

1. The Petitioner shall be bound by all of her testimony and exhibits of record, and by the testimony of her witnesses and the representations of her counsel identified in this report;
2. The Petitioner will house no more than 16 residents in the group home, including any resident staff, and up to six non-resident staff are permitted on the largest shift;
3. The Petitioner must possess, not later than the issuance date of the use and occupancy certificate, valid State of Maryland and County licenses, certificates, and/or registrations that may be required for a group home which provides assisted living to the elderly;
4. Petitioner must comply with the conditions of approval of the Preliminary Forest Conservation Plan prior to issuance of any building permit and sediment control permit;
5. The sediment and erosion control plan and a storm water management plan must be submitted to MNCPPC for review prior to approval by the Department of Permitting Services. The plans must conform to the limits of disturbance specified on the Preliminary Forest Conservation Plan;
6. Petitioner must install the 6 foot privacy fence along the western property line and the three foot fence along a portion of the southern property line to screen the parking lot from adjacent parcels and from Batson Road, as shown in the revised Landscape/Lighting Plan (Exhibit 31(a));
7. Petitioner must maintain at least the 14 parking spaces called for in her revised statement of operations (Exhibit 21(b)), but may include up to the eighteen spaces at the locations shown on her revised site plan (Exhibit 21(a)); and
8. Prior to commencing operation, Petitioner must install a one foot by one foot sign, facing towards the exiting drivers at the exit from the group home driveway, warning them of children at play.
9. Petitioner must include her husband and any other resident family member in determining the number of Group Home residents if and when her husband, or any other resident family member, either serves as a resident staff member in the Group Home or receives services provided by the Group Home.

On a motion by Allison Ishihara Fultz, seconded by Donna L. Barron, with Angelo M. Caputo and Donald H. Spence, Jr., Chairman in agreement and Louise L. Mayer necessarily absent, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 21st day of June, 2004.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF: *
CONNIE LUCAS, *
Petitioner *
*
Connie Lucas *
William Wirts *
For the Petition *
*
Susan W. Carter, Esquire *
Attorney for Petitioner *
***** *
S-2480 *
Martin Klauber, Esquire, People’s Counsel *
*
In Support of the Petition *
***** *
Edward Bishop *
John Boston *
Kay Ward *
Thomas Williams *
Community Participants *
*

Board of Appeals Case No.

(OZAH Referral No. 01-13)

Before: Martin L. Grossman, Hearing Examiner

**SUPPLEMENTAL HEARING EXAMINER’S REPORT AND
RECOMMENDATION**

I. BACKGROUND OF REMAND ORDER & RECENT DEVELOPMENTS

Petition No. S-2480 seeks a special exception pursuant to §59-G-2.26 of the Zoning Ordinance, to permit construction of a structure to be used as a large group home for the elderly. The property is located at 16434 Batson Road, Spencerville, MD, on Lot 4 of the Jackson's Addition Subdivision to Spencerville, Tax Map KS 343, Parcel 425. It is zoned RC (Rural Cluster).

After a hearing and the receipt of additional filings, the Hearing Examiner issued a report and recommendation to the Board of Appeals on March 2, 2004, recommending that the special exception be granted, with conditions. By order adopted March 17, 2004 and effective March 31, 2004, the Board of Appeals stated that the Hearing Examiner's report "is unclear as to whether the Petitioner's husband will live at the subject property, and therefore, what the total number of residents at the property will be is also unclear." The Board therefore remanded this matter to the Hearing Examiner to determine "whether the Petitioner's husband will reside at the subject property" (Exhibit 36).

Because the Hearing Examiner's report of March 2, 2004, did in fact state (p. 7) that "Petitioner plans to live in the group home with her husband," the Hearing Examiner assumes that the Board's remand was intended to find out whether the Petitioner's husband would be receiving care as a resident of the Group Home, or just living there as his personal residence. If it is the latter, then the question is whether he must be counted towards the maximum of 16 Group Home residents. These questions are addressed in Part II, below.

By letter dated March 24, 2004, Petitioner's attorney stated that "Mr. Lucas will reside on the premises insofar as this group home will also be the Lucas family residence." Exhibit 37. Petitioner contends in the letter that because Mr. Lucas will not be a member of the staff, he should not be counted as a resident of the Group Home. The Hearing Examiner re-opened the record to receive the Board's remand order and the Petitioner's letter of March 24, 2004. While the record was open to receive public comment, Petitioner filed another letter, dated April 19, 2004 (Exhibit 43), which required that the record remain open for further public comment until May 3, 2004 (Exhibit 44).

During that period, Petitioner's counsel forwarded to the Hearing Examiner, a letter from Robin Ferro, Permitting Services Specialist with the Department of Permitting Services (DPS). In that letter, which was dated April 27, 2004 (Exhibit 45(b)), Ms. Ferro stated that "[i]t is the opinion of the Department that the presence of the husband residing in the dwelling is not counted against the maximum number of residents in the group home." Ms. Ferro supplemented that letter with a memorandum to the Hearing Examiner, dated May 6, 2004 (Exhibit 46), explaining the basis for the DPS opinion quoted above.

On May 17, 2004, Technical Staff filed a Supplemental Report (Exhibit 47) in which they concluded that Petitioner's husband should not be counted towards the Group Home maximum of 16 people. On May 18, 2004, the record was reopened to receive these new filings (Exhibits 45(b), 46 and 47) and immediately closed again. We now turn to the question of whether Petitioner's husband should be considered one of the 16 permitted Group Home residents.

II. DOES PETITIONER'S HUSBAND COUNT TOWARDS THE MAXIMUM NUMBER OF GROUP HOME RESIDENTS?

The explicit question posed by the remand order was “whether the Petitioner’s husband will reside at the subject property” (Exhibit 36). The answer to that question is clearly provided both in the original record and in the materials filed since the remand. In the original record, Petitioner’s Revised Statement of Operations (Exhibit 21(b)) specified on the first page that “Petitioner and her spouse will also reside in the home.” Similarly, Petitioner testified at the hearing, “There will be 15 residents, myself and my husband,” in response to the question, “How many residents will there be?” Following the remand, Petitioner’s attorney wrote to the Hearing Examiner, and stated for the record: “Mr. Lucas will reside in the premises insofar as this group home will also be the Lucas family residence.” Exhibit 40. Petitioner’s attorney followed up with another letter (Exhibit 43), indicating that Petitioner’s husband will merely be living at the subject property and will be neither a staff member nor one of the “residents” of the Group Home. There is no evidence in the case to the contrary, and the Hearing Examiner therefore finds that Petitioner’s husband will, in fact, be living in the subject premises and that he will not be receiving care as a “resident” of the Group Home.

The more difficult question is whether Mr. Lucas should be counted towards the 16 person maximum for this Group Home. The Hearing Examiner’s initial reaction to this question was that he should be counted because he will be residing there -- one who resides is a resident, by definition. However, both the Department of Permitting Services and Technical Staff of the M-NCPPC have taken a contrary view. They both recognize that Mr. Lucas will be residing there, but feel that there will be two “theres” there, the Group Home “there” and the private residence “there.” According to DPS and

Technical Staff, Mr. Lucas will be residing in the private residence “there,” which is a permitted use in the RC Zone, because he will not be on staff and will not be receiving any services from the Group Home. Mrs. Lucas, on the other hand, will be a resident staff member at the Group Home, and she will therefore be counted towards the 16 maximum pursuant to the statutory language.

The Hearing Examiner is still a bit uneasy about this conclusion because neither the private residence nor the Group Home presently exists. In other words, there is, as yet, no there there, so it may be a bit of a stretch to say that Mr. Lucas will be living in his private residence even though the whole entity will be designed and built as one structure to house the Group Home residents and him.

To resolve this uneasiness, the Hearing Examiner examined both the legislative history of the last two amendments to the Group Home definition in Zoning Code §59-A-2.1, and the Board of Appeals opinions regarding Group Homes in cases filed after the first of these amendments was enacted, in 1997. The Hearing Examiner takes official notice of this legislative history and the relevant Board of Appeals opinions; however, it appears that neither the Council nor the Board of Appeals has squarely addressed the subject issue.

The 1997 amendment to the Zoning Code,¹ *inter alia*, combined a number of different group facility definitions into one Group Home definition, increased the number of permitted residents to 16 for large Group Homes and added a specification that resident staff would be counted towards the 16 resident maximum. The original language proposed for the amendment excluded staff from the count, but did not specify whether the staff in question were resident or non-resident. According to Technical Staff of the

¹ Ordinance No 13-47, ZTA No. 95017; Adopted, February 4, 1997; Effective, February 24, 1997.

M-NCPPC, “Staff members [of the Group Home] are excluded from the number of residents to conform with the State Life Safety Code applications.”²

The Planning, Housing & Economic Development (PHED) Committee asked the Office of the County Attorney for advice on whether the Fair Housing Act required that staff be included in the number of Group Home residents. By memorandum dated November 9, 1995, the County Attorney’s Office opined that non-resident staff should be considered “a reasonable accommodation required by the Fair Housing Act.”³ The memorandum concluded that “the staff should not be included in the calculation unless they make their primary residence at the home.” The PHED Committee then recommended, in its January 17, 1997, memorandum to the Council (p.5), that resident staff be counted towards the 16 resident maximum, but neither the PHED Committee nor the County Attorney analyzed whether resident family members of the Group Home’s owner should also be counted. The Council ultimately enacted the language counting the resident staff as part of the 16 residents.

