

Resolution No.: 17-863
Introduced: September 10, 2013
Adopted: September 10, 2013

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

By: District Council

SUBJECT: APPLICATION NO. G-954 FOR AMENDMENT TO THE ZONING ORDINANCE MAP AND DEVELOPMENT PLAN AMENDMENT 13-01, C. Pat Harris, Esquire, Attorney for Applicant, 4831 West Lane LLC, OPINION AND RESOLUTION ON APPLICATION. Tax Account Numbers 07-00490821 and 07-00487286

OPINION

Filed on November 15, 2012, by 4831 West Lane LLC, Local Map Amendment Application (LMA) G-954 requests reclassification of approximately 11,847 square feet of land from the R-60 to the TS-R Zone (Transit Station-Residential), consisting of Lot 26 of the Edgemoor subdivision and the rights-of-way for Lots 24 and 25 of the Edgemoor subdivision. In addition, Development Plan Amendment No. 13-01 seeks to amend a development plan approved as part of LMA G-843 to include Lot 26 and the right-of-way associated with Lots 24 and 25.¹ The gross tract area of the development plan amendment is 38,804 square feet.² Exhibit 2. The subject site is located in the northwest quadrant of the intersection of Montgomery Lane and West Lane in Bethesda, Maryland, in the 7th Election District.

The property subject to the development plan amendment is currently improved with single-family detached structures used for office and retail purposes.

Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) recommended approval of both the rezoning application and the development plan amendment in a report dated December 7, 2012. The Montgomery County Planning Board (Planning Board) considered the application on December 20, 2012 and also recommended

¹ LMA G-843 rezoned Lots 24, 25 and 27 from the R-60 to the TS-R Zone, but did not rezone the right of way associated with Lots 24 and 25 nor did it include Lot 26. The Applicant previously filed a local map amendment application (G-912) to add Lot 26 to the TS-R Zone, but inadvertently failed to include the rights-of-way that had not been rezoned in G-843. The Council permitted the Applicant to withdraw G-912 without prejudice.

² All exhibit references are to the record of LMA G-954, rather than to DPA 13-01, unless otherwise noted.

approval, subject to the addition of several new binding elements and suggesting that the public use space located on the northern portion of the site be moved to Montgomery Lane. Exhibit 55.

The Applicant submitted a revised development plan amendment at the public hearing before the Hearing Examiner on January 11, 2013. The public hearing was continued to January 15, 2013, and the Hearing Examiner referred the amended plan to Technical Staff and the Planning Board. *See, Montgomery County Zoning Ordinance, §59-D-1.72.* In a supplement report dated February 25, 2013, Technical Staff again recommended approval, finding that the revised development plan increased the compatibility of the development with the surrounding area. Exhibit 105(a). The Planning Board also found that the revised building design increased the project's compatibility, although it still recommended additional binding elements. Exhibit 105.

The public hearing was reconvened on April 8, 2013, and was continued to April 9, April 15, April 16, April 17, April 19, April 29, 2013, and May 13, 2013. The record was left open to permit the Applicant to submit a revised development plan (Exhibit 127) changing one of the binding elements and for the Villages of Bethesda Homeowners Association to submit written testimony on the plan. These were received into the record, as well as responses from those opposing the application, and the record closed on May 30, 2013. Exhibits 126-129.

The applications were opposed by the City Homes of Edgemoor and Edgemoor Condominium Residences as well as individual residents of those associations; it was supported by the Villages of Bethesda Homeowners Association and the owners of Edgemoor at Arlington North and 4825 Montgomery Lane.

To avoid unnecessary detail in this Resolution, the Hearing Examiner's Report and Recommendation dated July 15, 2013, is incorporated herein by reference. Based on its review of the entire record, the District Council finds that the application meets the standards required for approval of the requested rezoning for the reasons set forth by the Hearing Examiner.

Surrounding Area

The surrounding area must be delineated in a floating zone case for the purpose of determining the compatibility of the proposed development. Technical Staff delineated the boundaries of the "surrounding area" as Moorland Lane to the north, Arlington Road to the west, Woodmont Avenue to the east, and Elm Street to the south. Exhibit 54. This includes the entire Transit Station Residential District designated in the Sector Plan and is shown on the following page. The parties agreed with Technical Staff's delineation, although those opposing the application argue that because of its unique designation as a "Mixed Street" in the Sector Plan, projects fronting Montgomery Lane should carry more weight when determining the compatibility of the proposed development. 4/17/13 T. 215.

There are several existing and approved (but un-built) residential buildings in the surrounding area. Of these, at least two were built prior to adoption of the 1994 Sector Plan. These include two high-rise multi-family buildings, the Chase and the Christopher, both of which are approximately 120 feet in height. Exhibits 54, p. 7; 101(f), p. 6. The below-grade

parking garage for the Chase is located directly to the north of the subject property and includes an outdoor recreation area on the surface for residents of the Chase. Exhibit 54, p. 7. A single-family home owned by Mr. and Mrs. Theodore Chipouras confronts the property across West Lane and remains within the R-60 Zone. Exhibit 38(nn).

Developments built after adoption of the Sector Plan include the Edgemoor Condominium (Edgemoor High-Rise), a 10-story multi-family building rising to a height of 100 feet. Exhibit 54, p. 7. At the time of zoning approval (G-763), the Edgemoor High-Rise intended to provide between 147 and 149 units, including 20 moderately priced dwelling units. Exhibit 102(f). While developed to its full height, the High-Rise now contains only 52 condominium units and no MPDUs. 4/9/13 T. 269-270. The Council found that the height substantially complied with the 65-foot height limit recommended by the Sector Plan and was compatible with the surrounding area. The Hearing Examiner justified the excess height by the property's location immediately south of the 120-foot Chase and confronting much higher buildings in the CBD Core. Because of its unique location, the Hearing Examiner found that the Edgemoor would not "create a precedent for deviation from the height limits" set in the Sector Plan. Exhibit 106(f), p. 14. The Hearing Examiner in that case also noted that the six-story development recommended by the Sector Plan had not materialized because market conditions made it uneconomical due to the need to provide structured parking. *Id.*

The rezoning of the High-Rise was considered in conjunction with a rezoning and development plan amendment for the City Homes of Edgemoor (City Homes), a development of 29 single-family attached townhouses (LMA G-769) and no MPDUs. At the time of the rezoning, City Homes was approved for development at 27 dwelling units per acre, well under the minimum of 45 dwelling units per acre recommended by the Sector Plan. The developer of the Edgemoor High-Rise sought to "transfer" the unused density from City Homes to the Edgemoor High-Rise.

