

Item 4 - Correspondence

From: [joy](#)
To: [MCP-Chair](#)
Cc: ["David Brown"; rick@magginconstruction.com](#)
Subject: Hearing Testimony and exhibits - October 29 hearing
Date: Wednesday, October 28, 2020 2:08:45 PM
Attachments: [David Brown Hearing Testimony with two exhibits.pdf](#)

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Dear Chair Office,

David Brown has signed up to testify regarding Item 4 "Proposed Zoning Text Amendment" on October 29, 2020. Please find attached his written testimony, including two exhibits. Please distribute this testimony as necessary. Thank you.

Sincerely yours,

Joy Noel Johnson
Office Administrator

KNOPF & BROWN
401 E. Jefferson Street
Suite 206
Rockville, MD 20850
Phone (301) 545-6100
Cell (240) 630-9800
Fax (301) 545-6103
lawfirm@knopf-brown.com

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TESTIMONY OF
GREATER SOUTH GLEN NEIGHBORHOOD ASSOCIATION
BEFORE THE
MONTGOMERY COUNTY PLANNING BOARD
ON PROPOSED ZTA TO DEFINE
CONTINUING CARE RETIREMENT COMMUNITY
October 29, 2020

Chair Anderson and Members of the Board, good morning. I am David Brown, counsel for the Greater South Glen Neighborhood Association. The Association has asked me to explain to you their reasons why you should decline to forward the draft ZTA to the Council for introduction as a proposed ZTA. I regret not getting this opposition testimony to you earlier, but the private land use attorneys who are the motive force behind this proposal did not see fit to share it with me at any point, even though they were well aware of my involvement in exposing the invalidity of a conditional use application for independent senior living in the South Glen neighborhood of Potomac, which this ZTA is apparently designed to validate. They had good reason to keep me in the dark. It effectively denied me the opportunity to explain to your staff in advance of the preparation of their supporting memorandum why this proposal is an intentionally confused mess that should never get off the ground for the short flight from Wheaton to Rockville.

At the most basic level, the proposal fails both subparagraphs (2) and (3) of the requirements for a ZTA proposal, as spelled out in Council Resolution 18-48 (Jan. 27, 2015), Appx. B-1 to the Zoning Ordinance, i.e., the Process for the Introduction and Consideration of ZTA's:

(2) A statement of the problem that the amendment addresses and the reasons for the amendment;

(3) The effect of the proposed amendment on existing law and procedures.

What is the Problem?

Staff states that “[t]he overall intent of the ZTA is to clarify that ‘stand-alone’ units are permitted as part of a senior living project that includes independent living and assisted living care.” This “clarification” problem is ostensibly cured by adding a definition to the Ordinance for “Continuing Care Retirement Community” (“CCRC”). This makes no sense for multiple reasons.

First, genuine CCRC’s are closely regulated under State law by the Maryland Department of Aging. It makes no sense to define a CCRC for zoning purposes that does not track State law requirements for licensing and operation. **Exhibit 1** is a two-page excerpt from the Department’s website describing what a CCRC is and how it is regulated. It explains that there are 38 operating and approved CCRC’s in Maryland, and that they all have three features in common: (1) an entrance fee that is at least three times the monthly fee; (2) housing and health related services for those over 60; and (3) a contract that lasts for more than a year, and typically for life. CCRC’s must be registered with the Department and the contracts CCRC’s make with their residents must be on Department-approved forms with specified terms. Md. Ann. Code, Human Services Art., Title 10, Subtitle 4. The proposed CCRC definition in the ZTA bypasses all of this, leaving open the possibility that some “senior living project” that purports to be, but is not, a genuine CCRC would be allowed to be built. Indeed, as will explain, that is the real purpose of the ZTA.

