

IN THE CIRCUIT COURT FOR HOWARD COUNTY

MARC and MELINDA JORDAN, *et al*,

*Petitioners*

v.

BOARD OF APPEALS OF HOWARD COUNTY,  
ROBERT B. WILLIAMS, *et al*,

*Respondents.*

CIVIL

ACTION

NO.

13-C-07-068348 AA

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**MEMORANDUM OF RESPONDENTS**

[Maryland Rule 7-207]

Robert B. Williams, *et al*. (hereinafter “Respondents” or “Williams”), by and through their undersigned legal counsel, hereby submit this *Memorandum of Respondents*, in response to the “Protestants’ [*sic*] Rule 7-207 Memorandum” filed on behalf of Marc and Melinda Jordan, *et al* (“Petitioners’ Memorandum”), and in opposition of the appeal of the Opinion of the County Board of Appeals for Howard County (the “Board”), dated February 1, 2007, granting the Respondents’ request, pursuant to *Howard County Zoning Regulations* (“HCZR”) § 131.N for a conditional use for age-restricted housing (the “Board’s Order”).

**STATEMENT OF THE CASE**

Respondents filed with Howard County a Petition for Conditional Use for a condominium regime containing fifty (50) age-restricted, adult, single-family, detached homes and related amenities in the RR-DEO (Rural Residential - Density Exchange Option Overlay) zoning district. The proposed homes, each with an attached garage, will be located

on a fifty (50) acre portion of a 127 acre parcel. After review and a recommendation of approval by the Howard County Department of Planning and Zoning (“DPZ”), a public hearing was held by the Hearing Examiner for Howard County. The conditional use plan depicted footprints of single-family, detached homes to provide the hearing authority with a conceptual depiction of the maximum size of homes that could be built. Ignoring the recommendation of approval of the DPZ, the Hearing Examiner, after erroneously concluding that all age-restricted homes were to be constructed at the maximum size and misapplying recommendations of the *Howard County General Plan 2000* (“General Plan) as absolute mandates, denied Williams’ request. Williams filed a *de novo* appeal to the Board and, after several nights of public hearing affording all parties the opportunity to present testimony and evidence, the Board approved the conditional use, subject to two conditions. The appeal to this Court by the Petitioners at this level (referred to herein as the “Protestants”) followed.

## **THE EVIDENCE**

### **Technical Staff Report**

The DPZ completed its Technical Staff Report, dated February 22, 2006 (“Staff Report”), after reviewing Respondents’ proposed, conditional use plan.<sup>1</sup> After summarizing the proposal and its general location and providing background information regarding the subject property and its environs, the DPZ then evaluated the proposal pursuant to HCZR §

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<sup>1</sup> A copy of the *Technical Staff Report* is included herewith under Tab 1.

131.B [general criteria for conditional uses] and § 131.N.1 [specific criteria for Age-Restricted, Adult Housing]. The Staff Report first evaluated the factors to be considered regarding harmony with land uses and *General Plan* policies and then evaluated whether or not the proposed use would have any adverse effects at the proposed location beyond those normally associated with age-restricted, adult housing. The evaluation by the professional planning staff of those general and specific requirements and the DPZ recommendation to the Hearing Authority is summarized below:

### **HCZR § 131.B - General Criteria**

- the proposed use is “predominantly residential in nature, with a low intensity of use”
- the proposed density complies with the specific density criteria in the HCZR
- the subject property is “quite large” for the use with “much open space and wide areas for buffers”
- the subject property is located on low traffic volume roads which only connect to a major road at a traffic signal
- the nature of the proposed use will be “in relative harmony with the Rural Residential land use and policies” of the General Plan and “will be in harmony with the General Plan policies encouraging housing for an aging population”
- the proposed, age-restricted housing use is “similar in character and operation as any relatively low-density, single-family detached neighborhood”
- there will “be no inordinate noise, no generation of dust, fumes, odors, glare, or vibrations, and no creation of hazards” from the proposed use
- there will be “wide buffer areas” separating the proposed use from the adjoining residential properties and the use will “not hinder or discourage the development and use of adjacent land and structures more at” the subject

property than elsewhere

- more than required parking will be provided and the parking lot will not be readily visible to the surrounding areas
- the ingress and egress drives will provide safe access with adequate sight distance; acceleration and deceleration lanes are unnecessary at this location
- the proposed use “at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with age-restricted residential developments”

*Staff Report*, Section IV.A (1) - (5) at page 5. (Emphases added.)

### HCZR § 131.N.1 - Specific Criteria

- DPZ suggested that the proposed age-restricted, single-family, detached units [only detached and semi-detached units are allowed in the RR-DEO zone] should present inherent distinctions from other, “by-right dwellings” based on building design and/or floor plans; if no distinction exists, there would be an unallowed increase in overall density
- the total number of bedrooms must address Health Department requirements
- the Respondent<sup>2</sup> should present evidence that the dwellings qualify as age-restricted, adult housing on the basis of building design
- 50 dwelling units are proposed on 50 acres in compliance with applicable requirements
- height requirements are maintained and the plan appears to comply with or exceed the minimum setback and building separation distance requirements
- 50% of the conditional use area is required to be open space - this requirement is exceeded

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<sup>2</sup> Respondents at this level were the Petitioners below, therefore, appropriate contextual changes have been incorporated in this *Memorandum*

- recreational uses comply with requirements provided that they are limited to use by owners and their guests
- the proposed community building complies with applicable size requirements
- the “general size of the dwelling units as depicted” are larger than some homes on Linden Church Road and they are relatively compatible with the homes along Twelve Hills Road
- a “significant transition buffer area is provided along the perimeter of the Site with open space and forest conservation areas”
- age restrictions will be a material inclusion in the Condominium Declaration, but it is recommended that the Respondents provide additional details on maintenance and enforcement of those restrictions
- common areas and the community building will be maintained by the Condominium Association
- although a short list of universal design features is given in Note 17, the Respondents should provide additional information to demonstrate that the proposed units are appropriate for the age-restricted population
- additional information should be provided to show compliance with the mandatory, Moderate Income Housing regulations

*Staff Report*, Section IV.B (1) - (14) at pages 5-7. (Emphases added.)

The Staff Report recommends approval of the requested conditional use, subject to standard conditions and the Respondents providing additional information to the Hearing Authority [Hearing Examiner/Board of Appeals] to address the comments in the evaluation.

*Staff Report*, Section V (1) - (5) at page 7. (Emphases added.)

### **The Plan**

At the outset of the hearing before the Board, through their expert engineer, Jacob



Widening of Forest

Conservation Easement<sup>6</sup>: at the express request of Mr. and Mrs. Shi, whose property adjoins the subject property on the east (identified as Lot No. 22 on Sheet 1), the forest conservation easement was widened, pushing the proposed homes further to the west, away from the Shi's property and more toward the interior of the subject property.

Heavy Landscape Buffer

Replaced Portion of Forest Conservation<sup>7</sup>:

parallel to Linden Church Road, adjacent to the subject property, an area of unmaintained forest conservation was replaced with a planted and maintained Landscape Buffer - C/Heavy Landscaping.

Added Sheet 3<sup>8</sup>:

Sheet 3 was added to show an illustrative detail of the landscape buffer (top, left-hand portion of sheet); [the black line in the center of the proposed street with triangles at either end correlates to the '**cross sectional view**' described below];

a potential '**cross sectional view**' is shown on the bottom of this sheet; it is, essentially an illustration of what one might expect to see (along the area of the black line in the center of the street) from within a home looking across the street

the testimony before the Hearing Examiner was that the proposed homes would be a maximum of 6,000 square feet which the Hearing Examiner interpreted to mean that

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<sup>6</sup> See, *Transcript* at pages 15 and 37.

<sup>7</sup> See *Transcript* at pages 15-16 and 36.

<sup>8</sup> See *Transcript*, at pages 18 and 38-39 [landscape buffer]; 19-20 and 39-40 [cross-sectional view]; 17-18 and 40-41 [housing types]; and 28-29 and 40 [mandatory and optional features as originally presented as separate Exhibit to the Hearing Examiner]

all would be 6,000 square feet; to ensure that the Board did not make the same mistake, elevations and footprints of four housing units proposed were added for clarification

the specific evidence that all homes would be 2-4 bedrooms, that contain specific design features not found in non-age restricted dwellings would be incorporated in each home, and a list of optional features (all depicted on Exhibit No. 3 before the Hearing Examiner) was reproduced on this sheet of the Plan in the bottom right-hand corner

Mr. Hikmat testified affirmatively that in his professional opinion, none of the clarifications alter significantly the density, configuration, proposed improvements or make any other material modifications to the proposed conditional use as originally evaluated by DPZ and/or the Hearing Examiner.<sup>9</sup>

The proposed use is fifty (50) single-family, detached homes located on 50 acres. There will be a combined sewage treatment system and one or more wells will serve the homes. No variances from the requirements of the HCZR are requested.<sup>10</sup> Although four, different housing products will be offered, ranging in size from 1,800 square feet to 6,000 square feet, the dwelling footprints shown on Exhibit 1 are all of the same size and all depict the largest footprint that could be expected. The largest footprints were depicted so that the Hearing Authority could evaluate the maximum amount of disturbance that might occur.<sup>11</sup>

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<sup>9</sup> See, *Transcript* at page 20.

<sup>10</sup> See, *Transcript* at page 17.

<sup>11</sup> See, *Transcript* at pages 33; 68-69

The mix of housing types will be market-driven. Providing a range of housing sizes will allow diversity and will permit persons aged 55 or greater to age in place in their own community.<sup>12</sup> The Health Department will determine the maximum number of bedrooms that can be included for all homes and that restriction will be contained in the Condominium Declaration and enforced by the Condominium Association, as well as the Howard County Health Department. Each of the homes will have an attached, two-car garage.

The project will contain a community center with pool and tennis courts as required amenities, together with associated parking areas and a paved exercise trail. Approximately 68% of the subject site will be open space in excess of the 50% required. Additionally, the buffer areas exceed the minimum requirements.<sup>13</sup>

The potential road noise from Maryland Route 32 was analyzed, based on traffic projections for the year 2020 and all homes are located well east of the 65 d.B.E. line, calculated without mitigation measures. The proposed homes are set back a greater distance than required by the HCZR or the gas company from the underground gas line that runs through the subject site.<sup>14</sup> The proposed access to the development has been located and designed to adapt to any future realignment of Route 32 that may be undertaken by the State

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<sup>12</sup> *See, Transcript* at page 27.

<sup>13</sup> *See, Transcript* at page 26.

<sup>14</sup> *See, Transcript* at pages 96-97.

Highway Administration.<sup>15</sup> Stormwater management will be designed prior to building permit issuance, with one facility providing both water quality and quantity management. Refuse will be picked up by a private contractor as in any condominium development.

Lighting in the community will be equivalent to that in any residential, single-family home community. The security lights on the community center building and parking area will not be seen by anyone outside of the development - those lights are on the other side of the ridge line and not visible from adjoining properties.<sup>16</sup> Lighting required on any roadways by Howard County will be provided to meet County safety requirements.

Given the location of the subject property with the homes and recreational amenities surrounded by heavy landscaping and perpetual forest conservation, the development is an “enclave”. The separation between proposed homes exceeds the County requirements so there will not be a “walled” appearance.<sup>17</sup> Even though the conditional use proposes age-restricted, adult housing, the wholly separate requirements for providing moderate income housing must be met. Compliance with the 10% mandatory requirement is not optional. Those moderate housing units may be provided as part of the 50 dwellings proposed on the subject property or they may be provided off-site as permitted. A moderate income housing agreement and a declaration of covenants and restrictions developed by the

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<sup>15</sup> *See, Transcript* at pages 54-55.

<sup>16</sup> *See, Transcript* at pages 81; 99-102.

<sup>17</sup> *See, Transcript* at page 289.

County Department of Housing and Community Development will have to be executed and recorded if this mandatory requirement is met on-site.<sup>18</sup>

As to specific criteria required for approval, Mr. Hikmat opined in his professional status that<sup>19</sup>:

- the size of the property meets the requirements of the HCZR
- the proposed use addresses a stated policy of the General Plan in that it provides housing for an aging population, in a community rather than forcing them into congregate, independent or assisted living facilities
- the proposed development will not hinder or discourage development of adjacent properties
- the proposed single-family homes will not generate any extraordinary noises or vibrations
- the dwellings proposed will be comparable in scale and character with those in the community
- there will be no impact on vicinal properties
- the scale and intensity of the proposed development is appropriate and made even more so by the extensive buffers and excessive setbacks being maintained
- the use proposed will not have any adverse effects at this location above and beyond those associated with the use regardless of where located within the zone

### *Private Water and Sewage*

Robert W. Sheesley, owner of Eco-Sense, Inc., an environmental consulting company, was called to provide his professional opinions regarding issues relating to private water supply and sewage disposal for the proposed age-restricted dwellings. Mr. Sheesley was the Environmental Health Director for the Howard County Department of Health in the mid-1980s and was the first director of Baltimore County's Department of Environmental

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<sup>18</sup> See, *Transcript* at pages 64; 305; 322.

