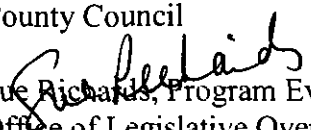


OLO MEMORANDUM REPORT 2002-3

April 16, 2002

TO: County Council

FROM:  Sue Richards, Program Evaluator
Office of Legislative Oversight

SUBJECT: Participants' Perceptions of the Special Exception Hearing Process in
Montgomery and Prince George's Counties

EXECUTIVE SUMMARY

This OLO report presents the perceptions of people who participated in a special exception hearing before the Montgomery County Board of Appeals, the Montgomery County Hearing Examiner or the Prince George's County Hearing Examiner. OLO conducted 26 informal interviews with applicants, supporters, opponents and attorneys.

Participants' satisfaction with the process varied widely. Some participants acknowledged their satisfaction and perceptions were frequently shaped by the outcome of the case, although other participants stated that they found the hearing to be fair even though they disagreed with the decision. Participants frequently voiced similar compliments and concerns regardless of which body conducted the hearing.

Participants' raised concerns about the time it takes to complete the special exception process and the Board's heavy workload and hearing schedule. Participants' believed many factors have contributed to the Board's increased hearing workload, including a shift toward more open and longer hearings, stepped up enforcement inspections, and a more conscientious interpretation of whether the law requires a hearing.

Participants proposed several remedies to address the Board's heavy workload such as amending the Rules of Procedure, the use of pre-hearing conferences and a triage system for modification requests. Some participants did not believe transferring hearings to the hearing examiner would reduce the Board's workload, and they were concerned it would lengthen the overall process.

Participants expressed mixed views about whether a lay board or a hearing examiner should conduct special exception hearings. These views reflected what the research literature says about the values of each approach. Specifically, those who preferred a lay board valued the multiplicity of views, the common sense citizens brought

to the issue, and the flexible, interactive approach to crafting a solution. Those who preferred a hearing examiner appreciated the objective, fact-finding approach, the efficient management of the hearing, and the professionalism and technical expertise. Many participants suggested that the County focus more on the qualifications of the people making the decisions and less on which body would hear and decide the cases.

Participants observed the County has seen an emerging hostility toward special exceptions and suggested the Council adopt a policy statement, rewrite the general conditions in the Zoning Ordinance to be more neutral, and/or delete negative special exception language from the County's master plans to respond to this trend.

To address the issue of better ways to site community serving uses, participants suggested structuring a review process that is respectful of abutting neighborhoods while recognizing the widespread benefits of some uses and/or establishing a mediation process for cases that create conflict or controversy within a community.

I. PURPOSE, SCOPE AND ORGANIZATION

Purpose. This report is a follow-up study to OLO Report 2000-5, *A Research Report on the Theory and Practices of Citizen Boards of Appeals and Zoning Hearing Examiners*. Specifically, it responds to the Council's request to interview a sample of individuals who have appeared before the Montgomery County Board of Appeals, the Montgomery County Hearing Examiner, and/or the Prince George's County Hearing Examiner concerning a special exception use.

The purpose of the interviews was to solicit participants' anecdotal views about the following issues:

- Satisfaction with and perceptions of the hearing process before each of the three bodies;
- Opinions about whether the Board of Appeals or the Hearing Examiner should hear and approve special exceptions;
- Opinions about whether the hearing examiner model provides a better way to site community serving special exceptions, such as elderly housing projects or private schools;
- Observations about the length of the special exception process; and
- Opinions about the workload issues the Board of Appeals currently faces.

Request from the Chair of the Board of Appeals. The Council expects to consider the results of this OLO report at the same time it addresses a request from the Chair of the Board of Appeals to transfer the authority for hearing special exceptions to the Hearing Examiner. According to the Chair, the principal policy objective of this change would be to reduce the caseload of the Board of Appeals to alleviate the burden of long hearings on lay members of the Board. The Chair proposes that:

- The Board of Appeals would continue to accept filings.
- The Hearing Examiner would schedule and conduct hearings.
- The Board of Appeals would hold a worksession to consider the Hearing Examiner's request and adopt the recommendation in whole or in part based on the Hearing Examiner's record.
- The Board or parties to the matter could request oral argument.
- An appeal to Circuit Court could be taken from the resolution adopted by the Board.

In September 2001 and January 2002, the PHED Committee discussed the Chair's proposal. The proposal raises several policy and budget questions that are outside the scope of this study. Council staff intends to address these questions in a separate memorandum and Council staff and OLO will work together to coordinate the timing of their products.¹

Organization. This report is organized as follows:

Section II provides background information from OLO Report 2000-5 for those readers who are not familiar with the theory and use of citizen boards versus a hearing examiner and/or the zoning structure and special exception practices in Montgomery and Prince George's counties.

Section III describes the methodology OLO followed to conduct the study and provides a profile of those interviewed.

Section IV reports the results of the interviews grouped under three topics:

- Perceptions of the hearing process;
- Additional comments about the Montgomery County Board of Appeals;
- Observations about the special exception process and role for the Hearing Examiner.

Section V presents OLO's findings.

¹ Council staff identified the following questions for the Council to address when the PHED Committee reviewed the request for the Supplemental Appropriation for the Office of the Hearing Examiner.

1. Historically, relatively few special exception cases have been referred to OZAH. What has changed in recent years to require the shift?
2. If OZAH is conducting hearings on cases referred from other offices, would there be more accountability if the funds for the hearing costs were provided in the budget of the referring office, e.g. Board of Appeals or Human Rights Commission?
3. Should OZAH be conducting hearings for the HRC or should these cases be referred to the Executive's hearing examiner?
4. If OZAH were to conduct all the special exception hearings, what is the appropriate funding source? Should the costs be offset by an increase in special exception application fees, an increase in the annual fee assessed to special exception holders, or other revenue sources?

II. BACKGROUND INFORMATION

A. Research about Citizen Boards and Hearing Examiners

OLO Report 2000-5, *A Research Report on the Theory and Practices of Citizen Boards of Appeals and Zoning Hearing Examiners* (December 2000) researched the history and use of citizen boards in zoning administration, alternative approaches to a citizen board, and the advantages of using a professional hearing examiner. This section provides a brief overview of that research.

1. Citizen Boards.

Zoning's founders expected the administration of zoning law to operate as a simple, self-regulating system with a minor role for the Board of Appeals. They envisioned a zoning board composed of expert administrators that would provide public access, protect zoning from special interests, and provide a mechanism for perfecting the zoning ordinance regulations through the exercise of administrative discretion.

The publication of the Standard State Zoning Enabling Act in the early 1920's accelerated the spread of zoning across the country in a form that differed radically from the vision of its founding fathers. The Standard State Zoning Enabling Act proliferated a structure for zoning that contained vague standards and the provisions that hardship cases would be decided by a loosely defined administrative board. The Standard State Zoning Enabling Act did not contain any language requiring a board of appeals composed of expert administrators.

In practice, the local enabling legislation for most cities eliminated any technical qualifications in favor of a more democratic "anybody can join" approach. Local enabling legislation typically specified the number of members and the appointing authority without any further membership qualifications. In some cities, legislators enacted qualifications so those members represented special interest groups.

Local legislatures delegated to citizen boards the same duties originally envisioned for a board of experts, namely to hear and decide applications for variances and special exceptions.² In delegating discretionary power to a public board, legislatures achieved multiple purposes, which included:

- Safeguarding the rights of property owners;
- Avoiding the arbitrary use of police power;
- Ensuring fair application of the regulations;

² The research literature suggests local legislators established deliberately vague standards to guide the board in its decisions because the legislature purposefully intended to give the board maximum discretion. Scholars also noted that ambiguous standards conveniently addressed the impossible task of trying to pre-regulate the uses, bulk, and height of buildings in each and every city block.

