

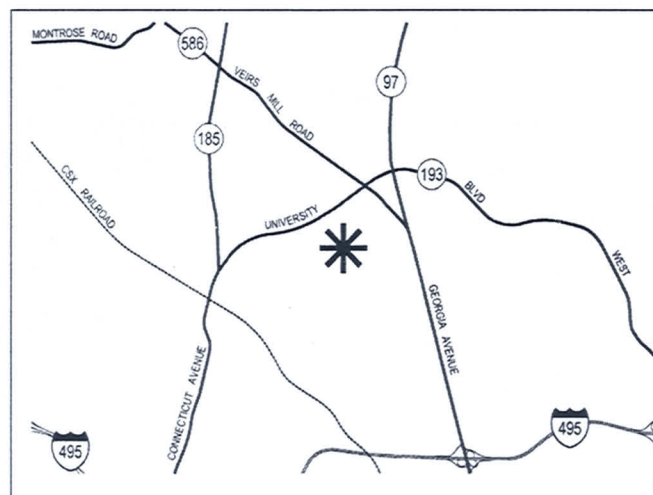
Kensington Heights, Preliminary Plan, 120110170

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Completed: 7/6/12

Description

- Fourteen (14) lots for three (3) single-family detached dwelling units and eleven (11) single-family attached dwellings; located on the north side of McComas Avenue approximately 60 feet east of the intersection of Melvin Grove Court and McComas Avenue; RT-8 Zone; 1.8 acres; Wheaton CBD and Vicinity Sector Plan.
- Applicant: Kensington Heights 2, LLC (Sterling Mehring)
- Filing Date: 2/23/11



Summary

- Staff recommends approval of the Preliminary Plan and Preliminary Forest Conservation Plan with conditions.
- A Schematic Development Plan (case No. G-879), approved on October 12, 2010, by resolution No. 16-1518, rezoned the property from R-60 to RT-8, with up to 14 dwelling units.
- Staff has received correspondence from adjacent property owners, which is attached.
- The Preliminary Plan will provide right-of-way dedication for McComas Avenue. The proposed lots will be served by public water and sewer, and the majority of the lots will be served by a private street. Two of the single-family detached units and all of the townhouse units will front on the private street. Pursuant to Section 50-29(a)(2), if the Board were to approve the proposed lot configuration, the Board would need to find the private street to have attained the status of a public street.

PRELIMINARY PLAN RECOMMENDATION AND CONDITIONS

Staff recommends approval of Preliminary Plan 120110170 subject to the following conditions:

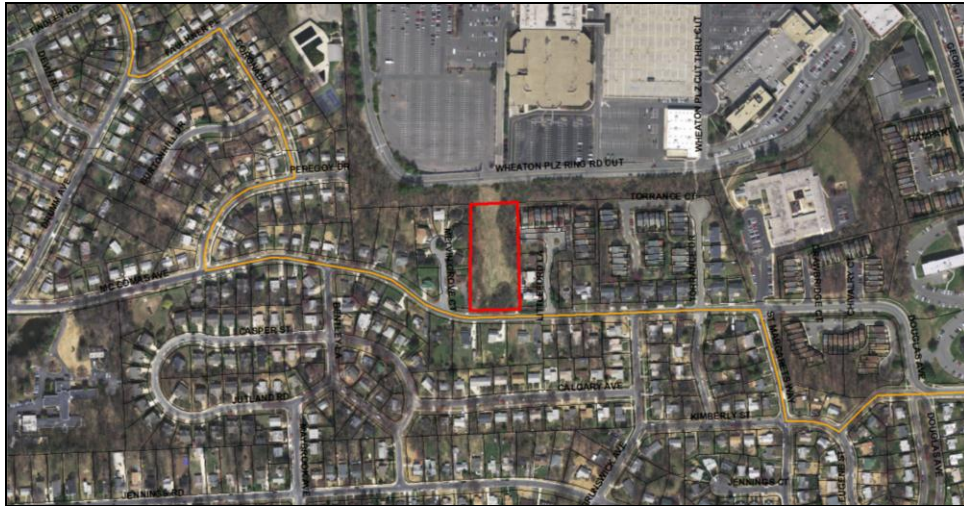
1. This Preliminary Plan is limited to fourteen (14) lots for a maximum of three (3) single-family detached dwelling units, and a maximum of eleven (11) single-family attached townhouse units.
2. The Applicant must dedicate, and the record plat must reflect, a 60-foot right-of-way (measured from the opposite right-of-way line) for McComas Avenue.
3. The Applicant must construct a five-foot wide sidewalk along the McComas Avenue frontage and extend the sidewalk off-site to the intersection of McComas Avenue with Melvin Grove Court and the intersection of McComas Avenue with Littleford Lane prior to issuance of a building permit. All sidewalk improvements are to be located within the public right-of-way (ROW).
4. The Applicant must satisfy the Policy Area Mobility Review (PAMR) test by mitigating one new peak-hour trip. The applicant has the option of paying \$11,300 to MCDOT in lieu of providing an off-site transportation improvement. The PAMR payment could be applied toward the construction of the off-site sidewalk extension required above.
5. The Applicant must provide a five-foot-wide sidewalk along both sides of the north-south internal private street prior to issuance of a building permit, as shown on the Preliminary Plan.
6. The Applicant must provide a pedestrian connection between McComas Avenue and the Wheaton Mall property via an internal sidewalk, as shown on the Preliminary Plan.
7. The Applicant must provide handicapped ramps at the crosswalk across the internal private street at the intersection with McComas Avenue.
8. The Applicant must provide at-grade crossings of the sidewalks across all driveways of the internal private street.
9. The Applicant must file a Final Forest Conservation Plan concurrently with the Site Plan.
10. Final Forest Conservation Plan must include mitigation plantings for variance trees removed.
11. Final Forest Conservation Plan must include detailed and specific tree protection measures for off-site trees affected by development.
12. The Applicant must demonstrate compliance with Section 50-32(b) of Chapter 50 – Subdivision of Land by developing and obtaining approval of a plan by the Department of Permitting Services for fill removal prior to Planning Board approval of the Site Plan.
13. The Planning Board has accepted the recommendations of the Montgomery County Department of Transportation (“MCDOT”) in its letter dated April 13, 2012, and does hereby incorporate them as conditions of the Preliminary Plan approval. Therefore, the Applicant must comply with each of the recommendations as set forth in the letter, which may be amended by MCDOT provided that the amendments do not conflict with other conditions of the Preliminary Plan approval.
14. The Planning Board has accepted the recommendations of the Montgomery County Department of Permitting Services (“MCDPS”) – Water Resources Section, in its stormwater management concept letter dated September 1, 2011, and does hereby incorporate them as conditions of the Preliminary Plan approval. Therefore, the Applicant must comply with each of the recommendations as set forth in the letter, which may be amended by MCDPS – Stormwater Section, provided that the amendments do not conflict with other conditions of the Preliminary Plan approval.
15. Prior to recordation of plat(s), the Applicant must satisfy the provisions for access and improvements as required by MCDOT.
16. The record plat must reflect a public use and access easement over all private streets and adjacent parallel sidewalks.
17. The record plat must reflect all areas under Homeowners Association ownership and specifically identify stormwater management parcels.

18. No clearing, grading, or recording of plats prior to certified Site Plan approval.
19. Final approval of the number and location of buildings, dwelling units, on-site parking, site circulation, and sidewalks will be determined at Site Plan.
20. In the event that a subsequent Site Plan approval substantially modifies the subdivision shown on the approved Preliminary Plan with respect to lot configuration or right-of-way location, width, or alignment, the Applicant must obtain approval of a Preliminary Plan amendment prior to certification of the Site Plan.
21. The Applicant must comply with the Binding Elements of Resolution No. 16-1518 approving Local Map Amendment G-879.
22. The Certified Preliminary Plan must contain the following note: “Unless specifically noted on this plan drawing or in the Planning Board conditions of approval, the building footprints, building heights, on-site parking, site circulation, and sidewalks shown on the Preliminary Plan are illustrative. The final locations of buildings, structures and hardscape will be determined at the time of Site Plan review. Please refer to the zoning data table for development standards such as setbacks, building restriction lines, building height, and lot coverage for the lots. Other limitations for site development may also be included in the conditions of the Planning Board’s approval.”
23. The Adequate Public Facility (APF) review for the Preliminary Plan will remain valid for eighty-five (85) months from the date of mailing of the Planning Board Resolution.
24. All necessary easements must be shown on the record plat.

SITE DESCRIPTION

Vicinity

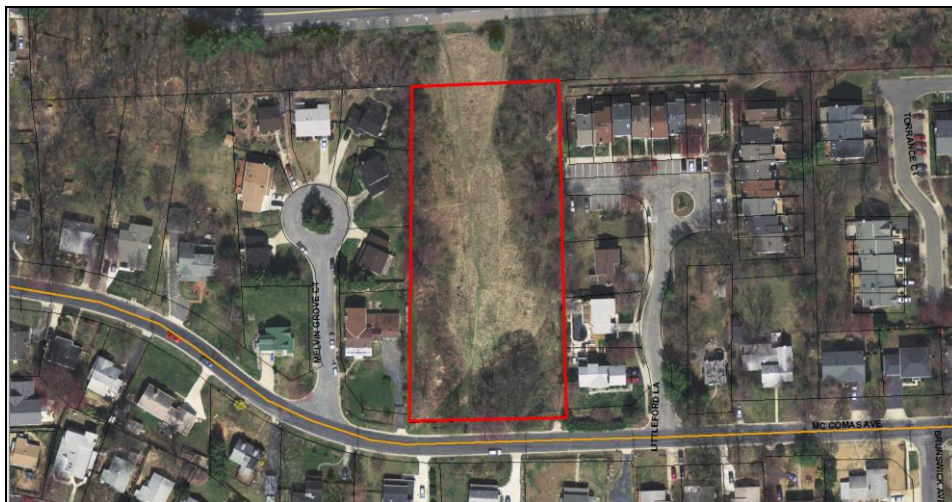
The Subject Property is located on the north side of McComas Avenue approximately 60 feet east of the intersection of Melvin Grove Court and McComas Avenue, within the Wheaton CBD and Vicinity Sector Plan area. The Westfield Wheaton Mall property abuts the Subject Property on the north. Areas immediately to the east, west, and south are predominantly residential. A townhome and single-family development, similar to the one proposed, abuts the Subject Property to the east. Stephen Knolls School is located approximately 1,000 feet east of the Subject Property.



Vicinity Map

Site Analysis

The 1.81-acre Subject Property is undeveloped and contains no forest, streams, wetlands, or environmental buffers. However, the site contains significant areas of man-made steep slopes due to previous use of the property as a stockpile site during the expansion of Westfield Wheaton Mall and has unknown amounts of fill. The Subject Property is graded as a plateau running north-south, from the Mall site, sloping steeply to the south, east and west. Currently, parts of the site are 18' higher than adjacent properties. The property is located in both Rock Creek and Sligo Creek watersheds; both are Use I watersheds.