<sup>19</sup> See, *Transcript* at pages 58-66.

Protection and Resource Management. Mr. Sheesley has extensive experience in environmental services and is one of a handful of people that have been certified by Howard County as a ‘privatized percolation test applicant.’<sup>20</sup> Mr. Sheesley’s extensive and comprehensive testimony covered all aspects of the disposal of sewage from the proposed dwellings in a single, septic reserve area and the provision of potable water to those dwellings from one or more water wells. A groundwater discharge permit [sewage] and a water appropriations permit [potable water] will have to be obtained from the Maryland Department of the Environment subsequent to conditional use approval and on-site testing and evaluation. To meet the requirements for conditional use approval and to appear and offer testimony, Mr. Sheesley has conducted soil evaluations of the subject property and a water balance assessment. Mr. Sheesley described the soils of the subject property as “excellent” finding nothing unique that would have an adverse effect. Based on the water balance assessment, Mr. Sheesley opined that there is sufficient water recharge on the site to provide adequate, potable water without adverse impact on water resources in the area.<sup>21</sup> There will be additional testing, applications and approvals obtained further along in the process. The Health Department will specify the maximum number of bedrooms allowed based on the capability of the soils, but no more than fifty dwellings will be allowed.

Of the 50 percolation test pits that have been dug, 49 have passed County and State

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<sup>20</sup> *See, Transcript* at pages 104-105.

<sup>21</sup> *See, Transcript* at pages 106-112.

requirements. The one test pit that did not pass is located in the northern portion of the septic reserve area and will not be used in any event.<sup>22</sup> In responding to Protestants' criticism that the Health Department did not have sufficient information to approve a 'percolation certification plan', Mr. Sheesley explained to the Board and the Protestants the procedure and nomenclature used by the Health Department. Mr. Sheesley described in detail the information shown on his in-field data sheets, compiled after field testing, and that he had submitted them to the Health Department for review in the normal course of the review/approval process. The Health Department then sent correspondence to Mr. Sheesley<sup>23</sup> indicating that

Percolation testing conducted March 20 and 22, 2006 on the referenced property [for sewage disposal] indicated satisfactory soil conditions. Copies of the test results are enclosed. Further review is contingent upon submission by a registered engineer/surveyor of a percolation certification plan showing ....”

*Protestants' Exhibit 4. (Emphases added.)*

Mr. Sheesley testified that the correspondence that Protestants suggested was an indication of incomplete analysis was, in fact, just the opposite. The soil conditions were approved and that correspondence provided direction regarding the notes, signature block and other standard requirements that had to be shown on the percolation certification plan before it was finally approved. Mr. Murray Snyder, a mechanical engineer (registered only in California)

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<sup>22</sup> See, *Transcript* at pages 334-335.

<sup>23</sup> Protestants' Exhibit 4.

who teaches that subject at the Naval Academy, has no familiarity with septic reserve areas or sewage disposal areas, is not a septic engineer, has no idea of minimum State requirements for on-site sewage disposal or standard practices for soil evaluation testing, was called by the Protestants to offset the extensive testimony of Mr. Sheesley.<sup>24</sup> Near the conclusion of his cross-examination, Mr. Snyder finally acknowledged that he had no expertise in the area of sewage disposal and that he merely did his own 'assessment' of the papers that had been filed to date with the County Health Department for this property.

Mr. Sheesley described the location of the 4.5 acres to be devoted solely to septic reserve area on the subject property. That area is located a sufficient distance from proposed water wells on the subject property and from wells and septic reserve areas on adjoining properties. The evaluations conducted prior to the hearing were sufficient to offer opinions on the conditional use, but there are additional permits and approvals that must be obtained in the future before building permits can be issued.

### **Traffic**

Joseph Caloggero, a professional engineer employed by The Traffic Group, Inc., appeared to render his professional opinion on the Plan and associated traffic considerations. In addition to having a B.S. in Engineering, Mr. Caloggero had (at the time of the Board's hearing) 30 credit hours toward a Master's of Science in Civil Engineering with a traffic concentration. Moreover, Mr. Caloggero is a certified, professional traffic operations

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<sup>24</sup> See, *Transcript* at pages 221-229.

engineer (PTOE) by the Institute of Transportation Engineers. Mr. Caloggero has experience in his professional career in evaluating traffic impacts that may be associated with age-restricted housing.<sup>25</sup>

Mr. Caloggero reviewed Exhibit 1, familiarized himself with the width of and access along Greenberry Lane, the width and access to Linden Church Road and out to the signalized intersection of Maryland Route 32. He is familiar with the area, Howard County and, specifically, the area along Maryland Route 32. Mr. Caloggero also reviewed State Highway Administration potential modifications to Route 32 in the area of Greenberry Lane.

Utilizing standard, accepted transportation engineering methods, Mr. Caloggero developed expected trip generation figures associated with the 50 age-restricted dwellings. That analysis revealed 15 morning total peak hour trips (in and out combined) and 30 evening total peak hour trips (in and out combined).<sup>26</sup> Mr. Caloggero's analysis included an allowance for residents that may still be working, despite being 55 years of age or older.<sup>27</sup>

Mr. Caloggero, being familiar with Howard County requirements, opined that before building permits could be issued in the future for the proposed age-restricted housing, the project would have to meet County Adequate Public Facilities Ordinance ("APFO") tests. At the time of APFO analysis, a further traffic impact analysis will have to be conducted

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<sup>25</sup> See, *Transcript* at pages 135-137.

<sup>26</sup> The 'peak hour' is a one hour, peak period between 7 a.m. and 9 a.m. (morning peak) and 4 p.m. and 6 p.m. (evening peak).

<sup>27</sup> See, *Transcript* at page 139.

which takes into account then existing traffic volumes, intersection turning movement counts and other future factors that may exist. That analysis is conducted prior to building permit issuance so that actual, observed data are used, rather than attempting to extrapolate existing data to some point in the future. Mr. Caloggero opined that the traffic impact of the 50 proposed age-restricted dwellings will not have any traffic impacts at this location that are above or beyond such impacts regardless of where the use is located in the zone.<sup>28</sup>

The Protestants called Mr. William Taylor, who lives on Broadwater Lane in the community. Mr. Taylor is, admittedly, not a traffic engineer but he is in business for himself “doing data analysis work.” Mr. Taylor conducted his own traffic survey by contacting certain residents in his community that he determined qualified as living in 55 plus households. Based on his study, Mr. Taylor calculated 665 daily trips and 4656 trips per week resulting from the proposed 50 dwellings.<sup>29</sup> Mr. Taylor described his observations of congestion at the intersection with Route 32 and described Route 32 as a level of service of F. Mr. Taylor then produced a series of Tables that purported to be public documents. During cross-examination, Mr. Taylor acknowledged that alterations had been made to his exhibits with results from his own traffic survey. Over objection, those tables were admitted as Protestants’ Exhibit 3.<sup>30</sup> Mr. Taylor described the intersection at Route 32 as being

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<sup>28</sup> See, *Transcript* at page 140.

<sup>29</sup> See, *Transcript* at page 178.

<sup>30</sup> See, *Transcript* at page 185-187.

“unfamiliar to Maryland Drivers.”

On cross-examination, Mr. Taylor was not familiar with traffic standards used by Howard County versus those used by the State Highway administration. The General Plan concerns testified to by Mr. Taylor were acknowledged to be related to capacity expansions of roadways in the area versus increased traffic loads. There is no capacity expansion proposed with or required by the proposed conditional use. Mr. Taylor’s traffic study was conducted of his nearby neighbors, none of which are in an age-restricted, adult housing community. Mr. Taylor did determine on his own that the nationally accepted traffic rates/standards used by Mr. Caloggero and other professional traffic engineers are “not that sound” and are “not backed by sufficient data to be sound numbers.” Mr. Taylor has no idea as to what data the SHA uses or what data are used for APFO purposes.<sup>31</sup> Referring to Protestants’ Exhibit 2 (traffic portions of the General Plan), Mr. Taylor was unable to define the reference to road segment as opposed to intersection. Mr. Taylor was also unaware that traffic counts used for APFO analyses must be conducted within one year of permit submittal.

Joseph Caloggero was recalled to the stand after listening to the testimony and reviewing the exhibits offered by the Protestants. Mr. Caloggero testified that the computations on Protestants’ traffic exhibits were not based on accepted traffic generation methods nor is there any significance of the mandatory headlight use on Route 32 in the

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<sup>31</sup> See, *Transcript* at page 198.

evaluation of a conditional use approval. Moreover, the single point of ingress/egress and access to/from the proposed development raises no concern from a traffic analysis standpoint relative to the proposed low-intensity, conditional use. No evidence or testimony offered by the Protestants resulted in any alteration of Mr. Caloggero's professional opinion during his direct examination.<sup>32</sup>

### **Generalized Opposition**

The Protestants presented a variety of other witnesses who testified in their behalf regarding general dislike of the proposed development, general concerns about wells going dry, traffic, inability to see stars at night and loss of farmland. In response, Mr. Robert Williams, one of the owners of the subject property and a life-long resident of the area testified that, yes, traffic volumes had increased on Route 32 but the subject intersection is a safe intersection and he knows of no fatalities that have occurred at the intersection. Mr. Williams has seen farms developed into houses in which the Protestants reside. Mr. Williams described the anticipated traffic from 50 age-restricted homes as insignificant.<sup>33</sup>

### **STANDARD OF REVIEW**

In reviewing a zoning board's decision, absent a clear error of law, a trial court cannot substitute its judgement for that of the agency in reviewing findings of fact, and must accept the agency's conclusions if they are based on "substantial evidence" and reasoning minds

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<sup>32</sup> See, *Transcript* at page 325.

<sup>33</sup> See, *Transcript* at pages 355-362.

could reach the same holdings based on the record. *Friends of the Ridge v. Baltimore Gas & Electric Co.*, 120 Md App. 444 (1998). On a pure question of law, however, the courts extend no deference to the agency, beyond the weight accorded to a persuasive opinion and reasoning stated. *Id.*

Furthermore, in *Coscan Washington, Inc. v. Maryland-National Capital Park & Planning Comm'n No. 1466*, the Court of Special Appeals held that an agency decision must be viewed in the light most favorable to the agency, and that the agency decision is *prima facie* correct and carries a presumption of validity. *Coscan Washington, Inc. v. Maryland-National Capital Park & Planning Comm'n No. 1466*, 87 Md. App. 602 (1991). Where inconsistent inferences may be drawn from the evidence, it is for the agency and not the courts to draw the inferences. *Id.* There is authority for the proposition that while a court's review of question of law is expansive, generally courts will defer to a local board's interpretation of an ordinance governing accessory uses, unless such ordinance, or the agency's interpretation of it, "has no foundation in reason." 2 Ziegler, Rathkopf's The Law of Zoning and Planning ("Rathkopf") §23.02., 23-6, (citing) *Nelson v. Valparaiso Bd. of Zoning Appeals*, 181 Ind. App. 252, 391 N.E. 2d 649 (1979).

The Maryland Court of Appeals, reviewing the decision of the Howard County Board of Appeals regarding a special exception/conditional use and a subsequent change in law, held:

In *Mayor and Aldermen of City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 398, 396 A.2d 1080, 1089 (1979), we defined the substantial

evidence test as “whether a reasoning mind reasonably could have reached the factual conclusion the agency reached,” Insurance Comm'r v. Nat'l Bureau, 248 Md. 292, 309, 236 A.2d 282 (1967), or as “‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,’ ” Bulluck v. Pelham Apts., 283 Md. 505, 390 A.2d 1119 (1978); Snowden v. City of Baltimore, *supra*, 224 Md. [443] at 448, 168 A.2d 390.’ In applying the substantial evidence test:

**The question for the reviewing court is ... whether the conclusions ‘reasonably may be based upon the facts proven.’ The court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness.**

*Annapolis Waterfront Co.*, 284 Md. at 399, 396 A.2d at 1089, quoting 4 K. Davis, *Administrative Law*, § 29.05, 137, 139 (1958).

*Layton v. Howard County Board of Appeals*, 399 Md. 36, 49 (2007) (Emphases added.)

Moreover, the appellate courts of this State have long recognized the right of elected bodies to specify uses, subject to enumerated conditions, which benefit the public as a whole:

Thus, we conclude, as this Court and the Court of Appeals often have, that a special exception/conditional use in a zoning ordinance recognizes that the legislative body of a representative government has made a policy decision for all of the inhabitants of the particular governmental jurisdiction, and that the exception or use is desirable and necessary in its zoning planning provided certain standards are met.