The Edgemoor at Arlington, located in the southeast corner of the intersection of Montgomery Lane and Arlington Road, is 35-feet high along Arlington Road and steps up to 46 feet high proceeding to the east. It contains 12 multi-family condominium units and no MPDUs for a density of 27 units per acre. The Edgemoor at Arlington North contains 31 condominium units and has 4 MPDUs for a density of 35 dwelling units per acre. It also steps up in height from 35 feet along Arlington Road to 48 feet adjacent to the subject property. The Villages of Bethesda (VOB), northwest of the subject property, is located in the southeast quadrant of the intersection of Arlington Road and Edgemoor Lane. The VOB is a townhouse community consisting of 21 dwelling units with no MPDUs at a density of 23 dwelling units per acre. These units rise to a maximum height of 42 feet. Directly east of the subject property (between the High-Rise and West Lane) is 4825 Montgomery Lane, recently approved by the District Council for a maximum of 4 dwelling units (LMA G-908, approved December 4, 2012, in Resolution 17-626). The Council approved a maximum 65-foot height at the time of zoning; the record reflects that this has been reduced at site plan to 60 feet with a 4-foot parapet. Exhibits 54, 84.

The Council has also recently approved developments along Woodmont Avenue and Hampden Lane. These include 4901 Hampden Lane (LMA G-819, initially approved July 25, 2006), at the northwest corner of Hampden Lane and Woodmont Avenue. That development

originally proposed a density of between 50-70 dwelling units. Exhibit 102(d). In 2012, the minimum density was reduced to between 40 and 70 dwelling units per acre to permit the developer to respond to market demand for larger units. Council Resolution 17-559 (adopted November 11, 2012).³ Exhibit 102(k). Approved for a maximum height of 70 feet, an exhibit submitted by the Applicant indicates that this building will now contain 34 dwelling units at a density of 48 dwelling units per acre. Exhibit 84. This approval was accompanied by an increase from 12.5% to 15% of the MPDUs provided. Resolution 17-559.

Further to the west along Hampden Lane is a building (HOC Building) developed by the Montgomery County Housing Opportunities Commission (HOC). The HOC Building provides “transitional housing” for individuals with very low or no incomes who will move as their income increases, as opposed to those who intend to occupy the unit long term. 4/9/13 T. 289. Land for the HOC building was contributed by the developer of the Edgemoor High-Rise to meet its affordable housing requirement. Subsequently, the HOC swapped the land donated for a parcel owned by the developer of Hampden Lane so that the latter project would be developed cohesively. Exhibit 106(o). The HOC Building contains 12 dwelling units and testimony at the public hearing indicated that the building is approximately 48 feet high. Exhibit 54, 4/17/13 T. 211. Traveling west on Hampden Lane, the District Council approved a development located in the northwest corner of the intersection of Hampden Lane and Arlington Road (G-842, approved September 26, 2006 in Resolution 15-1617). Exhibit 106(o). This building steps back from lower heights along Arlington Road to a maximum of 71 feet in height proceeding east. Because there is no setback between this development and several rows of the City Homes townhouses, the Applicant included “cut-outs” to provide light to City Homes. 4/17/13 T. 242.

Technical Staff characterizes the area as primarily residential with limited commercial uses. Several of those opposing the application assert that Montgomery Lane has a unique character different than other streets within the TS-R District because of its design as a “Mixed Street” in the Sector Plan. They also argue that, unlike other streets in the neighborhood which front commercial uses, all approved and constructed development along Montgomery Lane is exclusively residential. 4/17/13 T. 213-215; 4/29/13 T. 33.

The area that will be most directly impacted by the use determines the “surrounding area” in a rezoning case. The area demarcated by Staff is a logical boundary defining the impact of this development, as the entire District is within walking distance of the property. Based on this criterion, the District Council finds that Staff’s delineation of the surrounding area is reasonable, as did the Hearing Examiner. The District Council characterizes the area as primarily residential with limited commercial uses, but finds that Montgomery Lane is unique in its design and will exclusively consist of single-family attached and multi-family residential uses.

Zoning History

The property rezoned in LMA G-843 included Lots 24, 25, and 27 of the Edgemoor Subdivision (Holladay Project). The development plan originally proposed up to 50 market rate units and 7 MPDUs, for a total density of 74 dwelling units per acre. Exhibit 101(c). Because of

³ Because only excerpts from the Council’s opinion in DPA 12-02 are in the record, the Hearing Examiner took official notice of the full text of Resolution 17-559. OZAH Rules of Procedure, Rule 4.8.

the L-shaped configuration of the site, the project consisted of two four- and six-story “wings.” The four-story wing fronted on Montgomery Lane and had a significant step back until rising to 65 feet nearer the northern end. The building had a 15-foot setback from the sidewalk along Montgomery Lane. Exhibit 101(d). While the Hearing Examiner in LMA G-843 concluded that the project technically met the recommendations of the Sector Plan, he found that the building’s massing was incompatible with the Villages of Bethesda, the single-family detached structures on Lot 26, and the single-family detached dwelling confronting the property on West Lane. The District Council agreed with the Hearing Examiner’s recommendation to remand the case to permit the Applicant to revise the development plan, in part, to address these issues. *Id.*

After remand, the Zoning Hearing Examiner recommended approval of a revised application requesting a minimum of 40 and maximum of 48 dwelling units (including six MPDUs), for a maximum density of 73 dwelling units per acre. *Hearing Examiner’s Supplemental Report and Recommendation*, LMA G-843, p. 3 (June 21, 2007).⁴ Exhibit 101(c). The Hearing Examiner found the changes to the building massing sufficient to address the Council’s compatibility concerns, as did the Council. Exhibit 101(c).