Site Map

PROJECT DESCRIPTION

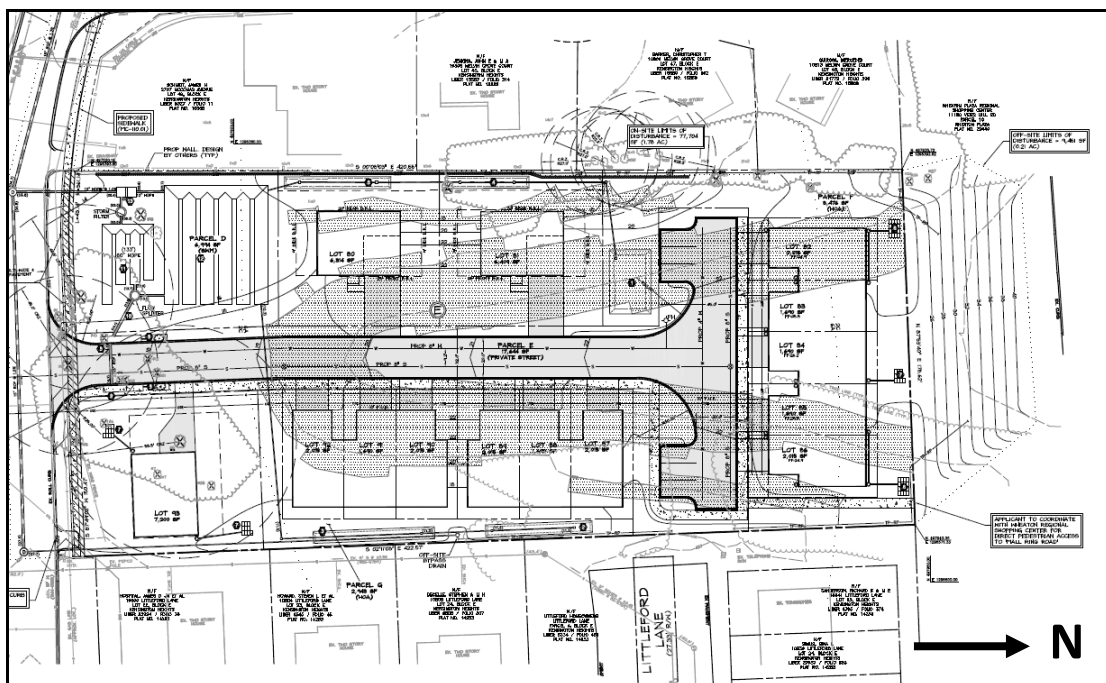
Previous Approvals

A rezoning application (G-879) was approved on October 12, 2010 for the reclassification of 1.81 acres of land from the R-60 zone to the RT-8 Zone (Attachment A). Development was limited to a maximum of 14 dwelling units. The layout of units, the private street, and open space shown on the Schematic Development Plan are similar in many respects to the application submitted for Preliminary Plan approval. The substantive change includes placing the proposed private street in a separate parcel rather than placing the private street in an easement across pipe stem lots. Staff believes the revised layout is less cumbersome in terms of maintenance and liability, and the ability of the private street to function as a public street. The Schematic Development Plan also contains four Binding Elements:

1. Vehicular access to this site shall be limited to McComas Avenue.
2. Building coverage shall not exceed 25% of the gross tract area.
3. The maximum number of dwelling units shall be 14. The final number of dwelling units will be established at Site Plan review.
4. Any units that have frontage on McComas Avenue shall be one-family detached homes.

Proposal

The proposed Preliminary Plan (Attachment B) consists of fourteen (14) lots for three (3) single-family detached dwelling units and eleven (11) single-family attached townhomes on approximately 1.81 acres zoned RT-8. The property will be served by a 20-foot-wide private street from McComas Avenue and 5-foot-wide sidewalks will be provided along the Subject Property frontage on McComas Avenue, internally to the site, and connecting to the Westfield Wheaton Mall property to the north. The proposed private street is shown as a separate HOA parcel and will have a public access easement for the private street and all sidewalks shown on the plat. The primary stormwater management facility is shown in the far southwest corner of the site adjacent to McComas Avenue. The Subject Property will be served by public water and sewer.



Proposed Plan

COMMUNITY OUTREACH

The Applicant has met all proper signage, noticing, and submission meeting requirements. Staff has received correspondence on the Preliminary Plan. Staff has met with nearby citizens on numerous occasions, and received various emails and one formal letter (Attachment C). Citizens are primarily concerned with:

- Clearing of all trees onsite;
- Removal of fill;
- Stormwater management facilities and runoff;
- Building heights and the height of the retaining wall; and
- Existing and proposed pedestrian connections.

Clearing of Trees

The citizens are concerned that the Applicant is proposing to clear all trees onsite for grading, the removal of fill, and the proposed retaining wall on the western property boundary. Although there are trees, there is no existing forest onsite. In this case, the Applicant is required to provide 0.33 acres of afforestation, which the Applicant is proposing to meet off-site or via fee in lieu.

Removal of Fill

Multiple longtime residents have reported this site as a fill and possible dumping location during the expansion of the mall property to the north. Staff is requiring the Applicant to test these soils and their suitability to support the proposed development prior to the submittal of the Site Plan. Residents are also concerned about the impact on their property by the removal of fill and general construction on the Subject Property. A Sediment Control Permit must be obtained from the DPS prior to clearing or grading of the site.

Stormwater Management (SWM) Facilities

Citizens are concerned that the proposed SWM facilities do not meet the new State SWM regulations for Environmental Site Design (ESD), and are not sufficient enough to handle the expected runoff from the proposed development. The Department of Permitting Services (DPS) Water Resources Section has approved the stormwater management concept as meeting the applicable Local and State stormwater management regulations. As outlined in the stormwater management section below, due to existing storm drain capacity and downstream flooding concerns in the Town of Kensington, overbank (10 year control) and extreme flood protection (100 year control) are required. DPS has approved the proposed SWM concept and finds the proposed facilities adequate to handle such flows.

Building and Retaining Wall Heights

Adjoining property owners were initially concerned with the height of the proposed retaining wall. Initial plan drawings had depicted the retaining wall as much as 12 feet tall in some locations. There were also concerns with the heights of the proposed homes onsite, since initially the Applicant was proposing to remove less fill which would leave the overall elevation of the site higher than the surrounding properties, and as result, the proposed building heights would have been higher compared to surrounding properties. The Applicant has revised the Preliminary Plan to show additional grading of the site resulting in an overall lower elevation for the site, which reduces the “towering” effect of the proposed buildings, and results in a retaining wall as low as 1 foot to approximately 5 feet tall at its highest point along the western property line. The ultimate location and elevation of the retaining wall will be determined at Site Plan review.

Pedestrian Connections

An adjoining property owner is opposed to the sidewalk extensions from the Subject Property to the intersection of Melvin Grove Court and McComas Avenue and the intersection of McComas Avenue and Littleford Lane. The adjoining property owner points out that a few trees and the owner's fence may have to be removed to accommodate the sidewalk. The Applicant's engineers have determined that the adjoining property owner's fence is on his property, and is not located in the area to be disturbed for the installation of the offsite sidewalk extension. It is not likely that the adjoining property owner's fence will be impacted due to the construction of the offsite sidewalk extension.

ANALYSIS AND FINDINGS

Sector Plan Compliance (Attachment D)

The site is located within the 2011 *Wheaton CBD and Vicinity Sector Plan*. There is no specific recommendation or comment in the Sector Plan for this site other than the general retention and preservation of the existing residential neighborhoods. The 1990 *Wheaton CBD and Vicinity Sector Plan* recommended the site as suitable for the PD-9 Zone. But in 2010, the property was rezoned from R-60 to RT-8 because the setback requirements of the PD-9 Zone were deemed too restrictive for the narrow shape of the site. The 2011 Sector Plan confirmed RT-8 zoning for the site.

Although the 2011 Sector Plan placed great emphasis on redevelopment of the commercial core of Wheaton, one of the goals of the Sector Plan's zoning recommendations was protection of existing residential neighborhoods (page 31, Planning Board Draft as modified by the Council Resolution of Approval). On page 33, it further states that the "heights and densities decrease closer to the single-family residential communities surrounding Wheaton's commercial areas and no change in zoning is recommended for the developed low-density stable residential communities that surround the more dense central areas."

The proposed Preliminary Plan meets all standards and requirements of the RT-8 Zone confirmed by the Sector Plan, and it preserves the existing residential neighborhood near the dense central area of the Sector Plan by allowing for the development of the vacant parcel into a mix of single-family attached townhomes and single-family detached units. Therefore, staff finds the proposed Preliminary Plan is in substantial conformance with the goals and objectives of the 2011 *Wheaton CBD and Vicinity Sector Plan*.

Adequate Public Facilities Review (APF)

Site Location and Vehicular Site Access Point

The site is located on McComas Avenue between Littleford Lane and Melvin Grove Court within an existing residential neighborhood, adjacent to the Westfield Wheaton Mall. The proposed development would create a private street from McComas Avenue, terminating in two hammerheads.

On-Site Circulation

Internal circulation will be adequate with a two-way private street with driveways for both the single-family detached and townhouse units.

Public Transit Service

The site is located approximately a half-mile from the nearest bus stop located at the intersection of Georgia Avenue (MD97) and Windham Lane, and approximately one mile from the Wheaton Metrorail Station.

Sector-Planned Roadway and Bikeway

McComas Avenue is not designated as a master planned roadway in the 2011 *Wheaton CBD and Vicinity Sector Plan*. It is a secondary residential street, with a 60-foot wide ROW. The Sector Plan recommends a signed shared roadway (on road bikeway), PB-7, along McComas Avenue.

Pedestrian Facilities

There are very few sidewalks in the surrounding neighborhood. Along the north side of McComas Avenue, there is a four-foot wide sidewalk with an eight-foot wide tree panel that is approximately 800 feet east of the site. There are also sidewalks along sections of Littleford Lane and Torrance Drive, which are both in close proximity to the site.

Sidewalks do not exist along this section of McComas Avenue fronting the site. As described in the recommended conditions above, the applicant must provide a sidewalk along their frontage of McComas Avenue to Melvin Grove Court and Littleford Lane.

Local Area Transportation Review (LATR)

The proposed residential development will generate eight (8) AM peak-hour trips within the peak-period (6:30 to 9:30 a.m.) and 12 PM peak-hour trips within the peak-period (4:00 to 7:00 p.m.). The table below illustrates the trips generated by the proposed land use:

<i>Land Use</i>	<i>No. of Units</i>	<i>Peak-Hour Trips</i>	
		<i>5 (AM)</i>	<i>9 (PM)</i>
Townhouse Units	11	5 (AM)	9 (PM)
Single-Family Detached Units	3	3	3
Total	14	8	12

The proposed lots do not generate 30 or more vehicle trips during the morning or evening peak-hours. Therefore, the application is not subject to LATR review.

Policy Area Mobility Review (PAMR)

The PAMR test requires the applicant to mitigate one (1) (10% of the 12) new peak-hour trip generated by the proposed residential development within the weekday AM and PM peak-periods. To satisfy the PAMR test, the Applicant could contribute \$11,300 per PAMR trip for a total of \$11,300, toward transportation infrastructure improvements within the greater Kensington/Wheaton Policy Area, or the required payment could be applied toward the offsite extension of the sidewalk.

With the conditions of this report, staff finds that the proposed plan satisfies the PAMR test, and is not subject to the LATR review. Staff also finds the proposed vehicle and pedestrian access and circulation to be adequate to serve the proposed subdivision.