The 1998 amendment⁴ merely added the words “but does not include infants less than two months old” to the sentence in the definition of Group Home⁵ which specifies who should be included in the “number of residents.” This text amendment was requested by Helena House, a Group Home for at-risk pregnant women, because, absent the amendment, the birth of a child would force the Group Home into technical violation

² Technical Staff report of August 28, 1995, page 2. Concerns were also raised by Technical Staff about parking demands that would be created by Group Homes, but they opined that requiring additional parking for a Group Home when it is a permitted use (as distinguished from a Special Exception) might violate the federal Fair Housing Act. This concern is not directly relevant to this case and therefore will not be further discussed; however, it does highlight one of the reasons these amendments were proposed – to assure compliance with federal fair housing law.

³ 42 U.S.C. §3604(f)(3)(B).

⁴ Ordinance No 13-97, ZTA No. 98012; Adopted, July 1, 1998; Effective, August 3, 1998.

⁵ Zoning Code §59-A-2.1.

of the limit on the number of residents.⁶ The PHED Committee unanimously recommended approval because, according to the Opinion accompanying the legislation, allowing infants in a transitional home will have very minimal impact on the surrounding neighborhood. Once again, the issue of whether relatives of the Group Home's owner should be counted was not considered.

Nevertheless, if one were to apply the same neighborhood impact test to this issue, one would have to recognize that adding an adult individual to the building housing the Group Home does have some impact on the neighborhood, in terms of traffic production, if nothing else. Thus, there is a certain logic to finding that non-infant family members of Group Home owners must be counted. That rationale, however, does not appear to have been persuasive to either the Board of Appeals or the Department of Permitting Services.

The earliest relevant Board of Appeals Opinion was located by Technical Staff,⁷ who referenced the *Vashti Johnson* Case, S-900, decided by the Board on January 18, 1984. In that case, the Board granted a special exception for "a group residential facility for housing exceptional persons (ambulatory elderly)," with a condition that the maximum number of patients should not exceed five. At the time of the decision, the Board recognized that there were four patients already in the facility and that the petitioner, the petitioner's husband and their three daughters also lived in the same two story building. Clearly, the Board did not count the petitioner's family as included within the maximum patient limit. On the other hand, the Board referred to those it did count as "patients served at the facility," so there would be no reason to count the non-patients in that group. Moreover, the Board could have set the patient limit higher, but chose not to,

⁶ Technical Staff report of May 22, 1998, regarding proposed Text Amendment 98012.

⁷ Technical Staff supplemental report of May 17, 2004 (Exhibit 47).

possibly because it recognized that the petitioner's family occupied the top floor of the house.

As mentioned above, the Hearing Examiner reviewed the Board's opinions in Group Home cases filed after the 1997 amendment. Based on a list of cases provided by the Board's staff, it appears that the Board has handed down 10 such opinions. They can be found in S-2271, S-2324, S-2406, S-2464, S-2481, S-2484, S-2498, S-2536, S-2539 and S-910-A. In none of these cases did the Board directly face the central issue on this remand. In one case, *Prince*, S-2498, the Board's Opinion of May 2, 2002, permits the number of "live-in staff" to be increased "to four family members" and the number of "residents" to be increased to 10, implying that the "live-in" family members are not "residents" as the term is being used, but that is not the same as holding that the maximum number of 16 residents may be exceeded by "live-in" family members, even if they are not on staff.

Thus, the most we can say is that there is some precedent in Board of Appeals decisions for not referring to the Group Home owner's resident family as "residents" of the Group Home. There appears to be no direct holding that non-staff resident family members do not count towards the Group Home's maximum.⁸

There is, however, another reason for not counting such non-staff family members, including Petitioner's husband in this case, and that is the need for consistency of interpretation of an ambiguous statutory provision. The agencies charged with interpreting this provision in the first instance, DPS and M-NCPPC, have both established a practice of interpreting the Group Home numerical limitation as

⁸ For ease of reference, copies of the Board's opinions in S-900 and S-2498 are attached hereto.

inapplicable in this kind of situation. According to Ms. Ferro of DPS, in her May 6, 2004, clarification memorandum to the Hearing Examiner (Exhibit 46),

The calculation of the number of residents in a group home has been interpreted by DPS staff to include only those people living in the dwelling who are receiving care or assistance, or those individuals who are staff members and living in the home. Infants less than 2 months of age, are not counted in the number of residents because infants would provide little or no impact on the group home facility.

If other people live in the home, such as a spouse or children of the group home provider, and they are not employed [*sic*] group home, then they are not considered “residents of the group home.” The group home definition states a facility “offering residential accommodations, supervision, or assisted community living for the residents.” A spouse or other person living in the home does not receive this type of care; therefore they are not counted in the total number of residents of the group home for licensing and permitting purposes.

This has been the interpretation of DPS staff since approximately 1999, when zoning text amendments were introduced to comply with ADA and FHA regulations concerning group homes.

The Hearing Examiner believes that, absent a clear statutory mandate to the contrary, the long term practice of an administrative agency charged with carrying out a statutory provision should not be lightly changed. Considering all these factors, the Hearing Examiner concludes that Mr. Lucas should not be counted towards the 16 resident maximum of the Group Home as long as he does not act as a staff member or receive care from the Group Home, as described in the DPS memorandum quoted above.

III. RECOMMENDATION

Based on the foregoing analysis, I recommend that the proposed special exception be granted, with the conditions specified in my initial report and recommendation, plus the following additional condition:

Petitioner must include her husband and any other resident family member in determining the number of Group Home residents if and when her husband, or any other resident family member, either serves as a resident staff member in the Group Home or receives services provided by the Group Home.

Dated: May 26, 2004

Respectfully submitted,

Martin L. Grossman
Hearing Examiner

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF: *
CONNIE LUCAS, *
Petitioner *

Connie Lucas *
William Wirts *
For the Petition *

Susan W. Carter, Esquire *
Attorney for Petitioner *

S-2480

Martin Klauber, Esquire, People's Counsel *

In Support of the Petition *

Edward Bishop *
John Boston *
Kay Ward *
Thomas Williams *
Community Participants *

Before: Martin L. Grossman, Hearing Examiner

Board of Appeals Case No.
(OZAH Referral No. 01-13)

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2480, filed on May 7, 2001, seeks a special exception pursuant to §59-G-2.26 of the Zoning Ordinance, to permit construction of a structure to be used as a large group home for the elderly. The property is located at 16434 Batson Road, Spencerville, MD, on Lot 4 of the Jackson's Addition Subdivision to Spencerville, Tax Map KS 343, Parcel 425. It is zoned RC (Rural Cluster).

Upon Petitioner's request for an expedited hearing, the Board of Appeals (BOA), on May 18, 2001, referred the matter to the Hearing Examiner for Montgomery County to conduct a public hearing and issue a written report and recommendation to the Board of Appeals for final action (Exhibit 13). On May 18, 2001, the Office of Zoning and Administrative Hearings issued a notice scheduling the hearing for August 13, 2001 at 9:30 a.m. (Exhibit 14). By letter of July 27, 2001 (Exhibit 18), the Petitioner requested that the hearing be deferred to a later unspecified date, and it was therefore removed from the Hearing Examiner's calendar by Notice dated July 30, 2001 (Exhibit 19).

On May 12, 2003, Petitioner's attorney wrote to the BOA updating exhibits and asking for a hearing to be scheduled (Exhibit 21). On June 16, 2003, being unaware of any further communications from Petitioner, Petitioner's attorney was advised by letter from the Hearing Examiner that the Petition would be dismissed for want of prosecution in 30 days pursuant to Zoning Code §59-H-6.8, unless good cause was shown for keeping it in active status (Exhibit 20). By letter dated June 19, 2003, Petitioner's attorney responded to the Hearing Examiner's letter stating that Petitioner did want a hearing (Exhibit 22). On July 3, 2003, the Office of Zoning and Administrative Hearings issued a notice rescheduling the hearing for October 20, 2003 at 9:30 a.m. (Exhibit 23).

On August 4, 2003, Petitioner's attorney wrote to the Hearing Examiner requesting that new exhibits be included in the file (Exhibit 24). On August 21, 2004, this request was noticed as a motion to amend the petition (Exhibit 25). No opposition to the amendment was received.

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a memorandum dated September 26, 2003, recommended approval of the petition on certain conditions (Exhibit 26).⁹ The Planning Board recommended approval by Memorandum dated October 14, 2003, which also included some corrections to the Technical Staff Report (Exhibit 27).

A public hearing was convened as scheduled on October 20, 2003, and testimony was presented by Petitioner, Connie Lucas, and her land planner, William Wirts, as well as by two nearby residents, Edward Bishop and John Boston.¹⁰ The main issue at the hearing was the potential impact of lights from the proposed use upon the nearby residents. At the suggestion of Martin Klauber, the People's Counsel (Tr. 47-48 and 70), Petitioner was asked to submit a revised landscaping plan showing the precise location and nature of the proposed trees and/or fencing, as well as a photometric study.

On November 20, 2003, Petitioner's counsel submitted a revised "Landscape/Lighting Plan" (Exhibit 31(a)). On November 25, 2003, Technical Staff submitted a supplemental report (Exhibit 32), stating the requirements for the amount of light spillage permitted in the subject area and concluding that Petitioner met those requirements. Technical Staff's recommendation therefore remained the same –

⁹ The Technical Staff Report is frequently quoted and paraphrased herein.

¹⁰ A third neighbor, Thomas Williams, participated in the hearing, but did not testify, and the owner of nearby undeveloped land, Kay Ward, also participated but did not testify.

