

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

www.montgomerycountymd.gov/content/council/boa/board.asp

Case No. S-2588

PETITION OF ONKAR SHARMA AND RAJESH BHANDARI

OPINION OF THE BOARD

(Public Hearing Date: December 15, 2003)

(Record Closed: February 23, 2004)

(Effective Date of Opinion: September 10, 2004)

Case No. S-2588 is an application for a special exception pursuant to Section 59-G-2.38 (Non-Resident Professional Office) of the Zoning Ordinance to permit the operation of a law office. Pursuant to the provisions of Section 59-A-4.125, the Board referred the case to the Hearing Examiner for Montgomery County to conduct a public hearing and submit a written report and recommendation to the Board. The Hearing Examiner convened a hearing on December 15, 2003. The record in the case remained open until February 23, 2004, and on April 1, 2004, the Hearing Examiner issued a report and recommendation for approval of the application.

Decision of the Board: Special Exception **granted**, subject
to the conditions enumerated below.

The subject properties are Lots 2 and 3; Block 1; Forest Glen Subdivision; located at 9911 and 9913 Georgia Ave, Silver Spring, Maryland, 20902, in the R60 Zone.

The Board of Appeals considered the Hearing Examiner's report and recommendation at its Worksession on September 1, 2004. After careful consideration and a review of the record in the case, the Board adopts the report and recommendation, and grants the special exception subject to the following conditions:

1. The Petitioners shall be bound by all of their testimony and exhibits of record, including the Site Plan, Exhibit 29(a), and the Landscape and Lighting Plan, Exhibit 29(c), and by the

testimony of their witnesses and representations of counsel identified in this report.

2. The use of both lots comprising the subject property, 9911 Georgia Avenue and 9913 Georgia Avenue, is limited to non-residential professional office uses. These properties may not be used for residential living purposes.
3. Hours of operation for the professional law office to be conducted on the subject property will be limited to 7:00 a.m. to 7:00 p.m., Monday through Friday, and 9:00 a.m. to 5:00 p.m. on Saturdays and Sundays.
4. The special exception shall have no more than a total of three employees on the combined subject property, including both lots.
5. Vehicle deliveries shall be limited to two per day, Monday through Friday, and one on Saturdays. No vehicle deliveries shall be made on Sundays.
6. Client visits shall be limited to no more than five per day, Monday through Friday, and no more than two per day on Saturdays and Sundays.
7. Within nine months of the effective date of the special exception, the Petitioners must obtain a valid access permit for the driveway entrance from the State Highway Administration.
8. The Petitioners must obtain a sign permit from the Department of Permitting Services.
9. Petitioners must obtain a one-year warranty on all of the plant materials installed. In addition, they must maintain the landscaping as instructed by the landscaper, which will include trimming, fertilizing, mulching, treating diseases and insects, regular watering, pruning, etc., as needed. Petitioners will perform this ongoing maintenance by obtaining a maintenance agreement from a landscape contractor to maintain the properties at least once a year. Petitioners agree that plant losses will be replaced.

10. The grass portion of the lawns will be seeded and sodded when the other landscaping work is done on the properties. Thereafter, bare patches of the grass portion of the lawns will be reseeded. The front lawn will also be edged.
11. The shared driveway between the two properties will be repaired and maintained such that it has a uniform appearance by replacing it or sealing off the cracks. This will be part of the normal maintenance of the properties.
12. Trash and recycle bins will be kept behind the houses except for pick up days.
13. Petitioners will pick up trash in front of and on the properties on a daily basis when the office is open.
14. Outside lights will operate on motion detectors after 7:00 p.m.
15. The sign and trinkets on 9913 will be removed.
16. The address numbers on 9911 Georgia Avenue will be straightened.

On a motion by Angelo M. Caputo, seconded by Allison Ishihara Fultz, with Louise L. Mayer and Donald H. Spence, Jr., Chairman in agreement, and Donna L. Barron necessarily absent, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 10th day of September, 2004.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

TABLE OF CONTENTS

Page No.

I. STATEMENT OF THE CASE	7
II. BACKGROUND	7
A. <i>The Subject Property and Neighborhood</i>	7
B. <i>Land Use History</i>	12
C. <i>Master Plan</i>	13
D. <i>Proposed Use</i>	13
E. <i>Front of Lots: Landscaping and Signage</i>	16
F. <i>Rear of Lots: Parking and Landscaping</i>	17
G. <i>Environment, Utilities and Public Facilities</i>	23
H. <i>Community Participation</i>	23
III. SUMMARY OF TESTIMONY	25
A. <i>Petitioner's Case in Chief</i>	25
B. <i>Community Participation</i>	27
C. <i>People's Counsel</i>	28
IV. CONCLUSIONS	28
A. <i>Standard for Evaluation</i>	28
B. <i>Specific Standards</i>	29
C. <i>General Standards</i>	31
V. RECOMMENDATIONS	34

I. STATEMENT OF THE CASE

Petition S-2588, filed August 5, 2003, requests a special exception under the R-60 Zone for a non-residential professional office to be located in two separate, existing buildings at 9911 and 9913 Georgia Avenue in Silver Spring, known as Lots 2 and 3, Block 1, of the Forest Glen subdivision.

Technical Staff of the Maryland-National Capital Park & Planning Commission (“MNCPPC”) reviewed the present petition and, in a report dated December 5, 2003, recommended *approval* with conditions.¹ See Ex. 38. The Montgomery County Planning Board did not consider this petition. Technical Staff submitted a supplemental memorandum on February 13, 2004 at the Hearing Examiner’s request.

On October 6, 2003 the Board of Appeals (“Board”) scheduled a public hearing in this matter for December 15, 2003. On October 16, 2003 the Board, acting under the provisions of Code § 59-A-4.125, referred the matter to the Office of Zoning and Administrative Hearings to conduct a public hearing and submit a report and recommendation. A public hearing was convened as scheduled on December 15, 2003, at which time testimony and other evidence were received in support of the proposed special exception, and in conditional support of the petition from a community association. The record was held open for about 60 days to receive site plan and landscaping revisions from the Petitioners and comments from all parties, and closed on February 23, 2004. By order dated April 1, 2004, the Hearing Examiner extended the time for submission of her report by one week, to April 1, 2004.

