

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
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IN THE MATTER OF:
PRIMROSE SCHOOL

Applicant

Matthew Taylor

Scott Wolford

Eduardo Intriago

James Alt

Glenn Cook

Srikanth Mandava

Jonathon Jolley

Elizabeth Vandermause

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* * * * *

OZAH Case No. CU 18-08

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and Ms. English	*

Before: Lynn Robeson Hannan, Hearing Examiner

HEARING EXAMINER’S REPORT AND DECISION

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I. STATEMENT OF THE CASE

Filed over three years ago on May 14, 2018, the Applicant, listed on the application simply as “Primrose School” seeks a conditional use to operate a Child Day Care Center for over 30 persons (up to 195 in this case) under Zoning Ordinance §59-3.4.4.F.¹ The Applicant is a corporate entity that franchises daycare centers throughout the country. 11/22/19 T. 17-18. The subject property is located at 7430 Needwood Road, Derwood, Maryland and is further described as Lot 8, Block A of the Derwood Heights subdivision. Exhibit 1; 11/22/19 T. 18-20.

The application spent over a year in the Planning Department and did not surface until the Applicant advised OZAH that it could set a hearing date for November 22, 2019. Exhibit 60. The Applicant amended its plans several times since filing the application. Exhibits 62-86, 92-96. Revised plans were also introduced at the public hearing. Exhibit 199. OZAH issued Notices of Motions to Amend on October 17, 2019 and February 2, 2020. Exhibits 100, 172. OZAH noticed a public hearing for November 22, 2019. Exhibit 100, 172.

Primrose seeks a 22-foot waiver of the minimum 34-foot setback required for the parking area, which includes the driveway. Exhibit 106, pp. 16-17. On October 28, 2020, Staff of the Montgomery County Planning Department (Planning Staff or Staff) issued its report recommending approval of the application, including the waiver request, subject to the following conditions (Exhibit 106, p. 2):

1. The proposed use is limited to a 195-child day care center and 32 employees.
2. No more than 32 employees including two administrators should be on site at any one time.
3. A 6-foot sidewalk must be constructed on the east side of Carnegie Ave. to provide a continuous connection to the temporary turnaround of Carnegie Avenue to the south.
4. A minimum 3-foot-wide gravel or natural surface pathway must be constructed running from Carnegie Ave. to the main building entrance on the south side of the building.

¹ All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended.

5. A fence must be constructed along the eastern property line adjacent to the parking lot and driveway capable of blocking headlight glare. Prior to the public hearing with the Hearing Examiner, the design and materials must be approved by Planning Department Staff.
6. The Applicant must obtain a sign permit from MCDPS for the proposed freestanding sign. A copy of the sign permit obtained from MCDPS must be submitted to the Hearing Examiner before the sign is installed on the property.
7. The hours of operation are 6:00 a.m. to 6:30 p.m., Monday through Friday.
8. School oriented special events and periodic staff training activities must not exceed six events per calendar year and such events may not extend beyond 9:00 p.m.
9. No more than three play areas shall conduct outdoor activities at the same time.
10. Children must not play outside prior to 8:00 a.m.
11. Landscaping must be in accordance with the Landscape Plan submitted on October 21, 2019.
12. The Applicant must obtain a storm water management plan concept approval prior to the public hearing with the Hearing Examiner.

The Planning Board adopted the Staff's findings but eliminated their recommended Condition No. 12 because Primrose submitted an approved stormwater management concept plan after the Staff Report was published. Exhibit 119. The Planning Board substituted a new condition (*Id.*):

12. Right-of-way dedications for Needwood Road and Carnegie Avenue, as shown on the Conditional Use Plan, to be accomplished by deeds of dedication prior to issuance of building permit.

The Planning Board also supported the waiver from the parking setback with the following conditions (*Id.*):

- The applicant shall provide landscaping and/or fencing sufficient to provide additional screening for adjoining properties from the day care facility.
- The applicant shall provide materials to the Hearing Examiner for further discussion concerning access safety and left turn access.

The public hearing proceeded as scheduled on November 22, 2019 but was continued to provide Primrose with time to submit an appraisal report responsive to one that had been submitted by those in opposition. 11/22/2019 T. 275-278. With the consent of the parties, OZAH issued notice of a second hearing date for March 5, 2020. Exhibit 172.

The March 5, 2020, hearing proceeded as scheduled. The hearing was conducted in-person and continued to March 6, 9, and 10, 2020. Shortly after the March 10th hearing, the County Executive ordered that County offices be closed due to the COVID-19 pandemic. On March 23, 2020, with the consent of the parties, the Hearing Examiner postponed the hearing indefinitely due to the pandemic. Exhibit 215.

On October 29, 2020, the Applicant requested that the public hearing proceed virtually. Exhibit 217. OZAH conducted a pre-hearing conference on December 3, 2020, to schedule the remaining hearings in the case on Microsoft Teams. Exhibits 220, 221. All parties attended the pre-hearing conference and agreed to hearing dates beginning on March 19, 2021.

OZAH issued notice of the March 19, 2021, public hearing on February 8, 2021. Exhibit 239. The March 19, 2021, hearing proceeded as scheduled on Microsoft Teams. Additional days of hearings were conducted on March 25, April 2, April 6, April 9, and April 13, 2021. The Applicant presented 9 expert witnesses, one member of the community supporting the application, and two former owners. Three expert witnesses and 24 members of the community appeared in opposition to the application. In addition to the hearing testimony, OZAH received 116 letters from members of the community opposing the application and one in support. Their concerns are summarized in Part II.E of this Report.

The Hearing Examiner left the record open to receive all hearing transcripts and the record closed on April 23, 2021. Due to the volume of testimony and evidence in this case, the Hearing Examiner extended her time to issue a decision from May 24, 2021, to June 7, 2021. Exhibit 240.

Upon careful review of the entire record, including the transcripts from 11 days of public hearings, the Hearing Examiner denies the application, finding that it unduly and adversely impacts the property value of the abutting neighbors to the east, that traffic and lighting is incompatible

II. FACTUAL BACKGROUND

The subject property consists of 2.94 acres and is long and narrow. The Applicant's expert civil engineer, Mr. Eduardo Intriago, testified that the lot has 229 feet of frontage on Needwood Road and is 600 feet deep. 3/5/20 T. 25. Most of the site drains to the west side of the property where there's an existing culvert on Carnegie Road that is in poor shape. A small portion on the southeast that drains to the southeast. *Id.*

The property is currently improved with an existing residential home consisting of approximately 1,200 square feet roughly in the middle of the property from east to west. 3/5/20 T. 26. The existing driveway is slightly east of the center of the Needwood Road frontage. Exhibit 106, p. 2. Planning Staff advises that there are no streams, wetland areas, 100-year floodplains or highly erodible soils, or rare, threatened or endangered species on the property. *Id.*

An aerial view of the property from the Staff Report (Exhibit 106, p. 2), marked by the Hearing Examiner to identify uses pertinent to her decision, is on the next page. Not pictured in that exhibit is a house confronting the subject property to the west of Carnegie Avenue (7500 Needwood Road) owned by Mrs. Jennifer Mitchell. Apparently, it was constructed after the aerial photographs in the Staff Report were taken. Mrs. Mitchell marked the approximately location of her home on the rendered Landscape Plan (Exhibit 148, shown page 9 in blue). The best depiction of the Mitchell property's relationship to the subject property is from Primrose's appraisal report (Exhibit 168, p. 8, shown on page 10).

The Applicant's expert in landscape architecture, Mr. Jonathan Jolley, described existing site conditions as shown on the Natural Resources Inventory/Forest Stand Delineation (NRI/FSD). The NRI/FSD is an inventory of natural features that guide development of the site. 3/5/20 T. 70.

Mr. Jolley testified that the site slopes generally from the northeast to the southwest. A small portion drains to the southeast. The northern portion of the site is relatively open with some isolated trees that are specimens or significant trees. There is an existing forest stand along the eastern property line and tree cover areas along the western property line abutting Carnegie Avenue. A large specimen tree is located approximately in the center of the site. There is a tree-covered area about mid-way between the northern and southern property lines along Carnegie Avenue that consists primarily of Norway Spruce. 3/5/20 T. 70.

Subject property

Needwood Road

Page 10

Redland Road

**Taiwanese Cultural
Center**

**Mitchell Residence
(Approximate)**

**Unimproved Section
of Carnegie Avenue**

**Tapscott-Smith
Residence**

**Improved Section of
Carnegie Avenue**

Aerial Photo from Staff Report
(Exhibit 106, above)

**Taiwanese
Presbyterian Church**

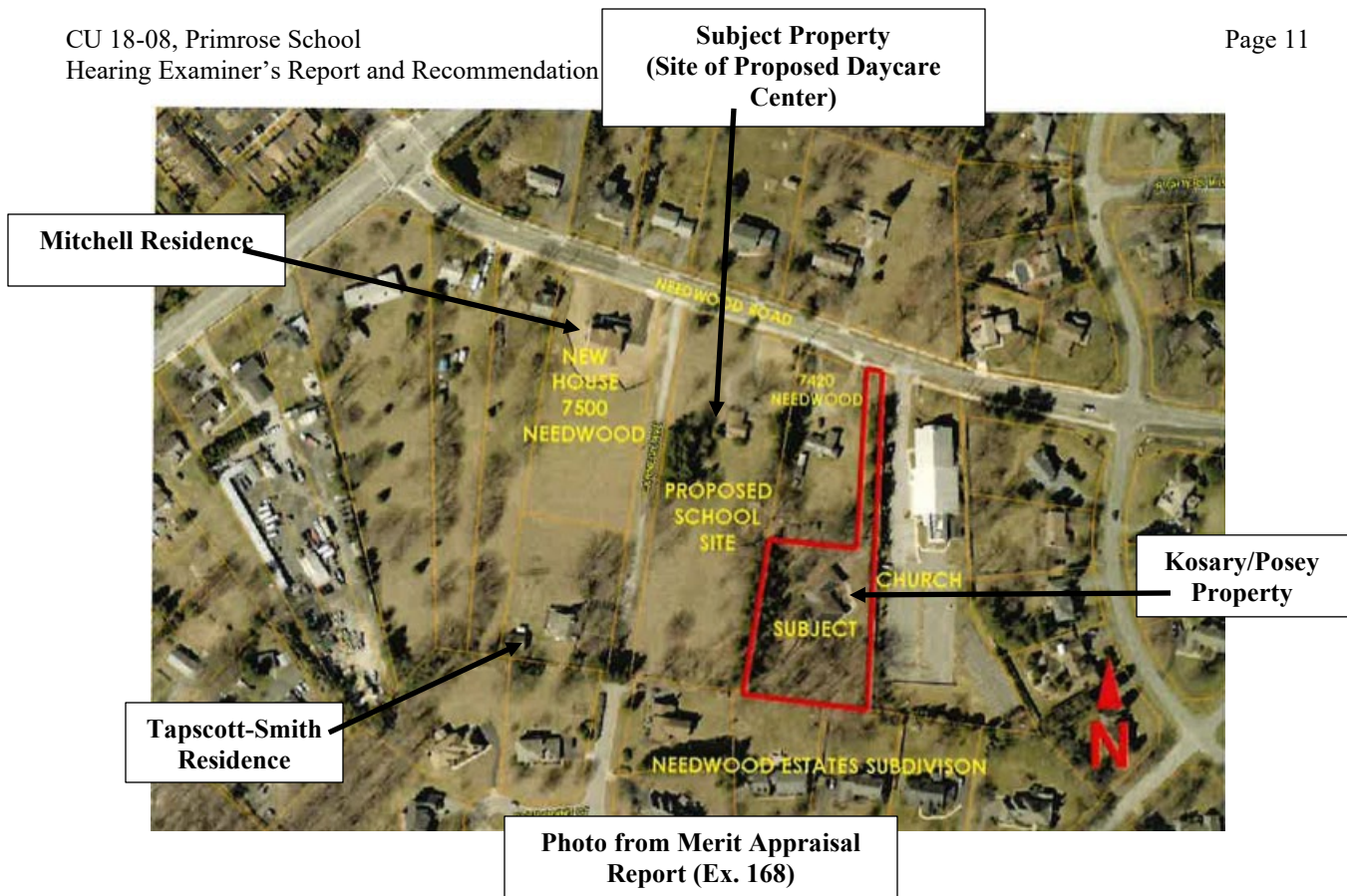
**7420 Needwood
Road**

**Kosary/Posey
Property
7416 Needwood Rd.**



**Mitchell Residence
(marked in blue)**

**Rendered Landscape Plan Marked to Show
Mitchell Property (Ex. 148)**



The center of the property east of Carnegie Avenue consists of open grassland. To the west, tree cover begins about a quarter of the way down from the northeast corner of the property moving south along the eastern property line. Within that area, there are several specimen trees. Further to the south are continuing grasslands until the southeastern corner, where there is a small area of forest stand connected with the tree cover along the eastern property line. It is also connected to the forested area on the neighboring parcel to the east. There is limited tree cover along the southern property line, with several specimen trees off the property on the Tapscott Smith to the west. 3/5/20 T. 64-65.

Mr. Jolley testified that the NRI/FSD failed to include two trees that would be impacted by the development. One, a 37-inch Silver Maple, is located on the Kosary/Posey property. The other, a red pine, was not initially included because it was under 24 inches in diameter, the threshold for identification on the NRI/FSD. Staff determined later that the red pine was a specimen tree under County regulations. 3/5/20 T. 66-70.

Carnegie Avenue is adjacent to the western side of the subject property. According to Staff (Exhibit 106, p. 4):

The subject property has frontages on Needwood Road (north) and Carnegie Avenue (west). Carnegie Avenue is a neighborhood connector street, approximately 900 feet in length, that runs from north to south between Needwood Road and Ottenbrook Terrace. About 40 percent of Carnegie Road is fully constructed. The constructed portion of Carnegie Avenue (southern portion) ends at the southern property line of the subject property. The remaining portion of Carnegie Avenue, which extends the entire length of the subject property, is not constructed and is currently a gravel driveway that provides access to three properties, including the subject property, from Needwood Road.²

Ms. Rosemary Tapscott Smith lives in the house on the west side of the unimproved portion Carnegie Avenue just north of the barrier preventing through traffic to the southern (improved) portion of Carnegie Road. The home of Dr. Carol Kosary and Mr. Paul Posey (7416 Needwood Road) abuts the property on the southeast side and a single-family residence abuts the northeastern side of the subject property. All these are zoned RE-1. The property immediately to the east of the Kosary/Posey property is developed with the Taiwanese Presbyterian Church.

B. Surrounding Neighborhood

To determine the compatibility of the proposed use, it is necessary to delineate the “surrounding neighborhood,” which is the area that will be most directly impacted by the proposed use. The neighborhood is then “characterized” to determine whether the use as proposed is compatible with the existing character of the area.

The parties disagree on the size and configuration of the surrounding area and whether the area west of Redland Road should be included. Staff defined the boundaries of the surrounding area as (Exhibit 106, p. 3):

North:	Mill Creek Stream Valley Park (SVP) and Rock Creek Regional Park
East:	Rock Creek Regional Park
South:	Needwood Golf Course, Crabbs Branch SVP

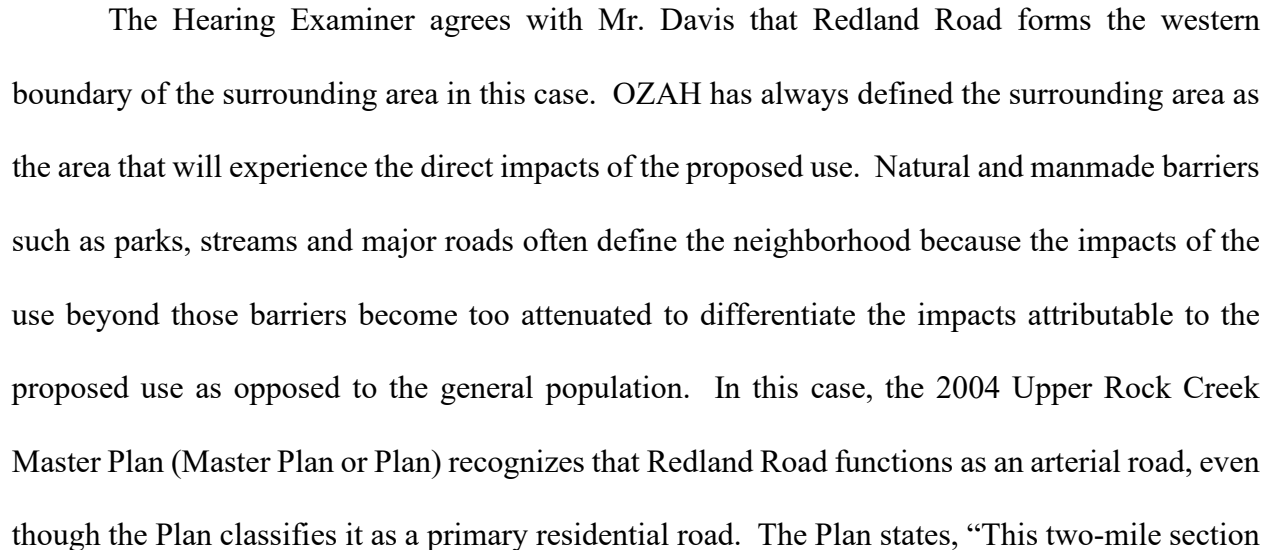
² Despite Staff's statement, both the Mitchell property and the subject property have existing access directly from Needwood Road.

West: I-370 interchange and Shady Grove Road

Primrose's expert land planner, Mr. Scott Wolford, testified that he originally proposed a larger surrounding area, but generally agreed with Staff's boundaries. 4/9/21 T. 136. The Staff Report includes a graphic of the boundaries "surrounding neighborhood" that they recommend (Exhibit 106, p. 3, on the next page).

In Mr. Wolford's opinion, the area west of Redland Road should be included within the surrounding area due to two factors. The first is the Inter-County Connector, immediately to the north of this neighborhood. In his opinion, the ICC increases and impacts the area of the neighborhood. Second is the Mid-County Highway, which also impacts the area and "creates a need for it to be on the west side of Redland Road. Finally, the Metro station to the southwest has "huge impacts" on surrounding areas. 4/9/21 T. 136. He believes that the Metro station should be included because it is within walking distance of the neighborhood and influences it. 4/9/21 T. 137.

The opposition's expert land planner, Mr. Joe Davis, opined that the area west of Redland Road should not be included within the surrounding neighborhood because it includes properties that are not directly impacted by the use and is very different in character. The area west of Redland Road has higher density zones, including the PD Zone, and has a different character of development than east of Redland Road. He agrees with Staff's northern and eastern boundaries. Even though Redland Road is designated as a primary residential road, it functions at a higher level. For that reason, it represents a reasonable western boundary for the area. 4/2/21 T. 160. Another reason that the area should not be included is that Redland Road is that the dividing line between the upper Rock Creek Master Plan area and the Shady Grove Master Plan area to the west. In this case, it is important to have a surrounding area that is based on the same planning principles and Master Plan guidelines for development. 4/2/21 T. 188.



of Redland Road operates more as an arterial roadway than as a primary residential roadway due to several factors.” *Plan*, p. 69. This is supported by the corrected Traffic Study submitted in this case. Exhibit 233. The Redland Road approaches to the intersection of Redland and Needwood Roads have the lowest delay rating possible—Level of Service (LOS) A. According to the Applicant’s expert traffic engineer, Mr. Glen Cook, MCDOT and SHA minimize delays on the major roadway through an intersection because that’s where most of the traffic is. 4/2/21 T. 63.³

Given the factual and legal basis for defining the surrounding area, reliance on the “outside influences” of the ICC, Shady Grove Metro, and I-370 undermines the Applicant’s argument. The focus in defining the surrounding area is not on the influence of major County infrastructure improvements or transportation systems—if this were the case, huge swaths of the County could be included in the surrounding area in every conditional use case. The basis of the delineating the surrounding area in a conditional use case rests on the direct impacts of the proposed use. Given the testimony and evidence that Redland Road functions as an arterial roadway and the stark difference in the zoning, master plans, and characteristics between the area west and east of the subject property, the Hearing Examiner finds that Redland Road forms the western boundary of the surrounding area.

Once the boundaries of the surrounding area have been delineated, the second step for the purpose of determining compatibility is to characterize the surrounding area. The disagreement on the neighborhood boundaries also influences the parties’ characterization of the neighborhood. The bulk of the testimony in the record focused on whether the area consists of large lot, low-density housing, characteristics that the General Plan Refinement uses to define the County’s

³ The Applicant’s attorney also suggests that the Master Plan has adopted the “two-lane road policy” incorporated into the 2000 Master Plan for the Potomac Subregion. 4/6/21 T. 112. That policy tolerates additional congestion on two-lane roads to preserve the rural character of the surrounding area. *Id.* He provided no support for that statement in the record.

“residential wedge”. *See, e.g.*, 4/9/21 T. 137-143 (Wolford); 4/2/21 T. 127 (Kosary); 4/2/21 T. 189, 4/6/21 T. 94 (Davis). As discussed in Part III.A of this Report, the importance of that determination relates more to consistency with the applicable master plan and the County’s general plan than the existing character of the area.

Staff described the area (including the eastern side of Redland Road) as follows (Exhibit 106, pp. 3-4):

...residential developments that are surrounded by parks on three sides and a major roadway to one side. The neighborhood is bisected by Redland Road from north to south and developed with residential dwellings in the R-90, R-200, RE-1 and PD 5 Zones. None-residential uses within the neighborhood boundaries include Candlewood Elementary School, two places of worship, a local park, a cultural center, and a Montgomery County Parks Department maintenance depot. Needwood is a 70-foot-wide primary residential road and it bisects the neighborhood east to west. Within the defined neighborhood, the area north of Needwood Road is located within the Gaithersburg Master Plan area. The portion of the neighborhood that is south of Needwood Road, with in which the subject property is located, is within the 2004 Upper Rock Creek Area Master Plan.

Mr. Wolford opined that the character of the area (as delineated by the Applicant) is an “eclectic mix” of land uses. It consists primarily of mixed types of residential single-family detached homes on different lot sizes. There are some apartments and townhomes in the PD5 Zone in the southwest corner of the area, north of Redland Road and south of the metro access drive. The rest of the area is made up of R-90, R-200, RE-1, and RE-2 Zoned property. 11/22/19 T. 95.

According to Mr. Wolford, there are also some institutional and commercial uses in the surrounding area. Institutional uses include the Candlewood Elementary School located in the northwest corner of the area. The delineated neighborhood contains two churches. One, the Taiwanese Presbyterian Church, is two lots to the east of the subject property on Needwood Road. The other is on Redland Road several hundred feet north of where it intersects with Needwood Road. 11/22/19 T. 95.

Mr. Davis testified that the area's character (using a western boundary of Redland Road) consists of low-density residential uses. The area south of Needwood Road is in the RE-1 Zone. There are existing subdivisions on the north side of the road that have larger lots, even though they are in the R-200 Zone. Some are as big as 2 acres and some are 1 acre, which was typical of subdivisions at the time. There is parkland to the north, the golf course to the east, and Crabbs Branch Stream Valley Park to the south. T. 189.

The Hearing Examiner finds that Staff's characterization of the surrounding area west of Redland Road best describes the existing character of the area. The area is primarily residential single-family detached homes in the RE-1 and R-200 Zones with a few community supportive institutional uses such as an elementary school and churches. The surrounding area also contains recreational/park uses such as the Needwood Golf Course and Crabbs Branch Stream Valley Park. There is an isolated non-conforming commercial use, Morton's Towing, along Redland Road. As non-conforming uses are typically not used to assess the character of the area, the Hearing Examiner does not give it weight.

C. Proposed Use

The Applicant seeks approval of a conditional use to construct and operate a Child Day Care Center for up to 195 children and 32 staff. Mr. Matthew Taylor, a representative of the Primrose School franchise corporation, described the franchisor's concept. It operates an early childhood education program that is group-based childcare focused on education. They develop their own curriculum and operations for the schools. They have approximately 405 schools across the county and develop about 30-40 new schools annually. They have schools in rural, suburban, and urban locations. They choose locations that are convenient to parents on their commute to and from work. An example of an urban location they are working on is a school at the Walter Reed hospital in Bethesda, and they have a school in Olney that is more suburban. They

are no strangers to the conditional use process, including a more recent approval at Layhill Road in a setting like this one, in his opinion. 11/22/19 T. 21-24.

Mr. Matthews testified that the franchisee for this property is Srikanth Mandava. Mr. Mandava purchased this site prior to a franchise agreement being signed with Primrose and brought the site to them. Mr. Mandava has consented to the application as the property owner, not the franchisee. T. 18-19. Typically, Primrose would be the purchaser of the parcel that would be assigned at closing to a franchisee. 11/22/19 T. 18-20.

Mr. Mandava testified he has set up two limited liability companies, one that will own the property and the other will operate the franchise. Needwood Developers, LLC, owns the property. Needwood Schools, LLC will operate the daycare. He, his wife, and a person named Burga Kodali, are members of the LLC. He is the managing partner for both entities. Mr. Kodali is a passive investor. 3/9/20 T. 266.

Mr. Mandava testified he is an information technology professional who manages and runs large teams of people driving programs for companies. His wife is a software engineer and they both are working parents. 3/9/20 T. 264. According to Mr. Mandava, they decided to enter the daycare field because they'd been working in IT for more than two decades. Their daughters are in their teens and they felt that they wanted to do something more meaningful, more passionate for themselves. His wife volunteers for some non-profit organizations including CASA and Center for Abused Women and Children. Putting those interest together, they started thinking about what they could do for a meaningful future. *Id.*, T. 264-265. They decided that they wanted to run an exemplary school that would be meaningful to them. Given their lack of experience running a day care, they felt a franchise would be the best way to go. After researching different franchises, they "fell in love" with Primrose. 3/9/20 T. 265.

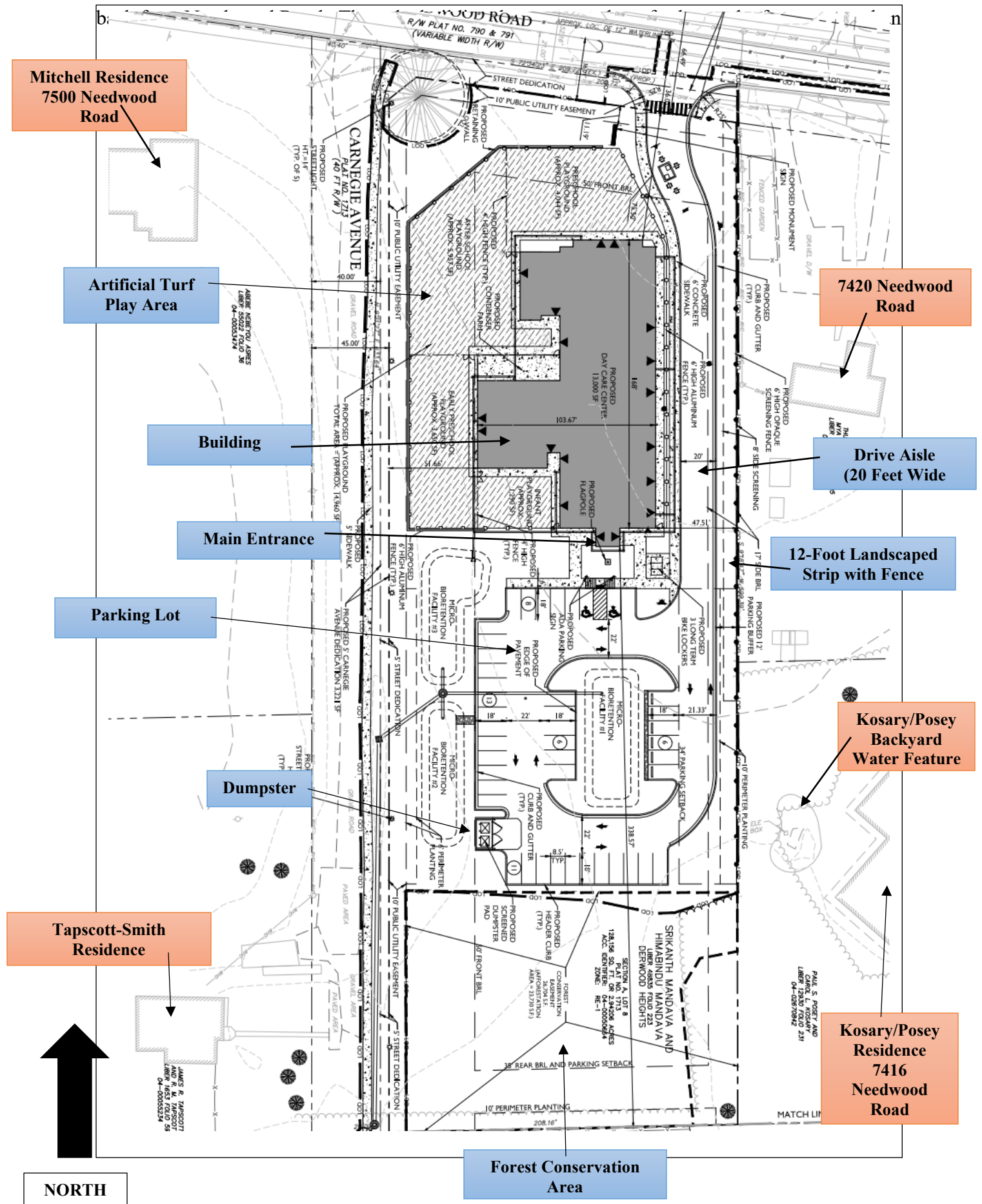
1. Conditional Use Site Plan

The final iteration of the conditional use site plan (Exhibit 199(d)) and its relationship with surrounding properties is shown on the following page. The proposed building is 168 feet long (excluding a vestibule) and 103 feet wide. Exhibit 199(d). Mr. Alt testified that the primary north-south axis of the building is 22-feet, 9 inches high, with different heights at the wings. The building is one story. 3/6/20 T. 282-284.

Mr. Wolford, Primrose's expert in land planning, testified that the building would be approximately 13,000 square feet with an adjacent play area of 12,000 and 14,000 square feet.⁴ 11/22/19 T. 140-141. To maintain the residential character of the neighborhood, Primrose oriented the shortest frontage toward Needwood Road. According to Mr. Wolford, Primrose aligned the front yard setbacks along Needwood Road with adjacent single-family detached dwellings. They did not want the building protruding in relation to the adjacent residential uses. The single-family home adjacent to the west is closer to the street than their building. The single-family detached home to the east is further back from Needwood Road. Thus, the building does not stand out further to the front or rear than those on the adjacent property. 11/22/19 T. 109-110. The dumpster is in the extreme southwest corner of the property to keep it as far from the neighbors as possible. The dumpster will be fully enclosed with gates so that it won't be visible to the community. 11/22/19 T. 111-112.

Mr. Intriago, Primrose's expert in civil engineering, testified that Staff required them to install a sidewalk along the east side of Carnegie Avenue, which is shown on the conditional use plan. Staff also wanted to see an access from Carnegie Avenue to the main entrance of the building. When Mr. Intriago explained that they could not make that access ADA-compliant, Staff indicated that they would accept a mulch trail. 3/5/20 T. 215.

⁴ The conditional use plan (Exhibit 199(d)) lists the play area as 14,960 square feet.



Mr. James Alt, the Applicant's expert in architecture, testified that the playground will be constructed of artificial turf with drainage underneath. Initially, Primrose proposed a six-foot high rod iron fence around the playground. 3/6/20 T. 257. Primrose later changed that to opaque fence to address screening concerns raised by Mrs. Mitchell. Primrose did not specify the material of the opaque fence.⁵ 4/6/20 T. 153. Mr. Alt testified that there will be age-specific playground equipment that will be in earth tones. Equipment chosen will not generate noise, such as bells or gongs. 3/6/20 T. 283.

3. Waiver of Parking Setback

The proposed conditional use plan calls for a waiver of the parking setback for the access drive on the eastern side of the property. The mandatory parking setback for the conditional use is 34 feet; the setback provided is 12 feet, necessitating a waiver of 22 feet or 65% of the minimum setback normally required. 3/5/20 T. 220. Initially, the Applicant proposed to access the property from Carnegie Avenue, but later discovered that the sight distance at that intersection with Needwood Road did not meet Montgomery County standards. This is due to a crest on Needwood Road just east of Carnegie Avenue in front of the subject property. Because the justification for the waiver is highly contested, the Hearing Examiner discusses this in Parts III.A and D of this Report.

4. Floor Plans/Building Specifications

Mr. Alt described the interior layout and exterior architectural details of the building. Elevations of the building are included in the Staff Report (Exhibit 106, on the next page). The floorplan is a corridor with classrooms on either side. 3/6/20 T. 251. According to Mr. Alt, the interior axis runs north-south. The majority of classrooms face east toward the driveway access.

⁵ The Hearing Examiner assumes that the fence will still be 6-feet in height, but no detail was submitted.

**Southern Elevation
(fronting parking lot)
showing main entrance**



**Northern Elevation
fronting Needwood Road**



**East Elevation
fronting 7420
Needwood
Avenue and
Kosary/Posey
Property**

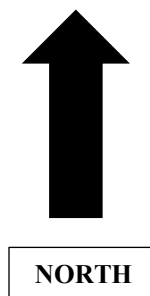


**Western Elevation
fronting
Carnegie Ave.**



**Building Elevations
Exhibit 106, p. 28**

Mr. Alt testified that the main entrance faces away from Needwood Road and is oriented toward the parking area to the south. Immediately inside the entrance is a foyer with reception and administrative offices. Infant classrooms are immediately inside the front door to accommodate parents carrying car seats. Proceeding north up the spine of the building, classroom ages increase up through 60 months. The floor plan for the building (Exhibit 79) is shown on the next page). Mr. Alt testified that two corridors run east/west; one is near the north end of the building and another is at about midpoint of the north/south axis. 3/6/20 T. 253. The interior is



designed to be a reassuring and comforting environment for small children and their parents. The interior is softly contemporary without bright colors and loud noise. 3/6/20 T. 255. A warming

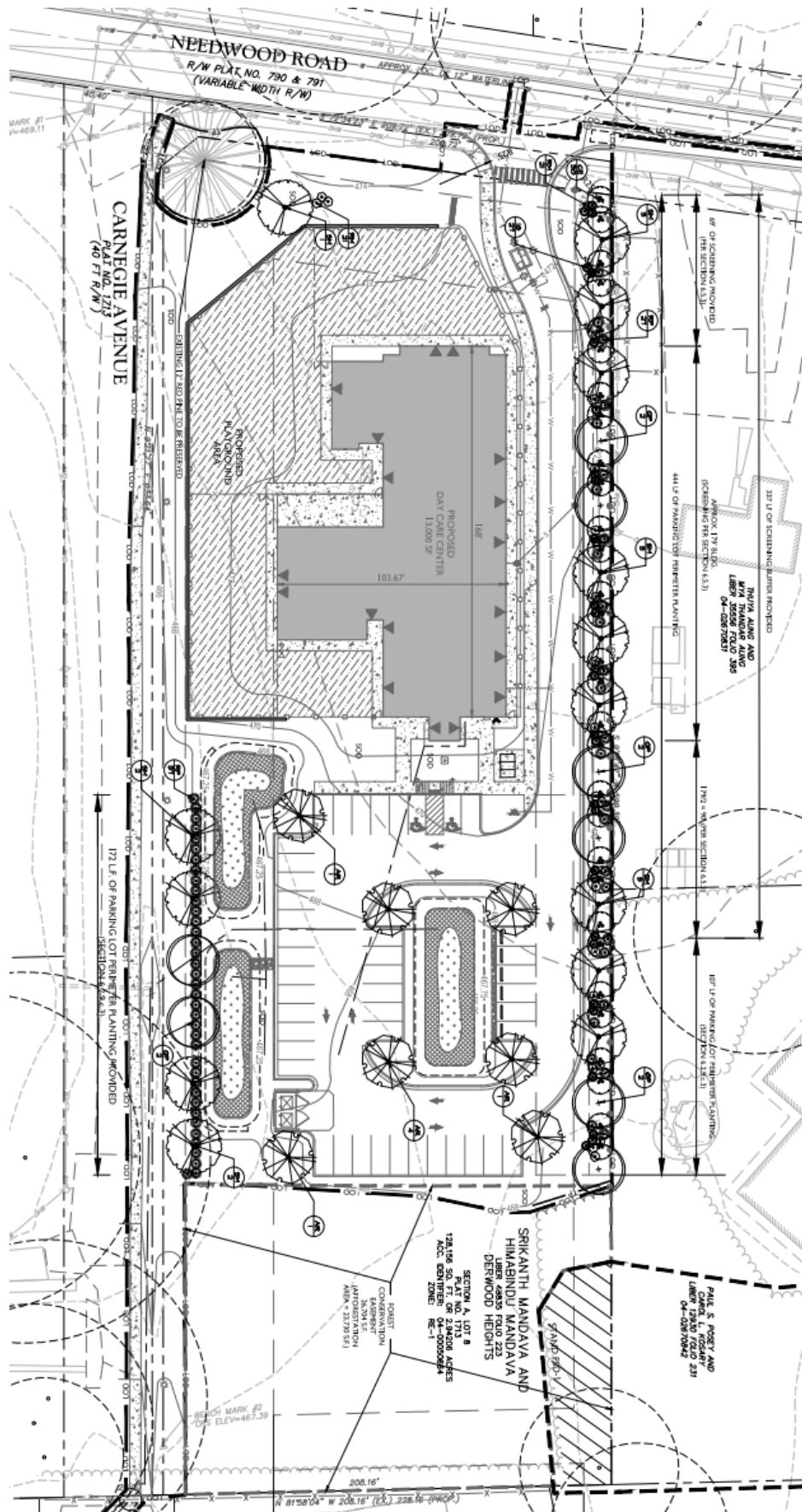
kitchen is in the core near the intersection of the main north-south corridor and the first east-west corridor. 3/6/20 T. 254.

According to Mr. Alt, Planning Staff asked Primrose to consider a two-story option to reduce site coverage. Primrose did not opt for a two story building because they have to introduce a number of items on the second floor for security, management and childcare. They also must have two stair cores and an elevator core, an elevator equipment room and additional resource rooms on the second floor. They ended up with a food delivery issue and the total bulk of the building ended up increasing from about 29 feet to another 12 feet, well above the massing of neighboring homes. After adding the additional features, they ended up approaching 15,000 square feet. 3/6/20 T. 285.








5. Landscaping

Mr. Intriago testified that the minimum perimeter landscaping required by the Zoning Ordinance permits two options—a 4-foot opaque fence and a landscaped buffer. On the eastern side adjacent to the Kosary/Posey property, the conditional use site plan calls for a 6-foot high opaque fence and a 12-foot landscaped strip, above the minimum required. 3/5/20 T. 209; 3/6/20 T. 280.

Primrose's expert in landscape architecture, Mr. Jonathan Jolley, described the landscape plan (Exhibit 199(i), shown on the next two pages). According to Mr. Jolley, the landscaping for the project is driven by the size of the building and other programmatic requirements. 3/5/20 T. 142. Mr. Jolley testified that the landscaping proposed meets the minimum requirements of the Zoning Ordinance. Portions of the landscaping exceed the requirements for parking lots with 10 or more spaces. The landscaped islands in the parking lot exceed the minimum of 5% of the surface area. The conditional use plan also exceeds the minimum required green area, which is 1,422 square feet. They are providing 1,725 square feet. 3/5/20 T. 142-150. Primrose proposes



Landscape Plan
Exhibit 199(i)

PLANT_SCHEDULE					
<u>CANOPY</u>					
<u>(DECIDUOUS) TREES</u>	<u>CODE</u>	<u>QTY</u>	<u>BOTANICAL NAME / COMMON NAME</u>	<u>CONT</u>	<u>SIZE</u>
	AR	7	ACER RUBRUM / RED MAPLE	B & B	2 - 3.5" CAL.
	SM	14	ACER SACCHARINUM / SILVER MAPLE	B & B	2 - 3.5" CAL.
	QP	8	QUERCUS PHELLOS / WILLOW OAK	B & B	2 - 3.5" CAL.
<u>UNDERSTORY</u>					
<u>(FLOWERING) TREES</u>	<u>CODE</u>	<u>QTY</u>	<u>BOTANICAL NAME / COMMON NAME</u>	<u>CONT</u>	<u>SIZE</u>
	CE	30	CERCIS CANADENSIS / EASTERN REDBUD MULTI-TRUNK	B & B	2 - 2.5" CAL.
<u>SHRUBS</u>					
	IG	27	ILEX GLABRA / INKBERRY HOLLY	3 GAL.	4" MIN.
	RP	64	TAXUS FPP / YEW	5 GAL.	8" MIN.
	RM	24	RHOODENDRON MAXIMUM / ROSE DAY		24" - 30"

LEGEND



CHAMPION TREE SIGN



TREE PROTECTION



"XGRASS" SYNTHETIC TURF (PLAYGROUND)

Landscape Plan Exhibit 199(i)

the minimum landscaping required for the perimeter of the property, except that the landscaped strip along the eastern property line is 12 feet rather than the minimum of 10 feet wide. 3/5/20 T. 151.

