

BOARD OF APPEALS
for
MONTGOMERY COUNTY
(240) 777-6600
(www.montgomerycountymd.gov/mc/council/board.html)

Case No. S-689-C

PETITION OF KENWOOD GOLF AND COUNTRY CLUB

OPINION OF THE BOARD

(Public Hearing Date: April 2, 2004)

(Close of Record: June 25, 2004)

(Effective Date of Opinion: September 9, 2004)

Kenwood Golf and Country Club filed an application for an administrative modification to a special exception to permit the addition of a golf cart bridge over and across Goldsboro Road. By Resolution dated August 25, 2003, the Board granted the modification. Within 15 days of the issuance of that Resolution, the Board received two requests for a public hearing on the modification. Pursuant to Section 59-G-1.3(c)(1) of the Zoning Ordinance, effective January 20, 2004, the Board suspended the Resolution granting the modification and referred the administrative modification request to the Hearing Examiner for Montgomery County to conduct a public hearing. The Hearing Examiner convened a hearing on April 2, 2004, the record in the case was held open until June 25, 2004, and on July 22, 2004, the Hearing Examiner issued a Report and Recommendation for denial of the administrative modification.

Decision of the Board: Administrative Modification **denied**.

The subject property is comprised of Lots 1, 2, and 3 Block 12, Lots 4 and 5 Block 13, Part of Lot 9, Lots 10, 11, 12, and Part of Lot 13 Block 11, in the Bradley Hills Subdivision, and Kenwood Section 5, all in the R-90 zone.

The Board of Appeals considered the Hearing Examiner's Report and Recommendation at its Worksession on September 1, 2004. The Board also had before it a letter, dated August 2, 2004, from Harry W. Lerch, Esquire, and Stuart Barr, Esquire, on behalf of Kenwood Golf and Country Club, requesting oral argument on the Report and Recommendation. After careful consideration, and review of the record in the case, the Board agrees with the Hearing Examiner's findings that "constructing a golf cart bridge of these dimensions in this setting would constitute an increase in the intensity of the use and that the bridge would have a substantial, if not dominant, visual impact on the immediate neighborhood." Therefore, the Board adopts the report and recommendation and

denies the administrative modification. On a motion by Louise L. Mayer, seconded by Allison Ishihara Fultz, with Angelo M. Caputo and Donald H. Spence, Jr., Chairman in agreement and Donna L. Barron necessarily absent, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 9th day of September, 2004.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF: *
KENWOOD GOLF & COUNTRY CLUB *
 Petitioner *
 *
 Ashby Chamberlain *
 Thomas Kummer *
 John Sekerak, Jr. *
 Curt Schreffler *
 For the Petitioner *
 *
Harry W. Lerch, Esquire *
Stuart Barr, Esquire *
 Attorneys for the Petitioner *

***** * Board of Appeals Case Nos. S-689-C
 Martin Klauber, Esquire, People’s Counsel * (OZAH Referral No. 04-28)
 In Opposition to the Petition *
 ***** *
 James I. Seevaratnam *
 Sherwin Gardner *
 In Opposition to the Petition *
 ***** *

Before: Martin L. Grossman, Hearing Examiner

**HEARING EXAMINER’S REPORT AND RECOMMENDATION
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I. STATEMENT OF THE CASE

A. Procedural Background

On June 19, 2003, Petitioner filed an application with the Board of Appeals to administratively modify an existing Special Exception, S-689-C, to permit construction of the golf cart bridge over Goldsboro Road (MD Route 614) about 600 feet west of its intersection with Radnor Road in Bethesda, Maryland (Exhibit 29).¹

Under Zoning Code §59-G-1.3(c)(1), the Board may grant administrative modification without a hearing “[i]f the proposed modification is such that the terms or conditions could be modified without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood.” On August 25, 2003, the Board granted administrative modification as requested (Exhibit 35).

However, within 15 days after mailing its resolution, the Board timely received two written requests for a hearing from neighbors of the subject property (Exhibits 30 and 31). If a request for a hearing is timely received, the Board must, under the same Zoning Code provision, suspend its decision and conduct a public hearing. Since hearing requests were timely received, the Board suspended its approval by resolution effective January 20, 2004 (Exhibit 37), and referred the matter to the Hearing Examiner (Exhibit 38) to conduct a public hearing and to make a written report and recommendation to the Board with regard to “the application filed for an administrative modification.”

On January 23, 2004, the Board issued notice of a hearing date on April 2, 2004, to hear “the application filed for an administrative modification to a special exception to permit addition

¹ The exhibits pertaining to the subject modification application begin with exhibit number 29.

of a golf cart bridge over and across Goldsboro Road.[Exhibit 39]” Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), issued its Report on March 25, 2004 (Exhibit 44), recommending approval, with conditions. Apparently due to a miscommunication, the initial Technical Staff report addressed the matter as if there had been a full modification request (sometimes called a “major” modification request), and did not directly address the issues raised by an administrative modification request.

A public hearing was convened as scheduled on April 2, 2004, and testimony was presented in support of and in opposition to the petition. Martin Klauber, People’s Counsel for Montgomery County, participated in the hearing and raised a number of issues with regard to the nature and location of the proposed bridge. The two neighbors, James I. Seevaratnam and Sherwin Gardner, who had written the Board opposing the administrative application, testified in opposition to the proposed bridge on grounds that it would be visible from their homes and would be an eyesore in their suburban setting. A letter from a neighbor, Joseph Hornyak, supporting the bridge was submitted by Petitioner at the hearing (Exhibit 47); however, Mr. Hornyak did not testify. Petitioner also submitted a letter of support from Nick Park, Chairman of Kenwood’s Golf Committee, expressing his support for the bridge to alleviate safety concerns with the current at-grade crossing. The hearing was concluded on April 2, 2004, but with the consent of all parties, the record was held open until June 1, 2004, to allow Petitioner to file a landscape plan by May 3, 2004, to permit Technical Staff to supplement its report by May 17, 2004, and to give the parties an opportunity for further comment following these filings. During this period, a letter was received from the State Highway Administration (Exhibit 58) praising the safety improvement expected from the bridge and indicating state review was ongoing.