Second, staff points out that CCRC’s may include independent dwelling units, because that possibility is expressly mentioned in the Ordinance, where CCRC’s are considered just one of

several types of “Residential Care Facility.” So it is hardly necessary to add a CCRC definition, but the only even arguable “clarification” that makes sense is to expressly incorporate the State law definition of CCRC into the Zoning Ordinance. If that were done, one might consider adding language identifying the kinds of living units that may be included in the CCRC. On this point, the staff report appears unaware of prior analysis of exactly this point in a May 2018 Study published by the Board, entitled “Meeting the Housing Needs of Older Adults in Montgomery County.” **Exhibit 2** is an excerpt. It differentiates among the types of age-restricted housing, and describes CCRC’s as follows:

CCRC: A Continuing Care Retirement Community (CCRC) provides long-term uninterrupted care that includes independent living units, residential care/assisted living services, and skilled nursing care, usually in one location. CCRCs allow residents to age in place as they typically sign a contract for lifetime care. CCRCs are often the most expensive retirement option.

Id. at 15. The Study goes on to note that there are eight CCRC’s in the County, “totaling approximately 2,880 independent living units, 530 assisted living units and 850 nursing home beds.” Id. at 16.

Third, even aside from the lack of a statutory ambiguity in the Zoning Ordinance, there is certainly no need to “clarify” that “stand-alone” independent living units can be included in a CCRC. As detailed above, such units are a common, if not predominant feature of existing CCRCs in the County. So one is left wondering, why is a clarification being proposed when none is needed? The answer lies in explaining what the staff report fails to candidly address: the effect of the proposed change on existing law.

What is the Effect on Existing Law?

Instead of directly addressing how the proposed change would impact existing Ordinance provisions, the staff report muddies the waters considerably with use of the term “senior living

project.” That is not a term found anywhere in the Zoning Ordinance. There are two different conditional uses being conflated with this term: “Independent Living Facility for Seniors” and “Residential Care Facility,” the latter of which includes CCRC’s whereas the former does not. This conflation appears intended to allow the “Independent Living Facility for Seniors” use to be broadened to include “stand alone” units because a facility with such units will then fit within the gerrymandered definition of CCRC proposed in the ZTA. The change would open the door to the rebranding as a CCRC a project that is primarily devoted to “stand alone” independent living units, a project that would not today pass muster as an “Independent Living Facility for Seniors.”

To see this effect of the proposed ZTA most clearly, consider what happened in the past year in the Heritage Gardens case, CU-19-09. The attorneys now behind the current ZTA proposal sought to have the Hearing Examiner approve the construction of 51 “Independent Living” units for seniors in the form of 11 triplexes and 9 duplexes, in the South Glen area of Potomac where the zoning is two-acre single-family detached, i.e., RE-2. Each of the 51 5656-7588 sq. ft. units, each with a double garage (which would have sold for well in excess of \$1 million), would be owned in fee simple by a senior, who had no obligation to make use of what would amount to concierge-arranged senior services emanating from a community clubhouse, the operator of which would also control the common areas not deeded to the 51 owners. In other words, except for sheer magnitude of the huge duplexes and triplexes, the form and substance of the project was very much along the lines of a townhouse project normally found in multiple-family residential zones with common space amenities, with an optional senior citizen orientation. I filed a motion to dismiss claiming, among many other defects, that the proposed development, rather than being a building or group of buildings devoted to communal living by seniors, was in reality an end run around the prohibition of townhouses, duplexes and triplexes in the RE-2 zone, designed to double

or triple the allowed density of the land via an age restriction. Apart from that, the project made no sense as a regulated conditional use: there would have to be 52 holders of the one conditional use, with no clear line of responsibility for compliance with whatever conditions were seen fit to be imposed by the Hearing Examiner. In the end, before the Hearing Examiner could rule definitively on the motion to dismiss, the attorneys for the developer—attorneys who in the attachment to today’s staff report style themselves as representing “a wide-array of senior living providers”—withdrew the application.

If their proposed ZTA is enacted, about the only modification that would have to be made to the Heritage Gardens project for it to meet the proposed CCRC definition is to add a handful of assisted living units to the clubhouse with a commercial kitchen and small dining area for meals. This would be squarely at odds with the whole CCRC concept: such a community is not a place for fee simple ownership of “stand alone” units; as detailed above, the concept is for the whole facility to be owned and operated by a single operator, who is accountable for conditional use compliance. Senior citizens who wish to relocate to a CCRC are putting homeownership issues, demands and challenges behind them, in favor of a simpler life that includes an end-of-life continuity of care, starting, in many cases, with independent living, but never with home ownership in the traditional sense.