Starting at the northwest corner of the subject property, Primrose plans to preserve an existing red pine tree. The eastern property line from Needwood Road to the southernmost point of the parking lot will be landscaped with a 12-foot wide strip and a 6-foot high opaque fence. They have not yet discussed the exact material with the owner of the Kosary/Posey property. The landscaped border will be planted with 15 large shade trees at 2" to 2.5" in caliper. These will provide an upper story in the long term. Landscaping will also include a lower story of 30 red buds, an ornamental tree native to the area. The border will include shrubs will be various sizes,

but all will be evergreens to assist with year-round buffering from light trespass through the fence. Multi-layer landscaping also adds to the aesthetics of the landscaping rather than having a one-layer row of trees. T. 117-118. In his opinion, the 12-foot width of the landscaped bed is sufficient to support the landscaping proposed. The required planting strip is normally a minimum of 10 feet. T. 119. The 12-foot bed flares out slightly in the northeast corner of the property as there is slightly more open space and gets wider again toward the forested area. 3/5/20 T. 117-119. According to Mr. Jolley the parking lot area will have a shade tree cover to meet the parking lot requirements for green area and canopy coverage. A micro-bioretenion facility is proposed in the center of the parking lot. 3/5/20 T. 113-118.

The western edge of the parking area along Carnegie will have a variety of large shade trees and a continuous hedge row along the entire side of the parking lot. The remaining areas around the building will be treated with sod for maintenance and a few scattered trees and shrubs for interest. The landscaping is primarily concentrated around the parking lot area and the eastern property line, supplemented by the forested area in the rear of the property. *Id.*

At maturity, the shade trees will provide upper canopy visibility or cover. At the time of planting, the shade trees will be approximately 10-12 feet high. The shade trees should reach a height about 50 feet at maturity except for the ornamental trees. The ornamental Red Buds reach at most 15 feet of height at maturity. 3/5/20 T. 122-124. The shade trees will mature in approximately 10 years. 3/5/20 T. 137.⁶

6. Lighting

Lighting consists of 15 wall-mounted sconces on the building, eight 20-foot pole lights in the parking lot, and 4 utility lights along Carnegie Avenue. Because the compatibility of the

⁶ On rebuttal, Mr. Jolley indicated that full maturity may take 20 years. 4/9/21 T. 81-82.

lighting is an issue in this case, a copy of the lighting plan is included on page 91 of this Report under the Hearing Examiner findings on compatibility.

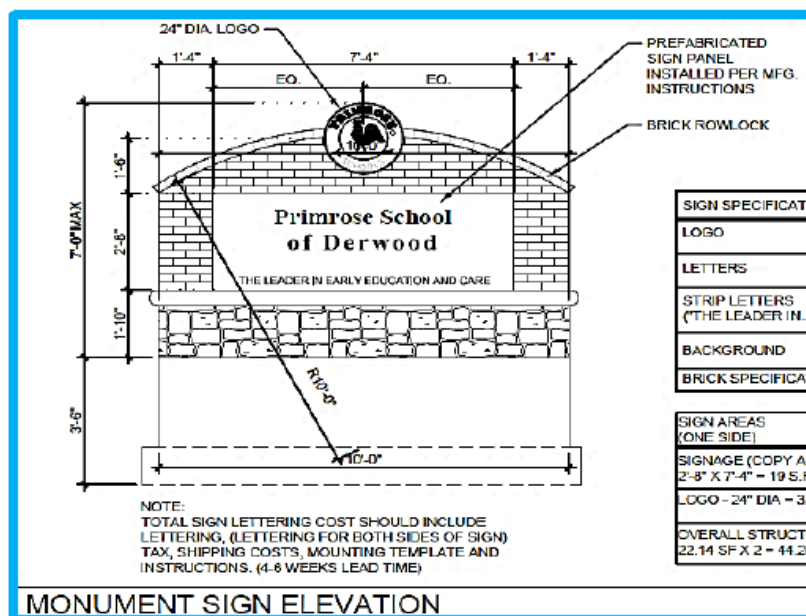
Initially, the Applicant testified that lights would be turned off at 9:00 p.m. 3/6/20 T. 290. On rebuttal, Mr. Mandava, the proposed franchisee and operator, testified that no lights will come on between 7:00 p.m. and 6:00 a.m. He was unsure how evening special events would be handled. 4/6/20 T. 158. When cleaners are inside the building, they will switch on lights only for the room they are cleaning. Janitorial staff will also draw blinds on the windows when working to minimize lighting coming out of the building. There will be soft lighting on the exterior just to illuminate the doorways, but it doesn't radiate a lot of light. He doesn't have "a lot of" specifics on those lights. *Id.*, T. 154. Exterior lights will not be turned on for the cleaning crew when they leave at 9:00 p.m. They will use their vehicle lights to exit the property. T. 156. The franchisor has not given him any regulations on lighting. 4/6/20 T. 144-158.

Mr. Alt testified that sconces are mounted at each exit door on the outside, seven feet above the ground. Fixtures on both pole and wall-mounted lights prevent horizontal illumination—all the light is directed downward. If you're standing on the edge of the property looking at the parking lot lights, you will not be able to see the luminaire. The photometric plan shows that illumination at the property line will be 0.1 or 0.0 footcandles. The 0.1 measurement is on the east side directly adjacent to one of the light poles. That point is about 25 feet south of the main entrance to the building on the eastern property line, immediately beneath one of the poles. The six-foot fence on the property line should also mitigate any light impact. T. 288-289. All the illumination sources now are LED, which diminishes light as it moves toward the ground. 3/6/20 T. 288-289. On rebuttal, Mr. Jolley testified that the parking lot pole lights may be lower, although he could not guarantee that this would not cause additional reflection from lighting on the building.

The options proposed by Primrose to address concerns raised at the public hearing are described in Part III.A of this Report.

7. Signage

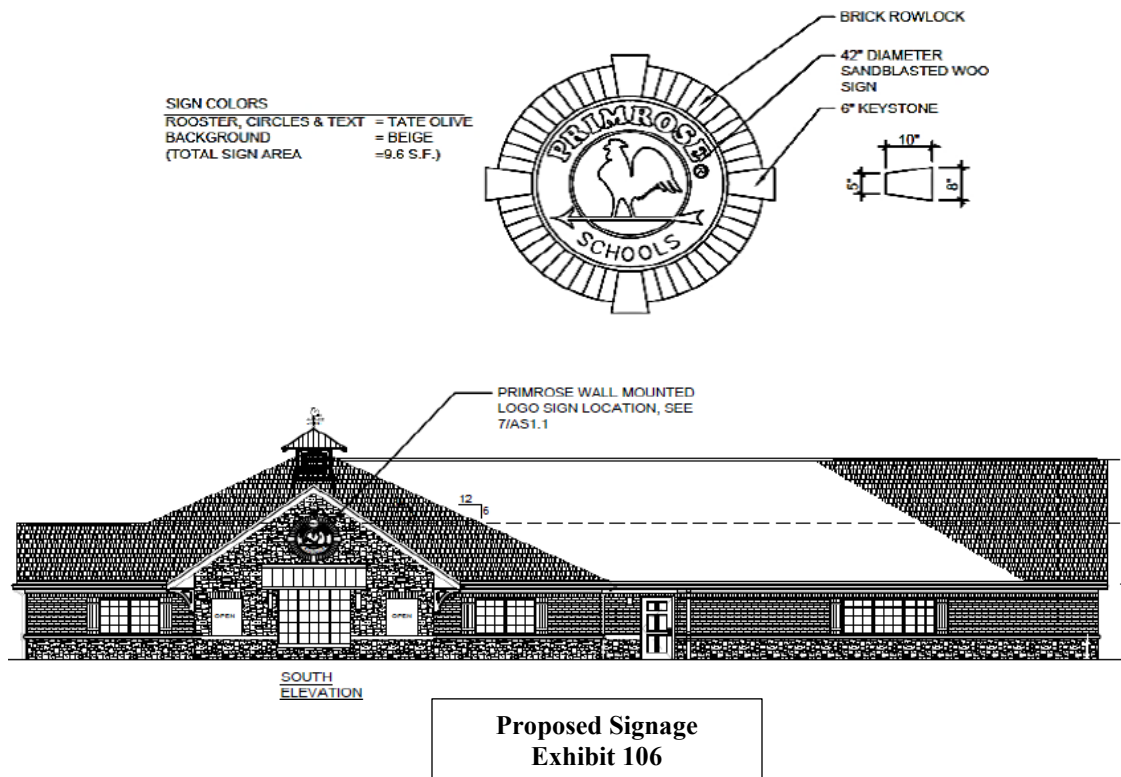
Staff reports that the site plan shows a 51.8-square foot (7.4 feet W X 7feet H), two-sided monumental identification sign located approximately 11 feet behind the right-of-way and approximately 56 feet from the front (north) property line. An elevation of the monument sign is reproduced below (Exhibit 106, p. 22):



Primrose also proposes a wall-mounted logo sign at the main entrance (Exhibit 106, p. 22, on the following page).

6. Operations

Mr. Mandava, a principal in the LLC that owns the subject property and proposed franchisee of Primrose, testified regarding the operations of the proposed use. Initially, Primrose proposed a before and aftercare program that would deliver and pick-up children to or from nearby public schools by bus. 3/9/20 T. 281-283. On rebuttal, Mr. Mandava stated that they no longer proposed a before or aftercare program because "it is not desired anymore." 4/6/20 T. 143



1. *Hours of Operation.* The school will be open to staff from 6:00 a.m. to 6:30 p.m. Student operating hours are between 6:30 a.m. to 6:30 pm. They expect children to arrive between 6:30 a.m. and 9:30 a.m. For the bulk of the enrollment, drop-off will occur between 7:00 to 9:00 a.m. T. 278. Primrose (the franchisor) has information on when the peak drop-off/pick-up times are but he did not have it at the time of the hearing. 3/9/20 T. 287. His sense is that 7:00 a.m. 9:00 a.m. is the peak period when people start coming in on a regular basis. *Id.*, T. 289.

2. *Staffing and Shifts.* Academic activities begin at 9:00 a.m. Staff will arrive in in shifts. He believes that they will need only 27 employees plus a cook.⁷ Shift times will depend on the pattern of the times children come in. Generally, one shift will be from morning to the afternoon from about 6:00 a.m. to Noon or 2:00 pm. Another shift will start in the afternoon and go until 6:30 pm. The cook will come in around 8:00 a.m. He does not know when the cook will leave. 3/9/20 T. 287.

⁷ The Staff Report states that the application is for 32 employees. Exhibit 106.

3. *Outside Play.* Initially, Mr. Mandava testified that there would be 68 children outside at one time, then he testified that there would be 62, then, a year later, 60. *Compare*, 3/9/20 T. 290, 291, 4/6/21 T. 146. He stated that noise will be controlled because children will always be supervised by teachers while they are playing outside in ratios required for the indoor classroom. Teachers will prevent the children from yelling and screaming. Children will be outside between 9:00 a.m. and 11:00 a.m. in the morning and between 1:00 p.m. and 3:00 p.m. in the afternoon. The age range of the children will be 3 months to 5 years. Infants are 12 weeks to 11 months, young toddlers are 18 to 23 months, early preschool is 24 -35 months, pre-school is 3-4 years, and pre-K is 4-5 years. The oldest child playing outside would be 5 years old. 4/6/20 T. 144-151.

Mr. Mandava testified that there could be some special events after 6:30 pm, such as graduation, that last up until 9:00 pm. They've agreed to a condition limiting those events to 6 times a year. The activities would be for less than the entire school due to the parking constraints. T. 299. The main special event is the graduation, according to Primrose Franchising. T. 300. Teacher training is done online or off-site.

Mr. Mandava testified that trash will be picked up twice a week and recycling will be picked up once a week. Pickups will be scheduled in the middle of the day between 10:00 a.m. and 3:00 p.m. 3/9/210 T. 17. Food deliveries will be made twice a week between 10:00 a.m. and 3:00 p.m. 3/9/20 T. 22. Mr. Alt testified that there will be no cooking in the facility, and so there will be no exhaust with odor. Food arrives refrigerated or frozen and is either warmed in a warming kitchen with a microwave or convention oven or is served at room temperature. The kitchen is in the core near the intersection of the main north-south corridor and the first east-west corridor. Fairly substantial refrigeration and freezer capacity allows them to space out food deliveries on an extended schedule. The food is warmed in the kitchen and then transported to the classrooms. T. 254.

7. Supporting Infrastructure

Mr. Intriago testified that the existing storm drain system did not have the capacity to support the proposed daycare center. In the larger watershed, the storm drain flows west around several properties and into the upper stream of Crabbs Branch. They propose to use the same branch to drain the water, but channel it into approximately 1,100 feet of new and replacement pipe towards the existing subdivision to the south, which has a public structure outflowing into Crabbs Branch. 3/6/20 T. 83.

New and replacement pipe is necessary because the current system is not sized to handle the flow from the daycare center. Various segments of the new pipe will be between 15 inches and 30 inches in diameter. The depth of the pipes varies. He thinks the deepest depth will be 15 feet. 3/9/20 T. 102. According to Mr. Intriago, installation of the storm drain will require excavation, traffic control, construction equipment. He could not answer how long that would take. *Id.*, T. 101-102.

On rebuttal, Primrose's expert in stormwater engineering, Mr. Robert Pease, testified that storm drain system would cost between \$800,000 to \$1,000,000. The infrastructure proposed will increase the diameter and capacity of the pipes that exist. The existing pipes are not large enough because the proposed facility will add flow into the system, and there are several places where the grade of the pipe is too flat to handle the additional flow. 4/6/21 T. 183-186.

Construction will require trenching. Once they begin trenching, they will use trench boxes that are dragged along as the pipes are constructed. Excavation of the trenches produces a lot of soil, which will be managed by the general contractor. He foresees loading the soil directly into dump trucks instead of the public right-of-way and storing it temporarily. Trenches will have steel plates over them. 4/6/21 T. 193.

In response to the community concerns regarding disruption due to the trenching, Mr. Pease provided details of how the construction would proceed. These are detailed in Part III.A of this Report.

D. Environmental Issues

From a design standpoint, Mr. Jolley testified the existing forest on the Kosary/Posey serves a purpose to provide habitat beneficial to species. Primrose intends to extend this forested area on the subject property to enhance this benefit. 3/5/20 T. 71. Under County regulations, Primrose is required to preserve or plant 0.61 acres of forest. The southeast corner of the site has approximately 0.07 acres of forest stand that is contiguous with the forest stand on the Kosary/Posey property. Primrose will add 0.54 acres of forest to the rear of the property. This area will be preserved by a forest conservation easement and will be fenced so that encroachments can be limited. 3/5/20 T. 71-79.

According to Mr. Jolley, because the site is long and narrow, development must be focused along the central spine of the property. This will require the removal of two specimen trees along the eastern property line because they are located in the proposed driveway. The impact to the red pine near the center of the site is due to grading, compaction, and its location within the proposed playground area. 3/5/20 T. 80-83.

Mr. Jolley testified that some significant trees off-site will be impacted as well because disturbance will occur in the critical root zone of the off-site trees. The "critical root zone" or CRV equals 30% of the tree canopy.⁸ Typically, they do not want more than 30% of the CRV to be impacted by construction. 3/5/20 T. 94. There are five trees that will have impact to their CRVs, including several specimen trees in front of the Tapscott Smith residence. These trees are

⁸ According to Mr. Jolley, the canopy is determined by measuring the diameter of the trunk and multiply that by a factor of 1.5. 3/5/20 T. 96.

well outside the limit of disturbance, but there will be some excavation within the critical root zones of those trees. Mr. Jolley opined that the risk to the long-term survival of the trees may be mitigated because they are not adding to the compaction problem, which is his primary concern. They do not want tractors running over the root zone. The limit of disturbance will be contained within the subject property except for offsite storm drainage that will be proposed. 3/5/20 T. 87.

Construction activity will also impact the critical root zone of a 37-inch Silver Maple on the Kosary/Posey property. After the Kosarys' did not agree with the tree's location on the NRI/FSD, Primrose sent out a survey team to identify the exact location of the tree. The tree is slightly closer to the subject property than shown on the FSD. Environmental staff did not require the PFCP be amended, but the correct location will be shown on the Final Forest Conservation Plan. Mr. Jolley testified that he is "comfortable" that less than 30% critical root zone of the silver maple will be impacted, although he has not been on the property. 3/5/20 T. 97. The tree's canopy will cross a little bit of the eastern property line (the limits of disturbance), so there will be an impact. He testified that he "feel[s]" that it will be less than 30% and would work with the property owner and staff to ensure they can limit encroachment and compaction. *Id.*, T. 98.

Mr. Jolley described measures to mitigate the impact of construction. The first measure would be to ensure no construction activity extends beyond the limit of disturbance, which is the eastern property line. Primrose would also install tree fencing along the eastern property line and provide some additional fencing for any potential storage of materials during construction. They could also provide additional security and signage to prevent storage of construction materials and vehicles from entering that area because the construction activity will be ongoing for the building and the parking lot. If these preventative measures did not work, he could recommend some mitigation measures with some injection or loosening of the soils and some fertilization to boost the robustness of those trees. 3/5/20 T. 100.

Those in opposition presented testimony and evidence that numerous trees on the Kosary/Posey property, including the silver maple and other trees close to the property line, will be damaged by the construction because the limit of disturbance is at the common property line.

The opposition also presented expert testimony and evidence of adverse environmental impact on Crabbs Branch due to the increased volume of stormwater from the proposed use. The opposition's evidence and Primrose's response are described in Part III.A of this Report.

E. Community Response⁹

1. Support

One neighbor, whose property confronts the subject property across Needwood Road, testified in support of the application. He finds the conditional use plan "very appealing" and doesn't believe the traffic on Needwood Road will be problematic. 3/9/20 T. 211-212. On cross-examination, he admitted that he is the resident agent for the LLCs that will own and manage the property. 3/9/20. Although he testified that he receives no financial benefit from the development, the Hearing Examiner did not find credible his testimony supporting the use.

At one point, the Applicant argued that the subject property could not be developed residentially because the government would require the owner to improve the entire length of Carnegie Road, which would be cost prohibitive. Mr. Michael Lasko testified that he was the prior owner of the property and lived there most of his life. His father had attempted to subdivide twice the property into residential lots, but each time the County had required the improvement of Carnegie Avenue. 3/10/20 T. 105-110.

⁹ In addition to testimony at the public hearing, OZAH received one letter supporting the application and 116 letters opposing it. *See*, Exhibit 36 (letters opposing) and Exhibit 146 (letter supporting). The Hearing Examiner does not summarize these in this Report because the Report is already lengthy and those testifying at the public hearing covered the issues raised in the letters.

Mr. Lasko's sister, Ms. Debra Lasko-Crone, attested to the same. Her father was told that the County didn't need the road but left it on the books so whoever developed the site would have to develop the road. *Id.*, T. 112. The problem is that the road can never connect without the people on the opposite side of the road giving up a right-of-way. That means that the Tapscotts and whoever bought the property in front would have to give up land to make the two roads meet. *Id.* She and her husband tried to build a house there. They were also told that they would have to improve Carnegie Avenue to County standards. *Id.*

2. Opposition¹⁰

The balance of the community input at the public hearing opposed the application. Concerns expressed centered on traffic congestion and queues on Needwood Road, whether there would be sufficient gaps in traffic for those living on Needwood Road to enter/exit their property, structural problems with the Redland/Needwood intersection, potential conflicts with pedestrians and cyclists using the shared pathway on the south side of Needwood Road, the impact on the existing storm drain system, and whether existing infrastructure, such as the sewer system, could handle the additional volume from the proposed facilities, frustration with fighting commercial use of this property, and a belief that the proposed use was too commercial for the area. Others challenged Mr. Mandava's representations that he will operate the daycare. Some expressed concern about the enforceability of conditions imposed in the conditional use process.¹¹ These are summarized by topic below.

a. Impact on Existing Queues

A major source of concern from the community in this case is queuing on westbound

¹⁰ Detailed testimony from Dr. Carol Kosary and Mr. Paul Posey, who live adjacent to the east of the subject property) is set forth in Part III.A of this Report under the relevant findings required for approval.

¹¹ *See, e.g.*, 3/19/21 T. 49-57. The Hearing Examiner finds this testimony too speculative as applied to this case and does not include it here.

Needwood Road toward the intersection of Redland Road. Several members of the community testified that the Traffic Study submitted did not accurately reflect existing conditions. *See, e.g.*, 3/5/20 T. 207-208 (Storbrauck); 3/10/21 T. 156 (Caponiti). They complained of significant traffic backups in the area, particularly along Needwood Road. *See, e.g.*, 3/5/20 T. 234; 3/10/20 T. 9-10 (Sarah Newens); 3/10/21 T. 148-156 (Caponiti); 3/10/21 T. 187-195 (Prahkye); 1/22/19 T. 201-213 (Barbour); 11/22/19 T. 253-255 (Stewart); 11/22/19 T. 237 (Chamoun). Mr. Caponiti submitted a photograph from a neighborhood website, where the person who posted the photograph stated that he took it from Needwood Road at the Taiwanese Presbyterian Church (Exhibit 206, below):



Mr. Michael Prahkye testified that he has seen westbound queues back up more and more frequently to Carnegie Avenue and the subject property. He sees these queues every day and it's

very difficult for him to make a left turn onto Needwood Road from his neighborhood (the South Riding subdivision). Buses also travel on the road and require people to stop. He submitted photographs taken from the “crest” on Needwood Road east of its intersection with Carnegie Avenue. For each photograph, he checked his rearview mirror and saw the backup extending even further east. He believes that the backups are long because a lot of people cut-through other neighborhoods to reach Redland Road. He is concerned that parents dropping children off will park in the entrance to the South Riding neighborhood, which is about 300 feet away from the subject property, because that is what people do on Sundays to get to the church. He is also concerned about conflicts with bikes and pedestrians. 3/10/20 T. 187-195. The photographs taken by Mr. Prahkye are shown below and on the following page (Exhibit 210(a)-(d).





Ms. Tami Kiley testified that she is on the Board of Directors for the Park Overlook Community Association. She stated that the intersection of Needwood and Redland goes from four down to two lanes as you approach. Needwood Road has already been widened so she doesn't believe that will happen again soon. In her opinion, the traffic is "horrendous" most of the day, but especially in the morning/evening rush hours. 11/22/19 T. 217-218.

Many residents testified that Needwood Road carries a lot of cut-through traffic, adding to the congestion. Ms. Patricia Eng, who lives on the north side of Needwood Road, testified many people use Needwood Road to cut through to I-270 from as far away as Bowie Mill and Muncaster Mill Roads. There is a new housing development on Muncaster Mill Road that may also take this

route. The improvements to the intersection of Needwood and Redland Roads acknowledged the increasing traffic in the area. Coming from her neighborhood anytime between 7:00 a.m. and 8:30 a.m., it's at least a five-minute and sometimes longer wait to make a right turn onto Needwood Road to get to Redland Road and beyond. A similar problem occurs from 4:30 p.m. to 6:00 p.m. in the evening.

Delegate Vaughn Stewart agrees with other witnesses that the proposed facility will exacerbate existing backups in the area. He travels through the region frequently has observed several choke points. There is a "huge" backup from people travelling toward Md. Route 355 on Redland Road. Many vehicles turn left on Crabbs Branch, so there is a huge backup there. 11/22/19 T. 253. Another major backup occurs on the Needwood approach to Redland Road. People there try to turn left onto Redland. Another occurs on Muncaster Mill Road with people trying to get to Redland Middle School and Magruder High School. Adding 200 students to the current traffic patterns causes him much concern. 11/22/19 T. 254.

Several individuals expressed concern that people will use the residential side streets to cut through to major roadways due to the backups in the area. Ms. Chamoun believes that parents will use the now-quiet side streets in the area to cut through her neighborhood, increasing traffic and endangering children at play. 11/22/19 T. 239 Mr. Marlowe testified that there are traffic sources other than commuters. One is a bus lot on Crabbs Branch that puts a lot of school buses onto Needwood headed eastbound in the morning and westbound in the afternoon, which will coincide with drop-off at the proposed facility. Needwood Road is also a major cut through between Redland Road and Muncaster Mill Road where a high school is located. These traffic sources compound upon the other traffic in the vicinity. 11/22/19 T. 234-235.

b. Impact on Access/Egress for Immediate Neighbors

Several of those living close to the intersection of Needwood and Redland Roads believe

that the additional traffic on Needwood will make access and egress to their problems even more difficult than it presently is due to longer queues. Ms. Tapscott Smith, who lives at the southern end of the unimproved portion of Carnegie Avenue, testified that she must exit Carnegie Avenue almost every day and sometimes more than once a day. Her parents built their home there in the early 1950s. Her mother is 98, she has lived in the same house for 65 years. Ms. Smith has lived in the house for most of her life and for the last 10 years as her mother's primary caregiver. 11/22/19 T. 220.

According to her, there are times sitting on Carnegie Avenue, trying to make a left, that she has to wait for two or three cycles of the light at the Redland/Needwood intersection before there is a gap in the traffic to make the left turn. There are times where she must pull out onto Needwood and block the eastbound traffic before she can make the left if someone westbound is willing to let her in. There is a school bus stop on Needwood just to the west of Carnegie Avenue. That also creates problems with queuing in the morning. 11/22/19 T. 225-226. Right now, to get out of her driveway safely, she literally must "gun it" when there's a gap on Needwood Road because it's only open for a second then someone is coming over the crest of the hill. Even if they don't see a car, they step on the gas to get out of the driveway. They often one or two light cycles before they can exit their driveway at rush hour. 3/5/20 T. 246.

Ms. Enitza Rodriguez's property adjoins the east side of the Taiwanese Cultural Center on the north side of Needwood Road. She believes that this daycare presents real challenges because Needwood at this location has a blind spot. When she pulls out every morning, there is "tons" of traffic from 5:30 a.m. to 10:00 a.m. She has three children in different schools. When she is pulling out onto Needwood to take her children to school, she sometimes must reverse because she can't get out, or is surprised by a car coming over the crest just to the east of her house. Whether you are making a right or left turn, you cannot see who is coming over that hill. There are times

when she is halfway out to try to get in the west turn lane on Redland Road. Cars block her ability to get to the turn lane and she must back into her driveway again. The Inter-County Connector has generated a lot of additional traffic in the area. Everyone uses Needwood Road as a shortcut to get to the ICC so traffic is a big problem. Her child in Magruder High School must cross the Needwood Road to get to the bus stop. She fears for her child's life every morning. Her dog was struck right in front of her house and had to be put down. It's also hard to make a right onto Redland Road in the morning. During the weekends, the church down the street generates traffic as well. 11/22/19 T.270- 272.

Ms. Olga Sabran's house is on the north side of Needwood Road opposite Carnegie Avenue and the subject property. She believes the existing increase in traffic is dangerous for the residents, particularly children and the elderly. To cross Needwood Road to get to the pedestrian pathway, her parents literally have to "dash" into the road, which is almost undoable for them because they have bad knees and hips. 3/5/20 T. 263. She has trouble pulling her car out from her driveway onto Needwood Road, which is congested in both directions in the morning and evening hours. To get to Candlewood elementary school, she must turn left onto Needwood Road from her house. She believes that traffic generated by waste removal, delivery trucks and service vehicles along, will create delays on Needwood Road without considering drop-offs and pick-ups. 3/5/20 T. 266. *See also*, 2/19/21 T. 25-26 (Cece English).

Ms. CeCe English testified that she lives north of Needwood Road opposite the subject property and the Kosary/Posey property . She testified that she has difficulty crossing Needwood Road and must go to the edge of her property and check carefully for traffic before crossing Needwood Road on foot. 3/10/20 T. 30-31.

According to Ms. English, it is very difficult to maneuver to pull out of the Kosary/Posey driveway and immediately turn to make a right into her driveway. When she tries to turn right

onto Needwood from her driveway, she must first intrude into the oncoming lane to make her turn. The other alternative is to bounce to her right, then left, and have her right rear tire off the curb. When she comes eastward and wants to turn left, she uses a particular point in front of a utility pole to slow so that her brake lights come on and will be clear to people travelling behind her. 3/19/21 T. 30-31.

c. Parking on Carnegie Avenue and In Other Neighborhoods

Another major concern expressed at the public hearing was the possibility that parents would use Carnegie Avenue using the pathway required by Staff. Others expressed the same concerns for the South Riding neighborhood.

Ms. Tapscott Smith testified that the path shown on the conditional use plan linking Carnegie Avenue and the entrance to the facility will incentivize parking on Carnegie Avenue. One reason why Carnegie Avenue wasn't approved for daycare's access was because there's a blind hill to the right when you make a left-hand turn from Carnegie onto Needwood. She is afraid that parents will park on Carnegie Avenue and use the path to enter the day care. This means that they do not have enough sight distance when they exit.

Ms. Tapscott testified that this has occurred with visitors to the Taiwanese Cultural Center. They use Carnegie Avenue as a parking lot and their members walk to the church. At times, Carnegie Avenue has been completely blocked by vehicles that use it as a parking lot and she has been unable to access her home. In her opinion, there will be two streams of traffic trying to exit onto Needwood Road—one using Carnegie and one use the site driveway. 11/22/19 T. 222. Other witnesses echoed Ms. Tapscott's concerns, particularly about the lack of sight distance from Carnegie Avenue. 11/22/19 T. 247.

Mrs. Mitchell shares these concerns. She believes that people are "absolutely going to park" along Carnegie Avenue to drop off their children and along Deer Park, the next street down.

3/5/20 T. 246. Ms. Cece English, who has served 14 years as a community liaison for the Taiwanese Cultural Center, testified that she once received pictures from Ms. Tapscott Smith of visitors to the Taiwanese Cultural Center that were parked on Carnegie Avenue. 3/19/21 T. 26.

Mr. Prahkye is concerned that parents will park in the entrance to the South Riding neighborhood, which is about 300 feet away from the subject property, because that is what people do on Sundays to get to the church. 3/10/20 T. 192-195.

d. Structural Problems with Intersection of Needwood and Redland Roads

Several people testified that the configuration of the intersection of Needwood and Redland Roads, which was improved relatively recently, was poorly designed and caused delays at the intersection. Ms. Tapscott Smith testified that the Redland/Needwood intersection is a “disaster,” even though it is about two blocks from a major transportation hub (*i.e.*, Shady Grove Metro). According to Ms. Tapscott Smith, when you’re going northbound on Redland Road, making a right-hand turn onto Needwood Road, vehicles are almost forced into the oncoming lane of Needwood Road, particularly if one is driving a larger vehicle. The right turn is a sharp, hard right and she’s seen large vehicles—tractor trailers, dump trucks, trash trucks, unable to make the turn if there’s traffic in both westbound lanes on Needwood. People in the northbound approach to the intersection must wait for Needwood traffic to get a green light and the west bound left on Needwood to move so they can make that corner. Immediately after you make the turn, there is a residential driveway that has a hill and the Taiwanese cultural center that accesses Needwood on the north. 11/22/19 T. 227.

c. Sufficient Gaps for Access/Egress at Site Driveway

Many individuals believe that there are insufficient gaps in the traffic along Needwood Road to allow adequate access and egress to and from the proposed facility, particularly because parents must make a left turn out of the facility onto Needwood Road. Ms. Tapscott Smith testified

that she questioned Primrose about this at the community meeting and the only explanation given was that not all 195 parents would be dropping their children off at the same time. She still has not been able to figure out how many cars will be coming during drop-off in the morning. Even if stretched out over two hours and reduced the total number of vehicles to 150, she does not see how you can have 150 cars exit and enter the property in 120 minutes. That does not even allow one minute for each car to get in, drop-off a child, and leave. The Applicant explained the children must be dropped off at the front door, taken out of the car, walked into the building, through security checkpoint, and walked to their classroom and turned over to the teacher. Then the parent must leave to make another spot for a parent dropping off a child. She does not understand how Primrose will prevent backups in their driveway and standing cars on Needwood Road. 11/22/19 T. 221. Mr. Marlowe testified that he was chairman of a parochial school with 240 students and getting parents in and out of that program was a continual hassle. *Id.*, T. 236. The roads and driveways were never wide enough. Parents want to park cars and go get kids—they are not thinking logically about traffic flow. Instead, they are wondering how they will pick up the children, get moving, because they must be somewhere else. 11/22/19 T. 236. *See, also*, 3/10/20 T. 212-213 (Mary Ann Shirven).

e. Conflicts with Pedestrians and Cyclists

Several individuals were concerned about conflicts between vehicles entering and exiting the property and cyclists and pedestrians on the shared use path on the southside of Needwood Road. Ms. Tapscott Smith testified that Montgomery County studied the need for a bike path on Needwood Road and found there were enough cyclists to warrant building the path. They have since built the bicycle path from Redland Road to the end of Needwood Road and there are cyclists and walkers utilizing that path all of the time in the morning and evening. She is concerned that

vehicles that enter and exit the site driveway and Carnegie will interfere with the pedestrian/bicycle traffic. 11/22/19 T. 223.

Delegate Vaughn Stewart shares Ms. Smith's concerns. According to him, there have been several new developments in the neighborhood over the last decade that have caused the County to promote and improve pedestrian and cyclist accessibility in the neighborhood. There are new sidewalks in the Candlewood neighborhood to make it easier for children who walk to school. Another is the multi-use path along Needwood to support use of the Shady Grove Metro station. There are several sidewalks in the planning stages on both Redland Road and Muncaster Mill Road. He is very concerned about the safety of pedestrians and bicyclists due to the lack of sight distance for people using the pathway. He believes that vehicles exiting the facility may block the pathway to make the left turn out onto Needwood Road. T. 258. He doesn't see how that situation could be avoided except to have pedestrians sit and wait for the cars, to go behind the parents' cars, which is not a safe option, or go into the road where there is no bike lane. In his opinion, many of those turning left out of the driveway will not be able to do so due to traffic back-ups on Needwood Road. 11/22/19 T. 255-259. Mr. James Dempsey believes that the project will negatively impact the County's goal for "Vision Zero" to end pedestrian deaths by the year 2030. He believes that the application states that there will be 150 pickups in the morning and 125 in the evening. If you average 6-10 minutes per family drop-off and pick-up, you've already exceeded that 12 parking spaces for parents. 3/5/20 T. 254. *See also*, 11/22/19 (Tapscott Smith); 3/5/20 T. 260-261 (Charles Ammerman); 11/22/19 T. 241 (Patricia Eng).

Others were concerned that the proposed use would generate "cut-through" traffic through residential streets, endangering children that walk to school or play in the area. 11/22/19 T. 247 (Dr. Michael Huppman); 11/22/19 T. 244 (Patricia Eng); 3/10/20 T. 159 (Anthony Caponiti). Dr. Michael Huppman moved to Otterbrook Terrace in 2016. He is very concerned that parents will

use his street as a cut-through to get to the proposed daycare. 11/22/19 T. 247. Mr. Caponiti believes that a bottleneck will occur that will cause traffic to cut through Candlewood and Mill Creek neighborhood. He believes that once people start to take shortcuts to avoid the light at Redland/Needwood, they will cut through local neighborhood. This will endanger children in the neighborhood because they are not bussed to the local school there and must cross streets. 3/10/20 T. 159.

f. Credibility of the Applicant

Mr. Caponiti questioned the credibility of Mr. Mandava's testimony. He pointed to a survey performed by Mr. Mandava stating that he'd reached out to six property owners, all of whom said they were supportive of the project. Exhibit 106, Attachment C. This survey included responses from Ms. Tapscott Smith, Ms. Martha Abera (owner of 7500 Needwood Road, currently owned by the Mitchell's), and Mr. Jakkampudi, all of whom were listed as "very supportive." Ms. Tapscott Smith and Mrs. Mitchell, however, appeared in opposition to the application. Mr. Caponiti looked at tax records for Mrs. Mitchell's property and Ms. Abera was not listed as the owner.¹²

Mr. Caponiti believes that Mr. Mandava purchased the property solely as an investment. The petition states that the owner of 7500 Needwood Road supports the application, but she has appeared at public hearing to oppose it. While the Mr. Mandava testified that he and his wife will run the business, Mr. Caponiti interprets a statement from the survey to mean that Mr. Mandava is a real estate agent. The survey includes the following comment about Mr. Jakkampudi: "Mr. Jakkampudi is a realtor himself and knowledgeable about real estate..." Exhibit 106(a), Attachment C. He doesn't see Mr. Mandava as being the day-to-day manager of the property. In

¹² The Hearing Examiner can only surmise that Ms. "Abera" may be related to the developer of the Mitchell property, as the opposition's real estate appraiser interviewed a "Mr. Abebe" that had developed the property. 3/6/20 T. 136.

Mr. Caponiti's opinion, the application for a daycare is purely an investment for him. Mr. Caponiti also questions whether Mr. Mandava will really run the daycare because he and his wife are from Herndon, Virginia, and the daily commute to the daycare, which runs 12 hours a day, would be two hours. 3/10/20 T. 173-174.

g. Compatibility

1. Size, Intensity and Character of Use

Many witnesses felt that the proposed daycare was a "forced fit" on the property. 11/22/19 T. 265-266 (Mark Simonson). Mrs. Mitchell testified that the size of the facility is out of proportion in the residential area, particularly when it has no screening or landscaping blocking the view from Needwood or her house. There are a few small businesses tucked away in the area, but you can't see them. She believes that this will be a huge change in the residential character of the area. 3/5/20 T. 249. Mr. James Dempsey believes that it is incompatible with the surrounding area because it is approximately five times larger than the average structure in the area. There's a community center closer to Redland, but it is not utilized as frequently because it doesn't operate five days a week with cleaning services, deliver, trash collection, potential for emergency vehicles, etc. 3/5/20 T. 257. Others felt that the intensity of operations (in terms of traffic) in addition to its size and commercial nature was incompatible with the residential area. 3/5/20 T. 261 (Charles Ammerman); 3/10/20 T. 9 (Sarah Newens); 3/19/21 T. 18-19 (Cece English).

Ms. Robin Ackad (nee Rice) testified that she has operated day centers for over 30 years. In her opinion, the overall application is too big. She believes that the worst part about the application is the side variance. With 2.94 acres to work with, there's no reason to grant a side variance. The drive aisle here doesn't even meet the residential building code that requires a setback of 17 feet. This has only a 12-foot setback. It's not justified to grant the variance simply

because they want to have that many children. 11/22/19 T. 202. She is “vehemently opposed” to the side yard setback because she thinks it’s incredibly unfair to the neighbor. T. 204.

Ms. Rice testified that numerous aspects of the application were either unclear or didn’t meet County or State requirements. 11/22/19 T. 184-202. An operator of several day care facilities, she disagreed with Mr. Wolford’s testimony that a day care below 195 children was not economically feasible and there are numerous examples of this in the County. *Id.*, T. 188-189.

Most of those in opposition felt that the commercial aspects of the proposed use were inconsistent with the low-density residential character of the surrounding area. *See, e.g.*, 3/10/21 T. 161-163 (Anthony Caponiti); 11/22/19 T. 244 (Eng); 11/22/19 T. 248 (Dr. Michael Huppman); 3/10/20 T. 9 (Sarah Newens).

2. Residential Character of Surrounding Area

Several nearby residents felt that the Staff Report and Primrose incorrectly characterize the neighborhood. Testimony from Mr. Marlowe was representative of this. He objected to an allusion in the report by the Planning Board that this neighborhood is in a transition from residential to commercial.¹³ The neighborhood has maintained a residential character for the 44 years he’s lived there. The community has argued in prior cases to maintain that residential character. There has been only one commercial use in the residential community, which is a storage place for trucks on Redland Road. 11/22/19 T. 236-237.

3. Adequate Parking for Parent Drop-Off and Pick Up

Several individuals were skeptical that the 44 spaces provided were adequate for parent drop-off and pick-up. Mr. Marlowe, who ran a parochial school, is concerned that the application contains no discussion of special events like after school and holiday programs. 11/22/19 T. 236.

¹³ The Hearing Examiner could not find this allusion in the Staff Report, although it may have occurred at the Planning Board hearing. Mr. James Alt, the project architect, did testify that Primrose prefers to be in a “transitional” neighborhood. 3/6/20 T. 273.

Ms. Rice also does not believe there are sufficient parking spaces to accommodate parent drop-off and pick-up. Primrose states that there will be 16 arriving every 15 minutes. If you calculate 16 children arriving at 15 minute intervals at 8:00 a.m., there will be 64 cars coming between 8:00 a.m. and 9:00 a.m. and 96 cars arriving between 8:00 a.m. and 9:30 a.m. T. 188. When added to the early care, there are 116 children arriving in the morning.¹⁴ You would have to almost double the number of cars coming every 15 minutes before the 9:30 a.m. cut off. 11/22/19 T. 189.

She also believes that review should include the length of time needed to drop-off children. First, you must drive 600 feet along the drive aisle from Needwood Road. Then you must find a parking space, get your children out, get to the sidewalk and then the front door. After that, you must sign-in in one spot with one or two children. After that, you must walk to another classroom with another child, and then return to your car in the parking lot. *Id.*

She's been doing childcare under a conditional use for 33 years and believes that some can cut the drop-off time down to three minutes if the facility is like a home where they come to the front door, say goodbye, and leave. There are new apps that parents use to get updated on their child's day to eliminate the time spent speaking with the teacher. She believes that good daycares have a handbook that asks parents to schedule time with the teacher during the day if they wish to discuss their child. *Id.*, T. 190.