II. BACKGROUND

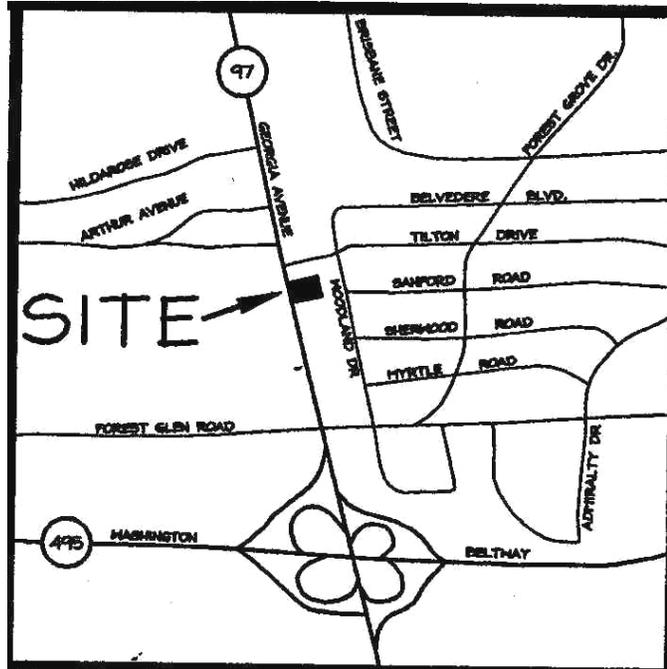
For the convenience of the reader, background information is grouped by subject matter.

A. The Subject Property and Neighborhood

The subject property consists of two lots located at 9911 and 9913 Georgia Avenue in the R-60 Zone. Lot 2, at 9911 Georgia Avenue, is approximately 6,691 square feet in size and will be referred to as Lot 2 or “No. 9911.” Lot 3, at 9913 Georgia Avenue, is approximately 6,726 square feet in size and will be referred to as Lot 3 or “No. 9913”. The subject property, therefore, contains a total of 13,417 square feet. The property is located on the east side of Georgia Avenue, two blocks north of the Capital Beltway (I-495). Its general location is shown on the vicinity map below.

Vicinity Map, Excerpted from Ex. 29(a)

¹ The Staff Report has been liberally paraphrased and cited in Part I of this report.



Each lot is developed with a one-story, brick and frame building formerly used as a single-family, detached dwelling, as shown in the first photograph on the next page. A surface parking facility shared by both properties is located in the rear of the buildings. Lot 3 also has a detached, single-car garage in the rear, which sits near the property line between the two lots. The subject property is accessed by a shared driveway from Georgia Avenue, which consists of one lane on each lot, divided by a utility pole. The driveway is shown in the second photograph on the next page. Site Landscaping is limited to a few trees on the eastern (rear) and southern property lines of Lot 2, a few trees at the rear of Lot 3 and a few bushes in the front yards. Lot 2 also has a chain link fence along its southern property line.

Subject Property as Seen from Across Georgia Avenue



View Towards Georgia Avenue Looking Out Common Driveway

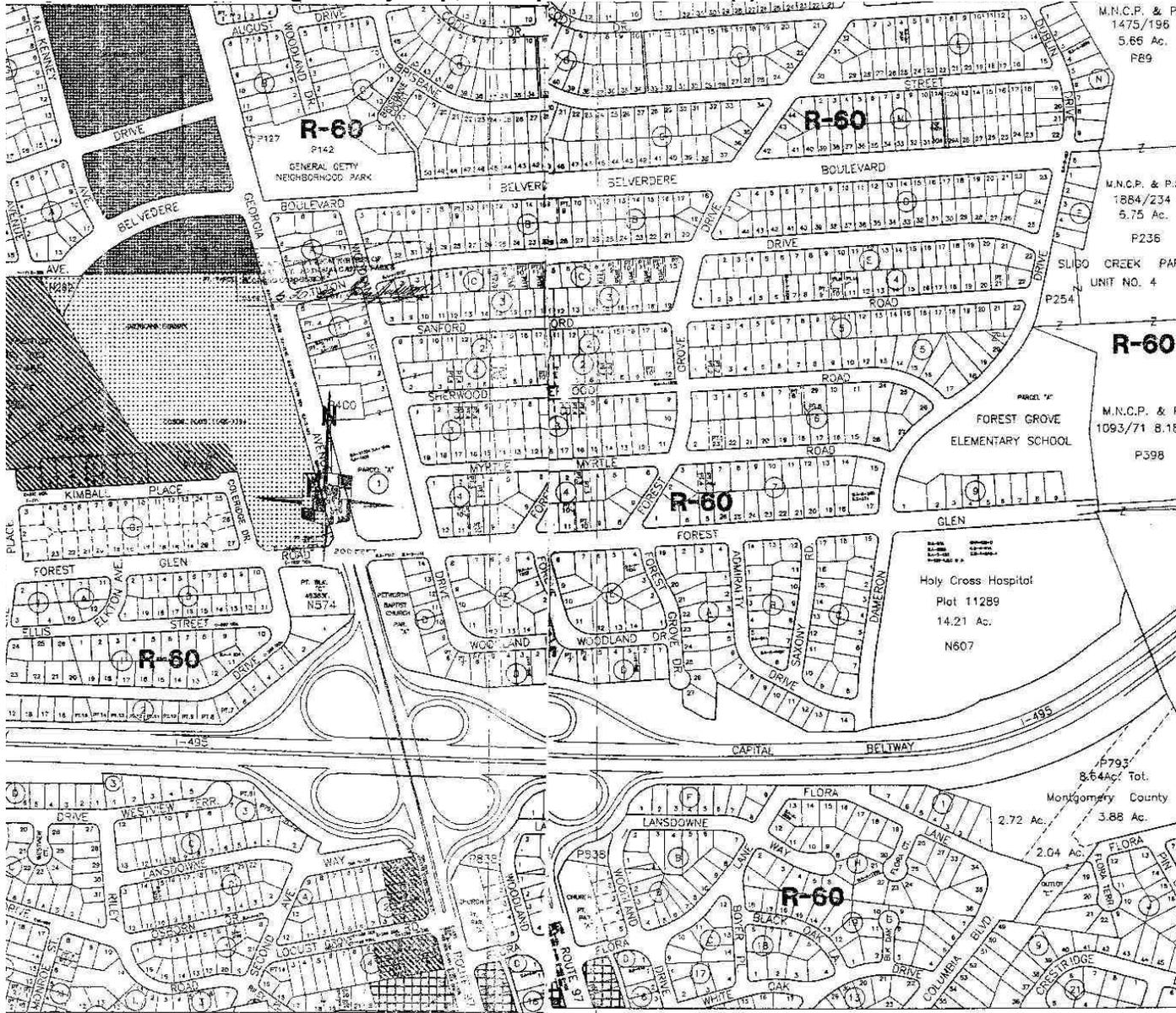


The subject property abuts single-family, detached dwellings to the north, south and east, as shown in the photograph below. Technical Staff defined the general neighborhood of the subject property as extending from Georgia Avenue on the west to Sligo Creek Park on the east, Forest Glen Road on the south and Belvedere Boulevard to the north. The Hearing Examiner considers it unlikely that homes as far west as Dameron Drive, which fronts on Sligo Creek Park, would be affected by the proposed special exception. The undersigned prefers to define the general neighborhood for purposes of the subject petition as the area bound by Georgia Avenue, Belvedere Boulevard, Forest Glen Road and Dameron Drive/Sligo Creek Park. Under either definition, the general neighborhood is classified entirely under the R-60 Zone and developed primarily with single-family, detached homes. As shown on the zoning map on the next page, a relatively large parcel in the northeast corner of Georgia Avenue and Forest Glen Road is developed with a three-story medical office building that houses two special exceptions; across Forest Glen Road just outside the defined neighborhood is a church; and confronting the subject properties across Georgia Avenue is a large condominium development, within which is a non-resident medical practitioner special exception.

