

Resolution No.: 15-1616
Introduced: September 26, 2006
Adopted: September 26, 2006

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY**

By: County Council

SUBJECT: APPLICATION NO. G-841 FOR AMENDMENT TO THE ZONING ORDINANCE MAP, Scott Wallace, Attorney for Owners and Shady Grove Investors I, L.L.C. and Shady Grove Investors II, L.L.C., OPINION AND RESOLUTION ON APPLICATION.

Tax Account Nos. 09-0323443 and 09-03384475

OPINION

Application No. G-841, filed on October 6, 2005 by Applicants Shady Grove Investors I, L.L.C. and Shady Grove Investors II, L.L.C., requests reclassification from the C-2 Zone (general commercial) to the PD-44 Zone (Planned Development) of 6.92 acres of land located north and east of the intersection of Research Boulevard and Omega Drive, in the 9th Election District. As required under the PD Zone, the application was accompanied by a Development Plan with detailed specifications related to land use, density, development standards and staging. Pursuant to Code § 59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone.

The Hearing Examiner recommended denial of the application on grounds that the proposed Development Plan is not in substantial compliance with the applicable master plan and does not fully comply with the purposes, standards and regulations of the PD-44 Zone, although it would provide for a form of development that would be compatible with adjacent development in terms of use and architecture and would provide for safe, adequate and efficient vehicular and pedestrian circulation.

The Montgomery County Planning Board (the "Planning Board") and its Technical Staff both recommended approval of the subject application, finding that the proposed development would

be compatible with the surrounding area, would be consistent with the purposes and standards of the zone, would be consistent with the recommendations of the applicable master plan and would serve the public interest. These recommendations were based, in large part, on a legal interpretation that was recommended by the Hearing Examiner, and followed by this Council, in a 2003 rezoning decision. Based on more detailed examination of the question in her report evaluating the present case, the Hearing Examiner now recommends a different legal interpretation.

The District Council agrees with the Hearing Examiner's analysis and conclusions. It therefore incorporates her report and recommendation herein.

The subject property consists of approximately 6.9 acres of land located north and east of the intersection of Research Boulevard and Omega Drive. The property is comprised of two largely undeveloped lots within the footprint of the Shady Grove Executive Park, an office park located just south of the intersection of I-270 and Shady Grove Road.¹ The lots are identified as Parcel T-T, Decoverly Hall on Plat No. 22312 (3.59 acres) and Parcel R-R, Decoverly Hall on Plat No. 20811 (3.32 acres). The Shady Grove Executive Park (the "Office Park") consists of a total of 42 acres and has Preliminary Plan approval for approximately 920,000 square feet of office space and a 135-unit hotel. To date, 710,000 square feet of office space has been constructed in six buildings ranging from four to six stories in height. The Office Park also includes parking structures and a Homestead Suites Hotel, as well as extensive landscaping, outdoor seating areas, and interconnected internal roadways and sidewalks. The existing Preliminary Plan approval would permit an additional 210,000 square feet of commercial development.

The property has an irregular shape. It abuts office buildings within the Office Park to the north and east. To the west, the subject property wraps around the extended-stay Homewood Suites Hotel at the corner of Omega Drive and Research Boulevard, and it has frontage on both of those roadways (214 feet of frontage on Research Boulevard, and 145 feet on Omega Drive). To the

¹ The subject site and the Office Park were originally under a single ownership. The Applicant has since sold the office buildings and the hotel, and now owns only the subject property.

south, it wraps around a 3-story parking structure that serves an adjacent office building and would also provide parking for Building One of the proposed development.

The property is gently sloping, with large grassy areas, scattered trees and a small forested area, measuring approximately 0.41 acres, near Research Boulevard. The forested area was placed in a conservation easement in connection with the development of the Office Park, and would be preserved and expanded as part of the proposed development. The only existing building on the subject property is a small, abandoned drive-through bank that would be razed to make room for the proposed development. Two entrances to the Office Park are located on the subject property, one extending east/west from Omega Drive and the other extending north/south from Research Boulevard. A third entrance drive connects to Corporate Boulevard, the major entrance drive to the Office Park from Shady Grove Road, but this third drive is not located on the subject property.

