

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-  
WASHINGTON REGIONAL DISTRICT IN  
MONTGOMERY COUNTY, MARYLAND

Office of Zoning and Administrative Hearings  
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Rockville, Maryland 20850  
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[www.montgomerycountymd.gov/mc/council/hearing.html](http://www.montgomerycountymd.gov/mc/council/hearing.html)

IN THE MATTER OF:  
SKYLARK INVESTMENT LLC AND  
CLARKSBURG VILLAGE LLC,  
Applicants

David Flanagan  
Craig Hedberg  
Leslie William Powell

For the Applicants

Robert H. Harris, Esquire  
Attorney for the Applicant

Martin Klauber, People's Counsel  
For Montgomery County

Neither in Support Nor in Opposition

Cherian Eapen  
Paul Majewski

In Opposition to the Application

Development Plan Amendment (DPA)  
Application No. 05-1

Before: Françoise M. Carrier, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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## I. SUMMARY

- Development Plan to be Amended:** Approved Development Plan for Greenway Village/Arora Hills, a large subdivision under construction in Clarksburg on a 374-acre tract located west of Ridge Road, north of Frederick Road and south of Stringtown Road.
- Site Size and Location:** The subject site is a three-acre area within 17 acres designated for a commercial center bounded by Little Seneca Parkway, Arora Hills Drive, Newcut Road and Snowden Farm Parkway.
- Current Zone and Use:** The subject site is zoned PD-4 and is undeveloped.
- Proposed Use:** The Development Plan Amendment proposes construction of an age-restricted, four-to-five-story multi-family residential building with 100 units in an unused area of the 17-acre tract that was previously approved for retail/commercial uses. This would increase the total number of dwelling units in Greenway Village from 1,330 to 1,430.
- Recommendations:** The Hearing Examiner, the Planning Board and Technical Staff all recommend approval, on grounds that the proposed multi-family building would be consistent with the applicable master plan, compatible with existing and planned uses in the surrounding area, and in compliance with the development standards for the zone.
- Neighborhood Response:** The Clarksburg Civic Association (CCA) and individual community members participated in opposition to this project. They argue that the residential density level previously approved for Greenway Village should not be exceeded, and that the proposed building would be too tall, not the right use for the site, and not well integrated into the retail center.
- Two individual community participants argued that no changes to the approved Development Plan should be permitted until the nearby homes have been built and occupied, so that the future residents who would be most affected have the opportunity to participate. The Hearing Examiner sees no legal basis to deny a development plan amendment for this reason.

## II. STATEMENT OF THE CASE

The proposed development plan amendment relates to a Development Plan that was originally approved in April, 2001 in connection with Local Map Amendment Application No. G-735,

and was amended via Development Plan Amendment Application No. DPA 04-3, which the District Council approved on December 14, 2004.<sup>1</sup>

LMA G-735 approved the construction of a new development, Greenway Village (also known by its "marketing name" of Arora Hills), with 1,330 dwelling units and a commercial center containing 89,000 square feet of retail/commercial uses. At the same time, LMA G-784 approved an adjacent new development, Clarksburg Village, with 2,653 dwelling units and 20,000 square feet of retail space, to be combined in a single commercial center with the commercial portion of Greenway Village. The two zoning reclassifications thus approved a total of 109,000 square feet of commercial space. This was considerably less than the 210,000 square feet of combined retail space that the developers had requested, on the advice of Technical Staff. As described by the current developer, Elm Street Development, represented by David Flanagan, the rezoning applications were recommended for approval with 210,000 square feet of retail by Technical Staff, the Planning Board and the Hearing Examiner. Based on opposition from the Clarksburg Citizens Association (the "CCA") and Clarksburg residents, who pointed out that the applicable master plan recommended 109,000 square feet of commercial space for that area, the District Council remanded the application to the Planning Board for a reduction of the combined commercial area to a total of 109,000 square feet. Mr. Flanagan stated that for the sake of expediency, nothing was changed except reducing the retail area to 109,000 square feet. This, Mr. Flanagan explained, left the developer of Greenway Village with "empty land" – land that could not be used as part of the commercial center, but had not been designated on the approved Development Plan for anything else.

Since the time of the original approvals, the developer of Clarksburg Village has purchased the portion of the commercial area that was originally part of Greenway Village, so the entire area proposed as the Village Center is under single ownership. Both entities, Greenway Village

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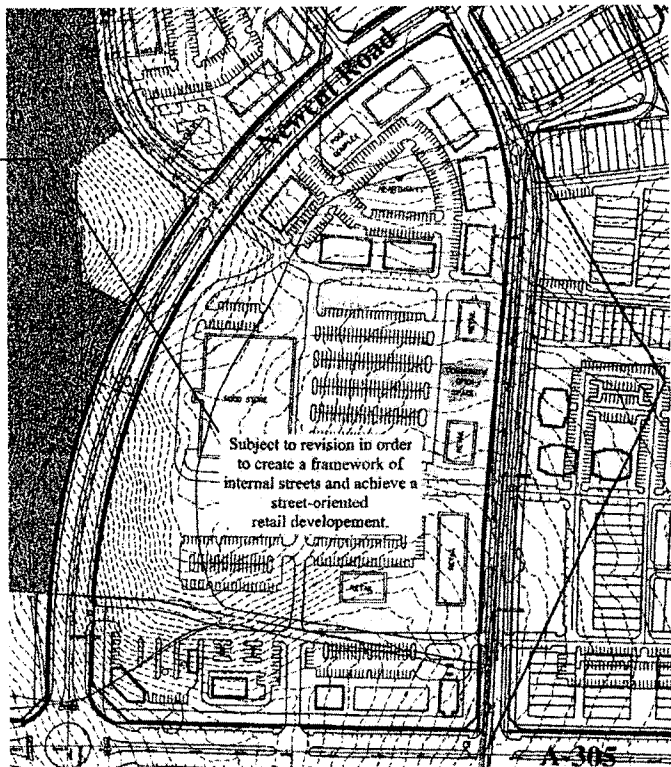
<sup>1</sup> The Development Plan approved in 2004 depicts many plan refinements that took place between 2001 and 2004 as part of the site plan approval process, but the only issue that was addressed in DPA 04-3 was the relocation of 2000 square feet of indoor community space from the commercial center to a clubhouse. The 2004 amendment was not the subject of a public hearing before a hearing examiner, but was decided by the Council based on the favorable recommendations of the Planning Board and Technical Staff.

LLC and Clarksburg Village LLC (the “Applicants”), are co-applicants in this case. They seek approval to build an age-restricted, multi-family apartment building with 100 dwelling units in a three-acre portion of the 17-acre commercial area.

The originally approved Development Plan provides basic street layouts and building locations for most areas of the 374-acre Greenway Village site. See Ex. 23(b). The 17-acre commercial area has a street layout and building locations, but, as shown on the excerpt below, they are overlaid by the following text: “Subject to revision in order to create a framework of internal streets and achieve a street-oriented retail development.” Ex. 23(b). Thus, changes to the layout of this area are expected to occur during the site plan approval process. Site plan review has not yet taken place for the commercial area, although site plans have been approved for the other 357 acres. The Applicants are not seeking approval in this application for any elements of the Development Plan other than the addition of a multi-family building in a three-acre portion of the commercial area. Other changes in the design and layout of the commercial area will be considered during site plan review, consistent with the original Development Plan approval.

**Retail Area Excerpt from Original Greenway Village Development Plan, Ex. 23(b)**

Text: Subject to revision in order to create a framework of internal streets and achieve a street-oriented retail development.



The present application has a long history. It was filed nearly three years ago, on June 17, 2005. It was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission ("M-NCPPC"), who recommended *denial* in a report issued in late 2006 (the "2006 Staff Report"). See Ex. 22. The denial recommendation was based on conclusions that the proposal was not well-integrated into the mixed-use neighborhood center, and that the placement of the senior housing was not optimal and would not help create a walkable, interconnected system of streets and retail uses with integrated housing. See Ex. 22 at 1. Applicants' counsel, Robert Harris, reports that when the Applicants appeared for the scheduled consideration of this matter by the Montgomery County Planning Board (the "Planning Board") on January 4, 2007, Staff indicated that they were not prepared to present the matter that day.<sup>2</sup> See Ex. 30. The matter was deferred, first to later in January, then to February, then indefinitely. As Mr. Harris stated in a letter to the Planning Board Chair, some members of Technical Staff preferred to have the Applicants redesign the retail center as a whole before getting any approval for the age-restricted apartment building. See *id.* The Applicants refused to consent to this, and eventually Technical Staff issued a new Staff Report, on February 22, 2008, recommending *approval* (the "Staff Report").<sup>3</sup> See Ex. 38. The Planning Board considered the application on March 10, 2008 and, by a vote of 3 to 0, recommended *approval*. See Ex. 39. In response to concerns raised by John Cook, Chair of the CCA Planning Committee, the Planning Board recommended adding two binding elements to the Development Plan, to which the Applicants agreed:

1. The proposed multi-family building must be limited to 4 to 5 stories and a maximum of 55 feet in height.
2. The developer must provide 138 designated parking spaces for the residents of the building.

These recommendations are reflected in the present development plan amendment.

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<sup>2</sup> This position may have been influenced by a letter from the CCA to the Planning Board Chair, dated January 4, 2007, requesting that the matter be deferred due to last-minute submissions by the Applicants that required additional review and a new Staff Report. See Ex. 28.

<sup>3</sup> The Staff Report has been liberally paraphrased in Parts I and III.

Under Section 59-D-1.74(d) of the Zoning Ordinance, the Hearing Examiner must conduct a hearing in a DPA case if there is public opposition to the application, or if a hearing is recommended by the Planning Board or requested by an aggrieved party within ten days of the Planning Board's consideration of the case. The Staff Report in this case, which was adopted by the Planning Board, stated that the application should be reviewed by the Hearing Examiner. Accordingly, a public hearing was scheduled and convened, after proper notice, on March 14, 2008. The hearing concluded on March 31, 2008. As required under Section 59-D-1.74(d) of the Zoning Ordinance, the record closed that day.

### **III. FINDINGS OF FACT**

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

#### **A. Subject Property**

The Greenway Village/Arora Hills property consists of approximately 374 acres of land. The commercial center contains approximately 17 acres, and is bounded by future sections of Little Seneca Parkway, Arora Hills Drive, Newcut Road and Snowden Farm Parkway.<sup>4</sup> The term "subject property" is used in this report to refer to the three-acre portion of the commercial center that is the subject of this application, which is located in the northwest corner of the commercial area, at the future intersection of Arora Hills Drive and Little Seneca Parkway. The general location of the subject property may be seen on the vicinity map on the next page.

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<sup>4</sup> It is not clear whether the 17-acre figure applies just to the Greenway Village portion of the commercial center, or to the combined Greenway Village/Clarksburg Village commercial center. The line between the two development plans that were approved in the original rezonings cuts through the combined commercial area on a diagonal line slightly north of Snowden Farm Parkway. The bulk of the commercial area is on the Greenway Village side of the line, so if the 17-acre figure does not include the part south of the line, the additional acreage is not significant for purposes of this application.

Vicinity Map, from Staff Report Attachment 1



LEGEND

-  DPA-05-1
-  Surrounding Area
-  Building
-  Paved Area
-  Lake and Pond
-  Stream and River

1" = 1/4 mile  
Address: Newcut Rd & Ridge Rd, Clarksburg

Key Map  
NTS



The subject property is part of a hilly, irregularly shaped, vacant piece of land surrounded by vast open space and large trees. The only nearby road that actually exists is Newcut Road, which abuts the commercial area to the west, but does not abut not the subject property.



