

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

| | | |
|--|---|-----------------------------|
| IN THE MATTER OF: | * | |
| THE REBECCA LIMITED PARTNERSHIP | * | |
| Petitioner | * | |
| Harold Weinberg. | * | |
| Ruth Hoffman | * | |
| Gregory Fields | * | |
| Charles T. Grimsley | * | Board of Appeals No. S-2772 |
| For the Petitioner | * | (OZAH No. 10-26) |
| <u>Michele M. Rosenfeld, Esquire</u> | * | |
| Attorney for the Petitioner | * | |
| ***** | | |

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

| | Page No. |
|---|-----------------|
| I. STATEMENT OF THE CASE..... | 2 |
| II. FACTUAL BACKGROUND | 3 |
| A. History of the Use..... | 3 |
| B. The Subject Property and Surrounding Neighborhood | 3 |
| C. The Master Plan..... | 6 |
| D. Proposed Use..... | 7 |
| E. Public Facilities..... | 11 |
| F. Environmental Impacts | 12 |
| G. Community Concerns..... | 12 |
| III. SUMMARY OF THE HEARING | 12 |
| IV. FINDINGS AND CONCLUSIONS | 17 |
| A. Standard for Evaluation..... | 18 |
| B. General Standards..... | 19 |
| C. Specific Standards: Charitable or philanthropic institution..... | 24 |
| D. Additional Applicable Standards | 28 |
| V. RECOMMENDATIONS | 30 |

I. STATEMENT OF THE CASE

On May 14, 2010, Petitioner, The Rebecca Limited Partnership, filed a petition for a special exception to establish a charitable institution located within an existing complex of housing for the elderly (the Rebecca House)¹ at 10920 Connecticut Avenue, Kensington, Maryland, pursuant to Section 59-G-2.21 of the Zoning Ordinance. The subject property is in the R-60 Zone. Petitioner plans to sublease the existing 4,000 square foot space on the first floor of the building to two charitable and philanthropic institutions, the American Childhood Cancer Organization and the National Association for Children of Alcoholics.

Notice of a public hearing for September 14, 2010, was issued on June 3, 2010. Exhibit 11. On August 23, 2010, the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) filed its Report (Exhibit 15),² directly with the Board of Appeals recommending approval of the Petition, with conditions.

Letters of support were received from Maryland State Delegate Alfred Carr, Jr, (Exhibit 12), Congressman Chris Van Hollen (Exhibit 19) and Kensington Mayor Peter Fosselman (Exhibit 20). There has been no opposition.

The hearing was held, as scheduled, on September 14, 2010, and the record closed on September 24, 2010, following receipt of the transcript.

Based on a review of the entire record, as will appear more fully below, the Hearing Examiner concludes that the petition should be granted, subject to the conditions recommended in Part V of this report. Filed coincident with this report is an Order extending the Hearing Examiner's time to file his report from October 25 to November 5, 2010.

¹ The Rebecca House is a 101-bed nursing and care home approved by the Board of Appeals in 1966 pursuant to Special Exception No. CBA-2041. Exhibit 3.

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

II. FACTUAL BACKGROUND

A. History of the Use

Technical Staff reports that the 4,000 square feet of office space that is the subject of this petition has been approved for a continuous series of special exception uses since 1973. Exhibit 15, p.2:

. . . In 1973, the Board approved a “charitable and philanthropic institution” special exception for the Mental Health Association of Montgomery County (S-271). That use included, among other things, a 24-hour telephone answering service to give information and referral services, and provided training in the form of educational materials, seminars and workshops.

In 1989, that use was changed to an approval for a private educational institution for Threshold Services, Inc. (Petition No. S-1731) which had a staff of 9 full-time and 4 part-time employees, and provided counseling on the property for up to 9 people per day with chronic mental illnesses.

In 2002, the special exception was transferred to the Make-A-Wish Foundation whose operations were almost operationally identical to the current special exception application [although Make-A-Wish Foundation theoretically operated as a private educational institution use pursuant to the Board’s resolution effective January 7, 2002 (Exhibit 9)]. . . .

The special exception use granted to Make-A-Wish Foundation was deemed abandoned by the County because the tenant, Make a Wish Foundation, had moved out, and it had been vacant for over a year.

Tr. 14.

B. The Subject Property and Surrounding Neighborhood

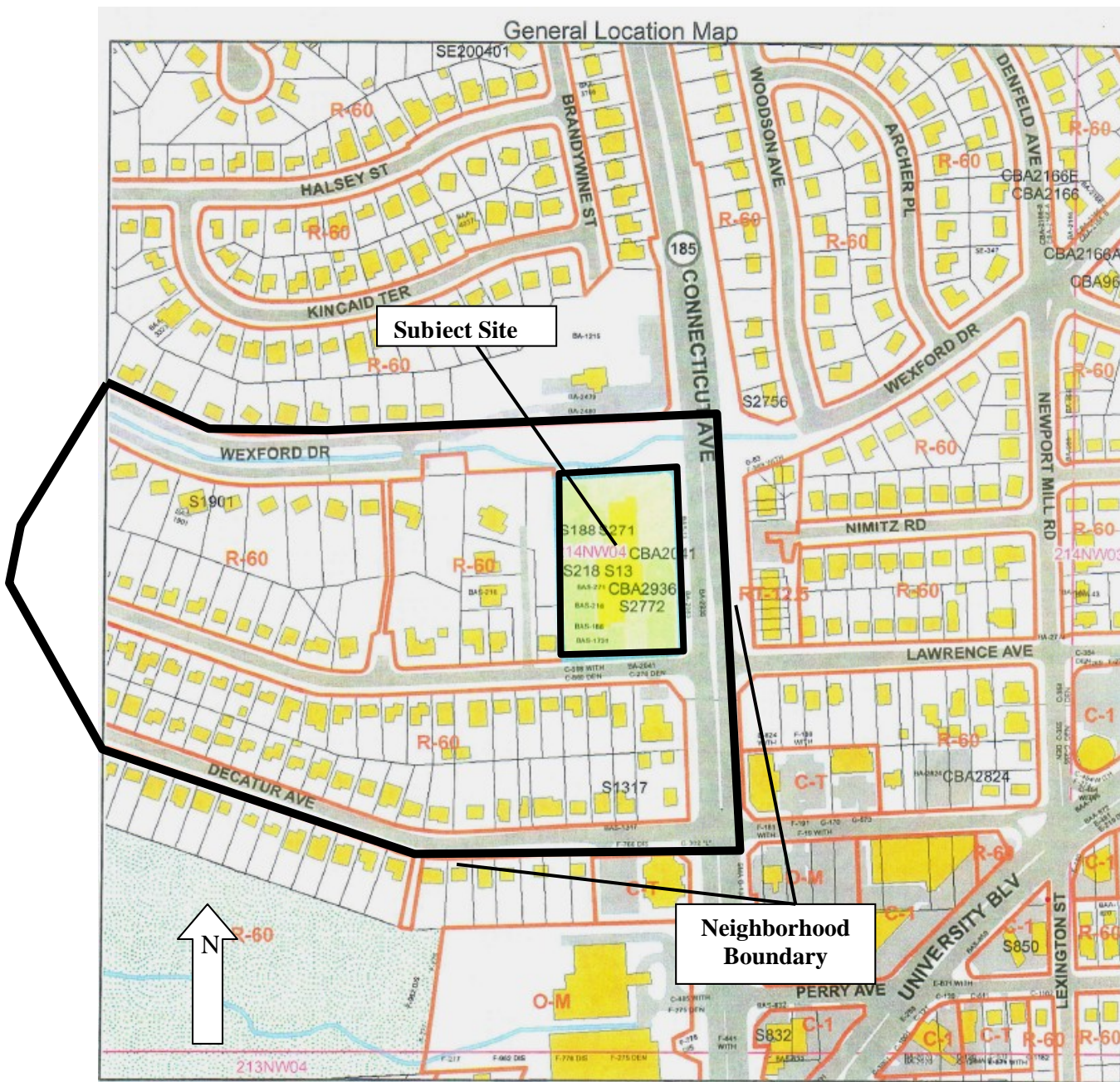
Technical Staff described the subject site as follows (Exhibit 15, p. 2):