The surrounding area for this application consists, of the area bounded roughly by I-270 to the north, Shady Grove Road to the east, Key West Avenue to the south, and Seneca Highway and Sam Eig Highway to the west. The surrounding area contains a mix of uses including the Office Park in the C-2 and O-M Zones; the hotel noted earlier, in the H-M Zone; the Decoverly Industrial Park in the O-M Zone; the Washingtonian Center, a major retail-restaurant-entertainment center in the City of Gaithersburg; and the 180-acre Crown Farm, which is currently classified under the R-200 Zone but has been approved by the District Council for annexation into the City of Gaithersburg. Technical Staff indicates that Gaithersburg intends to apply a mixed-use zoning category to the property. Applicant's land planner testified that the property is proposed for 2,000 residential units and 300,000 square feet of commercial development. Significant land uses beyond the defined surrounding area include the Shady Grove Life Sciences Center and the King Farm subdivision. A transit station was proposed in the applicable master plan for a location on Omega Drive, about 1,000 feet from the subject property, a short walk away. Under the current plans for the Crown Farm property, however, the transit station is shown about 2,000 feet from the subject property (about one-third of a mile away).

The subject property was classified under the R-200 Zone in the 1958 Comprehensive Zoning. It was reclassified to the C-2 Zone by Local Map Amendment (G-208) in 1980. C-2 zoning was reconfirmed by Sectional Map Amendment (G-502) in 1986.

Applicant seeks rezoning to the PD-44 Zone to permit construction of three multi-family residential buildings with a total of no more than 371 dwelling units, including 15 percent moderately priced dwelling units (MDPUs) on site. The buildings would be grouped together, separated from one another by internal roadways and landscaping. Parking for residents of Building One would be provided in a dedicated portion of an adjacent parking garage. Parking for Buildings Two and Three would be provided in an underground garage located beneath Building Two. In addition, Building Three would have a very small number of surface parking spaces.

Testimony indicated that Buildings One, Two and Three would have six, four and five stories, respectively, with a maximum building height of 70 feet.² Under the development standards of the PD-44 Zone, the Applicant would be required to have at least 25 percent of the dwelling units in a building with four stories or less, and at least 50 percent in buildings with more than four stories. See Code § 59-C-7.131. The preliminary unit breakdown is 184 units in Building One (six stories), 130 units in Building Two (four stories) and 57 units in Building Three (five stories). Applicant currently anticipates 205 one-bedroom units, 148 two-bedroom units and 18 three-bedroom units. The preliminary parking space count shows more than the minimum number of spaces required under the Zoning Ordinance. Photographs and testimony from Applicant's site designer establish the Applicant's intention to follow the form and prevailing brick materials of the existing office buildings, to maintain architectural compatibility with the Office Park.

The Office Park has an extensive network of sidewalks, as well as a number of open space areas with benches and landscaping, and a small forested area. The forested area would be enlarged to satisfy Applicant's forest conservation obligations, and additional sidewalks would be

² The Staff Reports lists the building height limit as 87 feet, based on an earlier Development Plan. Applicant subsequently learned that based on Department of Permitting Services policy, because all of the proposed buildings are shown on corner lots with private streets on both sides, height measurements can be taken at any curb elevation along these roads, rather than at the center line of the street grade. This reduced the height of the tallest building, as defined in the Zoning Ordinance, from 87 feet to 70.

constructed to connect to the existing circulation network. Other amenities shown on the Development Plan include open areas with seating and landscaping, a gazebo and an outdoor swimming pool.

Pursuant to Code § 59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone. The Development Plan is binding on the Applicant except where particular elements are identified as illustrative or conceptual. The Development Plan is subject to site plan review by the Planning Board, and changes in details may be made at that time. The principal specifications on the Development Plan – those that the District Council considers in evaluating compatibility and compliance with the zone, for example – may not be changed without further application to the Council to amend the Development Plan. In the present case, the general layout shown on the Development Plan represents a binding commitment by the Applicant, although exact locations of buildings and structures would be specified during preliminary plan and site plan review. The Development Plan also includes several textual binding elements that establish parameters for the development: no more than 371 units; 15 percent MPDUs on site; maximum floor area ratio of 1.5; minimum 55 percent green area, to be used for passive recreation; maximum building height of 70 feet; all forest conservation requirements to be met on site; sidewalks to be at least five feet wide; street trees to be placed 30 feet on center; streetlights to be provided on private streets A and B; and the swimming pool to be constructed in the general location shown on the Development Plan.

