

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
FOR MONTGOMERY COUNTY, MARYLAND**

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Petition of LAYHILL LEARNING CENTER, INC.,	*	
<i>for special exception for a child day care center,</i>	*	
MONIKA MAHABARE, <i>director,</i>	*	
REBECCA DANIELLE WALKER, <i>attorney for petitioner.*</i>	*	
*****		
GREATER COLESVILLE CITIZENS ASSOCIATION,	*	S-2857
DANIEL L. WILHELM, <i>president,</i>	*	OZAH 13-06
JANET DELAC MCNAB,	*	
<i>appearing in opposition.</i>	*	
*****		
<i>Before: LUTZ ALEXANDER PRAGER, Hearing Examiner</i>		

**HEARING EXAMINER REPORT AND RECOMMENDATIONS**

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## I. INTRODUCTION AND SUMMARY.

Layhill Learning Center, Inc., petitions to expand an existing child day care center at 170 Randolph Road, Silver Spring, by adding 32 children to its current enrollment of thirty and growing its staff from five to eleven. Layhill also requests a waiver of the required setback at the side yard for parking. Zoning throughout Layhill’s neighborhood is R-200. The property is within an area subject to the White Oaks Master Plan. Layhill does business as “ABC Learning Center.”

The County Planning Board and its technical staff recommend approval of the special exception, with conditions, but the Greater Colesville Citizens Association filed its opposition and actively participated in the hearing sessions. A local resident also appeared in opposition and was active throughout the hearing. She and the citizens association oppose the setback waiver, disagreeing with Board and staff recommendations that the waiver be granted.

Based on the record, I conclude that that the special exception and setback waiver should be approved, with conditions. The project satisfies Zoning Ordinance standards and is not inconsistent with the Master Plan.

The citizens association raised a troubling issue about road safety resulting from an increase in the number of cars needing to make U-turns at Randolph Road and Locksley Lane in order to drive west after they leave the day care center. Nevertheless, accident data presented by Layhill’s traffic expert persuades me that an increase in the center’s traffic caused by the expansion will not imperil traffic safety. The association’s and Board concerns about lighting have been largely allayed by changes in Layhill’s plans during the hearing. The association’s other concerns do not justify denial of the special exception for reasons I explain below.

Despite my recommendation of approval, I urge that approval be conditional and phased in over three years because Monika Mahabare, Layhill’s president, has been less than scrupulous in observing conditions imposed in the current special exception. Ms. Mahabare and her husband, who own the Randolph Road property used for the center, obtained the existing special exception in 2002. *In re More*, S.E. 02-2 (Aug. 14, 2002). (Ms. Mahabare has used several names in these two proceedings). One condition of approval limited the number of cars arriving at the center to six each half hour during morning and afternoon rush hours. *Id.* at 40 ¶ 6(1). The Mahabares were to include specific arrival times in contracts with parents and to collect fines for untimely arrivals. *Id.*, ¶ 7. The record evidence shows that the condition has been disregarded. Parents are unaware of the time

restrictions. Ms. Mahabare collected fines, if at all, only for arrivals after the center's closing time. The 2002 special exception also contained a condition that a staff member direct traffic to designated parking spaces. *Id.*, ¶ 6(2)-(3). That condition, too, has not rigorously been observed. One of Layhill's experts acknowledged that on-site parking is "rather random." T. II 156.<sup>1</sup>

The Planning Board recommended an important condition similar to the one that Ms. Mahabare ignored. It recommended restricting the number of trips to the site to eleven per half-hour hour during morning and afternoon rush periods. Ex. 39 at 1. For reason I explain later, I believe such a restriction is appropriate. Layhill's president testified that she was "okay with the terms." T. II 33. In light of Ms. Mahabare's failure to implement or enforce the traffic restrictions, I recommend that enrollment be limited to 44 in the first year and increased to 55 and 62 in the second and third years only if Layhill demonstrates to the Board that it is strictly adhering to the Board's conditions. I explain my rationale and my recommended monitoring mechanisms later in this report.

## II. STATEMENT OF THE CASE.

Layhill's petition was filed with the Board on July 30, 2012, and was referred to the Office of Zoning and Administrative Hearings ("OZAH"). Hearing was scheduled for February 1, 2013. Ex. 1; ex. 15.

The hearing opened as scheduled but couldn't be completed in a single day. The second day of hearings occurred on February 11. The two-day hearing generated 426 transcript pages. Aside from the Planning Board and its technical staff's submissions, proponents and opponents submitted 105 separate exhibits.

Ms. Mahabare testified on behalf of Layhill, as did Layhill's land planning expert (Lesley W. Powell), architect (Norman A.O. Howell), and traffic expert (Michael M. Lenhart). So also did three parents whose children were enrolled at the Mahabare center.

The president of the Greater Colesville Citizens Association, Daniel L. Wilhelm, testified in opposition and cross-examined Layhill's witnesses. The association emphasized the changes' alleged incompatibility with the neighborhood; adverse effects on property values; nonresidential lighting design; inadequacy of classroom space; and undesirable increases in traffic and accidents. Ex. 29; ex. 58; T. II 108-135. The association opposed waiver of the setback requirement and contended that the expanded day care center provided no services to the neighborhood. *Id.*

A resident living about 1.1 miles from Layhill, Janet D. McNab, also testified in opposition and was permitted to cross-examine.<sup>2</sup> Ms. McNab lives at 12435

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<sup>1</sup> The transcripts for the two hearing sessions are labeled T.I and T.II in this report. A name in parentheses is that of the witness.

<sup>2</sup> The distance was calculated by Google Maps using the pedestrian setting.

Meadowood Drive. T. II 90. She acknowledged on cross-examination that her residence was not within sound or sight of Layhill. T. II 97.

Sixteen parents with children at the day care center wrote letters of support. (Ex. 17-21, 25, 28, 30, 31, 43(a)-(f)). Layhill submitted a statement – on Layhill stationery – signed by 24 sets of parents who declared (rather oddly) they’d have no objections to Layhill’s operation “once approved and licensed by the proper authorities.” Ex. 59. Only three live within two miles of the center.

One letter supporting Layhill’s petition was from a next door neighbor, the owner-resident of 160 Randolph Road, Damon D.C. Manning. Ex. 22(k). Mr. Manning wrote he didn’t have a “single complaint” about the existing child day care center: “They do not make a lot of noise” and “keep they’re [*sic*] property neat and maintained.” *Id.*

Opponents also submitted letters. Two letters came from residents living at 200 and 210 Randolph Road. Ex 26, 27. They did not appear at the hearing. The 210 Randolph Road residents (Mr. and Ms. Arthur Miller) complained that the Mahabares had misled them in 2001 into believing the Mahabares would reside in the house and conduct a small day care home. Ex 26. Instead, they had never resided there and were now trying to expand further. “This set a precedent for other ‘businesses’ to sneak in to the neighborhood in the same deceitful fashion.” Ex. 26 at 1. The Millers also stated that expansion would make it even more difficult to enter Randolph Road from their driveway. *Id.* The residents of 200 Randolph Road (Ailue and Louise Gunter) raised similar complaints. Ex. 27.<sup>3</sup> So did Ms. Joan Sturgis, who lives at 116 Delford Avenue, a short distance behind the Layhill property. Ex. 54.

Fifty-seven individuals signed petitions opposing the special exception. Ex. 35, 37. Most, but not all of the signatories, live in the 20904 postal-code zone. Among their concerns was that Layhill’s growth would change the residential neighborhood by creating a large commercial enterprise, increase storm-water runoff from the enlarged driveway, and spur “a dramatic increase” in the number of U-turns on Randolph Road needed for access to the Layhill entrance. *Id.* Opposing letters also came from a resident of Two Farm Road, about two miles from Layhill (ex. 32) and from State Senator Karen Montgomery, who warned that approving the special exception would change the neighborhood into a commercial area. Ex. 16. Layhill is apparently not in the Senator’s district. T. II 103-104 (McNab).

I closed the record at the end of the hearing session on February 11 except for the filing of transcripts. The final transcript was filed on February 22. I subsequently entered Orders extending the time for filing this report to April 30.

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<sup>3</sup> Laurel J. Aird, who claimed to live one block from the Layhill site, also opposed by letter did not give her address.

### III. MASTER PLAN.

The White Oaks Master Plan of 1997 does not refer to the Layhill site in particular. Rather, it warns against “[e]xcessive concentration of special exception uses” along “major transportation corridors,” specifically mentioning Randolph Road. Ex. 7 at 24. Special exceptions are “more vulnerable to over-concentration” along such corridors.” *Id.*

A new application for a special exception “should be examined for compatibility with the surroundings.” *Id.* Creating a commercial appearance is objectionable. Therefore, front-yard parking should be avoided altogether and side- and rear-yard parking screened from view. *Id.*

The plan recognizes a general need for child day care facilities but cautions that they be located only in “appropriate locations.” *Id.* at 67. It notes that parents prefer centers that are near their employment or easily accessible transit.” *Id.*<sup>4</sup>

### IV. STATEMENT OF FACTS AND SUMMARY OF TESTIMONY.

The facts stated in this lengthy section are undisputed unless otherwise noted. I resolve some disputed facts in this section and others later in this report.

#### A. NEIGHBORHOOD.

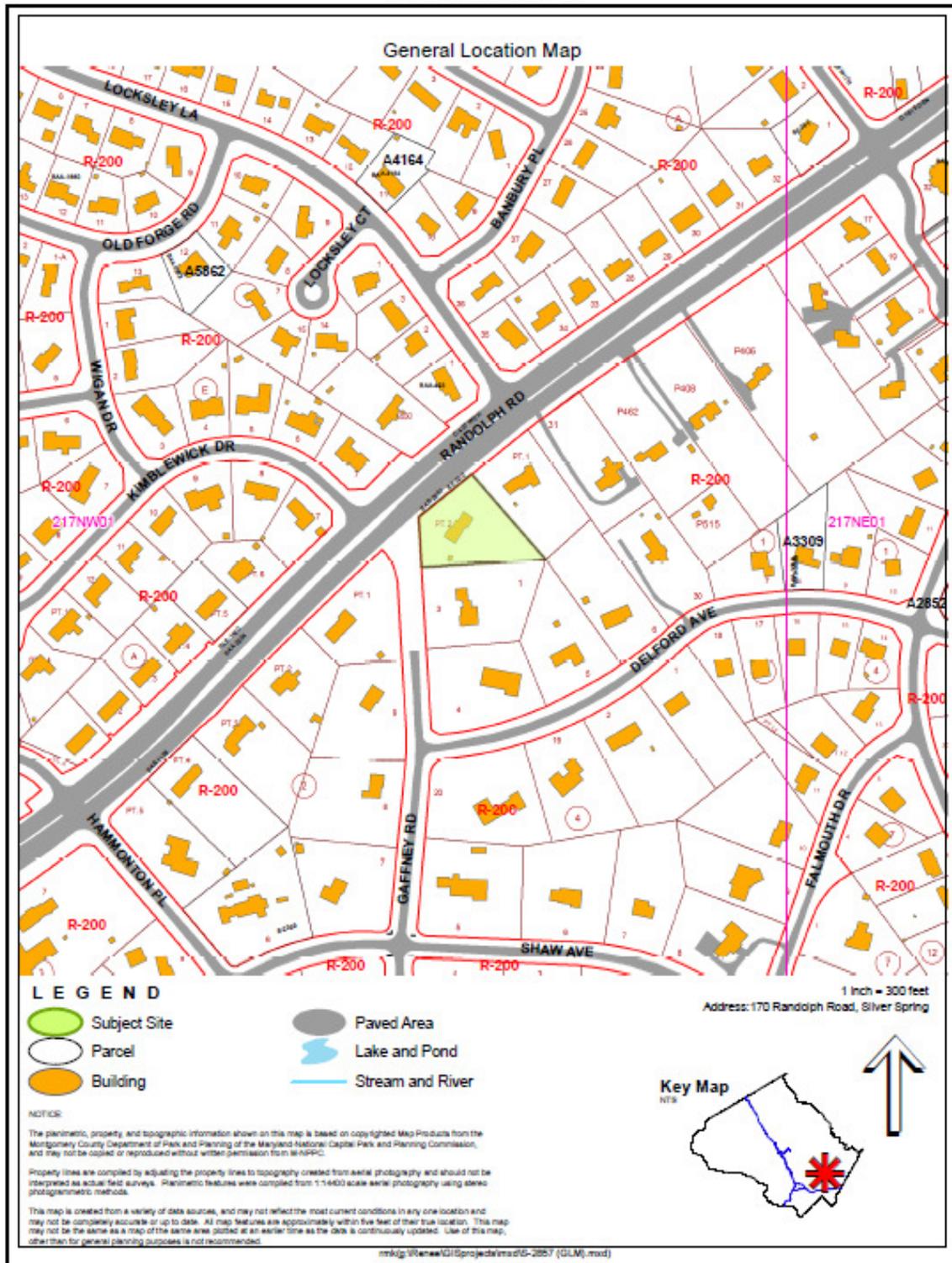
The technical staff report contains a map of the immediate neighborhood, showing an area extending about 900' to 1200' from the Layhill site. The report does not describe the area except to note that it consists predominantly of single family residences. Ex. 40 at 4. The schematic map shows large lots south of Randolph Road and smaller lots to the north. *Id.*; see also T. I. 53.

Absent other evidence in the record, I find that the staff’s map encapsulates the Layhill’s “neighborhood” for purposes of this case. The technical staff map is reproduced on the following page.

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<sup>4</sup> A provision in the Master Plan guarding against increasing impervious surfaces in the Paint Branch watershed does not apply to the Layhill property. According to Layhill’s land-planning expert, the property lies within the Northwest Branch Watershed. T. I 50 (Powell).

### ATTACHMENT 4



An aerial view of a broader neighborhood appears in the following photograph:



The most prominent physical feature of the neighborhood is Randolph Road itself. The road is a six-lane divided highway with a 120-foot wide right of way. Ex. 40 at 5; T.I 128. Its posted speed is 45 m.p.h. T. I 128.

The Randolph Road median prevents access to the Layhill site by cars travelling west except by means of U-turns at the closest western intersection, Hammonton Place. T. I 177-178. It requires motorists leaving the site intending to drive west to make a U turn at the next eastern intersection, Locksley Lane, 200' to 300' away. T. I 129, 177. Locksley Lane is designated as a “primary residential road” with a 70' two-lane right-of-way. Ex. 43(g) at 6. The Hammonton intersection, about 1000' east, has a turn lane but no traffic signal. T. I 178. The Locksley Lane intersection has a traffic signal but no separate turn lane, and no left arrow. T. I. 128, 177, 180. The Locksley Lane intersection, the more germane one in this case is depicted later in this report (at 29).<sup>5</sup>

The Layhill property lies next to Gaffney Road on the west but Gaffney remains an unbuilt “paper” street for now. The record is silent about when it will be constructed, if ever.