Other Public Facilities

Other public facilities and services are available and will be adequate to serve the proposed development. The property will be served by public water and sewer systems. The application has been reviewed by the Montgomery County Fire and Rescue Service which has determined that the Property has appropriate access for fire and rescue vehicles. Other public facilities such as schools, police stations, firehouses and health services are currently operating within the standards set by the Subdivision Staging Policy resolution currently in effect. The application is not required to make a School Facilities Payment. Electrical, gas, and telecommunications services are available to serve the Property.

Environment

Staff approved a Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) #420072910, on August 31, 2007, and recertified on January 8, 2010. As stated previously, the 1.81-acre Subject Property contains no forest, streams, wetlands, or environmental buffers. However, the site contains significant areas of man-made steep slopes due to previous use of the property as a stockpile site. The property is located in both Rock Creek and Sligo Creek watersheds; both are Use I watersheds. The proposed project is in compliance with the *Environmental Guidelines*.

Unsafe Land

Section 50-32(b) of the Subdivision Regulations reads:

“The board must restrict the subdivision of any land which it finds to be unsafe for development because of possible flooding or erosive stream action, soils with structural limitations, unstabilized slope or fill, or similar environmental or topographical conditions.”

As stated above, the Subject Property was used as a stockpile area during an expansion of the Westfield Wheaton Mall and has unknown amounts of fill. The Subject Property is graded as a plateau running north-south, sloping steeply from the Mall site to the south, east and west. Parts of the site are 18’ higher than adjacent properties. The Applicant is proposing to remove up to 14’ of fill from the site, so that the finished topography more closely matches the surrounding properties. In order to ensure the stability of the site, the Applicant must work with the Department of Permitting Services to develop a plan for fill removal prior to Site Plan submission.

Forest Conservation

This property is subject to the Montgomery County Forest Conservation Law (Chapter 22A of the County Code), and a Preliminary Forest Conservation Plan (“PFCP”) has been submitted for Planning Board approval (Attachment E). There are 0.00 acres of forest on-site and all forest conservation requirements will be met off-site.

Forest Conservation Variance

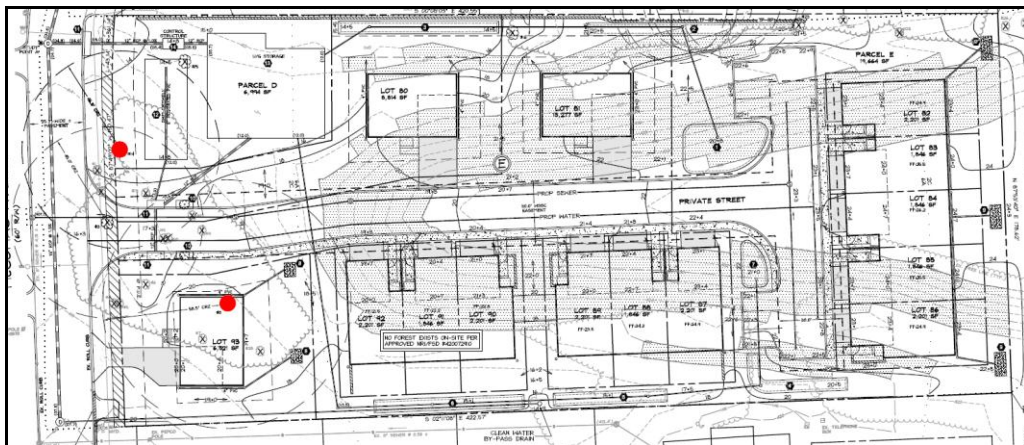
Section 22A-12(b) (3) of Forest Conservation Law provides criteria that identify certain individual trees as high priority for retention and protection. Any impact to these trees, including removal or disturbance within the tree’s critical root zone (“CRZ”) requires a variance. An applicant for a variance must provide certain written information in support of the required findings in accordance with Section 22A-21 of the County Forest Conservation Law. The law requires a variance to impact trees that: measure 30 inches or greater diameter at breast height (“DBH”); are part of a historic site or designated with a historic structure; are designated as national, State, or County champion trees; are at least 75

percent of the diameter of the current State champion tree of that species, or trees, shrubs, or plants that are designated as Federal or State rare, threatened, or endangered species.

The Applicant submitted a variance request on April 12, 2011 for the impacts to trees from the proposed layout. The Applicant has applied to remove two trees¹ that are considered high priority for retention under Section 22A-12 (b) (3) of the County Forest Conservation Law.

Unwarranted Hardship

As per Section 22A-21, a variance may only be granted if the Planning Board finds that leaving the requested trees in an undisturbed state would result in unwarranted hardship. In this case, the unwarranted hardship is caused by the need to remove the existing fill on the Subject Property in order to develop it safely and suitably.



Trees Requiring Variance

Variance Findings

Based on the review of the variance request and the proposed Final Forest Conservation Plan, staff makes the following findings:

1. *Granting the variance will not confer on the applicant a special privilege that would be denied to other applicants.*

Granting the variance will not confer a special privilege on the applicant as disturbance of the specified trees are due to the removal of fill and placement of stormwater management devices. The process of regrading the property will disturb the entire site, regardless of the proposed development program. Therefore, staff believes that it is not a special privilege that would be denied to other applicants.

2. *The need for the variance is not based on conditions or circumstances which are the result of the actions by the Applicant.*

The requested variance is not based on conditions or circumstances which are the result of actions by the Applicant. The requested variance is a result of the large amounts of fill on the Subject Property, that were placed there through previous redevelopment on the Westfield Wheaton Mall property.

¹ While the Applicant's request lists three trees to be removed, one of the trees, #3, 30" Red maple, does not require a variance to remove, as it is located in the ROW being dedicated.

3. *The need for the variance is not based on a condition relating to land or building use, either permitted or non-conforming, on a neighboring property.*

The requested variance is a result of the trees being impacted by the required grading and stormwater management facilities. There are no conditions relating to land or building use, either permitted or nonconforming, on a neighboring property that have played a role in the need for this variance.

4. *Granting the variance will not violate State water quality standards or cause measurable degradation in water quality.*

The proposed development will provide stormwater management for a site that currently has none. None of the trees proposed for removal are within any environmental buffers, as there are none on site.

Mitigation for Trees Subject to the Variance Provisions

The proposed variance for the removal of two trees must be mitigated by additional plantings on the Final Forest Conservation Plan. Mitigation should be at a rate that approximates the form and function of the trees removed. Therefore, staff is recommending that replacement occur at a ratio of approximately 1" DBH for every 4" DBH removed, using trees that are a minimum of 3" DBH, which is consistent with mitigation required on previously approved plans. Using this formula, the Applicant will need to plant six trees with a minimum size of 3" DBH.

County Arborist's Recommendation on the Variance

In accordance with Montgomery County Code Section 22A-21(c), the Planning Department is required to refer a copy of the variance request to the County Arborist in the Montgomery County Department of Environmental Protection for a recommendation prior to acting on the request. Staff forwarded the request to the County Arborist on April 15, 2011. The County Arborist has elected not to review the variance request. As such, the County Arborist's recommendation for the variance request is therefore presumed to be favorable.

Therefore, staff recommends that the variance be granted, and staff finds the preliminary plan satisfies the requirements of the Montgomery County Environmental Guidelines and Forest Conservation Law.

Stormwater Management

The Montgomery County Department of Permitting Services (MCDPS) Stormwater Management Section approved the stormwater management concept for the project on September 1, 2011. The stormwater management concept includes the use of dry wells, micro-bioretenion, and non-rooftop disconnect. Additional treatment is provided by the use of Filterra(s) and a volume based StormFilter. Due to existing storm drain capacity and downstream flooding concerns in the Town of Kensington, overbank (10 year control) and extreme flood protection (100 year control) are required.

Compliance with the Subdivision Regulations and Zoning Ordinance

This application has been reviewed for compliance with the Montgomery County Code, Chapter 50, the Subdivision Regulations, and Chapter 59, the Zoning Ordinance. The application meets all applicable sections. Access and public facilities will be adequate to support the proposed use. The application has been reviewed by other applicable County agencies, all of whom have recommended approval of the plan (Attachment F).

Lot Frontage on a Private Street

Section 50-29(a)(2) of the Subdivision Regulations (Attachment G) requires "...that individually recorded lots shall abut on a street or road which has been dedicated to public use or which has acquired the status of a public road." Thirteen (13) of the fourteen (14) lots will front onto a private street, while one (1) of the fourteen (14) lots will front on McComas Avenue, a public road. Therefore, if the Planning Board approves the Preliminary Plan, it must also find that the proposed private streets have acquired the status of public roads. As reflected in other similar cases approved by the Board, this finding must be based upon the proposed road being fully accessible to the public; accessible to fire and rescue vehicles, as needed; and designed to the minimum public road standards, except for right-of-way and pavement widths.

In the case of this subdivision, the proposed streets, which provide frontage to thirteen (13) of the (14) fourteen lots, can meet the minimum standards necessary to make the finding that they have the status of a public road. The private roads will be constructed to the minimum public road structural standards, have a 20-foot pavement width with adequate turning radii at intersections where needed for emergency access, have an appropriate paving cross-section elsewhere for private vehicles, and have an appropriate circulation and turnaround pattern. The private roads will be placed within an easement that ensures they remain fully accessible to the public.

CONCLUSION

The proposed lots meet all requirements established in the Subdivision Regulations and the Zoning Ordinance, and the application substantially conforms with the recommendations of the *Wheaton CBD and Vicinity Sector Plan*. Access and public facilities will be adequate to serve the proposed lots, and the application has been reviewed by other applicable County agencies, all of whom have recommended approval of the plan. Therefore, staff recommends approval of the Preliminary Plan and Preliminary Forest Conservation Plan with the conditions specified above.

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Attachments:

- A. Resolution for G-879
- B. Preliminary Plan
- C. Correspondence
- D. Wheaton CBD and Vicinity Sector Plan (pages 31-33)
- E. Preliminary FCP
- F. Agency Approvals
- G. Section 50-29(a)(2)

Resolution No.: 16-1518
Introduced: October 12, 2010
Adopted: October 12, 2010

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

By: District Council

SUBJECT: APPLICATION NO. G-879 FOR AMENDMENT TO THE ZONING ORDINANCE MAP, Steven A. Robins, Esquire and Martin J. Hutt, Esquire, Attorneys for Applicant, Kensington Heights 2, LLC, OPINION AND RESOLUTION ON APPLICATION Tax Account No. 13-01199036

OPINION

Application No. G-879, as amended by Applicant Kensington Heights 2, LLC,¹ requests reclassification of 1.806 acres (78,672 square feet) of unimproved land located at 2609 McComas Avenue, Kensington, Maryland, from the existing R-60 Zone to the RT-8 Zone. The property, which consists of Part of Lot 16, Block E, Kensington Heights Subdivision, is situated just south of Wheaton Plaza Shopping Center (also now known as “Westfield Wheaton Shopping Center” and “Westfield Wheaton Mall”).

The application was filed under the Optional Method authorized by Zoning Ordinance §59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development that consists of eleven (11) new townhomes and three (3) single-family detached homes. The proposal is set forth in a revised Schematic Development Plan (SDP), Exhibit 63(a), which contains an illustrative diagram and a specification of the binding elements, as well as other information regarding the development.

The Applicant initially requested rezoning to the RT-10 Zone, with a plan to build 15 townhouses and two (2) single-family detached homes (Exhibit 8), but after consultation with Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), Applicant amended its application to request rezoning to the RT-8 Zone, with 11 townhouses and 3 single-family detached homes. See Exhibits 27(a) and (c), later corrected in Exhibit 63(b).

Technical Staff reviewed the revised plans, and in a report dated October 19, 2009, recommended approval (Exhibit 33). The Planning Board considered the revised application on October 29, 2009, and by a vote of 4 to 0, recommended approval, as set forth in a memorandum

¹ The application was filed on December 1, 2008, amended on June 18, 2009 to reduce the re-zoning request from RT-10 to RT-8 (Exhibit 27(a)), and corrected on November 20, 2009 (Exhibit 63(b)), to show the full amount of acreage to be rezoned (1.806 acres).

dated October 30, 2009 (Exhibit 43). The Planning Board agreed with its Technical Staff that the application satisfied all of the criteria for reclassification to the RT-8 Zone.

A public hearing was duly noticed and convened on November 6, 2009, at which time the Applicant presented evidence and testimony in support of the application. Martin Klauber, the former People's Counsel, participated in the hearing, but he did not call any witnesses. The Kensington Heights Citizens Association (KHCA) submitted its testimony in writing to all parties in advance of the hearing because its representative was scheduled to be out of town on the hearing date. KHCA did not oppose the rezoning, but expressed concerns about stormwater management and removal of the hill on the site, which is comprised of excavation fill. KHCA also wanted a binding element, to which Applicant agreed, requiring that any residences at the McComas property line be single-family detached units. Exhibit 42.

Three other community witnesses testified at the hearing to express their concerns, one of whom testified against the rezoning. Another neighbor, who had merely expressed concerns at the hearing, sent a letter after the hearing expressing her opposition, asserting lack of compatibility and the need for pedestrian access from the development to Wheaton Plaza. Exhibit 84.

The filing of a revised, illustrative, site layout after the initial hearing caused the Hearing Examiner to obtain additional analysis from Technical Staff. On January 15, 2010, Technical Staff responded saying that although Staff found the new layout to be "not as appealing" as the previous SDP site layout, Staff determined that it was acceptable, and because the SDP layout is illustrative, the final site layout would be determined at subsequent stages in the development process (*i.e.*, at site plan and subdivision reviews). Exhibit 78. Staff also agreed to the other changes in the SDP, including binding elements that limited the number of dwelling units to 14 and required that any units fronting on McComas Avenue be one-family detached units. Technical Staff did express reservations about the addition of a non-binding note specifying that no pedestrian sidewalk access to Wheaton Plaza was being proposed, but Staff supported the SDP nevertheless because the note was non-binding and connectivity issues would be examined at site plan review.

Ostensible discrepancies in the evidence regarding the total size and boundaries of the subject property led the Hearing Examiner to schedule an additional day of hearings solely to address the property boundary issues. The hearing relating to the survey and boundary issues was held, as scheduled, on June 18, 2010. The Hearing Examiner left the record open after the survey hearing to allow comments from other parties who did not attend the hearing. The record closed on July 9, 2010.

The Hearing Examiner recommended approval of the application on the basis that the R-T 8 Zone at the proposed location would satisfy the requirements of the zone and its purpose clause; that the proposed reclassification and development would be compatible with land uses in the surrounding area; and that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. To avoid unnecessary detail in this Resolution, the Hearing Examiner's Report and Recommendation dated August 18, 2010, is incorporated herein by reference. Oral argument was held before the District Council on October 12, 2010. Based on

its review of the entire record and the oral argument, the District Council finds that the application does meet the standards required for approval of the requested rezoning for the reasons set forth by the Hearing Examiner.

The Property and the Acreage Issues

The subject property (Part of Lot 16, Block E, Kensington Heights), which has an area of about 78,672 square feet (1.806 acres), is bordered by Westfield Wheaton Mall on the north and McComas Avenue on the south. About 100 feet to the west is Melvin Grove Court and 100 feet to the east is Littleford Lane. It is equidistant (about 2,000 feet) from Drumm Avenue on the west and Georgia Avenue (MD 97) on the east.

The subject site is rectangular in shape, measuring about 200 feet wide and 400 feet deep, with approximately 200 feet of street frontage along McComas Avenue, which will provide the sole vehicular access to the site. This site is not in a special protection area or a primary management area. Tr. 62. According to Technical Staff, the site is just within a half-mile of the Wheaton Metrorail Station. It takes about 15 minutes to walk there. Tr. 115. Staff describes the property as follows (Exhibit 33, p. 4):

The subject property is currently zoned R-60 and is undeveloped. It is the only undeveloped property on the block. However, the property contains a large dirt stockpile area that was created during the expansion of the Wheaton Plaza Shopping Center. Because of the stockpiling activity, the site's topography has a sharp 22 percent grade, resulting in a man-made grassy hill on the property.

Applicant's engineer, Curt Schreffler, testified that the elevation of that mound at approximately its highest point in the center of the site is 438 feet above sea level, compared to 420 feet for the adjoining properties to the east and west. Tr. 54-55.

Two issues arose in this case regarding the acreage of the subject site. The first was that the initial application form (Exhibit 1) and the amended application form (Exhibit 27(a)) listed the size of the property as 1.76 acres (76,666 square feet), which is smaller than the amount of land that Applicant actually seeks to rezone, 1.806 acres (78,672 sq. ft.), as determined by a survey of the site. Zoning Ordinance §59-H-2.24 provides, "*After acceptance for filing, an application for a map amendment shall not be modified or amended so as to increase the area proposed to be reclassified or as to the class of zone requested.*"

Thus, if this difference were actually an increase in the amount sought in the "application," the change would not be permitted; however, the initial application also included an Identification Plat (Exhibit 5) which specified that the larger figure referred to the survey results and the smaller figure to the number specified in a deed to the property. The Hearing Examiner concluded that, pursuant to Zoning Ordinance §59-H-2.4, the term "application" is broader than just the application form. It included both documents (as well as other items), and thus the Applicant was not seeking to enlarge the area to be rezoned, but rather had referenced it by the two figures mentioned. Tr. 27-31. The District Council agrees with this legal conclusion.

In order to avoid confusion, the Hearing Examiner directed Applicant to file a corrected application form to reflect the correct acreage, which Applicant did in Exhibit 63(b).

The second issue concerned whether Applicant's survey fairly represented the actual property owned by the Applicant and did not include any part of the abutting land owned by the neighbors. Zoning Ordinance §59-H-2.1 provides, in relevant part,

Proposals for a local amendment of the zoning map may be made only by any governmental agency or by a person with a financial, contractual or proprietary interest in the property to be affected by the proposed amendment.

The Hearing Examiner therefore correctly realized the importance of establishing in the record whether Applicant has "a financial, contractual or proprietary interest" in the entire property it seeks to have rezoned and of avoiding a mistaken rezoning of property belonging to the adjoining property owners.

Confusion was created in this case because the Applicant had presented three different figures for the size of its property. The initial application form recited that the property consisted of "1.76 acres or 76,666 square feet." Exhibit 1. This figure was based on a "metes and bounds" description for Part of Lot 16, Block E (Exhibit 6), which concluded that the property contained "76,665.60 square feet (1.7602 acres), more or less." This description was premised on the tax records, not on the actual surveyed size of the property. Exhibit 90(a), pp. 3-4, ¶ 12(a).

At the hearing on November 6, 2009, it was revealed by Applicant that there was a discrepancy between the figures contained in the application form (Exhibit 1) and a survey result embodied in the certified Identification Plat (Exhibit 5), also filed as part of the application. Tr. 12-15. Exhibit 5 lists the survey result as "78,672.18 SQ. FT (1.8060 AC.) (SURVEY)". The same document also lists the figure, "76,665.6 SQ. FT (1.76 AC.)" as the figure purportedly on the deed.

Moreover, it turned out that the figure listed in Exhibit 5 as being the acreage from the deed is not. It is the figure from the metes and bounds description in Exhibit 6, but it does not match the figure contained in "Exhibit A" to the deed (Exhibit 76(a)). That figure is "78,196 square feet or 1.79513 acres of land, more or less." To complicate matters further, Applicant supplied another metes and bounds description in Exhibit 63(e) to accompany its amended application (Exhibit 63(b)). That description concludes that the area in question is "78,672.18 square feet (1.8060 acres) of land, more or less." That figure matches the one on the "survey" data from Exhibit 5 and on the amended application form (Exhibit 63(b)), but not the one on the deed (Exhibit 76(a)), nor the one on the Exhibit 6 metes and bounds description.

Thus, there are at least three different area measurements in the record for the subject site, two of which do not precisely match the description in the deed. Although Applicant affirmed in its "Corrected Amended Application" form (Exhibit 63(b)), that "it is the owner of the entire 1.8060 acre property . . .," the Hearing Examiner felt that additional evidence was needed to make a fair determination of the boundaries of the property subject to the application. Applicant was therefore ordered to file an affidavit from a licensed surveyor explaining the

discrepancies. Exhibit. 86. On March 5, 2010, Applicant filed an affidavit signed by David John Ritchie, a professional surveyor licensed in the State of Maryland. Exhibit 90(a).

Applicant's surveyor in his affidavit swore that the kind of discrepancies evidenced in this case were common and inconsequential; however, a confronting neighbor argued that the surveyor had not sufficiently explained the reasons for the discrepancy, and an adjoining property owner to the west of the site, questioned the accuracy of the survey regarding the property line separating the subject site from his property.

In order to resolve these boundary issues and to give the adjoining property owners an opportunity to present evidence on these points, the Hearing Examiner formally noticed and held an additional hearing day on June 18, 2010, which addressed solely the boundary and survey issues. The hearing notice was sent directly to all adjoining and confronting landowners and was duly published in two newspapers. Exhibits 104 – 107. The notice stated, *inter alia*, "all parties are invited to produce expert testimony regarding the sufficiency of the survey data provided by Applicant and/or to provide additional evidence or expert opinions on the issue." Exhibit 104. Nevertheless, none of the adjoining property owners appeared for the hearing.

The testimony presented by the two confronting property owners who did appear was insufficient to outweigh the expert surveyor's testimony on the survey and boundary issues. The only expert evidence was presented by Applicant's licensed surveyor, David John Ritchie, who explained that an iron pipe identified by an adjoining neighbor actually did not mark the property line separating his property from the subject site. Rather, it was about seven feet northeast of the corner "monumentation" the surveyor had found when he did the survey in 2006. Mr. Richie located a number of markers around the site marking the actual property lines, which were as he had listed them in his survey and affidavit. 6/18/10 Tr. 24-25. Mr. Ritchie confirmed that the size and boundaries of the subject site were as he had determined them in his survey, 1.8060 acres. 6/19/10 Tr. 68.

