



MONTGOMERY COUNTY, MARYLAND

TO: Parties to County Board of Appeals Proceedings  
FROM: Office of Zoning and Administrative Hearings  
SUBJECT: Transmittal of Report and Recommendation and Applicable Procedures

Enclosed is a copy of the Recommendation in County Board of Appeals Case No. **S-274-C**. A decision on this matter will be rendered by the Board within the time provided by law.

As a party of record, you may request oral argument before the Board of Appeals under the provisions of Section 59-A-4.61(e) of the Montgomery County Code. The request must be filed in writing within ten days after transmittal of the Hearing Examiner's report and recommendation and must explicitly state the matters desired to be presented at the oral argument.

You will be notified by the Board of Appeals if your request for oral argument is granted and at what time and place it will occur. If the request is granted, the oral argument must be confined to the evidence of record before the Hearing Examiner. No new or additional evidence or witnesses will be considered. Prior to oral argument do not attempt to discuss this case with individual Board members since such ex parte communications are prohibited by law.

If you have any questions regarding this procedure, please contact this office.

Dated: October 25, 2007

MLG/dwm  
Enclosure



Office of Zoning and Administrative Hearings

100 Maryland Avenue • Rockville, Maryland 20850 • 240/777/6660

BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS

Office of Zoning and Administrative Hearings  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660

IN THE MATTER OF:  
PETITION OF SUBURBAN HOSPITAL, INC. ,

Petitioner

Board of Appeals Case No. S-274 C  
(OZAH Referral No. 08-05)

Gene Corapi  
Russ Cramer  
Margaret Fitzwilliam  
Scott Harvey  
Robert Rothstein, M.D.  
Leslie Ford Weber  
Richard Whitaker

For the Petition

Barbara A. Sears, Esquire  
Erin Gerard, Esquire  
Attorneys for the Petitioner

\* \* \* \* \*

Martin Klauber, Esquire  
People's Counsel for Montgomery County  
Virginia Miller, Wyngate Citizens' Assoc.

Neither in Support nor in Opposition

\* \* \* \* \*

Lorraine Driscoll  
Amy Shiman  
For the Huntington Terrace  
Citizen's Association

In Opposition to the Petition

Norman Knopf, Esquire  
Attorneys for the Huntington Terrace  
Citizens' Association

\* \* \* \* \*

Before: Françoise M. Carrier, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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## I. STATEMENT OF THE CASE

The present modification request was initiated by a request for an administrative modification, made by letter dated May 3, 2007. See Ex. 29. Petitioner Suburban Hospital Inc. ("Suburban" or "the hospital"), seeks to modify an existing special exception for Suburban Hospital, located at 8600 Old Georgetown Road, Bethesda, in the R-60 Zone, to permit (i) the construction of an additional air handler and related air shaft on the north side of the hospital, facing Lincoln Street; and (ii) the installation of four noise barriers around existing rooftop equipment to resolve outstanding violations of the Montgomery County Noise Ordinance.

The Board of Appeals ("Board") considered the administrative modification request at its meeting of May 30, 2007, at which the hospital was represented by counsel, Barbara Sears and Erin Girard, and by hospital staff member Margaret Fitzwilliam. Community members Amy Shiman and Lorraine Driscoll appeared on behalf of the Huntington Terrace Citizen's Association (the "HTCA"). Ms. Shiman and Ms. Driscoll expressed concern about the hospital's compliance with county noise standards, and about the impact additional air handling equipment might have on these conditions. See Ex. 40. They suggested that the modification request should be combined with a future, more comprehensive modification application that the HTCA understood the hospital planned to submit in the near future. Ms. Sears stated that the hospital has an urgent need for the requested modification to proceed with relocating operating rooms and renovating a nursing unit, and waiting until a broader modification application is completed could hamper the hospital's ability to provide more immediately needed services. She also stated that the hospital had not received any citations from Montgomery County for noise violations, and would accept a condition of approval for the modification that would require the hospital to monitor noise levels and comply with county noise standards. See *id.*

The BOA voted four to zero to grant the requested administrative modification on May 30, with two conditions: (1) that the special exception holder monitor the noise level of the air handler on a monthly basis; and (2) the establishment of a community liaison committee. See Worksession Minutes of May 30, 2007. A BOA Resolution adopted May 30 and July 11, 2007, effective July 16, 2007, provides a timeline of events following the May 30 BOA meeting. See Ex. 40. On June 4, the

BOA received email correspondence from Steven C. Martin, Environmental Compliance Supervisor, Department of Environmental Protection ("DEP"), stating that he had issued to the hospital a Notice of Violation of the Montgomery County Noise Control Ordinance (the "Noise Ordinance"). On June 7, 2007, before the BOA had even mailed notice of a decision granting the administrative modification, the HTCA requested a public hearing on the modification. This was opposed by the hospital on June 26, 2007. On July 5, 2007, the BOA received a letter from counsel for the hospital requesting an expedited hearing on the modification, and informing the BOA that DEP had accepted Suburban's compliance plan to address the noise violations. *See id.*

The BOA considered the requested administrative modification again at its work session of July 11, 2007. The Board made the following findings:

. . .that the installation of additional air handling equipment to serve the proposed internal renovations to the hospital, which do not involve an increase in the number of beds or staff, will not substantially change the nature, character or intensity of the use or its effect on traffic or on the immediate neighborhood. The Board takes particular note of the requirement, as outlined in Steven Martin's letter of July 3, 2007, that 'Suburban . . . take measures over the next 60 days to isolate and identify various sources of noise from the rooftop' and that 'Within 90 days or by October 1, 2007, Suburban will submit a noise reduction scheme containing a plan of action with milestones and dates for completion of all noise mitigation work within a reasonable period of time, as determined by the Department.' The board finds that for the modification to avoid substantially changing the effect of the special exception on the immediate neighborhood, the hospital must comply with all county noise regulation standards and requirements.

The BOA's Resolution effective July 16, 2007 took the following actions:

- (1) Granting the requested modification;
- (2) Ordering the hospital "to maintain compliance with all county noise standards and requirements and . . . [to] provide copies of reports of all monitoring required for implementation of its Plan of Compliance, and thereafter, to the Board";
- (3) Ordering the hospital to form a Community Liaison Council ("CLC"), the membership of which "shall include Brian Gragnolati, President and CEO of Suburban Hospital, or his designee from Suburban Hospital . . . , representatives of the Huntington Terrace Citizens' Association

(HTCA); representatives from other citizens associations invited by HTCA; and Martin Klauber, People's Counsel, as an *ex officio* member. The CLC shall meet not less frequently than on a quarterly basis, beginning no later than September 1, 2007, and shall provide copies of its meeting minutes to the Board of Appeals within 30 days of each meeting”;

(4) Suspending the BOA's decision to grant the modification, as required in response to the HTCA's request for a hearing on the modification; and

(5) Referring the case to the Office of Zoning and Administrative Hearings to hold a public hearing on the administrative modification request. See Ex. 40.

The BOA scheduled a public hearing in this matter for August 29, 2007, to be conducted by a hearing examiner in the Office of Zoning and Administrative Hearings. Because this matter originated as an administrative modification, the case was not referred to Technical Staff at the Maryland-National Capital Park & Planning Commission or to the Montgomery County Planning Board.

On August 28, 2007, the hospital submitted to the Hearing Examiner its compliance plan to address the outstanding noise violations, with documentation indicating that DEP had accepted the plan. See Ex. 48. The compliance plan involves installing four sound barriers around existing rooftop equipment on the hospital, which the hospital requested to add to the pending modification request. See *id.* The hearing was convened as scheduled on August 29, but no evidence was taken due to objections from the opposition about the lack of time to review the compliance plan. The Hearing Examiner offered the Petitioner the option to present its case in chief that day, with the understanding that opposition counsel would have the opportunity to cross-examine and present his case at a later date, or to postpone the entire hearing. The Hearing Examiner also suggested that in light of the hospital's desire for a speedy decision on the modification, it might be more practical to request that the BOA conduct the hearing itself, to avoid having to wait for the Hearing Examiner's report and recommendation to be written. The Petitioner opted to postpone the hearing.

The Hearing Examiner informed the BOA by email on August 29 that the hearing had been continued to September 6, 2007, and that a request to return the hearing to the BOA's calendar

would be forthcoming from the Petitioner. The BOA considered this correspondence at its worksession of September 5, 2007, and found that it could not accommodate the modification on its own calendar sooner than the Hearing Examiner would be able to complete the case. See Ex. 71. The hearing was convened briefly on September 6 and postponed to September 12, 2007, to ensure a full ten days' notice of the request to amend the modification petition.

The hearing was convened on September 12, 2007 after proper notice, at which time testimony and other evidence were offered in support of and in opposition to the petition. The hearing concluded on September 14, 2007. The record was held open briefly for post-hearing submissions by the opposition and the Petitioner, and closed on September 20. Due to the demands of a very complex zoning case, the Hearing Examiner was unable to prepare this report and recommendation within the 30 days permitted by statute. With great regret, she extended the time for the issuance of the report by three days, to November 1, 2007.

On October 22, 2007 OZAH received a letter from opposition counsel Norman Knopf, addressed jointly to the BOA Chair and the Hearing Examiner. See Ex. 73. Mr. Knopf states that on October 13, 2007, HTCA community members observed construction on the exterior of the hospital "that would appear to be related to the HVAC system which was requested by the hospital" as part of the present modification request. *Id.* Following inquiries by community members to the Department of Permitting Services ("DPS"), a stop work order was posted on the hospital on October 16. Mr. Knopf requests that the Hearing Examiner's recommendation be delayed so that the record can be re-opened and further evidentiary proceedings may be held, and that a show cause hearing be conducted on the alleged violation of the terms of the special exception represented by the new construction. *Id.*

By letter dated October 23, 2007, Petitioner opposes Mr. Knopf's requests. See Ex. 74. Petitioner's counsel argue that Mr. Knopf's request is moot, because on October 23, 2007, Suburban obtained a building permit for the ongoing construction. Suburban objects to the treatment of Mr. Knopf's October 22 letter as a formal complaint, and argues that even if it were a complaint, the BOA is not authorized to conduct a show cause hearing unless the procedures outlined in Section 59-G-1.3(b)

are followed, requiring a DPS inspection, a notice of violation, an opportunity to correct any cited violations, and findings and recommendations from DPS. See Ex. 74. Petitioner's counsel also assert that the violation and enforcement process is wholly separate from the present modification request and should not further delay the issuance of the Hearing Examiner's report or the Board's action.

In an October 25, 2007 reply to Petitioner's response, Mr. Knopf asserts that his requests are not moot, because DPS lacked authority to issue a building permit for work that is the subject of the present modification petition. See Ex. 75. He asserts, moreover, that even if DPS had such authority, the BOA and the Hearing Examiner retain jurisdiction to determine whether such modification of the special exception should be permitted. Mr. Knopf also contends that DPS has issued a Notice of Violation and therefore a show cause hearing is timely. See *id.*

The Hearing Examiner sees no reason to delay this report while allegedly unauthorized construction is investigated. Enforcement of the terms of a special exception is within the purview of DPS and the BOA, and typically the BOA does not refer such matters to the Hearing Examiner. More importantly, whether or not the hospital has begun construction on improvements that are related to the present application, or has engaged in other construction activity requiring BOA approval, does not affect the merits of the present modification petition. The BOA may choose to defer action on the present modification request pending resolution of the alleged unauthorized construction, but its deliberations in that regard will not be aided by delaying this report and recommendation.

Petitions to modify the terms or conditions of a special exception are authorized by §59-G-1.3(c) of the Zoning Ordinance. Section 59-G-1.3(c)(4) states:

The public hearing must be limited to consideration of the proposed modifications noted in the Board's notice of public hearing and to (1) discussion of those aspects of the special exception use that are directly related to those proposals, and (2) as limited by paragraph (a) below, the underlying special exception, if the modification proposes an expansion of the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less.

(A) After the close of the record of the proceedings, the Board must make a determination on the issues presented. The Board may reaffirm, amend, add to, delete or modify the existing terms of the special exception. The Board may require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise and screening

requirements of 59-G-1.26, if (1) the proposed modification expands the total floor area of all structures or buildings by more than 25 percent, or 7,500 square feet, whichever is less, and (2) the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.

In the present case, Petitioner does not seek to add any square footage. Accordingly, this report addresses only the modifications presently requested.

## II. BACKGROUND

For the convenience of the reader, background information is grouped by subject matter.

### *A. The Hospital Site and Neighborhood*

Suburban Hospital is located at 8600 Old Georgetown Road in Bethesda, on the west side of the street, on property classified under the R-60 Zone and surrounded on three sides by single-family homes. The hospital building and associated surface parking occupy most of the block between Old Georgetown Road on the east, McKinley Street on the south, Grant Street on the west and Lincoln Street on the north. The rest of the block is occupied by single-family dwellings on Lincoln Street, Grant Street and McKinley Street, all of which are owned by Suburban and used as rental housing. The hospital confronts single-family dwellings to the north on Lincoln Street, and owns all but the corner lot. These are also used as rental housing. The hospital confronts additional single-family homes on McKinley Street to the south, but owns only two of those lots. Across Old Georgetown Road, the hospital confronts the campus of the National Institutes of Health ("NIH").

To avoid confusion between the land currently used for hospital purposes and the more extensive land area owned by the Suburban, this report will avoid the commonly used terms "the subject property" and the "subject site."<sup>1</sup> Instead, this report uses the term "the hospital" to refer to the

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<sup>1</sup> In written correspondence, Petitioner's counsel states that the hospital is located on a 14-acre campus. See Ex. 45. It is not clear whether the 14-acre figure refers only to the land currently dedicated to hospital use, or to all of Suburban's land holdings contiguous to the hospital site. A 2001 BOA Opinion on another modification described the site as comprised of 7.1 acres.

hospital as an entity and, depending on the context, to refer to the hospital site, including the building and associated surface parking.