The subject property is located at 10920 Connecticut Avenue, at the intersection of Connecticut Avenue and Lawrence Avenue in Kensington. The property is zoned R-60 and contains approximately 2.3 acres. The property is improved with a brick building that ranges from three to six stories because of the topography of the site. The building contains 101 units for the elderly and a paved parking area that contains approximately 94 parking spaces. Two driveways provide access to the site from Lawrence Avenue. No access is provided from Connecticut Avenue.

Rebecca House is depicted below (Exhibit 7(b)):



Technical Staff proposed the following definition of the General Neighborhood, which is not disputed by Petitioner: Wexford Drive to the north, Connecticut Avenue to the east, Denfeld Avenue to the west, and Decatur Avenue to the south. The Hearing Examiner also accepts this neighborhood definition, and it is shown (for the most part) on the Map provided as Attachment 1 to the Staff report (Exhibit 15). It is reproduced on the next page; however, Denfeld Avenue is off the map to the west.



The surrounding properties to the north, south, and west are zoned R-60, and according to Technical Staff, are developed with single-family homes. The property across Connecticut Avenue is zoned RT-12.5 and is developed with townhouses. Staff also reports that there are only two other special exception uses in the neighborhood. There is a community swimming pool on the adjoining property to the north, and a special exception was approved in 1986 for a non-resident medical practitioner’s office on Decatur Avenue. Exhibit 15, p. 3.

C. The Master Plan

The property at issue is subject to the 1989 Master Plan for the Communities of Kensington-Wheaton. The Master Plan recognized the already-built Rebecca House as an existing use, and recommended no changes to the use or zoning of the property. Tr. 33-34.

Technical Staff commented (Exhibit 15, p. 4) that the Master Plan includes a policy to “support special exception requests for installation of medical offices, adult day care, or other similar uses in apartment buildings with concentrations of the elderly.” (p.142) Because the Board of Appeals had previously approved uses at this site similar to the one proposed in this petition (*e.g.*, the Make-A-Wish Foundation), Staff reasoned that this analogous use must be consistent with the Master Plan recommendation.

The Hearing Examiner is not convinced that the proposed charitable institution use falls properly within the meaning of the sentence quoted from page 142 of the Master Plan since the uses mentioned in that sentence are clearly aimed at special exceptions which serve the elderly. However, the fact that the Master Plan supports specified special exception uses which serve the elderly does not mean that it opposes other special exceptions which do good works, even if they are not specifically directed towards serving the elderly.

The overall objectives of the Master Plan are stated on page 40 of the Plan:

To protect and stabilize the extent, location, and character of existing residential and commercial land uses.

