

Case No: S.E. 4749
Bhagya Village

Applicant: Bhagya Village, LLC

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND,
SITTING AS THE DISTRICT COUNCIL

ZONING ORDINANCE NO. 5 - 2016

AN ORDINANCE, conditionally approving Special Exception 4749 and Tree Conservation Plan 2-008-14-01, to use approximately 6.01 acres of R-80 (One-Family Detached Residential) zoned land as apartment housing for elderly or physically handicapped families located on the east side of Cipriano Road, approximately 2,640 feet north of the intersection with Good Luck Road, and identified as 6711 Cipriano Road, Greenbelt, Maryland, in Councilmanic District 4.¹

PROCEDURAL AND FACTUAL BACKGROUND

On or about September 4, 2014, Applicant Bhagya Village, LLC,² submitted an application for Special Exception (S.E. 4749) to construct a four-story, 61-foot-high, 118-unit apartment building for elderly or physically handicapped families in the R-80 Zone.³ *See* Ex. 1 – Application Form.

¹ We have jurisdiction to issue the final decision in this contested application for a special exception. *See* Md. Code, Land Use Art., Titles 22 and 25 and Prince George's County Code Sections 27-131–35 ("PGCC § ____"). *See also County Council v. Curtis Regency Serv. Corp.*, 121 Md. App. 123, 708 A.2d 1058 (1998).

² The applicant "Bhagya" Village, LLC, was formerly known as "Bagya" (without the "h") Village, LLC. The name change was formalized in April 2015, after the application was filed in 2014.

³ As part of the application for S.E. 4749, the Applicant is also requesting approval of a Type 2 Tree Conservation Plan (TCP 2-008-14-01) and a Departure from Design Standards 627 (DDS-627) for the location of a loading space and its access driveway less than 50 feet from a residential zone. On May 21, 2015, Planning Board held a public hearing on DDS-627. Subsequently, Planning Board conditionally approved DDS-627 on June 11, 2015, which we elected to review on June 22, 2015. *See* PGCPB No. 15-53. *See also* PGCC § 27-239.01(b)(9)(A–E), Zoning Agenda, 6/22/2015. Although oral arguments were combined in S.E. 4749 and DDS-627, we adopted a separate order of approval in DDS-627. *See* Final Decision in DDS-627, 3/14/16. We note that there was no appeal filed by any person of record in DDS-627. *See* Zoning Agendas, 6/22/15, 11/09/15, and 2/22/16. The Applicant also

In November 2014, Technical Staff of the Planning Department reviewed S.E. 4749 along with companion case DDS-627. Subsequently in April 2015, Staff transmitted its report to the Planning Board. Staff recommended conditional approval of S.E. 4749 and DDS-627. *See Ex. 35 – Technical Staff Report, 4/15/15.*

In May 2015, Planning Board elected not to conduct its own public hearing on S.E. 4749, but instead adopted Staff’s conditional recommendation of approval. *See Ex. 41(a) – Transmittal Letter.*

Within a month, the ZHE commenced public hearings to consider S.E. 4749 in accordance with the requirements of the Prince George’s County Code. Opposition to S.E. 4749 included but was not limited to Dr. Ronald C. Carlson, David R. Brace, and Raintree Homeowners Association, *et al.* *See (6/24/2015, 7/8/2015, 7/23/2015, and 8/6/2015, Tr.).*

In October 2015, the ZHE recommended denial of S.E. 4749 and TCP 2-008-14-01. *See ZHE’s Disposition Recommendation, 10/22/15.*

After receipt of the ZHE’s Disposition Recommendation in S.E. 4749, we elected to make the final decision on November 9, 2015. *See PGCC § 27-131.* Simultaneously, the Applicant filed exceptions to the ZHE’s Disposition Recommendation and requested oral argument. The Applicant requested a remand to the ZHE for the purpose of considering a new design to address the Examiner’s finding that a smaller building with a larger setback from adjacent properties would minimize adverse impact upon those properties.⁴ *See Exceptions Letter, 11/09/15.*

filed an Alternative Compliance (AC-14023) from Section 4.7 of the Landscape Manual, which has been withdrawn. *See (6/24/2015, Tr., pp. 80–81).*

⁴ At oral argument, the Applicant withdrew its written request for remand. *See (2/8/2016, Tr.).*

On December 7, 2015, notices of oral argument were sent to all persons of record for scheduled oral argument on January 11, 2016. *See* Notices, 12/7/15. Subsequently, persons of record were notified that oral argument was rescheduled to February 8, 2016. *See* Notices, 12/23/15.

