes uses along Route 28 such as the North Potomac Senior Center, a special exception with 37 units for those 55 and older, the Quince Orchard Medical Park, several churches, and the Owen Glen subdivision that includes townhouses. He concluded that the logic of locating higher density zoning on the subject property is obvious given the townhouse developments to the

north and east. The proposed development makes good planning sense to locate development with access to Route 28 that is similar to development in the vicinity.

Mr. Blumberg indicated that the vegetative screening and topography would add to the compatibility to the south and east. Storm water management and stream restoration will add to a more compatible relationship between the subject property and surrounding land uses.

Mr. Blumberg indicated that the separation distance between the proposed townhouses and adjacent single-family detached homes are similar to the surrounding neighborhood. In Kentlands, the townhouses are much closer to single-family homes. He conceded that Kentlands is a very different type of development than under the R200/TDR Zone and it was not included in the surrounding area used by the technical staff or his surrounding area. He perceives no inherent incompatibility with single-family homes and townhouses. Orchard Hills is a community located in the northwest quadrant of the intersection of Route 28 and Quince Orchard Road. Clusters of townhouses are located in this development along with single family homes and they are separated by an 80 foot area.

Mr. Blumberg testified that the proposed development satisfies all the development standards of the RT-8 Zone. The subject property will support sufficient density and building setbacks will meet the standards. The building height will meet minimum and maximum requirements. Likewise lot coverage, green area and parking requirements will be satisfied. The SDP will be reviewed again at the site plan stage and the layout will meet all standards.

Mr. Blumberg concluded that the proposed development is in the public interest. The site is within the water and sewer envelope and no extensions are required. Highway traffic capacity is available. The proposal satisfies a need for more housing. Fire, police and rescue services are close by.

Mr. Blumberg was questioned about the use of MPDUs and he indicated that the applicant will abide with law and provide MPDUs as may be required. The density for MPDUs is 9.76 units an acre, which as applied to the 5.25-acre site, could produce some 51 dwelling units, which he conceded could be theoretically built on the site although the constraints of the site would require very

small units, Tr. July 18, 2005, pp. 206-207. North Potomac is a community and not a planning area. There are four communities in the Potomac Subregion: North Potomac, Potomac, Darnestown and Travilah. All but North Potomac are considered to be semi-rural in character.

Daniel E. Pino, P.E. qualified as an expert witness in the field of civil engineering. He prepared an engineering report for the proposed development, Ex. 18 (b) and 23 (b). He also prepared exhibits that show impervious areas, Ex. 40, drainage areas, Ex. 41, and Natural Resources Inventory and Forest Stand Delineation (NRI/FSD), Ex. 18 (f) and (g). The NRI/FSD shows natural features of the site including soils types, steep slopes, and a stream valley buffer that extends 100 feet on both sides of the stream. A small portion of the stream valley buffer will be used for the access road, but the loss of this area will be compensated with an addition to the buffer at the northeast corner of the site. The NRI/FSD was approved by the MNCPPC.

Mr. Pino described the site as having an impervious area that consumes about 60% of the land. The rear or southern end of the site is about 10 to 15 feet higher than the front end. The site is divided into three drainage areas. In the first area, water flows in the southern end of the property to adjacent land and lots 190 and 10 on Citrus Grove Road. A second drainage area flows east to adjacent lots 4, 5, and 6 located on Blackberry Drive. The final third of the property drains to the existing stream that runs through the property. The proposed development will reduce the impervious surface to less than 40 % of the site.

Mr. Pino also prepared a storm water management concept plan, Ex. 23 (a). To meet the requirements of the storm water regulations, the plan must address three areas: recharge of groundwater, water quality and water quantity. The concept plan divides the site into two areas. In the northern area, water will be directed to a pond through surface sand filters and this process will recharge the groundwater and provide water quality and quantity controls. The outfall from this process will enter the existing stream. In the eastern area, water will be collected and taken to a recharge trench and then to an underground system with outfall to the existing stream.

Mr. Pino indicated that under the proposed development, the storm water management concept plan shows a great improvement in the reduction of water flow and velocity within the site and

with respect to adjacent properties. Under current site conditions, there is no on site storm water management. The concept plan will reduce runoff, reduce the size of the floodplain and provide for stream restoration to slow velocity. He conceded on cross-examination that development under the current zoning would also result in storm water management. He also conceded on cross-examination that while the concept plan has received provisional approval by the Department of Permitting Services (DPS), Ex. 23 (c), the proposed recharge trench might not be acceptable and the trench may have to be reduced when final engineering is done. He explained that the final plan approval stage usually occurs when the preliminary plan and site plan are reviewed.

Mr. Pino was questioned about the topography of the site and surrounding uses. At present there is a berm on the site with vegetation on top of the berm. The top of the vegetation or trees measures 434.9 feet above sea level at its highest point. The berm itself is at 405 feet above sea level. The existing homes along Blackberry Drive are at 383 feet above sea level. He used a topographic map to make these observations, Ex. 23 (d).

Mr. Pino concluded that the proposed development will be served by adequate public services and facilities. Water and sewer facilities are in close proximity to the site. A 24-inch sewer line is located along the stream that extends through the site. Water and sewer facilities are located in the Orchard Knolls subdivision. Water, gas, electric, phone and cable facilities are all located along Route 28. Access to the site will meet all design and safety standards.

Mr. Pino finally concluded that the proposed development will not produce any adverse impact from a civil engineering standpoint and it will be compatible with existing and proposed land uses in the surrounding area. During construction, all sediment control standards will be met and this issue will be monitored during and after construction by inspectors from the DPS.

Andrew T. Der qualified as an expert witness in the field of environmental science. He participated in the preparation of civil engineering, environmental and storm water management reports. He also prepared the preliminary forest conservation plan, Ex. 23 (e) and explained that the subject property does not currently contain forest as defined by the MNCPPC although there are trees on the site.