In her opinion, the application has no statistical analysis of how long it will take to drive down the driveway, park, negotiate getting the children inside and to their classrooms, and return to their car. She isn't sure that the number of children scheduled to arrive in 15 minute intervals can complete the drop-off in this period. *Id.*, T. 192; *see also*, 3/10/20 T. 212-213 (Mary Ann Shirven); 3/10/20 T. 165 (Anthony Caponiti); 3/5/20 T. 254 (James Dempsey).

¹⁴ Ms. Rice testified before Primrose withdrew its request for before and after care.

4. Comparison with Existing Approved Primrose Facilities

Several witnesses disagreed with Primrose's assertion that other Primrose schools D.C. Metro area were comparable to the one proposed in this application. Ms. Patricia Eng testified that representatives of the Applicant have pointed to their Layhill Road facility as an example of a comparable location. That facility is not comparable because Layhill Road is a four-lane divided highway with a speed limit of 45 miles an hour and traffic lights up and down to create gaps in the traffic. In contrast, Needwood is a two-lane road with a 30-mile per hour speed limit. 11/22/19 T. 241. Ms. English agreed, testifying that the three examples given of other Primrose facilities are not like this one. None (Layhill, Gambrills, and Bethesda) take note of the fact that this is a two-lane country road, and the others are on either divided four-lane highways or in commercial districts. In addition, the neighborhood has a lot of walkers and bikers; they are out every hour of the day. This path has major connections to Needwood Park, which permits bikers to travel as far south as Mount Vernon in Virginia or join a bike path that runs along the Intercounty Connector. 3/19/21 T. 32-33.

5. Noise

Adjacent property owners and others objected to the noise from the facility. Ms. Tapscott Smith testified that the noise from not just the parents and children, but the maintenance and cleaning staff and everything that goes along with having a commercial enterprise in your front or back yard is incompatible with the area. It really detracts from the residents feeling of community. She can't imagine that it will improve property values either. 11/22/19 T. 228.

Dr. Kosary, whose property adjoins the subject property to the east, testified about the impact of noise from car doors slamming, beeps from vehicles unlocking their cars, and groups outside at the Taiwanese Presbyterian Church on the east side of her property. This is set forth in detailed in Part III.A of this Report.

Mrs. Mitchell, who owns the confronting property west of Carnegie Avenue, also believes that they will be detrimentally impacted by noise from the increased traffic starting at 6:30 a.m. when Staff begins to arrive, deliveries, trash trucks, noise on the road, the HVAC and generator unit that will run even when school is not in session. She does not know how many children will be permitted outside at once. However, it's not just the noise from the children that concerns her—it's the overall noise from car doors shutting all morning long and the general commercial noises from this use. 3/5/20 T. 244. *See also*, 3/10/21 T. 10 (Sarah Newens); 11/22/19 T. 152-154 (Rosemary Tapscott Smith).

6. Screening/Lighting

Mrs. Mitchell believes that the landscaping does not sufficiently screen it from her home. The conditional use plan calls for removal of all trees on the west side of the subject property near her home on Carnegie Avenue. She will have direct views of the side of the building from her bedroom, kitchen, living room, dining room, kid's playroom and their walkout basement will be the back of a commercial building that's three times the size of their house. She also believes that they will be looking at the generators and HVAC units that run 24 hours a day. 3/5/20 T. 242-243.

They will also have views of artificial lighting. Right now, they can see the stars at night. The commercial lighting is not appropriate for the neighborhood, not this close to other people's houses. It's going to take 20 years for the trees to mature, and those will only block their view of the parking lot slightly. It will not block their view of the building at all. They will have to spend their own money to mitigate the impact because the applicant hasn't done any screening on the west side at all. 3/5/20 T. 243-244.

The screening along the eastern portion of the property is also heavily contested because the drive aisle is set back only 12 feet from the Kosary/Posey Property. This is detailed in Part III.A of this Report.

7. Decrease in Value of Adjacent Property

Mr. Posey presented detailed testimony explaining why he believes that construction of the Taiwanese Presbyterian Church devalued their property and that the proposed facility would devalue it further. Mr. Posey presented an expert witness, Mr. Terence McPherson, who opined that this would occur. The details of the testimony and evidence are set out in Part III.A of this Report.

Mrs. Mitchell believes that the facility will reduce the value of her property. They purchased the home in 2019, but it had been on the market since October 2018. They decided to move from D.C. to this area for the quiet, beautiful countryside and proximity to Metro. 3/5/20 T. 242. She believes it will have an impact on the peaceful use and enjoyment of her property and other surrounding properties. In her opinion, the proposed daycare will increase traffic on an already-congested road, dramatically change the character of the neighborhood and will adversely impact their property value and the property values of other homes close by due to the lack of screening, increase in traffic, and incompatibility with the surrounding area. She believes that, if approved, they will immediately be upside down in their property value. 3/5/20 T. 249. Other nearby residents expressed the same concern. 3/5/20 T. 266 (Olga Sabran).

8. Impact on Kosary/Posey Property

Much of the testimony during the public hearing focused on the impact of the conditional use on the adjacent property to the east, owned by Mr. Paul Posey and Dr. Carol Kosary. This is because the driveway access proposed is 12 feet from their western property line and the limits of disturbance for construction will be at the property line. To better understand the issues in this case, the Hearing Examiner describes their property in relation to the proposed daycare center.

Dr. Kosary has a Ph.D in statistics. She retired in December, 2017 from the federal government, where she was a mathematical statistician for 37 years. T. 194. She began her career

with the Army's Operational Test and Evaluation Agency where she was a data analyst for an iteration of the Apache attack helicopter. She has also worked for the Bureau of Labor Statistics and the National Center for Health Statistics working on the design and implementation of large, multi-stage national surveys as well as research and survey methods. For the last 25 years of her career, she was with the National Cancer Institute at the NIH. At the time of her retirement, she was the program manager of a large data-oriented program. T. 183-184. Dr. Kosary is also a Montgomery County master gardener and sits on their Board of Directors. 3/25/21 T. 34.

The Kosary/Posey property is located adjacent to the eastern side of the southern half of the subject property. Mr. Posey testified that their house was custom built 24 years ago and the design was written up in the Washington Post. 3/19/21 T. 99. He and his wife wanted a Frank Lloyd Wright inspired Prairie-style house. One of the features of this design is that they have many windows facing in every direction. The house has only one floor, but that is three feet above grade. They spent a full year looking all over Montgomery County for an appropriate piece of land to build on. They settled on the unimproved 1.35-acre lot in Derwood because it was convenient and because it was a secluded pipestem lot, away from busy Needwood Road. When they bought the property, it was filled with mature, tall trees. 3/19/21 T. 99-100.

Their rear yard faces the subject property. They have installed a water feature in the back yard that is approximately 23 feet from the common property line with the subject property. The distance from their kitchen window to their western property line is 75 feet. 3/25/21 T. 10.

Dr. Kosary testified Taiwanese Presbyterian Church lies along the entire length of their eastern property line. Their home has direct views of the church parking lot. The impact of the church on the property is described in more detail below. Dr. Kosary and Mr. Posey have multiple concerns about the impact of the conditional use on their property. These include adverse impacts from parking lot lighting, noise, traffic, and on the value of their property. They also believe that

the proposed conditional use is incompatible with the surrounding area for several reasons, including the community disruption for installation of the storm drain. Their specific testimony on each of these concerns is included in the next section of this report.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for almost all conditional uses. *Zoning Ordinance*, §59.7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a child Day Care Center for over 30 children. *Zoning Ordinance* §59.3.4.4.F.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application does *not* satisfy all of the specific and general requirements for the use and should be denied for the reasons that follow.

A. Necessary Findings (Section 59.7.3.1.E.)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner's conclusions for each finding, are set forth below:¹⁵

1. Satisfies Former Approvals (Section 7.3.1.E.1.a.)

a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;

Staff advises that there are no other prior approvals that must be satisfied, although Staff mentions a prior special exception application that was withdrawn.

¹⁵ Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

Conclusion: Having no contrary evidence in this case, the Hearing Examiner finds that there are no prior approvals applicable to this property except for the 1946 subdivision approval. There is no evidence that the lot as currently configured fails to satisfy this approval.

2. Requirements of Arts. 59-3, 59-4, and 59-6 (Section 59.7.3.1.E.1.b)

b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;

Conclusion: This subsection requires an analysis of the standards of the RE-1 Zone contained in Article 59-4; the use standards for Child Day Care Centers for over 30 Persons contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on that analysis, the Hearing Examiner finds that Primrose has demonstrated that the application meets the standards of Article 59-4, has not demonstrated that it meets all of the requirements of 59-3, and does not meet the criteria for a setback waiver in Article 59-6.

3. Conformance with the Master Plan (Section 59.7.3.1.E.1.c)

c. substantially conforms with the recommendations of the applicable master plan;

i. Environmental Goals

Whether the application complies with the *2004 Upper Rock Creek Master Plan* (Master Plan or Plan) is one of the most hotly contested issues in a case of hotly contested issues. Staff advises that the Master Plan reconfirmed the RE-1 Zone for the subject property but does not contain any recommendations specific to it. Exhibit 106, p. 6. Staff points out that the overall goal of the Master Plan is to protect environmental resources and maintain stream quality by preserving streams, forests, and wetlands in their natural state. *Id.* According to Staff, the Plan

makes several recommendations for the “Residential Wedge” including the following that are applicable to the subject property (*Id.*):

- Encourage new development that preserves natural resources.
- Encourage community design that is compatible with adjacent development, protects views from local roads, offers harmonious road design and maintains open space.
- Enhance the character of new communities by increasing natural open space where appropriate.
- Preserve additional open space and maintain views along local roads by locating large or conservation lots along them and by protecting views of meadows and woodlands.

Because the Master Plan points out the importance of limiting impervious area to protect water resources, Staff analyzed the impervious surface of the proposed use in comparison with other properties. Staff determined that the proposed conditional use would have an impervious area of between 36 – 38%, although it did not explain how it reached this conclusion. Staff found this level of imperviousness acceptable, although it did not explain how it reached the “typical” levels of imperviousness found in the area (*Id.*, pp. 7-8):

Within the Upper Rock Creek Master plan area, typical impervious levels for development vary with the zone and the availability of sewer service. The subject property is located within a neighborhood in the RE-1 zone with 23 percent typical impervious level with sewer service. The property confronts, across Needwood Road, a neighborhood within the R-200 Zone with a typical impervious level of 26 percent.

The Application proposes an impervious level of 36 percent to 38 percent ... As an older neighborhood, the impervious levels are lower than typically expected with more contemporary development. For example, the combined imperviousness of the lots to the east of the subject property have an 18 percent impervious level. The one exception within the immediate neighborhood is the recently built place of worship, one lot to the east of the subject property, which was built at an impervious level of 55 percent.

The Staff Report contains two graphics to show the levels of impervious surface in the immediate neighborhood (*Id.*, p. 7, on the next page). All parties disagree with Staff on the amount of impervious area shown in the conditional use plan and the parties disagree with each other.



**Graphic Showing Impervious Area
from Staff Report (Ex. 106)**

Primrose's experts contend that 33% of the proposed development is impervious. 3/6/20 T. 76. Those in opposition presented expert testimony that the impervious area is 47.8-49% of the site, depending on whether the sidewalk in the area along Carnegie to be dedicated is included in the calculation. 3/10/21 T. 128. Mr. Intrigo, Primrose's civil engineer, testified that the impervious area of the conditional use would be 33% because a portion of the play area is pervious, even though it is artificial turf. 3/6/20 T. 76. Mr. Alt testified that there is drainage underneath the playground, even though State regulations require artificial turf to be treated as impermeable. In his opinion, 99% of the play area is permeable, even though the State of Maryland treats it as impermeable. 3/6/20 T. 257.

Mr. Wolford, Primrose's expert land planner, justified that Primrose's percentage for the same reason. He testified that his firm designed the first pervious pavement parking lot in Montgomery County at the Johns Hopkins National Cancer Institute. That science was used to

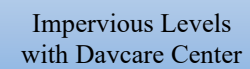
create the grass surface and rubber mat area of the playground, which passes water through into a groundwater recharge storage facility. 4/9/21 T. 147-149.

Primrose also argues that installation of the new storm drain system is a significant environmental benefit to the "entire watershed." 4/13/21 T. 10. Mr. Pease testified that there is erosion at the outfall that has caused a well-defined channel. They will have to design a ditch line through that. Based on the amount of storm drain flow and the slope of the outfall, they will improve the outfall by redressing the undercut, putting fabric and riprap down to take the energy out of the storm drain flow within the ditch to prevent further erosion there. The storm drain project will eliminate the existing erosion. 4/6/21 T. 204-205.

Mr. Russell Reese, an expert in land surveying and land development for those in opposition, opined that 47.8% of the proposed conditional use plan is impervious area. Even though the sidewalk is part of the area to be dedicated, Staff included that the dedication area when in their calculations. If the sidewalk is taken out of the equation, the impervious are will increase to 49%. 3/10/21 T. 126-129.

Mr. Reese also did not understand how staff could have come up with their calculation that 36-38% of the proposed development would be impervious. 3/10/20 T. 129. In his opinion, Staff did not include all the playground, even though the Montgomery County Department of Permitting Services (DPS) mandates that artificial turf must be counted as impervious area. To support this, one need only compare impervious area graphic in the Staff report with his own graphic (Exhibit 176(a).HH, on the next page). 3/10/20 T. 130.

Nor does Mr. Reese agree with Staff's calculation of the "typical" levels of imperviousness in the surrounding area. The Staff Report states that properties within the RE-1 zone with sewer have a "typical" impervious level of 23 percent. In the R-200 north of Needwood Road, Staff advised that typical impervious levels were 26 percent. Exhibit 106, p. 8.



The exhibit he prepared (Exhibit 176(a).HH, on preceding page) lists the actual existing and proposed impervious levels in the immediate vicinity of the subject property. Mr. Reese stated that was hard pressed to find anything close to those percentages estimated by Staff in the immediate neighborhood. In his opinion, all the properties within the neighborhood are under 20% impervious coverage, except for one approaching 23 percent. Only approximately 9.2% of the Mitchell property is impervious area. The only property with a much higher percentage is the church, which is up over 50 percent. 3/10/20 T. 134.

Mr. Joe Davis, the opposition's expert in land planning, opined that the proposed project represents a significant change in the level of imperviousness in the surrounding area. 4/2/21 T. 200-201. The Plan call for consistency with the existing character of the area. This impervious surface proposed here is much higher than the surrounding area. *Id.*, T. 202. In his opinion, the Master Plan intends that new development maintain a level of imperviousness comparable to the current levels, rather than increasing imperviousness and consequently increasing the amount of stormwater that drains to rivers and streams, in this case, to Crabbs Branch. 4/2/21 T. 203. When water drains from impervious surfaces, it is warmer than water from pervious surfaces and adversely affects the health of a stream.

One of the main goals of the Master Plan was to protect this drainage area. *Id.* Crabbs Branch is a Use IV stream. In his 40 years of experience with development in Montgomery County, there have been attempts to protect this class of stream because it does have good habitat. *Id.* The Plan recognizes the importance of Class IV streams (4/2/21 T. 203; *Master Plan*, p. 48, 49):

Protection of groundwater in Use III and Use IV stream systems is essential to the health of the cold water habitat. Groundwater is the source of the cold, clear water that feeds the stream between storms and moderates the warmer, often sediment-laden water delivered to the stream over the surface of the ground during storms.

* * *

Rock Creek and North Branch are Use III streams above Muncaster Mill Road, and below Muncaster Mill Road are Use IV streams. Use III streams, or "Natural Trout Waters" are waters that are capable of supporting natural trout populations, including propagation, and their associated food organisms. Streams of this quality are relatively rare in the County; the Use III area is one of six such areas. Use IV includes cold or warm waters that have the potential for, or are capable of, holding or supporting adult trout for "put and take" fishing. These streams are managed as special fisheries by periodic stocking and seasonal catching.

For this reason, he opined, the Master Plan's goals, recommendations, and objectives applies to the subject area because it recognizes that Use IV streams also need protection, although not at the same high level as the Use III streams north of Muncaster Mill Road. 3/5/20 T. 204.

Mr. Vincent Berg, an expert in stormwater management, opined that the storm drain project required by this development will hurt the water quality and temperature of Crabbs Branch, which is a Class IV trout stream. He built the large Crabbs Branch stormwater management facility upstream, which kept the stream in "pretty good" condition until recently. It used to be in very good condition going downstream toward the main stem of Rock Creek, but in recent years, the quality has gradually deteriorated to a "poor" condition, attributable to development in the area. This development will add to and exacerbate the deterioration of the water quality within Crabbs Branch stream system. 3/5/20 T. 187.

In Mr. Berg's opinion, the storm drain project will impact the outfall and cause more erosion and peaks in the stream even with the additional drainage. T. 193. This is because it increases the volume and rate at the outfall. 3/5/20 T. 193. While the proposed conditional use providing stormwater management on-site, it does not provide quantity controls for 2-, 5-, or 10-years storms. The storm drains are designed for the 10-year storms. All the high-flow intense storms now drain off the site and into the watershed through the existing system, which does not have adequate capacity because it was originally designed for the master planned zoning for the area. 3/5/20 T. 188-189.

ii. Residential Wedge

The parties also disagreed on whether the proposed use must comply with the Master Plan's recommendations for the "residential wedge". *Plan*, p. 7. Staff found that some of these applied to the subject property (Exhibit 106, p. 6, emphasis supplied):

On pages 12 and 13, the Master Plan makes overall recommendations for the Residential Wedge *including some applicable to the subject property...*

The Applicant agrees that some recommendations of the Plan may apply but believes that the subject property is an "outlier" because it's separated from the areas that were the focus of much of the Plan (north of Muncaster Mill Road). According to Primrose, the distinguishing factor is that the property is not in the special protection area north of Muncaster Mill Road but is in a regular watershed protection area. For this reason, the Plan language pushing for environmental sensitivity isn't binding because they don't really apply to the property. 4/13/21 T. 9-10. Primrose further argues that it's difficult to think of the property as being in the residential wedge when it's possible to walk to the Shady Grove metro. *Id.*

Mr. Wolford opined that the property isn't within the residential wedge because it is not "low-density, large lot" development, the characteristics describing the residential wedge in the 1993 General Plan refinement. Mr. Wolford supported this summarizing the lot sizes within the Applicant's "surrounding area." The neighborhood north of Needwood and east of Redland Road was subdivided in 1964-1965. There are 302 recorded lots in that neighborhood all zoned R-200. All the lots are below 20,000 square feet in size. The straight, square or rectangular lots on the roads, not at the ends of cul-de-sacs, were in the 11,000 to 12,000 square foot range. He does not believe that this constitutes a large lot, single-family neighborhood. 4/9/21 T. 137-138.

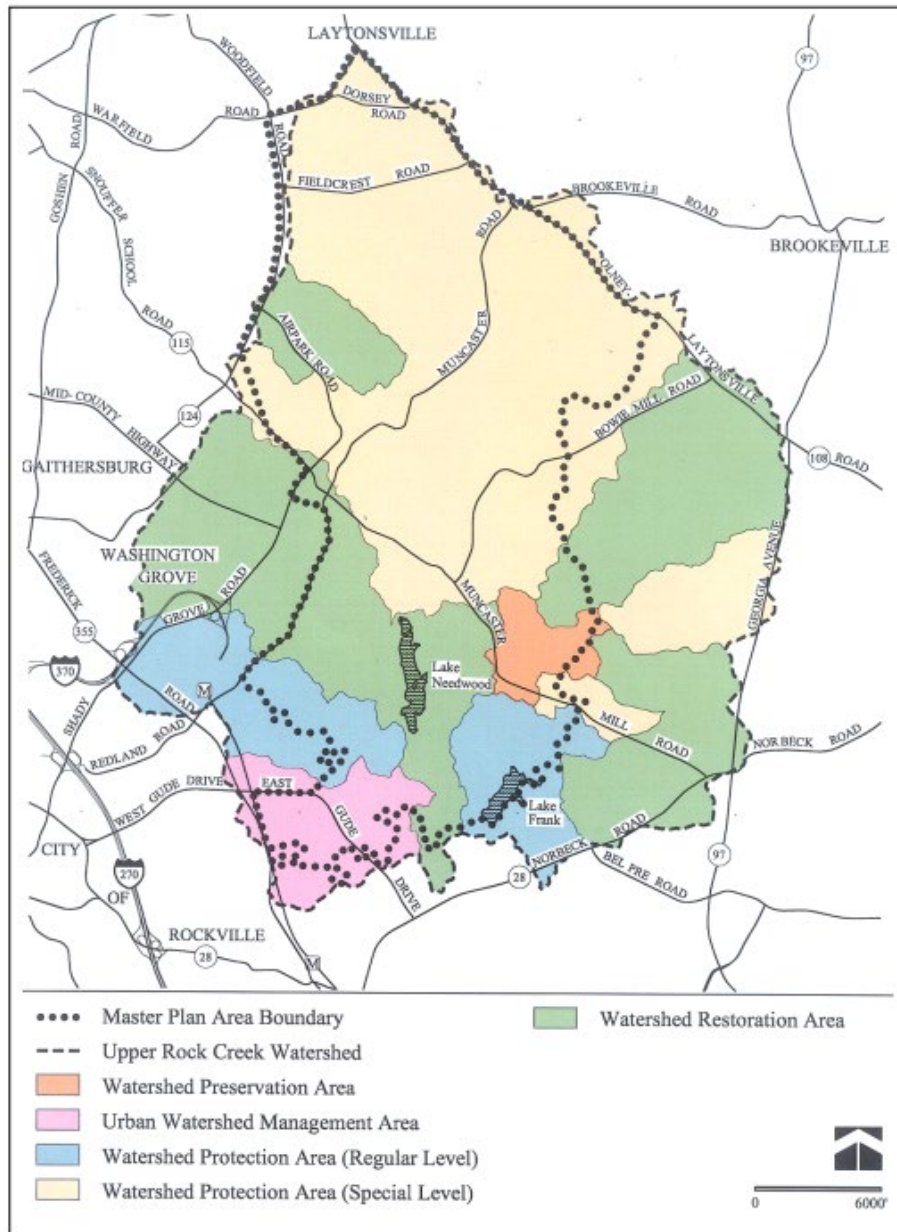
Mr. Wolford also looked at the lot sizes south of Needwood Road, which were subdivided and developed in 1983 and 1984. Those lots are mostly just above 20,000 square feet, which is not a low-density large lot subdivision. The development to the southeast of the subject property

is zoned RE-1. It was subdivided in 1983 and 1984 and even though they are zoned RE-1, the lots are in the 20-25,000 square foot range, which he does not consider low density, large lot. The subdivision immediately south of the property contains 28 lots, which were recorded in 1988. Most of these lots are 20,000 to 30,000, although some of the pie-shaped lots at the end of the cul-de-sac are around 40,000 square feet. He does not think of any of the R-200 existing development north of Needwood Road or any of the RE-1 south of Needwood Road as low-density, large lot development. 4/9/21 T. 138-141.

Mr. Wolford opined that the primary focus of the Master Plan was the area north of Muncaster Mill Road. It has completely different requirements for impervious area and recommendations for open space that the portion south of Muncaster Mill, which flows into Crabbs Branch and has a less stringent requirement for impervious area and potentially a much higher recommendation for density and development. 4/9/21 T. 143. In Mr. Wolford's opinion, the "Residential Wedge" is confined to the northern portion of the planning area that is subject to imperviousness caps.

In his opinion, the Master Plan recognized that Use III streams are located above Muncaster Mill Road and Use IV streams are located to the south. Because of this, he opined, map from the Master Plan (Exhibit 236, p. 50, on the following page) designates the subject property as being in "just" a water protection area, regular level, meaning that the area is substantially developed and water in the area should just be managed. *Id.*, T. 157. The rest of the area, to the east and north above Muncaster Mill, is in watershed restoration and other classes of protection. He believes that the Plan is "less stringent" in the area south of Needwood Road because of the distinction between the types of streams and their ability to support habitat. 4/9/21 T. 156-159.

Those in opposition believe that the subject property falls squarely within the "residential



**Master Plan Map of Water Shed
Protections Areas (Ex. 236, p. 50)**

wedge”. They point out that, if the Plan’s recommendations don’t apply to the subject property, the Master Plan contains nothing to guide development in the southern portion of the planning area, an anomalous result. Dr. Kosary testified that the 1993 General Plan refinement defined the “residential wedge” by property characteristics rather than a set boundary. She submitted an excerpt from the 1993 General Plan refinement that describes the “residential wedge” as “single-family, detached houses on lots of 1 and 2 acres.” 3/25/21 T. 15; Exhibit 227(a).EEE. The

opposition's expert land planner, Mr. Joe Davis, opined that the area is not precluded from being in the residential wedge because he views the planning area overall as a large lot area.

He acknowledged that the Plan recommends greater environmental protection for the northern part of the area but opined the Plan's remaining recommendations should not be ignored for the balance of the area. He testified that of equal importance to its environmental goals is the Plan's goal is the Plan's goal to preserve the residential character of the area, which would be applicable to this property. *Plan*, p. 7; 4/2/21 T. 192), In his opinion, the Plan's recommendations for the residential wedge are to extend open space heritage and preserve resources by directing development away from stream valleys, forests, other sensitive areas, and to establish low density zones for remaining large lot undeveloped properties in the planning area to ensure that open space can be preserved. These recommendations are just as applicable to the area south of Muncaster Mill Road because Crabbs Branch is classified as a Use IV stream and the Plan recognizes the importance of preserving these streams. 4/2/21 T. 194.

Dr. Kosary also believes that the subject property lies within the Residential Wedge. She submitted the Hearing Examiner's Report and Recommendation in BOA S-2668, Petition of the Taiwanese Cultural Center, which is located on the northeast corner of intersection of Redland Road and Needwood Road. Exhibit 176(a).OO. The Report concludes that the Cultural Center *is* in the residential wedge (*Id.*, p. 10):

The subject property is within the Upper Rock Creek Planning Area covered by the 2004 *Upper Rock Creek Area Master Plan*... Technical Staff reports that the Master Plan recommends that the site remain in an R-200 Zone, which permits the requested special exception. The Master Plan does not, however, make any specific recommendations for the subject property or the general neighborhood. Staff concludes that the "low intensity uses proposed for the Center...are in keeping with a primary objective of the Master Plan: maintaining the residential wedge character of this portion of Montgomery County." (Citations omitted). Staff notes that the use of an existing residential structure with limited external alteration also contributes to retaining the residential character of the area.

. Mr. Davis testified that the Plan states that, “Densities on properties in the main stem should be consistent with densities on similar properties.” That is a broad recommendation of the plan and has a direct application to the subject area and this property. 4/2/21 T. 206. Other language in the Plan calls for designing “new development and redevelopment to meet appropriate noise guidelines and ordinance to prevent conditions that may create local noise impacts.” *Plan*, p. 60; 4/2/21 T. 207. In his opinion, the Master Plan sought to retain the existing character of residential neighborhoods in the entire planning area to protect them noise impacts. *Id.*, T. 207.

Mr. Davis also opined that the proposed use is inconsistent with the Plan's recommendations for the intersection of Redland and Needwood Roads. The Master Plan classifies Redland as a primary residential street with the normal 70-foot row. The Plan recognizes, however, that Redland Road operates as a higher level road: “This two-mile section of Redland Road operates more as an arterial roadway than as a primary residential roadway due to several factors.” *Plan*, p. 69; 4/2/21 T. 208. Therefore, The Plan seeks to maintain the character of the area but notes that Redland Road has some stress associated with it. T. 208. Page 70 of the Plan notes that Redland will need improvements. Under “adjacent uses”, the Plan states, “adjacent land use on Redland Road is inconsistent with the residential road classification. It lists three houses of worship and commercial frontage between Muncaster Mill Road and Roslyn. *Plan*, p. 70; 4/2/21 T. 208. The Plan notes that there are 40 single-family detached residences along Redland Road, but see this as a transitional situation. The Plan calls for the improvements to Needwood and Redland Roads because it would exceed the Derwood policy area congestion standard. T. 208-209. These are the improvements that have been described in testimony in this case. The improvements sought to achieve the Master Plan goal to reduce the stress associated with Redland Road. T. 209.

From a planning perspective, he believes that redevelopment of properties or new development on properties that increase travel through the intersection will create additional problems with the functionality of that intersection in contravention of the Master Plan. 4/2/21 T. 209. There are some non-residential uses along Needwood Road that affect how the road is utilized. These are the Taiwanese Cultural Center, the Taiwanese Presbyterian Church, and a small group daycare for up to 12 children. The church use does not impact peak hour because traffic occurs on the weekend. It's his understanding that the Cultural Center does not have 9:00 a.m. to 5:00 p.m. all day operation. If uses with heavy traffic are instituted, Needwood Road potentially could become a larger scale connector road that also functions as an arterial. 4/2/21 T. 209-211.

Conclusion: After carefully reviewing the Master Plan, the evidence and expert testimony presented, the Hearing Examiner finds that the recommendations of the Master Plan to maintain the "Residential Wedge" include the subject property unless those recommendations (such as mandatory caps on imperviousness) specifically refer to the area north of Muncaster Mill Road.

The 2004 Upper Rock Creek Master Plan begins by describing the history of planning efforts in the area. This "Planning History" demonstrates that its recommendations were remedial and intended to prevent undesirable sprawl that had already invaded the area. *See, Plan*, p. 1. The Plan recognized that undesirably dense development had already occurred, degrading environmental resources in the area. In some cases, the development sprang up even despite the Plan's attempts restrict it. *See, Plan*, pp. 3-4. According to 2004 Plan, the 1961 Plan recommended three "low-density" residential zones. These were half-acre, one and two-acre zones. Under the current Zoning Ordinance, half-acre zoning is the R-200 Zone. *Zoning Ordinance*, §59.4.4.7.B.

The 1961 Plan recommended the two-acre Residential Estate Zone (RE-2) for the southern part of the planning area between the two proposed lakes (including Needwood Lake to the east of the subject property) because the County Council found that large-lot development, which had

already begun to occur, would better protect water quality in the lakes. *Plan*, p. 3. The 1964 *Montgomery County General Plan*, “*On Wedges and Corridors*”, reinforced that approach. According to the 2004 Upper Rock Creek Plan, “[t]he General Plan recommended a rural pattern—including the Upper Rock Creek watershed—that would act as a wedge, molding the urban corridors, providing open space for recreation, enabling the continuation of farming and natural resource activities and conserving natural resources.” *Plan*, p. 3. The 2004 Plan advises that the 1964 General Plan “placed lower densities in the Planning Area than had been recommended by the 1961 Plan.” *Plan*, p. 3.

The current Master Plan acknowledges that the R-200 zoned development above Needwood Road did not conform to the recommendations of the General Plan. It states that, in the 1960’s: “Land along Needwood and Redland Roads was reclassified to half-acre zones--in part because trunk sewer lines had already reached the area--and residential subdivisions were approved at this density.” *Plan*, p. 3. In 1964, according to the 2004 Master Plan, the Planning Commission warned against extending sewer further north because to do so “threatened the foundation of the General Plan”. *Id.*

Subsequent master plans for the area made several attempts to protect stream valleys and water resources with mixed success. *Plan*, pp. 3-5. The 1985 area master plan called for rezoning the entire undeveloped area in the R-200 Zone to RE-1 to alleviate continuing concerns with stormwater management. *Plan*, p. 3. Despite these recommendations, the 2004 Plan acknowledged that denser development continued to occur (*Id.*, p. 4):

Considerable residential development occurred following the approval of the 1985 Plan and the implementation of the Sectional Map Amendment of its zoning recommendations. Much of it took place on land that had formerly been farmed. Nearly 900 units were approved on almost 1,900 acres in the Master Plan area between September 1, 1985 and November 30, 1999. In addition, two substantially sized projects using transferable development rights were approved on land adjacent to the Upper Rock Creek Master Plan area in Olney. These projects totaled more than 800 units on more than 350 acres of former farmland. The majority of

the development was wholly located in the Master Plan Area—about 575 units on almost 1,550 acres—was approved for use of septic fields for wastewater disposal.

As a result, one primary goal of the 2004 Plan is to “protect environmental resources and maintain stream quality by keeping streams, forests and wetlands in a natural state.” *Id.*, p. 7. The Plan’s other primary goal is to preserve the residential character of the planning area (*Id.*):

Of equal importance is preserving the residential character. The generally low-density nature of the Upper Rock Creek watershed is in keeping with the wedges and corridors concept outlined in the General Plan. Much of the watershed is in the Residential Wedge, an area envisioned by the General Plan Refinement to maintain low densities and relatively large lots. Maintaining low densities also contributes to stream quality by limiting imperviousness, which in turn reduces the amount of warm water that flows into the streams and contributes to stream quality. *Keeping the existing residential densities is a second basic concept of the Plan.* (Emphasis supplied).

Given that the 2004 Plan recognizes that undesirable development occurred, and mentions as an example the area north of Needwood Road from the subject property, the Hearing Examiner disagrees with the Applicant that the “residential wedge” should be determined simply by looking at lot sizes within the surrounding area of a conditional use, which will change with each application. It recognized that the R-200 zoning north of Needwood Road did not further the Plan’s goals and took remedial action to downzone the remainder of the undeveloped R-200 land. Given the patchwork of inappropriate development cited in the Plan History and the repeated attempts to control it, she agrees with Mr. Davis’ expert testimony that one should look at the “area as a whole,” which consists of low-density, large lot zoning, including the subject property.

This interpretation is consistent with the definition of the “Residential Wedge” in the 1969 General Plan Refinement. Exhibit 227(a).EEE. The Hearing Examiner searched the Refinement in vain for the physical boundaries of the “wedge” area and could not find one. As Dr. Kosary pointed out, the Refinement defines the wedge by property characteristics rather than delineated boundaries: “All master plans since 1969 have considered areas zoned for lots of one and two acres as the residential wedge...” and again describes the wedge as consisting of “single-family,

detached houses on lots of one and two acres.” Exhibit 227(a) EEE. Given the planning area’s history of piecemeal, undesirable development, the large-lot zoning does not need to be contiguous because the Refinement and subsequent plans sought to stop the patch work of more dense developments that had occurred.

Nor is the Hearing Examiner persuaded by the size of the lots in the RE-1 subdivision southeast of the property. Mr. Davis testified that the area was developed as a cluster subdivision, which are purposefully designed to have smaller lots to provide more open space and protect environmental resources. 4/6/21 T. 94. Cluster subdivisions have been and still are in some cases *recommended* in the planning area for this reason. *Plan*, pp. 3-4, 12-13.

More persuasive to the Hearing Examiner than lot sizes of past development is the Plan’s current recommendation to retain the property’s RE-1 Zoning. Were this property an “outlier” to which the Plan’s recommendations didn’t apply, the Council could easily have extended the R-200 zoning south of Needwood Road in 2004. Or, it could have excluded the property from planning area entirely. The Hearing Examiner agrees with those in opposition that depicting the property as an “outlier” creates an absurd result that the property lies within a Master Plan area that contains few or no recommendations for its development. The Applicant takes the position that the recommendations apply, but not as but perhaps not as strictly. This leaves broad power to hunt and pick those recommendations that apply and undermines the very goals of the Plan—to protect environmental resources and maintain the existing character of the area.

While the subject property may be near the Shady Grove metro, the planning principles contained in the 2004 Plan are still evident in the vicinity of the subject property. Aside from confirmation of the RE-1 Zoning, the subject property is surrounded to the east by recreational space and Lake Needwood, a public park, and to the south is the Crabbs Branch Stream Valley

Park. Parkland and recreation areas were called for by the Plan to reduce intensive development that harmed water quality.

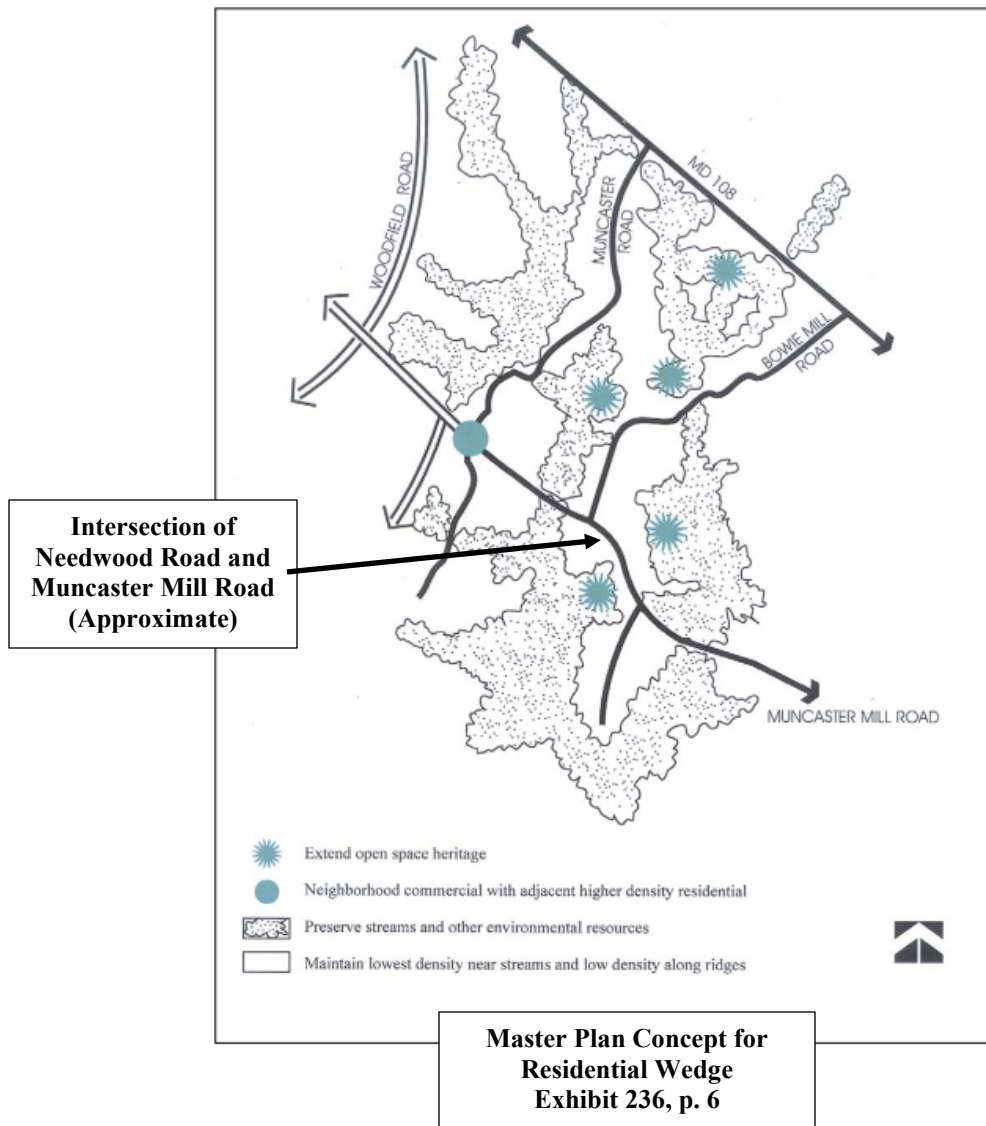
This conclusion is supported graphically in the Plan itself. Entitled, "Concept: A Residential Wedge Community", a graphic on page 6 of the Plan (on the next page) clearly includes land south of Muncaster Mill Road in the vicinity of the subject property as part of the residential wedge. A map in the Applicant's Traffic Study (Exhibit 63, p. 16) reveals that Needwood Road intersects with Muncaster Mill Road just south of the intersection of Muncaster Mill and Bowie Mill Road, and then proceeds west.

This interpretation is also consistent with interpretations of the Plan by County agencies. The Staff Report recognizes that the Plan's recommendations for the residential wedge apply to the subject property, just as the Hearing Examiner did in Board of Appeals Case No. S-2668 for the Taiwanese Cultural Center. In that case, Planning Staff found that the low-density proposed conformed to the Plan's goals for the residential wedge to maintain low density.

Having decided that the Plan's goals and recommendations are applicable to the subject property, the next step is to determine whether the conditional use proposed meets those goals. The Plan sought to limit impervious area in the watershed to protect water quality. While the cap on impervious surface does not apply to the subject property, the following does apply (*Plan*, p. 48):

Minimizing imperviousness is one of the best methods for assuring protection of water resources especially in headwaters areas. Evidence clearly indicates a causal relationship between the overall level of watershed imperviousness, water quality and the health of the aquatic community within receiving streams...*In the residential zones, all types of development—residential, institutional or special exception—should be regulated to achieve the same relatively low levels of imperviousness.* (Emphasis supplied).

CONCEPT: A COMMUNITY FOR THE RESIDENTIAL WEDGE



The record here contains two starkly different expert opinions, and yet a third opinion from Staff on the level of impervious area proposed for the conditional use. These range between 33% (the Applicant's), 36-38% (Planning Staff's), and 47-49% (the oppositions).