At oral argument on February 8, 2016, the Applicant withdrew its request for remand to the ZHE. The Applicant and Opposition indicated that they reached an agreement based on the contested facts before the ZHE, which included but was not limited to a revision of the design plans from four (4) stories to three (3) stories. *See* (2/8/2015, Tr.) and (6/24/2015, 7/8/2015, 7/23/2015, and 8/6/2015, Tr.). *See also* Parties' Written Proposed Conditions of Approval for S.E. 4749 and DDS-627, 2/8/15. At the conclusion of oral argument, we took this matter and DDS-627 under advisement. *See* (2/8/2015, Tr.)

On February 22, 2016, we directed staff to prepare orders conditionally approving S.E. 4749 and DDS-627. *See* Zoning Agenda, 2/22/15.

FINDINGS AND CONCLUSIONS⁵

The Property

Since 1979, the 6.01 acres of the subject property has been in the R-80 (One-Family Detached Residential) Zone.⁶ According to the County tax records, there is a single-family house on the property which was built in 1893. The house is not a historic resource or historic site.⁷ See Ex. 35 – Technical Staff Report, p. 4. The subject property is surrounded by the following land uses:

- On the north, a child care center in the R-80 Zone (Themba Creative Learning Academy)
- On the south, by single-family detached development in the R-80 Zone
- On the east, vacant County-owned land and a church in the R-80 Zone
- On the west, Cipriano Road and, across the right-of-way,

⁵ Except as otherwise stated herein, the District Council adopts the findings of facts and conclusions of law within the disposition recommendation of the Zoning Hearing Examiner. See *Templeton v. County Council of Prince George's County*, 23 Md. App. 596; 329 A.2d 428 (1974) (Where the Council has delegated the duty of making findings of fact and recommendations to the Zoning Hearing Examiner, the Council may comply with the requirement of “specific written findings of basic facts and conclusions of law” by adopting the Examiner’s findings and conclusions). The District Council may take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property, including the approval of a preliminary plat of subdivision. See PGCC § 27-141. See also Rules of Procedure for the Prince George’s County District Council: Rule 6: Oral Argument and Evidentiary Hearings: (f) The District Council may take administrative notice of facts of general knowledge, technical or scientific facts, laws, ordinances and regulations. It shall give effect to the rules of privileges recognized by law. The District Council may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence. We note that on October 1, 2015, the Planning Board adopted Resolution 15-93, which conditionally approved Applicant’s Type 1 Tree Conservation Plan (TCP1-005-15) and Preliminary Plan of Subdivision 4-15007. See PGCPB No. 15-93.

⁶ The purposes of the R-80 Zone are to provide for and encourage variation in the size, shape, and width of one-family detached residential subdivision lots, in order to better utilize the natural terrain; to facilitate the planning of one-family residential developments with medium-sized lots and dwellings of various sizes and styles; to encourage the preservation of trees and open spaces; and to prevent soil erosion and stream valley flooding. See PGCC § 27-429.

⁷ 1.58 acres of the subject property is within the 100-year floodplain; accordingly, the net tract area is 4.43 acres. See Ex. 93(c). The subject property is not exempt from the requirements of the Woodland and Wildlife Habitat Conservation Ordinance because it is in excess of 40,000 square feet in area, and contains more than 10,000 square feet of woodland. A revised Type 2 Tree Conservation Plan has been submitted for approval (TCP 2-008-14-01). See Ex. 13(a). A National Resource Inventory and Forest Stand Delineation have been approved for the property. See Ex. 18(a) and (b).

a single-family residential development in the R-80 Zone.

The neighborhood boundaries are as follows: to the north, Greenbelt Road (MD 193); to the south and east, Good Luck Road; and, to the west, Cipriano Road.

Master Plan/Sectional Map Amendment

The 2010 Sector Plan for Glenn Dale, Seabrook, Lanham & Vicinity recommends single-family low-density residential uses for the subject property. The Sector Plan also provides guidelines for infill development:

Residential infill should be sensitive to existing neighborhood characteristics. The “feel” of a neighborhood is established partially through the scale and massing of its residential units and their relationships with each other and the street. Residential units should continue the rhythm established by setbacks and complement buildings or adjacent properties. Houses should not be disproportionate to the surrounding built environment and overwhelm units on neighboring properties.

See 2010 Sector Plan and Sectional Map Amendment for Glenn Dale, Seabrook, Lanham & Vicinity, pp. 73-74.