*Mossburg v. Montgomery County*, 107 Md. App. 1, 7-8 (1995)

## LEGAL ARGUMENT

### **The Board Determined Properly that the Clarifications to the Plan Were Not Substantive**

The Board has been vested with the authority to consider facts and evidence and to make its own determination, based on the expertise that it possesses, whether a variance or

conditional use/special exception should be granted or whether additions to a plan are substantive. The clarifications to the Plan considered by the Board, described in detail on pages 6 to 8 above, were determined unanimously by the Board to be non-substantive. The number of units proposed did not increase, the location of the entrance did not change and several of the units were moved further from existing, adjoining residences so that the forest conservation buffer could be widened at the express request of adjoining owners. Areas of heavy landscaping (Type "C") to be maintained by the Condominium Association were added in replacement of areas of non-maintained, forest conservation areas. Illustrative, cross-sectional views were added in an effort to depict what the view from the interior of the development might be. Since the Hearing Examiner erroneously concluded, despite verbal testimony to the contrary, that all proposed homes would be of a single, maximum size, typical house footprints and elevations of four proposed dwellings were added depicting the variety of sizes of units proposed. What was a separate exhibit before the Hearing Examiner (Williams' Exhibit 2), specifying the mandatory and optional features that distinguish the units proposed from non-age-restricted units was reproduced on one of the sheets constituting the Plan. The entire Plan was accepted into evidence without objection as Exhibit 1.

The low intensity development scheme proposed with attendant/required community amenities was not altered. No change was made in the alignment of the roadways nor of the location of the septic reserve area. The clarifications offered did not change the use proposed. These issues, in a much broader context were discussed at the Hearing Examiner

level. In this *de novo* proceeding, the Board is not restricted to the record made before the hearing officer. *Halle Companies v. Crofton Civic Ass'n*, 339 Md. 131, 143 (1995) Thus, even new or different evidence beyond that presented to the Hearing Examiner is appropriate on any issue properly before the Board. “Although the issues to be addressed on review by the Board may be limited, new and additional evidence is permitted. The proceedings, therefore, are wholly original with regard to all issues properly raised.” *Id.*, at 142. The Board was correct in determining that such additional clarifications were non-substantive in nature.

***The Evidence Presented by Williams in Support of the Plan, Showing Compliance with Applicable Statutory Requirements and Demonstrating Harmony with the General Plan Was Substantial***

The approval of a proposed conditional use in Howard County requires compliance with two, separate but integrally related statutory provisions. The first, set forth in HCZR § 131.B, are the “General Standards Required for Approval.” The second requires compliance with the specific standards for the particular conditional use set forth in HCZR § 131.N. The applicant bears the burden of proof, by a preponderance of the evidence and the burden of persuasion, on both the general and specific standards. HCZR § 131.G.

***The General Standards***

All conditional uses must be in harmony with the applicable land uses<sup>34</sup> and policies in the General Plan for the district in which the use is proposed. The Board, in its evaluation

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<sup>34</sup> Harmony with the “Land Records of Howard County” as suggested by Protestants is neither required nor relevant. *See, Protestants’ Rule 7-207 Memorandum*, at page 16, enumerated heading 4.

of the Plan, was required to consider evidence regarding the “nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site”, together with the appropriateness of the intensity and scale of proposed uses given the “adequacy of proposed buffers and setbacks.” HCZR §131.B.1.a. & b.

The proposed use is in harmony with the General Plan. The Protestants have suggested that the proposed use, since it includes two-story dwellings as well as single-story dwellings which may be larger than small cottages, fails to comply with the sentence in the General Plan where it is recommended that the HCZR be amended to “provide other housing opportunities for seniors, including attached and detached single story single family homes.” General Plan at 82-83. To date, the Howard County Council has not accepted nor adopted such a regulation<sup>35</sup> – single story as well as two story dwellings can already be developed for age-restricted adult housing, subject to the maximum height limitation. Similarly, the County Council has not acted on the recommendation in the *Howard County Senior Housing Master Plan* (at page 25) to amend the conditional use for age-restricted adult housing in western Howard County to allow a density of two (2) dwelling units per acre.<sup>36</sup>

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<sup>35</sup> See, generally, the Board’s discussion at page 11 of the Board’s Order.

<sup>36</sup> General Plans and Master Plans are often overstated in their relative importance. The appellate courts of Maryland have characterized such plans as “general guides” (*Duke Street LPS v. Calvert County*, 112 Md. App. 37, 53 (1996)) or at “best a ‘flexible guide,’ or an ‘intellectual prophecy’ of future development.” *Kanfer v. Montgomery County Council*, 35 Md. App. 715, 733, (1977).

The Board's Order, being reviewed by this Court, is instructive of the evidence presented and the Board's analysis thereof regarding the required harmony with land uses and policies of the General Plan. The Board quoted directly from a recent decision of the Maryland Court of Special Appeals:

the term 'in harmony with' is not synonymous with 'in conformity with,' 'consistent with,' or 'in compliance with.' Rather, 'in harmony with' is a more flexible standard which requires the hearing authority to determine whether a particular use would be 'so inimical or injurious to the announced objectives and goals of the comprehensive development plan so as not to be able to co-exist with the plan's recommendations.' Indeed, the proposed use would have to frustrate or preempt achievement of the plan's recommendation before a finding of non-harmony would be justifiable.

*Board's Order* at 9-10, quoting, *Richmarr Holly Hills v. American PCS, LP*, 117 Md. App. 607, 656 (1997)

The substantial evidence presented by Respondents was evaluated by the Board which determined that the proposed age-restricted use "will be a low density residential development within a residential area. It is located on a 50 acre parcel and has access to a local road which will access a major arterial Maryland Route 32. The proposed use also furthers the goal of ensuring an adequate housing supply for the elderly, disabled and special populations (see Policy, 4.3, page 84)." *Board's Order* at 10.

There will be no walled appearance or massing as suggested by Protestants. The Plan shows clearly, as supplemented by the uncontradicted testimony of Jacob Hikmat, PE, that the setbacks between buildings exceed the requirements of the RR zone and both the open space and required buffers far exceed the requirements of the HCZR.

With respect to adverse impacts, the Protestants attempted to present evidence to the Board that more age-restricted housing units were being proposed on the subject property than would be permissible if non-age-restricted homes were built. The Board, following the direction of the late Judge Rita Davidson, correctly rejected that argument.<sup>37</sup> *Board's Order* at 12. The Board considered the overwhelming evidence that the proposed use will not have, at the subject property, adverse effects that are unique or different than if the use were located elsewhere in the zone. *Id.* As summarized above, the evidence showed without contradiction that the proposed use will not generate noise, dust, fumes, odors, vibrations or hazards that are different on Greenberry Lane than anywhere else. Likewise, the lighting will be the same, but at this location the vicinal properties will be shielded by the greater than required buffers and the 'enclave' nature of the area to be developed. Mr. Hikmat described the shielding effect that the ridge between the subject property and vicinal properties has on any standard residential lighting use and any County required public safety lighting.

Mr. Caloggero, a recognized, professional traffic expert evaluated the traffic to be generated by the proposed use and ingress/egress and sight distance issues. He opined that access to this proposed development was safe, with adequate sight distance and that no additional road improvements were required. In his expert opinion, the 50 age-restricted

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<sup>37</sup> In *Schultz v. Pritts*, 291 Md. 1, 5 (1981), Judge Davidson writing for the Court overruled the comparison of uses permitted as of right with proposed conditional/special exception uses as articulated previously in *Gowl v. Atlantic Richfield Co.*, 27 Md. App. 410, 341 A.2d 832 (1975).

homes will have no adverse effect at this location any different than in any other location in the zone. Based on his extensive experience in evaluating age-restricted and senior housing, he classified this use as a low-intensity housing use. The proposed use has more than adequate parking for the homes and the recreational amenities. There are no loading areas and all refuse will be picked up by a private refuse hauler hired by the Condominium Association.

Given that the proposed use is surrounded by heavy landscape buffers and vast areas of perpetual forest conservation, Mr. Hikmat and the DPZ both opined that the use will not hinder or discourage the development and use of adjacent land/structures in a manner different than if located in another portion of the zone. Clearly, when the proposed conditional use would create a substantially similar effect if it were located somewhere else in the zone, the inherent adverse impacts are not sufficiently unique to warrant denial of the proposed conditional use. *See, Anderson v. Sawyer*, 23 Md. App. 612, 625 (1974). Mr. Hikmat went further in his evaluation that the lack of environmentally sensitive areas on the subject property, its shape, configuration and separation and screening from adjoining uses actually renders the use at the subject property more compatible and in harmony with its surrounding environs than most parcels that are similarly zoned.

### **The Specific Standards**

Having met the burden of proof via substantial evidence on the general standards, Williams was required to do likewise with respect to the more objective, specific standards

applicable to age-restricted, adult housing as depicted on the Plan. The Protestants did not even attempt to show that the Plan fails to meet these requirements except to complain that no floor plans were introduced (none are required) and that the location and dwelling type of the moderate income housing requirement was not specifically shown. Rather than repeat the testimony summarized above for each, specific standard, the following chart is provided to aid the Court in its review of the Board's decision on the whether or not the Board correctly determined that the Plan meets those standards:

HCZR Section 131.N	REQUIREMENT	PLAN PROPOSES	CONDITION SATISFIED	CONDITION EXCEEDED
1.a	detached/semi-detached dwellings	ONLY detached dwellings	X	
1.b	in RR zone, minimum of 50 dwelling units	50 detached, single-family dwellings are shown on the Conditional Use Plan - Petitioners' Ex. 1	X	
1.c	1 dwelling unit per acre - allowable density	Conditional use area is 50 acres	X	
1.d.(1)(b)	maximum height of 34 feet	all dwellings will be less than 34 feet in height	X	
1.d.(2)	Structure/Use Setback from Perimeter (a) 40 feet (b) 50 feet	(a) minimum of 100 feet (b) minimum of 100 feet		X X
1.d.(3)	20 foot interior road setback for garage units	20 feet	X	
1.d.(4)(a)	Structure setback from lot lines	N/A - no interior lot lines in condominium development	—	—
1.d.(5)(b)	Distance between dwellings: side to side - 15 feet	20 feet		X
1.e.	50% of site area in open space	68% + [Note 2.E on Plan]		X
1.f.	Accessory uses limited to on-site residents/guests	Will be limited by Condo Declaration	X	

HCZR Section 131.N	REQUIREMENT	PLAN PROPOSES	CONDITION SATISFIED	CONDITION EXCEEDED
1.g.	Community building	Community building of 1000 sq. ft.	X	
1.h.	Loading/trash areas	N/A	—	—
1.i.	Buffering near periphery OR compatible building design <sup>38</sup>	Significant buffer <b>and</b> compatible dwellings		X
1.j.	Requirements for phased development	N/A - will be built in single phase	—	—
1.k.	Creation/Maintenance of Age Restrictions	Condominium Declaration Petitioners' Ex. No. 2	X	
1.l.	Open space managed by common entity	Council of Condominium Unit Owners	X	
1.m.	Floor plans <b>OR</b> other material demonstrating appropriateness for age-restricted <sup>39</sup>	Universal design features [Plan Note 17 and Sheet 3 of 3 of Exhibit 1]  Additional mandatory and optional features [Petitioners' Ex. No. 3; <i>see also</i> Sheet 3 of 3 of Exhibit 1]	X	X
1.n.	10% moderate income housing units	Req'd MIHU Agreement and MIHU Declaration will be executed and required - unless fee in lieu of is accepted pursuant to recently enacted legislation	X	

The Board evaluated the evidence on each of the applicable, specific criteria.<sup>40</sup> The Board had the task of listening to both sides and then rendering a decision. The question for

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<sup>38</sup> This requirement is stated in the disjunctive. Either the adequate buffer must be provided or the proposed dwellings must be compatible in scale and character with residences in the community. Respondents' testimony was that both criteria will be satisfied.

<sup>39</sup> This requirement is also stated in the disjunctive; the Respondents must provide floor plans **OR** other materials demonstrating appropriateness for an age-restricted population. The latter was provided – *See*, Exhibit 3 and Sheet 3 of 3 of Exhibit 1.

<sup>40</sup> Board's Order at pages 14-16.

this Court is “whether the conclusions ‘reasonably may be based upon the facts proven.’ The court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness”. *Mayor and Aldermen of City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 399 (1979), quoting 4 K. Davis, *Administrative Law*, § 29.05, 137, 139 (1958).

