

IN THE MATTER OF

BEFORE THE

ERICKSON LIVING PROPERTIES II, LLC

HOWARD COUNTY

Petitioner

ZONING BOARD

ZB Case No. 1116M

*** * * * ***

PETITIONER’S CLOSING MEMORANDUM

Petitioner, Erickson Living Properties II, LLC (also “Applicant”), through its undersigned counsel, pursuant to Howard County Zoning Regulations (“HCZR”) Sec. 121.0. and Howard County Zoning Board Rules of Procedure D.7., hereby submits this Closing Memorandum in support of its Petition in Case No. ZB 1118M (“Petition”).

Overview

The subject application for rezoning is a request for the Community Enhancement Floating District – Mixed (“CEF-M District”) for certain properties located in Clarksville, Howard County, Maryland (Map 34, Parcel 185; p/o Map 28, Parcel 100; and Map 35, Parcel 259) (collectively, the “Property” or “Site”). The Applicant’s Development Concept Plan (“DCP”) was admitted as Exhibit “A” to Petitioner’s Exhibit #1. The DCP was subsequently revised and admitted into evidence as Petitioner’s Exhibit #3. Portions of the DCP depicting the layout of the Motor Vehicle Fueling Facility (“MVFF”) were then further revised to reflect a revised MVFF layout (Option B”). The Option B amendments to the DCP were admitted into evidence as Petitioner’s Exhibit#7. The Applicant’s final proposed DCP consists of 46 sheets consecutively labeled DCP-1 through DCP-46 and includes the Option B layout for the MVFF. The purpose of this CEF-M proposal is to seek zoning approval for a continuing care retirement

community (“CCRC”) and to permit the expansion/relocation and architectural enhancement of the existing Freestate Gasoline Service Station currently located on Parcel 259.

Over the course of 14 public hearings before this Howard County Zoning Board (“ZB or “Board”), the Petitioner presented evidence in support of the applicable criteria including testimony from numerous supporters of the Petition who reside in the community.

I. Preliminary Motions

The ZB considered and decided numerous preliminary motions (including motions to dismiss) that were filed by various protestants/opponents (“Protestants”) in this matter. With the exception of the two issues below, Petitioner will not re-address other issues that were previously raised by preliminary motions in compliance with the ZB’s admonition to respect the Board’s rulings on these matters.

A. Whether the Zoning Board may approve a MVFF as a permitted use on the Design Concept Plan?

Protestants cite to HCZR Sec. 101.1.O for the proposition “[a]ll uses are prohibited unless specifically enumerated as a use permitted as a matter of right or as an accessory use in the various districts as provided by these Regulations.” Section 101.1.O applies generally to the HCZR; however, it is plain to see that this provision of law cannot be applied to all zoning districts. Unlike the various Euclidean zoning districts in the HCZR, several other types of floating or overlay zoning districts in the HCZR do not specifically enumerate uses. In CEF, CR or MXD zoning districts, permitted uses are prescribed by reference to uses allowed in other zoning districts. In the NT zoning district, there is no reference to permitted uses at all. Blind adherence to Section 101.1.O would provide that all uses are prohibited in these zoning districts.

Of course, this cannot be the case. In each of these instances, the appropriate interpretation is to follow HCZR Sec. 101.1.A, which provides that the particular shall control the general. That is, in each of the zoning districts in which permitted uses are not specifically enumerated, the appropriate action is to rely on the specific language as contained in these zoning districts.

As for the CEF zoning district, the legal argument in support of a Motor Vehicle Fueling Facility (“MVFF”) being a permitted use in this case has been previously briefed. Petitioner incorporates its Opposition to Motion to Dismiss as filed in this matter on August 4, 2020 as if such Opposition was fully set forth herein.

To summarize, the CEF is an inherently flexible zoning district that limits available uses not by enumeration, but rather by a list of “Excluded Uses” in Section 121.0.C that states only the uses not available in the zone. When the CEF zone was created, the County Council borrowed language from two other flexible zoning districts, CR and MXD, which provide “catch-all” provisions that allow the incorporation of uses not explicitly identified as Permitted Uses. This provision is so expansive as to require a list of excluded uses, which would be superfluous if the CEF were limited to enumerated uses. The Howard County Council had every opportunity to exclude a Gasoline Service Station as a permitted use from the CEF. The County Council, in fact, specifically excluded other uses that are not permitted as a matter of right in the B-1, B-2 or POR zoning district: e.g., Contractor storage facility, School bus, board or recreational vehicle storage facilities, Wrecked vehicle storage and Bulk Storage of Gasoline, fuel oil, liquified petroleum, and compressed natural gas. It should be noted that Bulk Storage of Gasoline, fuel oil, liquified petroleum, and compressed natural gas use category is conditional use #23 – directly next to the former Gasoline Service Station use, which was conditional use #24. This analysis indicates that MVFF is an allowable use that may be approved on a Design

Concept Plan if the Zoning Board finds the use is compatible with permitted uses in the CEF, such as a convenience store.

Even if the Zoning Board is not persuaded regarding the inherent flexibility of the CEF, MVFF is unquestionably a “new” and “innovative” use category under the Howard County Zoning Regulations. Petitioner presented the testimony of civil engineer Brandon Rowe, who is a civil engineer and design professional with considerable expertise with the Howard County Zoning Regulations. When asked how he could say that a MVFF could be a new innovative use category, Mr. Rowe acknowledged the humor of a Petitioner trying to prove a new MVFF as innovating. Mr. Rowe explained, however, that the issue at hand is the enumerated use category and not whether this particular MVFF is “new” and “innovative”. “New” and “innovative” are within the context of the Zoning Regulations’ where the question is whether a MVFF is, in the language of the Zoning Regulations, a use category is new and innovative.

Mr. Rowe explained that the Gasoline Service Station use category was an outdated use. First enumerated as a use in 1954, the Gasoline Service Station use was an auto and truck repair facility with accessory fuel that was permitted by right. The use became subject to a special approval in 1961, a special exception in 1977 with the varied criteria that you see today, but the fundamental use and its nature was not ever changed since its inception in 1954. Thus, some argued that the Gasoline Service Station use needed to be updated to reflect the actual uses that were occurring in the gas stations throughout Howard County. The Gasoline Service Station use was, in fact, updated in 2016. The Gasoline Service Stations was abrogated in favor of the use category Motor Vehicle Fueling Facility in 2016.

The CEF zoning district adopted in 2012 - four years earlier. For a regulation adopted in 2012, a use category adopted 4 years later would be “new.” Some have argued for an alternate

definition. They argue that “new” means recent or not old. But then the question becomes: when does a new use category cease being recent or new? What is the passage of time required before a new use category is no longer “new”? There is simply no answer to this question. Consequently, the only definition for “new” can be for use categories established after the adoption of the CEF zoning district.