Despite the purposes of the R-80 Zone and the guideline recommendation of the 2010 Sector Plan, apartment housing for elderly or physically handicapped families are permitted uses by special exception in the R-80 Zone. See PGCC § 27-337. A special exception, sometimes called a “conditional use,” is a zoning device that provides a middle ground between permitted and prohibited uses. *People’s Counsel for Baltimore Cnty. v. Loyola Coll. in Maryland*, 406 Md. 54, 71, 71 n.19, 956 A.2d 166, 176, 176 n.19 (2008); cf. *Maryland Overpak Corp. v. Mayor And City Council Of Baltimore*, 395 Md. 16, 29, 909 A.2d 235, 243 (2006) (citing *Lucas v. People’s Counsel for Baltimore County*, 147 Md. App. 209, 227 n.20, 807 A.2d 1176, 1186 n.20 (2002)). It allows the local legislature to set some uses as *prima facie* compatible for a given zone, subject to a case-by-case evaluation to determine whether the use would result in an adverse effect on the

neighborhood (other than any adverse effect inherent in that use within the zone), such that would make the use actually incompatible. Because special exceptions are created legislatively, they are presumed to be correct and an appropriate exercise of the police power. *Rylyns Enterprises*, 372 Md. at 543, 814 A.2d at 486 (citing *Brandywine Enterprises, Inc. v. Prince George's County Council*, 117 Md. App. 525, 700 A.2d 1216 (1997)).

Special Exception Requirements

We may approve a special exception if:

- (1) The proposed use and site plan are in harmony with the purpose of this Subtitle;
- (2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;
- (3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;
- (4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;
- (5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood; and
- (6) The proposed site plan is in conformance with an approved Type 2 Tree Conservation Plan; and
- (7) The proposed site plan demonstrates the preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible in accordance with the requirement of Subtitle 24-130(b)(5).

See PGCC § 27-317(a)(1–7). A special exception for apartment housing for elderly or physically handicapped families in the R-80 Zone also require additional findings, which are as follows:

- (a) Apartment housing and related facilities for elderly or physically handicapped families may be permitted within and on the property associated with an existing building, which was formerly used for a public school that has been declared surplus by the government entity which owns (owned) it (known as a surplus public school building), subject to the following:
 - (1) In addition to the requirements of Section 27-296(c), the site plan shall show the density, and the type and total number of dwelling units proposed;
 - (2) The District Council shall find that the subject property is suitable for the type of development proposed, and is of sufficient size to properly accommodate the proposed number of dwelling units;

- (3) Recreational and social amenities for the residents may be provided, if shown on the site plan and approved by the District Council; and
 - (4) The height, lot coverage, density, frontage, yard, and green area requirements, including restrictions on the location and height of accessory buildings, as specified for the zone in which the use is proposed, shall not apply to uses or structures provided for in this Section. The dimensions, percentages, and density shown on the approved site plan shall constitute the regulations for development under a given Special Exception.
- (b) Apartment housing and related facilities for elderly or physically handicapped families may be permitted within a building other than a surplus public school building, subject to the following:
- (1) The owner of the property shall record among the Land Records of Prince George's County a Declaration of Covenants which establishes that the premises will be solely occupied by elderly or handicapped families for a fixed term of not less than twenty (20) years. The covenants shall run to the benefit of the Maryland-National Capital Park and Planning Commission;

* * * * *

- (4) In the R-R, R-80, and R-55 Zones, the following shall apply:
 - (A) The requirements of paragraphs (1), (2), (3), and (4) of Subsection (a), above, shall be met;
 - (B) The District Council shall find that the proposed use:
 - (i) Will serve the needs of the elderly families or physically handicapped families; and
 - (ii) Will not adversely affect the character of the surrounding residential community. The District Council shall consider the lot size, height of the building, lot coverage of all buildings on the property, setbacks from surrounding properties, street frontage, and sufficiency of green area when determining the proposed development's effect on surrounding residential communities.
- (c) For the purposes of this Section, the term "elderly family" means a family which is included within age restrictions in conformance with the Federal Fair Housing Act and "physically handicapped family" means a family in which the head of the family, or his dependent, is physically handicapped. A person shall be considered physically handicapped if he has a physical impairment which:
 - (1) Is expected to be of continued and indefinite duration;
 - (2) Substantially impedes the ability to live independently; and
 - (3) Is of a nature that the ability could be improved by more suitable housing conditions.

See PGCC § 27-337 (a)(b)(1–4)(c).^{8, 9}

Applicant's Proposal

The Applicant wishes to construct a 215,378 square-foot four story, H-shaped building housing 118 condominium units. The net lot coverage will be 43.3%. The building height was reduced to 49 feet. *See* (6/24/2015, Tr. 80–81). The units will have the following breakdown: 8 studio units; 3 1-bedroom units; 69 2-bedroom units; and 38 2-bedroom units with den. *See* Ex. 35; (6/24/2015, Tr. 60).

Pursuant to PGCC § 27-568 of the Zoning Ordinance, the Applicant must provide .66 parking spaces per dwelling unit, or a total of 78 spaces. A few additional spaces are required for the office within the facility. One hundred and nine (109) spaces are provided in an underground parking garage and 48 surface parking spaces are provided, presumably for visitors. *See* Exhibit 93(c); (6/24/2015 Tr. 97–98). The Applicant's Site Plan indicates that eight (8) handicap parking spaces are provided and two (2) are van accessible. *See* Ex. 93(c). A loading space is required since there will be over 100 dwelling units. It was placed near the day care center to the north to avoid further impact to the adjacent dwellings to the south. *See* (6/24/2015, Tr. 94-95) The Police Department recommended that the loading space not be placed in the front of the facility adjacent to Cipriano Road since landscaping requirements would reduce visibility. *Id.* at 95.