With regard to phasing, the Development Plan identifies each building as one phase, with its associated infrastructure, but specifies that the three phases may occur in any order or simultaneously.

The Development Plan, consisting of Exhibit 50(a) and supporting exhibits, satisfies the requirements of Code § 59-D-1.3 by showing access points, approximate locations of existing and proposed buildings and structures, preliminary classification of dwellings by number of bedrooms, parking areas, and areas intended for common use but not public ownership. No road dedications are shown on the Development Plan because all necessary roadway dedications on Omega Drive and

Research Boulevard were done previously, at the time of subdivision and plat recordation, and the internal roads are proposed to be private roads.

Section 59-D-1.61 of the Zoning Ordinance requires the District Council, before it approves any application for rezoning to the PD Zone, to consider whether the application, including the development plan, fulfils the “purposes and requirements” set forth in Code Section 59-C for the requested zone. In making this determination, Section 59-D-1.61(a) expressly requires the District Council to make five specific findings. Maryland law, moreover, requires that zoning power be exercised in the public interest. The District Council finds that the Development Plan submitted with this application does not satisfy all the requirements for a development plan under Code §59-D-1.61(a)-(e). Each of the required findings is addressed below.

§59-D-1.61(a): master plan consistency. The master plan discussion will be separated into sections for ease of reference.

1. Use Recommendations

The text of the *1990 Approved and Adopted Shady Grove Study Area Master Plan* (the “Master Plan”) does not make any specific reference to the Office Park or the subject property. Community-Based Planning Staff reports that the preliminary plan and site plan approvals for the Office Park were granted while the Master Plan was being prepared, and, therefore, the drafters had every expectation that the subject site would be developed for office use as part of the Office Park build-out. Accordingly, the Office Park and the subject site are depicted on a series of Master Plan maps as committed office development in the C-2 Zone. On every map or drawing where the use of the subject site could be shown, the Master Plan has indicated office use. Thus, the proposed use would be inconsistent with the Master Plan’s specific recommendations for the subject property.

The proposed development would further one of the Master Plan’s general objectives -- increasing the County’s housing stock, with an appropriate mix of affordable housing. It would also be consistent with the Master Plan’s general support for mixed-use development in the I-270 Corridor. This, however, is not sufficient to demonstrate substantial compliance with the Master Plan, *i.e.*, compliance

with its essential recommendations and objectives. The Master Plan recommended a pattern of land uses with some areas for employment use, some for residential use, and some for mixed residential, commercial/retail and employment. This pattern is best seen on the Zoning and Highway Plan, which specifically designates six areas for mixed-use development: four very large tracts, with hundreds or perhaps thousands of acres in each, and two tracts that are smaller than the Office Park. The subject site's role in the Master Plan's recommended land use pattern is as part of the Office Park, which is one of many areas designated solely for employment uses.

The Master Plan's maps are, of course, presented in conjunction with its written objectives. The Master Plan's first land use objective is to provide a comprehensive transit system, and the second is to encourage a mix of employment uses and densities. The prominence of these objectives is reflected in the Land Use and Design Concepts diagram, Figure 4.2, and the Land Use Plan, Figure 5.1, both of which allocate at least half of the land in the study area to employment uses. As a residential use, the proposed development would not serve these objectives.

The third objective is to provide for "a broad mix of residential units, including affordable housing." Master Plan at 23. This objective is phrased in terms of providing a *mix* of residential units, not just increasing the number of housing units in the study area. Moreover, the text describing this objective proposes a land use pattern with a variety of housing types mixed within each residential neighborhood. Immediately following is the fourth objective, to create "identifiable residential and employment neighborhoods," with elements that foster a sense of place and a sense of community: a mix of retail, office and housing uses; an interconnected street system; diversity of housing types; street oriented buildings; and a mix of active and passive open space areas. *Id.* at 25. Read together, the third and fourth objectives call for developments with a variety of housing types, which will be identifiable as neighborhoods because they have features that foster a sense of community. These objectives anticipate developments of a fairly substantial size, large enough to accommodate a mix of dwelling types, retail and office uses, and active and passive open space areas.