Mr. Der described the current environmental conditions of the site. The property is in a significant unnatural state. Much of the site is in use and is cleared for storage, greenhouses, parking and vehicular traffic areas and structures connected with the nursery operation. The stream valley buffer area, which is considered a priority resource protection area, has very little natural features within it and is almost devoid of forest vegetation. A lot of the land is cleared, the soils compacted and about 3.18 acres contain impervious surfaces. The stream reflects serious water quality problems because of the absence of storm water controls and a newly installed culvert at the apex of the stream discharges more water than the stream channel can handle. The result is sediment and runoff of surface flow going into the stream and stream bank erosion.

Mr. Der participated in the design of the SDP, the forest conservation plan and the storm water management plan in an effort to provide restoration to the stream and its buffer area. These plans exceed all the requirements of applicable environmental guidelines and regulations. For example, the requirement for afforestation is 15% or 0.7 acres. The Applicant is proposing 20% or 1.08 acres to be located in the preferred stream valley buffer area and along Route 28. This afforestation will reestablish forest and habitat at streamside. In addition, the northeast corner of the site will be vegetated. The Applicant will also increase the buffer area to the required 100 feet along both sides of the stream. The storm water plan will provide management of previously uncontrolled storm water runoff.

Mr. Der offered several conclusions about the proposed development. He considers it to be in the public interest because of the net environmental gains from the restoration practices. He also considers the subject property suitable for the proposed development from an environmental standpoint and considers it to be compatible with surrounding uses. On cross-examination, he conceded that afforestation and storm water management controls would be required with development of the site under its current zoning.

J. Patrick Klima qualified as an expert witness in geotechnical engineering. He conducted a geotechnical analysis of the subject property and its subsurface. He found that the

southern area of the site rises dramatically and does not appear to be natural. He found fill in borings that ranged in depth about 2 to 16 feet. Beneath the fill, he found naturally occurring soils and rock.

Mr. Klima determined that the fill is primarily salty sand and the site appeared to be used as a soil disposal area. Anecdotal evidence indicates that the fill was deposited on the site from a Washington Metropolitan Area Transit Authority Metro construction site. In examining the fill, he did not find any overt sign of contamination or significant amounts of deleterious materials such as organic, trash or debris. He concluded that the site appeared to be clean.

Mr. Klima indicated that the fill material is not consistent with standards to support residential structures. The material is loose and would likely consolidate under loads. It will be necessary to remove these materials, clean them and re-compact them to specific densities. This process is considered normal, customary and consistent with similar circumstances for residential development of the type proposed. The removal and replacement process can be accomplished in a safe manner without adverse impact to future residents of the site or residents in the surrounding area.

Mr. Klima also testified that he conducted a Phase 1 Environmental analysis to determine if there is any environmental risk such a hazardous waste or petroleum residue. He found that the site was used some time ago as a diner and found a heating oil tank associated with this use. The Maryland Department of Environment evaluated the tank and concluded that it posed no risk to human health or the environment, Ex. 46. In addition, there was no evidence of improper use of pesticides of the type that has been banned.

Mr. Klima concluded that soils on the subject property will be adequate and suitable to support the proposed development. The soils will not cause an adverse impact on new residents or the residents of the surrounding area. On cross-examination, he maintained that despite the removal and replacement of fill on the site, the elevations will not change from those contained in the Applicant's grading plan and the process can be completed without affecting the berms.

Robert M. Brenneman, P.E., qualified as an expert witness in acoustical engineering. He reviewed the SDP to determine traffic noise impact on the subject property. He prepared a noise

contour map in accordance with the MNCPPC guidelines and this map was submitted as Ex. 47. He noted that residential use must not exceed 60 dBA<sub>Ldn</sub> noise levels in outdoor recreation areas. For townhouses, this area is considered the backyard. Inside noise levels are evaluated at a 45-decibel level. Typical residential construction mitigates noise levels about 20 decibels so any outside decibels levels of 55 decibels or less could readily achieve the 45-decibel standard.

Mr. Brenneman indicated that noise contour measurements reflect that proposed townhouse lots 17 to 20 are within the 60 decibel standard. Proposed lot 21 is at 62 decibels but a board on board solid wood fence can mitigate noise levels. The proposed townhouses on lots 17 to 20 will provide a barrier to reduce outdoor noise levels in the backyard areas.

Mr. Brenneman testified that the noise measurements evaluated traffic noise along Maryland Route 28, which reflected an average daily traffic volume of 14,550 vehicles in 2004. These vehicles consisted of 94% passenger cars, 4% medium trucks and 2% heavy trucks. He projected noise levels to 2025 and increased the average daily traffic by 22%. He concluded that the proposed development would be compatible with the surrounding area in terms of acoustical standards. On cross-examination, he was questioned about noise from the firehouse, but contended that this noise source is exempt from County noise controls and only traffic noise levels are relevant for purposes of evaluating the zoning request. The acoustical impact will be evaluated again at the site plan review stage.

C. Craig Hedberg qualified as an expert witness in the field of traffic and transportation planning. He described the surrounding road network. A four lane divided highway, Maryland Route 28, which extends past the subject property in an east-west direction, anchors the road network. There are two major signalized intersections with Route 28 that the Technical Staff required be included in the traffic analysis. These are Quince Orchard Road to the west and Tshiffely Square Road to the east. The Quince Orchard Road intersection is multilane and contains double left turns. The Tschiffely Square intersection was recently improved at the request of the Orchard Knolls Homeowners Association to provide an opportunity to make a left turn without have to make a U turn.

This improvement included a jug handle right turn from east bound Route 28 to the signalized intersection which permits a protected left turn.