<sup>5</sup> Street views of the Locksley Lane and Hammonton Place intersections are pictured in ex. 50(a) (looking east) and ex. 50(b) (looking west) respectively

Public bus service runs along Randolph Road, Metrobus C8 and Ride-On bus 10. Ex. 40 at 5. Two of Layhill's current staff arrive by bus. T. II 79. Bus stops exist on both sides of Locksley Lane. Ex. 43(g) at 10. There are sidewalks along the south side of Randolph Road leading to the Layhill entrance. *Id.* A cross-walk with push-button access exists at Locksley Lane. *Id.* at 8, 10.

Zoning maps show nine petitions have been filed to establish special exceptions along Randolph Road and nearby locations. Ex.53(b); T. I. 97 (Powell). After the hearing in this case, I requested this Board's staff to research which ones are in active use. It appears that only two are, aside from the Mahabares'. One allows elderly housing at 401 Randolph Road (S-2191); the other permits dog grooming as a home occupation at 330 Randolph Road (S-924). All other petitions were dismissed, abandoned, or revoked.<sup>6</sup>

#### B. THE PROPERTY.

The property that Layhill uses is owned by the Mahabares. When they purchased it, they certified under penalty of perjury that they would use it as their residence. Ex. 9 at (unn.) 1, 3. Neither has ever done so. T. II 60. Asked about the discrepancy between the certification and the property's actual use, Ms. Mahabare answered, "I don't know how to answer that." T. II 61. Use of the property for commercial purposes apparently raised an issue with the Maryland Department of Assessments and Taxation that was only recently resolved after the Mahabares were billed for the difference in tax rates. T. II. 83. Ms. Mahabare testified that she was unaware of the misclassification. *Id.*

The Mahabare property is recorded in the Montgomery County land records, plat book 31, as part of lot 2, block 1, North Springbrook subdivision. Ex 9. Its tax number is 05-00344600. *Id.*

The property is an irregularly shaped parcel that a recent survey shows to consist of 40,379 sq. ft., slightly over 9/10<sup>ths</sup> of an acre. Ex. 60(a).<sup>7</sup> The western lot line is a little over 2/5<sup>ths</sup> the length of the eastern line. *Id.* The lot's irregular shape can be seen on the neighborhood map (above at 6) and on the site plans reproduced below.

The Mahabare property fronts on Randolph Road to the north, the proposed Gaffney Road on the west, and one residence each to the south and east. See ex. 13 (County zoning map excerpt). The immediate eastern neighbor, Mr. Manning, of 130 Randolph Road, wrote the letter urging approval of Layhill's expansion. Ex. 22(k). No submission was received from the immediate southern neighbor(s).

Road access to the property is by means of a 20'-wide driveway that rises about 10' from Randolph Road into the Mahabares existing parking lot. Access is

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<sup>6</sup> Email from Katherine Freeman (executive director of this Board) to Martin Grossman (Director of OZAH), Feb. 28, 2013.

<sup>7</sup> A prior survey calculated the lot be larger, 43,464 sq. ft. That's the size stated in the 2002 special exception decision. See *In re More* at 1.

right-turn in and out because of the Randolph Road median. An 11-car parking lot exists along a portion of the property's western side yard. The lot extends to within 12' feet from the eastern property line. (The required side-yard setback is now 24' and is discussed below).

Viewed from Randolph Road, the driveway looks like this:

## ATTACHMENT 5



Figure 1: Front of Structure



Figure 2: Front of Structure



Figure 3: Play Area and Parking



Figure 4: Side Yard (Gaffney St—paper street)



Figure 5: View from Randolph Road

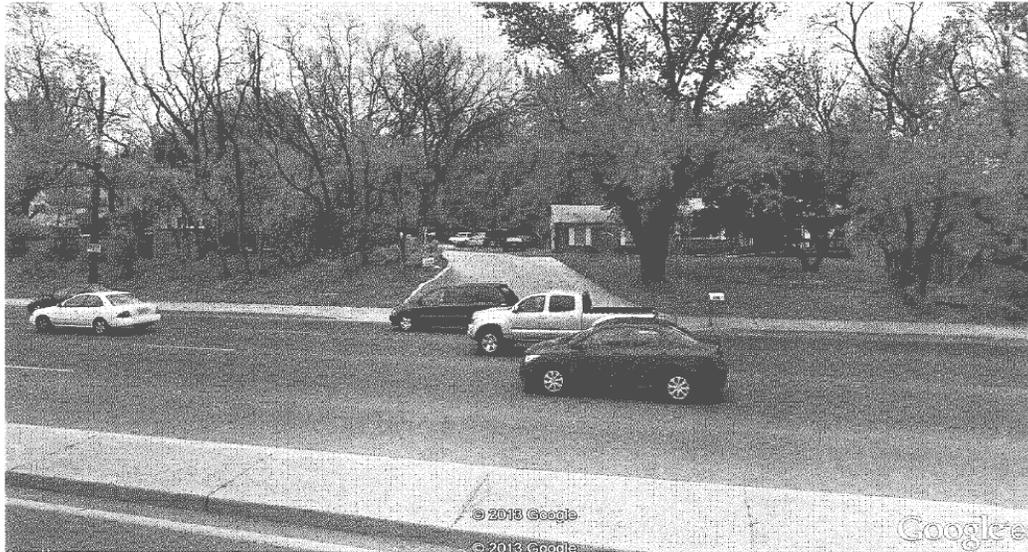


Figure 6: Play Area (rear yard)

A Google street view picture of the property, taken from Randolph Road, appears below. Ex. 57. The picture was introduced by Ms. McNab. T. I 105. She testified that the picture was “a very good representation.” T. I 106. Another

opponent, Mr. Wilhelm, called it “an accurate representation.” T. II 134. A Layhill rebuttal witnesses (Powell) testified that the photograph was “distorted” because, according to him, Google uses a camera mounted on a 5' or 6' pole. T. I 151.

I find the picture probative. It is not perceptibly different from the photograph included in the technical staff report. Ex. 40, att. 5, fig. 5.



Ex. 57

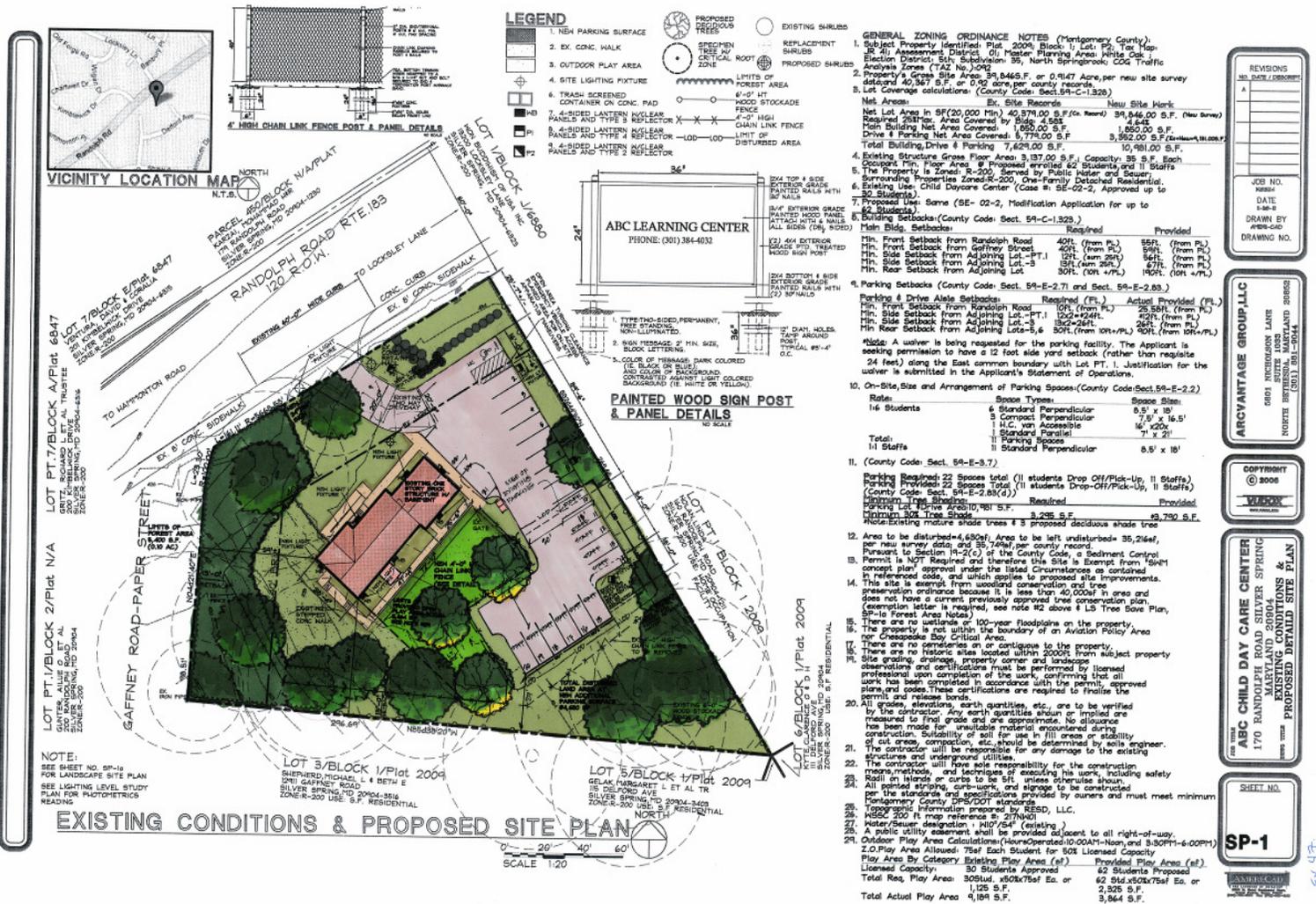
The property is improved by a residential structure that encompasses 3137 sq. ft. Ex. 22(h); ex. 40 at 3. The 2002 Decision authorizing the current child care center described the house as larger, 3256 sq. ft. *In re More* at 3 (“2002 Decision”). Layhill’s architect, Mr. Howell, testified that the discrepancy in measurements probably stems from a more accurate recent survey. T. 248-249. The present measurement includes the garage space and a basement that will be used as child care space. T. I. 246. The measurement is almost three times larger than the 1292 sq. ft. listed in State tax records. See ex. 24.

The house has three outdoor lights. See ex. 15(b). The building has a fire alarm system connected to the fire station and each room has a “pull” to activate the alarm. T. I 231; T. II 48. Each room also has an interconnected smoke detector system. T. I 231. The building does not have a sprinkler system. T. II 56. It is served by public water and sewer. T. I. 42.

The outdoor area to the south of the building is flat and part of it is currently used as the playground. T. I. 42. The playground will be moved closer to the house when the parking lot is reconfigured. The land slopes to the west. *Id.* A 6' wood-on-wood fence borders the property except at its Randolph Road frontage where shrubbery along the front screens some of the property. *Id.*; T.I 51; see ex 22 (i) (reproduced below).

Sixteen trees are on the property, seven of them only in "fair" condition. Ex. 22(q); T. I. 42. Layhill maintains an annual contact with a landscaping company, Ocho Landscaping. T. II 74 (Mahabare). Among other duties, Ocho replaces dying plants and repairs damaged trees. *Id.*

The site plan, showing existing conditions and proposed changes appear here:



### C. PRESENT USE.

Layhill currently operates under authority of the 2002 Decision to operate a child day care center for thirty children. The special exception allows a staff of up to six. *Id.* The center is allowed to operate from 6:30 a.m. to 7 p.m. but children may be present only between 7:00 and 6:30. 2002 Decision at 40, ¶ 4.<sup>8</sup> The center is not open on weekends. T. II 10, 12-13.

The 2002 Decision permitted up to twelve school-age children to attend the center provided they used public transportation and were escorted to the nearest bus stop by center staff. *Id.*, ¶ 4. Two 5-year olds who attend school were enrolled part-time in 2012-2013. Ex. 22(a) at 3 n. 5. They attend the center midday, arriving and departing on County school buses, and are escorted to the bus stop. *Id.*; T. II 22, 64.

The Mahabare center operates a day camp in the summer for the same type of population as enrolled during the rest of the year. The hours are the same, as is the population cap. Ex 22(a) at 4. Children are occasionally taken on day trips using rented buses scheduled to arrive and leave during off-peak hours. Ex. 22(a) at 5; T. II 14. In the summer, field trips occur twice a week between 10 and 12; in the winter, only one trip is scheduled. T. II 13-14.

The center has weekly trash pickups from the Randolph Road sidewalk and no commercial deliveries. Ex. 22(a) at 6. Ms. Mahabare shops for groceries and supplies once a week and brings them with her. T. II 20-22, 44-45; ex. 22(a) at 6. Breakfast, lunch, and snacks are served to the children daily. T. II 21. No changes are contemplated to these routines.

Ms. Mahabare, who also goes by the name Hire More and More Hirabi, is president of Layhill and director of ABC Learning Center. T. II 5, 41; see T. II 58-59 (explaining that the other names are “my old name” and “the same name”). She also owns another ABC Learning Center in Beltsville on Collier Road. T. II 30, 40-

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<sup>8</sup> The Zoning Ordinance provides for several categories of child care facilities. M.C. Code §59-A-2.1. A child day care facility for thirteen or more children is classified as a “child day care center.” *Id.*

The full definition in M.C. Code § 59-A-2.1 of a child day care center is:

- a. a dwelling in which child day care services are provided and the provider is not a resident and does not meet the requirements for a non-resident provider of a family day care home or a group day care home, or;
- b. a building in which child day care services are provided:
  - 1) for 13 or more children, or;
  - 2) which exceed the staffing limits of a family day care home, or a group day care home, or;
  - 3) for 24 hours a day provided that they are in conformance with state and local regulations.

41; ex. 55. She has been shuttling between the two centers daily, spending several hours at each. T. II 41. She estimates that she is absent from the Randolph Road facility 15-20 hours each week. T. II 65. The Mahabares' existing child day care center is licensed by the State. Ex 22(d); ex. 22(e).

The 2002 Decision contained several conditions relevant to consideration of the present application. In particular, the center was to comply with a transportation mitigation plan that strictly regulated rush hour traffic, parking spaces, and parking lot monitoring (Decision, at 40, ¶ 6):

- (1) Morning drop-offs will be limited to no more than six vehicles per hour period from 7:00 to 9:30 a.m. Afternoon and evening pick-ups will be limited to no more than six vehicles per half hour period from 4:00 to 6:30 p.m.
- (2) Parking spaces 1-6 (closest to Randolph Road) will be reserved for staff. Parking spaces 7-10 will be reserve[d] for parent drop-off and pick-up parking.
- (3) A staff member will monitor the parking area during drop-off and pick-up periods to ensure that on-site congestion does not result in off-site queuing, and to ensure compliance with provisions (1) and (2) of this paragraph.