- Keeping zoning regulations out of the courts;
- Avoiding the need taking minor amendments to the legislature; and
- Perfecting the regulations through the exercise of administrative discretion.

In practice, citizen boards have played a central role in the administration of a zoning ordinance. They have functioned as a jury and worked to adjust the conflicts between the imperfections of the zoning regulations and existing property interests. Unlike a planning commission, a board of appeals does not set broad policy; instead it makes policy “interstitially” by deciding individual cases within a framework of laws and regulations construed by others. A board is not free to decide cases on its own notions of what might be desirable. Rather the function of a board of appeals is to recognize the limitations of its powers.

The use of a lay board reflects the role of values in weighing land use decisions. In this role, the research literature suggests that a balanced representation of the economic and political interests of a community has been critical to the successful function of a board.

Citizen boards of appeals have been strongly criticized by some scholars and professionals. Early critics faulted boards of appeals for granting too many variances and undermining the comprehensiveness of the zoning system. Later studies reported that citizen boards had not operated to assure citizens equal protection or to produce a pattern of consistent, sound and articulate judgments.³

In response to the critics, Robert M. Anderson in a study of the Syracuse Board of Appeals suggested that citizen boards have done what they had to do and that the problem lies with the unrealistic expectations embedded in the structure of zoning administration, and not the institution of a citizen board.

Since zoning began, boards of zoning appeals have occupied an uncomfortable position in the center of the struggle between property owners and the state. The task of perfecting crude regulations and preventing the serious inequities which might flow from a literal enforcement of such regulations was assigned to these boards. The power to achieve these ends was delegated in broad language sufficient to enable boards to relieve, adjust and amend. But the courts have construed these powers so narrowly that the boards legally can effect only minor adjustments, relieve only major hardships and are without power to grant relief which may be construed as an amendment of the regulations. In short, where court decisions are respected, the board possesses very limited powers.

During the early years the boards were expected to accomplish a major task with minor tools. These administrative bodies were composed of citizens with a

³ One study identified several procedural shortcomings that contributed to this outcome. The authors observed that the board lacked time, that it could not distinguish between trivial and substantial information, and that it could not promulgate standards for administrative decisions

minimum of knowledge of law or municipal planning. Conversant with the demands of their communities if not with the niceties of legal construction, the boards defined their own powers in terms of their practical estimates of local needs. This process of redefinition ...achieved for the boards a freedom from formal legal restraint, and generated decisions which have been the target of most criticism of board behavior. Thus, the decision making process is so erratic as to be unpredictable on the basis of established judicial standards. This is disconcerting to lawyers, losing litigants and others concerned with the orderly disposition of disputes. In addition, the boards have gained a strong if not decisive voice in the development of planning policy. This distresses the professional planners and the citizen planning boards who conduct studies and draft legislation only to see their work distorted by board decisions which endorse privately devised plans which ignore the studies and bypass the legislation.⁴

2. Hearing Examiners.

OLO's review of the professional literature found that a hearing examiner brings several advantages to a quasi-judicial land use decision making process. Specifically, he/she:

- improves compliance with the legal requirements of due process;
- increases the likelihood of reaching a decision based on logic instead of politics or emotion, and
- insures fairness and consistency through more professional and timely decisions.

The disadvantages of a hearing examiner are that this approach leads to the loss of diverse views, the loss of an outsider's perspective, and the loss of a generalist's perspective. Other disadvantages are the increased cost to all parties due to the more formal decision-making procedures and the lack of accountability to the voters.

B. The Administration of Special Exceptions in Montgomery County

OLO Report 2000-5 presented a brief overview of zoning governance and information about the special exception decision making process in Montgomery County, which is summarized below.

1. Roles and Responsibilities

Montgomery County has an elected County Executive and an elected County Council. Four of the Councilmembers are elected at-large and five are elected by district.

Zoning and planning powers in the County are governed by Article 28 of the Maryland Code, which establishes the Maryland-National Capital Planning Commission

⁴ Robert M. Anderson, "The Board of Zoning Appeals – Villain or Victim?" Syracuse Law Review, Vol. 13 No. 3, Spring 1962, p. 386.

(M-NCPPC). The M-NCPPC is a ten-member body composed of the two separate planning boards for Montgomery and Prince George's counties.

The District Council appoints the five members of the Montgomery County Planning Board, the five members of the Montgomery County Board of Appeals, a Hearing Examiner, and a People's Counsel.

The Board of Appeals. Section 59-A-4.11 of the Montgomery County Zoning Ordinance authorizes the Board of Appeals to hear and decide special exceptions, variances, administrative appeals, appeals regarding property affected by highway master plans, public nuisance petitions, and appeals from the Sign Review Board or the Director in administering the sign ordinance.

Section 59-A-4.12 gives the Board of Appeals the power to compel the attendance of witnesses at hearings, requires a quorum of three members to act, and requires the board to act by written resolution. The law empowers the board to request technical assistance from the planning commission and the county government.

Section 59-G-1.11, delegates to the Board of Appeals the general authority "to grant petitions for special exceptions" as authorized in Section 59-A-4.1. Traditionally, the Board of Appeals has heard and decided the majority of special exception petitions; however recently the Board of Appeals has asked the Hearing Examiner to conduct the public hearing for some applications. Section 59-A-4.125 of the Zoning Ordinance states that the Board of Appeals can request that the Hearing Examiner conduct the public hearing and prepare a written report and recommendation to the board of appeals with the approval of three of its members. It provides that the "board of appeals shall have the sole authority to render a decision upon the merits of such petitions for special exceptions or other cases referred to the office by the board."

The Hearing Examiner. The Office of Zoning and Administrative Hearings (OZAH) administers public hearings in certain land use matters in a manner that protects the due process rights of participants and the public interest. The Hearing Examiner conducts hearings and makes recommendations for local map amendments, development plan amendments, and some special exceptions. The Hearing Examiner also takes referrals from the Board of Appeals, the human relations commission, and the merit system protection board.

Section 59-1.12 of the Zoning Ordinance authorizes the Hearing Examiner to hear and decide some special exception petitions "in addition to the authorization given to the county board of appeals." The Zoning Ordinance grants this authority for seven use categories.⁵

⁵ The categories are (1) Boardinghouses for 3 guests or fewer in the R-30, R-20 and R-10 zones; (2) Home occupations in the R-30, R-20 or R-10 zones; (3) Noncommercial riding stable for not more than two horses, for personal or family use in the RE-2 zone; (4) Temporary structures in residential zones; (5) Renewals of temporary special exceptions originally granted by the board, director or hearing examiner for boardinghouses, and home occupations; (6) Farm tenant mobile homes for more than one but less than four; and (7) Child day care facilities for up to 30 children.

The Zoning Ordinance requires the Hearing Examiner to hold a public hearing before making a decision and to provide notice in accordance with the same requirements for special exceptions that are heard by the Board of Appeals. The Zoning Ordinance states that the decision of the Hearing Examiner should be based on the evidence presented at the hearing. The decision should be in writing and contain a statement of the grounds and findings on which it is based.

The Zoning Ordinance states that a petitioner may appeal the decision of the Hearing Examiner to the County Board of Appeals, which reviews the decision on the record compiled by the Hearing Examiner. The Zoning Ordinance authorizes the Board of Appeals to hear oral arguments. The Board may affirm, reverse, or modify the Hearing Examiner's decision or remand the matter for further proceedings.

The District Council. The Zoning Ordinance gives the District Council sole authority to decide special exception requests for cemeteries and family burial sites. In these cases, the Zoning Ordinance delegates to the Hearing Examiner the authority to conduct a hearing and issue a written report with recommended findings and a decision with conditions of approval.