Development Plan Amendment

Unlike the former development plan, the development plan amendment before the Council now includes Lot 26, eliminating the need for the “winged” configuration of the Holladay Project. The Applicant proposes a building at a maximum height of 70 feet and a maximum FAR of 3.05. It also commits to a minimum number of 100 dwelling units and a maximum of 120 dwelling units *provided* that the 3.05 FAR is approved. Exhibit 127. The maximum density requested equates to 135 dwelling units per acre.

The Applicant testified that the addition of Lot 26 to the previous development plan permitted the Applicant to design a more efficient building and enables them to further the County goals to provide higher density, and diversity in housing types and affordable housing units. 1/15/13 T. 36-37. She testified that the existing neighborhood consists of larger condominium units averaging between 1,700 and 2,000 square feet. The Applicant proposes units that range between 585 square feet and 1,200 square feet because it believes this is more consistent with goals of the Bethesda Sector Plan. 1/11/13 T. 38. The average unit size of 860 square feet will diversify housing types within the Sector Plan area and create an opportunity to introduce rental units into the surrounding neighborhood. The binding elements do not require the development to be rental units and the Applicant desires flexibility in this regard. The Applicant believes that designating 15% of the units as MPDUs is also important because there are no existing MPDUs on Montgomery Lane itself, although the HOC Building on Hampden Lane does have affordable units. 1/11/13 T. 38-41.

In response to the Planning Board’s recommendations, the Applicant amended the development plan originally submitted to include a concave curve or scallop at the corner of Montgomery and West Lanes and designated it as public use space. The scalloped corner rises to the full height of the building, thus reducing the building’s frontage on Montgomery Lane

⁴ The Hearing Examiner took official notice of the Zoning Hearing Examiner’s Supplement Report and Recommendation dated June 21, 2007, and the District Council’s Order of Remand dated March 20, 2007.

from 120 feet to approximately 80 feet and mitigating its mass along the southern frontage. The Applicant's expert land planner opined that the public use would function as a pocket park and enhance the pedestrian environment.

The Applicant's expert architect testified that other features will reduce the mass of the building as well. These include a 12-foot step back of the roof beginning at 50 feet. According to him, this creates a compatible transition with the City Homes across Montgomery Lane, as these are of approximately the same height. The architect testified that the building's height of 70 feet blends with the height of the very large Edgemoor High-Rise to the east and the lower heights along Arlington Road to the west, creating a compatible east-west transition. The Applicant also incorporated undulations of approximately one foot in depth along the West Lane frontage so the façade will be reminiscent of townhomes. 5/13/13 T. 27-32.

Twenty-six percent of the site area will constitute private amenity area. The Applicant included a binding element limiting lighting in the western setback area to 24 inches in height to address the concerns of the owner of the Edgemoor at Arlington North. 5/13/13 T. 145. The roof top will include a green roof (which has not yet been designed). It also may include an additional private amenity area. 4/16/13 T. 97-101.

The Applicant's architect testified that the Applicant worked hard to mitigate the additional FAR needed to accommodate the MPDUs. According to the architect, the building could not make many more small adjustments, such as moving the setbacks further back. Residential buildings have a very precise program that must be followed. For instance, the units became "pinched" when they increased the step back from nine to twelve feet. Increasing the step back further could further constrain the units so that they do not meet current regulations or market demand. The Applicant tried to mitigate the building's height by reducing the typical spacing between slabs; the typical standard residential ceiling height of 10' 7" from slab to slab has been reduced to a nine-foot distance between slabs. He opined that the design is an optimal means of balancing these competing factors. 4/15/13 T. 19-21.

Binding Elements

Development in the TS-R Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the TS-R Zone. The Development Plan consists of several components that are binding on the applicant except where particular elements are identified as illustrative or conceptual. Illustrative elements may be changed during site plan review by the Planning Board, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment. The binding elements incorporated into the development plan (Exhibit 127) are attached as an appendix to this Resolution.

The Applicant has included some, but not all, of the Planning Board's recommended binding elements. The Applicant has conditioned its commitment to provide 15% MPDUs only if the full amount of the FAR requested (i.e., 3.05 FAR) is approved (Binding Element 3). Similarly, the Applicant has committed to a minimum of 100 dwelling units, conditioned upon the approval of a 3.05 FAR (Binding Element 2). It has also removed a binding element

requiring access to the parking garage to be located below the grade. *Compare*, Exhibits 105 and 127. The development plan amendment does contain binding elements recommended by Planning Board, including a commitment that the public use space substantially conform to the representations included in the February 25, 2013, Technical Staff Report and to the 12-foot step back at the 5th floor (Binding Elements 20 and 18, respectively). In response to concerns raised at the public hearing regarding the location of the mechanical penthouse, the Applicant includes a binding element that the penthouse will be set back from the building face on Montgomery Lane by a minimum distance of 25 feet, as shown on the renderings submitted with the application (Binding Element 22). It also added a binding element that it will propose landscaped amenity areas on the roof at the time of site plan (Binding Element 23). In response to other concerns expressed at the hearing, the Applicant added Binding Element No. 24, prohibiting location of a lay-by along Montgomery Lane. Exhibit 127.

The Applicant is providing 123 spaces for the 120 units because the Zoning Ordinance requires only ½ a parking space for each MPDU unit. T. 325. If each unit is assigned one parking spot, they will have three spaces for visitors, assuming the project is developed to the maximum density.

Conformance with the Sector Plan

The property is within the area covered by the *1994 Bethesda Central Business District Sector Plan* (Plan or Sector Plan). Generally, the 1994 Plan called for greater heights at the CBD Core (near the Bethesda Metro Station) stepping down to the edges of the Sector Plan area (some outside the CBD), to “ensure compatible transitions to adjacent neighborhoods...” Exhibit 110, p. 12. The Plan recommends heights of 65 feet for most of the properties along Montgomery Lane, stepping down to 35 feet closer to Arlington Road. The subject property is within the area recommended for 65-foot heights. *Id.* at 39.

