

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

SPECIAL EXCEPTION

4635

ON REMAND

DECISION

| | |
|-------------------|---|
| Application: | Day Care Center for Children |
| Applicant: | Tanya Young/Young World Family Day Care |
| Opposition: | None |
| Hearing Dates: | July 15, 2009 |
| Hearing Examiner: | Maurene Epps Webb |
| Recommendation: | Approval with Conditions |

NATURE OF REQUEST

(1) Special Exception 4635 is a request for permission to use approximately 1.44 acres of R-R (Rural Residential) zoned land for a Day Care Center for 56 children. The subject property is located in the southeast quadrant of US 301, and identified as 9000 Cheltenham Drive, Brandywine, Maryland.

(2) On February 9, 2009, this Examiner issued a decision to deny the request since I believed that there could not be two (2) independent uses operating on the residential lot. (Exhibit R-3) On May 20, 2009, the District Council issued an Order of Remand to allow Applicant an opportunity to submit evidence concerning the dwelling located on site and certain other changes to the request. (Exhibit R-2(b)) The District Council requested that the Examiner issue her recommendation on the remand to it within 75 days.

(3) No one appeared in opposition to the Application at the remand hearing held by this Examiner. At the close of that hearing the record was left open to allow Applicant to submit a copy of her lease with the owners of the property. (T. 6) Applicant could not submit the item in a timely manner. Accordingly, the record was closed on August 21, 2009.

(4) The record in the prior hearing is incorporated by reference and adopted herein.

FINDINGS OF FACT

Applicant's Proposal

- (1) The Applicant intends to lease the residential dwelling and the accessory building from the owners of the property in order to reside on site and operate a day care business for 56 children. (T. 4-5)
- (2) The evidence presented at the hearing below (adopted and incorporated herein) addressed the Site Plan, the play area, hours of operation, and number of children to be served.

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) Section 27-424.01(a)(5) permits a dwelling to serve as an accessory building in any residential zone if it is “secondary to a permissible nonresidential principal use.” Since Applicant will reside in the dwelling this provision allows her to also operate the Day Care Center on the same lot.

(2) The instant Application would generally satisfy the provisions of the Zoning Ordinance, as detailed in the prior decision which is attached hereto and incorporated herein, if the conditions below are met.

RECOMMENDATION

Special Exception 4635 is Approved, subject to the following condition:

1. Prior to the issuance of any permit Applicant shall submit a copy of her lease with the owner of the subject property to the Office of the Zoning Hearing Examiner for review and inclusion in the record.
2. Prior to the issuance of any permit Applicant shall revise the Special Exception Site Plan to include a note that states that the operator of the Day Care Center must reside in the dwelling. A copy of the revised Site Plan shall be submitted to the Office of the Zoning Hearing Examiner for approval and inclusion in the record.