***Compliance with the Moderate Income Housing Requirement is Mandatory***

The Protestants allege that the Plan fails to address the statutorily required Moderate Income Housing Requirement. It is accurate that none of the dwelling footprints/boxes shown on the Plan are labeled Moderate Income Housing Units. It is also accurate that the materials presented by Williams do not specify what the initial sales price will be of any moderate income housing units provided. That does not mean that the mandatory requirements were ignored or that the Board failed to deny the Plan because the specificity desired by the Protestants was not produced. Denial of the Plan on that basis is akin to saying that because the complete electrical plan and electrical layout for each home proposed was not produced as required by the Building Code of Howard County, the Plan should be denied. Had the Board denied the Plan based on Protestants’ assertions regarding Moderate Income Housing, even after Mr. Hikmat proffered that the required units would be provided on-site or off-site (as now provided), such denial would have been arbitrary and capricious. *See, Days Cove Reclamation v. Queen Anne’s Co.*, 146 Md. App. 469 (2002); *Sheetz v. Frederick City Planning Comm.* 105 Md. App. 531 (1995).

Statutory compliance with the Building Code is required to obtain a building permit. Compliance with the Moderate Income Housing statutory provisions is required “with the submission of the original final [subdivision] plat or original site development plan<sup>41</sup> for approval.” *Howard County Code* § 13.402(a)(1)<sup>42</sup> There may never be any moderate income housing units provided on the subject property. Mr. Hikmat testified that either five of the proposed units will be moderate income housing units or the developer will avail itself of the statutorily available, optional method of providing the required number of moderate income housing units off-site, as well as any other available alternatives. *See, Howard County Code*, §§ 13.402 (e), (f) & (g)

Compliance with the Moderate Income Housing requirements, just like site development plan approval and subdivision plat approval, comes at a stage much later than conditional use approval. The Board’s task is to evaluate the conditional use proposed at the location proposed. The proposed use is 50, age-restricted adult dwellings and associated recreational amenities that must comply with applicable law. The approval of the conditional use is not the final step in the development of the subject property. The appellate courts of this State have recognized specifically that there are a variety of stages of governmental review and approval in the development of land. *See, Art Wood Enterprises v. Wiseburg*

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<sup>41</sup> A “site development plan” is required as part of the subdivision review and approval process which occurs subsequent to conditional use approval.

<sup>42</sup> A copy of *Howard County Code* § 13.402 is included under Tab 2 with this Memorandum.

*Community Association, Inc.*, 88 Md. App. 723, 596 A.2d. 712 (1991) Thus, the approved conditional use on the subject property will have to undergo many additional reviews and approvals before the homes are built and occupied.

***Williams Met the Statutory Burdens for Conditional Use Approval***

HCZR § 131.G. defines the burdens that must be met for approval of a conditional use plan as:

The applicant for a conditional use shall have the burden of proof, which shall be by a preponderance of the evidence and which shall include the burden of going forward with the evidence and the burden of persuasion on all questions of fact which are to be determined by the Hearing Authority or are required to meet any provisions of these Regulations.

Williams absolutely had no burden to refute the irrelevant assertions, dislikes, fears or ‘opinions’ expressed by the lay Protestants as they lacked credibility and probative value on the issues under consideration. The Board disagreed with the Protestants<sup>43</sup> and, in its evaluation of the Protestants’ presentation, deemed much of the Protestants’ testimony as amounting “only to unsupported opinions and conclusions.” The Board felt so strongly about Protestants’ evidence that it summarized a holding of the Court of Special Appeals:

Unsupported conclusions or fears of witnesses, to the effect that a proposed use of property will or will not result in harm, amount to nothing more than vague and general expressions of opinion which are lacking in probative value.

Board’s Order at 17, *citing Anderson v. Sawyer*, 23 Md. App. 612 (1974).

Indeed, had the Board denied the conditional use based on the ‘evidence’ of the Protestants’

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<sup>43</sup> Board’s Order at 15-16.

the arbitrariness of such a decision could not have withstood judicial review. *Accord, Mossburg* at 25-26.

In fact, the Protestants did not have to present any evidence at all. The Board could have ruled that Williams failed to satisfy the required burdens of proof and persuasion. However, once the Board was persuaded, by substantial evidence in support, to approve the conditional use, the Protestants had a herculean task to refute it. Just a few years ago, the Court of Special Appeals evaluated the burdens placed upon a Harford County property owner for an extension of a zoning boundary through her property. In its discussion of the “diametric difference between **persuasion** and **non-persuasion**” the Court opined:

*Actually, to be persuaded of something requires a requisite degree of certainty on the part of the fact finder (the use of a particular burden of persuasion) based on legally adequate evidentiary support (the satisfaction of a particular burden of production by the proponent).*

There is a subtle, but critical, difference between 1) being **PERSUADED NOT TO DO** something and 2) being **NOT PERSUADED TO DO** something. The difference is far from trivial. The former requires some measure of persuasion; the latter requires none. The former carries with it a burden of production; the latter does not.

*Angelini v. Harford County*, 144 Md. 369, 378 (2002). (**Emphases in original.**)

Thus, but for the substantial evidence produced by Williams, it would have been simple for the Board to hold that it was “not persuaded” that the general requirements of HCZR § 131.B or the specific requirements of § 131.N.1 had been satisfied. Such was not the case. In the eighteen pages comprising its decision, most of which the Board utilized summarizing the evidence presented by Williams and the application of that evidence to the

required statutory criteria, the Board enunciated succinctly the evidence that persuaded it to grant the age-restricted conditional use. The bald allegations by Protestants that Williams had not met the required burdens is belied by the overwhelmingly uncontradicted, substantial evidence and reasoning of the Board's Order. The Board did not have to be persuaded to not approve Williams' conditional use. *Angelini* at 378. To the apparent displeasure of the Protestants, the Board evaluated all of the evidence presented and was persuaded to approve the conditional use.

### *The Density Exchange Overlay*

In what must be characterized as a final attempt to find some basis to attack the substantial evidence produced in support of conditional use approval, Protestants suggest that age-restricted, adult housing is allowable only in the RR zone, not the RR-DEO zone. Such an argument is based either on a lack of understanding of basic zoning principles or in an apparent attempt to blur the principal issue before the Court. HCZR § 131.A provides that “[c]onditional uses are authorized in specified zoning districts . . . .” The subject property is located within the Rural Residential (“RR”) zoning district, governed by HCZR § 105. The provisions of HCZR § 105 are applicable to the RR zoning district and only the RR district. In contrast, the County Council has adopted several “overlay districts” which the Council can “overlay” on top of a specific zoning district to provide additional provisions. The “DEO (Density Exchange Option) Overlay District” is governed by HCZR § 106 and that overlay can be applied to either the Rural Residential zoning district or the Rural

Conservation zoning district. Age-restricted, adult housing may be granted via conditional use in the RR zoning district, as well as others, irrespective of any overlay district that may be applied.

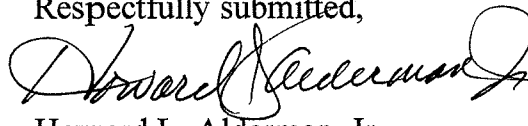
### **CONCLUSION**

Much of the Protestants' 'evidence' presented to the Board was that this age-restricted housing development was not finally designed, with all on-site sewage, water, stormwater management, lighting and landscaping approvals available for review by the Board. The Protestants have missed the mark. The Board is required to evaluate, not a site development plan, but a proposed use that the County Council has legislatively pre-determined to be compatible with the Protestants' neighborhood and in harmony with the General Plan if specified criteria are met.

The expert evidence presented by Williams satisfied all general and specific criteria and that the proposed age-restricted, adult housing at this location will not have any adverse effects above and beyond those effects inherently associated with that use regardless of where else it might be located in the zone. The Board was persuaded, the Protestants were not. However, until such time as the County Council permits zoning conditional use approvals to be decided by plebiscite, the considerable expertise and experience of the Board must be respected and affirmed.

For all of the foregoing reasons, the February 1, 2007, Decision and Order of the Board should be affirmed without further proceedings or consideration.

Respectfully submitted,



Howard L. Alderman, Jr.

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Attorneys for Respondents

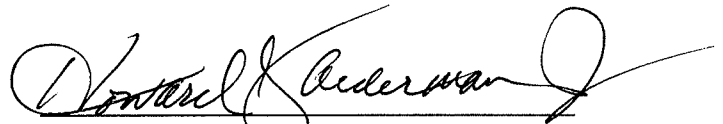
### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8<sup>th</sup> day of October, 2007, a copy of the foregoing *Memorandum of Respondents* was mailed, postage prepaid, First Class United States Mail to the following:

G. Randall Whittenberger, Esquire  
Miles & Stockbridge P.C.  
30 West Patrick Street 6<sup>th</sup> Floor  
Frederick, MD 21701

and to

Barry M. Sanders, Esquire  
Howard County Board of Appeals  
Office of the Howard County Solicitor  
3430 Courthouse Drive  
Ellicott City, MD 21043



Howard L. Alderman, Jr.





HOWARD COUNTY DEPARTMENT OF PLANNING AND ZONING  
 3430 Courthouse Drive ■ Ellicott City, Maryland 21043 ■ 410-313-2350

Marsha S. McLaughlin, Director

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 FAX 410-313-3467  
 TDD 410-313-2323

February 22, 2006

## TECHNICAL STAFF REPORT

*Petition Accepted on December 14, 2005  
 Hearing Authority Hearing of March 6, 2006*

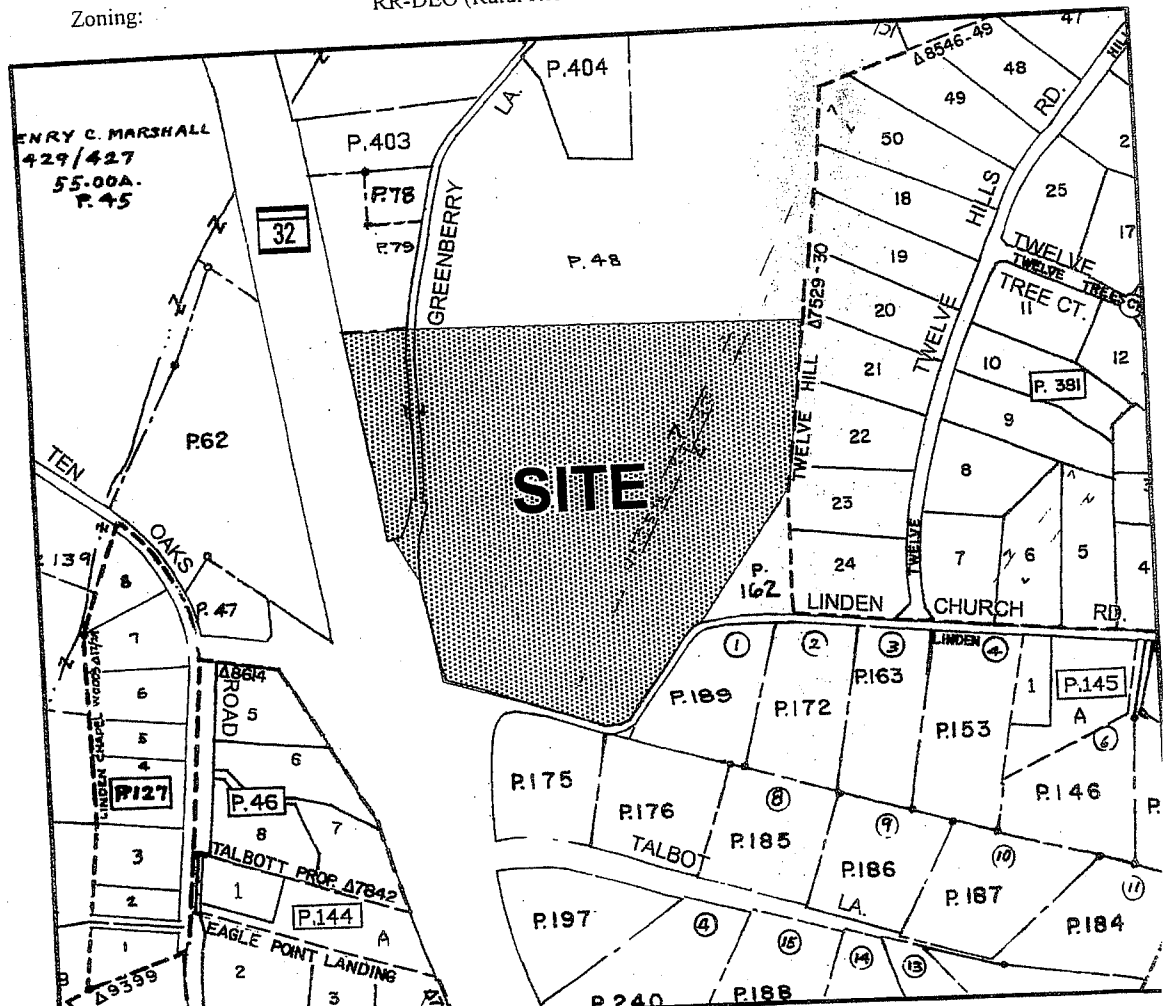
Case No./Petitioner: BA 05-046C -- Robert B. Williams, Joanna K. Benedict, et. al.