The People's Counsel. In 1999, the County Council enacted Bill 14-99 to allow the Council to employ a People's Counsel as a term merit system employee. The People's Counsel is intended to increase public confidence in the County land use process. The People's Counsel may participate in special exception proceedings before the Board of Appeals, the Hearing Examiner, or the County Council. The People's Counsel must file a notice of intent to participate. After this notice is filed, the People's Counsel is entitled to all notices and may participate by making motions, introducing evidence, and calling witnesses. The People's Counsel may file and argue an appeal, the same as any other party to the proceeding.

The Department of Permitting Services. The Zoning Ordinance requires the Department of Permitting Services and the Board of Appeals to establish a routine inspection program to monitor special exceptions. This program is described below under Compliance and Inspections.

2. The Process to Hear and Decide an Application for a New Special Exception

A petitioner files an application for a special exception with the Board of Appeals staff at the Council Office Building in Rockville. The Board of Appeals staff reviews the application for completeness, arranges for the posting of the property, sets the hearing date and collects the filing fee. The Zoning Ordinance provides that a hearing date cannot be earlier than sixty days after the application is filed. In practice, hearing dates may be three or four months after the application date.

The Board of Appeals staff forwards a copy of the application to the Montgomery County Planning Department of the Maryland National Capital Park and Planning Commission (M-NCPPC). The Planning staff prepares a written staff report and presents its report to the Montgomery County Planning Board in a public meeting. The Planning Board makes a recommendation on the proposed petition and forwards the Planning Staff's report and recommendation and the Planning Board recommendation to the Board of Appeals.

The Board of Appeals conducts a hearing for a new special exception request according to the Rules of Procedure for the Board of Appeals. The County Council adopts the Rules of Procedure. Applicants and supporters of a petition present their case, followed by the opponents. Each speaker is subject to cross-examination. Groups are encouraged to designate a spokesperson. Rebuttal witnesses are permitted after each side has been heard. Each side is also permitted a closing statement.

Whenever possible, the Board of Appeals decides a case immediately after the close of a hearing. If a case is complicated or lengthy, the Board may defer a decision until after a worksession.

After the Board of Appeals has reached a decision, it must prepare a written opinion, which it formally adopts as a resolution and enters into the Opinion Book. The Rules of Procedure require that the Board must mail an opinion within 30 days after the record is closed. The Board may ask an attorney participating in the case to prepare a draft opinion for its review. If the Board of Appeals approves the special exception, the applicant must wait for the opinion to be issued before he/she can apply for a building permit.

3. The Process to Modify or Change an Existing Special Exception.

When the Board of Appeals grants a special exception it enumerates specific conditions of operations to regulate that use. A special exception holder must request approval from the Board of Appeals to modify or change an approved special exception use. A special exception holder may also submit a modification request to bring a violation into compliance.

The Zoning Ordinances recognizes two categories of modifications – minor modifications and major modifications.

- Under Section 59-G-1.3 (c) a modification is considered minor "if the proposed modification is such that the terms or conditions could be modified without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood."
- Under Section 59-G-3 (c)(2) a modification is major if it "would alter the terms and/or conditions of the special exception in such manner as to substantially change the nature, character or intensity of use of the original grant, would result in the

extension, expansion or alteration of the size, location or appearance of the structure, or would intensify the impact on traffic or on the immediate neighborhood.”

The Board can grant a minor modification without holding a public hearing; however the Board must send a copy of its resolution to all parties entitled to notice at the time of the original filing. The notice allows any party to request a public hearing on the Board’s action within fifteen days after the Board’s resolution is mailed. The request must be in writing, specify the reasons for the request, and the nature of the objection or relief required.

The Board must convene a public hearing to consider a major modification. The Zoning Ordinance limits the public hearing to consideration of the proposed modifications and to discussion of those aspects of the special exception use directly related to those proposals.

4. Reporting Decisions.

The product for a Board of Appeals decision varies depending on whether a hearing is held by the Board of Appeals or the Hearing Examiner. The Board of Appeals will issue an opinion when it approves a special exception use for which it has held a hearing. The opinion may be ten to twenty pages long and typically has three parts. The first part, evidence and testimony presented, reports the facts and evidence on the record that pertain to the Board’s findings. The second part, findings, states the Board’s conclusions of law. The third part, conditions of approval, defines the operating requirements for the special exception use.

The Hearing Examiner’s report and recommendation presents a more narrative description of the case and typically summarizes both sides of all of the issues raised during the hearing. The Hearing Examiner presents findings of fact supported by evidence in the record and states conclusions of law. If the Board of Appeals agrees with the Hearing Examiner’s recommendation, the Board of Appeals will adopt the report and recommendation and then issue a one or two page resolution with its decision.

Decisions of the Board may be appealed to Circuit Court.

5. Compliance and Inspections

In 2001, the County Council instituted a fee to fund a special exception inspection program administered by the Department of Permitting Services (DPS). The fee pays for two DPS inspectors and a part-time aide. DPS has categorized the existing special exceptions by impact and inspects each use on an annual, biennial or triennial cycle.

The DPS inspector is conducting both routine and complaint inspections. DPS reads the opinion to determine the conditions of the special exception and conducts an inspection to determine compliance with each of the conditions. Typically, the special exception holder is not receiving an advance notice of the inspection; however, the holder

will have received a letter informing him/her about the special exception inspection fee, which may be an alert that an inspection is coming.

If the inspector finds a violation, he will serve notice and give 30 days to come into compliance. If the special exception holder takes action to correct the violation and sends information in writing, the inspector can grant additional time to cure the violation. If the special exception holder does not work to correct the violation, the inspector will issue a request to the Board of Appeals to hold a show cause hearing.

In some cases the special exception holder may have received a building permit for an improvement without having requested a modification to the special exception use.

C. The Administration of Special Exceptions in Prince George's County

OLO Report 2000-5 presented a brief overview of zoning governance and information about the special exception process in Prince George's County. The information below is excerpted from OLO Report 2000-5.

1. Roles and Responsibilities

Prince George's County has an elected County Executive and an elected County Council. The nine-member Council is elected by district. The Council and the Executive are elected to four-year terms. Planning and zoning powers have been delegated to the County by Article 28 of the Maryland Code.

The County Executive appoints the five Planning Board members.⁶ The District Council appoints the Hearing Examiner,⁷ the People's Counsel,⁸ and the Board of Appeals members.

The Board of Appeals. The Board of Appeals is a three-member body authorized to hear variances and administrative appeals. The Council has amended the law over the years so that the Board of Appeals no longer hears variances that are part of a special exception application. The Board of Appeals plays no role in the special exception process.

The Hearing Examiner. The Prince George's Zoning Ordinance authorizes the Hearing Examiner to conduct hearings for applications for special exceptions and variance applications related to a special exception application.

⁶ The Planning Board conducts administrative meetings to hear and decide subdivisions and site plan applications.

⁷ Section 27-126 of the County Code establishes the qualifications for the Hearing Examiner. The law requires the examiner: (1) to be an attorney, (2) to possess a judicial temperament, (3) to have at least five years experience in administrative litigation, and (4) to demonstrate a knowledge of administrative and zoning law practice and procedure by a competitive written exam.

⁸ The People's Counsel serves a five-year term. The appointee must be a member of the Maryland bar and experienced in zoning law and procedure. The law requires the People's Zoning Counsel to participate in the review of all Comprehensive Design Plans filed with the Planning Board and its staff for the purpose of protecting the public interest and insuring the compilation of a complete record on needed public facilities.

Section 27-126 of the County Code establishes the qualifications for the Hearing Examiner. The law requires the examiner: (1) to be an attorney, (2) to possess a judicial temperament, (3) to have at least five years experience in administrative litigation, and (4) to demonstrate a knowledge of administrative and zoning law practice and procedure by a competitive written exam.