Mr. Reese, the opposition's expert witness, estimated a higher amount because he included the play area in his calculations. Both he and Primrose's expert architect, Mr. Alt, acknowledged that the State of Maryland treats artificial turf playgrounds as impervious. Unfortunately, Primrose's other expert witness, Mr. Wolford, was not present for Mr. Reese's testimony and did

not review the transcript, so he was unable to contradict it. 4/9/21 T. T. 155. Staff does not explain how it arrived at 36-38%. Exhibit 106, p. 8. Mr. Wolford described the materials that made up the playground, and stated that they percolate through a groundwater recharge area consisting of clean gravel. 4/9/21 T. 155.

The Hearing Examiner does not need to decide the exact percentage of impervious surface on the conditional use plan because she finds persuasive Mr. Reese's testimony that the percentage of impervious area on properties in the vicinity is much lower than reported by Staff. The 2004 Master Plan sought to maintain the "same relatively low levels of imperviousness in the area." It is clear from just a review of Mr. Reese's graphic that this conditional use and the Taiwanese Presbyterian Church stand out like goliaths against the single-family detached dwellings in the vicinity. For this reason, she agrees with Mr. Reese's testimony that the Staff's average percentages must have been calculated over a "huge area" because Staff's average clearly has no relationship to the vicinity. Mr. Davis testified that Staff used a "County-wide average". To properly evaluate the average given by Staff, one would have to know the area considered, not included in this record. In contrast, Mr. Reese provided the exact impervious percentage developed lots, which are much lower even in the R-200 north of Needwood Road. The impervious area of the most recent construction, the Mitchell house, is only 9.2%.

Without more information on how Staff calculated the average percentage of imperviousness in the area, the Hearing Examiner declines to adopt them. Use of a County-wide average, as posited by Mr. Davis, would mitigate against the goals of the Master Plan by allowing denser development than what exists in the planning area today. The Hearing Examiner notes that the Staff Report characterizes the single-story configuration of the proposed facility as "larger than almost anything else in the vicinity of the site." *Id.*, T. 31. The major outlier is the Taiwanese Presbyterian Church, which no party (or Staff) characterizes as typical for the area. This

conditional use would sandwich the Kosary/Posey property between the two properties with extremely high imperviousness levels. The Hearing Examiner finds that the impervious surface of the facility proposed here does not substantially conform to the Master Plan recommendations.

The next question is whether the proposed conditional use conforms to other guidelines contained in the Plan for the residential wedge. Staff advised that four of the goals were applicable to the subject property (Exhibit 106): (1) encouraging new development that preserves natural resources, (2) encouraging community design that is compatible with adjacent development, protects views from local roads, offers harmonious road design and maintains open space, (3) enhancing the character of new communities by increasing natural open space where appropriate, and (4) preserving additional open space and maintaining views along local roads by locating large or conservation lots along them and by protecting views of meadows of woodlands.

Because the Applicant focused its testimony on why the Master Plan's recommendations didn't apply to the subject property, there is little in the record to support how the conditional use plan satisfies the four Master Plan recommendations applicable to the residential wedge, except for testimony and evidence about the compatibility of the project and the impervious area. The compatibility of the proposed use is discussed in the next section.

Primrose does argue that the storm drain project furthers the environmental goals of the Plan by eliminating erosion at the Crabbs Branch outfall. For this reason, they argue that it (the project) will be a "major benefit" to the watershed as a whole. 4/13/21 T. 10. This ignores the testimony Mr. Vincent Berg, an expert in stormwater management presented by the opposition. Mr. Berg testified that storm drain systems generally make conditions worse when it collects sheet flow because it generates bigger and faster volumes at the outfall. Mr. Pease testified that the outfall would be constructed to slow the flow of the water into Crabbs Branch but did not address whether the outfall would add additional spikes in temperature, potentially harming the stream's

water quality. The Hearing Examiner finds that the Applicant has failed to meet its burden of proof of the “benefit” that the project will provide. Even if, however, the improvement did benefit the entire watershed, an improvement project that benefits the public at large may not be undertaken at the expense of individual property owners.¹⁶ This is discussed below.

4. Compatibility of the Proposed Use (Section 7.3.1.E.1.d)

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;

Due to the numerous issues related to compatibility, the Hearing Examiner separates the testimony and evidence by topic.

i. Size, Scale and Intensity of the Proposed Use

Staff apparently found that the use was compatible with the surrounding area because the Applicant had made a “notable effort” to fit the 13,000 square foot building within the property using screening, architecture, and other features to mitigate its impact. Exhibit 106, p. 31. Staff determined that it would not alter the character of the neighborhood for the following reasons (*Id.*, pp. 31-32):

The building’s physical presence will be offset by a combination of setbacks, a residential building façade, extensive landscaping, and forest retention. Adequate off-street parking spaces are provided to satisfy the needs of the proposed daycare center.

Apparently due to the 22-foot waiver of the parking setback, Staff analyzed the “pros and cons” of a one-story and two-story structure but didn’t come to a decision that one was better than the other. Noting that both Primrose rejected the two-story option for operational reasons, Staff described the single-story proposal as (*Id.*):

¹⁶ *Cf., Montgomery Cty. v. Schultze*, 57 Md. App. 781, 787 (1984) (If the presence of a purpose to benefit the public in general is manifest in an ordinance imposing a special benefit tax...a special assessment on particular properties would be invalid.)

The proposed massing and architecture are most compatible with the neighborhood; however, the building footprint, even as a single-story option, is larger than almost everything else in the vicinity of the site. The massing of the single-story option would have less impact on the neighbors, in terms of height, but the larger footprint pushes the driveway closer to the edge of the property line and in turn could potentially impact the adjacent neighbors. The architecture of the single-story and two-story options should be similar to fit within the context of the surrounding neighborhood. Both options are positive in placing the parking behind the building, while providing screening along the edges of the site—between the neighbors and along Carnegie Avenue.

Mr. Wolford testified that both he and Staff were aware of the residential character of the area. 11/22/19 T. 110. For that reason, as already described, they sited the shortest frontage of the building along Needwood Road and aligned the front yard setbacks there with adjacent single-family detached dwellings. Mr. Wolford opined that the proposed facility would not alter the primarily residential character of the area because of the building's orientation (*i.e.*, narrow side facing Needwood Road), the fact that there is no weekend use and very limited evening use during the year. He believes it's a very quiet use, children will be outside during the day, and it doesn't create anything obnoxious that would detract from the neighborhood around it. Nor did he believe that the use will cause any undue harm to the surrounding area. 11/22/19 T. 143-144. Mr. Alt suggested that the building was compatible because the height is 12 feet below Mrs. Mitchell's house. 3/6/20 T. 284.

Primrose's expert testimony did not explicitly address the size and scale of the building in relation to the surrounding area. It's Amended Statement of Justification (Exhibit 62, p. 8), adds the following to the expert testimony:

The use proposed will not be the only civic and institutional use in the neighborhood. Two lots to the east along Needwood Road is the Taiwanese Presbyterian Church of Washington; and less than a tenth of a mile to the west along Needwood Road is the Taiwan Cultural Center. Two-tenths of a mile east on Needwood is another day care center, Little Hands Day Care, but that is a smaller in-house center.

Mr. Posey believes that Primrose's facility will alter the residential character of the area because it will be the defining neighborhood feature. The ridge that impacts sight distance on Needwood Road runs north/south through the length of the property. The highest elevation at the northeast corner is at an elevation of about 475 feet, the highest elevation within about a third of a mile. Added to the higher elevation is the 21.5-foot tall roof. The combination of elevation and height of the building will make it a prominent landmark. While Mr. Alt testified that the Mitchell's house may be 12-feet taller than Primrose's building, the day care center will be about three times as long and is higher in elevation. The Carnegie Avenue landscaping will not mature for 20 years. Until then, the entire length of Primrose's west side will be visible to those driving eastbound on Needwood. 3/19/21 T. 149-151. .

Mr. Davis, the opposition's expert land planner, opined that the size and scale of the use is out of character with the surrounding area. 4/6/21 T. 48. Mr. Davis agrees with Planning Staff's comments reflected in the Development Review Committee (DRC) notes.¹⁷ One of the reviewing planners commented that the "use proposed appears to be too intense for the property and in the subject area, not harmonious with the character of the surrounding area, does not appear to be compatible with the character of the residential neighborhood, compatibility with surrounding area must be demonstrated in terms of design and layout, architectural features." Exhibit 115.Y; 4/6/21 T. 11. The DRC comments further state, "[t]he design of the parking area along the western property line overstates the non-residential influence of the proposed development. Alternative design options should be entertained to lessen the impact of the non-residential use on the neighborhood."¹⁸ *Id.* Mr. Davis believes that those are two very important comments that were

¹⁷ The Development Review Committee consists of local, county and State agencies who have jurisdiction over aspects of an application, such as the Planning Department, Montgomery County Department of Transportation, and the Washington Suburban Sanitary Commission. The Committee's purpose is to "facilitate agency review" of applications. *Montgomery County Code*, §50.10.4.

¹⁸ The DRC reviewed a prior version of the plan before Primrose knew of the sight distance issue at Carnegie Avenue. Parking was located along Carnegie Avenue rather than the eastern side of the site.

made from a planning perspective concerning the size of the use and the effects that this use could have on the surrounding area. T. 11. While parking is now located on the east side, in his opinion these comments demonstrate that staff at the Planning Department had concerns about the program size of this project. Even with all amendments to the conditional use plan since then, the “program size” (*i.e.*, size of building/play area and number of students) has remained the same: It’s the same building, same playground area, the same parking area. All that has really changed in terms of the conditional use application has been the location of the driveway. 4/6/21 T. 12.

Mr. Davis opined that the application would alter the character of the neighborhood, not only on the east side due to the noninherent adverse effects associated with the setback waiver, but also on the west side of the property. Mrs. Mitchell, who owns 7500 Needwood, complained of the view from her home. Because this property is on a ridge, it will be very “obvious” both to Mrs. Mitchell and to the surrounding community. 4/6/21 T. 61. In his opinion, because of its size, scale and prominence, the residential articulation cannot conceal the commercial characteristics of the building--it is large and will be a dominant feature in the community. *Id.*, T. 61-62.

Dr. Kosary believes that the waiver for the driveway demonstrates that the scale of the development and its incompatibility with the surrounding neighborhood. 3/19/21 T. 217. The narrative about limited sight access on an impossibly narrow lot is false. Staff accepted this justification without any sight distance studies and without evidence that MCDOT had confirmed the Applicant’s assertions that the driveway is the only viable location for an access point along the frontage of the subject property.¹⁹ *Id.*

ii. Noise

The Staff Report contains little support for conclusion that there will be no “unacceptable”

¹⁹ The parties differences about the need for the waiver is discussed in Part III.D or this Report.

noise from the proposed daycare center. The only substantive discussion concerns the parking waiver and does not address noise from the play area (Exhibit 106, p. 16):

Staff supports this waiver because the proposed driveway access point provides the safest and most efficient length of distance of sight along a ridge on the adjoining road where sight distance is not constrained. To minimize and mitigate potential impacts, on adjoining properties, of glare and noise from vehicles entering and exiting the site, the Applicant will provide a combination of landscape buffer and screening.

The Applicant's Statement of Operations (Exhibit 10, p. 11) states that noise will be minimal due to the "substantial" distance of the play area from homes to the east and north. Mr. Mandava, who is not an expert on noise, testified that noise in the play area will be acceptable because teachers will work with the children to keep their noise levels down. 4/6/21 T. 144. The oldest child playing outside would be 5 years old. *Id.*, T. 146-151. Primrose will install an opaque fence around the play area, and those factors will help reduce the noise. Mr. Mandava also testified that landscaping and "all that stuff" will also reduce noise. 4/2/21 T. 152. He is not aware of any regulations or procedures in place by Primrose for regulating the noise generated by children when they are outside and has no specific noise data. *Id.*, T. 153.

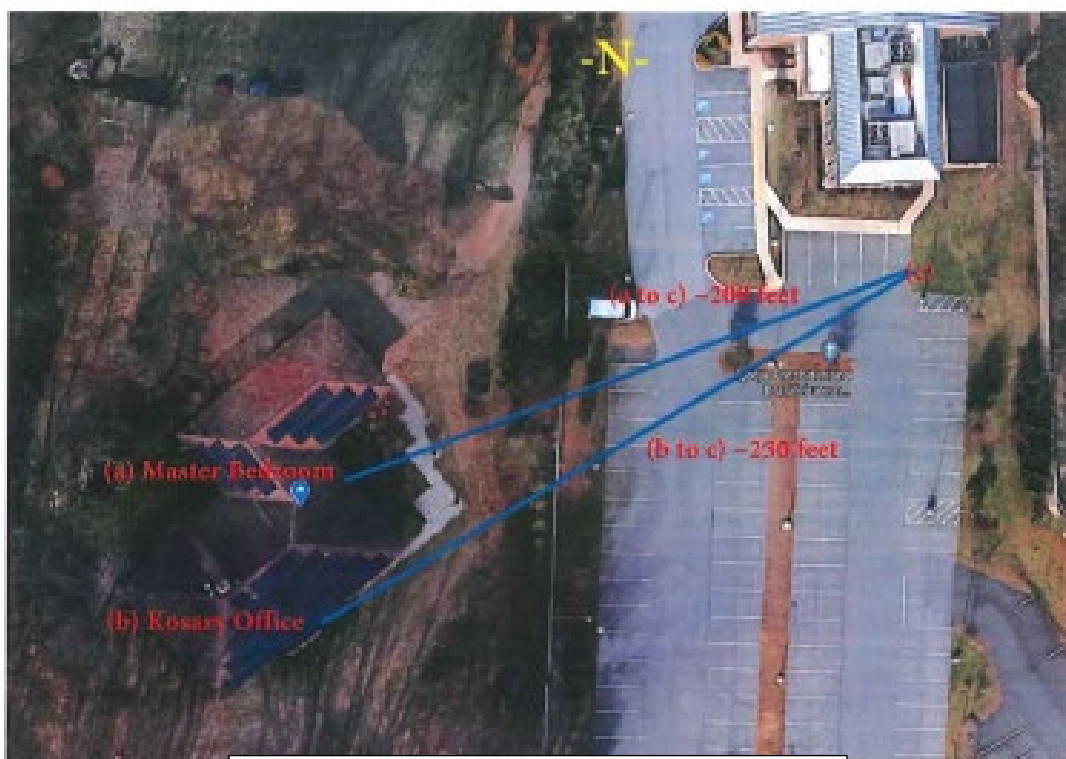
In response to concerns expressed by Mrs. Mitchell, Mr. Alt testified that the condensers are outside, but in an indentation on the western side of the building. The condensers are almost silent and emit a very low hum. There will be approximately 8 – 10 of them. The furnaces are horizontal units and are in the attic. The only part of the mechanical and heating and air conditioning systems that are on the exterior are the condensers, which are surrounded by a solid fence. Exhibit 193. The condenser furnace is tucked in between the two west-facing wings of the building and enclosed in a privacy fence. The condensers are about 30-42 inches high and will be enclosed by a 4-foot high fence. They typically color the privacy fences in a white, beige or clay to screen the condensers. The fence is a heavy-duty commercial grade extruded vinyl, solid fence system. 4/6/21 T. 274-278.

Dr. Kosary testified that she can hear noise from the church's parking lot inside her home. She hears children from her office on the southeast side of her home facing the church parking lot and from her master bedroom on the northeast side of her house with the windows closed, a solid fence and some landscaping. She thought the church was opening a daycare, but after checking, it was parents coming for yoga or choir practice and leaving their children in the grassy area on the south side of the church to play. 3/19/21 T. 198. Dr. Kosary submitted a graphics of the distance between area where children were playing at the church and where she could hear them from her property and the distance from Mrs. Mitchell's house to the play area proposed on the subject property (Exhibits 227(a).YY and XX, on the next page).²⁰

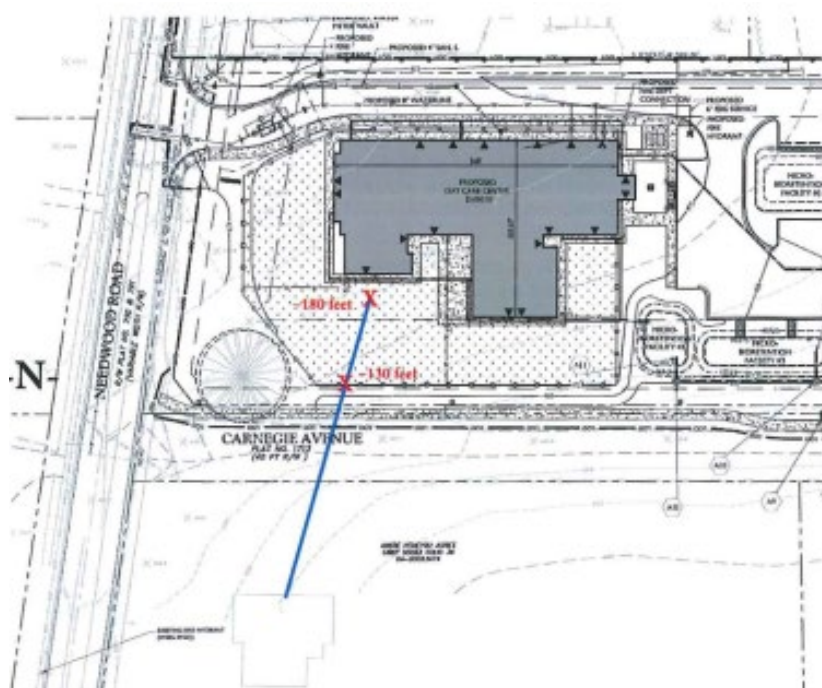
The distance from where Dr. Kosary heard the children playing at the church from inside her house is further than the distance between Mrs. Mitchell's house and the playground. The area where children were playing at the church was about 200 feet from her master bedroom and 230 feet from her office. Mrs. Mitchell's home is about 130 feet from the edge of the playground and about 180 feet to the point closest to the building. *Id.*, T. 199-200.

According to Dr. Kosary, there is a "line of sight" rule applicable to noise—if you can see the location of the noise, you'll be able to hear it. A 6-foot high fence may block the noise from ground level with your ear up against the fence standing next to it. However, sound waves will flow over the top. That is why sound walls along highways must be far taller than 6 feet to mitigate the sound. *Id.*, T. 201. She believes that having 60 children outside at one time will have much more impact and the non-solid fence (proposed at the time is not going to attenuate any noise. She

²⁰ Dr. Kosary testified that the Google Maps measurement tool is highly accurate. Google Maps works with global positioning system satellites to identify the latitude and longitude of each point identified. If you know the latitude and longitude of two points, you can calculate the distance between the points using some variation on what is referred to as the haversine. According to her, these calculations are highly accurate. For measurements under 100 miles, they are off by about only a half of a percent. 3/19/21 T. 199.



Distance from Kosary/Posey property to area
where children play at church (Ex. 227(a).YY)



Distance of Mitchell Residence to Play
Area (Ex. 227(a).XX)

believes that Ms. Tapscott will hear the noise from their house as Dr. Kosary will from hers. *Id.*, T. 200.

Mr. Posey described the noise they already experience on the eastern side of the property from the church parking lot. They can hear car doors slam, and beeps and toots when people lock their cars. Conversations in the parking lot seem to drift in the wind. He can hear conversations from the parking lot when he is in the yard, even when not wearing his hearing aids. 3/19/21 T. 118. Dr. Kosary seconded this. Presently, she can't work in her yard even with a fence and landscaping without the noise of cars entering and exiting, doors slamming, people talking, and the beep, beep or honk, honk as people lock and unlock their doors. She cannot keep the windows open on Sundays because of the noise. Now she will have noise seven days a week. 3/25/21 T. 189-190.

She does not feel it reasonable to say that children won't make noise on the playground, particularly when they've been cooped up indoors for hours. Dr. Kosary testified that the Applicant has no room left for additional screening, such as thick evergreens on the Carnegie Avenue side, to try to further buffer the playgrounds. The play area is crammed right up to the utility easement, and you can't place landscaping in the easement. *Id.*, T. 201.

iii. Screening/Lighting

On rebuttal, Mr. Jolley described the screening from the Kosary property at planting. In addition to the 6-foot fence, the trees they are planting will be a minimum of 14 feet tall. Trees along the entire property line are spaced at 30 feet on center. In his opinion, Dr. Kosary and Mr. Posey would have a view of approximately 7-8 feet of tree. The understory trees are going to be 15, perhaps 18 feet in height at maturity and will be between 6 and 8 feet at the time of planting. T. 79. At maturity, you will see understory and upper story trees above the fence. There will be a visual impact at the time of planting, but over time, the fence and landscaping will obscure the

view from either side of the property through a multilayered system. After approximately 20 years, the landscaping chosen is intended to block all views of the activity on the subject property. 4/9/21 T. 78-82. Mr. Jolley acknowledged that there will be no understory planting on the Kosary's side of the property—they will simply see a fence at the property line and whatever is above the fence on the subject property. T. 80. Mr. Jolley did not know who would maintain the fence on the Kosary side. T. 81.

Mr. Jolley testified that they could improve the level of screening earlier by planting larger caliper trees. Nurseries generally stock native trees that are 3 – 4" in caliper. Depending on the species, these larger caliper trees would be somewhere between 15-17 feet high at planting, depending on the species. They could also increase the density of the trees along the property line by using a 25-foot on center spacing to add an additional three shade trees. T. 82. If the Applicant did this, they would be required to install additional understory trees. Instead of the 30 provided, they would be required to install 36. Therefore, the initial planting could have a greater impact vertically with a slightly wider canopy of additional trees. 4/9/21 T. 82-83.

Mr. Jolley could not say for certain whether the landscaping and fencing proposed would obscure the view of the buildings and parking lot. The intent of the vertical screen is to block a direct line of sight from an equal grade as you walk along the eastern property line. 4/9/21 T. 125. He has never conducted tests of the extent fence and landscaping will obscure the view from the Kosary/Posey property. 3/5/20 T. 145. The building is a larger element which can't be completely screened with a fence. 3/5/20 T. 125.

Dr. Kosary testified that removal of mature trees along the eastern property line of the subject property will remove much of the existing screening of the subject property. The conditional use plan calls for removal of specimen tree SP-9, just north of the boundary between her property and 7420 Needwood Road. In the fall and winter, she can see SP-9 from several of

her kitchen and all her dining room windows on the west side of her house. If she can see SP-9, she will also be able to see the Primrose parking lot and the drive aisle. She believes that any tree at her property boundary which would have screened her view is either being removed by the Applicant or killed due to construction disturbance. 3/25/21 T. 190.

Mr. Vincent Berg, the opposition's expert in forestry and stormwater management opined that removal of a specimen tree right (SP-9) located right on the Kosary/Posey property line would significantly impact the visual screen provided to the Kosary/Posey property and will change the character of the neighboring property. He testified that Environmental Staff of the Planning Department did not recommend approval of SP9 because of its size and significance but was overruled by the Planning Board. 3/5/20 T. 179-182.

He also testified that Mr. Jolley's description of the landscape plan is not consistent with what will occur on the property. Primrose will remove most of the forest that currently existing along the eastern property line of the subject property. Based on his experience, the trees placed on the eastern side of the subject property will be 3 inches in diameter at breast height, but some of the plans show them as 1.5 to 3 inches. In his opinion, they should be a minimum of 3 inches. Growth will be slow for the first 2-3 years and it will probably be a full 20 years to reach full canopy. 3/5/20 T. 183-184. According to Mr. Berg, the site could have been designed differently to locate the access drive at the safest point on Needwood Road away from the eastern property line. The orientation and size of the building and possibly the play area would have to change, however. 3/5/20 T. 195. Dr. Kosary submitted a graphic she prepared showing the landscaping at installation (Exhibit 227(d).SSSS, shown below). She testified that she is 67 and may never live to see the landscaping at maturity.



**Graphic of Landscaping at
Planting (Ex. 227(d)).SSSS**

The above exhibit is based on information in a table from a website “Tree Canopy Spread & Coverage in Urban Landscapes” from Virginia Tech’s Urban Forestry Division (Virginia Tech Website). The table represents data collected by Virginia Tech on trees observed in the Mid-Atlantic urban environments. The website is part of the Urban Forest 2020 effort, a joint effort of Virginia Tech, the University of Maryland, Virginia State University, and the University of West Virginia. 3/25/21 T. 182.

The silver maples, red maples, and willow oaks shown on the landscape plan were all spread approximately 7 feet apart. The Virginia Tech Website projects a 20-year spread of only 15 to 18 feet, half of what is depicted on the Applicant’s landscaping plan. The canopy for the red buds was set at approximately 3 feet. There are also newly planted shrubs depicted, however, they are proportionally very small compared to the amount of area. These shrubs more than likely will probably just end up as deer food. They have a large deer presence because they are so close

to Crabbs Branch Stream Valley Park. She can attest that they love yews, rhododendrons, and inkberry holly shown on the landscape plan because she's had them devoured when she tried planting them. 3/25/21 T. 183.

The Virginia Tech report demonstrates that the trees proposed along the driveway and the parking lot are basically street trees typically found in urban settings planted along streets and parking lots. Street trees have a high mortality rates because they are often underwatered due to their proximity to asphalt. Because of this, many of them die and are replanted, therefore, never reach full maturity because their root system is constrained. In her opinion, the landscape plan shown is but "colorful fiction". 3/25/21 T. 184.

Dr. Kosary believes that the proposed trees will be dependent on her property for unconstrained land to extend their root system. The trees will probably be planted midpoint in the 12-foot wide planting strip, 6 feet from the curb and 6-feet from the Kosary's property line. The rule of thumb on calculating the critical root zone for a tree is that for every inch of tree diameter, the CRZ increases by 1.5 feet.²¹ The trees proposed in the landscape plan will be 2.5 inches in diameter at planting, resulting in a critical root zone radius of 3.75 feet. A 4-inch caliper tree would have a CRZ of 6 feet, up against the asphalt limits of the drive aisle. At that point, the only place the roots can spread is onto the Kosary property. This creates problems with anything she tries to plant to screen the new use because the roots, particular from the silver maples, are very shallow. You cannot plant anything around a silver maple, including red buds and shrubs that are shown on the plan, and expect it to live long. Silver maples are brittle and weak-wooded, constantly drop limbs, and are highly susceptible to storm damage. Some jurisdictions prohibit planting silver maples as street trees. Montgomery County does not include silver maples on their list of approved street trees. T. 188.

²¹ This calculation is consistent with Primrose's expert in landscape architecture's testimony.

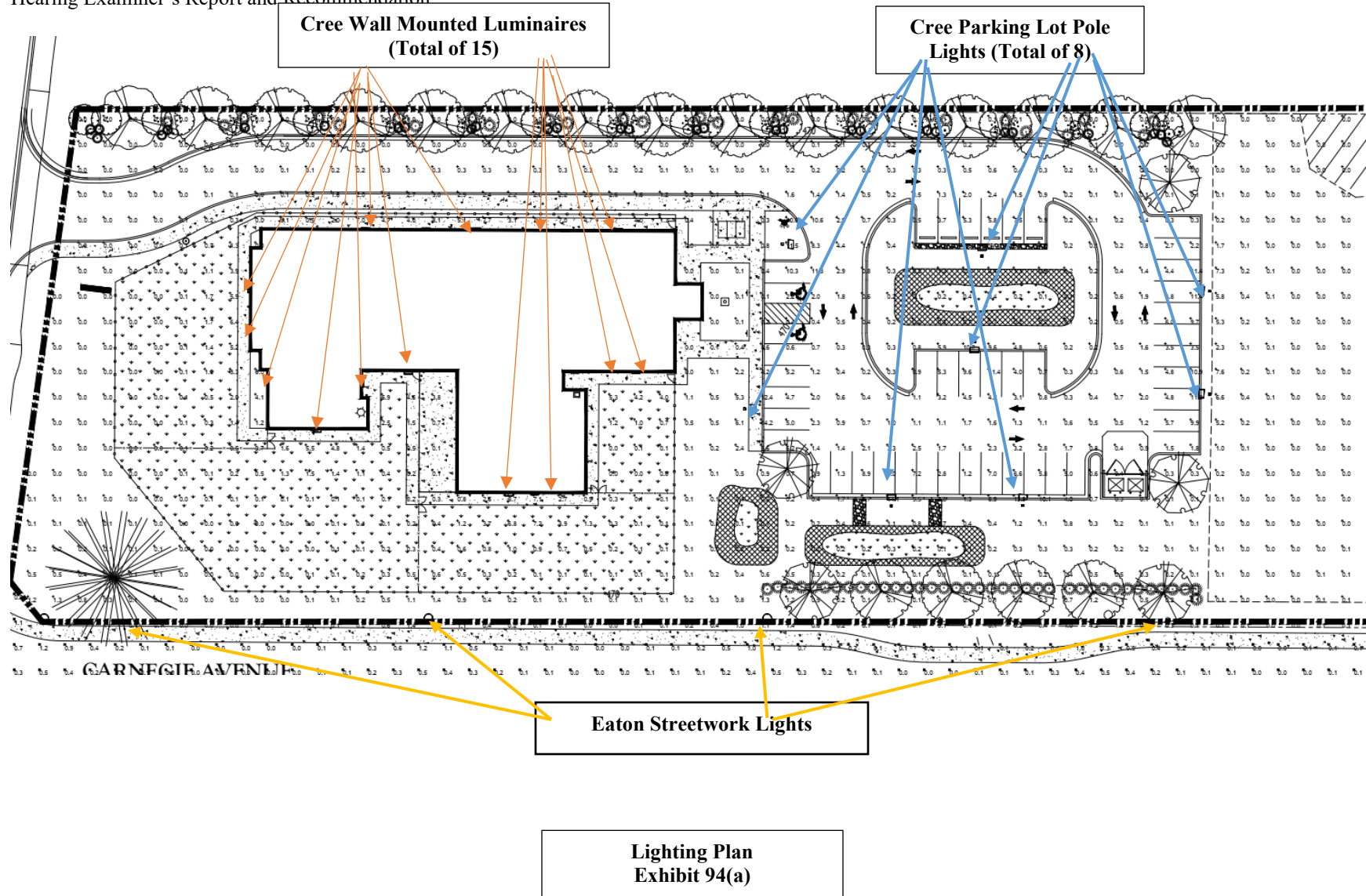
Dr. Kosary is already aware of the efficacy of a 12-foot landscape strip to screen the property. Her eastern boundary has a setback of 17 feet with much more extensive vegetation than will be provided on the Primrose side. A 12-foot setback is less than what would be required for a permitted use in the RE-1 Zone, which is 17 feet. She will also be able to see the cars. She can currently see cars traveling up and down Carnegie Avenue. Even with a 6-foot fence at their property line, the view from the first floor of her home will be above the top of the fence. 3/25/21 T. 189-190.




Mr. Davis opined that the proposed screening doesn't comply with the intent of the screening requirements. Section 6.5.3.2.B states that any conditional use abutting a residential detached zone must provide screening under Section 6.5.3. All conditional uses must have screening compatible with the adjacent properties. 4/6/21 T. 35-37. In his opinion, the 22-foot waiver requested is insufficient to ensure compatibility. The minimum of setback of 34 feet, is a minimum to create a buffer for adjacent uses. Rather than creating a buffer, it inserts a major activity (*i.e.*, vehicle traffic) that is incompatible with the adjacent uses. T. 38.

iv. Lighting

To aid in understanding this discussion, the Hearing Examiner reproduces the Lighting Plan, with the various fixtures marked, on the following page.²² Mr. Jolley testified that he'd designed the landscaping and fence on their common property line to shield views of vehicles and vehicle headlights from the ground level. Dr. Kosary testified that her home is not built at ground level—it's built on a full basement. The first floor is 3 feet above the ground. For that reason,

²² While the Lighting Plan states that there are 5 Eaton Streetwork lights, Dr. Kosary testified that she could find only four shown on the Lighting Plan. The Hearing Examiner identified four of the fixtures along Carnegie Avenue. The Hearing Examiner also had some difficulty locating the Cree Wallpack Luminaires. The locations shown are approximate.



Schedule											
Symbol	Label	Quantity	Manufacturer	Catalog Number	Description	Lamp	Number Lamps	Filename	Lumens Per Lamp	Light Loss Factor	Wattage
	B	15	Cree Inc	XSPWAX3MG-U	Cree XSPW Series Wallpack Luminaire, Type III Medium, 5700K, G Input Power Designator	4 type MDA LEDs	1	XSPWAX3MG-U_RESTL-2014-0032.IES	2673	1	25.28
	A	8	Cree Inc	OSQ-A-xx-4ME-B-57K-ULxxxxx w/OSQ-BLSMF CONFIGURED FROM OSQ-A-xx-4ME-U-57K-ULxxxxx w/OSQ-BLSLF	Cree OSQ Series Area Luminaire, Type IV Medium w/ Backlight Shield, B Input Power Designator, 5700K CONFIGURED FROM Cree OSQ Series Area Luminaire, Type IV Medium w/ Backlight Shield, U Input Power Designator, 5700K	CONFIGURED FROM MDA	1	OSQ-A-XX-4ME-B-57K-ULXXXXX W_OSQ-BLSMF_CONFIGURED.ies	8950	1	86
	C	5	EATON - STREETWORKS (FORMER COOPER LIGHTING)	ULA-A8-D-U-SYM-VMx-BK	UTILITY LIGHT ACORN TYPE V SYMMETRIC	(90) 4000K CCT, 70 CRI LEDS ABSOLUTE PHOTOMETRY IS BASED ON CALIBRATION FACTORS CREATED USING LAB LUMEN STANDARDS IN GONIOPHOTOMETER WITH TEST DISTANCE OF 28.75 FEET	90	ULA-A8-D-U-SYM-VMx-BK.ies	86	1	44.4

**Lighting Schedule and Statistics
Exhibit 94(a)**

their eye-level view extends over the height and sightline of the fence. They will see the parking lots, which will have an impact, she testified. The parking lot and building mounted lights are LEDs that are much more intense than the sodium vapor lights used in the past. 3/25/21 T. 192. In addition to the wall mounted lights, the Applicant proposes eight 20-foot pole-mounted lights in the parking lot. There will be more pole-mounted lights in the parking lot than they have on the street.

According to her, the Planning Department has applied lighting standards contained in the Model Lighting Ordinance to evaluate compatibility and setting conditions for site plans and conditional uses.²³ The Model Ordinance is a joint effort between the Illuminating Engineering Society of North America (IESNA) and the International Dark Sky Association and is accompanied by a User's Guide explaining how to apply it.²⁴ 3/25/21 T. 195.

The Model Lighting Ordinance divides land uses into five zones, each with appropriate lighting levels. Lighting zones were originally developed by the International Commission on

²³ Dr. Kosary cited to CU 17-04, Application of DBVR Rockville LP d/b/a Dr. Boyd's Veterinary Resort, where Planning Staff recommended a condition requiring the Applicant to provide certification from a qualified professional that the exterior lighting met the standards of the Model Ordinance. See, CU 17-15, Hearing Examiner's Report and Decision, p. 4.

²⁴ Dr. Kosary submitted the User's Guide into evidence to support her testimony. Exhibit 176(a).NN.

Illumination and introduced in the U.S. by the IESNA in 1999. 3/25/21 T. 195. According to the User's Guide, her neighborhood falls within Lighting Zone One or LZ-1. This is the default zone for low-density residential areas. Their neighborhood is dark at night. To ensure compatibility between uses in the same zone, the Model Ordinance limits the total amount of non-residential artificial light after dark within the zone. Zone limits are measured in lumens, which the User Guide defines as "[t]he unit of measure used to quantify the amount of light produced by a lamp or emitted by a luminaire." 3/25/21 T. 195-196; Exhibit 196 NN.

Based on the Model Ordinance, Dr. Kosary testified, the Lighting Plan proposed will generate approximately 141,450 lumens or 5.46 lumens per square foot of hardscape.²⁵ This demonstrates that there are almost 100,000 more lumens than called for in an LZ-1 Zone under the Model Lighting Ordinance recommendations. 3/25/21 T. 206. The lumens per square foot that would be generated equals the recommended level for LZ-3. LZ-3 is the default zone for business districts in a large city, including business zones and commercial mixed-use area. *Id.*, T. 209. In comparison, the Model Ordinance sets the lumen levels for the LZ-1 Zone at 43,750 lumens. 3/25/21 T. 198. This demonstrates that there are almost 100,000 more lumens than called for in an LZ-1 Zone under the Model Lighting Ordinance recommendations. 3/25/21 T. 209. Dr. Kosary submitted a graphic showing the distance between her windows and the parking lot lights proposed in the conditional use plan (Exhibit 227(d).BBBBB), on the next page).

In comparison to the daycare center, the outdoor lights at her house include seven 1-watt LED uplights in their water feature and two strings of Christmas lights on the evergreen next to this feature. They are timed to go on around dusk and turn off around 10 p.m. The seven total

²⁵ Dr. Kosary explained in detail the methods she used to calculate the lumens that will be generated by the proposed lighting for the daycare center. 3/25/21 T. 195-205.

LED lights produce 420 lumens, which is about equivalent to one 40-watt incandescent light bulb.

This is typical of the lighting that her neighbors have. 3/25/21 T. 210.

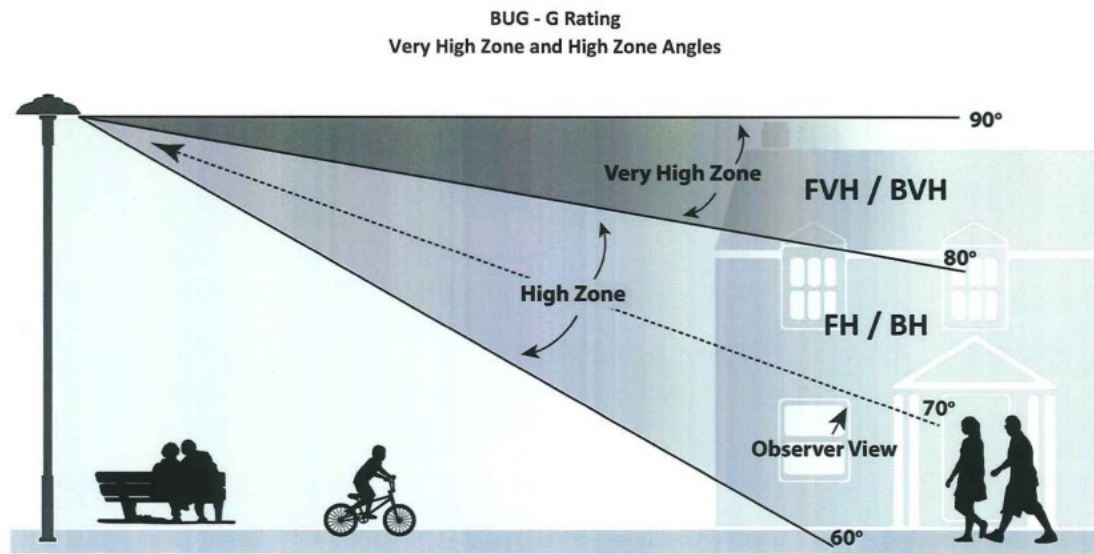


Exhibit 227(d).BBBBB

The lights shown on the conditional use plan also have high “BUG” ratings as well. The “BUG” rating is a classification system that classifies backlight, uplight, and glare for various zones. Ex. 227.NNN. T. 211. Dr. Kosary testified that the lighting proposed will generate “uplight” that will cause “sky glow” in the area at much higher levels than prescribed by the Model Ordinance. 3/25/21 T. 211-212; Ex. 227(b).NNN. “Uplight” is light emitted above the 90 degree or horizontal plane. The User’s Guide indicates that the maximum uplight in the LZ-1 zone should be “U1.” 3/25/21 T. 212.

Under Primrose's Lighting Plan, the Eaton Streetwork utility lights along Carnegie Avenue put out very few footcandles right next to the light fixture but have a "U5" level for uplight. According to the User's Guide table, a U5 is not even permissible in any zone. *Id.*, T. 212.

The lighting also exceeds the LZ-1 Zone standards for glare set by the Model Ordinance. Dr. Kosary testified that the "G" in "BUG" rating stands for glare. She submitted an exhibit to illustrate the different levels of glare that can occur (Exhibit 227(d).CCCCC, below). The User's Guide notes that glare can be annoying or visually disabling. 3/25/21 T. 216.