Mr. Hedberg also described other intersections along Route 28. To the west is the signalized intersection at the Potomac Valley Shopping Center. Directly north of the site across Route 28 is Orchard Drive, which provides access with left turns to and from the Orchards townhouse community onto Route 28 although the intersection is not signalized. Located to the east of the site is Blackberry Drive which connects to Route 28 from the south and provides the main access to the 150 homes in the Orchard Knolls community. This intersection is not signalized but there is a median break along Route 28 that allows a left turn onto Blackberry Drive from Route 28 and a right turn out. There is no left turn permitted out of Blackberry although the jug handle at the intersection with Tschiffely Square Road permits a left turn onto westbound Route 28. .

Mr. Hedberg indicated that the two critical intersections identified by the technical staff are subject to a critical lane volume capacity (CLV) standard of 1,475. He conducted a CLV analysis of both intersections using existing traffic, background traffic levels provided by the staff and projections of traffic from the proposed development using a density of 42 homes. This analysis indicates that both intersections will operate within acceptable levels of service with the proposed development. He also evaluated weekend traffic to assess the impact of the removal of traffic from the current nursery use. He found that on Saturday and Sunday the traffic from the proposed development would be significantly reduced from current levels. The reduction of traffic also occurred on weekdays but not at the same levels.

Mr. Hedberg testified that the proposed access to the site using the existing driveway would be safe and adequate because of the limitation to right turn in and right turn out. The driveway was improved along with the improvement to Route 28. He indicated that westbound traffic could make a left turn at Tschiffely Square Road and proceed west. Traffic along westbound Route 28 could make a U turn at the Potomac Valley Shopping Center intersection and access the subject property from eastbound Route 28.

Mr. Hedberg was questioned about the impact of connecting Citrus Grove Road to Route 28. He indicated that using such an extension would achieve little benefit to the community because a left turn cannot be made into or out of the site. When questioned about the proximity of the driveway for the firehouse and the proposed access, he acknowledged that they were close to each other. When questioned on cross-examination about having two roads only 50 feet apart exiting onto a highway, he conceded that it was not a desirable situation. However, he pointed out that the firehouse access road is only a driveway and not a road and the firehouse generates minimum traffic as it has an average of only 11 calls a day.

Mr. Hedberg reported that 15 traffic accidents were reported along this stretch of Route 28 in 2003, but he did not consider the number to be significant and noted that the accidents occurred before the improvements to Route 28. This road now has auxiliary turning lanes in addition to the four through lanes and he concluded that the new road design will produce less rear end collisions. He concluded that the proposed development will be compatible with the surrounding area in terms of traffic capacity and safety and is consistent with the master plan.

Ramon Sobrino, AIA, is Executive Vice President of Porten Companies and a partner in Porten. He qualified as an expert witness in the field of architecture. Porten has developed single family detached, condominiums, single family attached and adult communities in Maryland, Virginia and the District of Columbia. The Applicant is a contract purchaser and entered into a contract to buy the subject property from the current owner in the fall of 2004.

Mr. Sobrino explained that he has met with adjacent neighbors and the homeowners association on many occasions in an attempt to develop a plan that would be accepted by the community. He participated in several revisions of the SDP and noted that the Applicant has few remaining options to develop the site because of development constraints. The storm water management plan has been revised about three times and now is conditionally approved. A storm water management pond is proposed for the northwest corner of the site along the common boundary with the fire house property. The stream valley buffer and the entrance drive are fixed entities.

Mr. Sobrino described in detail the proposed development and the efforts made by the Applicant to accommodate concerns of the neighboring property owners. He used a power point presentation to illustrate existing site conditions and the proposed development, Ex. 50. An aerial photograph depicts the existing development on the subject property and the mixed residential development within the neighboring Orchard Knolls community. This community is developed with both single family detached homes and townhouses. The townhouses are separated from the single family homes by 135 feet at their closest point, Ex. 50-2 and 50-3.

Mr. Sobrino indicated that the subject property is currently used as a nursery and the site is densely packed with driveways, parking areas, a large nursery building and some 20 greenhouses located in the rear of the site. The height and width of the greenhouses is 8 and 15 feet respectively. The site contains a stream valley buffer area that is currently used for driveways and storage of materials and equipment. The nursery is screened from the adjacent residential development by berms, a fence of 8 or 9 feet, and lines of trees as shown on Ex. 50-3 and 50-4. Evergreen trees are planted on top of the berms. The screening provides an effective buffer for the adjacent homes, Ex. 50-5-9.

Mr. Sobrino testified that the proposed townhouses are similar to the existing townhouses within the Orchard Knolls community in terms of architecture, building materials, width and style, Ex. 50-11-12. He also presented as comparative evidence renderings of another townhouse project located on a 4.5-acre tract located at the intersection of Key West Boulevard and Maryland Route 28. This property is also located within the Potomac Master Plan area and is being developed as Potomac Corners with 39 townhouses that reflect an architectural style similar to the proposed development, Ex. 55. This project is bordered on two sides by single-family detached homes and is being built at a density of 10 dwelling units per acre.

Mr. Sobrino indicated that it is the Applicant's intent to keep the buffer area intact so the berms, existing fence and vegetation are not disturbed during construction or thereafter, Ex. 50-14-18. The Applicant intends to create a homeowners association that will have the responsibility to maintain the berms, fence and vegetation in perpetuity. The Applicant intends to amend the SDP to

add conditions that will insure that the screening remains intact. The proposed development will remove material and equipment storage and impervious areas from the stream valley buffer, Ex. 50-19-23. This buffer will be free from encroachments that are characteristic of the current use. Plants and landscaping will be added to this area.

Mr. Sobrino concluded that the proposed development would be compatible with the surrounding neighborhood. The revisions to the SDP have increased the distances between the proposed townhouses and the existing single-family detached homes within the Orchard Knolls community. The SDP and section analysis of adjacent properties along Blackberry Drive and Citrus Grove Road show that the proposed development will be well screened and visually separated from the proposed development, Exs. 51, 52, 53 and 54. The elevation of the berms and trees will shield the neighbors from any visual impact from the proposed development. On cross-examination, he conceded that the proposed townhouses may be visible from some locations. The townhouses will be 42 feet in height and there is a 27-foot difference with heights of the adjacent single-family detached homes. The Applicant has moved the setbacks twice and has lowered the proposed townhouses in an attempt to make them less visible.

