

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND
OFFICE OF ZONING HEARING EXAMINER**

**SPECIAL EXCEPTION
4681**

**ALTERNATIVE COMPLIANCE
10026**

DECISION

Application:	Day Care Center for Children/AC 10026
Applicant:	Kinder Explorers Children Learning Center
Opposition:	None
Hearing Date:	March 16, 2011
Hearing Examiner:	Maurene Epps Webb
Disposition:	Approval with Conditions

NATURE OF REQUEST

- (1) Special Exception 4681 is a request for permission to expand an existing Day Care Center for Children in the R-80 (One-Family Detached Residential) Zone by 1,558 square feet and increase the number of children from 20 to 40. AC-10026 is a request for alternative compliance from Sections 4.3 (Parking Lot Requirements) and 4.7 (Buffering Incompatible Uses) of the Landscape Manual. The subject property is approximately 0.3357 acre (14,623 square feet) in size and is located on the north side of Annapolis Road, approximately 300 feet east of its intersection with Greenwood Lane, also identified as 9216 Annapolis Road, Lanham, Maryland.
- (2) The Technical Staff recommended approval of the Application with conditions. (Exhibit 16) The Planning Board recommended approval of the request and an accompanying departure from design standards to waive a landscape strip along Annapolis Road (DDS-602). (Exhibits 22 and 23)
- (3) No one appeared in opposition to the Application at the hearing held by this Examiner.
- (4) At the close of the hearing the record was left open to allow Applicant to submit pictures of the site. These came in on March 17, 2011. On May 4, 2011, Applicant submitted a Natural Resource Inventory Equivalency Letter, and the record was closed at that time. (Exhibit 34)

FINDINGS OF FACT

Subject Property

(1) The subject property is rectangular in shape and consists of two (2) lots (part of Lot 43 and 43A, Block B of the Greenwood Subdivision) located back to back. (Exhibit 24(b)) It is improved with a one-story structure that was originally constructed as a single-family dwelling unit in 1940 and later converted to a Day Care Center for 20 children, pursuant to SE-4566 (approved in 2007). There is also an associated parking lot and outdoor play area. Staff noted that no preliminary plan of subdivision is required and the Application “is in substantial conformance with the recorded final plat of subdivision.” (Attachment to Exhibit 16, July 15, 2010 Memorandum from Dubicki to Alam)

(2) The site is exempt from the provisions of the Woodland and Wildlife Habitat Conservation Ordinance (formerly known as the Woodland Conservation and Tree Preservation Ordinance) since the property is less than 40,000 square feet in area, contains less than 10,000 square feet of woodland, and has no prior tree conservation plan approvals. A letter of exemption was included in the record. (Exhibit 9)

Surrounding Property and Neighborhood

(3) The subject property is surrounded by the following uses:

- North and East – Single-family development in the R-80 Zone
- South– Annapolis Road (MD 450)
- West – A dwelling with an office as an accessory use in the R-80 Zone

(4) The neighborhood boundaries are as follows:

- North – Greenwood Lane
- South – Annapolis Road (MD 450)
- East – Washington Boulevard
- West – the intersection of Greenwood Land and Annapolis Road

Master Plan/Zoning

(5) The subject property lies within an area governed by the 2010 Glenn Dale-Seabrook-Lanham Sector Plan and Sectional Map Amendment (“SMA”). The Master Plan recommends residential uses on the site. The SMA retained the property in the R-80 Zone.

(6) The 2002 General Plan placed the property within the Developing Tier. The vision for this Tier is to maintain a pattern of low to moderate density suburban residential communities, distinct commercial centers, and employment areas that are transit serviceable.

Applicant's Proposal

(7) Applicant currently operates a Day Care Center for 20 children, pursuant to SE-4566.¹ The instant request is to expand the use by adding a 1,558 square foot one-story addition to the existing 1,315 square foot one-story structure. The existing structure is a tan stucco-clad, commercial box styled building with a flat roof. The proposed addition has a long linear shape, and will be clad in vinyl siding with a concrete masonry block water table and foundation.

(8) Applicant wishes to increase the enrollment from 20 to 40 children. No off-premises play area is proposed. The Site Plan shows the location and use of all buildings located on adjoining lots and the proposed enrollment. It does not show the topography, as originally requested by Staff and the Planning Board.