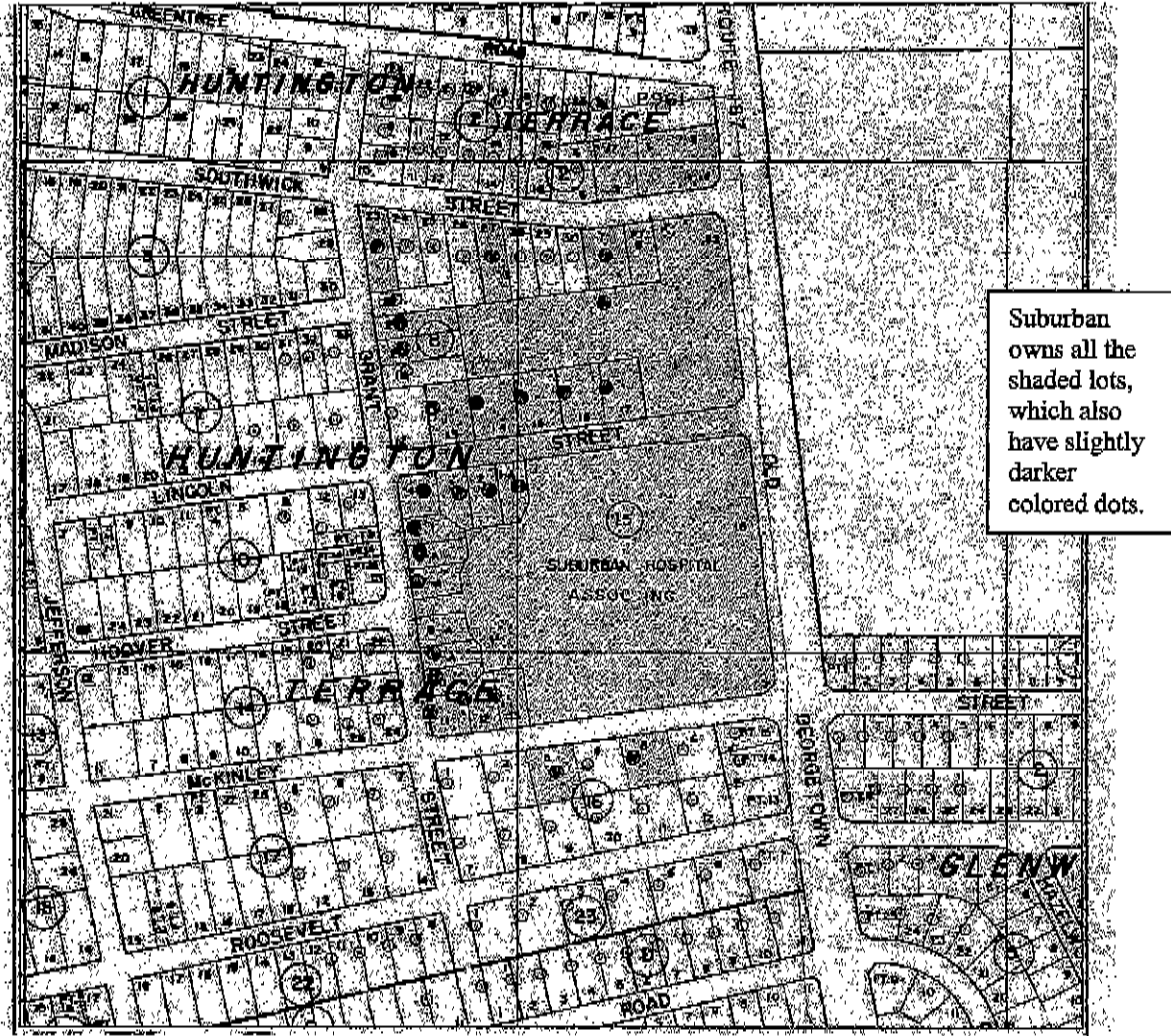
The general location of the hospital building and its relationship to its neighbors may be seen on the aerial photograph below.

**Aerial Photograph Downloaded from Google Earth<sup>2</sup>**



<sup>2</sup> The Hearing Examiner hereby takes official notice of Google Earth's widely recognized mapping capabilities.

Suburban Hospital Adjacent Land Ownership, Ex. 53 graphics only



SUBURBAN HOSPITAL  
ADJACENT LAND OWNERSHIP

OWNERSHIP KEY

- ⊙ SUBURBAN HOSPITAL INC
- ⊙ OTHER

RECORD:  
 See attached index general remarks:  
 1. Montgomery County DEPARTMENT of Planning and  
 2. Suburban Hospital, Inc. 2002 Land Map  
 3. 2002 and 2003 General Maps

Transcribed from 2002 Land Map and 2003 General Maps by Rodgett Consulting, Inc.  
 All other information for 2002 and 2003 maps is from the  
 original documents. See office map information report prepared  
 for the District of Columbia, 2007.

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**B. Land Use History and Proposed Modification**

The subject special exception was granted in 1955 and has been modified several times since then. The original hospital building was constructed in 1956 and is now known as the A Wing. The B Wing was built in 1961, the C Wing in 1966 and the D Wing in 1979. During the last several years, Suburban has been engaged in systematic renovations of all of its nursing units (blocks of patient rooms). Most of these renovations have not required external changes to the hospital building,

and therefore have not necessitated modifications of the terms of the special exception. The most recent modification approved by the BOA was in 2001, permitting the hospital to do the following: expand an existing underground mechanical plant located near the north edge of the property, adjacent to Lincoln Street; replace an existing 1,100-ton cooling tower on the north wing of the hospital with two 750-ton cooling towers; construct a trauma elevator along the exterior face of the west wing of the hospital; and install a new air handler on the roof of the west wing of the hospital , with an associated air shaft along the exterior of the west wing.<sup>3</sup>

The Petitioner is now in the process of renovating the "4300 Unit," a group of patient rooms on the fourth floor of the C Wing. At the same time, the hospital has begun relocating and modernizing six undersized, antiquated operating rooms from the A Wing, the oldest and narrowest wing of the hospital, to the fifth floor of the C Wing. These renovations are part of the hospital's ongoing efforts to ensure a high quality of patient care, consistent with modern medical technology and hospital standards. A new heating, ventilation and air conditioning unit will be needed to serve the renovated patient rooms and the new operating rooms. The 4300 Unit's current ventilation system does not comply with the standards set by the joint commission that accredits hospitals. The current system is grandfathered, but the hospital proposes to install a new air handler and a new air shaft to comply with the current standards.

The main part of the C Wing is a seven-story building on the north side of the hospital building, near Lincoln Street. Attached to the C Wing, between the seven-story building and Lincoln Street, is a one-story mechanical/engineering maintenance building. (In the aerial photograph on page 9, the seven-story part of the C Wing is slightly above and to the left of the rooftop cross that identifies the helipad, and the mechanical building sticks out from it towards the top of the page.) The hospital proposes to install the new air handler on the roof of the maintenance building. The air handler was described as "self-screening" because its mechanical components are enclosed inside light-colored, metal screens that would match the screens on the roof of the C Wing. The dimensions of the

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<sup>3</sup> The "west wing" referred to in the BOA's 2001 resolution appears to correspond to what has been described in the present proceedings as the D Wing.

enclosure are 33 feet in width, nearly 56 feet in length and nearly 14 feet in height. It would essentially give the mechanical building the appearance of a second story, slightly smaller in footprint than the first. Installing the air handler would result in moving or screening from view five or six small air shafts and vents that currently are visible on the low roof of the building.

The new air shaft is planned for installation on the north wall of the seven-story C Wing building, immediately above the new air handler. The air shaft would span three floors of the building and cover most of its width. It would be built over an existing air shaft that spans the entire height of the building, and would be enclosed with a light-colored panel system that looks like textured limestone, similar to the existing air shaft and to trim materials used on other parts of the hospital. The dimensions of the air shaft are 65 feet in width, nearly 32 feet in height and about 8 feet in depth.

The second set of improvements proposed as part of this modification consists of four noise-buffering screens, which are proposed to correct outstanding noise violations. The Noise Ordinance prohibits any person from creating noise that is higher than 65 dBa during the day, or 55 dBa at night (weekdays 9:00 p.m. to 7:00 a.m. and weekends/holidays from 9:00 p.m. to 9:00 a.m.), at the property line of the nearest residential property.<sup>4</sup> See Code § 318-5. The hospital's noise expert testified at the hearing that in practice, DEP grants a "grace amount" — it does not issue a notice of violation unless noise measurements exceed the statutory limit by more than 2.5 dBa. See Tr. Sept. 12 at 139. Thus, for the nighttime standard of 55 dBa, a noise measurement between 55 and 57.5 will not be considered a violation.

Following a noise complaint by homeowner Amy Shiman, who lives nine lots away from Suburban (about 700 feet from the closest wing of the hospital), the Montgomery County Department of Environmental Protection ("DEP") conducted nighttime noise tests May 3, 2007 at three of the residential lots abutting the hospital site, all of which are owned by Suburban.<sup>5</sup> Some of the noise

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<sup>4</sup> The acronym dBa refers to A-weighted decibels, a unit of noise measurement that approximates what the human ear hears. See Ex. 32(c). This is the universally accepted measurement metric for community noise studies. See *id.*

<sup>5</sup> DEP was initially inclined to test for Noise Ordinance compliance on the nearest residential property not owned by the hospital, but was advised by the County Attorney's office that noise levels should be measured on the closest residential lot, regardless of its ownership. See Tr. Sept. 12 at 142.

measurements were slightly above 57.5, leading DEP to issue a Notice of Violation on June 1, 2007. See Ex. 32(b). On June 19, DEP and the hospital's noise consultant took additional nighttime noise measurements, simultaneously. These noise measurements showed noise levels slightly exceeding 57.5 dBa at one location. See Ex. 52; Tr. Sept. 12 at 139-140. The existence of a violation having been confirmed, DEP required Suburban to submit a Plan of Compliance, followed by a Noise Mitigation Plan.

On August 27, 2007, Suburban submitted to DEP a Noise Mitigation Plan providing for the installation of four noise screens, to be mounted around four existing mechanical devices on the hospital's rooftops.<sup>6</sup> See Ex. 48(b). Computer modeling carried out by the hospital's noise consultant indicates that the proposed noise screens would result in nighttime noise levels at all adjacent residential properties below the statutory standard of 55 dBa. See Ex. 48(b).

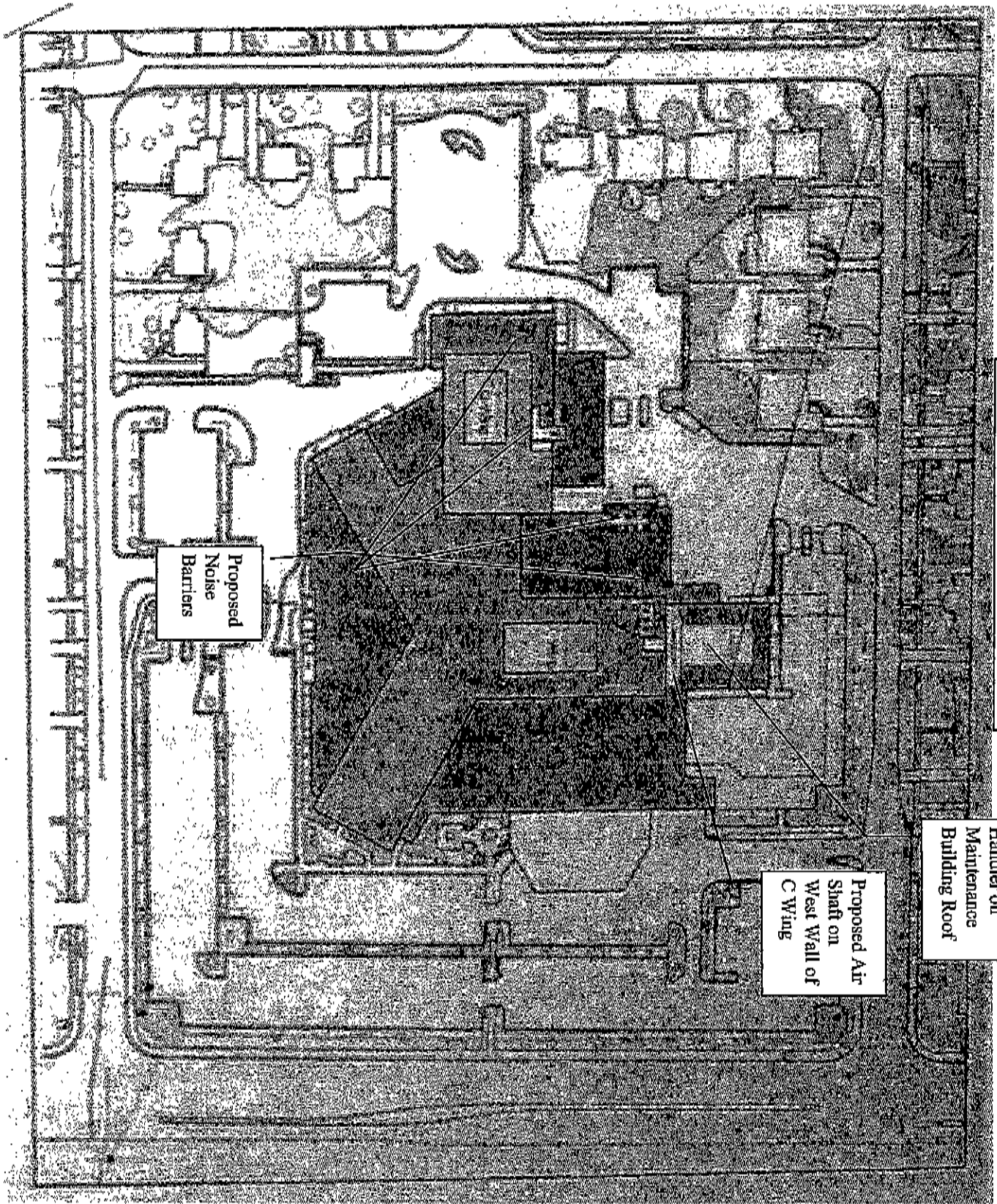
The diagram on the next page shows the proposed location for each element of the proposed modifications.

### ***C. Noise Impact***

As noted above, the Noise Ordinance dictates that a person must not cause or permit noise levels at a receiving residential property that exceed 65 dBa during the daytime and 55 dBa at night. See Code § 31B-5. Petitioner's noise control consultant, Scott Harvey, explained that noise levels of 65 dBa are generally considered equivalent to the level of human speech at two or three feet. A change in noise level of 3 dBa or more is considered perceptible to the human ear. A 5-dBa change is considered clearly perceptible, and a 10-dBa change is perceived as the noise being twice as loud. See Tr. Sept. 12 at 137. Shouting, for example, might measure 75 dBa.

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<sup>6</sup> This noise mitigation plan was submitted well ahead of schedule. In a letter dated July 3, 2007, DEP acknowledged receipt and acceptance of a Plan for Compliance that provided for submission of a noise reduction plan by October 1, 2007. See Ex. 58(a). The mitigation plan was submitted on August 27, five weeks early and two days before the scheduled hearing on the modification.



Site Map, Excerpted from Ex. 50

Proposed Air  
Handler on  
Maintenance  
Building Roof

Proposed Air  
Shaft on  
West Wall of  
C Wing

Proposed  
Noise  
Barriers

Mr. Harvey further explained that if two noise sources of equal value are added together, the result is a perception that the noise increases by 3 dBA – a barely perceptible change. For example, two 60-dBA noise sources put together will result in a noise level of 63 dBA, not 120 dBA, and two 90-dBA noise sources produce a noise level of 93 dBA. See *id.* at 138. Mr. Harvey also noted that if there are two sources of noise, one quiet and one louder, only the louder one will register – the two together will make no more noise than the louder one alone. See *id.* at 174.

Mr. Harvey developed the noise mitigation plan that the hospital submitted to DEP in response to the outstanding noise violations. To develop the plan, Mr. Harvey took repeated noise measurements on the residential lots where violations had been found, turning off various pieces of mechanical equipment at the hospital to determine which ones were creating the most noise. He also took measurements closer to the pieces of equipment. Based on the collected data, Mr. Harvey and his team determined which pieces of equipment were causing the most noise. Working with the hospital's architect, they developed a 3-D model of the hospital grounds and its surroundings. The model uses information about noise sources, building heights, soil and topography as inputs, then calculates what the noise levels are at surrounding properties. Once the model is calibrated so that it comports with reality, the user can start adding noise barriers to the model to see whether noise levels fall below the statutory limit. Mr. Harvey stated that DEP reviewed his methodology and concurred in it.

Mr. Harvey recommended four rooftop noise screens which, based on the computer model, would bring the noise levels below the statutory standard. The results of running the model with the screens are shown on two noise maps, which are identified in the record as Exhibit 48(h) and are attached as Appendix 1 to this report. The first map shows the "Current Mitigated Condition," which means it shows the noise levels on nearby properties with the four proposed noise mitigation screens in place, but without the proposed air handler and air shaft. See *id.* at 149. The second map shows the "Future Mitigated Condition," meaning the noise levels on nearby properties with the four proposed noise mitigation screens in place, plus the proposed air handler and air shaft. See *id.* at 149-150.

Mr. Harvey observed that all of the areas shown on the noise maps with noise levels of 55 dBa or higher are on hospital property, and do not spill over onto any of the adjacent residential properties. He concluded, therefore, that the proposed noise mitigation screens would cure the violations. As noted earlier, DEP accepted the hospital's proposed noise mitigation plan on August 28, 2007. See Ex. 48(a).