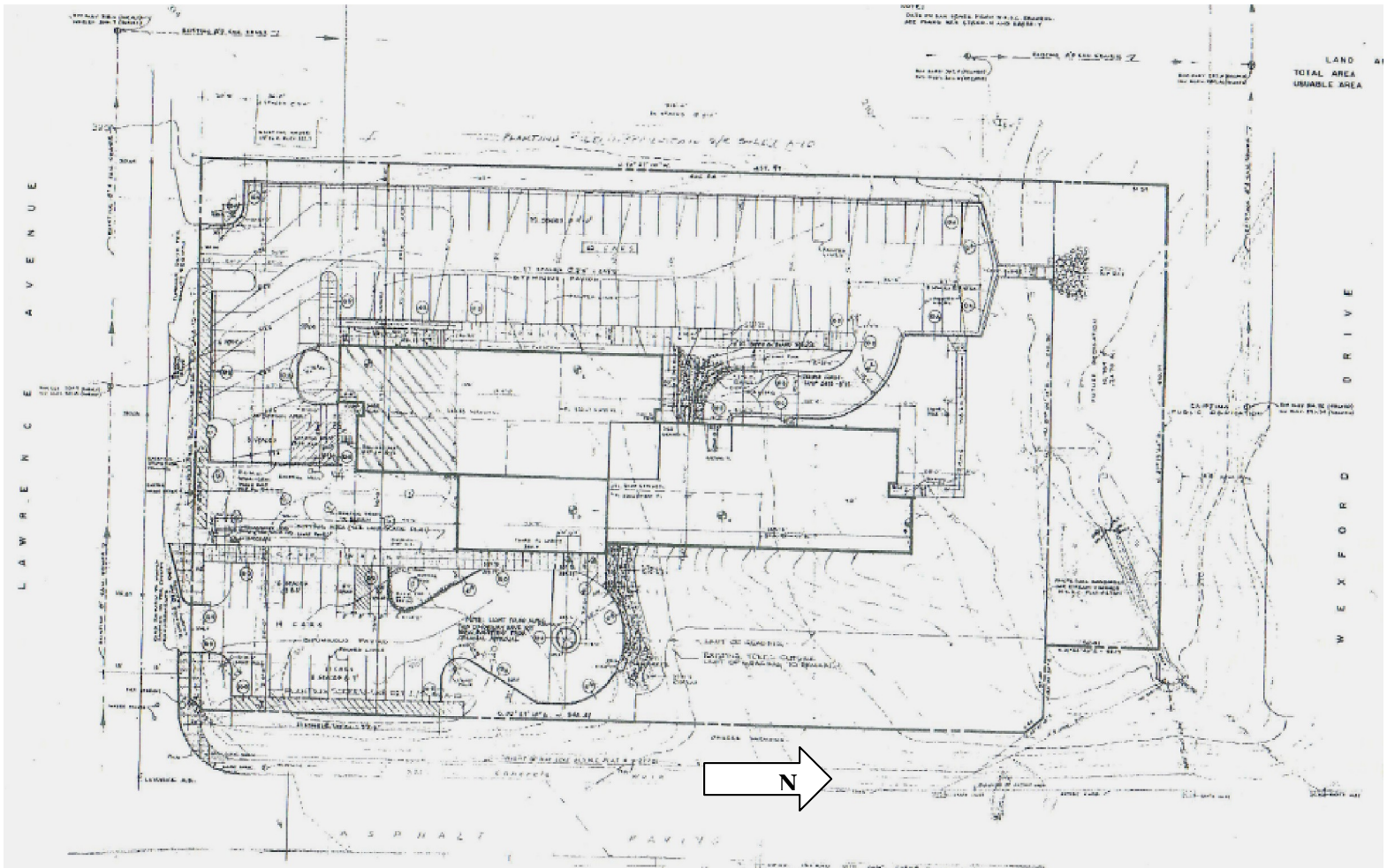
To maintain the well established low-to medium-density residential character which prevails over most of the planning area.

The proposed charitable uses would do nothing to disserve these objectives, and in fact, there is no evidence in this record that the proposed use would violate any recommendation or objective of the Master Plan. Moreover, both the Community-Based Planning Staff (Exhibit 15,

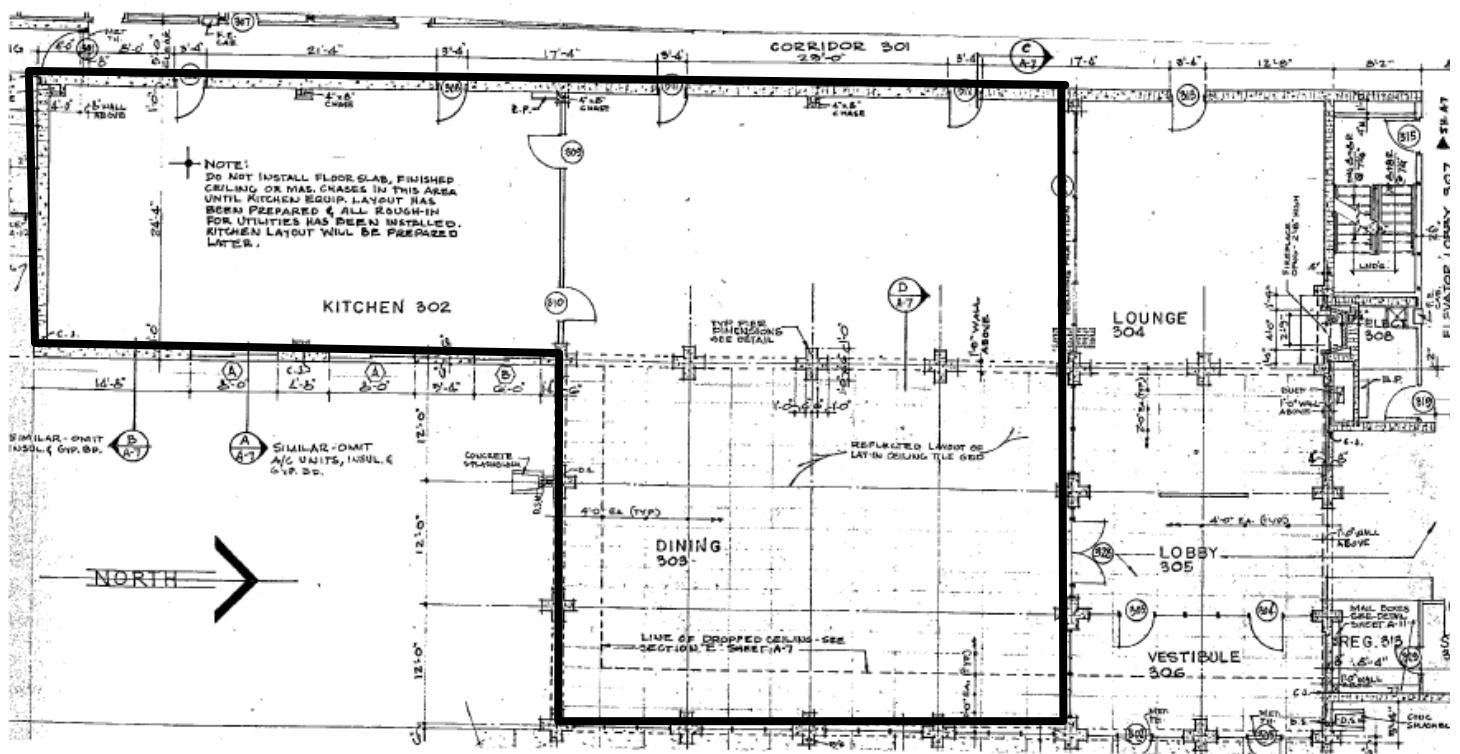
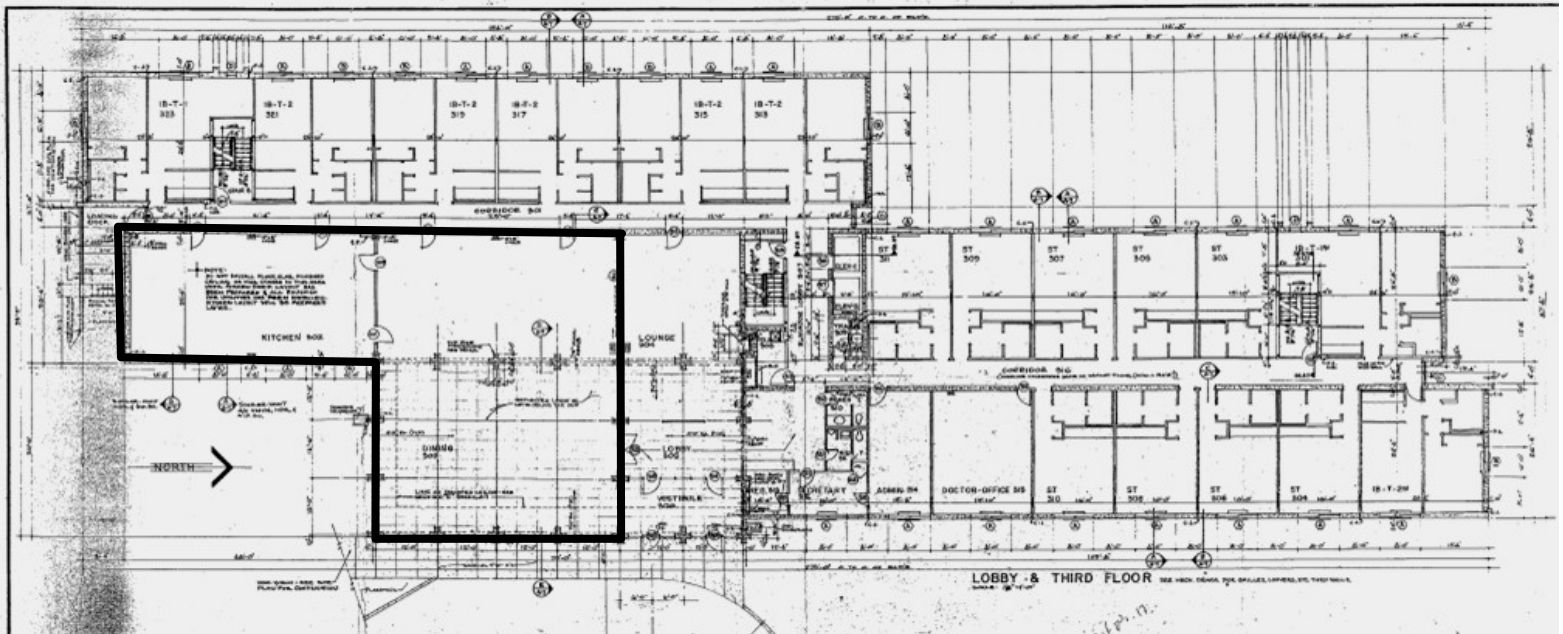
Attachment 5) and Petitioner’s land use expert (Tr. 33-34) opined that the proposed use is consistent with the Master Plan. Given this record and the absence of contrary evidence, the Hearing Examiner finds that the proposed use is consistent with the 1989 Master Plan for the Communities of Kensington-Wheaton.

D. Proposed Use

Petitioner, the Rebecca Limited Partnership, seeks a special exception so that it can sublease 4,000 square feet of vacant space on the first floor of the Rebecca House facility for the elderly to two charitable and philanthropic institutions, the American Childhood Cancer Organization (ACCO) and the National Association for Children of Alcoholics (NACoA). The use would co-exist with the 101 units of housing for the elderly in the Rebecca House. The Site Plan for the existing site (Exhibit 4) is shown below:



According to Technical Staff (Exhibit 15, p. 3), the 4,000 square foot space is already divided into offices and conference rooms and is accessible directly from both the exterior of the building and the main lobby of the building. The building floor plan (Exhibit 17) is shown below, with the specific area to be leased, on the southeast portion of the building, as outlined by Petitioner's agent at the hearing. It is followed by an expanded view of the lease area:



There will be no structural changes made to the building and no exterior changes whatever. Tr. 9 and 32. Petitioner's counsel also stated at the hearing that "There will be no exterior signage." Tr. 5. Technical Staff notes, "An approved special exception governs the existing lighting and landscaping. No changes to the approved landscape and lighting plans are proposed." Exhibit 15, p.5.

Proposed operations for the two charitable institutions are described in Petitioner's "Statement of Operations" (Exhibit 3(a)):

American Childhood Cancer Organization (ACCO) (formerly Candlelighters Cancer Foundation)

The American Childhood Cancer Organization (ACCO), founded in 1970 as the Candlelighters Cancer Foundation, is the largest private, grassroots non-profit in the United States providing services to children with cancer and their families. The national office of the ACCO, a duly organized § 501(c)(3) non-profit organization, coordinates the activities of 40 local nationwide affiliates, acts as the clearing house for childhood cancer treatment information through an 800 toll-free number, and acts as the distribution center of all ACCO publications. The ACCO responds to thousands of requests for treatment information from families via phone and email each year.

ACCO plans to lease approximately 1,600 square feet of office space at 10920 Connecticut Avenue within an existing 4,000 square feet space. Staff will access the space through a side door entrance to the building adjoining the parking lot where staff will park.

ACCO will employ a maximum of 6 full and part-time staff. It operates during normal business office hours, specifically 9:00 AM to 5:00 PM Monday through Friday, with an occasional meeting for staff in the evening (4 times a year maximum). ACCO does not conduct Board of Directors' meetings on-site: its directors are located across the country so all such board meetings are done via conference call (and evening or weekend calls are not conducted on-site).

ACCO's primary function is to act as a clearinghouse for childhood cancer information via telephone, email and our numerous publications. Their client contact is almost always at hospitals where children are being treated for cancer. Consequently, it would be extremely rare to have any direct client services at the office.

In summary, the only activities to be conducted by the American Childhood Cancer Organization at the Rebecca House location will be administrative and organizational in nature.

National Association of Children of Alcoholics

The National Association for Children of Alcoholics (NACoA) is a, duly organized § 501(c)(3) non-profit organization made up of members and affiliates who work on behalf of children of alcohol and drug dependent parents. NACoA's operations are in furtherance of its mission – *i.e.*, none of these vulnerable children should grow up in isolation and without support.