On May 3, 2004, as scheduled, Petitioner submitted a revised landscape plan (Exhibit 63(a)). On May 13, 2004, at the request of Technical Staff, a notice was issued to all parties of record giving Technical Staff until June 15, 2004, to submit their supplemental report, and keeping the record open until June 25, 2004 for public comment (Exhibit 61).

On May 17, 2004, a letter was received from another neighbor, F. William Burke, supporting the idea of constructing a golf cart bridge, but asking that it not be located so close to his home (Exhibit 62). On June 17, 2004, Technical Staff filed its supplemental report (Exhibit 65), and on June 18 all parties were forwarded a copy (Exhibit 66). The Supplemental Technical Staff Report was very brief and concluded that the modification request raised “significant issues (i.e., visibility, landscaping, compatibility, construction over public right-of-way, etc.)” which “could substantially alter the nature, character, and intensity of use,” and therefore “should be viewed as a major modification request.” Additional submissions were then received from Petitioner (Exhibit 67), from James and Rukmini Seevaratnam (Exhibit 68) and from Sherwin Gardner (Exhibit 70). The neighbors’ submissions continued to strongly oppose the bridge at the proposed location. Finally, on June 25, 2004, Petitioner submitted a letter asserting that Petitioner had met the standards not just for an administrative modification but for

a major modification (Exhibit 69). The record closed, as scheduled, on June 25, 2004.

B. Procedural Issue

In Petitioner's final submission, it suggests that this matter could be treated as either an administrative modification request or a major modification request. Although there has been an extraordinary amount of process in this case for an administrative modification, the Hearing Examiner cannot treat the matter as a major modification case because it was not noticed for that purpose.

Zoning Code §59-G-1.3(c)(4) expressly limits the public hearing on modification applications to consideration of the proposed modifications noted in the Board's notice of public hearing and to discussion of those aspects of the special exception use that are directly related to those proposals, absent certain other conditions not present here. The notice in this case explicitly stated that the hearing would address "the application filed for an administrative modification" Having held the hearing for that express purpose, due process considerations prevent the Hearing Examiner from now treating this case as a major modification request. For example, if the opposition knew that this was a major modification hearing, they may have elected to produce expert evidence on relevant points.²

In addressing administrative modification requests, there is one over-arching issue spelled out in Zoning Code §59- G-1.3(c)(1): **Is the proposed modification (i.e. construction of the golf cart bridge) such that the terms or conditions of the existing special exception could be modified without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood.**

It is that issue that must be addressed by this Report.

II. FACTUAL BACKGROUND AND ANALYSIS

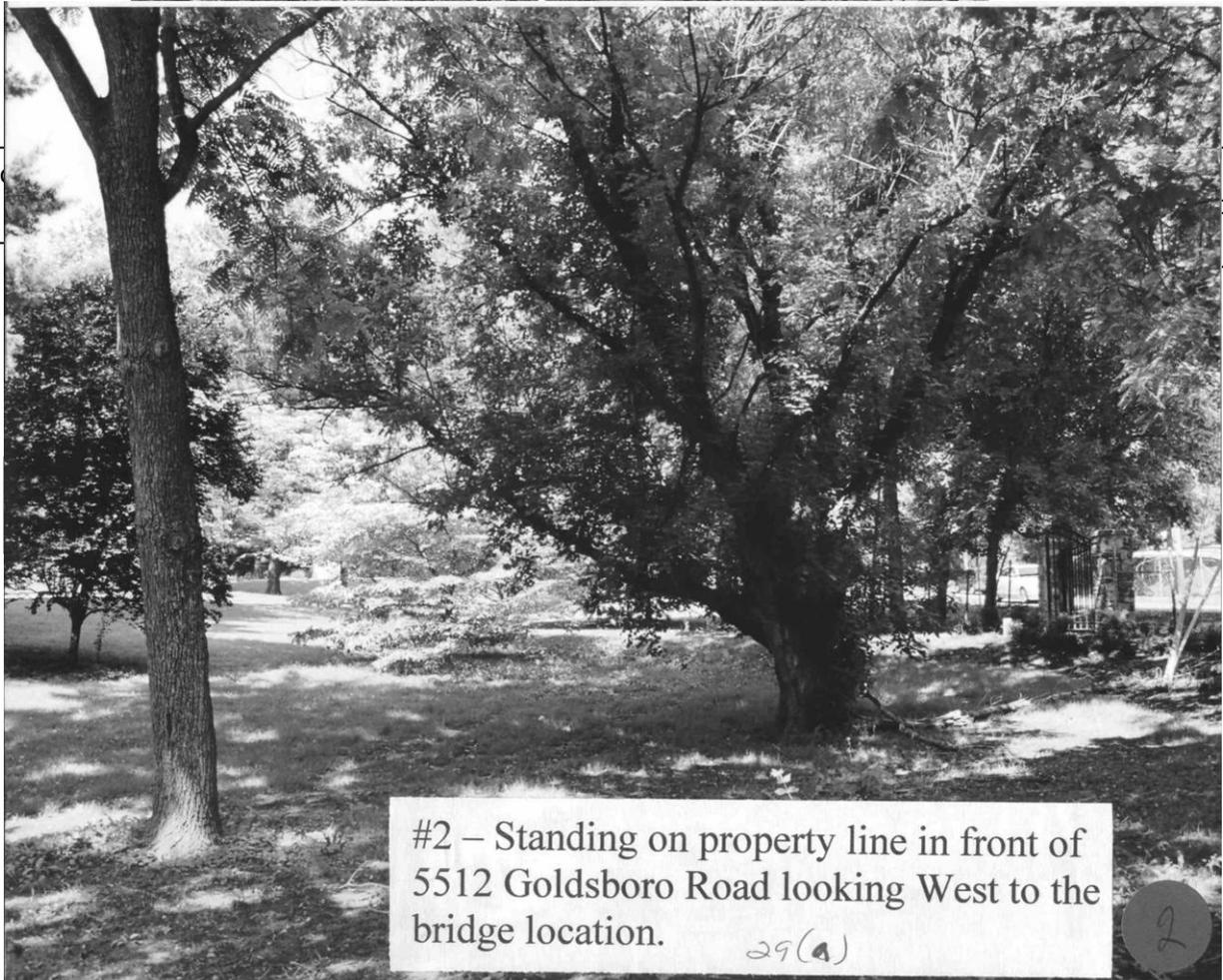
A. The Subject Property and Current Use

The Kenwood Golf and Country Club was established in 1928 and has been in continuous operation since that time. It operates with the following Special exceptions: BA-708, BA-1478, S-280 and S-689. The Club is located on approximately 102 acres at 5601 River Road, Bethesda, in the R-90 Zone.