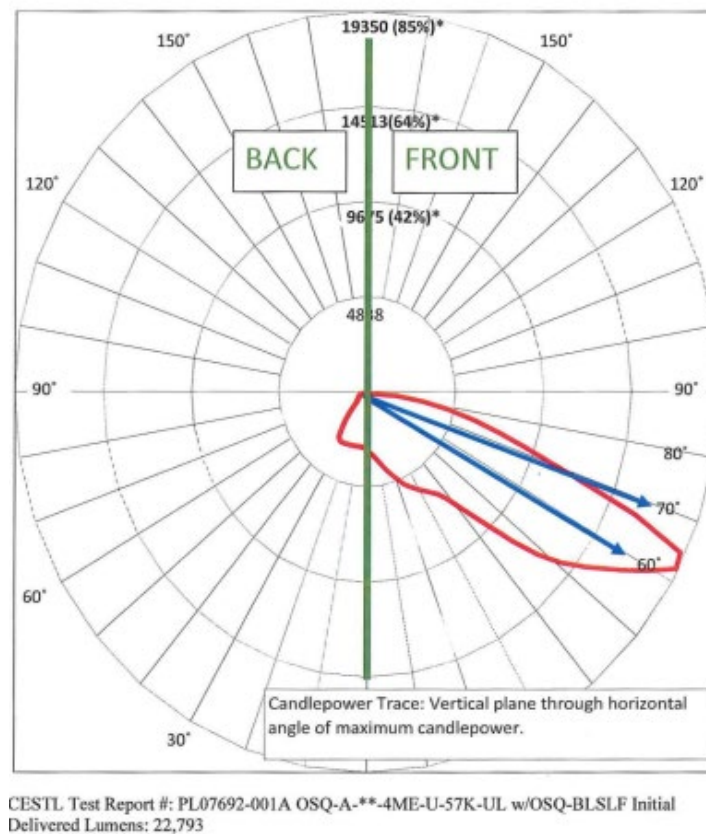


Source: <https://leotek.com/g-rating/>

The G rating looks at the amount of front light and backlight in what they refer to as the "high zone" that is marked in her exhibit. That is the amount of light emanating at the 60-80 degree angle. The "very high" zone is the amount of light that emanates from the 80- to 90-percent angle. The high zone is the perspective of a pedestrian on the ground and the very high zone is the perspective from the first floor of houses. 3/5/21 T. 216. The Model Ordinance User's Guide indicates that the maximum allowable glare in the LZ-1 zone is a G1. 3/5/21 T. 217.

The specifications for Eaton Streetwork lights state they have a glare rating of G3 under

the BUG rating system. Exhibit 227(d).TTTT; 3/25/21 T. 217. These lights are classified as B2, U5, and G3. The maximum allowable glare in the LZ-1 zone is just a G1. These are the lights that are going to be shining on the Mitchells and Tapscotts. *Id.*, T. 217. The eight parking lot lights shown on the Lighting Plan have a glare rating of “G2”, which is over the maximum allowable glare in the LZ-1 zone. T. 218. Dr. Kosary submitted a test report for these lights analyzing the backlight and uplight ratings (Exhibit 227(d).EEEEEE, below):



To conduct this test, the luminaire sits in exactly the middle of the circle where the green line comes down and the 90-degree line comes across. This shows the test for the parking lot lights. This luminaire is very well shielded in terms of uplight, above the 90-degree horizontal both to the front and back of the light. It is not totally shielded in terms of backlight, which is everything to the left of the green line, running vertically through the screen. While this is minimal, her experience with the church parking lots is that this is annoying, particularly because they will

be looking at these lights five days a week for at least parts of the year. The front-facing light dispersion is below the 90-degree horizontal plane, which is the real issue. The test results indicate that the front-facing lights will be within the "high zone", peaking at approximately 65 degrees. This will be the eye-view range for people both on the ground and in the first floor of a house. She experiences the church parking lot lights as having car headlights point at you from across a parking lot only at a higher point of view. 3/25/21 T. 220.

Dr. Kosary also pointed out that the Eaton Streetwork lights (along Carnegie) are 4,000 Kelvin. The higher the Kelvin score, the more light emitted in the blue range. 3/5/21 T. 221. In 2017, the AMA adopted guidelines presented in a report by the Council on Science & Public Health on the human and environmental effects of LED community lighting. Many initial installations of LED street lighting used 4,000 Kelvin luminaires, which emitted a large amount of blue light. While the blue light appears white to the naked eye, it created much worse nighttime glare than conventional high-pressure sodium lighting. Many residents in these early adopter areas complained of the prison atmosphere created by LED high-intensity, blue-rich lighting. T. 221.

The AMA recommended limiting LED lighting to no more than 3,000 Kelvin because higher levels had an impact on the circadian cycle of humans, animals, and insects. The Cree parking and building lights have an even higher Kelvin output than the streetlights found harmful in the AMA report. The proposed lighting is 5700 Kelvin; daylight is 6500 Kelvin. She believes that parking lots are lit for pedestrian safety, not for compatibility with the community. This is commercial lighting in a residential neighborhood that is highly incompatible, which she knows from experience. 4/2/21 T. 222.

The parking lot lights are 5,700 Kelvin. 3/25/21 T. 220-221. LED light emissions are characterized by their correlated color temperature, or CCT, index. The Kelvin scale reflects the equivalent color of a heated metal subjected to that temperature. High-pressure sodium lighting

has a CCT of around 2,100 Kelvin. Basically, the higher the Kelvin score, the more light emitted in the blue range. 3/25/21 T. 221.

On rebuttal, the Applicant's expert in landscape architecture, who was not qualified as a lighting expert but has worked closely with architects on many lighting plans, testified that he doesn't believe that direct glare (as opposed to diffused light) from the parking lot lights will adversely affect the Kosary/Posey property because it requires a light pole of 25 feet to see an LED bulb. While he agrees with Dr. Kosary's measurement of the distance of the nearest parking lot light to her property (*i.e.*, 135 feet), he calculates that the direct glare emitted from the parking lot light will extend 55 feet from the pole in every direction. Thus, the direct glare from the light would end at just before the curbing being installed for the drive aisle. 4/9/21 T. 98.

He believes that this is supported by the photometric study; the highest level of illumination on the ground along the eastern property line of the subject property is 0.1 footcandles. He believes that the illumination levels would be higher if the direct angle of the light was being thrown out further toward the property line. 4/9/21 T. 99.

The luminaire being used for the parking lot lights is a flat glass LED light where the bulb isn't exposed and is contained within the housing. The proposed light fixtures already call for a backlight shield to further reduce the glare. The backlight is typically a wrap installed on the back and side of the light to reduce the angle of throw even more. It's essentially like placing a hood or shield below the light fixture that prevents the light from shining toward the eastern property line. This can be further enhanced by a side backlight restriction on the unit as well. 4/9/21 T. 100. The shields would not eliminate illumination toward the eastern property line, but it would physically block much of the light. The LED luminaire has a flat bottom. You could attach a metallic shield to the luminaire that assists in focusing the light downward with less width of throws. 4/9/21 T. 110.

There are also other fixtures that could be installed to reduce any glare. One is an arm that can adjust up and down. After installation, one can further adjust the lens in the field to ensure that they reduce the angle of throw toward the eastern property line. There are options one can select to have flexibility to fine tune the lighting even after installation. 4/9/21 T. 101-102, 109. It could also be installed to further shield neighbors to the west. *Id.* T. 111. He testified that the neighbors will be able to see the poles on the property unless there is a "complete and utter" wall. *Id.*, T. 111.

According to Mr. Jolley, the light poles are primarily designed to distribute light evenly. As there is no building near the parking area, the only light source must be mounted. It may be possible, however, to install lower lights. There are a variety of pole heights and sources, depending on how the lighting is to be used. He believes that the minimum required to comply with the Code would be 15 feet. T. 112-113. The lower you make the poles, however, the more lights need to be installed. This could lead to additional light refracting off the building that will travel outward. The pole method reduces the total number of lights. The items he suggested could help fine tune the project in the field. T. 113.

On cross-examination, Mr. Jolley acknowledged that the light poles will be visible from the patio in Dr. Kosary's and Mr. Posey's back yard. The pole closest to the Kosary/Posey property was at elevation 467.5 and the luminaire would be 20 feet above the elevation, which would be 487.5. T. 115. The elevation of the Kosary's patio is 468.5. 4/9/21 T. 116.

On rebuttal, Mr. Mandava testified that he would accept a condition requiring that all lights in the facility be turned off at 7:00 p.m. and not turned on until 6:00 a.m. 4/9/21 T. 144. There will be soft lighting on the exterior just to illuminate the doorways, but it doesn't radiate a lot of light. He doesn't have the specifics on those lights. *Id.*, T. 154. He also testified that there will

be no lights on for the cleaning crew when they leave. They will use their vehicle lights to exit the property. *Id.*, T. 156.

iv. Traffic Congestion, Gaps, and Queues²⁶

1. Queues

A significant concern for much of the community is traffic congestion, gaps and queuing on Needwood Road. Testimony from the community, including photographs of the queues, was described in Part.II.E of this Report.

Mr. Cook testified that the westbound approach along Needwood Road becomes two lanes as it approaches the intersection. Those two lanes extend almost all the way back to Carnegie Avenue. The left-most lane in the westbound approach is dedicated to left turns only. The right lane is a combination left, through or right (*i.e.*, shared) lane. Left turns are the predominant movement at the intersection and is the predominant cause of the queues. 3/9/20 T. 235.

Primrose's initial Traffic Study (Exhibit 63), reviewed the length of the queues on the westbound Needwood Road to the intersection with Redland Road. Carnegie Avenue is 486 feet from the stop bar at the intersection. According to Mr. Cook, traffic engineers design projects using the 95th percentile of what they're measuring to determine what's acceptable. The Traffic Study shows that the 95th percentile of the westbound queues do not reach back to Carnegie Avenue. 3/9/20 T. 233-234. Their initial study projected the 95th back of the queue at 475 feet, under the 486 feet of available storage. *Id.* In his opinion, the Traffic Study demonstrates that 95% of the time, queues will not block the intersection of Needwood Road and Carnegie Avenue. While they can't guarantee that the queues will not ever back up as far as Carnegie Avenue, the

²⁶ Dr. Kosary and other neighbors testified that Needwood Road has a lot of "cut-through" traffic. Dr. Kosary testified that it is classified as a primary residential road. Using the traffic counts from the Applicant's Traffic Study, she believes that the community could take advantage of an Executive Regulation permitting neighborhoods to place traffic controls on primary residential streets. 3/25/21 T. 41-43. The Hearing Examiner does not address this because whether the existing traffic falls within the realm of the Executive Regulation is not a standard for approval of this conditional use.

additional 180 feet to the proposed driveway entrance adds another “cushion” that queues won’t block the proposed entrance. *Id.* It’s possible that at times the 95th percentile could go up to the 100th percentile if a blockage occurs at the intersection, but in his opinion, Primrose can “guarantee” that 95% of the time that won’t happen and they have an additional 180 feet before the entrance to the site driveway would be impacted. *Id.*, T. 234. Mr. Cook testified that he’d looked at accident records for that portion of Needwood Road. It did not identify any accidents over a three-year period along between just east of the Church and Redland Road. Only accidents identified were two or three at the intersection of Redland and Needwood, but not along Needwood. 4/2/21 T. 60.

Mr. Cook also testified that his firm conducted a gap study to determine whether there were sufficient gaps in traffic along Needwood Road to permit vehicles to enter and exit the daycare center at the proposed daycare driveway. People exiting the facility need to cross two lanes of traffic—eastbound and westbound Needwood Road. The Highway Capacity Manual recommends a 7.7-second gap to be able to make that maneuver. It recommends that a sufficient gap to make a left turn into the facility is 4.1 seconds. Using the cameras they mounted, their study concluded that there were approximately 353 gaps during the morning peak hour sufficient to allow vehicles to make a left turn from the facility driveway onto westbound Needwood Road. There were about 285 gaps in the evening peak hour. 3/9/21 T. 236-237. For the westbound left turn into the facility, they found that there were 791 gaps in the morning and 778 gaps in the evening. *Id.*, T. 237.

Mr. Cook acknowledged that there are problems with the design of the Redland/Needwood Road intersection. His firm viewed the intersection and observed some black tire marks on the right curb at the northbound Redland Road approach. This indicates that some vehicles did have trouble making that turn. After running templates for different size vehicles at the intersection, they found that passenger cars can “just barely squeak by”. Pickup trucks can just barely pass.

The larger trucks will hit the curb. Normally, turning radiuses that we use are conservative. 3/9/21 T. 242.

The simplest option to alleviate this condition is to move the stop bar on Needwood Road further east.²⁷ At present, the stop bar for westbound traffic on Needwood is very close to the intersection. This makes the turning radius very tight for vehicles northbound on Redland that want to turn right onto Needwood Road. Moving the stop bar on Needwood further east would allow vehicles making a right turn from northbound Redland onto eastbound Needwood more room to make that turn without worrying about a vehicle sitting in the westbound left turn lane on Needwood that has its nose sticking out beyond the stop bar. *Id.*, T. 242-243.

In Mr. Cook's opinion, another option to improve the intersection would be to increase the radius on that corner, which is possible. There is some signal equipment at that intersection that would have to be relocated, but it could be done. The Applicant would have to contact MCDOT to determine which option would be acceptable. The applicant will accept a condition to coordinate with MCDOT to attempt to resolve the problem. *Id.*, T. 243.

To address concerns about the safety of bicyclists and pedestrians on the shared pathway, Primrose proposes to keep striping far enough back from the road so vehicles or bikes can go along the trail and pedestrians without being encountered by passenger cars exiting the site onto Needwood. *Id.*, T. 245.

Many of the neighbors on Needwood Road testified that queues frequently extended past Carnegie Avenue and sometimes to the church, as summarized in Part II of this Report. Dr. Kosary testified that she finds it "not uncommon" to have westbound traffic backed up to Ms. English's driveway and sometimes past her own driveway, which is two to three car lengths' further east.

²⁷ Mr. Cook explained that the stop bar is the 24-inch wide white line that crosses the street at an intersection to signal drivers where they are required to stop. 3/9/21 T. 24

3/25/21 T. 34-35. Both situations would block the proposed Primrose driveway. She has also observed her neighbors making “some rather dangerous maneuvers” to enter westbound Needwood Road in the morning. *Id.*, T. 35.

Dr. Kosary testified that the Traffic Study fails to accurately capture existing and proposed conditions and that both existing and projected queues are longer than shown. She bases this on (1) data entry errors in the Traffic Study, and (2) the trip generation rates used do not meet LATR Guidelines. She believes that this reinforces the testimony from the community that queues in the area are longer than reflected in the Traffic Study.

The data entry error in the Applicant's Traffic Study lists traffic volumes in the wrong intersection approaches. *Id.*²⁸ She testified that Needwood traffic counts were entered incorrectly in the northbound Redland column, eastbound Needwood traffic counts have been entered into the southbound column, northbound Redland traffic counts have been entered in the eastbound column, and the southbound Redland traffic counts have been entered in the westbound column. 3/25/21 T. 49-51.

This error, in her opinion, is “profound” because it calls into question the Traffic Study's conclusion that the 95th percentile queue of westbound traffic along Needwood Road will not extend to Carnegie Avenue and block that intersection. 3/25/21 T. 52. Dr. Kosary submitted an exhibit showing the queue storage length of dedicated left turn lane on Needwood Road (Exhibit 115(i), on the following page).

Using the Google measurement tool, the westbound dedicated left turn lane on Needwood is about 425 feet long. This is the “queue storage length.” East of that, the storage lane becomes a “taper”, which is the area marked with the yellow lines. The taper splits the one (shared) lane of

²⁸ Because Primrose acknowledged that wrong volumes were listed in the Traffic Study, and because this Report is already long, the Hearing Examiner does not describe the detailed analysis Dr. Kosary used to identify the error. For those who wish to review it, her description occurs on 3/25/21 T. 44-51.



Exhibit 115(i)
Length of Dedicated Left Turn Lane at 425 feet

westbound Needwood into two lanes as you approach the Redland/Needwood intersection. 3/25/21 T. 56. The distance from the Redland/Needwood intersection is 475 to the west side of Carnegie Avenue and 500 feet to the east side of Carnegie Avenue. Exhibits 115.G, 115.H, 115.I.

According to a worksheet from the Applicant's Traffic Study, the length of the existing queue (without traffic from the proposed use incorporated) in the dedicated left hand turn lane is 437.7 feet, longer than the available storage in the dedicated left turn lane (*i.e.*, 425 feet). This means that traffic can back up past the full width of the left-turn storage lane into the taper area 95% percent of the time. She believes this is a safety issue because it forces cars into a narrower and narrower lane. It also supports the testimony of those along Needwood Road that backups make it difficult to exit their properties, especially in the morning. 3/25/21 T. 59-61.

With traffic from the proposed development added, Primrose's Traffic Study shows that the length of the westbound queue is 441.9 feet and the length of the shared (through, left and right-turn) lane is 475.3 feet. This means that the queue in the left-turn lane extends into the taper and probably into the shared lane. The shared lane results bring the queue to the edge of the intersection of Carnegie and Needwood. She believes that the neighbors will experience even more difficulty getting out of their driveways if the proposed facility is built. 3/25/21 T. 62.

Dr. Kosary testified that this means that queues westbound on Needwood may be even longer than the ones projected by the Study. With the correct volumes in the correct approaches, the Traffic Study demonstrates that both Redland approaches to the intersection have delays that are well within the delay standard of 59 seconds and have a Level of Service (LOS) A, which is the level of service with the least delay. The Needwood approaches, however, are both failing at LOS E and F. The westbound Needwood approach operates at LOS E, which, according to the HCM Manual, equates to "unstable flow, intolerable delay." Exhibit 115(m). The eastbound approach on Needwood has a LOS of F, which means "forced flow, congested and queues fail to clear." *Id.* In her opinion, the poor level of service on the westbound approach to Needwood Road confirms the testimony from the neighbors' testimony that they experience heavy congestion on Needwood Road, particularly at its intersection with Redland. 3/25/21 T. 66-67.

For intersections located in the orange policy areas such as this one, Dr. Kosary testified, the LATR Guidelines require Applicants to use the Highway Capacity Manual (HCM) standards for acceptable delays at studied intersections. To meet the Guidelines' standards, intersections must have an HCM average vehicle delay of 59 seconds. 3/25/21 T. 63. "Intersection delay" equals the weighted average of approach delay, or the delay for each of the intersection approaches from the north, south, east, and west. She knows this because she is a statistician and went through the equations in the HCM. She also used Excel to perform the calculations and confirmed the

results. Approach delay is nothing more than the weighted average of control delay, or the delay for each lane within an approach. Intersection delay should give a relatively good indication of what is going on at an intersection provided that all approaches have similar delays. This is not the case with the Redland/Needwood intersection because of the stark difference in the delays on Redland Road and on Needwood Road. 3/25/21 T. 65-66.

Dr. Kosary also believes that the software Primrose used for its traffic study did not return accurate results for delays and queuing because the Traffic Study shows that the “queue storage ratio” is over 1.00. The queue storage ratio represents the length of the queue divided by the available storage. It is important because it measures whether the software accurately accounts for existing conditions. 3/25/21 T. 75. The worksheet in Primrose’s initial Traffic Study lists queue storage ratio of 0.00. Assuming the back of queue length of 437.7 feet, you would need a left-turn lane of about 87,500 feet to get a queue storage ratio which rounds to 0.00. This is about 16.5 miles. Needwood Road is only about two miles long between the Needwood/Redland and Needwood/Muncaster Mill intersection. T. 72. This calculation is based on algebra—solving for the unknown. T. 72. In her opinion, the analyst who prepared the data should have looked more closely when it returned this “wacky” result. 3/25/21 T. 72.

When the correct volumes are placed in the correct approaches, the queue storage ratio is over 1.00. The Traffic Study uses McTrans software, one of the programs recommended by the HCM Manual. The McTrans FAQ sheet points out that if the queue storage ratio exceeds 1.00, the analyst should not be using the software because it will underestimate the computation of both delay and queue length. Exhibit 227(b).SSS. This is because the calculations do not account for what is called “spillback”, which occurs when a queue goes past its storage length and starts interfering with or blocking neighboring lanes. McTrans recommends using a different application

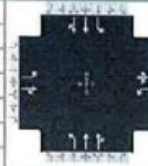
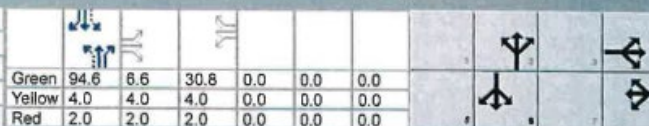
called CORSIM (short for Corridor Simulation) that utilizes microsimulation to compute delay and queue storage estimates in these situations. 3/25/21 T. 74; Exhibit 227(b).SSS.

Because of the extreme differences in the LOS for the Redland approaches (LOS A) and the Needwood approaches (LOS E and F) the McTrans software cannot accurately predict the queues. She explained that the results in the Traffic Study are the result of data flowing through a series of equations. Underlying these equations are assumptions about the characteristics of this data. Some of these assumptions and characteristics are mathematically complex. One of the most basic assumptions, however, is that each vehicle in the queue remains in its lane. If the queue exceeds the length of the turn lane, the equations are not designed to handle this because it violates the assumptions and data characteristics upon which the equations are built. This has a cascading series of impacts on the results. 4/9/21 T. 91.

When queue storage ratio shown in the Traffic Study is over 1.0, it means that the software has underestimated the length of the queues because the software cannot handle the spillback of vehicles in other lanes. The delays calculated for the westbound Redland/Needwood intersection approach, are even worse than the LOS E listed in the table. 3/25/21 T. 75.

Dr. Kosary testified that there is no way to know what the "100th" percentile of the queue is. These procedures are based on assumptions of how the data will be distributed. A normal distribution is what is called a "bell-shaped curve". Queues do not follow the normal distribution or bell-shaped curve but use a "Gaussian" distribution. To know the 100th percentile of the queue, one must know the standard error. According to her, one cannot make any assumptions whatsoever about the number of linear feet between the 95th and 100th percentile. They simply do not have enough information. 4/9/21 T. 40-41.

Mr. Cook acknowledged the intersection counts in the initial Traffic Study had been entered in the wrong volumes and submitted a corrected worksheet (Exhibit 233, on the next page).

HCS7 Signalized Intersection Results Summary																			
General Information							Intersection Information												
Agency	The Traffic Group						Duration, h	0.250											
Analyst	MYC			Analysis Date	3/29/2021			Area Type	Other										
Jurisdiction	Montgomery County, MD			Time Period	AM Peak			PHF	0.92										
Urban Street	Redland Rd			Analysis Year	Total Traffic			Analysis Period	1> 7:00										
Intersection	Redland Rd & Needwood			File Name	1TA.xus														
Project Description	Primrose Derwood 2017-0101																		
Demand Information				EB			WB			NB			SB						
Approach Movement				L	T	R	L	T	R	L	T	R	L	T	R				
Demand (v), veh/h				20	10	38	536	8	27	9	149	154	39	1234	8				
Signal Information																			
Cycle, s	150.0	Reference Phase	2	Green	94.6	6.6	30.8	0.0	0.0	0.0									
Offset, s	0	Reference Point	End	Yellow	4.0	4.0	4.0	0.0	0.0	0.0									
Uncoordinated	No	Simult. Gap E/W	On	Red	2.0	2.0	2.0	0.0	0.0	0.0									
Force Mode	Fixed	Simult. Gap N/S	On																
Timer Results				EBL		EBT		WBL		WBT		NBL		NBT		SBL		SBT	
Assigned Phase						4				8				2				6	
Case Number						10.0				10.0				6.0				6.0	
Phase Duration, s						12.6				36.8				100.6				100.6	
Change Period, (Y+R), s						6.0				6.0				6.0				6.0	
Max Allow Headway (MAH), s						4.4				4.3				0.0				0.0	
Queue Clearance Time (g), s						6.8				28.4									
Green Extension Time (g), s						0.1				2.4				0.0				0.0	
Phase Call Probability						0.95				1.00									
Max Out Probability						0.02				0.01									
Movement Group Results				EB			WB			NB			SB						
Approach Movement				L	T	R	L	T	R	L	T	R	L	T	R				
Assigned Movement				7	4	14	3	8	18	5	2	12	1	6	16				
Adjusted Flow Rate (v), veh/h				22	52		303	318		10	162	167	42	676	674				
Adjusted Saturation Flow Rate (s), veh/h/in				1767	1624		1767	1751		401	1856	1572	1042	1856	1851				
Queue Service Time (g), s				1.8	4.8		24.7	26.4		0.8	2.4	3.0	1.1	16.9	16.9				
Cycle Queue Clearance Time (g), s				1.8	4.8		24.7	26.4		18.1	2.4	3.0	4.2	16.9	16.9				
Green Ratio (g/C)				0.04	0.04		0.21	0.21		0.63	0.63	0.63	0.63	0.63	0.63				
Capacity (c), veh/h				77	71		363	360		256	1170	992	685	1170	1168				
Volume-to-Capacity Ratio (X)				0.282	0.736		0.834	0.883		0.038	0.138	0.169	0.062	0.577	0.578				
Back of Queue (Q), ft/in (95 th percentile)				39.6	104.8		441.9	475.3		5	44.7	46.3	12.7	218.8	213.4				
Back of Queue (Q), veh/in (95 th percentile)				1.5	4.1		17.3	18.6		0.2	1.7	1.9	0.5	8.5	8.5				
Queue Storage Ratio (RQ) (95 th percentile)				0.00	0.00		1.03	0.00		0.03	0.00	0.00	0.04	0.00	0.00				
Uniform Delay (d), s/veh				69.4	70.9		57.1	57.8		8.5	4.6	4.6	5.0	5.7	5.7				
Incremental Delay (d), s/veh				2.0	13.7		6.1	9.9		0.3	0.2	0.4	0.2	2.1	2.1				
Initial Queue Delay (d), s/veh				0.0	0.0		0.0	0.0		0.0	0.0	0.0	0.0	0.0	0.0				
Control Delay (d), s/veh				71.4	84.5		63.2	67.7		8.8	4.8	5.0	5.2	7.8	7.8				
Level of Service (LOS)				E	F		E	E		A	A	A	A	A	A				
Approach Delay, s/veh / LOS				80.7	F		65.5	E		5.0	A	A	7.7	A	A				
Intersection Delay, s/veh / LOS							24.4						C						
Multimodal Results				EB			WB			NB			SB						
Pedestrian LOS Score / LOS				2.31	B		2.33	B		1.89	B		1.89	B					
Bicycle LOS Score / LOS				0.61	A		1.51	B		0.77	A		1.64	B					
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HCS™ Streets Version 7.9.5																			
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Westbound
Left Turns
from Needwood
Road

Level of Service
for Westbound
Needwood
Approach to
Redland Road
Intersection

Levels of
Service for
Redland Rd.
Approaches

Overall
Intersection
Level of Service

Queue
Storage
Ratio

Corrected Traffic Study Worksheet
Exhibit 233(a)

He reran the analysis for the existing a.m. and p.m. volumes and the total a.m. and p.m. volumes. 4/2/21 T. 40. The overall intersection delay remains the same as reported in our original study in his original study and all intersections remain within the standards established by Montgomery County. *Id.* Mr. Cook acknowledged that the HCM intersection delay is the average delay from

every approach. The total intersection delay (weighted average of all approaches) is LOS C, which is an acceptable level of service under the LATR Guidelines. He agreed that the two Redland approaches operate a LOS A and the two Needwood approaches are at LOS E and F, which Mr. Cook characterized as a "poor level of service delay." 4/2/21 T. 62.

According to Mr. Cook, the difference between the levels of service on Redland Road and the level of service on Needwood Road stems from the timing of the light at the intersection. The County could adjust the timing of that signal to add a little more delay to the Redland Road approaches, which would improve the operation of the Needwood Road approaches. That would be up to MCDOT, however. Both MCDOT and SHA always give priority to the major roadway through an intersection because that's where most of the traffic is. Both agencies try to minimize the amount of delay for approaches with heavier volumes. The timing here could be adjusted to reduce the delays on Needwood, but that is not something that the Applicant can request. The County monitors all intersections and has the capability of adjusting the signal timing in real time if they see a problem or are requested to do so. 4/2/21 T. 62-64.

Mr. Cook acknowledged that there will be times when queues back up to Carnegie. Their study demonstrates that approximately 5 percent of the time traffic may extend back to Carnegie, but 95% of the time it will not. 4/2/21 T. 44. Therefore, the queuing study is consistent with neighborhood testimony. *Id.*

He agreed with Dr. Kosary that the queue storage ratio is a formula that tells you whether you have sufficient storage space in the left turn lane to accommodate the number of left turns. The applicant enters the length of full-width storage space available in the left turn lane. When the program determines what the back of the queue is, it calculates whether there is sufficient storage space. The corrected Traffic Study worksheet shows a queue storage ratio of 1.03. The line above 1.03 states the back-up queue is 17.3 vehicles. The queue ratio equates that to 441.9

feet. A 1.03 queue storage ratio means that they will be "3% short" on some occasions over an hour of signal operation. *Id.*, T. 78. When asked to described what he meant by "short", Mr. Cook testified that (4/2/21 T. 78-79) that there will be a 3 percent increase that on all cycles that you will not have enough storage or that 3 percent of the time you may have a car that cannot get into the left turn lane. *Id.*, T. 78-79, 81.

According to Mr. Cook, the queue length in their queuing study was shown as 430 feet. The 95th percentile queue was 441.9 feet, which is a different of about 11 feet. The queue storage ratio here is 1.0279, rounded to 1.03. When you apply that 3%, that means that they need to lengthen the queue by 11 feet. Eleven feet may be gained in multiple ways. They could lengthen the storage area for the left turn lane by simply restriping the left turn lane to add length. One car could easily pull into the hatched taper without interfering with through traffic, although he's not recommending that because it's against the law. 4/2/21 T. 79; 4/9/21 T. 44-45.

The third alternative is for individuals that want to turn left onto Redland from westbound Needwood is to stay in the shared lane. There are a series of things that happen on the road network every day that could make up the difference and get the queue ratio below 1.0. In this case, they are essentially discussing the difference for one car. If they altered the assumptions to have one additional car use the shared lane, that would reduce the delay about a 10th of a second at the intersection. 4/9/21 T. 45

Mr. Cook testified that the major factor mitigating against excessive queues is that the this is not the only left turn lane available at the intersection. Any car that can't fit into that lane may stay in the right lane, which is permitted to make a left turn at Redland Road. In his opinion, one limitation of this software package is that it doesn't account for storage in shared use lanes. 4/2/21 T. 79.

In response to the Hearing Examiner's questions, Mr. Cook testified that there is no queue

ratio in the shared through/right turn lane because it is not a storage bay. Theoretically, the shared lane extends all the way back to Muncaster Mill Road. The queue ratio really applies when you have exclusive turn lanes that have limited stacking for cars. 4/2/21 T. 79-80. In his opinion, both he and the opposition agree that there will be back-ups to Carnegie but disagree as to this frequency. In his opinion, the vehicles in the left-hand turn lane will not be able to clear the intersection in one light cycle only 5% of the time. Clearance of the shared lane depends on how many vehicles go through and how many go right. There will be occasions that there will be capacity in the shared lane for those making a left turn, therefore reducing the ratio on the dedicated left turn to 1.0. *Id.*, T. 81-82.

He also testified that the queueing study did not look the frequency of gaps for driveways that exit onto Needwood Road—it analyzed the number of gaps at the site's proposed driveway. He acknowledged that if the intersection at Redland and Needwood Roads is improved by pushing the stop bar further east toward Carnegie Avenue (discussed below), this would also push the queue further east as well. *Id.*

According to Mr. Cook, traffic engineering is not an exact science because it deals with random arrivals. In the field, they use a design distribution system to estimate that. There are other tools, but they are limited to what they are asked to use. Montgomery County may ask them to use one type of methodology, while the State Highway Administration may request another. At times, they use both methods. In this case, they only did what was required by the LATR Guidelines. In most instances, the results come out to be the same or at least similar. You will not get exact matches between the two methodologies because they are based on different assumptions. He understands why Dr. Kosary believes they should have used a different type of model in this case, but the LATR does not allow them to do that. 4/9/21 T. 43.

Mr. Cook acknowledged that if one of the left turn lanes is blocked, all traffic would have to utilize the shared lane until the left lane is opened. That would extend further the eastbound the storage in the shared lane. In addition to the other measures to reduce delay (flattening the radius at the intersection, changing the timing of the signal, moving the stop bar back) they now recommend an extension of the dedicated storage lane for westbound turns on Needwood Road. 4/9/21 T. 49.

Despite Mr. Cook's testimony, Dr. Kosary maintains that the queue storage ratio in the corrected worksheet still indicates primarily that the software use can't accurately measure the queues. 4/2/21 T. 99. According to her, the values highlighted in red on the corrected worksheet from the Traffic Study are generated by the software to alert people that there is a problem with the calculations. The dedicated left turn lane has a finite capacity. When the capacity is reached, vehicles move into the through lane increasing its queue. The increase in the queue, and accompanying increase in delay, is not accounted for by the program. It doesn't add them to the queue in the shared lane. Nor can the software account for people who make a mistake and try to return to the through lane, making that lane longer than it is. The shared lane is backing up more than the 473 feet and the software equations and assumptions can't account for that. 4/2/21 T. 95. The level of service, approach delay, and intersection delay are all highlighted in red. This is a "heads up" to the analyst that the estimates are off. 4/2/21 T. 91-98. The results in red are telling them that they should have used a "CORESIM" to look at the results. 4/9/21 T. 99.

2. Gaps

Mr. Cook initially testified that that there are more than sufficient room to accept the additional traffic without causing blockage past Carnegie Avenue should it ever become a public road. 3/10/21 T. 235. The results of the gap study (Exhibit 161(b), shown on the next page) performed by his firm state that cars will be able to make left turns into and out of the site driveway.

EXHIBIT A

Movement: Left Turn from Daycare Center to WB Needwood Rd

Base Critical Gap: 7.1 seconds (Source: HCM Exhibit 20-12)

Follow-up Gap: 3.5 seconds (Source: HCM Exhibit 20-13)

7:45 - 8:45 AM

Observed Gap Length (sec)	2 - 3	4 - 5	6 - 7	8 - 9	10 - 11	12 - 13	14 - 15	16 - 17	18 - 19	20 - 21	22 - 23	24 - 25	26 - 27	28 - 29	>29	Total
# of Observed Gaps	205	69	33	20	13	15	10	3	3	1	2	8	5	2	15	
# of Acceptable Critical & Follow-up Gaps within each observed gap	0	0	0	1	2	2	3	3	4	4	5	6	6	7	8	
Total # of Acceptable Gaps	0	0	0	20	26	30	30	9	12	4	10	48	30	14	120	353

4:45 - 5:45 PM

Observed Gap Length (sec)	2 - 3	4 - 5	6 - 7	8 - 9	10 - 11	12 - 13	14 - 15	16 - 17	18 - 19	20 - 21	22 - 23	24 - 25	26 - 27	28 - 29	>29	Total
# of Observed Gaps	238	79	61	30	18	18	14	9	7	5	2	2	2	0	4	
# of Acceptable Critical & Follow-up Gaps within each observed gap	0	0	0	1	2	2	3	3	4	4	5	6	6	7	8	
Total # of Acceptable Gaps	0	0	0	30	36	36	42	27	28	20	10	12	12	0	32	285

**Applicant's Gap Study
Exhibit 161(b)**

According to Mr. Cook, people coming out of the property will have to cross two lanes of traffic and need a gap in both eastbound and westbound traffic. The Highway Capacity Manual recommends a gap of 7.7 seconds to be sufficient for left-turns out of the driveway. It recommends a gap of 4.1 seconds to make a left turn into the driveway. Using the video cameras, his firm counted the number of gaps that were open. Gaps long than 7.7 seconds may allow more than one car to exit the site. Ten seconds will allow "follow through" traffic that can still get out in the same gap. 3/9/20 T. 235-236.

Their gap study concluded that there were approximately 353 gaps during the morning peak hour sufficient to allow vehicles to exit the driveway. There were about 285 gaps in the evening peak hour. There were 791 gaps in the morning peak hour of sufficient size to permit left turns from westbound Needwood into the site. There were 778 gaps for the same movement in the evening peak hour. 3/9/20 T. 236-237.

Dr. Kosary disagreed with the results of the Applicant's gap study. According to her, the LATR Guidelines do not give guidance on how to conduct a gap study. She reviewed a total of 27 conditional use or preliminary plan applications that included a gap study. Her review indicated that each appeared to apply somewhat different methods and it was difficult to determine exactly what had been done from the documents provided. 3/25/21 T. 100.

For this reason, she turned to the Manual of Transportation Engineer Studies, second edition, published in November of 2010 by the Institute of Traffic Engineers. This Manual includes guidance for conducting and presenting the results of a gap study. It has a companion handbook, the ITE Traffic Engineering Handbook, seventh edition. Exhibits 227(d).DDDD and EEEE. Both studies define a "gap" as "[t]he available time in seconds between two successive vehicles at the same point in space measured from the rear bumper of the lead vehicle to the front bumper of the following vehicle." Therefore, according to Dr. Kosary, a gap is measured within a traffic lane between two successive vehicles. On a two-lane road like Needwood, you would measure the gaps for both eastbound and westbound lanes. Both documents further define a critical gap as "[t]he threshold gap time used to determine whether vehicles, pedestrians, or bicyclists at a minor approach enter or cross the major traffic stream." 3/25/21 T. 101. Traffic flow theory defines a gap time as where major street traffic is equally likely to accept or reject a gap." 3/25/21 T. 100-101.

Dr. Kosary testified that drivers differ in their individual reactions to gaps. Critical gap times are developed through what is called a "gap acceptance study". T. 101. The Manual of Transportation Engineering Studies notes that many electronic counts record gap data by grouping the gaps into intervals of two seconds, i.e., the number of gaps between zero and two seconds, two and four seconds, etc. According to the Manual, two-second intervals are crude but acceptable for most gap studies, but larger intervals "are generally not useful." T. 102. The Manual further states,

“Statistics that describe the shape of gap distribution, such as percentiles, are more useful.” T. 102.

According to the Applicant's traffic study, the gaps were measured using videos taken for the traffic counts, recorded in April 2019. Therefore, the gaps that were supposedly measured at the site of the proposed driveway were possibly measured at the Needwood-Carnegie intersection, about 180 feet away, one of the three sites where traffic counts were collected for the Traffic Study. 3/25/21 T. 102. She assumes this is true because the Traffic Study mentions no other traffic count sites beyond the three locations and reports no other data from additional sites. *Id.*, T. 103. The gap times were taken from the Highway Capacity Manual, however, the HCM does not contain any recommended methodology for conducting a gap study. The critical gap periods used in the Applicant's Traffic Study are meant to be used in the queuing analysis for unsignalized intersections, basically the same analysis as that for a signalized intersection. They are just inputs to an equation that estimates the potential capacity of the road. She knows this because these pages from the Highway Capacity Manual were included in the Traffic Study. 3/25/21 T. 103-104.

A critical gap is the time when 50% of the drivers would accept the gap and 50% would not. She could not determine how the gaps were counted from the Applicant's gap study. She believes that the Applicant's gap study added together the gaps in westbound traffic and eastbound traffic rather than analyzing when both roadways had a critical gap at the same time (needed for left turns out of the site). She believes this was the case because the Applicant's gap study states, “we have utilized the total number of vehicles in both directions”. 3/25/21 T. 104. It further states that it examined, “vehicles turning left and/or right from the proposed daycare center to westbound Needwood Road.” *Id.*, T. 104. Right-hand turns from the proposed driveway would be turning eastbound onto Needwood Road, not westbound. Left-hand turns from the daycare center would have to cross eastbound traffic. Left-hand turns out of the daycare onto westbound Needwood are

the most complicated maneuver because it requires a simultaneous gap in both eastbound and westbound traffic. *Id.*, T. 105.

In her opinion, the Applicant's approach to the gap study is a very static look at a very dynamic system. You have a driver's individual decision-making process about whether to attempt a gap. You are also dealing with very congested opposing traffic streams. On top of this, you have vehicles attempting to make left-hand turns from westbound Needwood into the daycare center potentially interrupting eastbound traffic. Vehicles attempting to make right-hand turns into or out of the daycare can disturb traffic flow in the eastbound lane of Needwood. The gap study's last-minute, tacked on analysis does not demonstrate whether drivers will be able to exit the proposed Primrose daycare center easily and safely, especially for the left-hand turn from the driveway onto Needwood Road. T. 105-106.

According to Dr. Kosary, the Maryland State Highway Administration had the same opinion about a similar gap study prepared by The Traffic Group for a preliminary plan. Exhibit 227(c), GGGG; 3/25/21 T. 106. SHA recommended that a Synchro simulation be performed to look at the potential impact. In that case, the reviewer noted that the static analysis presented was "impractical that such a large volume of vehicles could be accommodated." Exhibit 226(c).GGGG. They found it unlikely that vehicles desiring to turn, "[w]ould always be present in the traffic stream directly behind one another" and that it was incorrect to assume that a following vehicle could use the initial turning vehicle's gap in the assumed follow-up time. Dr. Kosary testified that SHA also noted that turning vehicles could have an impact on the through travel lanes, which was not accounted for in the analysis. 3/25/21 T. 106-107.

Dr. Kosary testified that the ITE Manual of Transportation Engineering Studies and the companion Traffic Engineering Handbook find that statistics that describe the "shape" of the gap distribution are useful in analyzing whether sufficient gaps are available. However, the gap

distribution in Primrose's gap study demonstrates that three quarters of all the observed gaps are unusable in the a.m. They are under the critical gap time of 7.1 seconds. 3/25/21 T. 108. She prepared a graphic to demonstrate the unusable gaps, (Exhibit 227(c).HHHH on the next page.) 3/25/21 T. 108. This also demonstrates how congested the a.m. peak hour is on this stretch of Needwood Road and why so many have testified to the difficulty entering the road during the morning rush hour. *Id.*, T. 109.