The fundamental argument of the confronting neighbors is that the deed established the area of the property in this case, and the deed records the size of the parcel at 1.79 acres (78,196 square feet),² not 1.8060 acres (78,672.18 square feet). This argument missed the point. The District Council agrees with Hearing Examiner's finding that the surveyor's testimony doesn't outweigh the deed; it explains that the deed's figure of 78,196 square feet "more or less" is essentially the same as the final survey figure of 78,672.18 square feet, given the small size of the discrepancy and the nature of professional surveying standards. The District Council accepts the expert's testimony that the difference of 476 square feet between the deed's figure and his survey result is *diminimus* and within the range of professional differences in surveys. 6/18/10 Tr. 27 and Exhibit 90(a), pp. 4-5, ¶ 13. Not only is the difference very small, but the acreage figure of the 2006 deed conveying the property was qualified, as noted above – "78,196 square feet or 1.79513 acres of land, more or less." Exhibit 76(a), Emphasis added.

² The initial ID Plat (Exhibit 5) incorrectly attributed the still smaller figure for the area of 1.76 acres to the deed. That figure was actually from the tax records. The language on the ID Plat was corrected in Exhibit 47 to show that that figure came from the tax records. The deed in question specifies the area as 1.79 acres.

While the difference in the figures contained in the tax records is somewhat larger, Mr. Ritchie believes that those figures on the tax records, from which the initial 1.76 acre figure came, were the result of somebody measuring incorrectly because their instrumentation at that point was not as good as present day. 6/18/10 Tr. 27-30. When asked by the Hearing Examiner what accounted for the three different figures given in this case, Mr. Ritchie testified (6/18/10 Tr. 26-27):

Surveyed areas are consistently different than what's deeded.

* * *

The differences between surveys is techniques in surveying and equipment used and a lot of times, the time frame between. We have a much more accurate way of measuring distances now than they did back in even the '60s and '50s and, you know, the original Lot 16 was subdivided back in 1890 so just, it's all the differences between technique and equipment.

Mr. Ritchie stated that he uses state-of-the-art surveying equipment consistent with other companies in the area in the profession, and as is customary, he employs a two-man field crew. Mr. Ritchie further testified that the monumentation he found on the subject site (iron pipes and rebars) is indicated by small circles along the property line and noted by brief annotations on Exhibit 5. The pipes, rebars and caps were consistent with the record plats of the adjoining properties. To make sure that the monumentation he found correctly reflected the property lines, he located other monumentation randomly throughout the neighborhood to establish control coordinates. From those known points, the location of which was confirmed using GPS technology, he then determined the locations on the property to be surveyed. 6/18/10 Tr. 38-39; 49-50.

Based on his survey, Mr. Ritchie testified, "In my professional opinion, the land requested to be re-zoned by this local map amendment does not include any portion of the adjoining properties." 6/18/10 Tr. 37. This expert testimony was un rebutted, and the District Council finds that the evidence overwhelmingly supports Applicant's claim that it has a property interest in all of the land it seeks to rezone, and that none of it belongs to the adjoining property owners.

Surrounding Area and Zoning History

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The "surrounding area" is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development.

Technical Staff proposed to define the surrounding area as bordered by Wheaton Plaza to the north, Georgia Avenue to the east, Kimberly Street and Calgary Avenue to the south, and the Wheaton Plaza ring road to the west. Exhibit 33, p. 5. Applicant's land planner proposed to define the surrounding area with slightly different boundaries, but he indicated that these differences were not significant and would not affect the compatibility analysis. Tr. 117. The

Hearing Examiner accepted Technical Staff's surrounding area definition, as does the District Council.

Technical Staff describes the surrounding area as made up of a mix of commercial uses and residential developments of varying housing types (Exhibit 33, p. 5):

Wheaton Plaza, a large commercial shopping center developed under the C-2 Zone, makes up the entire northern half of the surrounding area. Below the shopping center is a transitional block along the north side of McComas Avenue (where the subject property is located) that contains a mix of single-family detached housing and townhomes. This transitional block has developed under R-60, R-T 8, and PD-9 zoning. South of McComas Avenue, the predominant land use is single-family detached housing, developed under the R-60 Zone. More townhomes and higher-density apartments are located along Georgia Avenue.

To the west of the subject site are single-family, detached homes in the R-60 Zone. Most significantly, the property immediately to the east of the subject site is zoned RT-8, the very zoning classification that Applicant seeks. It is composed of townhouses on the side adjacent to Wheaton Plaza and single-family detached homes to the south, precisely the configuration suggested by Applicant for its property. Further to the east are townhouses and single-family, detached homes in the PD-9 Zone, also arranged with the same configuration (townhouses on the north and detached homes on the south). As noted by Applicant's land planner, "between the bulk of the residential development to the south and the intense activity of the mall is this transitional block that acts as a separator or a transition between the commercial activity and the residential neighborhood to the south." Tr. 118.

The zoning history of the subject site and its adjacent block was provided by Technical Staff (Exhibit 69):

. . . [T]he property has retained the R-60 zoning classification continuously since 1958, the year of the zoning ordinance rewrite and corollary comprehensive rezoning of the County involving the combining of Upper Montgomery County with the then-regional district of Montgomery County. In October of 1978, a sectional map amendment (SMA G-137) rezoned certain properties in the Wheaton Central Business District area, but the subject property was not affected and retained R-60 zoning.

Although the property is zoned R-60, the 1978 Wheaton Sector Plan first recommended the site as suitable for the PD-9 Zone. In fact, in the 1978 Sector Plan a large stretch of the northern side of McComas Avenue was mentioned as suitable for PD-9 zoning. In the time period between the adoption of the 1978 and 1990 Wheaton Sector Plans, much of the northern side of McComas Avenue developed in a piecemeal fashion under both R-T 8 and PD-9 zoning. The 1990 Sector Plan retained the recommendation that the subject property was suitable for PD-9 zoning.

Proposed Development and Binding Elements

The Applicant proposes to level the existing hill of the site and construct 11 townhouses and three single-family detached houses. Applicant's vision for the project was discussed by its managing partner, Sterling Mehring, who testified that his plans were based on the Sector Plan, which contemplates a mix of housing types and a transition from the intense C-2 zoning on the north to the R-60 zoning which is to the west and to the south. Also, the Planning Board clearly preferred the maintenance of a single-family streetscape along McComas, with townhomes behind. Tr. 37.

Technical Staff characterized Applicant's proposal with similar language (Exhibit 33, p. 6):

The proposal maintains the established pattern of single-family detached homes fronting on McComas Avenue. The proposal places townhomes closer to the rear of the property, behind the single-family detached housing and abutting Wheaton Plaza.

* * *

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the "optional method" of application. The optional method requires submission of a schematic development plan (SDP) that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding on the SDP must be set forth in a Declaration of Covenants to be filed in the county land records if the rezoning is approved. The Applicant's final SDP (Exhibit 63(a)), which was revised after the hearing and approved by Technical Staff (Exhibit 78), sets forth the four binding elements for the development as follows:

BINDING ELEMENTS

1. Vehicular access to this site shall be limited to McComas Avenue.
2. Building coverage shall not exceed 25% of the gross tract area.
3. The maximum number of dwelling units shall be 14. The final number of dwelling units will be established at site plan review.
4. Any units that have frontage on McComas Avenue shall be one-family detached homes.

Applicant has also filed an executed copy of the Declaration of Covenants in the record of this case as Exhibit 63(f), and it contains the specified binding elements, as required. The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a schematic development plan amendment.

The graphic portion (*i.e.* site layout) of the revised SDP (Exhibit 63(a)), is illustrative (except as specified in the binding elements). The plan shows three single-family detached homes located generally on the southern and western sides of the site, adjoining the R-60 zoned land to the south and west, and townhouses on the east and north, adjoining the RT-8 zoned land to the east and the C-2 zoned land to the north. It should be noted that the stormwater management facility located in the southwest corner of the site may be moved elsewhere on the site at site plan and subdivision reviews. However, if it is moved and replaced with a dwelling unit at that location along McComas Avenue, the dwelling unit would have to be a single-family detached home, pursuant to the binding elements. Moreover, wherever it is located, Applicant plans for it to be an underground facility, so that the area will not be unattractive. Tr. 68-69.

The SDP also contains Site Data, Development Standards and General Notes.

The fifth general note specifies, "No pedestrian sidewalk access to Wheaton Plaza is being provided or proposed per the direction of the community." It was added by Applicant to address concerns expressed by the People's Counsel and a number of community residents who fear that a pedestrian connection to Wheaton Plaza would bring crime into their neighborhood. Tr. 38-41. It is non-binding and this plan can be changed by the Planning Board at Site Plan review, but Applicant's land planner, Alfred Blumberg, testified that such a connection is unlikely because of the large difference in elevations between the subject site and Wheaton Plaza and because there is no sidewalk to connect it to in this area of the Wheaton Plaza site. Tr. 120-121.

As proposed, all units will have front entry, two-car garages. The three single-family detached homes, in addition to the two-car garages, will have driveways deep enough to accommodate additional parking for two extra cars. Twelve guest parking spaces are also planned within the development. Thus, the parking count for the development is 40 spaces, 12 spaces more than required by the ordinance, even without counting the six extra driveway spaces. Exhibit 33, p. 6.

Internal vehicle circulation will be provided by a private street. Pedestrian access is provided through lead-in sidewalks. Vehicular access will be limited to McComas Avenue. One concern raised by a confronting neighbor was that the sight distances from the access road west along McComas Avenue will not be great enough for safety because there is a "blind curve" just before Melvin Grove Court. Tr. 156. However, Applicant's traffic engineer, Michael Lenhart, testified that the sight distance is more than adequate. Mr. Lenhart stated that he measured the sight distances at the proposed entrance into the subject property and found them to be around 200 feet in both directions. The American Association of State Highway Transportation Officials (AASHTO) produces the guidelines that jurisdictions utilize in designing highway facilities. It shows that for the 25 miles per hour speed limit posted on this road, one would need 155 feet of sight distance for a vehicle to come to a safe stop. Because the sight distances are about 200 feet in either direction from the property access, the access sight distances exceed the AASHTO minimum requirement. Tr. 88. Moreover, Transportation Staff found that the proposed access and vehicular/pedestrian circulation are safe and adequate, with final refinement to be considered at site plan review. Exhibit 33, p. 16. There is no contradictory expert evidence on

the point, and the District Council therefore finds that the record supports the finding that the planned access location is not unsafe.

Standard for Review

A floating zone, such as the RT-8 Zone, is a flexible device. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed development will be consistent with the purpose and regulations of the proposed zone and compatible with the surrounding development, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967), and that it will be consistent with a coordinated and systematic development of the regional district and in the public interest, as required by the *Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110*.

Requirements and Purpose of the Zone

Under the “purpose clause” set forth in Zoning Code §59-C-1.721, the R-T Zone may be applied if a proposal meets any one of three alternative criteria: (1) it is in an area designated for R-T Zone densities (implying a master plan designation); (2) it is in an area that is appropriate for residential development at densities that are allowed in the R-T Zones; or (3) it is in an area where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.