Request: Conditional Use for Age-restricted Adult Housing for a condominium development with 50 single-family detached age-restricted dwellings (Section 131.N.1.)

Location: Fifth Election District  
 Generally northeast of the Greenberry Lane intersection with Linden Church Road;  
 Tax Map 28, Grid 9, Part of Parcel 48; Currently 13110 Linden Church Road (the "Site").

Area of Site: 50 acres

Zoning: RR-DEO (Rural Residential-Density Exchange Option Overlay)



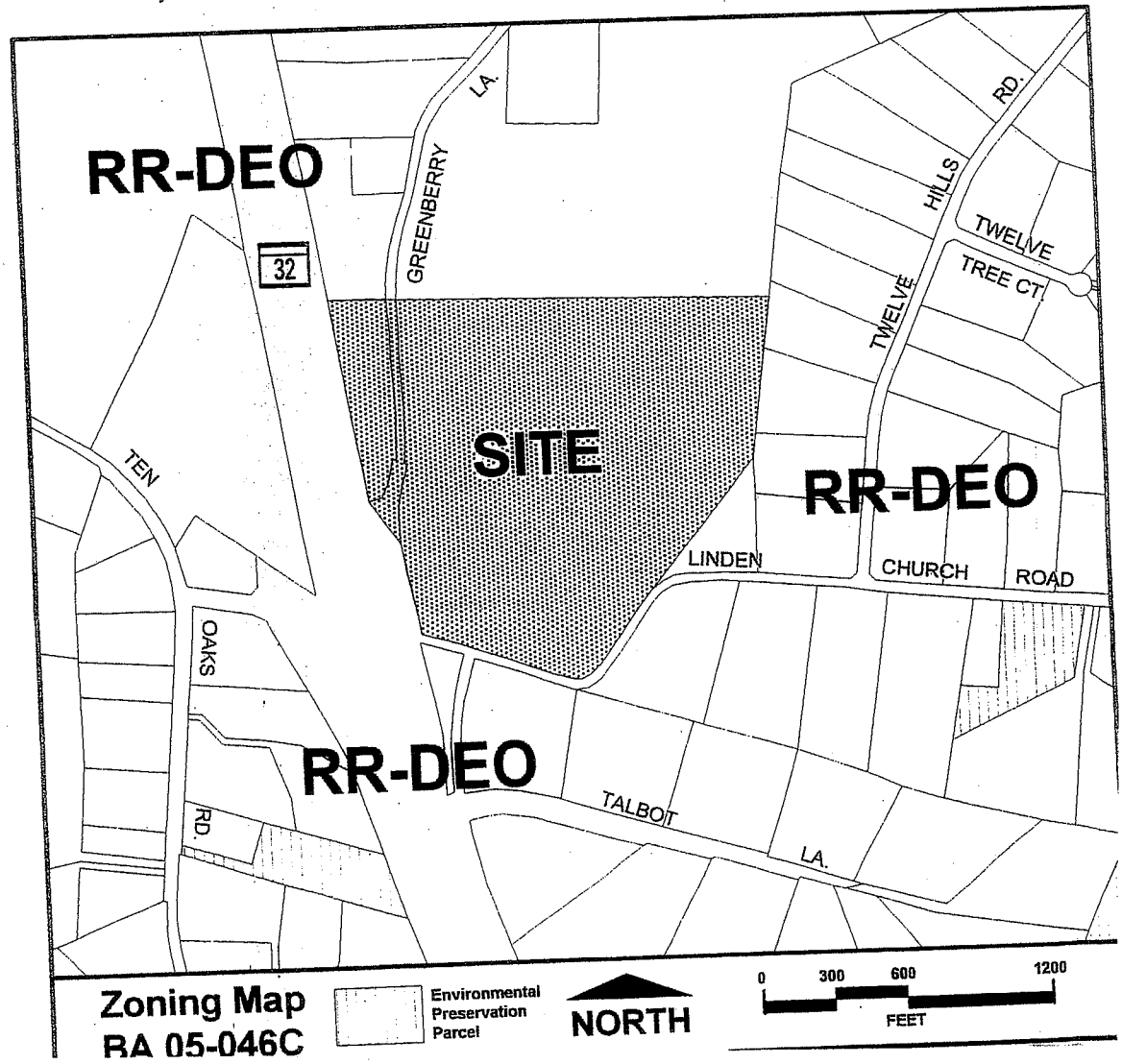
CASE NO.: BA 05-046C  
PETITIONER: Robert B. Williams, Joanna K. Benedict, et. al.

I. CONDITIONAL USE PROPOSAL

The current Parcel 48 is a farm property of approximately 127 acres. This petition indicates that the southern portion of Parcel 48 would be established as a 50 acre "Lot 1" to create the area of the Site. The Petitioner requests a Conditional Use for an Age-restricted Adult Housing development on the Site. As indicated in the petition, this would be a condominium development without individual lots for the dwelling units. The proposal is for 50 two-story, single-family detached dwellings with attached garages, individually fronting on an internal road. A wide entrance road with optional gate would extend to the east into the Site from Greenberry Lane to a point where a road to the left would extend generally 1,000 feet to the northeast, ending with a cul-de-sac, and a road to the right would extend first to the southeast and then turn to the northeast, ending with another cul-de-sac. This results in an elongated U-shaped pattern, keeping the dwellings to the west and east of a 50 foot wide gas easement which runs diagonally through the Site.

On the west side of the road to the west of the gas easement, the development would have a community center building of at least 1,000 square feet, and generally adjacent to that would be a swimming pool and tennis court area. A six-foot wide paved path/exercise trail system would extend from the community center area and run around much of the perimeter of the Site, with connections to the roads at several points. The Petitioner declares that 25 acres of the Site would be open space, although based on the plan it appears that the development may exceed that amount.

The parking for the development would be provided with two-garage parking spaces and two driveway parking spaces for each dwelling unit, or 200 parking spaces, plus a parking lot with 23 parking spaces in front of the community center. The Petitioner notes that the proposed dwellings "...will be compatible in scale and character with the residential development in the area", and would all incorporate universal design features as detailed in General Note No. 17 on the Conditional Use Plan. Five of the dwelling units would be Moderate Income Housing Units, but the location of these units is not specified in any way. The intention is to establish the development in a single phase.



CASE NO.: BA 05-046C  
PETITIONER: Robert B. Williams, Joanna K. Benedict, et. al.

I. **CONDITIONAL USE PROPOSAL (continued)**

Much of the perimeter of the Site is shown as a Forest Conservation Easement; it is presumed that this would predominantly be for afforestation purposes because the Site is mostly open. An approximately 4.5 acre area at the northwest of the Site is delineated for a community septic area. A stormwater management facility is indicated to be provided at the west side of the Site.

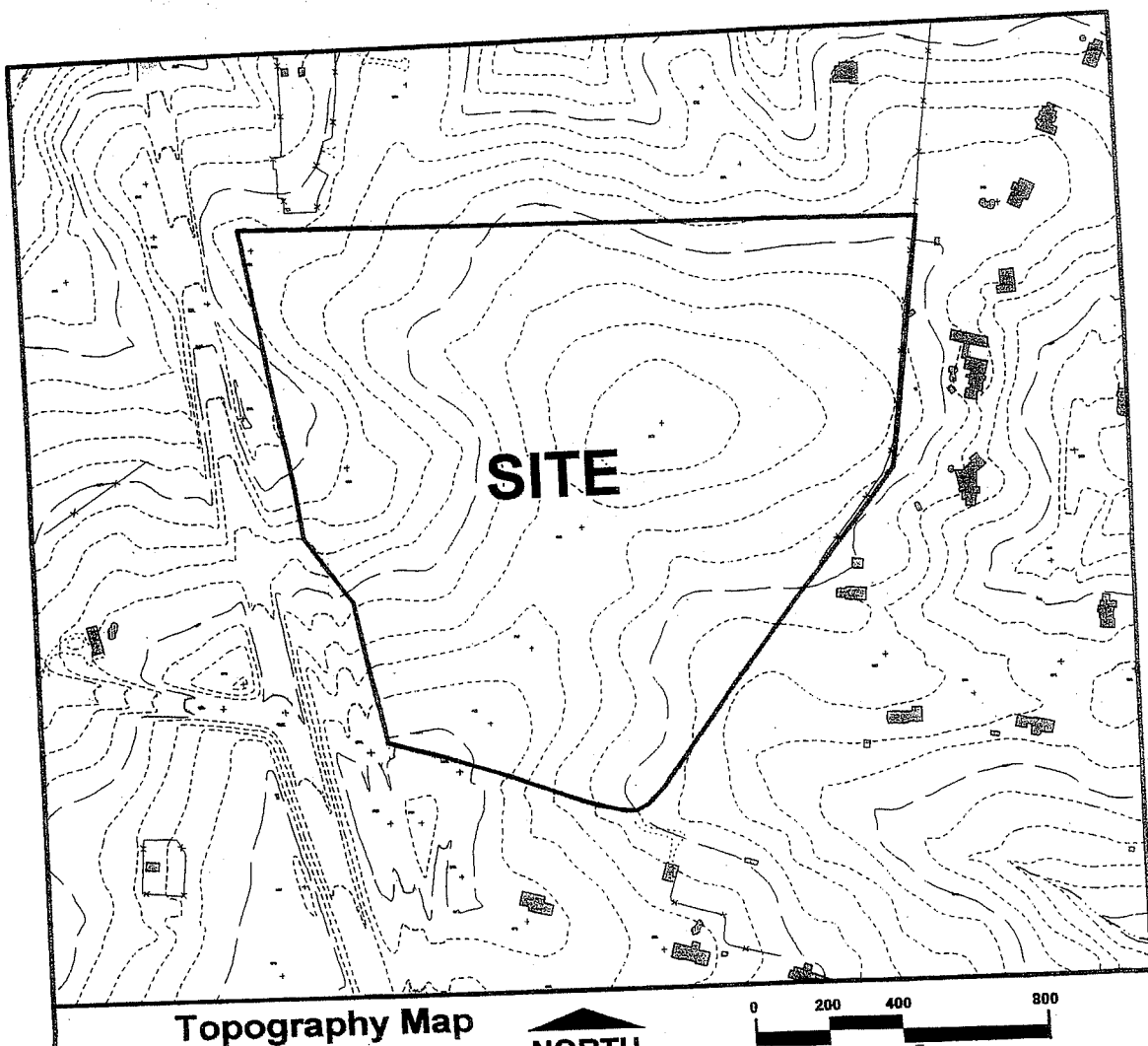
II. **BACKGROUND INFORMATION**

A. Site Description

The Site is currently predominantly open crop land with some narrow areas of perimeter vegetation, although the western areas adjacent to Greenberry Lane and MD 32 are wooded. Overall, the Site is very moderately sloped, with the higher points in the areas generally to the west of the gas easement. From these higher points the Site slopes down generally to the north, east and west, but mostly to the lowest areas in the west and northwest of the Site. The area of the Site appears to have no structures.

B. Vicinal Properties

To the north of the Site is the rest of Parcel 48, which based on the proposed area for the Site would be approximately 77 acres. This area is also a farm, and is the area with a principal dwelling, farm buildings, and a pond, with driveway access to Greenberry Lane. To the northeast of the Site is a Parcel 414, improved with a single-family detached dwelling accessed by a long driveway running along the east side of the Site to Linden Church Road; this Parcel 414 does not appear on the various maps but is depicted on the plan.



CASE NO.: BA 05-046C  
 PETITIONER: Robert B. Williams, Joanna K. Benedict, et. al.

II. BACKGROUND INFORMATION (continued)

B. Vicinal Properties (continued)

East of the Site are lots in the Twelve Hills Subdivision with generally two-story, brick, single-family detached dwellings fronting on Twelve Hills Road, and Parcel 162, which is a triangular-shaped parcel, and is improved with a one-story single-family detached dwelling and detached two-car garage, fronting on Linden Church Road. To the southeast of the Site, across Linden Church Road, is Parcel 189 which is currently unimproved. The properties to the south across Linden Church Road are Parcel 176 and Parcel 175, both improved with dwellings and other structures with driveway access to Linden Church Road. To the west of Parcel 175 is Broadwater Lane.

West of the Site is Greenberry Lane, and further west is the MD 32 right-of-way. To the northwest of the Site across Greenberry Lane are Parcels 78 and 79, which are sites of a gas pipeline transmission facility and an electric utility facility with a communications tower. All of the properties described above are also zoned RR-DEO.

C. Roads

The initial approximately 300 feet of Greenberry Lane north of Linden Church Road has two travel lanes and wide paved shoulders within a variable width right-of-way.

Linden Church Road has two travel lanes and approximately 22 feet of paving within a variable width right-of-way. The posted speed limit further the east of the Site is 25 miles per hour.

Sight distance along Linden Church Road is not a factor because there is no proposal for a driveway onto that road. Based on the existing alignment of Greenberry Lane, the estimated sight distance from the approximate location of the proposed driveway entrance is approximately 500 feet to the south past the Linden Church Road intersection, and approximately 300 feet to the north.