The 2002 decision contained a mechanism intended to enforce these traffic and parking conditions. The decision required the center to include a provision imposing a fine on any parent who arrives more than five minutes before the assigned drop-off or pick-up time, or more than five minutes after the assigned drop-off time, between the hours of 7:00 and 9:00 a.m. or between 4:00 and 6:00 p.m.. This fine shall be equivalent to the fine shown in the sample contract for any parent who arrives late for the assigned pick-up time.

*Id.* at 40-41 ¶7.

The record of this case contains strong evidence that the Mahabare center has been ignoring these conditions and the resulting transportation management plan, notwithstanding the center's one-page enrollment agreement. The agreement contains provisions regarding arrival times and fees and blank spaces for parent drop-off and pick-up times. Ex. 55. The agreement contains two related fee provisions:

Fee will be charged if arrival is before specified time or pick up is after specified time.

Late fee will be collected after 6:00 p.m. and specified time. \$5.00 for first five minutes and \$1.00 every additional minute.

Ms. Mahabare asserted that arrival times are negotiated with the parents. T. II 31. If a half-hour time slot that a parent wanted was unavailable, Ms. Mahabare said, the child would not be enrolled. T. II 32.

Three parents who testified on behalf of Layhill, however, were entirely unaware of the arrival schedule. Rebecca Esther Schreiber testified (T. II 19; italics added):

MR. PRAGER: All right. And do you have a contract with, with the daycare as to when you may pick up, when you may bring your child and when you may pick it up?

THE WITNESS: We arrange for a certain number of hours per day, like a certain schedule that the child will be at daycare, *so we drop them off anywhere from that time*. I believe it starts at like 7:30 in the morning, we can go until 6:00 at night, so we usually tend to drop off around 7:30 and pick up around 5:00. So we have --

MR. PRAGER: I understand. My question was do you have a contract which specifies what time of the day you may bring your child to the daycare center and what time of day you may pick up the child?

THE WITNESS: I'm not sure how to answer. They're --

MR. PRAGER: Well, you either have the contract or you don't.

THE WITNESS: *I guess I would say not.*

Keisha Nicole Hines-Harris's testimony about the absence of restrictions on arrival times was consistent with Ms. Schreiber. Although Layhill charged fees whenever a child was not picked up by 6 p.m., arrivals could occur any time between 7:00 and 9:00. T. II 24. Arrival times were neither regulated nor enforced (T. II 25-26; italics added):

MR. PRAGER: \* \* \* Ms. Hines-Harris, you testified that there was a contract. Does it specify what hours you, you can bring your child? Not the range of hours but is there a particular time that you, that you may bring your child in the morning?

THE WITNESS: *A specific time?*

MR. PRAGER: Yes.

THE WITNESS: *No. It just says, you know, as early as 7:00 and, for drop-off and no later than 6:00 to pick up.*

MR. PRAGER: So --

THE WITNESS: I think it's just understood that most parents, because they start school at 9:00, it's less disruptive if they get them there before 9:00.

MR. PRAGER: *So as far as you understand, there's a two hour window in the morning and --*

THE WITNESS: Yes.

MR. PRAGER: *-- a two hour window, roughly, in the evening, is --*

THE WITNESS: In the evening. Yes.

MR. PRAGER: *-- that correct?*

THE WITNESS: *Yes. Exactly.*

Alem Degefa testified that Layhill's contract merely limited drop-offs and pick-ups to the eleven hours between 7:00 and 6:00 (T. II 29-30; italics added):

MR. PRAGER: And just to, to clarify, you said that there was a contract that specifies when children could be picked up. Could you elucidate and tell me precisely what it says as to when your child can be dropped off in the morning and when it can be picked up in the evening?

THE WITNESS: I drop off in the morning sometimes 8:00, sometimes 7:00. It depend[s] when I work. I go work and I pick up before 6:00. Me or my husband.

MR. PRAGER: Right. But the question Ms. Walker asked is whether or not there's a contract that specifies when you can bring your child and the contract also specifies when you can pick up your child. Do you have such a specific time in your contract?

THE WITNESS: Yeah, 7 -- in the morning, 7:00. In the night, 6:00, the last.

MR. PRAGER: That's the last you can pick up.

THE WITNESS: 6:00, yes.

MR. PRAGER: And the earliest.

THE WITNESS: Yeah.

MR. PRAGER: *But it doesn't say whether or not you can bring your child at 8:30 or 8:45 or you can pick up your child at 5:15, does it?*

THE WITNESS: *No.*

Ms. Mahabare conceded that fines were rarely exacted, "not so often." T. II 41. She kept no record of fines collected: "No from late fee, no I do not have." T. II 72. Ms. Mahabare guessed that fines could range up to \$80 or even \$150 per month but had no first-hand knowledge. T. II 72. Her teachers collected the fees "because they had to stay for that class for that child." *Id.* "I don't personally collect anything, but my staff collects the payments for the late fee and they get that fee.

The company doesn't get the fee." *Id.* No fines have been collected for early arrivals: "I did not collect any early fee yet. I did not have that problem." T. II 71.

Record evidence also suggests that the 2002 Decision conditions about parking spaces and monitoring have not been enforced. The decision specified how the ten parking spaces on the property were to be used. Over the years, the lines marking the spaces have faded and been ignored. Layhill's landscaping expert, Mr. Powell, testified (T.II 152-153):

But what I also noticed is they have the wheel stops in the correct area, but the people aren't using those. \* \* \* And what's happened is, over the years, the paint stripes have worn off of the pavement, so that you can only see the paint stripes in certain areas. So I think people are pulling in and parking where it might be most convenient for them to get inside.

The result, Mr. Powell conceded, is that parking had become "rather random." T. II 156.

No question was raised during the hearing about compliance with other conditions in the 2002 decision.

#### D. PROPOSED OPERATIONAL CHANGES.

##### 1. *Changes in enrollment and staffing.*

Layhill proposes to grow its enrollment of thirty children to 62. Asked why 62, Ms. Mahabare explained that was what the building would accommodate: "We have place for 62 children. That's why we wanted 62." T. II 79; 80. The number of infants will remain the same, six. The number of 2-, 3- and 4-olds will double to twelve, ten, and ten, respectively. The number of toddlers (children from 18- to 24-months old) will triple to 9. The number of 5-year-olds will also triple, to fifteen. Ex. 22(a) at 4. Other than children who attend school, enrollment will be full time. T. II 11; ex. 22(a) at 3 n. 5.

During the hearing Ms. Mahabare, for the first time in these proceedings, asserted she intended to enroll children up to 8-years old. T II 11. The notice of hearing by this Board stated that the Layhill petition was designed to provide "programs [that] include infants through five year old pre-school children." Ex. 15(b), ¶ 3. Layhill's statement of operations did not include an older age group; neither does its proposed floor plans. Ex. 22(g) (designating basement space "D" for 15 five-year-olds); T. II 53, 62. Ms. Mahabare had participated in the preparation of the statement of operations and testified it accurately stated the proposed operations. T. II 8. Even so, she expressed surprise, when I questioned her, that children older than 5 had not been mentioned in the statement: "I thought it was disclosed previously. I always told I wanted 5-8, until 8-year olds, because there is sibling waiting for us." T. II 62. The center currently has no children older than 5. T. II. 53. If school-age children are enrolled, Ms. Mahabare testified, they will be taken to and from school by public school bus and accompanied to and from the bus

stop by a staff member. T. II 22, 64. New school age enrollees will be attend on a part-time basis, as the current two do. *Id.*

Because Layhill did not mention enrolling children older than six in its prehearing statements, thereby depriving the planning agencies and interested parties of opportunities to comment, its last-minute proposal is not properly before the Board. I recommend that the Board authorize only the enrollment of children younger than six in the present case.

With the growth in enrollment will come a growth in staffing, to 11, including Ms. Mahabare. T. II 10. The larger complement, Ms. Mahabare testified, complies with ratios established by the State. T. II. 11. Staff are on call and do not have fixed schedules. T. II 69-70. With expansion of the center, two staff members will arrive at the beginning of the day; others will arrive as needed: “It depends on the how many kids we get for the slots. How many kids is coming, that’s the way we need staff.” T. II 67. Departures will be staggered as the day’s enrollment drops, “[o]nce kids go down.” *Id.* Departing staff members do not return later in the day. T. II 79. Daily staffing is based on perceived need dictated by the children’s anticipated arrival and departure times. T. II 68-70. In case of an overflow of children, Ms. Mahabare steps in to teach and also reassigns staff between age groups. T. II 82.

## 2. *Operational changes.*

Layhill’s hours of operation will change. The center will open at 7 in the morning as now but will close at 6:30 in the evening, a half hour earlier. T. II. 8-9. The earlier closing is the result of issues raised before the Planning Board and its technical staff. *Id.* Some staff will arrive a half hour before opening time; some will leave a half hour after closing. *Id.* Layhill’s summer day-camp will keep the same hours. Ex. 22(a) at 4-5; T II 13.

Outdoor activities will be scheduled by age group but no more than fifteen children will be outside at one time. T. II 19, 76, 91; ex. 22(a) at 5. “We will not send more than 15 children.” T. II 76. Outside playtime will be from 9:30 to 5:30 or 6:00, except for a three-hour break between noon and 3 p.m. T. II 19, 77. In response to my request, Layhill submitted a schedule of outdoor play time by age group. The schedule appears in the record as ex. 60(c).

## 3. *New transportation management plan.*

The Planning Board and its technical staff recommended that Layhill must agree to limit the number of car trips in the morning and evening rush hours to eleven per half hour. The purpose is to make certain that Layhill can accommodate the increase in traffic attributable to its enlarged enrollment. Ex. 40, att. 6, at 2.

Layhill has agreed to accept such a condition. See T. II at 8; see T. I 116 (counsel’s representation: “the applicant agreed that she was more than amenable”). Its experts gave conflicting testimony about the necessity of a transportation plan.

Mr. Powell said his conclusions about Layhill's compatibility with the neighborhood hinged on its adherence to a transportation plan (T. I 119):

[Q] \* \* \* I understand \* \* \* your testimony as to compatibility with the neighborhood was dependent [i]n part on some sort of management plan that would limit the number of arrivals and departures at any one time, is that correct?

THE WITNESS: Yes.

Mr. Lenhart, on the other hand, testified that a transportation management plan was unnecessary (T. I 159):

At the time of the original approval of this special exception in 2002, the White Oak/Fairland Policy Area was under a moratorium[.] \* \* \* Now, the policy area is no longer under a moratorium \* \* \*. Because the moratorium is not there and we pass all acceptable thresholds and standards, there really would be no need to apply a TMP in this [case].

He asserted there would be sufficient parking on-site so that "no one will ever have to maneuver around the site looking for a spot." T. I152, ex. 40, att. 6. He also concluded that the Mahabares had been complying with the 2002 traffic management plan, based on a one-day survey he conducted of peak-hour traffic to and from the driveway. T. I 164, citing ex. 41(a) at 9.

I find the proposed transportation plan necessary for reasons stated below.

4. *Parking lot changes and the need for a side-yard setback waiver.*

The larger operations require physical changes to the property, the principal external one being enlargement and reconfiguration of the parking lot to provide 22 spaces, eleven for parents and eleven for employee parking. T. I 148-149; ex 22(p). (As discussed later in this report, § 59 E. 3.7 mandates that one space be provided for each employee and one space for each six children enrolled).

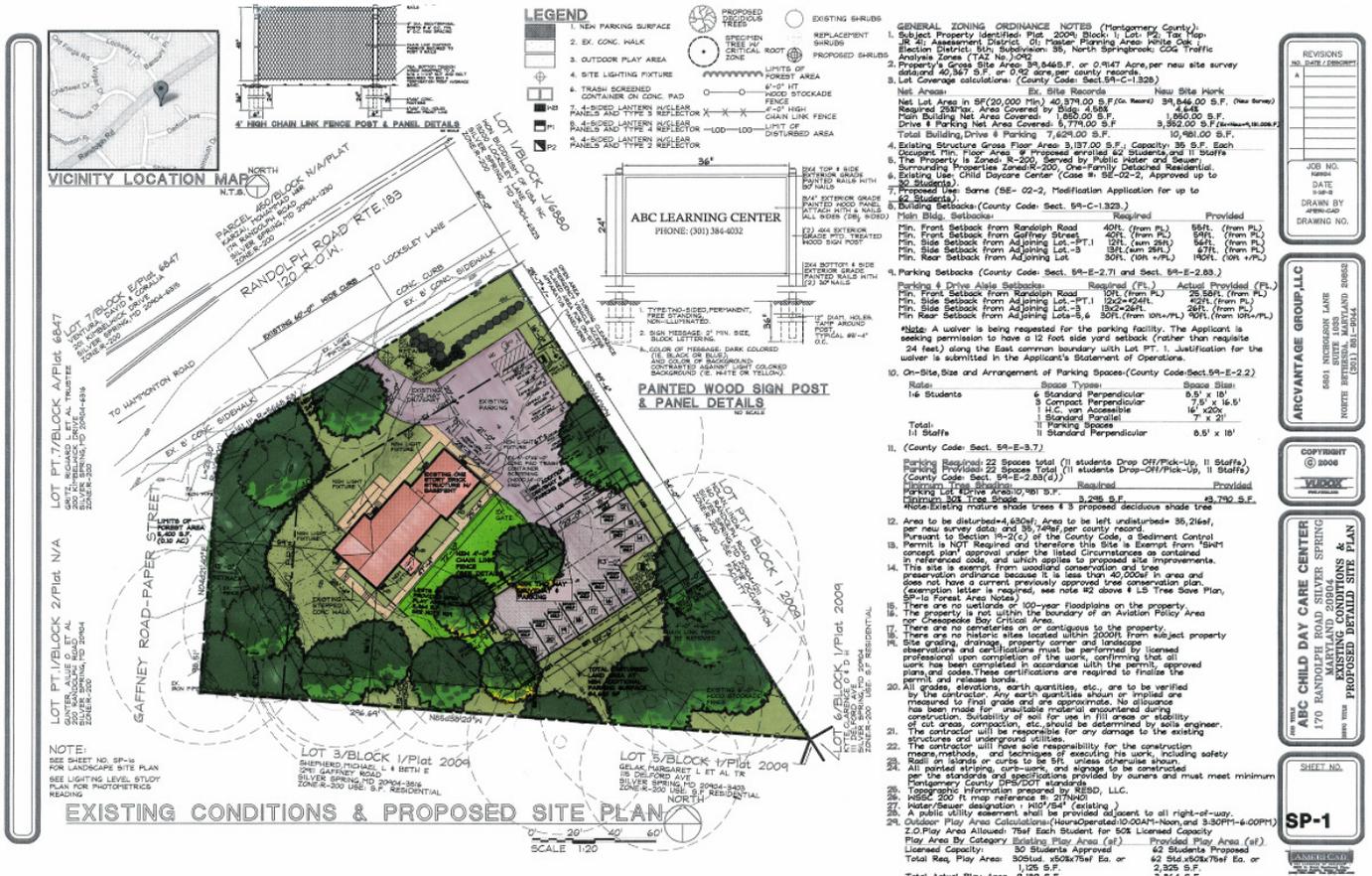
Layhill intends to create seven staff parking spaces behind the house and to provide four additional spaces near its eastern property line. T. I 42-44; see ex. 44 (spaces 11-21). Parents bringing and picking up their children will park on the eastern side closer to the front of the lot. T. I 43.