Mr. Sobrino also concluded that the proposed development would be in the public interest. The environmental benefits over the current use are significant as the development will provide storm water management where none exists today and restore a stream valley buffer that has been compromised by the proposed use. The proposal addresses a need for more housing in Montgomery County. The site is supported by public facilities including transportation. The development of the site under the current R-200 zoning would not be the best value for the site because the current use is much more valuable than development under R-200 density.

Mr. Sobrino conceded on cross-examination that he does not know if MPDUs will be provided. He explained that whether MPDUs will be provided is a determination to be made at the subdivision stage. The Applicant will comply with MPDU laws and has not sought a waiver, transcript, July 19, 2005, p. 60. If MPDUs are required the Applicant will provide them and he does not know

how many will be required. The Applicant has not placed a density limit on the development, Id., p. 62.

### B. OPPOSITION'S CASE IN CHIEF

Dr. Malcolm D. Rivkin qualified as an expert witness in the field of land use and planning. He has previously served as member of the MNCPPC and as a member of the Planning Board. He also served on the District Council Committee on Mansionization.

Dr. Rivkin concluded that the proposed development does not comply with the recently approved and adopted Master Plan for the Potomac Sub-region, Ex. 35 (b). This master plan is unusual because it singled out particular parcels for rezoning and provided the following policy:

The land use and zoning recommendations for the Subregion highlight those parcels or areas recommended for a change in use or density....Each site was evaluated in the context of the overall objectives of this Plan, as well as for compatibility with the surrounding community. *Environmental constraints, types of uses, buffering, access, and the comparative density of nearby properties were considered in determining compatibility.*

This Plan *supports the retention and reconfirmation of existing zoning* for all developed, underdeveloped, and undeveloped land in the Subregion, *except for those sites recommended for change in the Plan.* [Ex. 35 (b), p. 40, emphasis supplied]

Dr. Rivkin indicated that the subject property was not identified by the master plan for any zoning change and he opined that the applicant should apply for a master plan amendment to fully comply with the plan's policy. He stressed that it is important that the master plan passed through full public review before its adoption and the current proposal has not been subject to public and community review. He conceded on cross-examination that a master plan recommendation is not a necessary element for the approval of an RT-Zoning request or a floating zone.

Dr. Rivkin concluded that the proposal does not meet the purposes of the RT zones. Contrary to the Technical Staff's erroneous initial review, the subject property is not designated as suitable for the RT zones by any official document. The master plan recommends the site for continuation of its current R-200/TDR Zone. The site does not abut any commercial, industrial or high-density apartment use and, therefore, does not qualify for the RT zone as a transitional use. He

disagreed with the Applicant's land use consultant conclusion that the adjacent fire station is an industrial use because it is a public facility and is well landscaped.

Dr. Rivkin also concluded that the site is not appropriate for the RT-8 Zone density. The site does not abut a townhouse community that has been used in other cases as a justification to expand townhouse zoning. It is also inappropriate to locate two strips of townhouses on each side of a row of low-density single family detached homes as is proposed here. Indeed such a pattern is not a typical way to develop. The Orchard Knolls community currently reflects a symbiosis between townhouses and single family detached homes because it was planned as a total community and provides for street separation, setbacks and extensive landscaping. There is a total break in the density levels. In contrast, the proposed development would be invasive by locating high-density townhouses at a significantly higher elevation.

Dr. Rivkin was very critical of the Technical Staff review in this case. He has read numerous staff reports during his professional career but has never seen a report with so many errors. The initial report, dated July 1, 2005, Ex. 24, was sent to the Planning Board with erroneous conclusions about the site's designation for the RT-Zone, the compatibility of the SDP with adjacent single family homes and its conformity with the master plan. The staff's report also failed to evaluate the likely increase in density from the MPDU program. The MPDU law requires any project of 30 or more dwelling units to provide MPDUs and the proposed development of 39 market rate units will generate additional density of at least 5 more units. The staff ignored the impact of this increased density and this constitutes a serious flaw in the staff review.

Dr. Rivkin described the day of the Planning Board's review of this application on July 7, 2005. The entire day was taken up with prolonged consideration and discussion relating to deficiencies in the development of Clarksburg. The proposed development was the last item on the Board's agenda. He noticed that about 9:30 or 10:00 p.m. the staff passed out errata sheet to the staff's initial report and a packet of opposition letters. He conceded on cross-examination that the errata statement was dated July 5, 2005, Ex. 25. When the Board finally considered the application about 11:00 p.m., it appeared to be exhausted. The Board recommended approval of the application

by a 3 to 2 vote. Later the staff released a revised staff report, dated July 14, 2005 although the MNCPPC website continued to publish the erroneous report of July 1, 2005, Ex. 56. .

Dr. Rivkin concluded that the proposed development is not compatible with the surrounding community. He indicated that the proposed townhouses located at a 15 to 20 foot higher elevation than adjacent single family detached homes provides a very shaky basis for compatibility because the location of the townhouses is not a building element and is dependent on a number of factors including environmental issues and uncertain density levels. There is an unacceptable risk associated with the maintenance of the storm water management, the existing berm and landscaping on the berm. Existing cypress trees have a 20-year life and what are assurances that they will be adequately replaced. There are also gaps in the tree lines and the townhouses would not be invisible. There are a number of factors that influence the impact of the proposed development on the adjacent Orchard Knolls community including the height of trees, density of the proposed development, and topography. Density is an important element of compatibility. With the current uncertainty in the density of development, there can be no determination of compatibility.

