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I. STATEMENT OF THE CASE

On May 23, 2008, Petitioner, Federal Republic of Germany (German School – Washington, D.C., hereinafter referred to as “the German School”),¹ filed Petition CBA-2684-C seeking modifications to existing special exception (CBA-2684 and 2684-B) which permits Petitioner to operate a private educational institution pursuant to Zoning Code Section 59-G-2.19. In summary form, the modifications requested are to permit construction of new facilities and to add new activities, including a summer school program, without increasing school-year enrollment. The property is located at 8617 Chateau Drive, Potomac, Maryland and contains 16.93 acres. It is zoned RE-2 and bears the Tax Account No. 10-001-00853410.

On June 24, 2008, the Board of Appeals issued a notice that the Office of Zoning and Administrative Hearings would conduct a public hearing on October 20, 2008, at 9:30 a.m. (Ex. 21(b)).

On September 26, 2008, the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) filed its Report (Exhibit 23)², which recommended approval of the Modification Petition, with conditions.³ On October 13, 2008, the Planning Board unanimously recommended approval, with the same conditions suggested by Technical Staff (Exhibit 25).

On October 16, 2008, a letter in opposition was submitted by Jerome Sowalsky, a nearby

¹ The Petitioner is listed as “Federal Republic of Germany” on the application itself (Exhibit 1(a)). The Board of Appeals identified the Petitioner as “Government of the Federal Republic of Germany” in the original grant of the special exception on December 9, 1969 (Exhibit 17(a)), but added “(The German School)” to the heading in its opinions granting modifications on April 22, 1994 (CBA-2684-A and B, Exhibits 17(b) and (c)). The Board reverted back to just “Government of the Federal Republic of Germany” in the heading of the administrative modification granted on April 5, 1996 (Exhibit 17(d)). Through a “Usufruct Agreement” (Exhibit 15(c)), the Federal Republic of Germany authorized “The German School of Washington, represented by the School Board” to utilize the facilities on the subject site. The Federal Republic of Germany also signed a “Letter of authorization for Zoning Process” confirming that “the German School, represented by the School Board, has authority to prosecute the instant modification petition (Exhibit 16). The Statement of Operations filed by Petitioner (Exhibit 3(a)) refers to “The German School Society, Washington, D.C., operating as the German School Washington, D.C.” For clarity and simplicity, the Hearing Examiner has amalgamated all these versions of the Petitioner into “Federal Republic of Germany (German School – Washington, D.C.)”

² The Technical Staff Report, Exhibit 23, is frequently quoted and paraphrased herein.

³ On October 6, 2008, Petitioner’s proposed Transportation Management Plan (TMP), Exhibit 24, was submitted by Technical Staff as an attachment to its report.

resident (Exhibit 26). Mr. Sowalsky expressed concerns about the traffic and noise that would be generated by the changes, especially the new summer school. Similar written objections were raised by two other neighbors, Dr. George Char (Exhibit 27) and Dr. Ivan Aksentijevich (Exhibit 38).

The first hearing went forward as scheduled on October 20, 2008. Petitioner called seven witnesses, and four neighbors testified in opposition. The record was held open following the hearing for additional submissions from the Petitioner. The Hearing Examiner's review of the record after the initial hearing revealed that many of the activities enumerated in the proposed Statement of Operations (Exhibit 3(a)) had not been previously approved by the Board of Appeals and that the notice for the October 20, 2008 hearing (Exhibit 21(b)) did not specify that these activities were to be considered at that hearing. Therefore, on December 5, 2008, the Hearing Examiner issued an Order (Exhibit 48) reopening the record to conduct an additional hearing regarding the proposed Statement of Operations. New notice was sent out scheduling the additional hearing date for February 6, 2009, and specifying that the additional hearing was to be limited to consideration of the activities specified in the proposed Statement of Operations that were not expressly approved by prior Board of Appeals resolutions. Exhibit 48(a)). These limitations were imposed because the proposed new summer school and the proposed physical modifications to the site had already been fully addressed at the October 20, 2008 hearing.

On January 30, 2009, Petitioner filed a motion to postpone the February 6, 2009 hearing to allow time for amendment of the Statement of Operations and review by Technical Staff and interested parties. Exhibit 55. That motion was granted, but to accommodate the schedules of all interested parties, the new hearing date had to be set for April 7, 2009. Petitioner then filed a motion to bifurcate the case by sending the issue of proposed changes to the physical plant immediately up to the Board of Appeals for its review. Exhibit 62(a). That motion was denied because the Board's rules do not authorize bifurcation; much of the delay in this case is the result of

Petitioner's own doing; and little time would be saved by bifurcating the case. Exhibit 65.

The final hearing went forward as scheduled on April 7, 2009, and was completed on the same date,⁴ with the record held open for additional submissions from Petitioner by April 17, 2009; comments from the community and Technical Staff by April 27, 2009; and any responses from Petitioner by April 30, 2009, on which date the record would close.

Petitioner timely filed a "Second Amended Statement of Operations" on April 17, 2009, along with suggestions for changes to the proposed Transportation Management Plan (Exhibits 80(a) and 80). Comments were received from Mr. and Mrs. Sowalsky on April 27, 2009 (Exhibit 81). Petitioner replied on April 29, 2009 (Exhibit 86). The record closed on April 30, 2009, as scheduled.

The appropriate scope of the hearing on a petition for modification of a special exception is spelled out in Zoning Ordinance § 59-G-1.3(c)(4). That subsection provides:

(4) The public hearing must be limited to consideration of the proposed modifications noted in the Board's notice of public hearing and to (1) discussion of those aspects of the special exception use that are directly related to those proposals, and (2) as limited by paragraph (a) below, the underlying special exception, if the modification proposes an expansion of the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less.

(A) After the close of the record of the proceedings, the Board must make a determination on the issues presented. The Board may reaffirm, amend, add to, delete or modify the existing terms and/or conditions of the special exception. The Board may require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26, if (1) the proposed modification expands the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less, and (2) the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.

⁴ References to the transcript of the October 20, 2008 hearing are designated "10/20/08 Tr. xx," and references to the April 7, 2009 hearing transcript are designated "4/7/09 Tr. xx."

Petitioner's plans include expansion of the total floor area by 20,288 square feet, which exceeds the statutory threshold of 7,500 square feet; however, the expansion of the facilities (as distinguished from operations), when considered in combination with the underlying special exception, will not change the character of the special exception. Thus, the scope of this inquiry does not require a sweeping review of landscaping, circulation and screening on campus, except to the extent that they are affected by the proposed physical changes. This review will include the proposed physical changes to the site, the newly proposed summer school and the activities not previously approved by the Board, all of which have been noticed and discussed at the hearings in this case.

There is no opposition to the proposed physical modifications to the campus. As will be discussed below, Petitioner has demonstrated compliance with all the developmental standards, and its screening and other proposed measures should successfully avoid any adverse effects on the community from the new facilities. On the other hand, both the proposed summer school and the level of ongoing school-year activity not previously approved by the Board of Appeals are strongly opposed by neighbors living on Chateau Drive, a small street that provides the only access to the school. Four opposition witnesses testified at the two hearings, Jerome and Patti Sowalsky, Miguel Bachrach, and Susan Hess, all of whom are neighbors concerned about the impact of traffic, parking and related noise and activity on their neighborhood.

The central question in this case is easy to state – what are the appropriate limits and conditions to impose so that the activities of the German School do not create undue adverse effects on the school's neighbors living on Chateau Drive? As will be seen in the rest of this report, the answer to this issue is much more difficult to formulate than the question. The Hearing Examiner recommends approval of the proposed physical modifications, as well as most, but not all, of the ongoing activities engaged in by Petitioner. The Hearing Examiner also recommends approval of a

more limited version of the summer school than that proposed by Petitioner. The details are discussed below.

II. FACTUAL BACKGROUND

A. History of the German School and the Existing Special Exception Operations

The Board of Appeals granted special exception CBA-2684 to the “Government of the Federal Republic of Germany” on December 9, 1969, authorizing the Petitioner to build and operate a private educational institution for up to 650 students at the subject site. The Board’s resolution described an operation with “no summer school” (Exhibit 17(a), p.1) and severely limited after-hour activities:

There would be no athletic competition between schools, no grandstands, and no night activities. Soccer games are proposed to be held during the day. The school is proposed to be a day school only. P.T.A. meetings are held by classes and only one general meeting per year is held. It is anticipated that two school dances would be held during the school year. [Exhibit 17(a), p.2.]

The Resolution also specified that “Entrance to the school shall be from Chateau Drive only.” Exhibit 17(a), Condition 5. The school’s land is owned by the Federal Republic of Germany (Exhibit 15(a)), and used by the German School pursuant to a Usufruct Agreement, the current edition of which is in the record as Exhibit 15(b) and (c). The school began operations at the site in 1975.

On April 1, 1992, the Board of Appeals granted CBA-2684-A, a modification to the special exception, to allow the lower school to move from another location to join the upper school at the subject site. Before that modification was fully implemented, Petitioner and the community reached an accord to change some of the plans approved in CBA-2684-A, reducing building heights and adding buffering. While noting that either plan would have been appropriate, the Board accepted these changes as creating a “more pleasing” situation. Exhibit 17(b), p. 3. It therefore expressly revoked CBA-2684-A and replaced it, on April 22, 1994, with CBA-2684-B. Exhibits 17(b) and (c).

CBA-2684-B permits “the redesign of the building and other facilities initially approved by

the Board in April, 1992, including a bus bay, a 14-space parking lot and a gymnasium, to accomplish the consolidation of the kindergarten, elementary school, and high school.” Exhibit 17(b) p. 3. The Board also expressed its approval of Petitioner’s commitment not to have any access from the school to Kendale Road, on the west, thus leaving Chateau Drive as the only access. Petitioner filed an exhibit listing additional school activities in CBA-2684-B,⁵ but they were not expressly approved (or even mentioned) by the Board in its April 22, 1994 Opinion in CBA-2684-B. Moreover, the list does not include all the activities Petitioner indicates are currently ongoing. Most importantly, the 1994 list does not mention Saturday German language classes.

On April 5, 1996, the Board of Appeals granted an administrative modification to CBA-2684-B, which increased the size of the then proposed garage, gymnasium and HVAC system, while reducing the size of the then proposed elementary school addition. Exhibit 17(d). Having completed these modifications, the German School currently operates its consolidated campus at the subject site, pursuant to CBA-2684 and 2684-B. Access remains limited to Chateau Drive. The school’s current operations are described in the Second Amended Statement of Operations (Exhibit 80(a), pp. 1-3):

Pursuant to the special exception, the School conducts classes in the German language using German educational principles. The School’s operations now include educational programs for nursery school through 13th grade. It is anticipated that the 13th grade will be discontinued in 2009. A majority of the children are members of families assigned to the German Embassy, to other German government institutions or to international organizations. Approximately twenty (20) percent of the students are U.S. citizens. Students from the general local population are accepted.

Pursuant to the special exception, the maximum number of students permitted on the premises of the School is 650. Although actual enrollment varies from year to year, in most years the enrollment has ranged between 550 and 590 students.

⁵ The list of activities is included in Exhibit 3(c) in the CBA-2684-B file, but was misidentified in the exhibit list in that case as “Excerpts from the zoning ordinance.”

Faculty and support personnel vary from year to year. For the current school year, there are seventy-one (71) teachers, two (2) librarians, nine (9) office staff, four (4) maintenance staff, and ten (10) bus drivers. Independent contractors currently perform the School's cleaning and landscaping, and an independent contractor has been hired as a lifeguard for the indoor pool. Several of the teachers teach only one (1) or two (2) classes per week and, therefore, are not on the site every day or at the same time. The highest number of employees present at the School at any given time during regular school hours is approximately sixty (60). However, approximately eight (8) times a year, all teachers (approximately seventy (70)) are present for staff conferences that take place from 3:00 pm to 6:00 pm. Most teachers are on site already.

The School presently operates regular classes from late August through approximately the third week of June. Classes currently begin at 8:10 am, Monday through Friday. At the present time, classes end at 12:35 pm or 3:10 pm for students up to and including grade nine and end at 4:45 pm for grades ten through thirteen. There is a small aftercare program until approximately 4:45 pm for children in nursery school through 4th grade. 5th through 9th graders may engage in extracurricular activities until around 4:45 pm. 10th through 13th graders may remain on campus for extracurricular activities until as late as 6:00 pm. Occasionally, a few of those students may stay until approximately 8:00 pm for theater, ballroom dancing, music, or sports practice. Approximately forty (40) students, teachers, and parents participate in choir practice on Tuesday evenings from 7:30 pm to 9:00 pm.

At the present time, approximately 300 students arrive at the School in nine (9) school buses. Students in the top two grade levels are permitted to drive to school. For example, currently students in the 12th and 13th grades are permitted to drive to the School. After the 13th grade is eliminated in 2009, students in the 11th and 12th grades are proposed to be permitted to drive to the School. Presently, approximately thirty-five (35) students drive to the School and the remaining students are transported in carpools or by their parents, guardians, or other students. Approximately eighty (80) staff members drive to the School. However, several staff members are not on the campus every day and others arrive at varying times and are on the site for only part of the day.

Weekly meetings of the "Friends of the German School," the School's fundraising organization, take place at the School from 9:00 am to 12:00 pm. The meetings are attended by approximately twenty (20) parents most of whom stay after dropping off their children for school in the morning. The "Friends" Board of Directors meets four (4) times a year at the School from 9:00 am to 12:00 pm. The meetings are attended by approximately ten (10) persons.

Other weekday activities include a yearly nursery school/kindergarten Christmas party taking place in December from 9:00 am to 12:00 pm. This one-day event is attended by approximately 150 persons. An elementary school open house takes place twice a year, from 9:00 am to 12:00 pm, and is attended by approximately fifty (50) persons. A nursery school/kindergarten open house

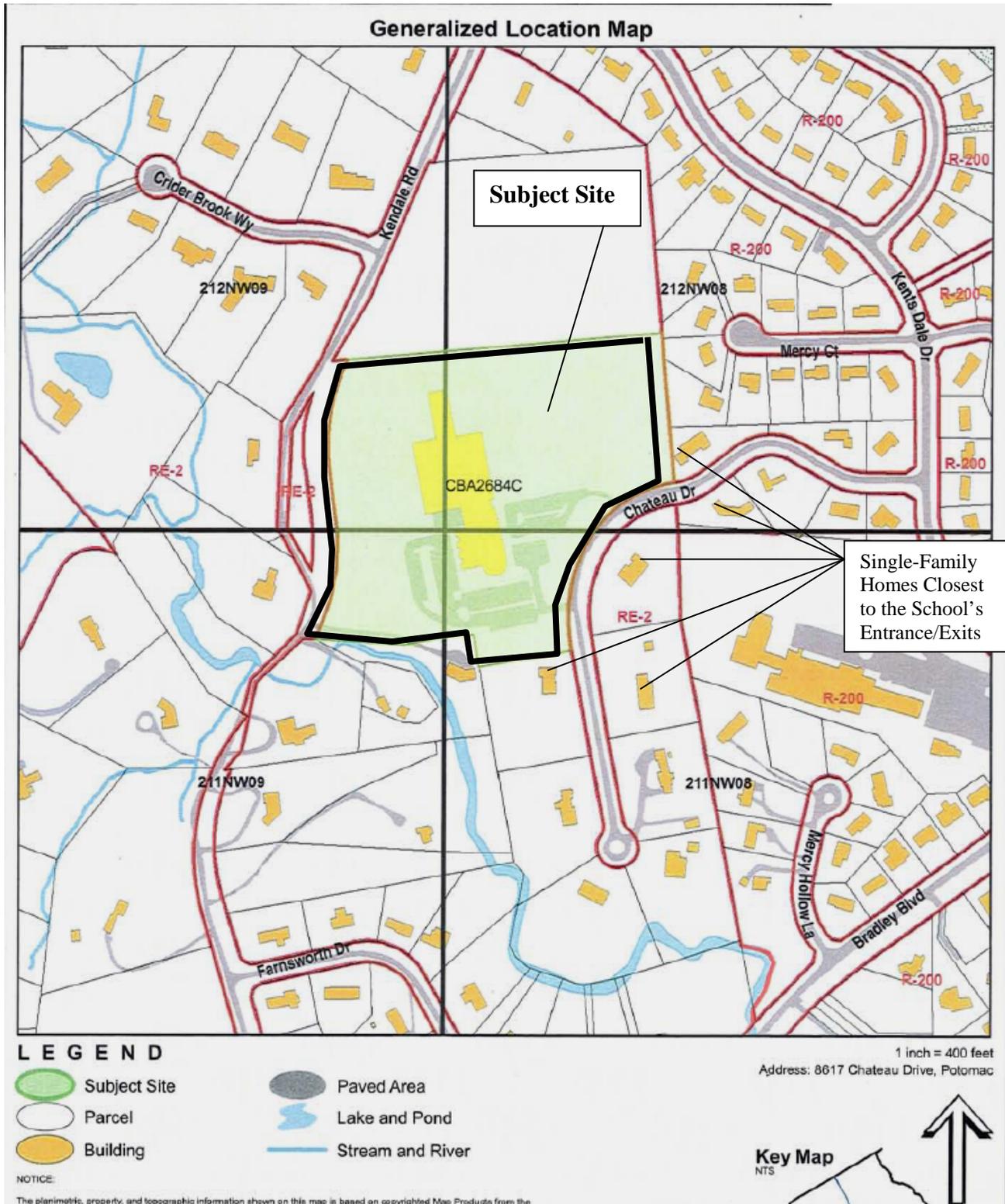
occurs three times per year, from 9:00 am to 3:00 pm, and is attended by approximately fifty (50) persons. A reception for new students and their parents takes place once a year, from 9:00 am to 12:30 pm, and is attended by approximately 300 persons. This is the first day of school and therefore parents and students are present on campus anyway.

In addition to classes and the other daily activities described above, the school hosts a number of athletic competitions with other schools (two or three per week, usually indoors) and a great variety of after-hour and weekend activities, which are set forth beginning on pages 3 through 12 of the proposed Second Amended Statement of Operations. The weekend activities include Saturday German Language Classes, which are attended each Saturday by up to 500 participants and 40 staff members. Participation is not restricted to German School students. Exhibit 80(a), p. 11.

There are also 12 weeknight theater productions attended by 50 to 300 people and running till 10 p.m.; four (4) Friday night student dances attended by 100 people running till 10: p.m.; five (5) annual events attended by 500 people or more (Christmas party for German language classes, Summer celebration for German language classes, Christmas Bazaar; Easter Bazaar and Schulfest); and numerous other evening and weekend activities. The school's plans for a summer school are described on page 13 of the Second Amended Statement of Operations.

B. The Subject Property and Surrounding Neighborhood

The German School is located at 8617 Chateau Drive, Potomac, Maryland on 16.93 acres. The property is zoned RE-2, a residential zone which, in general, permits single-family, detached homes on two-acre lots, and is described as Parcel "A" part of Block 1, in the Kendale Subdivision (Plat Book 90, Plat No. 9687, Liber 3574, Folio 175). The property is located between Kendale Road, on the west; Kentsdale Drive on the north and east; Chateau Drive on the east and south; and Bradley Boulevard about 1,200 feet further to the south. It is shown on the following page in the Generalized Location Map, appended to the Technical Staff Report (Exhibit 23) as Attachment 1. On the next page are photographs of "existing conditions" from Exhibit 8.





As can be seen in the aerial photo shown above, much of the area in and around the campus is forested. It is subject to an existing Forest Conservation Plan, which includes a Category I Forest Conservation Easement (Exhibit 10). The existing forest provides significant buffering for the campus. There are two entrance/exits to the campus, both of which are on Chateau Drive, as shown below in Figure 2B from the Transportation Management Plan (Exhibit 41(d)):

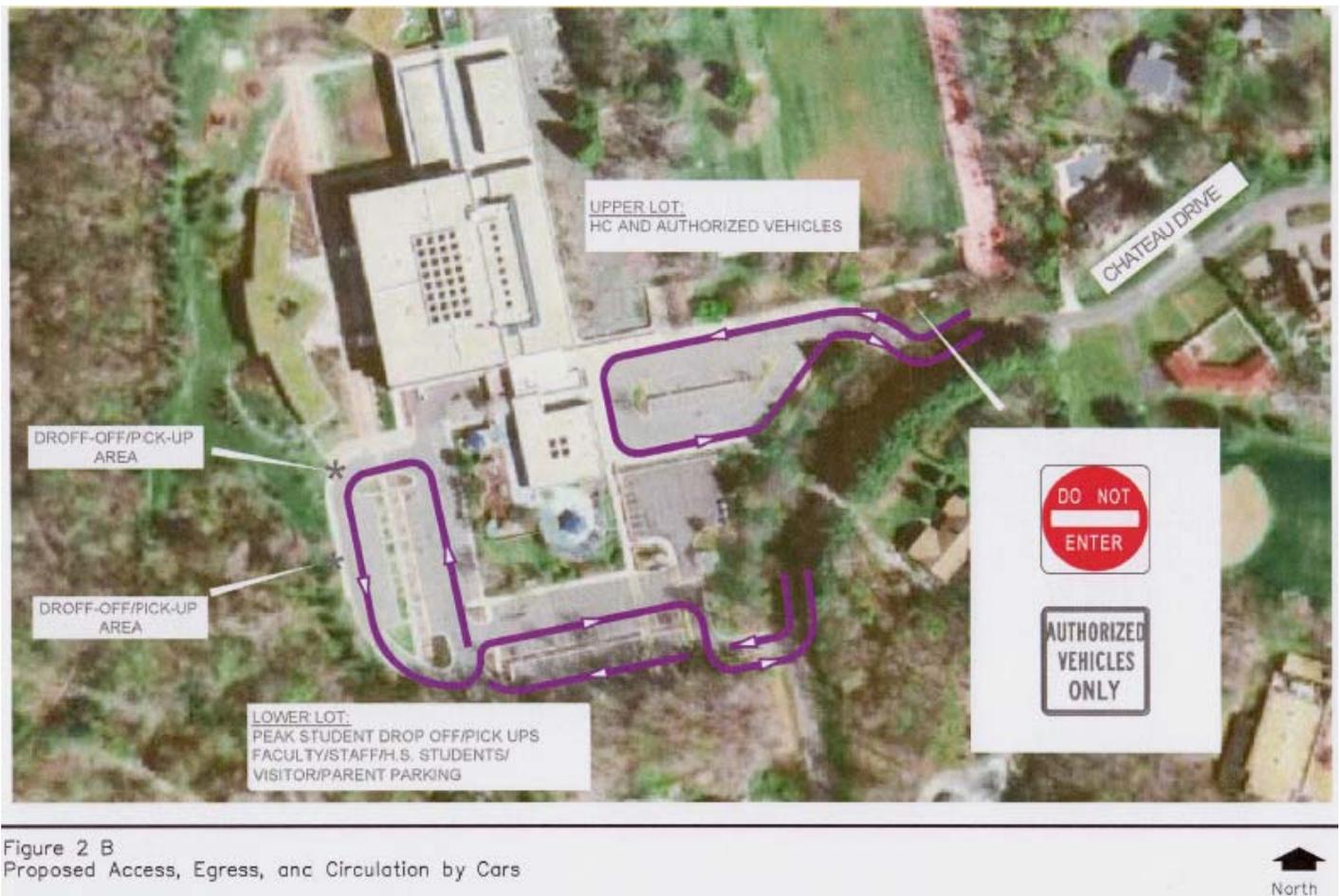
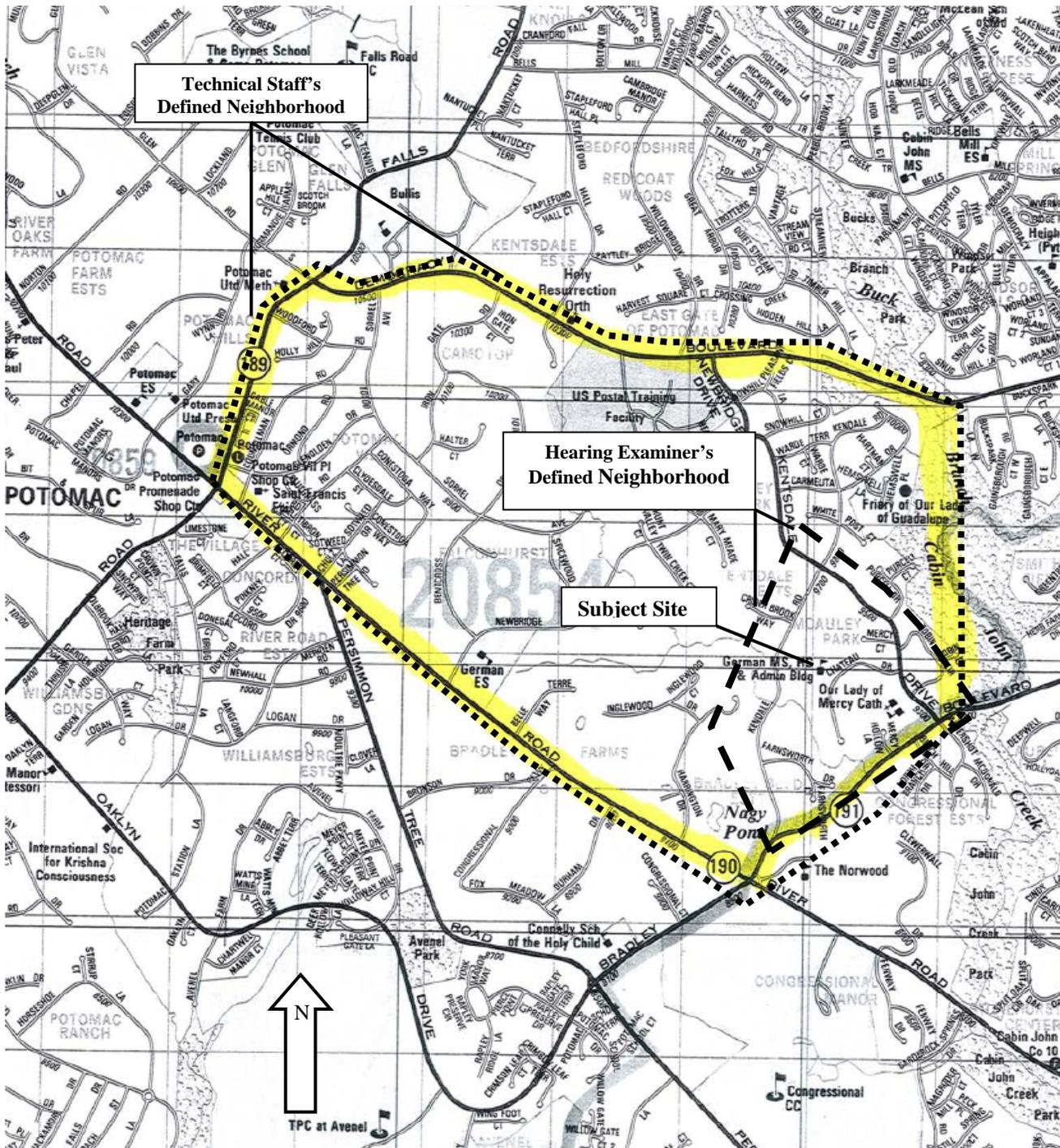


Figure 2 B
Proposed Access, Egress, and Circulation by Cars

Technical Staff proposes to define the neighborhood as bounded by Democracy Boulevard to the north, Cabin John Creek to the east, Bradley Boulevard to the south and River Road to the west. That area is shown as a yellow dotted line on the following Surrounding Area Map, appended to the Technical Staff report as Attachment 2:



The Hearing Examiner feels that the defined neighborhood proposed by Technical Staff is too large in this case because the likely visual and operational impacts from the modification, if granted, would be much more localized, and limited to the area around the school campus. The

neighborhood, as defined by the Hearing Examiner would be bounded by the rear property lines of the confronting homes on Kendale Road, on the north and west; the rear property lines of the confronting homes on Kentsdale Drive, on the north and east and Bradley Boulevard on the south, as shown by a dashed line on the above map.

According to Technical Staff (Exhibit 23, p. 3), the area surrounding the subject site includes an undeveloped 10-acre property to the north that is owned by Montgomery County Public Schools. The properties to the south and west of the school, in an area known as Bradley Farms, are in the RE-2 zone and contain single-family, detached houses. Properties to the south of the subject site along Chateau Drive also contain single-family, detached houses in the RE-2 Zone. The area east of the subject site, including part of Chateau Drive, is known as McAuley Park. It is zoned R-200 and also contains single-family detached homes. Chateau Drive is a two-lane local street which connects to Kentsdale Drive due east of the subject site. Kentsdale Drive is a County arterial that intersects, in a southerly direction, with Bradley Boulevard (MD Route 191). All of the opponents to the subject petition reside on Chateau Drive. Our Lady of Mercy Catholic School and its associated Church are located southeast of the subject property near the intersection of Kentsdale Drive and Bradley Boulevard.

C. The Master Plan

The subject property is included under the *Potomac Subregion Master Plan*, approved and adopted in 2002. The Potomac Subregion Master Plan describes the area as containing “large areas of older, well-established residential communities.” (Plan p. 41). The Master Plan continues to recommend the RE-2 zone, and the land use map indicates the site as a school/education facility.

The Master Plan text does not specifically reference the site, but does provide a general “Special Exception Policy” (pp. 35-36). Relevant recommendations include “Limit[ing] the impacts of special exceptions in established neighborhoods” and making “[e]fforts . . . to enhance or augment

screening and buffering as viewed from abutting residential areas . . .” (pp. 35-36). It is also worthy of note that the Council, in adopting the final version of the Master Plan, eliminated language in the October 2001 Planning Board Draft (p. 34) which would have required special exceptions for new or expanded private educational institutions to be “limited to those that serve the local area.” Instead, the Council substituted the following language in the final, approved Plan (p. 36):

There are a number of private educational institutions in the planning area and concerns have been raised about parking and traffic problems caused by queuing for drop-off and pick-up. The Council is considering amendments to the special exceptions provisions in the Zoning Ordinance to address these issues.

As will be seen below, the German School has sufficient parking on its campus to handle its normal activities, and has a Transportation Management Plan (TMP, Exhibit 41(d)), which should avoid any queuing from drop-off and pick-up points onto the public roads.⁶ When special events are anticipated to generate the need for more than 175 parking spaces, the TMP provides for satellite parking (TMP, p. 20). The sufficiency of these arrangements will be discussed in Parts II. E. and IV of this report, and the Hearing Examiner has recommended conditions which should alleviate the traffic and parking problems perceived by the neighbors.

The new science building and other physical modifications to the site should have virtually no adverse impact on the abutting residential community. The question is whether the proposed summer school and other after-school and weekend activities are consistent with the above-quoted Master Plan recommendation to “Limit the impacts of special exceptions in established neighborhoods.” This is an intense use operating off of a small, single-family, residential street, terminating in a cul-de-sac. As will be discussed in Parts II. E. and IV of this report, limitations and conditions are need to comply with the Master Plan’s recommendation.

The Master Plan recommends the continuation of the RE-2 Zone for the subject site, and a

⁶ Of more concern is the queuing problem the neighbors complain about at the intersection of Chateau Drive and Kentsdale Drive, which will be discussed in Part II. E. of this report.

private educational institution is permitted by special exception in the RE-2 Zone. This particular use has been permitted since 1969. It is fair to say that the modified use, as limited and conditioned by the Hearing Examiner's recommendations, would be consistent with the applicable Master Plan.

D. Proposed Modifications

As described in Part I of this report, the initial modification petition requested permission to construct new facilities and to add a summer school program. Exhibit 3(b). However, the Hearing Examiner's review of the record after the initial hearing revealed that many of the ongoing activities enumerated in the first proposed Statement of Operations (Exhibit 3(a)) had not been previously approved by the Board of Appeals. New notice was therefore issued, and an additional hearing was held solely to address the activities, both weekday and weekend, specified in the Statement of Operations. This part of the report will therefore be divided into three sections:

1. Physical Changes to the Campus;
2. Summer School, the TMP and the CLC;⁷ and
3. Operations, including After-hour and Weekend Activities.

1. Physical Changes to the Campus:

The proposed physical changes to the campus would include the following:

- (1) relocation of the existing multi-purpose activity court to the north side of the site;
- (2) construction of a new science and classroom building on the site of the current multi-purpose court;
- (3) placement of light bollards adjacent to the walkway south and west of the new building;⁸
- (4) additional landscape materials;
- (5) a new entrance sign;
- (6) replacement of existing security gates at each entrance drive;
- (7) a new prefabricated playhouse; and
- (8) additional windows in the elementary school building west side.

⁷ The "CLC," is short for Community Liaison Council, a group consisting of representatives of the school and the community, and facilitated by the People's Counsel. It will be described in greater detail in Part II. D. 2 of this report.

⁸ Petitioner's counsel asserted in his Pre-Hearing Summary (Exhibit 3(b), p. 1) and at the hearing (10/20/08 Tr. 17) that, in addition to the new bollards, there would be lights on the side of the new building, but neither the submitted lighting plans (Exhibits 6(a) and (b)) nor the testimony supports that claim. If Petitioner intends to add such lighting, it will have to apply for an administrative modification of its special exception.

Technical Staff described the proposed physical changes to the campus (Exhibit 23, pp. 4-5):

New science and classroom building

The school proposes to construct a new science and classroom building to facilitate modern teaching techniques. As shown on the attached site plan, the proposed new building will be located on the existing multi-purpose activity court. The L-shaped building consists of two stories and would be screened from view from neighboring properties. The proposed building would not exceed 35 feet in height and would be setback approximately 112 feet from the adjoining vacant lot to the north and approximately 340 feet from the adjoining lots (single-family detached homes) to the east. Existing knolls, berms, and trees would shield the view of the new building from the north and from the east. The topography of the remainder of the school site would shield the view of the new building from the south, and the existing main school building would shield the view of the new building from the west. According to the applicant, there would be lights on the side of the new building and light bollards around the new building. These lights, however, would not be readily visible from neighboring properties because the building would be shielded from view.