At the hearing Layhill presented two configurations of the L-shaped lot, one that assumed the County Department of Permitting Services would permit some spaces to be designed for compact cars, the other that it would not. The principal site plan, showing one parking configuration is shown above (at 12).

Mr. Powell testified that an alternate plan may be necessary to comply with Zoning Ordinance § 59-E-2.22: "we're not sure whether the Department of Permitting Services will allow those [compact car] parking spaces or not. They may have to be designed as full-size spaces. There's some unclear language within the Zoning Ordinance concerning that." T. I 43. The County standard for standard cars

is 8½', for compact cars 6½'. T. I 84. According to Mr. Powell, there is no space on the south to accommodate five cars if all spaces need to be full size. T. I 46.

Under the alternate parking plan one new space would be created parallel to an existing space twenty feet from the front entrance to the house. T. I 46; T. II 152; ex. 47. Mr. Powell asserted that the parallel space meets all zoning standards and would not compromise safety. T. I 47. The alternate configuration (ex. 47) is shown here:



No matter which of the two parking configurations is implemented each necessitates a waiver of the side-yard setback requirement of § 59-E-4.2 for four new parking spaces. T. II 77. Currently, the Code requires every parking facility used for a special exception in a residential zone to be a distance of twice the minimum required side yard setback. In zone R-200 the side yard setback for the R-200 Zone is 12'. Therefore, the parking facility needs to be at least 24' from the property line. At the time the Mahabares were granted their special exception, the setback requirement was only 12' (ex. 39 at 1) and the present parking lot was built to those specifications.

Layhill did not do a study of what the parking lot would look like if the standard 24' setback were enforced (T. I 89):

Q \* \* \* Mr. Powell, did you look at what would be the parking lot design if the 24 feet requirement was required to be met?

A No, I did not. I didn't do the initial design for this facility. It was done years ago by whoever did the original special exception. And for, I did not – when I came up with the thing, with the issue about the compact spaces, I was just looking at addressing the compact spaces.

The Department of Permitting Services suspended judgment about whether a sediment control permit and a storm-water management concept are required for the parking lot changes. Ex 12. Unless a project demonstrates it is exempt, both are ordinarily required by M.C. Code §§ 19.2 and 19.24.<sup>9</sup> According to the site plan, Layhill's changes meet one statutory threshold, disturbing fewer than 5000 sq. ft. – here 4630 sq. ft. Ex. 22(p). Nothing in the record, however, establishes that fewer than 100 cubic yards of earth will be moved. Layhill will necessarily be required to establish to the Department's satisfaction that it meets each of the statutory standards.

The Greater Colesville Citizens Association not only opposed waiving the setback requirement, it urged that existing grand-fathered parking spaces be subject to current rules. It contended that allowing additional cars to park closer to neighboring property and altering their orientation to face the fence will result in substantially more noise and exhaust fumes along the edge of the Layhill property. T. II 114-115; ex. 29 at 2; ex 58 at 2.<sup>10</sup> It will especially affect the immediately adjacent residence that Mr. Wilhelm estimated is located 30' from the property line. T. II 115. Other properties would also be affected, he claimed, though “to a much lesser extent.” T. II 126.

If the special exception were to be granted, Mr. Wilhelm said, the parking lot should be compelled to meet current standards: “It is common practice to require

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<sup>9</sup> M.C. Code § 19.2 provides, in part:

(c) A permit is not required under this Chapter for the following:

(1) Any minor land-disturbing activity that:

- (a) Is not associated with construction of a new residential or commercial building;
- (b) Involves less than 100 cubic yards of earth movement;
- (c) Disturbs less than 5,000 square feet of surface area; and
- (d) Is promptly stabilized to prevent erosion and sedimentation[.]

M.C. Code § 19.24 provides, in part:

(a) On-site stormwater management.

- (1) A person that receives a sediment control permit must provide on-site stormwater management unless the Director waives this requirement.

<sup>10</sup> The pages in both exhibits are unnumbered.

the entire area to be brought up to current standards when changes are made.” T. II 115; ex. 58 at 2.

In any event, the citizens association asserted, the amount of traffic coming to Layhill and the size of the “large commercial-like” parking lot was incompatible with the residential character of the neighborhood. T. II 115; ex. 29 at 3; ex 58 at 3. Moreover, storm-water runoff from the enlarged parking lot will detrimentally affect down-hill properties. Ex. 59 at 2-3. (Ms. McNab also protested that enlarging the parking lot will create storm-water run-off and will be incompatible with the residential nature of the neighborhood. T.II 91).

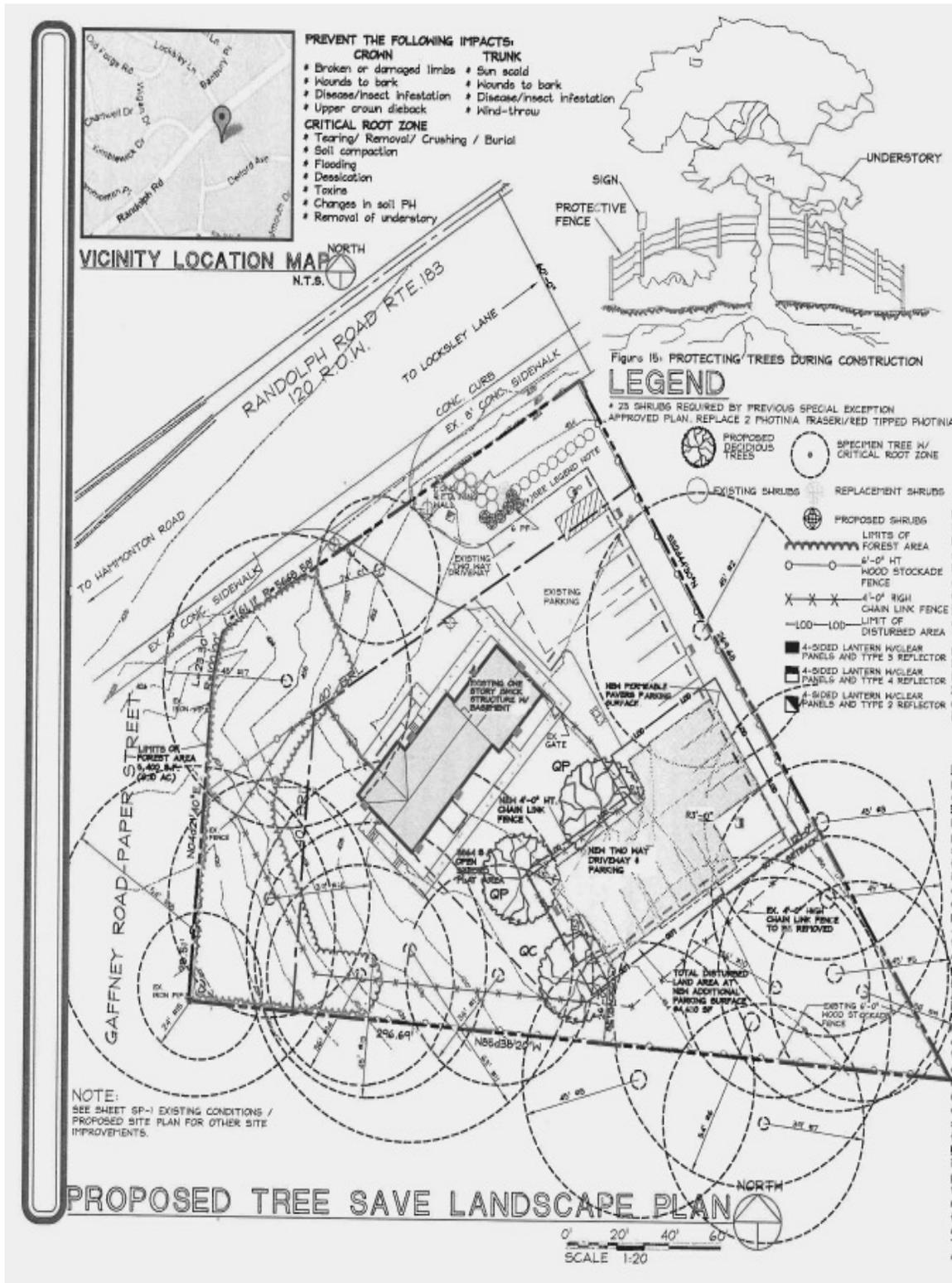
The citizens association stated that the additional noise, traffic, and fumes will depress the value of the neighboring property at 160 Randolph Road, as well as that of other “immediate neighbors.” Ex. 58 at 2-3. The association acknowledged that Mr. Manning, the owner of that property, supported Layhill’s petition but believed his views should be discounted because he had used that residence for an in-house program for children and may therefore have a different perspective. Ex. 29 at 3; T. II 126.

#### *5. Other external changes.*

The existing children’s playground will be displaced by the reconfigured parking lot and will be moved closer to the rear of the Layhill building. T. II 17-18 90; ex. 47 The playground will be surrounded by a chain-link fence and will have new and “upgraded” equipment. T. II 18, 19, 68. The new playground will be smaller than the old – 3900 sq. ft. – but will apparently meet State standards. T.I 64, 69, 91.

Layhill’s landscape plan calls for planting three new trees – two willow oaks and one scarlet oak, as well as six photinia shrubs. Ex. 22(q); ex 22(a) at 7. The shrubs are intended to provide screening for the enlarged parking lot. Ex. 22(a) at 7. The additional shrubbery, Layhill claims, meets the landscaping standards of §§ 59-E-2.71 and -2.81(b)(1) of the Zoning Ordinance. Ex. 22(a) at 7. The new trees supplement the current stock. Together, they will shade over 30% of the parking lot, as required by § 59-E-2.83(e) of the Zoning Ordinance. T. I 74 (Powell). The new trees will eventually be “very large,” perhaps as 70’ tall. T. I 100 (Powell).

The landscape plan’s diagram is reproduced below, with text on the following page:





Mr. Powell testified that the existing photinia hedge parallel to Randolph Road screens the parking lot. T. I 71, 97-98. The six new photinia shrubs will “fill in any of the little gaps that exist there.” T. I 79 (Powell). Together with the lot’s higher elevation, “[i]f you’re right in front of that parking lot, you cannot see it all” from Randolph Road. T. I 72. Although the parking lot would be hidden from street level, portions of the two cars parked in the two parallel spaces could be visible. T. I 97-98, 114-115. As an “estimate,” Mr. Powell thought, these two cars would hide the rest of the parking lot from Randolph Road. T. II 156. But see ex. 57, reproduced above.

The Planning Board’s technical staff has determined that the Layhill is exempt from submitting a forest conservation plan because all contemplated changes to the property disturb fewer than 20,000 sq. ft. of land. Ex. 8(a); ex. 40 at 13 & att. 7.

#### 6. *Additional outdoor and parking-lot lighting.*

Layhill proposes no external changes to the existing building except for the addition of more light fixtures; these will be supplemented by new lamp posts near the parking lot and driveway. T. I 225 (Howell: “We are not proposing any changes at all to the exterior of the building \* \* \*”).

Between hearing sessions, Layhill revised its lighting plan to reduce the number of fixtures it intended to mount on the building from seven to five. T. I 39; ex. 56. It also reduced the wattage to 70 watts per fixture. *Id.* Mr. Powell described the new fixtures as “standard colonial residential” that he deemed to be “in keeping with neighborhood.” T. I. 59, 60. Having seven lights on the building, Mr. Powell conceded, would have been abnormal and “excessive”. T. I 103, 109. (At present, the building has only three outdoor lights. See ex. 15 (b) (garage entrance; rear entrance; rear garage entrance)).

The justification for mounting two additional fixtures on the building, Mr. Howell testified, is that the County fire marshal requires “adequate” lighting at each exit.” T. I 249. Both “adequacy” and the number of lumens necessary are not specified. T. I 249. Mr. Powell testified (T. I 108-109):

The standards for lighting are safety. If you talk to Park and Planning, they're very vague about the amount of foot candles to provide and obviously, I would think a special exception falls into a very gray area because you do want to keep that residential feel. You don't want to go above and beyond.

Layhill’s revised lighting plan also contemplates the erection of five 9’-lampposts, four on the parking lot and one along the driveway. T. II 39; ex. 56. Previously, Layhill proposed that the parking-lot lampposts be 14’ tall, then 12’, before settling on 9’ following the first hearing session.



The Greater Colesville Citizens Association implicitly abandoned its opposition to Layhill's lighting plans once the lampposts were reduced to 9'. It had opposed Layhill's initial plans because of the height of the 14' lampposts; it had recommended they be no taller than 6'. Ex. 29 at 3. Later, a second letter said nothing taller than 8' would be acceptable. Ex. 58 at 3.

At the hearing, Mr. Wilhelm called Layhill's proposed 9' pole height "a good step." T. II 116. Although he preferred that they be lowered another foot even if it meant adding poles (*id.*), "I'm not sure one foot is going to make that much difference." T. II 131. It was doubtful, he said, that anyone could discern the difference between 8' and 9'. *Id.*

#### 7. *Traffic and accident rates.*

Traffic issues, notably whether the center's enlargement would spawn more accidents at the closest intersections, consumed a large portion of the two-day hearing. There was no dispute that the increase in traffic would satisfy the County's "local area transportation review" (LATR) and "policy area mobility review" (PAMR) guidelines.<sup>11</sup>

##### a. *Layhill's evidence.*

*i. Traffic volume.* Layhill's evidence on traffic was presented by its traffic expert, Mr. Lenhart, who submitted a report (ex. 43(g)) and testified extensively. Lenhart had conducted traffic counts on December 8, 2011, for three hours in the morning and three in the afternoon at Randolph's Road's intersections with Kemp Mill Road, the Layhill driveway, and Locksley Lane. T. I 187; ex. 43(g) at 6, 9. No survey was done for the Hammonton Place intersection. The Kemp Mill intersection is about three-quarters of a mile from the Layhill driveway. T. I 177. Its relevance was not explained.

On the day of the Lenhart traffic counts, fourteen cars took right turns into Layhill's driveway during the peak hour in the morning and fourteen in the afternoon, equivalent to seven per half hour. T. I 164-165, 173; ex. 43(g) at 9. During the same peak hour in the morning, thirteen cars left the center and fifteen in the afternoon. T. I 173; ex. 43(g) at 9. The peak hour in the morning that the Lenhart used was from 7:30 to 8:30; in the evening, it was from 4:45 to 5:45, "the most congested time." T. I 175.

According to Mr. Lenhart, the increased traffic volume to and from the Layhill center meets LATR guidelines. (LATR review is necessary if a site generates 30 or more trips. T. I. 132). The LATR guidelines use a formula to determine how many trips will be generated for a new project. According to Mr.

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<sup>11</sup> Newer County traffic standards, the "transportation policy area review" (TPAR), do not apply to projects, such as this one, that were submitted before January 1, 2013, or do not require subdivision approval. Council Res. 17-601 (Nov. 13, 2012) at 2; see T. I 130 (Lenhart).

Lenhart, the formula for a day care center is the number of staff times 1.75, plus 17, for the morning rush hour. T. I 132. For the evening rush hour the formula is staff times 2.06, plus 16. The formula translates to 36 trips in the morning and 39 trips in the evening for Layhill's staff complement of eleven. T. I 132, 160-161.

The LATR formula's calculations translates into only eight more trips during the morning peak rush hour, and eleven more in the afternoon peak rush hour, even as the number of children more than doubles and the staff almost doubles. Ex. 43(g) at 16; T. I. 161. Explaining the apparent anomaly, Mr. Lenhart testified that the LATR formula is restricted to assessing the peak hours. T. I. 162. In addition, there would probably be less than a doubling because some parents "drop off two kids, sometimes three kids at once." *Id.*

The Layhill project also meets PAMR guidelines, according to Mr. Lenhart. It is located in an area, the Fairland/White Oak policy area, that has "failed" because it is already overburdened. T. I 133; ex. 43(a) at 15. Although Layhill will generate more traffic, not all of it stems from "new" trips. T. I 161. Most will consist of diverted trips: "They're people that already live in the policy area, are driving in the policy area. They need a place to drop their kids off from daycare while they're moving around from A to B." T. I 161. In this case, only two cars in the morning and three in the afternoon are deemed "new" traffic. T. I 133, 161. Because Layhill will generate more than three "new" trips, it must pay the County a mitigation assessment of \$11,700. T. I 134; ex. 43(g) at 15, 20.

The area in which the Layhill center is located – the Fairland/White Oak Policy Area – has traffic below the County's "critical lane volume" (CLV) threshold. T. 138-139; ex. 43(g) at 17. Traffic flows predominantly west along Randolph Road in the morning, east in the evening. T. I 138. The flow is below capacity. T. I 139. According to Mr. Lenhart, the CLV for the area is 1475. *Id.* The actual CLV in the immediate area is only 863. When all planned projects in the area are completed, the peak-hour CLV at the Layhill site will be 863 in the evening and 490 in the morning. Ex. 43(g) at 21; T. I 139. During the same hour, the CLV at Locksley Lane will be 930 and 1100, respectively.

Asked to explain why his analysis focused solely on a single hour in the morning and one hour in the afternoon, Mr. Lenhart testified that traffic studies traditionally focus on a one peak hour in the morning and one in the afternoon (T. I: 175).

And the way a traffic study is done, not only in Montgomery County but every jurisdiction in the state of Maryland and anyplace else I've ever worked, you look at, we'll do a traffic count in the morning from 6:30 to 9:30 a.m., a traffic count in the evening from 4:00 to 7:00 p.m. and then we determine from those two three-hour periods what's the peak one hour, 60 minutes.

It is fair to look only at peak traffic Mr. Lenhart testified, because the traffic then has the greatest impact on the community and because it is "standard

operating procedure.” T. I 206. By definition, the peak hour has the greatest volume of traffic. T. II 140. It is not normal to examine more than an hour (T. II 141):

\* \* \* [T]here’s nowhere in the guidelines, or anywhere in any technical manuals that I’m aware of for any standard practice or methodology that requires you to look at a several hour period. It’s all one-hour period. The formulas are based on one hour.

So for me to say, over two hours you would get X, would be almost as much of a guess as anybody else in the room saying, it would be X. It’s all based on an hour. That’s a standard practice in how you look at these things.

Peak hour studies do not necessarily reflect the total amount of traffic to a site, Mr. Lenhart acknowledged. Doubling the number of children at a day care center *could* result in a doubling of car trips during a day, “if you looked over the course of the day, it would probably be doubled if you took a longer time horizon but again, really, you’re focused on the peak hour.” T. I 197-198. A full day study could have been produced using a trip generation manual created by the Institute for Transportation Engineers. T. II 143. But neither LATR nor PAMR guidelines require such a study and Lenhart’s traffic study had been designed to meet those guidelines. T. II 144. Had such a full-day study been done, it would have revealed that the additional traffic would not tax the community because the traffic would have been spread over time. T. I 197-198.

Mr. Lenhart acknowledged that traffic generated by a special exception use could at times be a nuisance in a neighborhood despite meeting LATR and PAMR guidelines but he asserted that would not be the case here. T. II 144-146. A nuisance could be created when increased traffic is generated on narrow local streets in a community, “it’s case-by-case.” T. II 145, 146. Here, because all traffic to the day care center occurs on a major highway and the center’s grade elevation muffles noise, “I don’t believe there would be an impact on the neighborhood.” T. II 146.

*ii. Accidents.* Mr. Lenhart concluded that Layhill’s expansion would not effect bicyclist and pedestrian access and safety. Ex. 43(g) at 6. During his December 8, 2011, observations, no one bicycled and pedestrian traffic had been sparse, primarily to and from a bus stop. *Id.*

Mr. Lenhart also concluded it was unlikely that Layhill traffic would generate car accidents. He relied on a three-year survey of accident data in the immediate vicinity prepared by the State Highway Administration. Ex. 41(a) at (unn.) 3-7. (The survey included data from 2009 to 2011 because 2012 data had not yet been reported. T. I 152).

The State survey listed 26 accidents occurred during the three years on the stretch of Randolph Road between 100 feet west of Hammonton Place and “several hundred” feet east of Locksley Lane. T. I 154; ex. 41(a) at 3. According to the State

report, the “most prominent accident type was rear end collisions with 11 occurrences recorded.” *Id.* The probable causes of three accidents were listed as “[o]ther or unknown.” About half the 26 accidents occurred at the intersection of Randolph Road and Locksley Lane. Ex. 41(a) at 7. Mr. Lenhart characterized the data as displaying no “real patterns.” T. I 158, 167, 168-169. Rear-end collisions, he said, are “typically the predominant accident at signalized intersections.” T. I 169; T. II 142. Although proportionately more accidents – four of 26 – occurred in the 8 a.m. hour, Mr. Lenhart speculated that could have been because of higher traffic volumes then. T. I 171-172; see ex. 41(a) at 4.

Of the eleven accidents at Locksley Lane, none had been classified as U-turn related; neither had the sole accident at Hammonton Place. T. I 154-155; see ex. 41(a) at 7. Both Locksley Lane and Hammonton Place have substantial sight distance, according to Mr. Lenhart. T. I 169-170. Exhibits 5(a)-(b) are driver-level photographs of the intersections taken by Mr. Lenhart. From the air, the Locksley Lane intersection looks like this:



On cross-examination, Mr. Lenhart conceded that the one accident at Locksley Lane labeled a left-turn accident might have been a misclassified U-turn accident but he doubted it. T. I 166, 167; T. II 139-140. No other accidents, was “even close to what would be considered a U-turn accident.” T. II 139.

Mr. Lenhart projected that Layhill’s expansion would cause an increase of no more than four additional U-turns per hour during the morning rush hour at Locksley Lane and three per hour at Hammonton Place in the afternoon. T. I 156-157, discussing ex. 43(g) at 18. He called the increase – which translates to an average of one additional U-turn per hour – “negligible.” T. I 157.

Mr. Lenhart conducted a study of Randolph Road traffic volume on January 15, 2013, to try to determine how long cars leaving the Layhill driveway would need to wait before entering the road. This “gap analysis,” which appears in the record as the first two pages of ex. 41(a), uses a software program based on a Highway Capacity Manual. T. I 142. So far as I understand from the testimony, Mr. Lenhart inserted the traffic volume along Randolph Road during one morning and one evening rush hour into the software program. See T. I 142-143. The program then calculated the amount of time it would take for a car to pull out of the Layhill driveway. *Id.*; T II 180-183, 203.<sup>12</sup>

The software program calculated that the probable average waiting time for cars trying to leave the Layhill driveway would be thirteen seconds during morning rush hours and sixteen seconds during the evening rush. T. I 142-146; ex. 41(a) at (unn.) 1-2 (pages labeled “two-way control summary”). Mr. Lenhart contented that that level of service warrants a grade of “B” in the morning and “C” in the evening. T. I 143-145; T. I 183 (“these are very good delays). Asked how easy it would be for a car leaving Layhill to cut across two traffic lanes to take a left or U-turn at the next corner, 200’ to 300’ distant, Mr. Lenhart replied (T. I 181):

\* \* \* the software assumes a gap in traffic \* \* \*. [L]et’s assume \* \* \* there were no median there and there were a street on the other side and you wanted to go all the way across, you’d need a gap on all the lanes to be able to do so. It would be much more, much more difficult because you’d have to tie-in gaps on both sides of the roadway. But the software looks at a big enough gap for everything to happen and in this case, the right turn is, it looks for a gap big enough in all of the westbound, eastbound traffic, not just the right lane of the eastbound traffic. \* \* \* You’d just have to wait, you know, for 20, 30 seconds until there’s a gap and then you go across.

Mr. Lenhart’s software program also calculated the likely queue-length of cars waiting to exit the driveway; in this case, the queue would likely to a single car on average. T. I 145-146, 202-203; ex. 41(a) at (unn.) 1-2 (entries for “queue length”). The software’s computations are “complex” and Mr. Lenhart did not know “right here what the formulas are” but “literally, I’ve done thousands of these studies \* \* \*.” T. I 202.

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<sup>12</sup> The names of the speakers of parts of page 203 (from line 23) through page 205 (line 11) are transposed. The lines assigned to the “witness” were spoken by the hearing examiner and the lines assigned to “Mr. Prager” were spoken by the witness.

b. *Opponents' evidence.*<sup>13</sup>

Mr. Wilhelm expressed the Greater Colesville Citizens Association's concern that intensification of traffic at Layhill would result in more accidents, particularly at Locksley Lane. He wrote two letters to the Office of Zoning and Administrative Hearings expressing that view and also testified. Ex. 29, 58; T. II 111-132. He conceded he is not a licensed traffic engineer but he had been on task forces dealing with traffic issues for many years and had testified "a lot" before the County's planning staff on LATR and PAMR. T. II 126-127.

Mr. Wilhelm did not dispute that the traffic volume would meet LATR and PAMR standards but contended that those standards did not address safety. T. II 111.<sup>14</sup> LATR and PAMR analyses also presented an incomplete picture because they focused on only two hours of the day. T. II 120. He, by contrast, was "addressing this from a safety standpoint, not a traffic[-]engineering, not a volume issue." *Id.*

Mr. Wilhelm stated that Layhill's expansion would double its traffic load and, hence, the number of U-turns likely to occur. Ex. 58 at 1. The trips and U-turns would not occur only during the one-hour peak in the morning and evening but over at least two hours. T. II 112. He estimated that 26 cars now bring the 30 children currently enrolled (assuming a few children are siblings and arrive together). Ex. 58 at 1 (chart); T. II 112, 118-119. In addition, four of the six staff members arrive by car, two by public transport. *Id.*

Applying the same ratio of automobile use to the enlarged enrollment and staffing level (T. II 119), Mr. Wilhelm calculated that 54 of 62 children and eight of eleven-staff members would arrive in separate cars. Ex. 58 at 1 (chart). Altogether, that would result in 62 automobile trips in the morning and 62 more in the afternoon. *Id.*<sup>15</sup>

Based on what he labeled a "reasonable assumption that half the parent trips make U-turns in the morning and half in the afternoon, Mr. Wilhelm anticipated that 54 cars carrying children and four cars carrying staff would need to make U-turns. Ex. 58 at 1; T. II 112. It did not matter exactly when the U-turns would occur: "They're going to make \* \* \* 58 U-turns total" during the full day. T. II 121-122.

Mr. Wilhelm assumed two U-turns would be necessary for each arriving parent, one coming and one going. Ex. 58 at 1. He also assumed that drivers would leave in the same direction they came. At one point he testified that even if his assumption was faulty for a particular driver, it would not matter in the aggregate:

<sup>13</sup> Ms. McNab's testimony did not address traffic.

<sup>14</sup> The transcript mentions "PATR" but presumably Mr. Wilhelm said, or meant to say, PAMR.

<sup>15</sup> The "total" in Mr. Wilhelm's chart in exhibit is 61, one less than the sum of numbers in the same column. The discrepancy is unexplained.

“some other people may do the reverse and may have four U-turns as opposed to no U-turns. \* \* \* [F]or this large number \* \* \* the averages are going to work out to the numbers that are shown here.” T. I 122. He later testified that, if many drivers return the way they came, “[i]t would lower the numbers \* \* \* if there was a significant number of them.” T. II 128.

Mr. Wilhelm maintained that the accident data contained in the Lenhart exhibit is flawed for two reasons. First, “[a]s we all know, police tell the public not to report small accidents so the number of total accidents in this short stretch [between Hammonton Place and Locksley Lane] is much greater.” Ex. 58 at 2; T. II 113. Second, all but two of the Locksley Lane accidents could have been U-turn accidents but had been mischaracterized by the police or been miscoded. *Id.*

Mr. Wilhelm agreed with Mr. Lenhart that line-of-sight is good along Randolph Road near Layhill. *Id.*; T. II 113, 142. That meant, he thought, that “the large number of U-turns” caused the accidents. *Id.* It takes a car longer to resume speed after a U-turn than a left turn and therefore it would be more likely to be involved in a crash. *Id.*; see, similarly, ex. 29 at 1. More traffic from Layhill meant more U-turns and correspondingly more accidents. Ex. 58 at 2; T. II 114.

On cross-examination, Mr. Wilhelm admitted he did not know whether any of the reported accidents actually involved U-turns. T. II 125. “It’s a guessing game, [an] educated guess.” T. II 126.

In any event, he stated, the number of reported and under-reported accidents is “excessive for even today.” T. II 128; ex. 58 at 2.