The District Council notes that the Master Plan considered measures that might have corrected an imbalance in the jobs/housing ratio by discouraging additional employment and encouraging more housing. Such measures were rejected for three reasons: so that the study area could continue to take maximum advantage of its attractiveness to R&D; to avoid development of primarily high-rise apartments, which would undercut Master Plan objectives to provide a mix of housing types; and because the Gaithersburg Policy Area as a whole had a significantly lower ratio of jobs to housing than the study area. See Master Plan at 53. Housing is an important objective of this Master Plan, but the overall vision focuses at least as much on employment uses as on housing.

The Applicant has clearly strived to design the proposed development with the “sense-of-community” elements identified in the Master Plan. It has only one type of housing, and lacks a retail element (impractical due to the small size of the development), but it does provide for an interconnected street system and open spaces, which would be accessible to both workers and residents. The buildings would be close to the internal streets within the development, although the Office Park as a whole is oriented towards parking lots, rather than streets. The layout would foster pedestrian activity and interaction to some degree, by creating open spaces where people might like to walk or sit. For residents, the pool would be another pedestrian destination. Thus, the proposed development would partially match the neighborhood vision espoused in the Master Plan. Its inability to do so fully, due to its size and the fact that most of the land around it is already developed, is perhaps symptomatic of the difficulty of trying to apply a “planned development” zone to fill in empty space in a development that was *actually* planned many years before, with a different use in mind.

Applicant argues, with support from the Planning Board and Technical Staff, that the subject site should be considered to have a Master Plan recommendation for residential use because, four years after the Master Plan was adopted, the County Council amended the Zoning Ordinance to permit “Dwellings” in the C-2 Zone by special exception. Legislative history from this action indicates that the Council was aware that the amendment would apply to land then classified under the C-2 Zone, such as the subject property, so the Council can be charged with the knowledge that it was

expanding the uses permitted in areas that previously had been zoned C-2 pursuant to master plan recommendations. (Legislative history also tells us that the Planning Board was split 2 to 2 on this amendment, and that Technical Staff opposed the amendment for several reasons, including a concern that master plan land use recommendations would be undermined.) The District Council is not persuaded that a later-adopted amendment to the C-2 Zone should be considered to affect the Master Plan's recommendations. The drafters of the Master Plan, and the Council and Planning Board in approving and adopting it, recommended a zone for the subject property that did not permit residential use – that recommendation can be changed only by amending the Master Plan, not by a zoning text amendment.

2. Density Recommendations

Even if a later decision to allow dwellings in the C-2 Zone were considered to effectively “amend” the recommendation of the Master Plan to include dwellings on the subject site, the density permitted under the “Dwellings” special exception is far lower than the density Applicant seeks in this case. The “Dwellings” special exception permits a base residential density of six units per acre, which may be increased up to 21.5 units per acre if at least 35 percent of the units are productivity housing (housing for households with incomes at and below the area-wide median income). Code § 59-G-2.36.2(b)(2).³ The development proposed here would have a base density more than twice as high, 44 units per acre, with a total density of 56 units per acre including MPDU bonus. Moreover, where the Master Plan did recommend residential uses, the highest densities recommended in the entire study area were 20 to 25 units per acre, more in keeping with the “Dwellings” special exception than with the density sought by Applicant.

Applicant argues that to determine the density recommended by the Master Plan, the District Council should consider the density permitted in the C-2 Zone, which is 1.5 FAR, rather than the residential density permitted in the “Dwellings” special exception. Applicant has committed, by textual binding element, to limit the density of the proposed development to 1.5 FAR. However, density

³ Additional restrictions apply, including a compatibility requirement, a limit on how much land in a planning area may be developed under this special exception, a 50-foot height limit, and a requirement to meet the development standards of the zone with regard to setbacks, green area and lot coverage.

expressed in terms of FAR, which relates directly to building size and configuration, is different from units per acre, which limits the level of activity on a site by setting a cap on the number of homes. The Master Plan does not provide a residential density recommendation for the subject site, and the only indications we have of what residential density the Master Plan recommended in the area point to a maximum of 20 to 25 units per acre – the density that was recommended for an area immediately confronting the subject site across Omega Drive. As a result, the District Council concludes that a density twice that high cannot be considered to substantially comply with the Master Plan.

3. Past Council Decision

The Planning Board, Technical Staff and the Applicant rely heavily on a 2003 decision of the District Council in LMA No. G-803, in which the Council approved rezoning to the PD Zone under circumstances somewhat similar to those in this case. In G-803, Applicant sought to rezone a 5-acre, split-zoned site, classified partly under the C-1 Zone and partly under the R-200 Zone, to the PD-9 Zone. The property was located on Georgia Avenue in the Olney Town Center. The applicable master plan maps recommended no change in the zoning of the subject property. Based on the fact that part of the site was zoned and recommended for residential use, and on an unusually high degree of consistency between the proposed development and other master plan objectives for the Olney Town Center, the District Council concluded, consistent with the Hearing Examiner's recommendation, that the development proposed in that case would be substantially consistent with the Olney Master Plan.

The PD Zone states that "no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher." Code § 59-C-7.121. In assessing compliance with this requirement in G-803, the Council accepted the Hearing Examiner's view that for the portion of the property that did not have a residential density recommendation, the required minimum of two units per acre should be considered satisfied because the moderate-intensity commercial density permitted in the C-1 Zone is more analogous to moderate-to-high density residential than to low-density residential of less than two dwelling units per acre.

None of the parties participating in LMA G-803 directly addressed the question of residential density as it pertained to the portion of the property recommended and zoned for commercial use. In the present case, in contrast, the issue was squarely raised by Technical Staff, and the Planning Board specifically relied on the reasoning described above from G-803 in making its recommendation. Having more closely examined the question in light of the record in the present case and the language of the PD Zone (including its requirement for a density recommendation of at least “2 dwelling units per acre,” and its statement, in Section 59-C-7.14(c), that “density of development is based on the area shown for residential use on the master plan”), the Hearing Examiner concluded, in the present case, that the most legally sound interpretation is that the PD Zone may be applied only to land that is recommended for residential use, and therefore has a recommended residential density, in the applicable master or sector plan. The District Council agrees. While the District Council may not arbitrarily change its position in a particular case absent a change in the facts, see *Schultz v. Montgomery County Planning Board*, 230 Md. 76, 81 (1962), it certainly should not be inextricably bound to follow a legal conclusion reached in a different case that it later realizes would be erroneous if applied to the facts and circumstances of a new case.

4. Other County Plans and Policies

Applicant presented persuasive evidence that the proposed development would be consistent with the 1993 refinement of the County’s General Plan, which identifies a harmonious balance of land uses, including a balance between housing and jobs, as one of its principal elements; with the County’s Housing Policy, which encourages new housing construction with higher densities and mixed uses, particularly near employment and transportation centers; and with current planning trends at the MNCPPC, as expressed in the Technical Staff’s March 2006 report, “Framework for Planning in the Future.”

5. Conclusion Regarding Development Plan Finding (a)

Based on the foregoing, the District Council concludes that (i) the subject site is recommended for commercial use in the Master Plan, and therefore is not eligible for reclassification to

the PD Zone; (ii) if the subject site were considered recommended for residential use by virtue of the Dwellings special exception, that recommendation carries with it a density recommendation of no more than 21.5 units per acre, less than half the density proposed in this application; and (iii) although the proposed development would promote some of the Master Plan's objectives and could be considered to comply with its general goals, it would not substantially comply with the use and density indicated for the subject site.

§59-D-1.61(b): purposes of the zone; safety, convenience and amenity of residents; and compatibility with adjacent development.

1. The Purpose Clause

The purpose clause for the PD Zone contains a number of goals and objectives, some of which are satisfied by this application and some of which are not. The District Council's findings as to each paragraph of the purpose clause are set forth below.

First paragraph: Master Plan implementation. As discussed under (a) above, the proposed development would promote some of the Master Plan's objectives, but it does not comply with the Master Plan's specific recommendations for this site. Moreover, the Master Plan does not provide any recommendation for appropriate residential density on the site, and residential density recommendations for nearby sites are less than half the level of density proposed in this application. The proposed development would be consistent with the County's General Plan and Housing Policy, but these are not enough to outweigh the Master Plan. Accordingly, this element of the purpose clause is not satisfied.