Construction of the new science and classroom building will require a relocation of the existing multi-purpose activity court. The reconfigured multi-purpose activity court would be located on the north side of the site, approximately 350 feet away from the closest residential uses to the east and approximately 42 feet from the vacant lot to the north.

New Entrance Sign and Security Gates

The school proposes to install a new entrance sign and new security gates. The school currently does not have an entrance sign along its driveways to identify the location of the school for users of the facility. The school proposes to install an entrance sign at its upper driveway entrance on Chateau Drive. The new sign would be a ground mounted entrance sign with a brick base that would measure approximately 36 square feet in area and be approximately 4 feet in height. Additionally, the applicant proposes to install new security gates at both the upper and lower driveway entrances.

Playground Features

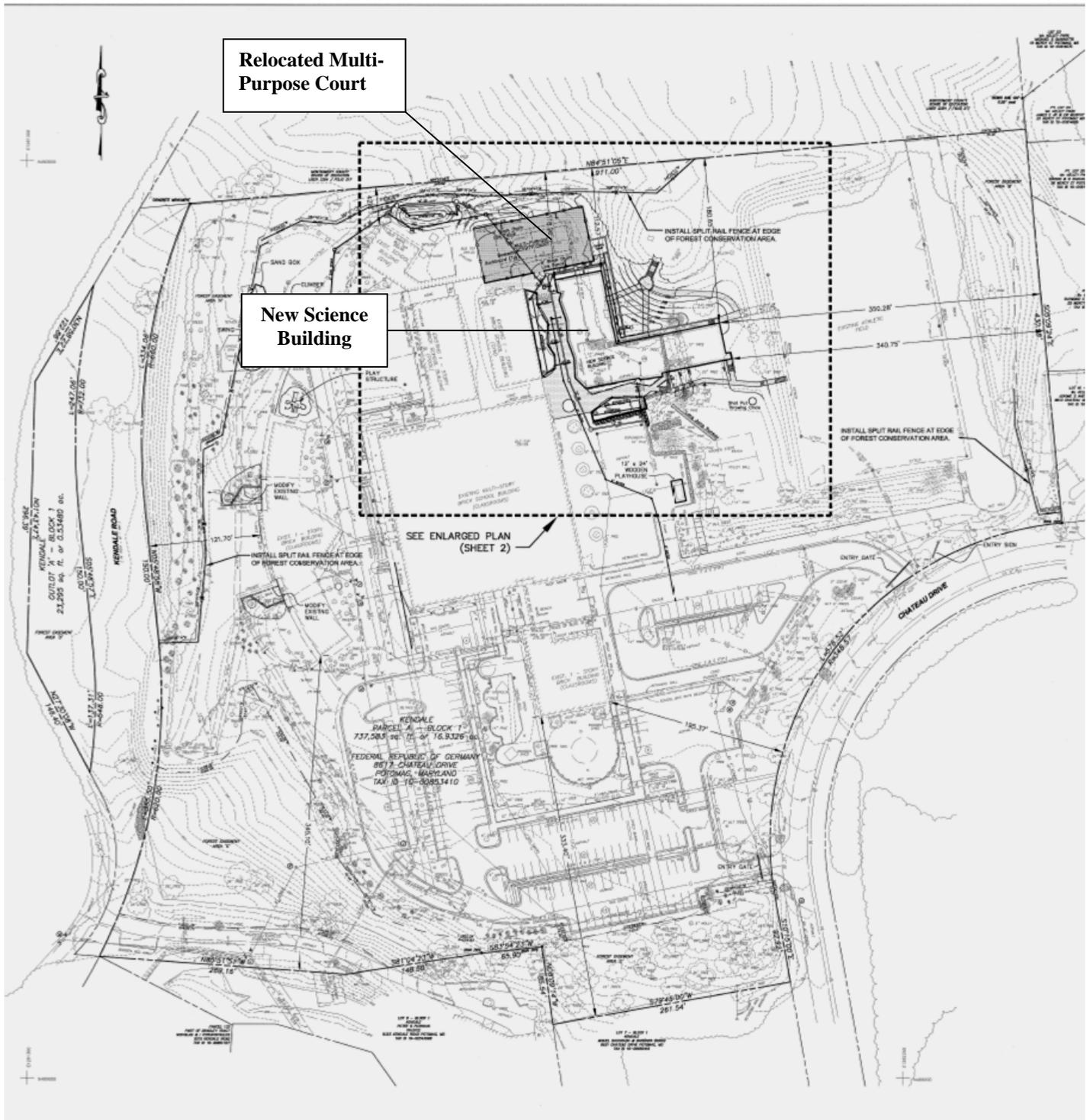
The school proposes to install a wooden playhouse to the south of the new science building as shown on the attached site plan. The playhouse would measure approximately 12 feet by 24 feet and approximately 15 feet high. The new playhouse would be located approximately 413 feet from the nearest residential property.

[Window Replacement on Existing Elementary School Building]

According to the applicant, the existing elementary school building lacks a sufficient number of windows on the west side of its lower level to satisfy requirements imposed by German regulations applicable to educational institutions. The school proposes to install new windows on the west side of the existing building.

a. Structural Changes:

These changes can be seen in the revised Site Plan (Exhibit 51(c)) and the revised Site Plan Enlargement (Exhibit 51(d)), which are reproduced below and on the following pages:



1. THE PROPERTY SHOWN ON THIS PLAN IS NOTED AS TAX PARCEL N970, MAP GP12 OF THE TAX RECORDS OF THE MONTGOMERY COUNTY, MARYLAND.
2. PROPERTY INFORMATION SHOWN HEREON HAS BEEN TAKEN FROM PUBLIC RECORDS AND CAN BE FOUND RECORDED AMONG THE LAND RECORDS OF MONTGOMERY COUNTY, MARYLAND ON PLAT No 9687.
3. THE LOCATION OF ALL UTILITIES SHOWN HEREON IS A COMBINATION OF FIELD INVESTIGATION, FIELD EVIDENCE AND AVAILABLE RECORDS. UTILITY LOCATIONS SHOWN ARE FOR DESIGN PURPOSES ONLY AND CANNOT BE GUARANTEED. CONTRACTOR/ENGINEERS SHOULD DIG TEST PITS BY HAND AT ALL UTILITY CROSSINGS TO VERIFY LOCATIONS.
4. THE PROPERTY IS ZONED RE-2.
5. THE USE IS PRIVATE EDUCATIONAL INSTITUTION.
6. PREVIOUS MONTGOMERY COUNTY BOARD OF APPEALS CASES:
 - CASE No: 2684, PETITION FOR SPECIAL EXCEPTION, 1969;
 - CASE CBA-2684-A, PETITION TO MODIFY SPECIAL EXCEPTION, 1992;
 - CASE CBA-2684-B, PETITION TO MODIFY SPECIAL EXCEPTION, 1994;
 - CASE CBA-2684-C, ADMINISTRATIVE MODIFICATION TO SPECIAL EXCEPTION;

| DEVELOPMENT STANDARDS | PERMITTED / REQUIRED | PROVIDED |
|---|----------------------|------------|
| MINIMUM LOT AREA | | |
| ACRES | 2 ACRES | 16.93 SF |
| SQUARE FEET | 87,120 SF | 737,583 SF |
| MINIMUM LOT WIDTH AT EXISTING STREET LINE | | |
| CHATEAU DRIVE | 25 FT | 578.52 FT |
| KENDALE ROAD | 25 FT | 839.56 FT |
| MINIMUM LOT WIDTH AT BUILDING LINE | 150 FT | 810 FT |
| MINIMUM SETBACK FROM STREET | | |
| CHATEAU DRIVE TO NEW SCIENCE BUILDING | 50 FT | 310 FT |
| MINIMUM SETBACK FROM ADJOINING LOT | | |
| ONE SIDE | | |
| NEW SCIENCE BLDG TO NORTH P/L | 17 FT | 112.57 FT |
| NEW SCIENCE BLDG TO EAST P/L | 17 FT | 340.75 FT |
| BOTH SIDES | | |
| NEW SCIENCE BUILDING TO NORTH AND SOUTH | 35 FT | 723.27 FT |
| NEW SCIENCE BUILDING TO EAST AND WEST | 35 FT | 739.81 FT |
| MAXIMUM BUILDING HEIGHT | | |
| NEW SCIENCE BUILDING | 50 FT | 35 FT |
| MAXIMUM LOT COVERAGE | | |
| EXISTING GYMNASIUM | | 22,200 SF |
| EXISTING MAIN BUILDING | | 37,600 SF |
| EXISTING KINDERGARTEN | | 10,400 SF |
| EXISTING BUS GARAGE | | 4,600 SF |
| EXISTING ELEMENTARY SCHOOL | | 10,834 SF |
| EXISTING BUS GARAGE/OFFICE ADDITION | | 3,408 SF |
| EXISTING GYMNASIUM ADDITION | | 6,422 SF |
| TOTAL EXISTING BUILDINGS | | 95,464 SF |
| NEW WOODEN PLAYHOUSE | | 288 SF |
| NEW SCIENCE BUILDING | | 11,000 SF |
| TOTAL EXISTING AND NEW BUILDINGS | 184,395 | 106,752 SF |
| PERCENT OF LOT AREA | 25% | 14.47% |
| OFF-STREET PARKING | | |
| EMPLOYEES AT 1 SPACE / EMPLOYEE | 102 | |
| STUDENT DRIVERS | 35 | |
| VISITORS/LOADING | 15 | |
| TOTAL | 152 | 172 |
| ACCESSIBLE SPACES | 5 | 6 |

KEY LEGEND

- ① NEW SCIENCE BUILDING.
- ② 60'x120' MULTI-PURPOSE ACTIVITY COURT.
- ③ LONG JUMP RUNWAY.
- ④ SHOT PUT THROWING CIRCLE.
- ⑤ STORMWATER MANAGEMENT BIO-RETENTION FACILITY.
- ⑥ BASKETBALL BACKBOARD (TYP.).
- ⑦ 8' HIGH BLACK CHAIN LINK FENCE.
- ⑧ PROPOSED WATER LINE.
- ⑨ PROPOSED SEWER LINE.
- ⑩ PROPOSED STORM DRAIN LINE.
- ⑪ NEW LIGHTING (TYP.). SEE LANDSCAPE PLAN FOR DETAILS.
- ⑫ PROPOSED PLAYHOUSE.

LEGEND

| | |
|--|---------------------|
| | PHONE POLE |
| | PHONE MH |
| | POWER POLE |
| | LIGHT POLE |
| | LIGHTING |
| | CLEAN OUT |
| | SANITARY MH |
| | STORM MH |
| | WATER VALVE |
| | HYD |
| | GROUND SHOT SIGN |
| | WOOD FENCE |
| | CHAIN LINK FENCE |
| | SPLIT RAIL FENCE |
| | IRON PIPE FOUND |
| | SANITARY SEWER LINE |
| | STORM DRAIN |
| | WATER LINE |
| | ASPHALT PAVING |
| | CONCRETE PAVERS |

The proposed new building is also depicted in the Exterior Elevations Plan (Exhibit 7(a)):

1 SOUTH ELEVATION OF NEW BUILDING
SCALE: 1/8" = 1'-0"

2 WEST ELEVATION OF NEW BUILDING
SCALE: 1/8" = 1'-0"

3 EAST ELEVATION OF NEW BUILDING
SCALE: 1/8" = 1'-0"

4 NORTH ELEVATION OF NEW BUILDING
SCALE: 1/8" = 1'-0"

5 NORTHEAST MODEL VIEW
NOT TO SCALE

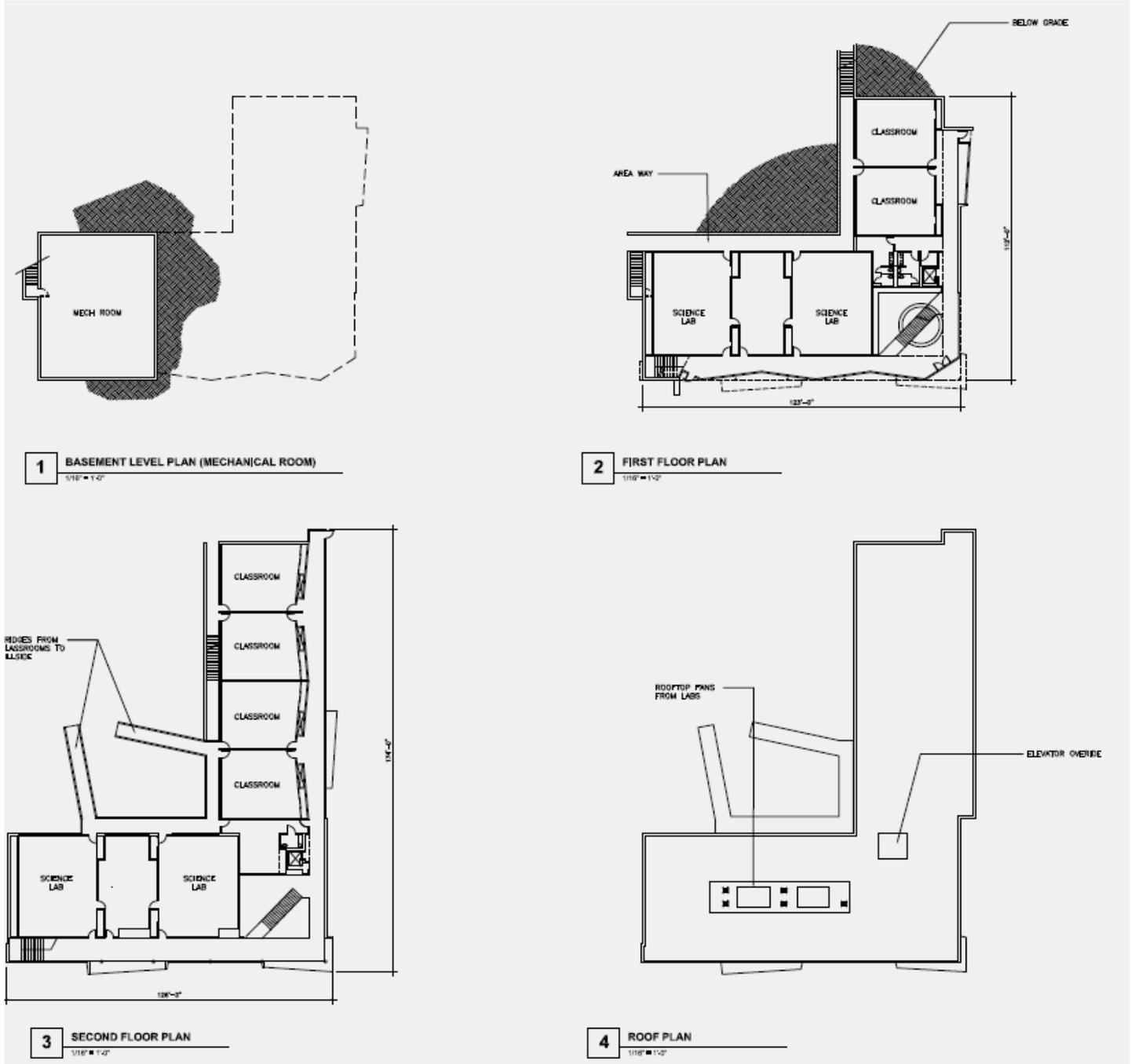
6 SOUTHEAST MODEL VIEW
NOT TO SCALE

7 NORTHWEST MODEL VIEW
NOT TO SCALE

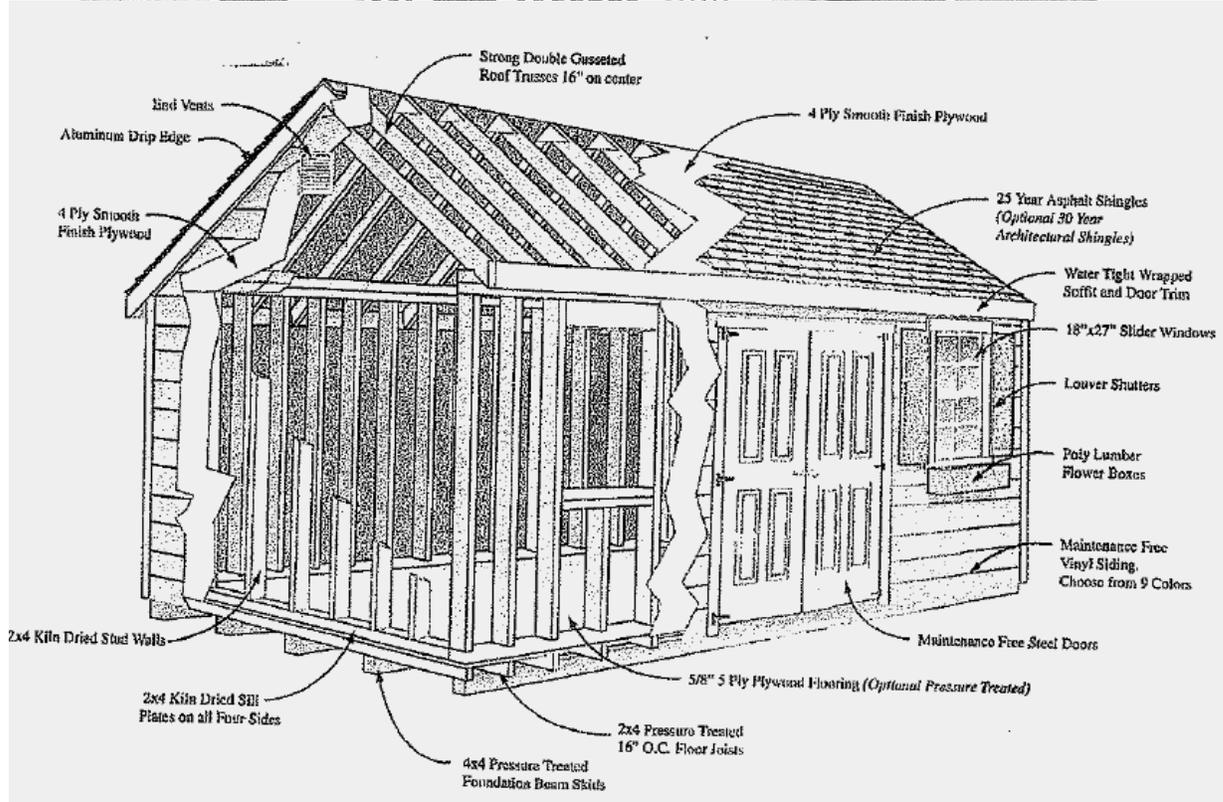
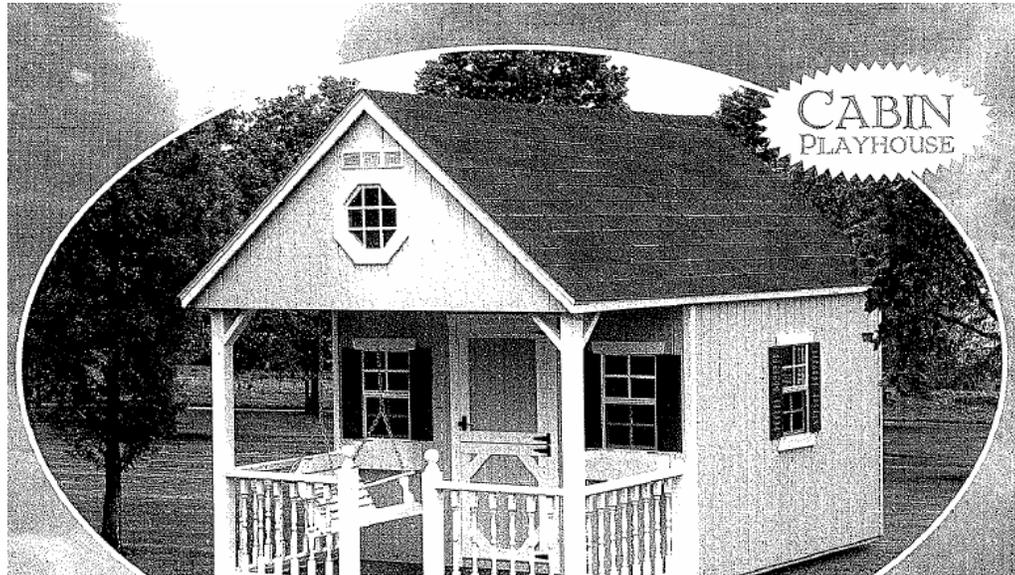
8 SOUTHWEST MODEL VIEW
NOT TO SCALE

9 ELEVATION KEY PLAN
NOT TO SCALE

Floor Plans for the proposed new building (Exhibit 7(c)) are reproduced below:



A depiction of a playhouse, similar to the one planned, and plans for the proposed new playhouse are shown on the following page (Exhibit 18):



Petitioner's architect, Joseph B McCoy, testified that materials proposed for the exterior facade of the new science building were chosen to be complimentary and compatible with materials that already exist on the school's campus, such as masonry, pre-cast concrete, varied mixtures of glass, aluminum and steel. The materials, as well as the massing of the building, were chosen

specifically to be in keeping with the surrounding residences, understanding that this is an institutional building and not a residence, but also trying to find the balance between materials that could be found in residences nearby, and at the scale of nearby residences. 10/20/08 Tr. 99-116.

Mr. Warner also opined that the scale and height of the proposed two-story building and the new play structure will be in harmony with the single-family characteristics of the neighborhood. The additional windows in the existing elementary school building would not change the density or the characteristics of that facility. 10/20/08 Tr. 39-41. The additions to the physical plant will not increase the intensity of the use nor impact the surrounding community, but will merely spread the use out over a broader area of the site, so the noise levels and commotion from any single point will be reduced. It will also have no visual impacts because of the buffers, the berms, the other structures that presently exist on the property, and additional landscaping. 10/20/08 Tr. 48-50. Moreover, the physical changes to the campus will not have any adverse impact on the neighborhood because the new science building, the relocated multi-use court, the playhouse, and the additional windows on the existing building are all in character with the existing conditions. 10/20/08 Tr. 81-82.

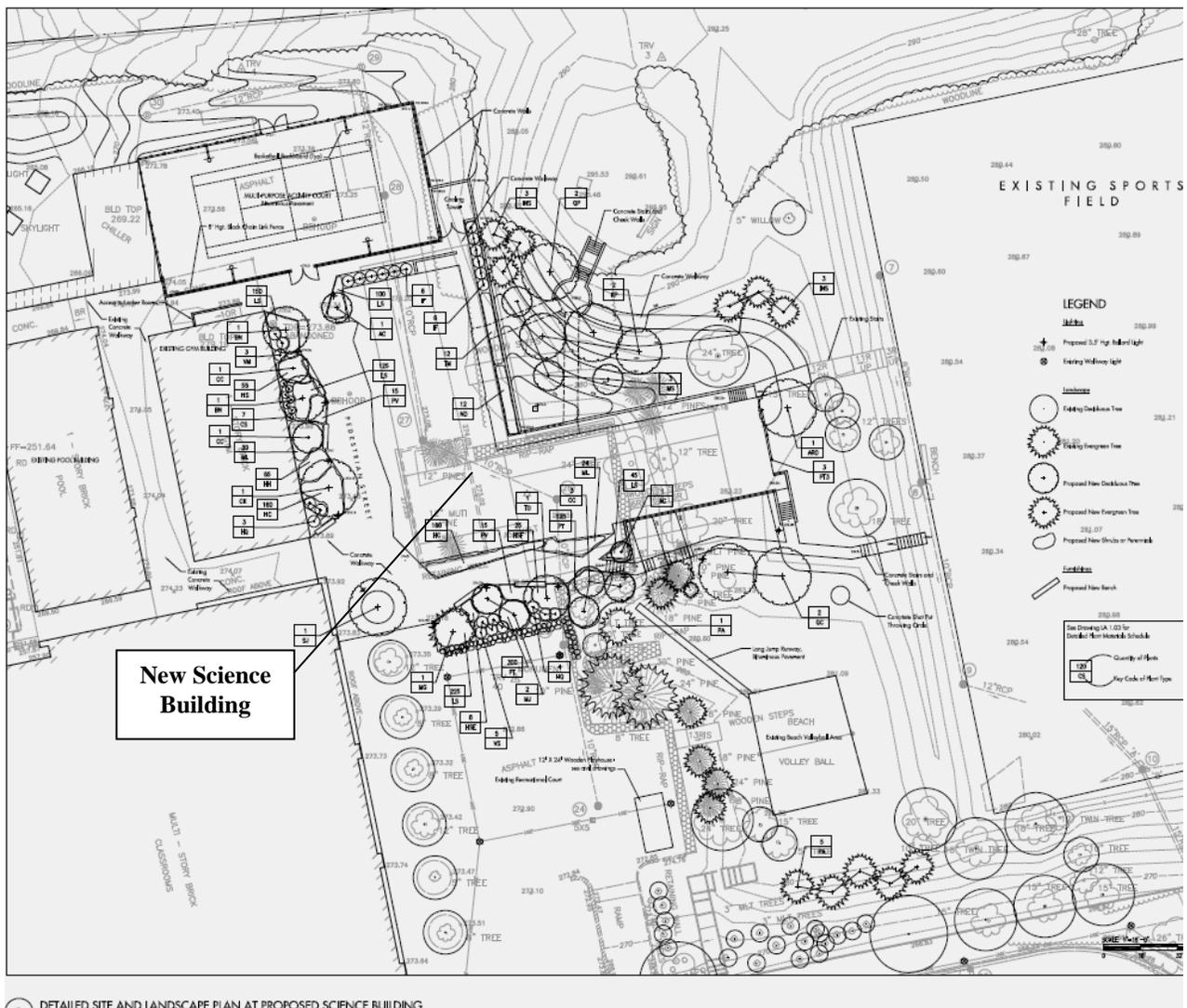
Technical Staff agreed, stating (Exhibit 23, p. 13):

The new building, playhouse and new windows on the existing elementary school building under the special exception modification would relate well to the surrounding area single-family home appearance. The scale and height of the new two-story building and one-story playhouse would be in harmony with the single-family homes in the neighborhood. The new windows on the existing elementary school building would match the existing windows.

b. Landscaping:

Brian Stephenson testified as an expert in landscape architecture, explaining the landscape plans, Exhibits 5(a), (b) and (c). 10/20/08 Tr. 87-98. He stated that the work at the lower school will disturb some existing planting that is on the side slopes adjacent to the school. The plan is simply to restore that planting after the work is done. However, that planting is not presently visible to adjacent properties because there is a treed landscape berm to the west of the lower school.

To the east, the side that the Sowalskys live on, there is a substantial graded hill adjacent to the proposed new building that has a lot of woodland on it, as well as a berm next to the existing athletic field that also has landscape planting on it. That planting will be preserved and enhanced as part of this plan, including some new evergreen trees and shade trees to the east of the proposed new building. There will also be new landscape planting on the south side of the proposed new building, consisting of evergreen trees, shade trees, and ornamental trees. These will be put in primarily to benefit neighbors who live to the south and across the street, the Hesses, for instance, who thought it was possible that, from their second story windows, they might be able to see into the property. Landscaping proposed for the new Science Building is shown on one of the Detailed Landscape Plans (Exhibit 5(b)), which is reproduced below:



Around the building itself, to the west of the new building and the south of the new building, there will be some detail landscape planting to enhance the pedestrian areas around the building. These areas are also planted for environmental purposes. They will function as bio-retention areas and serve as stormwater management facilities for treating the runoff water from the paving in that area.

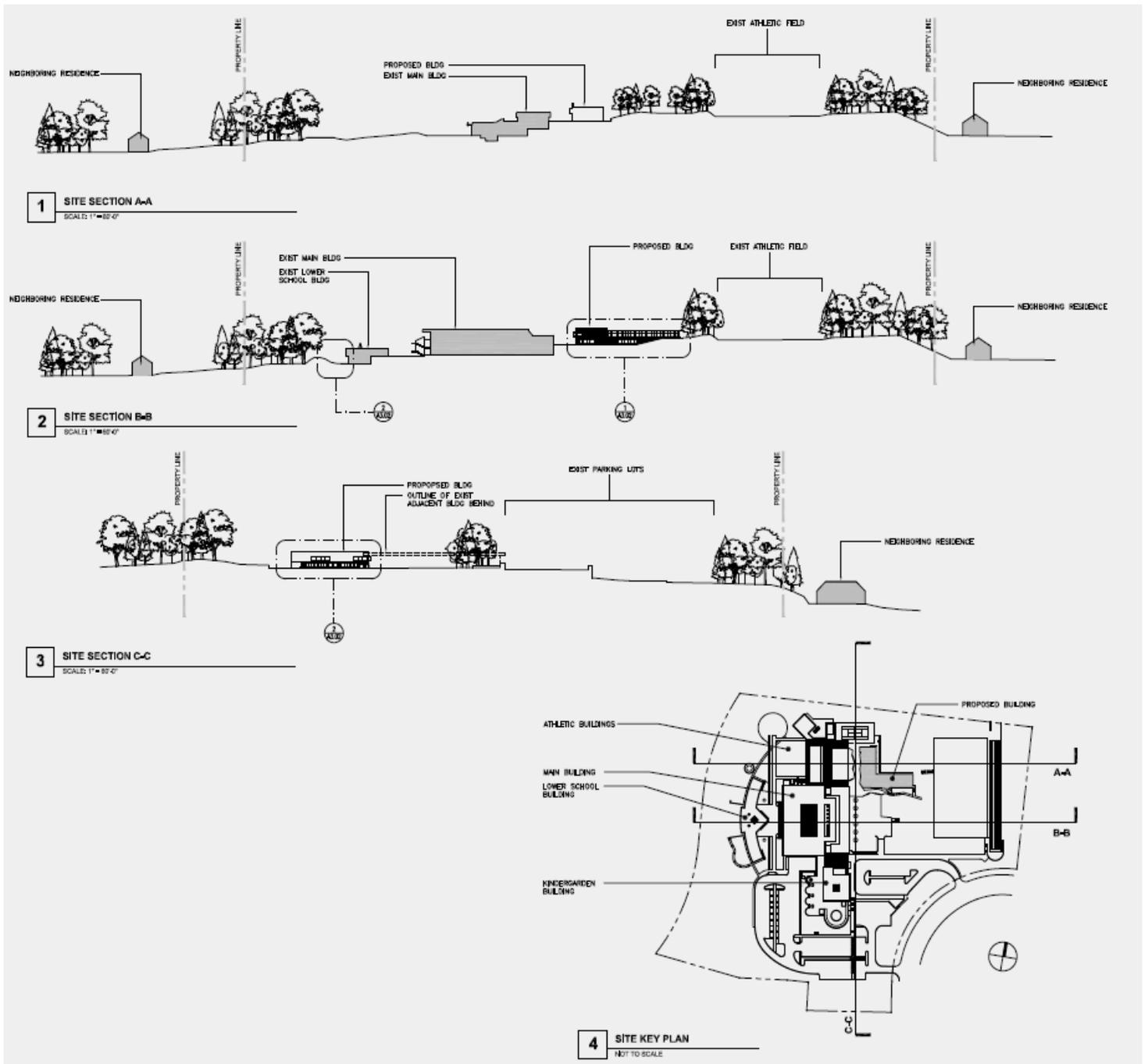
The narrow ends of the proposed new building to the north and to the east do not have windows on them, and the landscape plan shows that there would be vines growing up on those walls to further set the building into the landscape setting. To the north of the proposed new building is a forest conservation area, and the County School Board property to the north of that is completely wooded.

With respect to landscaping, Technical Staff found that, "Views of the new building and playhouse will be screened from adjacent neighbors by existing topography and trees. Sufficient landscaping is proposed in order to maintain the general character of the neighborhood." Exhibit 23, p. 8.

Mr. Warner testified that the property line of closest existing residence (Sowalsky property) is 340.75 feet from the proposed science building. The elevation on the Sowalsky property line at the corner is 272 feet, and at the proposed building, the elevation it is 278 feet, so the difference is six feet. There is also a 14 foot berm between the property and the proposed building, so the impact will be reduced, and the visual aspects will be similar to seeing a one-story building. Mr. Warner's "educated opinion" is that standing on the residential property, and looking west, which is the direction towards the new science building, that the berm and the existing tree stand will block the view from that direction, given that the berm itself is 14 feet higher than the observation point.

10/20/08 Tr. 59-63.

These features can be seen on Site Sections, labeled Exhibit 7(d) and reproduced below:



Petitioner’s architect, Joseph B. McCoy, testified that the new science building will be screened from view. At the beginning of the design phases, he conducted geometrical studies, and determined that the likelihood of somebody seeing this new building at the proposed location from

off of the campus is very low. In his opinion, the new proposed science building will be compatible in terms of scale and massing with the existing conditions, as shown in the cross-sections (Exhibit 7(d)), reproduced above. 10/20/08 Tr. 99-116.

All of the evidence supports the conclusion that there will be adequate landscaping and other buffering so that the proposed structural changes to the German School campus will not adversely affect the neighbors.