The subject site is located in the area subject to the *1990 Wheaton Central Business District and Vicinity Sector Plan*. The Sector Plan did not designate the subject site for the RT-8 Zone, and thus the Purpose Clause cannot be satisfied under that criterion.³ However, there are three alternative methods of satisfying the Purpose Clause, and an Applicant is required to satisfy only one of them. Accordingly, the Purpose Clause may also be satisfied by development in areas “*appropriate for residential development at densities allowed in the R-T Zones*” or in areas “*where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.*”

The evidence in this case supports Applicant’s contention that the subject site satisfies both the “appropriateness” and the “transitional” criteria. In this regard, Applicant’s land use planner, Al Blumberg, testified that the development is appropriate at this location because it is compatible with the abutting developments on either side and because of the location of this transitional block. As stated by Mr. Blumberg, “it is an appropriate location for this density. It’s an appropriate location for this design and it’s an appropriate location for the zone. . . . The

³ Applicant argues that its proposal does satisfy the “designated” prong of the statutory test because the proposed density and residential use will be the same as the PD-9 Zone, which is the zone that was actually recommended in the Sector Plan. Tr. 131-132. Technical Staff agreed for the same reasons. Exhibit 33, pp. 11-12. While this interpretation is arguable because the language of the statute could be read as allowing the term “designated” to refer to the density allowed in the RT Zone, not just to the RT Zone itself, the District Council concludes that a better interpretation of the term “designated” is that it is referring to the RT-Zone, while the term “appropriate” is referring to the densities allowed in the RT Zones. As discussed in the above text, this difference in interpretation of the statute does not affect the outcome of the case because the statutory test may be satisfied by meeting any one of the three alternative criteria.

whole purpose of the transitional block is to provide that transition between the mall and the Kensington Heights residential neighborhood. So, it meets at least, two of the three, if not three of those criteria of the zone." Tr. 132-133.

The density proposed by Applicant is 7.75 dwelling units per acre (*i.e.*, 14 Dwelling Units on 1.806 acres). Technical Staff found that the residential density proposed is appropriate because it is close to the densities of the nearby residential developments on the block and because "the site is designed in a way that matches single-family homes to its R-60 neighbors and townhouses to its R-T 8 neighbors. Additional factors, such as the site being in close proximity to the Wheaton Metrorail Station and that the proposal does not generate many peak-hour trips, lead to a conclusion that the proposed density is appropriate for the area." Exhibit 33, p. 14.

Technical Staff also found that the application satisfies the transition prong of the R-T Zone purpose clause because it will contribute to an existing transitional block from the Wheaton Plaza commercial shopping center to the single-family detached homes to the south of the site. The entire block along the northern side of McComas Avenue has developed with single-family homes facing the McComas Avenue street frontage and more clustered homes with increased density closer to Wheaton Plaza. As stated by Technical Staff, "A need has clearly been established in the past for an appropriate transitional block at this location. The subject property should complete the transition along the northern side of McComas Avenue." Exhibit 33, p. 12.

The Planning Board and the Hearing Examiner agreed. Given the adjacent developments, especially the RT-8 development adjoining to the east, the District Council finds that the subject development, at the proposed density of 7.75 dwelling units per acre, is clearly appropriate for the area. Moreover, the townhouses to be located in the northern and eastern parts of the development will serve as a transitional buffer for the existing single-family detached homes. The purpose clause of the RT-8 Zone is therefore satisfied.

The intent clause of the R-T Zones will also be fulfilled. The R-T Zone will allow much more freedom of design than the PD-9 Zone because development under the PD-9 is restricted by the PD-9 Zone's setback requirements, as applied to the narrow width of this site. Zoning Ordinance §59-C-7.15(b)(1). Also, by designing the townhouse units in small rows of three, with the only row of five abutting the Wheaton Plaza property, and by restricting any dwelling units abutting McComas Avenue to single-family detached units, Applicant will prevent detrimental effects on the adjacent properties in the neighborhood.

Applicant's proposal also meets and even exceeds all the development standards and special regulations of the RT-8 Zone, as demonstrated in Part III. F. of the Hearing Examiner's report. Most significantly, the maximum amount of building coverage is specified in the Zoning Ordinance as 35 percent in the RT- 8 Zone, and Applicant is binding itself to no more than 25 percent building coverage, considerably less than the maximum permitted.

In sum, the District Council finds that the subject application meets the purpose and requirements of the RT-8 Zone.

Compatibility

An application for a floating zone reclassification must be evaluated for compatibility with land uses in the surrounding area. In addition to the matters discussed in the preceding section, Technical Staff found that the proposed development would be compatible with surrounding development for the following reasons (Exhibit. 33, pp. 6 and 15):

Given the narrow shape of the site, the general layout is compatible with neighboring patterns of development. The smaller groupings of townhomes on the east side of the site are in scale with abutting single-family detached homes. Further, the smaller groupings break the mass of what was originally proposed as a larger townhouse row. The row of five townhouses at the rear of the site (closest to Wheaton Plaza) provides a clear termination of the proposed private road and fits within an already existing transitional block that provides a buffer between Wheaton Plaza and the single-family homes on the south side of McComas Avenue.

* * *

Comparative density is also an important factor in determining compatibility with adjacent properties. The proposal will be similar to the prevailing density of the northern portion of McComas Avenue. Other factors, such as building heights, materials, and the exact number of dwellings, will be further refined at the site plan stage to ensure compatibility.

The Applicant has also alleviated some of the community's concerns about compatibility by agreeing to limit the number of dwelling units to a maximum of 14 and specifying that any units that have frontage on McComas Avenue "shall be one-family detached homes." Binding Element 4.

The PD-9 Zone recommended by the Sector Plan permits a base density of nine dwelling units per acre, which is greater than the 7.75 density proposed here. Zoning Ordinance §59-C-7.14. Moreover, the PD-9 Zone requires that a minimum of 25% of the dwelling units be townhouses or attached. Zoning Ordinance §59-C-7.131. Thus, the Sector Plan's PD-9 Zone recommendation is, in effect, a determination that townhouses are not, *per se*, incompatible with the neighborhood.

Based on this record, the District Council agrees with the findings made by Technical Staff, the Planning Board and the Hearing Examiner that the proposed reclassification to the RT-8 Zone and the proposed development would be compatible with development in the surrounding area.

Public Interest

The Applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. When evaluating the public interest, the District Council normally considers Master Plan or Sector Plan conformity, the recommendations of the

Planning Board and Technical Staff, any adverse impact on public facilities or the environment, and factors such as the location near public transportation, especially a Metro station.

As mentioned above, the *1990 Wheaton Central Business District and Vicinity Sector Plan* does not recommend the RT-8 Zone. However, compliance with Sector Plan recommendations is not mandatory in this case because the R-T Zones do not require it; rather, the courts have held that the Master Plan or Sector Plan should be treated only as a guide in rezoning cases like this one. As stated in *Trail v. Terrapin Run*, 403 Md. 523, 527, 943 A.2d 1192, 1195 (2008),

We also acknowledge our statement in *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 530, 814 A.2d 469, 478 (2002) (citing *Richmarr*, 117 Md. App. at 635-51, 701 A.2d at 893-901, [1997] that:

We repeatedly have noted that [master] plans, which are the result of work done by planning commissions and adopted by ultimate zoning bodies, are advisory in nature and have no force of law absent statutes or local ordinances linking planning and zoning. . . .⁴

The Sector Plan and the recommendations of the Planning Board and Technical Staff were considered, at length, in Part III.G. of the Hearing Examiner's report. Although the Sector Plan does not specifically recommend the zoning change sought by Applicant, the requested rezoning is consistent with its objectives and general language. The Planning Board and its Technical Staff support the proposed rezoning, believing that the development will be compatible with surrounding uses and compliant with the purposes and standards of the RT-8 Zone.

The impact on public facilities was discussed in Part. III. H. of the Hearing Examiner's report. The evidence indicates that, although the local elementary school experiences some overcrowding, a new school is scheduled to open in the same general time frame that the proposed development would be completed. Moreover, "[t]he current growth policy school test (FY 2009) finds capacity adequate in the Einstein Cluster." See March 26, 2009 letter from Bruce H. Crispell, the Director of Long-Range Planning for the Montgomery County Public Schools (Attachment 5 to the Technical Staff report, Exhibit 33). Given Mr. Crispell's conclusion and the plan for added capacity for elementary school students, the District Council finds that there is sufficient school capacity for the proposed development.

The evidence also supports the conclusion that the impact on local traffic from this development would be minimal and will clearly meet LATR and PAMR standards. Evidence was also presented that the proposed development would have no adverse effect on utilities or other public services.

⁴ Because the proposed RT-8 Zone does not require conformance or consistency with the Sector Plan, this case is not affected by legislation aimed at modifying *Terrapin Run's* interpretation of the words, "conformance" and "consistency." See Smart, Green, and Growing - Smart and Sustainable Growth Act of 2009, effective July 1, 2009.

The potential for any adverse environmental impact was discussed in Part III. I. of the Hearing Examiner's report. As noted there, the site is not in a special protection area, and a forest conservation plan will be required at subdivision to maximize tree retention. A stormwater management concept plan has been submitted to DPS, and it will be reviewed at subdivision. Neither Technical Staff nor the Planning Board noted any adverse effect on the environment; nor is there any other such evidence of record despite concerns raised by the neighbors about the safe removal of the man-made hill on site. That issue is more properly addressed later in the development process. Moreover, the undisputed evidence is that removal of the hill on the site will reduce stormwater runoff onto adjoining properties.

Technical Staff concluded that the proposed development would be in the public interest because ". . . the proposal furthers the general intent of the 1990 Wheaton Sector Plan and is consistent with its objectives and general language. . . . The proposal will not have any adverse impacts on public facilities, and the property's proximity to the Wheaton Metrorail station makes it an ideal location for townhouse development. For these reasons, the application bears a sufficient relationship to the public interest to justify its approval." Exhibit 33, pp. 15-16.

It is the District Council's conclusion that this proposal minimizes adverse impacts on the community, provides a buffer from commercial development for the nearby single-family detached homes, and establishes a walkable community with easy and quick pedestrian access to Metro and the nearby shopping mall.

For all of these reasons, as more fully discussed in the Hearing Examiner's report, the District Council concludes, based on the preponderance of the evidence, that the proposed reclassification and development would have no adverse effects on public facilities or the environment, and that approval of the requested zoning reclassification would be in the public interest.

Conclusion

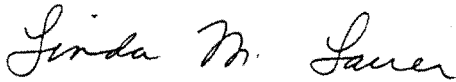
Based on the foregoing analysis and the Hearing Examiner's report, which is incorporated herein, and after a thorough review of the entire record, the District Council concludes that the application satisfies the requirements of the RT-8 Zone and its purpose clause; that the application proposes a form of development that would be compatible with land uses in the surrounding area; and that the requested reclassification to the RT-8 Zone bears sufficient relationship to the public interest to justify its approval. For these reasons and because approval of the instant zoning application will aid in the accomplishment of a coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District, the application will be approved in the manner set forth below.