## 8. *Interior modifications.*

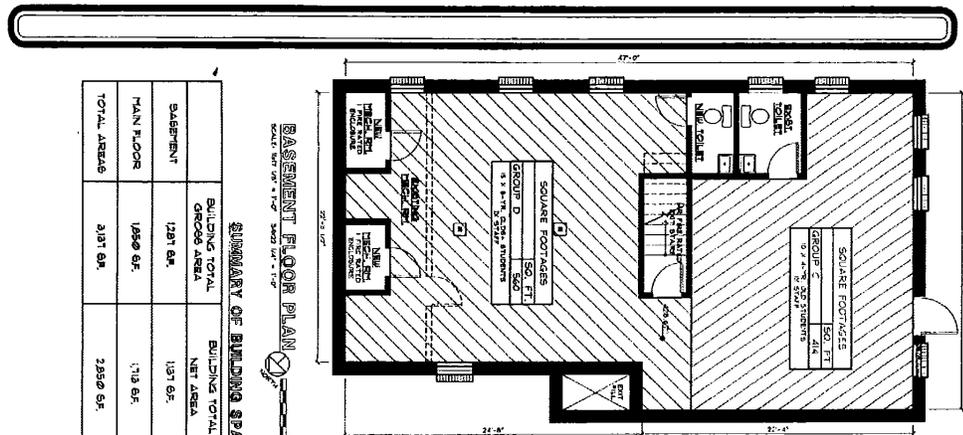
### a. *Layhill’s evidence.*

Layhill proposes to alter to the inside of the house to make use of the basement for the increased enrollment. T. I. 220. As a result of these changes, child care will extend throughout the building. The main level will retain its three classrooms and three bathrooms, as well as the director’s office and a kitchen. T. II 15, 57. The lower level will have two new classrooms, two bathrooms, and space for heating, air-conditioning, and other utility equipment. T. I 220, 229; T. II 16, 57.<sup>16</sup> An existing basement utility room will be reduced in order to widen one of the classrooms. T. II 16. The main entry to the building will be the front door. *Id.*

Proposed space assignments are reflected in the following diagram:<sup>18</sup>

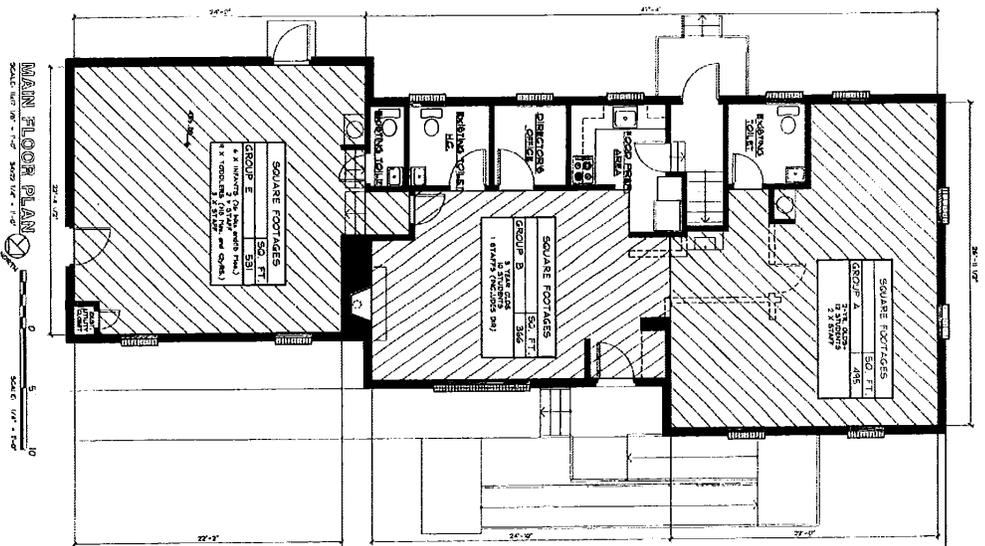
<sup>16</sup> Mr. Howell testified that the utility space might be eliminated entirely by “through-wall” mechanical systems. T. I 235.

<sup>18</sup> The number of toilets in the bathrooms may be changed and are not necessarily reflected in the diagram. T. I 245.



**SUMMARY OF BUILDING SPACE ALLOCATION**

	BUILDING TOTAL GROSS AREA	BUILDING TOTAL NET AREA	GROUPS TOTAL TOTAL FLOOR AREA	NON-ASSIGNED
BASEMENT	1281 SQ. FT.	1197 SQ. FT.	574 SQ. FT.	163 SQ. FT.
MAIN FLOOR	1859 SQ. FT.	1718 SQ. FT.	1382 SQ. FT.	321 SQ. FT.
TOTAL AREA	2141 SQ. FT.	2915 SQ. FT.	2366 SQ. FT.	484 SQ. FT.



<p>REVISIONS</p> <table border="1"> <tr><th>NO.</th><th>DATE</th><th>DESCRIPTION</th></tr> <tr><td> </td><td> </td><td> </td></tr> </table>	NO.	DATE	DESCRIPTION																												<p>DATE: 10/15/13 DRAWN BY: [Name] CHECKED BY: [Name] DRAWING NO.:</p>	<p>ARC VANTAGE GROUP, LLC 680 NICHOLS LANE SUITE 3100 NORTH BELTFRONT, MARYLAND 20882-1521 (103)</p>	<p>CONTRACT NO. 2010 VANTAGE PROJECT</p>	<p>ABC CHILD DAY CARE CENTER 170 RANDOLPH ROAD SILVER SPRING MARYLAND 20904 MINIMUM BUILDING APPROXIMATE BASIC REQUIREMENTS</p>	<p>SHEET NO. A-1b</p>
	NO.	DATE	DESCRIPTION																																
<p>EX. D</p>																																			

According to Mr. Howell, Layhill's architect, the building will meet State space requirement of 35 sq. ft. of space per child. T. I 227. He asserted that the space dimensions on the preceding diagram are accurate (T. I 256):

\* \* \* the drawings was generated by an AutoCAD and the dimensions of the, the outside dimensions of the existing structure and inside dimensions are generated from the actual survey drawings. The spaces on the inside, outside of the toilet, kitchen, director's office, the staircase and the mechanical closets, are generated automatically by a software, AutoCAD software that generates the square footage for those areas. In each case on my chart, it shows an overage in each of the classroom[s] in terms of what's required for the minimum square footage to occupy the number of students at 35 square foot each.

Furniture and other nonpermanent structures are not included in the calculations. T. I 260-261.

Howell testified that the State's minimum space requirement of 35 sq. ft. per child (COMAR 13A § 16.05.03) is calculated for the building as a whole, "it's not a per room calculation, it's a per house. \* \* \* Total occupancy." T.I. 259. Spatial issues will be resolved during the State inspection and licensing process. T. I 228, 258. According to Mr. Howell, the floor plan is sufficiently flexible to permit whatever adjustments are necessary. T. I 229.

In order to provide ingress and egress to the basement, Layhill will construct an enclosed fire protected staircase leading to an exit door on the main floor. T. I 221, 222; see ex. 5(d) (reproduced above). The staircase supplements an existing exit door in the basement that leads directly to the western side-yard. T. I. 221, 222, 249. The new staircase leads from the basement through the main floor kitchen. T. I 250. Layhill's architect stated that the entire stair system "has a one-hour rated protection on the wall, flooring and ceiling." T. I 250; see T. I. 251. The rating means that it would take one hour to burn through the protected wall system. T. I 251. The stair system has no smoke exhaust system but Mr. Howell stated that the staircase also protects against smoke infiltration. T. I. 252.

The County Fire and Rescue Services issued a letter approving the architectural plans for the remodeled building. Ex. 12; T. I 114. Layhill's statement of operations claims that all renovations will conform to applicable State and county laws. Ex. 22(a) at 3.

*b. Opponents' evidence.*

The Greater Colesville Citizens Association contended that Layhill's configuration of its building did not comply with State space criteria for child day care centers. Ex. 29 at 3-4; ex. 58 at 3. The association calculated that two areas in the building, those for three-year olds and for infants and toddlers contained fewer than 35 sq. ft. of space per child. See chart, ex. 29 at 4-5; T. II 117.

The association initially expressed concern for the safety of children who must go through the kitchen to enter or leave the basement (ex. 29 at 4) but did not pursue the matter in its second submission or during Mr. Wilhelm's testimony.

Ms. McNab criticized the building as too small for 62 children, with "substandard" bathrooms. T. II 92-93. It was being "chopped up to meet the minimal requirements." T. II 92.

The Board need not address in this case the adequacy of the space made available to the children. Compliance with State law will be determined by State licensing authorities. It is sufficient in this case to include the standard condition requiring Layhill to comply with State (and County) law.

#### 9. *New signage.*

Layhill wants to erect an over-size double-faced wooden sign at the Randolph Road entrance. Ex. 22(a) at 7. Without a sign, Ms. Mahabare explained, visitors didn't "know if it's the daycare center, and now they think it's just a house." T. II 61. Layhill intends to apply for a waiver allowing a 2' x 3' sign (*id.*), larger than permitted under County law in residential zones. Sec. 59-F.-4.9(a).

Ms. Mahabare answered "yes" to my question whether she would be satisfied with a smaller sign than proposed. T. II 23, 61.

An over-size sign, I find, is not necessary and will unnecessarily create a commercial appearance along Randolph Road.

#### 10. *Effects on the neighborhood.*

Layhill has done no study of the impact of its expansion on property values in the neighborhood. T. I 110. Asked if he had done such a survey, Mr. Powell answered "No, I have not. *Id.* He testified, however, that he doubted the expansion would affect values because there would be few noticeable external changes (T. II 149):

\* \* \* The parking that's there will be extended, but the parking seen in the earlier photographs is being reoriented, and the lighting is all going to be on timers. We've agreed to that.

The children are still going to be only 15 allowed out at a time, and we still have, or we have the condition of the 11 drop off at any one half-hour, I believe, or the limitations during the coming and going. And so, I believe, based on that, and those, the new conditions we have when we go up to 62 children, that there won't be any more adverse effect to it.

The opposition claimed that Layhill's enlargement would depress property values but presented no evidence to support their assertion.

There is, however, support for the opponents' assertion that the Mahabare center has benefitted few in the neighborhood. The citizens' association claimed

that most, if not all, of the families enrolling their children lived outside the immediate neighborhood. Ex. 58-at 3-4. Mr. Wilhelm noted that the closest of the three parents who had testified for Layhill lived about four miles away. T. II 117. Similarly, Ms. McNab characterized Layhill's proposed expansion as "a commercial venture disguised as a community daycare." T. II 91. Layhill, she said, did not serve the community because most of its clients lived outside the neighborhood and outside the 20904 postal zone. *Id.*

A Google Map search of the addresses of parents signing the letter supporting the Layhill petition (ex. 60(b)) reveals that only three of the 24 signatories live within a mile of the center. Five live two to three miles away. Nine others live between three and five miles from 170 Randolph Road and eight families live even more distant.

## **V. PLANNING AGENCY REPORTS AND RECOMMENDATIONS.**

### **A. PLANNING BOARD.**

The County Planning Board unanimously recommended approving the petition and waiving the side lot setback limits for the parking lot. Ex. 39 at 1. It suggested that light poles be no taller than standard residential lantern light poles. It also recommended that Layhill submit accident data at the public hearing to permit assessment of safety at nearby intersections where U-turns were likely.

The Board adopted its technical staff's recommended conditions for approval with three changes. *Id.* at 2. One change requires the last employee to leave by 6:30. Another prohibits outdoor play before 9:00. The third limits vehicle arrivals to no more than eleven per half-hour periods in the early morning and late afternoon.

I incorporate the Board's eight recommended conditions, with a few modifications, below.

### **B. PLANNING BOARD'S TECHNICAL STAFF.**

The technical staff recommended approval of the petition and waiver of the side-yard setback in a 16-page report. Ex. 40. The staff report concluded that the proposed use "does not conflict with any land use recommendations of the applicable master plan or alter the residential character of the area. The application is unlikely to result in any unacceptable noise, traffic, or environmental impacts on surrounding properties." *Id.* at 16.

The technical staff report also concluded that the proposed use met all general and specific standards of the Zoning Ordinance for a special exception to conduct a child day care center at the Mahabare property. *Id.* at 8-16. Elements of the report are discussed below.

## VI. DISCUSSION AND CONCLUSIONS.

### A. INTRODUCTION.

The Zoning Ordinance permits a child day care center for 31 or more children in an R-200 zone but approval is not automatic. Approval can be denied if “facts and circumstances show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use \* \* \*.” *Montgomery County v. Butler*, 471 Md. 271, 303, 9 A.3d 824, 843 (2010), quoting *Schultz, v. Pritts*, 291 Md. 1, 15, 432 A.2d 1319, 1327 (1981). In Maryland “each applicant must prove actually, to the satisfaction of the administrative decision-maker (subject to the narrow standards for judicial review and applicable constitutional principles), that his/her/its application will be compatible with the uses on (or future permitted use of) other properties in the neighborhood.” *Id.*

In particular, under the County’s Zoning Ordinance “[t]he 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.” Sec. 59-G-1.2.1. See *Butler*, 471 Md. at 291, 9 A.3d at 835 (“presenting a *prima facie* case meeting the County Code’s standards and requirements applicable to specific special exception use does not ensure the approval of the special exception application”).

Whether a proposed use has a significantly adverse impact on the surrounding properties turns on the particular evidence in the record. Zoning authorities in this County are not expected merely to “measure and assess what the adverse effects of a proposed use would be on an idealized or even *average* neighborhood or property in the zone. Rather, \* \* \* it is for the zoning board to ascertain in each case the adverse effects that the proposed use would have on the specific, *actual* surrounding area.” *Butler*, 471 Md. at 305, 9 A.3d at 844; italics in original; footnote omitted.

Under the Zoning Ordinance, a petitioner bears the burden of proof that a special exception will be compatible with the surrounding neighborhood and that it satisfies each specific zoning standard. Sec. 59-G-1.21(c). However, as discussed in the next section, a special exception may not be denied merely because it may cause adverse effects that are inherent in this type of use.

In the present case, there is little or no evidence that the Layhill expansion will have significant adverse effects on the neighborhood if Layhill adheres to the conditions recommended below. A special exception petition need not be rejected if conditions can be imposed that will reasonably reduce its adverse impacts on the neighborhood. In this case, I find there will be only two noticeable – and related – changes that could have adverse effects: the parking lot will virtually double in size and traffic could also double. Although the larger lot will reveal the Mahabare property is being used for something other a residence, that alone is insufficient to

warrant a conclusion that the neighborhood will suffer. Most of the larger lot will not be visible from Randolph Road because of landscaping and the 10' elevation rise. So long as Layhill keeps the vegetation intact, the lot will remain largely invisible. Nonetheless, queuing of cars could occur in the driveway and at the entrance of the parking lot, creating a commercial appearance. Queuing can be largely eliminated through a transportation plan that smoothes out traffic to and from the lot.