Hearing testimony suggests that the map shown on the previous page very nearly depicts what actually exists, except that some of units shown between Skylark Road and the Greenway Trail (an area of parkland shown in small dots, which runs down the middle of the Greenway Village site) have been platted but have not yet been built. See Tr. March 14 at 55. The aerial photograph below provides an idea of the current surroundings, but it is somewhat outdated and does not show all the development that has taken place in Greenway Village. See *id.*

**Aerial Photo, from Staff Report Attachment 2**



**LEGEND**  
DPA-05-1  
○ Surrounding Area

1" = 1/4 mile  
Address: Needle Rd & Ridge Rd, Clarkburg



## **B. Surrounding Area**

The surrounding area must be identified in a development plan amendment case so that compatibility can be evaluated properly. In general, the description of the surrounding area takes into account those areas that would be most directly affected by the proposed development. In the present case, Technical Staff recommended the surrounding area shown on the maps on pages 8 and 9, which is comprised of the 374-acre Greenway Village tract that sits to the north of the subject site. See Staff Report attachments 1 and 2. (The Applicants' land planner/landscape architect did not offer a recommended surrounding area.) In the Hearing Examiner's view, the surrounding area for this application should encompass property to the south that is likely to be affected, as well as to the north, but need not include the large area suggested by Staff, given the modest size and intensity of use of the proposed building. The Hearing Examiner designates the surrounding area to include the 17-acre commercial area and all parcels adjacent to it and confronting across planned roadways, as well as the first row of homes on the west side of the Greenway Trail.

The surrounding area as described above is classified under the PD-4 Zone and contains mostly undeveloped land. The 17-acre commercial area is intended for retail/commercial development, although no specifics have been provided as to the nature of the uses or the size of the buildings. Excluding the Greenway Trail, the rest of the surrounding area is either planned for or has been developed with various types of dwellings: single-family detached homes, townhouses, two-over-two units and multi-family buildings.

The photographs of the subject site and part of an existing Greenway Village neighborhood on the next page were provided by community member Cherian Eapen.

**View of Subject Site Looking North on Newcut Road, Ex. 65(f)**



**View from North Edge of Subject Site Towards Skylark Road and Greenway Village, Ex. 65(a)**



### C. Proposed Development

The Applicants propose to add to the Development Plan an age-restricted, multi-family building containing 100 dwelling units, with four to five stories and a maximum height of 55 feet. Detailed plans would be developed during site plan review, but the preliminary plan includes four stories facing east, including the front façade of the building, a turnaround area for vehicles and a small seating area, and five stories to the west, where the topography lends itself to an additional building story. The proposed building would have a designated, gated parking area with the full number of spaces required under the Zoning Ordinance.<sup>5</sup> Based on the current breakdown of 50 one-bedroom units and 50 two-bedroom units, this would require 138 parking spaces. The promise to provide designated parking in the full amount called for under the Zoning Ordinance was added as a textual binding element at the suggestion of the Planning Board, to ensure that residents of the apartment building would not have to compete for parking with retail customers.

The Applicants presently propose to follow federal guidelines for an age-restricted building, which require that one person age 55 or older reside in each dwelling unit, and prohibit children from residing in any unit on a permanent basis. The record includes a letter to the Planning Board Chair dated January 3, 2007 (immediately before the Planning Board was first scheduled to consider this application) from Jeffrey C. Kirby, owner of J. Kirby Development, LLC, a real estate development firm specializing in affordable and senior housing. See Ex. 27. Mr. Kirby states that his company has found a high level of demand at a senior housing site that was reserved at Clopper's Mill in Germantown well before the market had matured, and was built as the community aged. Mr. Kirby recommends that new communities reserve space for senior housing early on, near shopping, public transportation, office space, churches and other services. He suggests that while Clarksburg

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<sup>5</sup> This commitment is significant, given that other age-restricted apartment buildings have been constructed with waivers to permit fewer than the full number of parking spaces required under the Zoning Ordinance. Waivers have been granted based on arguments that due to the age restriction, residents would have fewer cars than in apartment buildings that are open to all ages. Testimony at the public hearing in this case indicated that residents of an age-restricted apartment building in a similar retail area in Clopper's Mill, where the full number of parking spaces was waived, have chronic problems finding parking spaces. The Applicants in this case have committed not to seek a parking waiver for this building.

may not have a large senior population today, the demand will grow as families age. He also recommends that senior housing be located in a separate building, not above retail uses. In Mr. Kirby's experience, seniors want their own identity and have major concerns about security, so they do not want to be in the same building with retail uses. Moreover, he finds that retail is built at the beginning of a community, and the senior housing may not be needed for a number of years. In addition, he considers the cost of building senior housing over retail prohibitive. Mr. Kirby recommends approving a general footprint for a senior building near the Clarksburg Village/Greenway Village retail area and offers to work with Technical Staff at the appropriate time to ensure a compatible façade. See Ex. 27.

A textual binding element on the proposed development plan amendment commits the Applicants to provide architectural design features with a compatible residential appearance on all four sides. To the east, the proposed building would face a row of "two-over-two" residential buildings across the entry drive into the retail area. These buildings have two dwelling units on each floor. Testimony from the Applicants' planner indicates that due to topography, these units would sit about six feet higher than the proposed multi-family building. The approved subdivision for Greenway Village sets a maximum height for the first row of units of 55 feet. Behind this row (to the east), the approved subdivision plan calls for two rows of townhouses with a maximum height of 40 feet, then another row of two-over-two's with a maximum height of 55 feet.

To the north, across Arora Hills Drive, the proposed building would confront two-over-two's with a maximum height of 50 feet and townhouses with a maximum height of 40 feet. To the north and northwest, diagonally across the proposed intersection of Little Seneca Parkway and Arora Hills Drive, the proposed building would confront single-family homes with a maximum height of 35 feet, and townhouses with a maximum height of 40 feet. The closest single-family detached home would be separated from the proposed multi-family building by a five-foot building setback, a 45-foot open space that encompasses part of a bike trail connection leading to the greenway, the 100-foot right-of-way for Little Seneca Parkway, and whatever building setback is established for the proposed building at site plan.

To the west, the proposed building would face Little Seneca Parkway and beyond it the Greenway Trail. To the south, the proposed building would be separated from the retail center by its designated parking area.


Pursuant to Code § 59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the zone. This development plan must contain several elements, including a land use plan showing site access, proposed buildings and structures, a preliminary classification of dwelling units by type and number of bedrooms, parking areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. Code §59-D-1.3. The Development Plan is binding on the Applicants except where particular elements are identified as illustrative or conceptual. The Development Plan is subject to site plan review by the Planning Board, and changes to illustrative elements may be made at that time. The principal specifications on the Development Plan – those that the District Council considers in evaluating compatibility and compliance with the zone, for example – may not be changed without further application to the Council to amend the Development Plan.

The principal component of the development plan amendment proposed in this case is a two-page document. Page one, Exhibit 61(a), is entitled "Revised Development Plan"; page two, Exhibit 61(b), is entitled "Revised Development Plan – Age-Restricted Housing Area." Exhibit 61(a) starts with the development plan that was approved in conjunction with the 2004 amendment to the original development plan, which has been revised to depict the 17-acre commercial area in a hatched pattern, with the caption "SEE SHEET 2 OF 2 FOR THIS AREA." Exhibit 61(b) shows the 17-acre commercial area at a larger scale, with approximate locations for the proposed multi-family building, its parking area and the residences planned nearby, and conceptual depictions of the proposed retail buildings and associated parking. Exhibit 61(b) also has some general notes and a series of textual binding elements, which are designed to express commitments the Applicants have made in textual form. The textual binding elements have the following effects:

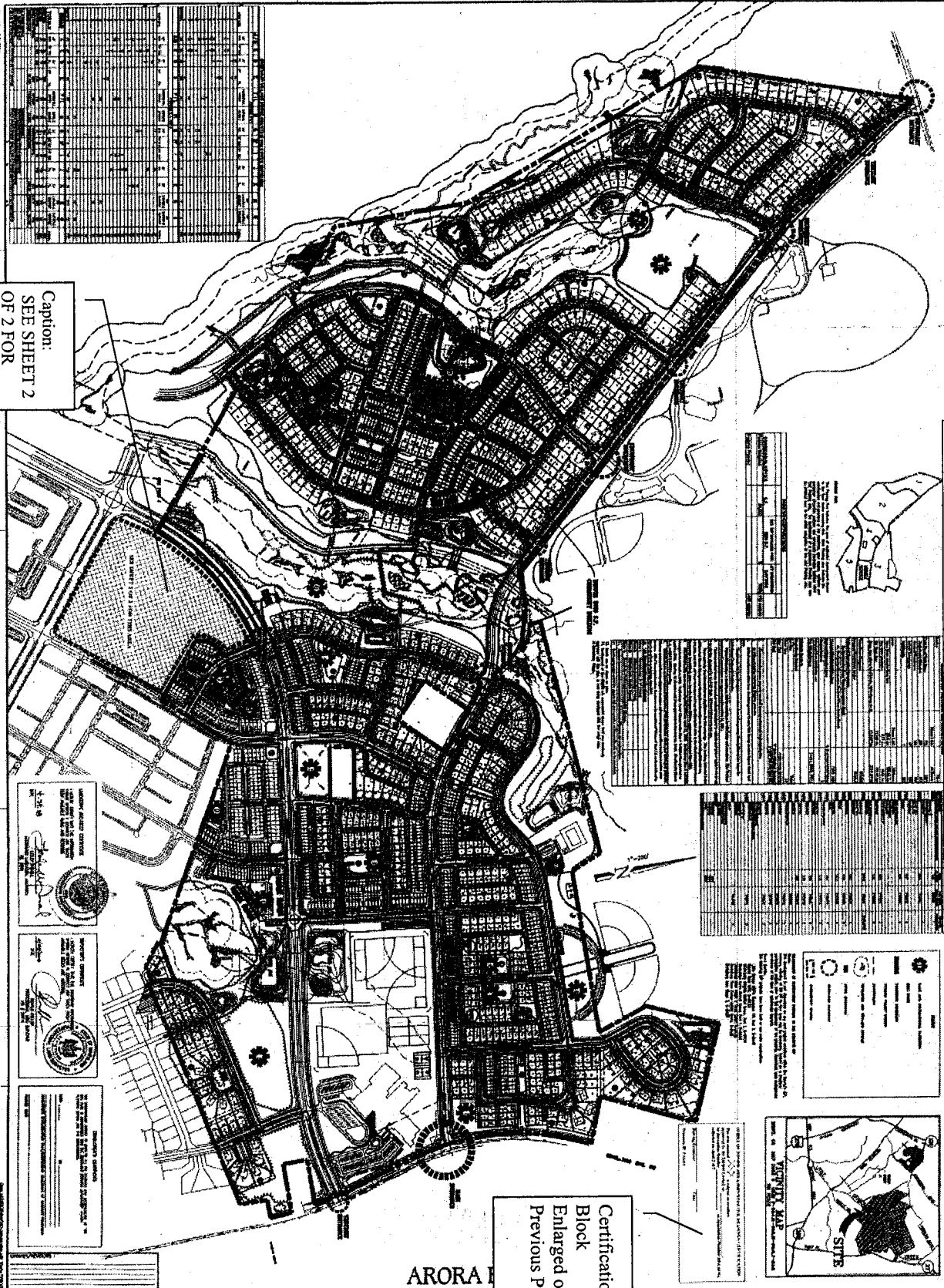
1. Limit the proposed building to 100 units.
2. Provide for the number of parking spaces required under the Zoning Ordinance.
3. Specify that the building would be built in a single phase.
4. Specify a maximum building height of 55 feet with four to five stories.
5. Specify that the building will have architectural design features with a compatible residential appearance on all sides.
6. Commit to 12.5 percent Moderately Price Dwelling Units on site, in the building.