As for “innovative,” again, the analysis is within the context of zoning. As Mr. Rowe testified, the modern Motor Vehicle Fueling Facility is a completely different use category than as Gasoline Service Station. The MVFF use category is not the same use category as that established in 1954 for than a car repair with accessory fuel. The MVFF is fuel, including alternative energy, plus convenience retail, carwash, carry out restaurant, fast food restaurant, banks, plus the myriad of ever-evolving one-stop, retail operations that are occurring in the modern MVFF.

A question was raised: weren’t such retail operations already occurring on gasoline service stations prior to the County’s establishment of the new, MVFF conditional use category? Of course. Mr. Rowe confirmed that the various uses occurring on Gasoline Service Stations were, in fact, occurring; however, whether or not such uses were occurring shoehorned into the Gasoline Service Station use category is quite beside the point. The significant point is that a new use category to recognize and validate the desirability of the innovation of the new MVFF use category was not created until 2016.

Thus, as Mr. Rowe explained: in zoning parlance, the MVFF is a new use category because it was adopted after the creation of the CEF zoning district. The MVFF use category is innovative in that it redefined the use to allow the innovation that has improved the use to our daily lives. A Motor Vehicle Fueling Facility is currently defined in the HCZR:

A facility that dispenses vehicle fuels through retail sales to the general public or fleet sales. ***The facility may include other uses that are either permitted as a matter of right in the zoning district in which the facility is located, or as may be permitted in the conditional use process, as well as the accessory sale of items typically associated with the cleaning, operation, and maintenance of motor vehicles.*** This term does not include private vehicle fuel dispensing that is exclusively accessory to a permitted principal use. ***This term does include facilities previously identified as gasoline service stations.***

HCZR Sec. 103.0. (emphasis added)

The MVFF definition in the HCZR references Council Bill No. 46-2016 (ZRA-159), § 1, 10-5-2016). Council Bill No. 46-2016 was repeatedly referenced during testimony.

A Gasoline Service Stations was defined as:

A facility offering retail sales to the public of gasoline, motor oil, lubricants, motor fuels, travel aids, and minor automobile accessories. A gasoline service station may also provide motor vehicle service, repairs and maintenance, including painting and bodywork.

<https://www.howardcountymd.gov/planning-zoning/zoning-regulations>

The change created by CB 46-2016 and the new MVFF use category allows innovation beyond the prior gasoline service station use even if, in the case of the MVFF use category, the improvement is simply for improving the mundane task of delivering motor fuel and accessory services to the public.

B. *Was the Zoning Board required to Engage Zoning Counsel?*

Petitioner incorporates by reference its Opposition to Motion to Engage Zoning Counsel, as previously submitted to the Board of February 9, 2021. In sum the CEF zoning district is a floating zone, which is similar to the nature of a conditional use. *E.g., Bigenho v. Montgomery County Council*, 248 Md. 386, 391, 237 A.2d 53, 56-7 (1968). Like conditional uses (otherwise referred to as special exceptions), floating zones are legislatively-created within the comprehensive zoning regulatory scheme. Conditional uses and floating zones enjoy the presumption of correctness and, consequently, the change/mistake rule is not applicable to either

conditional uses or floating zones. *See e.g., Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 541-43 (2002). “To rezone a property to a floating zone, the zoning authority must find generally that the legislative prerequisites for the zone are met and the rezoning is compatible with the surrounding neighborhood (much as required to grant a special exception).” *County Council of Prince George’s County v. Zimmer Development Co.*, 444 Md. 490, 516, 120 A.3d 677, 692 (2015).

Howard County Code Sec. 16.1000(c) provides that the purpose of the Zoning Counsel appearing at a hearing, producing evidence and testimony is to support the comprehensive zoning and facilitating the compilation of a complete record. Since there is no evidence being presented at a floating zone hearing as to change or mistake, the need for Zoning Counsel to support the current zoning map is both unnecessary and improper. Like a conditional use, the granting of a CEF floating zone by the Zoning Board for the subject Property is entirely consistent with the most recent comprehensive zoning. Just as the Zoning Counsel does not need to appear before the Board of Appeals to defend against conditional use proposals, she also need not attend Zoning Board floating zone cases.

II. Criteria for Establishment of CEF-M District

Howard County Zoning Regulation (“HCZR”) Section 121.0.I provides that a CEF-M district may be established at a particular location if the following 10 criteria are met:

1. The proposed CEF District is located within the planned service area for both public water and sewer service.
2. A proposed CEF-C District shall have frontage on and access to an arterial or major collector road. A proposed CEF-R or CEF-M District shall have frontage on and access to

an arterial or collector roadway, or a local road if access to the local road is safe based on road conditions and accident history and the local road is not internal to a residential development.

3. For all properties, the minimum development size for any CEF District shall be five acres.

4. The proposed CEF District is not located in an existing M-2, TOD, NT, MXD, or PGCC District.

5. A Proposed CEF-R District is not located in an existing non-residential zoning district unless the proposed CEF-R District adjoins a residential zoning district.

6. The proposed CEF District is not permitted within the interior of a neighborhood comprising only single-family detached dwellings.

7. A CEF development at the proposed location shall be compatible with surrounding residential neighborhoods, existing land uses in the vicinity of the site in terms of providing a transitional use between different zoning districts and/or land uses and the scale, height, mass, and architectural detail of proposed structures.

8. The proposed CEF development shall include enhancements as provided in Section 121.0.G. enhancements shall be proportionate to the scale of the CEF development.

9. The proposed CEF District shall meet the criteria of the purpose statement.

10. The proposed CEF Development does not comprise parcels which were added to the Planned Service Area to achieve Bay Restoration goals articulated in Plan Howard 2030.

As confirmed by the Department of Planning and Zoning's technical staff report, the Petition clearly satisfies the above criteria Nos. 1, 2, 3, 4, 5, 6 and 10. The record reflects that the satisfaction of these enumerated criterion was not controverted by any evidence or testimony

presented during the Zoning Board proceedings. Accordingly, this memorandum will focus on the evaluation of the Petition's satisfaction of criteria Nos. 7, 8, and 9 as set forth above.

Criterion No. 7 –

A CEF development at the proposed location shall be compatible with surrounding residential neighborhoods, existing land uses in the vicinity of the site in terms of providing a transitional use between different zoning districts and/or land uses and the scale, height, mass and architectural detail of proposed structures.

On October 7, 2020 (Zoning Board hearing #6), the Petitioner's architect, Mr. Mark Heckman, was called to testify about the Master Plan & Architecture as reflected on the Development Concept Plan ("DCP"). At hearing hour 3:06:43, Mr. Heckman began his testimony and he provided a detailed description of the master planning and architecture incorporated into the DCP. He further explained how the proposed CEF-M district fully satisfied Criterion #7 set forth above. Mr. Heckman testified that the proposed CEF-M District consists of an integrated continuing care retirement community ("CCRC") composed of 1,200 independent living units and 240 health care units consisting of assisted living, memory care, and skilled nursing facilities, resident accessory spaces and buildings, and accessory uses necessary for the operation of the community or for the benefit or convenience of the residents and their guests. In addition, he explained that the CCRC contains over 5 acres of public amenity space available to the general public at no charge. He explained that this public amenity space consists of pathways, seating areas, an amphitheater, covered pavilion, a playground, pickle ball courts, a bocce ball court, a dog park, a 48 space parking lot, and community meeting space within Erickson's Life Enrichment Center. Mr. Heckman also testified that the proposed CEF-M district would include a relocated Motor Vehicle Fueling Facility ("MVFF"). (See Petitioner's Exhibit #9 – M. Heckman Presentation.)

Mr. Heckman testified that the primary purpose of the Petitioner's proposed CEF-M district is to create a continuing care retirement community ("CCRC") to provide housing and continuing care for people over the age of 62. Mr. Heckman testified that the proposed CCRC is sited in two development areas upon the eastern and western portions of the Site and that it will consist of a series of 1 story to 5 story buildings with underground parking and accessory spaces with private internal roadways and enclosed pedestrian connections throughout.

Mr. Heckman testified that the Site itself is bordered to the southwest by a mix of B-1 and B-2 zoned commercial properties, undeveloped RC-DEO zoned agricultural land under preservation easements to the west and north, single-family detached dwellings across Sheppard Lane to the northeast, and the existing River Hill Garden and Landscape Design Center (currently undergoing redevelopment) and the Linden-Linthicum United Methodist Church to the immediate east. Although not adjoining the Site, Mr. Heckman explained that a section of the Village of River Hill developed as single-family detached dwellings is located to the east and southeast of the River Hill Garden and Landscape Design Center and Linden-Linthicum United Methodist Church properties approximately 400' from the boundary of the Site.

In his testimony, Mr. Heckman explained that with the full endorsement of the Design Advisory Panel ("DAP"), the DCP and architecture of the Site had been designed to provide either increased building setbacks or lower height buildings in areas along Route 108 and Sheppard Lane in order to minimize the visual impact of these proposed structures when viewed from the roadway and from vicinal properties. He also stated that taller buildings had been strategically designed to be located further away from Route 108 and Sheppard Lane in order to take full advantage of the Site's significant drop in topography between its eastern and western boundaries. He explained that the Site's topography drops off nearly 80 feet from its frontage

along Route 108 to the back of the Site along the western boundary of the Property. He explained that this significant drop in topography makes it possible for the Petitioner to locate taller buildings in these lower elevation areas without having the buildings appear to be out of place when viewed from the public roads and neighboring properties.

Mr. Heckman testified that the architectural design of the CCRC buildings is intended to acknowledge the traditional and diverse nature of the neighborhood aesthetic and while complementing the surrounding residential and commercial uses. Mr. Heckman testified that in his opinion as a licensed professional architect, the location of the buildings and uses throughout the Site and the compatible architectural designs proposed by the Petitioner provide an appropriate transition between the surrounding mix of commercial, institutional, residential, and agricultural uses in terms of scale, height, mass, and architectural detail. He testified that the existing development patterns in the Clarksville area follow a typical development pattern found throughout the country. Under this common development pattern, communities tend to develop along major roadways and around a commercial core of comparatively intensive uses. Then, as development occurs further away from this commercial core it tends to transition into lesser intensive uses such as institutional uses (schools, religious facilities); multi-family residential uses; and finally to low intensity uses including single-family residential uses. Mr. Heckman testified that the proposed CEF-M district at the proposed location was in keeping with the pattern of development commonly found throughout Howard County as well as throughout the country. Mr. Heckman testified that in his opinion as a licensed professional architect the proposed CEF-M district fully satisfied Criterion #7 set forth above.

Mr. Heckman also explained that the Petitioner's proposed CEF-M District also includes the existing Freestate motor vehicle fueling facility located on Tax Map 35, Parcel 259. The

Freestate motor vehicle fueling facility currently consists of eight double-sided fuel pumps and one standalone diesel pump and kerosene dispenser, a lighted canopy overhang, and an accessory convenience store. The inclusion of the motor vehicle fueling facility within the proposed CEF-M District will allow (i) the motor vehicle fueling facility to be redeveloped under architecturally enhanced standards (including, but not limited to, recessed lighting fixtures, environmental controls, and enhanced circulation and pedestrian safety features) with enhanced landscaping and streetscape features which would otherwise not occur absent this proposed CEF-M district and (ii) the relocation of the existing motor vehicle fueling facility to allow for the secondary public access road serving also as a potential connection to the adjoining commercial properties to the west of the Site along with signalized access to such properties.

Criterion #8 –

The proposed CEF development shall include enhancements as provided in Section 121.0.G. enhancements shall be proportionate to the scale of the CEF development.

HCZR Sec. 121.0.G provides that a CEF development must contain one or more design features or enhancements which are beneficial to the community. The boundaries of the community were proposed in Petitioner's Exhibit A. There was no argument against the proposed boundaries.

In the course of the Zoning Board hearings, Petitioner's witnesses demonstrated that the Petitioner's proposed CEF-M district provides a variety of Community Enhancements under Section 121.0.G, all of which are beneficial to the community, the general public, and the County as a whole and which far exceed those which would be required to be provided under the current development standards applicable to the several properties constituting the Site were they to be developed independently of each other. For a detailed summary of the proposed CEF-M district enhancements (the "Proffers") see attached Exhibit "A".

On July 15, 2020 (Zoning Board hearing #3) beginning at hearing hour 00:17:39, the Petitioner's representative, Mr. Scott Templin provided testimony regarding an overview of the proposed CCRC facility and CEF-M district. Mr. Templin's testimony was then followed by the testimony of the Petitioner's traffic engineer, Mr. Carl Wilson. Beginning at hearing hour 00:45:20, Mr. Templin explained and summarized the Petitioner's proposed Community Enhancements intended to fully satisfy Criterion #8 described above. In his testimony, Mr. Templin explained that the Site consisted of an existing motor vehicle fueling facility and two undeveloped RC-DEO parcels located along Route 108. He further explained that under existing zoning, the RC-DEO parcels are capable of being developed to support a single family detached development or estate-sized lots. Mr. Templin explained that under such a limited scheme of development, the road improvements required under either the SHA design standards or the Howard County's Adequate Public Facilities Ordinance would be limited to nominal frontage improvements or fee-in-lieu payments and would not result in any immediate relief from traffic congestion to the residents of the area. In addition, the development of these parcels independently of each other would drastically limit the potential to present a unified streetscape presence in full conformity with the Clarksville Pike Streetscape Plan and Design Manual.

Mr. Templin continued to explain that under the Petitioner's proposed CEF-M district, all of these underutilized subject properties would be integrated into a single well-connected design that would allow for these several properties to be developed into a more appropriate and socially beneficial use while simultaneously allowing the Petitioner to provide Community Enhancements under Section 121.0.G which are far in excess of those which would be possible without the implementation of the flexible standards of the CEF-M district. Mr. Templin then

summarized the following items as proposed Community Enhancements in full satisfaction of Criteria # 8 above:

1. Streetscape Enhancements along the entire frontage of the CEF project site (“Site”) adjacent to Route 108 in accordance with the Clarksville Pike Streetscape Plan and Design Manual, including, but not limited to, a multi-use pathway with connecting crosswalks, seating areas, and flowering shade trees.
2. The multi-use pathway will extend from the Site to the northeast along Route 108 extending to Meadow Vista Way opposite Trotter Road.
3. A pedestrian crosswalk will be provided at the traffic signal serving River Hill High School and Clarksville Elementary School.
4. Sidewalk extensions from the Site to the southwest connecting to existing sidewalks along the frontage of Clarksville Commons near Great Star Drive.
5. Sidewalk extensions and sidewalk widening along the east side of Route 108 from the River Hill Garden Center extending southwest to Great Star Drive.
6. Transportation Enhancements (subject to SHA and Howard County final approval) will extend far-beyond the 250’ in either direction of the Site, which is what would be required if this project was a traditional by-right development. The proposed road improvements include:
 - a. The construction of the five-lane section along MD 108 is consistent with the Clarksville Pike Streetscape Plan to match the section of MD 108 to the west of Linden Linthicum Lane. This construction will provide a significant benefit to roadway users, as queuing for Sheppard Lane will no longer block thru traffic along MD 108.
 - b. Sheppard Lane Improvements*

- (1) Realignment to a 70 degree angle.*
- (2) widened to provide two lanes onto MD 108, including a separate right turn lane and separate left turn lane.*
- (3) continuous left turn lane along eastbound MD 108, approaching Sheppard Lane.*
- (4) Widen the westbound MD 108 approach to provide two thru lanes and a separate right lane.*
- (5) Reconstruct the traffic signal and provide pedestrian accommodations as required by SHA.*
- (6) Provide interconnection of the traffic signal along MD 108 to MD 32.*

*= This improvement which alleviated a substandard condition was coordinated with the redevelopment of the River Hill Garden Center, which was required to provide a portion of the funds required for this road realignment project. Petitioner proffered to reimburse the County for the cost for the remaining portion of this project. Thus, this improvement at Sheppard Lane will have been completed at no cost to the County.

c. Installation of the traffic signal at Linden Linthicum Lane in a manner consistent with elements of the Clarksville Pike Streetscape Plan

d. Proposed Public Access Road to allow greater access to the newly-signalized intersection for properties west and south of the Site

e. Lengthening the right hand turn lane on Route 108 at River Hill High School Entrance

7. Linear Park

a. 5 acre park on Route 108 between Route 108 and the proposed Erickson at Limestone Valley.

- b. Public use recreation area including playground.
- c. Public use outdoor amphitheater.
- d. Public use covered pavilion.
- e. Public use of meeting space within Erickson's Life Enrichment center.
- f. Public use dog park.
- g. Public use pickle ball courts.
- h. Public use 48 space parking lot.

These proposed Community Enhancements provide much needed infrastructure improvements aimed at alleviating existing issues relating to traffic congestion, signalization, and pedestrian safety along this section of the MD 108 corridor. Mr. Templin testified that the Community Enhancements set forth above would not be possible but for the implementation of the integrated design proposal set forth in the Petitioner's proposed CEF-M district.

Proposed Enhancements are proportionate to Intensity and Impact

The question for the Board under HCZR Sec. 121.0.G is whether the proposed design features are proportionate to the increase in development intensity and impacts associated with the CEF rezoning compared to the previously existing zoning. The questions are: (i) what is the increase in development intensity and impacts associated with the CEF rezoning compared to the previously existing zoning? And (ii) is it proportional to the amount and quality of the enhancements being proffered by Petitioner?

The Site consists of an existing motor vehicle fueling facility and two undeveloped RC-DEO parcels located along Route 108. Under existing zoning, the RC-DEO parcels are capable of being developed for single family detached homes at a residential density of one (1) dwelling per 4.25 acres. In its supplement, the Petitioner acknowledged that the number of dwelling units

that could be developed on the Property, in addition to the currently-existing gas station, would be limited. Likewise, a majority of the land could continue as a farm.

Citing the Petitioner's request for 1200 independent living units and 240 assisted living units, Protestants argue that the analysis of this criterion is a comparison between residential units that could be developed on a RR-DEO parcel versus 1440 units, period. The CEF regulations, however, require a more rigorous analysis. The "development intensity and impact" is not surplusage. The ZB must contemplate the intensity and impact of the proposed development and whether the increase in intensity and impact as occasioned by the new CEF development is proportionate to the magnitude and quality of the Petitioner's proffered enhancements. Simply put, a larger developmental intensity and impact creates a concomitant requirement for more enhancements. Thus, the salient question in this case is what is the proposed CEF's developmental intensity and impact? The purpose of Zoning Regulations is to regulate adverse harm, not to impose standards on the financial structure of a proposed project. The entreatment to quantify the numerical value of enhancements viz-a-vis the number of units allowed is a solicitation to engage in the latter. This is improper.

Intensity & Impact

Maryland's law on zoning is rooted in nuisance law. *See e.g., Gorman v. Sabo*, 210 Md. 155, 122 A.2d 475 (1956). Before zoning was upheld as constitutional in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), local jurisdictions used their police power to regulate the externalities (noise, dust, fumes, odors) of many land uses. Thus, the substantial body of nuisance case law informed this of new regulation was a precursor to land use regulation through zoning. *See generally* Mandelker and Payne, *Planning and Control of Land Development: Cases and Materials*, Seventh Edition. Lexis Nexis Publishing (2008). The substantial body of

nuisance case law has been relied upon in upholding police powers under zoning law. As in nuisance law, decision-makers are concerned with evidence of actual harm as opposed to unsubstantiated expressions of concerns and fears by apprehensive opponents. Likewise, pecuniary benefit or the amount of profit is not a basis for deciding a zoning case. The approval/denial of a zoning application is about weighing actual harm.

Intensity is not density. Intensity within the context of a zoning case, like impact, relates to actual harm and what is required in order to compensate the community for additional harm above and beyond the existing zoning. The Opposition's argument that the proportionality of enhancements ought to be based on the amount of money that the proposed project generates is both inappropriate and not germane to a zoning decision.

HCZR Sec. 121.0.G measures proposed enhancements against actual development intensity and impact and not just numbers. In other words, how much a proposed CEF project ought to provide in terms of enhancements ought to be proportional to its actual intensity and impact on the community. Raw numbers such as 1200 or 1440 reveal less about the nature of the proposed use and its intensity and impact than the actual evidence presented by Petitioner's witnesses. In this case – like any other case – the ZB is required to examine the actual use in order to determine intensity and impact. Bald, unsubstantiated claims of developmental impact from 1440 residential dwelling units is both inaccurate and not germane to the instant case. The regulations require a more rigorous and real-world analysis of this criterion.

Mr. Mark Heckman, Petitioner's architect, testified to the intensity of the development and explained that because of the topography of the site and the distance to neighboring properties, he was able to design the site, its buildings and parking areas in a manner to be less visible to neighboring properties. Petitioner confirmed Mr. Heckman's testimony with balloon

tests that revealed the proposed development was highly buffered and its intensity greatly mitigated.

Likewise, on the topic of traffic, traffic engineer, Carl Wilson, testified to the development intensity and impact on traffic in the community as occasioned by the proposed CEF uses would be negligible. In fact, on July 15, 2020 at hearing hour 4:29:20, Mr. Wilson stated that “with the enhancements that are being proposed out here traffic is going to operate better in the future than it does today, even with the development of the Property.” Coupled with Petitioner’s other witnesses, the Petitioner has explained the nature of the proposed use and how the population of older adults residing in a CCRC as well as other strategies such as shuttles result in a very low impact on traffic. The ZB should note that there was no challenge to Mr. Wilson’s traffic study. No one questioned his analysis or provided empirical facts to refute Mr. Wilson’s conclusion. The bottom line is that for traffic, there is no increased development impact.

In an attachment to the Technical Staff Report, David Cookson with the Howard County Office of Transportation raised concerns regarding the impact this proposal would have on Howard County’s paratransit system. Mr. Cookson’s memorandum conveyed an estimate from the Regional Transportation Agency of Central Maryland that this proposal would generate 1,134 paratransit trips per month with a projected cost of \$680,000 a year. In order to respond to questions raised by the Zoning Board regarding these numbers, Mr. Scott Templin was recalled at the end of Petitioner’s case in chief on October 28, 2020 (hearing hour 2:02). Applying data derived from the Charlestown CCRC regarding RTA paratransit utilization, Mr. Templin estimated that the Limestone project would generate approximately 237 trips per month. Mr. Templin also testified as to the likelihood that this development will draw residents from within

Howard County, projected paratransit utilization is not necessarily new demand, but a relocation of demand that would have existed in the absence of Erickson's project being approved.

During his original testimony before the Board, Mr. Templin addressed the findings of the Fiscal Impact Study entered into evidence as Petitioner's Exhibit 1F.¹ The Fiscal Impact Study provides substantial justification for why this project would present low demand for county services, most specifically with regard to Erickson being a "self-sufficient, controlled access residential community." *Id.* at 20. Erickson will provide its own public safety patrols, on-site waste management, and other quasi-governmental services that are subsumed within the Erickson package of services. As a result "the services to be provided by Howard County to the planned CCRC are considered to be comparable to those furnished to other low-intensity commercial developments and are quite different from the range of governmental and school services provided to typical residential sub-divisions and individual properties." *Id.* at 21. The local cost generation is comparable to a major hotel or hospital operation. *Id.* Mr. Templin also noted that Erickson Limestone will employ 650 individuals, which will make it the 13th largest employer in Howard County. In explaining the bases for these numbers, Mr. Templin testified that one of the largest fiscal demands of new housing is education and that as a CCRC the Limestone project will not generate any school-aged children. The Fiscal Impact Study concludes that there will be an annual net fiscal benefit of \$4 million to the county from tax revenues generated from this project.²

¹ Zoning Board Member Elizabeth Walsh was not present for the majority of this presentation.

² Protestant, Mr. Hiruy Hadgu, argued that the Zoning Board should impute the cost of educating children whose families would purchase Erickson residents' homes. Mr. Hadgu assumed a 1 to 1 replacement for all Erickson residents and places the entire cost of education back onto the project for a total cost of \$6.3 million. Mr. Hadgu also projected paratransit costs of \$680,000.00, which was refuted by Mr. Templin. Thus, if Mr. Hadgu's reasoning was sound, which it is not, the final result of fiscal impact that the Zoning Board would consider ranges

Does the Proposed MVFF degrade the quality of the Linear Park such that the Petitioner's Enhancements are no longer proportional?

The proposed MVFF is an existing use. Petitioner explained the necessity of shifting the MVFF to the east slightly in order to accommodate the new intersection at Linden Linthicum/Route 108/new public access road. Petitioner has also offered to flip the location of the multi-product dispensers with the convenience store in a manner to maximize the distance between the dispensers and the various uses in the proposed park. Although there is no applicable setback requirement from the proposed MVFF to the proposed linear park, the plan shows clearly that the playground, dog park, pavilion and other areas containing structures are located at a distance greater than 300 feet from the fuel dispensers.

As for any areas within the proposed park that are adjacent to the proposed MVFF, the Opposition simply raised the question of why the Zoning Board would approve a MVFF next to a new park? As stated previously, the MVFF exists. Whether this case is acted favorably upon by the ZB or otherwise, the MVFF will continue to exist. Thus, the question is not whether the MVFF ought to be approved; rather, the issue is whether a new park in the manner as substantially shown is a desirable enhancement.

For those who question the location of the MVFF as being "next to a park," PlanHoward 2030 differentiates between "passive environmental holdings", such as the Patuxent Wildlife Preserve or Patapsco State Park, from parks designed for "active recreation" such as Centennial Lake and Cedar Lane Park. PlanHoward 2030 at 113. The majority of Howard County parks

between at least \$4 million net fiscal positive, or a net fiscal loss to the county of \$180,000 per year. In either event, the evidence presented by the parties as to the fiscal impact of the proposed project does not fundamentally alter the conclusion the intensity and impact of the proposed CCRC are relatively benign.

designed for active recreation are located along heavily-travelled, arterial roadways within the Planned Service Area where they can be conveniently-used by citizens. See Id. at 115, Map 8-1.

The Zoning Board was presented with pictures from the current traffic along Route 108. The pictures evidence the number of vehicles that travel and idle on Route 108 between Linden Linthicum and Shepard Lane. The proposed park is as close if not closer in proximity to Route 108 than the MVFF and the proposed location of the multi-product dispensers and vents. As discussed below, this is typical for Howard County parks, which tend to be located on major arterial roads. However, in the context of Protestants' criticism of the Linear Park, it would seem that the adverse impacts from the proposed MVFF pale in comparison to the routine proximity of this park to a state road where the number of vehicles with benzene and other volatile organic compounds are much more plentiful.

Thus, the proposition that parks must be protected and located in idyllic settings is expressly contrary to the intention behind this form of open space. PlanHoward 2030 provides that parkland in proximity to roads, development and population centers is most desirable because it serves the purpose of mitigating surrounding development and ensures full utilization of the park.

Protestants take the opposite position. Rather than mitigate the impacts of a MVFF with green space, they believe land use should be designed so that only other uses of a similar nature should be located in proximity to the use. Their position is that we seek to replicate heavy-retail areas such as Route 40 instead of Little Patuxent Parkway. This position misses the very purpose of parkland as a means to break-up and contrast against more intense uses and providing conveniently-located recreational benefits.