A digital photometric plan was submitted and no foot candles will cross over Applicant's property lines. *See* Ex. 55; (6/24/2015, Tr. 80). Applicant also submitted several renderings of the

⁸ PGCC § 27-296(c) pertains to other submission requirements that must be submitted with the special exception application, none of which are at issue here.

⁹ Moreover, when a Special Exception is approved, any requirements or conditions deemed necessary to protect adjacent properties and the general neighborhood may be added to those of this Subtitle. *See* PGCC § 27-318.

proposed use and its elevations. *See* Ex. 54 and 55. The exterior will not have vinyl siding but a type of “fiber cement panel”, red wire cut brick and stone in order that the building be virtually maintenance free. *See* Ex. 47 and 48; (6/24/2015, Tr. 92).

The Applicant submitted a draft of the proposed covenants. *See* Ex. 3. They run to the benefit of the Maryland-National Capital Park and Planning Commission and indicate that all units will be occupied by an elderly or physically handicapped family. The covenants are required to remain in effect for a fixed term not less than twenty (20) years. *See* PGCC § 27-337.

No medical services or commercial kitchen will be provided. *See* (6/24/2015, Tr. 91–92). But the Applicant submitted sufficient evidence to establish that the use will serve the needs of the elderly families or physically handicapped families. Some of the amenities to be provided on site include:

- Activity courtyards overlooking environmental preserve areas
- Transportation services to shopping, local and planned distant activities
- Elevators
- Underground and surface parking
- An exercise room with equipment area and a space for dance/yoga, etc.
- A media library room
- A meeting room
- Sitting Porch
- An area to garden
- A five-foot wide sidewalk to connect throughout the site to Cipriano Road.

The building will be secure, designed with electronic locks and card readers, (an ability for visitors to be “buzzed” in), and a garage accessed by an electronic “reader.” *See* (6/24/2015, Tr. 98–99). The amenities offered to residents are valued at “over \$320,000.00.” *See* (6/24/2015, Tr. 89). In addition, existing amenities near the subject property include the Cipriano Square Shopping Center approximately ½ mile to the north, the larger Greenway Shopping Center

approximately 1 $\frac{3}{4}$ miles to the northwest, and a hospital to the south west.

Applicant's expert in acoustical engineering testified that a six-foot-high noise reducing fence will be constructed along the northern and southern property lines to reduce any negative impact upon the Themba Creative Learning Academy (to the north) and the homes along Magnolia Drive (to the south). A sample of the fencing material was provided. *See Ex. 67*. The fence will be an "AIL Turf-Barrier reflective sound wall" designed with a density "of more than four pounds per-square foot and able to withstand a considerable wind live load." *See Ex. 66(b), Appendix*.

The expert prepared noise impact analyses for the proposed use. Current noise levels on site were measured from two locations on May 14, 2015. *See Ex. 66(b), Aerial Inserts*. A computer model was developed to address noise that could emanate from the proposed garage door entry to the underground parking and its drive aisle, the garage exhaust which will be located near the northwest corner of the garage (used to draw exhaust fumes through a shaft that leads to the roof), air-conditioning units with condensers in a well in the roof of the facility, the loading area/trash collection to the north, and the emergency generator (to be located inside the eastern side of the building).

The expert explained that the Code of Maryland Regulations (COMAR) pertaining to noise exempts "noise from devices used solely for the purpose of warning, protecting, or alerting the public, or some segment thereof, of the existence of an emergency or hazardous situation." *See Ex. 66(b)*. The expert opined that this language would exempt back up beepers on any truck using the loading area. *See (8/4/2015, Tr. 106–107)*. COMAR also expressly exempts trash collections between the hours of 7 a.m. and 10 p.m. *See Ex. 66(b), Appendix; (8/4/2015, Tr. 107)*.

The expert further explained that his biggest concern with the project had been possible

noise from the garage door, given its proximity to the homes to the south of the site. The expert noted that the subject property being at a higher elevation “lowers the receiver height and it effectively increases the effective height of the barrier because the ... higher the barrier, the better it works.” *See* (7/23/2015, Tr. 47). The expert also recommended use of a rubberized vinyl door:

“The TNR door measured at 58 decibels at 10 feet So we bought ourselves a ... reduction which brings our calculated noise level down to 46. 46 is really quiet. Normal conversational speech ... at a distance of two or three feet is 65 decibels. So we’re well below that.” *See* (6/24/2015, Tr. 50).