Dr. Rivkin concluded that the master plan created an expectation in the community that the site would be developed under the R-200/TDR Zone. The subject property and adjacent fire station are both classified under this same zoning category. He indicated that the site is not difficult to develop under the current zoning as it would yield about 10 homes that could sell for over a million dollars apiece given Montgomery County's current position as the highest priced area within the metropolitan region. Development under the current zoning would be the most compatible form of development given access through the Orchard Knolls community.

Dr. Rivkin also concluded that the proposed development would not be in the public interest. The proposal is not in accord with the master plan, is not appropriate and is incompatible with the adjacent community. The awkward access to the site would require potential residents to drive an additional 1/5 of a mile to the next intersection to negotiate a U turn for access to the site and this inferior access would mean public policy concessions. While there is a need for additional housing in the county, the proposed development represents high cost housing that would be

unaffordable to most residents of the county. Unaffordable housing is not a public interest justification for this zoning proposal.

Dr. Rivkin criticized the Applicant's reliance on master plan recommendations for development of old quarries. Neither the development of Stoneybrook nor Giancola quarries with townhouses serve as justification for the proposed rezoning. In each case the location of townhouses near single family detached homes did not involve physical or visual connections as is the case here. The Applicant's reliance on Zoning Application G-805 is misplaced as it involved property of only 34,302 square feet located between a church and a mid rise assisted living facility, Ex. 58. The District Council found that no other use was suitable at this location and made dual findings that the site was appropriate and a transition for 18 townhouses.

Dr. Rivkin conducted his own analysis of six past zoning decisions. In three of the cases, the RT-Zone was designated by the master plan, G-811 in Germantown, G-817 in Silver Spring and G-821 in Burtonsville. In another case, G-812 in Gaithersburg, the site abutted an existing townhouse development and more townhouses were found to be appropriate. In G-822 in Aspen Hill, the Applicant limited the density level under the RT-8 Zone to 5.3 dwelling units an acre including MPDUs. Finally in Case G-797 in Bethesda, a ½ acre site was approved for 5 townhouses as a transition between a high-rise building and a single family detached community.

Dr. David Haos is a resident of the Orchard Knolls subdivision and the owner along with his wife of Lot 6 located, which abuts the site to the east. He described the community as having a single-family character with 150 homes 67 of which are townhouses. The single family detached lots average in size about 1/3 an acre. It is an upscale community and the single-family detached homes resell in a range from \$750,000 to \$1,000,000. The townhouses resell in a range from \$400,000 to \$500,000. It is a quiet community and he seldom hears traffic noise from Route 28. He is occasionally awakened by noise of sirens from the firehouse.

Dr. Haos is a member of the Orchard Knolls Homeowners Association but he is not an officer or member of the board of directors. He did not attend the meeting when the association took up the proposed zoning. However, he learned from his neighbors that the association board voted

unanimously to oppose the rezoning because it is not in keeping with the character of the neighborhood. He met with MNCPPC officials, Callum Murray and Carlton Glibert. He and other community representatives also met with the Applicant and shared their concerns about the project. Following this meeting the Applicant increased building setbacks from 30 to 42 feet. The Applicant later increased the setbacks to 60 feet.

Dr. Haos is concerned about the height and closeness of the proposed townhouses. The Technical Staff was also concerned about the need for greater setbacks. The staff used the setback of the Fire and Rescue Collapsed Team Rescue Building as a guideline, which was initially recommended at 70 feet. However, the setback actually constructed was 60 feet. He described the screening and buffer between the firehouse property and the adjacent residential neighborhood as very effective. Leland Cypress trees ranging in height from 40 to 50 feet provide a good screen along the southern property line. The height of trees declines to about 20 to 25 feet along the subject property. Along the southern property line at Citrus Grove Road, the vegetation is more like shrubbery than tall trees and barely makes it to the top of the fence. The subject property is also elevated about 15 to 20 feet and the proposed development will be much more prominent to the adjacent community than the firehouse buildings.

Dr. Haos described his back yard as rising toward the subject property like a large hill. His neighbor has a 22-foot elevation from his back yard to the top of the berm on the subject property. His other neighbors on lots 4 and 5 have a single row of Leland Cypress trees as a screen from the subject property and these trees range in height between 20 and 25 feet. There are gaps in these trees as reflected by the picture in Ex. 50, p. 5.

Dr. Haos and his neighbors are concerned that the closeness of the proposed townhouses and their elevation renders them incompatible with the single-family homes based on criteria reflected in other townhouse clusters in the surrounding area. For this reason, he and his neighbors measured the degree of separation in nearby townhouses. A road, vegetation, and a building separation of 138 feet at the closest point separate the 67-unit townhouse cluster that is part of the Orchard Knolls subdivision from single-family detached homes. There is townhouse community

on the north side of Route 28 within the Orchards that backs up to single-family detached homes in Kentland. These townhouses are also separated from the single-family homes by 150 feet and a 50 feet wide dense buffer.

Dr. Haos also examined the land use pattern adjacent to firehouses in the Potomac Subregion. He looked at five firehouses and found that four of them were located adjacent to single-family detached homes and there was no need for a transition. The one exception involved a site studied in the master plan, Ex. 35 (b), p. 58. In this case, townhouses under the RT-8 Zone were recommended and developed adjacent to a community of single-family homes classified under the R-200 Zone. The townhouses are not comparable to the proposed development because the nearby single-family detached homes are developed on large lots and separated from the townhouses by a substantial buffer of dense trees as shown by a photograph, Ex. 57. He concluded that there is no need for a transition here because the firehouse is well set back and screened from the neighborhood by substantial trees.