View of Subject Property and Adjacent Properties Seen from across Georgia Avenue (No. 9913 and No. 9911 are the two middle houses)



Zoning Vicinity Map, Excerpted from Ex. 12(a)



Montgomery County Zoning Map
 and Planning Commission; Montgomery County Planning Department

Montgomery County Zoning Map
 The Maryland National Capital Park and Planning Commission; Montgomery County Planning Department

The photograph below provides a closer view of the subject property, Lots 2 and 3.



B. Land Use History

The portion of the subject property comprised of Lot 2 has been the subject of two special exceptions for a medical practitioner's office and residence, one granted in 1960 (CBA 1080) and the other in 1965 (CBA 1717). See attachments to Staff Report, Ex. 18. The medical office closed on December 31, 1991 and the BOA revoked both special exceptions effective January 7, 1994, after appropriate abandonment proceedings.² See attachment to Ex. 16. The Petitioners, Onkar Sharma and Rajesh Bhandari, purchased Lot 2 in 1994 and began operating their law practice from that location. Thus, Lot 2 of the subject property has been used for professional offices almost continuously since 1960. The present petition was filed one year after the Petitioners received a notice of violation from Montgomery County for operation of a business from a property in a residential zone without registration or special exception. See Notice of Violation, August 14, 2002, attached to Staff Report.

Lot 3 is currently leased to a religious organization and used as a meditation center. It is not used for residential purposes. The Petitioners' Summary of Proof stated that they are contract

² The Hearing Examiner is grateful to the Forest Estates Community Association for supplying the cited resolution and informing this office that the earlier special exceptions were revoked. Both the Petitioners' Summary of Proof and the Staff Report suggest that a valid medical office special exception still exists. See Ex. 3 at 2, Ex. 18 at 2.

purchasers of Lot 3, but Mr. Sharma testified at the hearing that they intend to lease Lot 3, which appears to be an accurate statement. The Petitioners submitted a written statement from the owner of Lot 3, Manjit S. Chowdary, M.D., authorizing them to pursue the subject special exception. See Ex. 11.

C. Master Plan

The subject property is located within the area covered by the *Forest Glen Sector Plan, Approved and Adopted 1996* (the "Sector Plan"). The Sector Plan emphasizes the protection of existing residential neighborhoods, and recommends limiting land uses on properties on the east side of Georgia Avenue, such as the subject property, to uses that are compatible with the adjoining neighborhood. See Sector Plan at 23. The Sector Plan specifically recommends the following (p. 23):

- Retention of the existing single-family detached houses;
- Office or service commercial uses which can be accommodated within structures that exhibit single-family residential scale and style, provided that the design guidelines are satisfied with regard to the location of entrances, parking, green space, and access to Georgia Avenue.

The "design guidelines" referred to in this section are found on pages 55 and 56 of the Sector Plan and reprinted below:

Any new development or special exception approvals along the east side of Georgia Avenue should be compatible in scale and form with the residential character of the adjoining neighborhood. New development should adhere to the following guidelines:

- The low-scale residential appearance should be maintained by limiting building heights along Georgia Avenue to three stories.
- Main building entrances should be provided on Georgia Avenue to accommodate pedestrians and transit users.
- Buildings, rather than parking, should dominate the street frontage. Parking lots should be located at the rear or side of the existing property with proper landscaping and screening.

Technical Staff opined that the proposed special exception would be consistent with the objectives of the Master Plan. No physical changes to the existing low-scale, one-story buildings are planned, so they would retain their low-scale, residential appearance. The buildings have front entrances that are easily accessible from Georgia Avenue for pedestrians, as well as rear entrances accessible from the parking lots. Parking is and would continue to be located at the rear of the lots, and Technical Staff finds the proposed landscaping and screening to be adequate.

D. Proposed Use

The Petitioners propose to continue operating a law office on Lot 2 and expand their space to include Lot 3. The practice focuses on immigration law and franchise law. The proposed hours of operation are 7:00 a.m. to 7:00 p.m. Monday

through Friday, and 9:00 a.m. to 5:00 p.m. on weekends. The Petitioners have agreed to limit the number of employees to a total of three for both properties, and to limit deliveries to no more than two per day during the week and one on Saturdays. The Petitioners have represented that they would receive no more than three to five visitors per day during the week and no more than two on Saturdays and Sundays.³

Mr. Sharma, who testified on behalf of the Petitioners, stated that they plan to lease No. 9913 for increase their storage and conference room space. They do not intend to expand their number of employees. Additional space nearby would be useful for their franchise practice, where they routinely deal with 20-year franchise agreement that they need to access more quickly than typical off-site storage will allow.

The Petitioners do not propose to make any changes to the existing structures property. Proposed landscaping enhancements and improvements to the parking area are discussed in the following sections. The only other physical changes that the Petitioners propose are improvements to the driveway entrance, which would be necessary to obtain an access permit from the State Highway Administration (“SHA”) to reconstruct the existing entrance to commercial standards. The site plan reproduced on the following page depicts widened curb cuts to provide a better turning radius, as well as a 10-foot by 5-foot median at the entrance point to permit only right-in/right-out turning movements. This is in keeping with the one-way traffic pattern on Georgia Avenue, which is divided by a median at the subject location. SHA has preliminarily approved the entrance modifications. See Ex. 29(e).

Site Plan, Ex. 29(a)

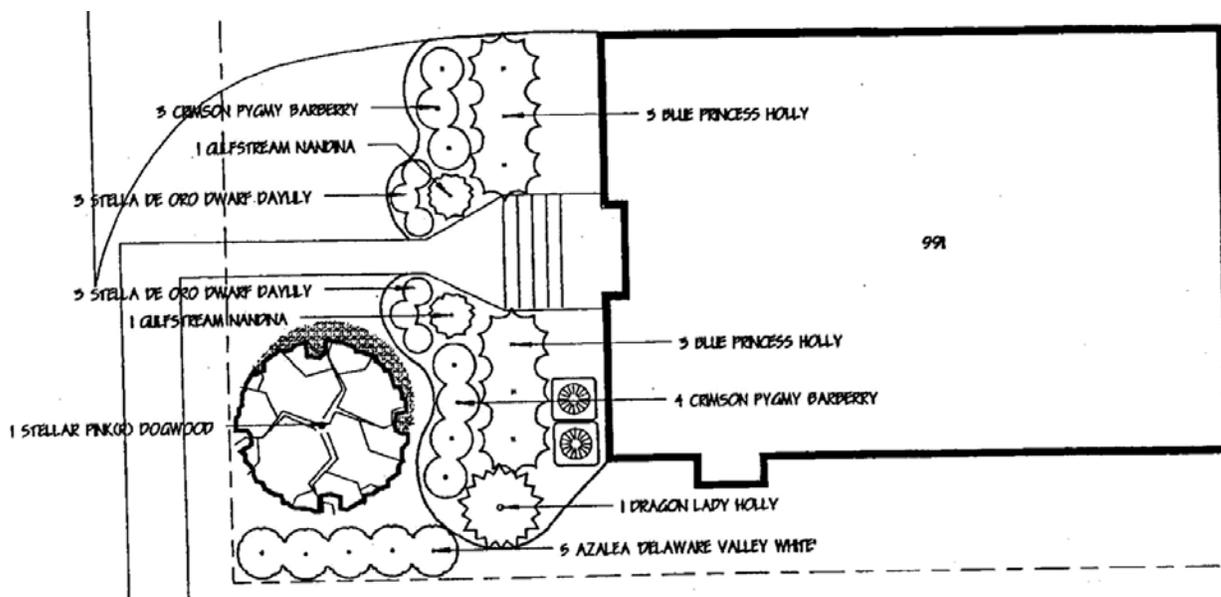
³ The Petitioners’ Summary of Proof stated that no visitors or deliveries would occur on weekends, but the testimony suggested this was incorrect.

E. Front of Lots: Landscaping and Signage

The subject property currently has minimal landscaping in the front yards. In consultation with the Forest Estates Community Association (the "Community Association"), which played an active role in this case, the Petitioners have developed a landscaping plan for the subject properties that would significantly improve their appearance from Georgia Avenue. Details of the landscaping plan showing the plantings proposed for the front yards of each lot are reproduced below and on the next page.

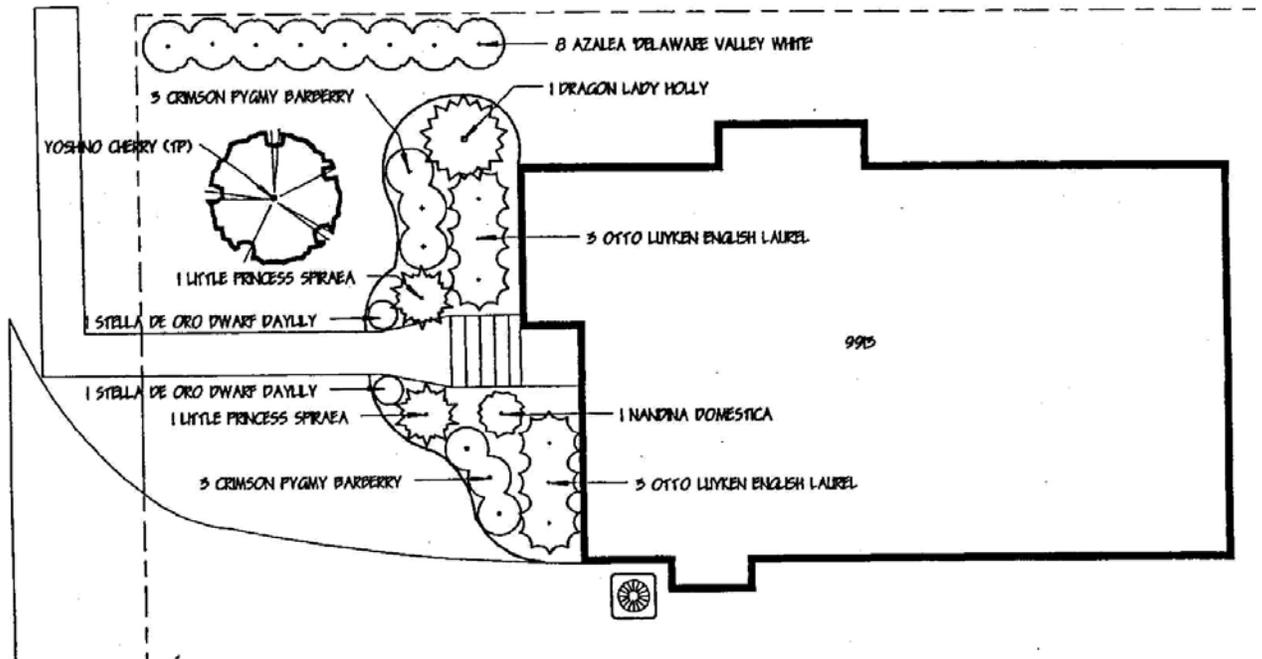
Landscaping Detail: Front Yard of Lot 2, No. 9911,

(excerpted from supplemental staff report, Ex. 27)



Landscaping Detail: Front Yard of Lot 3, No. 9913

(excerpted from supplemental staff report, Ex. 27)



The proposed front yard landscaping was agreed upon by the Petitioners and the Community Association, and Technical Staff opined that the proposed landscaping would enhance the residential character of both buildings. See Exs. 30, 27.

The Petitioners propose a single sign, to be placed in the front yard of Lot 2, No. 9911, reading "Law Offices/Sharma and Bhandari." The sign measures two square feet in size and is consistent with applicable signage requirements. The Petitioners have prepared a sign permit application for submission to the Department of Permitting Services. See Ex. 29(c).

F. Rear of Lots: Parking and Landscaping

The area behind each of the houses on the subject property is paved and used for parking, although there is no striping to designate parking spaces. As described by the Petitioners' site planner, drivers currently park randomly. According to the Staff Report, the proposed professional office use requires eight parking spaces.⁴ The Petitioners propose to add striping to designate a total of nine parking spaces on the combined subject property, including one handicapped-accessible space. Both Technical Staff and the Petitioners' site planner opined that this would provide adequate space for the three employees, three to five visitors and one or two deliveries anticipated per weekday.

As noted earlier, the parking area currently has a few trees along the southern and eastern perimeters. Along the northern boundary of the property, the asphalt goes all the way to the property line. The Petitioners propose to remove some of

⁴ Based on 2.5 parking spaces required for each 1,000 square feet of gross floor area, pursuant to Code § 59-E-3.7.

the existing asphalt along the northern boundary of Lot 3 to create a four-foot buffer. This buffer strip would be planted with grass and a row of Norway Spruce trees. The Petitioners propose to plant additional trees and shrubs along the eastern and southern property lines to fill in some of the gaps between existing trees. They also propose a six-foot, board-on-board fence along the eastern property line as a visual buffer. The final Landscape and Lighting Plan, Ex. 29(b), is reproduced on the next page.

Pursuant to Code § 59-E-2.38, parking facilities for special exception uses in residential zones are to be set back from the property lines “not less than the applicable building front and rear yard and twice the building side yard required in the zone.” In this case, under the R-60 Zone the parking area on the subject property would be required to be set back 20 feet from the rear property lines and 16 feet from each of the side property lines. Technical Staff indicated that compliance with these requirements would reduce the number of available parking spaces by two. The Petitioners’ site planner testified that in his opinion, fully compliance with these requirements would not be possible, or at the very least it would require removing the free-standing garage on Lot 3, which the Petitioners do not own. Accordingly, the Petitioners request waivers of these setback requirements to permit them to (1) maintain the current 12-foot setback from the rear property lines, (2) maintain the current setback of eight to nine feet along the southern property line, (3) create a four-foot setback along the northern property line, and (4) have no setback along the property line between the two lots, where the parking areas abut the shared driveway.

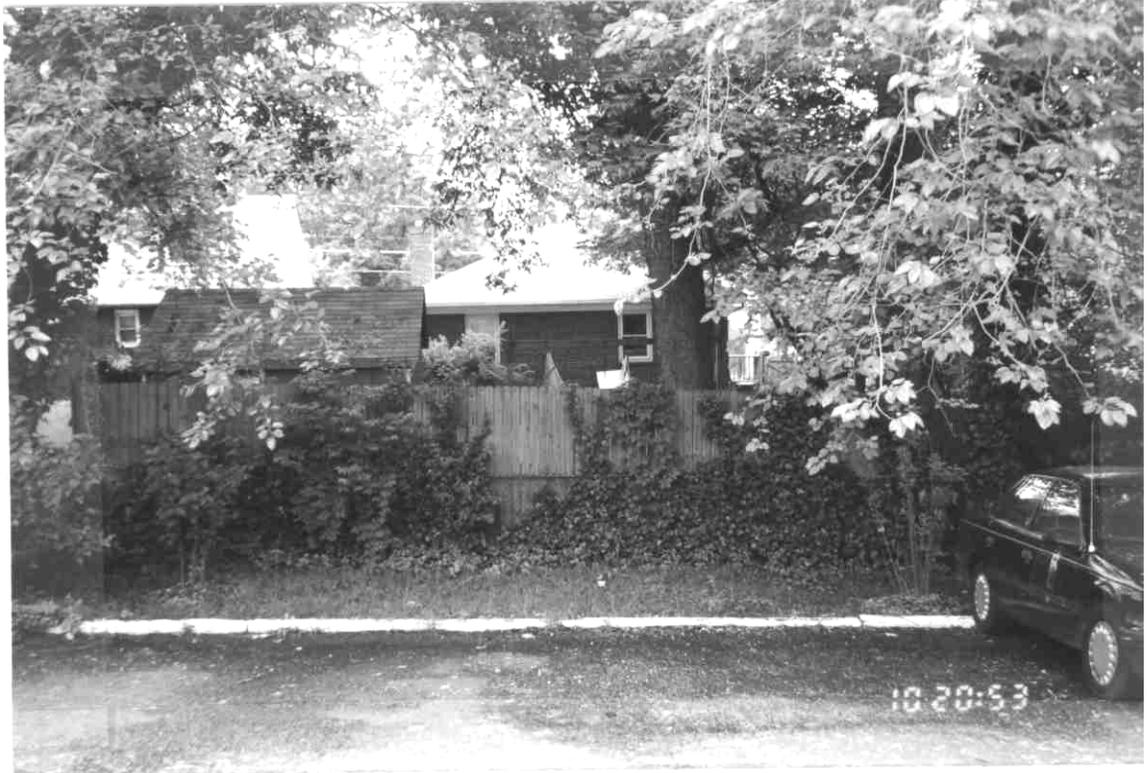
Under Code § 59-E-4.5, the Board of Appeals is authorized to waive any parking requirement in Chapter 59-E that is not necessary to accomplish the following objectives:

- (a) The protection of the health, safety and welfare of those who use any adjoining land or public road that abuts a parking facility. Such protection shall include, but shall not be limited to, the reasonable control of noise, glare or reflection from automobiles, automobile lights, parking lot lighting and automobile fumes by use of perimeter landscaping, planting, walls, fences or other natural features or improvements.
- (b) The safety of pedestrians and motorists within a parking facility.
- (c) The optimum safe circulation of traffic within the parking facility and the proper location of entrances and exits to public roads so as to reduce or prevent traffic congestion.
- (d) The provision of appropriate lighting, if the parking is to be used after dark.

Technical Staff supports the requested waivers on grounds that they would have no impact on the safety of pedestrians or motorists, the parking area would continue to operate safely, and adjacent properties would not be adversely affected because of the proposed landscaping and fencing. See Ex. 18 at 5, Ex. 27 at 4. Technical Staff did not address the question of lighting. However, the Landscape and Lighting Plan, Ex. 29(c), indicates that the parking area is lit by floodlights that are mounted on each of the buildings. The Petitioners' site planner testified that these lights are residential in nature, provide adequate lighting for the safe operation of the parking lot, and do not create any objectionable glare or illumination. Tr. at 43. The Petitioners do not propose any lighting changes.

Both Technical Staff and the Petitioners' site planner point out that the changes the Petitioners propose to make in connection with this application represent improvements over current conditions, which apparently have been in their present state at least since the Petitioners purchased Lot 2 eight years ago. The existing and proposed trees and shrubs around the parking lot would not be spaced closely enough to create a complete visual barrier. However, they would greatly improve the visual appearance of the subject property and provide significant visual buffering. A complete visual barrier would be provided along the east property line, to a height of six feet, with the proposed wood fence. The photographs on the following pages depict the current appearance of the parking area, as well views onto neighboring properties.

**Rear of Parking Lot at 9913 Georgia Avenue
Looking East Towards Rear of Adjacent Property (Lot 8)**



**Rear of Parking Lot at 9911 Georgia Avenue
Looking East Towards Rear of Adjacent Property (Lot 9)**



As the photograph below shows, additional screening exists along the southern border, at least during warm weather months, because of mature vegetation.

**View from Parking Lot of 9911 Georgia Avenue Looking South
Towards Adjacent Property, Rear of 9909 Georgia Avenue**



The next two photographs show that to the north, the parking lot for the subject property abuts a large parking area on the adjacent lot, where nearly the entire back yard has been paved.

**View from Parking Lot at 9913 Georgia Avenue Looking North
Towards Rear of Adjacent Property at 9915 Georgia Avenue**



**Second View from Parking Lot at 9913 Georgia Avenue Looking North
Towards Rear of Adjacent Property at 9915 Georgia Avenue**



G. Environment, Utilities and Public Facilities

The present petition is exempt from forest conservation requirements because no existing forest or trees would be removed. See Ex. 7. The subject property contains no other environmental resources such as wetlands or stream buffers.