NACoA operations include the publication of periodic online and print newsletters; creating videos, booklets, posters and other educational materials to assist natural helpers to intervene and support children; hosting Internet website information about, and ways to help, children of alcoholics and other drug dependent parents; sending information packets to all who ask; and maintaining a toll-free phone available to all. These activities are limited to administrative and organizational tasks that support the mission on NACoA.

NACoA employs 5 full-time and 3 part time employees, and its hours of operation are 8:30 a.m. – 5:00 p.m. NACoA does not have customers, clients or patients. Visitors to the office would be occasional and would include individuals such as a professional research or writing consultant, or members of NACoA's board of directors.

Conditions have been proposed by Technical Staff to incorporate the hours and staff requirements suggested in Petitioner's Statement of Operations, while allowing Petitioner a little flexibility to increase staff permitted on the premises.

- Hours of operation are limited to 8:30 a.m. to 5:00 p.m., Monday thru Friday, with occasional meetings for staff and Board in the evening.
- The special exception is limited to a maximum of fifteen (15) full-time employees, plus a maximum of five (5) volunteers on the site at any time

These limitations have been included in the conditions recommended in Part V of this report; however, at Petitioner's request, the fourth condition recommended by Staff, which would have prohibited client visits to the site, has been modified. Petitioner's counsel asked that Technical Staff's recommended Fourth Condition be amended to prohibit "counseling or treatment on site," because "from time to time, one of the associations members may, in fact, arrive to pick up some literature or have a meeting, and so we didn't want there to be any question that that activity could occur on a periodic basis." Tr. 5-7. This appears to the Hearing Examiner to be a perfectly

reasonable request, and the changed language is included in the Hearing Examiner's recommended conditions.

E. Public Facilities

Subdivision will not be required in this case because the subject site is already subdivided. Exhibit 15, p. 8. Therefore, the Board of Appeals must determine the adequacy of the public facilities. Public school capacity is not an issue in this case because the nature of the special exception (charitable institutions) would preclude demand for school facilities. Technical Staff reports that the site "will continue to be adequately served by public facilities." Exhibit 15, p. 8.

Specifically with regard to transportation facilities, Technical Staff reports (Exhibit 15,p. 4):

Transportation Planning staff has not recommended any transportation-related conditions to support granting of the subject special exception request, since the application meets the transportation-related requirements of the APF test. The proposed use will not have an adverse effect on the transportation network within the immediate local area.

This conclusion is based on the following quotation from Transportation Staff (Exhibit 15, Attachment 6):

. . . the office space approved in 1989 for a non-profit agency in Special Exception S-1731 established a total of 11 peak-hour trips for the office facility. In comparison, the proposed ACCO and NACoA offices, based on current M-NCPPC Local Area Transportation Review/Policy Area Mobility Review Guidelines trip generation rates for an office, are estimated to generate six (6) peak-hour trips during the morning peak period and nine (9) peak-hour trips during the evening peak period.

The peak-hour trip estimates associated with the subject special exception use are not expected to exceed the previously approved 11 peak-hour trip threshold for the office facility. The proposed special exception use, therefore, satisfies the requirements of the APF test.

There is no evidence to the contrary in this record, and the Hearing Examiner therefore finds that there are adequate transportation facilities for the proposed use.

Technical Staff calculated that the existing Rebecca House use requires 53 parking spaces (51 for the 101 residential units and 2 for staff). Exhibit 15, pp. 4-5. The proposed special exception

use is calculated as office space. Zoning Ordinance Section 59-E-3.2 requires 2.7 parking spaces for each 1,000 square feet of office use that is located in the site's area (South Central) more than 1,600 feet from a metro station. Since 4,000 square feet will be leased for the proposed special exception, 11 parking spaces are required ($4 \times 2.7 = 10.8$). Thus, the total combined use requires at least 64 parking spaces ($53 + 11$). Staff notes that there are a total of 94 existing parking spaces on site, and therefore more than adequate parking is provided.

F. Environmental Impacts

A Natural Resources Inventory/Forest Stand Delineation (NRI/FSD) #42011001E was approved on July 16, 2010. Exhibit 14(a). Staff indicated on the NRI/FSD and in a separate letter (Exhibit 13(a)) that the use is exempt from forest conservation requirements. Environmental Planning staff explained that no forest conservation plan is required because "the application is for an existing structure and the proposed use will not result in clearing of existing forest or trees . . ." See Environmental Planning Memo of July 20, 2010 (Exhibit 15, Attachment 7).

Given the absence of external modifications, there are no environmental issues in this case.

G. Community Concerns

As mentioned in Part I of this report, there have been three letters of support, including from Maryland State Delegate Alfred Carr, Jr, (Exhibit 12), Congressman Chris Van Hollen (Exhibit 19) and Kensington Mayor Peter Fosselman (Exhibit 20). There has been no opposition, and Technical Staff has not indicated any community concerns. Exhibit 15, p.5.

III. SUMMARY OF THE HEARING

The hearing took place on September 14, 2010, as scheduled. Petitioner called four witnesses, Harold Weinberg, President of Miles Realty Company, the managing agent for Rebecca Limited Partnership; Ruth Hoffman, Executive Director of the American Childhood Cancer

Organization; Gregory Fields, Vice-president of the National Association for Children of Alcoholics; and Charles T. Grimsley, Jr., a land use expert. There were no other witnesses at the hearing.

Petitioner's attorney, Michele Rosenfeld, Esquire, represented that there will be no exterior signage. Tr. 5. She also asked that Technical Staff's recommendation for a condition prohibiting client visits be amended to prohibit "counseling or treatment on site," because "from time to time, one of the associations members may, in fact, arrive to pick up some literature or have a meeting, and so we didn't want there to be any question that that activity could occur on a periodic basis." Tr. 5-7.

1. Harold Weinberg (Tr. 10-17):

Harold Weinberg testified that he is the President of Miles Realty Company, the managing agent for Rebecca Limited Partnership. He is authorized to testify on behalf of Petitioner. Petitioner seeks a special exception to allow a philanthropic or nonprofit organization to operate within the Rebecca House. He located the lease area as in the southeastern corner, highlighted on the floor plan, Exhibit 17.