The subject property is located within the Transit Station Residential District of the Sector Plan. Exhibit 110, p. 80. The objectives for the district include:

1. Provide incentives for and remove barriers to achieving high-density housing in the TS-R District.
2. Increase flexibility in the TS-R Zone to allow the district to achieve a low-rise, high-density “urban village” pattern.
3. Retain residential scale along Arlington Road. *Id.*

The Plan recommends the property for residential (high-rise or garden apartment) land use and the TS-R (Transit Station-Residential) Zone. *Id.* at 81. The Plan characterized the achievement of high-density housing as “an important objective” for this District. *Id.* It recommended only limited commercial and retail uses. The Plan envisioned a “low-rise, high-density urban village” and recommended changes to the TS-R Zone to make concept more feasible. Changes recommended included (1) reducing the required amount of green space permit buildings to fill out a sight, and (2) to reduce heights in order to lower construction costs.

The Plan recommended that the buildings appear like townhouses, but actually be three to six story multi-family buildings. *Id.* at 82.

To achieve the high density desired, the Plan recommends a *minimum* density of 45 dwelling units per acre except for developments along Arlington Road. The Plan states:

The Plan anticipates that some projects will incorporate higher densities, and the full 2.5 FAR density (about 100 dwelling units per acre) would be allowed. *Id.* at 82.

The Plan recommended a closed block configuration to create more usable open space and identified building frontage along Montgomery Lane as a resource for publically oriented open space. Montgomery Lane was designated a “mixed street” with curb-side parking and special pavers. *Id.* Thus, the Plan calls for a paving width of only 20 feet within a 52-foot right of way. The goal of the mixed street designation was to provide pleasant pedestrian linkages between the public library and park on Arlington Road and a proposed urban green space along Woodmont Avenue. *Id.*

The Plan included seven urban design guidelines for the TS-R District, included in full in the Hearing Examiner’s Report and Recommendation (page 39). The transportation chapter of the Plan identifies Montgomery Lane as an important pedestrian link between the Core and the public library. *Id.* at 151. It also recommended that the one-way westbound restriction (to approximately West Lane) be retained to prevent eastbound traffic through movement from Arlington Road to Woodmont Avenue. Travel ways on one-way streets should accommodate emergency traffic and allow traffic to pass a stopped vehicle. *Id.* at 180. According to the Plan, mixed streets were to emphasize pedestrian circulation while permitting limited slow traffic flow.

STANDARD FOR REVIEW

Section 59-D-1.61 of the Zoning Ordinance requires the District Council, before it approves any application for reclassification to the TS-R Zone, to consider whether the application, including the development plan, fulfills the “purposes and requirements” set forth in Code Section 59-C for the new zone. In making this determination, the law expressly requires the District Council to make five specific findings, “in addition to any other findings which may be necessary and appropriate to the evaluation of the proposed reclassification.” The required findings are set forth in full in the Hearing Examiner’s Report and Recommendation and are not repeated here. Based on this review, the District Council concludes Applicant has met the criteria for approval of the rezoning application and the development plan amendment.

Compliance with County Plans and Policies (Section 59-D-1.61(a))

Compliance with the Sector Plan

The Council finds that the land use and density of the proposed development substantially complies with the Sector Plan, as did Technical Staff, the Planning Board and the

Hearing Examiner. The Sector Plan recommends the TS-R Zone for the area subject to the development plan and multi-family residential is a permitted use in the Zone. The density also substantially complies with the Sector Plan. One important goal for the District is to locate residential densities close to Metro. For that reason, the Plan recommends a minimum number of units (i.e., 45 dwelling units per acre) as well as a maximum number of units i.e., (“about” 100 dwelling units per acre) for development within the District. Technical Staff advises that residential densities envisioned by the Plan have not been achieved and concluded that this application will “help fulfill the overall density envisioned” by the Sector Plan. Exhibit 54, p. 20. The Applicant submitted evidence and expert testimony that the District is currently developed at a density of 46 dwelling units per acre, which will increase to between 53 and 56 dwelling units per acre with the project as proposed. Exhibit 84; 4/8/13 T. 50. Based on the evidence presented, the District Council finds that the development does further the Sector Plan’s goal to locate high-density housing close to transit, as did the Hearing Examiner.

The District Council disagrees with arguments from the opposition that the use of the term “full” 2.5 FAR and the phrase “about 100” dwelling units in the Sector Plan represents an absolute cap on development because the Sector Plan must be read together with language in the TS-R Zone. Section 59-C-8.42 provides:

(c) The density of development must not exceed the FAR or the dwelling units per acre allowed by the zone, except that the maximum density permitted may be increased to accommodate the construction of moderately priced dwelling units as required by Chapter 25A and the construction of workforce housing units under Section 59-A-6.18 and Chapter 25B. The maximum number of dwelling units or residential FAR may be increased as needed for any MPDU density bonus and any workforce housing units provided on-site. The provision of MPDUs or workforce housing units does not authorize a reduction in any public facility and amenity or active or passive recreation space recommended in a master plan or sector plan.

Section 59-D-1.61 of the Zoning Ordinance mirrors this language, permitting the Council to approve a development that exceeds the height and density recommended in a master plan when the MPDUs provided exceed the minimum required:

(a) The proposed development plan substantially complies with the use and density indicated by the master plan or sector plan, and does not conflict with the general plan, the county capital improvements program, or other applicable county plans and policies. However:

(1) To permit the construction of all MPDUs under Chapter 25A, including any bonus density units, on-site in zones with a maximum permitted density more than 39 dwelling units per acre or a residential FAR more than .9, a development plan may exceed:

(A) any dwelling unit per acre or FAR limit recommended in a master plan or sector plan, but must not exceed the maximum density of the zone; and

(B) any building height limit recommended in a master plan or sector plan, but must not exceed the maximum height of the zone.

The additional FAR and height allowed by this subsection is limited to the FAR and height necessary to accommodate the number of MPDUs built on site plus the number of bonus density units.