Conclusion

This proposed ZTA falls squarely within the maxim, “If it ain’t broke, don’t fix it.” “Stand alone” units have a meaningful place in a genuine CCRC, but not in an imitation CCRC where property ownership is divided between the CCRC and its residents, and not in an “Independent Living Facility for Seniors,” which is all about communal living—what the Zoning Ordinance describes as “Group Living,” as opposed to “Household Living.” The proposal does not meet the

requisite requirements set forth in Council Resolution 18-48 of having both a meaningful purpose and no deleterious effect on the rest of the Zoning Ordinance. It should not be forwarded to the Council for introduction and consideration.

Continuing Care Retirement Communities



As of January 1, 2020, there are **38 operating or approved continuing care retirement communities**, known as CCRCs, in Maryland. The CCRCs, both operating and under construction, contains over 16,000 continuing care units, of which over 12,000 are independent living, over 2,000 are assisted living, and over 2,000 are nursing care.

The Maryland Department of Aging is the agency charged with administering the continuing care laws. The primary continuing care laws are located at Title 10, Subtitle 4, of the Human Services Article ("HSA"), Annotated Code of Maryland, and Code of Maryland Regulations (COMAR) 32.02.01, which can be accessed below under the "General Information" section.

Although the legal definition of "continuing care" is complex, in general, "continuing care" exists when all three of the following are present:

1. The consumer pays an entrance fee that is, at a minimum, three times the average monthly fee;
2. The provider furnishes or makes available shelter and health-related services to persons 60 years of age or older; and
3. The shelter and services are offered under a contract that lasts for a period of more than one year, usually for life.

The contract that is entered into between a CCRC provider and a resident is known as a continuing care agreement. Continuing care agreements are legally binding contracts between the provider and the resident that outline the responsibilities between the provider and the resident. Only a portion of the content of continuing care agreements is regulated by continuing care laws. Much of the content of the continuing care agreements will vary from community to community, as does the scope of the continuing care offered at these communities. For example, some CCRCs may provide full coverage nursing care in an on-site health center at no additional charge to the resident, while other CCRCs may provide priority admission to a nursing facility on a fee-for-service basis.

Exhibit 1

Entrance fees and monthly fees also vary widely. Generally, these fees are based on the level of care (independent living, assisted living, or nursing care), size of the unit, number of residents living in the unit, and type of contract entered into. Depending on the provider, these fees may or may not cover a wide range of services.

There is financial risk involved in choosing a CCRC, as large sums of money are paid in advance for future services. Also, some continuing care agreements provide for a refundable entrance fee, which may require that the unit be reoccupied (and, possibly, that a new entrance fee be paid by the new occupant) before a refund is paid. There is a risk that these units may not be reoccupied (or a new entrance fee may not be paid) in a timely manner.

The Department urges anyone who is considering moving into a CCRC to consult with an attorney and a financial advisor familiar with these types of agreements before signing any documents.

For additional information, please see the tabs below.

CCRC General Information



General Information

For Consumers

For Providers

Contact Us

Equal Employment Opportunity

Privacy

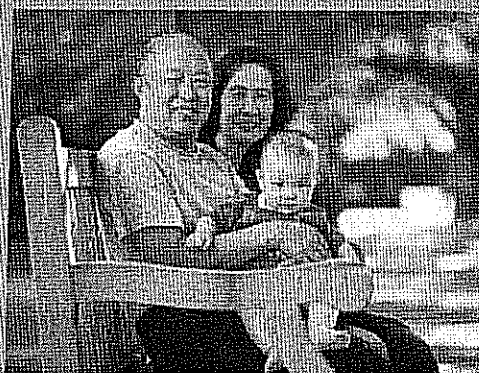
Accessibility

301 West Preston Street Suite 1007, Baltimore, MD 21201

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Meeting the Housing Needs of Older Adults in Montgomery County