The proposed hours of operation are 8:30 to 5:00 p.m., Monday through Friday, with occasional or intermittent evening or weekend hours between 9:00 and 5:00. There would be a maximum of 15 full-time staff, plus a maximum of five volunteers at any time.

According to Mr. Weinberg, this space been leased for similar uses in the past since the early 70s. The special exception that we had was deemed abandoned by the County because the tenant, Make a Wish Foundation, had moved out, and it had been vacant for over a year.

There are about 94 parking spaces are on the property, and eleven parking spaces are to be for the special exception tenants. [Petitioner's counsel proffered that there are 64 spaces that are required under the Zoning Code for the existing tenants, the residential tenants of the Rebecca

House, and there are 11 that are required for this use. “So with 94 existing spaces, they are far in excess of their minimum parking capacity.” Tr. 15.]

Mr. Weinberg concurred with changing Technical Staff’s condition No. 4 to read that no treatment or counseling would occur on the premises. Rebecca House agrees to be bound by the statement of operations in the record, and any conditions of approval that may be issued for the special exception.

2. Ruth Hoffman (Tr. 17-22; 26-27):

Ruth Hoffman testified that she is the Executive Director of the American Childhood Cancer Organization. It was funded in 1970 as Candlelighters Childhood Cancer Foundation, and it is the largest grass roots organization for kids with cancer in the world. It is also the largest distributor of books for children with cancer. She described the books and noted that everything is free.

In addition to that, her organization also funds cutting edge research, molecular targeted research, and then provides support programs for families. There are 40 affiliates across the country in different states, and those affiliates provide everything from financial assistance or emergency funds to face-to-face support and diagnosis. The members are the families of children with cancer around the country.

Ms. Hoffman indicated that the organization would not provide treatment or counseling services on the premises. They go to the hospital, if direct contact with the families is needed. The families don't come into the office at all. It's an office space from which books are shipped. Desk office work will be done there too.

Hours of operation would be 8:30 to 5:00 and there would be three full-time employees. There are not a lot of volunteers, but for special events, volunteers may come in. One time a year, three volunteers may come in to help. There are rarely visitors.

The American Childhood Cancer Organization has maxed out the space currently in use, and has an urgent need to expand into the subject site, which is also conveniently on the ground floor.

There would be no regular deliveries made to the site.

3. Gregory Fields (Tr. 22-27):

Gregory Fields testified that he is the Vice president of the National Association for Children of Alcoholics (NACoA). NACoA provides information, research and methodologies for the treatment and servicing of children and families afflicted by parental or familial alcoholism. It has been in business since 1983.

NACoA works with professional communities locally and throughout the country, specifically, social workers, primary healthcare physicians, educators, and clergy to ensure that each of these communities has effective programs addressing the particular needs of a constituency “that is often overlooked and very silent.” Tr. 23.

Members are those people across the country who donate to NACoA’s work. They will not provide treatment or counseling services on the premises. NACoA frequently engages in training for professional communities, but those sessions are always done at the client's location.

Hours of operation are from 8:30 to 5:00, Monday through Friday. NACoA has five full-time and three part-time employees. NACoA has three to five volunteers who come in for two or three hours a week for special projects, mailings, compilations or perhaps a special event that needs some attention. Generally they are present from 10:00 to 3:00.

Mr. Fields emphasized the need for NACoA to move into your new space quickly. Resources are scarce, and more cost-effective space is needed. There would be no regular deliveries made to the site.

[Petitioner's counsel noted that she asked for a maximum of 15 employees, which falls within the traffic parameters staff has approved, even though the two organizations presently do not have that amount of staff. The applicant is the landlord, and it also wants to reserve the ability to have some flexibility if either of these organizations expands their own staff, or if it comes time that they re-let to a new tenant, that there be some flexibility in the number of people who can actually occupy the space. Tr. 25-26.]

4. Charles Grimsley (Tr. 28-36):

Charles Grimsley testified as an expert in land use. He stated that the inherent characteristics of the use are just the employees and whatever vehicles they would have to come to park and enter and leave the building. Also their operations would have occasional deliveries of materials and items, just as a general business administrative use. There are no non-inherent characteristics because this is the type of use that's been approved in the building previously, and it's quite similar to the prior use, but to a bit lesser degree.

According to Mr. Grimsley, a charitable or philanthropic use is a permissible special exception in the R-60 zone. Setback requirements usually apply to this application, but there is a provision that if a building has lawfully existed for at least three years, then that provision is exempt. Mr. Grimsley noted that he is not suggesting there are setback issues here, just that if there were, they would be grandfathered. The application meets the minimum street frontage requirements. There are three frontages, and the least frontage is 240 feet. There is about 45,000 square feet of green area on the property, and so it far exceeds the 50 percent of the 4,000 square feet that they are requesting. The building height of 67 feet exceeds the maximum building height of 35 feet in this zone, but it was approved in the prior special exception underlying the overall property for the elderly housing use. There will be no structural changes and no exterior changes to the site either.

Mr. Grimsley further testified that the property front has direct access to a public street or roadway with more than one through travel lane. Lawrence Avenue is a direct connection to Connecticut Avenue, and off of Lawrence there are two driveways that enter onto the property to serve the parking on the property. Lawrence Avenue is constructed to primary road construction standards. There are no recreational facilities proposed for this application.

In Mr. Grimsley's opinion, the proposed use would be consistent with the Kensington Master Plan, which proposed no changes in use or zoning for the site. The proposed use would also be in harmony with the general character of the neighborhood. It will cause no detrimental effects. Nor will it increase the number, intensity, or scope of the special exception uses in a way that would adversely affect the predominantly residential nature of the area. The use will be adequately served by public facilities, and will not reduce the safety of vehicular or pedestrian traffic. It will meet the standards of the zoning ordinance.

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.

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 use 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.

A. Standard for Evaluation

The standard for evaluation prescribed in Zoning Ordinance § 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.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

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 charitable institution use. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics 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 listed the following inherent characteristics associated with a charitable institution use (Exhibit 15, p. 6):

- (1) vehicular trips to and from the site;
- (2) deliveries of mail and small parcels; and
- (3) parking.

Technical Staff found that there were no non-inherent adverse effects associated with this use (Exhibit 15, p. 6), and Petitioner's land use expert, Charles Grimsley, agreed. Tr. 30.

As stated by Staff (Exhibit 15, p. 6):

The non-profit charitable or philanthropic organizations that will lease the space will use it as their office headquarters. Their uses will include office space for their employees and volunteers, and the activities on site will be limited to meetings, telephone calls, computer work, etc. These activities are consistent with the type of general administrative activities conducted by the previously-approved charitable or philanthropic uses in the same space. There is adequate parking on the site. The use will occur entirely within the building. Staff finds that the size, scale, and scope of the proposed use is minimal and is not likely to result in any unacceptable noise, traffic, or environmental impacts. There are no non-inherent adverse effects associated with this use.

The Hearing Examiner agrees. There appears to be nothing atypical about the proposed charitable institution use, and nothing that would create adverse effects, either non-inherent or inherent. It will be located entirely inside an existing building with an existing special exception, and will create no more traffic or parking than its predecessors occupying the same space.

After reviewing the entire record, the Hearing Examiner is convinced, as was the Technical Staff, that the requested use will have no adverse effects, inherent or non-inherent, on the general neighborhood.

B. General Standards

The general standards for a special exception are found in Zoning Code Section 59-G-1.21(a). The Technical Staff reports and the Petitioner's exhibits and testimony provide sufficient

evidence that 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: Zoning Ordinance §59-C-1.31(d) permits a charitable institution as a special exception in the R-60 Zone.

(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 use would comply with the standards and requirements for a charitable institution set forth in Code §59-G-2.21, as detailed in Part IV.C., 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 property at issue is subject to the Master Plan for the Communities of Kensington-Wheaton, approved and adopted in 1989. The Master Plan supports the current R-60 Zone, and the R-60 Zone permits the proposed use by Special Exception. For this reason and those set forth in Part II.C. of this report, the

Hearing Examiner concludes that the proposed special exception is consistent with the goals of 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: Technical Staff found that the proposed use would be in harmony with the general character of the neighborhood. As noted by Staff (Exhibit 15, p. 7), “The use will be located entirely within the existing building and will not require construction of an addition to provide additional floor space. There is adequate parking. Traffic conditions will not be affected adversely. Staff does not find an excess of similar uses in the defined neighborhood.” The Hearing Examiner agrees with Staff’s conclusions, and also finds, as described elsewhere in this report, that the site is adequately served by public facilities.

- (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 evidence supports the conclusion that the requested special exception would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood for the reasons set forth in response to the previous provision.

- (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: The use will create no noise or other objectionable effects. Exterior lighting will not be changed for this use.

- (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: There is no evidence that the addition of the proposed charitable institution use would produce any adverse effects, and the Hearing Examiner so finds.

- (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: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. In fact, the proposed use will benefit the neighborhood by providing a needed charitable service to the community.

- (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.*

Conclusion: Technical Staff indicates that the subject site will be adequately served by existing public facilities (Exhibit 15, p. 8), and the evidence supports this conclusion, as discussed in Part II. E. of this report.

(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, 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: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (“LATR”) and Policy Area Mobility Review (PAMR). As indicated in Part II. E. of this report, Transportation Staff did do such a review, and concluded that the charitable institution use would generate fewer than 30 peak hour trips and is not expected to exceed the previously approved 11 peak hour trip threshold for this office facility; therefore, the special exception application satisfies the applicable standards. There is no contrary evidence in the record, and the Hearing Examiner concludes that the instant petition meets all the applicable Growth Policy standards.

(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: Technical Staff’s found that the proposed use “*will not reduce the safety of vehicular or pedestrian traffic.*” Exhibit 15, p. 8. Based on this record, the Hearing Examiner finds that the use will not reduce the safety of vehicular or pedestrian traffic.

C. Specific Standards: Charitable or philanthropic institution.

The specific standards for a charitable or philanthropic institution are found in Code § 59-G-2.21. The Technical Staff report and the Petitioner’s exhibits and testimony provide sufficient evidence that the proposed use would be consistent with the specific standards, as outlined below.

Sec. 59-G-2.21. Charitable or philanthropic institution.

(a) **Development standard.** *A special exception may be granted for a charitable or philanthropic institution, subject to the following requirements:*

(1) **In the Agricultural Zones** regulated by the development standards of Section C- 9.4, a charitable or philanthropic institution may be granted only if it is for re-use of an existing building. The development standards are those of the applicable zones except:

* * *

Conclusion: Not Applicable. The property is in a residential zone.

(2) **In the One-Family Residential Zones** regulated by Section C-1.32, the development standards are those of the applicable zones except:

(i) **Minimum side yard setback:** twice the minimum required by Section C- 1.32.

Conclusion: Technical Staff reports (Exhibit 15, p. 9) that Petitioner “is exempt from this standard pursuant to Code §59-G-2.21(a)(2)(viii). . .” The Hearing Examiner agrees. That section provides, “*For residential and office uses, standards (2)(i) and (iv) do not apply to the use of an existing building that exists lawfully at least 3 years before the special exception petition is filed.*” By its terms, this exemption applies when no “*expansion or addition*” is being made to the building. That is the case here.

(ii) **Minimum frontage:** twice the minimum required by Section C-1.32.

Conclusion: Technical Staff reports (Exhibit 15, p. 9) that the minimum frontage is 60 feet, and that the subject site has more than 390 feet of frontage along Connecticut Avenue;

244 feet of frontage on Lawrence Avenue; and more than 210 feet of frontage on Wexford Drive. The Hearing Examiner therefore finds that it meets the frontage standard.

(iii) Minimum green area: 50 percent in R-60, R-90, and RMH zones; 60 percent in R-150 and R-200 zones; 70 percent in RE-1, RE-2, and RE-2C zones.

Conclusion: As noted by Staff (Exhibit 15, p. 9), the property contains more than 45,000 square feet of green area, and no changes to the green area are proposed. It is unlikely that the 50% criterion specified in this section is intended to apply to the area of the special exception use (4,000 square feet) within an already existing building, as suggested by Staff; rather, it appears aimed at ensuring that a new or expanded structure in a residential zone will have adequate green area to maintain a residential appearance. Since no exterior changes are being made, there is no basis to apply this criterion in a way inconsistent with the Board's prior approval of the special exception already on the site. The Hearing Examiner therefore finds that the proposed use complies with this provision, to the extent it can be applied in this kind of circumstance.