Were the Applicant *not* able to increase the height recommended in the Sector Plan to accommodate MPDUs, these provisions would essentially be “read out” of the ordinance. *WFS Fin., Inc. v. Mayor of Baltimore*, 402 Md. 1, 13-14 (2007). The evidence reflects that the bonus height and density permitted for providing 15% MPDUs was adopted by the Council *after* adoption of the Sector Plan.⁵ Because these provisions were adopted after the Sector Plan, the Hearing Examiner concluded that the Zoning Ordinance intended to permit Applicants to exceed the density recommended by 22%, with a concomitant increase in height. *Id.*, 402 Md. 13-14 (2007) (The legislative body is presumed to have had, and acted with respect to, full knowledge and information as to prior and existing law and legislation on the subject of the statute and the policy of the prior law.) The District Council agrees with that determination. Nor is an absolute cap on density supported by the explicit language of the Plan, which uses the phrase “about” 100 dwelling units per acre. *Id.* The Applicant’s expert architect explained how the bonus density was calculated and the need for an additional floor. He also pointed out that the Applicant attempted to minimize its impact on the height by reducing the height between slabs. As the density of 135 dwelling units per acre does not exceed the maximum of 150 dwelling units per acre permitted in the TS-R Zone, the District Council finds that the height and density substantially comply with the Sector Plan.

For similar reasons, the District Council concludes that the number of stories proposed substantially complies with the Sector Plan. Although the Plan recommends buildings between three and six stories, the Applicant presented expert testimony that the additional floor was necessary to accommodate the MPDUs. The District Council concludes that this recommendation must be read in light of the Zoning Ordinance provisions permitting deviations in height for MPDU bonuses. Without the flexibility to add a single additional story, the Council’s policy could be defeated. As a result, the Council finds that the 5-foot difference between the height proposed and that recommended, created by the 7th story, is not a substantial enough deviation from the Sector Plan to deny the application at the rezoning stage.⁶

⁵ Some testimony indicated that the exemptions to height and density set forth in the TS-R Zone §59-D-1.61 were adopted two years after the Sector Plan. Amendments to §59-D-1.61 of the Zoning Ordinance mirrored these provisions and were adopted in 2004. *See*, Montgomery County, Md., Ord. No. 15-36 (November 30, 2004). The Council amended this provision in 2008 without changing the allowances for bonus density and height. Montgomery County, Md., Ordinance No. 16-28 (October 21, 2008). The Hearing Examiner took official notice of these Council actions. *OZAH Rules of Procedure*, Rule 4.8.

⁶ The TS-R Zone requires the final height of the project to be determined during site plan review. Thus, the actual height of the building may be lower than the maximum height approved at the zoning stage, which is what occurred during site plan review of 4825 Montgomery Lane. *Montgomery County Zoning Ordinance*, §59-C-8.51.

The second height-related issue is whether the development conforms to the “tenting concept” adopted by the Sector Plan. The Plan employs one tenting concept that begins at the Metro Core and proceeds generally downward toward the edge of the CBD at Arlington Road. The Plan calls for a separate 65-foot height limit beginning at Woodmont Avenue transitioning westerly to 35 feet along Arlington Road. Nothing in the Plan, however, *mandates* that each succeeding building be lower than the one immediately to the east. While there is language in the Plan stating that 6-story heights are “preferred” closer to Woodmont Avenue, this is not mandated either by the height limits imposed or by the Plan’s explicit language.⁷ Even strict adherence to the height limits in the Plan permits heights of up to 65 feet for the majority of the length of Montgomery Lane, transitioning to 35 feet closer to Arlington Road. As the Plan is a guide only, and even these guidelines use the term “preferred,” the Council finds that the heights of buildings along Montgomery Lane need not decline in a perfectly straight downward angle from a 65-foot height limit along Woodmont Avenue to comply substantially with the Plan.

Based on the evidence, the District Council finds that the proposed development will achieve the Plan’s goal to transition heights gradually. There is nothing in the Hearing Examiner’s recommendation for the Edgemoor High-Rise that requires that building to be *ignored* when considering subsequent approvals. Rather, the precedential language used in the Hearing Examiner’s report on the Edgemoor High-Rise means only that its location at the time, combined with other factors, was unusual enough that other projects would not be able to justify similar deviations in height. The language does not convey a mandate that future tenting must be measured from an imaginary 65-foot height limit from Woodmont Avenue. The District Council may consider existing conditions in determining whether the goals of the Sector Plan will be achieved. The District Council obviously found that the 100-foot height limit of the Edgemoor High-Rise substantially conforms to the Sector Plan, as did the Hearing Examiner. It is difficult to interpret the Plan so that a building of 100 feet that has been found to substantially conform to the height limit must be completely ignored when determining whether as-built conditions will achieve the Sector Plan’s goals. When the Edgemoor High-Rise is considered in the east-west transition from Woodmont Avenue to Arlington Road, the skyline does show a gradual decline. The Applicant presented expert testimony that the planning concept of transitioning heights must be read in the context of the Sector Plan’s guidelines to create a varied skyline. It may vary up and down during the gradual decline to the edge of the District. 5/13/13 T. 17-18. Based on this evidence, the District Council agrees with the Hearing Examiner that the height of the proposed development substantially complies with the Sector Plan’s goal to transition heights gradually from Woodmont Avenue to Arlington Road.

Those opposing the application also object to the development’s flat roof, contending that this violates the Sector Plan’s recommendation to enhance the residential character of the building by using hip roofs, gables, turrets and other types of pitched roof lines. *Plan*, p. 85. The Applicant’s architect testified that the guideline is obsolete because it doesn’t account for a green roof as well as roof top amenity areas. A green roof will be incorporated into this project and a roof top amenity area may be included. 4/15/13 T. 90-91. Technical Staff found roof top articulation unnecessary because there is sufficient articulation elsewhere in the building to

⁷ The Applicant presented evidence that other approved developments in the District vary from the heights recommended in the Sector Plan, although they use roof line step backs to create a compatible transition in height.

maintain the residential character intended by the Plan, as did the Hearing Examiner. Exhibit 54, p. 23. Based on this evidence, the District Council concludes that the residential articulation proposed is sufficient to meet the intent of this guideline.