Second paragraph: social and community interaction, distinctive visual character, balanced mixture of uses. The proposed development would achieve these objectives in several ways. The development would have a distinctive visual character because of textual binding elements regarding streetscape and open space, and because the new residential buildings would be well-integrated into the Office Park but have their own residential elements. The development's walkways and open spaces would encourage social and community interaction and activity among residents and

workers in the area. The development would contribute to a balanced mix of uses in the area by adding housing to a job-heavy region.

Third paragraph: broad range of housing types. The proposed development would provide two types of housing: market rate and MPDU multi-family units. Due to the relatively small size of the site, incorporating additional types of housing might have been challenging. Moreover, the large scale and bulk of multi-family buildings would be compatible with the existing office buildings in a way that would be difficult to achieve, on a relatively small site, with other types of housing. Accordingly, this requirement would be adequately satisfied.

Fourth and fifth paragraphs: trees, grading and open space. The proposed development would preserve a small existing forested area (0.44 acres) and extend it, adding 0.72 acres of forest, all of which would be subject to a conservation easement. It would also preserve several large trees scattered throughout the property. In addition, the development would create a green open space and seating area on the site of an unused bank building, which would be adjacent to the conservation area and accessible for both employees and residents, as well as visitors to the site.

The subject site is part of a tract that has been graded for office development, so it is already very level. The Development Plan would minimize additional grading by making use of an existing parking garage, putting the other major parking facility underneath the footprint of one of the new buildings, and using an off-site, regional stormwater management facility for quantity control.

Sixth paragraph: pedestrian networks. Pedestrian activity would be encouraged by a network of pedestrian sidewalks linking the proposed residential buildings with one another, the existing office buildings, the open space and recreation areas, and the nearby public sidewalks. Extensive retail, entertainment and dining opportunities are available at the nearby Washingtonian Center. More and closer opportunities will be available close by if the Crown Farm property is developed as currently proposed. The subject site is within 1,000 to 2,000 feet of two sites that have been proposed for transit stops, so it will have excellent access to public transportation if the transitway recommendations of the Master Plan are implemented. Currently, the site is served by Ride-On bus service along Omega Drive

and Research Boulevard, which provides transportation to the Washingtonian Center as well as the Shady Grove Metro.

Seventh paragraph: scale. The PD Zone encourages, but does not require, development on a large scale. While not large in an absolute sense, the proposed development would aggregate enough parcels to satisfy the Master Plan's specific size recommendation for PD zoning.

Eighth paragraph, first part: safety, convenience and amenity. The evidence demonstrates that the proposed development would provide safe and convenient roadways, sidewalks and pathways. It would provide a high degree of convenience and amenity for residents by creating opportunities to live and work in the same neighborhood, and to live in a pedestrian-friendly location, near retail, entertainment and dining opportunities, with open spaces for green relief and on-site recreation.

Eighth paragraph, second part: compatibility. The District Council is persuaded that, setting aside the Master Plan density issue, the proposed development would be compatible with existing uses in the surrounding area. Within the Office Park, the proposed residential buildings would be similar in scale, bulk and materials to the existing office buildings, and would be well-integrated into the relationships among the buildings, roads, sidewalks and open spaces. The residential uses would enliven the Office Park, changing it from a site that has very little activity outside the weekday daytime hours to one with substantial activity seven days a week, during the evening hours as well as daytime. The evidence amply demonstrates that the proposed development would not result in any access or parking problems for the existing office buildings. There is no evidence to suggest any adverse impacts on the hotel at the corner of Omega Drive and Research Boulevard, which might get some customers from friends and relations of the new residents. Moreover, the additional residents in an area that is job-heavy would benefit other businesses in the surrounding area, by providing them with potential employees and customers close by.

Ninth paragraph: three findings. The purpose clause states that the PD Zone "is in the nature of a special exception," and shall be approved or disapproved based on three findings:

- (1) the application is or is not proper for the comprehensive and systematic development of the county;
- (2) the application is or is not capable of accomplishing the purposes of this zone; and
- (3) the application is or is not in substantial compliance with the duly approved and adopted general plan and master plans.