The expert concluded that that the proposal will meet COMAR noise standards if the following criteria are met:

- The garage door must meet noise level of 64 dBA or less when measured at a distance of 10 feet such as those manufactured by Albany Door or the quieter TNR Doors. These doors include both metal and fabric type which are constructed to be very quiet.
- Speed limit on the drive aisle accessing the garage shall be restricted to 15 mph.
- The emergency generator shall be placed completely inside the building for its exhaust and supply air noise to meet COMAR standards at receiving property lines. This will be achieved with the use of critical exhaust mufflers, inlet and outlet air silencers, and a noise fence as necessary.
- The garage exhaust fan shall be designed to meet COMAR standards at receiving property lines.
- The noise fencing along the northern and southern property lines shall meet minimum acoustic standards of 31 STC such as those produced by AIL Sound Walls.
- Use of the loading area shall be limited to the following schedule:

Monday through Friday — 7:00 AM to Noon

Saturday and Sunday — 9:00 AM to 2:00 PM. *See* Ex. 66(b), p. 6.

Finally, the expert testified that “[t]he traffic noise impacting the front of the building

is below 65 dBA Ldn therefore the building does not warrant special mitigation to meet guidelines of 45 dBA Ldn for interior noise levels.” *See* Ex. 66(b), p. 6. The Applicant will install signage to indicate that the maximum speed in the drive aisle entering and exiting the garage will be 5 miles per hour to further reduce the possibility of vehicular noise on site. *See* (7/23/2015, Tr. 51–52).

The stormwater concept plan provides as follows:

Concept Narrative: In accordance with Environmental Site Design (ESD), MDE SWM Design Manual Chapter 5, a comprehensive design approach utilizing strategies that replicate natural hydrology was utilized for storm water management at the site.

The site is located ½ mile northeast of the intersection of Cipriano Road and Good Luck Road. The subject site...consists of forested area (4.4 acres) and a large lawn area surrounding the existing building (1.61 acres). The site also includes 100 year floodplain area and wetlands on the east side of Bald Hill Branch. The proposed improvements will include development of a condominium complex with 118 condos, and 50 surface parking spaces with drop off facilities. The proposed improvements will add approximately 1.76 acres of new impervious area. Proposed improvements will not have any impact to the 100- year floodplain and floodplain buffer and non-tidal wetlands. A natural resources inventory/forest stand delineation study of the subject site has established that there are no steep slopes and other natural resources within the footprint of the proposed development. The proposed improvement will impact the existing forest which will be compensated by reforestation and/or fee-in-lieu. A detail FSD plan will be submitted to address any forest obligation.

The natural conveyance of storm runoff through existing site comprises of sheet flow on the west of Bald Hill Branch and open and closed storm systems on the east side of Bald Hill Branch. All proposed improvement will be on west side of Bald Hill Branch. There will be no impact on the east side of Bald Hill Branch. On the west side of Bald Hill Branch runoff sheet flows from Cipriano Road to the Bald Hill Branch through existing floodplain buffer and forest area. In proposed conditions, the runoff through this development is conveyed to the proposed bioretention facility which in turn outfalls the filtered runoff to the existing floodplain buffer and forest area. The outfall from bio-retention facilities and closed storm drain systems will outfall as concentrated flow and the flow will spread out within a short distance and maintain existing sheet flow condition. Thus, there will be no change in the overall drainage pattern.

The site design promotes the development of the condominiums with one direct

access from Cipriano Road and thus minimizes additional impervious areas. The proposed improvements will include one drop-off facility and one access road to loading and unloading areas located in the south side of the proposed buildings. This design ensures that the impervious areas created are minimum. In addition proposed design also includes grass median in the surface parking area and drop-off areas. Unnecessary connections necessitating the requirements of private drives and walkways that generate additional impervious areas are minimized. All the runoff from the proposed buildings are conveyed to the bio-retention facilities via roof drain and closed storm drain systems. All parking and driveways are conveyed to the proposed bio-retention facilities and pervious pavements via sheet flow. ESD to MEP is provided for proposed improvements.

The grading patterns in rough grading mimic the final grading; this practice ensures that the land disturbance occurs once and once stabilized will not require additional disturbance. Super Silt fence is proposed along the floodplain buffer as shown in the concept erosion and sediment control plan. Super Silt fence will capture all sediment laden runoff that sheet flows from Cipriano Road to the east during rough and final site gradings.... *See Ex. 17(b).*

The Applicant's land use expert testified that the Application satisfied all applicable provisions of the Zoning Ordinance. The expert opined that the height of the building would not negatively impact the neighboring homes. *See (7/23/2015, Tr. 237–238).* As such, the Applicant avers that the proposed use will be in conformance with the applicable provisions of the Zoning Ordinance. The Applicant also noted that it agrees with all of the conditions of approval recommended by the Technical Staff with a slight amendment to a recommended condition concerning a shuttle schedule for transporting the residents. *See (7/24/2015, Tr. 61).* The Applicant would prefer a note be added that simply stated that shuttle service will be provided. *See Ex. 50.*