The Planning Board's recommendation letter stated that it would carefully review the design of the project at site plan "to ensure that the senior housing is well integrated into the commercial component of the project and that the residential building is oriented towards streets with good pedestrian circulation in the neighborhood." Ex. 39 at 2. To give the Planning Board the discretion necessary to accomplish these goals, the notes on the Revised Development Plan, Page Two, indicate that the building footprint and design, as well as pedestrian and open space features and parking configuration, are approximate and subject to site plan approval. See Ex. 61(b).

Pages One and Two of the Revised Development Plan are depicted on the next two pages. Details and text from Page Two of the Revised Development Plan are reproduced in larger scale on the pages that follow. Immediately below this paragraph is an enlargement of the Hearing Examiner's Certification Block from the Revised Development Plan, Page One.

<b>OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS CERTIFICATION</b>	
The area marked  is subject to revisions approved by the District Council on _____, by Resolution Number _____, in Application Number DPA 05-01, reflected on sheet 2 of 2.	
Hearing Examiner	Date
Francoise M. Carrier	

Revised Development Plan, Page One, Ex. 61(a)



Caption:  
SEE SHEET 2  
OF 2 FOR  
THIS AREA

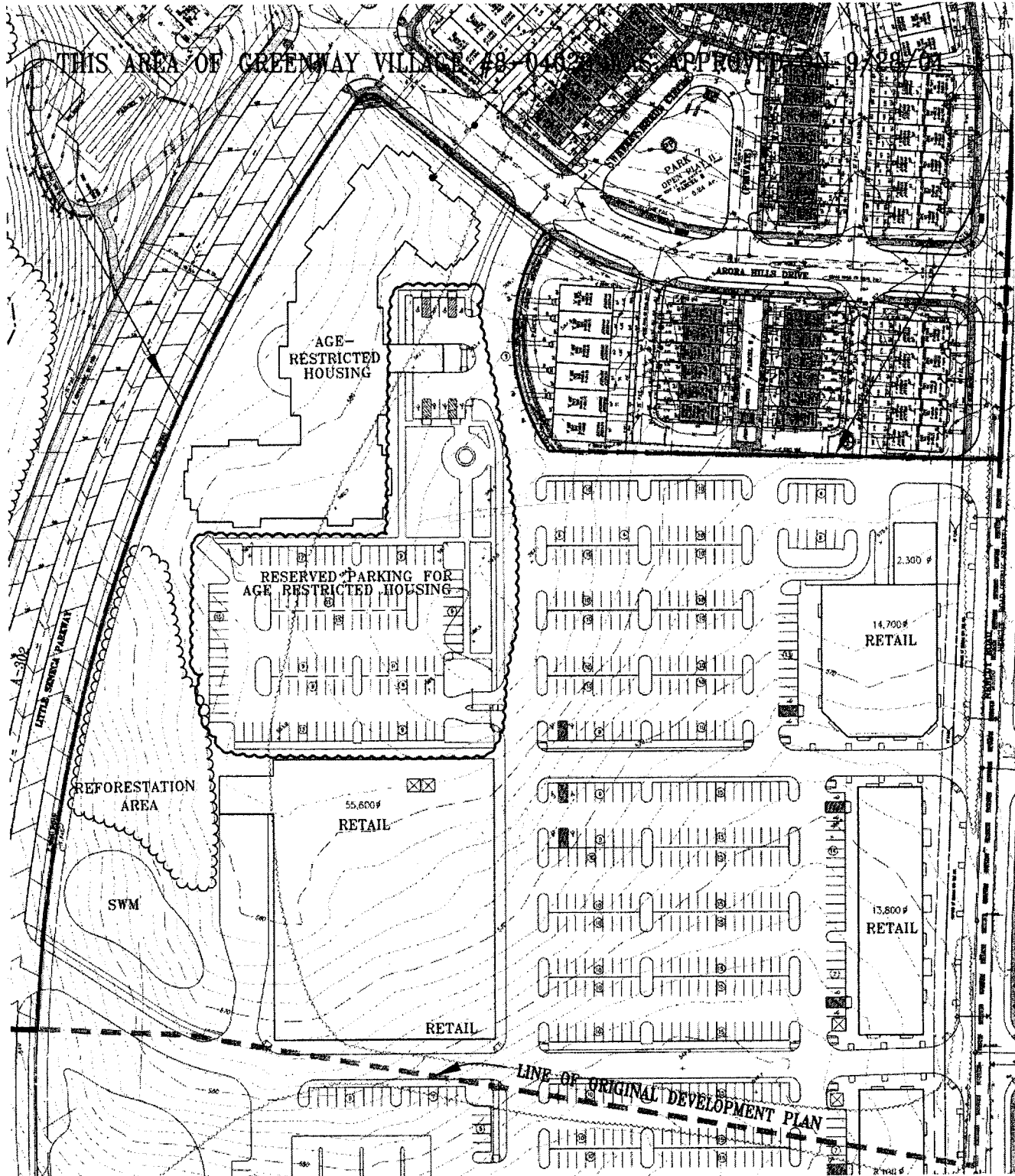
Certification  
Block  
Enlarged on  
Previous Page

ARORA





Revised Development Plan Page Two, Graphics for Subject Site and  
Immediate Vicinity, from Ex. 61(b)



**Revised Development Plan Page Two, Notes, from Ex. 61(b)**  
**This text reflects a handwritten correction made at the hearing.**

NOTES:

1. THIS IS AN AMENDMENT TO THE ORIGINAL DEVELOPMENT PLAN APPROVED IN LOCAL MAP AMENDMENT G-735, AS AMENDED BY APPLICATION No. DPA 04-03 AND BY THIS APPLICATION DPA 05-01.
2. BUILDING FOOTPRINT AND DESIGN, PEDESTRIAN FEATURES, OPEN SPACE COMPONENTS AND PARKING CONFIGURATION ARE APPROXIMATE AND ARE SUBJECT TO SITE PLAN APPROVAL.
3. THIS DEVELOPMENT PLAN AMENDMENT REFLECTS THE ADDITION OF 100 UNITS OF THE AGE-RESTRICTED HOUSING FOR AGE 55 AND UP, TOGETHER WITH ASSOCIATED PARKING.
4. PURSUANT TO RECOMMENDATIONS OF THE MONTGOMERY COUNTY PLANNING BOARD AT THE TIME OF APPROVAL OF THE ORIGINAL DEVELOPMENT PLAN, AND REVIEW OF THE DPA, THE LAYOUT FOR THIS AREA MAY BE REVISED AT THE TIME OF SITE PLAN APPROVAL TO REFLECT A FRAMEWORK OF STREETS AND A STREET ORIENTED PATTERN OF DEVELOPMENT TO THE EXTENT FEASIBLE.
5. ●————● POINT AT WHICH BUILDING HEIGHT IS MEASURED.

**Textual Binding Elements from Revised Development Plan Page Two, Ex. 61(b)**  
**This text reflects handwritten changes made at the hearing.**

TEXTUAL BINDING ELEMENTS

1. THE AGE-RESTRICTED HOUSING WILL BE LIMITED TO A MAXIMUM OF 100 DWELLING UNITS.
2. THE NUMBER OF PARKING SPACES TO BE PROVIDED FOR THE AGE-RESTRICTED HOUSING UNITS WILL MEET THE REQUIREMENTS OF THE ZONING ORDINANCE FOR MULTI-FAMILY HOUSING UNITS (ESTIMATED TO BE 138 BASED ON 100 UNITS AND A MIX OF 50-ONE BEDROOM AND 50-TWO BEDROOM UNITS).
3. THE AGE-RESTRICTED HOUSING WILL BE BUILT IN A SINGLE PHASE.
4. THE MAXIMUM BUILDING HEIGHT WILL BE 4/5 STORIES, WITH THE MAXIMUM HIEGHT IN FEET DETERMINED AT SITE PLAN SUBJECT TO A MAXIMUM OF 55 FEET, AS MEASURED FROM THE FINISHED ROAD ELEVATION OF ARORA HILLS DRIVE.
5. THE AGE-RESTRICTED HOUSING BUILDING WILL HAVE ARCHITECTURAL DESIGN FEATURES WITH A COMPATIBLE RESIDENTIAL APPEARANCE ON ALL SIDES.

6. ALL TPDU'S (12.5%)  
WILL BE PROVIDED ON SITE.

**D. Master Plan**

The subject property is within the area covered by the 1994 *Approved and Adopted Clarksburg Master Plan & Hyattstown Special Study Area* (the "Master Plan"). Staff of the MNCPPC Community-Based Planning Division report that Greenway Village and Clarksburg Village are located in the Newcut Road Neighborhood defined in the Master Plan, and that the Clarksburg Town Center is located to the north, adjacent to the Clarksburg Historic District. See Staff Report Attachment 5 at 1. The Newcut Road Neighborhood contains approximately 1,060 acres, most of which have now been approved for development, including 1,330 dwelling units in Greenway Village and 2,653 dwelling units in Clarksburg Village.

The Master Plan recommended development in the Newcut Road Neighborhood at a density of up to seven units per acre, which would allow slightly more than 2,600 units on the Greenway Village property. See Master Plan at 59. The current PD-4 zoning allows no more than four dwelling units per acre, for a total of approximately 1,500 units. The additional 100 units proposed in this application would bring the total for Greenway Village to 1,430, well below both the density permitted in the zone and the density recommended in the Master Plan.

One of the Master Plan objectives for the Newcut Road Neighborhood was to create a mixed-use neighborhood with a transit-oriented land use pattern and interconnected streets, strong pedestrian and bicycle linkages to a nearby park and a development pattern that encourages access to the greenway network. The Master Plan proposed the following mix of uses for this neighborhood (Master Plan at 62):

Residential	4,660 dwelling units
Retail	109,000 square feet
Office	Some office uses envisioned as part of the retail center
Civic/Public Uses	Local park, schools, greenway, places of worship, day care, community center.

Higher density residential uses, retail services, offices, and civic uses are clustered in the neighborhood center. To promote visual identify for the center, a vertical mix of three-to-four story buildings would be appropriate.

Community member Paul Majewski argues that the proposed building would violate the Master Plan's vision of three-to-four-story buildings in the retail center. Technical Staff acknowledges

that the height proposed in this application is not in strict compliance with the Master Plan's height recommendation for the retail area, but notes that four-story, 55-foot two-over-two units have already been approved across the entry drive from the subject site. See Ex. 40 at 2. The Hearing Examiner is inclined to agree with Technical Staff that with 55-foot buildings already approved at the edge of the retail center, the Master Plan's height recommendation need not be rigidly followed.