**Percent Distribution of Gaps by Gap Length in Seconds
Needwood Road at Carnegie Ave
7:45-8:45 AM**

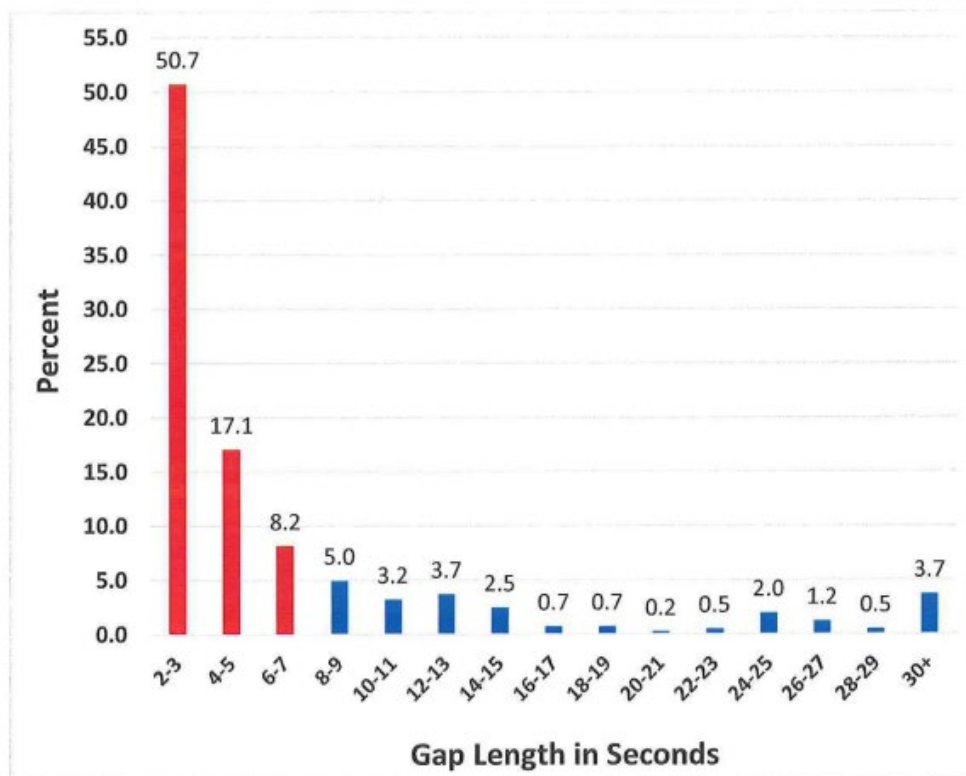


Exhibit 227(c).HHHH

Mr. Cook did not further explain the analysis in the gap study. He testified that, while there are different methods to do a gap study, “there is a common practice that we use when dealing with the County and State Highway Administration.” 4/2/21 T. 37. Primrose's study was “in

accordance with standard engineering practices and principles.” *Id.*, T. 37. The following exchange took place:

MR. COOK: Ms. Kosary did question the time limits of the gaps and headways [gaps] that we used to do our gap study. But that information was taken directly from the highway capacity manual, which is a tool that we have to use to compute capacity gaps and things of that nature.

COUNSEL: Okay. So you used an established reference document [in] terms of preparing the gap analysis.

MR. COOK: Yes, we did.

3. Design of Redland/Needwood Intersection

Mr. Cook agrees with the citizen's testimony that a right turn from northbound Redland Road onto Needwood Road is difficult to make. Because of the radius of the right turn, vehicles turning from Redland onto Needwood must cross over the existing stop bar for westbound traffic. Therefore, if a vehicle in the left-turn lane westbound on Needwood goes beyond the stop bar, it is difficult if not impossible for the vehicle seeking to turn right from Redland onto eastbound Needwood to make the turn. One of the “easy, quick fixes” would be to move that stop bar back a little distance so there's more space for cars to make the right turn. The other possibility would be to enlarge the radius of that corner so a car making a right turn from Redland does not need to swing into the westbound left turn lane on Needwood. Either solution is “within the control” of the Applicant with DOT's “assistance.” 4/9/21 T. 46-47. Mr. Cook testified that he has not asked the County about either option because the project hasn't been approved yet. *Id.*, T. 76. He confirmed he could suggest four options: (1) alter the signal timing, (2) move the stop bar further east on Needwood Road, (3) install speed bumps, and (4) enlarge the radius of the intersection. *Id.*, T. 77. Mr. Cook acknowledged that moving the stop bar further east on Needwood Road would push the queue further east on Needwood Road. 4/9/21 T. 13.

v. Storm Drain Construction

Dr. Kosary believes that construction of the storm drain will adversely impact the safety of the community because it will require trenching due to the depth of the new/replacement lines. 3/25/21 T. 19-22. She submitted a photograph of the type of trench required, which was used in construction at the Shady Grove Metro station (Exhibit 227(b).FFF):



She feels that the trench boxes have adverse environmental impacts because require a lot of trees to be removed to regrade slopes. The photographs show how major the storm drain infrastructure project would be. The residential neighborhood will have 15 foot trenches dug right up to people's boundary lines. 4/2/21 T. 130. The final leg of the proposed storm drain rebuild,

is located within the Crabbs Branch Stream Valley Park. They will have to remove a substantial number of trees to do construct the project. T. 20-22.

Trenches and associated equipment will require a trench box to cross Deer Point Court, Carnegie Avenue, Ottenbrook Terrace, and the driveway and front door sidewalk entrance of the home at 7401 Deer Point Court. She believes that it will block access to homeowners whose only access to their properties are from these roads. There are no sidewalks in these neighborhood and people who are blocked in are going to have to park on the street away from their homes and walk, possibly on someone else's lawn. The sidewalk along the boundary of 7401 Deer Point Court, between manholes A2 and A3 along Carnegie Avenue, is one of the locations that will be 15 feet in depth. The residents of Deer Point court will literally have to walk across their lawn to access their home during construction. Many of her neighbors also walk and bike through this area and will not be able to continue their activities safely given the depth of the required trenching as well as the movement of the excavating vehicles. This is a very large infrastructure projects usually constructed before homes and roads are built and is just one of the many examples, in her opinion, that the application is incompatible with what is supposed to be a low-density residential wedge. 4/2/21 T. 25-27.

Mr. Robert Pease, one of the Applicants expert engineers in storm drain systems, responded that the trenches will fall under OSHA regulations due to the depth of the trenches required. He explained that the process requires them to work with local utilities to map the existing utilities in the area, map them, verify the location with local utilities and dig test pits to ascertain the actual depth and location of existing utilities. 4/6/21 T. 190 After that, pipe is installed manhole to manhole to keep the neighborhood impact as minimal as possible. Trenches are not left uncovered. T. 190.

Before construction begins, the Applicant will have to implement erosion and sediment

controls and have them inspected by the County. Once they begin trenching, they will use trench boxes that are dragged along as the pipes are constructed. Excavation of the trenches produces a lot of soil, which will “somehow” be managed by the general contractor. He foresees loading the soil directly into dump trucks instead of the public right-of-way and storing it temporarily. Trenches will have steel plates over them. T. 193. At utility crossings, they will obtain data from a test pit and compare it against the mapping data and plans to verify the location of existing utilities. T. 193. In his opinion, he believes the whole project will take 3 – 4 months. T. 194. After completion of each segment, the ground will be stabilized with straw and seeded. T. 195. In Mr. Pease opinion, this project is a “bit complex” but doable. T. 203.

Mr. Pease acknowledged that there is erosion at the outfall that has caused a well-defined channel. They will have to design a ditch line through that. Based on the amount of storm drain flow and the slope of the outfall, they will improve the outfall by redressing the undercut, putting fabric and riprap down to take the energy out of the storm drain flow within the ditch to prevent further erosion there. T. 204. The storm drain project will eliminate the existing erosion. T. 204-205. Mr. Pease estimates that the entire project will cost between \$800,000 to \$1,000,000. T. 206.

vi. Likelihood of Alternative Development

Primrose apparently alleges that residential development of this property will not occur because the County will require improvement of Carnegie Avenue, which would be cost prohibitive. Mr. Lasko and Ms. Lasko-Crone appeared at the public hearing and testified of their difficulties their family experienced trying to subdivide the property. Their testimony is summarized in Part II.E of this Report.

Despite that testimony, Mr. Davis, who served as an expert in estimating the highest and best use of properties for the State Highway Administration, opined that the property could be developed with two to three residential lots, with total traffic would be far lower than 700 trips.

He views the volume of traffic an important operational issue characteristic of this use. 4/2/21 T. 185.

vii. Findings and Conclusion on Compatibility

Conclusion: Based on all testimony and evidence in this record, the Hearing Examiner finds that the proposed use is *not* compatible with the surrounding area in a manner consistent with the 2004 Upper Rock Creek Master Plan. She has already held that it doesn't comply with the goals and objectives of the Plan. She further finds that it is incompatible with the surrounding area. Her findings are arranged by topic below:

a. Size, Scale and Intensity

The Hearing Examiner finds it obvious that the size and scale of the building are out of character with the surrounding area. Staff acknowledged that the building footprint is larger than "almost everything else in the vicinity of the site." Exhibit 106. Mr. Reese's inventory of impervious area in the vicinity reinforces this.

That is not always cause to deny a conditional use in a residential zone. Buildings larger in scale than those in the surrounding community may be adequately screened by landscaping, topography, and other means. That is not the case here. Mr. Posey accurately points out that the building is located on a ridge at an elevation higher than the surrounding community. For this reason, the Hearing Examiner finds persuasive Mr. Davis' expert testimony that it will be the dominant feature when viewed from the east on Needwood Road and its length, size and mass is out of character with the surrounding area of primarily single-family detached homes.

The Hearing Examiner finds that the landscaping and the setbacks proposed do not adequately screen or buffer the massing of the building. A review of the rendered landscape plan with Mrs. Mitchell's house marked (Exhibit 148) supports her testimony that she will have an unobstructed view of the entire length of the building from numerous rooms inside her home. The

landscape plan contains no landscaping along a portion of Carnegie Avenue near her home. The Hearing Examiner finds the proffer of an opaque fence surrounding the play area obviously inadequate, as the building is 22 feet, 9 inches high, 168 feet long, and 103 feet wide. Nor does the Hearing Examiner find that the residential articulation and earth tone colors proposed on the building exterior adequately compensate for the building's mass when combined with unobstructed views.

The 12-foot landscaped buffer along the eastern side of the building does not provide adequate screening of the proposed use due to the proximity of the Kosary/Posey residence to the property line and the intensity of the use. The Hearing Examiner finds that Dr. Kosary and Mr. Posey will have views of the parking area, like the church parking lot on the east side of their property. Both testified that they will be able to see views of cars in the parking lot over the 6-foot fence due to its higher elevation and the fact that the first floor is three feet above the ground. The Hearing Examiner finds that the initial planting will not screen the glare from vehicles in the sun, like what they experience from the church's parking lot. The Applicant confirms that that they will be able to view the parking lot lights as well. While filtered views of the commercial aspects of a proposed conditional use may be in some cases acceptable, the impact here is made worse by the proximity of the drive aisle and parking to the Kosary/Posey property line, to their rear yard, and their kitchen window.

The Hearing Examiner recognizes that proposed lighting meets the technical illumination standards in the Zoning Ordinance requirements.²⁹ Both Dr. Kosary and Mrs. Mitchell testified, however, that the area is very dark at night. Mrs. Mitchell testified that she could see the stars.

²⁹ Section 59.6.4.4. of the Zoning Ordinance mandates that illumination levels for conditional uses be no more than 0.1 footcandles at the property line of an abutting property. The photometric study shows that illumination exceeds the 0.1 footcandles at the property line near Mrs. Mitchell's home. However, because of Carnegie Avenue, the Mitchell house technically confronts, rather than abuts, the property.

The Hearing Examiner finds that the lack of screening, proximity of neighboring properties, and dominant elevation makes the commercial nature of the lighting incompatible with the area, even if the illumination technically meets the Zoning Ordinance minimum requirements at the ground.

The Model Lighting Ordinance isn't incorporated into the Zoning Ordinance as is the limit on footcandles at the property line. Nevertheless, Dr. Kosary is correct that it has been used in conditional use cases, such as CU 17-15, to ensure that exterior lighting is compatible with the adjacent properties. In this case, of particular concern is the impact of the Eaton Streetworks utility lights that line Carnegie Avenue. A review of the landscape plan reveals that there is little to no vegetative screening of these lights from the opposite side of Carnegie Avenue, where Ms. Tapscott Smith and Mrs. Mitchell live. The Applicant provided no testimony to refute Dr. Kosary's testimony, based on the Applicant's lighting plan, that these lights will create "sky glow" or uplight. On rebuttal, Mr. Jolley did not address the impact of the Eaton Streetwork utility lights on the Tapscott and Mitchell properties. While these fixtures may meet the required footcandles at the property line of the subject property, the glow from these lights is unscreened. This, combined with the elevation, make these a prominent feature in the surrounding area. The Hearing Examiner also notes that the footcandles of the proposed lighting on Carnegie Avenue exceed 0.1 beyond the western property line and do not decrease to 0.0 until slightly west of the middle of Carnegie Avenue approaching the Mitchell property.

The Hearing Examiner finds credible Mr. Jolley's unrefuted testimony that "direct" glare from the pole light closest to Kosary/Posey property will extend 55 feet from the pole, which would be less than $\frac{1}{2}$ the distance of the pole from the Kosary/Posey kitchen. The question remains whether the diffused light and view of the parking lot lights is too commercial to be compatible with the surrounding area. The trouble with this again derives from the proximity of the parking lot to the Kosary/Posey property and residence. Mr. Jolley testified that, because the Kosary/Posey

property is at a higher elevation than the parking lot, they would be able to view the lights. The record reveals that there is nothing in the community that has this scale of lighting, except the church on the other side of the Kosary property. Dr. Kosary testified that there more lights in the parking area than streetlights on Needwood Road. Were there more distance and additional landscaping between the Kosary/Posey property (whose back patio water feature is 23 feet away), it is possible that the parking could be compatibly situated. But the proximity and visibility of the parking lots to the Kosary property in a dark area leads the Hearing Examiner to find that the view of the lights is incompatible with surrounding properties. The Mitchells will also have direct views of the parking lot lights, with even less screening. While there is screening around the parking lot, the Mitchell's have a direct view from their house to the building and parking area.

Mr. Jolley suggested the possibility of lowering the parking lot pole light to reduce glare, but also testified that this could increase the amount of light that would reflect from the building. There is no evidence before the Hearing Examiner that lower lights would reduce the impact on the Kosary property. The Hearing Examiner is not persuaded by the Applicant's proffer to turn all lighting off at 7:00 p.m. The possibility that cleaning staff will have to exit the site using only their vehicle headlights for illumination is unsafe. Insertion of commercial parking lot lighting with such little screening and so proximate to the neighbors is incompatible with the adjacent properties and the surrounding area.

b. Noise

Both sides agreed that there will be somewhere between 750 to 850 vehicle trips per day entering and exiting the facility. The Applicant provided no expert evidence on the impact of noise from vehicles, trash trucks, and children on the adjacent properties and, in fact, never addressed noise from the parking lot. Because Dr. Kosary and Mr. Posey have actual experience with a parking lot on the eastern side of their house, the Hearing Examiner finds their testimony and

evidence persuasive that noise from unlocking and locking cars, slamming of car doors, and conversations in the parking area, combined with the intensity of this use (approximately 800 vehicle trips per day five days a week), will adversely impact enjoyment of their own property. Primrose did not adduce any expert testimony or evidence to refute the testimony of Dr. Kosary and Mr. Posey and has failed to meet its burden to demonstrate that noise from the parking area and drive aisle will not adversely impact either the Kosary/Posey property.

As to noise from the play area, the Hearing Examiner finds that Primrose has failed to meet its burden of proof that noise will be adequately controlled. Nothing in this record provides a clue on the noise attenuation qualities of the proposed landscaping and opaque fence around the play area. The play area adjacent to Mrs. Mitchell's house will only have the opaque fence whose materials are unknown. While Mr. Mandava testified that noise in the play area will be adequately controlled by teachers, he has provided no quantifiable information on what noise levels will be if the "screaming" of children is controlled. Further, the Hearing Examiner finds his testimony relating to operations vague, contradictory, and lacking knowledge. He repeatedly had to defer to Primrose, who wasn't there to answer questions or be cross-examined, about the school's operations. He could not answer basic questions about the schedule, such as when and how many students would be in the play area, staffing shifts, or even the number of employees proposed in the applications. While she understands that he has never operated a daycare before, his lack of knowledge about running a daycare for 195 students is perplexing given the length of time this application has been pending. The Hearing Examiner does not need to determine whether his testimony reflects his true intentions regarding the property, but she does not find it credible.

The Hearing Examiner accepts Mr. Alt's unrefuted expert testimony that the condensers on the exterior of the building will not generate unacceptable levels of noise. Mrs. Mitchell

expressed concern about that but did not provide specifics. Mr. Alt's expert testimony adequately addressed those concerns.

c. Traffic

1. Queues

The Hearing Examiner finds that the Applicant has not met its burden of proof to demonstrate that queues generated by the proposed facility will not have an adverse impact on the neighborhood. The testimony and corrected worksheet demonstrate that the 95th percentile of the queue exceeds the available storage lane in the dedicated left turn lane. Mr. Cook stated that queuing study used 430 feet as the length of the storage lane. Dr. Kosary measured 425 feet using the Google measurement tool, which she believes is accurate. If the left storage lane is 425 feet long, the 95th percentile of the queue exceeds the space available for storage by 16 feet; if the dedicated left turn storage lane is 430 feet, it is 11 feet short of the 95th percentile for the queue. Mr. Cook testified that the software uses 25 feet for the length of a vehicle.

The Hearing Examiner disagrees with the Applicant's traffic engineer that the queue storage ratio means that the queue will extend past the available storage in the dedicated left turn lane only 3% of the time, as he stated at one point. 4/2/21 T. 81. A review of the corrected Traffic Study Worksheet supports both Dr. Kosary's and Mr. Cook's testimony that the queue storage ratio is simply the length of the 95th percentile back of the queue divided by the length of the storage lane, which is unrelated to the frequency of a backup.³⁰ See, Exhibit 233. This is consistent with Dr. Kosary's testimony that a queue storage ratio over 1.0 indicates only that the software is not able to accurately predict the queues because it does not account for left turning traffic that is forced from the dedicated left turn lane into the shared left/through/right turn lane.

³⁰ The corrected worksheet lists the 95th percentile back of queue as 441.9 feet. According to Mr. Cook, the storage available in the full-width left turn lane is 430 feet. Dividing 441.9 by 430 equals 1.0278, consistent with Mr. Cook's testimony that the ratio is "about" 1.0279. 4/9/21 T. 44.

Based on this record, the Hearing Examiner finds that the frequency of the backup is more closely related to percentile of the queue. Mr. Cook testified that the 95th percentile of the queue represents the length of the queue 95% of the time, although 5% of the time the queue may exceed that length. 4/2/21 T. 44. If the same principle is applied to the corrected worksheet, this would mean that 95% of the time the back of queue in the dedicated left turn lane will exceed the available storage. The fact that the software shows the ratio highlighted in red is consistent with Dr. Kosary's testimony that the queue storage ratio serves only to point out that the assumptions underlying the equations in the software cannot accurately predict the length of the queue because it does not account for the spillback of traffic into the shared lane.

According to Mr. Cook, the impact of this is minimal because the shortage represents only one car length. He points out that the software does not reflect the additional storage for left hand turns in the shared westbound lane, so more storage may be available than reflected by the McTrans software. The Hearing Examiner does not find this persuasive because the corrected worksheet demonstrates that 94% of the movements on westbound Needwood Road during the a.m. peak hour are left turns (including both the shared and dedicated left turn lanes), suggesting that a high percentage of the storage space in the shared lane is already utilized by traffic turning left.³¹ Exhibit 233, p. 3.

Mr. Cook also suggests that the required storage is available if cars wait in the taper, although he acknowledges this is illegal. The Hearing Examiner hesitates to approve a conditional use utilizing an option that violates the rules of the road. The possibility of restriping the taper to provide more storage space is more comforting but requires the approval from MCDOT. There is

³¹ The corrected worksheet for the a.m. peak hour shows that the sum of all movements in the westbound Needwood approach to the Redland Road intersection total 571. Of the 571 total movements, 536 or 94%, are left turns. $536/571 = 0.93870$. Exhibit 233.

no evidence in the record analyzing how probable MCDOT's approval is, and the Hearing Examiner finds that this solution is speculative at this point.

Of additional concern, however, is that the evidence and testimony indicate that there is little margin for error in determining whether backups on Needwood Road will block Carnegie Avenue. According to Dr. Kosary, using the Google measurement tool, the closest point of the Carnegie Road intersection is 475 feet from the Redland intersection. This is exactly the same length as the 95th percentile of the back of the queue on westbound Needwood Road in the a.m. peak hour, even assuming the worksheet accurately reflects the queues. The photographs submitted by Mr. Prahke and Mr. Caponiti support a finding that the back-ups frequently extend beyond that point.

Using Mr. Cook's estimate of the distance between Carnegie Avenue and Redland Road (*i.e.*, 486 feet), the back of queue estimated in the corrected worksheet (*i.e.*, 475 feet) leaves only an 11-foot clearance—exactly the shortage of available storage space in the dedicated left turn lane, according to Mr. Cook. If, as Dr. Kosary measured, the dedicated left turn storage lane is only 425 feet long, the deficit in the dedicated left turn lane extends to 16 feet, more than the shortage of storage in the dedicated left turn lane.

This lack of “cushion” in the distance to Carnegie Avenue and the back of the queue on westbound Needwood makes Dr. Kosary's testimony that the software cannot accurately predict the exact length of the queue more problematic. She provided a detailed rationale as to why the software couldn't predict the queue—it is not set up to account for situations when there is no storage in the adjacent westbound lane. While Mr. Cook places it at one car, he also testified that the McTrans software assigns 25 feet rather than 11 feet for the length of each car. Dr. Kosary testified that a different software could make this calculation; Mr. Cook testified that the alternative software is typically not used in this situation. The Hearing Examiner finds Dr. Kosary's

testimony, evidenced by the red shown in the corrected worksheet and photos submitted by individuals, persuasive that the software used does not generate the accurately predict the back of the queue.

The deficit of storage in the left turn lane westbound on Needwood also calls into question the Applicant's ability to improve the Redland/Needwood intersection by the "simplest" method, which is to push the stop bar in the dedicated left turn lane further east on Needwood Road. Mr. Cook acknowledged that the shortage of storage in the dedicated left turn lane would increase if the stop bar was moved further east. Mr. Cook's preliminary estimate (his firm had not done formal studies) was that the stop bar in the dedicated left turn lane for westbound Needwood Road would have to be moved 11 feet further east to make it easier for vehicles making right turns from northbound Redland to turn right. By the Hearing Examiner's calculation, that 11 feet added to the existing 11-foot deficit of storage would mean that storage in the left turn lane would have a deficit of 22 feet. The remaining methods of improving the intersection, according to the applicant, were to adjust the radius of the turn or adjust the signal timing of the intersection. Neither are under the control of Primrose nor does the record reveal whether it's possible to adjust the turn radius due to existing utilities. The Hearing Examiner finds these solutions speculative.

While Mr. Cook correctly points out that the overall Level of Service for the Redland/Needwood intersection meets the LATR Guidelines, that is that is not the end of analysis for conditional uses. The review of conditional uses includes not just compliance with the roadway congestion standards contained in the LATR, it also looks at whether traffic generated by the proposed use is compatible with the surrounding area. Here, the LOS A of the Redland approaches cause the overall intersection to operate at acceptable levels, even though the Needwood approaches have failing levels of delay. The Hearing Examiner finds that the Applicant has not met its burden of proof that the additional traffic from the daycare will not adversely impact

existing conditions. *Gerczak v. Todd*, 233 Md. 25, 26 (1963)(Applicant failed to show “ready access” to proposed development).

2. Gaps

Dr. Kosary provided a detailed analysis of why she believed the Applicant's gap study did not accurately capture the true number of gaps available to those who wish to make a left turn from the facility. She also posited that the gaps were counted at the intersection of Carnegie Avenue and Needwood Road, 180 feet away from the subject property. Her testimony was based on the Institute of Traffic Engineers (ITE) Manual, however, the principles she documented with excerpts from the manual are reasonable. Finally, she testified that, in her opinion, the gaps listed added together westbound and eastbound gaps rather than listing only the gaps where traffic was cleared in both directions. The latter is necessary for traffic to make the most difficult maneuver--left hand turn out of the site onto westbound Needwood Road.

The Hearing Examiner finds that Mr. Cook's response to Dr. Kosary's detailed analysis was somewhat vague and reveals only that the duration of the acceptable gaps used to prepare the study were from the Highway Capacity Manual, which he states is required by the County and State Highway Administration. His response does not address Dr. Kosary's testimony that the gap study totaled all gaps in both directions, rather than analyzing the frequency of simultaneous gaps in both lanes needed for vehicles to make a left turn out of the site. Nor does it address her testimony that the percentile of acceptable gaps is more reflective of existing conditions than simply the number of gaps. Mr. Cook did not challenge Dr. Kosary's assumption that the gaps were taken from the video cameras located where the traffic counts were taken and not at the actual intersection. The availability of gaps at the proposed site driveway would be impacted by the extent of the queue.

After reviewing the evidence on the length of the westbound queues on Needwood Road and testimony from the community and Dr. Kosary, the Hearing Examiner is skeptical that Primrose's gap study accurately projects the number of gaps available, as was the SHA. Given the problems with determining the extent of the 95th percentile of the queue, the number of available gaps that would be available at the site driveway are uncertain as well. The Hearing Examiner finds that the Applicant hasn't met its burden of proof that sufficient gaps will be available to accommodate the proposed use. She found the testimony of those describing the difficulties exiting those driveways credible and not contrived. There is little evidence in the record to demonstrate whether the available gaps will or will not be fewer with the added traffic from the proposed facility.

The same uncertainties regarding queuing and gaps do not persuade the Hearing Examiner that the traffic from the proposed daycare will not adversely impact those whose driveways exit directly onto Needwood Road. The Applicant's response to this the lack of accidents on that stretch of Needwood Road. This does not address the impact on their ability to exit and enter their properties. For this reason, the Hearing Examiner finds that the Applicant has failed to prove that traffic will not have an adverse impact on the surrounding area.

3. Conflicts with Pedestrians and Cyclists

The Hearing Examiner finds the evidence relating to conflicts with pedestrians and cyclists presented by the community too speculative to be persuasive. To deny a conditional use, it is not sufficient to present evidence that conflicts are a possibility—it must be shown that adverse consequences are a probability. *Miller v. Kiwanis Club of Loch Raven, Inc.*, 29 Md. App. 285, 296 (1975). The testimony provided nothing concrete that these conflicts will occur. Mr. Cook testified that Primrose proposes to keep the striping far enough back from the road so vehicles or

bikes can go along the trail and pedestrians without being encountered by passenger cars exiting the site onto Needwood. *Id.*, T. 245.

d. Storm Drain Construction

Dr. Kosary argued that construction of the storm drain project was incompatible with the surrounding community because it requires trenching and will cause road blockages and excavation adjacent to individual's properties. Mr. Pease testified, however, that the entire project will take 2-3 months to complete and will be subject to OSHA regulations.

The Hearing Examiner is not aware of any conditional use case holding that temporal inconvenience due to construction of public infrastructure is grounds for denial of a conditional use and the opposition has not referred her to any. Mr. Pease testified that the construction would be subject to OSHA regulations and carefully coordinated with local utilities. The Hearing Examiner finds the evidence of temporary impact to the community too unsupported to be the basis of denial of this conditional use.

e. Likelihood of Residential Use

At least initially, the Applicant (apparently) argued that no residential use of the property is possible because the County would require the developer to improve the full length of Carnegie Avenue. Mr. Lasko and Ms. Lasko-Crone testified of their efforts to do so in the past.

Even if residential development were precluded, which the Hearing Examiner does not find, that would not justify approval of an incompatible conditional use that will have an undue adverse impact on the surrounding area. In the grand scheme of conditional uses, it may be that there is one that is less intense than the one proposed here would be approvable for the subject property.

Mr. Davis, who was Chief of the Development Review Section of the Planning Department and has been an expert for the State Highway Administration in determining the highest and best

use of properties, testified that the other possible redevelopment of the property would be about two to three residences, with total traffic would be far lower than 700 trips. 4/2/21 T. 185. Mr. Intriago did not believe that Carnegie will ever be developed to County standards because of the sight distance problems at the intersection of Carnegie Avenue and Needwood Road. 3/5/20 T. 218. The Applicant's real estate appraiser compared the conditional use favorably to three homes on the property because homes could have a driveway from Needwood along the Kosary/Posey property line. Whether sometime of alternative development could occur on the property is not a criteria governing approval of this conditional use.

Finally, in closing, the Applicant warns that a much more intensive permitted use could be placed on the site, such as another church, that the neighbors could do nothing about. While that may occur, the standards for approval of conditional uses

5. Overconcentration of Conditional Uses (Section 59.7.3.1.E.1.e)

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;

Noting that there was only one active conditional use (the Taiwanese Cultural Center) in the surrounding area, Staff concluded (Exhibit 106, p. 27):

Although the proposed use introduces a new institutional use in the area, given its location along a Primary Residential street with two lanes and 70-foot right-of-way with a proposed full right-of-way dedication, it is not likely that the approval of the subject Conditional Use would increase the intensity and scope of the approved special exceptions/Conditional Uses in the area enough to affect the area adversely or alter its residential nature.

Staff also pointed out that a much smaller daycare existed in the area but stated that this would be only daycare center "exclusively providing childcare services for the wider portion of the community." *Id.*, p. 28.

On behalf of the opposition, Mr. Davis testified that this provision did not “come into play” because there are only two conditional uses in the surrounding area—the Taiwanese Cultural Center and the smaller day care. 4/6/21 T. 49.

Conclusion: From this record, the Hearing Examiner finds that there will not be an overconcentration of conditional uses in the surrounding area, although she fails to see why the size of the right-of-way has a significant part to play in the analysis, as that is the standard right-of-way for primary residential roads.

6. Adequate Public Facilities (Section 59.7.3.1.E.1.f)

f. 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. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or

ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and

Staff advises that the conditional use will not require approval of a preliminary plan. Exhibit 106, p. 28. There, the Hearing Examiner makes the determination whether public facilities will be adequate.

i. Trip Generation Rates

As already described, Mr. Cook testified that traffic from the proposed development will meet the Planning Board's Local Area Transportation Review (LATR) Guidelines, which require certain developments, such as this one, in orange policy areas to have an overall intersection performance of LOS C.

Mr. Cook estimated there will probably be approximately 850 cars going in and/or coming out of the site during the entire day. The ITE trip generation rates account for all vehicles entering and exiting the site, including deliveries. The 850-vehicle total includes them. Of the 800-850 cars entering the site, approximately 27% is pass-by during the morning peak hour and 12 percent in the evening peak hour. 3/9/20 T. 256-260

Aside from the comments on queueing and gaps, Dr. Kosary also takes aim at the trip generation rates used in the Traffic Study. She believes they should be higher. The Applicant's Traffic Study concluded that there will be a total of 252 vehicle trips in the a.m. and p.m. peak hours: 129 vehicle trips during the a.m. peak hour and 123 vehicle trips in the p.m. peak hour, just for two hours during the day. According to Dr. Kosary, the estimated trips during the morning peak hour should be 143 for the a.m. peak hour and 145 for the p.m. peak hour, for a total of 288 vehicle movements in or out two hours during both peak periods. 3/25/21 T. 80-83.

Dr. Kosary explained that the ITE Manual uses two types of equations to determine the estimated trips: There is a linear regression equation or "fitted curve" and the "average rate." Both the ITE and the LATR provide criteria for selecting which method to use. The ITE Manual uses the R^2 (pronounced "R-squared") formula to measure how well a linear regression equation "fits" or accurately reflects the data. A result of "1.00" means that the data perfectly fits the formula used to measure the data. The ITE Manual states that if there are over 20 data points used to estimate the number of trips generated by the proposed use, the linear regression equation (or

“fitted curve) method should be used regardless of the R^2 . 3/25/21 T. 81. The LATR Guidelines, however, instruct that the regression equations should *not* be used if the R^2 is under 0.75. The LATR Guidelines state, “[t]rips rates should be calculated using the best fit line formula (if available), unless the R^2 factor is lower than 75. Exhibit 227(b).UUU).

To determine which of the two formulas should be used in this case, Dr. Kosary used the ITE TripGen web-based app for the ITE Trip Generation Manual. Her results show that the R^2 for both the morning and evening peak hours are below 0.75. Because of this, the average rate formula should have been used rather than the linear regression equation. After applying the adjustment for the Derwood policy area, the average rate method estimates 143 vehicle trips for the p.m. peak hour and 145 vehicle trips for the total p.m. peak hour, a total of 288 vehicle trips. T. 82-83. She presented her results in graphic form (Exhibit 227(b).VVV, below):

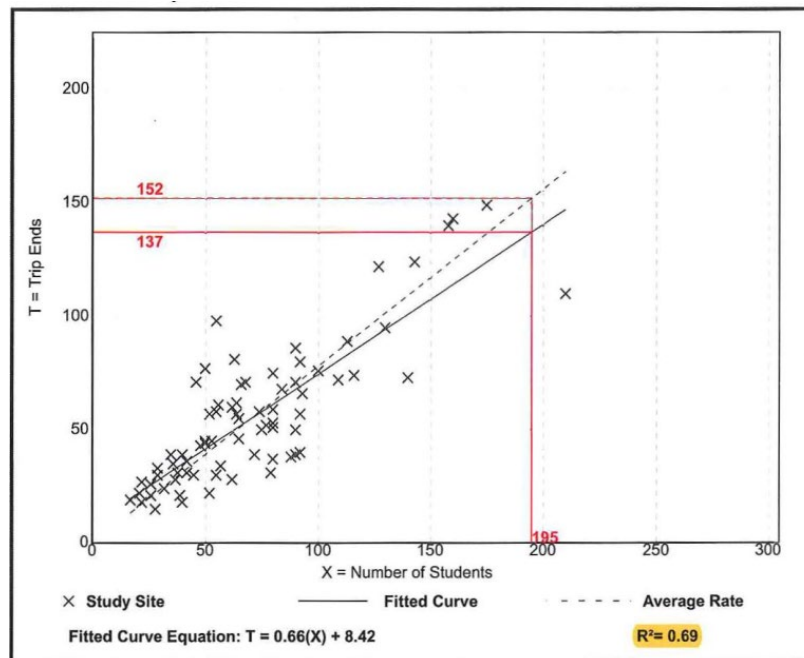


Exhibit 227(b).VVV

According to Dr. Kosary, the diagonal lines represent the “fit” line for the data. The average rate is the dashed line and should have been used rather than the linear regression equation. The solid line reflects the linear regression equation. 3/25/21 T. 85.

Mr. Cook testified that there are guidelines for determining which of the two methods to use, but they must be examined because they are not always applicable. In this case, the requirement tells you that must use a certain number of study points to establish the equation. If you meet that criteria and there is an equation available, most agencies request that they use the equation as opposed to the average rate. The R^2 factor measures the reliability of the data. That factor should be above .70 or .75. Montgomery County often ignores this factor if you have the required number of points in your study. If so, they ask you to use the equation. When they prepare a traffic study, they must first enter into a scoping agreement with Staff of the Planning Department. Staff instructed them to use the fitted curve equation as the basis for estimating trip generation. 4/2/21 T. 41-42.

In his experience, most government agencies including Montgomery County ask them to use the linear equation. His firm does not compute that; it is part of the printouts and the backup documentation contained in the ITE trip generation report. They have used the equation in the most of their cases. In this case, the LATR required an analysis using the Highway Capacity manual. 4/2/21 T. 43.

Based on his experience, the Synchro analysis is used primarily to look at roadway networks rather than single intersections. For instance, Maryland Rt. 355 has a series of traffic signals that are closely spaced together. Because the intersections are so closely spaced together, you would understand the traffic flow and capacity that occurs. Synchro is preferable in that situation because it does a better job of picking up queuing, blockages, overflow and things of that nature. It's usually used in more tightly spaced road network as opposed to a road like Needwood, which has a major road on each end, but a long distance between the two. Synchro looks at whether there are any major traffic generators between intersections that may impact traffic as well. In his

opinion, there are no major traffic generators between Needwood and Muncaster Mill Roads that would justify using Synchro. 4/9/21 T. 30-33.

ii. Other Public Facilities

Mr. Intriago initially testified that public water and sewer is available to the property because the property is in water category W-1 and S-1. There is a 5-foot wide sanitary sewer extension to an existing gravity manhole located on the northeast side of the property. There is an existing 12-inch water main on the north side of Needwood Road that they will be able to connect into to access public water. These have not formally been approved but in his professional opinion, meet all requirements. 3/6/20 T. 70-71.

They are providing water for fire-fighting that all meets all standards. There is an existing fire hydrant going out on the west side of Needwood Road. They meet the 250-foot distance to the nearest hydrant. They have submitted a fire access plan to the Department of Permitting Services, who had not yet approved it. 3/6/20 T. 71-74.

Dr. Kosary does not agree that the Applicant has demonstrated that extension of the water and sewer lines are feasible. She testified that she and her husband had a sewer extension installed when they built their home that ends at their property. Another sewer extension extends from Redland Road, but does not connect to the one in front of her property and does not serve the subject property. She stated that the property is not in sewer category 1, but in sewer category 3. Any sewer extension may need a private easement through 7420 Needwood Road to connect to the nearest existing main on the Posey/Kosary property. Dr. Kosary is not sure whether the sewer main can be extended to the subject property, in part because the water and sewer mains were not designed together. 3/25/21 T. 139.

Dr. Kosary submitted documentation from the WSSC that three of the four non-abutting properties, 7501, 7425, and 7430 Needwood, are categorized by Montgomery County as septic tier

two and sewer category three. Although 7420 Needwood, which in front of the Kosary/Posey property, is categorized as septic tier one, sewer category 1, they are not considered abutting the sewer main because the main ends within the Kosary/Posey property line but does not extend to 7420, the property north of hers fronting on Needwood Road. That property is on septic. *Id.*, T. 133-136.

Dr. Kosary doesn't know if the sewer can be connected due to conflicts with the water main installed in 1967. Sewer did not exist until almost 30 years after the water main was installed. She has no idea whether the sewer main and her water lateral are at similar depths since the water and sewer infrastructure to this portion of Needwood Road were not designed together. Because of that, she believes it's an open question whether the sewer main wasn't built further west because it would have prevented the connection to the water main. A WSSC preliminary feasibility review would provide this answer, but the Applicant apparently has not asked for one. 3/25/20 T. 138-139.

The existing sewer main is only 8" in diameter, the smallest that WSSC will install, because based on the low-density, RE-1 Zoning. The proposed development has an exceptionally large number of toilets and sinks, far more than any home in the area and far more than the church. A facility with 195 children and 32 staff members is going to see a much greater daily use than any home or church in the area. Because the property does not require approval of a preliminary plan, the Applicant is not required to submit an approved hydraulic planning analysis approved by WSSC. She is surprised that Planning Staff did not require any documentation from the Applicant or the WSSC that the property could be served by sewer. 3/25/21 T. 140-141.

Dr. Kosary testified that the only evidence suggesting that a sewer main can be installed is Mr. Intriago's testimony that he had informal discussions with several unnamed employees at WSSC, but no formal submission to WSSC was made. He introduced no documentation regarding

his discussions with WSSC and there's no evidence that WSSC has looked at any of Mr. Intriago's plans. The existing conditions plan (Exhibits 199(b), 227PPPP.1) labels a sewer manhole near the northeast corner as "inaccessible". This has been deleted from the grading and utility plan but is still visible in the metadata (Exhibits 199(f), 227.PPPP.2).

The utilities plan also shows that there is a 4-inch lateral sewer connection in the middle of the road. According to her, WSSC does not permit sewer laterals in the middle of the street because it is responsible for the lateral connection from the main to the point it hits the property line, so they want to minimize the length of this portion of any service connection. Under Section 1102.1.1.a of the WSSC's Development Services Code (Exhibit 227(c).NNNN), the subject property would be required to do a sewer main extension from its current terminal point within the Kosary/Posey property to at least their property line because two non-abutting properties are left to be served: 7420, 7430 and 7425, which is on the north side of Needwood Road. 3/25/21 T. 146-147.

She stated that 7420 Needwood could connect with the existing main within her property because the distance to the common property line is well under 25 feet. It indicates that the subject property might possibly connect to the existing sewer main at its current location; however, they would need a private easement from 7420 Needwood. She is not sure that WSSC will extend the sewer west to the property because they may need a private easement from 7420. 3/25/21 T. 148-149.

Dr. Kosary also testified that portions of the sewer shown on the existing plans will conflict with the proposed storm drains because they are located at the same or near elevations above sea level beneath ground surface. 3/25/21 T. 151. She named several points on the proposed storm drain plan where the storm drain crossed other utilities at close to the same depths and believes that existing service could be interrupted. 3/25/21 T. 151-162.

On rebuttal, Mr. Robert Pease, Primrose's expert in storm drain and sewer engineering, opined that sewer would be available to the property. According to him, the property is within the S-3 category, which is assigned by WSSC. WSSC assigns that category to areas where new systems are given immediate priority for both water and sewer. 4/6/21 T. 178. In his opinion, based on the category, the system has capacity to accommodate the proposed use. He "would imagine" that the existing system has sufficient capacity, or it would not be in the S-3 category. *Id.*, T. 180.

When a manhole is marked "inaccessible," he testified, it does not mean the manhole is permanently inaccessible; it means only that it was not accessible to the survey crew at the date of the survey. This line would be extended to the subject property, which, in his opinion, will not exceed the capacity of that line. After approval of the conditional use, they will submit a conceptual plan to WSSC, who will review it and estimate the flow from the facility. Ultimately, WSSC will assess whether their system has the capacity and whether they will permit the sewer extension to be constructed. He is not aware of any transmission problems in the pipe. 4/6/21 T. 181-182.

Conclusion: The Hearing Examiner finds that the traffic generated by the proposed use meets the LATR Guidelines, as reflected in the corrected worksheet from the Traffic Study. The Hearing Examiner doesn't address Dr. Kosary's allegation that the Applicant should have used a higher trip generation rate in the Traffic Study because nothing in the record documents the impact of the higher trip generation rates on the overall levels of service.³² If the trip generation rates should have been higher, there is nothing definitive as to how this would affect the result of the Traffic Study, except to assume that the back of queue would be longer and the delays on at least the

³² The higher trip generation rate may impact the queues on Needwood Road, but there is nothing specifically correlating this in the record.

Needwood approaches would be greater. Because the Needwood approaches to the Redland intersection are already failing but are offset by the low delay on the Redland Road approaches, the intersection overall performs acceptably. Without more evidence of the impact, the Hearing Examiner declines to rule on this issue.³³

Based on the detailed expert testimony of Mr. Pease, the Hearing Examiner also finds that sewer will be adequate to serve the proposed use. The County's 2020-2024 Growth and Infrastructure Policy (p. 22) states:

In accordance with the Adequate Public Facilities Ordinance, applications *must* be considered adequately served by water and sewerage if the subdivision is located in an area in which water and sewer service is presently available, is under construction, is designated by the County Council for extension of service within the first two years of a current approved Comprehensive Water Supply and Sewerage Systems Plan (i.e., categories 1-3)...(Emphasis supplied).

There is nothing to refute Mr. Pease's testimony that the notation that the sewer manhole is inaccessible is not a permanent barrier to installation of sewer. Without more evidence that the sewer system cannot be installed, the Hearing Examiner applies the Growth and Infrastructure Policy.

Finally, the Hearing Examiner finds, again based on Mr. Pease's testimony, that the storm drain can be constructed without disconnecting utilities to the community. As Mr. Pease phrased it, his testimony demonstrates that the project is complex but "doable."

7. Non-Inherent Adverse Impact (Section 59.7.3.1.E.1.g)

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

³³ Dr. Kosary may have been looking at the rates to estimate the total volume of traffic, and therefore, the intensity of the use. As already stated, she found that the total traffic was 750. Mr. Cook estimated 800 – 850. The Hearing Examiner has already found that the use was too intense only 12 feet from the property line.

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;*
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. *Inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §59.1.4.2. *Non-inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* As specified in §59.7.3.1.E.1.g., quoted above, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects, are a sufficient basis to deny a conditional use. Inherent adverse effects, alone, are not a sufficient basis for denial of a conditional use.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a child daycare center for more than 30 children. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics identified *or* adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects then must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Planning Staff determined that the inherent, generic physical and operational

characteristics associated with a child day care center are (1) buildings and related outdoor child care equipment (2) parking areas, (3) lighting, (4) noise generated by children (5) drop-off and pick-up areas, (6) outdoor play areas (7) long hours of operation (8) employees of the child care facility (9) and vehicular trips to and from the site. Exhibit 106, p. 30

Staff concluded that the location of the driveway so near the eastern property line was a non-inherent adverse characteristic of the conditional use plan. Staff found, however, that this did not justify denial of the application, calling the entrance the only “viable” access point on the property (*Id.*):

The scale of the proposed daycare center building, the proposed access point, the internal vehicular circulation system and the onsite parking area are operational characteristics typically associated with a landscape contractor operation.³⁴ Staff, however, considers the fact that the location of proposed driveway is restricted by sight distance and is located at the only viable access point on the property's frontage on Needwood Road to be a noninherent characteristic. However, Staff believes that this non-inherent characteristic does not rise to a level that warrants a denial. As noted, the Applicant is requesting a waiver from the side yard setback requirement for parking facilities to allow the proposed driveway.

With the recommended conditions of approval, the inherent and non-inherent impacts associated with the proposed uses do not rise to a level sufficient to warrant a denial of the Application.

At the public hearing, Mr. Wolford did not explicitly opine whether the waiver of the parking setback was a non-inherent characteristic of the proposed conditional use plan. The opposition's expert land planner, Mr. Davis, was employed as the Chief of Development Division at the Planning Department when he participated in the Zoning Text Amendment that established the inherent/non-inherent effects standard. 4/2/21 T. 151. He opined that inherent operational characteristics include noise that's generated from on-site activities of the center, hours of operation, number of employees, and vehicular traffic entering and exiting the property, drop-off

³⁴ As noted by Mr. Davis, the Staff Report incorrectly referred to the use proposed as a “landscape contractor.” 4/2/21 T. 162.

and pick-up of children and lighting. When these are inherent and typical for the use, these should not have adverse effects on the community. 4/2/21 T. 144-146. Non-inherent adverse effects are those things that go beyond what would be considered normal for the conditional use and could result in an adverse effect on the community. T. 146. If the non-inherent characteristics adversely affect the community, the conditional use should be denied. 4/2/21 T. 146-150.

In Mr. Davis' opinion, the staff report does not fully analyze the issue of inherent and non-inherent uses, which is problematic because that is the key to reviewing a conditional use plan. In his opinion, there is no justification for the parking waiver because there are other locations along the Needwood Road frontage that could meet sight distance requirements. On the conditional use plan, the driveway setback area is too small to provide an appropriate area of transition between this conditional use and the adjacent residential properties. 4/2/21 T. 155. In Mr. Davis's opinion, the need for a 22-foot waiver is a non-inherent characteristic of the proposed conditional use site plan. He compared it to a Maryland Court of Appeals case, *Montgomery County v. Butler*,³⁵ that upheld the inherent/non-inherent standard in the Montgomery County Zoning Ordinance. In *Butler*, the Board of Appeals found that the location of a landscape contractor's driveway located 22 feet from a dwelling was a non-inherent adverse characteristic that warranted denial of a special exception due to noise from trucks. This case similarly has a driveway very close to the property line. 4/2/21 T. 129.

i. Impact on Economic Value of Kosary Property

Mr. Posey testified that construction of the church on the eastern side of his property lowered the assessed value of his property. His property and the church property share a common property line for approximately 585 feet. The church was built in 2010. According to the building plans, the church was 11,500 square feet with an 82-car parking lot. Parking was later expanded

³⁵ *Montgomery Cty. v. Butler*, 417 Md. 271, (2010)

to 111 cars. Almost the entire property is now improved with the church, parking area, minimum required setback, and a stormwater management easement. Prior to construction, the property was heavily wooded. All the trees were clear cut for construction. The church built a 6-foot fence along the Posey's property line. 3/19/21 T. 113-115. Mr. Posey submitted the following photograph of his view of the church (Exhibit 227YYYY):



Because his property slopes down to the church parking lot, and the fence was at the bottom of the dip, the fence only screened the bottom half of the first row of cars in the parking lot. 3/19/21 T. 115. According to Mr. Posey, there is glare from the car windows during the day. They can clearly see the parking lot from half of the windows in the house. *Id.*, T. 117.

After the church was built, Mr. Posey appealed his tax assessment and included the photograph above with the appeal. Before his appeal, the State Department of Assessments and Taxation (SDAT) had valued the property at \$741,300. After the appeal, the assessment was reduced to \$688,900—a decrease of \$52,400 or 7.07 percent with no specific explanation. T. 130. SDAT decreased the value again in 2020 by \$28,800, or an additional 4.18%. Mr. Posey submitted a table showing the valuations of their property and the percentage it was devalued (Exhibit 227(d).AAAAA.1, on the next page).

Mr. Posey testified that Lines 9 through 12 show the value estimated by their expert real estate appraiser, Mr. Terrence McPherson. He estimates that the current appraised value of the house would drop to \$585,000 solely due to the addition of Primrose, a \$65,000 drop in value. This results in an overall decrease of 10%. The exhibit also shows the total value decrease due to

<u>Line</u>	<u>Description of Value</u>	<u>Date</u>	<u>Value</u>
1	State of Maryland Department of Assessments and Taxation Total Assessed Value	as of January 1, 2018 for tax year beginning July 1, 2018	\$ 741,300
2	State of Maryland Department of Assessments and Taxation Total Assessed Value AFTER APPEAL OF FEBRUARY 2018	as of March 27, 2018 for tax year beginning July 1, 2018	\$ 688,900
3	value change (L2-L1)		\$ (52,400)
4	percent change (L3/L1)		-7.07%
5	State of Maryland Department of Assessments and Taxation Total Assessed Value AFTER APPEAL OF FEBRUARY 2018	as of March 27, 2018 for tax year beginning July 1, 2018	\$ 688,900
6	State of Maryland Department of Assessments and Taxation Total Assessed Value AFTER REVISION OF DECEMBER 2020	as of December 29, 2020 for tax year beginning July 1, 2021	\$ 660,100
7	value change (L6-L5)		\$ (28,800)
8	percent change (L7/L5)		-4.18%
9	McPherson & Associates Total Current Appraised Value	October 2019	\$ 650,000
10	McPherson & Associates Appraised Value AFTER CONSTRUCTION OF DAY CARE	October 2019	\$ 585,000
11	value change (L9-L10)		\$ (65,000)
12	percent change (L11/L9)		-10.00%
13	Total loss in property value due to Taiwanese Presbyterian Church and Primrose (L3 + L11)		\$ (117,400)

Primrose and the church is \$117,400. 3/19/21 T. 130-131. Mr. Posey also submitted copies of the tax assessments used to support the figures in the table on the preceding page. Exhibits 227(d).AAAAA.2 and AAAAA.3.

In his opinion, the 2018 reduction is conservative. The value lost due to the church should have been larger, but the County accepted it and they did not wish to pay for a real estate appraiser. 3/19/21 T. 132. He also believes that Mr. McPherson's estimated loss from Primrose is very conservative. He noted that one of the real estate agents interviewed by Mr. McPherson estimated that Primrose together with the church would cause their property to be sold only at a fire-sale price. *Id.*, T. 132.

The current assessed value of \$660,100 is in line the starting estimate contained in the appraisal report prepared by Mr. McPherson (Exhibit 115(f)). Mr. McPherson estimated the current value at \$650,000 prior to construction of the Primrose School. In Mr. Posey's opinion, no reasonable person can claim that the church parking lot did not have a significant impact on their property value, and no reasonable person could claim that Primrose will not have a significant impact on their property value. He believes it will be a "double whammy" with a cumulative effect. Together they will cut his property value by more than \$117,000. T. 133. He disagrees with anyone who may say that a \$65,000 decrease in value is not an undue burden. T. 134.

Mr. Posey testified that he paid \$135,000 for the land in 1994. The cost to construct was \$504,000 and the total finished price was \$639,000. According to Mr. McPherson, construction of the Primrose facility will decrease its value to \$585,000, 9% less than what it cost to buy the land and build the house 23 years ago. 3/19/21 T. 134.

Mr. Terence McPherson, an expert real estate appraiser, testified that the current value of the Kosary/Posey residence is \$650,000. In his opinion, the construction of the conditional use will cause the value to drop to \$585,000, a difference of \$65,000. 3/6/20 T. 127.

Mr. McPherson's initial report was completed in October 2019. Exhibit 115(f). Mr. McPherson testified that he had received updated information on one of the properties in his study after his report was published. That property (7500 Needwood Road, the Mitchell residence) is located at the corner of Carnegie and Needwood and is a new house that recently sold. The land had been purchased in September 2017, for \$280,000. He spoke with the developer, Mr. Abebe, who had known that a conditional use was pending for the subject property. Mr. Abebe informed him that he started construction of the new house in January 2018 and listed it in October 2018 for \$1,499,000. The price of the house was lowered to \$1,100,000 and then relisted in June 2019 for \$995,000. It subsequently sold in July 2019 for \$920,000. Mr. McPherson asked the Mr. Abebe whether the conditional use had impacted the price of the house. Mr. Abebe responded that he had kept logs of the comments from individuals considering buying the property and many people did not want to purchase the property due to the pending conditional use. The developer's realtor told him that, if the conditional use application had not existed, the property probably would have sold for between 1.1 and \$1.2 million, a 16-23% increase. 3/6/20 T. 129.

Mr. McPherson typically tries to find comparable sales for his analysis. In this case, he looked for comparable sales of custom homes because the Kosary house is custom. He was unable to find any sales and, in the absence of sales data, there are two other standard approaches that appraisers can use to value property. One is a paired data analysis where you find two properties that are similar and isolate one of the sales for the item you're trying to extract. In this case, he looked for the impact of a residential property sandwiched between two nonresidential uses. He found two sales that met this category. The first was a property that located between a Citgo Gas Station and a veterinarian clinic. While the Citgo Gas Station is more intense than a daycare center, in his opinion, that would be offset by the fact that each of the sales were entry level housing. He testified that appraisers recognize an economic principle of mobility. In his experience, when you

don't have the income levels and choices of where you can buy, then you're much more willing to accept potentially negative influences. He felt that it was applicable because of this and there wasn't any data except for this that he could find. 3/6/20 T. 130-131.

Mr. McPherson adjusted each of the comparable sales and the paired data sales. Each of the two paired sales was separated by the same road. He adjusted for the differences between the two in the number of bathrooms, basements, and physical features to isolate the difference between the two caused by the "sandwich" between two commercial uses. His analysis indicated that the proximity of the commercial uses in the paired data sales reduced the value of the homes by about 12 percent. 3/6/20 T. 132.

According to Mr. McPherson, the other valuation approach when there are few comparables is to provide the site plan for the proposed development and an aerial of the subject property to realtors and interview them to determine what impact, if any, the proposed daycare will have on the subject property. According to Mr. McPherson, they were fortunate to have five realtors respond to the interview. Each of the realtors have sold over \$190 million worth of real estate in the last three years within in a two-mile radius of the subject property. *Id.*, T. 133.

The responses from the five interviewees ranged between no effect, which he felt was an outlier, and a negative difference of between 8 to 30% in the market price. This is consistent with Mr. Abebe's assessment that the Mitchell property sold for approximately 16 to 23 percent less because of the conditional use application. *Id.*

Based on these two methodologies (paired sales data and realtor interviews), he selected a 10% negative impact caused by the proposed conditional use. This reduces the value of the Kosary property to \$585,000, which is a decrease of \$65,000 in value. 3/6/20 T. 132-134.

He opined that his conclusion was conservative because he felt uncomfortable going higher than a 10% devaluation without more data. He felt both methodologies he used were appropriate

for this type of analyses. In his opinion, having a house sandwiched between two non-residential uses is very rare because he spoke with five brokers that had sales of over \$180 million. At the time he prepared his report, he had not completed his discussion with Mr. Abebe, who developed 7500 Needwood Road and estimated that his property has been devalued by approximately 16 – 23%. That conversation did not occur until 2/24/20. Before he interviewed the brokers, he sent them an email showing the layout of the proposed conditional use. 3/6/20 T. 134-136.

Ms. Elizabeth Vandermause qualified as an expert real estate appraiser for Primrose. In her opinion, infill development will occur in this area and the Kosary/Posey property will lose their secluded setting no matter what development occurs. Future infill development is indicated, in her opinion, because the land value of properties is outpacing the improved value of the properties. Buyers already see the changes in the neighborhood and understand that change is coming. Potential buyers will look at the empty lot next door and realize something will be built on it—it's near Metro, it's near bus lines, it's near the Intercounty Connector. The State of Maryland encourages infill development because they want to place development close to existing infrastructure. 3/6/20 T. 169. In her opinion, the infill development is part of Maryland's "Smart Growth" policy, although she did not know what a "priority funding area" is or whether the subject property lies in one. 3/6/20 T. 238-240.

For this reason, potential buyers of the Kosary/Posey property will know that loss of the secluded setting is already "baked into the cake", no matter what occurs in the future, 3/6/20 T. 188.

She testified that residential development of three houses on the subject property will devalue the Kosary/Posey property more than the daycare because it will be larger in mass and scale than the daycare center. Houses will be two stories—higher than the daycare center. In addition, one of the houses could sit right up against the property line for the Kosary home. There

will be less traffic, but there won't be no traffic. People will still be coming and going. There won't be a parking lot, but there could be a basketball court or swimming pools. There's always some activity going on with residential uses. 3/6/20 T. 47-48.

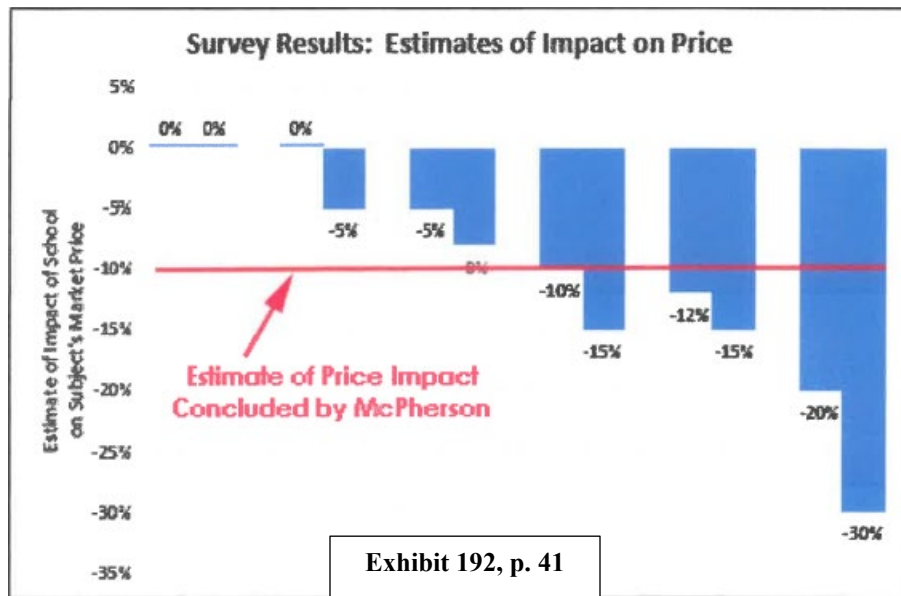
In her opinion, the conditional use plan for the daycare center benefits the Kosary/Posey property because it will preserve the rear portion of the site in forest conservation across from the Kosary/Posey dwelling. The building itself is sited toward the front of the site, not towards the back and is a one-story building. 3/6/20 T. 48. Another difference is that the daycare is operating during the day when a lot of people are at work. There are no evening, weekends, and holidays. *Id.* On cross-examination, she clarified that three houses may be 5,400 square feet each, with a total mass more than the 13,000 square foot daycare. The house at 7500 Needwood Road is approximately 5,400 feet. 4/6/21 T. 228-229.

According to her, permitted uses in the RE-1 Zone could be more intense. These could include a church or be three houses stacked along the side property line. The market knows that the Posey/Kosary property will lose their private setting. 3/6/20 T. 171-172.

Ms. Vandermause interprets the interview responses in Mr. McPherson's report to mean that more agents than not said that there would be zero impact to the sales price of the Kosary Posey property. She does not believe this daycare would have a negative impact on the property based on the interviews conducted by Mr. McPherson. She summarized the survey results in a table shown on the next page (Exhibit 192, p. 41).

According to her, three of the responses concluded that there would be no change to the value and every agent gave a range. Three people said zero, two people said negative five percent, one person said negative eight, another person said negative 10, and said negative 12 and one person said one and a half percent, minus 15, another said 20 and one said 30%. More people said that the value would change by zero to five percent. 3/6/20 T. 182. The highest density of

development, which is three single-family detached homes, will have the most impact on the setting because they can be up to 30 feet high for a modern house. The least impact, or least



density of development from these three examples is a daycare, which leaves the side yard open. 3/6/20 T. 182-183.

Ms. Vandermause also critiqued Mr. McPherson's comparable sales and paired data analysis, particularly due to the lack of comparables. In her opinion, the paired sale of with the Citgo gas station is not persuasive because the gas station is a much more intense use than a daycare. In addition to noise, a gas station generates fumes and hazardous conditions. 3/6/20 T.185-186.³⁶

Mr. McPherson disagreed that residential uses would have a greater impact on the value of the Kosary/Posey property than the proposed conditional use. Mr. McPherson's report concludes that development of the property with a residential use would not affect the value of the Kosary property as much as a conditional use. Residential uses conform to the existing zoning by right.

³⁶ Ms. Vandermause had many other critiques of Mr. McPherson's report. The Hearing Examiner gave both parties an opportunity to clarify their positions and rebut the other's testimony. See, 3/9/20, T. 12-50. The Hearing Examiner does not discuss them here because she finds Ms. Vandermause's basic premise faulty.

Conformity tends to increase the value of properties. Like 7500 Needwood Road, a residential property selling at \$920,000 will raise residential prices in the neighborhood. If houses were built instead of the proposed conditional use, they would not have a negative impact on value. This conditional use will have a commercial driveway right off the property line and the other detrimental conditions he's attested to. In his opinion, it will significantly affect the value of the Posey/Kosary property. 3/9/20 T. 23.

He disagrees with Ms. Vandermause's opinion that intensity is based solely on building floor area. T. 23. He opined that a commercial use is typically developed much more intensely than a residential use. With a house, you have the home site and a rear, side, and front yard. With a commercial use, the site is taken up mainly by the building, the parking lot, the parking lot lights, the stormwater management, and the curb and gutter. Comparing residential with commercial uses is comparing two different things. Commercial is more intense and residential is less intense, along with their relative values. 3/9/21 T. 23.

Mr. Davis, the opposition's expert land planner, provided a planning perspective on the two appraisal reports. He compared the two appraisal reports in this case to determine the highest and best use of the Kosary/Posey property. He concluded that the highest and best use for the property was one single-family detached home, as it is currently developed. The Merit report looked at the potential for redevelopment of Kosary/Posey. But in his opinion, it is maxed out in terms of residential development. 4/2/21 T. 222.

Mr. McPherson acknowledged that there wasn't a lot of comparison data for determining values of situations where you have a detached home with two non-residential or two commercial/institutional uses on either side. In Mr. Davis's opinion, the relatively limited data available to McPherson supports that appraiser's finding that a residential use wedged between two commercial uses is not a good planning situation. That situation has been discouraged in

Montgomery County for many years. If it did exist, it would more likely occur in an urban area like Bethesda or Silver Spring when there are hold out properties on a block being redeveloped. That is a different situation than this. 4/2/21 T. 223.

He opined that Ms. Vandermause's report was based in part on the State's emphasis for Smart Growth infill development. 4/2/21 T. 223. The State's Smart Growth policy uses a "carrot and stick" approach to funnel development into "priority funding areas." Priority funding areas are areas where the State finds that growth and development are appropriate. State funding for infrastructure projects are targeted for these areas and the State discourages public infrastructure projects outside of these areas. 4/2/21 T. 219-222.

Those in opposition submitted an exhibit delineating the boundaries of the State's priority funding areas. Exhibit 204. Mr. Davis testified that the exhibit shows that the subject property is not within a priority funding area. In his opinion, the State will not be encouraging infill development in the area north and south of Needwood. He believes that infill development that will occur will be in accordance with the requirements of the RE-1 Zone, either conditional or permitted uses. But in his opinion, it should be scaled so that it does not require additional infrastructure improvements. In this case, there is a major infrastructure improvement required for the facility to function, which is the storm drain system through the South Riding subdivision south of the property 4/2/21 T. 223-225.

ii. Impact on Trees on Kosary/Posey Property

Another adverse impact of the parking setback on the Kosary/Posey property is damage to existing mature trees that currently screen their eastern property line. Dr. Kosary submitted "before construction and after construction" graphics comparing the impact of construction on the existing tree cover at their eastern property line (Exhibit 115(n), 115(o), on the next page).

Because the parking waiver requires construction grading up to the property line of the



**Subject Property Existing Tree
Cover (Ex. 115(n), above)**

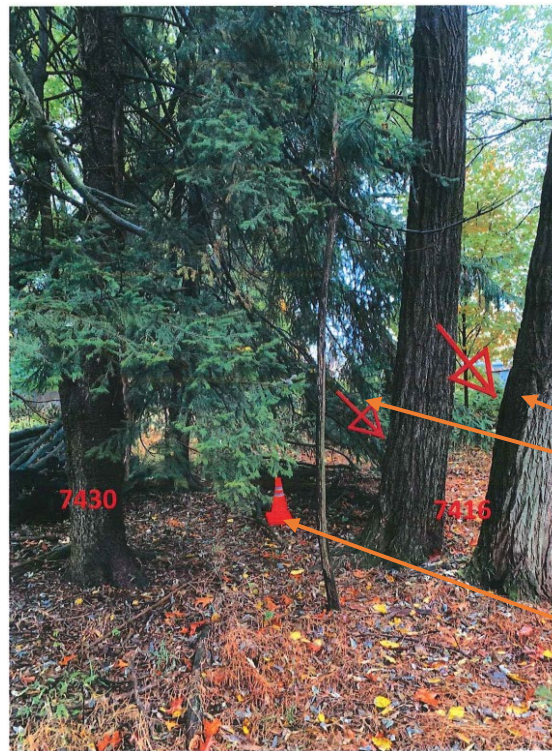


**Tree Cover on Subject Property Required by
Conditional Use Property (Ex. 115(o), above)**

common boundary with the Kosary/Posey property, Dr. Kosary testified that many mature trees will be damaged by the construction. They suffered damage on the eastern side of their property because the church's limit of disturbance went to their property line. The church's construction caused them to lose a champion tree, a 28.5 inch red pine, which is near a specimen-level tree. The tree died due to a poor root pruning job by the arborist for the church, which was done without the Kosary Posey's knowledge or permission. They came onto the Posey property to perform the work. An additional four large canopies trees suffered crown dieback, or death of branches or tips on the upper and outer portions of the tree crown, caused by stress, including one specimen level red maple. Construction damage causes trees to die over time. By the time the tree has died or suffered crown dieback, many people do not associate construction with tree damage. 3/19/21 T. 171-172.

Dr. Kosary testified that construction will impact the critical root zone of a large specimen tree, SP-10, a silver maple. There are arboricultural industry standards on construction damage to trees. The probability of construction impact on a tree depends on its species. 3/25/21 T. 172. She presented information from the University of Georgia Extension Service regarding silver maples. This species is highly susceptible to construction damage, as indicated in the report exhibit. The report states that silver maples have poor tolerance and will have difficulty reacting well to construction damage. She believes this tree will suffer crown dieback because she has observed this in other silver maples that were impacted by the church construction on the east side of her property. 3/19/21 T. 173.

Ms. Kosary testified that the area on her property at the property line contains many mature trees that will suffer damage from construction. She submitted photographs of existing mature trees (marked with red arrows) adjacent to the project's limit of disturbance or property line, shown by an orange cone (Exhibits 227(d), *see, e.g.*, Document RRRR.1, and RRRR.2 on the next page).



**Trees On
Kosary/Posey
Property**

**Common Property
Line**

Exhibit 227(d).RRRR.1



**Common
Property Line**

Exhibit 227(d).RRRR.2

Dr. Kosary testified that the neighborhood consists of large lots. The subject property contains over three acres and the Kosary/Posey property lot is over one acre. To have an LOD at the property line speaks volumes to her that the intensity of the proposed use is incompatible with the neighborhood. Her husband expressed it best when he stated the approval of a waiver for a 12-foot substandard setback is a theft of a 22-foot perimeter on their property. 3/19/21 T. 179.

Mr. Jolley testified that there are “proven methods” to reduce the potential damage to trees impacted by construction but he could not guarantee that all trees on the Kosary/Posey property would survive. 4/9/21 T. 71-72. Mr. Jolley testified that disturbance of more than 30% of the critical root zone of a tree has a potentially negative impact on its roots. The CRZ is extremely important to the health and longevity of the trees. From the photographs submitted, he believes that the critical root zone of the tree on 229(d).RRRR.4 (below) will likely suffer impacts along the property line. 4/9/21 T. 62.



The methods used to reduce damage include having a pre-construction meeting with all departments on the site and the owner of the Kosary/Posey property if they wish. The meeting would include technical professionals such as himself and a certified arborist from the Planning Department. They will mark the Limits of Disturbance, which is along the eastern property line of the subject property. If permitted by Dr. Kosary and Mr. Posey, he and a certified arborist will look at any trees of concern along that shared property line. They will identify the area between the proposed landscaped strip between the access drive curbing and the property line and prune the roots of trees on the Kosary/Posey property that extend into the subject property by approximately 12" to 18". The purpose of root pruning is to introduce stress on the trees slowly. Pulling up roots without pruning in advance increases the potential for damage to travel further into the root zone to the trees. 4/9/21 T. 64-68.

In addition, they will restrict storage of heavy machinery and limit storage of building materials in that area. Mr. Jolley acknowledged that some grading activities will occur between the LOD and the proposed driveway. *Id.*

Without entering the Kosary property, the last thing they could do is add extra root watering to assist the pruned roots. 4/9/21 T. 66-68. If permitted to enter the Kosary/Posey property, they could walk the property and evaluate all the trees they are concerned about along the property line that may have critical root zone impact. They would locate those trees on a map with GPS or survey equipment. Then, Primrose could employ tree fertilization in advance of construction. They can use a slow-release fertilizer that would last the duration of construction. This would boost the health and vigor of the trees before construction begins. Another method to mitigate construction impact would be additional watering throughout construction. Selective pruning (not elimination) of tree canopy may also be used to reduce the overall demand of the tree to consume water. Finally, they can mulch any grass under the trees. Grass competes with trees for nutrients

and water. They can apply a 2 to 3 inch layer of bark mulch in grassy areas to retain water for longer periods of time and temporarily prevent the growth of grass. After construction is complete, they return the areas to their original condition. *Id.* T. 69-71.

iii. Conclusion

Consistent with the Hearing Examiner's decision in another conditional use for a Primrose daycare center, and based on the recommendations from Staff and the expert testimony of Mr. Davis, the Hearing Examiner finds that the 22-foot waiver of the parking setback is a non-inherent characteristic of the proposed use. As pointed out by Staff, this does not necessarily mean that an application should be denied if the non-inherent characteristic doesn't detrimentally impact the surrounding area. In this case, however, the Hearing Examiner finds that the proposed use will have an undue economic impact on the value of the Kosary/Posey property and on the use and peaceful enjoyment of their property.

1. Undue Harm to Economic Value

The Hearing Examiner finds that the decrease in the assessment after Mr. Posey appealed to the State Department of Assessment and Taxation occurred because of construction of the church on the east side of his property because it occurred relatively soon after his appeal (which included the photograph of the church parking lot). There is less support that the 2018 decrease in assessed value was solely attributable to the church, but Mr. Posey believes that his property will devalue more than the 10% estimated by Mr. McPherson. The Hearing Examiner gives Mr. Posey's testimony weight, particularly as he has had the opportunity to do a detailed study of what is proposed on the subject property, his real life experience with the church on the other side of his property, and the impact on his own property. *Brannon v. State Rds. Com. of State Highway Admin.*, 305 Md. 793, 506 A.2d 634 (1986). Even without the 2018 decreased assessment, the first decrease of \$52,000 is significant and an undue impact. However, the 2018 assessment is

consistent with the value estimated by Mr. McPherson, which the Hearing Examiner finds persuasive.

The Hearing Examiner finds Mr. McPherson's appraisal more credible than the Merit Report and Mr. McPherson a more credible witness than Ms. Vandermause for several reasons. Mr. McPherson acknowledged that there was a lack of comparables for his paired data, an analysis consistent with Mr. Davis' testimony that it is poor planning to place a residence between two commercial uses. The Hearing Examiner has no doubt that the subject property will eventually be developed, which appears to be Ms. Vandermause's sole premise. The Hearing Examiner disagrees strongly with Ms. Vandermause, however, that the proposed daycare, with approximately 800 vehicle trips per day, commercial lighting on 20-foot parking lot poles, and massing larger than anything in the vicinity (except perhaps the church) is less intense than three single-family homes on the subject property, regardless of the square footage of the homes. This argument is simply not credible. The Hearing Examiner finds much more credible Mr. McPherson's testimony that the activity, lighting, and proximity of a commercial use is more intense than residential development and will have less impact on value than the daycare center.

Ms. Vandermauses "infill will occur" theory was partially based on an incorrect premise. She testified that infill would be encouraged because it is in a priority funding area. A priority funding area is designated by the State to direct State funds for infrastructure improvements to further "Smart Growth" policies. As evidenced by maps of the priority funding area introduced by the opposition, the subject property is simply not in one. This calls into question the extent of Ms. Vandermause's experience with development in Maryland. As it is not in a priority funding area, Mr. Davis testified that any infill would be in keeping with the existing RE-1 Zone development. The Hearing Examiner finds this much easier to accept.

The “baked in the cake” theory that the Kosary/Posey property will lose their secluded setting is also questionable. The Applicant relies on a “parade of horrors”, such as possible redevelopment of another church, without any evidence of the probability that this will occur. Ms. Vandermause relies repeatedly, even with her assessment of residential development, on speculation of what could happen under the Zoning Ordinance, and sometimes that is incorrect.³⁷

Nor does the Hearing Examiner agree with Ms. Vandermause's tally of interview responses. There were six interview responses, some of whom responded by giving a range beginning with zero. Ms. Vandermause double-counts the “zeros” in the ranges as separate responses. Even though some ranges began with zero, the more reasonable interpretation is that the response acknowledges negative impact, except for one response that said there would be no change. The obvious inference from the responses is that five of the six responses stated that the conditional use had a negative impact on the value of the Kosary/Posey property. This is consistent with Mr. McPherson's interview with the developer of Mrs. Mitchell's property, who explicitly informed him that the conditional use negatively impacted the sales price of her house at 7500 Needwood Road.

Finally, the Hearing Examiner finds that Mr. McPherson was much more credible as a witness than Ms. Vandermause. Mr. McPherson remained calm and professional through his testimony. He acknowledged the sparsity of comparables and that the Citgo gas station next to one of the comparables was more intense than the daycare center proposed here. Ms. Vandermause at times became angry, defensive, did not clearly or willingly answer questions, and at times muttered disparagingly under her breath.

³⁷ Ms. Vandermause testified that the three residential homes could be at the Kosary/Posey property line. On cross-examination she stated that she did not know the minimum setback for dwellings in the RE-1 Zone. *Zoning Ordinance*, §59.4.4. 3/6/20 T. 237.

The Hearing Examiner is not as disturbed by the lack of sales comparables as Ms. Vandermause. Mr. McPherson employed standard real estate appraisable techniques to address the situation and was conservative in discounting the value only by 10%. Mr. Posey believes that it will have a greater impact. In contrast, Ms. Vandermause did not estimate any value, but only critiqued Mr. McPherson's report. Even with few comparables, it is difficult to say that the real estate appraisal profession can provide no aid in estimating value or that the property is incapable of being valued. The lack of comparables is consistent with Mr. Davis' testimony that placing a residence between two intensive commercial uses is poor planning. The rarity of the situation does not mean that the accepted appraisal practices conducted by Mr. McPherson and only reinforces his response.

The "lack" of comparables also ignores Mr. Posey's actual experience with development of the eastern side of his property. If anything, the devaluation from development on the eastern side only supports the conclusion that his property value will again decrease when the west side of his property also becomes a parking lot.

Further supporting the Hearing Examiner's conclusion is Mr. McPherson's interview with the developer of the Mitchell property. The Hearing Examiner finds this persuasive because it is in the exact same position as the Kosary/Posey property—adjacent to the same conditional use. Mr. Abebe had a log of comments to support the his realtor's estimate that the sales price was 16%-23% less than market because of the conditional use, more than estimated by Mr. McPherson.

The Applicant argues that the Hearing Examiner should not decide this case based on a diminution of economic value because, according to the Applicant, that has never been done before and the appraisals reveal that there is no information to support this devaluation. 4/13/21 T. 15-16. The Hearing Examiner disagrees. The Hearing Examiner may not "read out" the plain language of the Zoning Ordinance. *Heartwood 88, Inc. v. Montgomery Cty.*, 156 Md. App. 333,

360 (2004)(Statutes should be read "so that no word, phrase, clause or sentence is rendered surplusage or meaningless," ... or "superfluous or redundant." (Citations omitted)). Additionally, the Applicant provided no factual basis for this claim.

The Hearing Examiner finds from the testimony and evidence that construction of the daycare center will significantly devalue the Kosary/Posey property at least as estimated by Mr. McPherson. The Kosary/Posey backyard feature is 23 feet from the limits of disturbance on the subject property and 75 feet from the kitchen window. Both Mr. Posey and Dr. Kosary testified that, because of the topography, they will be able to view cars in the parking lot of the daycare center, almost a *déjà vu* of the development of the church and subsequent devaluation of their property from the eastern side. The weight of the evidence here supports a conclusion that construction of the daycare center will unduly reduce the economic value of their property.

The Applicant argues that it is not fair to say that the Primrose School is having an adverse effect on the property value if a use permitted by right already allows something that would have that much effect. 4/13/21 T. 17. Primrose argues that the reduction in value caused by a conditional use should not be interpreted as an "undue burden" when construction of a use permitted by right (*i.e.*, the church) has already had such a large impact. *Id.* Comparison of impacts between conditional uses and by right uses are not the standard in conditional use cases, as the *Butler* case makes clear. The focus in this case is whether the proposed conditional use will have an undue impact on the Kosary/Posey property, not whether uses by right on the subject property (which are speculate at this point) could have an impact.³⁸

³⁸ In *Schultz v. Pritts*, 291 Md. 1, 36-27 (1981), the Court of Appeals wrote, "More particularly, by definition, a permitted use may be developed even though it has an adverse effect upon traffic in the particular location proposed. By definition, a requested special exception use producing the same adverse effect at the same location must be denied. Thus, by definition, a church may be developed even if the volume of traffic that it generates causes congestion and unsafe conditions at the particular location proposed. By definition, however, a special exception use for a funeral establishment producing the same volume of traffic and, therefore, the same congestion and unsafe conditions at the particular location proposed must be denied." To the extent that inherent/non-inherent analysis in the Zoning Ordinance may change the Shultz standard in some respects, as noted in *Butler*, it does not change this finding.

2. Undue Harm to Use and Peaceful Enjoyment of Kosary/Posey Property

The Hearing Examiner also finds that the potential damage to the mature tree screen on the Kosary property has undue adverse impact on the use and peaceful enjoyment of their property attributable to the non-inherent setback waiver. She finds for the same reason that the use is incompatible with the surrounding area under Section 59.7.3.1.E.1.d.³⁹

The non-inherent characteristic – the setback waiver – brings the limits of disturbance up to the common property line. Both Dr. Kosary and Mr. Jolley agreed that this could impact the critical root zone of mature trees on the Kosary/Posey property, including the specimen silver maple, and cause the trees to be damaged and eventually die. The Hearing Examiner finds credible Dr. Kosary's testimony about the damage to trees both from roots spreading from the subject property into her property and from the impact to the critical root zone of trees on her property. Dr. Kosary is also on the Board of Directors for the Montgomery County Master Gardeners. 3/25/21 T. 34. Both she and her husband testified about the tree damage due to construction of the church on the other side of his property.

While the Hearing Examiner agrees with Mr. Jolley that there are proven methods to reduce the potential damage from construction, he also recognized that there no guarantee that trees will survive. She finds credible Dr. Kosary's testimony that roots from the 12-foot strip on the subject property will have no choice but to grow toward her property interfering with the trees already there. Had this property met the required setback of 34 feet, the potential for this could be avoided. The construction impacts on the Kosary/Posey property stems from the limits of disturbance being all the way up to the property line. Based on the photographs in evidence, potential damage to the

³⁹ If this is not an undue impact on the peaceful enjoyment, which the Hearing Examiner finds that it is, she would deny for the same reason because damage to the trees on the Kosary/Posey property from construction on the subject property is incompatible with adjacent properties.

trees would be greatly curtailed if the full 34-foot setback were adhered to or even if the waiver was less than 65% of the required setback.

3. Montgomery County v. Butler

The Hearing Examiner asked both parties whether the Court of Appeals' decision in *Montgomery County v. Butler*, 417 Md. 271 (2010) applied to this case. In *Butler*, the Court upheld the validity of Montgomery County's standard relating to inherent and non-inherent impacts now contained in this section of the Zoning Ordinance. In doing so, it affirmed the Hearing Examiner's denial of a conditional use for a landscape contractor because the property was long and narrow, and the driveway ran only 42 feet from a dwelling on the adjacent property.

Primrose believes that *Butler* is distinguishable because of the intensity of that use compared with this one. In *Butler*, the vehicles using the driveway were associated with a landscape contractor's business which included trucks, backhoes, wagons, flat beds, lots of noise starting early in the morning—not passenger vehicles dropping children off and then leaving. 4/13/21 T. 23. The Applicant argues that the traffic in *Butler* was more industrial and noisier. In addition, the house was 42 feet from the driveway, closer than the Kosary/Posey residence.

Primrose believes that *Butler* is also distinguishable because there was no healthy landscaping to obscure the view from the adjacent property into the subject property. The Hearing Examiner in *Butler* stated that he didn't believe that there was a condition that can be devised that will attenuate these adverse effects adequately. Here, Dr. Kosary and Mr. Posey have rejected means suggested by their landscape architect to minimize damage to their property and maximize the amount of separation and protection. 4/13/21 T. 25. Primrose reminds the Hearing Examiner that she may impose a condition of approval requiring site plan approval where the issues on compatibility may be addressed.

Those in opposition argue that, despite the Applicant's contentions, the use proposed is too intense. It is 750-800 cars per day going up and down that driveway 12 feet from the Kosary's property line. The most that the Applicant will have is a fence that they don't know how they're going to maintain. 4/13/21 T. 31. Rather than trying to maximize the screening and compatibility for the project, this is a situation where they're trying to shoehorn a use that is way too large for what the site can accommodate. In contrast to the situation in *Butler*, they argue, the use proposed here isn't limited to a particular season—it's all year around. T. 45. Butler proffered to limit deliveries to no more than three times a week, two times a season. The *Butler* Court upheld the Hearing Examiner's denial of the conditional use due to the narrowness of Butler's lot, the configuration of the commercial enterprise activities, and installations on the lot, and the proximity of the commercial activities to adjacent properties. 4/13/21 T. 32-47; *Butler*, 417 Md. at 308.

The Hearing Examiner finds that Butler, while in some respects distinguishable, justifies denial of the conditional use in this case. The primary characteristics that generates the incompatibility here is the long, narrow configuration of the property in combination with Primrose's "program" – the size of the integrated building and play area. The combined building play area doesn't fit on the property with the screening necessary to ensure compatibility. This is evidenced not just on the Kosary/Posey side. There is almost no screening for a major portion on the Mitchell's side because the combined building/play area extends up to the utility easements. These physical and operational characteristics can't be "fixed" by site plan review. The lengthy history of the Applicant's attempts to develop this property are testimony to that.

While the type of traffic may not be industrial, it is more intense in terms of volume and duration. The landscape contractor in Butler was seasonal; here, the daycare center will run every business day for the full year with 800 trips per day. The driveway in *Butler* was 22 feet from the

adjacent owners' property line; here, it is 12 feet. While Dr. Kosary's kitchen window is 75 feet from the property line, her back yard is 23 feet away.

The Hearing Examiner finds the testimony of noise, glare and impact to their trees from the church very credible, particularly as they have documented it. Ms. Mitchell will have virtually unobstructed views of the 168-foot long building from almost every room in her home. While the type of vehicle in *Butler* was industrial, the volume, intensity, and lack of adequate buffer makes it applicable to this case.

**2. Construction Compatible with Existing Character of the Area
(Section 59.7.3.1.E.2)**

2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

This section requires the Hearing Examiner to analyze the compatibility of the use regardless of the Master Plan because it lies within a residential detached zone. As noted above, Staff found that Primrose met this criterion because of "notable effort" to make the building compatible with the character of the surrounding area. Exhibit 106, p. 31. For the reasons described, those in opposition disagree.

Conclusion: The Hearing Examiner has already found that the proposed use is incompatible with the surrounding area in a manner inconsistent with the Master Plan. For the same reasons, she finds that the proposed conditional use plan is not compatible with the character of the residential neighborhood.

3. No Presumption of Compatibility (Section 59.7.3.1.E.3)

3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

Conclusion: The Hearing Examiner finds that the proposed use meets many, but not all, of the

Technical development standards of the zone, landscaping and lighting requirements, site access, and parking requirements described below. The above section means that, simply because the application meets these technical requirements doesn't mean it must be approved. In this case, the Hearing Examiner has found that the Applicant has not met its burden of proof that it complies with the general standards and some of the limited use standards. For this reason, and because the application is incompatible with the surrounding area, she denies the conditional use.

B. Development Standards of the Zone (Article 59.4)

The general standards of approval (Section 7.3.1.E.1.b) require the application to comply the development standards of the RE-1 Zone. Development standards for the RE-1 Zone are contained §59.4.4.6.B. of the Zoning Ordinance. Planning Staff found that these standards were met, summarizing them in the table reproduced below (Exhibit 106, 9).

Table 1: Development Standards

RE-1 Zone Development Standards	Zoning Ordinance 59-4.4.6.B	Proposed
Minimum Lot Area	40,000 SF	128,156 SF (2.95 ac) 121,798 SF (Net)
Minimum Lot width: <ul style="list-style-type: none">▪ at building line▪ at front lot line	125 ft. 25 ft.	202.71 ft. 188.49 ft.
Maximum lot Coverage	15 percent	10.67 percent
Minimum Building Setback Principal Building: <ul style="list-style-type: none">• front• side street (Needwood Rd)• side• rear yard	50 ft. 50 ft. 17 ft. 35 ft.	51 ft. 75.50 ft. 47.51 ft. 338.57 ft.
Maximum Building Height	50 ft.	21.58 ft.
Parking: 59-6.2.4		
Min. Vehicle Parking spaces Day Care 3/1000 GFA (See Table 4 below under: D Parking)	39 sp	44 sp

Conclusion: Based on this uncontroverted evidence, the Hearing Examiner finds that the proposed use meets the development standards for the RE-1 Zone contained in Zoning Ordinance, §59.4.4.6.B. Requirements for the parking waiver (in Division 6.2 of the Zoning Ordinance) are discussed below.

C. Use Standards for a Child Day Care Center for Over 30 Persons (Section 59.3.4.4.F.2.)

The specific use standards for approval of a Child Day Care Center for over 30 Persons are set out in Section 59.3.4.4.F. of the Zoning Ordinance. Standards applicable to this application are:

F. Day Care Center (Over 30 Persons)

1. Defined

Day Care Center (Over 30 Persons) means a Day Care Facility for over 30 people where staffing, operations, and structures comply with State and local regulations and is not located in a townhouse or duplex building type.

Conclusion: Typically, the criterion above would be satisfied with a condition of approval requiring compliance with all State and local regulations. However, as the Hearing Examiner denies this conditional use, that is not necessary. The use proposed is not in a townhouse or duplex building.

2. Use Standards

a. Where a Day Care Center (Over 30 Persons) is allowed as a limited use, and the subject lot abuts or confronts property zoned Agricultural, Rural Residential, or Residential Detached that is vacant or improved with an agricultural or residential use, site plan approval is required under Section 7.3.4.

Conclusion: This section is not applicable because the proposed Day Care Center is not allowed as a limited use in the RE-1 Zone.

b. Where a Day Care Center (Over 30 Persons) is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:

i. All required parking must be behind the front building line; however, required parking may be located between the structure and the street where the Hearing Examiner finds that such parking is safe, not detrimental to the neighborhood, accessible, and compatible with surrounding properties.

Conclusion: The conditional use plan (Exhibit 199(d)) demonstrates that all parking is located behind the front building lines of both Needwood Road and Carnegie Avenue. This standard has been met.

ii. An adequate area for the discharge and pick up of children is provided.

Staff didn't explicitly conclude that parking spaces for discharge and pick up of children were adequate and provided no independent analysis of this. It did reproduce a table (apparently provided by Primrose), describing arrivals and departures from the property (Exhibit 106, p. 26, below). Mr. Intriago testified that the parking design reserves the 12 spaces closest to the main entry for parent drop-off and pick-up but did not know why Primrose calculated that 12 space should be reserved for parents. 3/5/20 T. 230. Mr. Cook testified that, based on his experience with Primrose, a single drop-off can take anywhere from 7 to 12 minutes for parents to complete and exit the site. 3/9/20 T. 256.

Table 5: Staff/Children Arrival and departure time

6:00 AM	School opens. Some staff arrive.
6:30 AM	<ul style="list-style-type: none"> •Vehicles begin to arrive with children •Vehicles are parked, and children are escorted into the classroom building by parents and are signed in.
6:30 AM – 9:30 AM	During this period, all students arrive and are in class. Vehicles tend to arrive at a steady pace of approximately 16 cars per 15-minute increments although there tend to be "clusters" of arrivals at 8:00 AM and 9:00 AM. But, absent any special circumstances, all students have arrived and are in class by 9:30 AM.
9:30 AM – 3:30 PM	There is some traffic arriving and departing during this period. Generally, that would involve parents coming to pick up a child for a special appointment; or parents arriving for a meeting with school administration; or special instructors (e.g., music teacher) arriving for a special purpose; or deliveries
3:30 PM – 6:30 PM	Pickup of children by parents tends to run at an even pace between 3:30 PM and 5:00 PM. Classes are formally over at 5:00 PM, but the School offers after-hours programs until 6:30 PM and approximately 15-20 students would stay over beyond 5:00 PM and would be picked up by their parents between 5:00 PM and 6:00 PM.

Source: Applicant Justification Statement May 15, 2019

Primrose's Amended Statement of Justification (Exhibit 62, p. 15) is equally conclusory:

Ample and appropriate area for the discharge and pick up of the children is provided in the design of the new facility on the subject property. There are eleven (11) parking spaces (2 handicapped) immediately outside of the front door of the school building, a number that is usually adequate to accommodate all children dropped off and picked up within a fifteen (15) minute interval.

Several in the community, some with experience in operating daycares, testified that they did not believe there were sufficient spaces for the size of the daycare. Ms. Alana Chamoun

testified that her mother-in-law owns a group day care home for 12 children to the east of the subject property on Needwood Road. She is concerned that the 12 spaces allotted for parent pick-up and drop-off will not be enough for 195 students. At her mother-in-law's daycare, the driveway is constantly filled with up to 6 cars during that time. To get to the Metro in time for a commute to downtown DC, you've got to drop your children off at the same time every day. There is no room for parents to park if the 12 spaces insufficient. In her opinion, it just adds more congestion to an already congested area.

Ms. Rice (Ackad) also questioned the time allotted by Primrose to drop-off and pick-up children. Parents must first drive 600 feet along the drive aisle from Needwood Road, then find a parking space, get your children out, get to the sidewalk and then the front door. After that, you must sign-in in one spot with one or two children, walk to one or classrooms with depending on how many children you're dropping off, and then return to your car in the parking lot. She felt that the application had no statistical analysis of how long it will take to drive down the driveway, park, negotiate getting the children inside and to their classrooms, and return to their car. She isn't sure that the number of children scheduled to arrive in 15 minute intervals can complete the drop-off in this period. She disagrees with the Applicant's position that the parking did not require vehicles to back up. They will have to back up to get out of the parking spaces. It's not a circular pattern. 11/22/19 T. 189-202. Others expressed the same skepticism. 11/22/19 T. 240-241 (Patricia Eng); 3/5/20 T. 267 (Olga Sabran).

Conclusion: The evidence and analysis presented by the Applicant is not precise. Mr. Matthew Taylor, Primrose's representative who develops sites for the franchisor, touched briefly on pick-up and drop-off by parents, but did not explain in detail why Primrose concluded that only 12 spaces were necessary. 11/22/19 T. 37-39. Mr. Wolford testified only that the minimum number of parking spaces required by the Zoning Ordinance is 39 and Primrose is providing 44 but did not

go into the analysis of whether these were enough to accommodate drop-off and pick-up for 195 children. 11/22/19 T. 145. Mr. Cook testified that, based on his experience with Primrose, Primrose calculates drop-off times between 7 and 12 minutes, but didn't analyze that in terms of the number of spaces required to accommodate this. 3/9/20 T. 256.

Based on the chart in the Staff Report of arrivals, the Hearing Examiner calculates that there is sufficient parking for 16 cars every fifteen minutes if drop-offs take no more than 7 minutes, the shortest time for drop-off given by Mr. Cook.⁴⁰ If the drop-offs take 12 minutes, the time needed for drop-off of 64 vehicles is slightly above an hour. The Hearing Examiner assumes, although in this case, it is only an assumption, that Primrose based the number of spaces allotted for parent drop-off on its experience, since it is a franchise with many facilities.⁴¹ However, both Ms. Rice and Ms. Chamoun have experience with daycares as well. Ms. Rice correctly notes that handicapped spaces must be reserved for the disabled. It's not clear whether the handicapped spots are included in the 12 spaces allocated for drop-off. Nor is there concrete testimony regarding how Staff changes will be managed in conjunction with drop-offs. While the drive aisle is long and has storage, it is only 20 feet wide in this case, under Primrose's preferred width of 24 feet. Mr. Intriago testified that Primrose prefers the drive aisles to be wider because parents are sometimes "distracted" when dropping off their children. 3/5/20 T. 207. Based on the record before her, the Hearing Examiner is unable to find that parking is adequate for the number of children proposed.

iii. The Hearing Examiner may limit the number of children outside at any one time.

Planning Staff concluded the following (Exhibit 106, p. 26):

⁴⁰16 vehicles x 15 minutes = 64 vehicles per hour. 64 vehicles/12 parking spaces = requires 5.34 turnovers per space in one hour. 5.3 turnovers x 7 minutes per drop-off = 37.7 minutes. The same calculation if drop-offs are 12 minutes apiece results in a total of 63.6 minutes, slightly above the one hour estimated by Primrose.

The Applicant indicated that only three of the four play areas will be active at any one time. In addition, the play areas are located away from the adjoining residential neighborhood separated by the building and the driveway and buffered by fencing and perimeter planting. Staff does not find a need for limitation on the number of children outside at any one time.

On rebuttal (as described above), Mr. Mandava testified that no more than 60 children will be outside at any time. He further stated that teachers will supervise children to keep the noise down. He also mentioned an opaque fence and landscaping would assist in keeping the noise down. 3/10/20 T. 14; 4/6/21 T. 153.

Conclusion: It is unclear to the Hearing Examiner whether Staff knew of the Mitchell residence at the time it published its report. The Hearing Examiner finds that the Applicant has not met its burden of proof that noise from the plan will not affect the neighbors. Mr. Posey and Dr. Kosary testified that they can hear noise from the church parking lot inside their home. The Mitchell's will have 60 children playing in proximity to their rear yard. While teachers may supervise the children, there is no quantification of how that would subdue noise nor any estimate of what the decibel level will be. Nothing in the record describes any sound mitigating qualities of either the landscaping proposed or an opaque fence. Based on this record, the Hearing Examiner finds that the Applicant has failed to meet its burden of proof that 60 children in the play area at one time will not adversely affect the surrounding properties. There is nothing in the record to reflect whether a smaller number could be compatible, and because she denies the use on other grounds, the Hearing Examiner doesn't decide this.

iv. In the RE-2, RE-2C, RE-1, R-200, R-90, R-60, and R-40 zones, the Day Care Center (Over 30 Persons) must be located on a site containing a minimum of 500 square feet of land area per person. The Hearing Examiner may reduce the area requirement to less than 500 square feet, but not less than 250 square feet, per person where it finds that:

(a) the facility will predominately serve persons of an age range that requires limited outdoor activity space;

***(b) the additional density will not adversely affect adjacent properties; and
(c) additional traffic generated by the additional density will not adversely affect the surrounding streets.***

Conclusion: The site area is a total of 2.94 acres or approximately 128,066 square feet. Staff correctly concluded that with 195 students, there will be 657 square feet per child, meeting this standard.

v. The Hearing Examiner may limit the number of people allowed for overnight care.

Conclusion: This provision is not applicable because the proposed use does not include any overnight care.

vi. In the AR zone, this use may be prohibited Section 3.1.5, Transferable Development Rights.

Conclusion: This provision is not applicable because the site is not located in the AR Zone.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. The applicable requirements, and whether the use meets these requirements, are discussed below.

1. Site Access Standards

Zoning Ordinance Division 59.6.1. governs "Site Access." Section 59.6.1.2. provides:

Division 6.1 applies to development in the Residential Multi-Unit, Commercial/Residential, Employment, Industrial, and Floating zones if:

- A. an apartment, multi use, or general building type is proposed; and*
- B. a site plan or conditional use approval is required.*

Conclusion: By its own terms, Division 59.6.1 does not apply to development in single-family residential zones, such as the RE-1 Zone involved in this case.

2. Parking Spaces Required, Parking Setbacks, Parking Lot Screening and Waivers

The standards for the number of parking spaces required, their design, parking setbacks

and parking lot screening are governed by Division 6.2 of the Zoning Ordinance.

a. Number of Parking Spaces Required by Section 59.6.2.4

The Staff report states that the “base minimum” required parking is 0.5 spaces per employee plus one space for each vehicle used for the daycare center. However, that applies only to Family and Group Daycares. *Zoning Ordinance*, §59.6.2.4. Nevertheless, Staff applies the correct metric in a table from the Staff Report (Exhibit 106, p. 12):

Table 5: Parking

Section 59.6.2.4 Parking	Required	Provided
Vehicle spaces 3 sp/1,000 SF of GFA	13,000 ÷ 1,000 X 3 = 39 sp including 2 van-accessible handicapped spaces	44 sp including 2 van- accessible Handicapped spaces
Bicycle parking 1/5,000SF, 85% long term	13,000 ÷ 5 X 1 = 2.60 = 3 sp	3 long term spaces

Section 59.6.2.4.B. of the Zoning Ordinance specifies the required number of spaces. Mr. Intriago testified that the conditional use plan includes 44 spaces, more than required by the Zoning Ordinance. He also testified that the three required three bicycle spaces are provided in long-term bike lockers are at the southeast corner of the main building. 3/5/20 T. 229.

Conclusion: Based uncontroverted this evidence, the Hearing Examiner finds that the Applicant's proposal satisfies the minimum number of parking space required by the Zoning Ordinance.

b. Parking Design Standards

Section 59.6.2.5.A through J of the Zoning Ordinance sets forth detailed design standards for parking spaces and access drive aisles. Staff advises that all these standards are met, and no one contests this.⁴² Based on this record, the Hearing Examiner concludes that these requirements have been met.

⁴² The Staff Report states that the all drive aisles are 22 feet. Exhibit 106, p. 13. However, Mr. Intriago testified that it is designed to be 20 feet to allow the landscaped buffer adjacent to the Kosary/Posey property to be 12 rather than 10 feet in width (the minimum required). 3/5/20 T. 207-208.

c. Parking Setbacks (Section 59.6.2.5.K.)

Section 59.6.2.5.K governs parking setbacks for conditional uses:

K. Facilities for Conditional Uses in Residential Detached Zones
Any off-street parking facility for a conditional use that is located in a Residential Detached zone where 3 or more parking spaces are provided must satisfy the following standards:

1. Location

Each parking facility must be located to maintain a residential character and a pedestrian-friendly street.

2. Setbacks

a. The minimum rear parking setback equals the minimum rear setback required for the detached house.

b. The minimum side parking setback equals 2 times the minimum side setback required for the detached house.

c. In addition to the required setbacks for each parking facility:

i. the required side and rear parking setbacks must be increased by 5 feet for a parking facility with 150 to 199 parking spaces; and

ii. the required side and rear parking setbacks must be increased by 10 feet for a parking facility with more than 199 parking spaces.

Additional provisions govern the grant of a waiver from this setback. The first is §59.6.2.10 of the Zoning Ordinance, which states:

The deciding body may waive any requirement of Division 6.2, except the required parking in a Parking Lot District under Section 6.2.3.H.1, if the alternative design satisfies Section 6.2.1.

Section 59.6.2.1 of the Ordinance is the intent of the parking regulations, which is to “that adequate parking is provided in a safe and efficient manner.” Section 59.7.3.1.E.1.b (under “Necessary Findings”, above) provides that the Hearing Examiner may waive this section “to the extent needed to ensure compatibility.”

Staff concluded that the minimum required setback called for in this section is 34 feet—two times the 17-foot setback required by the RE-1 Zone. None of the parties dispute the minimum

setback required. As this drive aisle is setback from the eastern property line only by 12 feet, the Applicant requests a waiver of 22 feet of the minimum setback required. Exhibit 106, pp. 15-17.

Staff supported the waiver request (Exhibit 106, p. 15-17):

Staff supports this waiver because the proposed driveway access point provides for the safest and efficient length of distance of sight along a ridge on the adjoining road where sight distance is not constrained. To minimize and mitigate potential impacts, on adjoining properties, of glare and noise from vehicles entering and exiting the site, the Applicant will provide a combination of landscape buffer and screening.

With the requested waiver and recommended conditions, the proposed design meets the intent of Section 6.2.1 to ensure that adequate parking is provided in a safe and efficient manner.

Because the Applicant's attempts to design the site layout are relevant to the need for the requested waiver of the parking setback in this case, the Hearing Examiner summarizes the testimony and evidence in the record briefly here.

Both the Applicant's expert in architecture, Mr. James Alt, its expert in civil engineering, Mr. Eduardo Intriago, and its expert land planner, Mr. Scott Wolford, testified that Primrose (the franchise corporation) provides them with a prototype building. According to Mr. Wolford, a daycare with students in the "low 100's" of children is not "economically feasible" for Primrose. 11/22/19 T. 175. The professional team uses that prototype to design the site layout. Mr. Wolford testified that Primrose informs them which of the prototype floor plans they would prefer to have based upon their market research, the proposed number of children, and the types of services they would like to provide. Primrose typically designs their centers so that the classrooms exit directly to an enclosed and secure play area. They then break up the play area into different age groups so that children have age appropriate equipment. 11/22/19 T. 108-109, 176-177. The different prototype buildings have different footprints but are about the same shape. 11/22/19 T. 176-177.

According to Mr. Alt, Primrose has about 400 prototypes. T. 248. The prototypes incorporate a variety of data that Primrose has assembled to develop their centers. Primrose

provides instructions on the number of classrooms. T. 248. His firm then analyzes the requirements provided by Primrose to incorporate into a building design. 3/6/2020 T. 248.

Mr. Intriago testified that Primrose provides him with a building and play area prototype, which he uses to engineer the site layout. In this case, he was given a building footprint by Primrose along with a narrow sidewalk on the eastern side that will take children from their classrooms to their individual playground areas. On the eastern side of the sidewalk there is a 4-foot landscaped buffer where he is placing the safety fence that prevent children from exiting the play area. 3/5/20 T. 212.

According to Mr. Intriago, Primrose initially explored using Carnegie Avenue for access. The County wished them to dedicate an additional 5 feet to bring the road up to current standards and they did a preliminary design. It was during this process that the Montgomery County Department of Transportation (MCDOT) informed them that the sight distance at the Carnegie Avenue intersection with Needwood Road did not meet minimum sight distance requirements. Until then, they had looked at abandoning the right-of-way and giving 50% to each of the abutting properties. They then would have put a driveway on the west side and provided a cross-easement to the Ms. Tapscott Smith's dwelling. That proposal was also turned down because MCDOT wanted them to obtain enough property to improve the turn-around at the southern end of Carnegie Avenue to current standards. After learning they would be unable to use Carnegie Avenue, they looked at access on the eastern side of the site. 3/5/20 T. 41-44.

The Applicant also originally proposed parking along the west side of the building along Carnegie Avenue. Planning Staff's policy, however, is to locate all parking in the rear of the property, so they had to redesign that as well.⁴³ 3/5/20 T. 204-206.

⁴³ Parking in the rear in this case is also required by the limited use standards of the Zoning Ordinance. *Zoning Ordinance*, §59.3.4.4.F.2.b.

According to the Applicant's expert witnesses, the subject property has several constraints that restrict where development can go on the property. Mr. Intriago testified that a major constraint is that the property has two front yards, one along Needwood and one along Carnegie. Both require the building to be setback 50-foot setback from each right-of-way. In his opinion, there is no problem with the proposed setback from Needwood because it is comparable to adjacent buildings along Needwood Road and the building could be moved north or south. In his opinion, the major constraint is the 50-foot setback from Carnegie Avenue, which forces the development to the east. He was given a building footprint by Primrose that includes a narrow sidewalk on the eastern side to take children from their classrooms to their individual playground areas. East of that sidewalk, there is a 4-foot landscaped buffer with a safety fence to prevent children from exiting the play area. After that is a 6-foot wide sidewalk to provide ADA access to Needwood Road that complies with the minimum width span required by Montgomery County. East of the sidewalk to Needwood Road is a 20-foot driveway. This leaves room only enough room for a 12-foot landscaped buffer along the eastern property line. Typical Primrose facilities have driveways that are 24 feet wide because parents may be distracted and need more room to maneuver. Mr. Intriago recommended the 20-foot width because he wanted to minimize the encroachment into the parking setback. The driveway is 20-feet wide, the minimum width to have two-way access. 3/5/20 T. 207-212.

In Mr. Intriago's opinion, the access drive cannot be located further to the west (toward the middle of the Needwood Road frontage) on the property because the drive aisle would not be able to accommodate turning movements of emergency equipment and large trucks. T. 206. East of the drive aisle is a 12-foot landscaped strip adjacent to the Kosary/Posey property. Exhibit 199(d). The Limit of Disturbance (LOD) for construction is on the eastern property line. *Id.*

Mr. Wolford characterized the site constraints as the long, narrow shape of the lot and the Planning Department's requirement to place parking in the rear of the building, which forces the building to the northern part of the property. 11/22/19 T. 102-109; 4/9/21 T. 152. He also testified the driveway had to be on the east side of the property because the intersection of Carnegie Avenue and Needwood Road did not have adequate sight distance. 11/22/19 T. 140-141.

According to Mr. Wolford, the Applicant's operations prevent it from locating the driveway further to the west. Primrose could not bring the driveway in front of the building because of the "program" size of the building and the play area. 11/22/19 T. 138-140. The "program" is the model for Primrose preferred operations that require every classroom have access to a playground surrounding the building. There isn't enough space to enter from the northeast corner, take an immediate right turn to wrap around the west side of the property and come back to the parking lot. They would have been required to get setback waivers for the parking because of the front yard setbacks from Carnegie. 11/22/19 T. 140-141. When asked whether the building or the site constraints generated the need for the waiver, Mr. Wolford testified (*Id.*, T. 141), "It's the site constraint and the geometry of what would have to be done to get all those radiuses and turns on the driveway." Mr. Intriago testified that they had studied the possibility of having the driveway turn west around the building. That configuration could not accommodate the required turning radius of a fire truck. It also meant the building had to be pushed south just to get the firetruck and driveway through the west side of the property. After the driveway passes the building, the driveway would usurp some of the parking area. 3/6/20 T. 58.

When you put the physical and operational characteristics together, Mr. Wolford testified, there's not a lot of developable area left to maneuver driveway around the building and through the site. The square footage of the building is based on the square footage that works for Primrose as a business model. 11/22/19 T. 168-169. Mr. Cook testified that the driveway is in the "optimal"

location because it is located where there is the most sight distance is available from both east and west approaches.

Mr. Intriago testified that the safest access point to the property is on the eastern side (as opposed to Carnegie Avenue) because this area meets the Montgomery County standards for line of sight. The existing driveway at the crest of Needwood Road is at the optimum location for site distance and is located approximately mid-way between the two property lines. From that crest, the road slopes down in either direction. 3/5/20 T. 33-36. In his opinion, the best driveway location purely for sight distance is approximately 20-30 feet west of the existing driveway to the eastern property line. The closer to the crest the greater the sight distance. 3/5/20 T.37. He testified, however, that they could not locate driveway access further west on the property due to the turning radius needed for fire trucks. To accommodate the fire code turning radius of a fire truck, which is 20 feet on the inside and 50 feet on the outside, they had to take the driveway and meander around the building. That meant the building had to be pushed south just to get the firetruck and driveway through the west side of the property. 3/5/20 T. 58.

Mr. Cook testified the “over vertical” (*i.e.*, crest) in the roadway limits or restricts the available site distance. This rise is also the reason that the Carnegie Avenue intersection does meet sight distance requirements. The location on the east side of the property eliminates the sight distance problem that existed with the driveway originally proposed (at Carnegie Avenue). The further to the east the driveway is located, the greater sight distance in both directions on Needwood Road. 4/2/21 T. 49-52. He testified that the driveway is best placed as far to the east as possible given the number of students proposed. 4/2/21 T. 75.

Those in opposition disagree that sight distance generates the need for the waiver of the parking setback and argue that it is Primrose’s “program”, including the size of the combined building and play area, and number of students that cause the parking to encroach 22 feet into the

minimum parking setback. Dr. Kosary and Mr. Posey take issue with Primrose's characterization of the need for the waiver provided to Staff by the Applicant's attorney. Counsel's letter to Staff (Attachment D to OZAH Exhibit 106), states that "a parking waiver is mandatory to provide access to the site" and that the "only" place for a driveway connection to be located is as close as possible to the eastern property line along Needwood Road. 3/25/21 T. 204. Not satisfied with her own measurement of available sight distance, Dr. Kosary tasked an expert in land surveying and land development, Mr. Russell Reese, to measure the available sight distance from three points along the subject property's Needwood Road frontage. He submitted certified sight distance measurements using the standard forms required by Montgomery County. 3/10/21 T. 118. He opined that adequate sight distance for a driveway begins at a point 136.6 feet west of the subject property's eastern property line. *Id.*, T. 119; Exhibit 176(a).II. The existing driveway on the subject property is 78 feet east of that point toward the Kosary/Posey property and has adequate site distance. *Id.* The property frontage along Needwood Road is approximately 208 feet. In his opinion, approximately 136.6 feet of that frontage has adequate sight distance. *Id.*, T. 123 124.

Thus, those in opposition argue that the need for the waiver does not stem sight distance or site constraints, such as the long narrow lot that has two front yards. They posit that the waiver stems from Primrose's insistence on adhering to its "program". Primrose's "program" includes the number of students and the size of the combined building and play area. Primrose's program requires the building and play area to be adjacent due to their operational requirement to have children access the play area directly from their classrooms. 4/13/21 T. 29-31.

Mr. Davis opined that there has been no justification to approve the setback waiver. Under the Zoning Ordinance, the waiver must fulfill the intent of the parking standards, which is to provide parking in a safe and efficient manner. They could provide parking with the minimum

34-foot setback in a safe and efficient manner. In his opinion, the primary purpose for the waiver is to reduce the amount of setback so they can provide a very large scale facility. *Id.*, T. 29.

Conclusion: The parties posit different reasons why the waiver of the parking setback is needed. The standards permits approval of a waiver if it meets the intent of the parking regulations in the Zoning Ordinance (i.e., to provide safe and efficient parking) and is compatible with the surrounding area.

The Hearing Examiner finds that *all* the factors cited by the parties drive the need for the requested waiver, including Primrose's "program". The Hearing Examiner finds sight distance permits the driveway to be located further west and that the proposed location is *not* the only location the driveway can be located solely looking at sight distance. Mr. Intriago testified that the driveway had to be located on the eastern edge of the property because they could not meet turning requirements for emergency vehicles in front of the combined building/play area, even though the best sight distance is from the existing driveway located toward the middle of the property. The rear parking forces the building to the north, leaving less area for emergency vehicles to turn. The building and play area are combined because Primrose's "program" requires children to have secure access from their classroom to the play area. Were it a smaller building with reduced enrollment or there was some flexibility in the design of the building and play area, it's possible that a different daycare center could be placed on the property. The Hearing Examiner agrees with Ms. Rice that there are daycares with fewer than 195 students that are economically viable. Whether a smaller-sized daycare center "fits" with Primrose's business plan is certainly theirs to decide but has no impact on the criterion for approval of a waiver.

The second question is whether parking waiver setback is compatible with the surrounding area and adjacent uses. The Hearing Examiner has found that it isn't. For that reason, she denies the waiver request.

C. Parking Lot Requirements for 10 or More Spaces

1. Landscaped Area

- a. A surface parking lot must have landscaped islands that are a minimum of 100 contiguous square feet each comprising a minimum of 5% of the total area of the surface parking lot. Where possible, any existing tree must be protected and incorporated into the design of the parking lot.***
- b. A maximum of 20 parking spaces may be located between islands.***
- c. A landscaped area may be used for a stormwater management ESD facility.***

2. Tree Canopy

Each parking lot must maintain a minimum tree canopy of 25% coverage at 20 years of growth, as defined by the Planning Board's Trees Technical Manual, as amended.

3. Perimeter Planting

- a. The perimeter planting area for a property that abuts an Agricultural, Rural Residential, or Residential Detached zoned property that is vacant or improved with an agricultural or residential use must:***
 - i. be a minimum of 10 feet wide;***
 - ii. contain a hedge, fence, or wall a minimum of 6 feet high;***
 - iii. have a canopy tree planted every 30 feet on center; and***
 - iv. have a minimum of 2 understory trees planted for every canopy tree.***

Staff found that the parking lot landscaping met the minimum requirements and Mr. Jolley testified to this effect. Exhibit 106, p. pp. 17-18. Mr. Jolley testified that portions exceed the requirements. According to Mr. Jolley the landscaped islands in the parking lot exceed the minimum of 5% of the surface area. 3/5/20 T. 148-149. The landscaped strip along the eastern property line is two feet wider than the minimum required.

Conclusion: Based on this evidence, the Hearing Examiner finds that the Applicant's proposal satisfies the minimum conditional use parking lot screening and landscaping requirements of the

Zoning Ordinance for parking lots in residential zones in this section. The problem in this case is the minimum required landscaping doesn't mitigate the adverse impact caused by the waiver of 65 percent of the required setback and the proximity of the Kosary/Posey dwelling and back yard.

3. Site Landscaping, Screening and Lighting

Standards for site landscaping and lighting are set forth in Division 6.4 of the Zoning Ordinance, and the standards for screening are set forth in Division 6.5. The stated intent of Division 6.4 is *"to preserve property values, preserve and strengthen the character of communities, and improve water and air quality."* §59.6.4.1. The stated intent of Division 6.5 is *"to ensure appropriate screening between different building types and uses."* Zoning Ordinance §59.6.5.1. These site screening and landscaping requirements are in addition to those that apply to screening and landscaping of parking facilities discussed above.

a. Lighting

Zoning Ordinance §59.6.4.4.E. provides:

E. Conditional Uses

Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.

The "outdoor lighting requirements" referred to above require illumination levels to be no more than "0.1 footcandles" or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone." *Zoning Ordinance, §59.6.4.4.E.*

Conclusion: The Photometric Plan (Exhibit 94(a)) shows that the footcandles will be 0.1 at most of the site boundaries. It does not meet that along the boundary of Carnegie Avenue, where the footcandles don't reduce to 0.1 until almost midway to the west into Carnegie Avenue. The Zoning Ordinance applies the 0.1 footcandle standard to residential properties that "abut" a lot with a

detached house building type. The term “abutting” is defined as properties that “share a property line or easement line.” *Zoning Ordinance*, §1.41. Because the Mitchell property technically confronts rather than abuts the subject property, the Hearing Examiner finds that the application meets the minimum standards of the Zoning Ordinance. In Part III.A of this Report, the Hearing Examiner found that the lighting proposed is not compatible with the surrounding area or the adjacent uses for the reasons stated due to the lack of screening and proximity to residences.

b. Site Screening and Landscaping

Division 6.4 of the Zoning Ordinance sets minimum standards for site landscaping, which are intended to “preserve property values, preserve and strengthen the character of communities, and improve water and air quality.” §59.6.4.1. Section 59.6.5.3.A.1. provides that “*Screening is required along a lot line shared with an abutting property that is vacant or improved with an agricultural or residential use.*”

The provisions of Division 6.4 are mostly general and definitional; however, the provisions of Division 6.5 are very specific. Zoning Ordinance §59.6.5.3.C.7. sets the following requirements:

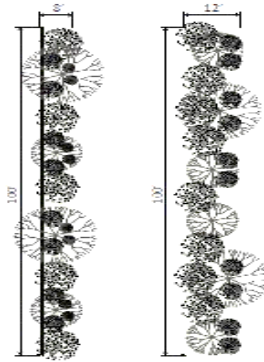
C. Screening Requirements by Building Type

- 1. Screening is determined by the proposed building type, unless otherwise stated. The minimum screening requirements for each building type are in Section 6.5.3.C.4 through Section 6.5.3.C.8.*
- 2. Plant materials are specified for each 100 linear feet of screening area. Any fractional requirement must be rounded up to the next higher whole number.*
- 3. The applicant may choose any option for the applicable building type or use.*

* * *

- 7. General Building with a Non-Industrial Use; Conditional Use in the Agricultural, Rural Residential, or Residential Detached Zones; and Conditional Use in a Duplex in Any Other Zone.*

The Zoning Ordinance contains two options for landscaping the site perimeter, shown on the following page. *Zoning Ordinance*, §59.6.5.3.C.



	Option A	Option B
Dimensions (min)		
Depth	8'	12'
Planting and Screening Requirements		
Trees (minimum per 100')		
Canopy	2	2
Understory or Evergreen	2	4
Shrubs (minimum per 100')		
Large	6	8
Medium	8	12
Small	8	--
Wall, Fence or Berm (min)	4' fence or wall	--

Planning Staff found that the perimeter landscaped screening met the minimum requirements. Exhibit 106, p. 18. Mr. Intriago testified that the landscaping proposed meets the minimum requirements and exceeds the minimum height of the fence by two feet. 3/5/20 T. 209. Mr. Jolley opined that the landscaping proposed meets all the requirements of Division 6.5 of the Zoning Ordinance, as confirmed by the Staff Report. 3/5/20 T. 133-134.

Conclusion: Based on this evidence, the Hearing Examiner finds that the Applicant's proposal is consistent with the site landscaping and screening provisions of the Zoning Ordinance. Again, due to the intensity of the use and the proximity of adjacent residential uses, she finds that the proposed conditional use is incompatible with the surrounding area.

4. Signage

The use of signage in residential zones is governed by Division 6.7. Zoning Ordinance

§59.6.7.8.A.1 sets the general standards for signs in Residential Zones:

A. Base Sign Area

The maximum total area of all permanent signs on a lot or parcel in a Residential zone is 2 square feet, unless additional area is permitted under Division 6.7.

1. Freestanding Sign

- a. One freestanding sign is allowed.*
- b. The minimum setback for a sign is 5 feet from the property line.*
- c. The maximum height of the sign is 5 feet.*
- d. Illumination is prohibited.*

Additional signage area is allowed for subdivisions and multiunit developments, as specified in

Zoning Ordinance §59.6.7.8.B.1.:

B. Additional Sign Area

1. Subdivision and Multi-Unit Development Location Sign

Additional sign area is allowed for a permanent location sign erected at any entrance to a subdivision or Multi-Unit development if the sign is a ground sign or wall sign located at an entrance to the subdivision or building.

- a. 2 signs are allowed for each entrance.*
- b. The maximum sign area is 40 square feet per sign.*
- c. If the driveway entrance to the subdivision or development is located in the right-of-way, a revocable permit issued jointly by the Sign Review Board and the appropriate transportation jurisdiction must be obtained to erect the sign.*
- d. The maximum height of a sign is 26 feet.*
- e. The sign may be illuminated (see Section 6.7.6.E).*

Conclusion: The signage proposed by the Applicant was described and depicted in Part II.C.7. of this Report and Decision. Staff advises that the wall sign meets the Zoning Ordinance requirements, but the “Applicant must obtain a sign permit for the proposed freestanding sign.” Exhibit 106. Because the free-standing sign is larger than permitted in a residential zone, the Applicant will also have to obtain a variance from the Sign Review Board. The Applicant did not describe or present testimony on the sign at the public hearing. Because the Hearing Examiner denies the conditional use, she takes no position on this issue.

IV. DECISION

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Primrose School, for a conditional use under Section 59.3.4.4.F. of the Zoning Ordinance, to operate a child Daycare Center for up to 195 children at 7430 Needwood Road, Derwood, Maryland, is hereby ***DENIED***, along with the request for a waiver of the parking setback.

Issued this 7th day of June, 2021.



Lynn Robeson Hannan
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any party of record may file a written request to appeal the Hearing Examiner's Decision by requesting oral argument before the Board of Appeals, within 10 days issuance of the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Additional procedures are specified in Zoning Ordinance §59.7.3.1.f.1. Contact information for the Board of Appeals is:

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600
<http://www.montgomerycountymd.gov/boa/>

PLEASE NOTE THE FOLLOWING BOARD OF APPEALS FILING REQUIREMENTS DURING THE COVID-19 PANDEMIC:

The Board of Appeals website sets forth these procedures for filing documents:

Because remote operations may not always allow us to promptly date-stamp incoming U.S. Mail, until further notice, all time-sensitive filings (administrative appeals, appeals of conditional use decisions/requests for oral argument, requests for public hearings on administrative modifications, requests for reconsideration, etc.) should be sent via email to BOA@montgomerycountymd.gov, and will be considered to have been filed on the date and time shown on your email. In addition, you also need to send a hard copy of your request, with any required filing fee, via U.S. Mail, to the Board's 100 Maryland Avenue address (above). Board staff will acknowledge receipt of your request and will contact you regarding scheduling.

If you have questions about how to file a request for oral argument, please contact Staff of the Board of Appeals.

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

NOTIFICATION OF DECISION TO BE SENT TO:

Jody Kline, Esquire
Attorney for the Applicant
William Chen, Esquire
Attorney for Dr. Kosary, Mr. Posey and Ms. English
Barbara Jay, Executive Director, Montgomery County Board of Appeals
Patrick Butler, Planning Department
Elsabett Tesfaye, Planning Department
Greg Nichols, Manager, Department of Permitting Services
Victor Salazar, Department of Permitting Services
Michael Coveyou, Director, Finance Department
Charles Frederick, Esquire, Associate County Attorney