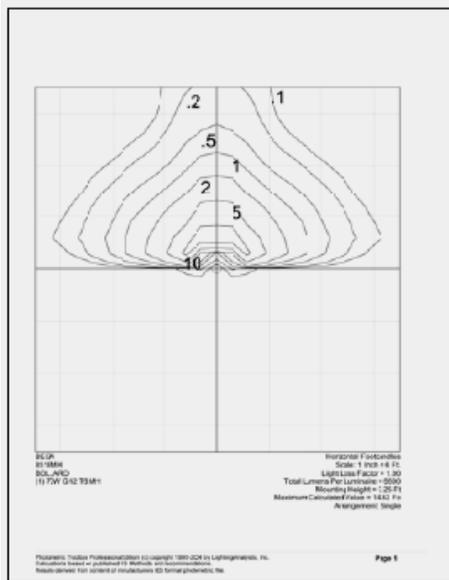
c. Lighting:

As mentioned in footnote 8 on page 17 of this report, Petitioner's counsel asserted in his Pre-Hearing Summary (Exhibit 3(b), p. 1) and at the hearing (10/20/08 Tr. 17) that the new lighting would consist of bollards near the new building and lights mounted on the sides of the new building, but neither the submitted lighting plans (Exhibits 6(a) and (b)) nor the testimony shows lighting mounted on the sides of the new building. If Petitioner intends to add such lighting, it will have to apply for an administrative modification of its special exception.

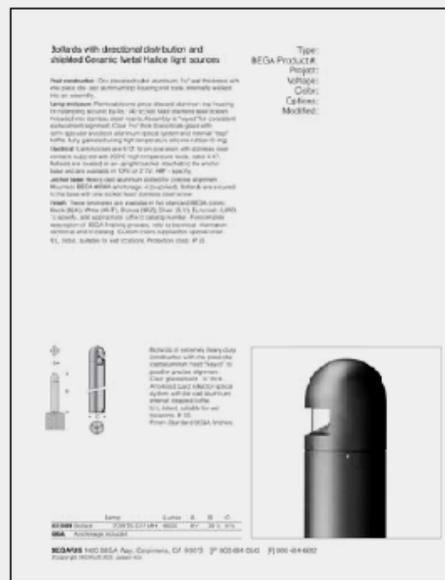
Petitioner's landscape architect, Brian Stephenson, testified that the west and south sides of the walkway around the new building will be lit with light bollards. These are 42-inch tall, 10-inch round metal posts that have a concealed light source in them that throws light down onto the walkway and towards the building. They will be placed around the walking areas of the building at 25-feet on center, and will provide a very low level identification of the walking areas at night.

According to Mr. Stephenson, no light from these bollards that will leave the site. The lights will be controlled with a photo cell to turn the lights on when it gets dark, but then they will have a time clock override so that they can be turned off when the functions that are at the school at night finish. There is no intention that these lights stay on all night.

The Lighting Plan and photometrics for the proposed bollards (Exhibits 6(a) and (b)) are shown on the following page.



1 LIGHT DISTRIBUTION DIAGRAM

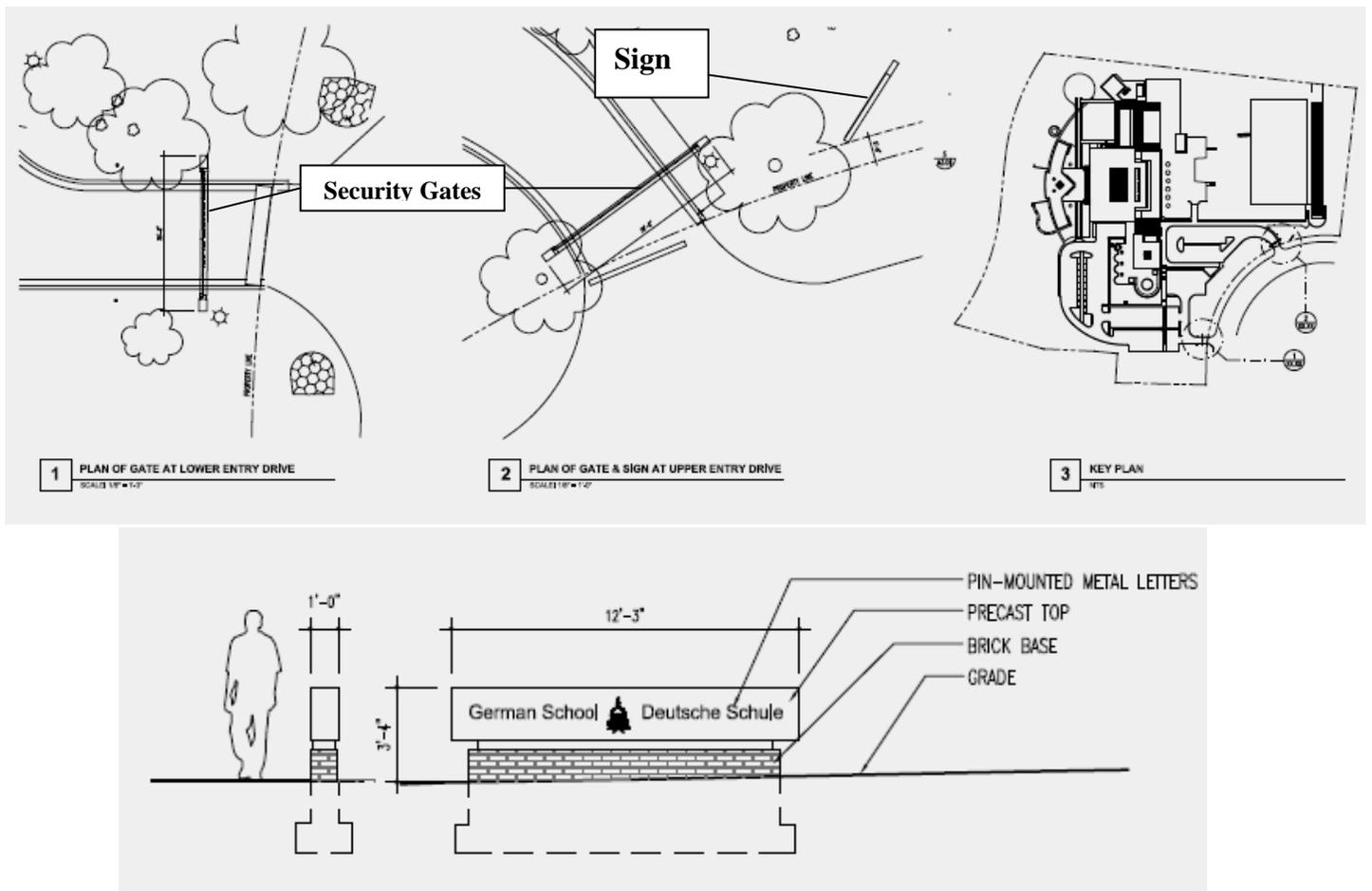


2 PROPOSED LIGHT FIXTURE

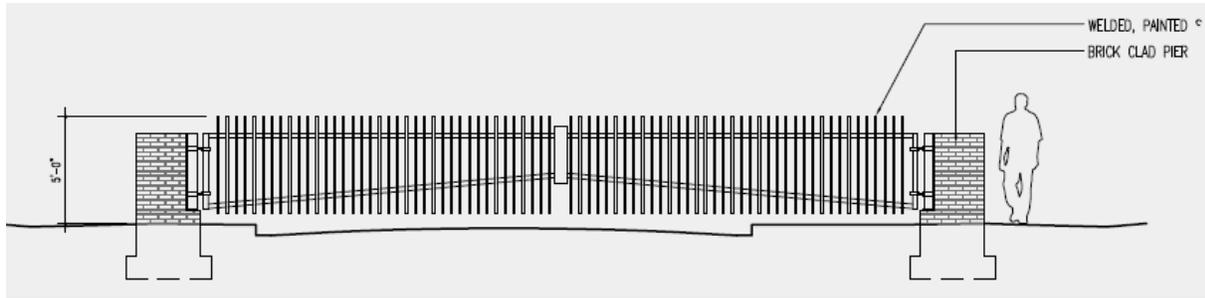
Mr. Stephenson opined that the new lighting will not adversely impact neighboring uses, and will not create any objectionable illumination or glare for the neighbors. Technical Staff agreed, stating (Exhibit 23, p. 13), “The new site lighting will not directly impact the adjoining properties, will be buffered from the adjoining properties by landscaping and a County permit for the installation of the lights will be obtained by the school.” Based on this evidence and the photometric study shown above, the Hearing Examiner concludes that the new bollard lights will not result in lighting in excess of 0.1 footcandles at the side and rear property lines,⁹ nor will it allow direct lighting to intrude into adjacent residential properties.

d. New Signage and Security Gates:

The proposed new entry sign and security gates are depicted in Exhibit 9:



⁹ That is the standard established for residential zones in Zoning Ordinance §59-G-1.23(h).



In the same Exhibit, Petitioner included photographic simulations of how the sign and gates will look when installed. They are shown below:



6 IMAGE OF GATE AT UPPER ENTRY DRIVE



7 IMAGE OF ENTRY SIGN AT UPPER ENTRY DRIVE

As shown in the above diagram, the sign will be 12 feet 3 inches in length, and 3 feet 4 inches tall. In consultation with neighbors who participated in the community meeting process, Petitioner selected finished brick as the base of the sign, and a cast stone and pre-cast element as the top portion of the sign. Petitioner will have to obtain a permit for the new sign and transmit it to the Board of Appeals before posting the new entry sign. There is existing illumination through street lamps that are not part of this project, but there will be no separate illumination on the sign itself.

The proposed new gates are actually replacement gates, which will be constructed of materials decided in consultation with the neighbors, most specifically the Hesses, who are directly across the street from one of the entry drives. The gates, as an institutional gates, are larger than most residential gates, but the materials were selected to be in harmony with what one might find at

a residence nearby – brick clad piers, at the ends of the gate, and painted steel guardrails with vertical pickets forming the arms of the gate. In Mr. McCoy's opinion, the replacement gates and the new entry sign will be in character with existing conditions and with the neighboring community.

e. Environmental Controls:

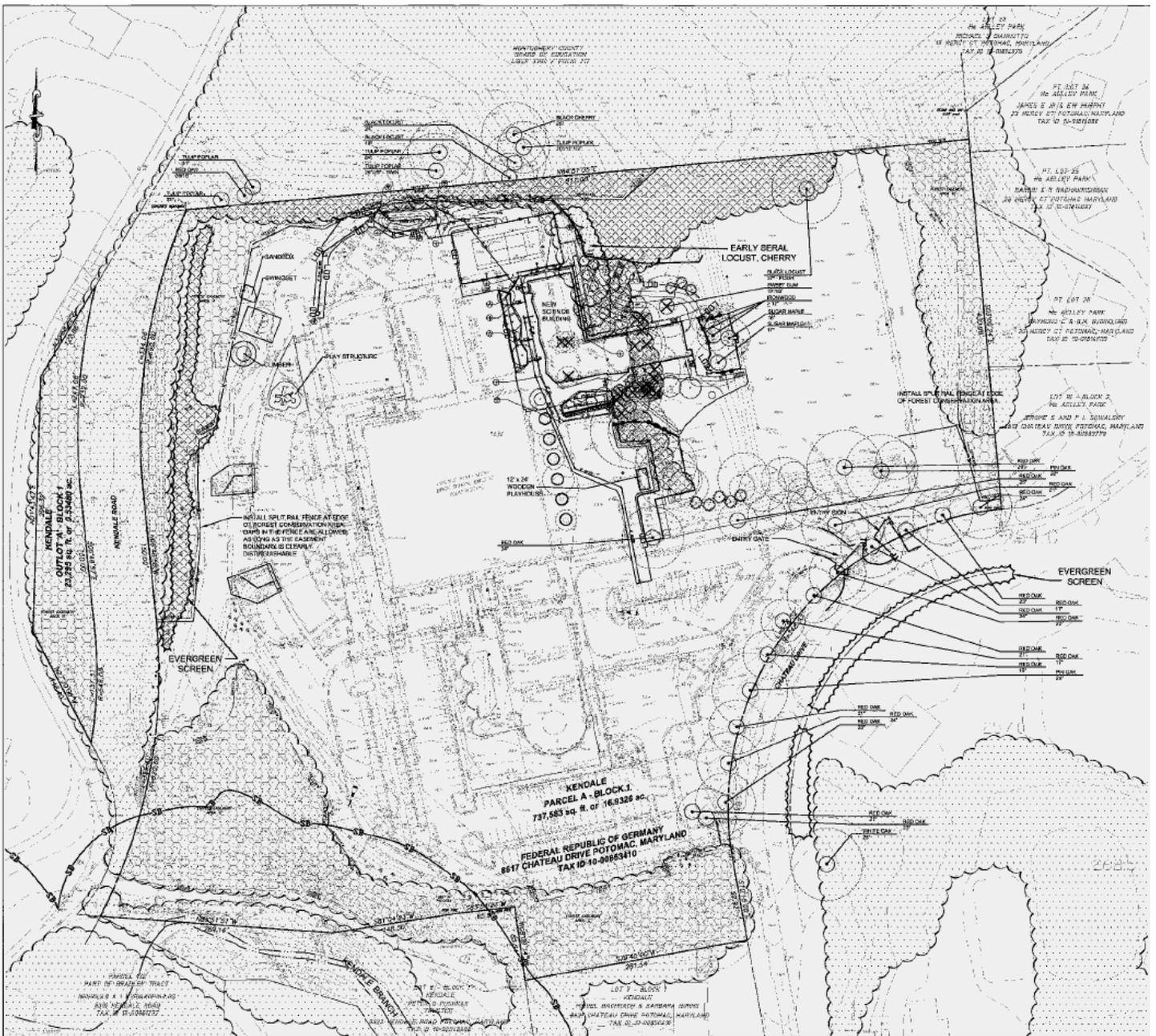
i. Forest Conservation:

Environmental Planning Staff recommended approval of the special exception for the German School. Exhibit 23, Attachment 11. Environmental Staff notes that the school property is subject to a previously approved final forest conservation plan. The forest conservation plan was originally approved on May 14, 1997 and amended in May 2008. On May 12, 2008, Environmental Planning staff approved an amendment to the approved plan to address restoration of existing Category I Easement areas. Exhibit 10(d). The revised plan includes restoration plantings of 32 trees and over 300 native ferns to replace trees and plants that had been improperly removed. Additionally, the plan provides a permanent split-rail fence with forest conservation signs to delineate and protect portions of the conservation easement areas from future encroachments.

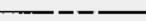
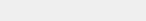
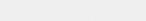
Technical Staff also points out that Petitioner submitted a revised forest conservation plan on September 16, 2008. This plan identifies the location of the proposed new building, the limits of disturbance, and measures to protect trees outside the limits of disturbance. According to Staff,

The approved forest conservation plan takes into consideration future expansion, and any forest removal associated with the current plan is incorporated into the earlier approvals. The current plan has no impact on the conservation easements and does not generate any additional planting requirements. It is [therefore] not necessary for the Planning Board to act on a forest conservation plan associated with this special exception. [Exhibit 23, pp. 7-8 and Attachment 11.]

Gregory Osband, Petitioner's expert in forest conservation planning and landscape architecture, testified (10/20/08 Tr. 127-151) that the school's proposed modification does not conflict with the approved, revised forest conservation plan, a which is depicted below (Exhibit 10(a)):



LEGEND

-  FOREST STAND OFFSITE
-  FOREST STAND ON SITE - TO REMAIN
-  FOREST STAND ONSITE, MOWED UNDERNEATH
-  EXISTING FOREST CONSERVATION EASEMENT AREA
-  STREAM BUFFER
-  STREAM
-  PROPERTY LINE
-  SIGNIFICANT OR SPECIMEN TREE
-  PERMANENT TREE PROTECTION FENCE
-  SPLIT RAIL FENCE
-  TREES TO BE REMOVED
-  GRZ (CRITICAL ROOT ZONE)
-  ROOT PRUNING
-  LIMITS OF DISTURBANCE

According to Mr. Osband, all of the proposed work stays outside of the existing forest conservation easements. Applicant also included tree save plans to save additional trees outside of these easements. In his opinion, the proposed development does not pose any potential adverse impact on the forest conservation plan. Technical Staff clearly agrees, and there is no contrary evidence in the record.

ii. Stormwater Management:

Petitioner filed a stormwater management concept plan (Exhibit 11), which was approved by the Department of Permitting Services on June 30, 2008 (Exhibit 23, Attachment 12). Max Kantzer, Petitioner's civil engineer, testified (10/20/08 Tr. 117-126) that the school's existing stormwater management system includes channel protection (*i.e.*, quantity controls), and water quality protection. The new facility will be built primarily on existing impervious area, with some small portion of it being new impervious area, and the concept plan calls for a portion of the building to have a green roof, three water quality facilities, bio-retention facilities, and some recharge. In Mr. Kantzer's opinion, the actual runoff increase from this facility would be negligible. The multi-court will provide some additional impervious area, but when you sum up all the totals of the green roof, the existing impervious areas, and the multi-court, the increase in impervious area is small.

Some stormwater pipe will be added to collect the runoff and bring it down to the existing system. In Mr. Kantzer's opinion, the new additions and changes to the physical plant will not have any adverse effects on the surrounding community. The runoff leaving the property will essentially have the same condition after development as before development. He believes that the storm water system that is in effect for the site is effective and is working fine.

Mr. Sowalsky complained that he has been getting some stormwater runoff across his property from the berm that separates his home from the school. 10/20/08 Tr. 123-124. Mr. Kantzer responded that the project isn't proposing any changes in that portion of the site. All the storm

drainage associated with the new construction will run to the west and exit the property at the southwest portion of the site (*i.e.*, away from the Sowalskys' property). 10/20/08 Tr. 124.

Petitioner's counsel therefore suggested that because the stormwater problem had nothing to do with the changes being proposed, it was not before the Board in this proceeding.

Nevertheless, Mr. Osband testified that he has worked with the school and several of the neighbors, including the Sowalskys, to address the stormwater runoff issue raised by Mr. Sowalsky. At the behest of the school, he examined the area, as did the head of forest conservation planning for the Park and Planning Commission, Mark Pfefferle. According to Mr. Osband, the Sowalsky driveway is built right up against the property line, and even a bit over, so the runoff from the existing site runs right to their driveway. Removal of some trees in that area may have affected the problem, and they will be replaced. In addition to that, Petitioner will be planting ground cover throughout the entire area to help to slow the existing runoff. These proposals are included in Exhibits 10(a) through (d), which is the revised forest conservation and tree save plan. In his opinion, these changes will decrease the runoff, though he cannot say that in every single storm there will be absolutely no runoff. Yet, it should be sufficient to avoid adverse consequences to Mr. Sowalsky's property. 10/20/08 Tr. 132-138.

Based on this record, the Hearing Examiner finds that the changes proposed by Petitioner will not be detrimental to the environment.

2. Summer School, the TMP and the CLC:

a. The Existing Special Exception:

A summer school is not authorized in the existing special exception. The language in the Board's original resolution approving the German School (CBA-2684 Opinion of December 9, 1969, Exhibit 17(a), p. 1), expressly stated that the Board contemplated "no summer school," and it

permitted a much lower level of activity in the regular school year than currently exists (Exhibit 17(a), p. 2:

There would be no athletic competition between schools, no grandstands, and no night activities. Soccer games are proposed to be held during the day. The school is proposed to be a day school only. P.T.A. meetings are held by classes and only one general meeting per year is held. It is anticipated that two school dances would be held during the school year.

The Board's language prohibiting a summer school has not been modified by subsequent Board resolutions.

b. Petitioner's Request to Add a Summer School:

Petitioner filed the current modification petition, in part, to obtain the Board's permission to institute a new summer school, which it described as follows:

German language courses; music, dance, art, science, creative writing, journalism, other academic programs, and sports activities. Enrollment for the summer program would include up to 450 students, aged three (3) to fifteen (15) years, with approximately fifty (50) faculty/staff members. The summer program would be conducted for approximately six (6) weeks in the summer, from approximately 8:00 am to 3:00 pm, with aftercare available until approximately 5:00 pm. [Second Amended Statement of Operations, Exhibit 80(a), p. 13.]

Sybille Young, the Chair of the Board of the German School, described the nature of the summer program that the school is proposing. 10/20/08 Tr. 152-167; 206-215. She stated that the school plans a summer academic program similar to what the school does during the school year, because it will be taught in German. One of the goals is to do enrichment courses during the summer period for children to catch up on what they may have missed during the school year, much like other schools are doing, and/or to enable children who want to join the school to catch up on their German knowledge. A requirement to attend the school is that you are fluent in German.

According to Ms. Young, twenty percent of the school's students are from families who are local (*i.e.*, not from the German Embassy population). The summer school would be open to the

public. It is a way of getting students for the regular school, because private schools are struggling with their enrollment, and there may be a decline in the German School enrollment, way under the 650 count.

Although the school is seeking a summer school enrollment cap of 450, that may not be achievable in the near future. The school will start small, depending on the demand from current students and from people who want to join the school. The summer school would be restricted to age 15 and below to avoid student drivers, especially “rambunctious traffic” caused by junior drivers. There would be a cap of 50 teachers for the summer school program. There might be the occasional activity outdoors during recess, but that is not the focus of the summer school. Ms. Young could not say whether there would be physical education classes, but stated that the principal focus would not be on athletics.

The hours of operation during the summer school would be similar to the daily schedule as during the regular school year. The aftercare program is used by about 50 students during the year. Ms. Young indicated that other than the lower cap of 450 students in the summer and the fact that bussing would not be offered initially, the summer school would be almost the same operationally as the regular school. Long term, if the number of 450 students is reached, it will be the same. It is meant to be a school with an academic focus, not a summer camp. Evening activities are not planned at this point for the summer school.

According to Ms. Young, if the Board were to approve the summer school, it would likely not begin until the following year (*i.e.*, 2010) because if everything goes according to plan, construction will begin next summer, and the school would not necessarily delve into summer school at the same time. If it does begin next summer, it would be a very small group.

Ms. Young was unable to testify as to whether summer schools are common among private schools in the County. In an effort to demonstrate that summer schools are an inherent characteristic

of private schools in the County, Petitioner submitted a survey, after the first hearing, of 45 private schools in the County. Exhibit 41(e). It showed that of the 45 surveyed schools, 39 had some kind of summer activity, but only 22 had summer schools. No attempt was made by Petitioner to compare the sites and access roads of the institutions with summer schools to the site and access of the German School.

Based on this record, the Hearing Examiner finds that Petitioner has failed to establish that summer schools are necessarily associated with a private school use in the County.

c. The Proposed Transportation Management Plan and Technical Staff's Review:

In order to assist in managing traffic generated both during the regular school year and during the proposed summer session, Petitioner agreed to establish a transportation management plan (TMP), the latest version of which is contained in Exhibit 41(d).¹⁰ Transportation Planning Staff described the TMP as follows (Exhibit 23, Attachment 10):

The TMP is also designed to reduce the School's transportation impacts on the campus and adjacent neighborhood. The TMP includes transportation management elements to manage the flow of traffic at the School's points of access and to ensure that queuing and circulation of vehicles on campus is conducted in an organized and efficient manner that supports the School's operations.

The TMP describes a comprehensive traffic management program which includes designation of a staff person as School Transportation Coordinator who will implement the traffic management elements associated with carpooling, bus transportation, parking enforcement, and vehicle limitations.

Proposed access, circulation and egress are depicted in Figure 2B from the TMP, which is reproduced on page 13 of this report. Based on its review of the TMP, Staff found that "the proposed traffic management elements are reasonable to handle the projected school traffic associated with operation of the School's daily programs during the school year and the proposed

¹⁰ Following the first hearing, Petitioner amended the TMP by adding a sentence providing that once enrollment in the summer program reaches 270 students, the school would offer a bus service to reduce traffic impacts. Exhibit 41(d), p. 10. Other amendments to the TMP include more detail on the trigger for arranging satellite parking for special events (Exhibit 41(d), p. 20) and an agreement to study traffic calming measures in the future (Exhibit 41(d), p. 22).

summer program in a safe and efficient manner.” Exhibit 23, Attachment 10. Transportation Planning Staff also determined (Exhibit 23, Attachment 10):

The School is not subject to the Local Area Transportation Review or Policy Area Transportation Review, since the School is not increasing the student enrollment or the number of faculty/employees. The traffic associated with the proposed summer program would be less than the traffic impacts of the daily operations of the school during the typical school year. There is no change to the existing access points and the internal traffic circulation.

The sufficiency of this approach in assessing traffic impacts on the community in a case like this one will be discussed in Parts II. E. and IV of this report.

d. The Proposed Community Liaison Council:

Finally, Petitioner has agreed to the creation of a Community Liaison Council (CLC), a group consisting of representatives of the school, the community and the People’s Counsel, who would be an *ex officio* member. CLCs, which have been widely used in the County, are designed to facilitate discussions between institutions such as the German School and its neighbors on issues of mutual concern. The People’s Counsel suggested that one be created in this case, and that suggestion is unopposed. 10/20/08 Tr. 25-26 and 256-260; 4/7/09 Tr. 59-63. The Hearing Examiner agrees that a CLC would be a useful tool in this case, and has recommended the following condition in Part V of this report:

Petitioner must create a Community Liaison Council (CLC) to discuss and address operating impacts and other issues of concern to Petitioner and/or the community. The CLC shall consist of Petitioner’s representative and representatives from any civic association or homeowners association within the defined neighborhood wishing to participate. The adjacent and confronting neighbors must also be invited to participate, and the People’s Counsel must be included as an *ex officio* member of the CLC. Meetings must be held at least twice a year, and minutes must be kept by Petitioner and filed with the Board of Appeals annually. The terms of the CLC proposed on pages 17-18 of the revised TMP (Exhibit 41(d)) are approved, except that residents of Kendale Road (to the west of the school) must also be invited to participate.

3. Operations, including After-hour and Weekend Activities:

a. Petitioner’s Initial Requests:

With regard to operations, the only change Petitioner initially sought was the addition of the summer school, as discussed above, and modification of a condition in the 1969 grant which specified that only students in the 12th and 13th grade are permitted to drive to school. Because the school proposes to discontinue the 13th grade, it asks that the 1969 condition be changed to specify that only students in the top two grades may drive themselves to school, if they are properly insured and licensed to do so. 10/20/08 Tr. 21-22. This seems like a sensible change, and the Hearing Examiner has recommended the following condition in Part V of this report:

The condition in the original December 9, 1969 grant (Exhibit 17(a), p. 4, Condition #9), which specifies that students driving to school shall be limited to insured students in the 12th and 13th grade, is hereby modified to read: "Students driving themselves to school shall be limited to students in the top two grades of the school, and students who do so must be properly licensed and insured. In no event shall a student drive to school in violation of applicable motor vehicle regulations."

There is also no dispute about the enrollment cap for the regular school year remaining at its original level of 650 students. Staff also suggested a cap of 102 employees based on Petitioner's own figures, which indicated that 102 was the total number of staff and that a maximum of approximately 60 will be on campus at any one time, except when there are staff conferences eight times per year. Exhibit 80(a), pp. 1-2. Petitioner suggested that the cap be changed to read, "102 employees on site," to give them a little flexibility. 10/20/08 Tr. 23-24. The Hearing Examiner proposes the following condition to provide both a cap and a general level of employee presence, in addition to the enrollment cap:

Regular School operations are limited to 650 students and 102 employees on site at any time, and at no time shall Petitioner admit a greater number of students than it is able to appropriately manage with the facilities, faculty and staff available at the time. Generally, staff on site will be approximately 60 employees, but for staff conferences (approximately eight times per year) and other special activities, up to 102 employees may be on site.

b. The Additional Ongoing Activities Not Yet Formally Approved by the Board:

The more knotty questions in this case involve the many activities that have been added

without formal approval by the Board of Appeals, on a theory that these were “evolutionary” changes that should be automatically permitted. 10/20/08 Tr. 255. In addition to classes and the other daily activities described on pages 8-10 of this report, the school hosts a number of athletic competitions with other schools (two or three per week, usually indoors) and a great variety of after-hour and weekend activities, which are set forth beginning on pages 3 through 12 of the proposed Second Amended Statement of Operations. The weekend activities include Saturday German Language Classes, which are attended most Saturdays during the regular school year by up to 500 participants and 40 staff members. Participation is not restricted to German School students. Exhibit 80(a), p. 11.

There are also about 65 “special events,” including 12 weeknight theater productions attended by 50 to 300 people and running till 10 p.m.; four (4) Friday night student dances attended by 100 people running till 10: p.m.; five (5) annual events attended by 500 people or more (Christmas party for German language classes, Summer celebration for German language classes, Christmas Bazaar; Easter Bazaar and Schulfest); and numerous other evening and weekend activities.

The after-hour and weekend activities (including frequencies, times and approximate numbers of attendees) are summarized in the following table from the Second Amended Statement of Operations (Exhibit 80(a), pp. 10-12):

| Activity | Date | Time | Attendees |
|--|-----------------------------------|---------------------|-----------------------------------|
| 1. Student theater, music, and art productions | 12 weeknights throughout the year | 7:00 pm to 10:00 pm | 1 with 300, and 11 with 50 to 200 |
| 2. School Society meetings | 2 weeknights throughout the year | 6:00 pm to 10:00 pm | 80 |
| 3. School Board meetings | 10 weeknights throughout the year | 7:00 pm to 10:00 pm | 15 |
| 4a. General Assemblies of Parent Association | 4 weeknights throughout the year | 7:30 pm to 10:00 pm | 60 |
| 4b. Elementary School Parent [Rep.] Meetings | 2 weeknights throughout the year | 7:00 pm to 9:30 pm | 25 |

| | | | |
|---|--|--|--|
| 5. Student dances | 4 Friday nights throughout the year | 6:00 pm to 10:00 pm | 100 |
| 6a. Parent-teacher class conferences | 4 weeknights at the beginning of the school year (2 for elementary school and kindergarten, 1 for high school/nursery school, 1 for middle school) | 7:00 pm to 9:00 pm | 120 |
| 6b. Parent-teacher consultations | 4 weeknights throughout the year (2 for elementary school and kindergarten, 2 for middle/high school/nursery school) | 5:00 pm to 9:30 pm | 2 with 175 2 with 200 |
| 7. German language classes | 30 Saturdays and 30 Wednesdays from early September to late May | 9:00 am to 11:30 am and 9:15 to 11:15 am on Saturdays and 7:00 pm to 9:00 pm on Wednesdays | 500 for Saturday classes (and 40 staff) and 35 for Wednesday classes (and 4 staff) |
| 7.a Teacher conferences for German language classes | 1 Saturday in March/April (included in the 30 Saturdays listed above), and 1 Saturday in August | 11:30 am to 3:00 pm 10:00 am to 2:00 pm | 40 staff |
| 7.b Written exams for German language classes | 1 Saturday during the year | 8:00 am to 4:00 pm | 45 (and 4 staff) |
| 7.c Oral exams for German language classes | 2 Saturdays during the year | 8:00 am to 7:00 pm | 15 (and 4 staff) |
| 7.d Christmas Party for German language classes | 1 Saturday per year (included in the 30 Saturdays listed above) | 10:00 am to 1:00 pm | 550 |
| 7.e Year-end summer celebration for German language classes | 1 Saturday per year (included in the 30 Saturdays listed above) | 10:00 am to 1:30 pm | 650 |
| 8. Student-only ballroom dancing classes | Monday nights from mid-November to mid-May | After-school to 6:30 pm | 60 |
| 9. Christmas Bazaar | 1 Saturday per year | 11:30 am to 7:00 pm | 600 |

| | | | |
|---|---|--|------------------------------|
| 10. Easter Bazaar | 1 Saturday every other year | 11:30 am to 3:30 pm | 500 |
| 11. New staff reception | 1 weeknight at the beginning of the school year | 6:00 pm to 9:00 pm | 100 |
| 12. Flea market | 1 Saturday in May | 9:00 am to 2:00 pm | 250 |
| 13. Schulfest (year-end party) | 1 weeknight per year | 4:00 pm to 9:00 pm | All students and 400 parents |
| 14. Ecumenical Service | 1 Sunday per year | 9:00 am to 1:00 pm | 250 |
| 15. Family overnight "sleepover" | 1 Friday night per year | 7:00 pm to 7:00 am | 100 |
| 16. College information night | 1 weeknight per year | 7:00 pm to 9:00 pm | 60 |
| 17. German/European university & career orientation night | 2 weeknights per year | 7:00 pm to 9:00 pm | 100 |
| 18. Graduation for high school diploma | 1 weeknight per year | 6:00 pm to 10:00 pm | 175 |
| 19. Graduation for German Abitur | 1 weeknight per year | 6:00 pm to 10:00 pm | 175 |
| 20. Weekend continued education seminars for teachers | 1-4 Saturdays per year | 10:00 am to 4:00 pm | 30 |
| 21. Informational meetings/staff & parents | 4 to 6 weeknights per year | 7:00 pm to 9:00 pm | 60 |
| 22a. School athletic competitions | 50 to 70 weeknights; and approximately 2-3 Saturdays and/or Sundays | 3:00 pm to 6:00 pm (range for weeknights) Approximately 3 hours, between 9 am and 4 pm on Saturdays | 30 |
| 22b. School athletic tournaments | 4 weeknights and 2 Saturdays | 3:00 pm to 9:00 pm on weeknights and/or Saturday mornings/afternoons | 30 - 100 |
| 23. Recreational sports activities | Gym: 3 to 5 weeknights during Nov. – Mar., and 1 to 3 weeknights during Apr. - Oct. Soccer Field: once a month | Gym: 5:00 to 7:00 pm and 7:00 pm to 10:00 pm on weeknights Soccer Field: 5:00 to 7:00 pm and 7:00 pm to 9:00 pm on weeknights and/or Saturday mornings/afternoons | 12 – 35 |

c. The Ostensible Comparison with Other Private Schools:

Petitioner attempted to compare the German School with seven other private schools in the County – McLean, St. Andrews, Green Acres, Bullis, Landon, Holton-Arms and Norwood. All but Norwood were included in a comparison chart in Exhibit 69(a) and attachments (Exhibits 69(b) – (h)) summarizing the size, location and activities at each of these schools.¹¹ At the beginning of the April 7 hearing, the Hearing Examiner alerted Petitioner’s counsel to their need to show that the proffered comparison schools were actually comparable to the German School in terms of their access roads and therefore the traffic impact on their neighbors. 4/7/09 Tr. 6-7.