The Master Plan also recommended diverse housing types, avoiding large concentrations of any single type of housing within each neighborhood, and street-oriented buildings. It recommended the following breakdown among unit types for the Newcut Road Neighborhood:

Detached	45-55%
Attached	35-45%
Multi-family	10-20%

Community-Based Planning Staff opined that the proposed Revised Development Plan would be consistent with the Master Plan's land use and community facilities recommendations. Staff noted that the proposed building would increase the total percentage of multi-family units in the Newcut Road Neighborhood to slightly less than 20 percent. This calculation is shown below (see Staff Report Attachment 5 at 4):

Newcut Road Neighborhood Development			
	Total Units	Multi-Family Unit Type	
Greenway Village	1,330	248	
Clarksburg Village	2,653	466	
Other Properties	100	0	
Proposed DPA	100	100	
Total	4,183 <sup>6</sup>	814	19.5 percent multi-family

As Mr. Majewski pointed out, neither Technical Staff nor the Applicant provided any information on how this change in the unit mix would affect the percentages of detached and attached units. Simple mathematics suggests that if the total number of units is increased and all the new units are multi-family, the percentages of single-family detached and attached units will necessarily decrease. Therefore, if either of those percentages is currently very close to the lower limit, it is possible that adding 100 new multi-family units could run afoul of the Master Plan's recommendation.

<sup>6</sup> The figures in this column in the Staff Report are shown with a total of 4,103. The Hearing Examiner has corrected this typographical error and used 4,183 to calculate the relevant percentage.

However, the Master Plan is only a guide. If this application is approved and the Planning Board later decides that these 100 units would result an unacceptable unit mix, the Board can require changes in the number of units during subdivision review, either for this building or in the portions of Clarksburg Village that have not gone through subdivision.

Community-Based Staff found that the proposed building would be consistent with the Master Plan's general recommendation to locate senior housing near transit, local bus routes, shopping and public facilities, given its location near retail and the Greenway Trail (a public facility).<sup>7</sup> See Master Plan at 167. The Applicants' planner observed that the proposed building would also be located near proposed bus routes on Little Seneca Parkway and Newcut Road. Staff noted in addition that the Revised Development Plan provides for a usable community outdoor space in the form of an urban park for community gathering and social interaction. Community-Based Planning Staff called for additional flexibility to locate housing within the retail area, but this is not what the Applicants have requested for the building proposed in this application. Staff's remaining comments are directed at site plan issues such as landscaping. See Staff Report Attachment 5 at 4-5.

The Applicants note that the proposed building would promote the Master Plan's goal of mixed uses connected by pedestrian access and street oriented buildings, because this building would fill in a gap in the building edge along the streets in this area, and without it there would be a less diverse mix of housing (no age-restricted units) and less attractive pedestrian areas. See Ex. 33(a) at 6. The Applicants argue that the proposed building would also serve the following Master Plan policies: (1) creating a community with a "town" scale; (2) preserving natural environmental features; (3) maintaining the proposed greenway network; (4) retaining and improving a street network and buildings related to it; (5) increasing the mix of uses and housing diversity called for to create transit- and pedestrian-oriented neighborhoods; (6) continuing the farmland preservation objectives

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<sup>7</sup> Staff notes that a preliminary plan of subdivision was approved in 2004 for a development known as Cabin Branch, located west of I-270, east of Clarksburg Road and north of West Old Baltimore Road, which included 500 units of senior housing. See Staff Report Attachment 5 at 4. A site plan application has not been filed for that senior housing. See *id.* The Hearing Examiner notes that based on the Master Plan's neighborhood designations, the Cabin Branch property would not be in the Newcut Road Neighborhood, which is located east of I-270.

reflected in the current approved Development Plan; and (7) maintaining consistency with the Master Plan's staging components. *See id.* at 6-7.

### **E. Public Facilities**

Under the County's Adequate Public Facilities Ordinance (Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, schools, water and sewage facilities, and police, fire and health services will be adequate to support the proposed development, and whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that the County Council sets biennially in the two-year Growth Policy.<sup>8</sup> While the final test under the APFO is carried out at subdivision review, the District Council must first make its own evaluation as to the adequacy of public facilities in a zoning case, because the Council has primary responsibility to determine whether the proposed development would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of the Council's review, and the fact that the Council's review is much broader at the zoning stage than what is available to the Planning Board at subdivision, a process designed to more intensively examine the "nuts and bolts" of a development. The District Council is charged at the zoning stage with determining whether the proposed development would have an adverse impact on public facilities and, if so, whether that impact would be mitigated by improvements reasonably probable of fruition in the foreseeable future.

#### **1. Transportation**

Pursuant to Zoning Text Amendment 07-17, enacted on February 26, 2008, the present application will be evaluated under the Growth Policy in effect when the application was filed,

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<sup>8</sup> See 2007-2009 Growth Policy, Resolution No. 16-376, adopted November 13, 2007. The Hearing Examiner hereby takes official notice of the 2007-2009 Growth Policy.

the 2003-2005 AGP Policy Element.<sup>9</sup> Under that policy element, subdivision applications are subject to only one transportation test, Local Area Transportation Review ("LATR").<sup>10</sup> The Planning Board recognizes its LATR Guidelines as the standard to be used by applicants in making submissions to the Hearing Examiner for zoning cases, which the Hearing Examiner interprets to include development plan amendments. See LATR Guidelines at 1. LATR typically involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the peak hour of the weekday morning and evening peak periods (6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.). However, under the LATR Guidelines, a project that would generate fewer than 30 new trips during the peak hours is considered too small to have a measurable impact on traffic, and therefore a traffic study is not required. See LATR Guidelines at 4.

In the present case, the proposed multi-family building is projected to generate eight trips during the morning peak hour and eleven during the evening peak hour, so no traffic study was required. See Staff Report Attachment 6. MNCPPC Transportation Planning Staff concluded that the proposed development plan amendment would not result in an adverse impact on the surrounding roadway network. See *id.* The Applicants prepared a traffic study nonetheless, analyzing potential impacts on the two closest planned intersections. See Ex. 32. The methodology prescribed under the LATR Guidelines is an analysis of Critical Lane Volume ("CLV"), which counts conflicting movements at an intersection, such as left turns v. through movements, as a means of assessing whether the intersection is performing at an acceptable level or is experiencing unacceptable levels of congestion. The County Council has established congestion standards for each policy area in the County, which establish the maximum CLV an intersection may have before it is considered to have unacceptable congestion. The congestion standards range from a CLV of 1,400 in rural areas to a CLV of 1,800 in Metro policy areas. See LATR Guidelines at 3. A development proposal will be

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<sup>9</sup> The Hearing Examiner hereby takes official notice of Zoning Text Amendment ("ZTA") 07-17.

<sup>10</sup> See 2003-05 Annual Growth Policy – Policy Element, Resolution No. 15-375, adopted October 28, 2003; Local Area Transportation Review Guidelines Approved and Adopted July 2004 ("2004 LATR Guidelines") at 1. The Hearing Examiner hereby takes official notice of the 2003-05 AGP Policy Element and the 2004 LATR Guidelines.



considered to pass LATR if a traffic study acceptable to Technical Staff demonstrates that the intersections studied will have CLVs below the relevant congestion standard with the proposed development in place, taking into account the impact of any proposed traffic mitigation. See LATR Guidelines at 1-2.

The traffic study performed for this application built on the traffic analysis prepared in 2001 for Greenway Village, which analyzed traffic expected for both Greenway Village and Clarksburg Village together. See Ex. 32 at 1. The trips anticipated from the proposed age-restricted apartment building (eight trips in the morning peak hour and 11 in the evening) constitute less than one half of one percent of the total trips anticipated from Greenway Village and Clarksburg Village combined. See Ex. 32 at 6. Adding those trips to the traffic projections would have no impact on one of the two future intersections studied, Ridge Road and A-302, and a minor impact on CLV at the other intersection studied, A-302 and A-305. CLV at both intersections would be well below the applicable congestion standard.<sup>11</sup> See Ex. 32 at 11. The Applicants' traffic expert, Craig Hedberg, opined that the impact of the proposed apartment building on traffic in the area would be insignificant. He added that the recently approved 2007-2009 Growth Policy included a determination that based on existing and approved development, there was no need to impose a trip reduction requirement under policy area mobility review.

Mr. Majewski called it ludicrous to say that the proposed 100-unit building would generate less than 30 trips during the peak hours. The projections were based on trip generation rates published by the Institute of Transportation Engineers, a widely referenced and well-regarded national organization. Mr. Majewski testified that a member of Transportation Planning Staff (probably Shariar Etemadi, although the transcript has an incorrect name) explained to him how the trip generation rates were derived, and there is a broad range in the underlying data used to compute the rate – from .03 trips per unit to 0.31 in the morning, and from .02 trips per unit to 0.27 in the afternoon.

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<sup>11</sup> The traffic study quoted the 1,425-CLV congestion standard under the 2007-2009 Growth Policy, which will be applied at subdivision if the present application is approved. See Ex. 32 at 11. The congestion standard under the 2003-2005 AGP Policy Element was a CLV of 1,450. See LATR Guidelines at 3.

Mr. Majewski has a college degree in mathematics and some experience in statistics, and he suggested that the dozen data points used to compute the rate are so scattered that the straight lines the ITE has drawn are not a good fit. See Tr. March 31 at 55; Ex. 64 at 462-463. He also pointed out that only one resident in each unit has to be age 55 or older, and he expects that market forces will attract younger residents to this building. See Tr. March 31 at 58. The Hearing Examiner noted that Technical Staff endorses the use of these rates, and the place to argue that the rates should be different is to the Planning Board, not the District Council. Unless specific evidence is presented in an individual case to demonstrate why the standard trip generation rates are inaccurate for the particular project in question, there is no sound basis to depart from the rates prescribed by the Planning Board and its Staff. In the Hearing Examiner's view, Mr. Majewski's objections to the prescribed rates do not provide such a basis.

### **2. Utilities**

In light of the planned residential and retail/commercial development in the immediate vicinity of the subject property, public water, sewer and other utilities can reasonably be expected to be available on site.

### **3. Schools**

The age-restricted development proposed in this application would have no impact on the public schools.

### **F. Environment and Stormwater Management**

MNCPPC Environmental Planning Staff recommend approval of the present application, noting that the area of the subject site was designated for development under the approved preliminary forest conservation plans for both Greenway Village and Clarksburg Village. See Staff Report Attachment 7; Ex. 17. The Applicants' planner/landscape architect, Leslie Powell, opined that the development proposed in this case would have no impact on the Applicants' ability to carry out the preliminary forest conservation plans as approved.

Preliminary water quality plans have been approved for both Greenway Village and Clarksburg Village, and a final water quality plan would be submitted with the site plan application for the proposed building, consistent with the practice for the other phases of the overall development that have approved site plans. See Exs. 53-55. Mr. Powell testified that the proposed building would be unlikely to affect the preliminary water quality plans because the subject site was always expected to be part of the density required for retail. The Applicants' civil engineer, David O'Bryan, submitted a letter opining that the proposed 100-unit multi-family building is in conformance with the preliminary water quality plan for the overall development, which assumed that the subject property would be used for commercial/retail development. See Ex. 62. Mr. O'Bryan stated that the imperviousness characteristics of the apartment building are compatible with commercial/retail development. He explained that more detailed decisions regarding stormwater management are made at the final water quality plan stage, during the site plan process. See *id.* This testimony is supported by correspondence among Technical Staff early in the application process. See Ex. 17.

#### **G. Community Participation**

The record includes six letters in support of the present application from Clarksburg residents. Two are unsigned, and therefore carry less weight. One of the unsigned letters was submitted to the Planning Board in December 2006, praising the developer behind Clarksburg Village for high quality work and supporting a "senior center" adjacent to the planned retail center. See Ex. 25. The second unsigned letter was submitted to the Planning Board in March 2008, and states that the proposed senior housing would be a positive addition to the community. See Ex. 35. The four signed letters were submitted by Applicant's counsel at the final hearing. Two of the four are undated, but Applicant's counsel represents that they were prepared shortly before the hearing. See Ex's. 46 – 49. Dr. Armina Rahman, a resident of Clarksburg Village, looks forward to the new retail space and considers senior housing near the retail a good idea, to accommodate older relatives of the many young families in Clarksburg Village. See Ex. 49. Robin H. Wunsh Barron, also a Clarksburg Village resident, looks forward to the new retail center and believes that adding senior housing or nursery

facilities to it would be a great idea, allowing families to live closer together as they form and grow. See Ex. 48. Clarksburg Village resident Marci Craig looks forward to a grocery store and other retail development in the neighborhood and supports the idea of locating senior housing nearby, so seniors can have stores close enough to walk to. See Ex. 47. Finally, Elaine Kirsch, a Clarksburg Village resident, local realtor and Governor-appointed member of the Upper Potomac Tributary Strategies Team, supports both the plans for more retail in Clarksburg Village and including senior housing near the retail. See Ex. 46.

The two community members who testified at the hearing, Paul Majewski and Cherian Eapen, stated that at a general meeting of the CCA that took place between the first and second hearing dates in this case (March 14 and March 31), a motion was passed opposing the present application based on parking, building height, traffic and little community benefit for the added density. See Tr. March 31 at 52. The motion added that to promote visual identity for the retail center, a mix of three and four story buildings would be appropriate, and stated that the organization would entertain the possibility of a mix of uses in the 17-acre retail area, with retail on the ground floor and offices above, or a mix of office and residential units. See Tr. March 31 at 39.

The Chair of the CCA Planning Committee, John Cook, submitted a letter on March 13, 2008 objecting to the proposed development plan amendment. See Ex. 43. Mr. Cook wrote that the present proposal "would put the approved development ceiling so high that only bad design and planning could fit the results onto the parcel." *Id.* He is concerned that the issues Technical Staff and the Planning Board deem "site plan questions" should not be put off for site plan review, because the CCA has consistently found that once *any* approval is given for a project, it is too late for meaningful changes – by the time it gets to site plan review, the developers successfully claim "prior approval" to get what they want without making changes.

Mr. Cook contends that if Greenway Village and Clarksburg Village had been considered as a single development initially, more would have been required for approval of such a massive project. He argues that developers should not be able to seek approval for projects in small pieces, as amendments. Mr. Cook also questions why these Applicants should be permitted to

“transfer density between developers” after the approved density has been established for both Greenway Village and Clarksburg Village. The Hearing Examiner notes that there has been a transfer of property ownership between the Greenway Village and Clarksburg Village developers, but no transfer of density has been requested in this application. The Greenway Village portion of the commercial area now belongs to the Clarksburg Village developer, but the land is still part of the Greenway Village Development Plan. Moreover, the Applicants have not, to the Hearing Examiner’s knowledge, sought to justify their request for additional residential density by offering to reduce the approved density elsewhere. It is simply a request for additional density.

Mr. Cook makes the following additional points (see Ex. 43):

1. The proposed building would drive the percentage of multi-family units above the Master Plan’s recommended 20 percent for Greenway Village – it would be under 20 percent only if the entire Newcut Road Neighborhood is taken into account. The Hearing Examiner notes that the Master Plan’s recommended unit mix was specifically established for the Newcut Road Neighborhood as a whole. See Master Plan at 62.

2. The proposal should not be called “senior housing” – it is really “active adult,” which is important because there are no plans for transit here [by “transit” Mr. Cook appears to mean light rail, since bus lines are anticipated nearby], and no ability for residents to walk to most services.

3. The Applicants cannot demonstrate how they can feasibly create a designated parking area for the proposed building while still having enough space to properly design the retail area with adequate parking. If the proposal is approved, it should at a minimum include a designated, exclusive parking area for building residents. The Hearing Examiner notes that this is now shown on the Revised Development Plan, Page Two.

4. Some of the two-over-two units in Greenway Village should be eliminated if this is approved, to balance the housing mix and mirror the previously approved residential density.

5. The height limit should be set at 40 feet, since the proposed location is “the high point of the entire neighborhood and can be seen from all directions.” The Hearing Examiner notes that Mr. Powell pointed out several locations near the subject site on the Revised Development

Plan, Page Two, that are at higher elevations than the subject site, which is not even the high point in the retail area, let alone in the entire neighborhood.

6. The basic plan was rejected by previous Technical Staff who reviewed it.

7. Prior attempts to add more commercial density to this area were also rejected by the District Council.

Paul Majewski argued, both in testimony and in two letters, that the present application should be denied, deferred or at least subjected to conditions. He argued for denial based on excessive density, excessive height and inadequate parking arrangements. In Mr. Majewski's view, it might be worth it to the County to increase the density at Greenway Village above what was promised to the community to allow housing that is actually for the elderly, but it should not be done to allow housing for "aging mid-lifers" and their younger friends and relatives. See Exs. 42(a), 60. He is concerned that increasing the density above what was promised will impede the free traffic flow that the Master Plan intended, because the planned roadways were based on a certain level of density. Mr. Majewski noted that many of the roads proposed in the Master Plan are not certainties, so it is not even clear that Clarksburg can handle the density that has already been approved.

Mr. Majewski maintained that notice of the hearing on this application was inadequate, because the sign was posted at a location where few current residents drive. The Hearing Examiner is satisfied that notice was provided as legally required, including signs and direct mailings to over 500 area residents. Mr. Majewski also is concerned that the present application lessens the opportunity for other uses that might be helpful to the community, such as child day care or places of worship.

Mr. Majewski agrees with the original staff report that the proposed building would not be well-integrated with the retail center to create a mixed-use neighborhood. Instead of buildings at the edges with a big parking lot in the middle, he thinks the design should make it easy for people to walk to the stores. In the Hearing Examiner's view, the question of integration has more to do with the rest of the retail center than with the building proposed here. The layout shown for the 17-acre retail center does not appear to satisfy the Master Plan's call for a pedestrian-oriented "main street" commercial center. Images of pedestrian-friendly development that the Hearing Examiner has seen

in master plans and in other cases typically depict retail uses that are closer together than shown in this case, not separated by large surface parking lots. This issue, however, is not before the District Council in this application. In approving this application, the District Council would be approving only the proposed apartment building, not the layout for the retail center as a whole, which the original rezoning specifically left for site plan review. The District Council saw fit to delegate that design oversight to the Planning Board in the original rezoning, and there has been no request by the Applicants to change that decision.

Mr. Majewski's Master Plan and traffic arguments are discussed in earlier sections of this report.

Mr. Majewski contends that if the present application is not denied, it should be deferred until the new population of this neighborhood has moved in, so that the emerging Greenway Village community can have a say in the plans. See Ex. 42(a).

If the application is approved, Mr. Majewski recommends the following conditions:

1. The building should be limited to four stories and a height of 45 feet on all sides.
2. Density elsewhere in the development should be reduced by at least 50 dwelling units.
3. At least 40 percent of the parking for the proposed building should be shielded from rain and snow.
4. The walkways to the retail uses should be safer, shorter and less exposed to the weather than the current design, which would require people to walk across drive aisles on exposed sidewalks.
5. The Applicants should be required to post large drawings of the proposed structure conspicuously on existing Newcut Road, Little Seneca Parkway, Snowden Farm Parkway and Arora Hills Drive, showing vertical comparisons to people and planned surrounding structures.

6. Real estate agents must be given drawings of the proposed buildings and informed to display them at every residential lot being built or sold within one mile of the site, and at every meeting with a potential buyer.
7. Prospective residents of the building should be given a priority based on advanced age, or one resident should be required to be at least 65 years old, except as decided otherwise on a case-by-case basis by a government/community board.

The Hearing Examiner explained at the hearing that detailed issues like the exact design of walkways and parking areas are more appropriately discussed at site plan review, and that the District Council does not have the authority in this case to require postings on nearby streets or to require specific disclosure to prospective buyers. Prospective buyers who wish to know what development has been approved in an area always have the option to contact MNCPPC staff, who will be able to provide full and accurate information. With regard to priority for older people, the County has established incentives for developers to designate housing for people age 62 ½ or older, but if those incentives are not successful, the Hearing Examiner is not aware of any mechanism to require a developer to create a priority system based on the County's public policy concerns. Finally, based on the proximity to two-over-two buildings that have been approved at a height of 55 feet, the proximity to the potentially large buildings in the adjoining retail center and the commitment to provide residentially compatible architectural features on all four sides of the building, the Hearing Examiner agrees with Technical Staff and the Planning Board that the proposed building would be compatible with its surroundings, at the height proposed.

The second community witness at the hearing was Cherian Eapen, a resident of Arora Hills. Mr. Eapen is also a staff member in the Transportation Planning Division at MNCPPC, but he spoke at this hearing in his individual capacity, and studiously avoided commenting on transportation-related issues.

Mr. Eapen opposes the present application on grounds that the use and density are inappropriate. He argued that there is sufficient multi-family type density adjacent to the commercial area that could serve the 55-and-older community: the two-over-two units just east of the subject site



(this unit type is sometimes considered single-family attached, but to the layperson tends to look like apartments) and multi-family buildings to the south and southeast. In Mr. Eapen's view, the density that has already been approved is enough. He noted that the additional multi-family units would raise the multi-family percentage in Greenway Village to almost 24.3 percent, which he considers too high.

Mr. Eapen was concerned that people in the neighborhood did not have much information about this application, so he did some outreach. He asked people whether they supported an age-restricted apartment building or would prefer to see additional retail or commercial uses. The general response, he reports, was that people want a commercial center, not more housing. He also asked what other types of uses people would like to see, and one thing that resounded with the people he spoke with was a child day care center. Mr. Eapen considers this application "a bad attempt to collect additional density on the property" after failing to get additional commercial density earlier. Tr. March 31 at 38. He suggested that current residents would like to see a viable commercial area, and that the Applicants should go back into the community and hold a charette to see what people want on this site.

Under cross-examination by Applicant's counsel, Mr. Eapen acknowledged that the PD-4 Zone calls for a minimum of 25 percent multi-family units, but he disagreed that this provision is effectively a presumption that such a percentage is compatible in the PD-4 Zone. See Tr. March 31 at 42. Instead, Mr. Eapen pointed out that there is a provision for a waiver. He argued that the 19.5 percent multi-family referenced in the Staff Report leaves little room for changes in the mix of units at site plan.

Mr. Eapen echoed Mr. Majewski's complaint that the community did not have adequate notice of this hearing.

The record includes a series of eight emails that were written in response to a query by Mr. Eapen to his some of his neighbors as to whether people liked the idea of an age-restricted

apartment building, or would prefer additional retail/office/mixed use on the subject site.<sup>12</sup> See Ex. 66. These emails are unsigned, and clearly represent quick responses to an email, not detailed comments on the proposed development plan amendment. Nonetheless, they suggest some level of support in the community for Mr. Eapen's views. His email to his neighbors suggested that he would ask the Applicants to pull the proposal and consider something different. The record does not reflect whether such a request was made, but after so much time waiting for consideration of this application, perhaps the Applicants were simply not willing to start over.