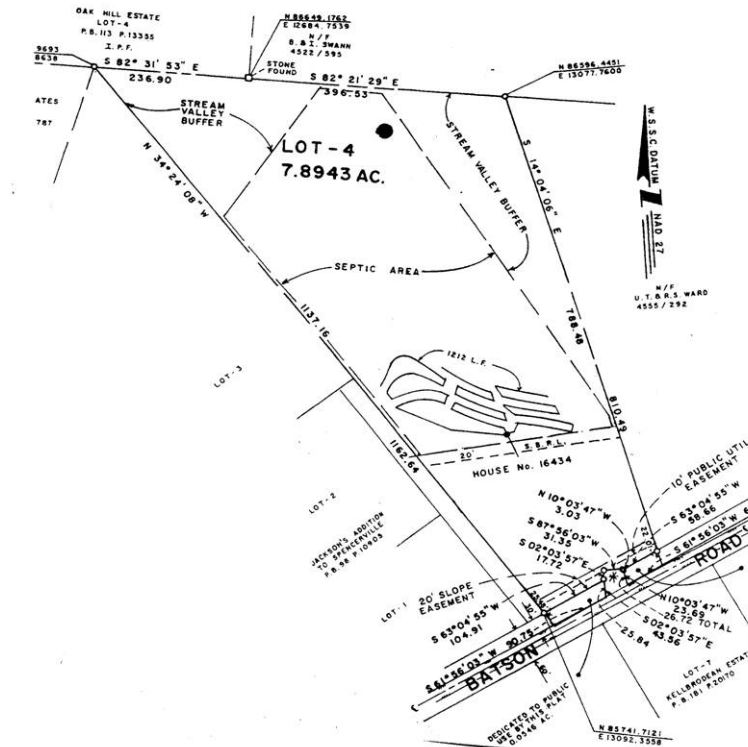
approval. On November 28, 2003, the Hearing Examiner sent notice to all interested parties about Technical Staff's supplemental report analyzing the

Petitioner's new submission (Exhibit 33). The notice gave the parties until January 16, 2004, to submit comments. No additional comments were received, and the record closed on January 23, 2004. It was reopened on February 19, 2004, to receive a supplemental Technical Staff report dated February 17, 2004 (Exhibit 34) and for any public comments on that report. No further comments were received, and the record closed for good on March 1, 2004.

II. FACTUAL BACKGROUND

A. The Subject Property

As noted above, the subject property is located at 16434 Batson Road, Spencerville, MD, on Lot 4 of the Jackson's Addition Subdivision to Spencerville, Tax Map KS 343, Parcel 425. It is zoned RC (Rural Cluster). The currently undeveloped lot has an area of 7.8943 acres (approximately 343,876 square feet), upon which Petitioner seeks to construct an 11,745 square foot, two-story group home for 16 elderly residents.



The shape and location of the lot are depicted in the portion of the Plat Map, Exhibit 6, shown below:

The lot was recorded by minor subdivision under Montgomery County Code §50-35A-6, since it was a residentially zoned parcel created by deed prior to June 1, 1958. Technical Staff reports that no preliminary plan of subdivision was required for this process (Exhibit 26).

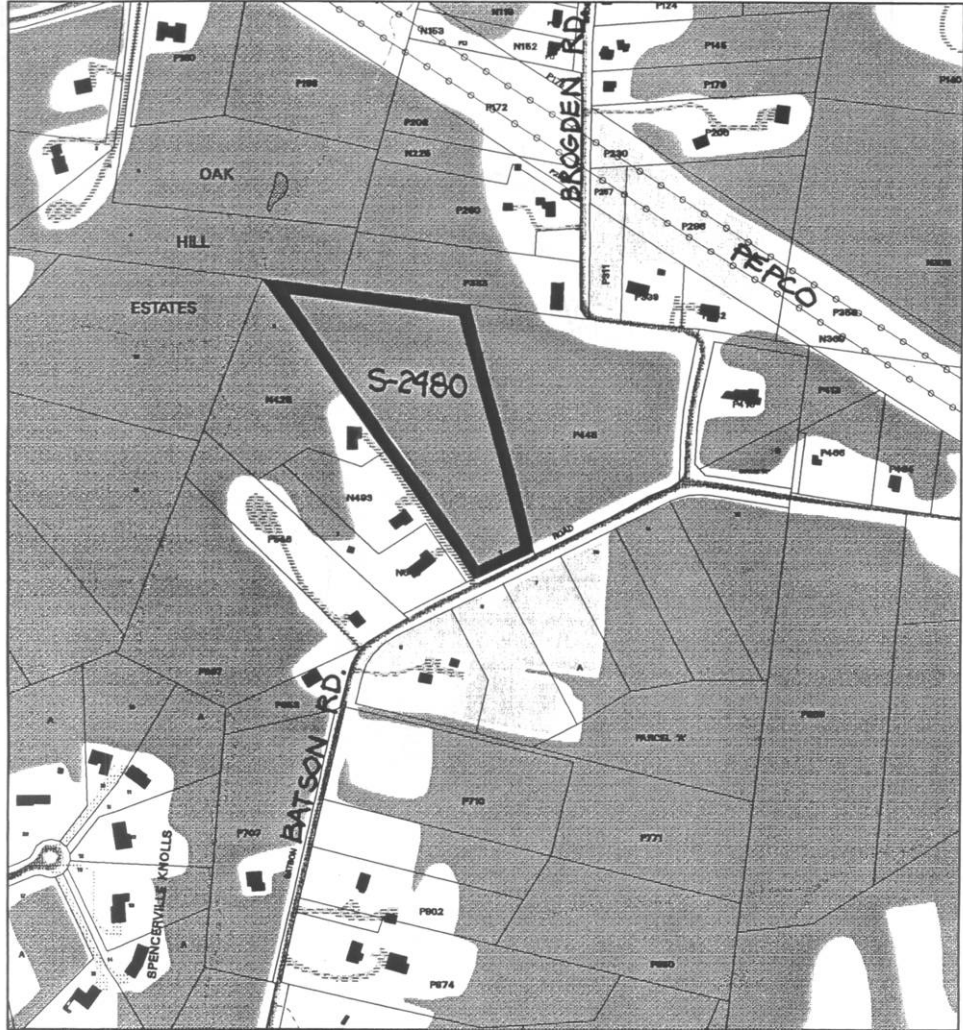
The subject site has approximately 191 feet of frontage along Batson Road. It is mostly wooded, with a relatively small clearing near Batson Road. The grade drops approximately eighty feet from Batson Road to the stream along the northwest corner of the property in the rear. Two gravestones are located under two specimen white oak trees near Batson Road.

The property is located in the Lower Patuxent River watershed and contains a small portion of one tributary stream and its associated buffer. Technical Staff notes that the property also contains the stream buffer of another tributary stream located just outside the property boundary, and the property drains to the Rocky Gorge Reservoir, which is a primary drinking water supply for the region.

B. The Neighborhood and its Character

The neighborhood is rural and residential in character, on land zoned Rural Cluster (RC). The only other residences in the immediate vicinity are three single-family homes located off a common driveway along the western boundary, a single-family home to the north, and two single-family homes across Batson Road to the south. Tr. 15-16. To the east are an undeveloped parcel and the Patuxent River Watershed Conservation Park

VICINITY MAP FOR
S-2480 LUCAS PROPERTY - PROPOSED LARGE GROUP HOME



Map compiled on July 10, 2001 at 2:52 PM | Sits located on base sheet no - 222NE03

NOTICE

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 Property lines are compiled by adjusting the property lines to topography created from aerial photography and should not be interpreted as actual field surveys. Planimetric features were compiled from 1:14400 scale aerial photography using stereo photogrammetric methods.
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Key Map



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING
 THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
 6767 Georgia Avenue - Silver Spring, Maryland 20910-4766

area. Spencerville Road (Rt. 198) is about 3000 feet to the southwest along Batson Road. To the northeast is Brogden Road and PEPCO power lines (about 500 feet from the northeast corner of the lot).

The vicinity map attached to Technical Staff's report is shown below:

C. Proposed Use

Petitioner proposes to construct a new residence to serve as a large group home in order to provide assisted living care for up to 16 elderly residents. Petitioner plans to live in the group home with her husband. According to the Revised Statement of Operations (Exhibit 21(b)), “[t]he typical resident will be an older, frail individual requiring assistance with the tasks of every day living (e.g., bathing, dressing, meal preparation) and will generally no longer drive.” All employees providing assistance to residents, including Petitioner, will be certified as nursing assistants.

Once the group home has received appropriate licensure from the County and State, the required ratio of staff to residents will be maintained. At full capacity, there will be a maximum of six staff (not including Petitioner) present at any given time. Staff will be employed seven days a week. Staff schedules will be staggered as follows:

Up to 3 staff members – 6:00 AM – 3:00 PM

Up to 3 staff members – 8:00 AM – 4:30 PM

Up to 3 staff members – 10:00 AM – 6:30 PM

Up to 3 staff members – 3:00 PM – 11:30 PM

Up to 3 staff members – 11:00 PM – 7:30 AM

In addition to the above staffing, Petitioner will be on staff through the evening/night hours from 5:00 p.m. to 7:45 a.m. As set forth in to the Revised Statement of Operations, Petitioner proposes “to offer a family-style living environment for the elderly adults who reside in the group home.”