Citizen Opposition

The Opposition's primary concerns with the proposal is the mass/height of the building, the location of the entrance to the underground parking facility, and the impact that

construction on site may have on stormwater runoff and the floodplain in the area. The building is seen as too large for the site. As noted above, it is four stories above ground with a below ground parking garage. The proposed facility will only be approximately 51 feet from its southern property line. The closest home to the south is only approximately 67 feet from the facility. Although landscaping will provide some screening when the trees are fully grown, residents of the apartment building on the third and fourth floors on the southern portion of the building will be able to see into the yards and northern facing windows of those homes. Cars accessing the underground parking will be entering the garage fairly close to those homes. The opposition therefore believes this will adversely affect their privacy rights, health and safety.

The Opposition expert in land use planning prepared a report and Power Point on his review of the instant request. *See* Ex. 84 and 85. The expert opined that the request did not satisfy all applicable provisions of law. He offered the following in support of his opinion:

The staff report states... the use itself is residential in character. However, the 61-foot-high multifamily apartment building in the middle of a single-family neighborhood does not fit within the scale of the neighborhood.... This staff finding [is] unsupportable due to the following facts:

- The proposed building of 215,000 square feet is approximately ... 112 times larger in floor area than the homes adjacent to the site or located in the neighborhood. In fact, assessment data within the neighborhood places the average home size at less than 2,000 square feet.
- At 118 units, the density for this project eclipses the number of units per acre for other elderly and handicapped senior housing projects involving special exceptions considered by the County, regardless of the zone in which they were located. The proposed density of 19.63 units per acre, or 26 units per “buildable” acre is substantially higher than any project heard as a special exception, that was approved, approved with conditions, or disapproved. Even the one with the highest density and smallest acreage (Trinity Terrace) (SE-4419) only had a height of 38.5 feet, 22.5 feet shorter than the Bhagya Village project at 61 feet.
- The shear mass of the building will dwarf homes in the neighborhood and tower over adjacent residences on Magnolia Drive. *See* Ex. 84.

The Opposition met with the Applicant on several occasions prior to the hearings before ZHE. Opposition provided lists of conditions to address some of their concerns. *See* Ex. 35, pp. 108–111, 118; Attachment to Exhibit 51(b). Applicant also submitted proposed conditions that addressed many of those raised by the Opposition. For example, it did suggest the addition of noise fencing, additional landscaping and changes to the garage to address concerns about noise, headlight glare, and vehicle exhaust from cars entering the underground parking area. The loading space will only be used during certain hours to reduce any impact on the children attending the Themba Creative Learning Center. Applicant did not increase the size of the landscape yard to the south, but did increase the size of the proposed plant material to better buffer its building. It agreed to conditions to lessen the possibility of flooding the homes to the south along Magnolia Drive, and will grade an area to the north east to lessen any stormwater runoff onto Themba Creative Learning Center property. *See* Ex. 51(b). At the time of these meetings, Applicant would not consider a revision to its building to reduce size or height.

Maryland Case Law

In *Schultz v. Pritts*, 291 Md. 1, 15 (1981), the Court of Appeals described the required analysis for special exceptions as follows:

These cases establish that a special exception use has an adverse effect and must be denied when it is determined from the facts and circumstances that the grant of the requested special exception would result in an adverse effect upon adjoining and surrounding properties unique and different from the adverse effect that would otherwise result from the development of such a special exception use located anywhere within the zone. Thus, these cases establish that the appropriate standard to be used in determining whether a requested special exception 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 at the particular location proposed would have any adverse effect above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.

In subsequent cases, the Court of Appeals has explained that the *Schultz* comparison for

special exception does not entail a comparative geographical analysis which weighs the impact at the proposed site against the impact the proposed use would have at all other sites within the zone. *People's Counsel for Balt. Cnty. v. Loyola Coll. in Md.*, 406 Md. 54, 100-01 (2008). Rather, this comparison “is focused entirely on the neighborhood involved in each case.” *Id.* at 102. Accordingly, even though a special exception use may have some adverse effects on the surrounding area, “the legislative determination necessarily is that the use conceptually are compatible in the particular zone with otherwise permitted uses and with surrounding zones and uses already in place, provided that, at a given location, adduced evidence does not convince the [zoning agency] that actual incompatibility would occur.” *Id.* at 106.

In *Loyola*, the Court of Appeals concluded its analysis of the *Schultz* test as follows:

With this understanding of the legislative process (the “presumptive finding”) in mind, the otherwise problematic language in *Schultz* makes perfect sense. The language is a backwards-looking reference to the legislative “presumptive finding” in the first instance made when the particular use was made a special exception use in the zoning ordinance. It is not a part of the required analysis to be made in the review process for each special exception application. It is a point of reference explication only.

Id. at 106-07.

As the Court of Appeals explained in *Montgomery County v. Butler*, 417 Md. 271, 305 (2010), (quoting *Schultz*, supra, 291 Md. at 11), “[i]f [the applicant] shows...that the proposed use would be conducted without real detriment to the neighborhood...[the applicant] has met his burden.”¹⁰ Once the applicant meets this threshold, the local zoning board will “ascertain in each case the adverse effects that the proposed use would have on the specific, actual surrounding area.”

¹⁰ The phrase detriment to the neighborhood implies necessarily that the Board’s task is to determine if there is or likely will be a detriment to the surrounding properties. These requirements also are imposed by PGCC § 27-317 (a) (4) and (5). PGCC § 27-108.08.01(a)(9) defines “area” in this context as: “Unless otherwise specified, an ‘area’ of land means ‘contiguous area.’”

Id. (citing *Schultz*, *supra*, 291 Md. at 11). The Court of Appeals has noted that, “‘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 functioning of the comprehensive plan, a denial of an application for a special exception is arbitrary, capricious and illegal.’” *Loyola*, *supra*, 406 Md. at 83 (quoting *Turner v. Hammond*, 270 Md. 41, 55 (1973)).

Based on the contested record, we concur with the ZHE that the Applicant must design a smaller building with a larger setback found that to minimize adverse impact on adjacent property owners.¹¹ See ZHE’s Disposition Recommendation, p. 16–17. At oral argument, the Applicant and Opposition proposed a series of written conditions of approval, which include a reduction of the proposed building from four (4) stories to three (3) stories as recommended by the ZHE. The parties’ written conditions of approval also address appropriate building setbacks and revisions to TCP 2-008-14-01, which all satisfy required findings for approval we must make pursuant to PGCC §§ 27-317 and 27-337. Therefore, we find that a remand to the ZHE is not necessary for us to approve S.E. 4749 and TCP 2-008-14-01 because the ZHE already found, based on the contested record, that a smaller building with a larger setback would minimize adverse impact on adjacent property owners. See *O’Donnell v. Bassler*, 289 Md. 501, 510, 425 A.2d 1003, 1008 (1981) (there is no need to remand if the remand would be futile).

In light of the written proposed conditions of approval submitted by the Applicant and

¹¹ The ZHE recommended denial of S.E. 4749 because she found that the Applicant “must design a smaller building with a larger setback from adjacent properties, to minimize adverse impact upon those landowners.” See ZHE’s Disposition Recommendation, p. 16–17. The ZHE also recommended denial of S.E. 4749 because she opined that S.E. 4749 is not in furtherance of the 2010 Sector Plan’s guidelines for residential development for the property. As we previously stated, despite the purposes of the R-80 Zone and the Sector Plan’s guidelines for residential development for the property, apartment housing for elderly or physically handicapped families are permitted uses by special exception in the R-80 Zone. See PGCC § 27-337. The required finding we must make is not whether the proposed special exception furthers the Plan’s guidelines for residential development; instead, we must find whether S.E. 4749 *will substantially impair the integrity* of 2010 Sector Plan. See PGCC § 27-317(a)(3) (Emphasis added).

Opposition, we find that the proposed use in Special Exception 4749 and Tree Conservation Plan 2-008-14-01—to use approximately 6.01 acres of R-80 (One-Family Detached Residential) zoned land as apartment housing for the elderly or physically handicapped families located on the east side of Cipriano Road, approximately 2,640 feet north of the its intersection with Good Luck Road, and identified as 6711 Cipriano Road, Greenbelt, Maryland, in Councilmanic District 4—will be conducted without real detriment and thus have no adverse impact to the specific, actual surrounding neighborhood. Because we find that a smaller building with a larger setback would minimize adverse impact on adjacent property owners the proposed, we also find that S.E. 4749 *will not substantially impair the integrity* of 2010 Sector Plan.

WHEREAS, as expressly authorized by the Regional District Act within Titles 22 and 25 of the Land Use Article of the Annotated Code of Maryland, and Subtitle 27 of the Prince George’s County Code, we conditionally approve the S.E. 4749 and TCP 2-008-14-01.

NOW, THEREFORE, BE IT ORDAINED AND ENACTED:

SECTION 1: S.E. 4749 and TCP 2-008-14-01 to use approximately 6.01 acres of R-80 (One-Family Detached Residential) zoned land as apartment housing for the elderly or physically handicapped families located on the east side of Cipriano Road, approximately 2,640 feet north of the its intersection with Good Luck Road, and identified as 6711 Cipriano Road, Greenbelt, Maryland, in Councilmanic District 4, is hereby conditionally APPROVED.