The urban design guidelines recommended by the Sector Plan also suggest that unit entrances along the street be on the first floor to encourage street life. The Applicant has provided a single entrance on the first floor at the intersection of Montgomery Lane, but not individual unit entrances, an item requested by City Homes. 4/19 Tr. 256-257. City Homes requested the Application to include these ground floor entries along West Lane to ensure that deliveries occur there rather than on Montgomery Lane. *Id.*

The Applicant presented expert testimony that the purpose of the recommendation is to activate the street. The Applicant's architect testified that the design includes "French balconies" along the Montgomery Lane frontage that accomplish this. Technical Staff concluded that these balconies were sufficient to achieve an active street presence. Exhibit 54, p. 23.

The District Council finds that the proposed design substantially conforms to the intent of the Sector Plan. The Applicant presented expert testimony that the location of the public use space at the entrance will enhance and activate the pedestrian environment unlike other public use space in the area. Based on this evidence, the District Council finds that the combination of the location of the building's entrance along Montgomery Lane and its incorporation with the project's public use space will achieve the goal of the Sector Plan to activate the street.

The development plan does comply with other urban design guidelines recommended by the Plan. One of these is to incorporate individual parcels in the unified developments. The Council concludes that the development does this by incorporating Lot 26 into the former Holladay project.

The design guidelines also call for low-rise buildings to fill out a parcel. Technical Staff concluded that low-rise buildings are generally less than five stories, but found that the 7-story height substantially complied with the Sector Plan because it is necessary to provide MPDUs. Assuming that 7 stories is "mid-rise," the District Council finds that the development plan substantially complies with the Sector Plan because the 7th story has been "squeezed" so that the overall height is only 5 feet above the 65-foot limit recommended by the Plan. The 12-foot step back at 50 feet assists in mitigating this height and the building fulfills the Plan's recommendation to have buildings "fill out" the parcel.

The final urban design guideline calls for parking to be located either underground or in rear decks so that it may not be seen from public streets. Except for the loading areas on West Lane, all parking will be contained in an underground garage. As a result, the District Council finds that the development plan substantially conforms to this Sector Plan recommendation.

The General Plan and the County Capital Improvements Program

There is no evidence in this case that the proposed development conflicts with the County's General Plan or the Capital Improvements Program. The District Council finds that the project conforms to both plans and programs.

Other County Policies (Annual Growth Policy and Adequate Public Facilities Ordinance)

At the rezoning stage of development approvals, an applicant must demonstrate that there is a "reasonable probability that available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application is submitted." *Montgomery County Code*, §59-H-2.4(f).

Under the current 2012 – 2016 Subdivision Staging Policy (Staging Policy), "[t]he Planning Board and staff must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated." Council Resolution 17-601, p. 21. There is no such evidence in this case. The remaining three public facilities: transportation, schools and water/sewer service are considered below.

Transportation:

Technical Staff found that transportation facilities would be adequate. Exhibit 54, p. 28-31. The Applicant presented expert testimony that transportation facilities will be adequate to serve the development under the current Subdivision Staging Policy. 4/15/13 T. 233-239. There is no evidence in the record to the contrary.

School Capacity:

Technical Staff advises that school capacity is adequate to serve the proposed use, as did the Hearing Examiner. Based upon this evidence, the District Council finds that school facilities are adequate to serve the proposed development.

Water and Sewer Service:

Under the Staging Policy, applications must be considered adequately served by water and sewerage if the subdivision is located in an area in which water and sewer service is presently available. Council Resolution No. 17-601, p. 20. The Applicant presented expert testimony that water and sewer systems are adjacent to the site, as are gas, storm drains and electrical utilities. The property is within the W-1/S-1 water and sewer category. The District Council finds these utilities adequate to serve the proposed development.

Housing Element of the General Plan:

The Housing Element of the General Plan encourages the provision of affordable housing, particularly in areas close to transit facilities. Approved in 2011, one of its major goals

is to provide more affordable housing close to employment and transit. *Approved and Adopted Housing Element of the General Plan* (May 18, 2011). The Housing Element also calls for new development to incorporate green and energy efficient standards. *Id.* at 16. The Applicant presented expert testimony that the development plan would further these goals by (1) adding new housing in mixed-use transit oriented areas near employment, (2) creating smaller, more energy efficient units, (3) creating the potential for rental units, and (4) fulfilling the neighborhood design identified in the Element.

Based on this evidence, the District Council finds that the proposed development will be consistent with applicable County plans and policies.

Compliance with Zone Purposes, Standards and Regulations (§59-D-1.61(b))

Compliance with the Purposes of the TS-R Zone

The TS-R Zone is a “floating zone,” intended to be used in transit station development areas designated on an approved and adopted master plan within walking distance to transit. *Id.*, §59-C-8.21. The Zone is intended to be used to “facilitate and encourage innovative and creative design and the development of the most compatible and desirable pattern of land uses” that take advantage of the flexible standards of the Zone. *Id.*, §59-C-8.21(d).

As indicated by uncontroverted evidence and testimony in this case, the subject property is within a Transit Station Development Area and District designated in the Sector Plan. Exhibit 54, p. 24; 1/11/13 T. 111. Technical Staff advises that the property is within walking distance to the Bethesda Metro station; it is located approximately 950 feet from that station. Exhibit 54, p. 24. The District Council finds that the proposed development plan amendment meets this intent of the TS-R Zone.

Technical Staff found that the development will use the flexibility provided by the TS-R Zone to achieve creative design and desirable land uses. They advise that the setbacks ensure that detrimental effects to adjacent residential properties will be minimized and the building will add to a cohesive building line along Montgomery Lane. Exhibit 54, p. 25. The Hearing Examiner further concluded that the location of the concave public use space will both increase setbacks along Montgomery Lane and mitigate the mass of the building. For these reasons, the District Council finds that the development plan meets this intent of the Zone.

The purposes of the TS-R Zone are set forth in Code §59-C-8.22. These include (1) promoting the effective use of transit station development areas, (2) locating residential uses within walking distance of a transit station, (3) providing a range of densities to afford planning choices matching the characteristics of the TS-R District, and (4) using the design flexibility of the zone to prevent detrimental impacts on the surrounding area and promote systematic development of the area.