According to the most recent data available as determined by the State Highway Administration, the traffic volume on Linden Church Road east of MD 32 was 1,000 ADT (average daily trips) as of August, 1997. There is no data available for Greenberry Lane.

D. Water and Sewer Service

The Property is not in the Metropolitan District and is within the No Planned Service Area according to the Howard County Geographic Information System maps as of February 1, 2006.

The Site is proposed to be served by private community water and septic facilities. A 4.5 acre septic easement area is shown at the northwest corner of the Site.

E. General Plan

The Property is designated Rural Residential on the Policies Map 2000-2020 of the 2000 General Plan.

Greenberry Lane and Linden Church Road are depicted as local roads on the Transportation Map 2000-2020 of the 2000 General Plan.

F. Agency Comments

See attached comments on the proposal from the following agency:

1. Department of Inspections, Licenses and Permits
2. Bureau of Environmental Health

The following agency had no objections to the proposal:

1. Department of Fire and Rescue Services

No comments were received to date from the following agencies:

1. Department of Recreation & Parks

CASE NO.: BA 05-046C  
 PETITIONER: Robert B. Williams, Joanna K. Benedict, et. al.

II. BACKGROUND INFORMATION (continued)

G. Adequate Public Facilities Ordinance

The petition is subject to the Adequate Public Facilities Ordinance. A site development plan for the proposed development is subject to the requirement to pass the test for adequate road facilities.

III. ZONING HISTORY

There is no record of any specific Board of Appeals, Zoning Board, or Department of Planning and Zoning cases for the Property.

IV. EVALUATION AND CONCLUSIONS

A. Evaluation of petition according to Section 131.B. of the Zoning Regulations (general criteria for Conditional Uses):

1. The proposed use is a 50 single-family detached, age-restricted residential development with associated community building, recreation facilities, roads and parking (the "Use"). The Use is predominantly residential in nature, with a low intensity of use, and although the density is above what is typical for the vicinity, it is still relatively low and does comply with the specific density criteria as noted below. The Site is quite large for the Use, with much open space and wide areas for buffers. The Site is located on low-volume local roads which do not go through to the north or to the east, and which only connect to a major road at a traffic signal at the intersection of Linden Church Road and MD 32. The residential nature of the Use will be in relative harmony with the Rural Residential land use and policies indicated in the Howard County General Plan, and will be in harmony with the General Plan policies encouraging housing for an aging population.
2. The Use is anticipated as being similar in character and operation as any relatively low-density, single-family detached neighborhood. There would be no inordinate noise, no generation of dust, fumes, odors, glare, or vibrations, and no creation of hazards.
3. All buildings would be of a complying height for the use category and the Use would have wide buffer areas separating the Use from the existing adjoining residential properties. The Use would not hinder or discourage the development and use of adjacent land and structures more at the subject Site than generally elsewhere.
4. Parking areas will be of adequate size for the particular use because the provided parking will significantly exceed the minimum parking requirements. The one parking lot will be well separated from all surrounding residential uses and will not be readily visible to the surrounding area due to the dwellings within the proposed development. The other parking spaces are at each individual dwelling unit, and will not affect surrounding properties in any way. There will not be a refuse area because each dwelling unit will have standard household containers and pick-up.
5. The ingress and egress drives will provide safe access with adequate sight distance. Acceleration and deceleration lanes are unnecessary in this location.

Based on the evaluations above, the proposed Use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with age-restricted residential developments.

B. Evaluation of petition according to Section 131.N.1. (Specific Criteria for Age-restricted Adult Housing):

1. The official definition of the term "Age-restricted Adult Housing" is "A development that contains independent dwelling units with full kitchens that is designed for and restricted to occupancy by households having at least one member who is 55 years of age or older." As it is a separate use category, it is implied that Age-restricted Adult Housing is meant to have inherent distinctions from other by-right dwellings, such as single-family detached dwellings. These distinctions should be clearly evident based on building design and/or floorplans.

CASE NO.: BA 05-046C  
 PETITIONER: Robert B. Williams, Joanna K. Benedict, et. al.

IV. EVALUATION AND CONCLUSIONS (continued)

B. Evaluation of petition according to Section 131.N.1. (continued)

The proposed detached residential units as depicted on the plan have no apparent qualities that show any distinctions as Age-restricted Adult Housing from typical by-right single-family detached dwellings. With two full stories as depicted in the Schematic Footprint and Elevation on the plan, these units might contain 6,000 square feet of floor area. This appears to be quite excessive upon consideration of the intended "aging in place" purposes of universal design features and overall active-senior housing objectives for smaller, more easily maintained dwellings.

In the event the proposed dwellings are no different from many by-right single-family dwellings, this could be considered an exploitation of the Age-restricted Adult Housing Conditional Use category to significantly increase the density of a standard detached dwelling product over what could be achieved through a by-right residential subdivision, even one with receiving density. There needs to be clear evidence that the dwellings will have a specifically limited number of bedrooms to meet the Health Department concerns, and that the space within the dwellings will not be easily convertible to additional bedrooms. The Petitioner should present more detailed building plans and floorplans to prove that the dwelling units qualify as Age-restricted Adult Housing on the basis of building design.

2. The petition proposes 50 dwelling units, and therefore, the petition complies with Section 131.N.1.b.
3. The Site is declared to be 50 net acres, and the proposed 50 dwelling units equals one dwelling unit per each net acre. The petition complies with Section 131.N.1.c.
4. The principal structures comply with the maximum height requirement, and the proposed plan appears to comply with or exceed the minimum setback and separation distances of Section 131.N.1.d.
5. The proposed plan appears to exceed the minimum 50 percent open space requirement of Section 131.N.1.e., although the Petitioner only declares 25 acres as open space, which complies with the minimum open space requirement.
6. Recreational accessory uses are proposed, and this would comply with Section 131.N.1.f. provided that these recreational uses are limited to on-Site residents and their guests.
7. The development is under 100 dwelling units, so the development must include a community building of at least 20 square feet for each dwelling unit, or 1,000 square feet. The proposed community building is said to be 1,000 square feet at a minimum, so the petition complies with Section 131.N.1.g.
8. Section 131.N.1.h. is not applicable, because each dwelling will have individual household-style trash containers and individual pick-up, and not a community facility. There is no proposal for a loading area.
9. Although the general size of the dwelling units as depicted on the plan are larger than some of the existing residential development along Linden Church Road to the southeast, they are relatively compatible in size with the existing residential development along Twelve Hills Road to the east and northeast. A significant transition buffer area is provided along the perimeter of the Site with open space and forest conservation areas.
10. The Petitioner intends to establish the Use in one phase, but it is also stated that if there will be more than one phase, the recreation facilities will be established in the first phase. The petition complies with Section 131.N.1.j.
11. It is stated in Section 8.b. of the petition form that "The age restrictions will be a material inclusion of the Condominium Declaration." It is recommended that the Petitioner provide more details on how the age-restrictions will be maintained and enforced for the proposed Use.

CASE NO.: BA 05-046C  
 PETITIONER: Robert B. Williams, Joanna K. Benedict, et.

IV. EVALUATION AND CONCLUSIONS (continued)

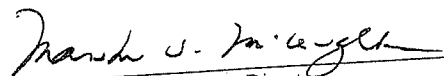
B. Evaluation of petition according to Section 131.N.1. (continued)

12. In General Note No. 2.L. on the plan, it states that the common areas and community improvements will be maintained by the Condominium Association. The petition complies with Section 131.N.1.1.
13. A short list of universal design features to be provided within the proposed dwellings is given in General Note No. 17. However, no floor plans were submitted, and the Petitioner instead notes that "Specific floor plans meeting these requirements will be submitted as time of building permit application." Section 131.N.1.m. requires two basic things to be provided with the petition; a list of interior features, which is provided, and that the "...petition shall include floor plans or other material demonstrating that the proposed dwellings will be appropriate for the age-restricted population." In other words, something other than the required list must be provided, in addition to the list, in order to demonstrate compliance with this requirement.
14. The Petitioner declares that five dwelling units will be provided as Moderate Income Housing Units. It is recommended that the Petitioner provide more details to clarify how this requirement will be realized, because it is questionable that Moderate Income Housing Units would be practical based on the size of the proposed dwelling units.

V. RECOMMENDATION

For the reasons stated above, the Department of Planning and Zoning recommends that the request for a Conditional Use for Age-restricted Adult Housing be **GRANTED**, subject to the following conditions:

1. The Conditional Use shall be conducted in conformance with and shall apply only to the proposed Use as described in the petition and as depicted on the Conditional Use Plan for "Greenberry" submitted on November 16, 2005 and not to any other activities, uses, or structures on the Property.
2. The Petitioner shall present more detailed building plans and floorplans to prove that the dwelling units qualify as Age-restricted Adult Housing on the basis of building design; that the dwellings will have a specifically limited number of bedrooms to meet the Health Department concerns; and that the space within the dwellings will not be easily convertible to additional bedrooms.
3. It is recommended that the Petitioner provide more details on how the age-restrictions will be maintained and enforced for the proposed Use.
4. In addition to the list of the interior universal design feature, the petition shall include floor plans or other material demonstrating that the proposed dwellings will be appropriate for the age-restricted population.
5. It is recommended that the Petitioner provide further explanation about how five of the proposed dwelling units of the same general size indicated on the plan will be provided as Moderate Income Housing Units.

  
 Marsha S. McLaughlin, Director

MEMO TO: Department of Planning and Zoning

FROM: Department of Inspections, Licenses and Permits

Petition No.: BA 05-046C Date Due: 2/1/06 Date Rec'd: 12/22/05

Tax Map No.: 28 Block: 9 Parcel: p/o 48

Applicant: Robert Williams, Joanna K. Benedict, Et al

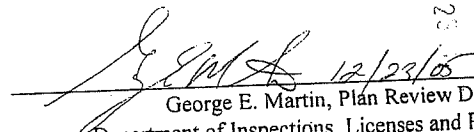
Location/Address: 13110 Greenberry Lane; Clarksville, Maryland

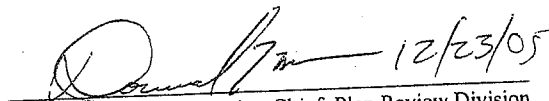
Nature of Petition: Conditional use for 50-condominium age restricted adult housing.

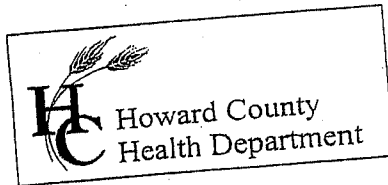
Mark only items that apply and provide information as requested. Be specific. If a code section or council bill or resolution can be cited, do so. Also, include any recommendations.

1. This office has **no** objection to the approval of this petition. However, the applicant should be advised that a building permit is required for the construction of the proposed condominium building.
2. Be advised that an 8' x 4' stoop is shown on the schematic footprint. Please assure grades are adjusted to make a "NO" step main entrance.

5 DEC 23

  
George E. Martin, Plan Review Division  
Department of Inspections, Licenses and Permits

  
Donald Mock, P.E., Acting Chief, Plan Review Division  
Department of Inspections, Licenses and Permits



7178 Columbia Gateway Drive, Columbia MD 21046  
(410) 313-2640 Fax (410) 313-2648  
TDD (410) 313-2323 Toll Free 1-866-313-6300  
website: [www.hchealth.org](http://www.hchealth.org)

Penny E. Borenstein, M.D., M.P.H., Health Officer

MEMORANDUM

TO: George Beisser, Chief  
Division of Planning & Zoning Administration

FROM: Michael J. Davis, Program Supervisor *mjd*  
Well and Septic Program  
Development Coordination Section

DATE: February 22, 2006

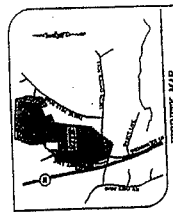
RE: Petition Number: BA-05-046C  
Property Location: E. Side of Greenberry Lane, N. Of Linden Church Rd.

The Department of Health has reviewed the above referenced petition for a conditional use for a 50-condominium age restricted adult housing and has no objection provided that the following conditions are met:

1. Percolation testing is conducted and the soils are found to be adequate for the design of an on-site sewage disposal system.
2. The owner/developer is responsible for notifying all buyers/homeowners of the units that there are restrictions to the number of bedrooms in each unit based on the size of the sewage disposal system. Each buyer must acknowledge in writing that he/she is aware that the unit may not have more than (number based on design) bedrooms. Additionally, the homeowners must acknowledge in writing that they are fully responsible for the operation, maintenance, and repair/replacement of the on-site sewage disposal system.
3. All units must have recordable exterior flow meters.
4. All requirements of the Code of Maryland Regulations 26.03.02.02 are met including the development of an agreement executed between the Department (Maryland Department of the Environment) and the owner of the proposed sewerage system which provides that the owner deposit into an escrow account funds to cover the repair or replacement of the highest-cost treatment plant unit. In addition, the agreement may require that a separate account be established which provides sufficient funds for the initial operation and maintenance of the system.