In addition to special exception applications, the Hearing Examiner conducts hearings for applications for zoning map amendments, petitions for revocation or modification of a special exception, fence waivers, amendments of map amendment approvals and basic plans, reviews of certification of nonconforming uses, amendments of approved special exceptions and special exception site plans, complaints regarding medical practitioners offices in single family dwellings and race tracks, parking waivers, appeals from the Historic Preservation Commission, and any other case for which the District Council directs a hearing be held.

The District Council. The Zoning Ordinance gives the District Council the authority to make a final special exception decision instead of the Hearing Examiner in certain circumstances. Specifically, the District Council makes a final decision if:

- A decision is appealed to the District Council.⁹
- After receiving notice of a decision from the Hearing Examiner, a majority of the District Council votes to make the final decision on its own.
- For cases located within a municipality, the Hearing Examiner's recommendation is contrary to the recommendation of the municipality. In these cases, the Hearing Examiner submits findings of fact, conclusions of law, and a recommended case disposition to the District Council, which makes the final decision. A two-thirds vote of the District Council is required to override the recommendation of a municipality.

The District Council has also reserved the right to decide certain special exceptions such as medical resident campuses and commercial recreation attractions.

If the decision of a Hearing Examiner is appealed to District Council, the appeal is heard on the record. The Hearing Examiner states that controversial applications are frequently appealed. Special exception applications that require a variance are also routinely appealed. This is because the Zoning Hearing Examiner has adopted a policy that it will not approve variances as part of a special exception. The Hearing Examiner states the District Council upholds some decisions and overturns others.

⁹ Section 27-131 authorizes any person of record or the People's Zoning Counsel to file within 30 days an appeal from the Zoning Hearing Examiner decision, exceptions to the decision, or a request for oral argument.

The People's Counsel. The People's Zoning Council regularly participates in special exception hearings before the Zoning Hearing Examiner.¹⁰ The law authorizes the People's Zoning Council to "summon, examine and cross-examine witnesses, introduce documentary evidence into the record, file exceptions, and make such argument to the Hearing Examiner or the Council as the law and the evidence in the case may warrant." In practice, the People's Counsel insures that the evidence introduced into the hearing is relevant and that citizen representatives are, in fact, speaking on behalf of the community.

2. The Process to Hear and Decide an Application for a New Special Exception

A petitioner wishing to pursue a special exception files an application with the Park and Planning Department. Staff reviews the application for completeness and accuracy. After the petitioner has submitted a final application, planning staff posts the property and distributes the application to public agencies for review and comment. The application is assigned to a planner who reviews the application, compiles the public agency comments, and prepares a staff report. Copies of the staff report are forwarded to the Zoning Hearing Examiner and the People's Counsel.

The law provides that the applicant can request a Planning Board meeting following the issuance of the planning staff report or the Planning Board can ask to consider the matter. According to the Hearing Examiner, in practice, most applications are taken to the Planning Board for a recommendation and the Hearing Examiner does not schedule a hearing until recommendations from the Planning staff and the Planning Board are available.

The hearing is conducted according to guidelines found in the Zoning Ordinance. There is a one-hour limit for each presentation, unless the Hearing Examiner extends the time. First, the applicant presents the case and the opponent presents a response. Next, the applicant has an opportunity for rebuttal, followed by rebuttal by the opposition. Then, there is time for public agency comments and questions. The hearing closes with a summation by the opponent, followed by a summation by the applicant. The Hearing Examiner indicates that approximately three-quarters of all petitioners are represented by an attorney.

The Zoning Hearing Examiner states that the Hearing Examiner system has saved the District Council time. The Hearing Examiner also observes that the process is more streamlined because the rules of evidence apply and the examiner, more so than the District Council or a citizen's board, has the ability to limit discussion and comments to relevant issues.

¹⁰ Under the County charter and the law, the People's Zoning Council may appear at all zoning case hearings "for the purpose of protecting the public interest and insuring the compilation of a full and complete record."

3. Reporting Decisions

After the conclusion of the hearing, the Hearing Examiner prepares a written decision with specific findings of fact and conclusions of law. There are no time requirements in the law, but the Hearing Examiner tries to publish an opinion within 30 days. The law gives the Hearing Examiner the authority to approve or deny most special exception applications. If the Hearing Examiner makes the final decision, the law also gives the Hearing Examiner the authority to approve site plan amendments, to grant time extensions, and to exercise the reconsideration powers normally given to the District Council.

III. INTERVIEW METHODOLOGY

OLO conducted informal conversational interviews with people who had recently participated in a special exception hearing before the Montgomery County Board of Appeals or the Hearing Examiner in Prince George's County or Montgomery County. OLO compiled the list of interviewees in Montgomery County from case files heard within the last six months. OLO solicited the names of participants in Prince George's County from the Hearing Examiner's Office.

OLO prepared a set of questions to structure the interviews. The interviews generally covered the same topics but the questions were not always asked in the same order. OLO conducted 26 interviews with people who had participated in a special exception hearing or been involved in a special exception decision. The interviewees included attorneys (for the applicant or the opposition), applicants, people supporting the application, people opposing the application and the People's Counsel in Montgomery County. The interviews were conducted in March and April 2002.

The interviewees reflect a very small percent of people who have participated in special exception hearings. (In Montgomery County, in particular, many of the special exception cases that the Board of Appeals has heard and decided in the last six months have been very controversial and the hearings have been well attended.) The observations reported below provide anecdotal information only. It is not appropriate to draw conclusions about the views of the general public from these comments.

IV. PERCEPTIONS AND OBSERVATIONS OF PARTICIPANTS

This section reports the perceptions and observations of participants OLO interviewed. OLO has organized the information from the interviews into the following topics:

- Perceptions of the hearing process;
- Additional comments about the Montgomery County Board of Appeals; and
- Observations about the special exception process and a role for the Hearing Examiner.

OLO uses the words “many,” “some,” “other,” and “a few” to describe how frequently a common theme or perception was expressed. The phrase “many participants” means that a perception or theme was expressed often or widely held. The phrases “some participants” and “other participants” suggest people had divergent views. The phrase “a few participants” or “one participant” means that a view was expressed infrequently or by only one person.

This section of the report reflects the voices of the individuals interviewed and, as such, weaves many specific words and verbatim comments into the text. The words and phrases in these remarks reveal the heartfelt emotions and strong passions that surround many of these special exception decisions.

A. Perceptions of the hearing process

The perception of a fair hearing is a critical component of the special exception process. The elements of a fair hearing include an opportunity to testify, the sense that there is an effort to keep the testimony relevant, the perception that procedural rules are followed and applied equally, and the perception that a case is decided on the pertinent facts and that there is a reasonable basis for the decision. As one participant stated, “Ninety-nine percent of the process is how a person is treated. The most important thing is that people feel heard, that the process is fair and that people are given an explanation for why a decision was made.”

1. The Montgomery County Board of Appeals hearing process

Many participants observed that the hearings are held with an “incredible degree of fairness” and “evenhandedness.” One participant characterized the hearings as “superb and fair.” Another stated that it was “a very fair tribunal” and a third observed that the Board gave both sides a fair chance. One participant observed that the Board bent over backwards to make sure people were heard. Another participant, who was on the losing side of a decision, felt the hearing was very fair and open and that the Board gave him every opportunity to submit information to make his case.

Other participants perceived that the hearings were too open-ended and longer than they needed to be. A few participants observed that the Board did a “terrible” job of keeping the testimony relevant. One participant felt that there was “no limitation” to the questions that were asked and observed only one place in a very long hearing process where the Chair ruled that a line of questioning could not be pursued. Another participant noted that the practice of letting everyone cross-examine a witness lengthened the hearing unnecessarily.