Based on the preponderance of the evidence and for the reasons stated above, the District Council concludes that despite its positive features, the present application is not proper for the comprehensive and systematic development of the County due to a lack of Master Plan compliance; is not in compliance with or capable of accomplishing all of the purposes of the zone; and is not in substantial compliance with the Master Plan.

2. Standards and Regulations of the Zone

The standards and regulations of the PD-44 Zone are summarized below, together with the grounds for the District Council's conclusion that the proposed development would satisfy many, but not all of these requirements.

Section 59-C-7.121, Master Plan Density. Pursuant to Code §59-C-7.121, "no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher." The subject property is recommended in the Master Plan for office use in the C-2 Zone. The Master Plan neither recommends the site for residential use nor provides guidance as to an appropriate residential density. For the reasons discussed earlier, the District Council concludes that this fatal flaw cannot be cured by the fact that since 1994 (four years after adoption of the Master Plan), the C-2 Zone has permitted residential uses with a density greater than two units per acre by special exception. The District Council further concludes that the commercial density permitted in the C-2 Zone in terms of FAR should not be used as a proxy for the residential density requirement of this section.

Section 59-C-7.122, Minimum Area. Code §59-C-7.122 specifies several criteria, any one of which may be satisfied to qualify land for reclassification to the PD Zone. The subject application satisfies the first of these criteria, which states the following:

That it contains sufficient gross area to construct 50 or more dwelling units under the density category to be granted.

Applicant proposes to construction 371 dwelling units on the subject site.

Section 59-C-7.131, Residential Uses. Pursuant to Code §59-C-7.131, all types of residential uses are permitted, but parameters are established for the unit mix. For a PD-44 development with more than 200 units, at least 25 percent of the units must be in buildings with four stories or less, and at least 50 percent must be in buildings with more than four stories. The Development Plan in this case does not specify building heights, beyond a maximum height of 70 feet, but it does address this requirement by stating that 35 percent of the units would be in Building Two, which testimony indicated would have four stories, and 65 percent would be in Buildings One and Three, which testimony indicated would have six and five stories, respectively. Taken together, the District Council finds that these elements satisfy the requirements of this section.

Section 59-C-7.132, Commercial Uses. Commercial uses are permitted but not required under the PD Zone. Parameters established for commercial uses are not applicable to the subject application, which is limited to residential uses.

Section 59-C-7.133, Other Uses. Noncommercial community recreational facilities for the use of residents, such as the swimming pool, are permitted in the PD Zone. No other nonresidential uses are proposed.

Section 59-C-7.14, Density of Residential Development. The Zoning Ordinance provides the following direction for the District Council in considering a request for the PD Zone (§ 59-C-7.14(b)):

The District Council must determine whether the density category applied for is appropriate, taking into consideration and being guided by the general plan, the area master or sector plan, the capital improvements program, the purposes of the planned development zone, the requirement to provide [MPDUs], and such other information as may be relevant.

Applicant seeks the PD-44 density category. The record does not indicate the density of the only residential uses in the surrounding area, at the Washingtonian Center, so that comparison cannot be made. The proposed buildings would have an FAR no greater than the maximum in the C-2 Zone, which presumably is the FAR of the existing buildings in the Office Park, but that is a different

concept from the residential density categories of the PD Zone. Moreover, as noted earlier, the Master Plan does not recommend a residential density for the subject property, but the highest residential density it recommends in the study area is 20 to 25 units per acre, which is less than half the maximum permitted in the PD-44 Zone. The only evidence to support a determination that the proposed density would be appropriate are the favorable recommendations of the Planning Board and Technical Staff. Neither the Planning Board nor Technical Staff addressed the question of the appropriate *residential* density, relying, instead, on findings that setting maximum FAR equal to that of the surrounding commercial zone would be enough to ensure compatibility. As discussed earlier, the District Council is not persuaded that this comparison can properly be made. Accordingly, relying on the Master Plan, the District Council concludes that the density proposed is excessive.

Section 59-C-7.15, Compatibility. This section requires that a proposed development be compatible internally and with adjacent uses. It also establishes minimum parameters for setbacks and building height that are designed to promote compatibility. Apart from the Master Plan density issue, the District Council finds that the proposed development would be compatible with existing development in the surrounding area.