(9) The entire front yard is paved and four (4) parking spaces are located thereon. Five (5) parking spaces are required for the Day Care and that is the number shown on the Site Plan. (Exhibit 24(b)) A 1,400 square foot play area is required (75 square feet of play area serving 50% of the capacity (40 children)). Applicant's outdoor play area is located to the rear of the property and is 4,500 square feet, with 2,600 square feet free of proposed buffer plantings. (Exhibits 24(b) and 32). The closest dwelling on an adjoining lot is over 26 feet from the outermost boundary of the outdoor play area, and 74 feet from that portion of the play area that will remain free of proposed buffer plantings. (Exhibits 24(b) and 32) The rear of the property is enclosed by a six (6) foot tall, board on board fence.

(10) Applicant's witness, Mark Ferguson, accepted as an expert in the area of land use planning, testified (in person and in writing) that the application satisfies the applicable provisions of the Zoning Ordinance, once alternative compliance (addressed *infra*) is approved. (Exhibit 32; T. 18-19) In support of his position Mr. Ferguson noted that Applicant is providing additional plantings; no parts of the County's Green Infrastructure Network will be affected (and there are no regulated features on site); and subdivision is not required. (Exhibit 32; T.18)

Alternative Compliance

(11) The Application is required to satisfy the provisions of the Landscape Manual. Applicant has received a departure from the requirement of a 10-foot landscape strip adjoining the parking lot. (Exhibit 23) Applicant also requested Alternative Compliance from the requirements of the Landscape Manual for Section 4.3(b) (Parking Lot Requirements), along the western property line, and Section 4.7 (Buffering Incompatible Uses), along the eastern property line. The first request is for the western portion of the site where Applicant is adjacent to the common property line shared with a parking lot for a single-family dwelling with an accessory office use. The entire area is paved so Applicant will provide 98 additional plant units to the 24 required, but requests to place

¹ A new Special Exception is required because Applicant requests an increase in floor area in excess of 15% of the existing Day Care Center.

them further north along the western property line. The second request is for the eastern property line where the proposed day care center is adjacent to a single-family dwelling. The existing structure is set back 13.9 feet from the property line and the addition will only be 21.7 feet from it. The building setback in the Landscape Manual is 30 feet. Applicant proposes 100 plant units (an additional 12 from the required number). The Planning Director and the Alternative Compliance Committee recommend approval of Alternative Compliance. (Attachment to Exhibit 16, October 21, 2010 Memorandum from Reidy to Piret)

Agency Comment and response thereto

(12) The Technical Staff recommended approval with conditions. (Exhibit 16) Many of the recommended conditions were addressed by Applicant in its revised Site Plan but some were not. (Exhibits. 24(b) and 26) Applicant explained why it believed it could not meet several of the conditions. One condition requested that an approved natural resources inventory (NRI) be submitted, as required by Section 27-296(c)(1)(J) of the Zoning Ordinance. The Environmental Planning Section noted that the site is relatively flat, there are no streams or 100-year floodplain on site, and the site does not contain any elements within the designated network of the Countywide Green Infrastructure Plan. (Attachment to Exhibit 16, November 9, 2010, Memorandum to Alam from Reiser) At the hearing Applicant noted that there had been discussions with Staff that indicated that a full natural resources inventory would not be required where, as here, no disturbance or impact is proposed or anticipated. (T. 6-8) Subsequent thereto Applicant submitted an "Equivalency Letter" from Staff that notes that Applicant is not required to submit a NRI unless "it be discovered later in the review process that the information on which this letter was based is inaccurate...." (Exhibit 34)

(13) Applicant's witness noted that the tree canopy coverage schedule recommended by Staff is indeed provided on the revised Site Plan. (Exhibit 24(b); T. 9) Applicant stated that its architect would make the changes in 1(c), (d) and (e) of the Staff Report, as recommended. Applicant's witness noted that it was not feasible for Applicant to install shutters along the existing picture window on the front left of the building (as suggested by Staff in condition 1(f)) since the window is too large. Applicant submitted a picture of the existing fencing which appears to be in good repair. (Exhibit 20(f)) It ,therefore, requested that Staff's recommended condition that fencing be of different material (suggested in condition 1(g)) not be imposed unless and until fencing is replaced. (T.12)

(14) The Transportation Planning Section reviewed the most recent traffic data for the closest intersection to the site (MD 450/Whitfield Chapel Road) and concluded that the request "would not pose unanticipated safety issues on the adjacent roadways from the standpoint of transportation", reasoning as follows:

Using the trip rates from the Institute of Transportation Engineer (ITE) *Trip Generation Manual*, 8th edition, a day care facility ... will generate 0.80 trip per student during the AM peak hour, and 0.82 trip per student during the PM peak hour. Based on the proposal for 20 additional students and applying the trip rates, the proposed facility could generate 16 trips during the AM peak hour,

while the evening peak hour generates 16 trips.... The trip generation manual indicates that 65 percent of the trips are already on the road and are considered pass-by trips. Hence the actual number of new trips being generated by the proposed site would be 5 AM and 5 PM trips....

Based on traffic data that were collected in December 2007 ..., an analysis by staff revealed that the intersection operated at a level of service/critical lane volume (LOS/CLV) A/919 during the AM peak hour and C/1282 during the PM peak hour. While adequacy is not a required finding for a special exception application, even with some modest growth factor applied to the three-year-old counts, and given the increase in traffic by a margin of five peak hour trips, the critical intersection will still operate well within acceptable limits.

Regarding parking and on-site circulation, no issues have been identified.

(Attachment to Exhibit 16, November 5, 2010 Memorandum from Burton to Alam)

(15) The Planning Board recommended approval of both requests with the same conditions proffered by the Technical Staff. (Exhibit 2). In reaching its recommendations, the Planning Board reasoned as follows:

The application conforms to the land use recommendation of the 2010 *Approved Glenn Dale-Seabrook-Lanham and Vicinity Sector Plan and Sectional Map Amendment* for residential uses. The General Plan places this property in the Developing Tier, recommending low to moderate density suburban residential communities, distinct commercial centers, and employment areas that are increasingly transit serviceable. The Community Planning Division has indicated that there were no specific land use recommendations in the plan related to this property, which is located in Living Area 6 (LS-6). However, the applicant should consider the guidelines with respect to residential design for new construction outlined in the Community Design and Identity chapter of the sector plan....

None of the responses from any referring agencies received by staff indicate that the proposed expansion of the day care center, with the included conditions, will adversely affect the health, safety, or welfare of residents or workers in the area. The Planning Board accepts that the proposal for expanded uses on the site, in consideration that the net trip generations is relatively small, would not pose unanticipated safety issues on adjacent roadways from the standpoint of transportation. Access for the proposed uses on the site is acceptable in consideration of the scope of the facility and the traffic to be generated. Thus, enlarging the existing day care center and increasing the enrollment from 20 to 40 children will not endanger the health, safety, or welfare of the residents or workers in any way.

(Exhibit 22, p. 8)

(16) The Planning Board also wanted Applicant to “work with the adjacent property owner to the east of the subject property to replace the existing four-foot high chain link fence with a four-foot high non-wood, low-sheen durable material.” At the hearing held by this Examiner, Applicant indicated that the fence in question is not on its property, but belongs to the adjoining property at 9218 Annapolis Road. (Exhibit 27; T. 16) Applicant did agree to discuss the matter with its neighbor. (T. 17)

(17) The Department of Public Works & Transportation noted that the request “is consistent with the approved Stormwater Management Plan No. 4513-2010-00, dated April 8, 2010.” (Attachment to Exhibit 16, July 13, 2010 Memorandum to Alam from Abraham)

(18) The State Highway Administration reviewed the request and noted that it requires no modification and that “the existing driveway width is sufficient to meet SHA’s current [standards].” (Attachment to Exhibit 16, December 22, 2010 Memorandum from Choudhary to Alam)

APPLICABLE LAW

(1) Day Care Centers for Children are permitted in the R-80 Zone upon grant of a Special Exception in accordance with the requirements of Sections 27-317 and 27-348.01.

(2) Section 27-317 provides as follows:

(a) A Special Exception may be approved if:

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

(b) In addition to the above required findings, in a Chesapeake Bay Critical Area Overlay Zone, a Special Exception shall not be granted:

- (1) where the existing lot coverage in the CBCA exceeds that allowed by this Subtitle, or
- (2) where granting the Special Exception would result in a net increase in the existing lot coverage in the CBCA.

(3) Section 27-348.01 provides as follows:

(a) A day care center for children may be permitted, subject to the following:

- (1) The District Council may specify the maximum number of children to be enrolled, which may not be increased by State or local health, education, or fire regulations;
- (2) An ample outdoor play or activity area shall be provided, in accordance with the following:

(A) All outdoor play areas shall have at least seventy-five (75) square feet of play space per child for fifty percent (50%) of the licensed capacity or seventy-five (75) square feet per child for the total number of children to use the play area at one (1) time, whichever is greater;

(B) All outdoor play areas shall be located at least twenty-five (25) feet from any dwelling on an adjoining lot, and shall be enclosed by a substantial wall or fence at least four (4) feet in height;

(C) A greater set back from adjacent properties or uses or a higher fence may be required by the District Council if it determines that it is needed to protect the health and safety of the children utilizing the play area;

(D) Any off-premises outdoor play or activity area shall be located in proximity to the day care center, and shall be safely accessible without crossing (at grade) any hazardous area, such as a street or driveway;

(E) The play area shall contain sufficient shade during the warmer months to afford protection from the sun;

(F) Sufficient lighting shall be provided on the play area if it is used before or after daylight hours to insure safe operation of the area; and

(G) Outdoor play shall be limited to the hours between 7 A.M. and 9 P.M.;

(3) In the C-W, C-M, I-1, I-2, and I-4 Zones, a Special Exception for a day care center for children shall be allowed only if the Council finds that existing development and uses in the neighborhood (particularly on adjacent properties) will not adversely affect the proposed use.

(b) In addition to the requirements of Section 27-296(c), the site plan shall show:

(1) The proposed enrollment;

(2) The location and use of all buildings located on adjoining lots; and

(3) The location and size of outdoor play or activity areas.

(c) Any day care center for children which has, on or before the effective date of this Ordinance, fully complied with the provisions of this Subtitle in effect at the time the use commenced shall not be required to meet the requirements of this section, provided that the use has not been expanded or changed since that time. Any expansion or change shall be governed by the provisions of this section, or of Sections 27-445.03, 27-464.02, 27-475.02, or 27-541.02.

(d) For the purposes of this section, enrollment shall mean the largest number of children enrolled in the center in any one (1) session.

(4) The use should satisfy the purposes of the R-80 Zone, set forth in Section 27-428 (a) of the Zoning Ordinance:

(a) **Purposes.**

(1) The purposes of the R-80 Zone are:

(A) To provide for and encourage variation in the size, shape, and width of one-family detached residential subdivision lots, in order to better utilize the natural terrain;

(B) To facilitate the planning of one-family residential developments with medium-sized lots and dwellings of various sizes and styles;

(C) To encourage the preservation of trees and open spaces; and

(D) To prevent soil erosion and stream valley flooding.

(5) In Schultz v. Pritts², 291 Md. 1, 432 A. 2d 1319, 1325 (1981), the Court of Appeals provided the following standard to be applied in the review of a special exception application:

Whereas, the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the [administrative body] that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. . . . But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal.

The record in this case reveals “no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan”. It would, therefore, be proper to grant the request, once conditions, noted below, are met.

CONCLUSIONS OF LAW

(1) The purposes of the Zoning Ordinance are listed in Section 27-102. Fifteen purposes are enumerated. This Examiner finds that the proposed use will specifically promote the following purposes:

To protect and promote the health, safety, morals, comfort, convenience, and welfare of the present and future inhabitants of the County

This purpose is furthered since the Applicants are providing a needed service by offering child care to the population in the Lanham area.

To implement the General Plan, Area Master Plans, and Functional Master Plans

The Master Plan recommended continued residential use of the property. The requested use is one that supports this goal by providing a service that homeowners would provide in their own homes if they did not need to work outside the home and is, therefore, a residential use.

To promote the conservation, creation, and expansion of communities that will be developed with adequate public facilities and services

² A recent decision by the Court of Appeals, Montgomery County v. Butler, 417 Md. 271 (2010), does not entirely reverse the Schultz decision. The Court did hold in Butler, however, “that, to the extent there is any inconsistency between the special exception standards in the prevailing County Code and the reasoning and holdings of Schultz and its progeny, the County . . . was free [to provide differing standards in its legislation].” *Id.*, At 278. There are no differing standards in the Zoning Ordinance; accordingly, Schultz can be cited in this case.

The proposed use will not place any additional burden upon the public facilities in the area since the use is adjacent to an arterial roadway, and the few additional vehicular trips anticipated would not impact the level of service at the MD 450/Whitfield Chapel Road intersection. Accordingly, this purpose of the Zoning Ordinance is met.

To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining property

The Application does not alter the residential character of the neighborhood and will be conducted in a manner that will shield adjoining properties from adverse impact, given the additional landscaping and the sight-tight fence near the play area. Thus, this purpose is accomplished.

To insure the social and economic stability of all parts of the County

This purpose is also furthered by the instant Application since the Applicant will add to the County tax base and provide a needed use to parents and/or guardians in the area.

(Section 27-317(a)(1)).

(2) The Special Exception Site Plan shows the proposed enrollment, location, and use of buildings located on adjoining lots and the location/size of the outdoor play area. (Section 27-348.01(b))

(3) The subject proposal is required to have at least 75 square feet of play space per child for 50% of the licensed capacity or 75 square feet per child for the total number of children to use the play area at one time. The Site Plan indicates that the total enrollment is 40 children and that there will be 4,500 square feet of play area – far in excess of the amount required for 50% of the licensed capacity. There will be no off-premises outdoor play or activity area, nor will the play area be used before or after daylight hours, thereby minimizing any adverse impact that children at play may have upon neighboring properties. The closest dwelling is more than 26 feet from the limits of the outdoor play area, and more than 74 feet from that portion of the play area that will not be in the required bufferyard. The play area does contain sufficient shade during warmer months. The hours of use are limited to daylight hours. There is a six (6) foot high board on board fence around the perimeter of the rear of the site. Applicant is proposing a four (4) foot vinyl fence adjacent to the existing play equipment area to the rear of the addition. (Section 27-348.01(a)(2))

(4) The District Council has made a legislative determination that this use satisfies the purposes of the R-80 Zone, if it meets the provisions of Sections 27-317 and 27-348.01. Nonetheless, there is sufficient evidence in the record to find that the request will satisfy the purposes of the R-80 Zone since open spaces will be preserved and the Department of Environmental Resources will only issue permits if the addition and parking is constructed in a manner that prevents soil erosion. (Section 27-317 (a)(1))

The proposed use conforms to all applicable requirements of the Zoning Ordinance and does not require the grant of a variance. (Section 27-317(a)(2)).

(5) The proposed use will not substantially impair the integrity of the Master Plan for Glenn Dale-Seabrook-Lanham. The Master Plan classified the area as one residential in nature and the instant Application will not alter said character, since day care centers are typically found in residential areas. (Section 27-317(a)(3)).

(6) Additionally, the fencing of the play area, limited hours of its use, landscaping provided, and the reasonable hours of operation for the Center lessen any adverse impact on adjacent properties, thereby insuring that the Special Exception will not be detrimental to the use or development of said properties. For the same reasons the use can be found to not adversely affect the health, safety or welfare of residents or workers in the area. (Section 27-317(a)(4) and (5)).

(7) The Application is exempt from the requirements of the Woodland and Wildlife Habitat Conservation Ordinance. (Section 27-317(a)(6)).

(8) Staff and Applicant have noted that there are no streams or 100-year floodplain on site nor any elements within the designated network of the Countywide Green Infrastructure Plan. Staff has even provided an "Equivalency Letter" that purports to obviate the need for a NRI. Under these circumstances a finding can be made that the Site Plan demonstrates the preservation of the regulated environmental features in a natural state to the fullest extent possible. (Section 27-317 (a)(7))

(9) I would note that the requirement for the NRI is found in Section 27-296 (the provisions related to filing the request). While I agree that one is probably unnecessary for this site I see no authority for the "Equivalency Letter" that waives the requirement. An amendment to either the law or the Environmental Technical Manual should be made to permit these letters, and to avoid this situation in the future. For purposes of this Application I can find that sufficient information has been submitted to show all of the existing features on site, and that Staff has determined, in its expertise, that there will be no adverse environmental impact.

(10) Staff and the Planning Board still recommended that Applicant show the topography of the site to ensure that the existing trees will be retained as proposed. I agree with this recommendation.

(11) Finally, I would agree with the Planning Director that the alternative compliance proposed by Applicant should be approved. The size of the lot and the location of the required landscape strips make strict compliance impractical and improved environmental quality will result from the alternative compliance.

DISPOSITION

Special Exception 4681 and AC-10026 are approved subject to the following conditions:

1. Prior to the issuance of any permits, the Special Exception Site Plan shall be revised to outline the boundaries in red as required by the Zoning Ordinance, and to show the existing topography, proposed grading, and spot shots to ensure the existing trees on the property will be able to be retained as proposed. If the trees are not going to be saved during the construction phase, the location of a suitable shade structure and a color detail, with materials clearly labeled, shall be included on the site plan.
2. Prior to the issuance of any permits, the Applicant shall submit revised architectural elevations that (a) label the colors of all of the proposed exterior building materials; (b) show that the color of the proposed vinyl siding matches the color of the existing building; and, (c) indicates that the proposed concrete masonry block water table shall be built with split-face block in a darker color, different from, but complementary to, the proposed vinyl siding.
3. Shutters in a darker color complementary to the existing tan stucco shall be added to all windows on the front and side elevations to the proposed and existing buildings, with the exception of the picture window on the left of the existing building.
4. If any replacement fencing is needed, a non-wood, non-white, low-sheen durable material shall be utilized.
5. Prior to the issuance of any permit the revised Special Exception Site Plan shall be submitted to the Office of the Zoning Hearing Examiner for review and inclusion in the record.

[Note: The Special Exception Site and Landscape Plan is Exhibit 24(b)]