Many participants perceived that the Board made its decision based on the evidence in the record and was absolutely able to explain its decision. One participant applauded the creative searching process the Board uses in crafting its decision. Another participant appreciated that the Board had the flexibility and willingness to apply common sense in its decision making. One participant acknowledged that a lay board

gives a community an opportunity to insert its views into the opinion and to weigh in on defining the specific operating conditions for a special exception.

Some participants perceived that the Board ignored “huge amounts” of evidence or dismissed evidence rather than discussing it and explaining it in its decision. One participant stated that the Board’s only job was to make findings of fact on each special exception condition and felt that the Board generally failed to do that. Participants who believed that the Board ignored evidence also characterized their hearing before the Board as unfair. Two participants characterized their case as “an absolutely unfair hearing” but also observed that their case was an aberration that should not be used to judge the Board of Appeals as a whole.

Other participants believed the Board did not run the public hearing in a manner that limited or filtered out irrelevant testimony. Some felt that the Board got caught up in side issues and decided cases based on information that was irrelevant or plans that were attractive. Some perceived that some of the decisions were “framed by the controversy surrounding the case” instead of the special exception guidelines. One participant observed that when the Board started deliberating it felt like Board members were “arbitrarily coming up with ideas to decide what the standards should be” and “making up” answers. Another participant felt that the Board had its mind made up at the outset of the case.

2. The Montgomery County Hearing Examiner hearing process

Participants before the Montgomery County Hearing Examiner observed that the Hearing Examiner did a good job of running an orderly hearing and that the hearings were very comfortable and informal. Others noted that the Hearing Examiner was very efficient, well organized and well prepared.

Many participants observed that the Hearing Examiner displayed a great amount of tolerance and patience for the lay person and felt that this made for a very pleasant experience. One participant reported that the Hearing Examiner did a good job of explaining “why we were there and what would happen.”

Many acknowledged that the Hearing Examiner gave everyone a chance to talk. Participants said they felt the Hearing Examiner heard their concerns.

A few participants commented that there was a lot of emotion and tension present in the hearing room. One participant observed that the Hearing Examiner diffused some of the tension through the handling of the hearing.

Another participant felt that the Hearing Examiner tried to see both sides of the issue but allowed the opponents’ testimony to “wander off far too many times” and to bring up questions that had nothing to do with the special exception request.

Participants observed that the Hearing Examiner did a good job of explaining *his/her decision*. Some participants appreciated that the Hearing Examiner took the time to explain why their particular concerns were not relevant to the final decision. Other participants appreciated that the Hearing Examiner mentioned their concerns in the final decision even though these concerns did not affect the outcome of the case.

Some participants perceived that hearings before the Hearing Examiner were rigid, objective and legalistic. One participant followed the logic of the findings that the Hearing Examiner made, but questioned whether those findings reflected the outcome that the Examiner would have wanted.

3. The Prince George's County Hearing Examiner hearing process

Participants who appeared before the Prince George's County Hearing Examiner reported that the process ran fairly well. Participants observed that Prince George's County has a longstanding tradition of using Hearing Examiners to hear and decide special exceptions, that everyone is used to the process and that there are not many issues associated with it.

One participant commented that the hearing provided a good method for galvanizing a community and a useful way for people to focus their concerns. This participant said meetings with the community held outside the hearing process were not as productive whereas the hearing convened by the Hearing Examiner helped to move things along.

Participants observed that the Hearing Examiners managed the hearings well. They did a good job of letting people have their day in court and structured the order of the hearing to use people's time efficiently.

Participants acknowledged that the Hearing Examiner performed lots of fact finding and that this was very helpful, especially for complex cases. One participant stated that the Hearing Examiner seemed to "own the process" and did a good job of keeping track of the testimony and the issues.

Participants reported that the People's Zoning Counsel participates in every case before the Hearing Examiner. Participants stated that the People's Zoning Counsel task is to make sure that the record is complete. Participants observed that *in carrying out this task*, the People's Counsel has been a "Godsend" because "he goes a long way towards shedding the bias from a case" and "keeps the heat from people's perception that a case is weighted one way or another."

Participants stated that the District Council has retained the authority to decide special exceptions in Prince George's County. One participant observed that the District Council regularly asks to review Hearing Examiner decisions but most of the Hearing Examiner decisions stand. This participant also noted that if a case is appealed to Circuit

Court, the case is heard on the record put together by the Hearing Examiner and that these cases are rarely overturned.

B. Additional Observations about the Montgomery County Board of Appeals

1. The institutional role of the Board of Appeals

OLO heard comments from several participants about the institutional role of the Board of Appeals in Montgomery County. Participants acknowledged that special exceptions are uses that the legislature wants in operation, subject to standards. Participants recognize that there is a balancing test for special exceptions and emphasized that the Board of Appeals does a lot of good work in working out the concerns of people on a case by case basis. Participants also noted that controversial cases are less than five percent of the caseload and it is a subset of those cases that cause problems.

One participant remarked that Boards of Appeals and its chairs routinely “get in hot water” because they approve things that people don’t like. This participant observed that there are usually one or two cases that get a Chair in trouble. These cases can’t be avoided because that Board exists to make these tough decisions. This participant emphasized that “it is the structure, the system and the process of special exceptions that is flawed, not the people.”

Many participants acknowledged that the Board plays a valuable role in isolating and protecting the Council; however some participants perceived that the Board has been inappropriately subjected to political pressure in some cases. Other participants expressed concerned that the Board of Appeals is not accountable to anyone. One participant was frustrated that the only recourse was an expensive appeal to Circuit Court.

Many participants attributed their treatment in the special exception process to larger forces. For example, one participant observed that the quality of the County government is “eroding” and that the Board of Appeals is part of this larger “demise.” Participants who had bad experiences often stated that they did not blame the Board of Appeals and were not mad at any members of the Board of Appeals personally.

2. Changes instituted by the current Board of Appeals

Almost all of the participants acknowledged that the Montgomery County Board of Appeals has changed its operations since the current Chair was appointed; participants disagreed about the value of these changes.

One person noted that this Board has a narrower view of what its limits allow them to do than previous boards have had, and that this Board has “clamped down an awful lot.” Others observed that previous Chairs were focussed on getting the facts on the record and making a decision whereas this Chair is more process oriented.

One person observed that the Chair has “done a very conscientious job of sprucing up the Board” so that now it is “less careless in its everyday processes.” Another

stated that the Chair has tried to institutionalize the Board as a quasi-judicial setting through the “force of his personality” and his training as a lawyer.

Several participants expressed great satisfaction with this Board and the changes it has implemented. Participants commented that the Board is really attuned to the effects special exceptions have on surrounding neighborhoods. They perceived that this Board has raised expectations for how citizen boards are supposed to behave and that the treatment of all parties by the Board has been “exemplary.”

Other participants observed that the County has seen “a general hostility” toward special exceptions emerge in the last few years. They noted that the County Council appointed the new Chair in response to complaints from civic activists and that the Board is carrying out the Council’s wishes. Some participants reported a perception exists that the County has “targeted” private educational institutions and landscaping contractors for elimination. Some special exception holders who thought they were doing the right thing or making a community contribution feel like they have been “clobbered unfairly” and feel punished by the County.

3. The Board of Appeals’ workload and hearing schedule

Some participants acknowledged that the Board fell behind in its hearing schedule due to certain cases last summer and, even though it has referred cases to the Hearing Examiner for hearing, the backlog is an ongoing problem. Applications for special exceptions received in March were scheduled for hearings in July. (Under the current requirements of the Zoning Ordinance, the hearings could have been held in May.)

Participants identified several different factors that are contributing to the heavy workload of the Board of Appeals.