² This is not to say that the record already made must be repeated if Petitioner elects to file for a major modification. There would have to be an additional hearing so that any interested party would have the opportunity to present any additional evidence or cross-examination relating to the issues involved in a major modification request, but the testimony already taken and the exhibits already submitted should be considered part of the record for the request.

The Club is located on the north side of River Road (MD 190) and is bisected by Goldsboro Road (MD 614). The property has approximately 3,000 feet of frontage along River Road and 2,000 feet of frontage with Goldsboro Road. According to Technical Staff, the Club facilities include a clubhouse, an 18-hole golf course, a pro shop, two large swimming pools, 16 outdoor tennis courts, four indoor tennis courts, and a 45-room guesthouse. These facilities are clustered primarily in the southeastern corner of the property with the remainder of the site occupied by the golf course. Parking areas are located in this area with the main vehicular access off River Road, approximately 600 feet west of Dorset Avenue. An aerial photo of the Club, outlined in a light color, is shown below (Exhibit 45):

Technical Staff describes the topography as “rolling terrain with mature trees located along the perimeter of the property and throughout the golf course.” The area around Goldsboro Road where Petitioner wants to locate the bridge was aptly described by community witness, Sherwin Gardner, as a “park-like setting.” Tr. 164. That sense is conveyed by Petitioner’s own photos, contained



in Exhibit 29(a), one of which is shown below with Petitioner's own caption.

The home at 5512 Goldsboro Road, referred to in the photo, belongs to F. William Burke, and it is the closest home to the proposed bridge location. At the present time, golf carts cross Goldsboro Road at grade level, protected by a button activated, yellow flashing light, as shown below (Exhibit 52, Photos 28 and 29). The crossing has functioned in this fashion since 1987 or 1988, but there was an accident



in 2000, which motivated the Club to try to improve safety with a bridge. Tr. 17.

B. The Neighborhood

The neighborhood was defined by Technical Staff as bounded “by Tanglewood Drive to the north, Radnor Road and Garnett Drive to the east, Cromwell Drive and Ridgefield Road to the south, and Millwood Road to the west. The neighborhood includes all properties within view of the Club and the site of the golf cart bridge.” Technical Staff notes that the neighborhood is predominantly residential in character, with single-family homes in the R-60 and R-90 Zone. Other uses in the neighborhood include the Concord St. Andrews United Church, located at the intersection of River Road and Goldsboro Road, the Fourth Presbyterian Church confronting the Club on the south side of River Road, and Somerset Elementary School located in the Radnor Holding School northeast of the Club. Special exceptions in the area include a radio tower operating on Club property (BA-2590).

Although Petitioner's Land Use expert, John Sekerak, Jr., recommended defining the neighborhood as covering an even broader area (Tr. 86-88, and Exhibit 50), the Hearing Examiner accepts Technical Staff's definition for purposes of this review, because the impact of the proposed bridge on Petitioner's neighbors is largely a visual one, and it is doubtful that the proposed bridge would be visible at or near grade level from beyond Technical Staff's defined neighborhood. In fact, for the same reason, it could reasonably be argued that the defined neighborhood for purposes of this review should include only the area in which the proposed bridge would be visible. Since the evidence does not clearly delineate that area, we will

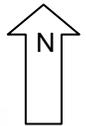
use the Technical Staff's definition. The outline of Technical Staff's defined neighborhood can be seen as a dark line circumscribing the light line, on the portion of the aerial photo reproduced on page 6 of this Report. The vicinity of the Kenwood Club is also shown on the following map from the Technical Staff report (Exhibit 44):

The possible effects on the neighborhood from the proposed bridge will be discussed immediately after the next section, which describes the proposed modification.

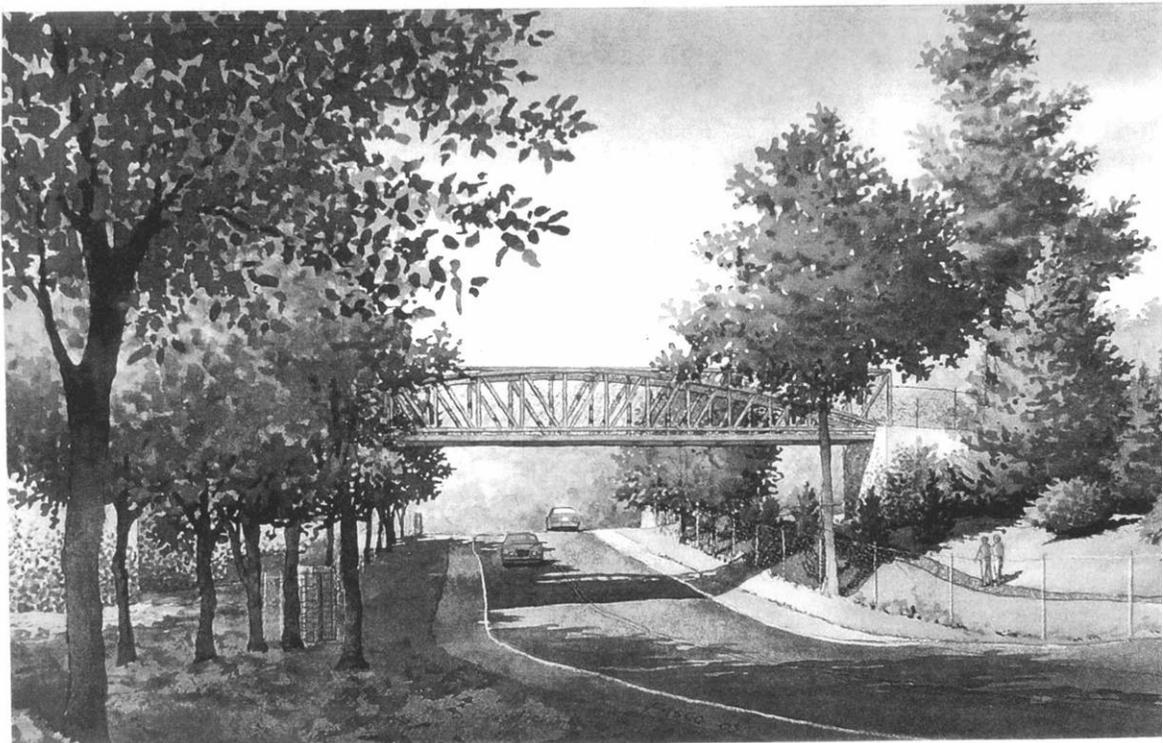
C. Proposed Modification

Petitioner requests a minor modification of its special exception to permit the construction of a golf cart bridge across Goldsboro Road (MD Route 614), which divides the Club property in two. Petitioner proposes to locate the golf cart bridge near the eastern property boundary, opposite the Club's maintenance facility, and about 600 feet west of Goldsboro's intersection with Radnor Road. The bridge would eliminate the at-grade crossing that currently exists for golfers playing the Club's golf course. Petitioner's concept of what the bridge will look like is shown below:

VICINITY MAP FOR KENWOOD GOLF & COUNTRY CLUB



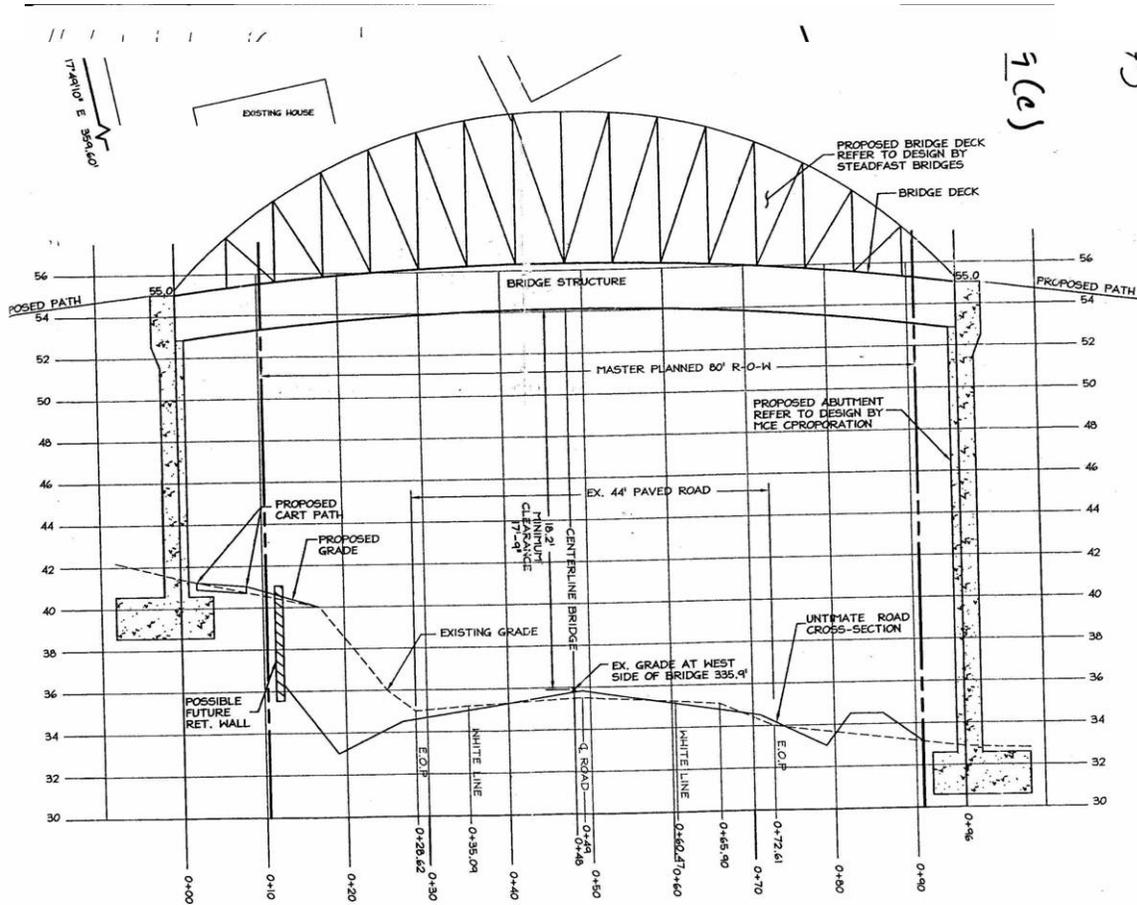
BRIDGE PERSPECTIVE



GOLDSBORO ROAD, VIEW TO THE WEST

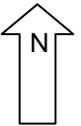
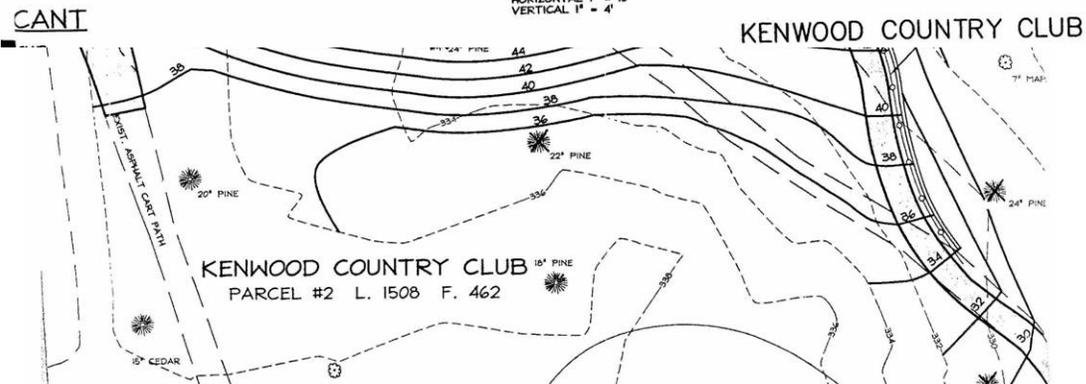
Unfortunately, this "Bridge Perspective" does not depict the full structure that will be visible, for there are hundreds of feet of ramps and concrete support structure leading up to the bridge, as can be seen below in the Site Plan (Exhibit 29(c)):