During the hearing, Petitioner called Andrea Jarrell, an independent communications and marketing consultant for private schools, colleges, and universities, who testified as an expert in the curriculum and extracurricular activities offered by private schools in the County.¹² She noted that private schools of the caliber of the German School are not that different from place to place. Their activities are typical of what she has seen in other areas where she has worked. She testified that the German School’s level of activities was actually somewhat lower, in some cases significantly lower, in terms of things like athletic activities, than she had seen at other K through 12 schools.

¹¹ Although Norwood School was not included in the chart, Petitioner’s counsel attempted during the April 7, 2009 hearing (4/7/09 Tr. 235-236) to show that the Board had approved similar Saturday language classes at Norwood in 1994 (S-285-D). Petitioner’s Counsel apparently did not realize that the Board’s initial grant of authority on April 9, 2004, to allow Saturday language classes at the Norwood School (Exhibit 78), was an administrative modification, subject to change if the community requested a hearing after notice was issued. Since notice of the Saturday language classes did generate a request for a hearing from the community, the Board suspended the grant of authority on June 4, 2004, in order to hold a public hearing (Exhibit 82). The administrative modification request, including its request to hold Saturday language classes, was subsequently withdrawn by Norwood School. Notice of December 9, 2004 (Exhibit 83). It should be noted that the 2004 administrative modification request for Saturday language classes at Norwood had nothing to do with the underlying Petition, S-285-D, which was granted back in 2001 to allow physical plant changes on the Norwood site. The Board did not assign a new number to the administrative modification request when it was filed in 2004.

¹² Ms. Jarrell has never worked at a private school, and her knowledge appears not to extend to all the private schools in Montgomery County. The Hearing Examiner therefore expressed his concern about the breadth of her knowledge regarding operations in Montgomery County private schools and noted that she may not be able to reach any kind of global conclusions as to what is necessarily associated with (*i.e.* inherent in) a private school in the County. Nevertheless, because she does have knowledge beyond that of a layman that may be helpful to the finder of fact, the Hearing Examiner accepted her as an expert and determined that his concern would go to the weight to be given her testimony. 4/7/09 Tr. 154-167.

Ms. Jarrell noted that the comparison table of schools (Exhibit 69(a)) shows that many of those schools have a broad range of activities that are happening on Saturdays and Sundays, and some of those schools are conducting regular, weekend, SAT prep classes. When the Hearing Examiner indicated that he was more concerned with the number of people attending those events, which is what puts the pressure on the neighborhood and its roads, Ms. Jarrell responded that the number of people attending the events in other schools is not given in the comparison tables, and she did not have any evidence as to the numbers of people attending Saturday events at these other schools. However, she estimated that about one third of the student enrollment would attend some events. For a theater production, you could expect 200 people. For a big alumni event, you could expect hundreds of people.

In response to a question from the Hearing Examiner, Ms. Jarrell testified that she is not aware of any other private school in Montgomery County that has a Saturday activity that happens 30 Saturdays in the school year, and usually has an attendance of between 500 and 600 people. She also was unable to testify as to how these other schools in Exhibit 69(a) compare in terms of their access, whether they are on major roads and have multiple access points, or how they impact on the community that way. Ms. Jarrell admitted that she had never been to the German School, although she knows where it is located, and that it is at the end of a cul-de-sac. 4/7/09 Tr. 154-184.

Petitioner's transportation expert, Robert Kohler, also was unable to supplement the data regarding the comparison schools. 4/7/09 Tr. 74-105. When the Hearing Examiner questioned whether there were differences in the access roads between the German School and other schools to which Petitioner compared it in Exhibit 69, Mr. Kohler indicated he was not familiar with the other schools and had not visited them. He could say that while the other schools were proximate to residential neighborhoods, they were accessed on roadways that were a higher classification than Chateau Drive.

One of the neighbors of the German School, Jerome Sowalsky, testified that he and his wife personally measured the access roads of the schools that Petitioner chose for comparison. 4/7/09 Tr. 184-193. The results of his measurements and observations are set forth in his letter of April 6, 2009, to the Hearing Examiner (Exhibit 75, pp. 1-2):

In its Pre-Hearing Statement, the GS [German School] attempts to justify, by analogy, the activities of the GS described in the Revised Statement by pointing to the activities of six other schools. As is frequently the case with arguments by analogy, this one fails because the analogies do not hold up. Yes, the six other examples are private schools in Montgomery County with busy schedules, but none of them is situated on a narrow, curvy residential street that ends in a cul-de-sac. Three of the schools- Bullis, Landon and Holton-Arms are situated on large tracts of land (78, 76 and 57 acres respectively) that are isolated from the surrounding residential neighborhoods, and in each case, they can be accessed by wide, major thoroughfares. Bullis has access from both Falls Road and Democracy Boulevard; Landon from both Wilson Boulevard and Bradley Boulevard; and Holton-Arms from River Road. In the case of Holton-Arms, although the only access is from River Road, there are turn-off lanes in both directions from River Road and once vehicles turn onto the road leading to the school, they go directly to the school without traversing any residential areas; no one except those going to the school uses this road.

The other three schools that the GS sees as analogous also differ from the GS in important respects. In each case, there are at least two ways to get in and out of the school property and in each case the access roads are approximately twice as wide as Chateau Drive- The McLean school which can be accessed from Deborah Drive and Candlelight Lane (both of which are at least 30 feet wide) is located on Lochiver Lane which itself is over 37 feet wide- almost twice as wide as Chateau Drive, which measures about 19½ feet wide and has no shoulders on either side. St. Andrews School is on Postoak Road, which is a major, lined road wide enough to accommodate two school buses going in opposite directions with cars parked on either side of the Street all at the same time, and the school can be accessed from either direction on Postoak. Green Acres with only 208 students compared to the GS's 550 to 590 is hardly comparable to the GS; however even this school is on Danville Drive that is almost twice as wide as Chateau Drive.

Given these disparities, we believe that the GS's reliance on the operations of these six schools is misplaced. It may provide some support for the kind of activities that some private schools engage in, but it does not support the level of those activities carried on by GS in the physical environment in which it exists.

At the end of the hearing, the Hearing Examiner indicated to Petitioner's counsel that the problem with the data provided by Petitioner, in an attempt to compare extracurricular activities at the German School with other area private schools, is that the data did not illuminate whether the

comparison schools chosen by Petitioner are actually comparable to German School, in terms of their settings, their size, their access and the roads they are on. The German School is on a short and narrow street, ending in a cul-de-sac. The Hearing examiner gave Petitioner the opportunity to submit some clarifying data regarding the settings, size, access and roads the comparison schools are on, and an indication as to the volume of the other schools' activities (*i.e.*, the numbers of students that are involved). 4/7/09 Tr. 222-245. No additional data was forthcoming from Petitioner to refute the information supplied by Mr. and Mrs. Sowalsky.

The Hearing Examiner concludes, based on a preponderance of the evidence, that Petitioner has failed to demonstrate that the activities of the German School are comparable to other private schools in the County with similar settings, site size and access roads. Petitioner has also failed to establish that Saturday classes (language or otherwise) for a body of enrollees almost the size of the regular student body and occurring 30 times a year (*i.e.*, on almost every Saturday the school is not closed for a holiday during the entire academic year) are necessarily associated with a private school use in the County.

d. Petitioner's Efforts to Address the Impacts of School-Generated Traffic and Parking:

According to Ms. Young, the German School has done a number of things in an effort to lessen the impact of traffic from the Saturday language classes and other activities. Drop-offs are not allowed in the upper parking lot anymore, because of the risk that the cars would back up onto Chateau Drive. Everybody in the Saturday classes drops off in the elementary school parking lot, which is at the very end of the property. Everybody has been told that they cannot park on Chateau Drive, and vehicle tags are being listed so that the rules can be enforced. When violations are reported by the community, there will be a penalty system, as specified in the TMP. Based on feedback from the neighbors, the school is backing buses into their parking spaces in the evening instead of backing them out in the morning, to avoid the warning noise in the early hours. Use of the

upper parking lots is being restricted. Bus ridership has been increased, and others are being encouraged to carpool. Smoking down in the circle at the end of Chateau Drive has been eliminated. Satellite parking at Our Lady of Mercy is used for the Christmas bazaar to avoid the cars parking on Chateau Drive. A bus transports people from Our Lady of Mercy to the school. Two policemen stand at the entrance to the parking lot, and just their presence keeps people much more disciplined. The school has committed in the traffic management plan (Exhibit 41(d), p. 20), that when the school expects to have more than 175 cars coming, satellite parking will be provided. 4/7/09 Tr. 147-150.

Petitioner's transportation planner, Robert Kohler, testified that the German School actually produces 20% fewer trips than would be expected from a school its size, according to standards published by both the LATR Guidelines and the Institute of Transportation Engineers. He attributed the lower trip count to the car pooling and bus services offered by the school. 4/7/09 Tr. 79-80. Whether these measures to reduce the impact of traffic have been sufficient to render this use compatible with the neighborhood will be discussed in Parts II. E and IV of this report.

As mentioned in the previous section, Technical Staff did not require a traffic study in this case because Staff assumed that, absent an increase in enrollment permitted on site, the previous approvals would suffice. Nevertheless, in an effort to show that the amount of traffic to be generated by the school's activities does not unduly impact the neighbors, Petitioner, at the second hearing, produced evidence of the critical lane volumes (CLVs) at the nearby intersections.¹³

Mr. Kohler testified that his study of the critical lane volume at the intersections of Chateau Drive and Kentsdale Drive, and Kentsdale Drive and Bradley Boulevard during the peak hours, yielded CLVs well below the 1450 CLV congestion standard for the area. He opined that the CLVs

¹³ Critical lane volume is the standard measure used by the County to evaluate congestion at intersections, and derivatively, road capacity. It involves a count of vehicles coming through an intersection during the peak hours of the morning and evening peak periods. By determining which of these movements are critical under the standards set forth in the Local Area Transportation Review (LATR) Guidelines, a critical lane volume (CLV) for the intersection is calculated and then compared to the congestion standard for that area.

for the peak hours would indicate the worst case scenario in terms of road capacity. Although four more trips were observed in the Saturday morning drop-off period, than in a regular weekday drop-off, the Saturday traffic is generally in line with what is currently occurring at the drop-off during the weekdays. 4/7/09 Tr. 74-79.

At the request of the Hearing Examiner, Shahriar Etemadi, Technical Staff's Transportation Division supervisor, testified at the April 7, 2009 hearing. 4/7/09 Tr. 17-73. After being shown the revised Statement of Operations, Mr. Etemadi stated that the cumulative impact on the roads of the after-school and Saturday activities will be less than what occurs during the peak hour of a typical school day. For some of these after-school activities, the hours of arrival and leaving are spread out, so the traffic is not going to be concentrated during one hour or half an hour coming in and out. Secondly, some of these activities are off-peak, during Saturday, or after 7:00 p.m. Finally, these activities often have more people in one car coming to the site and leaving. So the auto occupancy is high, and therefore, the number of trips coming to the site would be less. 4/7/09 Tr. 30-35.

Mr. Etemadi readily admitted that his analysis does not measure the cumulative impact on the community; he is measuring the capacity of the road. He assesses road capacity by the peak-hour analysis and then projects those results. If the peak hour is okay, then he concludes that the road capacity is sufficient overall. 4/7/09 Tr. 47-48.

Although Mr. Etemadi was testifying on April 7, 2009 regarding Saturday and after-school activities, his answers made it clear that he was stating the same approach he took to evaluating summer school traffic impacts.

When asked by Petitioner's counsel, "Do you think, based on the site conditions, the nature of Chateau Drive, that the traffic presented by the German School's after hours and weekend activities imposes undue adverse consequences on the neighborhood?," Mr. Etemadi declined to

answer directly, stating that was a subjective evaluation of compatibility. Instead, he offered the following testimony (4/7/09 Tr. 35-39):

Chateau Drive is a secondary residential street, meaning that is the lowest classification of the roadway system that we have in our system. That means a small number, relatively speaking, to other classification of roads. A small number of traffic will be allowed.

Again, because it's the lowest level of classification, there is a different opinion among experts as what would be the capacity of a road like this. If we have a freeway or a major highway or arterial, we have a very good idea of what the capacity is, because we can measure the level of congestion.

With a secondary residential street, it is very difficult to measure the congestion because it's very difficult to measure the amount of delay for travelers in that small segment of the roadway. I mean, if we have 15, 20, 100 cars more, obviously there will be more delay. But the delay is not measured in a sense of, in a sense of congestion, if I can say that.

So for a secondary residential street, I would say, probably a couple of hundred, 300 cars per hour, peak hour with the capacity. Again, as I said, this is, there is a difference, a different opinion as what the capacity of these streets are. But 200 or 300 cars per hour still can flow within a reasonable speed and reasonable level of time.

The Hearing Examiner asked whether his capacity estimate took into consideration that Chateau Drive is a dead end street on one end, that the other end empties into Kentsdale Drive, and there is reportedly a problem with backups at the intersection with Kentsdale Drive. Mr. Etemadi replied that there are many variables that may cause a road to be congested or not. They did determine that there would be no queuing from the subject site onto Chateau Drive from drop-off and pickup of school children, but there have been no studies done by Transportation Division as to either the backups or delays at the Kentsdale Drive intersection. 4/7/09 Tr. 35-39. Petitioner's own transportation expert confirmed that, although he had not done any delay studies, he observed approximately seven to eight vehicles queued at that stop-controlled intersection, waiting to turn left to get onto the main line of Kentsdale, during the peak drop-off period, which is the peak time that the school operates in the morning. 4/7/09 Tr. 81-82.

Thus, the evaluations of traffic done by Petitioner's transportation expert and by Technical Staff's Transportation Division were founded on road capacity analysis, not compatibility with the neighborhood. Whether that is a sufficient methodology for determining the traffic issues in this case will be discussed in Parts II. E and IV of this report.

E. Community Concerns

Although there is considerable opposition in this case from the neighbors living on Chateau Drive, it appears that Technical Staff and the Planning Board were unaware of the opposition in the community or the concerns of the neighbors when they acted, since the Staff report indicates that it "has not received any comments from the community." Exhibit 23, p. 8.

Four neighbors testified in opposition to the petition at each of the hearings: Jerome Sowalsky, Miguel Bachrach, Susan Hess and Patti Sowalsky. They also wrote numerous letters and e-mails discussing the issues (See Exhibits 26, 44, 45, 46, 50, 52, 53, 64, 70, 72, 75 and 81). In addition, letters of opposition were received from Dr. George Char (Exhibit 27(a)), Dr. Ivan Aksentijevich (Exhibit 38) and from a group of neighbors, including Shen-Sho Tseng, Rosario Uy and the others listed above (Exhibit 44).

All the complaining neighbors live on Chateau Drive, which is described in Petitioner's TMP as a "local street . . . a curb-less, 20-foot wide, cul-de-sac street . . ." Exhibit 44(d), p. 3. All the opposition centers around the proposed addition of the summer school program; the extent of after-hour and weekend activities; and the accompanying traffic, noise, delays and disruption to the neighborhood.¹⁴ The neighbors are especially incensed about the possibility of losing their peace and quiet during the two summer months, which have been a respite time for the

¹⁴ The letters from Drs. Char and Aksentijevich did not make it clear whether they oppose the new science building as well as the summer school, but the other neighbors indicated that, in general, they "have no objection to the construction elements of the original request. The proposed building, revised signage and lighting, activity court, and play structure are not in themselves problematic." Exhibit 44, p. 1.

neighborhood in the past.

Some concern was also expressed by Miguel Bachrach about the possible negative effects of traffic upon property values. 10/20/08 Tr. 83-84, 205-206; 4/7/09 Tr. 113-114; and Exhibit 45. However, Mr. Bachrach was not qualified as an expert in real property values, and he did not produce any admissible data on the point.¹⁵ Petitioner also produced no evidence whatever regarding possible impacts of traffic on property values. Technical Staff made a conclusory finding that the use will not be detrimental to the economic value of surrounding properties. Exhibit 23, p. 10. Whether the traffic generated by the German School reduces surrounding property values really depends in this case on compatibility questions related to the ability of the neighborhood to comfortably absorb the level of activity (traffic and otherwise) produced by the school, as will be discussed in Part IV of this report.

No opposition was expressed at the hearings to the proposed new science building and other physical changes on campus.¹⁶

Opposition of the neighbors to the summer school is based on their expressed need to get a summer break from the impact of the heavy schedule of curricular and extra-curricular activities generated by the German School both during the work-week and on weekends throughout the regular school year. One has only to review the 13 page, Second Amended Statement of Operations, Exhibit 80(a), get a sense of the neighbors' concerns. Portions of their testimony at the hearings in

¹⁵ Mr. Bachrach states in his letter of November 21, 2008 (Exhibit 45) that the impact of traffic on property values "is consistently negative." He cites various studies to support this statement, but did not provide copies of the studies themselves for the record. When the Hearing Examiner looked at the first citation on the internet, it turned out to be a study of Scotland. The titles to the other listed studies suggest that their evaluations relate to the impact of traffic noise upon property values. That suggests to the Hearing Examiner that those studies relate to the constant pressure of highway noise, which is not the issue in this case. In the absence of either live expert evidence on the subject, or at the very least copies of the studies in the record, the Hearing Examiner cannot place any reliance upon them.

¹⁶ There was some discussion of stormwater runoff onto the Sowalskys' property, but as discussed in Part II. D.1.e. of this report, none of the proposed changes will make that situation any worse, and it will likely be improved, if not eliminated, by new plantings by Petitioner.

this case and of their letters highlight these issues:¹⁷

Mr. Sowalsky testified (10/20/08 Tr. 6, 150; 216-219; 4/7/09 Tr. 184-193) that he has lived at 8613 Chateau Drive for 23 years, since July of 1985. When he and his wife first moved in, the German School consisted only of the upper school. They had a very limited schedule from sometime in the morning, 8:30 or so, until 3:00 in the afternoon; not very many after school activities, at least on the outside of the school, and virtually no evening activities and no weekend activities.

According to Mr. Sowalsky, moving the lower school to the site created considerably more traffic. Evening activities increased substantially and the number of special events that take place during the year increased substantially. Two years ago the school started Saturday classes which run until around noon, and there has been weekend use of the playing field that hadn't occurred before. "The school utilization has gone up tremendously, and with it, as might be expected, with that kind of expansion, the traffic has increased substantially, and on more days of the week and more times a day. It is not only mornings and evenings, but throughout the day and on Saturdays." 10/20/08 Tr. 217. With the traffic comes the commotion of the cars. For many of the activities during the week, the buses are coming back and forth. The rumbling of the buses causes vibrations in his home.

The buses start, during the week, at approximately 6:30 a.m., and their final trip doesn't return until about 6:30 p.m. And they do go out in the course of the day. Chateau Drive is just a local, residential street that ends in a cul-de-sac, not very wide, and goes uphill. There is a wide bend before you get to the school. There are mornings somewhere around 8:30, when he has to wait five minutes before he can exit his driveway because of the traffic. Mr. Sowalsky believes that this amount of traffic was never contemplated when the German School was first granted a special exception to be on that street, because of the limited nature of what they were proposing.

¹⁷ Unlike the summary of testimony in Part III of this report, the summary here combines the testimony of each witness over two hearing days and their individual letters, to get an overall sense of the concerns of each neighbor.

The proposed summer school would be a new venture, and would include not just the school's student body but participants from the community at large. The eight weeks of the school's summer vacation are the only respite that the neighbors get from the kind of traffic and the commotion that goes with all of that. Few of the students walk to school. There is noise on the outside, as well as on the playing fields, which is what you would expect. So there has been a reasonable expectation that at least the summer period would be retained as the quiet period of the neighborhood.

Mr. Sowalsky did an actual count of vehicle movements up and down the street, and on the last occasion, Saturday, March 7, 2009, counted 928 vehicle movements during the period that the school was in operation, from about 8:30 to a little after 12:00 noon. Observations on other Saturdays yielded counts of 788 and 776 trips during the same time period. He feels that, for the small street that he lives on, that is an intolerable amount of traffic. The expectation has always been that there would be some peace and quiet on Saturday and on the weekend. He also challenged the comparison that Petitioner attempted to draw with other private schools, as was discussed in Part II.D.3. of this report.

While he realizes that things change, he would like some curtailment of the activities of the school, and not further expansion. By opening Saturday classes to the general public, to adult education, the school has gone beyond what they've been authorized to do by the Board of Appeals. He believes it is just too much for this street and this neighborhood to bear. During the Christmas bazaar this past Christmas, the street was overrun with people, and he could barely get up the street. There were cars parked on at least one side of the street. He feels that there has to be a limit on where people can park, and what they can do during that day, and a cutoff time, because that event went long beyond the 7:00 p.m. cutoff time that is reflected in the Statement of Operations.

Mr. Sowalsky stated that he realized that there must be some balancing between the interests of the school and the interests of the neighborhood. He is not objecting to all the activities on this statement of operations, many of which are essential to the operation of any school. His primary objection regarding regular school-year activities is to the German language classes on Saturday mornings, which have never been approved by the Board of Appeals and have brought a tremendous amount of traffic to Chateau Drive. He also wants limits placed on the Christmas bazaar requiring off-site parking, shuttle busses and a 7:30 p.m. closing time. He opposes any Sunday activity except for the Ecumenical Services. Exhibit 75.

Patti Sowalsky testified (10/20/08 Tr. 244-246; 4/7/09 Tr. 194-197) that she lives at 8613 Chateau Drive. She stated that when she moved to that street over 24 years ago, she had a lovely quiet house on a lovely, quiet, crooked little street, with a small school at the top. She has been inundated since then with so much more – buses, cars, programs, weekends. The only time they have peace and quiet is the summer. “That is sacrosanct to us. We will fight you for that. We do not want a summer school in our neighborhood. We want our privacy and our peace and quiet. That is what we bought for. That is what we came for. And I think we have a right to ask for it.” 10/20/08 Tr. 245 As to traffic, Ms. Sowalsky stated that she has actually been forced off the small road by school buses. She did not object to the construction of the proposed new building on campus.

Susan Hess testified (10/20/08 Tr. 220-227; 4/7/09 Tr. 197-210) that she has lived at 8620 Chateau Drive for about 10 years, diagonally across the street directly from the German School. Her property overlooks the lower parking lot, and the side view of the school is what she sees.

She stated that nobody from the Chateau Drive area played a part in the original special exception, in which there were the people from the west side who objected to an entry on their road, Kendale. Except for the Chateau house itself (a big stone house that was built in the twenties),

there were no houses on Chateau Drive at the time of the original special exception in 1969. Her house, slightly past the school and across the street, was built in 1974. Although other houses were built after the special exception was granted, no one knew it would grow to this extent. The vehicular traffic and the number of activities that bring the vehicular traffic are what has become an issue. The activity has grown exponentially in the nineties.

Ms. Hess noted that the original special exception did not permit summer programs or weekend and after-school activities, essentially nothing outside the 8:00 to 3:00 hours, five days a week. In the course of time, the German School has added Saturday and after-school programs. To the neighbors, the content of the programs is not particularly important. "What's important is that it brings students and traffic to the street, and commotion on the street, literally, 12 hours a day, and there is something going on six days a week currently. So it is quite outside what had been originally approved by the County." 10/20/08 Tr. 223. She expressed a concern that the traffic counts provided by Petitioner were not accurate. For example, they do not include traffic before and after the count was taken, even on the one day of the count.

Ms. Hess added that those living in the neighborhood find this a continuing encroachment which impacts on the neighborhood. In addition, more students are driving their own cars to the school on a regular basis. A number of these students leave campus several times a day, racing up and down Chateau Drive on the lower end of the street, past the school. Traffic is on one end of the street, and student behavior issues are on the other end of the street. So, the German School is constantly impacting those in the neighborhood in some ways that may not show up in traffic counts. Students also congregate and smoke and litter.

Ms. Hess also challenged the comparison that Petitioner attempted to draw with other private schools. The schools that are cited by Petitioner – Bullis, Landon, and Holton-Arms are on

larger roads with one or more entrances. The other schools noted, Green Acres and McLean, have wider residential streets for access. The German School is on Chateau, with no secondary access.

Ms. Hess suggested that five recommendations contained in the community's letter of November 21, 2008 (Exhibit 44), should be implemented:

1. The German School to house buses off-site or use private bus transportation.
2. All students and buses or car pools for departure from the school each day. No single car pickups.
3. For all special events where more than 175 vehicles are expected, satellite parking is mandatory for vehicles in excess of 175.
4. No parking on neighborhood streets allowed at any time.
5. Development of an annual vehicle trip budget for approved activities. A total number of vehicle trips would be approved for annual operations and adjusted by the school within the budget allowance, to meet specific or changing school needs. Car pooling or busing could cause a budget savings in single car trips to be applied to vehicle trips for other activities.

Ms. Hess also objected to the Christmas bazaar, the Easter bazaar and the rummage sale as unnecessary to the educational mission of the school. Because of all of the traffic that it brings to the street, she objected to ¶ 23 of the amended statement of operations, which, in her opinion, sublets the German School out to other institutions interested in using the fields or the classrooms.

Ms. Hess concluded that she did not believe the County would approve this operation in this location if it were a new application today.

Miguel Bachrach testified (10/20/08 Tr. 228-243; 4/7/09 Tr. 106-116) that he lives at 8621 Chateau Drive, adjacent to the school's west end, the opposite end from Mr. Sowalsky. He has lived in the neighborhood for 15 years, and there has been an increase in traffic counts, noise and speed. While the school may have told the parents and the bus drivers to drive carefully, there are very few people or vehicles that abide by the speed limit.

Mr. Bachrach also noted that he drives his kids to school every day, and every morning there is a backup of cars waiting to exit Chateau Drive onto Kentsdale Drive. The backup ranges from one to ten cars, depending on the time of day. A lot of the patrons of the school want to turn

left onto Kentsdale Drive, and sometimes you have to wait five to ten minutes for an opening in traffic to move out. This significant impact “is very very frequent, and it is natural. There's a lot of traffic in the street.” 10/20/08 Tr. 230-231. There is no light, and there is nobody there controlling traffic at the intersection of Chateau onto Kentsdale. He suggested that, like other schools do, somebody should be directing traffic at the intersection so that cars can move up and down in an orderly fashion.

Mr. Bachrach stated that his objection is to the operation during the summer, and he is not objecting to a new building, but would like to be reasonably assured that the way it is going to be done is not going to have a severe impact on neighboring homes.

Mr. Bachrach challenged traffic projections based on a single day of observations, which he felt was not a statistically sound methodology. He also questioned Mr. Etemadi's conclusion that because the summer school enrollment and after-school activities involve significantly fewer students than a typical day in the regular school-year program, the proposed summer and after-school activities must have significantly less traffic impact. Mr. Bachrach noted that the summer school and after-school activities have fewer busses and less opportunity for carpooling. From Petitioner's traffic study, the Saturday traffic has more trips than a regular school day.

Mr. Bachrach also questioned Mr. Etemadi's assumption that because the German School mitigates its trips more than the average school that there is a reduced impact on the neighborhood. The baseline traffic on the streets accessed by other schools is much higher than Chateau Drive. Since the baseline traffic on a quiet residential street is low, the influx of traffic from the German School is very disruptive. It is much higher than many of the other schools.

Mr. Bachrach noted that traffic and resulting noise and pollution have an impact on the property values by virtue of the traffic, and the view of the neighborhood is that there has to be some balance between what the school needs and what the neighborhood's welfare is, both in terms of

how it affects daily lives and the impact on property values. He does not believe there has been a real assessment of the cumulative impact of all these activities on the neighborhood and on property values.

In his letter of January 27, 2009, Mr. Bachrach made the following three suggestions:

- a. Set a cap of a maximum of 4 events per year on “large scale” events (*i.e.*, those likely to attract more than 100 attendees);
- b. Prohibit events lasting past 9 p.m. or occurring on weekends;
- c. Prohibit activities (such as dance and language lessons) that are not part of the regular school curriculum and are offered in other places.

As is frequently observed in special exception cases, zoning is not a plebiscite and we do not elevate general fears expressed by the neighbors above the probative evidence offered by experts. *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). This case, however, is different from *Rockville Fuel*. First of all, the expert evidence in this case did not sufficiently address the cumulative impact of traffic on the neighborhood. Moreover, the neighbors in this case did not testify just about their fears, but about the daily experience they have lived through as a result of traffic and activity generated by the German School over many years. Their evidence, especially regarding the uniqueness of the site and the cumulative effects of the school’s activities, is probative and must be considered. *Moseman v. County Council of Prince George’s County*, 99 Md. App. 258, 266, 636 A.2d 499, 503 *cert. den.*, 335 Md. 229 (1994). How the evidence from the experts and the neighbors affects the overall disposition of this case will be discussed in Part IV of this report.

III. SUMMARY OF THE HEARING

Two hearings were held in this case. The first hearing, held on October 20, 2008, addressed structural changes to the campus sought by Petitioner and the proposal by Petitioner to operate a summer school. Seven witnesses were called by Petitioner and four opposition witnesses testified, all neighbors living on Chateau Drive. A second hearing was held on April 7, 2009, solely to

address issues related to school-year operations that have been ongoing without formal approval by the Board of Appeals. Petitioner recalled several witnesses that testified at the first hearing and added two additional witnesses. The same four neighbors testified as to their concerns about the impact of Petitioner's operations upon the quiet of their small street, Chateau Drive. At the request of the Hearing Examiner, Shahriar Etemadi, Transportation Planning Supervisor for the Technical Staff, testified regarding traffic on Chateau Drive. To avoid confusion, the testimony at each hearing is summarized separately below. References to the transcript of the October 20, 2008 hearing are designated "10/20/08 Tr. xx," and references to the April 7, 2009 hearing transcript are designated "4/7/09 Tr. xx."

The October 20, 2008 Hearing:

At the inception of the October 20, 2008 hearing, to avoid even the appearance of a conflict of interest, the Hearing Examiner disclosed that his wife is a teacher the nearby Norwood school, which, like the German School, is a private educational institution. No objection to the Hearing Examiner serving in this matter was raised by any party. 10/20/08 Tr. 8.

Petitioner's counsel indicated that Petitioner wished to modify the ninth condition in the original 1969 grant, which provided that only insured students in the 12th and 13th grade were permitted to drive to school. As stated in the Statement of Operations (Exhibit 3(a)), the school proposed to discontinue the 13th grade in 2009, and the school therefore requests that that condition be changed to allow students in the top two grades to drive. The top two grades will be 11 and 12, but to build in some flexibility, he suggested that the condition refer only to "the top two grades." The Hearing Examiner observed that the condition would have to be worded so as not to imply permission to underage drivers, if the school later eliminated another grade at the top.

Petitioner's counsel also stated that Petitioner has no objection to the faculty cap proposed by

Technical Staff, but that the faculty cap should be 102 staff on campus at any one time. He noted that the school has voluntarily agreed to implement a transportation management plan (TMP).

10/20/08 Tr. 21- 24. He agreed to the conditions proposed by Technical Staff, except as noted with regard to the staff cap applying to staff on site at any one time. 10/20/08 Tr. 248. Petitioner's counsel argued that a summer school is an inherent characteristic of a private school, and that the 1969 special exception grant imposes 11 enumerated conditions, but it doesn't prohibit the school from certain "evolutionary changes." 10/20/08 Tr. 249-255.

The People's Counsel, Martin Klauber, Esq., stated that one of the elements of the transportation management plan is the establishment of a Community Liaison Council, including the West Montgomery Citizens Association, and representatives of the two abutting streets, Chateau Drive and Kendale Road. Petitioner's counsel agreed, stating "The school is committed to being a good neighbor, and the school is certainly willing to have this community committee established." 10/20/08 Tr. 25-26.

A. Petitioner's Case

Petitioner, represented by Ronald M. Bolt, Esq. and David Podolsky, Esq., called the following witnesses at the hearing: Robert Warner, land planner; Brian Stephenson, landscape architect; Joseph B McCoy, architect; Max Kantzer, professional engineer; Gregory Osband, forest conservation expert and landscape architect; Sybille Young, Chair of the Board of the German School; and Robert Kohler, transportation planner.

1. Robert Warner (10/20/08 Tr. 28-86):

Robert Warner testified as an expert in land use planning. He described the school property and the area surrounding it, noting that other institutional uses, including a U.S. Postal training facility, Congressional Country Club, Norwood private school, Seven Locks Elementary School, the Maitre'd School and the Connolly School of the Holy Child, are all within a mile of the property.

When asked whether the conclusions made in his report were still true today, Mr. Warner responded, "As far as I know, yes." 10/20/08 Tr. 34. When asked whether the school's use as a private educational institution, was a permissible special exception use in the subject zone, Mr. Warner replied, "As far as I am aware." 10/20/08 Tr. 35. The Hearing Examiner reminded Mr. Warner that he was testifying as an expert witness, and that such waffle language could affect the weight given to his testimony. 10/20/08 Tr. 35.

Mr. Warner testified that the German School was constructed in 1975, but Mr. Podolsky corrected him, indicating that the school was opened in 1975. Mr. Warner further testified that "As far as I understand," the site covered by the 2002 Potomac Subregion Master Plan." 10/20/08 Tr. 37. The Master Plan identifies use of this property as for schools, churches, synagogues.

In Mr. Warner's opinion, the scale and height of the proposed two-story building, and the new play structure itself, will be in harmony with the single-family characteristics of the neighborhood. The additional windows in the existing elementary school building would not change the density or the characteristics of that facility. Moreover, the new science and classroom building would be located an adequate distance as a buffer from the adjoining property. These will be shielded with landscape material, berms, and other buildings on the site itself. The special exception modification will not alter the general operational characteristics which were approved previously and will not increase the residential population, since the student body will not increase in size. 10/20/08 Tr. 39-41.