Many participants believed the Board’s increased workload results from the combined effects of the DPS inspection program and a policy change by the current Board to hold a hearing on almost every issue that comes up. One participant observed that the current Board’s interest in making sure everything is done properly has slowed down the proceedings generally. Another participant characterized the workload problems of the Board as “a burden of its own making.” A few participants observed that in its willingness to hold public hearings, the Board failed to follow its own rules of procedure.

Some participants reported that previous Boards’ granted more modifications administratively with fewer public hearings and questioned whether the new practice of holding more public hearings represents a good use of the Board’s valuable hearing time.

Another participant observed that the Board has established the practice of deliberating in public worksession. The participant noted that this practice is more like a legislature than a court, which is the model for a quasi-judicial board. He also observed it will be difficult to reverse this course of action.

Another participant believes the Board will continue to be swamped because it has not thought through how it is going to handle the impacts of its decisions, such as the follow-up to the Holton Arms case which will require more schools to validate their special exceptions.

Some participants did not believe that transferring special exception hearings to the Hearing Examiner would resolve the Board's workload issues. They note that currently the Board can hear and decide a case in one sitting whereas the use of a Hearing Examiner would add another step and lengthen the process. Another observed that it would only shift the decision to a different arena.

Participants suggested the Board could pursue several different strategies to address the Board's workload issues. Some suggested that the County Council needs to amend the Rules of Procedure to tighten up the hearing process or, more informally, tell the Chair to change how the hearings are run because recently they have been overly generous in terms of what is allowed. This participant estimated more prudent handling of the hearings could reduce the hearing time by ten or twenty percent.

Other participants suggested that the Board could use pre-hearing conferences to narrow the issues of dispute. These conferences, which could be run by the People's Counsel or the Executive Secretary to the Board, could eliminate hearing time currently spent on questioning because, for example, someone hasn't seen an exhibit.

A few participants suggested the Board explore a method to triage the multitude of modification requests stemming from the DPS inspection process. They suggested that the Board develop a method for resolving minor infractions at the staff level without the need for a hearing before the Board. Participants suggested that a transfer from one doctor to another in the same field or modifications to the façade of a building or to a building located in the interior of a site might be candidates.¹¹

4. The Board of Appeals' staff

Generally participants perceived the Board of Appeals staff to be very helpful, courteous and polite. Participants commented that they called staff to find out about an application or ask a question and they were pointed in the right direction.

A few participants said that the staff could be more accommodating to the realities of people coming to the office to get information. For example, it seems unreasonable to close the office at 4:00 p.m. when it appears there are enough staff to leave the office open longer.

¹¹ The special exception comprehensive re-write may begin to address this issue inasmuch as it focuses on the potential impact of a modification rather than on changes in its appearance.

5. Other Board of Appeals' practices

Several participants acknowledged that the matters assigned to the Board are more complex than they used to be. Participants had different perceptions of the Board's ability to handle this complexity. One participant found that the Board members routinely asked "the tough and right questions." In contrast, another participant found the Board was incapable of handling technical issues and analyzing technical studies.

Several participants observed that the Board routinely asks attorneys to draft its opinions. Participants had mixed opinions about the value of this practice. Some believe it is an acceptable practice because it is a common practice in other courts and it helps address the Board's backlog in issuing opinions. They noted that the Board reviews the draft and makes changes as needed. Others perceived that this practice allows the Board to "sidestep" its major responsibility and that it is at odds with the Board's own Rules of Procedure.

Several participants reported a lack of coordination between the Board of Appeals and other County departments or agencies, such as Park and Planning and the Department of Permitting Services. In some cases, participants received documentation from one office suggesting that a special exception was not required, only to find out later that it was. This lack of coordination created practical problems for applicants who believed they had complied with the County's procedures and went on to offer service or take action and later learned they were in violation.

C. Observations about the special exception process and the role of the Hearing Examiner.

1. Perceptions about the time to complete the special exception process

Participants felt that long delays exist in the special exception process. Participants reported that typically, a hearing is scheduled three to four months after an application is filed, and it takes from three to twelve months to issue an opinion after the hearing is held. After the opinion is issued, an applicant or special exception holder must wait for the 30-day appeal period to expire before applying for a building permit.

Several participants identified the delay in issuing an opinion as a serious problem. Many noted that nothing is final until the opinion is adopted and that problems are created because, in the interim period, the Board "can and does change its mind." One participant believed the delay in issuing an opinion was politically motivated.

Participants expressed mixed views about whether hearings held over multiple days were a problem or not. Some participants reported difficulty with multiple hearing days scheduled over several weeks to accommodate the Board's part-time status. They observed that it is difficult for Board members and participants alike to remember all the details of a hearing and that there are extra expenses associated with preparing for several

separate hearing days. Other participants believed that hearings extended over several weeks provided more opportunities for the public to attend at least one day of a hearing.

2. Giving the hearing examiner an expanded role in the special exception process

Participants expressed a range of opinions about giving the hearing examiner an expanded role in the special exception process. Participants representing both community and developer interests support a role for the hearing examiner. Other participants favor retaining the current structure of a citizen board. Other participants did not have an opinion on the issue.

Participants who favored an expanded role for the Hearing Examiner cited several reasons. Some participants suggested that a lay board is an anachronism left over from the 1960s and that it no longer makes sense for a County with a population of 850,000 to have a lay board with part-time members.

One participant supported the use of a Hearing Examiner to help institutionalize the changes that the current Board has brought to the special exception process.

Many believed the Hearing Examiner would improve the hearing process by making findings of fact, treating parties fairly and equally, and managing the hearing process efficiently. Specifically, people believed hearings would be shorter, more balanced, and more focussed on debatable issues.

Participants cited many advantages of using a Hearing Examiner. Specifically, participants perceived a Hearing Examiner would more narrowly consider the issues, hear cases more efficiently, provide more continuity, and develop an expertise through ongoing involvement on a continuing basis that cannot be achieved with a part-time board.

Participants agreed that the use of a Hearing Examiner would bring objectivity to the process. Many voiced the sentiments of one participant who said that a Hearing Examiner typically does not get caught up in “a million side issues” and “can get rid of all the tears.” There was a perception that a Hearing Examiner would force lawyers to prepare their cases properly. One participant noted that the odds of interpreting and applying the law properly are greater with a Hearing Examiner.

Participants observed that the use of a Hearing Examiner would add a layer of accountability to the process. They observed that a professionally trained hearing examiner would be held to a higher level of scrutiny and would be less subject to political manipulation. Some noted it would be easier to raise questions if there were a perception that a hearing examiner had acted improperly.

Participants acknowledged that the use of a Hearing Examiner would add another layer to the approval process and many believed a Hearing Examiner would slow things

down. Whereas today the Board of Appeals can often conduct a hearing, close the record and make a decision in one sitting, a new system could require time for the Hearing Examiner to prepare a report, plus additional time to schedule the item on the Board's agenda. Moreover, the Board of Appeals could have fairly long debates because it would have missed the body language of the hearing.

Participants who agreed on a new role for the Hearing Examiner did not agree on what that role should be. Some supported having the Hearing Examiner conduct the hearings, with a recommendation to the Board of Appeals. Others favored a Hearing Examiner who would hear and decide cases, with an appeal to the County Council for highly contentious cases.

Many participants observed that whether a Hearing Examiner would be better than a lay board depends on the qualifications, experience, background and training of the Hearing Examiner. Some participants believed the Hearing Examiner should be trained as a lawyer with a strong zoning background. Other participants supported a Hearing Examiner trained in land use planning, with the ability to understand and analyze complex technical studies.

Some participants preferred to keep a citizen board with the flexibility the law currently provides. Participants expressed a fondness for the Board of Appeals as a County institution. They stated they have always had confidence in the Board of Appeals, that the County has been blessed with experienced Board members, and that they have always been treated well by the Board.