The Petitioners' site planner testified that the subject property is and would continue to be served by adequate utilities. Technical Staff states that the property is served by adequate public facilities, including public water and sewer. Transportation Planning Staff notes that the proposed use would generate fewer than 50 vehicle trips during the morning and evening peak hours and, therefore, a traffic study is not required to satisfy Local Area Transportation Review requirements. For purposes of current Policy Area Transportation Review requirements, the subject property is located within the Kensington-Wheaton policy area, which had remaining capacity of 2,529 jobs as of November 30, 2003 – more than adequate to accommodate the modest use proposed here.

H. Community Participation

The Community Association filed a pre-hearing submission in opposition to the proposed special exception, noting that it was recently named Civic Association of the Year by the Mid-County Citizens' Advisory Board for its efforts to improve the community. See Ex. 16. The Community Association stated that the proposed special exception is not consistent with the character of the neighborhood and would contribute to increasing commercialization that threatens the adjacent residential neighborhood. The Community Association also described several ways in which the Petitioners have contributed to an impression of blight and deterioration along Georgia Avenue that the Community Association is trying to turn around. For example, when the chain link fence on the Petitioners' current property, No. 9911, was partially knocked down by a car, the Petitioners left it in a state of disrepair for several years, despite requests from the Community Association to remove or fix it. The broken fence was one of the worst

eyesores along that stretch of Georgia Avenue for several years, and was repaired only after the County, at the Community Association's request, inspected the area for violations. In addition, as of the date of the public hearing in this matter the Petitioners had the address numbers for No. 9911 posted, illegally and in haphazard fashion, on a utility pole in front of the house. Moreover, they have failed to properly maintain and edge their lawn, resulting in soil and grass spreading onto the sidewalk and reducing the amount of space available for pedestrians, as seen in the photograph below, excerpted from Exhibit 16.

Photograph of Erosion on Lot 2, No. 9911



On the morning of the public hearing in this case, the Petitioners and Community Association representatives signed an agreement on conditions to which the Petitioners would consent in exchange for the Community Association's support for their petition. The Petitioners agreed, among other things, to repair the driveway, remove the chain link fence and remove the address numbers on the utility pole. See Ex. 20. The agreement also stated that the front lawns of the two lots would be "landscaped according to the recommendations of a professional landscaper, as approved by an officer of the Forest Estates Community Association." *Id.* The Hearing Examiner suggested that this condition was problematic because it appeared to delegate to the Community Association the BOA's authority to approve landscaping for special exceptions. The record was then held open to allow the Petitioners to prepare a landscaping plan with input from the Community Association and Technical Staff.

The final Landscape and Lighting Plan, Exhibit 29(c), was submitted as scheduled, together with a list of eight agreed-upon conditions of approval. Shortly thereafter, the Community Association submitted a letter withdrawing its opposition to the petition and stating that the parties had reached agreement on the landscaping and eight conditions of approval. The People's Counsel also submitted a letter indicating his support for the petition in light of the agreement between the Petitioners and the Community Association. The agreed-upon conditions are included in the recommended conditions of approval at the close of this report as conditions 9 through 16. The photographs on the next page illustrate some of the problems that these very specific conditions seek to address, such as visible trash and recycle bins and "trinkets" on Lot 3, No. 9913.

Trash and Recycling Bins in Plain View on Lot 2, No. 9913



Plastic “trinkets” in front of Lot 3, No. 9913



III. SUMMARY OF TESTIMONY

A. Petitioner’s Case in Chief

1. Onkar Sharma, Petitioner

Mr. Sharma owns the property at 9911 Georgia Avenue and currently operates a law office at that location, handling mostly immigration and franchise matters. He seeks to continue his practice at this location and extend it to the adjacent property at 9913 Georgia Avenue. He proposes to have hours of operation from 7:00 a.m. to 7:00 p.m. Monday through Friday, and 9:00 a.m. to 5:00 p.m. on weekends. He agreed to limit the number of employees to three for both properties, and to limit deliveries to no more than two per day during the week and one on Saturdays. He testified that he normally receives two to four client visits per day during the week, and no more than two on Saturdays and Sundays. Mr. Sharma testified that he had also agreed to additional conditions requested by the Forest Estates Community Association, which were submitted into the record a signed agreement between himself and the Community Association. See Ex. 20.

Mr. Sharma stated that the operation of his office would not create any offensive noise, glare, vibrations, dust, fumes or odors. He has never received any complaints about noise or activity on the property he currently uses for his office, No. 9911.

Mr. Sharma testified that he plans to lease the building next door basically for storage space. His clients enter into 20-year franchise agreements, and from time to time he needs to refer to the paperwork on those agreements. He prefers to lease the building next door, rather than using a storage service, to have easy access to his files. This would allow him to respond quickly to requests from clients rather than having to wait to get files from storage.

Mr. Sharma confirmed that he understands that if the proposed special exception is granted, he cannot make changes to his business without the Board's permission, for example to add an employee or change his business hours. He added that at this time, the three employees using these two buildings consist of one attorney and two support staff.

2. Curt Schreffler, site engineer.

Mr. Schreffler was designated an expert in civil engineering and site planning, although his testimony extended more broadly to areas such as master plan compliance.

Mr. Schreffler first described the location of the subject properties and their relationship to the general neighborhood. The properties front on the east side of Georgia Avenue, a state highway with multiple lanes of traffic, and are two blocks north of the Capital Beltway. Each property is developed with a one-story, brick and frame building that was originally a single-family home and is currently used for non-residential purposes. Each of these buildings contains about 1,300 square feet of space. The properties share a common driveway leading to parking areas in the rear. The Petitioners propose to supplement the landscaped buffers for the parking areas, reorganize the parking and add a privacy fence along the rear property lines.

Currently parking is somewhat random, with no striping. The Petitioners propose to create a more formal parking area, which Mr. Schreffler initially testified would have five parking spaces on each property. In response to a question by the People's Counsel, Mr. Schreffler acknowledged that the Petitioners would be required to designate one parking space as handicapped-accessible. That requires marking one parking space as handicapped-accessible, and turning the space next to it into a designated aisle associated with the handicapped-accessible space. The combined properties would then have a total of nine parking spaces, including one handicapped-accessible space. Mr. Schreffler opined that this would provide adequate parking space to accommodate three employees and two to four clients per day, and would satisfy the requirement, under the Zoning Ordinance, for parking four spaces per lot. He stated that

he had made three site visits during the course of the previous year, during business hours, and there was always more than enough parking available.

Mr. Schreffler testified that both of the existing buildings comply with the development standards that applied under the R-60 Zone when they were built, and the green space on the lots exceeds the minimum required. The parking areas, however, do not comply with applicable setback requirements. The parking areas are required to be set back 20 feet from the rear property line and the Petitioners propose a setback of 12 feet. The parking areas are also required to have side setbacks of 16 feet. The Petitioners propose a four-foot setback on the north side of No. 9913, and eight to nine feet on the south side of No. 9911. The Petitioners propose no side setback along the shared property line between the properties, where the parking areas abut the shared driveway.

Mr. Schreffler described the nature of the additional landscaping proposed in the parking area, and why he feels this would be sufficient to maintain compatibility with surrounding properties. He presented a photograph of the property north of 9913 Georgia Avenue, which has a parking area very similar to the existing parking areas on the subject properties, and described the buffer area planned along that boundary line as a buffer between two parking areas.

B. Community Participation

Forest Estates Community Association (previously defined as the Community Association) was represented at the hearing by Richard Lutz, its President, and Paul Gordon. Mr. Lutz made a statement on behalf of the organization, as summarized below.

Mr. Lutz began a campaign four years ago, first as an individual and more recently as an official of the Community Association, to improve aesthetics and safety along Georgia Avenue in the Forest Estates area. He submitted into the record two articles from local newspapers describing his efforts, which began with picking up litter on the street and expanded to bigger goals. He emphasized that the Community Association is not content to just have development that is consistent with what is already there – they want to see improvement. They want this section of Georgia Avenue to become an attractive, landscaped boulevard, in keeping with the goals established in the Master Plan. They persuaded the State to promise landscaping and a median strip along Georgia Avenue, which should be installed this Spring. They also want to work with property owners, including business owners, to retain the residential quality of the area.

The Community Association represents an area bounded on the south by Forest Glen Road (Rte. 192), on the west by Georgia Avenue, on the north by Dennis Avenue and on the east by Dameron Drive and Sligo Creek Park.

Mr. Lutz testified that the Community Association does not have an objection to the operation of a law office on the subject properties, nor does it object to the setback waivers requested for the parking area. He withdrew the Community Association's stated opposition to the proposed special exception contingent on a series of operating conditions to which the Petitioners had agreed on the morning of the hearing.

The Community Association's main concern is the appearance of the subject properties from Georgia Avenue, which they view as the front door to their neighborhood. Mr. Lutz noted that the 16 properties on Georgia Avenue between Forest Glen and August Drive are the first thing visitors see as they exit the Beltway going north. Currently, what they see is in a state of deterioration. Improving that appearance

is vital to reducing crime and improving property values. The subject properties make up about 20 percent of that 16-property strip. To be consistent with the Sector Plan, the proposed special exception must include landscaping and avoid an overly commercial appearance.

C. People's Counsel

The People's Counsel, Martin Klauber, delivered a brief closing statement in which he described this case as a win-win situation: the Petitioners get to expand their business in a nice community, and the community gets to see two pivotal lots on Georgia Avenue upgraded. Moreover, it was all done in a courteous, considerate manner, making better neighbors and therefore a better community. Mr. Klauber recommended approval of the special exception with the agreed-upon conditions.

IV. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. The special exception is also evaluated in a site-specific context because there may be locations where it is not appropriate. Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (see Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed special exception, with the conditions recommended at the end of this report, would satisfy all of the specific and general requirements for the use.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are "the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations." Code § 59-G-1.21. 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 non-residential professional office. 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, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Physical characteristics associated with a non-residential professional office are a single-family structure to house the office use, a parking facility adequate to accommodate employees and visitors and an identification sign. Technical Staff suggests that typical operational characteristics of a non-residential professional office include client visits primarily during the weekday, with limited activity on the weekend,

especially Saturday, and trips to and from the site by employees and delivery services during normal business hours. Absent any analysis or data to support this position, the Hearing Examiner is not persuaded that non-residential professional offices, which are limited to recognized professions such as doctors, lawyers and architects, necessarily involve weekend operating hours. Moreover, the record includes no evidence as to whether the early morning hours and early evening hours proposed in this case are typical of the use. Absent specific evidence to the contrary, the undersigned is inclined to believe that the operating hours typically associated with a non-residential professional office are closer to standard business hours of 9 a.m. to 5 p.m., Monday through Friday. However, the precise definition of inherent v. non-inherent operating hours need not be determined here because the evidence supports the conclusion that, even if the proposed operating hours should be considered non-inherent adverse effects, the inherent and non-inherent adverse effects associated with the use proposed here are not sufficient to support denial of the special exception.

All of the physical and operational characteristics of the proposed use other than early morning and early evening hours and weekend activities are typical of non-residential professional offices and should be considered inherent in the use. Moreover, In light of the limitations on the number of employees, client visits and deliveries to which the Petitioners have agreed, the level of activity anticipated on the subject property would not cause adverse effects sufficient to justify denial of the petition.

B. Specific Standards

The specific standards for a non-resident professional office are found in §59-G-2.38. The provisions of this section and the Hearing Examiner's findings with respect thereto are as follows:

Sec. 59-G-2.38. Offices, professional, nonresidential.

An existing single-family structure may be used for professional office purposes by any member or members of a recognized profession, such as doctors, lawyers, architects, accountants, engineers, veterinarians, but not including the following:

- (a) medical, dental or veterinarian clinics
- (b) in-patient treatment facilities
- (c) general business offices, such as the offices of insurance companies, trade associations, manufacturing companies, investment concerns, banks or real estate companies.

Conclusion: The proposed use would be for a law office, which is one of the recognized professions enumerated.

The property must be:

- (a) located in a central business district that is designated as being suitable for the transit station-residential (TS-R) zone on an approved and adopted sector plan; or,
- (b) designated as being suitable for nonresidential professional offices in the R-60 zone on an approved and adopted master or sector plan and is located along a major

highway with an existing right-of-way width of no less than 90 feet or along that portion of an arterial road designated as a boundary of a central business district.

Conclusion: The subject property is located along Georgia Avenue, a major highway with a right-of-way measuring 100 to 110 feet.⁵ The subject property is in the R-60 Zone, at a location that is recommended in the applicable Sector Plan as suitable for office uses that “can be accommodated within structures that exhibit single-family residential scale and style, provided that the design guidelines are satisfied with regard to the location of entrances, parking, green space, and access to Georgia Avenue.” Sector Plan at 23. The subject property satisfies this requirement. The proposed office would be accommodated within an existing single-family structure, with no exterior changes proposed. Moreover, the proposed site plan would satisfy the design guidelines specified in the Master Plan: the building would maintain a low-scale residential appearance, there would be an entrance on Georgia Avenue that would be at least as prominent as the rear entrance, and the parking would be located behind the building with appropriate landscaping and screening, allowing the building and front yard to dominate the street frontage. The landscaping and screening proposed for the parking areas would not create an impenetrable visual screen to the south or north, but photographic and other evidence supports the conclusion that the landscaping and screening proposed would be adequate to prevent any significant adverse effect on neighboring uses as a result of the parking lot appearance and activity.