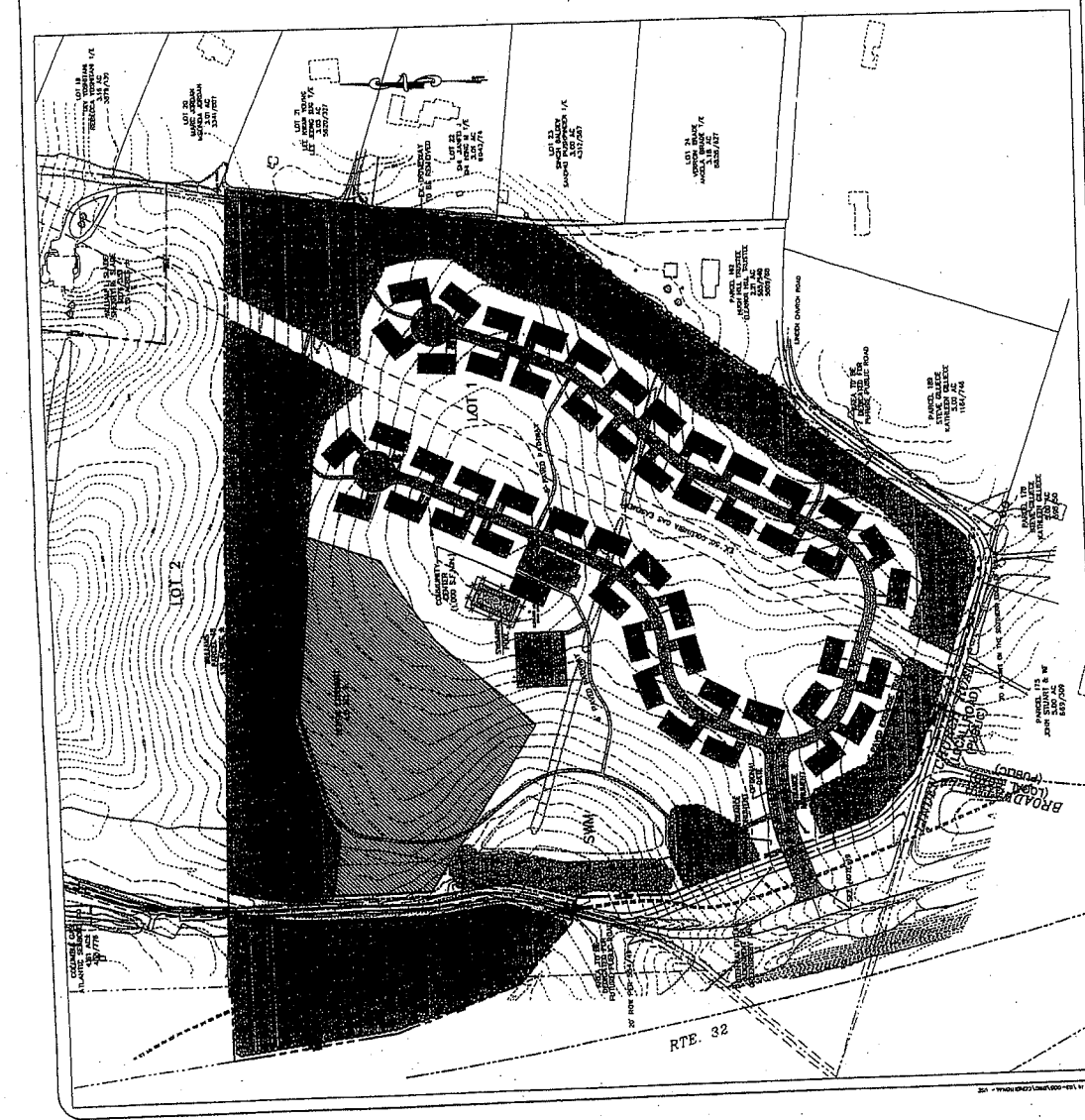
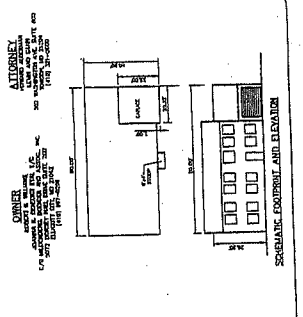
If you have any questions, I may be reached at (410) 313-2651.

sjn



**PROPERTY MAP**

- GENERAL NOTES:**
1. THIS PLAN IS SUBMITTED AS A PRELIMINARY PLAN AND IS NOT TO BE CONSIDERED A FINAL PLAN.
  2. THE PROPERTY IS LOCATED IN THE TOWNSHIP OF HENRIETTA, COUNTY OF HENRIETTA, STATE OF MICHIGAN.
  3. THE PROPERTY IS LOCATED IN THE TOWNSHIP OF HENRIETTA, COUNTY OF HENRIETTA, STATE OF MICHIGAN.
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  19. THE PROPERTY IS LOCATED IN THE TOWNSHIP OF HENRIETTA, COUNTY OF HENRIETTA, STATE OF MICHIGAN.
  20. THE PROPERTY IS LOCATED IN THE TOWNSHIP OF HENRIETTA, COUNTY OF HENRIETTA, STATE OF MICHIGAN.



OWNER: MIDDENBERG & ASSOC., INC.  
 ATTORNEY: ALDRIDGE & ASSOC., P.C.  
 ENGINEER: MIDDENBERG & ASSOC., INC.  
 DATE: 11/16/74



## SUBTITLE 4. MODERATE INCOME HOUSING UNITS

### Sec. 13.400. Applicability.

This subtitle applies to:

- (a) Age-restricted adult housing, in accordance with Section 131.N.1.n of the Howard County Zoning Regulations;
  - (b) Mixed use developments, in accordance with Section 127.C.6.b of the Howard County Zoning Regulations;
  - (c) Planned senior communities, in accordance with Section 127.1.B.8 of the Howard County Zoning Regulations;
  - (d) Residential mobile home developments, in accordance with section 113.F.2 of the Howard County Zoning Regulations;
  - (e) Any development for which the provision of moderate income housing is proffered by the petitioner and made a condition of approval in a preliminary development plan approved by the Zoning Board; and
  - (f) Residential developments in the R-SA-8, R-A-15, CCT, POR, R-SI, TOD, CAC zoning districts and any other zoning districts that may include a moderate income housing unit requirement.
- (C.B. 93, 1996; C.B. 38, 2001, § 1; C.B. 59, 2001; C.B. 21, 2003, § 1; C.B. 22, 2006, § 2)

### Sec. 13.401. Definitions.

- (a) *In General.* In this subtitle, the following words have the meanings indicated.
- (b) *Commission.* "Commission" means the Howard County Housing Commission.
- (c) *Department.* "Department" means the Howard County Department of Housing and Community Development.
- (d) *Designee.* "Designee" means the Howard County Housing Commission, a nonprofit corporation, or a quasi-public housing development organization designated by the department as eligible to operate and maintain moderate income housing units on a long-term basis.
- (e) *Director.* "Director" means the Director of the Department of Housing and Community Development.
- (f) *Dwelling Unit.* "Dwelling unit" has the meaning stated in the Howard County Zoning Regulations.
- (g) *Eligible Purchaser.* "Eligible purchaser" means a holder of a certificate of eligibility under section 13.406 of this subtitle, who has received a bona fide mortgage commitment in an amount sufficient to enable the individual to purchase a moderate income housing unit.
- (h) *First-time home buyer.* "First-time home buyer" means an individual who, during the 3 years before receiving a certificate of eligibility:
  - (1) Has not owned any property used or usable as a residence; or
  - (2) Has owned a personal residence but, because of the separation or divorce of the

joint tenants or the death of one of the joint tenants, needs to purchase a personal residence without the former joint tenant.

(i) *Initial Sale Price*. "Initial sale price" means the price set by the commission under section 13.403 of this subtitle for the first sale of a type of moderate income housing unit.

(j) *Median Income*. "Median income" means the median annual income of Howard County as determined by the U.S. Census Bureau.

(k) *Moderate Income*. "Moderate income" means an annual household income of up to 80% of the median income in Howard County.

(l) *Moderate Income Housing Unit*. "Moderate income housing unit" means a dwelling unit offered for sale or rent to households with moderate incomes.

(m) *Moderate Income Housing Unit Offered for Sale*. "Moderate income housing unit offered for sale" means a unit that is built on a subdivided lot or subject to a condominium regime, as provided in a moderate income housing unit agreement under section 13.402(b) of this subtitle.

(n) *Proffered Unit*. "Proffered unit" means a moderate income housing unit in a development for which the provision of moderate income housing is proffered by the petitioner and made a condition of approval in a preliminary development plan approved by the zoning board.

(o) *Rehabilitated Existing Moderate Income Housing Unit*. "Rehabilitated existing moderate income housing unit" means an existing residential housing unit that has been determined by the Department of Housing and Community Development to have met the specified eligibility criteria and rehabilitation requirements for such units as provided in this subtitle and that is subject to and bound to comply with all of the requirements in this subtitle applicable to newly built moderate income housing units.

(p) *Rental Unit*. "Rental unit" means a moderate income housing unit that is not a moderate income housing unit offered for sale.

(C.B. 93, 1996; C.B. 38, 2001, § 1; C.B. 59, 2001; C.B. 21, 2003, § 1; C.B. 66, 2003, § 1; C.B. 22, 2006, § 2)

**Sec. 13.402. Development procedures; moderate income housing unit agreement; alternative.**

(a) *Development Procedures*.

(1) When a development is subject to this subtitle, the developer shall submit to the Department of Planning and Zoning, concurrent with the submission of the original final plat or original site development plan for approval; as applicable:

- (i) An agreement to meet moderate income housing unit requirements; and
- (ii) Recordable covenants approved by the department and the County Solicitor.

(2) Covenants under this subsection shall be recorded among the land records of Howard County concurrently with the recordation of the final subdivision plat or site development plan approval, as applicable.

(3) Covenants under this subsection shall be extinguished in accordance with the agreement under subsection (b) of this section.

(b) *Moderate Income Housing Unit Agreement*. The moderate income housing unit agreement under this section shall be in a form prescribed by the department and shall include:

- (1) A statement of the number of moderate income housing units required under the zoning regulations;

- (2) A requirement that the developer comply with the minimum specifications for moderate income housing units established by the department;
  - (3) A plan for construction of moderate income housing units offered for sale and rental units, which shall, to the extent practicable, taking into account current market conditions, the needs of eligible purchasers, and planning considerations, require that each phase of the development contain its proportionate share of the total number of moderate income housing units required under the approved final plan or site development plan; and
  - (4) A statement of how moderate income housing units will be provided that shall include the number of units, types of units, and location of units.
- (c) *Covenants.* The covenants under this section shall be in a form prescribed by the department and shall include provisions prohibiting the sale or rental of a moderate income housing unit except to an eligible purchaser, the commission, the county, or a designee in accordance with this subtitle.
- (d) *Requirement to Provide On-Site and as a Ratio of the Same Types of Units.* Except as provided in subsection (e) and (f) of this section, a developer obligated to provide moderate income housing units in accordance with the zoning regulations as part of a development shall provide all of the units on the site of the development project and in the same ratio of unit types as required by the proposed development.

(e) *Optional Methods.*

(1) A developer required to provide moderate income housing units under the zoning regulations may request permission to provide the required units:

- (i) At a different location; or
- (ii) As a different ratio of unit types.

(2) A developer may use an optional method under this subsection if the director, upon recommendation from the Housing and Community Development Board and in consultation with the Director of Planning and Zoning and the Director of Citizen Services, determines that:

- (i) a. The number of moderate income housing units to be constructed in the development will render the development economically unfeasible; or
  - b. The development proposes an indivisible package of services and facilities to all residents that would cost the moderate income housing unit owners so much that the units would be rendered unaffordable to eligible purchasers; and
- (ii) The optional method results in geographic distribution of moderate income housing units throughout the county.