The record contains four additional emails in opposition (two from the same person at different points in time), all unsigned. The Hearing Examiner places less weight on unsigned comments because of the lack of verification. New issues raised in these letters include contentions that the infrastructure promised in Clarksburg is being built too slowly to allow additional density that will contribute to traffic and that the developer should not be rewarded for mismanaging the development districts, resulting in homeowners buying property without realizing they would be liable for large additional taxes. See Exs. 20, 24, 26 and 36.

#### **IV. SUMMARY OF HEARING**

##### **A. Applicant's Case in Chief**

1. David Flanagan, developer. Tr. March 14 at 36-50, 82-85.

Mr. Flanagan testified as the Applicants' representative. He stated that his company has been working on this property in Clarksburg for 24 years, and in that capacity he was a member of the Citizens Advisory Committee for the Master Plan. Mr. Flanagan described the planning process for the commercial area of Clarksburg Village and Greenway Village, which started with plans that followed the Master Plan's recommendation for 109,000 square feet of retail space. He stated that because the Master Plan showed the retail area bridging the two subdivisions, the two developers

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<sup>12</sup> These emails were admitted over the objection of Applicants' counsel, who argued that they should not be admitted because they are unsigned. The Hearing Examiner admitted them, while acknowledging that the lack of signatures reduces the weight to be given to them.

filed concurrent rezoning requests. Mr. Flanagan stated that Technical Staff would not recommend approval of the applications unless the retail space was increased to 210,000 square feet. Staff considered the Master Plan recommendation a guide, and felt that more retail was needed. As noted in Part II above, the District Council required the retail space to be reduced to the 109,000 square feet suggested in the Master Plan, leaving the empty space at issue in this case.

Mr. Flanagan testified that once his company took ownership of the entire commercial center, they started considering possibilities for the three acres of space that would not be absorbed into the permitted retail square footage. They realized that there are no senior housing projects on this side of I-270 in all of Clarksburg. In Mr. Flanagan's view, senior housing is a use that works very well in a village center, within walking distance to retail stores and transit. He cited an example at Clopper's Mill in Germantown, where his company built a residential community with a retail center, then eight to ten years later, as residents and their parents aged, a demand for senior housing developed. He noted that in preliminary meetings in the Fall of 2004, both Technical Staff and the CCA liked the idea of senior housing. See Tr. March 14 at 41-42. The Applicants initially filed their application for a 120-unit building, but reduced the number of units to 100 after discussions with Staff, the CCA and residents of the development.

Mr. Flanagan stated candidly that the Applicants filed the present application when they did to be able to get Council approval before people start moving into the homes that are planned around the retail center, to make the zoning approval proves easier. See Tr. March 14 at 43. In his view, that way people who buy the homes know there is going to be senior housing at that location.

Mr. Flanagan noted that with the proposed apartment building, the overall density for Greenway Village would still be below the maximum recommended in the Master Plan, and below the maximum for the PD-4 Zone. It would also, he maintained, keep the percentage of multi-family dwellings in the general neighborhood just under the maximum percentage that the Master Plan recommended. Mr. Flanagan noted that even with the additional 100 units, the Applicants would still need the District Council waive the requirement of the PD-4 Zone for a minimum of 25 percent multi-family dwellings, as they did in the original approvals.

Addressing community concerns about the height of the proposed building, Mr. Flanagan stated that the Applicants propose a building that would be four stories on one side, with an additional story on the other side due to topography. He argued that the Planning Board has approved two-over-two, single-family attached dwellings right across the street from the subject site at a four-story, 55-foot height limit, which is the same level committed to for this building. See Tr. March 14 at 47.

Mr. Flanagan stated that the building is proposed to meet federal guidelines for age-restricted housing, which means at least one resident per unit age 55 or above. Based on his experience, he expects most of the units to be affordable housing, typically with tax credits involved, and probably rentals. He acknowledged, for school-impact purposes, that children are not permitted to live in an age-restricted building on a permanent basis. He also stated that the required 12.5 percent MPDUs would be within the building, and concurred with the contents of the Applicants' pre-hearing statement. See Tr. March 14 at 49.

The CCA expressed a concern about adequate parking, referring to a similar development in Clopper's Mill where residents apparently have difficulty finding parking, and have to compete with retail customers. Mr. Flanagan pointed out that at the subject site, the Applicants have committed to designate for the proposed building the full amount of parking called for in the Zoning Ordinance. See Tr. March 14 at 82-83.

2. Les Powell, land planner. Tr. March 14 at 50-90, 115-117; March 31 at 6-16, 21-27.

Mr. Powell was designated an expert in land planning and landscape architecture. His firm has served as engineers and planners for both Greenway Village and Clarksburg Village, and has obtained site plan approval for phases 1 through 5 of Greenway Village, located north of the commercial center, and for Phase 1 of Clarksburg Village, located northwest of the subject site. Mr. Powell explained that Phases 1 and 2 of Greenway Village have been built, Phase 3 is about 70 percent built and the grading has begun for Phase 4. In Clarksburg Village, Phase 1 is currently under construction and Phase 2, south of the subject site, is in the midst of the site plan approval process. Mr. Powell acknowledged that the vicinity map submitted by the Applicants, Exhibit 4,

depicts the development that is anticipated around the subject site, not what actually exists today. He testified that the vicinity map in Attachment 1 to the Staff Report is very close to what is currently on the ground, except that some of the lots shown south of Skylark Road, between Ridge Road and the Greenway Trail, have not yet been built. Mr. Powell also reviewed the aerial photograph in Attachment 2 to the Staff Report, stating that it shows less development than has actually occurred. He suggested that the reality is something in between Attachment 1 and Attachment 2. See Tr. March 14 at 55. The area immediately surrounding the subject site currently remains vacant.

Mr. Powell described the 17-acre commercial area, bound on the south by Snowden Farm Parkway, on the west by Little Seneca Parkway (referred to in the Master Plan as Newcut Road extended), on the east by existing Newcut Road and on the north by Arora Hills Drive and the sides of proposed single-family attached dwelling units. Using Exhibit 51, a height and setback exhibit that was required as part of the site plan approvals for Greenway Village, Mr. Powell pointed out that the homes that have been approved directly east of the subject site have a 55-foot maximum height. He noted that these units sit six feet higher in elevation than the road they face, which is the access road from Arora Hills Drive to the proposed multi-family building and the retail area. North of the subject site, across Arora Hills Drive, Mr. Powell identified two strings of single-family attached homes with height limits of 50 feet and 45 feet, respectively (the Hearing Examiner notes that the end unit in the second string of dwellings has a 45-foot height limit, but the rest of that string has a 40-foot limit).

Mr. Powell opined that the proposed multi-family building would be compatible with the nearby residences because it would be similar in height, and probably lower than the units to the east because of the topography. He noted that the area selected for the Village Center has some of the steepest ground on the whole site, which is why they propose a building with four stories on its east side and a fifth, walk-out story on its west side. The west side of the building would mostly face Little Seneca Parkway and the Greenway Trail beyond it. Diagonally to the northwest, the building would confront the first in a block of single-family detached homes on the other side of the 100-foot right-of-way for Little Seneca Parkway. That first home, he observed, has a 50-foot side setback from the road, making it 150 feet from the property line of the subject site; 45 feet of the setback is an open

space that encompasses part of the bike trail connection leading to the greenway. The setback for the proposed multi-family building from Little Seneca Parkway would be determined at site plan, but the plans currently show 30 feet, suggesting a total distance of 180 feet. See Tr. March 14 at 61. Mr. Powell acknowledged that the closest single-family detached home would have a height limit of 35 feet, and that the street grade in front of that house would be about four feet lower than the street grade on Arora Hills Drive next to the proposed multi-family building.

Mr. Powell acknowledged that although the proposed multi-family building is shown with its front façade facing east, towards the nearby single-family attached units and the retail center, the final orientation would be established at site plan. See Tr. March 14 at 63. He does not anticipate the building turning around, because the current orientation is facing the drop-off area. Nonetheless, the Applicants agreed to add a binding element to the Development Plan stating that the age-restricted building will have architectural design features with a “compatible residential appearance” on all sides. The Applicants also added a binding element in response to the Planning Board’s recommendation that the proposed building should have designated parking in the amount recommended by the Zoning Ordinance. Mr. Powell noted that the Zoning Ordinance calls for the same number of parking spaces per dwelling unit for any multi-family building, regardless of whether it is age-restricted. See Tr. March 14 at 89.

Turning to the purpose clause for the PD Zone, Mr. Powell opined that the proposed project would implement the Sector Plan by adding to the unit mix, enhancing the visual appearance of the neighborhood and filling in a void on the Development Plan. Mr. Powell argued that the project would promote the integration of mutually compatible uses because the proposed building would be very similar in use to the nearby two-over-two dwellings and townhouses, and would be compatible in height and scale. He stated that the project would promote the County’s housing policy by providing age-restricted housing and MPDUs. Mr. Powell noted that the Sector Plan recommended senior housing near transit, retail and public facilities, and the subject site fits this because it is part of a planned retail center, is located near proposed bus lines on Little Seneca Parkway and Newcut Road, and is very close to the Greenway Trail, a public facility.

With regard to the purpose clause reference to encouraging a maximum of social and community interaction, Mr. Powell testified that the apartment building would serve as a transition between other residential uses and the retail core, and hopefully there would be a lot of traffic and interaction, including people from various residential areas using the seating area planned in front of the apartment building. He suggested that the proposed building would create a distinctive visual character for the development by putting a face on three streets, so the nearby residents feel like they are part of a vibrant area. He added that the proposed building would contribute to a balanced and coordinated mix of uses and a broad range of housing types by adding more multi-family units, providing a transition to the retail center, and providing the only age-restricted units planned in the area.

Mr. Powell stated that with four stories on one side and five on the other, to work with the topography, the proposed building would minimize grading. He added that the retail area was always intended to be "graded out." Tr. March 14 at 80. With regard to preserving open spaces, Mr. Powell stated that the seating area shown in front of the proposed building would add a small open space along the walkway into the retail center, and the seating area and adjacent sidewalk would contribute to a comprehensive pedestrian circulation network.

Mr. Powell contested the CCA's suggestion that four stories is the maximum height recommended in the Sector Plan. In Mr. Powell's view, the Sector Plan mentions three to four stories, but does not proscribe five stories. Mr. Powell also rejected the CCA's contention that the subject site is the high point in the entire neighborhood, pointing out several nearby locations with a higher grade. See Tr. March 14 at 84. He acknowledged that the subject site sits higher than Little Seneca Parkway, which leads down into a stream valley. Mr. Flanagan interjected that the subject site is not even the high point within the retail area. See *id.* at 85.

3. Craig Hedberg, transportation planner. Tr. March 14 at 90-98.

Mr. Hedberg was designated an expert in transportation planning and traffic engineering. His testimony is summarized in Part III.E. above.

## **B. Community Opposition**

### 1. Paul Majewski, Tr. March 14 at 98-117; March 31 at 16-33.

Mr. Majewski has lived in Clarksburg for nine years and is an active member of the CCA, having served formerly as an officer and currently as a member of the planning committee. He spoke on his own behalf.