Traffic to the enlarged center may double in volume over current levels. Even though Mr. Lenhart doubted that it would, he conceded it to be a possibility. And although Mr. Lenhart's gap analysis suggests that having a string of cars waiting to enter Randolph Road will be relatively rare, it can't be discounted unless traffic to and from Layhill is adequately controlled.

There is a substantial showing that a transportation management plan is desirable and necessary. The planning agencies strongly recommended limiting traffic to eleven arrivals and departures per half hour in the morning and afternoon. The eleven trips reflect the capacity of the parking lot for parent drop-offs and pick-ups. Mr. Powell conceded that he based his analysis of adverse effects on adherence to a transportation plan. While Mr. Lenhart dissented in effect, his testimony is insufficient to undermine the desirability of a plan to assure against congestion on the lot and at the driveway exit. In any event, Ms Mahabare has consented on behalf of Layhill to implement the proposed plan.

A plan is meaningless unless enforced. The record reveals that the Mahabares were, at best, lax in enforcing the previous plan. The wording in the agreement between Layhill and parents was seemingly a meaningless *pro forma* exercise. The parents who testified were certainly unaware of the transportation plan's restrictions. Ms. Mahabare kept no record of fines. To the extent any were levied, they were used to compensate teachers for having to stay after hours to await late pick-ups.

My recommendations include enforcement mechanisms. To give them needed bite and to permit monitoring, I recommend that enrollment within the first two years be limited to 44 and 55 respectively. Layhill will be required to maintain monthly written schedules listing which families are to arrive in any given half hour time slot. It will be required to keep records of fines. It must designate a "traffic supervisor," responsible for monitoring parking and on-site traffic. Increases in enrollment will be permitted only when the Board is satisfied that Layhill is in full compliance with the transportation management plan.

The record does not support the opponents' contention that increase Layhill traffic will spawn automobile accidents. I find that Mr. Lenhart presented compelling evidence U-turn-related accidents are unlikely to rise at the Locksley Lane and Hammonton Place intersections as a result of Layhill's expansion. There had been at most one such accident in the three years reviewed; more probably there had been none. The opponents' contrary speculation has no factual basis.

The opponents correctly state that the proposed day care center will provide few benefits to the community but that's an inadequate reason to withhold approval. Only three of 24 families whose children currently attend the center live within a mile of it and only five others live less than three miles away. The enlarged Layhill center is likely to have the same dispersion of clients. Of course, Layhill should find it in its interests to provide services to its neighbors.

The Zoning Ordinance does not explicitly require a special exception use to benefit the neighborhood in which it's located. When a special exception use produces a number of adverse effects on a neighborhood, there may sometimes be merit in balancing adverse effects against direct benefits. There is no legislative basis, however, for denying approval because a special exception use provides few benefits to the neighborhood when, as here, the few adverse effects can be avoided by adding conditions to the use.

B. STANDARD FOR EVALUATION, § 59-G-1.2.1.

The following standard of review applies to all special exceptions applications:

*A special exception must not be granted without the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. 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. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.*

Under this subsection, a special exception cannot be denied simply because the use will spawn effects that are common attributes of – “inherent” in – that use. The legislature has already decided that the use is permissible in the abstract despite its probable inherent adverse consequences.

There are several “inherent physical and operational characteristics” common to all child day care centers: noise from children playing outside in an outdoor play area; lighting to illuminate entryways; space to drop off and pick up children; parking for staff; and traffic to and from the site. The Planning Board's technical

staff identified the same inherent effects using somewhat different language. Ex. 40(a) at 7.<sup>19</sup>

Layhill necessarily shares those characteristics and has agreed to lessen the impact of several of them. In order to minimize noise from the children, Layhill agreed to a condition of approval that would restrict the number of children outdoors at one time to fifteen. It agreed to lower the lampposts on its parking lot to 9', a height Mr. Wilhelm granted was indistinguishable from the 8' height the Greater Colesville Citizens Association advocated. The number of lampposts was reduced, as was wattage at all outdoor lighting fixtures. As § 59-G-1.2.1 states, “[i]nherent adverse effects alone are not a sufficient basis for denial of a special exception.”

The issue therefore is whether there are circumstances in this case that cause *unusual* – “non-inherent” – adverse effects sufficient to warrant denial of the application. In the Court of Appeals’ words, “[T]he appropriate standard to be used in determining whether a special exception \* \* \* should be denied is whether there are facts and circumstances that show that the particular use proposed *at the particular location* proposed would have any adverse effects above and beyond those inherently associated with such a special exception use \* \* \*.” *Butler*, 471 Md. at 305, 9 A.3d at 844, quoting *Schultz*, 291 Md. at 15, 432 A.2d at 1327; brackets, ellipses, and italics added by *Butler*.

Unlike the technical staff, which found *no* non-inherent adverse effects, I identify two possible ones. The first is Layhill’s need to obtain a setback waiver. Without that, Layhill cannot provide sufficient parent and staff parking for the number children it proposes to have. Statutory setbacks provide important safeguards for immediate neighbors, moderating the effects of exhaust fumes and noises from slamming doors, engine idling, motorist voices, and the like. They are legislative presumptions that should be overridden only when the statutory standards for a waiver in § 59 E-4.2 are clearly satisfied.

I conclude that a waiver in this case will not, in fact, create sufficient adverse effects to warrant denial. The best evidence of that is the letter from Mr. Manning, owner of the next-door property, the property that the setback requirement is designed to protect. Mr. Manning wrote that he had not a “single complaint” about the Mahabare facility and recommended approval of the Layhill project. Since the Mahabare center has operated for over a decade with parking spaces within 12' of Mr. Manning’s property, it is highly unlikely that Layhill’s four additional parking spaces will perceptibly “affect the health, safety and welfare of those who use any adjoining land \* \* \*.” Sec. 59-E-4.2. I discuss the setback requirement at greater length below in the subsection on parking.

The second possible non-inherent adverse effect could be congestion at the parking lot and driveway. As already explained, any such adverse effect can be

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<sup>19</sup> The technical staff identified “(1) vehicular trips to and from the site; (2) outdoor play area; (3) noise generated by children; (4) drop-off-and pick-up areas; and (5) lighting.”

eliminated by strict adherence to the recommended transportation management plan.

C. SPECIFIC STANDARDS FOR CHILD DAY CARE FACILITIES, INCLUDING GROUP DAYCARE HOMES.

Section 59-G-2.13.1 of the Zoning Ordinance permits this Board to approve a child day care facility for 31 or more children if the following criteria in subsections (a) and (b) are met.<sup>20</sup>

*[a](1) a plan is submitted showing the location of all buildings and structures, parking spaces, driveways, loading and unloading areas, play areas and other uses on the site[.]*

Layhill submitted adequate site and landscape plans. See ex. 44, 22(i). (A larger version of the latter appears in the record as 22(q)). An alternate parking configuration is shown on ex. 47 but I recommend that it may be substituted only if the Department of Permitting Services certifies that the parking configuration depicted on exhibit 44 does not meet County standards.

*2) [P]arking is provided in accordance with the Parking Regulations of Article 59-E[.]*

The parking arrangements in ex. 44 and 47 meet the standards of Article 59-E for the reasons elaborated on below in part VI.D.

*(3) [A]n adequate area for the discharge and pick up of children is provided[.]*

The reconfigured parking lot will provide ample space for discharges and pick-ups so long as on-site traffic is limited to eleven trips in and out of the lot per half-hour. The lot has space for that many cars at a time. The recommended transportation management plan should guard against congestion and ensure adequate space for discharge and pick-up at peak times.

*(4) [T]he Petitioner submits an affidavit that the Petitioner will:  
(A) comply with all applicable State and County requirements;  
(B) correct any deficiencies found in any government inspection; and  
(C) be bound by the affidavit as a condition of approval for this special exception[.]*

Ms. Mahabare filed an affidavit meeting those standards on behalf of Layhill. Ex. 22(c).

*(5) [T]he use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity. The hearing examiner may require landscaping and screening and the submission of a plan showing the location, height, caliper, species, and*

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<sup>20</sup> Subsection (c), addressing child day care facilities run by nonprofit organizations, is inapplicable in the present case. Layhill is about profit.

*other characteristics, in order to provide a physical and aesthetic barrier to protect surrounding properties from any adverse impacts resulting from the use.*

For reasons stated throughout this report I find that the use here is compatible with the residential area in which it's located and won't become a nuisance because of traffic, noise, or type of physical activity, so long as Layhill observes the conditions I recommend.

The property is already surrounded by an opaque 6' fence. The landscaping plan appears sufficient to protect surrounding properties from noise, fumes, and other adverse effects .

*[(b)] (1) [A] landscaping plan must be submitted showing the location, height or caliper, and species of all plant materials[.]*

Layhill has submitted such a landscape plan. Ex. 22(i); ex. 22(q). The plan shows multiple locust, tulip poplar, red maple, and black cherry trees on the site. In addition, the applicant is proposing willow oak and scarlet oak trees as well as six additional photinia shrubs. They appear to be adequate to screen the property and make it seem less non-residential.

*(2) [I]n the one-family residential zones, facilities providing care for more than 30 children must be located on a lot containing at least 500 square feet per child. The Board may reduce the area requirement to less than 500 square feet [under circumstances not relevant in this case].*

The Layhill lot meets this standard. It's just short of an acre, 40,379 sq. ft. as measured in the recent survey. Ex. 60. Using that measurement, each enrolled child theoretically is allotted 651 sq. ft. Naturally, square footage per child will be even greater in the first three years if the Board accepts my recommendation that enrollment be capped at less than full capacity during that time until Layhill demonstrates full compliance with the recommended transportation management plan.

#### D. PARKING.

1 *Number of parking spaces.* Layhill will have sufficient parking spaces. Section 59-E-3.7 of the Zoning Ordinance requires a child day care facility to provide parking for all employees and an additional space for each six children enrolled:

*Child day care facility. \* \* \* For a child day care center, one space for every non-resident staff member in addition to the residential parking requirement if applicable and adequate parking for discharge and pick up of children. In this instance, the average drop off and pick up space required is one space for every six children. Waivers and variances are allowed in accordance with the Zoning Ordinance.*

Layhill's plan meets the minimum requirements of § 59-E-3.7. There will be eleven parking spaces for the eleven employees. There will also be eleven parking spaces for the parents of 62 children to drop-off and pick-up their off-spring (62 divided by 6). No waiver of the minimum standard is therefore necessary.

The residential parking requirement is inapplicable because the property has never been used residentially since the Mahabares acquired ownership.

2. *Setback waiver.* When the Mahabares were granted the special exception to operate their child day care center in August 2002, parking lots could be built up to the side-yard setback line. That's no longer the case. Section 59-E-2.83 now prohibits parking areas within *double* the minimum required side-yard setbacks for the zone:

*(b) Setbacks. Each parking and loading facility, including each entrance and exit driveway, must be set back a distance not less than \* \* \* twice the building side yard required in the zone. \* \* \**

*(e) For any cumulative enlargement of a surface parking facility that is greater than 50% of the total parking area approved before May 6, 2002, the entire off-street parking facility must be brought into conformance with this section.*

*An existing parking facility included as part of a special exception granted before May 6, 2002, is a conforming use.*

The side-yard setback for the R-200 Zone is 12', meaning that parking spaces along the side of the Layhill property must be 24' from the eastern boundary. The lot is not a conforming use because the Mahabare special exception was approved three months after the Ordinance was amended.

Despite non-conformance, intrusion into the prohibited area may be authorized by waiver when the statutory double setback standard is not needed to accomplish its presumptive purpose. Section 59-E-4.5 provides:

*When approving an application, the Director, Planning Board, Board of Appeals, or Hearing Examiner may waive any requirement in this [Off-Street Parking] Article not necessary to accomplish the objectives of Section 59-E-4.2, and in conjunction with reductions may adopt reasonable requirements above the minimum standards. Any request for a waiver under this Section must be referred to all adjoining property owners and affected citizen associations for comment before a decision on the requested waiver.*

All adjoining property owners and affected citizens associations were given notice of the waiver request.

The setback waiver in this case, allowing parking within 12' of the Manning property, does not defeat the objectives of the parking restrictions, as expressed in § 59-E-4.2:

*A parking facilities plan shall accomplish the following objectives:*

*(a) The protection of the health, safety and welfare of those who use any adjoining land or public road that abuts a parking facility. Such protection shall include, but shall not be limited to, the reasonable control of noise, glare or reflection from automobiles, automobile lights, parking lot lighting and automobile fumes by use of perimeter landscaping, planting, walls, fences or other natural features or improvements.*

For a number of reasons, it is unlikely “health, safety and welfare” of the adjoining neighbor would be adversely affected by waiving the setback for the four additional parking spaces. Mr. Manning, the directly adjacent neighbor for whose benefit the setback requirement exists evidently doesn’t think so. He has over a decade of experience with present configuration 12' from his property line. Not only doesn’t he object to the Layhill expansion, including the setback waiver, he supports it. In addition, the Manning property is protected by a 6' high board-on-board fence that should continue to dampen noise, block glare from automobile lights, and ward off automobile fumes.

Some additional protection against fumes can be provided by a condition that all parking near the eastern property line be head-in. I recommend such a condition below.

Glare from the parking lot lights is unlikely for other reasons. The Layhill center will be in session only during daylight hours in the seven-and-a-half months of daylight savings time. The lot lights will be off and glare from headlights will be absorbed by ambient daylight. In the remaining three-and-a-half months, automobile lights will be necessary only for about an hour in the morning, and about ninety minutes in the evening. The photometric study reveals that the parking-lot illumination will emit zero foot-candles at the eastern property lines. Ex. 56. Wattage at each light will be limited to 70 watts.

In order to preserve as much of a residential facade as possible, I recommend that parking lot lights be extinguished on the Layhill property between 6:30 in the evening and 7:00 a.m. and during all daylight hours. Outdoor lighting on the house shall follow the same restrictions but may be illuminated 15 minutes earlier in the morning and 15 minutes later in the evening for staff arrivals and departures.

No other possible adverse effects on adjoining land from waiver of the setback requirement were identified during the hearing.

*(b) The safety of pedestrians and motorists within a parking facility.*

No testimony or letters in opposition to Layhill’s petition suggested reasons why the setback waiver will endanger pedestrians and motorists on Layhill’s property. I can think of none.

*(c) The optimum safe circulation of traffic within the parking facility and the proper location of entrances and exits to public roads so as to reduce or prevent traffic congestion.*

The waiver will not reduce optimum safe circulation on the parking lot; if anything, it provides additional lot space to maneuver safely. The waiver will not affect the location of the driveway.

*(d) The provision of appropriate lighting, if the parking is to be used after dark.*

The waiver has no bearing on lighting. Lighting is adequate and will not spill over on neighboring property.

#### E. GENERAL CONDITIONS, § 59-G-1.21.

Section 59-G-1.21 contains overlapping criteria to assess whether the special exception use disturbs the neighborhood or satisfies other needs. Satisfaction of each criterion must be established by a preponderance of the evidence.

I address each criterion in turn and conclude that each has been satisfied by a preponderance of the evidence provided Layhill complies with each condition I propose.

*(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.*

Child day care facilities are authorized in R-200 zones by special exception. See § 59-C-1.31.

*(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.*

The proposal satisfies § 59-G-2.13.1 standards applicable to group day care homes for the reasons I explained 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 a special exception must be consistent with any recommendation in a 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.*

The proposal is consistent with the *White Oaks Master Plan*. Neither the Planning Board nor its technical staff found inconsistency with the land-use objectives of the master plan. The Plan contains no specific recommendations for the site.

Approval of the special exception will cause no “excessive concentration of special exception uses” along Randolph Road. Ex. 7 at 24. For one, this is an expansion of an existing use, not a new use. For another, this Board’s staff has informed OZAH that there are only two other active special exceptions in the immediate vicinity.

The Layhill expansion will not be incompatible with the surroundings. The existing building will not be altered except for the addition of three outdoor residential lights. Those will be lit only in the winter months and then only when the center is in session. Side- and rear-yard parking will be substantially (but not fully) screened from view. No parking is contemplated in the front yard.

Child day care facilities in “appropriate locations” are preferred uses. For reasons stated throughout this report, the Layhill location is not inappropriate.

*(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.*

The one-family detached dwelling unit in which the daycare operates will not undergo exterior alterations and will continue to be in harmony with the typical homes of the neighborhood.

Outdoor activity will be limited by a condition that no more than fifteen children can be playing outside at any one time. Considering the size of the property and the distance of the playground from nearby residences, noise will be virtually undetectable.

There are no other child day care facilities in the neighborhood.

Parking and traffic issues are discussed throughout this report. While traffic will increase in intensity, its impact can be sufficiently ameliorated so that the general character of the neighborhood will not be disturbed.

*(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.*

Layhill’s expansion will not contribute to commercialization of the residential neighborhood. The day care center has existed for over a decade and has not led to a proliferation of commercial activities. Nothing in the record intimates that adding

another 32 children will affect the peaceful enjoyment of surrounding properties. The number of children outside at a time will be limited to fifteen, hardly a source of bedlam in the community. The enlarged parking lot will be partially visible from the road but enough will be camouflaged by landscaping so as not to jarring to the surrounding residential neighborhood. The sign, if limited in size to that authorized by the County Code, will be suitably discreet.

Layhill did not file a study of its probable effect on the economic value of surrounding properties but neither did the opponents. The effect of the expansion is therefore speculative. The amount of traffic will necessarily grow, perhaps double. That ordinarily can be an undesirable result. Here, though, strict adherence to and enforcement of the eleven-cars-per-hour condition recommended by the Planning Board, technical staff, and in this report, will diffuse traffic and prevent massing of cars at the site. Under the circumstances, and absent probative evidence in the record, the change in intensity of use is unlikely to depress the property values of surrounding properties, much less the general neighborhood.

*(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.*

The enlarged child day care center should produce none of these objectionable effects. Noise will be abated by restricting the number of children at play outside at a time. Glare from house and parking lot lights will not spill beyond the property lines. Lights on the lot will be extinguished after 6:30 p.m. and before 7 a.m., exterior house lights between 6:45 a.m. and 6:45 p.m. Foliage and the fence, as well as front-in parking, should diminish exhaust emissions on neighboring property.

*(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.*

The child day care center is an existing authorized use. Its enlargement will not alter the predominantly residential nature of the community. As noted above, there are only two active authorized special exception uses in the area.

*(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.*

Layhill's operation won't adversely affect the health, safety, security, morals, or general welfare of the residents, visitors, or workers in the area. Traffic issues will remain contained by the recommended transportation management plan.

*(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.*

*(A) If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of granting the special exception.*

*(B) If the special exception:*

*(i) does not require approval of a new preliminary plan of subdivision; and*

*(ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*

*then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

*(C) With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

The technical staff report states that the site does not require a preliminary plan of subdivision and therefore is reviewed under ¶ B of the subsection. Ex. 40 at 10. Public facilities, the report states, are adequate for the proposed Layhill expansion. *Id.*

The Lenhart testimony persuades me that Layhill's additional traffic will meet the specifications of both LATR and PAMR. No opponent testified to the contrary. Mr. Wilhelm accepted the Lenhart conclusions for both tests.

The Planning Board's transportation staff also accepted the Lenhart analysis and conclusions. Ex. 40, att. 6 at 2-3. It agreed that critical lane volumes at all relevant intersections are currently below congestion level and will remain so when all approved projects are completed. *Id.* at 3 (chart). Under PAMR, the Fairland/White Oak Policy Area has a mitigation requirement of 45% for "new" peak-hour trips. *Id.* ("New" trips do not include pass-by and diverted trips of drivers to and from other destinations). *Id.* at 2. According to the transportation staff, a payment of \$ 11,700 to the County constitutes sufficient mitigation.

I find Mr. Lenhart's accident data, generated by the State Highway Administration, more than sufficient to conclude that additional Layhill traffic is

unlikely to spawn U-turn accidents at Locksley Lane or at the Layhill entrance. None of the accidents at Locksley Lane or Hammonton Place were coded as involving a U-turn. It is conceivable that the accident coded as a left turn was in fact a U-turn accident. Assuming it is, it proves nothing. A single U-turn accident over a span of three years is insufficient to establish a pattern. Even if Layhill traffic at Locksley Lane doubles, there is inadequate basis for inferring a significant increase in U-turn accidents there. (No one at the hearing contended that the Hammonton Place west-bound turn lane is inherently dangerous).

*(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.*

No finding is 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.*

Layhill presented sufficient evidence that its proposed enlargement satisfies applicable Zoning Ordinance standards, provided the conditions recommended in this report are met, and has satisfied its burdens of proof.

#### F. GENERAL DEVELOPMENT STANDARDS, § 59-G-1.23.

*(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Layhill's proposed use meets all applicable development standards for the R-200 zone other than the side yard setback standard for the parking lot. (I recommend that standard should be waived in this case for reasons stated above).

The following chart, copied from the technical staff report (ex. 40 at 11), shows that Layhill meets all other relevant development standards:

Development Standards	Required	Provided
Maximum Building Height:	50 ft.	25 ft.
Minimum Lot Area	20,000 sq. ft.	39,846 sq. ft.

Development Standards	Required	Provided
Minimum Width at Proposed Street Line:	25 ft.	± 160ft.
Minimum Front Yard Setback:	40 ft.	± 59ft.
Minimum Side Yard Setback:	12 ft.	67ft.
Minimum Rear Yard Setback:	30 ft.	± 190 ft.
Parking Facility Side Yard Setback for Special Exceptions in a Residential Zone (§ 59-E-2.83)	24 ft.	12
Parking Requirement (§59-E-3.7)	1 space for each employee; 1 space per 6 children 11 staff X 1 = 11 62 children/6 = 11 Total = 22	22

*(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Parking has been discussed in part VI D of this report.

*(c) Minimum frontage. \* \* \**

This subsection, by its terms, applies only to a few special exception uses. Child day care centers are not among them. The subsection is therefore inapplicable.

*(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Layhill received a forest conservation exemption certificate. Ex. 8(a). It has no plans to remove trees.

*(e) Water quality plan. \* \* \**

The subsection applies only to land disturbance in a Special Exception Area. Layhill is not located in such an area according to the Planning Board's technical staff.

*(f) Signs. The display of a sign must comply with Article 59-F.*

Signs in residential areas can't ordinarily be larger than 2 sq. ft. Sec. 59-F-4.9(a).<sup>21</sup> Layhill wants to erect a sign three times larger – 6 sq. ft. – and intends to apply for a waiver to do so.

While a sign may be useful to identify the property so that potential clients can find it, Layhill has offered no justification for an oversize sign. Ms. Mahabare explained Layhill wants a sign so that clients can tell “if it’s the daycare center, and now they think it’s just a house.” T. II 61. A sign conforming to § 59-F-4.9 will serve that purpose, and Ms. Mahabare seems to agree. T. II 23, 61.

The purpose of the sign restriction is to maintain the residential character of a residential neighborhood. Layhill will already alter the character of its property with a lighted parking lot for 22 cars. It has shown no justification for altering its aspect further through a nonconforming sign advertising its presence. So much as possible the Mahabare property should continue to let passers-by “think it’s just a house.” I therefore strongly recommend that no waiver be granted

*(g) Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its sighting, landscaping, scale, bulk, materials, and textures, and must have a residential appearance where appropriate. \* \* \**

No external structural changes are proposed. The building will retain its residential character.

*(h) Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

*(1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

*(2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

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<sup>21</sup> Section 59-F-4.9 (a) states:

Residential Zone. The total area of all permanent signs on a lot or parcel in a residential zone must not exceed 2 square feet, unless additional area is permitted pursuant to this ordinance.

(1) Freestanding Sign.

(A) Number. One is allowed.

(B) Area. The sign area must not exceed 2 square feet per sign.

(C) Placement.

1. Location. The sign must be set back at least 5 feet from the property line.

2. Height. A sign must not exceed 5 feet in height.

(D) Illumination. No illumination is allowed.

The final photometric study introduced by Layhill demonstrates that the proposed lighting meets the standards of this subsection. Luminaires incorporate non-glare features. The lighting levels do not exceed 0.1 foot candles at the property's perimeters. Lighting is subdued, with no more than 70 watts per fixture. A six-foot board-on-board fence and shrubbery will deflect light spillage.

In addition, Layhill will be obligated by a condition recommended in this report to extinguish all parking lot lights between the close of center operations and their start in the morning.

## VII. RECOMMENDED DECISION AND CONDITIONS.

My analysis of the record leads to the conclusion that the petition to conduct a child day care center at 170 Randolph Road, Silver Spring, for up to 62 children should be granted. The proposed use meets all relevant standards of the County Zoning Ordinance, provided petitioner complies with the conditions recommended below.

I also conclude that a waiver of the side-yard setback, that would permit parking within 12' of the eastern property line, will not defeat the purposes of Zoning Ordinance § 59 E-4.2 and should be granted.

The Board should retain jurisdiction to monitor compliance with petitioner's transportation management plan (§ 2 below) in light of petitioner's principals' past failure to enforce the transportation conditions established in *In re More*, S.E. 02-02 (Aug. 14, 2002). Following receipt of the documents specified in §§ 2(d)-(f), the Board will schedule a work session to determine whether petitioner has fully implemented the transportation plan and whether it should be allowed to increase the number of children on site to the population limits as specified in the following paragraph.

1. The center's enrollment is limited to 62 children, all less than six years old, and staffing is limited to 11 staff, including the director. During the first year after approval of the special exception by the Board of Appeals, enrollment is limited to 44. In the second year after Board approval, enrollment may be increased to 55 if the Board expressly finds that petitioner has fully complied with its transportation management plan and has filed the necessary supporting documents. The enrollment limit may be further raised to full enrollment of 62 in the third year if the Board expressly finds compliance with the transportation management plan and with the document-filing requirements in § 2.

2. Petitioner shall implement a transportation management plan with the following attributes:

- a. Morning drop-offs of enrollees shall be limited to no more than 11 vehicles per half hour period between 7:00 a.m. and 9:00 a.m.
- b. Afternoon and evening pick-ups shall be limited to 11 vehicles per half hour period between 4:00 p.m. and 6:30 p.m.

- c. Drop-off and pick-up periods must be established by contract between petitioner and its clientele. Each contract shall specify the half-hour period during which the client is to drop-off and pick up offspring. The contract shall provide for the collection of fines at the rate of at least \$ 1.00 for each minute by which arrival at the day care center for drop off and pick up falls outside the half hour designated in the individual contract.
  - d. Petitioner shall maintain a monthly schedule of contracted arrival times grouped by half-hour periods. The twelve monthly schedules shall be submitted to the Board of Appeals on May 1, or the next business day, in 2014 and 2015.
  - e. Petitioner shall maintain a monthly account of fines collected for untimely drop-offs and pick-ups, grouped by half-hour periods. The twelve accounts shall be submitted to the Board of Appeals on May 1, or the next business day, in 2014 and 2015.
  - f. Petitioner shall designate a staff member to monitor the parking area during drop-off and pick-up periods to ensure that on-site congestion does not result in off-site vehicular queuing, and to ensure compliance with provisions (a) and (b) of this paragraph. The name of the designated staff member (and of each successor staff member) shall be filed with the Board within fifteen days of designation.
  - g. In no event may a child be dropped off before a staff member is present to supervise that child; nor may a child be left alone if a parent is late in making a pick-up.
3. The hours of operation throughout the year are limited to the period between 7:00 a.m. and 6:30 p.m., with the first employee arriving at 6:30 a.m., and leaving no later than 6:30 p.m., Monday through Friday.
  4. Outdoor play times must be staggered and may not start prior to 9 a.m. No more than 15 children may be in the outdoor play area at a time.
  5. All children must be under the direct supervision of a staff member at all times, both inside and outside the building.
  6. Petitioner shall not use a public address system of any kind outside the building.
  7. Physical improvements are limited to those shown on the site and landscape plans, exhibits 44 and 22(q). Petitioner may implement the alternate parking configuration depicted on exhibit 47, but only if the Department of Permitting Services certifies that the parking configuration depicted on exhibit 44 does not meet County standards. All parking near the eastern property line shall be front-in.
  8. On-site lighting shall comply with all provisions of the photometric lighting plan, exhibit 56. All parking lot lights shall be extinguished between 6:30

p.m. and 7:00 a.m. All exterior house lights shall be extinguished between 6:45 p.m. and 6:45 a.m. (except that emergency lighting on the building may briefly be lit when triggered by movement sensors).

9. Petitioner may erect a sign at its front entrance limited to the size restrictions in Zoning Ordinance § 59-F-4.9(a) and complying with all other relevant standards in Article 59-F of the Ordinance. The sign shall not be illuminated.

10. In accordance with Code § 59-G-2.13.1(a)(4), petitioner is bound by the affidavit of compliance submitted in connection with this case, exhibit 22(c), in which petitioner certifies that it will comply with and satisfy all applicable State and County requirements, correct any deficiencies found in any government inspection, and be bound by the affidavits as a condition of approval for the special exception. In particular, petitioner must comply with all Maryland State and Montgomery County licensure requirements and standards for the operation of a child day care facility.

11. Petitioner shall pay \$11,700 to the Montgomery County Department of Transportation to mitigate “new” traffic generated during peak traffic periods.

12. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. In particular, before construction of the parking lot may begin, petitioner must obtain certification from the Department of Permitting Services showing that no sediment control permit and no storm-water management concept are required for petitioner’s enlarged parking lot.

13. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Respectfully submitted.



Lutz Alexander Prager  
*Hearing Examiner*

April 30, 2013