(3) A developer who uses an optional method of providing moderate income housing units in accordance with paragraph (1) of this subsection shall calculate the number of units to be provided as set forth below:

- (i) For every one moderate income single family detached housing unit required by the zoning regulations, the requirement shall be increased by the multiplier in the following chart:

TABLE INSET:

--	--	--

Type of Unit	On-Site	Off-Site
Single Family Detached	Not Applicable	1.5 Moderate Income Units
Single Family Attached	1.5 Moderate Income Units	1.75 Moderate Income Units
Apartment	1.75 Moderate Income Units	2.0 Moderate Income Units

(ii) For every one single family attached moderate income housing unit required by the zoning regulations, the requirement shall be increased by the multiplier in the following chart:

TABLE INSET:

Type of Unit	On-site	Off-site
Single Family Attached	Not Applicable	1.5 Moderate Income Units
Apartment	1.5 Moderate Income Units	1.75 Moderate Income Units

(iii) For every one moderate income apartment required by the zoning regulations, the requirement shall be modified by the multiplier in the following chart:

TABLE INSET:

Type of Unit	On-Site	Off-Site, Apartment Units
Apartment	Not Applicable	1.5 Moderate Income Units
Single Family Attached	Not Applicable	.67 Moderate income Units

(f) *Alternative Compliance to Optional Methods.*

(1) A developer may request permission from the director to use a method other than those set forth in subsection (e) of this section to provide moderate income housing units.

(2) A request shall include the following information:

(i) A description of the alternative compliance proposal, including a comparison of the required and proposed units, in terms of the location, numbers, types, bedrooms, and square footage; and

(ii) The projected fair market value of the required and proposed units.

(3) In determining whether to approve a request under this subsection, the director, upon recommendation from the Housing and Community Development Board and in consultation with the Director of Planning and Zoning and the Director of Citizen Services, shall consider whether:

(i) The phasing of moderate income housing units will be provided sooner than would be required by the phasing of market rate units;

(ii) The units present innovative architecture or site design features that contribute to affordability;

(iii) The design reduces operating and maintenance costs;

(iv) The location of the proposed alternative is part of a mixed-use development with existing or potential transit service; and

(v) The development provides a package of services or amenities for the benefit of moderate income residents.

(4) In granting a request under this subsection, the director may reduce the number of units that would have been required under subsection (e) of this section, but may not reduce the number of units below the number required by the zoning regulations.

(g) *Alternative of Providing Rehabilitated Existing Moderate Income Housing Units.* The developer of a housing development subject to this subtitle may provide up to five rehabilitated existing moderate income housing units if the developer's requirement is for 29 or fewer moderate income housing units or, if the developer's requirement is for 30 or more moderate income housing units, the developer may provide a maximum of 20% of the required moderate income housing units by providing rehabilitated existing moderate income housing units provided that:

(1) Prior to approval of a final subdivision plat or, if the property is not being subdivided, a site development plan:

(i) The developer provides:

a. One rehabilitated existing moderate income housing unit certificate approved by the department as provided below for each moderate income housing unit required by this subtitle; or

b. Two rehabilitated existing moderate income housing unit certificates for condominium apartment units approved by the department as provided below for each moderate income housing unit required by this subtitle; and

(ii) The developer executes all of the required agreements and covenants relating to the provision of newly built moderate income housing units in this subtitle.

(2) (i) If a developer is required to provide age-restricted moderate income housing units by the zoning regulations, the developer may use the alternative of providing rehabilitated units as permitted by this subsection.

(ii) A developer may use a non-age restricted rehabilitated unit instead of an age-restricted rehabilitated unit under this subsection if the director, with the concurrence of the chief administrative officer:

a. Has made a good faith effort to find, but is unable to find, any eligible purchaser who meets the criteria for the age-restricted moderate income housing unit consistent with federal discrimination law exemptions; or

b. Has determined that the unit is not physically suited for use by an age-restricted eligible purchaser.

(iii) The total number of non-age restricted rehabilitated units that are substituted for age-restricted units shall not exceed 10.

(3) Except as provided in subsection (i) of this section, the rehabilitated existing moderate income housing units are subject to all of the requirements applicable to newly built moderate income housing units in this subtitle.

(h) *Approval of Certificates for Rehabilitated Existing Moderate Income Housing Units; Sale of Certificates.* The application, approval and sale of certificates for rehabilitated existing moderate income housing units shall be governed by the following criteria and procedures:

(1) (i) The owner of a residential housing unit or units or an applicant acting on their behalf may apply to the department for eligibility to apply for a certificate for a rehabilitated existing moderate income housing unit.

(ii) Within 20 business days following application, the department shall approve

such a unit as eligible for a certificate application if it finds:

- a. That the unit is in need of substantial repairs based on an itemized estimate of cost of repairs submitted by the applicant;
- b. That the unit shall not be or previously have been a moderate income housing unit approved pursuant to this subtitle; and
- c. That the unit will add to the stock of needed moderate income housing units in the county.

(2) (i) If the department approves a unit as being eligible for certificate application, the owner of the unit or an applicant acting in his behalf may apply for that certificate.

(ii) The department shall approve the application and issue a certificate for a rehabilitated existing moderate income housing unit if it finds that the applicant has executed the required moderate income housing unit covenants and agreements and met the following rehabilitation requirements for the unit:

- a. Kitchen and bath cabinets shall be new or updated in the last ten years and in good condition; kitchen and bath fixtures shall conform to current maximum water usage standards; and all major kitchen appliances shall be new and warranted for at least one year;
- b. All carpets and flooring shall be new except for hardwood flooring that is new or newly refinished;
- c. The heating and cooling systems shall be new or have been replaced in the last ten years and be in good working order;
- d. All drywall or other wall materials shall be in good condition with no outdated finishes;
- e. All doors and locks shall be in good working order;
- f. All windows shall be new or replaced in the last ten years, have insulated glass or storm windows and be in good condition;
- g. The roof shall be new or replaced in the last ten years, be in good condition, and have at least a twenty year manufacturer's warranty remaining at the time of sale;
- h. Facia, gutters and downspouts shall be in good condition;
- i. The applicant shall certify that the unit complies with all applicable asbestos and lead paint laws;
- j. Exterior paint shall be new and siding shall be new or replaced in the last ten years and be in good condition;
- k. Decks shall be power washed and stained and be in good condition;
- l. The yard shall be in good condition with adequate and appropriate ground cover, trimmed trees and bushes, if any, fences in good condition, if any, and with any sidewalks and driveways in good condition and not in need of repairs; and
- m. The applicant shall provide the following items for the purchaser of the moderate income housing unit:
  - i. A new power mower, for units having a lawn;
  - ii. Pruning shears, for units having shrubs or other similar landscaping.

- iii. A power edger, for units having a lawn;
- iv. A rake, for units having a lawn;
- v. 1 gallon of interior paint in each color used;
- vi. 1 gallon of exterior paint in each color used, where appropriate; and
- vii. Paint brushes and rollers for interior and exterior surfaces.

All rehabilitation done to the outside of apartment units pursuant to this section shall be consistent with other units in the structure.

(3) The department shall have the unit inspected by an independent inspector who will certify that the unit meets the above rehabilitation requirements prior to the department's decision on the application. The applicant shall pay the costs of this inspection before the department makes a decision on the application.

(4) The owner of the rehabilitated existing moderate income housing unit is the holder of the certificate for that unit once it is issued by the department and may:

(i) Receive credit for providing alternative moderate priced housing units pursuant to subsection (g) of this section, which units shall be sold and, except as provided in subsection (i) of this section, otherwise subject to all of the requirements applicable to newly built moderate priced housing units in this subtitle; or

(ii) Sell the certificate and the unit to which it applies to a developer of moderate income housing units at a price to be agreed to by the holder and developer who shall then receive credit for providing alternative moderate income housing units pursuant to subsection (g) of this section, which units shall be subject to all of the requirements applicable to newly built moderate priced housing units in this subtitle.

(i) *Initial Sale Price for Units Sold Through the Moderate Income Housing Unit Community Revitalization Program.* The commission shall:

(1) Establish the initial sale price for rehabilitated units provided through the moderate income housing unit community revitalization program; and

(2) Adopt regulations setting the standards to be used for establishing the initial sale price.

(j) *Annual Analysis of the Moderate Income Housing Programs.* The director shall complete an annual analysis of the moderate income housing unit programs and shall submit the analysis to the County Executive and to the County Council. The analysis shall include:

(1) The number, types, and location of moderate income housing units provided on-site and as required by the zoning regulations;

(2) Moderate income housing units provided as an optional method under subsection (e) of this section and as an alternative compliance under subsection (f) of this section;

(3) The number of moderate income housing units that have been renovated and the financial costs of renovating the unit;

(4) The range of sale prices and rental rates, including the average sales price and rental rate; and

(5) Income information on the home buyers and renters participating in the program.

(k) *Alternative of Satisfying Moderate Income Housing Unit Requirement in Residential Mobile*

*Home Development.* The developer of a housing development in an R-MH zoning district which is subject to this subtitle may satisfy all, or a portion of, its moderate income housing unit requirement by providing for the sale of lots in an adjoining subdivision to the commission or designee as defined in this subtitle at below market price by an agreement with the commission or designee as defined in this subtitle provided that:

- (1) The housing development and the adjoining subdivision were part of the same original sketch plan;
- (2) The adjoining subdivision shall be zoned residential-mobile home and shall consist of previously leased pad sites in a mobile home park;
- (3) The residential mobile home development and the adjoining subdivision share a stormwater management facility;
- (4) The lots shall be sold to the commission or designee as defined in this subtitle at below market price for either conveyance through shared equity financing to an eligible purchaser or rental to an individual of moderate income;
- (5) Each lot sold to the commission or designee as defined in this subtitle shall equal one moderate income housing unit required in the adjacent housing development;
- (6) Concurrent with, prior to, or within 120 days subsequent to the approval of a site development plan or the final plat of subdivision for the housing development, the developer and the commission or designee as defined in this subtitle shall execute an agreement which satisfies the requirements of this section;
- (7) The agreement shall provide that any covenant to provide moderate income housing units which is already recorded shall be extinguished upon the sale of the same number of lots to the commission or designee as defined in this subtitle; and
- (8) An existing resident in the adjoining subdivision who meets the eligibility requirements of this subtitle shall be given first priority as an eligible purchaser of a lot or as a tenant of a lot owned by the commission or designee as defined in this subtitle.

(C.B. 93, 1996; C.B. 38, 2001, § 1; C.B. 59, 2001; C.B. 58, 2002, § 1; C.B. 13, 2003, § 1; C.B. 66, 2003, § 1; C.B. 29, 2004, § 1; C.B. 14, 2005, § 1; C.B. 78, 2004, § 1; C.B. 22, 2006, § 2; C.B. 61, 2006, § 2)

### **Sec. 13.403. Prices for moderate income housing units offered for sale; rates for rental units.**

(a) *Initial prices for moderate income housing units offered for sale.* The initial sale price for a moderate income housing unit shall be determined by the commission in accordance with this subsection.

- (1) Twice a year, the commission shall establish the initial sale price for each type of moderate income housing unit offered for sale.
- (2) Before establishing the initial sale price under this subsection, the commission shall publish notice of the real property tax, insurance, and interest rate factors it proposes to use in establishing the initial sales price in 2 newspapers of general circulation in the county.
- (3) Before establishing the initial sale price for moderate income housing units located in planned senior communities and age-restricted adult housing developments, the commission shall consult with the Office on Aging.
- (4) The department shall provide to the commission information concerning current real property tax and insurance rates.

(5) The initial sale prices for moderate income housing units shall be based upon:

(i) A base size unit of the following types:

TABLE INSET:

Type	Moderate Income Units - Minimum (Sq. Ft.)
Single-family detached	1,680
Semi-detached (duplex)	1,500
Townhouse	1,500
Back-to-back townhouse	1,400
Apartments	750

(ii) Factors established annually by the commission for:

- a. Real property taxes;
- b. Insurance rates; and
- c. Interest rates on FHA 30-year mortgages; and

(iii) A written statement from the developer indicating the amount of the homeowners association or condominium fees that will apply to the units.

(6) The department shall provide to the commission the price at which an eligible purchaser with a household income equal to the following percentages of median income, adjusted by family size appropriate to the size and number of bedrooms in the dwelling unit, can afford to purchase a dwelling unit:

- (i) 70% for proffered units and single family homes;
- (ii) 65% for semi-detached townhomes; and
- (iii) 50% for apartments (condominiums).

(7) For the purposes of this subsection:

(i) A purchaser can afford to purchase a dwelling unit if the purchaser's monthly income would qualify the purchaser to obtain a 30-year fixed rate mortgage at the prevailing interest rate in an amount sufficient to pay 97% of the purchase price of the unit;

(ii) A purchaser's monthly income qualifies for a mortgage if the monthly payment required to pay (1) the monthly principal and interest of the mortgage loan, plus (2) the monthly payment of taxes and insurance on the property, calculated in accordance with the factors established by the department under subsection (a) of this section, plus (3) the monthly payment of homeowners or condominium association fees, does not exceed 28% of the purchaser's monthly income; and

(iii) The prevailing interest rate is the prevailing mortgage interest rate for FHA-insured 30-year fixed-rate mortgages in the Baltimore Metropolitan Area; as published periodically by the Federal National Mortgage Association or other comparable publication as determined by the department.

(8) The department shall determine the prevailing interest rate as of December 15 and June 15 of each year.

(9) As determined by the department, an adjustment in the sales price of a moderate income housing unit may be made for: