

IN THE MATTER OF	:	BEFORE THE
KERGER POND LLC	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 21-025C

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DECISION AND ORDER

On December 6, 2021, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the Petition of Kerger Pond LLC (Petitioner) for an Age-Restricted Adult Housing, General (ARAH) Conditional Use in a R-20 (Residential: Single) Zoning District, filed pursuant to Section 131.0.N.1 of the Howard County Zoning Regulations (HCZR).

The Petitioner certified to compliance with the notice and posting requirements of the Howard County Code. The Hearing Examiner viewed the subject property as required by the Hearing Examiner Rules of Procedure. William Erskine, Esq. represented the Petitioner. Samar Alomer and Mickey Cornelius testified in support of the Petition. James Raggio, Esq. represented the opposition, Dunteachin Estates Homeowners Association, Inc. (HOA). Paul Bunting, Eric Bruner, and Michael DiFilippo appeared in opposition to the Petition. Mr. Bunting and Mr. Bruner live in Dunteachin Estates and Mr. DiFilippo lives in Laurel, Maryland.

HOA’s Request to Postpone Hearing, filed November 22, 2021 was denied on November 30, 2021. The basis for the request was Council Bill 87-2021 (ZRA 198), which would decrease the density of Age-Restricted Adult Housing under certain circumstances. CB 87-2021 was on the Council agenda for consideration for final passage on December 6, 2021. The action taken on CB 87-2021 was to table the Bill.

On December 8, 2021, after the conclusion of the evidentiary hearing, a Decision and Order was issued approving BA 21-025C, subject to 10 Conditions. On December 16, 2021

Petitioner, by its attorney, filed a Request for Reconsideration and Request to Suspend Decision and Time for Appeal for Sixty (60) Days. Opposition's attorney was contacted and indicated that he was not going to file a written response to the Motion. On January 3, 2022, a Decision and Order was issued suspending the December 8, 2021 Decision and Order finally disposing of the Conditional Use application and setting an evidentiary hearing for February 22, 2022.

Petitioner introduced into evidence the following Exhibits on February 22, 2022:

1. Revised Conditional Use Plan (2/22/22)
2. Revised Spread Sheet addressing DAP and DPZ comments (2/22/22)

MOTION FOR RECONSIDERATION

Rules of Procedure Rule 11.5 establishes the standard for the hearing examiners reconsideration of her decision. "The hearing examiner will revise the decision only upon a finding of mistake of fact or mistake of law." There is inherent authority in administrative bodies to reconsider their own quasi-judicial decisions which applies in the absence of a rule or statute providing for reconsideration. Where, as here, a rule or statute exists, it governs as to circumstances under which the body may grant reconsideration. Pursuant to the Rules of Procedure, Howard County Board of Appeals Hearing Examiner Rule 11.5, reconsideration is limited to a legally recognized ground and the hearing examiner may not impermissibly reconsider and reverse the decision based on a "mere change of mind". Cinque v. Montgomery County Planning Bd., 173 Md. App. 349, 918 A.2d 1254 (2007)

Petitioner cites County Council of Prince George's County v. Zimmer Development Co., 217 Md. App. 310, 92 A.3d 601 (2014) for the proposition that reconsideration is authorized where, as here, a mistake of fact includes the failure of an underlying premise. Condition 3.e of the December 8, 2021 Decision and Order requires that the Conditional Use Plan be amended in response to concerns raised by DAP and DPZ. The underlying premise was that

these amendments could be addressed during Site Development Plan review. Subsequent engineering revealed that the amendments could not be resolved in a manner which would allow DPZ to approve minor modifications during the SDP process. Section 131.0.1.2.c. Opposition counsel, while in agreement in principle with the revised Conditional Use Plan, argued that Petitioner should proceed in accordance with the procedures to modify conditions in lieu of the instant request for reconsideration. As the design for the revised Conditional Use Plan in accordance with the DAP and DPZ recommendations resulted in a situation whereby DPZ does not have the authority approve the SDP, this has created a classic catch-22 situation which was clearly an unintended consequence of the original approval and is remediable through the approval of the Motion for Reconsideration.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the original hearing, and as supplemented by the evidentiary hearing on February 22, 2022, the Hearing Examiner finds the following facts:

1. Property Identification. The subject Property is located on the east side of Kerger Road, south of its intersection with Ilchester Road, and north of its intersection with Josie Court, and is in the R-20 Zoning District. The subject Property is in the 1st Election District. It is identified as Tax Map 0031, Grid 0021, Parcel 497, and known as 5263 Kerger Road, Ellicott City, Maryland (the Property).
2. Property Description. The Property consists of 8.35 acres, all of which are included in the Conditional Use area. The irregular-shaped Property is currently improved with a single-family detached dwelling and several accessory buildings. The environmentally sensitive areas on the Property consist of two intermittent streams on the southern and eastern property lines, two ponds, and wetlands associated with the streams and ponds. The site rises from an elevation of 369 feet at the southeast corner to 403 feet at the northwest corner. Existing vegetation covers portions of the rear lot line and the south lot line.

3. Vicinal Properties.

Direction	Zoning	Land Use
North	R-20	Single-Family Residences
South	R-20	Single-Family Residences
East	R-20	Single-Family Residences, County owned open space
West	R-20	Single-Family Residences, Kerger Road

4. Roads. Kerger Road has two travel lanes within a 60-foot right-of-way. The speed limit is 25 miles per hour. There are speed humps located on Kerger Road approximately 100 feet north of the proposed access and approximately 500 feet south of the proposed access. Traffic count data is not available for this portion of Kerger Road.

5. Water and Sewer Service. The Property is within the Planned Service Area for Water and Sewer. The Property is served by public water and sewerage.

6. The General Plan. PlanHOWARD 2030 designates the Property as Established Community on the Designated Place Types Map. The Plan's Functional Road Classification Map depicts Kerger Road as a Minor Collector.

7. Zoning History. There is no record of a Board of Appeals, Zoning Board, or any other Zoning case for the Property.

8. Reported Agency Comments.

(a) The Division of Land Development recommended adjustments to the Conditional Use Plan, items to be included in the Environmental Concept Plan, that an approved Site Development Plan must be obtained prior to the issuance of grading and building permits, items required to bring the landscape plan into conformance with the requirements of the Landscape Manual, that the development must comply with the Forest Conservation Act, and the identification/ concerns regarding sidewalks required along both sides of the streets within the proposed development and the pathway within the

BRL. See October 6, 2021 memo from Luber to Goins.

- (b) Development Engineering Division, Department of Planning and Zoning found no adverse engineering impacts on adjoining properties, and all development must comply with current Howard County design criteria including APFO requirements and stormwater management.
- (c) Department of Fire and Rescue requested that there be no on-street parking in the proposed cul-de-sac so fire and safety vehicles have adequate area to turn around.

9. Design Advisory Panel (DAP). DAP reviews and makes recommendations on developments of Age-Restricted Adult Housing pursuant to Title 16, Subtitle 15 of the Howard County Code. HZRA §131.O.N.a.18 requires that “the Conditional Use Plan and the architectural design of the building(s) shall have been reviewed by the Design Advisory Panel...prior to the submission of the Conditional Use petition to the Department of Planning and Zoning. The Petitioner shall provide documentation with the petition to show compliance with this criterion.” Section 16.1504 sets forth the recommendations the Panel shall make consistent with the compatibility criteria for Age-Restricted Adult Housing including, but not limited to, the design for buildings, vehicular circulation and access, pedestrian access and linkages, parking, existing trees, landscaping, and walls and fences. The Panel shall also address scale, massing, and compatibility of building in relation to the surrounding area as well as the architectural style, materials, entrances, windows, roof design, and colors of the proposed structures. Proposed open space including pathways, public spaces, amenity areas, and similar features are also to be considered by the Panel.

DAP reviewed the proposed Conditional Use Plan at its April 7, 2021 meeting and by unanimous (4-0) vote recommended that Petitioner provide an amended Plan (1) showing alternative unit sizes or smaller unit sizes, (2) that Petitioner consider eliminating Units 21 and 22 and substitute that space with a community center, provide an outdoor recreation area, and provide street trees along the entirety of the private road, (3) that outdoor

space be provided in the backyard of each unit, (4) consider the reduction in size and/or number of units to make the development more concurrent with the neighborhood, (5) rework the site layout to better embrace the pond amenity for the entire neighborhood, (6) review the architecture in consideration of existing architecture, and (7) widen the proposed walking trail from 5 feet to 6 feet.

Petitioner provided an amended Plan which was reviewed by DAP at its June 9, 2021 meeting. The amended Plan addressed some, but not most, of DAP's concerns. At the conclusion of DAP's second review, by unanimous (5-0) vote, DAP adopted seven Recommendations which have been addressed as follows in the revised Conditional Use Plan (2/22/22):

1. For the applicant to come back with a plan that shows alternate unit sizes or smaller unit sizes.

Single story semi-detached units with a 40-50% reduction in livable area are proposed as an option on Lots 10-15. Two single story single-family detached dwelling units are proposed adjacent to the entrance on Lots 1 and 28. Two dwelling units have been eliminated reducing the density from 4 units per net acre to 3.7 units per net acre.

2. That the applicant considers eliminating Units 21 and 22 to use that space for a community center that meets the code and provides an outdoor recreational area.

Two dwelling units have been eliminated. The community building has been relocated to be more inclusive of the pond. The community building has increased in size by almost 50% from 20 square feet per unit to 30 square feet per unit. Total square footage for the community center is now 840 square feet which exceeds the minimum square footage of 560 square feet. A patio/deck has been added to the rear of the community center which increases the useable area and is a nice amenity. Paths have been added to link the community with the pond and other

residences. Additional benches will be provided.

3. For the applicant to provide outdoor space in the backyards for each unit.

All of the units have, at a minimum, a 40-foot back yard.

4. For the applicant to study the plan in great detail, even after a reduction in the size of all or some of the units and reducing the quantity of the units to make it more concurrent with the neighborhood.

Two single story single-family detached dwellings are proposed for Lots 1 and 28. Lots 10-15 are proposed for either detached or semi-detached dwellings with a low profile roof line. After 50% of the units have been sold, any remaining Lots 10-15 may be developed with any dwelling type being offered elsewhere on site.

5. For the applicant to take another look at the overall site layout and to better embrace the existing pond amenity for the entire neighborhood.

The pond has been embraced through the relocation of the community building closer to the pond, the addition of a patio to the community building, and by the addition of pathways and benches.

6. For the applicant to take a look at the adjacent variety of architecture to make sure the proposed homes are fitting into that vernacular.

Petitioner has evaluated the variety of architecture in the vicinity and has provided architectural elevations which fit into the vernacular.

7. For the applicant to widen the proposed walking trail from 5 feet to 6 feet.

The revised Conditional Use Plan provides a 6 foot walking trail. The revised Plan also includes sidewalks on both sides of Private Road A, street trees 10 feet from each driveway, a shower box for each shared bathroom, and two (2) additional parking spaces for visitor parking (11 parking spaces now provided)

10. Conditional Use Proposal. The Petitioner proposes an Age-Restricted Adult Housing (ARAH) development consisting of a maximum of 28 single-family dwellings which includes two (2) single story single-family detached units at Lots 1 and 28 and a possibility of detached/semi-detached single/two story units on Lots 10-15, a gazebo, an 840 square foot community center, and walking trails. All dwellings will incorporate features from the DPZ Universal Design Guidelines.

11. Opposition. Opposition agrees in principle with the revised Conditional Use Plan (2/22/22).

BURDEN OF PROOF

The Court of Appeals of Maryland has frequently expressed the applicable standards for judicial review of the grant or denial of a Conditional Use. The Conditional Use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The Conditional Use is a valid zoning mechanism that delegates to an administrative body a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating this presumption. The legislative body has statutorily determined that a Conditional Use is compatible in a particular zoning district absent specific facts adduced to the contrary at a particular location. The duties given the hearing body are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the Zoning Plan.

The Applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the zoning body that the proposed use would be conducted without real

detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden.

The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the zoning body to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a Conditional Use is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md. 41, 54-55, 310 A.2d 543, 550-51 (1973); Rockville Fuel & Feed Co. v. Board of Appeals of Gaithersburg, 257 Md. 183, 187-88, 262 A.2d 499, 502 (1970); Montgomery County v. Merlands Club, Inc., 202 Md. 279, 287, 96 A.2d 261, 264 (1953); Anderson v. Sawyer, 23 Md. App. 612, 617, 329 A.2d 716, 720 (1974). These standards dictate that if a requested Conditional Use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied. Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1325 (1981). See also Mossberg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

The appropriate standard to be used in determining whether a requested Conditional Use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed and the particular location proposed would have any adverse effects above and beyond those inherently associated with such a Conditional Use irrespective of its location within the zone. Turner v. Hammond, 270 Md. 41, 54-55, 310 A.2d 543, 550-51 (1973); Deen v. Baltimore Gas & Electric Co., 240 Md. 317, 330-31; 214 A.2d 146, 153 (1965); Anderson v. Sawyer, 23 Md. App. 612, 617-18, 329 A.2d 716, 720, 724 (1974). Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1331 (1981). See also Mossberg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

CONCLUSIONS OF LAW

1. General Criteria for Conditional Uses (Section 131.0.B)

HCZR Sections 131.0.B.1-3 require the Hearing Authority to evaluate whether the proposed Conditional Use will be in harmony with the landscape uses and policies indicated in the Howard County General Plan for district in which it is located through the application of three standards: harmony with the General Plan, overall intensity and scale of use, and atypical adverse impacts.

A. **Harmony and Intensity of Use**

Section 131.0.B.1. The proposed Conditional Use plan will be in harmony with the land uses and policies in the Howard County General Plan which can be related to the proposed use.

While Howard County General Plan policies are not directly related to Conditional Use requests for ARAH, the proposed single-family semi-detached dwellings are compatible in character with the surrounding residential areas. Additionally, the development is in harmony with following policies that encourage housing options for residents at diverse income levels and life stages:

Policy 9.2: "Expand full spectrum housing for residents at diverse income levels and life stages, and for individuals with disabilities, by encouraging high quality, mixed income, multigenerational, well designed, and sustainable communities."

Policy 9.4: "Expand housing options to accommodate the County's senior population who prefer to age in place and people with special needs."

Section 131.0.B.2. 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 are such that the overall intensity and scale of the use(s) are appropriate for the site.

The Petitioner is proposing a maximum of 28 dwelling units on 7.51 net acres. In the R-20 Zoning District, an ARAH may be approved up to a maximum residential density of 4 dwelling units per net acre. Therefore, the 7.51 net acres of the Property may be approved for up to 30 dwelling units. Petitioner is requesting a maximum of 28 units which is less than the

density permitted. 4 dwellings per net acre is permitted and 3.7 dwellings per net area is requested. The development complies with all setbacks, environmental buffers, bulk regulations, and provides 50% open space, more than the 35% required. A 560 square foot community building is required, an 840 square feet community building is to be provided.

The Functional Road Classification Map of PlanHoward 2030 depicts Kerger Road as a minor collector, which is an appropriate classification for the types and number of vehicles associated with the proposed use.

The nature and intensity of the use, the size of the Property in relation to the use, and the location of the site, with respect to streets that provide access, are such that the overall intensity and scale of the use are appropriate.

B. Adverse Impacts (Section 131.0.B.3)

Unlike HCZR Section 131.0.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, or Section 131.0.B.2, which concerns the on-site effects of the proposed use, compatibility of the proposed use with the neighborhood is measured under Section 131.0.B.3's six off-site, "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading; (d) access; (e) environmentally sensitive areas; and (f) impact on the character and significant historic sites.

Inherent in the assessment of a proposed Conditional Use under these criteria is the recognition that virtually every human activity has the potential for adverse impact. The assessment therefore accepts some level of such impact in light of the beneficial purposes the zoning body determined to be inherent in the use. Thus, the question in the matter before the Hearing Examiner is not whether the proposed use would have adverse effects in an R-20 Zoning District. The proper question is whether there are facts and circumstances showing the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception [conditional] use irrespective of its location within the zones. *People's Counsel for Baltimore County v. Loyola*

College in Maryland, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below and as conditioned, Petitioner has met its burden of presenting sufficient evidence under HCZR Section 131.0.B.3 to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with an Age-Restricted Adult Housing, General, in the R-20 Zoning District.

Section 131.0.B.3.a. The impact of adverse effects such as, but not limited to, noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions will be greater at the proposed site than it would generally be elsewhere in the same zoning district or other similar zoning districts.

The proposed development will consist of single-family detached and semi-detached dwellings. There is no evidence of atypical adverse effects such as noise, dust, fumes, odors, vibrations, increased lighting, hazards, or other physical conditions that would be greater at the subject site than generally elsewhere.

Section 131.0.B.3.b. The location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping on the site are such that the use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.

The proposed buildings and structures comply with all setback and height requirements. The proposed development retains some of the existing vegetation on the north, south, and east property lines and provides a Type "C" vegetative buffer along the north property line. The buffers along the south and east property lines exceed the requirements of a Type "C" buffer.

Two Forest Conservation Easements will provide for afforestation of the Property. Easement "A" is shown along the east property line and Easement "B" is shown on a portion of the southern boundary and provides additional screening from vicinal properties. No variances are requested.

Thus, the proposed use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject Property than generally elsewhere.

Section 131.0.B.3.c. The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be approximately located and buffered or screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

The Zoning Regulations do not contain a parking requirement for age-restricted adult housing semi-detached structures; however, the closest parking use category is age-restricted adult housing single family attached structures, which requires two spaces per unit and an additional 0.3 spaces per unit for guest parking. Additionally, 10 parking spaces per 1,000 square feet are required for the community building. Therefore, 65 spaces are required for the 28 units and nine (9) are required for the 840 square foot community building for a total of 74 parking spaces. The Conditional Use Plan shows 56 parking spaces allocated to garages, eleven (11) on-street parking spaces and an additional 56 spaces provided on the driveways. The total number of parking spaces provided is 123.

The parking spaces are screened from the public roads and adjacent properties by proposed landscaping. Waste will be collected in individual residential trash receptacles, which will not be visible from the public right-of-way or adjacent properties.

Section 131.0.B.3.d. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate. For proposed Conditional Use sites which have driveway access that is shared with other residential properties, the proposed Conditional Use will not adversely impact the convenience or safety of shared use of the driveway.

Precise sight distance measurements can only be determined by a detailed sight distance analysis, which is typically conducted during Site Development Plan review. The estimated sight distance on Kerger Road exceeds 500 feet in both directions. According to the American Association of State Highway and Transportation Official (AASHTO) guidelines, based on an estimated stopping sight distance of 155 feet for a car going 25 miles per hour, the existing access point on Kerger Road appears to provide safe access with adequate stopping sight distance. The use will not share access with any other properties.

Section 131.0.B.3.e The proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.

The environmentally sensitive areas on the Property consist of 0.84 acre of floodplain, two intermittent streams, two ponds and associated wetlands. The walking trail has been reconfigured to avoid encroachment into the environmental buffer and therefore, the proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.

Section 131.0.B.3.f. The proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.

The closest historic site (HO-865) (John S. Ridgely Farm) is located approximately 1,000 feet to the south of the Property and is buffered from the proposed development by significant distance and two single-family developments. Therefore, the proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.

2. Specific Criteria for Age-restricted Adult Housing (Section 131.0.N.1.a)**1.a. Age-restricted Adult Housing, General**

A conditional use may be granted in the RC, RR, R-ED, R-20, R-12, R-SC, R-SA-8, or R-A-15 District, for age-restricted adult housing, provided that:

- (1) **Single-family detached, semi-detached, multi-plex attached and apartment dwelling units shall be permitted, except that only detached, semi-detached, multi-plex and single-family attached units are permitted in developments with less than 50 dwelling units in the R-ED, R-20 and R-12 districts.**

The Property is zoned R-20 and the development proposes 28 single-family detached and semi-detached dwellings, in accordance with Section 131.0.N.1.a(1).

- (2) **In the R-ED, R-20, R-12, R-SC, R-SA-8, R-H-ED, R-A-15, or R-APT Districts the development shall have a minimum of 20 dwelling units.**

Twenty eight single-family detached and semi-detached dwelling units are proposed on the R-20 zoned Property, in accordance with Section 131.0.N.1.a(2).

- (3) **Only detached and semi-detached units are permitted in the RC and RR Districts.**

The Property is zoned R-20 and therefore this criterion does not apply.

(4) The maximum density shall be as follows:

Zoning District	No. of Dwelling Units	Max. Units Per Net Acre
R-20	20-49	4

The Property is zoned R-20 and 28 dwelling units are proposed on 7.51 net acres, making the maximum density 3.7 unit per acre, in accordance with Section 131.0.N.1.a(4).

(5) If the development results in increased density according to subsection (4) above, the site must have frontage on or direct access to a collector or arterial road designated in the General Plan.

The R-20 zoning district allows a maximum density of approximately 2 dwelling units per acre. The proposed development has a density of 3.7 dwelling units per acre and has frontage and direct access on Kerger Road, a minor collector.

(6) Site Design:

The landscape character of the site must blend with adjacent residential properties. To achieve this:

(a) Grading and landscaping shall retain and enhance elements that allow the site to blend with existing neighborhood.

Residential properties only abut approximately 29% of the site's perimeter. North of the Property are five lots created through Plat # 25271 in 2019. All are undeveloped, except for Lot I, which contained a house when the plat was recorded. A heavily wooded 70-foot-wide open space lot owned by Howard County adjoins the Property to the east. Five single-family detached dwellings in the Dennis Preserve subdivision adjoin the Property to the south. Kerger Road is located to the west along with a 1.26-acre county owned open space lot and single-family detached dwellings.

Existing vegetation/trees and a pond within 4.18 acres of open space will be retained constituting approximately 50% of the Property.

The proposed development retains some of the existing vegetation on the north, south, and east property lines, and provides a Type "C" vegetative buffer along

the north property line. The buffers along the south and east property lines exceed the requirements of a Type "C" buffer. Two Forest Conservation Easements will provide for afforestation of the site. Easement "A" is shown along the east property line and Easement "B" on a portion of the southern boundary.

Therefore, the landscape character of the site will blend with limited number of adjacent residential properties, however, the layout of the site does not blend well with the existing pond element.

- (b) **The project shall be compatible with residential development in the vicinity by providing either:**
 - (i) **An architectural transition, with buildings near the perimeter that are similar in scale, materials, and architectural details to neighboring dwellings as demonstrated by architectural elevations or renderings submitted with the petition; or**

The revised Conditional Use Plan incorporated a mix of dwelling types and sizes with architecture and scale which is compatible with the neighborhood.

- (ii) **Additional buffering along the perimeter of the site, through retention of existing forest or landscaping, enhanced landscaping, berms, or increased setbacks.**

Residential properties abut only approximately 29% of the site's perimeter. The proposed development provides additional buffering through a combination of retained forested area, enhanced landscaping, and increased setbacks to diminish the visible impact to the limited number of adjacent residential properties.

North of the Property are five lots created through Plat# 25271 in 2019. All are undeveloped, except for Lot I, which contained a house when the plat was recorded. The existing house on Lot I is oriented toward Kerger Road with a side loaded garage adjacent to the Property and will be shielded from development by a Type "C" landscape buffer. A Type "D" landscape buffer and/or a six-foot fence along the north property line could be provided for additional screening.

A heavily wooded 70-foot-wide open space lot owned by Howard County adjoins the Property to the east and will screen the development from residents to the east.

Five single-family detached dwellings in the Dennis Preserve subdivision adjoin the Property to the south. The landscape buffer provided along the southern property lines exceed the Type "C" buffer requirements by providing six (6) additional shade trees and 38 additional evergreen trees. Additionally, units 27 - 28 exceed the 40-foot setback by between 20 and 40 feet and units 17 - 26 exceed the 40-foot setback by between 80 and 300 feet.

Kerger Road is located to the west along with a 1.26-acre County-owned open space lot and single-family detached dwellings. Units 1/2 and 27/28 are the closest units to Kerger Road. Units 27/28 exceed the 50-foot setback from Kerger Road by 20 feet and are located over 200 feet from the closest residence across Kerger Road. Evergreen trees are provided along Kerger Road to break up the visible impact as shown on Sheet 3 of the Conditional Use Plan. Units 1/2 are located over 150 feet from the closest residence across Kerger Road and evergreen trees are also provided along Kerger Road to break up the visible impact.

- (c) For projects with less than 50 dwelling units in the R-ED, R-20 and R-12 Districts, setbacks from existing public streets shall be the same as the setback required for residential uses on adjacent properties.**

The revised Conditional Use Plan proposes 28 dwelling units in the R-20 zone and

the design conforms to the required 50-foot front or side structure setback and a 20-foot use setback from a collector public street.

(7) Bulk Requirements

(a) Maximum Height:

- (i) Apartments 40 feet**
 - Except in R-SA-8, R-A-15 and R-APT 55 feet**
- (ii) Other principal structures 34 feet**
- (iii) Accessory structures 15 feet**

The height of the proposed two story single-family semi-detached dwellings will not exceed 34 feet.

(b) Minimum structure and use setback:

- (i) From public street right-of-way 40 feet**
- (ii) From residential lots in RC, RR, R-ED, R-20, R-12 or R-SC**

Districts:

- Apartments 100 feet**
- Single-family attached 75 feet**
- Single-family detached, semi-detached, and multi-plex 40 feet**

- (iii) From open space, multi-family or non-residential uses in RC, RR, R-ED, R-20, R- 12 or R-SC 30 feet**

- (iv) From zoning districts other than RC, RR, R-ED, R-20, R-12 or R-SC 20 feet**

All buildings comply with the 50-foot setback from an external public street right-of-way and 40-foot setback from lots in the R-20 Zoning District.

- (c) Minimum structure setback from interior roadway or driveway for units with garages 20 feet**

All dwellings along the interior roadway contain garages and comply with the 20-foot setback.

- (d) Minimum structure setback from lot lines for single-family detached or multi-plex units**

- (i) Side 10 feet**

Except zero lot line dwellings 0 feet

A minimum of 10 feet must be provided between structures

- (ii) Rear 20 feet**

Single-family detached units are in compliance with this criterion. Multi-plex units are not proposed and therefore, this criterion does not apply.

(e) Minimum distance between single-family detached and/or attached dwellings:

- (i) For units oriented face-to-face 30 feet*
- (ii) For units oriented side-to-side 15 feet*
- (iii) For units oriented face-to-side or rear-to-side 20 feet*
- (iv) For units oriented rear-to-rear 40 feet*
- (v) For units oriented face-to-rear 100 feet*

Single-family detached units are in compliance with this criterion. No attached dwellings are proposed and therefore, this criterion does not apply.

(f) Minimum distance between apartment buildings or between apartment buildings and single-family dwellings:

- i. For units oriented face-to-face30 feet*
- ii. For units oriented side-to-side15 feet*
- iii. For units oriented face-to-side or rear-to-side30 feet*
- iv. For units oriented rear-to-rear60 feet*
- v. For units oriented face-to-rear100 feet*

Apartments are not proposed; therefore, this criterion does not apply.

(g) Apartment buildings and groups of single-family attached units may not exceed 120 feet in length. However, the Hearing Authority may approve a greater length, up to a maximum of 300 feet in R-SA-8, R-A-15 and R-APT, or 200 feet in other districts, based on architectural design that mitigates the visual impact of the increased length.

Neither apartments nor single-family attached buildings are proposed therefore, this criterion does not apply.

- (8) At least 50% of the gross site area in the RC, RR, R-ED Districts, at least 35% in the R-20, R-12, and R-SC Districts, and at least 25% in the R-SA-8, R-H-ED, R-A-15 and R-APT Districts, shall be open space or open area in accordance with the Subdivision and Land Development Regulations. The open space or open area shall provide amenities such as pathways, seating areas and recreation areas for the residents, and shall be protective of natural features.**

The Property is zoned R-20 and 50% of the site (4.18 acres) is proposed for open space. Benches, a gazebo, and a 6-foot-wide walking trail will be provided in the open space area.

- (9) **Accessory uses may include social, recreational, educational, housekeeping, security, transportation, or personal services, provided that use of these services is limited to on-site residents and their guests.**

A community center, benches, a gazebo, and 6-foot-wide walking trails are proposed for on-site residents and their guests.

- (10) **At least one on-site community building or interior community space shall be provided that contains a minimum of:**

- (a) **20 square feet of floor area per dwelling unit, for the first 99 units with a minimum area of 500 square feet, and**

The Petitioner is required to provide 1,160 square feet of floor area (20 square feet per unit x 58 units = 1,160 square feet) for on-site community buildings or interior community space. The Petitioner satisfies this requirement by providing a 1,200 square foot community building that is limited to on-site residents and their guests.

- (b) **10 square feet of floor area per dwelling unit for each additional unit above 99.**

A 560 square foot on-site community building, or interior community space, is required and an 840 square feet community building that is limited to on-site residents and their guests is proposed.

- (11) **Loading and trash storage areas shall be adequately screened from view.**

Trash and recycling pickup within the development will be curb-side pickup at each dwelling and no central trash storage area is proposed in connection with the dwelling units or the community building under this Petition. Trash pick-up from the community building and trash receptacles along the walking path/trail will be the responsibility of the condominium association and/or a professional management company hired by the condominium.

- (12) **For a development that will be built in phases, open space areas, recreational facilities and other accessory facilities shall be provided in each phase to meet the needs of the residents. The developer shall provide a schedule for the installation of facilities at the time the Conditional Use is approved.**

The development will not be constructed in phases therefore this criterion does not apply.

- (13) **The petition shall establish how the age restrictions required under the definition of this use will be implemented and maintained over times. If the development will not be a rental community under single ownership, an entity such as a condominium association or homeowner's association shall be established to maintain and enforce the age restrictions in addition to County enforcement of zoning regulations.**

A condominium association will be established which will enforce age restriction requirements through covenants and restrictions.

- (14) **All open space, common areas and related improvements shall be managed and maintained by a common entity, either the owner of the development, a condominium association, or a homeowner's association.**

A condominium association established by the Petitioner will be responsible for the maintenance of open space, open areas and common areas and related improvements in perpetuity.

- (15) **The development shall incorporate universal design features from the Department of Planning and Zoning guidelines that identify required, recommended, and optional features. The petition shall include descriptions of the design features of proposed dwellings to demonstrate their appropriateness for the age-restricted population. The material submitted shall indicate how universal design features will be used to make individual dwellings adaptable to persons with mobility or functional limitations and how the design will provide accessible routes between parking areas, sidewalks, dwelling units, and common areas.**

The development will incorporate the following universal design features:

- Slopes or ramps on the exterior of units in accordance with current Howard County regulations
- a "no-step" access to the front door entrance to all dwelling units and community buildings.
- 36" wide front door with exterior lighting at the entrance
- all interior doorways at least 32" clear width in the open position
- 36" wide fully accessible route must connect throughout the first floor of the dwelling unit.
- complete living area including master bedroom & bath on first level floor
- lever handles on interior and exterior doors
- clear floor space of 30" x 48" inches centered on appliances

- reinforced walls to allow for the later installation of grab bars around the toilet, tub, and shower stall.

- (16) At least 10% of the dwelling units in the R-ED, R-20, R-12 and R-SC Districts, and at least 15% in the R-SA-8, R-H-ED, R-A-15 and R-APT Districts, shall be Moderate Income Housing Units.**

Three (10%) of the 28 dwelling units will be Moderate Income Housing Units.

- (17) Housing for the elderly special exceptions uses approved by the Board of Appeals on or prior to July 12, 2001 and constructed under the zoning regulations in effect at that time, may convert the existing dwelling units to age-restricted adult housing uses, with respect to minimum age restrictions only, without being subject to further hearing authority review and approval under current Conditional Use requirements, provided that the dwelling units are made subject to the new covenants and other legal means of enforcing the age-restricted adult housing minimum age restrictions, and that a copy of the recorded new covenants is submitted to the Department of Planning and Zoning to be filed in the original special exception case file.**

A special exception (Conditional Use) for housing for the elderly has not been approved by the Board of Appeals for this Property, therefore, this criterion does not apply.

- (18) The Conditional Use plan and the architectural design of the building(s) shall have been reviewed by the Design Advisory Panel, in accordance with Title 16, Subtitle 15 of the Howard County Code, prior to the submission of the Conditional Use petition to the Department of Planning and Zoning. The Petitioner shall provide documentation with the petition to show compliance with this criterion.**

The Conditional Use Plan and architectural design of the buildings were reviewed by the Design Advisory Panel on April 7 and June 9, 2021. The minutes of the meetings and recommendations are in the record as documentation of compliance with this criterion.

ORDER

Based upon the foregoing, it is this 23rd day of February, 2022, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Motion for Reconsideration be and hereby is **GRANTED**, and it is further **ORDERED**,

That the Petition of Kerger Pond, LLC. for Age-Restricted Adult Housing, General, in a R-20 (Residential: Single) Zoning District, be and is hereby **GRANTED**;

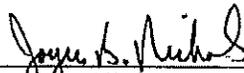
Provided, however, that:

1. The Conditional Use shall be conducted in conformance with and shall apply only to the uses as described in the Petition and depicted on the revised Conditional Use Plan (2/22/22), and not to any other activities, uses, structures, or additions on the Property.
2. Petitioner shall obtain all required permits.
3. Lots 10-15 shall be limited to development of low roof profile single family detached or semi-detached dwelling units until 50% of the lots are sold; after the 50% threshold is met, Lots 10-15 may be offered for sale with any of the dwelling unit types being provided onsite.
4. An Environmental Concept Plan for the site must be approved prior to the Site Development Plan in order to identify any impacts to streams, wetlands and their buffers, floodplain, steep slopes and specimen trees on site which are protected from disturbance per the Land Development Regulations.
 - a. Specimen Trees must be shown with their Critical Root Zones in order to evaluate the level of disturbance.
 - b. A review of the current plan shows that Alternative Compliance may be needed for impacts to environmental area and will be required for specimen tree removal. The proposed plan will require specimen trees to be removed for the development to be constructed as designed. Since the Alternative Compliance for this has not been approved, the proposal may not be permitted to advance with its current layout. If the conditional use is approved, this Division recommends flexibility in the Decision and Order to allow the development to be re-designed to accommodate the protection of specimen trees, if the trees are not approved for removal. Should flexibility not be granted, DPZ requests that the decision specify that approval of the Conditional Use plan does not convey a right to remove those specimen trees nor have the approved plan serve as justification to meet the hardship requirement of the alternative compliance review process.
5. An approved Site Development Plan for the proposed Age-Restricted Adult

Housing development will be required prior to the issuance of grading and building permits.

6. The proposed landscape screening must meet the requirements of the Landscape Manual to effectively screen the proposed development from the neighboring properties and roadway.
 - a. The perimeter landscape buffers as shown on the Conditional Use Plan comply with the Landscape Manual.
 - b. A minimum of 15-foot-wide landscaped area shall be provided between common parking areas and any adjacent residential structure.
 - c. Street trees may not be planted within 10 feet of a driveway.
 - d. Identify the location of refuse/recycle pick-up. Loading and trash storage areas shall be adequately screened from view.
7. This development will be subject to and must comply with the Forest Conservation Act, per Subtitle 12 of the County Code, prior to Site Development Plan approval.
 - a. Approval of Alternative Compliance is required for the removal of any specimen tree. If the approval is granted, the required mitigation will be determined as part of the evaluation of this application.
8. There shall be no on-street parking in the cul-de-sac.
9. Amend Conditional use Plan Note 6 to include 11 on street parking spaces and correct the total number of parking spaces provided.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER



Joyce B. Nichols

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.