ACTION

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

Zoning Application No. G-879, requesting reclassification of 1.806 acres (78,672 square feet) of unimproved land, known as Part of Lot 16, Block E, Kensington Heights Subdivision, and located at 2609 McComas Avenue, Kensington, Maryland, from the existing R-60 Zone to the RT-8 Zone, is hereby **approved** in the amount requested and subject to the specifications and requirements of the revised Schematic Development Plan, Exhibit 63(a); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance and that the revised Declaration of Covenants (Exhibit 63(f)) is filed in the County land records in accordance with §59-H-2.54 of the Zoning Ordinance and proof thereof submitted to the Hearing Examiner within the same timeframe.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council

Attachment C

October 12, 2011

Mr. Patrick Butler
Ms. Amy Lindsay
Maryland National Capital Park and Planning Commission

James Schmidt
2707 McComas Avenue
Kensington, Md. 20895

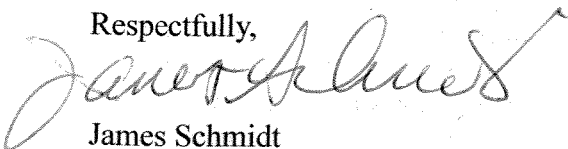
RE: Preliminary Plan # 120110170

Thank you for the opportunity to supply my input. I am an adjoining homeowner to the West of the subject property. The property is referred to as Mount McComas, named for the spoils dumped there by the owners of Wheaton Plaza during expansion activities, creating a 20 vertical foot high hill. This hill should be removed and the lot restored to its original elevations. This will keep the proposed roof ridge lines equal in height to the existing roof lines both East and West of the subject property. I have reviewed the preliminary plan prepared by CAS Engineering dated 2-14-11. Traveling up the centerline of McComas Avenue, starting at the West property line, the existing elevations are shown in 2 foot increments, terminating at the East property line at an elevation of 420. This indicates a total existing elevation change from West to East of 8 vertical feet. When looking at the proposed elevation changes between lots #'s 80 and 81 on the plan, the elevation starts at 412 in their backyards, matching the existing elevation of the adjoining properties, and then transitions to an elevation of 420 between the side yards resulting in an 8 vertical foot rise in approximately 35 linear feet. Although it may meet County code, these units will tower over the existing homes to the West. Of the 20 vertical feet of spoils dumped, only two thirds are proposed to be removed. These unnecessary elevation changes force the installation of a retaining wall shown without detail on the plans. No proposed heights on this wall are shown on the plans. Just North of the middle of John Jenkins' home on Lot 48, at the West property line, the existing elevation is shown at 413. The proposed spot elevation at the wall's location is shown at 21.5 vertical feet. This would mean a wall over 8 and a half feet tall! If the site were restored to its original elevations a wall would not be necessary. Also of concern is the majority of this proposed wall is less than 1 foot from the existing property line. This does not allow for a buffer for natural screening or landscaping. Are the neighbors expected to utilize our property to screen out this looming 8.5 foot tall wall? If a wall of any height must be built, a minimum of at least 4 feet from the West shared property line should be provided to accommodate a buffer for limits of disturbance, silt fencing, erosion and sediment control and eventual landscaping and screening. This will also allow the existing fences along the West lines to be maintained.

I have lived at my current address for 57 years and am concerned about the process as it moves forward. I would request to be an active participant and allowed input on all matters concerning setbacks, retaining walls, screening, lighting, green areas, landscaping, fencing, and other aesthetic enhancements that are critical to a safe and beautiful neighborhood.

I trust the County will continue to monitor the development of this property and protect the rights of the current homeowners.

Respectfully,



James Schmidt

Butler, Patrick

From: KHCA Vice President <khcavicepresident@gmail.com>
Sent: Monday, May 21, 2012 12:43 PM
To: Butler, Patrick
Subject: Mt. McComas Development #120110170

Patrick

Has the date for the Planning Board hearing been set yet? From what I understand, it is coming up in June, right? Also, please provide the Stormwater Concept narrative.

In the mean time, the Association's Mt. McComas working group is putting together testimony, but I wanted to provide you with an outline of some concerns made known by the neighbors that could perhaps be addressed in the staff report.

Generally, while we understand that the up-zoning has already taken place, the prevailing sentiment is that the Preliminary Plan's density and proposal to shave the top third of the landfill are too aggressive for the complicated location and do not represent an adequate transition with our green, single-family residence community.

Specifically, regardless of density, this development has to fully comply with the Maryland Stormwater Management Act of 2007 which mandates use of Environmental Site Design to the Maximum Extent Practicable. The development footprint is too big, with too many units, and does not appear to be adapted to the preexisting topography, which is a fundamental requirement of ESD. For example, destroying existing trees and building on slopes of the landfill is not a good idea - they should remained wooded and be utilized as the final infiltration step in the stormwater treatment train. Furthermore, only the first five of thirteen stormwater devices are true ESD: dry wells don't use vegetation and are more of an adjunct facility, and the Filterra device does not actually infiltrate the runoff. With the drastic increase in impervious surface, some neighbors are concerned this could actually exacerbate the drainage problems already experienced on McComas Avenue. Additionally, destruction of all the existing trees on this nearly two-acre green lot is going to put an additional strain on the grey stormwater infrastructure. To make matters worse, Critical Root Zones of existing trees on adjacent lots are going to be severely compromised. Has any attempt at reforestation been made? The measurements for existing trees and other PFCP claims need to be verified by Planning Department staff as well.

It would be great if you could address at least some of the concerns outlined above prior to the hearing.

Regards,

Danila S. Sheveiko
Vice President, Land Use Chair
Kensington Heights Civic Association

land use and zoning

Zoning recommendations are based on five goals.

- Encourage Class A office development at the Metro station.
- Allow for retail in the center of the CBD and along the three main roads.
- Increase housing mixed with some retail surrounding the center of the CBD.
- Place highest densities and building heights in the center of the CBD.
- Protect existing residential neighborhoods.

Zoning Background

Wheaton was designated as a CBD before the location of the Metro station. The 1978 Plan recommended rezoning the Wheaton CBD to the CBD-0.5, CBD-1, CBD-2, CBD-R1, and CBD-3 Zones. The CBD Zones were intended to provide a hierarchy of density and heights where the buildings were tallest in the center and tapered downward to the surrounding, lower-scale neighborhoods.

The 1990 Plan recommended a Retail Preservation Overlay Zone for a 35-acre portion of the CBD to prohibit optional method, large-scale redevelopment that might have a negative impact on smaller businesses. The Overlay Zone was applied to CBD-1, CBD-2, and CBD-3 zoned properties and limited development to standard method. The Overlay Zone, as originally approved, required site plan approval for any new buildings or additions, regardless of size.

In 2006, the Overlay Zone was amended to eliminate the requirement for assemblage and to allow optional method development with some limits, among other changes.

In 2009, a limited sector plan amendment expanded the CBD boundaries and rezoned properties on the east side of Georgia Avenue north of Blueridge Avenue to CBD-0.5 and CBD-1. It also removed the Overlay Zone from the frontage of the same block along Blueridge Avenue.

Proposed Zoning

The CBD Zones require a minimum land area of 18,000 square feet (except in the Wheaton Overlay Zone) and a lengthy approval process for optional method development (Project Plan and Site Plan review). Optional method development is costly and time-consuming for a small property owner. For a developer to be interested in assembling properties, there has to be enough market potential to justify the risk.

Since the 1990 Plan, only 21,000 square feet of commercial space has been developed under the standard method in the Overlay Zone. Since the 2006 Overlay Zone amendment, no plans have been approved using optional method within the Overlay Zone. Wheaton's only proposed optional method project is the 2010 mixed-use development on the existing Safeway site, which is outside the Overlay Zone.

This Plan recommends two context-sensitive mixed-use zones (CRN and CR) that permit a mix of residential and nonresidential uses with varying densities and heights. The zones promote economically, environmentally, and socially sustainable development patterns where people can live, work, play, and have access to services and amenities while minimizing the need for automobiles.

The CR Zones do not require assemblage and can enable revitalization of small properties and businesses. They can also customize height and density requirements and provide the tenting effect essential to focusing a downtown. The CR Zones are easier for small properties (less than 10,000 square feet or 10 units) to use, because there is no minimum lot size required for the optional method.

The Plan recommends removing the Overlay Zone and rezoning all the CBD Zones to CR Zones. The Plan also recommends rezoning other non-residentially zoned properties, some sites with multifamily zoning and a very small number of single-family zoned properties to CR Zones.

In the CR Zones, additional density may be achieved through incentives that can be bundled to earn the maximum allowable density.

The CRN Zone is a transitional zone appropriate for areas between high-density developments and low-density, single-family residential uses. The CRN Zone permits a more limited mix of uses and less intense development where transitions must be provided to nearby neighborhoods. It allows development only under the standard method, and requires site plan review for development of certain limited uses and adjacent to a property in an applicable residential zone or separated from such zone by a primary, secondary, or tertiary street right-of-way; development greater than 10,000 square feet or a height greater than 40 feet; or development of 10 or more dwelling units. One of the chief benefits of site plan review in both the CRN Zone and the CR Zone is to ensure that development conforms to sector plan recommendations.

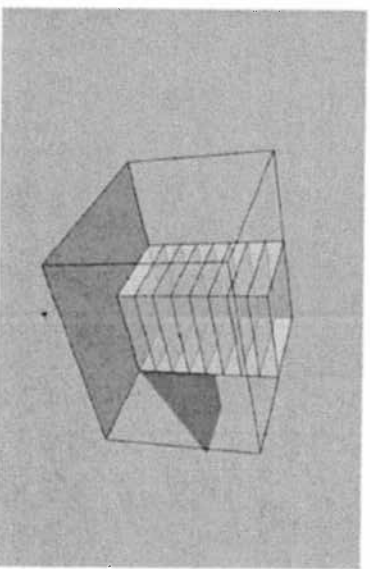
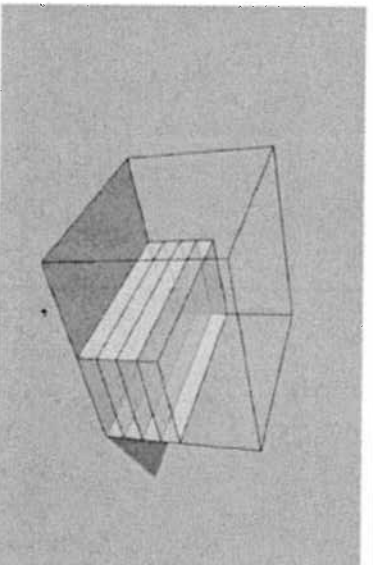
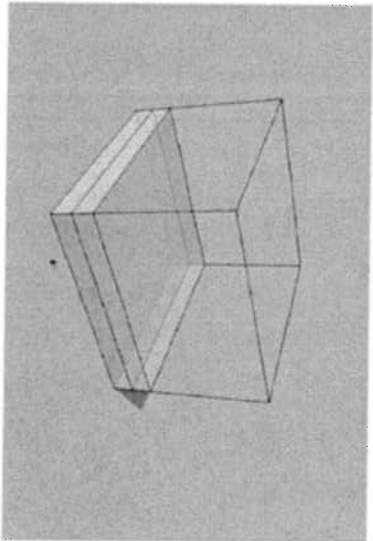
- Remove the Overlay Zone and replace the CBD Zones and some commercial and multifamily residential zones with CR Zones. Where existing residential development has been built under CBD zoning, the proposed CR Zones will approximate the existing zoning and allow an appropriate amount of mixed-use redevelopment.

Density and Building Height

The density and height of buildings shape the built environment and define the skyline. The Plan places the greatest densities and heights at and near the Metro station in the center of downtown, along Georgia Avenue and Veirs Mill Road. The tallest development is recommended on the WMATA Triangle site at the convergence of Veirs Mill Road and Georgia Avenue, to encourage the development of an iconic building at the southern gateway to Wheaton. Taller buildings are also allowed at the two other important nodes in Wheaton: the intersections of University Boulevard and Georgia Avenue, and of University Boulevard and Veirs Mill Road, which serve as the northeast and northwest gateways to the downtown.

The heights and densities decrease closer to the single-family residential communities surrounding Wheaton's commercial areas.

Density is measured as Floor Area Ratio (FAR). The greater the FAR, the higher the amount of maximum allowed development. But higher density doesn't always create taller buildings. A shorter, wider building may have more FAR than a taller, narrower building.



Attachment F



DEPARTMENT OF TRANSPORTATION

Isiah Leggett
County Executive

Arthur Holmes, Jr.
Director

April 13, 2012

Mr. Patrick Butler, Planner
Area I Planning Division
The Maryland-National Capital
Park & Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910-3760

RE: Preliminary Plan No. 120110170
Kensington Heights

Dear Mr. Butler:

We have completed our review of the amended preliminary plan dated February 29, 2012. An earlier version of this plan was reviewed by the Development Review Committee at its meeting on April 11, 2011. We recommend approval of the plan subject to the following comments:

All Planning Board Opinions relating to this plan or any subsequent revision, project plans or site plans should be submitted to the Department of Permitting Services in the package for record plats, storm drain, grading or paving plans, or application for access permit. Include this letter and all other correspondence from this department.

1. Necessary dedication along McComas Avenue in accordance with the master plan or as directed by the Planning Board.
2. Grant necessary slope and drainage easements. Slope easements are to be determined by study or set at the building restriction line.
3. We have accepted the consultant's February 29, 2012 amended storm drain capacity and impact analysis. The impact analysis is predicated on providing on-site control for the post-development runoff at the existing ten (10) year runoff rate, as directed by the Department of Permitting Services/Water Resources Section. We concur with this approach and support approval of the applicant's proffered storm drain improvements within the McComas Avenue right-of-way.
4. The sight distances study has been accepted. A copy of the accepted Sight Distances Evaluation certification form is enclosed for your information and reference.

Division of Traffic Engineering and Operations

100 Edison Park Drive, 4th Floor • Gaithersburg, Maryland 20878
Main Office 240-777-2190 • TTY 240-777-6013 • FAX 240-777-2080
trafficops@montgomerycountymd.gov

5. Private common driveways and private streets shall be determined through the subdivision process as part of the Planning Board's approval of a preliminary plan. The composition, typical section, horizontal alignment, profile, and drainage characteristics of private common driveways and private streets, beyond the public right-of-way, shall be approved by the Planning Board during their review of the preliminary plan.
 6. In accordance with Section 50-35(n) of the Montgomery County Code, we recommend the Montgomery County Planning Board require the applicant to construct an off-site sidewalk along McComas Avenue to connect with Melvin Grove Court (as proposed on the preliminary plan).
 7. The owner will be required to submit a recorded covenant for the operation and maintenance of private streets, storm drain systems, and/or open space areas prior to MCDPS approval of the record plat. The deed reference for this document is to be provided on the record plat.
 8. Relocation of utilities along existing roads to accommodate the required roadway improvements shall be the responsibility of the applicant.
 9. If the proposed development will alter any existing street lights, signing, and/or pavement markings, please contact Mr. Dan Sanayi of our Traffic Engineering Design and Operations Section at (240) 777-2190 for proper executing procedures. All costs associated with such relocations shall be the responsibility of the applicant.
 10. Trees in the County rights of way – spacing and species to be in accordance with the applicable MCDOT standards. Tree planning within the public right of way must be coordinated with Brett Linkletter, Chief of the Division of Highway Services, Tree Maintenance Section at (240) 777-7651.
 11. Permit and bond will be required as a prerequisite to DPS approval of the record plat. The permit will include, but not necessarily be limited to, the following improvements:
 - A. Across the McComas Avenue site frontage, widen the existing pavement to twenty six (26) feet and construct curb, gutter, five (5) foot wide concrete sidewalk and handicap ramps, and storm drainage and appurtenances with street trees as a secondary residential street.
- * **NOTE: the Public Utilities Easement is to be graded on a side slope not to exceed 4:1.**
- B. On McComas Avenue, construct five (5) foot wide concrete sidewalk (with handicap ramp) between the western property line and Melvin Grove Court, if required as an off-site amenity by the Montgomery County Planning Board.
 - C. Enclosed storm drainage and/or engineered channel (in accordance with the MCDOT Storm Drain Design Criteria) within the County rights-of-way and all drainage easements.

Mr. Patrick Butler
Preliminary Plan No. 120110170
April 13, 2012
Page 3

- D. Permanent monuments and property line markers, as required by Section 50-24(e) of the Subdivision Regulations.
- E. Erosion and sediment control measures as required by Section 50-35(j) and on-site stormwater management where applicable shall be provided by the Developer (at no cost to the County) at such locations deemed necessary by the Department of Permitting Services (DPS) and will comply with their specifications. Erosion and sediment control measures are to be built prior to construction of streets, houses and/or site grading and are to remain in operation (including maintenance) as long as deemed necessary by the DPS.

Thank you for the opportunity to review this preliminary plan. If you have any questions or comments regarding this letter, please contact Mr. Andrew Bossi, our new Development Review Area Engineer for this project at andrew.bossi@montgomerycountymd.gov or (240) 777-2197.

Sincerely,



Gregory M. Leck, Manager
Development Review Team

m:/subd/gml/docs/pp/120110170, Kensington Heights

Enclosure

- cc: Sterling Mehring; Kensington Heights 2, LLC
Eric Tidd; CAS Engineering
Ed Axler; M-NCPPC Area 1
Catherine Conlon; M-NCPPC DARC
Preliminary Plan folder
Preliminary Plan letters notebook
- cc-e: Dave Kuykendall; MCDPS WRM
Atiq Panjshiri; MCDPS RWPR
Henry Emery; MCDPS RWPR
Andrew Bossi; MCDOT DTEO



DEPARTMENT OF PERMITTING SERVICES

Isiah Leggett
County Executive

Carla Reid
Director

September 1, 2011

Eric B. Tidd, P.E.
CAS Engineering
108 W. Ridgeville Boulevard, Suite 101
Mount Airy, MD 21771

Re: Stormwater Management **CONCEPT** Request
for Kensington Heights/Residence at McComas
Preliminary Plan #: 120110170
SM File #: 234250
Tract Size/Zone: 1.806 Ac./RT-8
Total Concept Area: 1.806 Ac.
Lots/Block: PT 16/E
Watershed: Lower Rock Creek

Dear Mr. Tibb:

Based on a review by the Department of Permitting Services Review Staff, the stormwater management concept for the above mentioned site is **acceptable**. The stormwater management concept proposes to meet required stormwater management goals via ESD to the MEP with the use of dry wells, micro-bioretenion, and non-rooftop disconnect. Additional treatment is provided by the use of Filterra(s) and a volume based StormFilter. Due to existing storm drain capacity and down stream flooding concerns in the Town of Kensington overbank (10 year control) and extreme flood protection (100 year control) are required.

The following **items** will need to be addressed **during** the detailed sediment control/stormwater management plan stage:

1. Prior to permanent vegetative stabilization, all disturbed areas must be topsoiled per the latest Montgomery County Standards and Specifications for Topsoiling.
2. A detailed review of the stormwater management computations will occur at the time of detailed plan review.
3. An engineered sediment control plan must be submitted for this development.
4. All filtration media for manufactured best management practices, whether for new development or redevelopment, must consist of MDE approved material.
5. It is recommended that the micro-bioretenion on lots 80 & 81, and those behind the town houses on lots 87-92 be planted in a grass to provide ease of maintenance since these are located behind the units and two are on private lots.
6. Micro-bioretenion #1 should be planted with a mixture of trees, shrubs and herbaceous plants. Refer to bioretenion standard and specification for planting requirements.
7. All stormwater structures not on private lots should be on a stormwater parcel and must stormwater easements and covenants. The proposed retaining wall can not be in the easement.

This list may not be all-inclusive and may change based on available information at the time.

Payment of a stormwater management contribution in accordance with Section 2 of the Stormwater Management Regulation 4-90 **is not required.**

This letter must appear on the sediment control/stormwater management plan at its initial submittal. The concept approval is based on all stormwater management structures being located outside of the Public Utility Easement, the Public Improvement Easement, and the Public Right of Way unless specifically approved on the concept plan. Any divergence from the information provided to this office; or additional information received during the development process; or a change in an applicable Executive Regulation may constitute grounds to rescind or amend any approval actions taken, and to reevaluate the site for additional or amended stormwater management requirements. If there are subsequent additions or modifications to the development, a separate concept request shall be required.

If you have any questions regarding these actions, please feel free to contact David Kuykendall at 240-777-6332.

Sincerely



Richard R. Brush, Manager
Water Resources Section
Division of Land Development Services

RRB: tia CN234250 Kensington Heights McComas.DWK

cc: C. Conlon
SM File # 234250

ESD Acres:	1.286
STRUCTURAL Acres:	0.52
WAIVED Acres:	0.0



FIRE MARSHAL COMMENTS

DATE: 17-Aug-11
TO: Eric Tidd - eric@casengineering.com
CAS Engineering
FROM: Marie LaBaw
RE: Kensington Heights (McComas Ave)
120110170

PLAN APPROVED

1. Review based only upon information contained on the plan submitted **23-Jun-11**. Review and approval does not cover unsatisfactory installation resulting from errors, omissions, or failure to clearly indicate conditions on this plan.
2. Correction of unsatisfactory installation will be required upon inspection and service of notice of violation to a party responsible for the property.

MONTGOMERY COUNTY CODE
Chapter 50

§50-29

in the applicable master plan, and for the type of development or use contemplated in order to be approved by the board.

- (2) **Lots To Abut on Public Street.** Except as otherwise provided in the zoning ordinance, every lot shall abut on a street or road which has been dedicated to public use or which has acquired the status of a public road. In exceptional circumstances, the board may approve not more than two (2) lots on a private driveway or private right-of-way; provided, that proper showing is made that such access is adequate to serve the lots for emergency vehicles, for installation of public utilities, is accessible for other public services, and is not detrimental to future subdivision of adjacent lands. In multi-family and town house development, not subdivided into individually recorded lots, the board may approve more than two (2) lots or buildings on private roads or drives, provided there is adequate access from such roads or drives to a public street, as above.

The board may approve more than two (2) lots on private roads or driveways if such private roads and driveways are needed for the creation of new lots to be used as a one-family residence by a child of the property owner or the spouse of a child or by the parents of the property owner. This provision shall apply to only one (1) lot for each child, whether created for the child or the spouse of a child and only one (1) lot for the parents, whether created for one (1) or both parents.

Further, this provision shall apply only upon a finding by the board that such access is adequate to serve the lots for emergency vehicles, for installation of public utilities, and the lot is accessible for other public services, and is not detrimental to future subdivision of adjacent lands.

- (3) **Side Lines.** Side lines of interior lots shall be perpendicular to the street line, or radial to a curved street line, unless determined by the board that a variation from this rule will result in a better layout.
- (4) **Double Frontage Lots.** Double frontage lots, meaning a block having only one (1) tier of lots between two (2) streets or roads, shall not be approved except:
 - a. Where unusual topography, orientation or the size of the subdivision permit no other feasible way to subdivide; or
 - b. Where access to one (1) of the streets may be controlled by the board as provided in subsection (g) of section 50-25 or paragraph (4) of subsection (a) of section 50-28.