Mr. Majewski agreed that the CCA planning committee supported the concept of senior housing at this site when it was suggested in September 2004, although he does not recall whether there was a vote. Addressing the CCA's participation in the original rezoning cases for Greenway Village and Clarksburg Village, Mr. Majewski stated that the reason the CCA opposed a retail area of 210,000 square feet was a desire to make sure that the Town Center retail area would be the biggest one around. See Tr. March 14 at 114.

As summarized in Part III above, Mr. Majewski opposes the proposed multi-family building principally on grounds that the approved density for Greenway Village should not be exceeded, and that nothing should be approved for the subject site until the future residents of the nearby homes have been identified and can voice their opinion. His testimony is summarized in Parts III. D., E. and G. above.

### 2. Cherian Eapen, Tr. March 31 at 33-51.

Mr. Eapen is a resident of Arora Hills. He is also a staff member in the Transportation Planning Division at MNCPPC, but he spoke at this hearing in his individual capacity, and studiously avoided commenting on transportation-related issues. His testimony is summarized in Part III.G. above.

## **C. People's Counsel**

The People's Counsel, Martin Klauber, participated in the first hearing date for this application. He was unable to attend the second hearing date, but submitted a letter stating that the



Applicants' proposal to provide a specially demarcated, gated parking area for the subject building addressed the only issue that caused him substantive concern. See Ex. 59.

## V. FINDINGS AND CONCLUSIONS

### A. The Proposed Development Plan Amendment

Before approving a development plan amendment, the District Council must make five specific findings set forth in Code § 59-D-1.61. These findings relate to consistency with the master plan and the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas. The required findings are set forth below in the order in which they appear in the Zoning Code, together with the Hearing Examiner's analysis.

- (a) ***That the zone applied for is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies. However, to permit the construction of all MPDUs required under Chapter 25A, including any bonus density units, on-site, a development plan may exceed, in proportion to the MPDUs to be built on site, including any bonus density units, any applicable residential density or building height limit established in a master plan or sector plan if . . . [not relevant].***

As set forth in more detail in Part III.D above, the Planning Board, Technical Staff and the Applicants' land planner found that the proposed development would be in substantial compliance with the recommendations of the Master Plan, including use and density. The Hearing Examiner agrees. This analysis of Master Plan compliance responds not only to paragraph 59-D-1.61(a), but also to the requirement of the PD Zone for substantial compliance with the Master Plan as a whole.

The additional 100 dwelling units proposed here would increase the number of units per acre on the 374-acre Greenway Village tract from 3.5 to 3.8, but the density would remain well below the maximum of seven units per acre recommended in the Master Plan. It would also remain below the minimum density of five units per acre recommended in the Master Plan, but the decision to permit that was made in the original rezoning.

The proposed age-restricted, multi-family building would be consistent with the Master Plan's recommendation for a substantial number of residential units in the Newcut Road Neighborhood, for diverse types of housing and for senior housing near transit, local bus routes, shopping and public facilities. The proposed building would add a new type of housing (age-restricted) not currently represented in the Newcut Road Neighborhood. It would place age-restricted housing near shopping, bus routes and a public trail system – not assisted living or 65+ housing, admittedly, but nonetheless housing that is more likely than a typical apartment building to have, over time, a large percentage of residents who are older and have a greater need for shopping and buses within walking distance than the general population.

The additional 100 multi-family units would increase the percentage of multi-family units in the Newcut Road Neighborhood to almost 20 percent, the maximum recommended for the neighborhood in the Master Plan. While it is possible that the additional 100 multi-family units could decrease the percentages of single-family detached and attached homes to levels below the minimums recommended in the Master Plan, the Planning Board can control that outcome by requiring adjustments in the number of units during the remaining site plan reviews. Moreover, the Master Plan is a guide, and the applicable statutory language requires substantial, not exact, compliance with its terms.

Mr. Majewski worries that the Planning Board will reduce a more desirable form of density elsewhere in the community to permit this building while keeping the unit type percentages within the Master Plan's recommendations. He argues that the future population of Greenway Village should decide where to put extra density, not the developers. Zoning in Maryland is not done by plebiscite; there is no legal mechanism to let community members decide what should be built on privately owned land. See *Quinn v. County Comm'rs of Kent County*, 20 Md. App. 413 (1974). Community input on zoning decisions is encouraged, and the District Council may properly consider and rely on relevant evidence provided by community members. Nonetheless, the District Council cannot delegate its zoning authority to the community at large. It must carry out its responsibility to decide zoning cases in a fair and reasonable manner, based on substantial, probative evidence and

applicable legal standards. The preponderance of the evidence in this record indicates that the proposed multi-family building would not result in multi-family units in the Newcut Road Neighborhood exceeding the Master Plan's recommended maximum, and that if the recommended percentages of single-family units are in danger of not being met, the Planning Board can require adjustments to the unit count to stay within the percentages, or can make a decision to allow a minor departure from those percentages if it concludes that doing so will serve the public interest.

The proposed building would promote the Master Plan's goal of mixed uses connected by pedestrian access and street-oriented buildings by putting a building face on three streets that would otherwise be empty, along with pedestrian walkways connecting the proposed building to nearby uses. Whether the retail area as a whole will be able to achieve this Master Plan goal is a separate question, and is not addressed here; the original rezoning decision left the layout and design of the retail area for site plan, and that decision is not altered by action on the present application.

If built to the maximum stories and height permitted by the textual binding elements, the proposed building would not fully comply with the Master Plan's recommendation for three- and four-story buildings in the retail center. The Planning Board has already permitted buildings above this height at the edge of the retail center, directly across the entry into the retail area from the subject site, and recommends permitting the proposed building at the same height. While the building proposed here is much larger than the two blocks of two-over-two's that have been approved at a 55-foot height, giving it a greater potential visual impact, the Hearing Examiner finds that the preponderance of the evidence, weighted with the opinions of the Planning Board and its Technical Staff, argues in favor of a finding that a four-to-five-story height substantially complies with the Master Plan. This finding is supported by the fact that the five-story side of the building, intended to take advantage of the natural topography, would face away from the retail center, decreasing its visual impact on whatever cohesive identity may be developed for the retail center.

There is no evidence to suggest that the proposed development would be inconsistent with the General Plan or the Capital Improvement Program. It would be consistent with the County Housing Policy, which calls for more housing generally, more affordable housing – such as the 13

MPDUs that would be part of this project – and more housing for seniors. As discussed in Part III.E. above, the proposed building would be consistent with the applicable Growth Policy.

- (b) ***That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.***

### **1. Purpose of the Zone**

The District Council found in the original rezoning decision that the purposes of the PD Zone would be satisfied by the overall Greenway Village development. As detailed below, the addition of the proposed multi-family building supports that finding. The purpose clause for the PD Zone, found in Code §59-C-7.11, is set forth in full below, with relevant analysis and conclusions for each paragraph following.

It is the purpose of this zone to implement the general plan for the Maryland-Washington Regional District and the area master plans by permitting unified development consistent with densities proposed by master plans. It is intended that this zone provide a means of regulating development which can achieve flexibility of design, the integration of mutually compatible uses and optimum land planning with greater efficiency, convenience and amenity than the procedures and regulations under which it is permitted as a right under conventional zoning categories. In so doing, it is intended that the zoning category be utilized to implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories.

It is further the purpose of this zone that development be so designed and constructed as to facilitate and encourage a maximum of social and community interaction and activity among those who live and work within an area and to encourage the creation of a distinctive visual character and identity for each development. It is intended that development in this zone produce a balance and coordinated mixture of residential and convenience commercial uses, as well as other commercial and industrial uses shown on the area master plan, and related public and private facilities.

It is furthermore the purpose of this zone to provide and encourage a broad range of housing types, comprising owner and rental occupancy units, and one-family, multiple-family and other structural types.

Additionally, it is the purpose of this zone to preserve and take the greatest possible aesthetic advantage of trees and, in order to do so, minimize the amount of grading necessary for construction of a development.

It is further the purpose of this zone to encourage and provide for open space not only for use as setbacks and yards surrounding structures and related walkways, but also conveniently located with respect to points of residential and commercial concentration

so as to function for the general benefit of the community and public at large as places for relaxation, recreation and social activity; and, furthermore, open space should be so situated as part of the plan and design of each development as to achieve the physical and aesthetic integration of the uses and activities within each development.

It is also the purpose of this zone to encourage and provide for the development of comprehensive, pedestrian circulation networks, separated from vehicular roadways, which constitute a system of linkages among residential areas, open spaces, recreational areas, commercial and employment areas and public facilities, and thereby minimize reliance upon the automobile as a means of transportation.

Since many of the purposes of the zone can best be realized with developments of a large scale in terms of area of land and numbers of dwelling units which offer opportunities for a wider range of related residential and nonresidential uses, it is therefore the purpose of this zone to encourage development on such a scale.

It is further the purpose of this zone to achieve a maximum of safety, convenience and amenity for both the residents of each development and the residents of neighboring areas, and, furthermore, to assure compatibility and coordination of each development with existing and proposed surrounding land uses.

This zone is in the nature of a special exception, and shall be approved or disapproved upon findings that the application is or is not proper for the comprehensive and systematic development of the county, is or is not capable of accomplishing the purposes of this zone and is or is not in substantial compliance with the duly approved and adopted general plan and master plans. In order to enable the council to evaluate the accomplishment of the purposes set forth herein, a special set of plans is required for each planned development, and the district council and the planning board are empowered to approve such plans if they find them to be capable of accomplishing the above purposes and in compliance with the requirements of this zone.

1<sup>st</sup> paragraph: Master Plan implementation. For the reasons stated under (a) above and in Part III.D., the Hearing Examiner concludes that the addition of the proposed multi-family building to the Development Plan would be in substantial compliance with the recommendations and objectives of the Master Plan. In light of the fact that the present application does not seek a change in zoning, the question of whether the proposed plan would implement the Master Plan's objectives more fully than would be possible under other zoning classifications is not relevant.

Second paragraph: social and community interaction among those who live and work in an area, distinctive visual character, balanced mix of uses. The proposed multi-family building would contribute to social and community interaction among residents of Greenway Village and to a balanced mix of uses by providing an additional housing type (age-restricted) as a transition between the retail core and the larger residential areas. It would also fill in an empty area on the Development

Plan with an active residential use, including, as currently shown, an open seating area in the front of the building and sidewalks connecting it to nearby residences and the retail core. Adding building frontage on three streets, with associated sidewalks and an open seating area and turnaround, would contribute to creating a distinctive visual image for the retail core.

Third paragraph: broad range of housing types. The proposed building would add to the stock of multi-family housing in the area, and would provide the only age-restricted housing in the Newcut Road Neighborhood. The record suggests that 500 units of age-restricted housing are planned in the Cabin Branch neighborhood of Clarksburg, but a site plan application has not been filed for that development, and there is no age-restricted housing in Clarksburg today.

Fourth and fifth paragraphs: trees, grading and open space. The proposed building would not impede the implementation of the approved preliminary forest conservation plan for Greenway Village, which was found in the original rezoning to satisfy this requirement, nor would it interfere with the preservation of open spaces along the Greenway Trail and elsewhere in the overall project. The proposed building would take advantage of the natural grade by having one additional story on the east side of the site, where the grade is lower. It would also make use of property that would have to be graded anyway for construction of the retail core. The small seating area shown in front of the building may also be considered an urban contribution to open space.