The proposed elevation of the structure is shown on the Bridge Profile, also taken from the Site Plan (Exhibit 29(c)):



BRIDGE PROFILE

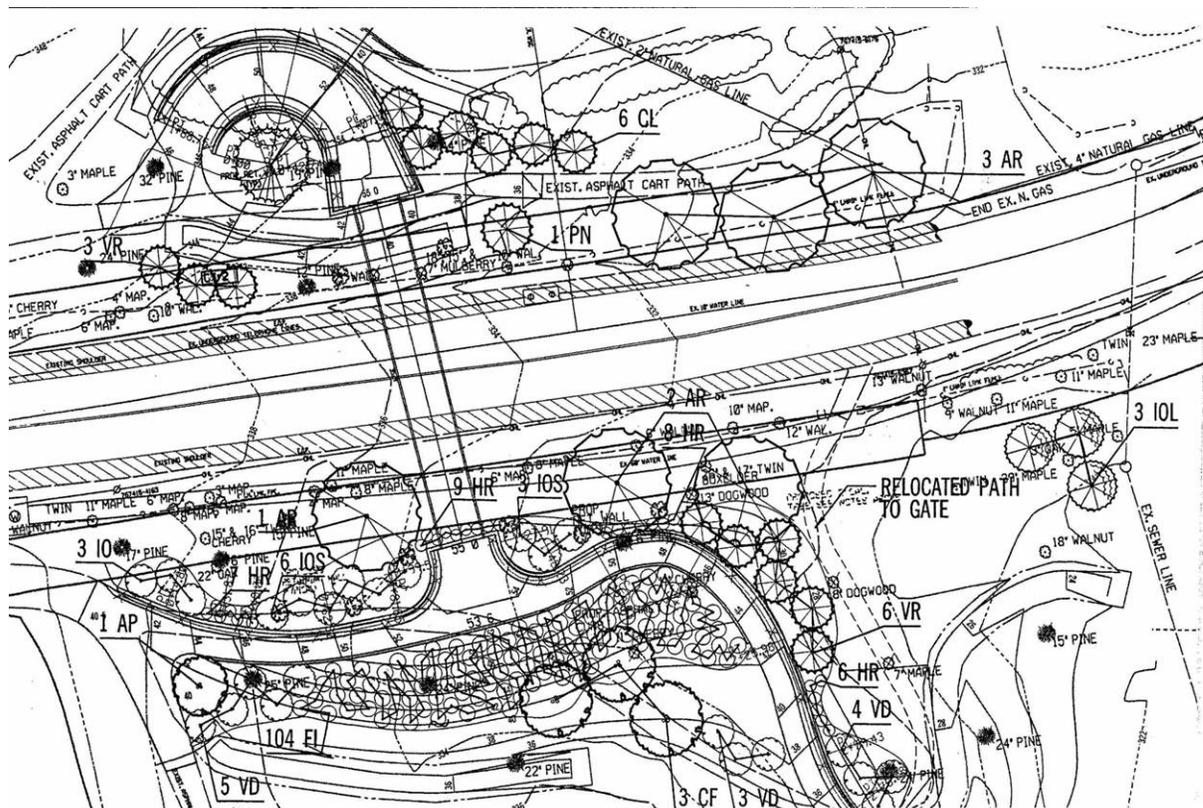
SCALE
HORIZONTAL 1" = 10'
VERTICAL 1" = 4'



Thus, the bridge, as planned, would have a 12 foot wide, 96 foot long deck, which would be 17 to 19 feet above the current grade, and a metal superstructure that would rise another 10 feet above the deck. It would be supported by concrete abutments and served by ramps, paved with asphalt, that would extend 250 feet along the southern side of Goldsboro, much of it quite close to the road. Tr. 132-133. Because of changes in elevation, a four-foot high chain link fence would be installed along portions of the new pathways. As can be seen from the diagram, the ramp on the northern side of Goldsboro would be shorter than the one on the southern side. The concrete abutments would be stamped and stained to resemble stonework. Existing overhead wires along the south side of the road would be relocated to go over the bridge.

In order to buffer the impact of this substantial structure, Petitioner proposed a revised Landscape Plan, after the hearing. The relevant portion of Exhibit 63(a) is shown below.

D. The Concerns of the Neighbors and the People's Counsel



This case is in its present posture because of the neighbors' letters to the Board. To understand their concerns, it is helpful to first look at an aerial photo which shows where they are located in relation to the proposed bridge and its lengthy concrete abutments. The residence locations on the aerial photo (Exhibit 51) shown below are based on the testimony (Tr. 93-94). A diagram of the proposed bridge and abutments, from Petitioner's Exhibit 29(b), has been

superimposed on the aerial photo to give a better sense of the impact on the neighbors.³



his address is actually on Radnor Road. The closest residence, at 5512 Goldsboro Road, is owned by F. William Burke, who wrote that he supports building a golf cart bridge, but asked that it be placed at the location of the present crossing or even further west where there are no residences (Exhibit 62).

³ The Hearing Examiner has attempted to correctly match the scale of the diagram to the aerial photo.

Two close-by residents, James I. Seevaratnam and Sherwin Gardner, both wrote (Exhibits 30, 31, 33, 34, 43, 59, 68 and 70) and testified (Tr. 142-158, 159-166) in opposition to the bridge at its planned location. Both strongly oppose the proposed bridge because of the visual impact it will have on their homes. Photos submitted by these gentlemen demonstrate that the bridge will be visible from their homes. The first is Exhibit 55(a), which was taken from the front porch of the Seevaratnam home at 5508 Goldsboro Road. You can see the sign for the existing at-grade crossing in the picture, and the bridge will be about 200 feet closer to the home than that, so it will be clearly visible.

The following picture was attached to Mr. Gardner's letter of September 29, 2003 (Exhibit 34). It was taken from his home at 5504 Goldsboro Road, and on it, he has marked the approximate position of the proposed bridge. Once again, it will be clearly visible.

Signs for Existing At-Grade Crossing



5508 Goldsboro Road: View from Front Porch

- nfe



Both Mr. Seevaratnam and Mr. Gardner also testified that the bridge would be clearly visible from their homes and that other alternatives had not been sufficiently explored. Mr. Gardner added that the bridge would adversely affect his property values, a concern which Petitioner has not addressed.