Technical Staff and the Hearing Examiner found that the location of up to 120 multi-family units within walking distance of the transit station achieved this purpose of the TS-R Zone. *Id.* Technical Staff found that the increased density (above that of the Holladay Project)

will contribute to a greater diversity of housing choices, both with the addition of more MPDUs and because the unit sizes will be much smaller than the majority of those currently existing or approved in the area. *Id.* In addition, this development offers an opportunity to introduce rental units in the area, although this is not a binding element of the development plan. Based on this evidence, the District Council finds that the development plan will fulfill the purposes of the TS-R Zone.

Technical Staff initially found that the setbacks provided adequately protected adjacent residential properties. *Id.* Subsequently, the Applicant redesigned the project to move the public use space to Montgomery Lane, thereby increasing the Montgomery Lane setback for a portion building's façade, providing a viable public use space, and decreasing the building's mass. The District Council finds the development plan to be consistent with this requirement of the Zoning Ordinance.

Compliance with the Standards and Regulations of the TS-R Zone

The Applicant presented expert testimony that the proposed plan meets the development standards of the TS-R Zone. The property exceeds the minimum lot area of 18,000 square feet as the gross tract area of the property is 38,804 square feet. While the maximum base density in the zone is 2.5 FAR, the TS-R Zone permits a bonus density of up to 3.05 FAR to provide MPDUs. The FAR of the proposed building is the maximum 3.05 FAR because 15% of the units will be MPDUs.

The TS-R Zone permits a maximum base density of 150 dwelling units per acre. The development proposes a maximum of 120 dwelling units, the equivalent of 135 dwelling units per acre. A binding element commits the Applicant to a minimum of 100 dwelling units per acre provided that the full 3.05 FAR is approved.

The TS-R Zone requires a minimum of 10% of the gross tract area to be public use space. The development plan (Exhibit 127) confirms that the minimum has been provided. In addition, the total amount of open space, including active or passive recreational areas, must be 30%. The development plan shows that the open space exceeds the 30% minimum. The TS-R Zone requires 20% of the gross area to be active and passive recreational space; the proposed private amenity space is 26% of the site area. Exhibit 127; 4/15/13 T. 54-55. The District Council finds that the development standards of the TS-R Zone have been met.

Safety, Convenience and Amenity of Residents

The record includes a significant amount of evidence regarding the amenities to be provided. The Applicant proposes a substantial amount of open area with both hardscaping and landscaping within the setbacks, including the private amenity areas to the north and west and the public use space along Montgomery and West Lanes. In addition, the Applicant added a binding element (Binding Element 23) that it will propose an amenity area on a portion of the roof at site plan. 4/8/13 T. 274; Exhibit 127. Based on this evidence, the District Council finds that the development plan provides "maximum safety, convenience, and amenity of the residents," as required.

Compatibility with Adjacent Development

The District Council finds that the mass, scale, height and density of the proposed development is sufficiently compatible with the neighborhood to proceed beyond the zoning stage, as did the Hearing Examiner. The height of City Homes should be 48 feet when used to assess the compatibility of the proposed development with City Homes.

While those opposing the application make general allegations that differences in ground elevation will cause the project to loom above City Homes and other developments in the area, there is nothing in the record specifically quantifying or demonstrating this effect. The Applicant submitted expert testimony that the roof top step back and contrasting materials on the top two floors of the proposed development provided a compatible north-south transition between City Homes and the proposed development. The Planning Board and Technical Staff agreed with this assessment. Even assuming the 48-foot height of City Homes, the difference in the height of the step back and the height of City Homes is only 2 feet. Further, the difference in elevation between the City Homes and the proposed development, according to Ms. Susan Turnbull, is 3 feet. Exhibit 101(i). Those opposing the Application have provided no evidence that the combined 5-foot difference significantly alters the transition depicted and found compatible by the Planning Board and Technical Staff. There was testimony that the proposed development would block certain vistas which currently exist for residents of City Homes; however, the District Council has nothing before it requiring preservation of particular vistas based in the evidence presented here. The expert testimony indicates that this project will not impact the light available to City Homes or cast shadows on the townhouses.

The Applicant presented expert evidence that differences in elevation will be imperceptible from the ground because the pedestrian's perception changes with the elevation. While there are grade changes between the City Homes and Hampden Lane, the Applicant's expert architect testified that elevations could theoretically matter where there are not intervening buildings, but testified that the project would not be visible from Hampden Lane. Without more concrete evidence from the opposition that elevations will cause the development to be incompatible with the surrounding area, the District Council finds that the height of the building will be compatible with the City Homes. The Council also finds that the transition in heights between Woodmont Avenue and Arlington Road is compatible with the surrounding area because of the expert evidence that heights need not transition downward in a straight line.

There were also contentions that the height of the mechanical penthouse (i.e., approximately 10-12 feet) would exacerbate the building's mass from the street, although little expert testimony supported this. The Applicant added a binding element that the penthouse would be setback no *closer* to the street than shown on the existing exhibits. With this binding element, the District Council finds that there is sufficient evidence for approval of the rezoning application and development plan amendment.

The District Council concludes that the development's setbacks are compatible with the surrounding area. The Applicant provided expert testimony that included detailed measurements of the setbacks along the entire length of Montgomery Lane; the setbacks provided for the proposed development exceed or equal those in other developments along the street. While in

this instance, the setback is combined with a 70-foot height, the Applicant has incorporated revisions to the design to mitigate the building's mass, such as the 5th floor step back with contrasting colors on the top floor, the concave scallop running the full length of the building, and the undulating façade along West Lane. The curved frontage along Montgomery and West Lane acts to increase the setback from City Homes. While City Homes desires a 15-foot building setback, the Applicant presented expert testimony that the difference would have little impact on compatibility and impairs the important goal of providing a continuous street edge. 4/8/13 T. 69-74. Technical Staff also found creating a continuous building edge an important component of the development plan. Exhibit 54. The Applicant's experts testified the difference between the building face of City Homes and the proposed development is 73 feet, the largest on Montgomery Lane. While there was summary expert testimony to the contrary, the District Council finds that the evidence regarding the need to provide a solid building edge along the street and the large distance between building facades is more detailed and persuasive, as did the Hearing Examiner.