One participant acknowledged that the strength of the Board comes from its "citizen roots." Participants expressed appreciation for the common sense that a lay board brings to resolving a case. Others stated that they liked "having more than one brain" working on an issue, especially for controversial projects. Participants acknowledged the value of the Board lies in putting "soul" into the interpretation of the zoning ordinance.

Those who favored retaining a citizen board were concerned that under the proposal to have a hearing examiner hold hearings, the Board would get a package "purged of emotional issues." There was a concern that although the record would be complete, it would also be "sterile." Another concern was that the process would lose the ability the Board of Appeals has now to bounce things back and forth in order to work towards an opinion.

3. Using the hearing examiner to provide a better way to site community serving special exceptions

Some participants were concerned that there has been a radical shift in the attitudes about special exceptions in the County. They observed that special exceptions are treated with a lot of hostility, especially in residential zones. They noted that this emerging attitude is anti-smart growth and remarked that community-serving uses might

more properly be labeled community-building uses. A few participants reminisced about the scale and mix of uses in the neighborhoods where they grew up and said that the County would be going in the wrong direction if it were to take these special exceptions out of residential neighborhoods.

Participants offered several observations and suggestions about more effective ways to site community serving special exceptions. One participant suggested that the Council could respond to the hostile treatment of community special exceptions by adopting a policy statement acknowledging that these facilities make valuable contributions, re-wording the general conditions in the zoning ordinance to be more neutral, and deleting negative special exception language from its master plans.

One participant suggested that the Council should worry less about the structure of the hearing process and more about whom they appoint. This person believed that if the Council appointed a Board that balanced protectionist and pro-growth advocates, the Board would be able to work out the issues.

Participants distinguished between different types of special exceptions – namely those that have only a narrow public benefit and others have a public interest that transcends the immediate neighborhood.

Some participants believed that the process is not structured to allow the decision-maker to recognize or weight the broader public interest. They stated that by law, the Board of Appeals must measure an application according to its impact on the immediate neighborhood. Its job is not to evaluate the general welfare and it can't look beyond the standards in the ordinance to the issues of broader public benefits. They stated that it is ridiculous that uses such as a hospital, a private school or an elderly housing project are viewed only in terms of their impact on an immediate neighborhood when there is a public interest in these uses thriving so that they can provide first-rate services.

They suggested that the Council needs to structure a review process for community serving uses that is respectful of abutting neighborhoods but also recognizes the more widespread benefits of some uses. This process must be a fully transparent public process where the applicant has to justify their case and where conditions are openly negotiated.

One participant suggested a combination of a mandatory referral process coupled with a first rate site plan review process could be an effective remedy. Under this approach, the site plan review process would address the impacts on the adjacent properties. A first rate site plan could encourage smart growth policies by finding innovative solutions to standardized setbacks in the ordinance.

Some participants remarked that mandatory referral would not be a good approach because it is only an advisory process and, more importantly, there would be no appeal to court. One participant acknowledged that certain uses should legitimately bypass the zoning process through mandatory referral because a zoning hearing becomes

a forum for people to complain. This participant suggested limiting the mandatory referral/site plan approach to uses that have strong social values such as Personal Living Quarters (PLQs). Another participant suggested developing a conditional use permit as an alternative approach.

Other participants agreed that the immediate neighborhood carries too much weight in the current process and supported a hearing examiner because a Hearing Examiner would be as far removed as possible from the process.

One participant suggested there may be merit in establishing an up-front mediation process for cases that create conflict and controversy within a community. This participant observed that the People's Counsel has helped some groups to work out issues and that neighborhoods have used private contractual agreements to eliminate friction in other cases. Another participant was wary of any remedy that added an additional step and more professionals to an already complex and cumbersome process. This participant was concerned that the general public would never be able to keep up if the County brought in a mediator with a whole new set of rules.

4. Hearing examiner costs and sources of funds

Participants agreed that for the Hearing Examiner to hear all special exceptions would probably require two full-time examiners plus an increase in support staff. One participant commented that money might also be needed for additional hearing rooms.

Participants suggested several funding strategies. One participant remarked that the Board of Appeals is not routinely collecting fees that are already on the books for a modification process. Another participant proposed instituting higher fees for amendments to give an applicant an incentive to submit the best plan at the beginning of the process.

Another participant suggested raising current application fees to reflect the value of the project. One participant commented that the existing fee schedule subsidizes more socially oriented uses and that an increase in application fees would likely continue that subsidy. A few participants observed that the current application fees are among the highest on the East Coast. Some participants stated that their clients would pay higher fees to support a Hearing Examiner.

Another participant recommended requiring special exception holders who are brought in for show cause hearings to pay the cost of the proceedings if they are found to have violated the conditions of their special exception.

V. FINDINGS

This section of the report summarizes OLO's findings and conclusions. The general findings report participants' satisfaction with the hearing process and perceptions about the Board of Appeals and special exception uses. The specific findings address the workload of the Board of Appeals and the issue of community serving special exceptions and a role for the Hearing Examiner.

GENERAL FINDINGS

#1. Participants' overall satisfaction with the special exception hearing process varies widely.

OLO's interviews with participants about their experiences in special exception hearings revealed varying levels of satisfaction and a diverse set of observations and comments. Some participants acknowledged their satisfaction and perceptions were frequently shaped by the outcome of the case although other participants stated that they found the hearing to be fair even though they disagreed with the decision.

Many who participated in hearings before the Montgomery County Board of Appeals, the Montgomery County Hearing Examiner and/or the Prince George's County Hearing Examiner reported that the hearings are fair, evenhanded and well managed. Other participants in front of each body raised concerns about the hearing being too open or an opponent's testimony wandering off.

#2. Participants' views about the Board of Appeals and the Hearing Examiner closely mirror what the research literature says about each approach.

The planning research literature recognizes distinct differences in using a lay board versus a hearing examiner to conduct the special exception process. The literature finds that citizen boards function as a jury and work to adjust the conflicts between the imperfections of the zoning regulations and existing property interests. The use of lay boards reflects the role of values in weighing land use decisions. In this role, the research literature suggests that a balanced representation of the economic and political interests of a community has been important to the successful functioning of a board.

The research literature suggests that a lay board also comes with certain risks. Historically, some studies found lay boards have granted too many variances and undermined the comprehensiveness of the zoning system. Other studies reported that citizen boards had not operated to assure citizens equal protection or to produce a pattern of consistent, sound and articulate judgments.

The professional literature reports that a hearing examiner improves compliance with the legal requirements of due process, improves fact finding, increases the likelihood

of reaching a decision based on logic and insures fairness and consistency through more professional and timely decisions.

The disadvantages of a hearing examiner are that this approach leads to the loss of diverse views and the loss of an outsider's and/or a generalist's perspective. Other drawbacks are more formal decision making procedures and the increased costs.

OLO's interviews suggest that participants in Montgomery County perceive that a difference exists in how a lay board arrives at its decision, compared to a hearing examiner. Specifically, participants recognize that the Board of Appeals uses a searching, interactive process to reach a creative decision. In contrast, participants report that the Hearing Examiner reaches a recommendation based on a record of facts and logic.

Participants expressed mixed views about each approach. Some participants appreciated the flexibility inherent in the approach used by the Board of Appeals whereas other participants felt like the Board was "making up" answers. Similarly, some participants appreciated the contribution of the Hearing Examiner as an objective fact finder; however, others raised concerns that the recommendations were "sterile" and made by only one person.

#3. Participants' observed about the institutional role of the Board of Appeals and the changes instituted by the current Board suggest schisms continue to exist in the County about the value, role and appropriate enforcement of special exceptions.

Almost all of the people OLO interviewed acknowledged that the Board has changed its operations since the current Chair was appointed; however participants disagreed about the value of these changes. Several participants expressed great satisfaction with this Board and the changes it has implemented. Participants commented that the Board is really "attuned" to the effects special exceptions have on surrounding neighborhoods.

Other participants observed that the County has seen a general "hostility toward special exceptions" emerge in the last few years. They noted that the County Council appointed the new Chair in response to complaints from civic activists and that the Board is carrying out the Council's wishes. Some participants reported a perception exists that the County has "targeted" private educational institutions and landscaping contractors for elimination. Some special exception holders who thought they were doing the right thing or making a community contribution feel like they have been "clobbered unfairly" and feel punished by the County.

- #4. Many observers suggested the County Council focus less on which body would hear and/or decide special exceptions and more on the qualifications of the people making the decisions.**

Some participants observed that whether a hearing examiner would be better than a lay board depends on the qualifications, experience, background and training of the hearing examiner. Some participants believed the hearing examiner should be trained as a lawyer with a strong zoning background. Other participants supported a hearing examiner trained in land use planning, with the ability to understand and analyze complex technical studies.

One participant suggested that the Council should worry less about the structure of the hearing process and more about the people they appoint. This person believed that if the Council appointed a Board that balanced protectionist and pro-growth advocates, the Board would be able to work out the issues.

SPECIFIC FINDINGS ABOUT THE BOARD OF APPEALS' WORKLOAD

- #5. Participants observed that it took a long time to complete the special exception process. Many applicants expressed concerns about the time it took the Board to issue an opinion after it made its decision.**

Participants felt that long delays exist in the special exception process. Participants reported that typically, a hearing is scheduled three to four months after an application is filed, and it takes from three to twelve months to issue an opinion after the hearing is held.

Several participants identified the delay in issuing an opinion as a serious problem. Many noted that nothing is final until the opinion is adopted and that problems are created because, in the interim period, the Board "can and does change its mind."

Participants expressed mixed views about whether hearings held over multiple days were a problem or not. Some observed that it is difficult for Board members and participants alike to remember all the details of a hearing and that there are extra expenses associated with preparing for several separate hearing days. Other participants believed that hearings extended over several weeks provided more opportunities for the public to attend at least one day of a hearing.

#6. Participants believed multiple factors have contributed to the increased number of hearings and the increased number of hearing days.

Many participants believed the Board's increased workload results from several factors. Specifically, participants identified the following factors that have contributed to the Board's heavy workload –

- More controversial cases that required multiple hearing days;
- A increase in the complexity of cases;
- A more open-ended approach to managing the hearings, which has increased the length of many hearings;
- Stepped up inspections by the Department of Permitting Services (DPS), which have increased the number of modification requests; and
- A more conscientious interpretation of the law, which has increased the number of hearings the Board holds.

One participant observed that the current Board's interest in making sure everything is done properly has slowed down the proceedings generally. Some participants reported that previous Boards granted more modifications administratively and questioned whether holding more hearings on minor administrative matters represents a good use of the Board's valuable hearing time.

#7. Participants proposed a range of solutions to address the Board's current workload problems.

Participants suggested the Board could pursue several different strategies to address the Board's workload issues. Some suggested that the County Council amend the Rules of Procedure to tighten up the hearing process or, more informally, tell the Chair to change how the hearings are run. Another participant suggested that the Chair could use pre-hearing conferences to narrow the issues of dispute.

Some participants suggested the Board explore a method to triage the multitude of modification requests stemming from the DPS inspection process. They suggested that the Board develop a method for resolving minor infractions at the staff level without the need for a hearing before the Board or develop an administrative procedure to handle technical issues identified by DPS inspections.

#8. Some participants believed transferring special exception hearings to the Hearing Examiner would not resolve the Board's workload issues.

Some participants did not believe that transferring special exception hearings to the Hearing Examiner would resolve the Board's workload issues. Others thought this change would add another step and lengthen the process. Another observed that it would only shift the decision to a different arena.

***SPECIFIC FINDINGS ABOUT SPECIAL EXCEPTIONS
AND A ROLE FOR THE HEARING EXAMINER***

#9. Participants proposed that the Council establish a policy and review process for community serving uses.

Participants offered several observations and suggestions about more effective ways to site community serving special exceptions.

One participant suggested that the Council could respond to the “hostile treatment” of community special exceptions by adopting a policy statement acknowledging that these facilities make valuable contributions, re-wording the general condition language in the Zoning Ordinance to be more neutral, and deleting negative special exception language from the County’s master plans.

Other participants suggested that the Council focus on structuring a review process for community serving uses that is respectful of abutting neighborhoods but also recognizes the more widespread benefits of some uses. This approach would respond to a perception that the immediate neighborhood carries too much weight in the process under current law, especially for community uses, which must thrive in order to provide first-rate services for citizens throughout the County. Suggested approaches included a combined mandatory referral/site plan review process or a conditional use permit.

One participant suggested there may be merit in establishing an up-front mediation process for cases that create conflict and controversy within a community. Another participant was concerned that the general public would never be able to keep up if the County brought in a mediator with a whole new set of rules.

#10. Participants expressed mixed views about giving the Hearing Examiner an expanded role in the special exception process.

Participants representing both community and developer interests supported a role for the Hearing Examiner. Participants cited many advantages to using a Hearing Examiner. Specifically, some believe a Hearing Examiner would more narrowly consider the issues, hear cases more efficiently, provide more continuity, and develop an expertise through ongoing involvement on a continuing basis that cannot be achieved with a part-time board.

Some participants preferred keeping a citizen board with the flexibility the law currently provides. Participants expressed a fondness for the Board of Appeals as a County institution. They stated they have always had confidence in the Board of Appeals, that the County has been blessed with experienced Board members, and that they have always been treated well by the Board.

Participants expressed appreciation for the common sense that a lay board brings to resolving a case. Others stated that they liked having “more than one brain” working on an issue, especially for controversial projects. Participants acknowledged the value of the Board lies in putting “soul” into the interpretation of the Zoning Ordinance.

Those who favored retaining a citizen board were concerned that under the proposal to have a Hearing Examiner hold hearings, the Board would get a package “purged of emotional issues.” There was a concern that although the record would be complete, it would also be “sterile.” Another concern was that the process would lose the ability the Board of Appeals has now to bounce things back and forth in order to work towards an opinion.

#11. Participants who supported a role for the Hearing Examiner in the special exception process do so for different reasons.

Participants who favored an expanded role for the Hearing Examiner cited several reasons. Some participants suggested that a lay board is an anachronism left over from the 1960s and that it no longer makes sense for a County with a population of 850,000 to have a lay board with part-time members. Another participant supported the use of a Hearing Examiner to help institutionalize the changes that the current Board has brought to the special exception process.

Many believed the Hearing Examiner would improve the hearing process by making findings of fact, treating parties fairly and equally, and managing the hearing process. Others believed the Hearing Examiner would bring objectivity to the process and would force lawyers to prepare their cases properly. Finally, some observed that the Hearing Examiner would add a layer of accountability to the process and could be held to a higher level of scrutiny, and would be less subject to political manipulation.

#12. Participants suggested many ways to pay for the increased costs that a Hearing Examiner would incur.

Participants believed an expanded role for the Hearing Examiner would require two full-time examiners plus an increase in support staff. They suggested several funding strategies:

- Routinely collecting fees that are already on the books for a modification;
- Raising current application fees to reflect the value of the project;
- Instituting higher fees for amendments to a proposed application to give an applicant an incentive to submit the best plan at the beginning of the process; and
- Requiring special exception holders brought in for show cause hearings to pay the cost of the proceedings if they are found to have violated their special exception.