Section 59-C-7.15 of the Zoning Ordinance places height limits on land classified under the PD Zone that adjoins land for which the area master plan recommends a one-family detached zone. In the present case, no single-family detached homes are recommended or existing on any adjoining land.

Section 59-C-7.16, Green Area. The PD-44 Zone requires a minimum of 50 percent green area. The Development Plan depicts green area equal to approximately 58 percent of the site, and a textual binding element specifies that at least 55 percent green space will be provided.

Section 59-C-7.17, Dedication of Land for Public Use. This section requires that land necessary for public streets, parks, schools and other public uses must be dedicated to public use, with such dedications shown on all required development plans and site plans. All necessary roadway

dedications on Omega Drive and Research Boulevard were done previously, at the time of subdivision and plat recordation for the Office Park. No new dedications are proposed.

Section 59-C-7.18, Parking Facilities. Off-street parking must be provided in accordance with the requirements of Article 59-E of the Zoning Ordinance. As shown on the Development Plan, the proposed project would provide more than the required number of spaces.

The final two elements of finding (b), the maximum safety, convenience and amenity of the residents, and compatibility, have already been addressed.

§59-D-1.61(c): safe, adequate and efficient internal vehicular and pedestrian circulation systems. The evidence supports a finding that the proposed internal vehicular and pedestrian circulation systems and points of access would be safe, adequate, and efficient. The Development Plan provides for continued use of the existing access points to the Office Park, as well as an extensive network of internal, interconnected roads and sidewalks.

§59-D-1.61(d): preservation of natural features. The proposed development would tend to prevent erosion of the soil and preserve natural vegetation and other natural features of the site by preserving the small forested area on the site and some of the existing trees. The site is already very level, having been graded as part of the development of the Office Park. Grading would be further minimized by using an existing parking garage to serve one building, building another parking garage underneath the footprint of one of the new buildings, and using an off-site regional stormwater management facility for water quantity control.

The Development Plan provides for forest conservation and afforestation sufficient to satisfy applicable forest conservation requirements. Testimony and written submissions establish that the proposed development would readily satisfy water protection requirements.

§59-D-1.61(e): common area maintenance. The Applicant has not provided documents specifying the particulars of common area maintenance because it has not determined whether the project would be developed as a rental or for-sale community. Applicant's land planner represents, in a written submission, that the proposed development would be maintained and managed

by a professional management company that would be responsible for the perpetual care and maintenance of all recreational, common and quasi-public areas. The District Council considers this sufficient.

The Public Interest

In addition to the five development plan findings, the District Council also must consider the relationship of the present application to the public interest. When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities or the environment. As discussed earlier, although the Planning Board and its Staff concluded that the proposed Development Plan would be substantially consistent with the Master Plan, the District Council concludes, as did the Hearing Examiner, that while the proposed development would further some of the Master Plan's objectives, it would not be sufficiently consistent with the Master Plan to support approval.

The evidence of record indicates that the proposed development would have no adverse effects on traffic congestion or public utilities. The evidence indicates that the proposed development would add a small number of students (about 23) to a high school that is over capacity, as that term is defined by MCPS, and is expected to remain over capacity for the next several years. The Planning Board has made a finding, however, that all school clusters have adequate capacity to support subdivision approval during FY 2007. In the past, the District Council has considered such a finding sufficient to support the approval of rezoning requests, like the present application, that would add only marginally to the existing overcrowding.

The Master Plan plays a central role in the purpose clause for the PD Zone, so in this context its recommendations and objectives are entitled to particular deference. Having found that the proposed development would not be consistent with the Master Plan, the District Council concludes that approval of the application would not be in the public interest.

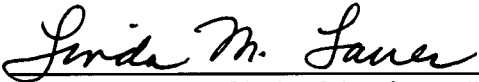
For these reasons, the application will be denied in the manner set forth below.

ACTION

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-841, requesting reclassification from the C-2 Zone (general commercial) to the PD-44 Zone (Planned Development) of 6.92 acres of land located north and east of the intersection of Research Boulevard and Omega Drive, identified as Parcel T-T, Decoverly Hall on Plat No. 22312 (3.59 acres) and Parcel R-R, Decoverly Hall on Plat No. 20811 (3.32 acres), in the 9th Election District, is hereby **denied**.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council