SECTION 2: In order to protect adjacent properties, the surrounding neighborhood, and to enhance the overall structure of the building, approval of the proposed special exception and tree conservation plan is subject to the following conditions:

1. Site plans submitted in S.E. 4749 and TCP 2-008-14-01 shall be revised for approval by the ZHE as follows:
 - a. The total number of residential units shall be reduced from a total

of 118 units to a total of 89 units.

- b. The building shall be reduced from four (4) stories to three (3) stories with a fourth floor “penthouse” containing no more than twelve (12 \pm) units located inside the building footprint.
 - c. The building shall be placed twenty two (22 \pm) feet further away from the southern property line.
 - d. The building shall be placed twenty three (23 \pm) feet further away from the eastern property line.
 - e. The total number of surface parking spaces in front of the building shall be reduced to a maximum total of thirty seven (37) surface parking spaces.
 - f. The total number of garage parking spaces shall be reduced by thirty five (35) parking spaces for a maximum total of ninety five (95) garage parking spaces.
 - g. The architectural plans shall be revised consistent with these conditions and shall utilize the same colors and materials as shown on the submitted architectural plans.
 - h. Ten (10) evergreens will be added to the landscape plan at the eastern side of the property to provide a total of eighteen (18) evergreens along the eastern side of the building.
2. The site and landscape plans shall be revised to include the following:
- a. Update the sight-tight fencing detail to show the proposed ground plane, and avoid gaps in screening that might occur under the fence.
 - b. Update the required building restriction line (BRL) and landscape yard delineations along the southern property line consistently with the requirements of the 2010 *Prince George's County Landscape Manual*.
 - c. Include the building height, in feet, within the building footprint on the site and landscape plans.
3. Prior to Type 2 tree conservation plan (TCP2) approval, the TCP2 shall be revised as follows:
- a. Add the Environmental Technical Manual standard notes

pertaining to specimen trees, off-site woodland conservation, and management of Virginia pines on the TCP2 plan.

- b. Add an invasive species plan to the TCP2 that specifies what measures will be implemented on-site regarding the management and control of invasive species identified on-site in the forest stand delineation report.
 - c. Replace the TCP2 approval block on the plan with the correct TCP2 approval block for this application.
 - d. Remove the specimen tree sign detail and root pruning details located on Sheet 2 of the TCP2.
4. Prior to certification of the special exception, the final stormwater management plan, special exception plan, and Type 2 tree conservation plan shall be revised as necessary to be consistent with one another. The trial and bench shown on the concept plan with the woodland preservation area shall not be shown on the final stormwater management plan.
 5. Prior to certification of the Type 2 Tree Conservation Plan, a copy of the erosion and sediment control concept plan shall be submitted.
 6. Prior to certification of the special exception, the following corrections shall be required:
 - a. Provide the square footage of the existing gross floor area on the site in the general notes.
 7. Prior to issuance of the first building permits, the applicant and the applicants heirs, successors, and/or assignees shall provide a financial contribution of \$210 to the Prince George's County Department of Public Works and Transportation (DPW&T) for the placement of bikeway signage along Cipriano Road, unless modified by DPW&T of the Prince George's County Department of Permitting, Inspections and Enforcement (DPIE).
 8. Dead and/or hazardous (in danger of falling) trees located in the area adjacent to Cipriano Road and the Themba Creative Learning Center Shall be removed.
 9. Dead and/or hazardous (in danger of falling) trees located on the subject property adjacent to the homes on Magnolia Drive shall be removed.
 10. Use of the loading space will be restricted to 7 AM to noon, Monday through Friday, and 9 AM to 2 PM on weekends.
 11. Trash trucks shall be scheduled to service the property during the hours of 8 AM to 5 PM.

12. Outside lighting fixtures will be designed to prevent light from spilling onto adjacent properties.
13. The permeable pavement and micro-bioretenention facilities shall include perforated under drain pipes that collect and convey infiltrated water to the storm drain system.
14. The permeable pavement and micro-bioretenention facilities shall include an impermeable clay liner to prevent the infiltration of water.
15. A yard inlet and a drainage ditch shall be installed in the landscape buffer on the southern edge of the property to collect surface runoff and prevent it from reaching the adjacent homes on Magnolia Drive.

SECTION 2: This Ordinance shall take effect on the date of its enactment.

Enacted this 14th day of March, 2016, by the following vote:

In Favor: Council Members Davis, Franklin, Glaros, Harrison, Lehman, Patterson, Taveras, Toles and Turner.

Opposed:

Abstained:

Absent:

Vote: 9-0

COUNTY COUNCIL OF PRINCE GEORGE'S
COUNTY, MARYLAND, SITTING AS THE
DISTRICT COUNCIL FOR THAT PART OF THE
MARYLAND-WASHINGTON REGIONAL
DISTRICT IN PRINCE GEORGE'S COUNTY,
MARYLAND

By: _____

Derrick L. Davis, Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council