Both Gentlemen spelled out their concerns in even greater detail in their final letters to the Hearing Examiner. Mr. Seevaratnam and his wife submitted a letter dated June 18, 2004 (Exhibit 68) challenging the effectiveness of the newly proposed landscaping in hiding such a tall bridge and its abutments, especially since "the curve in the road at this location brings the bridge into the direct line of vision of the adjacent residences." As stated by the Seevaratnams,

[the] landscaping around the abutments will [not] address our concerns regarding the overhead bridge that is suggestive of industrial/commercial strips and interstate highways and will rise 27 ft into an otherwise scenic skyline in the immediate vicinity of residential homes, changing the nature and character of the park-like setting of Goldsboro Road.

The Seevaratnams summarized their arguments, asserting that:

- (1) Installation of the proposed bridge at the planned site will be a major modification across a public right of way that will be

incompatible with the exclusively residential character of the neighborhood and its park-like setting.

(2) Installation of the proposed bridge at the planned site will permanently change:

1. The nature and character of Goldsboro Road.
2. The nature and character of the residential homes in the vicinity (zoned R-90). It will take away the comfort with the surrounding natural environment that residents now enjoy, impair the desirability of the homes and possibly negatively impact property values.

(3) All the residents in the vicinity of the proposed site of the bridge have spoken against locating the bridge at this site.

(4) The proposed bridge, a major construction across a public right-of-way that will change the nature and character of the neighborhood, is not an inherent effect of golf courses and country clubs. Other country clubs have built underground tunnels to cross highways, and although the existence of a water main-line is cited as the reason for not opting for tunnel construction, requisite engineering expertise and construction at approved depths would surmount the problems. This would impose additional financial costs on the Kenwood Club but could be done.

(5) Rescission of the Board of Appeals initial disposition on the Kenwood Club's petition, does not preclude the Club from pursuing other avenues to achieve its goal of ensuring the safety of club members and employees. This could be accomplished without imposing an incompatible structure on a residential area in a park-like environment and permanently scarring the neighborhood.

Sherwin Gardner's final submission of June 23, 2004 (Exhibit 70) emphasized the significant impact of the 20 foot tall concrete abutments needed to support the bridge and ramps, characterizing them as "ugly, imposing concrete intrusions on the residential nature of this R-90 zoned neighborhood." He also challenged the safety argument and criticized the Kenwood Club for "ignoring the adverse economic effects of the bridge on its immediate neighbors and the compatibility effects on the public in general [including] the environmental effects on the scenic quality of the area." Mr. Gardner suggested that other less intrusive and more compatible measures should be employed.

Martin Klauber, the People's Counsel, stated his opinion about the proposed bridge:

I want to submit that, and I'm going to argue that this is totally out of scale. It's out of harmony and the basic design is could

be redesigned to be a heck of a lot more compatible than this quasi railroad bridge crossing on Goldsboro Road. [Tr. 79]

Mr. Klauber also opined that, "There's going to be a visual impact on the people using the bridge; the people going under the bridge; and the people living by the bridge." He concluded that there should be "a supplemental technical staff report which analyzes a more finely and specific landscape plan with a possibility of some other types of design of the bridge . . . and a complete hearing on a full modification." Tr. 178-179.

III. SUMMARY OF THE HEARING

A. Petitioner's Case

Petitioner called four witnesses at the hearing, Ashby Chamberlain, President of the Kenwood Golf and Country Club, Thomas Kummer, and engineer who testified as a lay witness regarding the State approval of the proposed bridge, Curt Schreffler, a civil engineer who gave expert testimony on technical aspects of the proposed bridge, and John Sekerak, Jr., a landscape architect and land planner, who testified as an expert in those fields.

1. Ashby Chamberlain:

Ashby Chamberlain testified that he is the president of the Kenwood Golf and Country Club, and he reviewed its history. Tr. 11-14. In 1997 or 1998, the Club was able to get a blinking amber caution light where the golf carts cross Goldsboro Road. Tr. 13-14. The crossing has functioned in this fashion since that time, but there was one accident in 2000, which motivated the Club to try to improve safety with a bridge. Tr. 17.

The Club considered tunneling under the road, but there is a 60 inch high pressure WSSC waterline there, so the Club felt that the bridge was their only alternative. Tr. 19. However, there has never been a request for a formal decision by the WSSC as to whether a tunnel could be built. Tr. 23. According to Mr. Chamberlain, there would be no expansion in the number of golfers if the bridge were built. Tr. 21.

Mr. Chamberlain further testified that the Club had considered different locations for the bridge, but "it just wouldn't fit" (Tr. 24); however, in response to the cross-examination question, "Are you saying it is impossible to locate a bridge elsewhere?", Mr. Chamberlain responded, "No, you can put it anywhere. If cost is no object you can put it anywhere." Tr. 27.

2. Thomas Kummer:

Thomas Kummer, who is a civil engineer, testified as a lay witness regarding the conditions of the site and aspects of the proposed bridge. He stated that it would be unlighted. Tr. 40-41. The bridge would be constructed using "concrete form liners," and the concrete would be stained to a brown color. Goldsboro Road would be shut down for two or three days during construction.

Mr. Kummer has been dealing with the State Highway Authority, which has given some level of approval as to pedestrian and traffic safety, but they are still waiting for structural review. Tr. 42-46. Mr. Kummer felt it would be very difficult to get WSSC approval to relocate its water main. Tr. 45. Mr. Kummer further testified

that the bridge abutments [but not the span or its truss work] would have the appearance shown in Exhibit 48 (*i.e.*, looking somewhat like stone). Tr. 47-48.

According to Mr. Kummer, the Department of Permitting Services has approved the sediment control storm water management plan and the WSSC has approved construction of the proposed bridge, which crosses over the WSSC easement. Tr. 49-50. Finally, Mr. Kumer testified that the current at-grade crossing is at the highest point on Goldsboro Road. Tr. 54-55.

3. Curt Schreffler:

Curt Schreffler testified as an expert in civil engineering. Mr. Schreffler testified that the location for the proposed bridge “was chosen as the most appropriate location for economic, aesthetic reasons as well as for being integrated into the existing golf course . . .” Tr. 60. Mr. Schreffler later testified that from an engineering standpoint, there is no reason the bridge could not be located further to the west. Tr. 75.

According to Mr. Schreffler, the State Highway Administration requires that the bottom of the bridge have a clearance of at least 17 feet, nine inches. Tr. 62. Mr. Schreffler discussed the location of the abutments, based on the topography and the location of the WSSC easement. According to WSSC records, a 16 inch water main runs the entire length of Goldsboro Road, from River Road to Bradley Boulevard. Tr. 141-142. In his opinion, trying to tunnel under the water line would be “economically infeasible.” Tr. 67.

Mr. Schreffler further testified that, from an engineering standpoint, materials other than steel could be used for the bridge span, but he thought the bridge itself would be more massive. Tr. 73. As currently planned, the retaining wall on the south side of Goldsboro would have to be 250 feet long, gradually rising to the 18 foot level of the bridge deck. Tr. 77-78. On cross-examination, Mr. Schreffler explained how the truss work on top of the deck helps support the bridge, and possible alternatives to a truss bridge. He indicated that no other designs were considered before the current one was chosen. Tr. 81-82.

4. John Sekerak, Jr.:

John Sekerak, Jr. testified as an expert in a landscape architecture and land use planning. He testified that he would define the neighborhood more broadly than Technical Staff had, expanding further into residential neighborhoods surrounding the Kenwood Club. Tr. 86. In Mr. Sekerak’s opinion, construction of the proposed bridge over Goldsboro Road would not substantially change the nature, character or intensity of the Kenwood use. Tr. 89.

Mr. Sekerak agreed that the visibility of the bridge from the neighborhood is “one of the elements that would be involved in the analysis.” Tr. 89-90. But, he felt that the impact on the larger neighborhood is not substantial.

Mr. Sekerak described the conditions at the subject site and introduced various photographs and other exhibits, noting that the viewing of the bridge would be more obstructed when the foliage was full. Tr. 96-99. He also identified photos of other

bridges (Exhibits 53(a), (b), (c) and(d)) that he said were similar to the one planned in this case. Tr. 100-105.

According to Mr. Sekerak, a bridge of this type could be constructed out of wood, but he would not speculate on whether the State Highway Administration would approve it. Tr. 106. He was unable to answer whether the bridge could be located further to the west of the presently planned location, from a landscape architecture standpoint. Tr. 109.

Mr. Sekerak further testified that the bridge would not change the nature of the Club's use, and that it would improve safety. In his opinion, the bridge would have no adverse effect on the neighborhood, and in fact would be in harmony with the general character of the neighborhood. Tr. 110-112. He indicated that even though there would be substantial impact on the homes on Goldsboro Road near the bridge, there was not a substantial impact on the entire neighborhood. Tr. 121.

In order to objectively assess the impact of the bridge's visibility, Mr. Sekerak, suggested the following factors (Tr. 124): "Who is viewing; what they're viewing; the context of the view; the length of the view; [and] the duration of the view." Upon further questioning, he added the factor of "proximity."

Mr. Sekerak also described the gradual increase in the height of the 250 foot long bridge abutment on the south side of Goldsboro Road. Tr. 132-135.

B. Opposition's Case

1. James I. Seevaratnam

James Seevaratnam testified that the Petitioner has not addressed the community concerns about whether and where the bridge should be built. Tr. 142-143. He stated that photos taken by Petitioner were misleading because they were not taken from the south side of Goldsboro Road, where the homes are. He submitted photos taken by his wife from his home. Mr. Seevaratnam testified, "It's clear from the photographs that from whatever angle you look at Goldsboro you will see the bridge whether it is winter, summer or spring."

He further testified that, although we are all concerned about safety, Petitioner had not sufficiently considered alternatives to the bridge at the proposed location. Tr. 147 -153.

2. Sherwin Gardner:

Sherwin Gardner testified that "this bridge would be in plain view of my home as pictures taken during the summer and submitted with my letters clearly show." Tr. 159. He further testified that "the bridge would clearly constitute an aesthetic intrusion and would likely affect and impair property values. And testimony today shows that the planning analysis that was done does not address the impact on property values." Tr. 161-162.

Mr. Gardner also stated, "it's unreasonable that the affected homeowners should bear the burden of a bridge crossing whose purpose is to benefit a private

enterprise and its members.” Tr. 162-163. In his opinion, if the protection provided by the current warning light is insufficient, “then the Kenwood Club should consider other options such as a crossing guard or improved warning techniques such as painted strips on either side of the existing crossing. If the club wishes to consider consideration of a bridge, then it should be moved further west along Goldsboro Road in the direction Of River Road where there is sufficient space that is not visible to neighboring homes.” Mr. Gardner noted that Goldsboro Road extends for a considerable distance downgrade from the crest where the crossing now is, towards River Road, so “there should be ample space” there for the bridge. Mr. Gardner stated that if this requires additional expense by the Club, “in my view that's reasonable since it's the Club that's seeking the benefits.” Tr. 163.

C. People’s Counsel

Martin Klauber, the People’s Counsel, stated his opinion about the proposed bridge:

I want to submit that, and I'm going to argue that this is totally out of scale. It's out of harmony and the basic design is could be redesigned to be a heck of a lot more compatible than this quasi railroad bridge crossing on Goldsboro Road. [Tr. 79]

Mr. Klauber also opined that, “There's going to be a visual impact on the people using the bridge; the people going under the bridge; and the people living by the bridge.” He concluded that there should be “a supplemental technical staff report which analyzes a more finely and specific landscape plan with a possibility of some other types of design of the bridge . . . and a complete hearing on a full modification.” He suggested, as an example of other bridge designs, the stone bridge over the Clara Barton Parkway from MacArthur Boulevard. Tr. 178-179.

IV. FINDINGS AND CONCLUSIONS

At the beginning of this Report, we noted that the central issue in this case, established by Zoning Code §59-G-1.3(c)(1), is whether “the proposed modification [*i.e.*, construction of the golf cart bridge] is such that the terms or conditions [of the existing special exception] could be modified without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood.”

The use will, of course, remain a golf course under Zoning Code §59-G-2.24. Golfers will likely be safer if the bridge is installed (Exhibit 58), but there is no evidence that other aspects of the Kenwood Club use will change. Thus, the bridge would not substantially change the nature or character of the use. Moreover, installation of the bridge would remove an impediment to the flow of traffic on Goldsboro Road. While that may be considered a substantial effect on traffic, the Hearing Examiner reads the statutory provision as testing for a substantial negative effect, not a substantial positive effect. Hence, Petitioner also meets the “traffic effect” prong of the administrative modification test – the proposed modification will

not “substantially chang[e] the effect on traffic.” However, the “intensity of use” and “substantial neighborhood effect” tests raise more difficult hurdles for the Petitioner. Under the statutory provision, the failure to clear either one of these hurdles would make the subject case inappropriate for administrative modification.

What is being proposed is a very sizable structure, especially in this “park-like” setting, as Mr. Gardner put it. Petitioner urges, through the testimony of its expert in landscape architecture and land use planning, John Sekerak, that the impact on the larger neighborhood is not substantial, even though he admits there would be a greater impact on the homes on Goldsboro Road near the bridge. Tr. 121. It should be remembered that Mr. Sekerak sought to define the neighborhood in even broader terms than the Technical Staff. The statute, on the other hand, uses the term “immediate neighborhood” in discussing the test for administrative modifications, and the Hearing Examiner takes that to mean that we must consider not just the proposal’s effect on the larger area around the Kenwood Club, but also its potential impact on those homes closest to the proposed modification.

The Hearing Examiner is mindful of the legal doctrine that probative evidence, such as that provided by Petitioner’s experts, cannot be outweighed by contentions that amount to little more than generalized concerns and unsupported allegations. See *Rockville Fuel & Feed Co. v. Board of Appeals*, 257 Md. 183, 192-93, 262 A.2d 499, 504-505 (1970); *Moseman v. County Council of Prince George’s County*, 99 Md. App. 258, 265, 636 A.2d 499 (Ct. Spec. App. 1994).

However, in the subject case, juxtaposed against Petitioner’s evidence are not just the generalized concerns of the neighbors, but also their direct evidence, both photographic and testimonial, of the likely visual impact of the bridge on the neighborhood, as well as the Technical Staff’s supplemental report of June 17, 2004 (Exhibit 65), concluding that the modification request raised “significant issues (i.e., visibility, landscaping, compatibility, construction over public right-of-way, etc.)” which “could substantially alter the nature, character, and intensity of use.”

Clearly, the proposed modification raises some serious issues which should be further explored prior to any approval. For example,

1) Is the proposed bridge appropriately located (*i.e.*, should it be located further to the west to reduce the impact on nearby homeowners)? This question should involve an analysis of how the topography of area affects visibility of the proposed structure to nearby homeowners.

2) Are the materials to be used in the bridge and its design compatible with this park-like, residential setting (*i.e.*, would stone be more appropriate than steel and concrete, with overhead metal trusses, which the People’s Counsel said made it look like a railroad bridge (Tr. 79 & 179))?

3) Is the final landscaping plan (Exhibit 63(a)) sufficient to buffer the visual effects of the bridge and its support structures (especially the 250 foot long concrete support structure along the south side of Goldsboro, which gradually rises to a height of 17 feet)?

4) Will there be adverse economic consequences upon the nearby homes if the proposed bridge is built? and

5) Are there feasible alternatives to a bridge, such as a tunnel under Goldsboro Road, given the presence of a nearby 60 inch water main?

While these questions should be considered in a full review of a request to build the proposed golf cart bridge, the evidence is sufficient at this stage for the Hearing Examiner to conclude, by a preponderance of the evidence, that construction of the proposed bridge would increase the intensity of the Kenwood Club's use, and substantially change the effect of that use on the immediate neighborhood. That change is, at the very least, a visual one, and Petitioner's own land use expert, John Sekerak, Jr., concedes that the visibility of the bridge from the neighborhood is "one of the elements that would be involved in the analysis." Tr. 89-90.

Although it is not easy to objectively analyze visual impact, Mr. Sekerak, in questioning by the Hearing Examiner, suggested the following factors (Tr. 124): "Who is viewing; what they're viewing; the context of the view; the length of the view; [and] the duration of the view." Upon further questioning, the witness added the factor of "proximity." In the subject case, the evidence is that the nearest homeowners, Burke, Seevaratnam and Gardner, will be viewing the proposed bridge from their homes, and that view will be practically constant, although full foliage may provide some insulation. Mr. Sekerak did not feel that this visual intrusion constituted a substantial effect on the neighborhood because he viewed "the neighborhood" in the broadest geographical context. The Hearing Examiner, however, must follow the statutory language and look to the effect on the "immediate neighborhood."

As is evident from the immediate neighbors' photographic evidence, shown on pages 15 and 16 of this Report, and from Petitioner's own aerial photo (Exhibit 51) depicted on page 14 of this Report, the proposed bridge would be quite close to their homes. Given the size of the proposed bridge and its support structure (a 12 foot wide, 96 foot long deck, which would be 17 to 19 feet above the current grade, and a metal superstructure that would rise another 10 feet above the deck, all supported by concrete abutments and served by ramps, paved with asphalt, that would extend 250 feet along the southern side of Goldsboro), the Hearing Examiner finds that constructing a golf cart bridge of these dimensions in this setting would constitute an increase in the intensity of the use and that the bridge would have a substantial, if not dominant, visual impact on the immediate neighborhood.

In sum, the effect of the Kenwood Club's use on the immediate neighborhood will change substantially if the proposed bridge is constructed, and the Hearing Examiner must therefore recommend that the Board of Appeals reject the proposed administrative modification.

V. RECOMMENDATION

Based on the foregoing analysis and a thorough review of the entire record, I recommend that Petition No. S-689-C for administrative modification of the existing special exception to allow construction of a golf cart bridge over Goldsboro Road (MD Route 614) about 600 feet west of its intersection with Radnor Road in Bethesda, Maryland be DENIED. I further recommend that, if Petitioner files an application for a "major" modification, that the Board treat the entire record in this proceeding as part of the record of the major modification request, so that testimony does not have to be repeated, though it may be amplified.

Dated: July 22, 2004

Respectfully submitted,

Martin L. Grossman