The Board must find that the property meets the following criteria:

- (a) Such use will not constitute a nuisance because of traffic or physical activity;
- (b) Such use will not affect adversely the use and development of adjacent properties;
- (c) A minimum of 25 percent of the lot area shall be devoted to green area;
- (d) The board may allow the exterior of the premises to be changed, altered or modified provided the single-family character and the basic residential appearance of the building is retained.

Conclusion: The evidence strongly supports the conclusion that the limited levels of physical activity associated with the proposed use would not rise to the level of a nuisance, nor would they have an adverse effect on the use and development of adjacent properties. With the improvements shown on the Landscape and Lighting Plan and provided for in the recommended conditions of approval, implementation of the special exception would enhance the visual appearance of the subject property from Georgia Avenue and would buffer the surrounding properties from the view of the parking area and any impacts from its modest activity levels.

The Landscaping and Lighting Plan, Exhibit 29(c), indicates that Lot 3 would have approximately 37 percent green space and Lot 2 would have approximately 29.5 percent green space, both of which exceed the required 25 percent. The

⁵ The Sector Plan indicates a right-of-way for Georgia Avenue at the location of the subject property of 100 feet. See Sector Plan at 36. The Site Plan submitted in this case, Exhibit 29(a), identifies Georgia Avenue with a right-of-way measuring 100 feet.

Petitioners do not propose any changes to the exterior of the two buildings on the property, which would retain their residential appearance.

C. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioner's written evidence 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: A non-residential professional office is a permitted use in the R-60 Zone at locations designated as appropriate for such uses in the applicable master or sector plan. As discussed in Part IV.B. above, the subject property is so designated in the applicable Sector Plan.

(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 set forth for the use in Code §59-G-2.38, as detailed in Part IV.B. above.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny 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: For the reasons discussed in Part IV.B. above, the evidence supports the conclusion that the proposed use would be consistent with the *Forest Glen Sector 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.

Conclusion: The proposed facility would have no effect on population density, a very low intensity and unobtrusive character of activity, and a negligible impact on traffic and parking. It would involve no new structures. The neighborhood contains existing medical office uses that are located, like the subject property, along Georgia Avenue, where their impact on the character of the adjoining residential neighborhoods is minimized. The Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed use would be in harmony with the general character of the neighborhood.

- (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: Due to the low intensity of the activities involved and their unobtrusive nature, as well as planned enhancements to the physical appearance of the property, the evidence supports the conclusion that the proposed use would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (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 evidence supports the conclusion that due to the nature of the activities involved, the proposed use would cause no objectionable noise, vibrations, fumes, odors, dust or physical activity at the subject site. Exterior lighting is limited to residential-type fixtures that illuminate the parking lot. The undisputed testimony of the Petitioners' site planner supports the conclusion that these lighting fixtures would not create any objectionable illumination or glare.

- (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: The proposed special exception is consistent with the recommendations of the Sector Plan, and therefore, is not considered to alter the nature of the area. Only two other special exception uses have been identified in or near the general neighborhood, both of which are medical offices located along Georgia Avenue rather than within the adjoining residential neighborhoods. Moreover, the subject property historically has been used for professional offices almost continuously for more than 40 years. For all of these reasons, the Hearing Examiner concludes that the proposed use would not increase the number, intensity, or scope of

special exception uses in the area sufficiently to affect the neighboring one-family residential area adversely or alter its character.

- (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.

- (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: The evidence supports the conclusion that the subject property would continue to be served by adequate public services and facilities with the proposed use.

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of granting the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: Subdivision approval would not be required. The proposed use would generate far fewer than 50 vehicular trips during the weekday peak hours. Accordingly, the proposed use is not subject to Local Area Transportation Review requirements. Adequate jobs capacity exists within the Kensington-Wheaton Policy Area to satisfy Policy Area Transportation Review requirements.

- (ii) With regard to findings relating to public roads, the Board . . . must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Conclusion: The preponderance of the evidence supports a conclusion that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic, and may have a beneficial effect due to the entrance improvements required by SHA.

- (b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding

public facilities does not bind any other agency or department which approves or licenses the project.

Conclusion: No finding necessary.

- (c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Conclusion: The record substantiates a finding that the Petitioners have met the burden of proof and persuasion.

V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2588, which requests a special exception under the R-60 Zone for a non-residential professional office to be located in two separate, existing buildings at 9911 and 9913 Georgia Avenue in Silver Spring, known as Lots 2 and 3, Block 1, of the Forest Glen subdivision, be **granted** with the conditions listed below and that the requested parking waivers be **granted** to permit the setbacks shown on the Site Plan, exhibit 29(a):

17. The Petitioners shall be bound by all of their testimony and exhibits of record, including the Site Plan, Exhibit 29(a), and the Landscape and Lighting Plan, Exhibit 29(c), and by the testimony of their witnesses and representations of counsel identified in this report.
18. The use of both lots comprising the subject property, 9911 Georgia Avenue and 9913 Georgia Avenue, is limited to non-residential professional office uses. These properties may not be used for residential living purposes.
19. Hours of operation for the professional law office to be conducted on the subject property will be limited to 7:00 a.m. to 7:00 p.m., Monday through Friday, and 9:00 a.m. to 5:00 p.m. on Saturdays and Sundays.
20. The special exception shall have no more than a total of three employees on the combined subject property, including both lots.
21. Vehicle deliveries shall be limited to two per day, Monday through Friday, and one on Saturdays. No vehicle deliveries shall be made on Sundays.
22. Client visits shall be limited to no more than five per day, Monday through Friday, and no more than two per day on Saturdays and Sundays.
23. Within nine months of the effective date of the special exception, the Petitioners must obtain a valid access permit for the driveway entrance from the State Highway Administration.
24. The Petitioners must obtain a sign permit from the Department of Permitting Services.
25. Petitioners must obtain a one-year warranty on all of the plant materials installed. In addition, they must maintain the landscaping as instructed by the landscaper, which will include trimming, fertilizing, mulching, treating diseases and insects, regular watering, pruning, etc., as needed. Petitioners will perform this ongoing maintenance by obtaining a maintenance agreement from a

landscape contractor to maintain the properties at least once a year. Petitioners agree that plant losses will be replaced.

26. The grass portion of the lawns will be seeded and sodded when the other landscaping work is done on the properties. Thereafter, bare patches of the grass portion of the lawns will be reseeded. The front lawn will also be edged.
27. The shared driveway between the two properties will be repaired and maintained such that it has a uniform appearance by replacing it or sealing off the cracks. This will be part of the normal maintenance of the properties.
28. Trash and recycle bins will be kept behind the houses except for pick up days.
29. Petitioners will pick up trash in front of and on the properties on a daily basis when the office is open.
30. Outside lights will operate on motion detectors after 7:00 p.m.
31. The sign and trinkets on 9913 will be removed.
32. The address numbers on 9911 Georgia Avenue will be straightened.

Dated: April 1, 2004

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner