

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

**SPECIAL EXCEPTION
4592**

DECISION

Application:	Day Care Center for Children and Alternative Compliance (AC-07009)
Applicants:	Catherine's Christian Learning Center/ Clayton and Kishia McGhie
Opposition:	Michael and Linda Reamy
Hearing Dates:	August 20, 2008 and September 17, 2008
Hearing Examiner:	Maurene Epps Webb
Disposition:	Approval with Conditions

NATURE OF REQUEST

(1) Special Exception 4592 is a request for permission to use approximately .574 acre (25,000 square feet) of R-R (Rural Residential) zoned land for a Day Care Center for 70 children.¹ (Exhibit 3) The subject property is located south of Brandywine Road, approximately 1,056 feet west of Branch Avenue (MD 5), and identified as 13515 Brandywine Road, Brandywine, Maryland.

(2) The Technical Staff recommended approval of the Application with conditions. (Exhibit 9) It also recommended approval of the request for alternative compliance. The Planning Board chose not to review the Application, and accepted Staff's recommendation as its own. (Exhibit 10)

(3) Mr. and Mrs. Reamy (adjacent landowners) 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 the Applicant to submit several items. The last was received on January 8, 2009, and the record was closed at that time. (Exhibit 45(a-d))

FINDINGS OF FACT

Subject Property

(1) The subject property is rectangular in shape and improved with a one-story 1,600 square foot masonry structure, two (2) sheds and a freestanding screened porch.

¹ The Application originally requested a Day Care Center for 101 children, but was revised to 70 children.

Applicant currently operates a day care center for 12 children (a use permitted by right in the Zone). The property is accessed from Brandywine Road into a parking area. A six-foot tall stockade fence encloses the portion of the site used for the day care and its play area.

(2) The site has less than 10,000 square feet of existing woodlands, is less than 40,000 square feet in size and is not subject to a previously approved Tree Conservation Plan. It is, therefore, exempt from the provisions of the Woodland Conservation and Tree Preservation Ordinance. (Exhibit 25)

Surrounding Property and Neighborhood

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

- North – single family dwellings in the R-R Zone
- West – single family dwellings in the R-R Zone
- South – vacant land in the R-R Zone
- East – a certified nonconforming metal contractor/fabrication business with outdoor storage (CNU-25205-06) in the R-R Zone

(4) The neighborhood boundaries are as follows:

- North – Surratts Road
- South – US 301/ Crain Highway/MD 5
- East – US 301/Crain Highway
- West – Danville Road

Master Plan/Zoning

(5) The subject property lies within as area governed by the 1993 Subregion V Master Plan and Sectional Map Amendment. The Master Plan recommended low suburban residential land use for the property. The Sectional Map Amendment rezoned the site from the R-A Zone to the R-R 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) The Applicant purchased the dwelling in 2005 and has operated a small group child care for 12 children on the premises. Applicant presently resides in the facility but indicated that it would no longer do so if the request is granted. It wishes to expand its day care business from 12 to 70 children, in a phased manner. In Phase 1 it will expand

to 40 children.² In Phase 2 it will expand to 70 children. In order to accommodate Phase 2, Applicant intends to construct a one-story, 1,056 square foot addition to the rear of the existing one-story, 1,600 square foot structure. (Exhibits 29 and 45 (b)- (d))

(8) In its program description Applicant indicates that the hours of operation will be from 6:00 A.M. to 6:00 P.M., Monday thru Friday. (Exhibit 27) The Site Plan also reflects these hours. The play area is 1,749 square feet in area, to be expanded to 2,625 square feet at Phase 2.³ This is the square footage required to serve 50% of the enrollment. The play area will only be used during daylight hours, and will not be illuminated. No off-premises play area is proposed. The Site Plan reveals that there is one (1) single family dwelling on the adjacent lot and the play area is at least 80 feet from the property line.

(9) The Site Plan also shows the location and use of all buildings located on adjoining lots and, the proposed enrollment.

(10) All development will be well within the applicable locational requirements of the Zoning Ordinance. (T. 23-26) Applicant rearranged the entrance and the traffic pattern on site in response to comments from the State Highway Administration ("SHA"), *infra*. It's witness noted that the need for a deceleration lane along Brandywine Road will be addressed at the time of permit review, and it may not be required due to proposed changes to Brandywine Road. (T. 63 - 64)

(11) Nine (9) parking spaces are required and 18 are provided. (Exhibit 39; T. 10, 23) The lighting for the parking area will be designed in a manner to prevent glare on the neighboring properties.

(12) The Application satisfies most of the requirements of the Landscape Manual. Alternative Compliance is sought from the requirement that the west bufferyard be 20 feet in width. Applicant proposes a five-foot wide bufferyard in this area. Alternative Compliance was also sought for the eastern bufferyard since the minimum required width there is 30 feet and Applicant wishes to provide 8 feet. The Planning Director recommends approval of the requests since Applicant is doubling the required plant units to the east (adjacent to the commercial contractor) and to the west (adjacent to the single family dwelling), and the narrowness of the property makes it "impractical" for the Applicant to fully satisfy the requirements of the Landscape Manual. (Exhibit 12) If approved there will be commercial landscape in the front of the site (with trees and shrubs) along Brandywine Road, and trees will be planted along the property line adjacent to the Reamy's property and adjacent to the commercial use to the east.

² Under State licensing requirements Applicant may serve up to 40 children in the existing building. T. 8

³ The Site Plan also indicates that the proposed play area will be 2,577 square feet which is an insufficient amount of space. Accordingly, it must be revised to delete this figure.

Opposition's comment

(13) Mr. Michael Reamy and Mrs. Linda Reamy, adjacent landowners testified at the hearing. They stated that they had “no problem with the day care personally”. They were concerned with the language on the Site Plan that indicated that the fence bordering the site would be a “natural color” since the language is unclear. (T. 35) They also preferred that the fence be a stockade fence to ensure that no glare from headlights would spill onto their property when parents exit the subject property. (T. 38) The Reamy's were also worried that the expanded building would somehow disturb their property due to water runoff until it was explained that a stormwater concept plan approved by the Department of Environmental Resources should ensure that doesn't occur. (T. 39-42)

Agency Comment

(14) The SHA offered the following comment:

- Access to the site is proposed on the south side of MD 381 via (1) entrance point. The applicant proposes to expand an existing day care facility to accommodate up to 101 children. Given the use & potential for a high number [of] peak trips in the AM & PM hours ...[i]t is unlikely the parking lot will be sufficient enough to accommodate parents picking up and dropping off their children. MD 381 at this location is one lane in each direction. SHA recommends that construction of a 425' deceleration lane (325' approach and 100' taper) and left turn lane or bypass lane into [the] site. Coordination with SHA is necessary to obtain a permit for all work within the State right-of-way.
- Based upon the size, scope and potential trip generation of this development, M-NCPPC Transportation Planning may determine that a traffic impact study is necessary to provide an adequate measure of mitigation to the recommended improvements above.

(Exhibit 18)

(15) The Technical Staff recommended approval with conditions, all of which were addressed in the revised Site Plan. (Exhibits 9 and 39; T. 20)

(16) The Transportation Section reviewed Applicant's original Site Plan which requested approval for 101 students and showed Brandywine Road with an ultimate right-of-way of 80 feet. (Exhibit 17) It opined that the Day Care Center should generate approximately 71 AM peak hour trips and 73 PM peak hour trips. After factoring in pass-by traffic it believed there would be a net of 25 AM and 26 PM trips. They believe these minimal trips will “not pose unanticipated safety issues on adjacent roadways.” (Exhibit 17, p.2) The Section also noted that the State Highway Administration plans to construct a MD 5/Brandywine Road interchange approximately 1,200 feet north of the subject property. Once constructed that portion of Brandywine Road adjacent to the site will be a local roadway.

(17) The Urban Design Section recommended that the six-foot perimeter fence be vinyl, rather than wood, due to maintenance issues and the resulting aesthetic impact of wood decay. (Exhibit 14)

(18) The Historic Preservation & Public Facilities Planning Section noted that the existing fire engine service at Brandywine Fire Station, Company 40, has a service travel time of 4.25 minutes which is beyond the 3.25-minute travel time guideline. The paramedic service response time is 4.25 minutes and within the 7.25 minutes travel time guidelines. Police facilities remain adequate if the proposal is approved since 116,398 square feet of space is required for the latest population estimate of 825,520 residents and 267,660 square feet exists. (Exhibit 21)

(19) The Department of Public Works and Transportations issued a stormwater concept approval letter for the site. (Exhibit 45(b))

APPLICABLE LAW

(1) Day Care Centers for Children are permitted in the R-R 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 Tree Conservation Plan.

(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-R Zone, set forth in Section 27-428

(a) of the Zoning Ordinance:

(a) **Purposes.**

(1) The purposes of the R-R 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 moderately large 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.

(b) **Uses.**

(1) The uses allowed in the R-R Zone are as provided for in the Table of Uses (Division 3 of this Part).

(c) **Regulations.**

(1) Additional regulations concerning the location, size, and other provisions for all buildings and structures in the R-R Zone are as provided for in Divisions 1 and 5 of this Part, the Regulations Tables (Division 4 of this Part), General (Part 2), Off-Street Parking and Loading (Part 11), Signs (Part 12), and the Landscape Manual. (CB-1-1989)

(5) In Schultz v. Pritts, 291 Md 1, 432 A2d 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 Brandywine 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

The proposed use will not place any additional burden upon the public facilities in the area (since the new facility will be required to have indoor sprinklers). 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. 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 70 children and that there will be 2,625 square feet of play area – 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 outdoor play area is more than 80 feet from any dwelling on an adjacent lot. The play area does contain sufficient shade during warmer months. (Section 27-348.01(a)).

(4) The District Council has made a legislative determination that this use satisfies the purposes of the R-R 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-R 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 Subregion V. 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 Conservation and Tree Preservation Ordinance. (Section 27-317(a)(6)).

DISPOSITION

Approval of Special Exception 4592 and AC-07009, subject to the following conditions:

1. Prior to the issuance of permits Applicant shall revise the Site Plan to clarify that the 6 foot high vinyl fence will be light brown in color and will be a stockade fence (and remove reference to "natural color"). The revised Site Plan shall be submitted to the Office of the Zoning Hearing Examiner for approval and inclusion in the record.
2. Prior to completion of the addition, no more than 40 children may occupy the existing 1,600 square foot facility.
3. Prior to the issuance of permits Applicant shall cease residing in the facility.

[Note: The Special Exception Site Plan and Landscape Plan is Exhibit 39.]