Mr. Harvey described the proposed barriers as specialized acoustical barriers made of two panels of metal separated by a four-inch air gap. The interior panel has perforations in it, so the sound goes into the cavity between the two pieces of metal, and the cavity is filled with sound-absorptive material to absorb the sound. The outer metal panel then forms a barrier to keep the noise from passing through.

Mr. Harvey and his firm conducted a noise impact analysis for the proposed air handler and air shaft, using a similar modeling method to the one used to develop the noise mitigation plan for the violations. See Ex. 45(a). Taking the calibrated noise model of the hospital, they added to it data from the manufacturer of the proposed air handler and data for a high-velocity fan that is also proposed to be installed on the roof in connection with renovating the 4300 Unit.<sup>7</sup> See *id.* at 143. Mr. Harvey explained that the air shaft does not have noise impacts. See *id.* at 157-158. It contains large duct work for air to travel, and has built-in silencers that reduce noise to the shaft. Mr. Harvey described the air handler as self-screened, consisting of fans and sound absorbing materials enclosed in a box. (The size and appearance of the air handler and air shaft are described in Part II.B. above.)

The two noise maps in Appendix 1 show that with the new air handler (and the rooftop fan), noise levels would be below 55 dBa on all the nearby residential properties. Mr. Harvey noted that

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<sup>7</sup> Petitioner did not seek a modification to install the fan because it would not be visible from areas surrounding the building. Petitioner's counsel, Barbara Sears, described a rule of thumb that if an alteration would be visible and is not internal to a structure, it should be the subject of a modification. See *id.* at 155. Petitioner's architect testified that the fan, which would measure approximately four feet wide by six feet long by eight feet tall, would be installed behind an existing enclosure that houses other mechanical equipment. Tr. Sept. 12 at 188-89. If the fan would have noise impacts on nearby homes, the Hearing Examiner would consider it an appropriate subject for a modification, despite the fact that it would not be visible. The hospital's decision not to include this fan in its modification request may raise an enforcement issue, but is not relevant to the issues to be decided in connection with the pending modification request, and therefore will be discussed no further in this report.

the proposed air handler has two modes of operation, a daytime mode and a nighttime mode that ramps down to about 60 percent of the daytime mode and is much quieter. He understands that this particular air handler would be switched to the nighttime mode at night because the new surgical suites would not be used at night (other air handlers at the hospital run at the same level 24 hours a day). See Tr. Sept. 12 at 160-61. Mr. Harvey opined that because both maps were produced based on daytime noise levels, they provide a high degree of assurance that the nighttime levels will be below the statutory limit.

Mr. Harvey acknowledged that the evidence does not include a map showing the hospital's current noise impacts on the neighborhood, making it difficult to compare the noise expected from the new air handler (and the rooftop fan) to current conditions. See *id.* at 161. The submitted noise maps permit a comparison between (a) noise levels with the proposed mitigation screens and the new air handler, and (b) noise levels with just the proposed mitigation screens. There is numerical data showing actual, current noise levels at some locations, including the locations where noise measurements showed the highest levels of noise, see Exs. 32(c) and 52, but projections have not been provided for what that data would look like with the proposed modifications in place.

Mr. Harvey acknowledged that the homes that would experience the greatest increase in noise from the proposed air handler are not necessarily the same homes that currently have the highest noise levels. See *id.* He agreed that the noise maps show some homes that will experience an increase in noise if the air handler is installed. For instance, some houses that currently experience noise levels between 45 and 50 dBA will experience noise levels between 50 and 55 dBA with the new air handler. See *id.* at 163. Mr. Harvey stressed, however, that the data shows none of the homes will experience noise levels above the nighttime noise level of 55 dBA, even during the day. See *id.* Mr. Harvey opined that the proposed modification would result in noise levels that comply with the Noise Ordinance, and that are not detrimental to the surrounding community. See *id.* He further opined, based on his familiarity with the proposed equipment and how it would be installed, as well as extensive experience in measuring vibration levels, that the proposed modification would not result in any

detrimental vibrations. See *id.* at 164. Mr. Harvey explained that the air handler would be “spring isolated” from its surroundings, meaning that the rotating parts would be mounted on springs that isolate the vibrations as well as controlling noise. The springs keep the vibrations out of the building and therefore out of the grounds and the neighborhood.

Finally, Mr. Harvey opined that the proposed modification would not be detrimental to the use, peaceful enjoyment or development of surrounding properties. See *id.* at 165. He based that opinion primarily on the Noise Ordinance. See *id.* Mr. Harvey noted that the Noise Ordinance was enacted to protect people from noise impact. It is restrictive, and it is enforced, and it requires compliance with noise limits that are equivalent to human speech during the day and half that loud at night. Mr. Harvey considers the nighttime limit to be a relatively quiet standard, so in his view, satisfying that standard means no detrimental impact. See *id.*

The HTCA argues, in response, that (i) satisfying the statutory limits established in the Noise Ordinance is not sufficient to demonstrate that noise will not be detrimental to the use and peaceful enjoyment of surrounding properties; (ii) local residents find the noise from the hospital to be very disturbing, described as a constant hum that makes it difficult to sleep; (iii) even if the BOA finds that compliance with the Noise Ordinance is sufficient, noise maps showing noise levels that are just under the statutory limit are not adequate – noise levels should start out significantly below the standards, since the evidence suggests that equipment can get noisier over time; and (iv) the hospital should not be permitted to add a new air handler, which will increase the overall noise level, until its existing noise violations are cured. These arguments will be addressed in turn.

#### **1. Statutory Limits Not Adequate; Residents Find Noise Levels Disturbing**

In support of its argument that satisfying the statutory noise limits is not sufficient, the HTCA cites *Anne Arundel County v. Carlucci*, 83 Md. App. 121, 573 A.2d 847 (Md. App. 1990), *cert. denied* 320 Md. 800 (1990). In *Carlucci*, adjoining landowners brought an action against a gun club, alleging that the noise from the club’s shooting activities constituted a nuisance. The neighbors testified that the sound of the gunfire was intense and could be heard all day and into the evening, even inside

their homes with the windows and doors shut. The HTCA emphasizes language in the *Carlucci* opinion stating that "it makes no difference that the business was lawful and one useful to the public and conducted in the most approved method," it can still be considered a nuisance. 573 A. 2d at 852. The court described the standard for finding a nuisance, which requires actual physical discomfort to persons of ordinary sensibilities, and an injury that materially diminishes the value of the property as a dwelling and seriously interferes with the ordinary comfort and enjoyment of it. *See id.* The court found that the gun club was, in fact, a nuisance. *See id.* at 853. The remedy imposed, however, offers little support for the HTCA's argument that compliance with the Noise Ordinance is not enough: the court gave the gun club six months to design and implement a noise abatement system that would bring its noise levels below the maximum of 65 dBA during the day/55 dBA at night that was established in applicable regulations. *See id.*

The violations section of the Noise Ordinance is quoted below in its entirety, for ease of reference:

**Sec. 31B-5. Noise level and noise disturbance violations.**

(a) *Maximum allowable noise levels.*

- (1) Except as otherwise provided in Sections 31B-6(a) and 31B-8, a person must not cause or permit noise levels that exceed the following levels:

<i>Maximum Allowable Noise Levels (dBA) for Receiving Noise Areas</i>		
	<i>Daytime</i>	<i>Nighttime</i>
Non-residential noise area	67	62
Residential noise area	65	55

- (2) A person must not cause or permit the emission of a prominent discrete tone or impulsive noise that exceeds a level, at the location on a receiving property where noise from the source is greatest, that is 5 dBA lower than the level set in paragraph (1) for the applicable noise area and time.
- (3) Sound that crosses between residential and non-residential noise areas must not exceed the levels set in paragraph (1) for residential noise areas.

- (b) Noise disturbance. A person must not cause or permit noise that creates a noise disturbance.
- (c) Examples. The following examples illustrate common noise-producing acts that violate this section if they exceed the noise level standards set in subsection (a) or create a noise disturbance. The examples are illustrative only and do not limit or expand the noise level or noise disturbance standards of this section:
  - (1) Sounding a horn or other signaling device on any motor vehicle on private property except:
    - (A) in an emergency; or
    - (B) as a danger warning signal during daytime hours if the device complies with noise level limits.
  - (2) Operating a sound-producing device on public streets for commercial advertising or to attract public attention.
  - (3) Selling anything by outcry.
  - (4) Loading, unloading, opening, closing or otherwise handling containers, building materials, construction equipment, or similar objects.
  - (5) Operating a device that produces, reproduces, or amplifies sound.
  - (6) Allowing an animal to create a noise disturbance.
  - (7) Operating power equipment mounted on a motor vehicle or operating other devices powered by a generator or a motor vehicle.

A "noise disturbance" is defined in Section 31B-2 as "any noise that is:

- (1) unpleasant, annoying, offensive, loud, or obnoxious;
- (2) unusual for the time of day or location where it is produced or heard; or
- (3) detrimental to the health, comfort, or safety of any individual or to the reasonable enjoyment of property or the lawful conduct of business because of the loudness, duration, or character of the noise."

The HTCA correctly points out that the Noise Ordinance provides for two types of violations: exceeding the noise limits, or creating a "noise disturbance." The record contains no evidence about the County's past practice in enforcing the "noise disturbance" provision of the Code,

nor does it contain any legislative history that might help interpret the intent of the “noise disturbance” violation provision. Absent such evidence, the Hearing Examiner looks to the examples cited in Section 31B-5(c), which are considered a violation if they exceed the noise standard or cause a noise disturbance. All of the examples listed are what might be considered active noise-making activities, not passive noise-making incident to operating HVAC systems for an institutional building such as a hospital. This suggests that the “noise disturbance” violation may have been intended to bring within the County’s regulatory control discrete, noise-creating activities that might not exceed the statutory limits, but could, by their nature or the way they are undertaken, create a disturbing noise.

The BOA’s responsibility in this case, of course, is to determine whether the modifications proposed in this petition would cause “objectionable noise” (Section 59-G-1.21(b)(6)) or otherwise be incompatible with the general neighborhood of the site, mindful that the Zoning Ordinance places less emphasis on adverse effects that are inherent in a use – as HVAC systems surely are for a hospital – than on those that are non-inherent. Given the limited guidance available, the Hearing Examiner considers the statutory limits established in the Noise Ordinance to be the best indicator currently available of noise levels that are considered objectively reasonable.

## **2. Noise Barely under the Statutory Limits Should be Rejected**

The HTCA’s perspective on whether it is good enough for the Petitioner to say that the new equipment would generate noise just under 55 dBa is informed by the community’s experience since the 2001 modification that allowed the hospital to install new HVAC equipment. During the 2001 proceedings, the Petitioner represented that the equipment then being proposed would generate noise levels of 45 to 50 dBa at nearby residential receiving areas, and the air handler then proposed would generate a noise level less than 40 dBa. See BOA Resolution effective September 19, 2001 at 4. The community questions why, if those representations were accurate, noise measurements taken in 2007 show much higher noise levels, some just over 57.5 dBa.

Mr. Harvey testified that the equipment that led to the outstanding noise violations is older equipment, not the items that were approved in 2001. His explanation for the noise increase is

that lack of maintenance can lead to machinery making more noise over time. See Tr. Sept. 12 at 170-177. Petitioner's Director of Plant Operations, Russell Cramer, who oversees day to day equipment maintenance, among other things, testified that the hospital follows a maintenance schedule for all equipment. In his experience, however, machinery can get noisier as it ages, no matter how well it is maintained. See Tr. Sept. 14 at 71. The Hearing Examiner notes that the description of the hospital's representations in 2001 does not predict overall future noise levels, but rather the noise that would be generated by the each of the two noise-generating machines that were proposed to be added. It may be that the new equipment was quieter than equipment that was already in place, and that noise from all sources, measured at the closest residential property lines, would have been closer to the levels measured in 2007. Nonetheless, the HTCA worries that if equipment tends to get noisier over time, and noise impact projections are not always fully accurate, the noise impacts from the equipment proposed in this modification request will end up worse than has been projected.

Mr. Harvey testified that in his experience, noise modeling does not predict actual noise impacts with 100 percent accuracy. He stated that when he has been asked (in other cases, not by Suburban) to take noise measurements after new equipment has installed, he has found that the actual noise is usually close to the levels his computer model predicted – mostly within 5 dBa. See Tr. Sept. 12 at 179-180. This, he concedes, means that there can be a perceptible difference between projected and actual noise levels. See *id.*

Petitioner's noise maps indicate that during the day, when the proposed air handler would be operating at its noisiest capacity, the only areas with noise above the nighttime standard of 55 dBa would be immediately around the hospital and between the hospital and Lincoln Street. The 55 dBa line is the line between the gray areas and the orange areas on the maps. That line does not appear to touch any residential property, although it is obscured in one location by the depiction of Lincoln Street. Moreover, Mr. Harvey has represented that the new air handler would be operated in "night mode" at night, reducing its output by about 40 percent. See Tr. Sept. 12 at 158. This provides the "cushion" that he feels assures actual noise levels will be below 55 dBa at night. In light of the

importance of this representation to Mr. Harvey's analysis, and the risk inherent in approving equipment with projected noise levels just below the statutory limit, the conditions of approval recommended in this report include a requirement that the air handler installed on the roof of the maintenance building be operated in "night mode" between during nighttime hours, as defined in the Noise Ordinance, and that this requirement be posted prominently wherever the controls for the unit are located. The recommended conditions of approval also provide for regular noise monitoring and reporting, and require mitigation for any noise measurements over the statutory limits.

### **3. New Noise-Generating Equipment Should Not Be Permitted until Existing Violations Are Cured**

As noted earlier, the information in the record concerning current noise levels in the vicinity of the hospital is limited to noise measurements taken at the sites of three abutting homes. Noise level projections, on the other hand, are provided in the easy-to-read format of the noise maps in Appendix 1. Comparing the available data, the Hearing Examiner concludes that because noise measurements above 55 dBa were taken at three abutting homes (see Ex. 52), it is likely that if an "existing conditions" noise map were drawn up today, it would show at least some part of the property attached to the abutting homes in orange – with noise levels between 55 and 60 dBa. The next step is to assess how the air handler proposed in the present modification would affect the noise contours on nearby homes, particularly the abutting homes.

The proposed air handler clearly would lead to increased noise levels for several nearby homes. See Ex. 48(i), in Appendix 1. The largest impact would be on homes directly across from the C-Wing, on the north side of Lincoln Street. However, a close review of the noise maps shows that the proposed air handler would also increase noise levels, albeit to a lesser degree, for abutting homes on Grant Street. Moreover, the noise maps show a more significant noise increase for the closest house to the C-Wing on the south side of Lincoln Street, which is one of the locations that had nighttime noise measurements in May and June of this year that were above 55 dBa. Accordingly, the Hearing Examiner concludes that the proposed air handler would worsen already existing noise violations, if it were permitted to be installed and operated before the existing violations are corrected. The hospital's

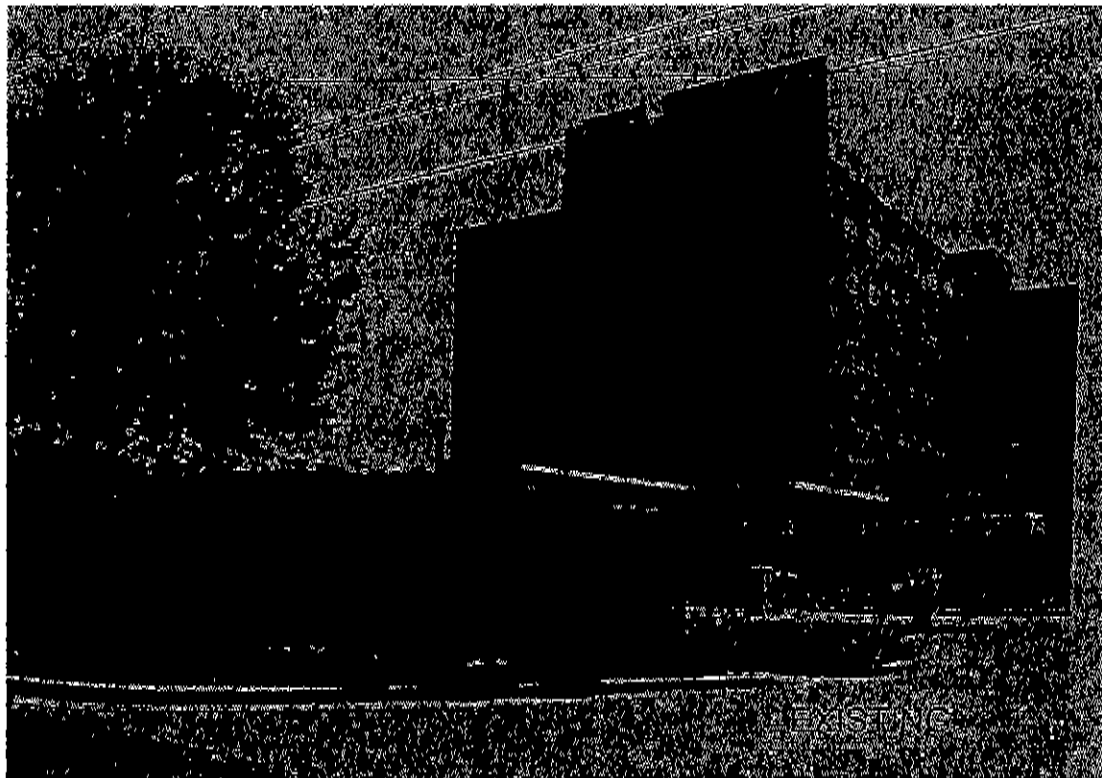
Noise Mitigation Plan submitted to DEP estimates a total time from design to completion of construction for the four noise barriers of 28 to 30 weeks. That schedule would put noise barriers in place in seven to eight months, much farther out than the hospital's proposed schedule for installation of the new air handler and air shaft, which were intended to be installed in late October. See Tr. Sept. 12 at 187. The recommended conditions of approval reflect the Hearing Examiner's conclusion that the BOA should avoid knowingly sanctioning a worsening of existing noise violations by allowing the new air handler to be installed before the noise barriers are erected and their efficacy is assessed.

The Hearing Examiner recognizes that delaying the installation of the new air handler and air shaft may have adverse consequences for the hospital, if it is unable to put the 24 beds in the 4300 Unit back into service before the winter season, when (per the testimony) hospital admissions increase. The hospital's Director of Operations, Gene Corapi, testified that the decision was made to take the beds out of service last spring, and begin the renovations, on the assumption that the modification would be approved in time for an October installation. See Tr. Sept. 14 at 78-79. This was not an unreasonable assumption, but it turned out to be incorrect for several reasons, including the BOA's hearing calendar, the community's request for a public hearing, the intervening event of noise violations leading to an amendment to the modification request, and the Hearing Examiner's schedule and workload. The fact that the hospital took a risk with the beds in the 4300 Unit should not hinder the BOA in carrying out its responsibilities under the Zoning Ordinance.

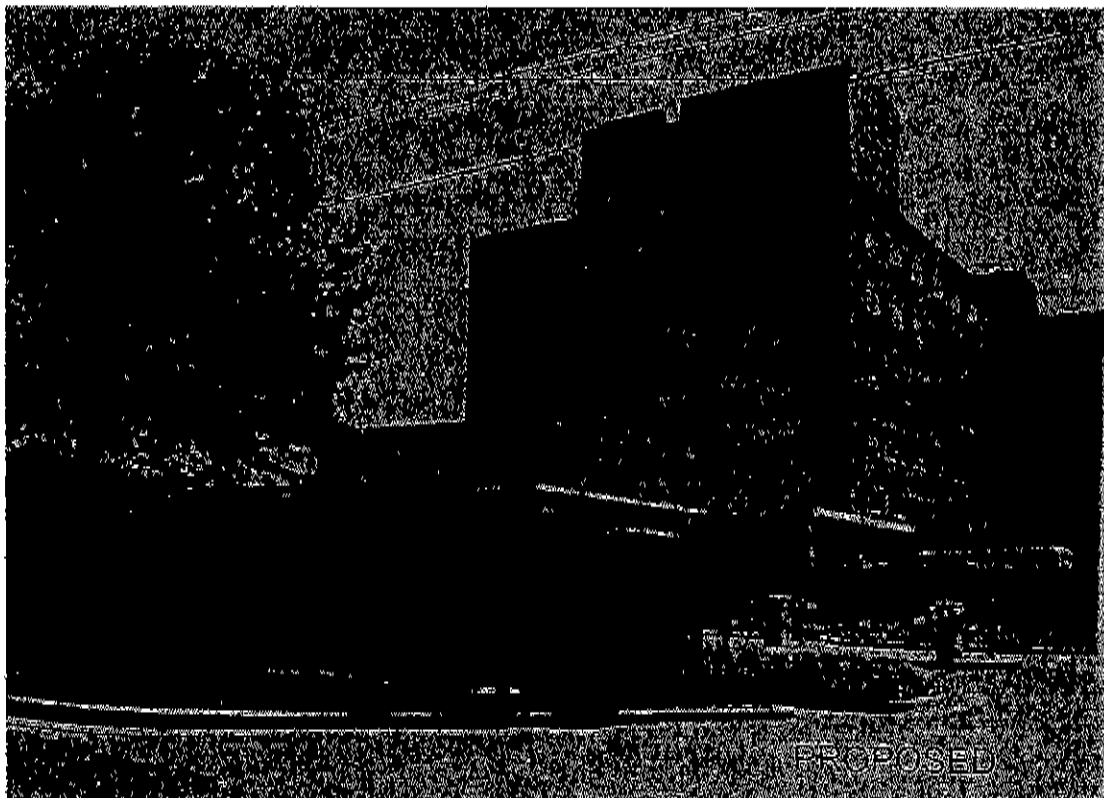
#### ***D. Visual Impact***

The HTCA argues that the proposed air handler, and more specifically the proposed air shaft, would have a detrimental visual impact on the neighborhood. The photographs on the next page compare the current appearance of the west wall of the C-Wing, which has a relatively narrow air shaft between rows of windows, with a simulation of the appearance anticipated with the new, larger air shaft.

**Current Condition: West Wall of C-Wing, Facing Lincoln Street. Ex. 48(d), bottom photo.**



**Proposed Future Condition: West Wall of C-Wing, Facing Lincoln Street. Ex. 48(d), top photo.**



Petitioner's architect testified that each element of the proposed modification would be enclosed in materials that would be consistent with existing materials used on the hospital building, making them architecturally compatible with the hospital. See Tr. Sept. 12 at 103-104. As an HTCA member pointed out, the salient legal issue is compatibility with the neighborhood, which is composed of small, single-family homes. Because the hospital is already part of the neighborhood, however – and indeed has been for a very long time – the Hearing Examiner finds that the proposed changes to the exterior of the hospital building would blend into the building sufficiently that they would not materially change the hospital's visual impact on the neighborhood.

Petitioner submitted several photographs showing that for some houses on Lincoln Street, the west wall of the C-Wing and the attached maintenance building are largely hidden, at least in warm-weather months, by trees. See Ex. 65. For the house or houses that have the view in the photographs on the previous page, however, the west wall and the maintenance building are very visible, despite a six-foot evergreen hedge along the hospital's parking lot. Moreover, most of the trees in the photographs appear to be deciduous, suggesting that the building is more visible during the cold weather months.

In response to a question from the Hearing Examiner about whether the hospital would consider planting tall evergreens along Lincoln Street, to screen the unappealing view of the C-Wing with its appendages and loading area, Mr. Corapi stated that the hospital would not be opposed to the idea, if it can be done. Ms. Sears interjected that there is no room for large trees between the public right-of-way for Lincoln Street and the adjacent parking lot, which are separated only by a narrow planting strip. One community member indicated in her testimony that large evergreens along Lincoln Street would be very welcome. The Hearing Examiner considered recommending a condition requiring the hospital to investigate the feasibility of such plantings and report back to the BOA. On balance, however, considering the fact that the view is already unattractive and would be made only marginally more so by the proposed modification, as well as the likelihood that the current configuration does not leave room for larger evergreens, the Hearing Examiner has decided not to recommend such a

condition. It may be more practical and more beneficial to consider such measures in the context of the larger modification request that is anticipated in connection with the hospital's expansion plans.

Petitioner submitted additional photographs simulating the appearance of the four noise screens proposed in the Noise Mitigation Plan. See Exs. 48(e) and (f). These photographs are not reproduced here because it is very difficult to see the screens at a small scale. The photographs demonstrate clearly that to the extent the noise screens would have any noticeable visual impact, it would be a beneficial impact, replacing views of mechanical equipment with solid walls in a neutral color that blends into the hospital.

### ***E. Community Involvement.***

Most of the HTCA's concerns have been discussed in previous sections of this report. Two additional areas should be addressed: the larger modification plan anticipated from the hospital in the near future, and the composition of the proposed Community Liaison Council ("CLC").

#### **1. Anticipated Major Modification**

The hospital acknowledges that it is in the process of preparing an expansion plan that will involve significant changes in the hospital site. When the Hearing Examiner asked for a basic description of the planned expansion, Mr. Corapi stated that "what the hospital has discussed with the community thus far" is replacing the existing parking structure on Old Georgetown Road with a larger one, north of an existing, tall administration building, and expanding the footprint of the hospital to the northwest, over what is currently Lincoln Street. Mr. Corapi observed that the purpose of the planned expansion is to replace and upgrade existing facilities, including providing private rooms for patients. See *id.* at 43-44. Currently, only 70 of the patient rooms are private. He stated that additional clinical space will be included, as well, but the details of the expansion are still being worked out. He added that the expansion plans do not contemplate tearing down any of the existing wings of the hospital. See *id.* at 46. The only structures expected to come down are the parking garage and homes on Lincoln Street, which Suburban owns.

Mr. Corapi stated that the part of the C-Wing on which proposed air handler and air shaft would be installed would not be affected because the maintenance building on which the new air handler would be located houses maintenance and engineering facilities and sits over the boiler plant, so from an engineering perspective that has to stay in place and cannot be built upon. *See id.* at 38-39. Mr. Corapi acknowledged that the community has asked the hospital to consider directing any expansion towards Old Georgetown Road, where the hospital currently has parking lots. *See id.* at 49. He stated that to his knowledge, the modification currently requested would not make it more difficult to place buildings along Old Georgetown Road. *See id.*

The HTCA argues that the present modification petition should be deferred until the major expansion modification petition is filed, because to do otherwise is to permit a piecemeal approach that does not allow a complete and efficient review. The HTCA is concerned that approving the present modification could tie the BOA's hands with regard to the modification that would be necessary for the anticipated expansion plan, by putting the hospital in a position to argue that it cannot consider alternatives the community might propose because of the money expended on the new air handler and air shaft. The HTCA envisions the possibility that a viable expansion plan might involve building foundations on either side of the one-story maintenance building and constructing a new building on those foundations. Such a plan might have the added benefit, the HTCA argues, of allowing the new air handler and air shaft to be completely hidden by a new building, removing their visual impact and reducing their noise impact. They contend that considering the proposed air handler and air shaft in the context of the major expansion modification would provide many more opportunities to mitigate their impacts.

At a minimum, the HTCA asserts that if the present modification petition is approved, the approval should state that the hospital proceeds at its own risk, and that funds spent on this modification will not be considered a valid reason to reject an expansion alternative that otherwise makes good planning sense.

Mr. Klauber recommends that the BOA follow in this case the same course of action it has taken with other hospitals, which is to approve this modification on condition that the hospital may not submit any other modification petition until it first submits to the BOA a long-range strategic plan for the development of the hospital. This suggestion is reflected in the recommended conditions of approval.

Petitioner, not surprisingly, contends that the proposed modification is not related to the hospital's expansion plans and should be considered on its own merits. In light of Mr. Corapi's sworn testimony that the modifications proposed here would not make it more difficult to place buildings along Old Georgetown Road, and that the expansion plan as presently configured does not involve changes to the portion of the C-Wing involved in these modifications, the Hearing Examiner is inclined to agree. The hospital has requested approval for a discrete set of improvements that are susceptible of being considered on their merits, and as a special exception holder Suburban is entitled to that consideration, taking due account of the community's needs. Moreover, the Hearing Examiner does not consider it a function of conditions of approval to put a special exception holder on notice, as Mr. Knopf suggested, that the BOA will not allow its hands to be tied in future cases. It would be reasonable for the hospital to expect, nonetheless, that the BOA will not allow the present modifications to be a factor in decisions related to the anticipated major expansion plan.

## **2. Composition of the CLC**

Virginia Miller spoke on behalf of the Wyngate Citizens Association, which represents 1,560 homes in Bethesda. Wyngate is about a mile to a mile and half from the hospital, with boundaries from Old Georgetown Road a little south of Beach Drive to Aniston, and continuing to Greentree Road. Her association objects to the wording of the Board of Appeals' Resolution effective July 16, 2007 (since suspended), which directed Suburban to form a CLC, with membership to include representatives of the hospital, the HTCA and "other citizens associations invited by the HTCA," as well as the People's Counsel. See Ex. 40. Ms. Miller requests that the resolution be amended to permit all surrounding neighborhood communities to participate equally in the CLC, as has been the case with a

similar group formed by the National Institutes of Health. Ms. Miller finds it inconsistent with Montgomery County's usual democratic approach to allow one community to control the composition of the CLC. She commented that Suburban is extremely important to her community, and its survival and welfare are critical.

Ms. Miller suggests that the CLC include those who live within several miles of the hospital, a fire department if they felt they had an issue they wanted to address, a representative of NIH, since they have a partnership with Suburban and are involved with some of the same traffic issues, and maybe the nearby schools. Ms. Miller acknowledged that her community does not abut the area covered by the HTCA – there are other citizens' associations in between. *See also* Ms. Miller's letter at Exhibit 47.

The same request concerning the CLC was also transmitted by letter from the Oakmont Special Taxing District, which describes itself as "a very nearby community" for whom the existence and welfare of Suburban Hospital is of vital importance. *See Ex. 44.* The writer, Barbara Moskowitz, requests that the CLC be open to all citizens groups "in the proximity of the hospital." *Id.*

Petitioner's counsel stated in her closing argument that the hospital would welcome the participation of other community groups in the immediate area in the community liaison council. *See Tr.* Sept. 14 at 98. Suburban also submitted a letter to the BOA, received on June 21, which describes the hospital's community outreach efforts. *See Ex. 38.* These efforts have included the formation of a Community Panel for a Healthy Future, whose purpose has been to identify the most important priorities and considerations in a long-range development plan and to provide feedback on the plan as it has evolved. *See id.* The Community Panel has had broad membership including "several local citizens associations, fire and rescue, police, business, clergy, other local health care providers, and a Suburban physician, volunteer, staff member and patient." *Id.* The HTCA participated in the Community Panel for some time, then made a decision to withdraw based on its belief that Suburban was using the panel to give the appearance of a community effort, "even as it ignored utterly the concerns of those neighbors who would be most directly affected by the consequences of any

expansion.” Letter from HTCA to hospital president, Ex. 35. The HTCA reports that it requested repeatedly, in writing, that John Carter, Chief of Community Based Planning at the MNCPPC, and the People’s Counsel, Martin Klauber, be included in the panel, but Suburban refused. HTCA contends that the panel agenda was strictly controlled by the hospital, and only its management and consultants were permitted to make presentations to the group, which had no way to confirm or challenge the hospital’s assertions. *See id.* HTCA raised these and other concerns in a series of letters to Suburban beginning in October 2005, many of which are in the record of this case, and contends that it withdrew from the panel after concluding that Suburban did not intend to use the panel for any legitimate communication purposes. *See id.*

Suburban and the HTCA also have met separately six times during the past year, with MNCPPC staff John Carter and Judy Daniel, as well as Mr. Klauber. *See Ex. 35.* The HTCA found that these talks accomplished little, as Suburban “ignored our concerns throughout and instead used the meetings to repeat its plans, which would destroy our community by closing Lincoln Street – the central artery of Huntington Terrace – and tearing down homes . . . .” *Ex. 35.*

The hospital counters that it has made extensive efforts to involve the community in its long-range planning, and that the HTCA’s decision to withdraw from the Community Panel was regrettable. The hospital submitted several letters that it has written in response to various letters from the HTCA over the last few years, demonstrating its ongoing dialogue with the community.

The Hearing Examiner finds that whether or not the hospital has engaged in meaningful community outreach or has been unwilling to consider the concerns of the HTCA is not directly related to the merits of this case. It is clear that there is a great deal of animosity between the hospital and the HTCA, which is most regrettable between a community-serving institution and its closest neighbors. This and any other modifications to the hospital’s special exception could be processed more smoothly and with less delay if a constructive, mutually respectful relationship existed between the two entities. Because such a relationship clearly does not exist today, the Hearing Examiner considers the BOA’s original direction concerning the membership of the CLC to be appropriate, and this is reflected in the

recommended conditions of approval. CLCs are not uncommon for special exceptions, and in my experience, their membership is routinely limited to the closest citizens association and individual owners of abutting and confronting homes. Those are the members of the community most directly affected by the operation of the special exception, and the CLC is designed to afford them a unique opportunity for direct discussions with the holder of the special exception. The formation of a CLC does not prohibit the hospital from continuing its Community Panel meetings with representatives of the broader community, it merely provides a separate forum in which the focus is narrowed to impacts on and concerns of the HTCA.

### **3. Other Community Involvement**

The record contains only one piece of correspondence from an individual homeowner writing on his own behalf. Jeffrey B. Grill, a resident of Southwick Street, forwarded to this office a copy of a lengthy, detailed letter that he sent to Suburban's president and CEO, Brian A. Gragnolati, on August 13, 2007. See Ex. 43. Mr. Grill wrote in response to a May 23, 2007 presentation that the hospital made to the Huntington Terrace community regarding its expansion plans. Mr. Grill noted that in a June 2006 email, he had expressed support for Suburban's expansion plans, provided that the hospital addressed certain concerns, none of which he believed Suburban firmly opposed. Mr. Grill points out that unlike the HTCA and the vast majority of his community, he is not firmly opposed to closing Lincoln street or demolishing some residences. However, based on the hospital's presentation on May 23, Mr. Grill reached the conclusion that he can no longer support Suburban's expansion plans because the hospital "has failed to address in any meaningful way the concerns I previously addressed." Ex. 43.

Mr. Grill's concerns are increased traffic resulting in safety issues, the aesthetics of the master plan and the desire to keep a "small community" feel, and protecting home values. Mr. Grill expressed dismay that Suburban has failed so totally to address the traffic issues that would be created by closing Lincoln Street, and surprise that the hospital "made no attempt to appease the community by offering at least some form of underground parking." *Id.* He finds the proposed seven-story structure,

20 feet taller than the existing hospital building, completely unacceptable in the context of the Huntington Terrace neighborhood, and more than the community can bear. Finally, Mr. Grill contends that home values should be protected by buffer zones, or by buy/sell options from the hospital.

### **III. SUMMARY OF HEARING**

#### ***A. Applicant's Case in Chief***

1. Gene Corapi, Suburban Senior Vice President for Operations. Tr. Sept. 12 at 4-51.

Mr. Corapi has been with Suburban for five years. He holds a master in health services administration from George Washington University and has many years' experience in hospital administration. Mr. Corapi's duties cover the day-to-day operations of the hospital. His job includes coordinating the work of directors of the functional areas of the hospital, who report to him, and ensuring that the staff and physicians have the resources they need to provide patient care. With regard to the subject of the present modification application, that has included general responsibility to oversee these projects.

Mr. Corapi stated that Suburban Hospital is Montgomery County's designated trauma center, which means it is part of a statewide, coordinated trauma system having staffing, facilities and protocol in place at all times, to which critically injured patients in Montgomery County are taken. Last year, Suburban treated almost 1,500 trauma patients, 42,000 emergency patients and 14,000 individuals admitted as in-patients. The hospital recently was recognized by the National Foundation of Trauma Care as one of the Country's five most highly prepared trauma centers.

Mr. Corapi explained that the hospital was built in four phases over time. The A wing is 51 years old, the B wing is 46 years old, the C wing is 41 years old and the D wing is 28 years old. Technology and patient care protocols have changed dramatically since the hospital was built, and so have standards for space criteria and environmental control, like air exchange rates. To allow Suburban's staff to provide high quality patient care, Suburban has been systematically modernizing and upgrading its facility. Over the past five years, Suburban has renovated six existing in-patient

nursing units, leaving two remaining to be renovated, including the one currently under renovation, for which the new HVAC system is proposed. The unit currently being renovated, the "4300 Unit", treated over 2,000 patients last year.

The hospital has also selected four operating rooms that desperately need to be upgraded to meet current hospital standards. The operating rooms to be replaced measure approximately 300 square feet each, far below the 600 to 700 square feet each planned for the replacement operating rooms, reflecting current design standards and air capacity requirements.

Mr. Corapi testified that a major donation was identified in the Fall of 2006 to upgrade the next unit, so the hospital immediately started planning the renovation of the 4300 Unit. The donation made it possible to simultaneously design and construct the six replacement operating rooms located directly above the nursing unit. The renovation required taking all 24 beds in the 4300 Unit out of service. Suburban has no vacant space in which to relocate patient beds in the interim, so the renovation was scheduled to take place during the summer months, when the hospital's admissions typically are lowest. Because the experts determined that this renovation would require a modification to the exterior of the building, the modification request was filed. It was filed during the spring of 2007, as soon as plans were available, so that construction could be performed during the summer and completed in the fall.

Mr. Corapi testified that the renovation currently underway will not increase the number of beds, the number of operating rooms, services or staff. It will serve to modernize existing spaces, support existing services and allow better patient care. Most importantly, the renovations would allow the hospital to meet current standards for air flow in hospitals. The operating room renovations would replace six operating rooms that are severely undersized and limit the staff's ability to accommodate modern medical technology.

Mr. Corapi stated that the new air handler is necessary to meet modern air flow standards, which provide a higher rate of air exchange than older technology. These standards are promulgated by a joint hospital commission that accredits hospitals nationwide. The standards permit

the hospital to continue to using existing air handling equipment, but if renovations are done, the standards require Suburban to meet the current standards. Because the hospital has severely limited ceiling space, the duct work for the new operating rooms has to run in the ceiling space of the 4300 Unit on the floor below. Thus, the HVAC design for the 4300 Unit and the new operating rooms have to be completed simultaneously. Mr. Corapi stated that the air handler was being manufactured at the time of the hearing, and was to be delivered to the hospital and installed in late September, then connected when the nursing unit renovation was completed in October. He noted that with the exception of the special exception modification, all permits necessary for the 4300 Unit renovation have been granted. Without the modification, Mr. Corapi stressed, the hospital will not be able to install or connect the air handler, or reopen the 24 beds.

Under cross-examination, Mr. Corapi acknowledged that at times, Suburban has had to close due to lack of capacity, and inform Emergency Medical Services of the situation, suggesting that they take patients elsewhere. He was quick to add, however, that Suburban prides itself on keeping the doors open as much as possible. If Suburban is closed, an emergency patient who is brought to the hospital by car or on foot still has to be treated. If they are in an ambulance, they could be diverted to another nearby hospital. If Suburban is closed to trauma patients, the nearest trauma hospitals are in Baltimore and Prince George's County.

Mr. Corapi stated that the first nursing unit renovation began in the spring of 2002. He suggested that the 2001 modification requested by the hospital to permit a new air handler unit might have been connected to that renovation. Mr. Corapi observed that the first six nursing unit renovations involved only interior changes, so no modifications of the special exception were necessary. Moreover, like the current renovations, they did not involve any expansion in personnel or the number of beds. Mr. Corapi stated that the hospital has a total of 231 beds, so the 24 beds currently out of service represent slightly less than ten percent.

Opposition counsel sought to question Mr. Corapi about whether the major modification that the hospital plans to submit in the coming months would involve any changes to the C wing.

Petitioner's counsel objected on grounds that such testimony would be speculative, and there ensued a lengthy discussion among counsel and the Hearing Examiner as to whether any questioning about the future major modification is relevant to the matter at hand. The Hearing Examiner acknowledged that the Zoning Ordinance limits the subject of a modification hearing to the requested modification, unless there is a significant increase in the square footage of structures involved, which is not the case here. The Hearing Examiner further acknowledged that Applicant's counsel could choose to direct her witnesses not to answer any questions about the planned major modification, but noted that it would be helpful to the Hearing Examiner's and the BOA's analysis to have a general picture of the expansion plan and whether the present modification would in any way constrain future decision on that expansion plan. Having put her objection on the record, Applicant's counsel did not instruct her witness not to answer the question. *See id.* at 31. Opposition counsel stated for the record that when the time comes for a hearing on the planned expansion, the community will argue that the hospital proceeds with the present modification at its own risk, and this approval should not drive the decision on the major modification. *See id.* at 33.

Mr. Corapi testified that the roof on which the air handler proposed in this modification is to be installed would not, to his knowledge, be affected by the future expansion plan. *See id.* at 35.

Mr. Corapi agreed that the renovation of the 4300 Unit and replacement of four operating rooms is an expensive undertaking. He denied, however, that this would inhibit any proposal to remove the C Wing and build a different building in that location, arguing that Suburban would be unlikely to remove the C Wing because it is in the newer part of the hospital, and has the emergency entrance. *See id.* at 37.

When the Hearing Examiner asked for a basic description of the planned expansion, Mr. Corapi stated that what the hospital discussed with the community this far is replacing the existing parking structure on Old Georgetown Road with a larger one, north of an existing tall administration building, and expanding the footprint of the hospital to the northwest, over what is currently Lincoln Street. Mr. Corapi explained that the part of the C-Wing involved with the proposed air handler and air

shaft would not be affected because the one-story building on which the new air handler would be located houses maintenance and engineering facilities and sits over the boiler plant, so from an engineering perspective that has to stay in place and cannot be built upon. See *id.* at 38-39.

Under further cross-examination, Mr. Corapi acknowledged that the community has asked the hospital to consider directing any expansion towards Old Georgetown Road, where the hospital currently has parking lots. See *id.* at 49. He stated that to his knowledge, the modification currently requested would not make it more difficult to place buildings along Old Georgetown Road. See *id.*

2. Robert Rothstein, M.D., Director of Emergency Department. Tr. Sept. 12 at 56-66.

Dr. Rothstein is a physician at Suburban and has been Director of its Emergency Department for 22 years. His responsibilities include making sure that patients in the emergency department receive quality care.

Dr. Rothstein discussed the impact on the Emergency Department of having the 4300 Unit closed for renovation. He noted that the National Academy of Sciences recently found that emergency care in this county is in crisis because our emergency departments are overwhelmed. Among the reasons for this, Dr. Rothstein suggested, are that people are living longer and have more chronic diseases, so when they get an acute illness on top of chronic disease at an older age, they utilize more medical resources. Physicians cannot handle all the people who need help, so emergency rooms end up seeing people who can't get an appointment with a doctor, in addition to people who are uninsured. The result is that people with a serious illness or injury that necessitates admission to the hospital are likely to wait longer for a bed than in the past, and ambulances have to wait longer to bring patients into the hospital. All of this is why the renovation of the 4300 Unit was planned for the summer months, when patient volume is at its lowest.

Dr. Rothstein testified that diverting ambulances is a failure of the hospital's obligation to the community. It can lead to delays in providing care to critically ill people, in circumstances where delay can make a significant difference in the outcome of treatment. He emphasized that delay in

reopening the 24 beds in the 4300 Unit has a significant impact on whether Montgomery County residents get the healthcare they need. About 75 percent of the patients who are admitted to Suburban come through the Emergency Department, so the link between beds and emergency care is clear.

As to whether the proposed modification would have an adverse impact on the community, Dr. Rothstein recommends weighing the costs and benefits. His job is to look out for the health care and benefits of the whole community, and from his viewpoint, he does not see any impact on the neighborhood from the proposed modification.

3. Richard Whitaker, architect. Tr. Sept. 12 at 51-126.

Mr. Whitaker was designated an expert in architecture. He testified that his firm investigated options for getting adequate air into the renovated 4300 Unit rooms and the new operating rooms, and found that the only feasible solution was to put an air handler on top of the engineering maintenance building, and distribute the air from that handler up the side of the building into the units. *See id.* at 70.

Mr. Whitaker described Exhibit 50, which has three components. Across the bottom is a cross-section from the intersection of Grant and Lincoln Streets to the location of the proposed air handler. The top middle and left parts of the exhibits show photographs taken from various points along that cross-section, looking at the hospital. The upper right corner has a site plan showing the hospital and surrounding homes, with a line indicating the locations shown on the cross-section.

Mr. Whitaker noted that Suburban owns the four houses abutting the hospital on the south side of Lincoln Street. On the north side of the street, Suburban owns all the houses except the one on the corner of Grant Street. Mr. Whitaker observed that the hospital has a six-foot, evergreen hedge on that side, plus a lower, wooden fence that starts at the northwest corner of the maintenance building and goes west approximately 50 feet, and the closest home is surrounded by deciduous and evergreen trees. The hedge runs from the first entrance off of Lincoln Street to the hospital's receiving area. Mr. Whitaker further noted that the homes closest to the hospital, and both of the homes directly across from the C-Wing, are one-story homes.

Mr. Whitaker then explained what the modification proposes, using Exhibit 48(d), which provides a photograph simulating what the proposed air shaft and air handler would look like from across the street. He noted the dimensions of the proposed equipment and stated that the shaft would be covered in a material that has the appearance of limestone, which is an element used on many parts of the hospital building. In Mr. Whitaker's opinion, the limestone color would be less noticeable than covering the air shaft in a color like the brick of the C-Wing walls. See *id.* at 103. He believes that a darker color would make the air shaft more visually intrusive and make it look like a heavy element placed on the side of the building. The lighter color would make it look lighter, more like the sky. See *id.* at 104. The air handler would be covered in a painted aluminum product that would emulate similar colors and materials on screening elsewhere on the hospital buildings.

Mr. Whitaker stated that the C-Wing building is about 147 feet from Lincoln Street, and the one-story engineering building is set back about 80 feet from Lincoln Street. In his view, the proposed modification would be compatible with the surrounding area. See *id.* at 81. He notes that the homes on Lincoln Street shown in the photographs have a limited view of the hospital because of the trees. Mr. Whitaker opined that the proposed air handler and air shaft would have no detrimental impact on the use, peaceful enjoyment or development of the surrounding property. He emphasized that the new structures have been designed to blend in with the hospital.

Mr. Whitaker opined that the proposed modification would be in harmony with the general character of the neighborhood. No additional occupied space would be created, so there would be no increase in population density. The design would match the color and form of existing enclosures and the color and texture of existing limestone highlights. The additional structures would be similarly proportioned to other mechanical components of the building. Mr. Whitaker further opined, based on his familiarity with similar equipment, that the proposed modification would not result in objectionable dust, illumination, glare or fumes. There would be no objectionable vibrations, no changes to exterior lighting and no changes in site activity.

Mr. Whitaker noted that the compliance plan related to the noise violations involves installing four noise screens, two on the C-Wing and two on the adjacent D-Wing. Mr. Whitaker described the locations and sizes of the proposed screens, as shown on Exhibit 48(c). See *id.* at 86-92. He noted that the screens would shield existing mechanical equipment. They would be built to a height about a foot higher than the equipment to be shielded, using metal panels in a beige color similar to other elements of the hospital building. Mr. Whitaker opined that the proposed screens would not be detrimental to the use, peaceful enjoyment, or development of the surrounding property and would be in harmony with the general character of the neighborhood because they would blend into the existing hospital building. See *id.* at 94. They would create no vibrations, fumes or lighting. He considers the screens architecturally suitable for the site and compatible with the neighborhood.

On cross-examination, Mr. Whitaker testified that the air handler is built so as not to create vibrations, because any vibrations would translate into the building, making it uncomfortable for the occupants.

Mr. Whitaker stated, on further cross-examination, that at least 50 percent of the homes in the neighborhood have a color similar to the limestone color that would be on the air shaft. He noted that "harmony" is a relative term. The air shaft would not increase the actual mass of the building, and is itself a very slender element, adding maybe two percent to the bulk of the building.

When asked whether it would be possible to extend the C-Wing over the one-story engineering maintenance building for a hospital expansion, Mr. Whitaker opined that it would be very complicated, but the difficulty would not increase because of the proposed air handler and air shaft. It would be enormously expensive and difficult to span over that building, so he would not recommend it.

4. Scott Harvey, noise control engineer. Tr. Sept. 12 at 126- 186.

Mr. Harvey was designated an expert in acoustical engineering with a specialty in noise and vibration control. He explained that vibration means movement in a solid object such as the floor or the ground. Noise or sound is movement that is perceived through the air with your hearing.

The bulk of Mr. Harvey's testimony, which covered the noise impacts of the proposed equipment as well as curing the noise violations, is summarized in Parts II.B and C above.

Mr. Harvey testified that Suburban contacted him in May 2007 for help with a notice of noise violation the hospital had received from Montgomery County. Mr. Harvey first reviewed some noise measurements taken the County, then took his own measurements, which came out lower. That called into question the County's measurements, so Mr. Harvey and Steve Martin from the County Department of Environmental Protection went out to the site together and took side-by-side measurements. They did this, in part, because the County's measurements showed noise levels that just barely exceeded the limits prescribed in the Noise Ordinance, so it seemed important to verify their accuracy. Mr. Martin had just had his instrument re-calibrated when the joint measurements were done, so he was very sure that his instrument was measuring accurately.

The County data from the side-by-side measurements showed slightly lower numbers than the original measurements, but some of the numbers still exceeded the 55 dBA nighttime limit established in the Noise Ordinance. Mr. Harvey pointed out that the highest measurement was 57.9, which is 2.9 dBA above the nighttime noise limit – a barely perceptible difference. That noise level was measured at one location, the rear yard of 8613 Grant Street, which is one of the two houses in the middle of the block that are across the parking lot from the D-Wing. Mr. Martin took noise measurements at this house, one other on Grant and one house on Lincoln Street, Mr. Harvey explained, because he had previously measured noise violations at those locations.

Mr. Harvey explained that the County took the initial measurements in response to complaints by community members. The complaints actually came from people who lived some distance from the hospital. Mr. Martin's measurements at one such house, 700 feet from the hospital, showed no noise levels exceeding the limit. As Mr. Harvey explained it, a community member asked Mr. Martin to measure the noise levels at the some of the homes abutting the hospital. He was initially reluctant to do so because all of those homes are owned by the hospital, but the County Attorney's office advised him to measure at the nearest residential location, so he did. *See id.* at 142.

Having determined that there were violations of the Noise Ordinance, Mr. Martin required a plan of compliance from the hospital, which Mr. Harvey developed.

Mr. Harvey opined that the proposed modification would not be detrimental to use, peaceful enjoyment or development of surrounding properties. See *id.* at 165. He based that opinion "upon this noise code primarily." See *id.* Mr. Harvey noted that the noise code was enacted to protect people from noise impact. It is restrictive, and it is enforced, and it requires compliance with noise limits that are equivalent to human speech during the day and half as loud at night. Mr. Harvey considers the nighttime limit to be a relatively quiet standard, so in his view, satisfying that standard means no detrimental impact. See *id.*

Under cross-examination, Mr. Harvey declined to agree that noise levels below 55 dBA in someone's yard could be disturbing at night. See *id.* at 167-68. For a constant noise source that continues without variation, he opined that anything below the statutory limit is not annoying or disturbing. Mr. Harvey described the noise that the proposed air handler would make as a low-frequency hum, similar to the equipment whose noise levels led to the recent violation notice. He considers that type of noise less disturbing than voices. Mr. Harvey noted that a five-dBa penalty is attached to noises that turn on and then off, which are considered more annoying. See *id.* at 170. Mr. Harvey stated that at the noise levels projected in this case, the constant humming would not be enough to set off vibrations in people or in their homes. See *id.* at 171.

Mr. Harvey confirmed that he testified on behalf of the hospital at a Board of Appeals hearing on a modification that was requested in 2001. Opposition counsel read and referenced testimony by Mr. Harvey during those proceedings to the effect that the noise level expected from the modification proposed at that time would be below county noise requirements. When asked what happened that resulted in the current noise violations, Mr. Harvey stated that the equipment currently making noise that exceeds county standards is not the equipment that was approved in 2001. He noted that during their investigation they turned the air handler that was approved in 2001 off and then on, and found that it did not change the noise levels. Mr. Harvey interprets that to be a result of that

unit's location and the fact that it is quiet compared to some of the other equipment. He noted that if you have two sources of noise, one quiet and one louder, only the louder one will register – the two together will make no more noise than the louder one alone. See *id.* at 174.

Mr. Harvey testified that he was not involved with the design, installation or anything else related to the equipment that led to the present violations. He suggested that lack of maintenance would be a likely explanation for equipment becoming noisier over time, for instance if a bearing could start screeching over time. He testified that he has not been asked to test the proposed equipment, after it is installed but before it is made fully operational, to see whether it creates noise levels that match the projections from the computer model. He has conducted such tests on other projects, and has found the computer modeling to be “relatively accurate,” meaning mostly within five dBa of reality.

Mr. Harvey defended the County's practice of not considering a noise measurement a violation unless it is over the statutory limit by 2.5 dBa or more. He stated that it is an appropriate practice because there are variations. For instance, when he did side-by-side measurements with Mr. Martin, they calibrated their instruments before doing the measurements and were within a foot of each other, but they still came up with different values. See *id.* at 180-81. He thinks it is appropriate to have some tolerance. He conceded that the County does not use a grace period in the other direction, i.e. considering a noise measurement between 53.6 and 55 dBa to be a violation because there could be an error in measurement.

When asked what other materials might be considered to mitigate the noise violations, Mr. Harvey stated that masonry and wood are also used for sound attenuation. The advantage of the materials he recommends is that they are tested in a laboratory, so you know how they are going to perform. He said that his firm uses wood “all the time,” but these products are designed to do this job – they are designed to reduce noise and come with a built-in absorbent layer. See *id.* at 183.

On re-direct, Mr. Harvey stated that a noise disturbance is defined in County Code Chapter 31-B as “a sound that is unpleasant, annoying, offensive, loud or obnoxious, unusual for the time of day or location when it is produced or heard, or detrimental to the health, comfort or safety or an

individual or reasonable enjoyment of property or the wrongful conduct of business because of the loudness or character of the noise.” *Id.* at 184. In Mr. Harvey’s view, the 65 dBa and 55 dBa noise limits were established to avoid noise disturbances.

The Hearing Examiner asked Mr. Harvey whether people would experience an increase in the noise level in their yard by 5 dBa as a noise disturbance, or find such a change objectionable, if the County did not have statutory noise limits. See *id.* at 185-86. Mr. Harvey replied that people would not find a 5 dBa change objectionable.

### ***B. Community Testimony***

1. Virginia Miller, Wyngate Citizens Association. Tr. Sept. 12 at 51-56.

Ms. Miller’s testimony is summarized in Part II.E above.

2. Amy Shiman. Tr. Sept. 12 at 193-

Ms. Shiman has lived at 5517 Hoover Street in Bethesda, about eight houses away from Suburban, for nine years.<sup>8</sup> She served on a liaison group that worked on the proposed hospital expansion in 2001, which tried to negotiate a mutually acceptable expansion that would allow for additional hospital stays and additional parking, while keeping the orientation toward Old Georgetown Road and keeping Lincoln Street open. Ms. Shiman testified that those negotiations were “abruptly terminated,” and that the community was assured at that time that when the new HVAC system was installed, the noise would be quieter. She described the noise from the hospital as “a constant roar that detracts from the enjoyment of my property and concerns me about my children’s health as exposure to constant low levels of noise.” Tr. Sept. 12 at 194. She has found over the years that the noise has gotten worse. There are more helicopters and ambulances, as well as more visual intrusions, but Ms. Shiman suggested that the community feels the HVAC noise “is something that is controllable.” *Id.*

Having gotten more and more frustrated by noise that can be heard two blocks from the hospital, Ms. Shiman asked DEP to test the noise levels in the fall of 2006. The testing was not done at

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<sup>8</sup> The hospital’s Mr. Corapi testified on the second hearing day that Ms. Shiman’s home scaled off at distance of about 900 feet from the C Wing and 700 feet from the B Wing. See Tr. Sept. 14 at 89.

the nearest residential lot line, so in April 2007, Ms. Shiman asked DEP to test again, at the nearest residential lot line. DEP's Mr. Martin first had to check with an attorney, which he did, then he stated that he would need permission from the renters of the homes, because all of the homes closest to the hospital are owned by the hospital. Ms. Shiman took it upon herself to knock on the doors of three of the rental homes, introduce herself and ask whether the residents would be willing to let the County do some noise testing at 5:00 in the morning. The renters she spoke with said they were disturbed by the noise, can't sleep at night, but didn't want to complain. They said they would allow the testing, which they did. Ms. Shiman submitted a map identifying the three homes in question, two on Grant Street and one on Lincoln Street. See Ex. 56.

Ms. Shiman noted that the testing on May 3, 2007 (the same day the present modification petition was filed) found noise levels at the three homes adjacent to the hospital exceeding the County's noise standards. She stated that Mr. Martin notified the hospital of the violations on May 25, 2007, and on May 29, Ms. Shiman and another local homeowner, Robert Newton, electronically filed a noise complaint. She attended a Board of Appeals hearing on May 30, at which the Board required the hospital to do monthly noise testing at the same locations as the May 3 testing. She questioned why no test results were submitted for July or August. The Hearing Examiner explained that testing was to be done on a quarterly basis, not monthly, and that the resolution requiring that testing was suspended when a public hearing was requested on the modification request.

Ms. Shiman submitted a letter from Mary Kane, a former tenant in one of the hospital's rental houses.<sup>9</sup> See Ex. 55. Ms. Kane states that she complained to DEP about noise from the hospital in 1999, while she was a tenant at 8605 Grant Street. Two months later, her lease was not renewed past its August, 1999 expiration. Ms. Kane states that Suburban's leasing agent, Jerry Sincavage, told her that her lease was not renewed because of her noise complaint. See *id.* [The hospital

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<sup>9</sup> The letter was admitted over the objection of the hospital's counsel, Barbara Sears. Ms. Sears argued that it should not be admitted because it is hearsay, and the nature of the allegations in the letter call for an opportunity for cross-examination. See Tr. Sept. 12 at 196. She further argued that Ms. Shiman should have submitted the letter earlier in the proceedings, rather than waiting until the public hearing. The Hearing Examiner admitted the letter nonetheless, offering the hospital whatever time might be needed for a response. The hospital submitted a response two days later, at the second hearing date.

subsequently submitted a letter from Mr. Sincavage stating that the records for 8605 Grant Street show no record of noise complaints from the tenant, Mary Kane. See Ex. 61. The letter also includes the following statement: "Under no circumstances would I, Jerry Sincavage, Property Manager, tell the tenant the lease is not being renewed because of noise complaints." *Id.* Finally, Mr. Sincavage states that Ms. Kane initially entered into a lease in 1995 and was offered lease extensions through 1999. See *id.*]

The Hearing Examiner observes that Mr. Sincavage's letter does not state that noise complaints would not result in a decision not to renew a tenant's lease -- he merely states that he would not *tell* a tenant that is the reason for a decision not to renew. Moreover, the hospital submitted Mr. Sincavage's letter at the second hearing date, but did not bring Mr. Sincavage, a current employee, to testify in person. On the other hand, Ms. Kane likewise was not available for cross-examination, and her letter has few details. The Hearing Examiner finds that Ms. Kane's letter at least calls into question any inference the hospital might try to draw that the lack of participation in this hearing by Suburban's present renters is an indication that the noise from the hospital does not bother them.

Ms. Shiman stressed that the existing noise levels are excessive, and interfere with her enjoyment of her property. She argued that the community is entitled to the least noise reasonably possible from the hospital, and that the hospital should follow the same policy as NIH, located across Old Georgetown Road from Suburban, which is to adopt a noise standard of 45 dBa<sup>10</sup>. She also questioned why the hospital's compliance plan does not conform to a statement in a June 27, 2007 letter from the hospital's noise consultant, Mr. Harvey, to the hospital, which describes the goal of the proposed compliance plan as reducing the noise levels by seven to ten dBa, to a level of 48 to 51 dBa to leave a significant "margin of safety" from the 55-dBa noise limit. See Ex. 58(c). Ms. Shiman described this as a "commitment" the hospital had made, but Mr. Harvey's proposal to the hospital would be difficult to construe as a commitment on the part of the hospital. Moreover, the evidence of

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<sup>10</sup> Ms. Shiman offered into evidence minutes from an NIH community liaison council meeting of May 17, 2007. See Ex. 57. This exhibit was admitted over the objection of Petitioner's counsel, who argued that no foundation was presented for what it was, what it referred to or why it was relevant. The Hearing Examiner finds the document only marginally relevant but sees no reason to question its veracity, and therefore admitted it.

record is not sufficiently specific to indicate whether the proposed noise mitigation would leave the three houses in question with noise levels above or below 51 dBa – all that the submitted noise modeling suggests is that the three houses in question would have noise levels in their rear and side yards over 50 dBa but below 55 dBa. See Ex. 48(h).

Ms. Shiman contended that Suburban should be required to cure its current noise violation before getting permission to install any new noise-generating equipment. Ms. Shiman also suggested that it would be nice to have some mature trees put in along the hospital's perimeter, especially where six of the mature trees have died.

Under cross-examination by Petitioner's counsel, Ms. Shiman agreed that none of the noise violations DEP identified were found on her property, although she does not believe testing was done at her property. Ms. Shiman conceded that the noise level on her property probably would not reach a level of 57.5 dBa. She also acknowledged that she complained to DEP, not to Suburban, because she knew that DEP is the appropriate government agency to test the noise levels.

When questioned about the context in which NIH agreed to adhere to a 45 dBa standard, Ms. Shiman was unsure.

At the second hearing, another community member submitted on Ms. Shiman's behalf a letter from Ms. Shiman relating a conversation she had with an official from the Maryland Health Care Commission about the implications of the hospital having 24 beds out of commission.<sup>11</sup> See Ex. 59. Ms. Shiman relates that she spoke with Paul Parker, Chief of the Maryland Health Care Commission, who stated that it is not unusual for a hospital to take ten percent of its beds out of service for renovation, and that such a situation can be managed, even if there are delays of several months. See Tr. Sept. 14 at 5. As described by Ms. Shiman, Mr. Parker added that taking 20 percent of the beds at a hospital out of commission would be much harder to manage. Ms. Shiman closed her letter by

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<sup>11</sup> The letter was admitted over the objection of Petitioners' counsel, who argued that it was "hearsay on hearsay," because we don't know what the person who wrote the letter was told. Ms. Sears argued that ten percent of the beds at the Washington Hospital Center, which has 907 beds, is very different from ten percent of the 238 beds at Suburban. The Hearing Examiner accepted the letter, but notes that hearsay evidence from a third party about the impact on Suburban of the 24 beds being closed carries less weight than the direct testimony on the subject provided by Suburban's management.

maintaining that the BOA should not feel pressured to grant approval of the proposed new HVAC system because of beds being out of commission.

3. Lorraine Driscoll, Huntington Terrace Citizens Association. Tr. Sept. 14 at 3-35.

Ms. Driscoll is president of the Huntington Terrace Citizens Association ("HTCA") and a ten-year resident of the neighborhood. She stated that the HTCA requested a hearing on the proposed modification for three reasons: (1) Suburban is currently out of compliance with county noise standards and those violations should be corrected before new HVAC units are added, preferably bringing noise levels below the county maximum; (2) the present modification represents a piecemeal approach, rather than the long-term strategic plan that the community has repeatedly requested over the past year, which would allow effective consultation with the community and efficient review by the BOA; and (3) the present modification request could tie the BOA's hands in connection with the upcoming major expansion proposal, by freezing in place some component of the proposed expansion.

Ms. Driscoll testified that the "constant din" from the hospital detracts from residents' enjoyment of the neighborhood. She stated that two weeks before, she was talking with Ms. Shiman in front of her house, eight houses away from the hospital, and they found they had to raise their voices to be heard. Ms. Driscoll expressed skepticism about noise projections, noting that six years ago, Suburban promised that their HVAC additions would remain under the statutory limits, but that didn't happen. Ms. Driscoll acknowledged Mr. Harvey's testimony testified that the source of the current noise violations is not the equipment that was approved in 2001, but older equipment, probably in need of maintenance. She expressed skepticism about this, as well, stating that the community does not understand how noise levels could be at 57.5 dBa, so much higher than the projections in 2001 that noise levels would be about 52 to 53 dBa on Lincoln Street and 48 to 49 dBa on Grant Street. See Tr. Sept. 14 at 9-10, 17-18. Her concern, of course, is that the projections offered in the present proceedings, which show noise levels within a few dBa of the statutory nighttime limit, will prove to underestimate the actual noise levels.

Ms. Driscoll noted that one of Suburban's written submissions identifies the distance from the hospital to the nearest residential improvements not owned by Suburban as 300 feet. Ms. Driscoll pointed out that many rental homes are contiguous to Suburban, and argued that the residents of those homes are entitled to the same protections as any other Montgomery County resident, without fear of retribution.

Ms. Driscoll took issue with Suburban's characterization of the aesthetic impact of the proposed modification as a "minor visual" impact. She recalled testimony from Petitioner's architect, on the first hearing day, about how compatible the new air shaft and air handler would be with the rest of the hospital. The issue, Ms. Driscoll observed, is compatibility with the neighborhood, not the hospital. She affirmed that the HTCA would like to work with the hospital on options for better aesthetics and better noise protection, noting that there would be more and better options if the proposed HVAC unit were considered in conjunction with the anticipated major modification. For example, she suggested that a building might be constructed around the new HVAC equipment, so it wouldn't be visible at all.

Ms. Driscoll maintained that Suburban should provide the community with a long-term strategic plan, so the neighbors will know what to expect. She argued that such a plan would provide context for minor modifications, and would allow effective consultation among hospital management, county planning professionals, the People's Counsel and members of the HTCA. She noted her dismay that during the half-dozen meetings her community has held with Suburban in the past year, the hospital never mentioned the proposed new HVAC installation, which would have provided the opportunity to work out an agreement before coming to the BOA. Ms. Driscoll described this as an example of the hospital's "callous disregard of our interests and concerns." Tr. Sept. 14 at 29.

[On rebuttal, Mr. Corapi contends that the hospital sent the HTCA a proposed outline for a meeting scheduled between the HTCA and the hospital on February 12, 2007, and the second item listed was an administrative modification to the special exception for an internal project in operating room suits. He produced an email from hospital staff member Leslie Ford Weber to someone at the HTCA named "Ann." See Ex. 67. Mr. Corapi's recollection is that the meeting did not get to that issue

because the HTCA wanted to go back to other issues that had previously been addressed. The People's Counsel produced a copy of the actual agenda for the meeting, which was prepared by the HTCA. See Ex. 68. The agenda does not mention a proposed administrative modification. Mr. Corapi explained that the hospital had agreed to let the HTCA set the agenda. See Tr. Sept. 14 at 88. He also noted that the hospital sent a letter to the community on May 8, providing notice shortly after the administrative modification request was filed. See Tr. Sept. 14 at 75,82; Ex. 66.]

Ms. Driscoll stated that the hospital initially said a major expansion proposal would be filed with the BOA as early as last June, then it was August, more recently October. She reiterated the HTCA's concern that approving the present modification could tie the BOA's hands in its review of the anticipated larger modification. Ms. Driscoll noted that in discussions last spring about an alternative the community suggested, the hospital's engineer said that would not work due to equipment that was put in place as a result of the last modification. Her organization fears the same thing will happen again with the present modification, and the hospital will argue that the money it spent on this modification precludes various options. One of the alternatives the HTCA has suggested for the anticipated expansion is to use additional height to make full use of the space, including erecting support pillars around the C-Wing and building on a platform above it. Ms. Driscoll is concerned that the present modification proposal would preclude that option. See *id.* at 32.

Ms. Driscoll requested that the BOA defer consideration of the present application for new HVAC equipment, and consider it in conjunction with the anticipated major expansion proposal. See *id.* at 32-33.

Ms. Driscoll voiced the opinion that when Suburban suggested people could suffer serious health consequences from beds being out of service for an extended period, they were painting the worst possible scenario. She noted that the hospital has acknowledged that other hospitals pick up the need when Suburban's beds are full. Moreover, she added, the situation is of the hospital's making, as they closed the beds before obtaining necessary county approval. She also notes that the urgency attached to the number of beds is undermined by the fact that the proposed expansion does not call for

an increase in beds, and by the fact that Suburban formally opposed a request by Shady Grove Hospital to establish an emergency facility, including beds, in Germantown. *See id.* at 34. Ms. Driscoll stressed that her community does not want the possibility of health consequences, however remote, to last any longer than necessary. Accordingly, they would support any effort to put the beds back into service until the requisite approvals are obtained. *See id.* at 33.

Finally, Ms. Driscoll addressed the proposed community liaison council. She noted that the County's zoning laws require consideration of the impact of land uses on nearby uses, those within sight and sound. This, she suggests, argues for a community liaison council comprised of communities affected by sight, sound and other impacts, which is the HTCA. Ms. Driscoll noted that her association is particularly sensitive on this point because in the past, Suburban has created, for what Ms. Driscoll terms "public relations purposes," an in-house task force composed largely of individuals and organizations with no land use interest, including employees, people interested in health care, and patients or former patients who do not live in the neighborhood. Ms. Driscoll expressed the HTCA's willingness to participate in a liaison group that will allow her community to discuss the hospital's options with the People's Counsel and MNCPPC staff, and its commitment to working with the hospital on a long-term plan that will be acceptable to the hospital, the neighborhood and the County. *See id.* at 34-35.

Petitioner's counsel, Barbara Sears, asked Ms. Driscoll whether she noticed, during her conversation in front of Ms. Shiman's house where voices had to be raised to be heard, that the house next door has a window air conditioner. Ms. Driscoll replied that she had not noticed the air conditioner, but that she can distinguish the sound of the hospital's HVAC and other equipment because she is very familiar with it. *See Tr. Sept. 14 at 36.*

In response to a question from the Hearing Examiner, Mr. Corapi stated that the hospital would not object to considering whether taller evergreens could be planted along the Lincoln Street side of the hospital. *See Tr. Sept. 14 at 99.* Petitioner's counsel interjected that there is no room for trees on hospital property along the road, because of the parking area inside the hedge, so it would require

county approval to plant new trees in the public right-of-way. Ms. Sears suggested that tall evergreens might not work with the power lines.

### ***C. Applicant's Rebuttal***

1. Gene Corapi, Suburban management. Tr. Sept. 14 at 38-40, 58-

Mr. Corapi identified the letter from Suburban's rental agent, Gerry Sincavage, that was discussed above in connection with Ms. Shiman's testimony. See Tr. Sept. 14 at 38-40.

Mr. Corapi identified six photographs that were taken on September 13, 2007 showing various views on Lincoln Street: houses across the street from the C-Wing; the view of the C-Wing from in front of one of those houses, showing a grass strip with deciduous trees and a six-foot hedge; the parking lot on the hospital side of the hedge; a view of the rooftop corner on the C-Wing, looking east; and two views of an NIH building as seen from Lincoln Street. See Ex. 65, Tr. Sept. 14 at 58-62. Mr. Corapi stated that the hospital's hedge along Lincoln Street is green all year round, and that the deciduous trees are healthy. Mr. Corapi acknowledged that there are some dead trees in front of the hospital, and stated that they are working with their tree experts to identify trees that would stand up better to the high winds from helicopters. On the photographs showing an NIH building, Mr. Corapi pointed out how the rooftop screens blend into the sky, so you don't see them at a distance. He stated that the noise mitigation screens Suburban is proposing would be similar in color.

Mr. Corapi testified that he generally hears about noise complaints from the hospital's Director of Plant Operations, Russel Cramer. See Tr. Sept. 14 at 65-66. In preparation for the September 14 hearing, he learned from Mr. Cramer that the hospital has records of two noise complaints that the hospital received some time ago, going back at least to the spring. In both situations, the noise was found to related to belts on equipment that had aged and needed to be replaced.

Mr. Corapi testified about the hospital's efforts to inform the HTCA about the present modification request, as discussed above in connection with Ms. Driscoll's testimony.

Mr. Corapi testified that he would not describe the timing of taking the 24 beds on the 4300 Unit out of operation as a "business decision," because it is a renovation, not adding beds or operating rooms. The renovation is being done to accommodate existing business at the hospital. He reiterated that the timing of the renovation was linked to a significant donation that was dedicated to that purpose. He also repeated that the goal was to close down the unit from spring to fall, 2007, when admissions are lightest, and they submitted all their permit and approval requests as soon as the design was complete. Mr. Corapi stated that the hospital assumed all the permits and the administrative modification would be granted, since the project is merely to replace existing facilities. Based on his familiarity with the special exception process, it was his judgment that the modification process would be completed in time for the equipment to be installed in October.

Mr. Corapi added that the present modification is not related to the anticipated major expansion, which is expected to take a very long time to go through the special exception modification process. The hospital needed to come up to standards with air flow in the units being renovated, and did not believe it was right to tie it to the larger expansion.

2. Margaret Fitzwilliam, Suburban management. Tr. Sept. 14 at 41-46.

Ms. Fitzwilliam is Corporate Director of Capital Renovation and Space Management for the hospital. She identified for the record a series of letters that the hospital has sent to the HTCA in response to the several letters already in the record from the HTCA to the hospital. She also identified a letter from the hospital to Councilmember Roger Berliner responding to questions he had sent to the hospital.

3. Leslie Ford Weber, Suburban management. Tr. Sept. 14 at 48-51, 64-65, 76-77, 81.

Ms. Weber is Senior Vice President of Development for Suburban and Executive Vice President of the Suburban Hospital Foundation. She testified that her first knowledge of the noise violation came in a telephone call from Ms. Shiman on May 23, 2007. She confirmed that Mr. Martin of DEP informed her by telephone on May 25 that the County had recorded a noise violation on May 3, and that she referred the matter to Mr. Corapi.

Ms. Weber confirmed that the hospital sent a "Dear Neighbor" letter in May to notify the neighborhood about the administration modification request. She did not recall whether the letter was sent to all 300 households in the HTCA area, or just to the owners of property adjoining or confronting Suburban's property, which would include property owners, for example, who are across Grant Street from residential lots that are owned by Suburban. See Tr. Sept. 14 at 76.

Ms. Weber testified, on cross-examination, that no limits were placed on the donation that funded the present renovation requiring the money to be spent within any particular timeframe. See Tr. Sept. 14 at 81.

4. Russell Cramer, Suburban management. Tr. Sept. 14 at 67-

Mr. Cramer is Corporate Director of Plant Operations for Suburban, and is a registered mechanical engineer. He testified that noise complaints come to him. Regarding the two noise complaints Mr. Corapi mentioned, Mr. Cramer stated that his staff investigated the source of the noise by walking around the site with walkie-talkies and turning off various pieces of equipment until they could isolate the source of the noise so they could fix it. In one case it took a couple of days because it was a belt that warmed up during the day and got quieter, then got louder at night when the temperature dropped. Mr. Cramer stated emphatically that if he received a noise complaint, his staff will find the problem and fix it.

When asked on cross-examination whether temperature differences could lead to different readings on a warm May day than in the winter, Mr. Cramer responded that "you'd get different noise readings no matter when you tested on any day. There's other background noise going on. . . with birds chirping and leaves rustling this seems to be more of an art than a science from what I could see . . . ." Tr. Sept. 14 at 70-71. He opined that equipment that meets noise standards at one time might become noisier over time, with wear and tear, even with regular maintenance. Mr. Cramer explained that the hospital has a routine maintenance schedule, probably a quarterly check at least for most of the rooftop equipment, but they can test one day and grease and adjust belts and the equipment can go bad the next day. In his view, "the sound profiles of mechanical equipment can

change over time." *Id.* at 71. He noted that he followed the same procedure to locate the source of the noise violations that DEP identified that he followed to respond to neighbors' complaints: going around the site turning individual pieces of equipment on and off to find out which ones are making the most noise.

***D. People's Counsel.*** (Tr. Sept. 12 at 28, Tr. Sept. 14 at 107-109.)

Martin Klauber, the People's Counsel for Montgomery County, noted for the record that in the case of an administrative modification requested by Washington Adventist Hospital, the Board of Appeals required as a condition of the modification that the hospital submit a strategic plan to provide context for the minor modification. He pointed out that Suburban has never submitted a strategic plan in connection with its special exception. Mr. Klauber recommended that the BOA require Suburban to submit a strategic plan to explain how the proposed modification would fit in the with the planned development of the hospital.

Mr. Klauber suggested that the noise inspections could have been avoided if there were better communications between the hospital and the community around it. He recommended that the requested modification be granted, but only if the hospital is required to submit a long-range plan.

#### **IV. CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. The special exception is also evaluated in a site-specific context because there may be locations where it is not appropriate. Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (see Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed modification, with the conditions recommended at the end of this report, would satisfy all of the specific and general requirements for the use.

### ***A. Standard for Evaluation***

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. In general, analysis of inherent and non-inherent adverse effects establishes what physical and operational characteristics are necessarily associated with the use in question. Characteristics of a proposed modification that are consistent with the characteristics thus identified are considered inherent adverse effects. Physical and operational characteristics of the proposed modification that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, are considered non-inherent adverse effects. The inherent and non-inherent effects thus identified are analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Given the extensive, complicated nature of a hospital operation and the limited evidence available in the record, for purposes of this report and recommendation the analysis of inherent and non-inherent characteristics is limited to those that are relevant to the proposed modification. The Hearing Examiner considers HVAC equipment and noise screens to be inherent characteristics of a hospital facility. Inherent characteristics can be rendered non-inherent by features such as unreasonable or incompatible scale or scope. However, based on the evidence and analysis outlined in Parts II.C and D above, the Hearing Examiner finds that with full compliance with the recommended conditions of approval, the equipment proposed in this modification petition would not result in

objectionable noise or visual impacts, and therefore should be considered inherent characteristics of the use. Accordingly, the Hearing Examiner concludes, based on the preponderance of the evidence, that with the conditions recommended at the close of this report, the inherent and non-inherent adverse effects of the proposed modification are not sufficient to warrant denial.

### ***B. Specific Standards***

The specific standards for a hospital are found in Code § 59-G-2.31. Petitioner's written evidence and testimony provide sufficient evidence that with the recommended conditions, the proposed modification would be consistent with these specific standards, as outlined below.

#### **Sec. 59-G-2.31. Hospitals.**

A hospital or sanitarium building may be allowed, upon a finding by the board that such use will not constitute a nuisance because of traffic, noise or number of patients or persons being cared for; that such use will not affect adversely the present character or future development of the surrounding residential community; and if the lot, parcel or tract of land on which the buildings to be used by such institution are located conforms to the following minimum requirements; except, that in the C-2 and C-O zones, the minimum area and frontage requirements shall not apply:

- (1) **Minimum area.** Total area, 5 acres.
- (2) **Minimum frontage.** Frontage, 200 feet.
- (3) **Setback.** No portion of a building shall be nearer to the lot line than a distance equal to the height of that portion of the building, where the adjoining or nearest adjacent land is zoned single-family detached residential or is used solely for single-family detached residences, and in all other cases not less than 50 feet from a lot line.
- (4) **Off-street parking.** Off-street parking shall be located so as to achieve a maximum of coordination between the proposed development and the surrounding uses and a maximum of safety, convenience and amenity for the residents of neighboring areas. Parking shall be limited to a minimum in the front yard. Subject to prior board approval, a hospital may charge a reasonable fee for the use of off-street parking. Green area shall be located so as to maximize landscaping features, screening for the residents of neighboring areas and to achieve a general effect of openness.
- (5) **Commission recommendation.** The board or the applicant shall request a recommendation from the commission with respect to a site plan, submitted by the applicant, achieving and conforming to the objectives and requirements of this subsection for off-street parking and green area.

(6) **Building height limit.** Building height limit, 145 feet.

(7) **Prerequisite.** A resolution by the health services planning board approving the establishment of the hospital shall be filed with the petition for a special exception.

Conclusion: The proposed modifications would not affect compliance with any of the requirements listed in subparagraphs (1) through (7). Based on the evidence and analysis outlined in Parts II.C and D, the Hearing Examiner concludes that the proposed modifications would not result in the creation of a nuisance, nor would they result in adverse impacts to the present character or future development of the surrounding residential community. The proposed noise screens would have no identifiable adverse effects, and considerable beneficial impact. The air handler would increase noise levels in the immediate vicinity of the C-Wing, and particularly for homes directly across Lincoln Street. The increase in noise levels is projected to be approximately 5 dBa, which is clearly a noticeable change. Mr. Harvey testified, however, that most people would not find a 5-dBa increase in noise in their yard to be objectionable. See Tr. Sept. 12 at 185-86. The Hearing Examiner concludes that the noise levels and increases projected in this case would not, in the context of this neighborhood, be sufficiently noticeable to adversely affect the character or future development of the surrounding residential community, which is already heavily impacted by the presence of Suburban, NIH and busy Old Georgetown Road.

### **C. General Standards**

The general standards for a special exception are found in Section 59-G-1.21(a). Petitioner's written evidence and testimony provide sufficient evidence that, with the recommended conditions of approval, the general standards would be satisfied in this case, as outlined below.

#### **Sec. 59-G-1.21. General conditions:**

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:
  - (1) Is a permissible special exception in the zone.

Conclusion: Not applicable to a modification.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: With the recommended conditions of approval, the proposed modification would comply with the standards and requirements set forth for the use in Code §59-G-2.31, as detailed in Part IV.B. above.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The proposed modification is too minor in nature to have any master plan implications.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: For the reasons discussed in Parts II.C and D above, the Hearing Examiner concludes that with the recommended conditions of approval, the proposed modification would be in harmony with the general character of the neighborhood, considering the cited factors. There would be no change in population density, intensity and character of activity, traffic and parking conditions or number of similar uses. The design, scale and bulk of the proposed air handler and air shaft would blend in with the existing hospital building, and would make the unattractive appearance of the C-Wing only slightly more unattractive, not enough to have any material impact on the neighborhood.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions of approval, the proposed modification would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions, the proposed modification would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site. As discussed in Parts II.C and D, the visual impacts would be minor, and the noise impacts should be considered acceptable, provided that the hospital complies with the recommended conditions of approval and ensures that noise levels drop below the statutory limits and remain there consistently.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: The proposed modification would not increase the number of special exception uses in the area. The evidence supports the conclusion that the proposed modification would not increase the intensity or scope of special exception uses sufficiently to affect the area adversely or alter its character.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions, the proposed modification would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.
- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of granting the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.
- (ii) With regard to findings relating to public roads, the Board . . . must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Conclusion: The proposed modification would have no effect on the adequacy of public services and facilities, including roads, or on pedestrian or vehicular safety.

- (b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.

Conclusion: No finding necessary.

- (c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Conclusion: The record substantiates a finding that the Petitioner has met the burden of proof and persuasion.

### **59-G-1.23 General Development Standards**

Pursuant to Section 59-G-1.23, each special exception must comply with the development standards of the applicable zone where the special exception is located, applicable

parking requirements under Article 59-E, forest conservation requirements under Chapter 22A, and sign regulations under Article 59-F; must incorporate glare and spill light control devices to minimize glare and light trespass; and may not have lighting levels along the side and rear lot lines exceeding 0.1 foot candles. Furthermore, under Section 59-G-1.23(g), any structure constructed under a special exception in a residential zone “must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.” Under Section 59-G-1.26, a structure constructed pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted, and must have suitable landscaping, streetscaping, pedestrian circulation and screening.

The proposed modification would not affect compliance with development standards, would not implicate forest conservation requirements, would not change exterior lighting, and would not materially affect the hospital building’s relationship to the surrounding neighborhood or its exterior appearance.

## V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-274 C, which seeks to modify the existing special exception for Suburban Hospital, located at 8600 Old Georgetown Road in Bethesda, be **granted** with the following conditions:

1. Petitioner shall be bound by all of its testimony and exhibits of record and by the testimony of its witnesses and representations of counsel identified in this report.
2. All terms and conditions of the approved special exception shall remain in full force and effect, except as specifically amended by this modification.
3. The new air handler and air shaft approved in this modification may not be installed or in any way used on site until the four noise screens that are approved in this

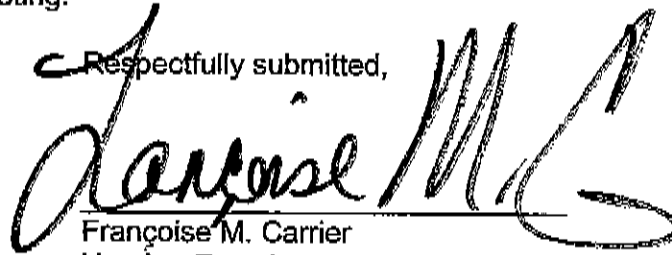
modification have been properly installed, noise measurements have been taken that demonstrate compliance with the daytime and nighttime residential noise limits established in the Montgomery County Noise Ordinance, Chapter 31B of the County Code, and the results of such testing have been submitted to the Board of Appeals. The testing results submitted to the Board of Appeals shall be presented at a meeting of the CLC required under Condition 11 below, such meeting to be held as soon as possible for the express purpose of presenting these testing results to the Huntington Terrace Citizens' Association.

4. After installation, the new air handler and air shaft approved in this modification may not be put into use until noise measurements have been taken that demonstrate compliance with the daytime and nighttime residential noise limits established in the Montgomery County Noise Ordinance, and the results of such testing have been submitted to the Board of Appeals. The testing results submitted to the Board of Appeals shall be presented at a meeting of the CLC required under Condition 11 below, such meeting to be held as soon as possible for the express purpose of presenting these testing results to the Huntington Terrace Citizens' Association.
5. All equipment installed in connection with this modification, as well as all existing equipment on the outside of the hospital building that generates noise, must be kept in good working order through a regular maintenance program.
6. Noise levels generated by the hospital must be tested on a quarterly basis by a professional who is trained in noise measurement. Unless permission to do the testing is denied by residents of the homes, testing must be carried out on at least three abutting residential parcels on Grant or Lincoln Streets, and on the three homes closest to the C-Wing on the north side of Lincoln Street. The results of such testing must be submitted to the Board of Appeals as soon as possible, and to the CLC required under Condition 11 below at its next regularly schedule meeting.

7. In the event that any noise testing shows noise levels on a receiving residential parcel that exceed the statutory limits established in the Noise Ordinance, the hospital must, within 45 days of receiving the test results, submit a proposed Noise Mitigation Plan and associated modification request, if necessary, to the Board of Appeals. Within the same 45-day period, the Noise Mitigation Plan must be submitted to the Montgomery County Department of Environmental Protection, Division of Environmental Policy and Compliance, with a request for its review and for comments to be submitted to the Board of Appeals within 30 days. Any such Noise Mitigation Plan must also be presented to the CLC required in Condition 11 below at its next regularly scheduled meeting.
8. The new air handler approved in this modification must be operated in the reduced-power "nighttime mode" described by Petitioner's noise consultant, Scott Harvey, on weekdays from 9:00 p.m. to 7:00 a.m. and on weekends and holidays from 9:00 p.m. to 9:00 a.m. Exceptions to this condition may be made in the event of an emergency requiring nighttime use of the one of the operating rooms served by this air handler, but abuse of this exception may lead to the imposition of additional conditions on the special exception.
9. Within 60 days of the Board of Appeals' Opinion in this matter, the hospital must submit to the Board of Appeals the hospital's long-range development plan, as currently constituted. The submitted plan must be sufficiently detailed to meet with the Board's approval. The plan submitted to the Board of Appeals must be presented to the HTCA at the next regularly scheduled meeting of the CLC required under Condition 11 below.
10. No further modifications of the subject special exception will be accepted for filing until a long-range plan has been submitted per Condition 9.

11. The hospital shall undertake the formation of a Community Liaison Committee, whose members shall consist of the President and CEO of Suburban Hospital, or the President's designee from Suburban Hospital in the event he is unable to attend any meeting in person; representatives of the Huntington Terrace Citizens' Association; representatives of other citizens' associations invited by HTCA; and Martin Klauber, People's Counsel, as an *ex officio* member. The CLC shall meet at least once every three months, and its first meeting shall be held no later than 60 days after the Board of Appeals' Opinion in this matter is issued. A copy of the minutes of each meeting of the CLC shall be submitted to the Board of Appeals within 30 days of each meeting.

Dated: October 25, 2007

Respectfully submitted,  
  
Françoise M. Carrier  
Hearing Examiner

## Appendix 1



**PHOENIX**  
noise & vibration

330 North East Street, Suite 2  
 Frederick, MD 21704  
 301-840-4227

Suburban Hospital  
 Rooftop Noise  
 Current Mitigated Condition

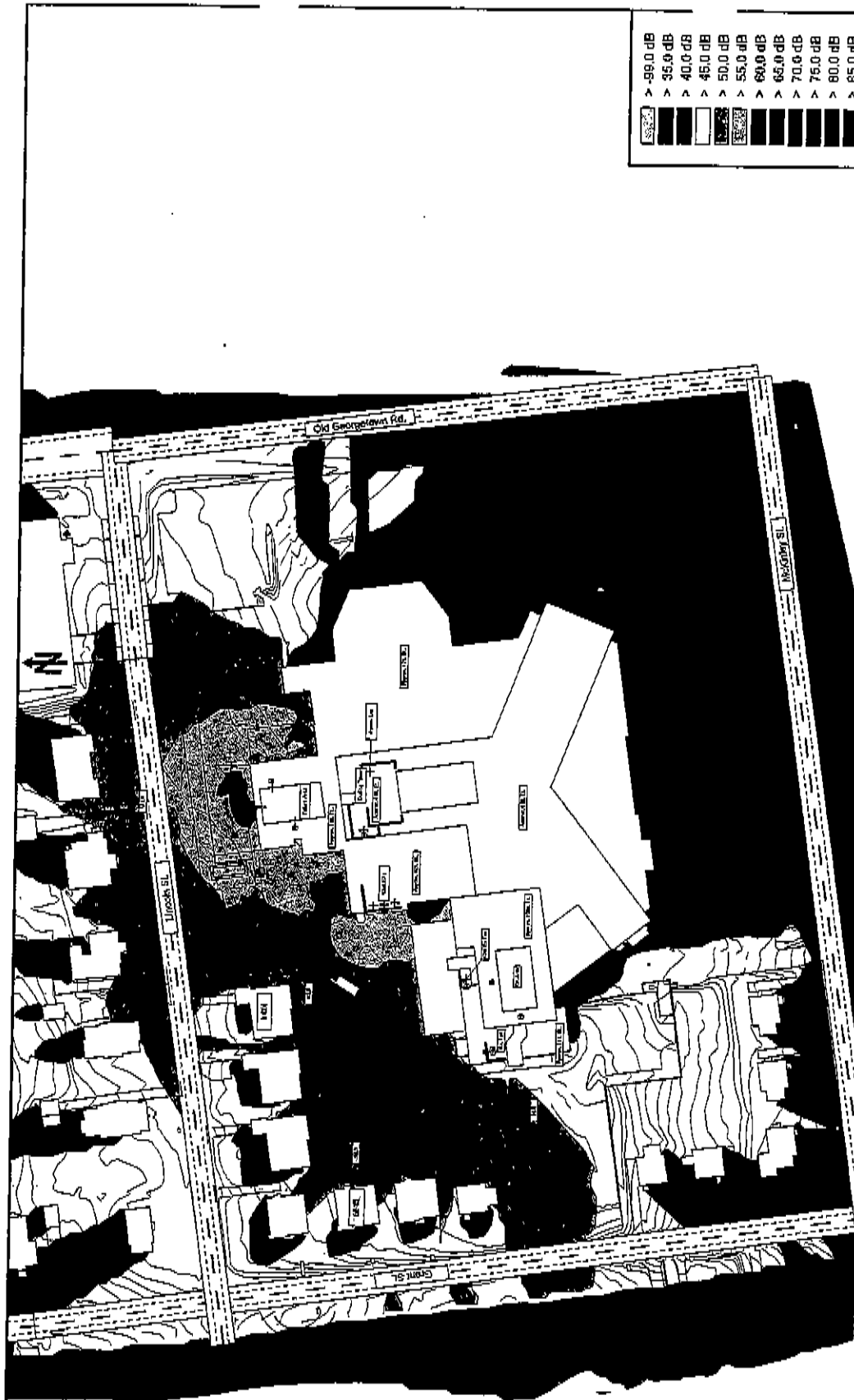
DWG. NO. 1

DATE: 27 Aug. 2007

SCALE: NTS

DRAWN BY: SMB

EXHIBIT NO. 48(h)  
 REFERRAL NO. S-274-C



> 35.0 dB	> 35.0 dB
> 40.0 dB	> 40.0 dB
> 45.0 dB	> 45.0 dB
> 50.0 dB	> 50.0 dB
> 55.0 dB	> 55.0 dB
> 60.0 dB	> 60.0 dB
> 65.0 dB	> 65.0 dB
> 70.0 dB	> 70.0 dB
> 75.0 dB	> 75.0 dB
> 80.0 dB	> 80.0 dB
> 85.0 dB	> 85.0 dB

**PHOENIX**  
INCORPORATED 1984  
 800 North East Street, Suite 400  
 Frederick, MD 21701  
 301-248-4227

Suburban Hospital  
 Rooftop Noise  
 Future Mitigated Condition (Daytime)

DWG. NO. 2  
 DATE: 27 Aug. 2007  
 SCALE: NTS  
 DRAWN BY: SMB

EXHIBIT NO. 48 (i)  
 REFERRAL NO. S-274-C