Sixth paragraph: pedestrian networks, minimizing reliance on cars. The proposed building would have walkways designed to connect with the system of pedestrian networks approved for Greenway Village and expected to be approved for the retail center. The building's location at the entrance to the retail center would encourage pedestrian activity by placing 100 additional dwelling units within walking distance of retail services and bus lines.

Seventh paragraph: scale. The PD Zone encourages, but does not require, development on a large scale. The Development Plan for Greenway Village provides for a large-scale development, to which the proposed building would contribute a new use type and a transition between the main residential areas and the retail core.

Eighth paragraph, first part: maximum safety, convenience and amenity. The evidence demonstrates that adding the proposed multi-family building to Greenway Village would achieve a maximum of safety, convenience and amenity for residents of the building by providing a new housing option within walking distance of retail, open space and bus lines. It would also add to the convenience and amenity of Greenway Village as a whole by providing a new way for older relatives to live near Greenway Village families, by putting a building face on three streets on the edge of the retail center, and by providing a transition between the main residential neighborhoods and the retail core.

Eighth paragraph, second part: compatibility. The evidence supports the conclusion that the proposed development would be compatible with existing and planned uses in the surrounding area. The residential use type is very similar to the nearby two-over-two's and townhouses. Although the density of dwellings would be greater in this building, the lack of private outdoor space suggests less outdoor activity than may take place at other nearby types of units. The proposed building would be larger in bulk than other nearby residential buildings, but would be no greater in height than the closest units, and similar in height to the units across Arora Hills Drive. The proposed multi-family building would be as much as 20 feet taller than the closest single-family detached home, but the distance between them would be at least 150 feet of roadway and open space, which would mitigate the visual impact considerably. The proposed building would also be a compatible addition to the Development Plan as a transition between the main residential areas and the retail core, providing a low-intensity, residential use as a buffer from the higher levels of activity in the retail core.

As discussed in detail in Part III.E., the Hearing Examiner concludes that the proposed building would not be incompatible on the basis of traffic impacts, as it would have no adverse impact on traffic conditions in the area.

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

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

On the Hearing Examiner's reading, this element of the purpose clause does not add new requirements, but reminds the District Council of its responsibility to carefully consider whether the PD Zone would be appropriate in the location for which it is requested or, in the case of a development plan amendment, whether the overall development would continue to be appropriate with the proposed amendment. The conclusions drawn earlier in this section govern the findings to be made here. Based on the preponderance of the evidence and for the reasons stated above, the Hearing Examiner concludes that present application is proper for the comprehensive and systematic development of the County; is capable of accomplishing the purposes of the zone; and is in substantial compliance with the Master Plan.

## **2. Standards and Regulations of the Zone**

The standards and regulations of the PD-4 Zone are summarized below, together with the grounds for the Hearing Examiner's conclusion that Greenway Village would not violate any of these requirements as a result of the proposed multi-family building.

Section 59-C-7.121, Master Plan Density. Pursuant to Code §59-C-7.121, "no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher." The Greenway Village tract was recommended in the Sector Plan for residential development at a density of five to seven units per acre, so this requirement is satisfied.

Section 59-C-7.122, Minimum Area. Code §59-C-7.122 specifies several criteria, any one of which may be satisfied to qualify land for reclassification to the PD Zone. The Greenway Village tract satisfied and continues to satisfy the first of these criteria, which states the following:



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

Greenway Village has enough space for the already-approved 1,330 units, and the subject property itself has sufficient space to permit the construction of 100 additional dwelling units.

Section 59-C-7.131, Residential Uses. Pursuant to Code §59-C-7.131, all types of residential uses are permitted, but parameters are established for the unit mix. A PD-4 development with more than 800 units is required to have at least 25 percent multi-family units in buildings of four stories or less, and is permitted to have no more than 20 percent multi-family units in buildings over four stories. The District Council has authority under Section 59-C-7.131, note 1, to waive the percentage requirements for multi-family units to achieve master plan goals. A waiver was approved in the original rezoning to allow Greenway Village to satisfy the Master Plan recommendation for a maximum of 20 percent multi-family uses, instead of the 25 percent minimum called for in the zone. The Applicants now request a continued waiver of the 25 percent minimum for multi-family units, to keep the overall development within the unit mix recommended in the Master Plan. The Hearing Examiner recommends that such a waiver be granted, in keeping with the original zoning approval for Greenway Village and the recommendations of the Planning Board and its Staff.

Section 59-C-7.132, Commercial Uses. Commercial uses are permitted under certain circumstances in the PD Zone, but none are proposed in this application.

Section 59-C-7.133, Other Uses. No uses other than a single multi-family residential building are proposed in this application.

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

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

The present application does not seek to change the zoning classification for the subject property or the larger Greenway Village tract, which was found appropriate in the original rezoning. With the additional 100 dwelling units proposed, Greenway Village would continue to have a residential density below the maximum permitted in the PD-4 Zone.

Section 59-C-7.15, Compatibility. This section requires that a proposed development be compatible with adjacent uses, as discussed in Part V.A.(b)(1) above. It also establishes minimum parameters for setbacks and building height that are designed to promote compatibility but are not relevant here, because there is no adjoining land that is not classified under the PD Zone.

Section 59-C-7.16, Green Area. The proposed multi-family building would be located on land that was originally intended for retail/commercial development. Its use for a multi-family building would have no impact on the conclusion in the original rezoning that Greenway Village can satisfy the PD-4 Zone's 40 percent green area requirement.

Section 59-C-7.17, Dedication of Land for Public Use. The proposed multi-family building would not change any of the dedications approved on the original Development Plan.

Section 59-C-7.18, Parking Facilities. Off-street parking must be provided in accordance with the requirements of Article 59-E of the Zoning Ordinance. The Revised Development Plan provides for a designated, gated parking area for the proposed multi-family building with the minimum number of spaces required under Article 59-E. Compliance with the parking requirements of Article 59-E for this building is a textual binding element specified on the Revised Development Plan, Page Two.

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

**(c) *That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.***

The proposed multi-family building would not affect the internal vehicular and pedestrian circulation systems and points of external access that have been approved for Greenway Village to date, nor would it affect the final design of circulation and access for the retail center, which

the original zoning approval left for determination during site plan review. The proposed multi-family building as shown on the Revised Development Plan sits within the street framework as currently designed. Its location is specifically described in text as approximate, to leave the necessary flexibility for its exact location to be determined, during site plan review, in relation to the final design for the retail center.

- (d) ***That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.***

The addition of the proposed multi-family building would not impeded implementation of the approved preliminary forest conservation plan for Greenway Village, which has already been found acceptable. The proposed building would make productive use of land that would have to be graded anyway in conjunction with development of the retail core. It would also take advantage of the natural terrain by having one additional story on the west side of the building, where the grade is lower.

The approved preliminary water quality plan for Greenway Village assumed that the subject site would be used for commercial/retail development, and the proposed multi-family building has imperviousness characteristics compatible with commercial/retail development. Thus, the building proposed here is in conformance with the preliminary water quality plan that has already been approved. If this application is approved, this building will be taken into account more directly in the review and approval of a final water quality plan during site plan review.

- (e) ***That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.***

The Applicants report that Greenway Village has a large homeowners association established for the maintenance of common areas, and that the proposed building will either be a

condominium that maintains its own common areas, or a rental project with a building owner handling the maintenance.

### **B. Public Interest**

The applicant must show that the proposed development plan amendment bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [*Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110*].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on the environment or public facilities.

For the reasons stated above, the Hearing Examiner agrees with the Planning Board and Technical Staff that the subject application would be in substantial compliance with the recommendations and objectives of the Clarksburg Master Plan. The positive recommendations of the Planning Board and Technical Staff support a conclusion that the proposed development would be in the public interest.

For the reasons discussed in Part III.E above, the Hearing Examiner concludes that the preponderance of the evidence fully supports a conclusion that public facilities would be adequate to accommodate the proposed development and would suffer no adverse impact due to implementation of the development plan amendment.

Community participants raised a fairness issue that relates to the public interest. They argued that it is unfair to approve a development plan amendment now, when none of the nearby homes have been built or occupied, and that the developer should be required to wait until the new residents have arrived and can participate in deciding how the subject property should be used. The Applicants' representative testified candidly that they are seeking this development plan amendment

now precisely because it is generally easier to get approval when there are no residents around to object. The Hearing Examiner has sympathy for community members' view that it would be better for community morale to let the future local residents participate in this decision-making process. However, as discussed in Part III.D, we do not engage in zoning by plebiscite, so there is no legal basis to require the Applicants to wait until local residents have moved in who can be polled as to their preferences. Moreover, the County routinely approves development plans in previously undeveloped areas, with no residents around to participate. The Hearing Examiner does not perceive any legal basis to refuse to make a decision on a development application before local residents have moved in, simply because it is a development plan amendment, rather than a new development plan.

The Hearing Examiner has also considered the opinion of members of Technical Staff who argued, earlier in this application process, that it would be better from a planning perspective to redesign the retail area to promote the goals and objective of the Master Plan, then add a new use on the subject site. However, the Applicants as property owners are entitled to present an application, at a time of their choosing, and receive a decision from the District Council. Moreover, approval of the present application merely approves the construction of a multi-family building on the subject site, within the parameters specified on the Revised Development Plan, Page Two. Approval of this application does not constitute approval or endorsement of any particular layout or design for the retail center as a whole. The original rezonings for Greenway Village and Clarksburg Village delegated that decision to the Planning Board at site plan review, and that delegation has not changed.

Based on the preponderance of the evidence, the Hearing Examiner is persuaded that the proposed development plan amendment sufficiently supports the public interest to permit its approval.

## **VI. CONCLUSIONS**

Based on the foregoing analysis and after a thorough review of the entire record, I reach the conclusions specified below.

1. The requested reclassification to the Planned Development Zone is in substantial compliance with the use and density recommended by the *Clarksburg Master Plan*, and does not conflict with the county capital improvements program or any other county plan or policy.
2. The Revised Development Plan, Exhibits 61(a) and (b), complies with the purposes, standards, and regulations of the Planned Development Zone and provides for a form of development for the proposed multi-family building that will be compatible with adjacent development.
3. The Revised Development Plan proposes no changes to the previously approved internal vehicular and pedestrian circulation systems and points of external access for Greenway Village, nor does it affect the final design of circulation and access for the retail center, which the original zoning decision left for determination during site plan review.
4. By its design, by minimizing grading and by other means, the proposed multi-family building would tend to minimize grading. It would have no effect on the previously approved open space conservation, preliminary forest conservation plan and preliminary water quality plan for Greenway Village.
5. The evidence supports a conclusion that the ownership and method of perpetual maintenance of areas to be used for common or quasi-public purposes will be adequate and sufficient.
6. The proposed development plan amendment would have no adverse effects on public facilities and would serve the public interest.

## VII. RECOMMENDATION

I, therefore, recommend that Development Plan Amendment Application No. 05-1, seeking to amend the existing development plan approved in conjunction with Zoning Application G-735 and amended by DPA 04-3 on December 14, 2004, be ***approved*** as requested, subject to the specifications and requirements of the final submitted Revised Development Plan, Exhibits 61(a) and (b); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Revised Development Plan approved by the District Council, Exhibits 61(a) and (b), with the changes to the binding elements and notes that were handwritten at the March 31, 2008 hearing added in the

same type as the existing text, within 10 days of approval, in accordance with § 59-D-1.64 of the Zoning Ordinance.

Dated: April 30, 2008

Respectfully submitted,

Françoise M. Carrier  
Hearing Examiner