As to the building's mass, the Applicant responded to concerns raised by creating the scallop that runs the full height of the building, increasing the step back from 9 to 12 feet, including French balconies along the Montgomery Lane façade, and creating undulations along the West Lane façade, which it asserts are reminiscent of townhouses. The District Council concludes that the overall mass of the building has been sufficiently reduced for the purposes of rezoning.

Also at issue is whether the architecture sufficiently declares the building's residential character and compatibly relates to the surrounding area. The Applicant presented expert testimony regarding the architectural details designed to emanate a residential character. These included French balconies, a defined base, middle, and top, making the top two floors lighter and reflective of light changes, and the undulations on the West Lane Façade. Technical Staff found this articulation and fenestration sufficient to be compatible with the existing residential character of the surrounding area, as did the Planning Board. Those opposing the application did present some expert testimony that the use of glass around the scallop emphasized the building's mass, but the expert did not provide a detailed explanation of why this would be the case. Considering the well-thought out rationale submitted by the Applicant's architect and the recommendations of Technical Staff, the Planning Board, and the Hearing Examiner, the District Council finds that the Applicant has successfully met its burden of proof that the proposed development is compatible with the surrounding area.

Internal Vehicular and Pedestrian Circulation Systems and Site Access (Section 59-D-1.61(c))

Whether the application can satisfy this finding has been the source of much of the controversy in this case. After carefully reviewing the testimony and evidence submitted, the District Council finds that the weight of the evidence falls in favor of the Applicant because its evidence is more objective, quantifiable and systematic.

In order to determine congestion levels on Montgomery Lane, the Applicant's expert transportation engineer performed field observations of the existing queues, which are only one

to two vehicles long. He also performed a delay/queuing analysis using the protocols of the Highway Capacity Manual. This projected that queues would remain essentially the same after development of the project. Because the existing volumes on the street are already quite low, he opined that the project's impact on traffic will be "imperceptible." 4/15/13 T. 246.

The Applicant's transportation planner opined that vehicular access will be safe, adequate and efficient because West Lane (after the Applicant's dedication) will have a sufficient paved area to accommodate traffic. He pointed out that moving the development's access to the northern end of West Lane will minimize conflicts along Montgomery Lane. The addition of two loading bays above the required minimum, all of which will be accessed from West Lane, will eliminate the need for service vehicles to stop on Montgomery Lane. He also testified that parking is adequate to serve the use. Census data indicates that 36% of renters in the area do not have cars. Even if, however, the property is developed as condominiums, he opined that parking opportunities are available in nearby public garages.

While those opposing the application expressed skepticism that service vehicles will actually use the West Lane loading areas because they are less convenient, their testimony amounted to no more than skepticism. Similarly, while residents presented pictures of congestion problems that have occurred on Montgomery Lane due to service and other vehicles parking illegally on Montgomery Lane, there was no evidence that the proposed development, which will utilize West Lane for deliveries and have three loading areas, will exacerbate this problem. While existing residents suggest that large tractor trailers will not be able to access the property, they did not present evidence that moves would be handled by these larger vehicles. The same is true as to the proposition that the one-to-one ratio between parking spaces and dwelling units is insufficient. While those opposing the application expressed skepticism that people would not use parking garages, there is little in the way of quantifiable evidence to this effect.

In contrast, the Applicant presented expert testimony that those vehicles large enough to move furniture for the size of the units proposed will be able to unload and load in at least one of the loading bays or the lay-by (located on West Lane). The Applicant also took videos recording traffic volumes and vehicle deliveries occurring on sequential days. These videos did not record any congestion occurring on the street; the time attributable to vehicle deliveries averaged three minutes and there were an average of 4.67 deliveries per day.

Based on this evidence, the District Council finds that site access and circulation will be safe, adequate and efficient.

Preventing Erosion, Preserving Vegetation, Forest Conservation and Water Resources (Section 59-D-1.61(d))

The District Council finds that the development will not cause erosion or adversely impact vegetation, forest or water resources. Expert testimony demonstrates that there are no significant natural features on the existing site except for one specimen tree. In addition, the development may impact the Critical Root Zone of a specimen tree on 4825 Montgomery Lane. In the opinion of the Applicant's expert in civil engineering, the Applicant will be able to obtain a variance from the requirements of the Forest Conservation Law for removal of the tree on the

subject property if necessary. The Applicant also presented evidence that the proposed development plan has received an exemption from other requirements of the County's Forest Conservation Law. *See, Montgomery County Code, Chapter 22A.* The Applicant's civil engineer testified at length as to how sediment and erosion control would be controlled on the site.

Ownership and Perpetual Maintenance (Section 59-D-1.61(e))

The Applicant has submitted a deed and record of the Maryland State Department of Assessments and Taxation evidencing the Applicant's ownership of the site. Exhibit 7. It has also submitted a statement describing how the common areas and privately owned public use space will be maintained. Exhibit 18.

Having no evidence to the contrary, the District Council finds that the applicant has sufficiently demonstrated both ownership of the property and its commitment to perpetual maintenance of all recreational and other common or quasi-public areas.

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, any adverse impact on public facilities, the environment, and public benefits such as the provision of affordable housing and the location of residences near a Metro station.

The issue of Sector Plan conformance and adequacy of public facilities have already been discussed in this Report and the Planning Board, Technical Staff and the Hearing Examiner have recommended approval of this application.

For the above reasons, the District Council concludes that the proposed development would be in the public interest.

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-954, requesting reclassification approximately 11,847 square feet of land from the R-60 to the TS-R Zone (Transit Station-Residential), consisting of Lot 26 of the Edgemoor subdivision and the rights-of-way for Lots 24 and 25 of the Edgemoor subdivision, and Development Plan Amendment No. 13-01, consisting of 38,804 square feet and including Lots 24-27 of the Edgemoor Subdivision, are hereby ***approved*** in the amount requested and subject to the specifications and requirements of the final Development Plan, Exhibit 127, provided that the Applicant submits to the Hearing Examiner for certification a reproducible

original and three copies of the Development Plan approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council