[During Mr. Warner's testimony, it came to light that there were small errors in the square footage of floor space to be added to the site, and Petitioner will submit revised plans after the hearing. 10/20/08 Tr. 44-46]

Mr. Warner opined that the overall intensity of the use would not increase, but he conceded that it would increase in the summer. 10/20/08 Tr. 47. The additions to the physical plant will not

increase the intensity of the use nor impact the surrounding community, but will merely spread the use out over a broader area of the site. It will also have no visual impacts because of the buffers, the berms, the other structures that presently exist on the property, and additional landscaping.

10/20/08 Tr. 48-50.

Mr. Warner testified, in response to a question posed by Petitioner's attorney, that a summer school is "an inherent use" of private educational institutions in the County (10/20/08 Tr. 52). The following colloquy then occurred between Mr. Warner and the Hearing Examiner (10/20/08 Tr. 53):

THE WITNESS: Right. It is inherent in the schools that I am aware of in living in the County.

MR. GROSSMAN: Well, how many schools are you aware of? What have you done to check out that issue?

THE WITNESS: Sidwell Friends and a couple of others that have that. I would say, I would say, in my opinion, it is, but I cannot specifically cite schools and programs. If you need that, then I cannot really give that.

MR. GROSSMAN: Well, I guess, on what do you base your opinion if you cannot site, if you do not know what, in general, the run is, and you only can refer to a few schools, how do you have that opinion? How do you reach that opinion? I am not saying it is wrong, just what's the basis for that?

THE WITNESS: Personal experience.

MR. GROSSMAN: And that personal experience involves how many schools, how many private schools?

THE WITNESS: It would be one or two.

[The Hearing Examiner noted that that was not a sufficient basis for reaching the conclusion that summer schools were inherent characteristics of private schools in the County, and later agreed to let Petitioner submit a survey of County private schools on this issue after the hearing. 10/20/08 Tr. 54; 164-165.]

According to Mr. Warner, the school is presently served by the County through WSSC, the Police Department and the Fire Department. It is also covered by electrical service of Pepco and other general utilities, so its specific existing operations are serviced, and they will continue to be. More stormwater management and sediment erosion control will be added.

Mr. Warner opined that the special exception modification will be in compliance with the development standards of the RE-2 Zone, including all lot area, lot coverage, parking, setbacks, and height requirements, and Petitioner will have permits for forest conservation, water quality, and the signage plans. 10/20/08 Tr. 54-56.

According to Mr. Warner, the forest conservation area will not be touched during the construction, and new plant material will be planted to enhance the existing landscaping on the property. Mr. Warner opined that the use will be in compliance with Zoning Ordinance §59- G-2.19(a)(4)'s density requirements in that the school has 650 students, which is about 38.4 students per acre, which is well below the 87 students per acre that is allowed. 10/20/08 Tr. 57.

Mr. Warner testified that the property line of closest existing residence (Sowalsky property) is 340.75 feet from the proposed science lab. The elevation on the Sowalsky property line at the corner is 272 feet, and at the proposed building, the elevation it is 278, so the difference is six feet. But then there is also a 14 foot berm between the property and the proposed building, so the impact will be reduced, and the visual aspects will be similar to seeing a one-story building. Mr. Warner's "educated opinion" is that standing on the residential property, and looking west, which is the direction towards the new science building, that the berm and the existing tree stand will block the view from that direction, given that the berm itself is 14 feet higher than the observation point. 10/20/08 Tr. 59-63.

Mr. Warner opined that the inherent characteristics of any private educational institution include buildings; classrooms; outdoor recreational areas; traffic associated with coming to and from the school; off-street parking; supplies and handling of materials coming into the site; solid waste handling; drop off and pick up areas for students controlled on the property itself; the noise of children and other operations; and the effects of any type of light distribution. He also agrees with Technical Staff's listing of the inherent characteristics of a private educational institution. While it

doesn't expressly include summer school, it doesn't specify that it is only referring to non-summer operations either. 10/20/08 Tr. 68-70.

According to Mr. Warner, the summer program being proposed is not a summer day camp; rather it would be summer school. Nevertheless, it would meet the criteria in Zoning Ordinance §59-G-2.19(b) because those activities, in combination with other activities of the institution, will not have an adverse effect on the surrounding neighborhood. 10/20/08 Tr. 73-77.

Mr. Warner explained that light bollards are low level structures that would throw light on the ground, not into the air. 10/20/08 Tr. 78-79. He admitted that if the special exception were approved, and the school was operating a summer program, the traffic in July would be different because the school would then be operating the program during the summer. 10/20/08 Tr. 80.

According to Mr. Warner, the use would be in harmony and not have any adverse impact on the neighborhood because the specific activities and the uses of the buildings and the new science building and the relocated multi-use court, the playhouse, and the additional windows on the existing building are all in character with the existing operations. Also, the implementation of these activities will distribute the activity at a less dense level than presently. So the noise levels and things like that will be reduced in the direction that they go. 10/20/08 Tr. 81-82.

As to the summer program, the operations presently exist at the facility in any month from September through the rest of the year, other than July and August. They have been in operation for an extended period of time, and have been acceptable and have been approved through a special exception. In the summer, those operations would be reduced in the number of students involved, and in the number of employees, so the intensity of the operations would still be acceptable. 10/20/08 Tr. 82-83.

[When Mr. Warner was asked to recollect whether the special exception grant permitted weekend activities and Saturday programs, Petitioner's counsel objected that the document speaks

for itself. The Hearing Examiner sustained the objection, noting that the special exception specifies what is permitted and that document speaks for itself. 10/20/08 Tr. 85-86.]

2. Brian Stephenson (10/20/08 Tr. 87-98):

Brian Stephenson testified as an expert in landscape architecture. He explained the landscape plans, Exhibits 5(a), (b) and (c) and the lighting plans, Exhibits 6(a) and (b). He testified that the work at the lower school will disturb some existing planting that is on the side slopes adjacent to that school. The plan is simply to restore that planting after the work is done. In either case, that planting right now is not visible to adjacent properties because there is a landscape berm to the west of the lower school, with evergreen trees.

Mr. Stephenson further testified that, to the north of the proposed new building is a forest conservation area, and the County School Board property to the north of that is completely wooded. To the east, the side that the Sowalskys live on, there is a substantial graded hill adjacent to the proposed new building that has a lot of woodland on it, as well as a berm next to the existing athletic field that also has landscape planting on it. That planting will be preserved and enhanced as part of this plan, including some new evergreen trees and shade trees to the east of the proposed new building. There will also be new landscape planting on the south side of the proposed new building, consisting of evergreen trees, shade trees, and ornamental trees. These will be put in primarily to benefit neighbors who live to the south and across the street, the Hesses, for instance, who thought it was possible that, from their second story windows they might be able to see into the property. So this landscape screening is there for that reason.

Around the building itself, to the west of the new building and the south of the new building, there will be some detail landscape planting to enhance the pedestrian areas around the building. These areas are also planted for environmental purposes. They will function as bio-retention areas

and serve as storm water management facilities for treating the runoff water from the paving in that area. The stormwater management concept plan has been approved.

The narrow ends of the proposed new building to the north and to the east do not have windows on them, and the landscape plan shows that there would be vines growing up on those walls to further set the building into the landscape setting.

Mr. Stephenson further testified that, on the west side and the south side of the walkway, the site will be lit with light bollards. These are 42-inch tall, 10-inch round metal posts that have a concealed light source in them that throws light down onto the walkway and towards the building. They will be placed around the walking areas of the building at 25-feet on center, and basically will provide a very low level identification of the walking areas at night. No light from these bollards that will leave the site. The lights will be controlled with a photo cell to turn the lights on when it gets dark, but then they will have a time clock override so that they can be turned off when the functions that are at the school at night finish. They are generally done by around 11:00 at night. There is no intention that these lights stay on all night.

Mr. Stephenson opined that the new lighting will not adversely impact neighboring uses, and will not create any objectionable illumination or glare for neighboring uses.

3. Joseph B. McCoy (10/20/08 Tr. 99-116):

Joseph B. McCoy testified as an expert in architecture. In his opinion, the new science building will be screened from view. Mr. McCoy explained that, at the beginning of the design phases, he conducted geometrical studies, and determined that the likelihood of somebody seeing this new building at the proposed location from off of the campus is very low. In his opinion, the new proposed science building would be compatible in terms of scale and massing with the existing conditions, as shown in Exhibit 19(c), which are cross-sections through the existing German School site. [The full-size, site section is contained in Exhibit 7(d).]

The proposed building, at its highest point, would be two stories. The height is shown at 35 feet to the highest projection, 30 feet to the parapet line, and that is measured from the highest point of the building. The side of the building which faces east (*i.e.*, the side that faces several adjoining residences, including the Sowalskys) is one-story, because of the way the building has been tucked into existing landscape, as well as that adjacent berm. So the massing at two stories is consistent with the way the existing buildings on site are developed at that end of the site. Because of the slope generally from east to west on the German School site, buildings change height and step down the hillside. But at the area where we are proposing this new building, the one to two-story massing of our building is consistent with the existing building.

Mr. McCoy further testified that materials proposed for the exterior facade of the new science building were chosen to be complimentary with materials that already exist on the school's campus, such as masonry, pre-cast concrete, varied mixtures of glass, aluminum, steel. The new building would be compatible in terms of materials with the character of the existing conditions. The materials, as well as the massing of the building, were chosen specifically to be in keeping with the surrounding residences, understanding that this is an institutional building and not a residence, but also trying to find the balance between materials that could be found in residences nearby, and also at the scale of a residence nearby.

Mr. McCoy also designed the new entry gates and new entry sign. Exhibit 32 is a photo simulation of the proposed entry sign superimposed on the location planned for it on school property. The sign would be 12 foot 3 inches in length, and is 3 feet 4 inches tall. In consultation again with neighbors who participated in the community meeting process, Petitioner selected finished brick as the base of the sign, and a cast stone and pre-cast element as the top portion of the sign.

The proposed new gates (Exhibit 9) are actually replacement gates, which will be constructed of materials decided in consultation with the neighbors, most specifically the Hesses,

who are directly across the street from one of the entry drives. The gate, as an institutional gate, is of different proportion than residential gates, because the driveway is a different proportion, but the materials were selected to be in harmony with what one might find at a residence nearby, brick clad piers, at the ends of the gate, and a painted steel guardrails with vertical pickets forming the arms of the gate. In Mr. McCoy's opinion, the replacement gates and the new entry sign would be in character with existing conditions and with the neighboring community.

In response to a question raised by the Hearing Examiner, Mr. McCoy noted that U.S. building codes, including the building code for Montgomery County, do not have a specific recommendation or requirement for the size of windows or the location of windows in classrooms. As long as you meet egress requirements, which are a separate part of the building code, the window requirements are not specified. The German code, however, as a matter of course, specifies that 20 percent of the floor area be provided in windows. In addition to that, there is a requirement for direct access to the exterior from any room occupied as a classroom. And then finally that the window size of normally 50 square feet be provided as an operable window or mechanical smoke ventilation in each classroom. The windows are intended to be consistent with the character of the existing building in which they would be installed, and they will not be visible from the adjoining properties because of the change in terrain that exists already.

The proposed new entry sign have to go to the Sign Review Board for approval, and the Petitioner, after the Sign Review Board considers the sign, will transmit the Sign Board's approval to the Board of Appeals so that the record in this case is complete. The sign will not have separate illumination. There is existing illumination through street lamps that are not part of this project, but there will be no separate illumination on the sign itself.

4. Max Kantzer (10/20/08 Tr. 117-126):

Max Kantzer testified as an expert in professional engineering. Mr. Kantzer prepared a

conceptual storm water management plan for this property, which was approved by Richard Brush, who is a supervisor in the Department of Permitting Services.

The school has an existing storm water management system for the existing development on site, which includes channel protection, and also water quality protection. The new facility is going to be built primarily on existing impervious area, with some small portion of it being new impervious area, and the concept plan calls for a portion of the building to have a green roof, three water quality facilities, bioretention facilities, and some recharge. In his opinion, the actual runoff increase that would occur from this facility is essentially negligible. The multi-court will provide some additional impervious area, but when you sum up all the totals of the green roof, the existing impervious, and the multi-court, the increase in impervious area is small enough.

The only addition would be to put some storm water pipe in to collect the runoff and bring it down to the existing system. In Mr. Kantzer's opinion, the new additions and changes to the physical plant will not have any adverse effects on the surrounding community. The runoff leaving the property will essentially have the same condition after development as before development. He believes that the storm water system that is in effect for the site is effective and is working fine.

On cross-examination, Mr. Kantzer testified that while there may be some runoff that occurs off of the berm and down onto Mr. Sowalsky's property, the project isn't proposing any changes in that portion of the site. All the storm drainage associated with the new structure, the new construction, is all running to the west, and existing the property at the southwest portion of the property (*i.e.*, away from the Sowalsky's property). He noted that, as part of the permitting process, Petitioner will submit final sediment erosion control plans, storm water management plans, and detailed computations. If there is an issue, it could be remedied at that time.

Mr. Kantzer further testified that all development standards would be met if the proposed modification is allowed, even with the minor changes to total floor area noted at the hearing.

5. Gregory Osband (10/20/08 Tr. 127-151):

Gregory Osband testified as an expert in forest conservation planning and landscape architecture. He stated that a forest conservation plan has been approved for the subject site and that the school's proposed modification does not conflict with the forest conservation plan. The existing forest conservation plan that has been in place since the time of the elementary school building was built. The forest conservation plan will be modified to reflect the new buildings, but all of the proposed work stays outside of the existing forest conservation easements. Applicant also included tree-save plans to preserve additional trees outside of these easements. In his opinion, the proposed development does not pose any potential adverse impact on the forest conservation plan.

Mr. Osband further testified that he has worked with the school with several of the neighbors, including the Sowalskys, to address the stormwater runoff issue raised by Mr. Sowalsky. At the behest of the school, he examined the area, as did the head of forest conservation planning for the Park and Planning Commission, Mark Pfefferle. The Sowalsky driveway is built right up against the property line, and so the runoff from the existing site runs right to their driveway. Over the course of the years, several times, the school has taken some trees down in that area, and they agreed to take another tree down because it looked a little unstable. That area is actually a forest conservation area, and no trees should have been taken down without permission, so Petitioner proposed to replant seven trees.

In addition to that, Petitioner will be planting ground cover throughout the entire area to help to slow the existing runoff. These proposals are included in Exhibits 10(a) through (d), which is the revised forest conservation and tree save plan. In his opinion, these changes will decrease the runoff, though he cannot say that in every single storm there will be absolutely no runoff. It should be sufficient to avoid adverse consequences to Mr. Sowalsky's property. Mr. Osband could not "say for sure" that these changes in the forest conservation area would prevent water runoff to the extent

that is required by Montgomery County and other applicable regulations; however, Mr. Pfefferle recommended the changes and Technical Staff approved the revision, as shown on Exhibit 10(d). It does not constitute a sufficient change to the Forest Conservation Plan to require additional Planning Board approval because it did not change the existing forest conservation easements; Petitioner was merely planting within existing forest conservation easements. It is something that is approvable at the staff level.

[Mr. Podolsky interjected Petitioner's position that because the stormwater problem had nothing to do with the changes being proposed, it was not before the Board in this proceeding. Under his interpretation of Zoning Ordinance §59-G-1.3(c)(4)(A), the entire special exception becomes an issue if the changes are adding to some adverse effect created by the underlying special exception – a kind of “stacking effect.” There is no evidence here that either the original special exception or the changes have any adverse stormwater effect on the Sowalsky property. Mr. Bolt added that §59-G-1.3-(c)(4)(A) was intended to require sufficient screening and landscaping around a building in a residential zone, not to require all runoff on the borders of the property to be addressed. The Hearing Examiner noted that there has been testimony that part of the problem may have been created by the fact that trees were removed without going to the Planning Board regarding the forest conservation plan. So it may be a matter of getting us back to where it should have been in the first place. The People's Counsel and Mr. Podolsky then discussed the nature and limits of the Board's authority regarding forest conservation plans when it established conditions to a special exception grant.]

Mr. Osband indicated that the Sowalsky driveway actually impinged a bit onto Petitioner's property. He stated that Petitioner had worked very hard to accommodate Mr. Sowalsky, and will continue to work very hard, and to look at any way that they can, within the confines and restrictions imposed by the forest conservation easement.

6. Sybillie Young (10/20/08 Tr. 152-167; 206-215):

Sybillie Young testified that she is the Chair of the Board of the German School. She described the nature of the summer program that the school is proposing. She stated that the school plans an academic program that is going to be similar to what the school does during the school year, because it will be taught in German. So one of the goals is to maybe do enrichment courses during the summer period for children to catch up on what they may have missed during the school year, much like other schools are doing , and/or to enable children who want to join the school to catch up on their German knowledge. A requirement to attend the school is that you are fluent in German.

The school is putting the summer school cap at 450. That may not be achievable in the near future. The school will start small, depending on the demand from current students and additional demand from people who want to join the school. It will build from there.

The summer school would be restricted to age 15 and below to avoid student drivers, especially “rambunctious traffic” caused due to junior drivers. There is a cap of 50 teachers for the summer school program. There might be the occasional activity outdoors during recess, but it is not the focus of the summer school. Ms. Young could not say whether there would be physical education classes, but stated that the principal focus would not be on athletics.

The hours of operation during the summer school would be 8:00 AM to 3:00 PM, with the possibility to allow for aftercare until 5:00 PM, according to the Statement of Operations (Exhibit 3(a). Within the five minutes here or there, it is the same kind of daily schedule as during the regular school year. The aftercare program is used by about 50 students during the year. Ms. Young indicated that other than the lower cap of 450 students in the summer and the fact that bussing would not be offered initially, the summer school would be almost the same operationally as the regular school. Long term, if the number of 450 students is reached, it will be the same. It is

meant to be a school with an academic focus, not a summer camp. Evening activities are not planned at this point for the summer school.

According to Ms. Young, if the Board were to approve the summer school, it would likely not begin until the following year (*i.e.*, 2010) because if everything goes according to plan, construction will begin next summer, and the school would not necessarily delve into summer school at the same time. If it does begin next summer, it would be a very small group

Ms. Young stated that she could not testify that other private schools in Montgomery County have summer schools with an academic focus, but she knows from hearsay that many kids in other schools go to summer school because they did not make the grade, and that some other schools do offer summer programs of some kind.

[Mr. Bolt argued, based on his reading of Zoning Ordinance §59- G-2.19(a)(4)(B), that summer schools are an inherent part of private educational institutions. The Hearing Examiner, at the suggestion of the People's Counsel, invited Petitioner to submit a survey of summer activity at private schools in Montgomery County to help determine whether summer schools are an inherent characteristic. The opposition would have 10 days to reply.]

According to Ms. Young, 20 percent of the schools students are from families who are local (*i.e.*, not from the German Embassy population). The summer school would be open to the public. It is a way of getting students for the regular school, because private schools are struggling with their enrollment, and there may be a decline in the German School enrollment, way under the 650 count.

With regard to traffic management, Ms. Young testified that, after meeting with the neighbors, the school had made major efforts to avoid excessive parking on Chateau Drive, by having satellite parking and even a shuttle coming to the school, and by emphasizing at school events the importance of being a good neighbor. The school has asked its community to drive even

more slowly than the speed limit on Chateau Drive. At the Christmas bazaar, the school had an agreement with Our Lady of Mercy, which is the school on Kentsdale, that allowed the use of their parking for that event. School personnel were out directing the traffic that way. The same was done for the summer party. [The Hearing Examiner noted that he would like to see the language in the TMP have a more affirmative requirement for satellite parking when parking will exceed the on-site capacity of 175 cars.]

Ms. Young indicated that busses now back into the garage to avoid excessive noise in the early morning from the automatic backup warning sound. In the beginning of the school year, Petitioner implemented new traffic and parking rules that take account of all of the points in the TMP, and distributed those to school parents, faculty and students, with a sign-off.

According to Ms. Young, when the elementary school moved over to the Chateau Drive campus, the bus traffic actually decreased because, before the relocation from Newbridge Drive, the busses would come back to Chateau Drive and then out again and back again, doubling the traffic. The passenger car traffic has increased, however.

Ms. Young further testified that there are 10 bus routes, so there are 10 buses that leave the site in the morning. At 12:35, 10 or fewer buses leave the site to take children home. At 3:00 about 8 busses leave the site, and after that there are sometimes no more buses. In the course of the day, the school does permit students to drive off campus, for lunch or other activities.

7. Robert Kohler (10/20/08 Tr. 168-205):

Robert Kohler testified as an expert in transportation planning. Mr. Kohler observed traffic conditions at the German School on two normal school days (October 17, 2007 and October 7, 2008) and on a Saturday (October 4, 2008). His company, Wells and Associates, conducted traffic counts at the intersections of Bradley Boulevard and Kentsdale Drive, Kentsdale Drive and Chateau

Drive, and then the site accesses on Chateau Drive, as well as internal traffic counts on Wednesday, October 17, 2007.

On only one of his observation days at the school (October 7, 2008), did Mr. Kohler observe any queuing onto Chateau Drive, which happened twice, briefly, and which he attributed to “driver behavior.” 10/20/08 Tr. 174. By that he meant, at the southern lot, the lower lot access point, which is where inbound and outbound pickup and drop offs occurs, vehicles entering the site in the morning peak hour for drop off, two vehicles were noted stopped in Chateau Drive in order to let vehicles exit the site. Although there is room for two vehicles to traverse one another at that access, the driver behavior was such that they wanted the vehicle to exit before they entered.

In Mr. Kohler’s opinion, the school’s drop off and pickup areas are adequate, safe and efficient for the school’s uses. The basis for the opinion is that all site traffic was internal to the site, and vehicles were safely negotiating crossing one another in a safe and efficient manner. The proposed structures and the physical improvements to the site will not change the traffic patterns for the school. The summer school will generate less traffic at a different time of year than the typical daily operations of the school. The same is true with regard to parking. This is because the enrollment cap would be lower and because it would occur at a time (summer) when traffic volumes are typically lower on adjacent roadways. Also, the students at the summer program would not be able to drive to the program, as they would be too young.

Mr. Kohler further testified that he prepared a traffic management plan (TMP) in connection with the modification petition, and amended the TMP based on comments from Technical Staff and the People’s Counsel. The TMP for the school includes monitoring and better communications with the community, notification of special events and also enforcement for infractions to the rules and on campus. It also includes an effort to reduce car trips by encouraging car pooling and helping families to find nearby students who wish to car pool. Mr. Kohler attended a number of meetings

with the neighbors, and made accommodations based on those meetings, including an enrollment cap of 450 students, an employee cap of 50 employees, and limiting the summer school to students below driving age. The program in the summer would not include any inordinate traffic or anything beyond what is there today. The uses are less than what is occurring on a typical weekday.

Mr. Kohler explained that his traffic study assumed that all traffic from Chateau Drive towards Kentsdale and Bradley Boulevard was traffic attributed to the school because the school is located on a cul-de-sac street shared with single-family homes. Even with that assumption, only 17 percent of the trips at Kentsdale Drive and Bradley Boulevard in the morning peak hour would be attributed to the school. That is 211 out of 1222 trips. In the p.m. peak hour, with the same assumptions, only 7 percent of traffic at that Kentsdale and Bradley Boulevard intersection, was attributable to the school, which is 48 trips out of 697. The critical lane volumes were not measured or calculated because there was not going to be an increase over the current daily usage during the school year. Therefore, Technical Staff did not require it. Traffic volume attributable to the school during the summer would be less than during the regular school year.

Chateau Drive is a 20-foot wide, paved roadway from Kentsdale Drive to its cul-de-sac where it is wider at the end. It facilitates traffic to single-family residential units, as well as the German School. Typically, from traffic engineering standpoint, trips are looked at on an average daily trip, not over the course of a year, and the number of trips throughout a 24-hour period, based on the use of the school and the houses, is accommodated by the roadway today. Mr. Kohler did not know how many houses there are on Chateau Drive. He would not classify the volume of traffic as unusual because it has a cul-de-sac, given that a school is on the street. Mr. Kohler could not name another similar street in the region with that volume of traffic. He conceded that there would be more traffic with the school operating a summer program, with a corresponding impact, than is

there today, however it would still be less than weekday operations with the school in a normal session.

Mr. Kohler indicated that in 2007, when he visited the site, he had seen vehicles parked along the side of the road, but during his 2008 visits, he did not see vehicles parked along the side of the road, except for specific service vehicles parked where construction is going on. He described the road as a smooth, blacktop, paved roadway. Mr. Kohler has never seen buses pass one another on that street. He explained the bus access to the school using a diagram from the revised TMP. They move in a counterclockwise fashion and queue on site. [Mr. Bolt noted the location of the proposed entry sign, as shown on the site plan.]

According to Mr. Kohler, there are four rounds of bus service. The morning is the drop off to school. That occurs between 6:45 and 8:15 a.m. for the bus drivers. Then there is a mid-day time when the buses have another round between 12:35 and 2:30 p.m. There has been an afternoon peak, which is between 3:15 and 4:15 p.m. That is for the upper levels of school. And then there is a final bus between 4:55 and 6:20 p.m., with fewer buses in that service. The buses are parked the majority of the time in the garage below the upper lot, which is accessed from the lower lot. At such time that the buses are needed to transport students to and from the school, such as in the morning or upon dismissal times which range from 12:35 p.m. for preschool and elementary school; 3:05 p.m. for students up to and including grade nine; and then final dismissal is 4:45 for grades 10 through 13. Those buses return as soon as they have completed their routes, and the times can vary depending on which route they are driving.

In answer to the Hearing Examiner's question, Mr. Kohler testified that if bus service was not provided, there would be more vehicles associated bringing students to and from the site than if bus service was utilized. [The Hearing Examiner expressed the concern that without bus service,

even a reduced enrollment might result in more traffic.] Mr. Kohler felt that with the enrollment cap, it would still be less traffic than what is there currently.

Mr. Kohler indicated that he has made observations on at least five different days. In answer to the question of whether he had a statistically significant sample, Mr. Kohler replied that frequently in transportation engineering, one observation is used because typical days are observed. He did not know whether the traffic had increased since the lower school was moved to this site, nor whether increased traffic would impact property values.

B. The People's Counsel

Martin Klauber, Esquire, the People's Counsel (10/20/08 Tr. 256- 260):

Martin Klauber, the People's Counsel, did not present any witnesses at the hearing, but he did participate in the hearing and suggested certain conditions. 10/20/08 Tr. 256- 260.

Mr. Klauber recommended that the Hearing Examiner take some of the salient controls of the Statement of Operations, and reproduce them as specific conditions, including the hours of operation, the amount of staff permitted on site, and the amount of extra-curricular activities, such as evening events. The Hearing Examiner responded that he was concerned that doing so might take him outside of the authority granted by Zoning Code § 59-G-1.3(c)(4) to review modification petitions, since the Statement of Operations presumably incorporated existing conditions. Mr. Klauber suggested that the alternative might be for a neighbor to report a complaint to DPS.

As to summer programs, Mr. Klauber stated (10/20/08 Tr. 258):

Having official and personal knowledge about summer programs, I concur with what Callum Murray concluded in his memorandum about summer programs and private schools. But I certainly side in favor of a summer program here. Am I in favor of the summer program to the extent that it is been proposed? I would really ask and invite the school to examine that cap.

Mr. Klauber noted that the school has been extremely responsive when issues have been brought up in community meetings. He suggested that a community liaison council will go into the operational characteristics of the school and address many of the issues raised by the neighbors.

Mr. Klauber recommended approval of the construction facilities modification and a summer program, but he reserved judgment as to the contours of a summer program until he reviews post-hearing filings. Based on his limited knowledge, before seeing the survey to be conducted by Petitioner, he thought that summer programs, other than the athletic portion, are inherent characteristics of a private educational institution.

C. Community Opposition

Four neighbors testified in opposition to the petition: Jerome Sowalsky, Miguel Bachrach, Susan Hess and Patti Sowalsky. All their concerns at the first hearing (held on October 20, 2008) centered around the proposed addition of the summer school program, and the accompanying traffic, noise and disruption to the neighborhood during the two summer months, which have been a respite time for the neighborhood in the past. None of the neighbors opposes the new science building, nor the other structural changes on campus.

1. Jerome Sowalsky (10/20/08 Tr. 6, 150; 216-219):

Mr. Sowalsky testified that he has lived at 8613 Chateau Drive for 23 years, since July of 1985. When he and his wife first moved in, the German School consisted only of the upper school. They had a very limited schedule from sometime in the morning, 8:30 or so, until 3:00 in the afternoon; not very many after school activities, at least on the outside of the school, and virtually no evening activities and no weekend activities.

According to Mr. Sowalsky, moving the lower school to the site created considerably more traffic. Evening activities increased substantially and the number of special events that take place during the year increased substantially. Two years ago the school started Saturday classes which run

until around noon, and there has been weekend use of the playing field that hadn't occurred before. "The school utilization has gone up tremendously, and with it, as might be expected, with that kind of expansion, the traffic has increased substantially, and on more days of the week and more times a day. It is not only mornings and evenings, but throughout the day and on Saturdays." 10/20/08 Tr. 217

The buses start, during the week it is approximately 6:30 a.m., and their final trip doesn't return until about 6:30 p.m. And they do go out in the course of the day. Chateau Drive is just a local, residential street that ends in a cul-de-sac, not very wide, and goes uphill. There's a wide bend before you get to the school. There are mornings somewhere around 8:30, when he has to wait five minutes before he can exit his driveway because of the traffic. Mr. Sowalsky believes that this amount of traffic was never contemplated when the German School was first granted a special exception to be on that street, because of the limited nature of what they were proposing to do.

Now they come before the Board of Appeals proposing to start a new venture. It hasn't been there before. This is not a school that is solely for their existing student body. They are going out to the community at large to try to find students to come to the summer school. Although Mr. Sowalsky does not look forward to the new construction, he is prepared to live with it, but he is opposed to the new summer school. When the school first made this proposal, it was called a summer camp. They apparently changed the nature of it now, and it appears to him that they were juggling that around a bit so that it would be a little bit easier to get approval. But whatever you call the project, it is, without question, a new venture for the school, which substantially further encroaches on the neighborhood, and on his peaceful enjoyment of his property. The eight weeks of the school's summer vacation are the only respite that the neighbors get from the kind of traffic and the commotion that goes with all of that, the students, few of whom walk to school. There is noise on the outside, as well as on the playing fields, which is what you would expect. So there has been a

reasonable expectation that at least the summer period would be retained as the quiet period of the neighborhood. "Looking at the history of the German School in this neighborhood, we believe that so far the scales have very much tipped in favor of the German School, and we think now is the time to bring some balance to the situation by denying their petition for the summer school." 10/20/08 Tr. 220.

Mr. Sowalsky noted that the trees that were removed from the school property adjacent to his land were not removed by him; they were removed by the German School. He was not even aware that there was any kind of easement there at the time. 10/20/08 Tr. 150.

2. Susan Hess (10/20/08 Tr. 220-227):

Susan Hess testified that she has lived at 8620 Chateau Drive for about 10 years, not quite across the street directly from the German School, but kind of catty-corner, the next lot down. Her property overlooks the lower parking lot, and the side view of the school is what she sees.

Ms. Hess went through all of the files for the German School to see what had been permitted originally and if that permit had been modified over time. She found that the original permit listed operating hours of 8:00 to 3:00 five days a week with no summer programs, and it said no summer programs specifically. There were no weekends, no after school activities, nothing outside the 8:00 to 3:00 hours, five days a week. In the course of time, the German School has added more. They have added Saturday programs, evening programs, or after school. To the neighbors, the content of the programs is not particularly important. "What's important is that it brings students and traffic to the street, and commotion on the street, literally, 12 hours a day, and there is something going on six days a week currently. So it is quite outside what had been originally approved by the County." 10/20/08 Tr. 223.

[When the Hearing Examiner asked Mr. Bolt whether expanded hours and special events had been approved, he replied that the school's position is that "although the original 1969 grant

describes in the summary certain events, the school is not prohibited from having additional events.” 10/20/08 Tr. 224.]

Ms. Hess added that those living in the neighborhood find this a continuing encroachment which impacts on the neighborhood. In addition, more students are driving their own cars to the school on a regular basis. A number of these students leave campus several times a day, racing up and down Chateau Drive on the lower end of the street, past the school. Traffic is on one end of the street, and student behavior issues are on the other end of the street. So, the German School is constantly impacting those in the neighborhood in some ways that may not show up in traffic counts. Students also congregate and smoke and litter.

Ms. Hess stated that she objects to the idea of the comparison of the summer program impacts to the current program impacts. “The real comparison needs to be made, what it might be relative to what it is now, which is virtually nothing in the eight weeks of summer that we get relief from all of the traffic congestion that goes on. So it is the 650 to 450 comparison, just as a wash, when it is really 450 compared to zero.” 10/20/08 Tr. 227.

3. Miguel Bachrach (10/20/08 Tr. 228-243):

Miguel Bachrach testified that he lives at 8621 Chateau Drive, adjacent to the school, the west end, the opposite end from Mr. Sowalsky. He has lived in the neighborhood for 15 years, and traffic counts notwithstanding, there has been an increase in noise and speed. It is a miracle, he thinks, that there have not been any accidents so far. While the school may have told the parents and the bus drivers to drive carefully, there are very few people or vehicles that abide by the speed limit.

Mr. Bachrach also noted that he drives his kids to school every day, and every morning there is a backup of cars waiting to exit Chateau Drive onto Kentsdale Drive. A lot of the patrons of the school want to turn left onto Kentsdale Drive and sometimes you have to wait say five to ten

minutes for an opening in traffic to move out. This significant impact “is very very frequent, and it is natural. There's a lot of traffic in the street.” 10/20/08 Tr. 230-231. There's no light, and there is nobody there controlling traffic at the intersection of Chateau onto Kentsdale. He suggested that, like other schools do, you have somebody help directing traffic at the intersection so that cars can move up and down in an orderly fashion. [Mr. Bolt noted that it is a County road. Mr. Klauber suggested the possibility of speed calming devices and that the neighborhood contact the police department to have a policeman stationed on Chateau and Kentsdale. This issue can be discussed in the community liaison council. Some schools hire off-duty Montgomery County police, in uniform, to direct traffic. Petitioner's counsel agreed that the TMP could provide that traffic calming measures and traffic safety measures along that intersection will be discussed and an effort to reach a solution that alleviates this problem.].

Mr. Bachrach stated that the appropriate traffic comparison, from the point of view of the welfare of all the neighborhood, is the summer with silence and no traffic the way it is now, and a busy summer. He also observed that while the school starts normally on a day at 8:30, there's a lot of activity before that. For example, there was a tractor moving at 3:00 in the morning and waking up one of his house guests. There were also people at the school blowing leaves before 7:00 in the morning. [Mr. Bolt agreed to a condition prohibiting leaf blowing before 8:00 a.m. 10/20/08 Tr. 238.]

Mr. Bachrach indicated that the school just started having discussions with the community. He stated that his objection is to the operation during the summer, and he is not objecting to a new building, but would like to be reasonably assured that the way it is going to be done is not going to have a severe impact on neighboring homes. Mr. Bachrach stated that he is willing to serve on the community liaison committee.

4. Patti Sowalsky (10/20/08 Tr. 244-246):

Patti Sowalsky testified that she lives at 8613 Chateau Drive. She stated that when she moved to that street over 24 years ago, she had a lovely quiet house on a lovely, quiet, crooked little street, with a small school at the top. She has been inundated since then with so much more – buses, cars, programs, weekends. The only time they have peace and quiet is the summer. “That is sacrosanct to us. We will fight you for that. We do not want a summer school in our neighborhood. We want our privacy and our peace and quiet. That is what we bought for. That is what we came for. And I think we have a right to ask for it.” 10/20/08 Tr. 245

As to traffic, Ms. Sowalsky stated that she has actually been forced off the small road by school buses. She did not object to the construction of the proposed new building on campus. She knows of other private schools, and not one of them has a summer school, although some have summer camps, if the community supports it.

The April 7, 2009 Hearing:

A second hearing was held on April 7, 2009, solely to address issues related to school year operations that have been ongoing without formal approval by the Board of Appeals. Petitioner recalled Robert Kohler and Sybille Young, who had testified at the October 20, 2008 hearing. In addition Petitioner called Kai Schachtebeck, the acting head of cultural affairs for the German Embassy; and Andrea Jarrell, a communications and marketing consultant, who testified as an expert in curriculum and extra-curricular activities offered by private schools in the County. The same four neighbors testified as to their concerns about the impact of Petitioner’s operations upon the quiet of their small street, Chateau Drive.

At the inception of the April 7, 2009 hearing the Hearing Examiner asked the parties to address the relevant issues. The Petitioner’s witnesses need to show how access roads to the schools submitted by Petitioner for comparison regarding school activities actually compare with

the sole access road used by the German School. Also, the question is not the quality of the German School's programs but the adverse effect of the activity they create upon the neighbors.

4/7/09 Tr. 6.

The Hearing Examiner pointed out that the chief complaint of the neighbors is the question of traffic volume, parking and commotion on Chateau Drive. That's what should be addressed here. And with regard to traffic, the issue here is not LATR or PAMR, which measure impact on public facilities, it is compatibility as outlined in Zoning Ordinance Section 59-G-2.19(b). That section specifies that, in evaluating traffic impacts on the community, the Board must take into consideration the total cumulative number of expected car trips generated by a regular academic program after-school and summer programs, whether or not the traffic exceeds the capacity of the road. So this is an issue that transcends the question of road capacity *per se*, which is the way it is usually measured. It really deals with compatibility. 4/7/09 Tr. 7-8.

The Hearing Examiner also asked the community witnesses to state, in addition to any other testimony they want to offer, what specific activities in the revised Statement of Operations, unduly impact upon you, and which do not. 4/7/09 Tr. 8.

Petitioner's attorney, David Podolsky, made an opening Statement. He asserted that in 1969 when the special exception was first approved, the Board of Appeals did not require a list of all activities that were permitted, as the Board now does. If they were inherent activities and the Board did not restrict them, they were allowed. 4/7/09 Tr. 11-12. He also stated Petitioner's "position that all of the activities that we have presented in writing, and that we will discuss today, are in fact inherent. They are typical of a private school. And therefore, because they are inherent, they would not be the basis for a denial of any modification." 4/7/09 Tr. 12-13.

The Hearing Examiner responded that the fact that an activity may be typical of schools doesn't finally answer the inherent, non-inherent dichotomy here. You have to look at the site

conditions and the nature of activity, and the volume in a situation like this. Every school, for example, has a student body and buildings, but they are not automatically permitted as inherent if they are outsized for the site and the neighborhood. 4/7/09 Tr. 15-16.

At the end of the hearing (4/7/09 Tr. 222-245), the Hearing Examiner indicated that there was a problem with the data provided by Petitioner comparing extracurricular activities at the German School with some other area private schools. The problem is that the data did not go far enough, because it did not illuminate whether or not Petitioner is comparing the German School with other comparable schools in terms of their settings, their size, their access, and the roads they are on. The German School is on a short, narrow street ending in a cul-de-sac. The Hearing examiner gave Petitioner the opportunity, in addition to submitting a proposed revised statement of operations, to also submit some clarifying data regarding the settings, size, access, and roads the comparable schools are on, and a comparison as to the volume of the other school activities, the volume of students that are involved.

The Hearing Examiner also gave Petitioner the option of doing a delay and backup study at the intersection of Chateau and Kentsdale Drive. He also suggested that Petitioner look at the issue of how the number of activities can be paired back without it affecting the school's core functions and submit something.

Petitioner's counsel argued that although the school may be unique in that it is located on a cul-de-sac, the school is also unique in that it is mitigating traffic to a much greater extent than one would expect for a private school. Petitioner put into evidence two Board of Appeals Opinions. Petitioner's counsel stated that, in S-285-D, the Board had granted Norwood School the right to offer Saturday Japanese classes up to the amount of its student cap. Exhibit 78, Resolution of April

9, 2004.¹⁸ In S-687, the Board, in discussing the Bullis School, recognized that, like most other private schools in the area, Bullis permits its students, parents, alumni, invited guests and friends to use its outdoor tennis courts when the courts are not being used as part of the regular academic program. 4/7/09 Tr. 235-236.

Finally, the Hearing Examiner offered Petitioner the opportunity to provide some legislative history supporting Petitioner's argument that Zoning Ordinance §59- G-219(b) only applies to situations where a school is allowing some outside entity to use the facilities.

A. Petitioner's Case

1. Mr. Kohler (4/7/09 Tr. 74-105):

Mr. Kohler performed a traffic evaluation of the traffic impact associated with the German School's after hours and weekend activities. He has been out to observe at the school multiple times at different times of year. He found that when you compare the weekend activities to the weekday activities of the school, the morning drop-off trips for weekend activities, such as the German language classes, are consistent with the drop-off trips for the existing weekday operations at the German School. There were 365 trips during the peak weekday drop off. On Saturday, there were 369. Thus, there are roughly four more trips in the morning on a Saturday drop-off.

Mr. Kohler further testified that the weekend activities and the evening activities have not caused queuing extending onto the public road network. There is sufficient queuing on site in both the upper and the lower lots of the school parking facilities to allow for adequate bus and vehicle

¹⁸ The 2004 administrative modification request for Saturday language classes at Norwood has nothing to do with the underlying Petition, S-285-D, which was granted back in 2001 to allow physical plant changes on the Norwood site. The confusion was created because the Board did not assign a new number to the administrative modification request when it was filed in 2004. Thus, the old number, S-285-D, was used. Petitioner's Counsel also apparently did not realize that the Board's initial grant of authority on April 9, 2004, to allow Saturday language classes at the Norwood School (Exhibit 78), was an administrative modification, subject to change if the community requested a hearing after notice was issued. Since notice of the Saturday language classes did generate a request for a hearing from the community, the Board suspended the grant of authority on June 4, 2004, in order to hold a public hearing (Exhibit 82). The administrative modification request, including its request to hold Saturday language classes, was subsequently withdrawn by Norwood School. Notice of December 9, 2004 (Exhibit 83).

pickup and drop-off queuing to be maintained, so that they do not impact the residents on Chateau Drive.

Mr. Kohler noted, as did Mr. Etemadi, that the after-school activities operate outside of peak hours when there is less traffic on the roadway. He determined the critical lane volume (CLV) for the peak hours, which would be the worst case scenario. When evaluating the CLV at both Chateau Drive and Kentsdale, and Kentsdale and Bradley, he noted that the operations are significantly below the congestion standard set up by both the County and the State. They operate during the peak period in the morning with 959 critical lane volume at Bradley Boulevard and Kentsdale, which is well below the 1450 congestion standard. The critical lane volume summary was marked Exhibit 76. Mr. Kohler indicated that the trips actually generated by the German School are well below what local data, the LATR Guidelines and the Institute of Transportation Engineers (ITE), would anticipate for a school of this size.

Mr. Kohler opined that the reason for the trips being lower at this school is attributable to the car pooling and bus services offered by the school. Approximately 50 percent of the students were bused in addition to a good number car pooling to and from the school. On top of that, the afternoon peak periods are over multiple time periods, rather than consolidated at one time, so the dismissals help to better dissipate the traffic.

Mr. Kohler observed operations at the intersections of Chateau Drive and Kentsdale, and Kentsdale and Bradley, but he did not conduct any further analysis using highway capacity manual or anything like that. Based on his analysis of the CLV, though, he concluded that those intersections are operating acceptably. At the stop controlled intersection of Kentsdale and Chateau, there is a typical delay for the movements turning left into Chateau from Kentsdale in the morning. He observed a maximum of about seven vehicles during the peak queue in the morning drop off for the left turn into Chateau from Kentsdale, but there were adequate gaps in the

conflicting through movement on Kentsdale that did allow for multiple left turns to occur at one time after that conflicting vehicle was out of the way. Exiting from Chateau, making a left turn onto Kentsdale, approximately seven to eight vehicles queued at that stop controlled intersection, waiting to turn left to get onto the main line of Kentsdale, during the peak drop-off period, which is the peak time that the school operates in the morning. He did not conduct an analysis of the delay involved. In the morning, the peak hour of the school occurs between 7:30 and 8:30 in the morning, and the peak hour of the intersection is consistent with that, between 7:30 and 8:30 in the morning. So they do have the same peak hour during the morning.

Based on the fact that the school does not impede nor queue into the Chateau Drive at the access points at any time during the day, and the fact that the trip generation for the overall school operations are 20 percent to 35 percent below what would otherwise be anticipated at the school for a similar size school, Mr. Kohler concluded that the school does not have an undue impact on the surrounding road network and neighborhood, especially since the after-school activities during the week occur at a time when there is much less traffic than during the peak on that road network, typically after the 6:00 p.m. hour. There is approximately 50 percent less traffic at the Kentsdale/Bradley intersection after the 5:00 p.m. hour.

At the Kentsdale/Chateau Drive intersection, during the peak hour of the street, which is also the peak hour of the school in the morning, between 7:30 and 8:30, that intersection carries 808 vehicle trips during that one-hour period. Beginning at 8:30 in the morning, that intersection carries significantly less traffic to the tune of 378 vehicle trips, which is less than half as much. And then in the evening, it carries roughly 200 vehicle trips after 5:00.

Based on the trip generation counts that he conducted at the driveways, the CLV analysis that he prepared, Mr. Kohler concluded that the operations of the school do not impact negatively

the intersection of Chateau and Bradley, nor the intersection of Bradley and Kentsdale, and the operations are not significantly impacting the neighborhood.

Mr. Kohler stated that, for events larger than the 175 parking spaces on the site, the traffic management plan (TMP) provides for the use of satellite parking in off-site locations, which has previously been utilized for the winter Christmas bazaar, among other activities.

Mr. Kohler further testified that the 1969 and 1991 traffic studies could not be used to compare with the present traffic. In fact, the 1969 study was prepared prior to the school being opened. The 1991 study did not compare to 1969 regarding what the trip generation would be; it only focused on the trip reductions that would occur if two school sites were combined at the Chateau Drive location.

In Mr. Kohler's opinion, Chateau Drive has capacity to handle the traffic generated from the after-hours and weekend activities. In answer to the Hearing Examiner's question, Mr. Kohler testified that he did not make a determination of a total cumulative number of expected car trips generated by the regular academic program and the after school program; however, his traffic counts from the morning to the evening (6:30 a.m. and 7:00 p.m.) amounted to 1,190 trips on Chateau Drive. That was on a Wednesday October 17, 2008, during a regular school day.

In Mr. Kohler's opinion, given the width of the roadway, the volume over that 12 hour period is high but not exceeding the capacity of 200 to 300 trips per hour. The overall trip generation peaks in the morning for the school when the peak number of drop-offs occurs. The school utilizes a staggered departure to minimize the impact, so that there are three fewer smaller peaks, rather than one larger peak in the afternoon.

The Saturday counts were made from 8:30 a.m., which is generally the majority of time that people would begin arriving at the school, and most people are departed by 12:00 noon. 755 trips

occurred in that three and a half hour time period. That translates to about 200 trips per hour, which is within the capacity of the road.

[The Hearing Examiner suggested that Petitioner might want to supplement the record with those estimated delay times, based on a CLV analysis, with a copy of the source page identifying the manual and the page from the highway capacity manual showing the basis for the estimate. Petitioner's counsel indicated they would consider that after hearing all the evidence.]

On cross-examination, Mr. Kohler admitted that his traffic counts were made solely on one day of the week and one day during the weekend, a Saturday. Though he did not personally do the counts, he can testify that every time he had visited the site, he never noticed more than seven or eight vehicles stopped to turn left or right onto Kentsdale from Chateau or from Kentsdale into Chateau. There is no record his observations in the evenings, nor of the frequency or number of times he visited.

In response to the question of whether a single day of observations is statistically significant, Mr. Kohler responded that typically, in any transportation impact study there is only one day of traffic count data. He made sure that this was a typical day at the school when the traffic counts were conducted. For the specific day that he conducted the traffic counts, 93 percent of the students were in school. He presumed that is consistent with what the maximum number of students out of an overall enrollment would be on site at one day.

From a statistical standpoint, the more observations you always have, the more accurate your results are going to be from when looking at a global approach. When doing a transportation impact study, the standard is one day of counts. Also, the traffic counts that were conducted for the Saturday German language classes are very closely in line with the three other counts that were conducted by residents in the neighborhood. He made sure the Saturday he used for the count was

a typical Saturday. One of the counts made by a neighbor was different, but that may not have been a typical Saturday.

Mr. Kohler concluded that there is no undue impact from the school because queuing does not extend into Chateau Drive, and it does not impede through movement on Chateau Drive. Further, the school has taken multiple mitigation measures in order to reduce their impact by backing their buses in the evening, so that they can pull out head first in the morning, and not give off the backup alarm sounds in the early morning. Additionally, in order to make Chateau Drive a safer roadway, the buses queue on site, internal to the site in the morning after drop-off, so that they are then released individually to park in the parking garage, so that there are no conflicting bus movements on Chateau Drive. On top of that, the after-school activities occur outside the peak hour, so the trips on the roadway at Chateau and Kentsdale and Kentsdale and Bradley are significantly less than during the peak hour drop-off in the morning between 7:30 and 8:30.

Saturday German language classes are different from the regular school because there is no upper age limit, and the Saturday classes do not have buses. They operate at different time periods, and they operate with a different number of people attending on average, because it is not a requirement to go to the Saturday school. To measure the cumulative impact, one would have to evaluate each of the programs to come up with a cumulative impact as to what it would be. The traffic counts do take into account the after-school and weekend activities. The cumulative impact on the day the counts were conducted was 1190 trips between 6:30 a.m. and 7:00 p.m.

When the Hearing Examiner questioned whether there were differences in the access roads between the German School and other schools to which Petitioner compared it in Exhibit 69, Mr. Kohler indicated he was not familiar with the other schools and had not visited them. He could say that while the other schools were proximate to residential neighborhoods, they were accessed on roadways that were a higher classification than Chateau Drive.

2. Sybille Young (4/7/09 Tr. 116-150; 210-221):

Sybille Young testified that the German School's by-laws require Board Member meetings, and they take place on Thursday evenings. They are supposed to be over by 10 p.m., but sometimes they run over. Because of the neighbors' noise complaints, Ms. Young agreed to close the upper parking lot, and ask people to park in the elementary school parking lot, and enter through the lower entrance of our school, through the cafeteria.

Ms. Young described the German language classes given on Saturdays as a way for the school to reach out to the community. The regular German classes during the week are expert classes, so everybody who wants to participate in those classes has to be well spoken in German. The Saturday classes teach German not as a native language, but as a foreign language. It gives the students from the community the opportunity to come up to speed in order to enter our school. It also reaches out to a lot of people are people who have contact with Germany and students who live too far away to attend the regular school. They come from way down in Virginia, or from areas of Maryland that would be just too much out of the way to come on an every day basis. There are no restrictions on who can attend, while there is a strong restriction as to who can attend the regular school, in terms of the language ability. The Saturday school is also used to bring staff up to speed, because the working language at the German School is German, and all staff must have a certain language ability in German so they can participate in our teacher conferences. Parents of enrolled students may also come on Saturday.

The German School has offered German language classes since in 1976. In the late eighties, the enrollment was probably very similar to today, and her guess is that the number taking German language classes then was between 200 and 300. Part of the mission defined in the bylaws for the school is to run a German speaking school, a nursery school, and German language classes. Ms. Young is reluctant to put a cap on the Saturday classes, but would consider providing bus service

and encouraging carpooling to mitigate traffic. An effort is being made to integrate the Saturday classes into the TMP.

Ms. Young further testified that the regular school up to grade 10 goes until 3:00 p.m., but the upper grades have classes that go until 5:00 p.m.. The number of students staying in the school between 3:00 p.m. and 5:00 p.m. is probably less than 100. Students are occasionally involved in some sports activities that may go on a little after 6:00 or 7:00 p.m., but these are smaller groups, with 25 to 30 students in a game. Outside students are shuttled in by bus. The school hardly ever reaches the number 300 people for evening activities, except when there is a really big theater production. Also, generally students staying for after-school activities are on site already, as well as their coaches. So they are not generating more trips.

Ms. Young guessed that the 93 percent attendance on the day traffic was measured is very good attendance for the school. For Saturdays, which is voluntary, she felt that an attendance at 80 percent would be very normal.

On cross-examination, Ms. Young admitted that it had occurred to the school that by offering German language classes to the general public that the school might be exceeding what the Board of Appeals had granted. However, she felt that German language classes were part of the school's mission and were always there even though not mentioned in the activities approved by the Board. The school is modeled against a German School in Germany, just like its counterparts in New York, Boston, and also in Silicon Valley. There are no plans to have any operations on Sundays, but she considers Saturday to be a school day. Ms. Young indicated that she is not aware of other private educational institutions that have regular classes of this magnitude on Saturdays.

The school has done a number of things to lessen the impact of traffic from the Saturday language classes. Drop-offs are not allowed in the upper parking lot anymore, because of the risk that the backlog would go into Chateau Drive. Everybody in the Saturday classes drops off in the

elementary school parking lot, which is at the very end of the property. Everybody has been told that they cannot park on Chateau Drive. Vehicle tags are being listed so that the rules can be enforced. When violations are reported by the community, there will be a penalty system, as specified in the TMP. Based on feedback from the neighbors, the school is backing buses in instead of bringing them out in the morning and is closing the upper parking lots. Lawn mowing will begin later in the morning. Bus ridership has been increased and others are being encouraged to carpool. Smoking down in the circle at the end of Chateau Drive has been eliminated. Satellite parking at Our Lady of Mercy is used for the Christmas bazaar to avoid the cars parking on Chateau Drive. A bus transports people from Our Lady of Mercy to the school. Two policemen stand at the entrance to the parking lot, and just their presence keeps people much more disciplined. The school is committed in the traffic management plan, that when the school expects to have more than 175 cars coming, satellite parking will be provided.

The Hearing Examiner asked Ms. Young if it was possible to have the Saturday classes in German language offered outside of the campus in some other location. She responded that it was possible, but it is important to the school to create a bond between the school and the attendees. She receives many comments from the children and the parents who come to the German language classes of how much they like the school, and how much they would like to come there every day. This past year 20 children from the Saturday classes joined the regular school. She guessed that most of the attendees are children; with perhaps 50 to 100 adults. About 60 to 70 students from the core school also attend Saturday school. Ms. Young could not say whether excluding the adults would be the least intrusive method of cutting the numbers because she likes to attract families. Most of the adults are parents, who would make the trip anyway to drop off a child. The Hearing Examiner offered to give Petitioner time after the hearing to look at the issue of how this number can be paired back a little bit without it affecting the school's core functions. The attendees

currently do not exceed 550, with a staff of 40. The school has not reached 550, and could work with a cap of 500. Ms. Young also indicated that the school would maximize the use of buses and car pools further than Petitioner is doing now. 4/7/09 Tr. 210-217.

The Hearing Examiner asked Ms. Young how essential activities such as the rummage sale, Christmas bazaar and the Easter bazaar were to the school. She responded that the Christmas bazaar is very important as a cultural event, and it is the major fund raiser for the school. The flea market (rummage sale) is another fund raiser, especially for the nursery school. The Easter bazaar, only takes place every other year. 4/7/09 Tr. 217-219.

The Hearing Examiner also questioned Ms. Young about the point raised by Ms. Hess, that Paragraph 23 on page 10 of the revised Statement of Operations, opens the school up to lots of activities that are really not critical to the school, but are outsiders' activities. Ms. Young responded that they are not really outsiders. It is an outreach to the community, "but it's one of the parts that one could consider as not really essential to running the day-to-day operation of the school. I would agree to that. It is nice to have. I would, if we had to reduce that, I would like to keep a one night a week opportunity for the teachers to have some sort of sports activity." 4/7/09 Tr. 219-220.

Finally, she noted that when there is a 5:00 to 7:00 p.m. event, everybody who attends that will be on site already (*i.e.*, not generating trips. If it's a 7:00 to 9:00 or 10:00 p.m. activity, some may be still on-site, but some will come from outside.

3. Kai Schachtebeck (4/7/09 Tr. 151-154):

Kai Schachtebeck testified that he is the acting head of the cultural affairs department of the German embassy. He stated that his department interacts with the German School nearly on a daily basis. The role of the cultural affairs department of the embassy is oversight, that the school is managed according to the German regulations, and also the cultural affairs department has a seat on

the school's board of directors. The embassy supports the German School in fundraising activities, and the German School receives money from the German government.

According to Mr. Schachtebeck, the German government has a policy for how schools abroad should be operated. There are 132 German Schools abroad, which are there not only for German experts, but also to promote German foreign cultural policies, so there is foreign cultural policy goal. There is a 1,000 page manual for German Schools abroad, which includes the cultural foreign policy goal, so to promote German culture, to promote interaction between the host country and Germans. There is a big emphasis on encounters between Germans, the German School and the host country. This policy is implemented through German language courses, student performances in arts and music and the Christmas and Easter bazaars, which showcase how these holidays are celebrated in Germany. The Christmas bazaar, the Easter bazaar and the German language courses are open to the public to promote this interaction.

4. Andrea Jarrell (4/7/09 Tr. 154-184):

Andrea Jarrell, an independent communications and marketing consultant for private schools, colleges, and universities, testified as an expert in the curriculum and extracurricular activities offered by private schools in the County.¹⁹ She noted that private schools of the caliber of the German School are not that different from place to place. Their activities are typical of what she has seen in other areas where she has worked. She testified that the German School's level of activities was actually somewhat lower, in some cases significantly lower, in terms of things like athletic activities, than she had seen at other K through 12 schools.

¹⁹ Ms. Jarrell has never worked at a private school, and her knowledge appears not to extend to all the private schools in Montgomery County. The Hearing Examiner therefore expressed his concern about the breadth of her knowledge regarding operations in Montgomery County private schools and noted that she may not be able to reach any kind of global conclusions as to what is typical, or necessarily associated with (*i.e.* inherent in) a private school in the County. Nevertheless, because she does have knowledge beyond that of a layman that may be helpful to the finder of fact, the Hearing Examiner accepted her as an expert and determined that his concern would go to the weight to be given her testimony. 4/7/09 Tr. 154-167.

Although the German School has language classes on Saturday, the comparison table of schools (Exhibit 69(a)) shows that many of those schools have a broad range of activities that are happening on Saturdays and Sundays, and some of those schools are conducting regular, weekend, SAT prep classes. On balance, even the language class didn't seem so extraordinary in comparison to the other schools in terms of the number of events happening on a weekend. When the Hearing Examiner indicated that he was more concerned with the number of people attending those events, which is what puts the pressure on the neighborhood roads, Ms. Jarrell responded that the number of people attending the events in other schools is not given in the comparison tables, and she did not have any evidence as to the numbers of people attending Saturday events at these other schools. However, she estimated that about one third of the student enrollment would attend some events. For a theater production, you could expect 200 people. For a big alumni event, you could expect hundreds of people.

Ms. Jarrell then reviewed information provided on Petitioner's comparison table (Exhibit 69(a)). Looking at the sporting events for the German School, there are 52 events versus 77 events at the McLean School, versus 114 events at St. Andrews, versus 158 at Bullis. There are no sporting events at the German School on Saturdays, while other schools do have them. Under special events, there are 11 special events for the German School versus 45 special events, both on Saturdays, week nights, Saturdays and Sundays for Holton Arms. Again, 11 at the German School versus 27 week nights, Saturdays and Sundays for the Landon School. Ms. Jarrell corroborated the accuracy of the comparison tables by looking at the online calendars of the other schools. She did not find any activities at the German School that were unusual in terms of content or number of attendees for a private school. Although the language classes are a unique program, she didn't see anything unusual. In response to a question from the Hearing Examiner, Ms. Jarrell testified that she is not aware of any other private school in Montgomery County that has a Saturday activity that

happens 30 Saturdays in the school year, and usually has an attendance of between 500 and 600 people. She also was unable to testify as to how these other schools in Exhibit 69(a) compare in terms of their access, whether they are on major roads and have multiple access points, or how they impact on the community that way.

According to Ms. Jarrell, parents and students are looking for extraordinary opportunities when they go to independent schools. It's very common practice that life at an independent school, goes on from the wee hours in the morning until 9:00 at night. One of the things that independent schools are providing is a whole child education. So they need to educate not just academically, but in terms of character and athletic and art education, all of that, to make the well rounded person.

Ms. Jarrell admitted that she had never been to the German School, although she knows where it's located, and that it's at the end of a cul-de-sac. In answer to the cross-examination question, "So the opinion you're giving here has nothing to do with how the school impacts the neighborhood, is that correct?," Ms. Jarrell answered, "The opinion that I'm giving is about the typicality of the events offered at the school." 4/7/09 Tr. 179-180.

If the school were to drop the German lessons on Saturdays, it would negatively impact on the school because they are central to the German classes are to its mission. The German language classes strengthen the bonds with the community, with prospective students, with current students and with the parents of both of those groups. In Ms. Jarrell's opinion, the range of extra-curricular activities offered by the German School is typical of quality private schools.

B. Government Agencies

1. Shahriar Etemadi (4/7/09 Tr. 17- 73):

Shahriar Etemadi testified that he is the transportation supervisor with the Maryland National Capital Park and Planning Commission. [He was called as a witness by the Hearing Examiner, and

both sides were given the opportunity to cross-examine him about all transportation matters related to this case.]

Under questioning by Petitioner, Mr. Etemadi testified that if the after-school activities generate fewer number of students and faculties as compared to the regular school activities, then it can be argued with confidence that the proposed activities, meaning the after hours and weekend activities, have significantly less impact because they will create less traffic. 4/7/09 Tr. 19-20.

Traffic decreases after peak hours by 20 to 25%. 4/7/09 Tr. 21.

Mr. Etemadi testified that estimates for traffic generated by after-school, Saturday and summer activities are based on the counts for weekday peak-hour trips. Based on 590 students who were enrolled at the time, the school generated about 175 trips during the highest peak that they've had, the highest number of trips during one hour between 7:30 and 8:30 in the morning. According to Mr. Etemadi, the extracurricular activities will not generate volume in excess of what is measured during the peak hours. He indicated that after-school activities often have more car pooling, which reduces the number of vehicle trips. As a result of that kind of evaluation, he estimated that the total cumulative number of expected car trips generated by the after-school programs would reach a level of volume of up to 70 percent of what is generated during the regular school year for a normal school day peak hour. That amounts to between 130 and 150 trips, at the most, for a given hour of after-school activity (*i.e.*, not including regular school day traffic). While the volume would fluctuate depending on the activity, the estimate is based on a worst case scenario. 4/7/09 Tr. 22-28.

After being shown the revised Statement of Operations, Mr. Etemadi concluded that the cumulative effect of these activities will be less than what we have during the peak hour of a typical school day. For some of these after-school activities, the hours of arrival and leaving are spread out, so the traffic is not going to be concentrated during one hour or half an hour coming in and out.

Secondly, some of these activities are off-peak, during Saturday, or after 7:00 p.m. Finally, these

activities often have more people in one car coming to the site and leaving. So the auto occupancy is high, and therefore, the number of trips coming to the site would be less. 4/7/09 Tr. 30-35.

When asked by Petitioner's counsel, "Do you think, based on the site conditions, the nature of Chateau Drive, that the traffic presented by the German School's after hours and weekend activities imposes undue adverse consequences on the neighborhood?" Mr. Etemadi declined to answer directly, stating that was a subjective evaluation of compatibility. Instead, he offered the following testimony (4/7/09 Tr. 35-39):

Chateau Drive is a secondary residential street, meaning that is the lowest classification of the roadway system that we have in our system. That means a small number, relatively speaking, to other classification of roads. A small number of traffic will be allowed.

Again, because it's the lowest level of classification, there is a different opinion among experts as what would be the capacity of a road like this. If we have a freeway or a major highway or arterial, we have a very good idea of what the capacity is, because we can measure the level of congestion.

With a secondary residential street, it is very difficult to measure the congestion because it's very difficult to measure the amount of delay for travelers in that small segment of the roadway. I mean, if we have 15, 20, 100 cars more, obviously there will be more delay. But the delay is not measured in a sense of, in a sense of congestion, if I can say that.

So for a secondary residential street, I would say, probably a couple of hundred, 300 cars per hour, peak hour with the capacity. Again, as I said, this is, there is a difference, a different opinion as what the capacity of these streets are. But 200 or 300 cars per hour still can flow within a reasonable speed and reasonable level of time.

The Hearing Examiner asked whether his capacity estimate took into consideration that Chateau Drive is a dead end street on one end, and on the other end empties into Kentsdale Drive, and there is reportedly a problem with backing up at the intersection with Kentsdale Drive. Mr. Etemadi replied that there are many variables that may cause a road to be congested or not. They did determine that there would be no queuing from the subject site onto Chateau Drive from drop-off and pickup of school children, but there have been no studies done by Transportation Division as to either the backups or delays at the Kentsdale Drive intersection.

On cross examination by Mr. Bachrach, Mr. Etemadi indicated that his conclusions relating to traffic volume are based on the traffic counts done by Petitioner's expert, Wells and Associates. He stated that his opinion that after-hours traffic is less than peak-hour traffic is not speculative, but is based on decades of data from all over the country. The German School after hours activities do not include all the students who are enrolled in the school. It is less than a typical school day. So based on that, if in a typical school day, there are 590 students enrolled and coming to the site, and for other activities after-hours, 300 or 400 students are participating, then the effect will be less. Also, during after-hours activities the auto occupancy of traffic coming to the site is higher than the typical school day. Therefore, the number of vehicles coming to the site is less. That is why he concluded that the cumulative effect of after-hours activities is less than a typical peak hour during the school year. 4/7/09 Tr. 39-45.

Mr. Etemadi further testified that his understanding of the cumulative effect of the traffic is when you have the highest number of traffic on Chateau Drive -- that would be the worst possible case. That is during the peak hour. He is not measuring the cumulative impact on the community; he is measuring the capacity of the road. He is assessing it by the peak-hour analysis and then projecting what that peak hour is. If the peak hour is okay, then the rest, then the road capacity is sufficient overall. 4/7/09 Tr. 47-48.

According to Mr. Etemadi, a delay analysis for the intersection of Chateau Drive and Kentsdale Drive could be done based on data collected during the peak hour at that intersection. Alternatively, knowing the CLV at that intersection during the peak hour, he could give an estimate of the delay. 4/7/09 Tr. 49-50.

Mr. Bachrach asked about traffic studies for the school done in 1969 and 1991, which reportedly showed 260 school generated trips in 1969 and 230 in 1991. Mr. Etemadi testified that these must have been peak-hour figures, not trips for the entire day. He also mentioned that the

German School is probably one of the best trip mitigating schools that he had seen when compared to other schools. He estimated that about 56 percent of total trips that could have been generated have been mitigated or lessened. 4/7/09 Tr. 51-59. This results from the high usage of school busses and the small number of students who drive alone. 4/7/09 Tr. 64-65.

2. Martin Klauber, Esquire, the People's Counsel (4/7/09 Tr. 59-63):

Martin Klauber, the People's Counsel, did not present any witnesses at the hearing, but he did participate in and suggested certain conditions. Mr. Klauber had to leave the second hearing early, but made the following statement (4/7/09 Tr. 59-63):

His basic position has remained unchanged from the first session of his public hearing. He supports the requested modification of the school to have the summer school. He also supports the school's requested modification about extracurricular activities. He observed that statement of operations includes one of the most detailed analyses of after-hour activities and weekend activities that has ever been submitted by a private school special exception in Montgomery County.

Most of the activities end at 10:00 p.m., or should. He relies on the Hearing Examiner to fairly weigh the testimony on extracurricular activities, and based on the necessary finding of compatibility and on the inherent/non-inherent issue, to make a determined judgment of what extracurricular evening and weekend activities are appropriate, for this school.

Mr. Klauber recommended that the conditions allow for organic changes to take place in every school. The Board of Appeals itself has changed its administrative standards for private schools, and the office of People's Counsel has played a part in that organic change of what the Board of Appeals expects of a private school.

Mr. Klauber raised the question of whether the transportation management plan is adequate, given the needs of the school and the needs of a community, including other parts of the community that were involved in previous cases, but are not with this modification petition. He also

recommended establishing a community liaison council in this case; that it meet two times a year; that minutes be kept of those meetings; that those meetings, as in the other 29 community liaison councils, deal with the operating impacts, issues and questions produced in the school; and that the school file an annual report with the Board of Appeals attaching the minutes of those community liaison council meetings. As in every other community liaison council, the People's Counsel facilitates those meetings. He expressed the hope that the entire community, as well as the West Montgomery County Citizen Association, will be involved in the community liaison council.

The Hearing Examiner observed that the people from Kendale Road, on the western side of the school, haven't appeared in reference to this matter, probably because, by earlier agreement with them, all of the traffic is actually funneled into Chateau Drive, rather than partly onto Kendale Road.

C. Community Opposition

Four neighbors testified in opposition to the petition: Jerome Sowalsky, Miguel Bachrach, Susan Hess and Patti Sowalsky. All their concerns at the first hearing (held on October 20, 2008) centered around the proposed addition of the summer school program, and the accompanying traffic, noise and disruption to the neighborhood during the two summer months, which have been a respite time for the neighborhood in the past. None of the neighbors opposes the new science building, nor the other structural changes on campus.

A second hearing was held on April 7, 2009, solely to address issues related to school year operations that have been ongoing without formal approval by the Board of Appeals. The same four neighbors testified as to their concerns about the impact of Petitioner's operations upon the quiet of their small street, Chateau Drive.

Jerome Sowalsky (4/7/09 Tr. 184-193):

Jerome. Sowalsky referenced his letter of April 6, 2009 (Exhibit 75), as summarizing his testimony and his wife's relating to the Statement of Operations. The activities of the school have

increased substantially over the years, and they have never been subject to a special exception proceeding until today. The burden is on the school to prove that the increased activities are something that are essential to the operation of the school.

Mr. Sowalsky stated that he realized that there must be some balancing between the interests of the school and the interests of the neighborhood. He is not objecting to all the activities on this statement of operations, many of which are essential to the operation of any school. His primary objection is to the German language classes on Saturday mornings, which have never been approved by the Board of Appeals and have brought a tremendous amount of traffic to Chateau Drive. When he and his wife first moved to Chateau Drive, there may have been a school there, but it was relatively invisible. There was hardly any traffic on Saturday mornings going to and from the school. At some point around 1996-97, there appeared to be an all out effort by the school to expand that Saturday morning operation. Apparently they were quite successful, and that led to an enormous increase in traffic on a narrow residential street. With the traffic comes the commotion of the cars. For many of the activities during the week, the buses are coming back and forth. The rumbling of the buses causes vibrations in his home.

When he goes out on Saturday morning, Mr. Sowalsky can be stuck in his driveway for several minutes by a steady stream of cars coming up the road from about 8:30 to a little after 9:00. Then later on in the morning, as people are leaving, there is another a steady stream of traffic. He did an actual count of vehicle movements up and down the street, and on the last occasion, Saturday, March 7, 2009, counted 928 vehicle movements during the period that the school was in operation, within a period from about 8:30 to a little after 12:00. For the small street that he lives on, that's an intolerable amount of traffic. The expectation has always been that there would be some peace and quiet on Saturday and on the weekend.

Mr. Sowalsky noted that the 1969 special exception and the early special exceptions were fairly restrictive in terms of what they had to say about weekend activity, and just in general fairly restrictive, because he believes the Board of Appeals knew that they were authorizing the construction and operation of a school on a street that probably couldn't bear a lot of activity. While he realizes that things change, he would like some curtailment of the activities of the school, and not further expansion. They also need to alert the neighborhood to proposed changes. By opening Saturday classes to the general public, to adult education, they've gone beyond what they've been authorized to do by the Board of Appeals. It's just too much for this street and this neighborhood to bear.

Mr. Sowalsky further testified he and his wife personally measured the access roads of the schools that Petitioner chose for comparison. They are differently located, and more appropriately located for the kind of schools they are, with the kinds of activities they have. The basis that has been presented for comparing German School with the six other schools is really unconvincing.

The summer program is just another thing that's going on at that school that intrudes into the peace and quiet of the neighborhood. During the Christmas bazaar this past Christmas, the street was overrun with people, and he could barely get up the street. There were cars parked on at least on one side of the street. He feels that there has to be a limit on where people can park, and what they can do during that day, and a cutoff time, because that event went long beyond the 7:00 cutoff time that's reflected in the Statement of Operations. It could have gone on until 8:00 or 9:00 at least, which in itself is not wrong, but it started so early and it's such a long day that it took up virtually the entire day.

He conducted traffic counts on three days. He counted 788, 776 and then 928. During the taking of those counts, he did not determine which cars were going to German School and which were going to residences on Chateau, but there are only six homes beyond the school, so on

Saturday morning, there is a minimal traffic from those houses. He agreed that, apart from the church service, the only Sunday activities listed in the statement of operations are the occasional sporting events. He objects to sporting events on Sunday.

Patti Sowalsky (4/7/09 Tr. 194-197):

Patti Sowalsky adopted her husband's testimony and added that she felt the People's Counsel was not impartial. The Hearing Examiner explained that the People's Counsel was entitled to take a position in these cases to support what he feels is in the public interest. He is not required to be neutral. That's the Hearing Examiner's role [until he writes his report based on the evidence].

Susan Hess (4/7/09 Tr. 197-210):

Susan Hess submitted a summary of her testimony as Exhibit 77. She expressed a concern that the traffic counts were not accurate. For example, it does not include traffic before and after the count was taken even on the one day of the count. Ms. Hess asserted that the German School has no transportation management plan of its own.

In the community's letter of November 21, 2008 (Exhibit 44), five things are requested:

1. The German School to house buses off-site or use private bus transportation.
2. All students and buses or car pools for departure from the school each day. No single car pickups.
3. For all special events where more than 175 vehicles are expected, satellite parking is mandatory for vehicles in excess of 175.
4. No parking on neighborhood streets allowed at any time.
5. Development of an annual vehicle trip budget for approved activities. A total number of vehicle trips would be approved for annual operations and adjusted by the school within the budget allowance, to meet specific or changing school needs. Car pooling or busing could cause a budget savings in single car trips to be applied to vehicle trips for other activities.

Ms. Hess stated that she agree with Mr. and Mrs. Sowalsky about the comparison table provided by Petitioner. The schools that are cited Bullis, Landon, and Holton-Arms are on designated secondary roads with one or more entrances. The other schools noted, Green Acres and

McLean, have wider residential streets for access. That the German School is on Chateau, with no secondary access is clearly the issue here. She hardly has any disagreement with the activities of the school, the presence of the school, except for the fact of the traffic.

Nobody from the Chateau Drive area played a part in the original special exception in which there were the people from the west side who objected to an entry on their road, Kendale. Except for the Chateau house itself (a big stone house that was built in the twenties), there were no houses on Chateau Drive at the time of the original special exception in 1969. Her house, slightly past the school and across the street, was built in 1974. Although other houses were built after the special exception was granted, no one knew it would grow to this extent. The vehicular traffic and the number of activities that bring the vehicular traffic are what has become at issue. The activity has grown exponentially in the nineties. She fears the school will add activities without going through the modification process.

Taken another way, would the County approve this operation in this location today? She did not think so. The neighborhood is continuing to pay the price for the growth and development of this institution.

Ms. Hess objected to the Christmas bazaar, the Easter bazaar and the rummage sale as unnecessary to the educational mission of the school. Because of all of the traffic that it brings to the street, she objected to ¶ 23 of the amended statement of operations, that essentially sublets the institution out to other institutions who are interested in using the fields or the classrooms, et cetera.

On cross-examination, Ms. Hess admitted that the German School had submitted a TMP and had responded (Exhibit 47) to the concerns raised by the neighbors, but she meant that Petitioner had not agreed to the suggestions made by the community.

Miguel Bachrach (4/7/09 Tr. 106-116):

Miguel Bachrach challenged Mr. Etemadi's conclusion that because the summer school

enrollment and after-school activities involve significantly fewer students than a typical day in the regular school year program, then it can be argued with confidence that the proposed summer and after-school activities have significantly less traffic impact. The summer school and after-school activities have fewer busses and less opportunity for carpooling. From Petitioner's traffic study, the Saturday traffic has more trips than a regular school day.

Mr. Bachrach also questioned Mr. Etemadi's assumption that because the German School mitigates its trips more than the average school that there is a reduced impact on the neighborhood. The baseline traffic on the streets accessed by other schools is much higher than Chateau Drive. Since the baseline traffic on a quiet residential street is low, the influx of traffic from the German School is very disruptive. It is much higher than many of the other schools.

Mr. Bachrach testified that there is often queuing on Chateau Drive going onto Kentsdale Drive. Depending on the hour of the day, it could be one car, it could be eight cars, nine cars, 10 cars. He has had to wait up at that intersection for up to seven or eight minutes, depending on what time he leaves. If he leaves before 6:00 a.m. or after 8:15 a.m., there is no wait. It varies a lot, but more often than not, he has to wait when he leaves in the morning.

Mr. Bachrach stated that the traffic study figures indicate that there are many more trips now than there were in 1969 and 1991.

Mr. Bachrach noted that traffic and resulting noise and pollution have an impact on the property values by virtue of the traffic, and the view of the neighborhood is that there has to be some balance between what the school needs and what the neighborhood's welfare is, both in terms of how it affects daily lives and the impact on property values. He does not believe there has been a real assessment of the cumulative impact of all these activities on the neighborhood and on property values.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards.

Petitions to modify the terms or conditions of a special exception are authorized by §59-G-1.3(c)(4) of the Zoning Ordinance. As mentioned in Part I of this report, Petitioner's plans include expansion of the total floor area by 20,288 square feet, which exceeds the statutory threshold of 7,500 square feet; however, the expansion of the facilities (as distinguished from operations), when considered in combination with the underlying special exception, will not change the character of the special exception. Thus, the scope of this inquiry does not require a sweeping review of landscaping, circulation and screening on campus, except to the extent that they are affected by the proposed physical changes. This review will include the proposed physical changes to the site, the newly proposed summer school and the activities not previously approved by the Board, all of which have been noticed and discussed at the hearings in this case.

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed physical modifications to the site, taken in combination with Petitioner's transportation management plan, screening and other proposals, will successfully avoid any adverse effects on the community and will meet the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below. The proposed summer school, on the other hand,

must be severely limited, and some of the ongoing after-school and weekend activities of the school, which have not been previously approved by the Board, must be curtailed, and others eliminated, as detailed below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. *“Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.”* Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. *“Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.”* *Id.*

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a private educational institution use. Characteristics of the proposed modifications that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed modification that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff suggested that the inherent adverse effects associated with private educational institutions include (Exhibit 23, p.8.):

- (1) buildings and structures, as well as outdoor areas for children to play;
- (2) early and long hours of operation;
- (3) traffic to and from the site by staff and students;
- (4) deliveries of supplies and trash pick-up;
- (5) drop-off and pick-up areas for students who attend the school or summer camp; and
- (6) noise from children playing in the play areas.

The Hearing Examiner accepts Staff's recitation of the inherent characteristics of a private educational institution use. As will appear below, the Hearing Examiner disagrees with Staff's conclusion as to whether certain characteristics of the German School use are inherent or non-inherent.

B. Applying the Standard to the Requested Modifications

1. Inherent v. Non-inherent Characteristics:

The Development Review Division of Technical Staff concluded that "There are no non-inherent adverse affects [*sic*] associated with the application;" however, the analysis upon which this conclusion is based appears to address mainly (if not solely) impacts from the proposed physical changes to the campus.²⁰ Exhibit 23, p. 8. The Hearing Examiner agrees with that portion of Staff's conclusion that relates to the physical changes on the campus. No physical changes to the campus have been proposed which are atypical of a private educational institution use, and the Hearing Examiner finds no non-inherent adverse effects from those proposed physical changes to the campus. Operational characteristics and existing site conditions are a different story.

²⁰ In reaching its above-quoted conclusion, Staff stated only "In reviewing the application, staff finds that the inherent characteristics of size, scale and scope associated with the proposed application are minimal and not likely to result in any unacceptable noise, traffic disruption, or environmental impacts at the proposed location. Adequate parking is available for the employees and students under the existing special exception. Views of the new building and playhouse will be screened from adjacent neighbors by existing topography and trees. Sufficient landscaping is proposed in order to maintain the general character of the neighborhood." Exhibit 23, p. 8.

Community Planning Staff disagreed with the Development Review Division to some degree with regard to operational characteristics. They characterized the “the sport program element of the overall summer school program” as a non-inherent characteristic of the proposed modification. They nevertheless felt that both the physical and operational characteristics of proposed modification, including the summer school, would not have an adverse effect on the surrounding community. Exhibit 23, Attachment 9.

Neither element of Technical Staff had the benefit of the evidence regarding operational characteristics and existing site conditions submitted into the Hearing Examiner’s record by the community in this case. Based on the entire record, the Hearing Examiner finds that Technical Staff was incorrect in its findings regarding the existence and extent of non-inherent site and operational characteristics in this case and in its findings about their adverse impact upon the neighborhood. Development Review Division Staff ignored a fundamental aspect of the definition of non-inherent characteristics, the “*adverse effects created by unusual characteristics of the site.*” Zoning Ordinance §59-G-1.2.1. Community Planning Staff recognized the existence of unusual site conditions, but apparently did not factor those conditions into its analysis of non-inherent characteristics. As stated by Community Planning Staff (Exhibit 23, Attachment 9):

When the German School obtained the original special exception approval in 1969, the School was required to dedicate land for the realignment of Kendale Road, a primary residential road on the west side of their property. Unusually, although the right-of-way was dedicated, the School was granted permission to take access off Chateau Drive, a tertiary residential cul-de-sac serving 12 houses on the south-east side of the property. **If the application were to be made today, access from a road with a minimum classification of a primary residential road would be required.** [Emphasis added.]

At the April 7, 2009 hearing. Shahriar Etemadi, Technical Staff’s Transportation Division supervisor, characterized Chateau Drive as “a secondary residential street, meaning that [it] is the

lowest classification of the roadway system that we have in our system.” 4/7/09 Tr. 36; Emphasis added.

Based on the above-quoted statements of Community Planning Staff and Mr. Etemadi, and the extensive evidence from the neighbors regarding the adverse impacts on them from traffic, parking and other school-generated activity on Chateau Drive (as discussed in Part II. E. of this report), the Hearing Examiner concludes that Chateau Drive, the sole access road serving the German School, is an unusual characteristic of the site leading to non-inherent adverse effects. These adverse effects are exacerbated when the number of activities increases and when particular activities attract large numbers of participants, because these activities naturally produce traffic, parking and commotion on Chateau Drive.

In addition to this unusual site condition, there are operational characteristics of the German School that are not inherent in the operation of a private school in the County. As mentioned above, Community Planning Staff found that only “the sport program element of the overall summer school program” was a non-inherent characteristic of the proposed modification. Neither Community Planning Staff nor Development Review Division Staff analyzed existing after-school and weekend activities at the site because those activities were not considered as part of the case until the Hearing Examiner realized, after the first hearing, that Petitioner’s proposed Statement of Operations included after-school and weekend activities that had never been formally approved by the Board of Appeals. *See* Page 4 of this report.

Petitioner’s counsel argued that a summer school is an inherent characteristic of private schools in the County, and that the 1969 special exception grant does not prohibit the school from certain “evolutionary changes.” 10/20/08 Tr. 249-255. However, Petitioner’s evidence did not prove that a summer school is either inherent in County private schools or “evolutionary” in nature. That evidence is discussed at length in Part II.D.2.b. of this report. As mentioned there, Petitioner

submitted a survey, after the first hearing, of 45 private schools in the County. Exhibit 41(e). It showed that of the 45 surveyed schools, 39 had some kind of summer activity, but only 22 had summer schools. No attempt was made by Petitioner to compare the sites and access roads of the institutions with summer schools to the site and access of the German School.

While the survey reveals that most private schools have some summer activities, it also shows that less than half of them have summer schools. Based on this evidence, the Hearing Examiner cannot conclude that summer schools are “*necessarily associated with*” private educational institutions in the County. That is the statutory standard for determining which characteristics are inherent. The Hearing Examiner therefore finds that the summer school proposed by Petitioner would be a non-inherent characteristic of the use. It should be noted that a summer school may be an option considered by private schools, but it is certainly not a core activity, since the German School has been operating without one for more than 30 years.

Even if a summer school were deemed to be an inherent characteristic of a private educational use because it is consistent with such a use, the size of the projected summer program here would create non-inherent characteristics and adverse effects in conjunction with the non-inherent site conditions discussed above, thereby requiring denial of, or limitations on, the program. The Zoning Ordinance does not require that each characteristic of the use be considered in isolation from other characteristics. In fact, it expressly provides, “*Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.*” Code § 59-G-1.2.1. The proper evaluation of the adverse effects in this type of special exception is discussed in the next section of this report.

The same analysis applies to the issue of after-hour and weekend activities in this case, which are discussed at length in Part II.D.3.b. of this report. These extra-curricular activities are not items that Petitioner initially sought to formally modify in this case; rather, they are the innumerable

activities that have been added by the school over the years without benefit of formal approval by the Board of Appeals. In addition to the many regularly scheduled activities, there are currently about 65 “special events,” including 12 weeknight theater productions attended by 50 to 300 people and running till 10 p.m.; four (4) Friday night student dances attended by 100 people running till 10: p.m.; five (5) annual events attended by 500 people or more (Christmas party for German language classes, Summer celebration for German language classes, Christmas Bazaar; Easter Bazaar and Schulfest); and numerous other evening and weekend activities.

The after-hour and weekend activities (including frequencies, times and approximate numbers of attendees) are summarized in a table from the Second Amended Statement of Operations (Exhibit 80(a), pp. 10-12), and reproduced on pp. 42-44 of this report. The most concerning of weekend activities are the German Language Classes given on 30 Saturdays a year and attended by up to 500 participants and 40 staff. Exhibit 80(a), pp. 5-6 and 11. These classes actually produce slightly more traffic on Chateau Drive than the regular weekday school traffic according to Petitioner’s own traffic counts. 4/7/09 Tr. 74-79. According to the testimony of Sybille Young, the Chair of the German School’s Board of Directors, Petitioner realized that these Saturday classes had not been approved by the Board, but felt that they were part of their core mission, and were therefore “inherent” in their special exception. 4/7/09 Tr. 138. On the other hand, Petitioner has not limited these classes to their own students, but rather uses them as a kind of outreach to attract new students and families to their fold. 4/7/09 Tr. 121-122. Therefore, they are attended by adults and children who are not enrolled in the German School’s regular academic program, as well as by German School students and staff. 4/7/09 Tr. 122-123.

Ms. Young has misunderstood the use of the inherent/non-inherent dichotomy as set forth in Zoning Ordinance §59-G-1.2.1. The question is not whether an activity is inherent to a particular school’s vision of its mission, but whether it is inherent in the nature of independent schools in the

County. Petitioner has produced no evidence that Saturday classes (language or otherwise) for a body of enrollees almost the size of the regular student body and occurring 30 times a year (*i.e.*, on almost every Saturday the school is not closed for a holiday during the entire academic year) is an inherent characteristic of private schools in the County.

Petitioner attempted to show that other private schools in the County had comparable after-hour and weekend activities, as discussed in Part II. D. 3. c. of this report, but their evidence failed to show even one school that conducted weekend classes at the levels that have been ongoing without permission at the German School. Moreover, the neighbors produced evidence that the comparison schools chosen by Petitioner were not, in fact, comparable in terms of access roads and other site conditions. *See* Part II. D. 3. c. of this report.²¹

Based on this record, the Hearing Examiner finds that the Saturday German language classes at this intensity and frequency are not an inherent activity of private educational institutions in the County and are not permitted evolutionary changes. Moreover, even if Petitioner had proven that weekend activities of this type are necessarily associated with, and therefore inherent in, the use, we still must consider the adverse impacts of that characteristic in conjunction with the other inherent and non-inherent site conditions and operational characteristics in determining whether or not it is permissible in this case, and to what extent.

We therefore now turn to the appropriate methodology to assess the level of adverse impacts of a private educational institution use.

²¹ It should be noted that the neighbors' comparison data was accepted to show that the comparison being attempted by Petitioner was invalid, not that there are other locations within the zone where the proposed use would have less of an adverse effect. In *People's Counsel For Baltimore County. v. Loyola College In Maryland*, 956 A.2d 166 (MD. 2008), citizens opposing a special exception petition argued that the standard established for special exception applicants required Loyola College to show that there were no other locations within the zone where the proposed use would have less of an adverse effect than on the local neighborhood of the property in that case. The Court of Appeals rejected that standard, and that standard is not being applied in this case. The standard being applied in this case looks to whether the operational characteristics of the German School's after-hour and weekend activities are inherent in a private school use and whether they create adverse impacts upon the immediate neighborhood, in combination with other characteristics of this particular use, such as unusual site conditions and the sheer volume of other activities.

2. Assessing the Impact of the Combined Characteristics of the German School:

As mentioned above, Zoning Ordinance §59-G-1.2.1 requires that we examine the combined effects of inherent and non-inherent characteristics. The concept of combined impact is especially relevant in private educational institution special exception cases because of the specific language in the Code governing this type of use when, as in this case, there are extracurricular activities.

Section 59-G-2.19(b), provides:

*(b) If a Private Educational Institution operates or allows its facilities by lease or other arrangement to be used for: (i) tutoring and college entrance exam preparatory courses, (ii) art education programs, (iii) artistic performances, (iv) indoor and outdoor recreation programs, or (v) summer day camps, **the Board must find, in addition to the other required findings for the grant of a Private Education Institution special exception, that the activities in combination with other activities of the institution, will not have an adverse effect on the surrounding neighborhood due to traffic, noise, lighting, or parking, or the intensity, frequency, or duration of activities. In evaluating traffic impacts on the community, the Board must take into consideration the total cumulative number of expected car trips generated by the regular academic program and the after school or summer programs, whether or not the traffic exceeds the capacity of the road. A transportation management plan that identifies measures for reducing demand for road capacity must be approved by the Board.***

The Board may limit the number of participants and frequency of events authorized in this section. [Emphasis added.]

Technical Staff concluded that this provision does not apply because Petitioner proposes a summer school and not a summer camp. Exhibit 23, p. 17. Petitioner agrees (10/20/08 Tr. 161-162), and also argues that the subsection is inapplicable because these extracurricular activities are run by the school itself and not by lease or other arrangement. 4/7/09 Tr. 238-239.²² The Hearing Examiner finds that both Technical Staff and Petitioner have read this section much too narrowly.

“The cardinal rule of construction of a statute is to ascertain and carry out the real intention of the Legislature.” *Mayor & Council of Rockville v. Rylyns Enterprises*, 372 Md. 514,549-552,

²² The Hearing Examiner rejects Petitioner’s second argument, as it is contrary to the express language of the statute. That language specifies that the section applies whether the school “operates or allows its facilities” to be operated by others. [Emphasis added.] Thus, it applies to the German School which is operating these programs itself.

814 A.2d 469,490-491 (2002).

The Hearing Examiner invited Petitioner to submit legislative history to support its argument (4/7/09 Tr. 240), but Petitioner elected not to do so. Because much hinges on the correct interpretation of Section 59-G-2.19(b), the Hearing Examiner reviewed its legislative history, all of which is a matter of public record. The section was enacted in Zoning Text Amendment (ZTA) 02-01, Ordinance No. 14-46, effective April 22, 2002. Its original version did not include the cumulative impact sentence. It was added in on the advice of the legislative staff to address the concerns raised in testimony before the Council on March 5, 2002, regarding the proposed ZTA.

At least three witnesses at the Council hearing on the ZTA (representing two different civic associations) questioned the use of road or intersection capacity as the measure of impact on the community from after-school and summer programs. They focused on the fact that capacity analysis does not measure the increases in duration and cumulative effects of after-school activities (*i.e.*, Activities continuing long after regular school hours may not affect road capacity, but the community has to endure their effects over a much longer period of the day.).

As stated by the Legislative Staff, in recommending the current language in Section 59-G-2.19(b),

The community makes a reasonable case that when traffic extends into the evening and weekends, with a longer period of activity, a somewhat different analysis than road capacity may be needed, particularly when the school is located on an interior road. It would seem to make sense in such situations to establish a standard that allows consideration of the cumulative traffic impacts from car trips generated by the regular academic program and the after school or summer programs, whether or not the traffic exceeds the capacity of the road.²³

Based on this legislative history, and reading Subsection 2.19 (b) as a whole and in the context of the entire section, the Hearing Examiner reaches two conclusions:

²³ March 21, 2002 memorandum from Ralph D. Wilson, Senior Legislative Analyst to Planning, Housing, and Economic Development [PHED] Committee, regarding ZTA 02-01, page 3.

1. The Council intended this subsection to address after-school, weekend and summer activity in general, with the items it mentioned serving as examples. It is clear that the Council was attempting to address the cumulative impact problem of all the curricular and extracurricular activities because it said just that:

In evaluating traffic impacts on the community, the Board must take into consideration the total cumulative number of expected car trips generated by the regular academic program and the after school or summer programs, whether or not the traffic exceeds the capacity of the road.

2. Road capacity analysis alone is not a sufficient measure of cumulative impacts upon the community by all school-generated activity. Once again, the Council stated explicitly that the “total cumulative number of trips” generated by all programs must be considered, not just “the capacity of the road.”

To interpret this section as Staff and Petitioner suggest would lead to an absurd result clearly not intended by the Council – that the cumulative impact of regular, summer, weekend and after-hour activities upon the community might not be considered because many of German School’s activities with great impact are ones not specifically mentioned in the listing. We know from the legislative history that such an interpretation would defeat the very purpose of the additional language the Council added to the statute.

Moreover, even if one did accept a narrow interpretation of §59-G-2.19(b) which limits its application to schools that have one or more of the listed items, we know that the German School, though it does not have a summer camp, has at least three of the items specifically listed in the section, “(ii) art education programs, (iii) artistic performances, [and] (iv) indoor and outdoor recreation programs.” Therefore, even under a narrow reading of this section, its language would apply to this case, and the impact of those activities would have to be considered along with all other school programs (*i.e.*, “*expected car trips generated by the regular academic program and the after school or summer programs*”) to ascertain cumulative impact.

Applying this interpretation of the applicable statute to this case, we next examine whether Petitioner has demonstrated that the cumulative impact of the school’s activities do not create unacceptable adverse effects upon the neighborhood.

As discussed at length in Part II. D. 2 and 3 of this report, the evaluations of traffic done by Petitioner's transportation expert and by Transportation Division of Technical Staff were founded on road capacity analysis, not compatibility with the neighborhood.

Robert Kohler, Petitioner's traffic engineer, testified that his study of the critical lane volume at the intersections of Chateau Drive and Kentsdale Drive, and Kentsdale Drive and Bradley Boulevard during the peak hours, yielded critical lane volumes (CLVs) well below the 1450 congestion standard for the area. He opined that the CLVs for the peak hours would indicate the worst case scenario in terms of road capacity. 4/7/09 Tr. 74-79.

Shahriar Etemadi, Transportation Division's supervisor, testified that his analysis did not measure the cumulative impact on the community; rather he measured the capacity of the road. He assessed it by peak-hour, critical lane volume analysis, and then projected the impact on road capacity. He opined that if the peak hour volume meets the CLV standard, then the road capacity is sufficient overall. 4/7/09 Tr. 47-48. He concluded that road capacity was adequate here, though he admitted that it is very difficult to measure the congestion on a secondary residential street. 4/7/09 Tr. 35-39. Because it considered road capacity to be adequate during the school year, Technical Staff concluded that road capacity for summer school, which would have a lower level of enrollment, would be adequate. Exhibit 23, Attachment 10.

In spite of the expert analysis deeming road capacity to be adequate, the neighbors testified convincingly that the Saturday German language classes, when combined with the many other school activities, create an intolerable level of traffic, disturbance and delay on Chateau Drive, as discussed in Part II. E. of this report. No delay analysis was conducted by the traffic experts who provided evidence in this case, though Mr. Kohler admitted that he observed occasional backups of up to eight cars at the intersection of Chateau Drive and Kentsdale Drive. 4/7/09 Tr. 35-39; 81-82.

As mentioned above, road capacity analysis is only one factor to be considered in determining the cumulative impact of the extensive weekend and after-hour activities, as well as the summer program proposed by the German School. This conclusion based not only on the direct admonition in §59-G-2.19(b) to look beyond road capacity analysis, but also on language elsewhere in the Zoning Ordinance. The very first provision in §59-G-2.19(a) requires a finding that

(1) the private educational institutional use will not constitute a nuisance because of traffic, number of students, noise, type of physical activity, or any other element which is incompatible with the environment and character of the surrounding neighborhood;

Moreover, Code §59-G-2.19(a)(4) requires that the Board set the maximum student density only after considering many factors relating to traffic impact on residential streets. The General Conditions for obtaining any special exception (Zoning Ordinance §59-G-1.21) also require a finding of compatibility, harmony with the neighborhood, and that the use will not be detrimental to the use, peaceful enjoyment and economic value of the neighborhood. The application of these provisions of the Zoning Ordinance is discussed in Parts IV. C. and D, below.

Based on all the evidence, including the road capacity analysis, the testimony of Petitioner's witnesses and that of the neighbors, the Petitioner's exhibits and the extensive discussions in the neighbors' letters, the Hearing Examiner concludes that the level of activity generated by the German School (*i.e.*, the cumulative volume of trips on Chateau Drive) is currently having serious adverse consequences upon the neighbors, and that Petitioner's plans and programs will have to be curtailed to limit those impacts.

The Hearing Examiner fully understands that Petitioner wants to operate during the summer and conduct activities after normal hours and on weekends to maintain a vibrant and inviting academic milieu for the German School. The problem is that the German School does not operate in a vacuum. It has neighbors, and every activity which extends hours of operation and produces

traffic puts more strain on the neighbors because the school can only be accessed on a small cul-de-sac road, Chateau Drive.

The Hearing Examiner's recommendations on how to address this problem are contained in Part V of this report.

C. General Standards

The general standards for special exceptions are found in Zoning Code Section 59-G-1.21(a). The Hearing Examiner finds that, with the recommended conditions and limitation, the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions:

(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is a permissible special exception in the zone.*

Conclusion: Private educational institutions are permitted by special exception in the RE-2 Zone involved in the subject case.

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed modifications, as limited and conditioned, would comply with the standards and requirements for private educational institutions set forth in Code §59-G-2.19, as discussed in Part IV.D., below.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location.*

If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The subject property is included under the *Potomac Subregion Master Plan*, approved and adopted in 2002. The Master Plan recommends the continuation of the RE-2 Zone for the subject site, and a private educational institution is permitted by special exception in the RE-2 Zone. This particular use has been permitted since 1969. As discussed in Part II. C. of this report, the modified use, as limited and conditioned by the Hearing Examiner's recommendations, would be consistent with the applicable Master Plan.

(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.

Conclusion: As discussed in Part II. D. 1. of this report, the proposed physical modifications to the campus would be in harmony with the general character of the neighborhood. The Hearing Examiner agrees with Technical Staff on this point (Exhibit 23, p. 9):

The scale and height of the new two-story building (height 35 feet) and new one-story playhouse (maximum height 15') would be in harmony with the single family homes in the neighborhood. The new science and classroom building would be located 112 feet from the north property line which adjoins an undeveloped site. The new playhouse would be located 352 feet from the north property line. The new building would be located 340 feet from the nearest residential property. The new playhouse would be located 413 feet from the nearest residential property. Existing berms and trees would shield the view of the new building and playhouse from the east and the north. The topography of the remainder of the school site would shield the view of the new building and playhouse from the south,

and the existing main school building would shield the view of the new building and playhouse from the west.

As indicated in Parts II. E and IV.B of this report, with regard to the proposed summer school, and with regard to the after-school and weekend activities which have never been formally approved by the Board, a number of limitations and conditions are needed to insure that the intensity and character of activity, traffic and parking conditions will not cause disharmony in the neighborhood. These proposed limits and conditions are spelled out in Part V of this report.

The evidence supports the conclusion that public facilities and services will be adequate.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The proposed physical modifications to the campus would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, for all the reasons stated in response to the previous section; however, as indicated in Parts II. E and IV.B of this report, with regard to the proposed summer school, and with regard to the after-school and weekend activities which have never been formally approved by the Board, a number of limitations and conditions are needed to insure that the German School's operations will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site. These proposed limits and conditions are spelled out in Part V of this report.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: As discussed in Part II.D.1.c. of this report, photometric studies demonstrate that the new bollard lights will not create light spillage onto surrounding properties. There is no photometric evidence with regard to proposed wall-mounted lights for the new building, and therefore Petitioner will have to request an administrative modification if such lighting is actually intended. In general, the proposed physical modifications to the campus would not cause objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, for all the reasons stated in response to the previous sections; however, as indicated in Parts II. E and IV.B. of this report, with regard to the proposed summer school, and with regard to the after-school and weekend activities which have never been formally approved by the Board, a number of limitations and conditions are needed to insure that the German School's operations will not create objectionable noise or physical activity at the subject site. These proposed limits and conditions are spelled out in Part V of this report.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff does not mention any other special exceptions in the area, and the subject modification petition will not create an additional special exception. However, for the reasons set forth in the preceding paragraphs, the modifications proposed in the subject case would increase the intensity and scope of the subject

special exception use sufficiently to affect the area adversely, absent the limitations and conditions recommended by the Hearing Examiner in Part V of this report.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Except as previously noted with regard to excessive cumulative activity on Chateau Drive, the evidence supports the conclusion that the proposed modification would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

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

(B) *If the special exception does not require approval of a preliminary plan of subdivision, by the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: As determined by Technical Staff (Exhibit 23, p. 11), the special exception modifications sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review will be done by the Board of Appeals. Technical Staff reports:

The subject site is adequately served by public facilities. The property is adequately served by public water and sanitary sewer service operated by the Washington Suburban Sanitary Commission (WSSC). Transportation Planning staff concludes that the school is not subject to the LATR/PAMR requirements since the school does not propose to increase the student enrollment.

Although the Hearing Examiner questions Staff's conclusions regarding cumulative impact on the neighbors of traffic on Chateau Drive, as discussed at length elsewhere in this report, the evidence supports the conclusion that there are adequate public facilities available to the site.

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

Conclusion: Although some concern was expressed by the neighbors about vehicles speeding on Chateau Drive, Transportation Planning staff reviewed the proposed changes and Petitioner's proposed TMP, and concluded that "the proposed traffic management elements are reasonable to handle the projected school traffic associated with operation of the School's daily programs during the school year and the proposed summer program in a safe and efficient manner." Exhibit 23, Attachment 10. The Hearing Examiner concludes that with the implementation of the TMP and with the limitations and conditions recommended in Part V of this report, the proposed use and modifications would not reduce the safety of pedestrian or vehicular traffic.

D. Specific Standards: Educational Institutions, Private

The specific standards for a private educational institution are found in Code § 59-G-2.19. The Hearing Examiner finds that, with the recommended conditions and limitation, the specific standards for this special exception would be satisfied in this case, as outlined below.

Sec. 59-G-2.19. Educational institutions, private.

(a) *Generally. A lot, tract or parcel of land may be allowed to be used for a private educational institution if the board finds that:*

(1) *the private educational institutional use will not constitute a nuisance because of traffic, number of students, noise, type of physical activity, or any other element which is incompatible with the environment and character of the surrounding neighborhood;*

Conclusion: For the reasons set forth in Part II.D.3, Part II. E. and Parts IV.B. and C. of this report, the Hearing Examiner finds that, unless limited and conditioned as recommended in Part V of this report, the proposed summer school and the after-school and weekend activities will constitute a nuisance because of traffic, number of students, noise, or type of physical activity. Chateau Drive was described by Community Planning Staff as “a tertiary residential cul-de-sac,” and Staff noted, “If the application were to be made today, access from a road with a minimum classification of a primary residential road would be required.” Exhibit 23, Attachment 9. The extensive record made by the neighbors demonstrates that traffic generated by the German School has become a nuisance in recent years, and would be even more so if a summer school with 450 students were created on top of all the other activities of the German School. As has been previously discussed, the level of activity at the German School is far beyond what was contemplated in the initial approval by the Board. The Hearing Examiner’s recommendations for dealing with this problem are discussed in Part V of this report.

(2) *except for buildings and additions completed, or for which a building permit has been obtained before (date of adoption [April 2, 2002]), the private educational institution must be in a building architecturally compatible with other buildings in the surrounding neighborhood, and, if the private educational institution will be located on a lot, tract, or parcel of land of 2 acres or less, in either an undeveloped area or an area substantially developed with single-family*

homes, the exterior architecture of the building must be similar to a single-family home design, and at least comparable to any existing homes in the immediate neighborhood;

Conclusion: The evidence in this record supports the conclusion that the proposed structural changes on the campus will be compatible both with the existing structures and with the neighborhood. Petitioner's architect, Joseph McCoy, testified that materials proposed for the exterior facade of the new science building were chosen to be complimentary and compatible with materials that already exist on the school's campus, such as masonry, pre-cast concrete, varied mixtures of glass, aluminum and steel. The materials, as well as the massing of the building, were chosen specifically to be in keeping with the surrounding residences, understanding that this is an institutional building and not a residence, but also trying to find the balance between materials that could be found in residences nearby, and also at the scale of a residence nearby. 10/20/08 Tr. 99-116. The additions to the physical plant will also have no visual impacts because of the buffers, the berms, the other structures that presently exist on the property, and additional landscaping. 10/20/08 Tr. 48-50.

Technical Staff agreed, stating (Exhibit 23, p. 13):

The new building, playhouse and new windows on the existing elementary school building under the special exception modification would relate well to the surrounding area single-family home appearance. The scale and height of the new two-story building and one-story playhouse would be in harmony with the single-family homes in the neighborhood. The new windows on the existing elementary school building would match the existing windows.

(3) the private educational institution will not, in and of itself or in combination with other existing uses, affect adversely or change the present character or future development of the surrounding residential community; and

Conclusion: The use, as modified, will not adversely affect or change the present character or future development of the surrounding neighborhood, if the limitations and

conditions recommended by the Hearing Examiner are followed, as described in Parts IV.C. and V of this report.

(4) *the private educational institution must conform with the following standards in addition to the general development standards as specified in Section G-1.23:*

- a. *Density—The allowable number of pupils per acre permitted to occupy the premises at any one time must be specified by the Board considering the following factors:*
 1. *Traffic patterns, including:*
 - a) *Impact of increased traffic on residential streets;*
 - b) *Proximity to arterial roads and major highways;*
 - c) *Provision of measures for Transportation Demand Management as defined in Section 42A-21 of the Montgomery County Code;*
 - d) *Adequacy of drop-off and pick-up areas for all programs and events, including on-site stacking space and traffic control to effectively deter queues of waiting vehicles from spilling over onto adjacent streets; and*
 2. *Noise or type of physical activity;*
 3. *Character, percentage, and density of existing development and zoning in the community;*
 4. *Topography of the land to be used for the special exception; and*
 5. *Density greater than 87 pupils per acre may be permitted only if the Board finds that (i) the program of instruction, special characteristics of students, or other circumstances justify reduced space and facility requirements; (ii) the additional density will not adversely affect adjacent properties; (iii) additional traffic generated by the additional density will not adversely affect the surrounding streets.*
- b. *Buffer—All outdoor sports and recreation facilities must be located, landscaped or otherwise buffered so that the activities associated with the facilities will not constitute an intrusion into adjacent residential properties. The facility must be designed and sited to protect adjacent properties from noise, spill light, stray balls and other objectionable impacts by providing appropriate screening measures, such as sufficient setbacks, evergreen landscaping, solid fences and walls.*

Conclusion: As observed by Technical Staff (Exhibit 23, p. 16), the existing special exception established a cap on student population at 650 students, which is a density of 38.4 students per acre (16.9 acres). That density is less than half the density of 87 students per acre which may be permitted without a special finding under this section. Staff also notes that the density of the proposed summer program (450 students) would be 26.6 students per acre, also well below the cap. Based on these facts and the traffic analysis done by Petitioner's transportation planner, Technical Staff concludes that the population densities stated above are appropriate.

The Hearing Examiner does not accept Staff's analysis because it fails to take into account the tertiary road which provides the single access to the school and the effect that this site condition has when combined with the many after-school and weekend activities held by the school. While the regular cap of 650 and the proposed summer cap of 450 might be acceptable in isolation, the Zoning Ordinance requires that we consider these operational characteristics in conjunction with other characteristics of the school, such as unusual site conditions and the many extra-curricular activities.

When the Board originally approved an enrollment cap of 650 students for the German School (CBA-2684 Opinion of December 9, 1969, Exhibit 17(a)), there was no proposal for a summer school and there were no single-family residences along Chateau Drive (4/7/09 Tr. 205). The Board also contemplated a much lower level of activity than currently exists (Exhibit 17(a), p. 2):

There would be no athletic competition between schools, no grandstands, and no night activities. Soccer games are proposed to be held during the day. The school is proposed to be a day school only. P.T.A. meetings are held by classes and only one general meeting per year is held. It is anticipated that two school dances would be held during the school year.

Considering these factors together, as discussed in Part IV B. of this report, the Hearing Examiner concludes that the 650 enrollment cap for the regular school year is appropriate only if the proposed summer school and the after-school and weekend activities are severely limited and conditioned. While this record would justify rejecting any summer school, the Hearing Examiner recommends a cap of 100 students and 15 staff for summer school, unless and until an additional access road is provided for the school, as will be discussed in Part V of this report. A cap of 250 students and 25 staff is recommended for Saturday German language classes conducted on campus. Other recommended conditions and limits on activities are discussed in Part V of this report.

The Hearing Examiner agrees with Technical Staff that the buffering, landscaping and setbacks are all adequate to protect the neighbors from on-campus activities (Exhibit 23, p. 16):

All the outdoor sports and recreational facilities are buffered from the adjoining properties by landscape materials. The plant materials are located so as to buffer activities associated with the facilities. Because the outdoor sports and recreational facilities are buffered from the adjoining properties, they would not constitute an intrusion into the adjoining residential properties. The modified multi-purpose activity court would be located on the north side of the site, 350 feet away from the closest residential uses to the east of the site.

- (b) *If a Private Educational Institution operates or allows its facilities by lease or other arrangement to be used for: (i) tutoring and college entrance exam preparatory courses, (ii) art education programs, (iii) artistic performances, (iv) indoor and outdoor recreation programs, or (v) summer day camps, the Board must find, in addition to the other required findings for the grant of a Private Education Institution special exception, that the activities in combination with other activities of the institution, will not have an adverse effect on the surrounding neighborhood due to traffic, noise, lighting, or parking, or the intensity, frequency, or duration of activities. In evaluating traffic impacts on the community, the Board must take into consideration the total cumulative number of expected car trips generated by the regular academic*

program and the after school or summer programs, whether or not the traffic exceeds the capacity of the road. A transportation management plan that identifies measures for reducing demand for road capacity must be approved by the Board.

The Board may limit the number of participants and frequency of events authorized in this section.

Conclusion: This subsection and its proper application in this case were discussed at length in Part IV. B. 2. of this report. Based on the entire record and on the referenced discussion, the Hearing Examiner finds that the level of activity generated by the German School (*i.e.*, the cumulative volume of trips on Chateau Drive) is currently having serious adverse consequences upon the neighbors, and that a summer school, at the requested intensity, would add to that problem. As stated in the Zoning Ordinance, *“The Board may limit the number of participants and frequency of events authorized in this section.”* The Hearing Examiner therefore recommends the caps discussed in the previous section and the elimination of three of the five annual events which draw 500 or more people, the Christmas party for German language classes, Summer celebration for German language classes, and the Easter Bazaar. The Hearing Examiner also recommends elimination of the flea market, which draws about 250 people. Other conditions are recommended in Part V of this report.

(c) *Programs Existing before April 22, 2002.*

(1) *Where previously approved by the Board, a private educational institution may continue the operation of (i) tutoring and college entrance exam preparatory courses, (ii) art education programs, (iii) artistic performances, (iv) indoor and outdoor recreation programs, or (v) summer day camps, whether such programs include students or non-students of the school, if the number of participants and frequency of events for programs authorized in 59-G-2.19(b) are established in the Board’s approval.*

(2) *Where not previously approved by the Board, such programs may continue until April 22, 2004. Before April 22, 2004, the underlying special exception must be modified to operate such programs, whether*

such programs include students or non-students of the school. The Board may establish a limit on the number of participants and frequency of events for authorized programs.

Conclusion: Petitioner's proposals include both continuation of existing programs and addition of many activities that have not been formally approved by the Board, as outlined in Parts II. D. 2 and 3 of this Report.

(d) *Site plan.*

(1) *In addition to submitting such other information as may be required, an Petitioner shall submit with his application a site plan of proposed development. Such plan shall show the size and shape of the subject property, the location thereon of all buildings and structures, the area devoted to parking and recreation facilities, all access roads and drives, the topography and existing major vegetation features, the proposed grading, landscaping and screening plans and such other features necessary for the evaluation of the plan.*

(2) *No special exception, building permit or certificate of occupancy shall be granted or issued except in accordance with a site plan of development approved by the board. In reviewing a proposed site plan of development the board may condition its approval thereof on such amendments to the plan as shall be determined necessary by the board to assure a compatible development which will have no adverse effect on the surrounding community, and which will meet all requirements of this chapter. Any departure from a site plan of development as finally approved by the board shall be cause for revocation of the special exception, building permit or certificate of occupancy, in the manner provided by law.*

Conclusion: The subject case involves a modification petition, not a new special exception.

Petitioner has submitted a comprehensive set of plans, which are more than sufficient to allow evaluation of the proposed modifications. As stated above, the proposed physical changes to the campus will be compatible with the community.

(e) *Exemptions. The requirements of Section G-2.19 do not apply to the use of any lot, lots or tract of land for any private educational institution, or parochial school, which is located in a building or on premises owned or leased by any church or religious organization, the government of the United States, the State of Maryland or any agency thereof, Montgomery County or any incorporated village or town within Montgomery County. This exemption does not apply to any private educational institution*

which received approval by the Board of Appeals to operate a private educational institution special exception in a building or on a lot, lots or tract of land that was not owned or leased by any church or religious organization at the time the Board of Appeal's decision was issued.

Conclusion: This subsection is not applicable.

- (f) *Nonconforming uses. Nothing in this chapter shall prevent any existing private educational institution which obtained a special exception prior to the effective date of this chapter, from continuing its use to the full extent authorized under the resolution granting the respective special exception, subject, however, to division 59-G-4 of this chapter.*

Conclusion: This subsection is not applicable.

- (g) *Public Buildings.*

(1) *A special exception is not required for any private educational institution that is located in a building or on premises that have been used for a public school or that are owned or leased by Montgomery County.*

(2) *However, site plan review under Division 59-D-3 is required for:*

- (i) *construction of a private educational institution on vacant land owned or leased by Montgomery County; or*
- (ii) *any cumulative increase that is greater than 15% or 7,500 square feet, whichever is less, in the gross floor area, as it existed on February 1, 2000, of a private educational institution located in a building that has been used for a public school or that is owned or leased by Montgomery County. Site plan review is not required for: (i) an increase in floor area of a private educational institution located in a building that has been used for a public school or that is owned or leased by Montgomery County if a request for review under mandatory referral was submitted to the Planning Board on or before February 1, 2000, or (ii) any portable classroom used by a private educational institution that is located on property owned or leased by Montgomery County and that is in place for less than one year.*

Conclusion: This subsection is not applicable.

- (h) *Applications filed before May 6, 2002. Any application filed before May 6, 2002 for a private educational institution special exception or modification of a private educational institutional special exception must comply with the requirements of Article 59-G and Article 59-E in effect at the time the special exception was filed.*

Conclusion: This subsection is not applicable.

E. Additional Applicable Standards

59-G § 1.23. General development standards

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

Conclusion: The following Table from Technical Staff Report (Exhibit 23, p. 12) demonstrates compliance with all development standards. A correction has been made by the Hearing Examiner to accurately reflect building coverage, based on evidence received after Staff filed its report:

Development Standard Table

| | <u>Required</u> | <u>Proposed</u> |
|--|-----------------------------------|---------------------------------------|
| Minimum lot area | 2 acres | 16.93 acres |
| Maximum lot coverage (.59-C-1.328) | 184,395 sq. ft. (25% of lot area) | 106,752 sq. ft. (14.47 % of lot area) |
| Off-street parking | 152 spaces | 172 spaces |
| Minimum lot width (59-C-1.322) at street line at building line | 25 feet 150 feet | 578 feet 810 feet |
| Maximum building height | 50 feet | 35 feet |
| Minimum setbacks (59-C-1-323) Front Side | 50 feet 17 feet | 250 feet 112 feet |

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

Conclusion: Zoning Ordinance §59-E-3.7 requires that private educational institutions provide “[o]ne parking space for each employee, including teachers and administrators, plus sufficient off-street parking space for the safe and convenient loading and unloading of students, plus additional facilities for all student parking.” Technical Staff stated (Exhibit 23, p. 12):

The use is in compliance with the requirements of Section 59-E for parking requirements since the existing parking facilities were approved as part of the existing special exception and the number of parking spaces, students and employees will not change under the modification to the special exception. Section 59-E-3.7 requires for educational institutions, private: one parking space per employee, plus sufficient off-street parking space for loading and unloading space and student parking. 102 employees, 35 student drivers and 15 visitor/loading spaces are anticipated for a total of 152 spaces required. 172 spaces are provided. Of the parking spaces provided, 5 are required to be handicap accessible. Six handicap or accessible parking spaces are provided.

The revised TMP indicates that the school will actually provide 175 off-street spaces (Exhibit 41(d), p.14), and that satellite parking will be arranged for events where the number of cars arriving is expected to exceed 175 vehicles (Exhibit 41(d), p. 20). The proposed parking total of 175 spaces is compliant with Zoning Code §59-E-3.7.

- (c) ***Minimum frontage.*** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*
- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
 - (2) *Sand, gravel or clay pits, rock or stone quarries.*
 - (3) *Sawmill.*
 - (4) *Cemetery, animal.*
 - (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
 - (6) *Riding stables.*
 - (7) *Heliport and helistop.*

Conclusion: Not applicable.

- (d) ***Forest conservation.*** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must*

not approve a special exception that conflicts with the preliminary forest conservation plan.

Conclusion: Technical Staff indicates that Petitioner submitted a revised forest conservation plan on September 16, 2008. This plan identifies the location of the proposed new building, the limits of disturbance, and measures to protect trees outside the limits of disturbance. According to Staff,

The approved forest conservation plan takes into consideration future expansion, and any forest removal associated with the current plan is incorporated into the earlier approvals. The current plan has no impact on the conservation easements and does not generate any additional planting requirements. It is [therefore] not necessary for the Planning Board to act on a forest conservation plan associated with this special exception. [Exhibit 23, pp. 7-8 and Attachment 11.]

The Hearing Examiner finds that the subject site is governed by an approved forest conservation plan, and that the proposed special exception will be consistent with that plan.

- (e) ***Water quality plan.*** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Petitioner filed a stormwater management concept plan (Exhibit 11), which was approved by the Department of Permitting Services on June 30, 2008 (Exhibit 23, Attachment 12). Max Kantzer, Petitioner's civil engineer, testified (10/20/08 Tr. 117-126) that the school's existing stormwater management system includes channel protection (*i.e.*, quantity controls), and water quality protection. The new facility will be built primarily on existing impervious area, with some small portion of it being

new impervious area, and the concept plan calls for a portion of the building to have a green roof, three water quality facilities, bio-retention facilities, and some recharge. The increase in impervious area from the multi-court will be small. In Mr. Kantzer's opinion, the actual runoff increase from this facility would be negligible. The Hearing Examiner concludes that the special exception sought in this case would be consistent with the stormwater management concept plan approved by DPS.

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

Conclusion: Petitioner plans to install a new entrance sign, as discussed in Part II.D.1.d. of this report. The proposed new sign is depicted on pages 31-32, above. It will be 12 feet, 3 inches in length, and 3 feet, 4 inches tall. In consultation with neighbors who participated in the community meeting process, Petitioner selected finished brick as the base of the sign, and a cast stone and pre-cast element as the top portion of the sign. Petitioner will have to obtain a permit for the new sign and transmit it to the Board of Appeals before posting the new entry sign.

(g) **Building compatibility in residential zones.** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: The compatibility of the proposed structures with their surroundings is discussed above in connection with the requirements of Zoning Code Sections 59-G-1.21(a)(4) and 59-G-2.19(a)(2). The Hearing Examiner concludes that the structures planned in this case will be compatible based on the nature of the building materials, the low elevations of the buildings, the thorough landscape buffer and the distance from all residences.

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

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

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

Conclusion: As mentioned in Part II. D. 1. c. of this report, Petitioner's counsel asserted in his Pre-Hearing Summary (Exhibit 3(b), p. 1) and at the hearing (10/20/08 Tr. 17) that the new lighting would consist of bollards near the new building and lights mounted on the sides of the new building, but neither the submitted lighting plans (Exhibits 6(a) and (b)) nor the testimony describes lighting mounted on the sides of the new building. If Petitioner intends to add such lighting, it will have to apply for an administrative modification of its special exception. Technical Staff reports that "[t]he new site lighting will not directly impact the adjoining properties, will be buffered from the adjoining properties by landscaping and a County permit for the installation of the lights will be obtained by the school." Exhibit 23, p. 13. Based on the evidence and the photometric studies, the Hearing Examiner concludes that the new bollard lights will not result in lighting in excess of 0.1 footcandles at the side and rear property lines, nor will it allow direct lighting to intrude into adjacent residential properties.

59-G-1.26. Exterior appearance in residential zones.

A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.

Conclusion: The compatibility of the proposed structures with their surroundings is discussed above in connection with the requirements of Zoning Code Sections 59-G-1.21(a)(4) and 59-G-2.19(a)(2). The Hearing Examiner concludes that the structures planned in this case will be compatible based on the nature of the building materials, the low elevations of the buildings, the thorough landscape buffer and the distance from all residences.

Based on the testimony and evidence of record, I conclude that, with the limits and conditions recommended in Part V of this report, the changes proposed by Petitioner will meet the specific and general requirements for the proposed use

V. RECOMMENDATIONS

A. Discussion of Appropriate Remedies

As discussed above, the Hearing Examiner finds that both existing and proposed operational characteristics of the German School, in conjunction with unusual site conditions (*i.e.*, site access limited to one small cul-de-sac road), create excessive adverse effects on the immediate neighborhood along Chateau Drive. Petitioner has agreed to a number of steps to address these problems, as outlined in Part II. D. 3. d. of this report, including a TMP and a CLC, but the Hearing Examiner finds that these steps will not be sufficient absent limits on enrollment caps for both Saturday German language classes and the proposed summer school, and other conditions, as specified in Part V. B of this report, below.

Members of the community have suggested a number of remedies for the adverse impacts they are experiencing:

All the neighbors ask that the proposed summer school program be rejected. Mr. and Mrs. Sowalsky suggest that the Saturday German language classes should be eliminated, or alternatively,

limited to no more than 250 students. Exhibit 81. Mr. Sowalsky also wants limits placed on the Christmas bazaar requiring off-site parking, shuttle busses and a 7:30 p.m. closing time. He opposes any Sunday activity except for the Ecumenical Services. Exhibit 75.

In their letter of November 21, 2008 (Exhibit 44), the neighbors recommended the following:

1. The German School to house buses off-site or use private bus transportation.
2. All students and buses or car pools for departure from the school each day. No single car pickups.
3. For all special events where more than 175 vehicles are expected, satellite parking is mandatory for vehicles in excess of 175.
4. No parking on neighborhood streets allowed at any time.
5. Development of an annual vehicle trip budget for approved activities. A total number of vehicle trips would be approved for annual operations and adjusted by the school within the budget allowance, to meet specific or changing school needs. Car pooling or busing could cause a budget savings in single car trips to be applied to vehicle trips for other activities.

Ms. Hess would also do away with the Christmas bazaar, the Easter bazaar and the rummage sale (*i.e.*, Flea market) as activities which bring a lot of traffic to the street and are unnecessary to the educational mission of the school. She objected, as well, to Paragraph #23 on page 10 of the amended statement of operations (Exhibit 80(a)), because, in her opinion, that provision “sublets the institution out to other institutions . . . interested in using the fields or the classrooms.” 4/7/09 Tr. 207.

In his letter of January 27, 2009 (Exhibit 53), Mr. Bachrach made the following three suggestions:

- a. Set a cap of a maximum of 4 events per year on “large scale” events (*i.e.*, those likely to attract more than 100 attendees;
- b. Prohibit events lasting past 9 p.m. or occurring on weekends;
- c. Prohibit activities (such as dance and language lessons) that are not part of the regular school curriculum and are offered in other places.

The Hearing Examiner has carefully considered these suggestions and has incorporated many of them into his recommendations, while attempting to balance them with the needs of the German

School. The Hearing Examiner has not recommended total denial of the summer school program, but has recommended that it be limited to 100 participants and 15 staff, which will drastically reduce its impact on the neighborhood, especially in combination with the other measures recommended by the Hearing Examiner.

While the Hearing Examiner is loathe to limit an activity as central to the German School as German language classes, he feels compelled to recommend such a limit for the Saturday classes (not the regular weekday German language classes) because they are excessively intrusive into the neighborhood's weekend peace and quiet, and Petitioner has not been able to come up with a sufficient plan to reduce the impact itself, despite repeated invitations from the Hearing Examiner. Moreover, many of the participants are not actually German School students. The Hearing Examiner has therefore recommended a cap of 250 participants and 25 staff for on-site, Saturday German language classes.

The Hearing Examiner has also recommended conditions which would eliminate the Easter bazaar, the flea market, and some other large scale events. He has not recommended eliminating the Christmas bazaar because Ms. Young testified that it was a very important cultural event and fund raiser for the school. 4/7/09 Tr. 217-218. Paragraph #23 on page 10 of the amended statement of operations (Exhibit 80(a)) should be modified to prohibit use of the gymnasium on weekends by anyone other than German School students and staff and their families, and to prohibit such use after 9:00 p.m.

As requested by the neighbors, the Hearing Examiner included a recommended condition prohibiting parking on Chateau Drive for school-related activities, and notes that the revised TMP (Exhibit 40(d)) requires satellite parking for events likely to attract more than 175 vehicles. The Hearing Examiner believes it would be best to see how the revised TMP, the proposed CLC and other newly recommended conditions affect traffic before imposing the additional suggested traffic controls.

However, there is one other option that was not fully explored at the hearings in this case – the possibility of providing additional access to the school, probably from Kendale Road on the west. At the second hearing, Ms. Hess testified that when the school was originally built, there were no residences along Chateau Drive (4/7/09 Tr. 204-205), and thus there was no reason for the Board to permit access from Kendale Road, where existing residents might be disturbed. When the homes were first constructed along Chateau Drive, there was a low level of activity at the school. In recent years, that has grown exponentially and now impacts upon the residents of that small street. 4/7/09 Tr. 205-206. As it stands now, the entire burden falls on the residents lining Chateau Drive. It is thus time to consider whether access on the other side of the school should be permitted to reduce the burden upon the residents who live on Chateau Drive. At present, the Board's prior resolutions prohibit any such access, so an additional modification petition would have to be filed with the Board.

If the German School wants to expand its activities to the extent it has requested, it should consider petitioning the Board to modify the restriction against having an access on Kendale Road. The Hearing Examiner cannot recommend such a change because Petitioner has not requested it, and the community notice did not raise it as a possibility.

The Hearing Examiner has recommended a condition which would require this issue to be explored at CLC meetings. Such meetings should include neighbors from the west side of the school (*i.e.*, the Kendale Road side), as well as from the east side (*i.e.*, the Chateau Drive side). The Hearing Examiner can make no findings as to the propriety or efficacy of such an additional access because it was not sought by Petitioner, and there is no evidence in the record from which it could be evaluated. There is ample evidence that prior to the 1994 expansion, the German School generated much less activity than it presently does.

B. Recommended Approvals, Conditions and Limitations

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition CBA-2684-C, which seeks to modify the existing special exception (CBA-2684 and CBA-2684-B) for a private educational institution operated by the Federal Republic of Germany (German School – Washington, D.C.), at 8617 Chateau Drive, Potomac, Maryland, be *granted in part* and *denied in part*. I recommend that it be granted in full as to the physical changes proposed for the campus; that the proposed summer school be permitted with a greatly reduced student cap and no weekend activity, as set forth below; that regular school-year extra-curricular weekday and Saturday activities be limited as spelled out below; that no Sunday activities be permitted, except for the Ecumenical Service specified as Item #14 on page 12 of the Second Amended Statement of Operations (Exhibit 80(a));²⁴ that certain extracurricular events be eliminated, as set forth below; that the effective date of the Board’s resolution with regard to operational characteristics be set for a date after the end of the current school year to avoid a disruption in current school-year operations; that the Statement of Operations and the TMP be amended to incorporate the conditions specified below; and that the Board retain jurisdiction over this case to determine, based on an annual review, whether summer school activities are creating an excessive adverse impact on the neighborhood. The following conditions are recommended:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. All terms and conditions of the approved special exceptions shall remain in full force and effect, except as modified by the Board as a result of this Modification Petition. The

²⁴ The only Sunday activities listed in the Second Amended Statement of Operations are the Ecumenical Church service and an occasional athletic competition which may take place on “2-3 Saturdays and/or Sundays” (Item 22(a)). The Hearing Examiner sees no reason why athletic competitions cannot be restricted to weekdays and Saturdays during the school year to give the neighborhood at least one day of rest each week.

German School's Statement of Operations must be amended to include all of the changes required by these conditions.

3. Regular weekday School operations are limited to 650 students and 102 employees on site at any time, and at no time shall Petitioner admit a greater number of students than it is able to appropriately manage with the facilities, faculty and staff available at the time.

Generally, staff on site will be approximately 60 employees, but for staff conferences (approximately eight times per year) and other special activities, up to 102 employees may be on site.

4. Saturday German language classes conducted on site are capped at 250 participants and 25 staff. No additional limits are recommended for German language classes held on Wednesdays during the regular school year.
5. The following activities listed in the Second Amended Statement of Operations (Exhibit 80(a)) must be discontinued:²⁵ Item #1. Four (4) of the twelve (12) student theater, music and art productions; Item #7.d. the Christmas party for German language classes; Item # 7.e. Summer celebration for German language classes; Item #10, the Easter Bazaar; and Item #12, the Flea market.
6. No meetings or activities may continue on campus after 10 p.m., nor beyond the times specified in the Statement of Operations.
7. No Sunday activities are permitted, except for the Ecumenical Service specified as Item 14 on page 12 of the Second Amended Statement of Operations (Exhibit 80(a));
8. Paragraph #23 on page 10 of the amended statement of operations (Exhibit 80(a)) must be modified to prohibit use of the gymnasium on weekends by anyone other than German

²⁵ Item numbers are a reference to the Items as listed in the matrix on pp. 10 to 12 of the Statement of Operations and reproduced on pp. 42-44 of this report.

School students and staff (and their families), and to prohibit such use after 9:00 p.m.

9. A summer program is permitted under the following conditions: The summer program must be conducted for no more than six (6) weeks in the summer, from 8:00 am to 3:00 pm, on weekdays, with aftercare available until no later than 5:00 pm. All summer activity must terminate by 5:00 p.m. each weekday, and there must be no school activity on the weekends during the summer. The total enrollment of the summer program is limited to 100 students, ages 3 to 15 years, and 15 employees on site at any time, and at no time shall Petitioner admit a greater number of students to its summer programs than it is able to appropriately manage with the facilities. No athletic competition with other schools will be permitted on campus during the summer months.
10. Petitioner must implement the traffic management program described in the revised Transportation Management Plan (TMP), Exhibit 41(d), as modified to comply with the conditions set forth herein, and to provide a Saturday bus, carpool and/or shuttle bus system for the German language classes.
11. Vehicles arriving at the school are not permitted to be stacked (*i.e.*, queued) on off-site streets during morning drop-off and afternoon pick-up periods.
12. No parking is permitted on Chateau Drive for school-related activities, and Petitioner must enforce this restriction through its TMP.
13. The condition in the original December 9, 1969 grant (Exhibit 17(a), p. 4, Condition #9), which specifies that students driving to school shall be limited to insured students in the 12th and 13th grade, is hereby modified to read: "Students driving themselves to school shall be limited to students in the top two grades of the school, and students who do so must be properly licensed and insured. In no event shall a student drive to school in violation of applicable motor vehicle regulations."

14. There must be no leaf blowing on site before 8 a.m. on weekdays and 10 a.m. on weekends.
15. The new entrance sign may not be posted until Petitioner has received a permit therefore from Montgomery County Department of Permitting Services (DPS) and has filed a copy thereof with the Board of Appeals.
16. Petitioner must comply with all terms of the final forest conservation plan approved by M-NCPPC Environmental Planning Staff.
17. Petitioner must comply with a stormwater management plan, as approved by the County Department of Permitting Services (DPS).
18. Petitioner must create a Community Liaison Council (CLC) to discuss and address operating impacts and other issues of concern to Petitioner and/or the community. The CLC shall consist of Petitioner's representative and representatives from any civic association or homeowners association within the defined neighborhood wishing to participate. The adjacent and confronting neighbors must also be invited to participate, and the People's Counsel must be included as an *ex officio* member of the CLC. Meetings must be held at least twice a year, and minutes must be kept by Petitioner and filed with the Board of Appeals annually. The terms of the CLC proposed on pages 17-18 of the revised TMP (Exhibit 41(d)) are approved, except that residents of Kendale Road (to the west of the school) must also be invited to participate.
19. That Petitioner shall explore, at CLC meetings, the possibility of creating a new school access on Kendale Road, to share some of the traffic burden created by the school.
20. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all

applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

21. The Board shall retain jurisdiction over this case until further notice to determine, based on an annual review, whether summer school activities are creating an excessive adverse impact on the neighborhood. To avoid disruption, this resolution shall not affect operations ongoing at the German School in the current 2008-2009 school year, which ends in late June, 2009.

Dated: May 19, 2009

Respectfully submitted,

Martin L. Grossman
Hearing Examiner