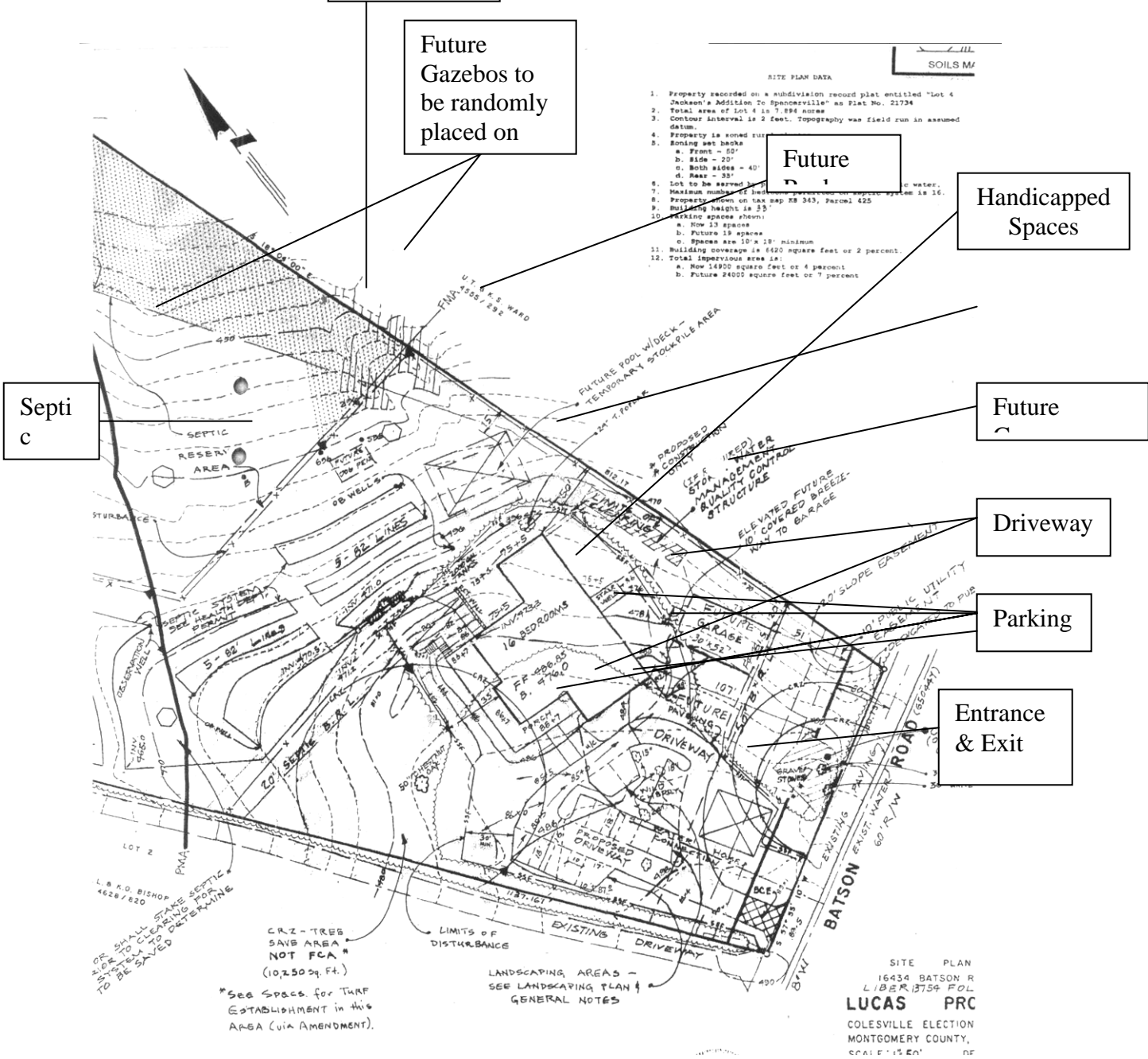
Meals will be shared and menu planning will include input from residents, who will be asked to suggest favorite recipes. A microwave equipped kitchen with a fully

stocked refrigerator and pantry will be accessible to residents to promote personal independence. Ms. Lucas or her staff will purchase groceries and household products from neighborhood stores and local orchards. Exhibit 21(b).

The proposed two-story structure, with a basement, will comprise approximately 11,745 square-feet on the two floors. The locations of the proposed building and other features are shown on the portion of the Final Forest Conservation Plan, Exhibit 24(b), depicted below:

Group **

By Technical Staff's calculation, approximately six acres of the property will remain forested, and there will be a selective cutting of trees located within the proposed septic system area at the Future Dog structure.



A V-shaped, 30 inch high by 42 inch wide sign is planned for near the front entrance. It would be held up by five and a half foot posts and would not be illuminated. Petitioner notes that the size and shape of the sign are contingent upon obtaining approval of a sign variance. Petitioner also notes the possibility of a future swimming pool, garage and dog pen.

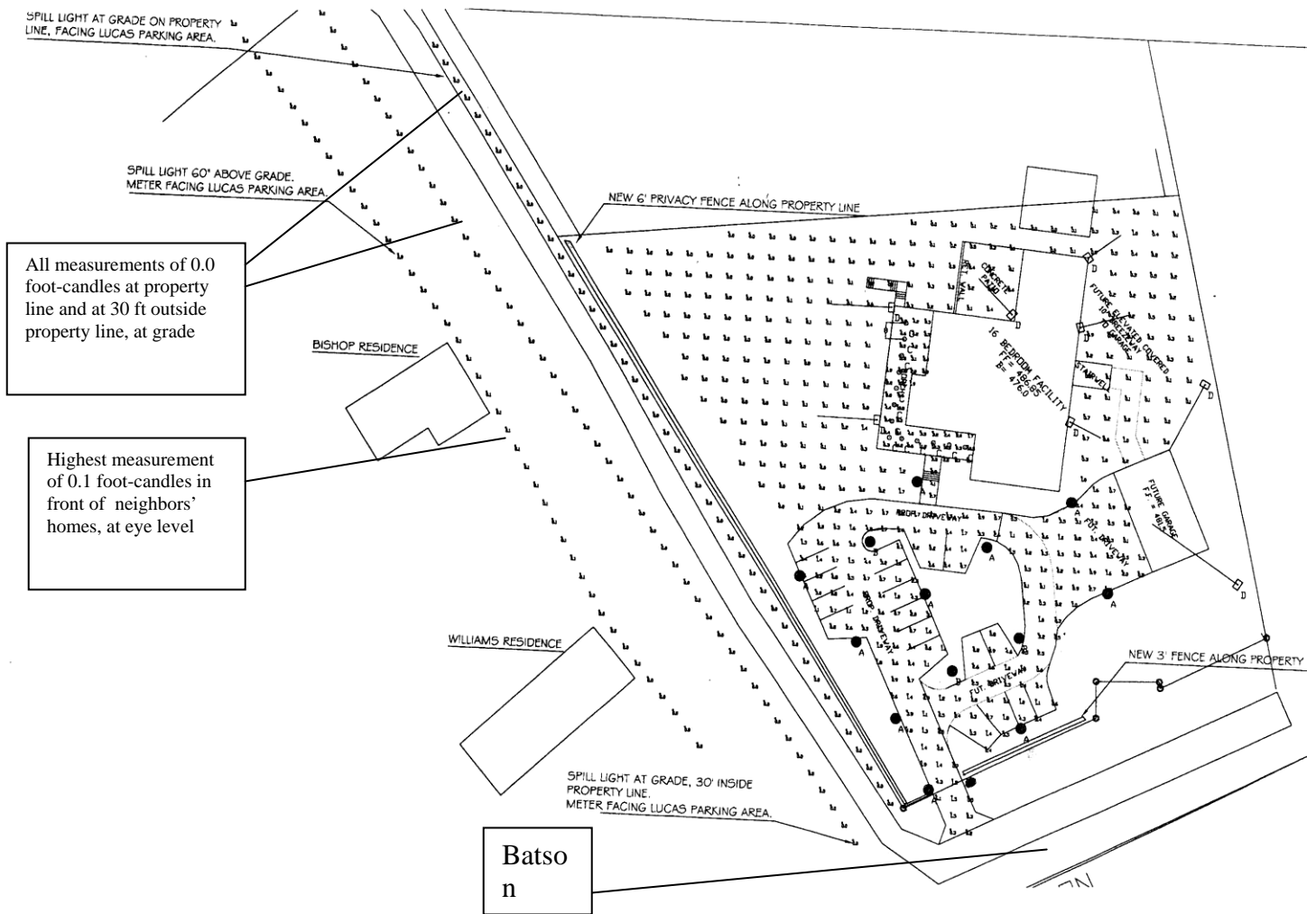
A total of 14 parking spaces are mentioned in the Revised Statement of Operations (Exhibit 21(b)), but actually 18 spaces, including two handicapped spaces, are shown on the Revised Site Plan (Exhibit 21(a)) and were mentioned in the hearing. Tr. 18 and 23. They are located along a 16-foot wide driveway, as depicted in the diagram shown above. Petitioner does not anticipate that there will be a need for any additional spaces. Technical Staff indicates that only 11 spaces are required (Attachment to Exhibit 27).

The driveway area will be illuminated with decorative lamps on 8 foot poles.¹¹ Also dispersed around the building will be floodlights for ground lighting (characterized as “acorn fixtures” by the Technical Staff). These will be directed towards the building to prevent off-site glare. According to the Revised Statement of Operations (Exhibit 21(b)), there will be vegetation to produce a residential setting. Moreover, the revised Landscape/Lighting Plan (Exhibit 31(a)) indicates that a 6 foot privacy fence along the western border confronting the Boston, Bishop and Williams residences will all but eliminate any light spillage, and a 3 foot stockade fence in front of the parking area along

¹¹ Petitioner’s earlier plan to use 7 foot poles was modified in the Revised Landscape/Lighting Plan (Exhibit 31(a)).

Batson Road will screen the headlights from the road. The portion of Exhibit 31(a) depicting the photometric study is shown below:¹²

¹² The orange lines on the actual Exhibit 31(a) depict the locations of the fences. The three dimensional diagram at the top of the Exhibit incorrectly depicts the three foot fence along the Batson Road frontage as continuing along the entire frontage. In fact, as indicated by the main diagram, it will only extend along the parking area.



The photometric study shown above demonstrates that, with the privacy fence installed, there will be an illumination level of 0.0 foot-candles at all at-grade locations along the western property line and at all locations, at-grade, 30 feet outside the property line.¹³ The study further indicates, that even from a vantage point 60 inches above grade (*i.e.*, at eye level), the light spillage perceived by a person standing in front of the western neighbors' homes and facing the subject property would not exceed 0.1 foot-candles, a negligible

¹³ The photometric study refers to this measurement as being 30 feet “inside” the property line, but since the study shows the location outside the property line and an explanatory note on the study states that the measurement is “thirty feet off the parking lot”, the label using the word “inside” is clearly a typographical error.

amount. Technical Staff is satisfied with the use and effect of the proposed privacy fence in reducing light spillage (Exhibit 32).

The proposed group home will be residential in appearance, according to Petitioner's Revised Statement of Operations. The planned appearance of the proposed

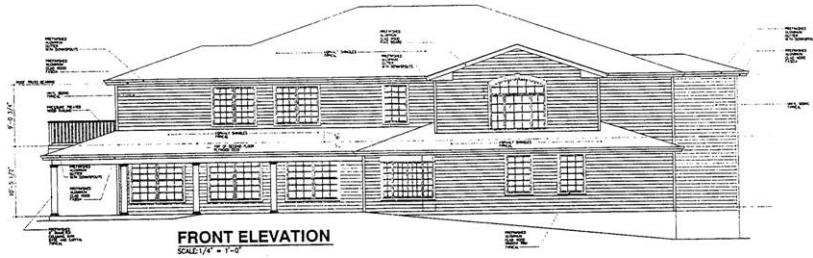


EXHIBIT NO. 7d
REFERRAL NO. S2480



SECTION

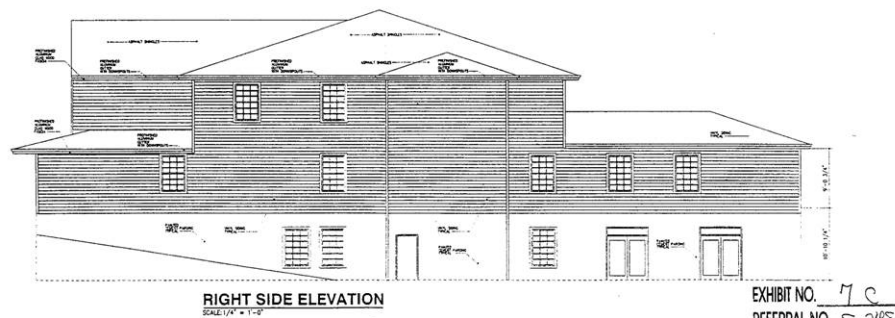


EXHIBIT NO. 7c
REFERRAL NO. S2480

group home can be seen in the following reduced copies from Petitioner's Exhibits 7(c) and (d), which depict the building elevations:

The first floor is designed to be completely handicapped accessible with a large, communal area. There will be both private and semi-private rooms available. Rooms will have full bathrooms with sinks adjusted so that residents are able to sit when combing their hair, shaving and tending to other needs.

D. Master Plan

The subject site is governed by the *Cloverly Master Plan*, approved and adopted in 1997. The Plan “is guided by two fundamental planning concepts: **Protect Watersheds and Reinforce the Character of Cloverly’s Communities.**” [Emphasis in original] *Cloverly Master Plan* at 13. The Plan does not specifically address the group home special exception sought in this case; however, it does set out guidance for evaluating Cloverly special exception cases, in general (at page 37):

- Maintenance of a residential appearance, where feasible.
- Compatibility with the scale and architecture of the adjoining neighborhood, consistent with the proposed use.
- The impact of signs, lighting, and other physical features on surrounding residential communities.
- Location of parking, loading, and other service areas to maintain residential appearances to the extent feasible.
- Options for landscaping that minimizes the non-residential appearance of the site and the view from surrounding properties and roads. It is preferable for landscaping to reinforce Cloverly’s rural character and be consistent with the streetscape standards . . . of the Master Plan and the landscaping standards for special exceptions.
- When special exceptions are adjacent to each other or to commercial properties, review whether it is feasible and reasonable to consolidate driveways and connect parking areas.
- Any special exception application that exceeds the recommended imperviousness level for a particular watershed in a SPA must be reviewed to determine compliance with the appropriate laws.

Technical Staff discusses the first bullet point in this list and notes that various features of the proposal would maintain the residential character of the area. The group home will be a two-story structure, and “the use of a pitched roof, residential scale windows, and siding materials maintain a residential appearance and make it compatible with the adjoining neighborhood. The lighting plan indicates ‘acorn’ fixtures and ground lighting that is typical of residential settings.” Staff also notes that the group home sign will not be illuminated. Parking areas are located 75 feet or more from the front property line, and Petitioner plans to maintain the vast majority of the property forested, with gazebos for the residents placed along paths behind the proposed residence. This special exception would not be adjacent to any other special exception or commercial facility and would not exceed the recommended imperviousness levels, as discussed in Part II.E., below. In sum, the Petitioner’s plan is consistent with the *Cloverly Master Plan*.

Although the concept of a group home may seem somewhat inconsistent with the idea of maintaining the look of single family residences, the Technical Staff correctly points out that group homes are allowed as special exceptions in the Rural Cluster Zone. Moreover, the subject proposal has been designed to maintain a residential look

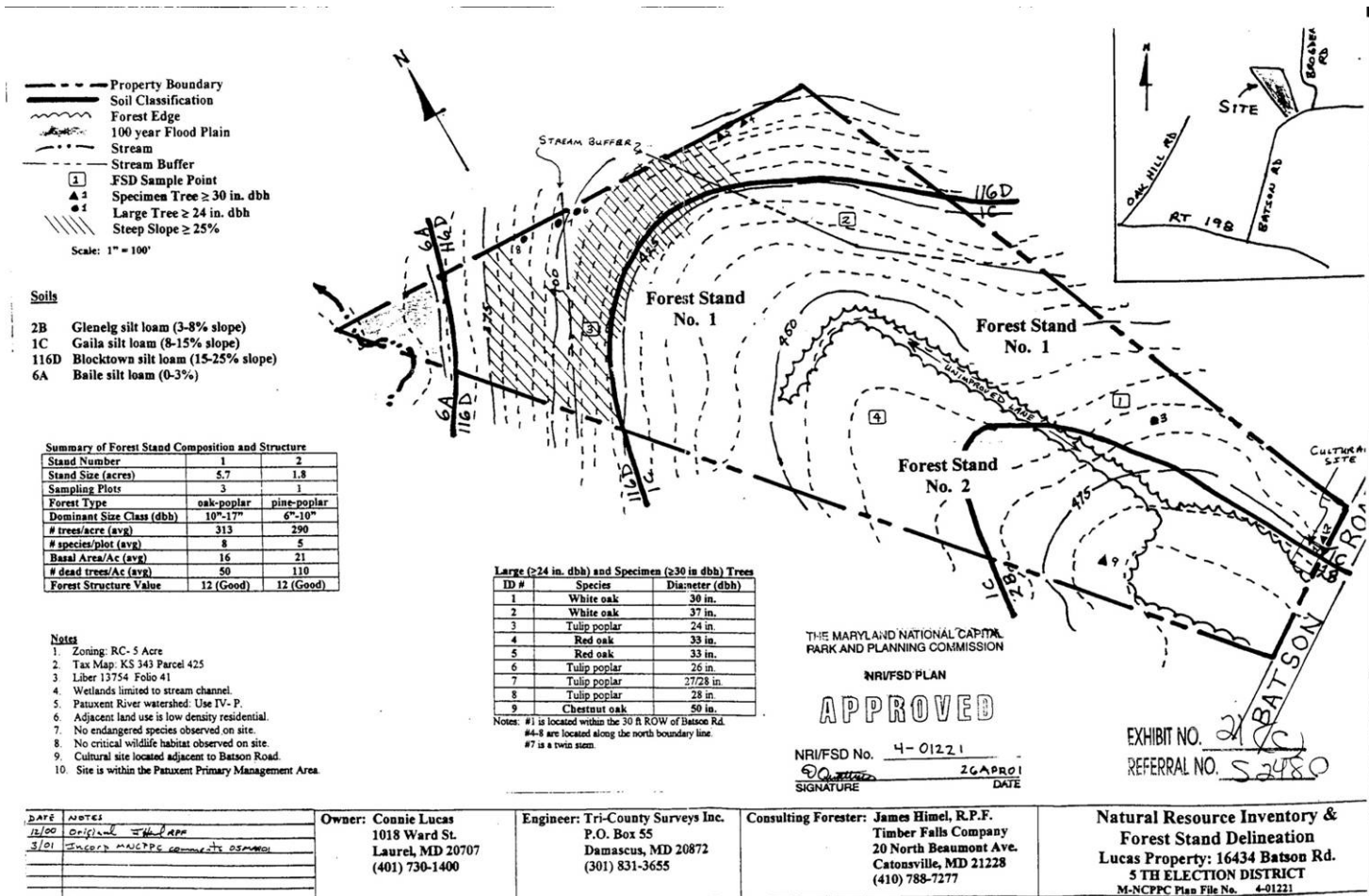
E. Environment

According to the Technical Staff, the Patuxent River and the reservoir are being heavily impacted by increasing pollution levels associated with land development, and by ongoing pollution associated with agricultural activities. The Patuxent River Policy Plan (State Policy Plan) was approved in 1984 to address these impacts. Under this State Policy Plan, Montgomery County agreed to develop and implement a primary management area approach to watershed protection.

As described by the Technical Staff, the Primary Management Area (PMA) in Montgomery County is a water quality protection and restoration area along streams and the river, where land use activities are managed to protect and enhance water quality. The width of the PMA is 660 feet for all tributaries. It consists of a stream buffer as defined in the Environmental Guidelines, and a transition zone where lower density uses are recommended and imperviousness should not exceed 10 percent.

Since the majority of the subject property falls within the PMA transition zone, Technical Staff states that it must meet the 10 percent imperviousness limitation. According to the approved storm water management concept plan, the current imperviousness is 4 percent of the site and the proposed imperviousness is 7 percent of the site, thereby meeting this criterion.

The proposed Final Forest Conservation Plan (Exhibit 24(b)) includes preservation of 3.72 acres of forest within the on-site stream buffers and on adjacent



upland area. The forested area is shown, and its makeup specified, in the NRI/FSD (Exhibit 21(c) depicted below:

Technical Staff notes that a significant amount of the forest being counted as cleared is within the extensive septic reserve area required for this use, and clearing will not take place in the reserve area until a replacement septic trench is needed. According to Technical Staff, the Health Department requires more than the typical length of septic reserve on properties which drain to the Patuxent reservoirs, as an extra precaution for water quality protection. In keeping with other forest conservation plans approved with this requirement, some of the forest included in the extra reserve area is not required to be counted as cleared. A minimum of 1.15 acres of off-site reforestation is required as part of the forest conservation plan.

Note 7 on Exhibit 24(b) specifies that the Petitioner “intends to place at least 5.0 acres of preserved woodland under a State-approved Forest Management Plan.” The Final Forest Conservation Plan also includes preservation of a specimen tree, along with a detailed tree protection plan.

F. Public Facilities & Transportation

Technical Staff characterizes the potential site-generated traffic as “nominal.” (Exhibit 26) Transportation Planning Staff concluded that when the property is operated as a group home it will not generate the 50 total peak hour trips necessary to warrant a traffic study under the Local Area Transportation Review (LATR), especially since the elderly residents would not be driving. Under the FY 04 Annual Growth Policy (AGP) currently in effect, rural policy areas (Goshen, Travilah/Darnestown, Rock Creek, Poolesville, and Patuxent) are not assigned staging

ceilings. Thus, Policy Area Transportation Review (PATR) is not applicable to this policy area (*i.e.*, Patuxent). Moreover, under the FY 03-05 AGP policy element which goes into effect on July 1, 2004, PATR will be abolished.

Public water will be available to the subject property and sewage will be managed by a septic trench system. Since the property will be used as a home for the elderly, there will be no need for schools. Police, fire and health services are presumed adequate under the AGP, absent evidence to the contrary.

G. Development Standards

The subject lot is exempt from the development standards in the RC Zone because, according to the Technical Staff (Exhibit 26), the lot was created by a deed before the approval date of the most recent sectional map amendment. This exemption is provided in Zoning Code §59-C-9.73(b)(2), which also provides that the development standards from the previous zone will govern. Technical Staff, in a supplemental report dated February 17, 2004 (Exhibit 34), stated that the previous zone was the RA Zone, and that Petitioner’s proposal meets the development standards specified for that Zone, as described below:

RA Zone Development Standards	Required/Permitted	Provided
Minimum Lot Area	2 Acres	7.9 Acres
Maximum Lot Coverage	25%	Approx. 2%
Minimum Front Yard	50 Feet	107 Feet
Minimum Side Yard	17 Feet; Sum of 35 Feet	50 Feet; Sum of 130 Feet
Minimum Rear Yard	35 Feet	720 Feet
Minimum Lot Frontage	150 Feet	190.75 Feet

H. Community Response

Not surprisingly, the Petitioner's proposal to build a group home for 16 elderly residents generated interest from the four nearest neighbors, Edward Bishop, John Boston, Kay Ward and Thomas Williams, all of whom participated in the hearing, with Messrs. Bishop and Boston testifying. Their concerns included the question of whether the proposed group home would fit into the rural setting, the possible effects on property values of having a group home next door, the potential for light spillage into their property, the danger to children from increased traffic and the possibility of water runoff onto their land caused by the new construction.

On the question of whether any group home would be a good fit in this rural setting and the potential effect on neighboring property values, the answer is supplied by the Zoning Code, which permits group homes as a special exception in the RC Zone. If the Petitioner demonstrates compliance with all the general and specific conditions in the statute, and, taking site conditions into account, the use produces only the adverse effects that are consistent with the nature of the permitted use (*i.e.*, no non-inherent adverse effects), it is not the province of the Hearing Examiner to second-guess the fact that the Zoning Code permits that use in this Zone.

In order to meet the concerns of the neighbors about light spillage, the record was held open to receive a revised Landscape/Lighting Plan showing precisely how Petitioner planned to shield the neighbors from light spillage. On November 20, 2003, Petitioner submitted Exhibit 31(b), which was discussed above. Copies of this revised Landscape/Lighting Plan were shared with the Technical Staff and the neighbors, and they were given the opportunity to respond for the record. Although Technical Staff filed a supplemental report indicating that it was satisfied with the lighting situation (Exhibit

32), no further responses were received from the neighbors. Erection of the fences depicted in the revised Landscape/Lighting Plan will be a condition recommended by the Hearing Examiner.

As to the traffic concerns, the Technical Staff report found that the potential increase in traffic from the proposed use would be “nominal.” Nevertheless, in order to meet the concerns raised by the neighbors, the Hearing Examiner is recommending a condition that would require Petitioner to post a one foot by one foot caution sign at the exit from the group home onto Batson Road, warning that there are children at play.

Finally, the issue of possible water runoff onto neighboring land will be dealt with by a condition requiring submission of a storm water management plan to Technical Staff for review prior to approval by the Department of Permitting Services, as suggested in the Technical Staff report of September 16, 2004. Moreover, as noted in Technical Staff’s supplemental report of February 17, 2004, the topography shown on the submitted plans indicates that much of the property drains to the north (*i.e.*, away from the neighbors’ properties in question, which are located east and west of the subject property).

III. SUMMARY OF THE HEARING

A. Petitioner’s Case

Petitioner called two witnesses, herself and William Wirts, an expert in land surveying and land use planning.

1. Connie Lucas

Petitioner testified that back in the year 2000 she discussed the possibility of building a group home with her neighbors, and “everybody was encouraging.” Tr. 17.

Petitioner described the subject property as “close to city amenities” with “a very country like setting.” She stated that the group home (which she characterized as “my home”) will be “a very quiet home.” *Id.* Petitioner indicated that in a year or two, she planned to add the “future garage,” “future pool” and “future dog pen” depicted on the revised Site Plan (Exhibit 21(a)).¹⁴ The future dog pen and garage are intended for use by Petitioner’s family, independent of the group home. Tr. 20.

There is a septic system to the north of the group home building and a secondary septic reserve area a little north of the main system. Petitioner testified that although Technical Staff’s report referred to only 13 parking spaces, there are actually 18 parking spaces on the Site Plan (Tr. 23), two of which are for the handicapped (Tr. 18).¹⁵ She also stated that there would be “residential” lights on the first story of the porch and lights in the parking area. Tr. 24. The parking area lights would be on seven foot posts.¹⁶ Tr. 25. There will also be “mini-floodlights” facing the house, for security. These lights would be equipped with motion sensors. Petitioner stated that she would submit a photometric study that would demonstrate no adverse effects on the neighbors. Tr. 27-28.

Petitioner then described the two story group home she planned to build, including its facilities, and indicated that there would be 15 residents until she became elderly, and then she would live there with her husband. Tr. 32. The typical resident would be over 75 and would need assistance with making meals, bathing and the like.

¹⁴ These features can also be seen on the portion of Exhibit 24(b) shown above on page 9 of this report.

¹⁵ The Site Plan notes (under the heading “Site Plan Data”) refer to 18 regular parking spaces, one handicapped space and one loading space. The Hearing Examiner was able to locate 16 regular parking spaces, two handicapped spaces and one loading space on the Site Plan. Since only eleven spaces are required, per the Technical Staff report, the distinction seems inconsequential.

¹⁶ The revised Landscape/Lighting Plan (Exhibit 31(a)) refers to 8 foot poles for these lights, a change apparently made after the hearing.

Few visitors are expected. The maximum staff present would be six at any one time. Tr. 35.

Petitioner indicated that the house “will look like a regular family home” and will be landscaped and screened with trees. The majority of the land will remain wooded. Tr. 36-37. According to Petitioner, the proposed group home will be in harmony with the neighborhood and will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties. It also will not produce any objectionable noise, vibrations, fumes, odors, dust glare or physical activity. It thus will not adversely affect the health, safety, security, morals or general welfare of the residents, visitors or workers. Tr. 38. Petitioner indicated she would have public water and an approved septic system. There would be minimal impact from traffic, parking and other physical activity. Petitioner stated that her planned group home “will keep the same quiet environment that is presently there.” Tr. 38.

Finally, Petitioner stated that she would obtain all necessary permits and licenses, that the property is of sufficient size to accommodate the proposed number of residents and staff and that there would be sufficient parking (18 spaces) to accommodate the use. Tr. 39. During cross-examination by the Peoples’ Counsel, Petitioner indicated that she would put up a three foot stockade type fence to block view of the parking lot from the street. Petitioner also stated that she would be willing to submit a more detailed landscaping plan showing how the neighbors would be buffered from the effects of her proposed group home. Tr. 48. Only two of the lights would generally be left on all night. Tr. 53-54. There would be few deliveries since Petitioner would shop for groceries and the linens would be washed on site. Tr. 71-72.

2. William Wirts

William Wirts was called by Petitioner as an expert in land surveying and land use planning. He testified as to the Storm Water Management Concept Plan, Exhibit 30, and indicated that appropriate testing has been done to assure the suitability of the site. Tr. 79-80. He also stated that there is enough septic system capacity and backup to last perhaps 100 years.

In response to one of the neighbor's concerns, Mr. Wirts testified that he was unaware of any streams on the property. He stated that Health Department regulations require any septic system to be at least 100 feet from any water system, "[a]nd we certainly meet that requirement." Tr. 81.

Mr. Wirts indicated that the parking lot would be about 20 feet from the edge of the driveway that separates the subject property from the western neighbors, and in his opinion the existing trees are "not going to be enough to provide an adequate buffer from any headlights." Tr. 82-83. It was agreed that this problem would be addressed in the revised Landscape/Lighting Plan, which was in fact filed after the hearing (Exhibit 31(a)). Finally, Mr. Wirts testified that, aside from the lighting issue, in his opinion, the proposal met all the requirements for the special exception, was consistent with the Master Plan and would be in harmony with the character of the neighborhood. Tr. 85-86.

During cross-examination by Mr. Klauber, the witness was unable to articulate the inherent adverse effects to be expected from a large group home for the elderly, and he indicated that he was "not an expert on group homes." Tr. 86-87. Mr. Wirts was also unable to state a land use basis for his conclusion that surrounding property values would not be diminished by the building of the group home in question; rather, he based his

opinion on his experience as a real estate agent, not a field of expertise for which he was offered or accepted as an expert in this proceeding. Tr. 89.

In answer to John Boston's question about the possibility of excessive water runoff onto his property, Mr. Wirts opined that the flow of water onto his property "won't be increased very much at all . . . [f]ive percent, ten percent." Tr. 90. Mr. Wirts testified that this increase would not "[c]ause a problem to his property." Tr. 91. When asked by the Hearing Examiner whether there was a way to handle the water runoff so that it does not increase the flow onto Mr. Boston's property, Mr. Wirts said there was not "without doing irreparable harm to the forest." Tr. 92. According to Mr. Wirts, "[a] certain amount of development should be expected by anybody when they build a house from their neighbor."

The same concern about possible water runoff was then raised by Petitioner's neighbor to the east, Kay Ward. Ms. Ward, although she declined to testify, stated during her questioning of Mr. Wirts that she was also worried about the possibility of a failure of the septic system and by the possible effects on her property values of having a group home next door. Tr. 94. Mr. Wirts responded that when a septic systems fails, "it" will leak to the surface; however, this is unlikely to happen for 20 to 25 years, the normal life of a septic system. As to property values, Mr. Wirts stated that they should not go down if the group home "meets the residential character of the neighborhood." Tr. 94. He also opined that because of the size of Petitioner's lot, he did not think that the planned group home would adversely affect local property values.

When further questioned by the People's Counsel about the water runoff problem, Mr. Wirts testified that the amount of additional runoff caused by the project was not

likely to exceed the 5% to 10% figure he had mentioned because after the septic system is built, the area will be “restabilized” with grass, which has only a slightly higher runoff factor than the present ground cover. Moreover, runoff from the impervious parking area will be diverted with either a ditch or an “aversion dike,” in accordance with the storm water management plan. Mr. Wirts added, “We're going to be building a storm water management facility and an infiltration trench that will provide both quantity and quality protection of [Ms. Ward's] property and ours too,” so he did not feel there would be any runoff problem on her property. Tr. 99.

On re-direct, Mr. Wirts indicated that Department of Permitting Services (DPS) had reviewed and approved the storm water management concept plan for the subject property; that DPS would normally consider impact on surrounding properties when evaluating a storm water management concept plan; and that DPS will review a final storm water management concept plan before this project is given the approval to go forward. Tr. 101.

B. Community Participants

1. Edward Bishop

Edward Bishop testified that the area he lives in is rustic and rural. Houses have a much higher value than Mr. Wirts suggested, and “there is a certain type of connotation of having a group home on your property or close by, close to it.” Tr. 103. His concerns included the question of whether the proposed group home would fit into the rural setting, the potential for light spillage into their property, the danger to children from increased traffic and the possibility that the children (or even his own occasional music) might be too loud for the elderly residents next door. On cross-examination, Mr. Bishop

indicated that he was satisfied with the proposal to have Petitioner submit a revised Landscape/Lighting Plan to him for comment after the hearing. Tr. 105. He felt that people pulling out of the driveway would be a danger to children, but he had no suggestions on how to ameliorate the safety problem. Tr. 108.

2. John Boston:

John Boston testified about his concern that the increase in traffic, visitors to the residence and staff will change the community. He stated that he is not against group homes, but he feels that the facility, with its lighting and six foot fence, will not blend in with the nature of the community. Mr. Boston's earlier questions to Petitioner's witnesses also made it clear that he was worried about the possibility of water runoff onto his land caused by the new construction.

3. Kay Ward and Thomas Williams:

Although neither Kay Ward nor Thomas Williams elected to testify, it was clear from their questions of Petitioner's witness, William Wirts, that they were both concerned about the effect of a nearby group home on their property values. Tr. 88 and Tr. 94-95. Ms. Ward also expressed concern about the possibility of water runoff onto her land. Tr. 94.

C. The People's Counsel

Martin Klauber, the People's Counsel, did not call any witnesses, but his cross-examinations helped to clarify the record in this case. He also suggested a procedure that was utilized to insure that the neighbors' concerns about light spillage were alleviated. Tr. 114-116. To that end, Petitioner was required to submit a revised Landscape/Lighting Plan to the Hearing Examiner, to Technical Staff and to all participants at the hearing.

After Technical Staff's comments were received by the Hearing Examiner, notice was sent out to all parties inviting further comment. None was received, indicating apparent satisfaction with Petitioner's revised plan.

Mr. Klauber also suggested having Petitioner and the community apply for a "Children at play" sign to reduce any added danger from increased traffic, but Mr. Bishop indicated that there already was one posted. Tr. 107.

Finally, although not enamored of the idea of fencing off the subject property, Mr. Klauber stated that he "would tentatively support the approval of this special exception." Tr. 114-115. Mr. Klauber did not file any additional comments in response to the revised Landscape/Lighting Plan and the Technical Staff's renewed recommendation of approval.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards.

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a large group home. Characteristics of the proposed large group home that are consistent with the “necessarily associated” characteristics of large group homes will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with large group homes, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff described the physical and operational characteristics necessarily associated with a large group home as follows:

This application represents a proposal for a new group home for the elderly. The inherent, generic physical and operational characteristics arising from the given use include residential activities consistent with a large home, except that the age of clients is restricted. Such a use will include parking by staff and residents.

To this description, the Hearing Examiner would add that one would expect a large group home (*i.e.*, one with 9 to 16 residents, according to the definition contained in Zoning Code §59-A-2.1) to generate some traffic and to have indoor and outdoor facilities (*e.g.* recreational areas) appropriate to accommodate the individual and group needs of the residents. These facilities will likely go beyond those found in a normal large home because a group home has aspects of a small institution, as well as aspects of a large residence. The Hearing Examiner believes that these factors are inherent in all group homes, by their nature, although their scale will vary significantly according to the nature of the group home and its residents. A group home for children will necessarily produce much more traffic than a home for the elderly such as the subject property, but a certain amount of traffic production is inherent in the operation of the group home. In this case, because the residents will be elderly, the additional traffic which will be generated was characterized by Technical Staff as “nominal.”

Technical Staff identifies the non-inherent characteristics as including “the size and mass of the building, setbacks, and specific operational characteristics of the senior housing, including any combined use.” Technical Staff notes that there is no combined use proposed in this case.

The Hearing Examiner agrees that the size and mass of a particular group home could be so excessive, or its setbacks so inadequate, given the nature of the site as to be considered non-inherent characteristics, but the distinction between inherent and non-

inherent characteristics gets a little blurry when we are discussing a large group home that is a reasonable size to accommodate the number of residents permitted by the statute. Since the Zoning Code expressly permits 16 residents, the Hearing Examiner finds that a house large enough to reasonably accommodate those residents is an inherent characteristic of the group home. Nevertheless, whether one characterizes the size, mass and setbacks of the proposed group home as inherent or non-inherent, the Hearing Examiner agrees with Technical Staff's conclusion that, in this case, they are compatible with adjacent development.

The lot on which the group home will be built is very large (approximately 7.9 acres) and well forested. The main structure will cover only about 2% of the property, will be designed to look "residential" and will be set back far from the road and the neighbors. Therefore, its size and mass will not be obtrusive in that setting.

On the other hand, possibly excessive light spillage and water runoff are not inherent characteristics of group homes, and the extent of these potentialities must be considered in this case. With regard to light spillage, the Petitioner produced a revised Landscape/Lighting Plan with a photometric study which demonstrated the effectiveness of Petitioner's plan to avoid the problem (mostly created by lights in the parking lot area) by erecting a six foot high fence along the western boundary of the property and a three foot fence along a portion of the Batson Road frontage. Technical Staff reviewed the plan (Exhibit 32) and found that it was sufficient to comply with the requirements of Zoning Code §59-G-1.23(h), which sets the light-buffering standard for residential zones.¹⁷

¹⁷ One could argue that the residential standard is too high because the subject property is located in the RC Zone, which is listed as an agricultural, not residential zone; however, we need not address that point

The Hearing Examiner agrees, even though some form of landscaping other than a fence might have been more attractive. The Hearing Examiner is persuaded by the fact that fences are

because Petitioner has agreed to meet the higher standard, and appropriately so in an area adjacent to a number of residences.

not unusual in residential areas, and they are permitted by Zoning Code §59-E-2.91 as a screening device for parking areas. Moreover, all the abutting property owners had an opportunity to review and comment on the revised Landscape/Lighting Plan and none opposed the fence proposal or even commented.

On the issue of possible water runoff from the modifications to the landscape which will be caused by this project, we have the unopposed testimony of Petitioner's expert, William Wirts. In Mr. Wirts' opinion, the additional runoff on the Boston property will not exceed 5 to 10 %, an amount which he did not consider consequential, Tr. 90-91, and he did not expect any runoff on the Ward property Tr. 99. Although this expert did not particularly inspire confidence, we can rely on the expertise of the Technical Staff and the Department of Permitting Services, both of which will review the erosion control plan and storm water management plan before building permits are issued. Therefore, the Hearing Examiner finds that the non-inherent characteristic of possible water runoff onto neighboring properties does not require denial of the petition in this case. Similarly, Technical Staff found "that there are no non-inherent characteristics that warrant a recommendation of denial [and] that all of the physical and operational characteristics of the proposed use will be compatible with existing development."

In sum, based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, I conclude that there are no non-inherent adverse effects from the proposed use which would require denial of the Petition.

B. General Conditions

The general standards for a special exception are found in Section 59-G-1.21(a).

The Technical Staff reports and the testimony and exhibits of the Petitioners provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A large group home is a permissible special exception in the R-C Zone, pursuant to Code § 59-C-9.3.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.26 for a large group home, as outlined in Part C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The subject site is governed by the *Cloverly Master Plan*, approved and adopted in 1997. The Plan “is guided by two fundamental planning concepts: Protect Watersheds and Reinforce the Character of Cloverly’s Communities.” *Cloverly Master Plan* at 13. The Petitioner has complied with all of the environmental requirements and will be building on only a small portion of the subject lot, leaving the vast majority of it forested, which will help maintain the rural look of the area. The Plan does not specifically address the group home special exception sought in this case; however, it does set out guidance for evaluating Cloverly special exception cases, in general (at page 37):

- Maintenance of a residential appearance, where feasible.
- Compatibility with the scale and architecture of the adjoining neighborhood, consistent with the proposed use.
- The impact of signs, lighting, and other physical features on surrounding residential communities.
- Location of parking, loading, and other service areas to maintain residential appearances to the extent feasible.
- Options for landscaping that minimizes the non-residential appearance of the site and the view from surrounding properties and roads. It is preferable for landscaping to reinforce Cloverly’s rural character and be consistent with the streetscape standards . . . of the Master Plan and the landscaping standards for special exceptions.
- When special exceptions are adjacent to each other or to commercial properties, review whether it is feasible and reasonable to consolidate driveways and connect parking areas.
- Any special exception application that exceeds the recommended imperviousness level for a particular

watershed in a SPA must be reviewed to determine compliance with the appropriate laws.

The proposal would maintain the residential character of the area. The group home will be a two-story structure, and as noted by Technical Staff, “the use of a pitched roof, residential scale windows, and siding materials maintain a residential appearance and make it compatible with the adjoining neighborhood. The lighting plan indicates ‘acorn’ fixtures and ground lighting that is typical of residential settings.” Staff also notes that the group home sign will not be illuminated. Parking and lighting has been buffered so as to reduce their impact, and Petitioner plans landscaping to maintain the residential and rural character of the area. The amount of impervious surface being added is well within acceptable limits. Thus, the Hearing Examiner is satisfied that Petitioner’s project is consistent with the recommendations of the *Cloverly Master Plan*.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed use will be in harmony with the general character of the neighborhood because it will be designed to have a residential look, will in fact be predominantly residential in character, will include only 16 residents, will create very little additional traffic and will leave the vast majority of the land forested.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Although three of the community participants expressed concerns about the possible impact on their property values of having a group home next door, they presented no evidence that a negative economic impact would occur. Petitioner's expert, William Wirts, testified that he would not expect a negative impact as long as the residential character of the area was preserved. To allow this evidence to be outweighed by contentions that amount to little more than generalized concerns and unsupported allegations would be counter to the dictates of Maryland law. See *Rockville Fuel & Feed Co. v. Board of Appeals*, 257 Md. 183, 192-93, 262 A.2d 499, 504-505 (1970); *Moseman v. County Council of Prince George's County*, 99 Md. App. 258, 265, 636 A.2d 499 (Ct. Spec. App. 1994). Moreover, the RC Zone does permit large group homes as a special exception, so the mere fact that the project is for a group home cannot weigh against it. Based on a preponderance of the evidence, the Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the proposed use, the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, or physical activity at the subject site. Petitioner's revised Landscape/Lighting Plan and photometric study satisfied Technical Staff and the Hearing Examiner that the illumination and glare would be kept within appropriate limits.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff notes that there are two unrelated special exceptions in the Batson Road vicinity. BAS 1703 is an approved (1989) special exception for a landscape contractor on Batson Road. BAS 820 is an approved (1982) special exception for a horticultural nursery on Spencerville Road, right near the intersection with Batson Road. Technical Staff and the Hearing Examiner conclude that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of*

any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities. Petitioner has access to public water and will build an approved septic system. Since the project will be a home for the elderly, availability of schools is not an issue. Storm drainage will be handled by a storm water management plan to be approved by both the Technical Staff and DPS. Police and fire protection are assumed adequate under the AGP unless those agencies indicate to the contrary. Additional traffic expected to be generated by the group home was characterized by the Technical Staff as “nominal.”

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The*

adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of both the Local Area Transportation Review (“LATR”) and the Policy Area Transportation Review (“PATR”). The Technical Staff did do such a review, and it is contained in Transportation Planning Staff’s Memorandum of July 17, 2001, attached to the Technical Staff’s report (Exhibit 26). Since the proposed group home would generate only one morning peak hour trip and one evening peak hour trip (*i.e.*, fewer than 50 total trips in the weekday morning and evening peak hours), the requirements of LATR are satisfied without a traffic study (Exhibit 26). Turning to the PATR, the FY 2004 Annual Growth Policy (“AGP”) does not have applicable transportation staging ceilings for jobs and housing because the Patuxent Policy Area is a rural area. Therefore, the Transportation Staff concludes, as does the Hearing Examiner, that the instant petition meets the applicable tests regarding traffic impact.

(ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff reviewed vehicular and pedestrian circulation plans for the site and determined that the proposal will have no detrimental effect. (Exhibit 26). Thus, the evidence of record supports the finding that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

C. Specific Standards

The testimony and the exhibits of record [including the Technical Staff Reports, Exhibit 26 (as corrected in attachment to Exhibit 27), Exhibit 32 and Exhibit 34] provide sufficient evidence that the specific standards required by Section 59-G-2.26 are satisfied in this case, as described below.

Sec. 59-G-2.26. Group home, large.

(a) When allowed. In addition to the general conditions required in division 59-G-1, a group home may be allowed upon a finding by the Board of Appeals:

(1) That any property to be used for a group home is of sufficient size to accommodate the proposed number of residents and staff.

Conclusion: There are 16 bedrooms in the proposed group home. Fifteen of them will be occupied by elderly residents and the 16th by Mrs. Lucas, who will serve as part of the staff until she becomes elderly and then will live in the group home as a resident. Technical Staff found that the proposed structure, which includes dining rooms and other common areas, would be large enough to accommodate the residents and staff. The Hearing Examiner agrees.

(2) *That the site to be used as a group home for children provide ample outdoor play space, free from hazard and appropriately equipped for the age and number of children to be cared for.*

Conclusion: Not applicable. This group home will be for the elderly.

(3) *That off-street parking must be provided in the amount of one parking space for every 2 residents and one space for every 2 employees on the largest work shift. The Board may decrease the off-street parking where the method of operation or clientele indicates the decrease is warranted.*

Conclusion: There will be sixteen residents and a maximum of six staff present at any one time. Therefore, under this provision there must be a minimum of 11 spaces -- $(16 + 6)/2 = 11$. Petitioner's revised site plan shows locations for 18 parking spaces (including two handicapped spaces), and this proposal therefore meets the parking requirements.

(b) ***Decision to be expedited.*** *In order to expedite a decision regarding a proposed group residential facility, the Board must give priority consideration in scheduling a public hearing and in deciding petitions for such a facility.*

Conclusion: The petition was initially expedited, but on July 27, 2001, the Petitioner requested that the hearing be deferred to a later, unspecified date, and it was therefore removed from the Hearing Examiner's calendar. It was not until May 12, 2003 (almost two years later) that Petitioner's attorney wrote to the BOA updating exhibits and asking for a hearing to be scheduled. The hearing was held on October 20, 2003, but the record had to be held open until Petitioner could submit a revised Landscape/Lighting Plan and it could be reviewed by Technical Staff, the People's Counsel

and the community participants. The record closed on January 23, 2004, at the end of the comment period. It was reopened on February 19, 2004, to receive a supplemental Technical Staff report dated February 17, 2004 (Exhibit 34) and for any public comments on that report. No further comments were received, and the record closed for good on March 1, 2004. This report followed on March 2, 2004.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2480, seeking a special exception for a large group home located at 16434 Batson Road, Spencerville, Maryland, be GRANTED, with the following conditions:

1. The Petitioner shall be bound by all of her testimony and exhibits of record, and by the testimony of her witnesses and the representations of her counsel identified in this report;
2. The Petitioner will house no more than 16 residents in the group home, including any resident staff, and up to six non-resident staff are permitted on the largest shift;
3. The Petitioner must possess, not later than the issuance date of the use and occupancy certificate, valid State of Maryland and County licenses, certificates, and/or registrations that may be required for a group home which provides assisted living to the elderly;
4. Petitioner must comply with the conditions of approval of the Preliminary Forest Conservation Plan prior to issuance of any building permit and sediment control permit;

5. The sediment and erosion control plan and a storm water management plan must be submitted to MNCPPC for review prior to approval by the Department of Permitting Services. The plans must conform to the limits of disturbance specified on the Preliminary Forest Conservation Plan;

6. Petitioner must install the 6 foot privacy fence along the western property line and the three foot fence along a portion of the southern property line to screen the parking lot from adjacent parcels and from Batson Road, as shown in the revised Landscape/Lighting Plan (Exhibit 31(a));

7. Petitioner must maintain at least the 14 parking spaces called for in her revised statement of operations (Exhibit 21(b)), but may include up to the eighteen spaces at the locations shown on her revised site plan (Exhibit 21(a)); and

8. Prior to commencing operation, Petitioner must install a one foot by one foot sign, facing towards the exiting drivers at the exit from the group home driveway, warning them of children at play.

Dated: March 2, 2004

Respectfully submitted,

Martin L. Grossman
Hearing Examiner