Montgomery Planning M-NCPPC

May 2018



Lisa Sturtevant
& Associates, LLC



Exhibit 2

Neighborhood Fundamentals, LLC



Types of Age-Restricted Housing

Independent Living: Age-restricted rental properties for those 55 or 62 or older, either at market rate or subsidized rents. Subsidized independent living in this study is classified as properties receiving financial support from Public Housing, Section 8, Section 202, Section 236, Low Income Housing Tax Credits (LIHTC), or Montgomery County Moderately Priced Dwelling Units (MPDU) programs.

Active Adult Homeownership: Real estate developments that offer independent, relatively maintenance-free living to residents 55 and older. These communities can be either age restricted or age targeted and offer either single-family homes or condominiums for purchase and are not equipped to provide increased care or health-related services.

Assisted Living: Residential or facility-based programs that provide housing and supportive services, supervision, personalized assistance, and/or health-related services to meet the needs of residents who are unable to perform or need assistance in performing activities of daily living. Assisted living is a way to provide care to people who are having difficulty living independently, but do not need the daily nursing services provided in a nursing home. Assisted living units in this study are defined as those with greater than 16 assisted living units as licensed by the Maryland Department of Health.

Group Homes: A group home for the elderly is a community-based residential program for three to 16 unrelated individuals that provides housing, supportive services, supervision, personalized assistance, and/or health-related services. Group homes must be licensed as assisted living facilities by the Maryland Department of Health. Group Homes in this study are defined as assisted living facilities licensed by the Maryland Department of Health with 16 or fewer units/beds. Sites with multiple houses at adjacent addresses have been combined; therefore, some group homes may show more than 16 units.

Nursing Homes: Nursing homes provide care for individuals of all ages needing 24-hour nursing care or assistance. Individuals or families typically seek nursing home care when it is no longer possible to care for a person at home safely or when the needs of the individual become so complex they cannot be provided in the home. Nursing homes included in this study are licensed as nursing facilities or long-term comprehensive care facilities by the Maryland Department of Health.

CCRC: A Continuing Care Retirement Community (CCRC) provides long-term uninterrupted care that includes independent living units, residential care/assisted living services, and skilled nursing care, usually in one location. CCRCs allow residents to age in place as they typically sign a contract for lifetime care. CCRCs are often the most expensive retirement option.

Leisure World includes a range of housing types and prices, from relatively inexpensive condominiums and patio homes to higher cost townhomes and single-family detached homes.

The average age range of an active adult community resident such as Leisure World is late 70s. Active adult communities do not offer long-term care or assisted living, though residents and their families may seek outside help, at their discretion and expense, when the need arises. These communities often have on-staff social workers who can assist with connecting residents to outside services, including home healthcare and meal delivery.

Assisted Living

Assisted living is a type of long-term care facility for those who are able to generally live on their own but who may need help with some activities of daily living (ADL), or simply prefer the convenience of having their meals in a central cafeteria and having nursing staff on call. The average age range of an assisted living resident is mid- to late-80s. Residents typically need help with at least two ADLs, and often have one or more chronic conditions, like osteoporosis or high blood pressure. The majority of assisted living residents move into these facilities from their own homes, although some move into an assisted living facility from a hospital stay or a nursing rehabilitation facility.^{xvii}

Assisted living facilities in Maryland are licensed to provide up to three levels of care. Assisted living units in this study are defined as buildings with 16 or more units and licensed at least to "level one" care by the Maryland Department of Health.^{xviii}

There are an estimated 27 assisted living facilities in Montgomery County, totaling

approximately 2,000 units. Nearly all of the County's assisted living facilities are market rate.

Group Homes

There are approximately 178 group homes in Montgomery County, defined as assisted living facilities with fewer than 16 units, totaling around 1,380 beds. Group homes are the most geographically widespread senior housing facility type with locations throughout all of the populated regions of the county, with a cluster collocating around Leisure World. The Germantown and Gaithersburg areas to the northwest have a significantly lower number of group homes and assisted living facilities than other parts of the County.

Continuing Care Retirement Communities

CCRCs provide long-term, uninterrupted continuing care that includes independent living units, residential care/assisted living services, and skilled nursing care, usually in one location. Residents typically sign a contract for lifetime care. Eight CCRC facilities exist in Montgomery County, totaling approximately 2,880 independent living units, 530 assisted living units, and 850 nursing home beds. The largest of these facilities is Asbury Methodist Village in Gaithersburg and Riderwood Village on the southeast border of Montgomery County. Riderwood Village is located partially in Prince George's County.

- Data Sources:
 - Maryland Department of Health Office of Health Care Quality (OHCQ) Licensee Directory, Assisted Living Programs October 2017¹¹².
 - Senior Housing Inventory and Analysis Report 2006, Maryland-National Capitol Park and Planning Commission (M-NCPPC)¹

Group Homes: A group home for the elderly is a community-based residential program for three to 16 unrelated individuals that provides assisted living services that include housing, supportive services, supervision, personalized assistance, and health-related services. Group homes must be licensed as assisted living facilities by the Maryland Department of Health. Group Homes in this study are defined as assisted living facilities licensed by the Maryland Department of Health with 16 or less units/beds. Sites with multiple houses at adjacent addresses have been combined (some homes may show more than 16 units).

- Data Sources:
 - Maryland Department of Health Office of Health Care Quality (OHCQ) Licensee Directory, Assisted Living Programs October 2017³
 - Senior Housing Inventory and Analysis Report 2006, Maryland-National Capitol Park and Planning Commission (M-NCPPC)¹

Nursing Homes: Nursing homes provide care for individuals of all ages needing 24 hour nursing care or assistance. Individuals or families typically seek nursing home care when it is no longer possible to care for a person at home safely or when the needs of the individual become so complex they cannot be provided in the home. Nursing home residents usually have complex medical and assistance needs requiring 24 hour care. Nursing homes included in this study are licensed as nursing home or long term comprehensive care facilities by the Maryland Department of Health.

- Data Sources:
 - Maryland Department of Health Office of Health Care Quality (OHCQ) Licensee Directory, Comprehensive Care Facilities and Extended Care Facilities Nursing Homes October 2017³.
 - Senior Housing Inventory and Analysis Report 2006, Maryland-National Capitol Park and Planning Commission (M-NCPPC)¹

CCRC: A Continuing Care Retirement Community (CCRC) provides long-term uninterrupted care that includes independent living units, residential care/assisted living services, and skilled nursing care, usually in one location, and usually for a resident's lifetime. CCRCs allow residents to "age in place" as they typically sign a contract for lifetime care. CCRCs are often the most expensive retirement option.

- Data Sources:
 - Senior Housing Inventory and Analysis Report 2006, Maryland-National Capitol Park and Planning Commission (M-NCPPC)¹
 - Maryland Department of Health Office of Health Care Quality (OHCQ) Licensee Directory, Comprehensive Care Facilities and Extended Care Facilities Nursing Homes October 2017³
 - Maryland Department of Health Office of Health Care Quality (OHCQ) Licensee Directory, Assisted Living Programs October 2017³

¹¹² <https://health.maryland.gov/ohcq/Pages/Licensee-Directory.aspx>

From: [Susanne Lee](#)
To: [Coello, Catherine](#)
Cc: [Neam, Dominique](#); [Olson, Shannon](#); [David Brown](#)
Subject: Re: Teams Invite & Planning Board Info
Date: Wednesday, October 28, 2020 3:44:33 PM
Attachments: [Advice on Residential Care Facilities.pdf](#)

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Whew - thank you so very much. For sure I think I will be able to participate now. Also attached is an exhibit I will be referring to. I know it is past the deadline to submit written testimony but this is an important document that is key to the discussion so I am hoping that it can be shared with the Planning Board.

Thanks again.

Susanne Lee

From: Coello, Catherine <catherine.coello@mncppc-mc.org>
Sent: Wednesday, October 28, 2020 3:34 PM
To: Susannelee1@hotmail.com <Susannelee1@hotmail.com>
Cc: Neam, Dominique <Dominique.Neam@mncppc-mc.org>; Olson, Shannon <shannon.olson@mncppc-mc.org>
Subject: Teams Invite & Planning Board Info

Good afternoon Ms. Lee,

Following up on our phone call, I am resending the Teams invite. Please use the link highlighted below to join the Planning Board meeting via Teams. As requested, here is the information to call into the meeting just in case:

Dial the phone number: **+1 443-961-1463**

Enter Conference ID: 307 241 416#

Please see further below for additional details regarding the meeting tomorrow.

Agenda #4 Proposed Zoning Text Amendment: Residential Care Facility: Continuing Care Retirement Community

- **Please join the call at 9:40AM for setup.** The meeting will begin live streaming at 10AM.
- Mute yourself when you are not talking.
- Please use your webcam when you are speaking or being spoken to.
- Send copies of all exhibits to dominique.neam@mncppc-mc.org or mcp-chair@mncppc-mc.org prior to your schedule agenda item.
- Commission staff: please disconnect from VPN before joining the meeting.

Microsoft Teams meeting

Join on your computer or mobile app

[Click here to join the meeting](#)

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Thank you for signing up to testify about Item 4, “Proposed Zoning Text Amendment: Residential Care Facility: Continuing Care Retirement Community,” before the Montgomery County Planning Board on Thursday, October 28, 2020. The Planning Board meeting will be conducted virtually and you have registered to testify via Teams. You should have received the Teams invite from our IT staff which includes information on what time to join the meeting for this item. Please let me know if you need us to resend the invite.

Please see below for additional information regarding the meeting:

- **Please do not forward the Teams invite. We will not accept callers into the virtual meeting who did not sign up to testify.**
- **Exhibit Copies:** Please send a copy of your exhibits/presentations to MCP-Chair@mncppc-mc.org. **You must send copies in advance** of the Planning Board meeting if you wish to share content during the meeting.
- Speakers are given 3 minutes to testify. Testimony will not get cut off when three minutes are up, but we kindly ask that comments are kept as succinct as possible.
- **Only one individual may serve as the representative of a group.** Others speaking in support of a group’s position are allotted time to speak in an individual capacity. If represented by a lawyer who is also testifying, then the individual’s testimony cannot cover the same ground.

Please let me know if I can be of any further assistance.

Thank you,

Catherine Coello, Administrative Assistant

The Maryland-National Park and Planning Commission

Montgomery County Chair’s Office

2425 Reddie Drive, Wheaton, MD 20902

Main: 301-495-4605 | Direct: 301-495-4608

www.MontgomeryPlanningBoard.org



MONTGOMERY COUNTY, MARYLAND

February 28, 2020

Patricia Harris, Esquire
Lerch Early Brewer
7600 Wisconsin Avenue, Suite 700
Bethesda, MD 20814

Re: Request for Advice/Residential Care Facility

Dear Ms. Harris

You have asked for preliminary advice on whether a Residential Care Facility under Section 59.3.3.2.E.2.c of the Zoning Ordinance may include independent dwelling units for seniors as well as assisted living and memory care units.

It is my understanding that there is no pending application filed for this property. As no case is pending and the opinion here is based solely on the representations presented, it is advisory only and subject to revision if the matter is presented in a proceeding before OZAH or in any other matter. No legislative history on the provisions of the Zoning Ordinance has been submitted. This would, of course, also have a bearing on this preliminary advice and could substantially change it.

My preliminary advice is:

1. Independent age-restricted dwelling units are permitted in a residential care facility only if the facility is a "continuing care retirement community."
2. A continuing care retirement community must include a nursing home and comply with State law.
3. If a separate application for an Independent Living for Seniors (under §59.3.3.2.C of the Zoning Ordinance) is filed, the independent dwelling units must be contained in the same building in which services are provided.

Background

You have represented that the "key features" of the proposed use are:

The proposed senior living community will contain approximately 28 memory care beds, 56 assisted living beds and 74 independent living units. The memory care and assisted living component and 29 of the independent living units will be located within a single multi-story "lodge" building (the "Lodge"). The Lodge will contain a central kitchen and three separate dining rooms for each of the three levels of

care. Separate health and wellness and amenity space for each level of care will also be provided. The community will include staff 24 hours a day. The remaining 45 independent living units will be in separate structures containing either two or three units each. The residents living in these separate independent living units will have full access to the same level of services and staff, including the dining hall, as the independent living units located within the Lodge.

Analysis

The rules of statutory construction seek to ascertain the Council's intent when it adopted the relevant law. These require the Hearing Examiner to give all provisions their plain meaning, harmonizing conflicting provisions to give effect to the entire law. The legislative history may also be considered to clarify ambiguous language.

The proposed project must meet two statutory definitions under the 2014 Zoning Ordinance: (1) Group Living, and (2) Residential Care Facility. Group Living under Section 59.3.3.2.A means "the residential occupancy of a structure by a group of people that does not meet the definition of any Household Living use under Section 3.3.1."

The definition of Residential Care Facility is:

Section 59.3.3.2.E.1. Defined, In General

Residential Care Facility means a group care or similar arrangement for the care of persons in need of personal services, supervision, or assistance essential for sustaining the activities of daily living, or for the protection of the individual, in which:

- a. the facility must meet all applicable Federal, State, and County certificate, licensure, and regulatory requirements;
- b. resident staff necessary for operation of the facility are allowed to live on-site; and
- c. the number of residents includes members of the staff who reside at the facility, but does not include infants younger than 2 months old.

Residential Care Facility includes a nursing home, an assisted living facility, a *continuing care retirement community*, a hospice, and a group home. Residential Care Facility does not include a Hospital (see Section 3.4.6, Hospital) or Independent Living Facility for Seniors or Persons with Disabilities (see Section 3.3.2.C, Independent Living Facility for Seniors or Persons with Disabilities). (Emphasis supplied).

Other provisions governing Residential Care Facilities refer to dwelling units. *See, Zoning Ordinance*, §§59.3.3.2.E.2.c.ii(c), (g), and (h). The use of the term "dwelling units" suggest that

some form of independent living is permitted. This is because a dwelling unit contains facilities for those who do not need assistance with activities essential to daily living. *See*, §59.1.4.1 (“Dwelling unit” is a “building or portion of a building providing complete living facilities for not more than one household, including, at a minimum, facilities for cooking, sanitation, and sleeping.”) Typically, independent living units would not meet the definition of “Group Living,” because stand-alone dwelling units constitute a form of Household Living excluded by that definition. Nor do they fall within the primary definition of “Residential Care Facility” because they are not for individuals who need assistance with the essential activities of daily living. This is consistent with the fact that “Independent Living Facilities for Seniors” are excluded from the definition of “Residential Care Facilities.”

Some of the references to independent dwelling units in the regulations governing a Residential Care Facility, however, refer explicitly to independent dwelling units in a continuing care retirement community. The occupancy requirements for requirements for a Residential Care Facility include:

(h) In a *continuing care retirement community*, occupancy of any independent dwelling unit is restricted to persons 62 years of age or older, with the following exceptions:

- (1) the spouse of a resident, regardless of age;
- (2) another relative of a resident, 50 years of age and older;
- (3) the resident widow, widower, or other surviving relative of a resident who dies while residing at the continuing care retirement community, is allowed to remain even though the resident widow, widower, or other surviving relative has not reached the age of 62. (Emphasis supplied).

Id., §59.3.3.2.E.2.c.ii(h). Reflecting this, a continuing care retirement community is explicitly *included* in the definition of Residential Care Facility.

The best interpretation to harmonize the references to independent dwelling units in the provisions governing a Residential Care Facility is that independent dwelling units are permitted in a Residential Care Facility *only if they are part of a continuing care retirement community*. This harmonizes the references to independent dwelling units in the occupancy requirements in §59.3.3.2.E.2.c.ii(h), which explicitly refer only to a continuing care retirement community. It is also consistent with the fact that a “continuing care retirement facility” is specifically included in the definition of “Residential Care Facility,” whereas an Independent Living Facility for Seniors is not.

This interpretation also harmonizes the provisions governing Residential Care Facilities with the definition of “Group Living.” The purpose of a continuing care retirement community is to permit individuals to transition from independent living to more assistive care within the same community. While initially independent, a continuing care retirement community guarantees residents an opportunity to progress to the type of care that falls squarely within the definition of Group Living and Residential Care Facility at the same location.

This legislative history of Section 59.3.3.2.E, governing Residential Care Facilities, also supports this interpretation and aids in defining the term “continuing care retirement community.”

The “Old Zoning Ordinance to New Zoning Ordinance Cross Reference” (attached to the 2014 Zoning Ordinance) states that a Residential Care Facility under the 2014 Zoning Ordinance is the equivalent of a “Life care (continuing care) facility)” under Section 59-G-2.35.1 of the 2004 Zoning Ordinance. The 2004 Zoning Ordinance defined a life care (continuing care) facility as:

A building or group of buildings providing a continuity of residential occupancy and health care for senior adults. Occupancy is restricted as provided in Section 59-G-2.35.1. A life care facility must include dwelling units for either independent or assisted living, or both, plus a nursing home of a suitable size to provide treatment or care of the residents; it may include ancillary facilities for the further enjoyment, service or care of the residents. (Emphasis supplied.)

2004 Zoning Ordinance, §59-A-2.1. Section 59-G-2.35.1 of the 2004 Ordinance also reflects the requirement for a nursing home:

The facility must include the following:

(1) Dwelling units for independent or assisted living, or both. “Assisted living” is defined as providing meals plus other services to persons who may need some supervision or assistance in the activities of daily living but who do not need hospital or nursing care.

(2) A nursing home for the care of residents of the life care facility. If allowed by the terms of the exemption issued by the MHRPC (see Paragraph (b)(2), above), the nursing home may serve nonresidents for the first 5 years after the facility opens for occupancy. At the end of that 5 year period, occupancy of the nursing home must be restricted to residents of the life care facility, unless the Board makes a finding at that time that such a restriction would cause an undue hardship in terms of adequate patient care or financial feasibility, and the MHRPC agrees not to impose the restriction.

Thus, the 2004 Ordinance permitted independent dwelling units for seniors within a continuing care community but mandated that the community include a nursing home sized to accommodate residents of the community. State law contains additional requirements for continuing care retirement communities, which are referenced in both the current and 2004 Zoning Ordinances. *See, Md. Human Services Code Ann. Section 10-407, et. seq.* The Hearing Examiner has not researched the State law governing these communities and takes no position on what it may require. The 2004 Ordinance required continuing care retirement communities to serve only residents of the community after a certain period of time. *2004 Zoning Ordinance, §59-G.2.35.1(e).* As your proposed use does not include a nursing home, it would not qualify as a Residential Care Facility.

In the alternative, you suggest applying for two separate uses: (1) a Residential Care Facility under §59.3.3.2.E. for the assisted living and memory care, and (2) an Independent Living Facility for Seniors under §59.3.3.2.C for the independent dwelling units. While the assisted living and memory care units do fall within the definition of Residential Care Facility, the 45 stand-alone independent units are unlikely meet the definition of "Independent Living Facilities for Seniors." This is because the Group Living definition excludes Household Living and the definition of Independent Living Facilities for Seniors requires the independent dwelling units to be located within the same building as the associated services. *2014 Zoning Ordinance*, §§59.3.3.2.A, 59.3.3.2.C.1. Unlike the definition of Residential Care Facility, the definition of Independent Living Facility for Seniors does not explicitly permit stand-alone independent dwelling units.

Again, this advice is preliminary only and not binding in any proceeding before OZAH or any other County agency.

Sincerely,

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS



Lynn Robeson Hannan
Director

Copies to:

Matt Mills, Esquire
Christina Sorrento, Esquire
Ehsan Motazed, DPS