(iv) Maximum FAR: 0.25 for residential, recreational, and environmental uses; 0.25 or 100,000 square feet, whichever is less, for office uses. Any charitable or philanthropic institution established by special exception before May 6, 2002 may expand to a 0.25 total floor area ratio.

Conclusion: As with the first subsection, above, Technical Staff reports (Exhibit 15, p. 9) that Petitioner "is exempt from this standard pursuant to Code §59-G-2.21(a)(2)(viii). . ." The Hearing Examiner agrees for the reasons stated above.

(v) *Maximum building height: 35 feet in R-60 and R-90 zones; 50 feet in R-150, R-200, RE-1, RE-2, RE-2C, and RMH zones.*

Conclusion: Technical Staff reports (Exhibit 15, p. 9) that the building is 67 feet in height, and that that height was approved by the Board of Appeals as part of the underlying special exception approval for the building. The same rationale applies to this subsection as to subsection 2(iii), above. It was aimed at ensuring that a new or expanded structure in a residential zone will be compatible with nearby residences. Since no exterior changes are being made, there is no basis to apply this criterion in a way inconsistent with the Board's prior approval of the special exception already on the site. The Hearing Examiner therefore finds that the proposed use complies with this provision, to the extent it can be applied in this kind of circumstance.

(vi) *The property must front on and have direct access to a public street or roadway having more than one through travel lane in each direction of travel. Access to a corner lot may be from an adjoining primary street, constructed to primary standards, if the Board finds this access to be appropriate and not detrimental to existing residential uses on that primary street. This requirement does not apply to any charitable or philanthropic institution facility that lawfully exists on May 6, 2002.*

Conclusion: Technical Staff concluded (Exhibit 15, p. 10) that the property meets this criterion because it is "a corner lot, and has direct access to Lawrence Avenue, an adjoining primary street constructed to primary standards. Lawrence Avenue has a dedicated right-hand turn lane off Connecticut Avenue into the subject property." Petitioner's land planner, Charles Grimsley, agreed in his testimony. Tr. 33. There is no contrary evidence in the record, and the Hearing Examiner therefore finds that the subject site is compliant with this provision.

(vii) *Outdoor recreational 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 facilities must be designed and sited to protect adjacent properties from noise, spill light, stray balls, odors, and other objectionable impacts by providing appropriate screening measures, such as sufficient setbacks, evergreen landscaping, solid fencing, and walls. The setback must not be less than twice the rear yard setback of the zone. This requirement does not apply to outdoor recreational facilities which lawfully exist on May 6, 2002.

Conclusion: No outdoor recreational facilities are proposed by Petitioner related to this special exception. This provision is therefore not violated.

(viii) For residential and office uses, standards (2)(i) and (iv) do not apply to the use of an existing building that exists lawfully at least 3 years before the special exception petition is filed. Any expansion or addition to the existing building must comply with the standards in effect at the time a modification is filed.

Conclusion: This provision has been applied to “standards (2)(i) and (iv),” as noted above.

(3) In the C-1 and C-3 Zones, the development standards are those of the applicable zones.

Conclusion: Not Applicable. The property is in a residential zone.

(b) Parking Standard.

(1) Off-street parking space must be provided as follows:

(i) Residential: one parking space for every 2 residents, and one space for every 2 employees on the largest work shift.

(ii) Recreational and Environmental: the total number of required parking spaces for each component of the proposed development under Section E-3.7 for auditorium, health club, commercial swimming pool, commercial recreational establishment, and other similar uses.

(iii) Office: same as general office under Section E-3.7.

Conclusion: Parking requirements are discussed in Part II. E. of this report. As indicated there, applicable provisions (Sections 59-E-3.2 and 3.7) require a total of 64 parking spaces for this site (including 11 for the special exception use sought here). Since 94 spaces are provided on site, this provision has been complied with.

(2) *The Board may modify the off-street parking space requirements if warranted because of the program, method of operation, or clientele.*

Conclusion: Not Applicable. No modification to these requirements is being sought.

(3) *All other parking design standards must comply with Section E-2.83 and other applicable sections of Article 59-E.*

Conclusion: No changes to the parking design previously approved by the Board of Appeals for this site are being sought. This provision is therefore not violated.

(c) **Waiver.**

* * *

Conclusion: Not Applicable. No waiver is being sought.

D. 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 requirements of Zoning Ordinance §59-G-2.21 specify the development standards for this special exception. As discussed above, the subject site is compliant therewith.

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

Conclusion: Parking requirements have been discussed in Part II. E. of this report and on page 27 of this report in connection with the specific requirements of the special exception. Petitioner more than meets all parking requirements.

- (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: This section is 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: As stated in Part II.F. of this report, the property is not subject to the Montgomery County Forest Conservation Law, regarding this application, since no external changes are being made, and no forest or trees are being removed.

- (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: This section is not applicable because the subject site is not in a special protection area, and therefore a water quality plan is not required.

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

Conclusion: As previously discussed, no external signage is proposed in connection with this special exception use.

- (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: This section is not applicable since no structure is being constructed, reconstructed or altered.

- (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: No changes are being made to external lighting previously approved by the Board for this site in connection the special exception for senior housing already existing on the site.

Based on the testimony and evidence of record, I conclude that the use proposed by Petitioner meets the specific and general requirements for the special exception, and that the petition should be granted, with the conditions recommended in the final section of this report.

V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition numbered S-2772, in which Petitioner “The Rebecca

Limited Partnership” seeks a special exception to operate a charitable institution use within an existing building at 10920 Connecticut Avenue, Kensington, Maryland, be *granted* with the following conditions:

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. Hours of operation are limited to 8:30 a.m. to 5:00 p.m., Monday through Friday, although occasional staff and Board meetings are permitted in the evenings. Operations must be consistent with the Statement of Operations (Exhibit 3(a)).
3. The special exception is limited to a maximum of fifteen (15) full-time employees, plus a maximum of five (5) volunteers on the site at any time.
4. There must be no counseling or treatment on the site relating to this special exception.
5. There must be no external signage or external changes to the site related to this special exception.
6. 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.

Dated: November 5, 2010

Respectfully submitted,

Martin L. Grossman
Hearing Examiner