Protestants question the value of the linear park due to its location next to an MVFF. Yet again, this position eludes the necessary contrast from surrounding uses that makes a park valuable. All of Howard County's most popular parks are directly adjacent to state highways. Meadowridge Park is located at the intersection of Route 100 and Route 29. Blandair Park is bisected by Route 175. Centennial Park is proximal to the intersection of Route 29 and Route 108. This means that Howard County's most utilized recreational spaces are routinely exposed to exhaust fumes from some of our most traversed roadways and yet no one would suggest that they are diminished by it. Park-goers experience this recreational space on a transient basis for time periods varying from 30 minutes to a few hours. They will be over a football field's distance from the fuel dispensers. It is unlikely that the MVFF will enter their consideration while enjoying the pickle ball courts, playground, dog park, amphitheater, and picnic spaces offered within this amenity.

Criterion No. 9 –

The proposed CEF District shall meet the criteria of the purpose statement.

As stated in Section 121.0.A, the CEF-M district was established to encourage the creative development and redevelopment of commercial and residential properties through flexible zoning so that the proposed development complements and enhances the surrounding uses and creates a more coherent, connected development. As established in the Petition and by the evidence produced at the Zoning Board hearings, the Petitioner's proposed CEF-M district meets all of the stated purposes of the CEF district.

Section 121.0.A sets forth the 6 intentions of the CEF Zoning district.

1. Allow greater design flexibility and a broader range of development alternatives than the existing zoning district.

The Petitioner's proposed CEF-M district fully meets the stated intention above because it is intended to provide a truly integrated continuing care retirement community experience within Howard County for people over the age of 62. As stated above, the CCRC and CEF-M district proposed by the Applicant would result in 1,200 much needed senior independent living units and 240 health care units, consisting of assisted living, memory care, and skilled nursing facilities, resident amenity spaces and buildings, and accessory uses necessary for the operation of the community or for the benefit or convenience of the residents and their guests.

In addition, the proposed CCRC contains over 5 acres of public amenity space available for use to the general public at no cost and consisting of multi-use pathways for pedestrians and bicyclists, seating areas, an outdoor amphitheater, a playground, a dog park, pickle ball courts, bocce ball court, a covered pavilion, and public use of community meeting space within the Life Enrichment center. As stated above, the existing Site consists of an existing Freestate motor vehicle fueling facility and two undeveloped RC-DEO parcels located along MD 108. Under the Petitioner's proposed CEF-M district, all of these underutilized properties are aggregated and integrated into a single connected design which fulfills a stated land use policy goal of the General Plan and allows for these sites to be developed to their highest and best uses while simultaneously allowing the Petitioner to provide Community Enhancements under Section 121.0.G which are far in excess of those which would be possible without the implementation of the flexible standards of the CEF district.

2. Provide features and enhancements which are beneficial to the community in accordance with Section 121.0.G.

The Petitioner's proposed CEF-M district fully meets the stated intention above because the proposed CCRC and CEF-M district will provide numerous Community Enhancements as

required under Section 121.0.G and as described in detail above. These Community Enhancements are highly valued and beneficial to the local community and to Howard County as a whole.

3. Provide a higher quality of site design and amenities than is possible to achieve under the standard provisions of existing zoning district requirements.

The Petitioner's proposed CEF-M district fully meets the stated intention above because it will result in higher quality site design and amenities including an integrated CCRC community providing 1200 much needed independent living units, 240 health care units, consisting of assisted living, memory care, and skilled nursing facilities, resident amenity spaces and buildings, and accessory uses necessary for the operation of the community or for the benefit or convenience of the residents and their guests, all in a well-developed and coordinated campus like setting. The higher quality site design proposed by the Petitioner utilizes the entire Site and takes advantage of the existing topography and environmental features to create a vibrant interconnected senior community which would not be possible under the underlying zoning. In addition, the inclusion of the existing motor vehicle fueling facility within the Site, will allow this use to be redeveloped under modern standards (including, but not limited to, recessed lighting fixtures, modern environmental controls, and enhanced circulation and pedestrian safety features) with enhanced landscaping and streetscape features which would otherwise not be possible under the underlying zoning.

The development of the Site under an integrated design by consolidating three underutilized adjacent properties under the Applicant's proposed CEF-M District allows for the creation of amenity spaces and buildings, walkways and bike paths, gardens, and open space areas throughout the project on a scale which would not be possible under the underlying zoning.

4. Encourage creative architectural design with the most favorable arrangement of site features, based on physical site characteristics and contextual sensitivity to surrounding developments.

The Petitioner's proposed CEF-M district fully meets the above stated intention above because it results in a creative architectural design with the most favorable arrangement of site features, based on physical site characteristics and contextual sensitivity to surrounding developments. As shown on the DCP, the Petitioner's proposed CCRC and CEF-M district is sited in two development areas located upon the eastern and western portions of the Site. The improvements to the Site consist of a series of 1-5 story buildings and amenity spaces with internal roadways throughout. The separation of the improved areas of the Site into these two development areas integrates those stream and wetland features and buffers located through the middle of the Site as well as those specimen trees located throughout while simultaneously limiting the disturbance of those features in the development of the proposed CCRC and CEF-M district. All residential buildings are linked together by a series of enclosed and environmentally conditioned pathways and bridges.

In addition, by providing underground parking in each of these two development areas for the vast majority of the parking needs, the Petitioner's proposed CEF-M district takes an unprecedented approach toward the reduction of impervious surfaces on site resulting from surface parking. The creative architecture of the proposed CCRC buildings and the layout of Site features is based upon the Site's physical characteristics and contextual sensitivity to surrounding developments. The design of the CEF-M district is proposed to acknowledge the traditional and diverse nature of the neighborhood aesthetic and will complement the surrounding residential and commercial uses.

5. Serve as a transitional area by providing a mix of uses compatible with the surrounding community.

The Petitioner's proposed CEF-M district fully meets the above stated intention above because the evidence presented to the Zoning Board established that Site is bordered to the southwest by a mix of B-1 and B-2 commercial properties, undeveloped RC-DEO agricultural land under preservation easements to the west and north, single-family detached dwellings across Sheppard Lane to the northeast, and the existing River Hill Garden and Landscape Design Center (currently undergoing renovations) and the Linden-Linthicum United Methodist Church to the immediate east. Although not adjoining the Site, a section of the Village of River Hill developed as single-family detached dwellings is also located to the east of the River Hill Garden and Landscape Design Center and Linden-Linthicum United Methodist Church properties approximately 400' from the boundary of the Site.

With the full endorsement of the Design Advisory Panel, the Petitioner has carefully provided either increased building setbacks or lower height buildings in areas along MD 108 and Sheppard Lane in order to minimize the visual impact of these structures when viewed from the roadway and from vicinal properties. According to Mr. Heckman, taller buildings have been strategically located further away from MD 108 and Sheppard Lane in order to take full advantage of the Site's significant drop in topography between its eastern and western boundaries. Mr. Heckman indicated that the Site's topography drops off nearly 80 feet from its frontage along Route 108 to the back of the Site along the western boundary of the Property. This significant drop in elevation makes it possible for the Petitioner to locate taller buildings in these lower elevation areas without having the buildings appear to be out of place in terms of height or mass when viewed from the public roads and neighboring properties.

The proposed use of the Site under this CEF-M district provides a mix of commercial and residential uses in a campus-like setting which serves as an appropriate and compatible transition between the surrounding community consisting of a mix of commercial, institutional, residential, and agricultural uses in terms of scale, height, mass, and architectural detail.

6. Encourage aggregation of underutilized properties.

The Petitioner's proposed CEF-M district fully meets the above stated intention because it results in the aggregation of three (3) parcels of land - only one of which is currently developed. The proposed CEF-M district will result in the aggregation of these underutilized properties and will permit a higher quality site design with amenities including an integrated CCRC community providing 1200 much needed independent living units, 240 health care units, consisting of assisted living, memory care, and skilled nursing facilities, resident amenity spaces and buildings, and accessory uses necessary for the operation of the community or for the benefit or convenience of the residents and their guests, all in a well-developed and coordinated campus like setting. The higher quality site design proposed by the Petitioner utilizes the entire Site and takes advantage of the existing topography and environmental features to create a vibrant interconnected senior community which would not be possible under the underlying zoning. In addition, the inclusion of the existing motor vehicle fueling facility within the Site, will allow this use to be redeveloped under modern standards (including, but not limited to, recessed lighting fixtures, modern environmental controls, and enhanced circulation and pedestrian safety features) with enhanced landscaping and streetscape features which would otherwise not be possible under the underlying zoning. The aggregation of the several underutilized parcels within the overall Site under the Petitioner's proposed CEF-M district allows for the creation of

amenity spaces and buildings, walkways and bike paths, gardens, and open space areas throughout the project on a scale which would not be possible under the underlying zoning.

III. Other Critiques

A. Does Petitioner's Proposal Comply with the CEF's Provisions Regarding MIHU

The Petitioner has been unambiguous that it will fulfill its requirement to satisfy the 10% MIHU requirement under Section 121.0.E of the Zoning Regulations. The Petitioner can satisfy this criterion and justifiably end the evaluation of this criterion at this point. There is compliance with the law, period. The Petitioner, however, elected not stop at this point.

Mr. Templin explained that the entrance deposit in a CCRC can often be a barrier to entry for MIHU applicants. Petitioner acknowledged that under the current law, the set aside of 10% for MIHU units may not always result in an actual 10% of the units in a CCRC being MIHU units. The MIHU law includes the option to convert a MIHU unit to a market rate unit after 60 days of being unable to fill the MIHU unit under Howard County Code Sec. 13.405(d). It has been acknowledged that another CCRC in Howard County provides less than 10% MIHU because they are unable to find qualified applicants for the MIHU units and, consequently, is able to convert MIHU units into market rate rentals.

To address this dilemma, the Petitioner conferred with the Howard County Department of Housing & Community Development and proposed an alternative compliance to address the weakness of the current law and its applicability to CCRC's. In her February 28, 2020 letter, which is contained within the Technical Staff Report, Housing Director Kelly A. Cimino outlined that Erickson Living would provide a \$2 Million scholarship fund for qualified MIHU applicants who do not have the assets to pay the entrance deposit, as well as offer a non-refundable entrance deposit option to MIHU tenants to significantly reduce the cash needed to

move in to the community. In exchange, the number of MIHU's on-site would be reduced to 8%. Director Cimino provided the position of her department that this alternative proposal is concerned preferable to compliance with the standard 10% MIHU requirement. And what of the right of developers to convert MIHU units to market rate unit under Section 13.405(d) after the 60 day priority period for MIHU residents? As explained, the Petitioner is agreeing to waive its right to convert MIHU units to market rate units, forever. And what was the question that was posed to Mr. Templin? No matter what? In all instances? What if Erickson is unable to find an eligible MIHU applicant? Mr. Templin explained that the MIHU unit would sit empty until a MIHU applicant is approved. Thus, the Petitioner has every incentive to fill the MIHU units with MIHU applicants. Still, some have criticized the Applicant's proposal for the simple reason that it is not 10%. That conclusion is unwarranted in light of the waiver of the right under Sec. 13-405(d). The reality is that Petitioner's proposal for alternative compliance is preferable to the current 10% MIHU law, which allows for a lesser number of MIHU units if eligible residents are not identified within 60 days, which Mr. Templin explained was often the case for another CCRC in the County.

B. Competition and Demand

Several of the Protestants affiliated with existing CCRCs in Howard County have testified against this proposal citing the absence of demand for such housing. These witnesses raised the issue as to whether Erickson's proposal will harm existing CCRC's by siphoning off potential residents. Ultimately, those Protestants sought to have the Zoning Board maintain the constrained market for CCRC services so as to benefit these existing facilities.

The regulatory scheme for approval of CCRCs is set forth in Maryland Annotated Code, Human Services, Title 10, Subtitle 4, Part II, Continuing Care Retirement Communities – Certificates of Registration (the "CCRC Ordinance") (Petitioner's Exhibit #14). As part of the approval of any new

license for a CCRC, the petitioner must submit a feasibility study that, among other things, must demonstrate the market for the project; as well as an actuarial forecast by a qualified actuary. CCRC Ordinance, Section 10-409(d). This feasibility study must be approved by the Department of Aging. *Id.* As such, outside of Protestants' interest in protecting the market for their existing CCRCs of choice, there is no basis for the Zoning Board to conclude that Erickson's proposal will not have an available market of interest. Moreover, competition and market demand are not appropriate bases to deny this Petition.

C. Gas Station Task Force Report – Protestants' Exhibit 26

This Task Force Report is neither law nor persuasive authority in this case. On April 14, 2021 (Zoning Board Hearing #13) at hearing hour 3:52, Protestants' witness, Mr. Chris Alleva, agreed that the Gas Station Task Force Report was not adopted by the County Council and is not applicable to this case. There was no testimony to the contrary.

D. Environmental Considerations

Although "environmental restoration of streams, wetlands or forests, or enhanced landscaping" may be offered as community enhancements, development conducted under the CEF zone is not held to an elevated environmental standard different from development in any other zone. While Erickson's proposal will be constructed in a manner that is in full compliance with all applicable environmental regulations, Erickson has not proposed environmental enhancements as a part of its package of Community Enhancements.

Nevertheless, on April 7, 2021 (Zoning Board hearing #14) beginning at hearing hour 02:23:25, Protestant Alan Schneider called Patuxent Riverkeeper Frederick Tutman to testify regarding the environmental impacts of development. Notably, Erickson's counsel objected to this testimony due to the fact that such testimony was irrelevant to the CEF criteria applied by the Zoning Board. In response, the ZB Chair limited Mr. Tutman's testimony to the "contextual sensitivity" of the project "to the surrounding community" and, to the extent applicable, the

proposed community enhancements. (April 7, 2021 hearing, 02:49:00). The Chair further clarified later in the hearing that there was no increased environmental standards for CEF petitions and that to the extent Mr. Schneider and Mr. Tutman wished to create such a standard, they should present this to the County Council in their legislative function.

In the context of this limited proffer of relevance, Mr. Tutman provided blanket statements regarding the effect of developing the subject property, making no distinction between Erickson's proposal and any other development at this location. He testified that the development would contribute to flooding based on existing conditions and culverts on the Freestate gasoline service station site with no reference to the storm water management requirements that will be imposed on this development. He provided blanket testimony that the development would inevitably impair the water quality of the neighboring waterways without recommending mitigating buffers or on-site water treatment. In sum, Mr. Tutman presented a binary choice – no development or environmental ruin.

Mr. Tutman's critiques are misplaced in two key respects. First, Howard County has some of the strongest environmental protection policies in the State of Maryland; however, these regulations are applied during the Site Development Plan review process. In addition to the construction in accordance with environmental site design employing the latest and most effective stormwater management techniques on what is currently tilled farmland with no water management, Mr. Rowe also provided testimony on September 2, 2020 at hearing hour 4:14:45 that there are about 7+ acres of existing forest on the Site today, but with the flexibility of the CEF zoning district, an additional 2.5+ acres of forest conservation can be created. Mr. Tutman disregards the effect of these regulations in order to contend that no development of any type can be undertaken in an environmentally sensitive manner. He also takes the position that the Zoning

Board should not defer any environmental review to later stages in the development process, but rather impose this scrutiny to a Development Concept Plan that is not designed or intended for this purpose.

Second, the subject Property is within the PSA, the Priority Funding Area, and is designated in PlanHoward 2030 as a Tier I “Targeted Growth and Revitalization Area”. PlanHoward 2030 describes these as “areas where current policies, zoning, and other regulations, as well as policies suggested in PlanHoward 2030, seek to focus most future County growth.” *Id.* at 74. Due to its location in the PSA, this is also a Tier 1 property within the Priority Funding Area. “In accordance with State Smart Growth requirements, higher density housing is directed inside Howard County’s growth boundary, the Priority Funding Area.” *Id.* at 125. Mr. Tutman’s testimony has no relevance in the context of these planning documents. Rather, he seeks to have the Zoning Board reverse, or ignore, the inclusion of this Property in the PSA, Growth Tier I, and Priority Funding Area. Mr. Tutman summarized his position by stating that water preservation is “pretty simple, you stop putting things in the water and you get cleaner water.” This is an overly simplistic and flippant dismissal of the much more complicated balance of growth and preservation manifested in PlanHoward 2030 and other planning documents.

Stripped down, Mr. Tutman’s opinion is that Howard County should have vacant cornfields over well-designed communities within planned growth areas. That may be his preferred outcome, but it is not consistent with the growth policies adopted by the County Council.

Conclusion

Petitioner has provided substantial and competent evidence to support the approval of its Design Concept Plan and petition for CEF zoning. An overwhelming majority of residents and

community organizations/institutions in proximity to the proposed CEF testified in favor of approval. These witnesses spoke to the desirability of the community enhancements and the pressing need to provide traffic enhancements along the Route 108 corridor in Clarksville.

Petitioner has provided the attached Proffer Sheet setting forth conditions of approval consistent with Erickson's proposed Community Enhancements. Petitioner respectfully requests that the Zoning Board approve the Design Concept Plan and proposed CEF-M zoning for the Subject Property.

EXHIBIT A

Erickson Living Properties II, LLC ("Petitioner") Howard County Zoning Board Case No. ZB 1118M

Transportation Enhancements:

1. Subject to Howard County and Maryland SHA approval, the Petitioner shall construct and dedicate at no cost to Howard County, the "Road Improvements" in the locations and manner as substantially shown on the Development Concept Plan ("DCP") at DCP-29 through DCP-44. Prior to the issuance of a Certificate of Occupancy for the first residential structure, Petitioner shall ensure construction of all "Road Improvements" for Rt. 108 (Clarksville Pike) in the locations and manner as referenced above.
2. Prior to the issuance of a Certificate of Occupancy for the first residential structure, the Petitioner shall reimburse Howard County for its cost for realignment and improvements made to Sheppard Lane as part of cost sharing agreement with the developers of River Hill Square

Multi Use Pathway and Connectivity Enhancements:

3. Subject to Howard County and Maryland SHA approval, the Petitioner shall construct and dedicate at no cost to Howard County, the Multi-Use Pathway(s), Multi-Use Pathway Extension and Sidewalk, excluding Pathway Extension by Others, (collectively "Pathways") in the locations and manner as substantially shown on the DCP at DCP-29 through DCP-42. Prior to the issuance of a Certificate of Occupancy for the first residential structure, Petitioner shall ensure completion of all "Pathways" in the locations and manner as referenced above. In the event that Petitioner is not able to permit and construct any portion of the Pathways, Petitioner shall coordinate with Howard County, MD to post a bond/surety/fee for an amount necessary to ensure construction of that portion of the Pathways. Any bond/surety/fee shall be posted prior to the issuance of a Certificate of Occupancy for the first residential structure.

Community Park Enhancements:

4. Subject to Howard County approval, the Petitioner shall construct the Linear Park ("Park") along the frontage of MD Route 108 as substantially shown on the DCP at DCP-29 and DCP-30 in Option B, as submitted in Petitioner's Exhibit #7. Prior to issuance of a Certificate of Occupancy for the first residential structure, Petitioner shall ensure completion of the "Park" in the locations and manner as referenced above. The Park shall be free and open to the general public.

Moderate Income Housing

5. Petitioner will meet the existing MIHU requirements, or through an alternative compliance as requested by the Department of Housing and Community Development outlined below:
 - a. 8% of the total number of the independent living units shall be reserved for MIHU eligible residents;

- b. MIHU eligible residents shall be defined as households earning up to 60% of the Area Median Income (AMI) and will be restricted to individuals sixty-two (62) years and older in accordance with all applicable state and federal fair housing regulations.
- c. Petitioner shall waive its rights under Howard County Code Sec. 13.405(d)(1) to offer any portion of the reserved MIHUs to the general public without restriction after the 60-day priority period;
- d. Petitioner shall establish a \$2,000,000.00 revolving subsidy fund, to be phased in proportional to the total units built, subject to approval of Howard County Department of Housing and Community Development ("DHCA"), that will be utilized to defray the cost of the Entrance Deposit for eligible prospective residents;
- e. Additionally, Petitioner shall establish a non-refundable Entrance Deposit for MIHU eligible applicants to reduce the funds required to move into the proposed continuing care retirement community