Dr. Haos concluded that the proposed development would not be compatible with the surrounding neighborhood as it is out of character with it. In other locations in the surrounding area where townhouses and single-family homes are near each other, the distance between the two types of houses are greater, they are separated by a substantial buffer and they are located on the same elevation. The proposed development will be up to 22 feet higher than the strip of single-family homes located along Blackberry Drive and Citrus Grove Road. The distance of separation will only be 96 feet at its closest point. The buffer of trees has gaps between them. The higher elevation townhouses will look down into back yards of adjacent homes and will constitute an invasion of privacy.

Dr. Haos prepared a series of photograph purporting to depict the mass and intrusiveness of the proposed townhouses. He uses photographs from the existing townhouses in Orchard Knolls had them superimposed over photographs of the subject property., Ex. 64, 65 and 66. There were deficiencies in this approach because the townhouses used in the photographs were wider than the proposed development and were not setback as far as the SDP proposes to locate the

townhouses. Moreover, existing trees that would mask part of the building mass were deleted in the process. Consequently, the Applicant objected to the admissibility of the photographs as they misrepresented the building mass and were not a fair and accurate depiction of the proposed development. The objection was sustained and the photographs were excluded from the record.

David Gillis is a resident of the Orchard Knolls subdivision and is owner of lot 5 that abuts the subject property. He believes the proposed development is not compatible with the neighborhood and he is especially concerned about the proposed building height, privacy issues and the soundness of the storm water management plan.

Mr. Gillis expressed concern that the elevation of the proposed townhouses will place units facing his backyard that are 27 feet higher than his home in a peak-to-peak comparison. The Applicant's representation of the buffer area is misleading because the trees appear to be a solid mass when, in fact, they are not. When he is in his back yard looking up at the subject property, he can see the greenhouses, the berm and some vegetation. One photograph in the record shows this view, Ex. 50, p. 3. There is a great variation in the height of the trees. As the tree line extends from north to south, the trees become shorter. This buffer is not as effective as the 60-foot separation across Blackberry Drive that exists between his home and the existing townhouses to the east.

Mr. Gillis expressed concern about the privacy issue. The proposed development will be situated like a watchtower perched over his backyard and looking into his bedrooms and bathrooms. He has two daughters at home and he is concerned about intrusions into their privacy. He is also concerned that after the site is re-graded and the retaining wall is installed, about half the drainage from the subject property would be directed toward his home. He is concerned that the storm water system presents risks to his property.

Mr. Gillis attended the Planning Board's consideration of the Application on July 7, 2005. He recorded the session and transcribed the comments of Commissioner Wellington in dissent, Ex. 71. The Applicant objected to the admissibility of the exhibit on the grounds of accuracy. Mr. Gillis, testifying under oath, indicated that he transcribed the comments from a tape recorder and the transcript is an accurate representation of the Commissioner's comment. On occasion, both

applicants and opposition have submitted comments of MNCPPC Commissioners and the practice has been to admit the comments. The Opposition's Counsel agreed to provide the Applicant's Counsel with a copy of the tape and leave was granted to allow submission of any changes to the transcript.

Lisa Goodman is an original homeowner in Orchard Knolls and resides at the end of Blackberry Drive on Blackberry Terrace. She explained that the community of homes was developed by NV Homes about 1989. One of the first segments developed was the 67 townhouses. She and her husband purchase their home that was completed in 1992. Before they purchased the home, they examined the master plan and asked about the status of the Potomac Garden Center. They were advised that the subject property was zoned for single-family detached development.

Ms. Goodman is a member of the HOA, its board of directors and an officer. Orchard Knolls is a real community as opposed to the large and unwieldy developments in Kentlands and the King Farm. Orchard Knolls is small, intimate and integrated community. It has a great location and is close to everything. The housing mix fosters a sense of community.

Ms. Goodman has participated in the community's review of the proposed development. The proposed development is not planned to integrate well. Its access is a problem as it will generate awkward U turns along a busy road that has a history of accidents and fatalities. The State will not allow a traditional access to the site because it is located too close the existing signalized intersection. The planned use for Citrus Grove Road was to integrate the subject property into the larger community as part of a single family detached development.

Ms. Goodman considers the proposed development to be a bad fit for this location. There is no community benefit in the proposal to locate 39 townhouses on about 3 acres of land given the problems of the site access, its topography and its proximity to single-family detached homes that will be harmed by the intrusion. In effect, the Applicant is proposes to add a new and distinct community within a larger community without any ties to or integration into the larger community. The subject property was intended for single-family detached development as an extension of the existing community and that is how it should be developed.

Reardon D. Sullivan, P.E., is an adjacent property owner who had initially planned to testify at the hearing but did not appear. Instead he submitted two letters. The letters were submitted during a time when the record remained open. He contends among other things that the proposed building height is four stories, that the stormwater management plan is inadequate, that the proposed development will be exposed to siren noise from the firehouse, that the building height of existing townhouses and single family detached homes are “virtually the same” while the proposed townhouses will tower over his home and eliminate any enjoyment of privacy, and that letters from 120 community residents opposed the rezoning.

### **C. APPLICANT’S REBUTTAL CASE**

Daniel T. Pino, P.E., testified that the existing site runoff constituted a drainage area of 1.26 acres and its flow represented a 10 year storm of 5.75 c.f.s., Ex. 41. After the proposed development, runoff will be reduced to a drainage area of 0.47 acres and a 10 year flow of 0.62 c.f.s., Ex. 42. With respect to the impact on lot 5, the total drainage from the entire area through the subject property to lot 5 is 1.84 acres and a flow of 5.6. Drainage that is directly attributable to the subject property and drains to lot 5 is 0.76 acres and a flow of 3.52 c.f.s. See, Ex. 72. After the implementation of the storm water management plan, the total drainage is reduced from 1.84 acres to 1.41 and flow is reduced from 5.6 c.f.s. to 2.54 c.f.s. After the implementation of the plan, drainage from the subject property only to lot 5 will be reduced form 0.76 acres to 0.33 acres and flow will be reduced from 3.52 c.f.s. to 0.41 c.f.s., Ex. 73.

Ramon Sobrino testified that the owner of the Potomac Garden Center provided him with information about complaints filed by the Orchard Knolls community about noise, fencing, pesticides and other issues. The owner agreed to provide landscaping and a fence. There was an agreement between the HOA and the owner. Nevertheless, the complaints continued after the agreement. The Applicant proposed to submit a file of the complaints and the agreement, Ex. 74. The Opposition’s objection to the exhibit was sustained and it was not admitted.

The Applicant’s counsel submitted a response to Mr. Sullivan’s letters. The response indicated that the proposed building height will be 35 feet or three stories, that the stormwater

management concept plan constitutes a significant improvement over existing conditions and will comply with all laws and regulations, that site access will be adequate, that siren noise from the firehouse will not cause a nuisance, that the separation between existing townhouses and single family detached homes is 135 feet and not 150 feet, that existing townhouses are 8 feet higher than the existing single family detached homes in Orchard Knolls, that screening and an additional row of trees will eliminate any intrusion from the proposed townhouses and that opposition letters basically consist of two form letters.

#### **IV. ZONING ISSUES**

Having completed the findings of fact, it is now necessary to apply these facts to the zoning issues involved. The RT-8 Zone is a floating zone that contains eligibility criteria, development standards and a post-zoning review process that delegates to the Planning Board site-specific issues such as building location, landscaping and screening.

The zoning issues concern whether or not the proposed reclassification complies with the purposes and requirements of the RT-8 Zone, whether the reclassification would provide a form of development that is compatible with existing and planned land uses in the surrounding area, whether the reclassification is in conformity with the recommendations of the applicable master plan, and whether the reclassification is in the public interest.

##### **A. PURPOSE CLAUSE**

The application satisfies the development standards of the RT-8 Zone. The subject property exceeds the minimum tract area of 20,000 square feet. The illustrative density of 7.37 dwelling units per acre is within the density limit of 8.0 dwelling units per acre not counting MPDUs. The building coverage, green area, and parking are all within specified limits of development and will be finally established at the site plan stage.

However, the floating zone also requires that locational requirements be met and here at least one of three alternative conditions must be met: the rezoning must satisfy *“a need for a buffer or transitional use between commercial, industrial or high density apartment uses and low density one-family use”*, or it *must be “designated”* on a master plan or other planning document for such

development, or it must be determined upon the evidence *to be "appropriate"* for development at the location and at the density sought. See, Mont. Co. Code §59-C-1.721.

### **1. TRANSITION**

The evidence does not support the Applicant's contention that there is a need for a transition between commercial, industrial or high-density apartment uses and single family uses. There are no commercial, industrial or high-density apartment uses abutting the site that would make it suitable for such a transition. The fire station is an institutional use and is located on a well-maintained and landscaped site.

The Applicant's contention that the adjacent fire station could be perceived to be an industrial use lacks merit, as it is directly contrary to the specific language of the zoning ordinance. Such an interpretation would distort the standards for application of the RT zones and subject them to subjective and undefined notions based on perceptions of adjacent uses.

Application G-805, relied upon by the Applicant, is not controlling precedent because the District Council based its decision in that case on the rezoning being both appropriate and a suitable transition. The situation in that case is distinguishable from the situation here. The G-834 site was not shown to be limited only to townhouse development. As is explained below, the G-834 site does not provide an appropriate location for the RT-8 Zone.

### **2. DESIGNATION**

The Master Plan does not designate the subject property for development under the RT-8 Zone. Despite an initial belief that the zone was so designated, the Technical Staff now concedes that it was in error and the application does not meet these eligibility criteria of the purpose clause.

### **3. APPROPRIATE**

The Applicant's last remaining opportunity to qualify for the RT-8 Zone is to show that the subject property is appropriate for residential development at densities permitted in the RT Zones. The Applicant contends that the appropriateness of the RT-8 Zone is clear in light of development of townhouses and other land uses in an expanded surrounding area and beyond. The Opposition contends that the subject property is not an appropriate location for the RT-8 Zone because it is

bordered on two sides by single family detached homes, there are no townhouses that are contiguous to the subject property, the location of townhouses on the subject property would isolate a row of single family detached homes, and the RT-8 Zone is inconsistent with the prevailing zoning located south of Route 28.

The term “appropriate” is undefined in the zoning ordinance although it is linked to location and density. “Appropriate” as used in the zoning ordinance does not constitute a rigid standard to be mechanically applied. Rather, it is applied in a flexible manner so that each application can be evaluated on a case-by-case basis to determine if it is a proper fit given the location and density proposed. What is appropriate density at one location may be inappropriate at another.

The Applicant contends that the proposed zoning is appropriate because the site possesses characteristics similar to locations elsewhere in the county where the RT or similar zoning has been applied. Here the comparative evidence involves properties spread throughout the Potomac Subregion and beyond the relevant surrounding area. The sites are factually distinguishable from the subject property. Each of these supposedly comparable sites involves either different zoning classifications, different basis for the rezoning, or special factors such as topography, location or shape of the property. None of these comparative examples involves factors or characteristics that are so similar as to be compelling precedent.

The District Council authorizes a variety of land uses, building bulk standards and densities through its zoning powers. Density is one of the most important factors that determines the character and lifestyle of a community. *Fitzgerald v. Montgomery County*, 37 Md. App. 148, 376 A. 2d.1125 (1977). Since the Applicant failed to specify its intended density, density must be evaluated at the zoning stage based on an assumption of maximum potential development. *Wheaton Moose Lodge v. Montgomery Co.*, 41 Md. App. 401, 397 A. 250 (1979). As the findings of fact indicates, the evaluation will assume 42 townhouses which constitute a range of 2.6 to 4.2 times the comparative densities of planned and adjacent uses.

Within the context of the surrounding area, the proposed application is clearly inappropriate. The community located on the north side of Route 28 makes up only about one-third of the surrounding area and it will experience little impact from the proposed development because a 4-lane highway separates the subject property from it. The area contains only a portion of the Orchards townhouse community and its density within the area is not specified in this record. However, the south side of Route 28, where the bulk of the surrounding area is located, will be seriously impacted by the proposed development.

This community contains a mixture of institutional, commercial and residential uses. However, it is predominately residential in character and reflects a prevailing residential density of three dwelling units per acre. The single family detached homes and townhouses that make up the bulk of this community were developed under a common plan and allowances for diversity in housing styles were accommodated by road separation, vegetation and distance.

The proposed development would pack 42 nonintegrated and unplanned townhouses on about 3.8 acres. The threefold density increase would create an island of higher density amidst a sea of low-density development. The District Council in Zoning Application G-218 rejected a similar threefold density increase proposed for the Potomac Subregion, See, Res. No. 9-1636, Jan. 2, 1982. While floating zones are valuable tools to promote healthy development, they are not appropriate as tools for random application of inhospitable development.

## **B. COMPATIBILITY**

An application for a floating zone reclassification must be evaluated for compatibility with existing and planned uses in the surrounding area. The evidence is conflicting on this point. The Applicant and the Technical Staff conclude that the latest version of the SDP provides a form of development that is compatible with adjacent uses. Indeed, the Applicant has revised the SDP and the binding elements in an attempt to render the density imbalance less intrusive.

The Opposition submitted persuasive evidence that the proposed development would be incompatible, notwithstanding the Applicant's proposals for setbacks and landscaping. There are gaps in the current tree stand that allow the townhouses to be visible from adjacent homes. The

Applicant's proposal to install a second row of trees does not establish that the gaps will be closed. There is also an elevation rise to the subject property that ranges from 10 to 15 feet. The Opposition contends that the higher situated townhouses will hover over the adjacent backyards and constitute an invasion of privacy. The Applicant's own evidence shows that there is a dramatic difference in the respective heights of the proposed townhouses and the existing homes in Orchard Knolls. The section sketches reproduced on pages 17 and 18 show that the peak of the townhouses will range between 24.9 and 27.1 feet higher than the peak of existing homes.

The Applicant cites as evidence of compatibility the existing 67 townhouses located on the east side of Blackberry Drive. This attempted comparison matches apples and oranges. The existing Orchard Knolls townhouses are developed on about the same elevation as the single family detached homes. The townhouses are separated from the nearby single-family detached homes by a road and 60 foot right of way. A distance of about 135 feet also separates the townhouses from the closest single family detached home. Finally, the Orchard Knolls townhouses were built according to a plan and they are integrated into the community as part of the prevailing R-200/TDR zoning scheme. The proposed townhouses will be built at much higher elevation, will not be separated by the same distance and will constitute an unplanned intrusion that will not be integrated into the community.

The master plan emphasizes that comparative density is an important factor in determining compatibility with adjacent properties. Developed at a threefold density increase, the proposed rezoning would constitute a serious intrusion into the adjacent low-density residential enclave. The disparity in density is too great to be mitigated by landscaping and setbacks.

### **C. MASTER PLAN**

The Potomac Sub-region Master Plan, adopted and approved in 2002, explicitly recommends that the entire area where the subject property is located remain classified under the R-200/TDR Zone. Lacking any direct evidence of master plan conformity, the Applicant resorts to an inferential approach. Under this approach, the Applicant contends that the proposed development is in compliance with general goals and objectives of the master plan. The Applicant then identifies

properties in the Potomac Subregion where townhouses were authorized and argues that there are sufficient similarities between these properties and the subject property to justify an inference that the master plan, if the subject property was considered today, would recommend the site for the RT-8 Zone.

This type of hypothetical analysis makes any master plan recommendation vulnerable to a variety of interpretations that undermine explicit recommendations of the plan. If the Applicant's hypothesis is correct, there is a simple way to prove it and that is by obtaining a master plan amendment for the subject property. Lacking a master plan amendment or a crystal ball, the examiner must apply the explicit recommendation of the master plan for this site and it does not support the proposed rezoning.

#### **D. PUBLIC INTEREST**

When evaluating the public interest, the District Council normally considers master plan conformance, the recommendations of the Planning Board and staff, and other public interest factors including public amenities and affordable housing. The proposal does not conform to the explicit recommendations of the master plan. The favorable Technical Staff and Planning Board recommendations are not entitled to much weight given the failure to evaluate the critical density issue.

The Applicant contends that the proposed environmental amenities are significant, as the proposed development will provide storm water management where none exists today and restore a stream valley buffer that has been compromised by the current use. While it is true that the proposed development would provide significant environmental improvements to the site, development under the current zoning would also generate similar environmental benefits.

The Applicant also contends that the proposal addresses a need for more housing in Montgomery County. The evidence on housing only addresses high priced market rate units, which the Opposition expert land planner observed is not affordable for most residents of the County and therefore does not constitute a valid public interest factor. In other zoning cases, the provision of MPDUs is usually cited as an important public interest factor. However, the Applicant has chosen to

omit from the evidence any indication of how affordable housing would be provided under the MPDU program.

For all of these reasons, the Hearing Examiner concludes that the proposed reclassification does not bear sufficient relationship to the public interest to warrant its approval.

## V. CONCLUSIONS

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

1. The application does not satisfy the requirements of the purpose clause.
2. The application does not propose a compatible form of development
3. The application does not conform with the recent Potomac Sub-region Master Plan;

and

4. The application was not shown to be in the public interest.

## VI. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-834, filed on January 6, 2004, and requesting reclassification from the R-200/TDR Zone to the R-T 8 Zone of 5.288 acres of land known as P-426, located at 12024 Darnestown Road, Gaithersburg, Maryland, in the 6th Election District, be denied.

Dated: September 29, 2005

Respectfully submitted,

Philip J. Tierney  
Hearing Examiner