

**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:
AMERICAN CAREGIVERS, INC.

Petitioner

Mary Emah

For the Petition

Frank J. Kammel
Frank B. Cockrell

Neither in Opposition or
Support of the Petition

Board of Appeals Case No. S-2801
(OZAH Case No. 11-22)

Before: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER’S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2801, filed on December 23, 2010, seeks a special exception, pursuant to §59-G-2.13 of the Zoning Ordinance, to permit a Daycare Facility for Persons with Disabilities in a single-family detached home located at 3060 Fairland Road, Silver Spring, Maryland, on land in the R-90 (Residential, One-family, Detached) Zone. The property's legal description is Lot P7, Block 9 of the Calverton Subdivision. The tax account number is 05-02259637.

The Hearing was scheduled for April 18, 2011, by notice dated January 5, 2011 (Exhibit 14(b)). Technical Staff at the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report issued March 28, 2011, recommended approval of the special exception, with conditions. Exhibit 17.¹ The Planning Board transmitted its recommendation on April 12, 2011, adopting six conditions proposed by Staff and amending another condition requiring the Applicant to provide additional landscaping along western and front property lines to screen parking areas. Exhibit 19.

A public hearing was convened on April 18, 2011, as scheduled. Ms. Mary Emah appeared in support of the Petition. Two individuals, Mr. Frank Kammel and Mr. Frank Cockrell appeared solely to request that the "surrounding neighborhood" adopted by Technical Staff and the Planning Board be enlarged to reflect the "commercial creep" in the Calverton area.

The record was held open till April 27, 2011, to await the filing of the transcript. The record closed, as scheduled, on April 27, 2011.

There is no opposition to this special exception, and the petition meets all of the statutory criteria. The Hearing Examiner therefore recommends that the petition be granted, with conditions.

¹ The Technical Staff report is frequently quoted and paraphrased herein.

II. FACTUAL BACKGROUND

A. The Subject Property and the Neighborhood

The subject property is located at 3060 Fairland Road, Silver Spring, Maryland, in the Calverton Subdivision, just to the east of the traffic circle at the intersection of Fairland Road and Galway Drive. Exhibit 17, p. 6. The property is zoned R-90 and improved with a single-family home that is currently used as a home health practitioner's office. Exhibit 16, p. 6. The existing house, which fronts on Fairland Avenue consists of approximately 1,768 square feet. Exhibit 17, p. 3. The front of the house may be seen in photographs taken by Technical Staff (Exhibit 17, p. 4) shown below:



The home has a two-car attached garage. Access is from a semi-circular driveway connected to Fairland Road. In addition to the driveway and garage there is a parking pad on the west side of the property. A sidewalk runs in the front along Fairland Road. The semi-circular driveway, parking pad, and garage are shown in the photograph included in the Technical Staff Report on the next page (Exhibit 17, p. 5).



The rear of the property is open and fenced on all three sides. Technical Staff advises that the existing landscaping is well-maintained and the yard gently slopes away from Fairland Road. Exhibit 17, p. 3. The rear yard is shown below:



Mr. Frank Kammel, representing the Calverton Citizens Association, requested the Planning Board to expand the surrounding neighborhood from the area defined by Technical Staff. Technical

Staff delineated the general neighborhood as follows:

The neighborhood that surrounds the subject property is generally bound by single-family homes along the southern side of Memory Lane to the north and the single-family detached homes along the south side of Fairland Road to the south. The east side of the neighborhood boundary truncates just before reaching an R-200 zoned subdivision, and the neighborhood tapers off to the west where homes no longer have access along Fairland Road. All homes in the neighborhood are single-family detached homes. The entire neighborhood is zoned R-90. The neighborhood boundary, which is depicted with a dashed line on the map below, has been drawn to include any nearby properties that may be affected by a potential increase in traffic, noise, or physical activity associated with the proposed use. No other special exceptions exist within the neighborhood boundaries. Exhibit 17, p. 6.

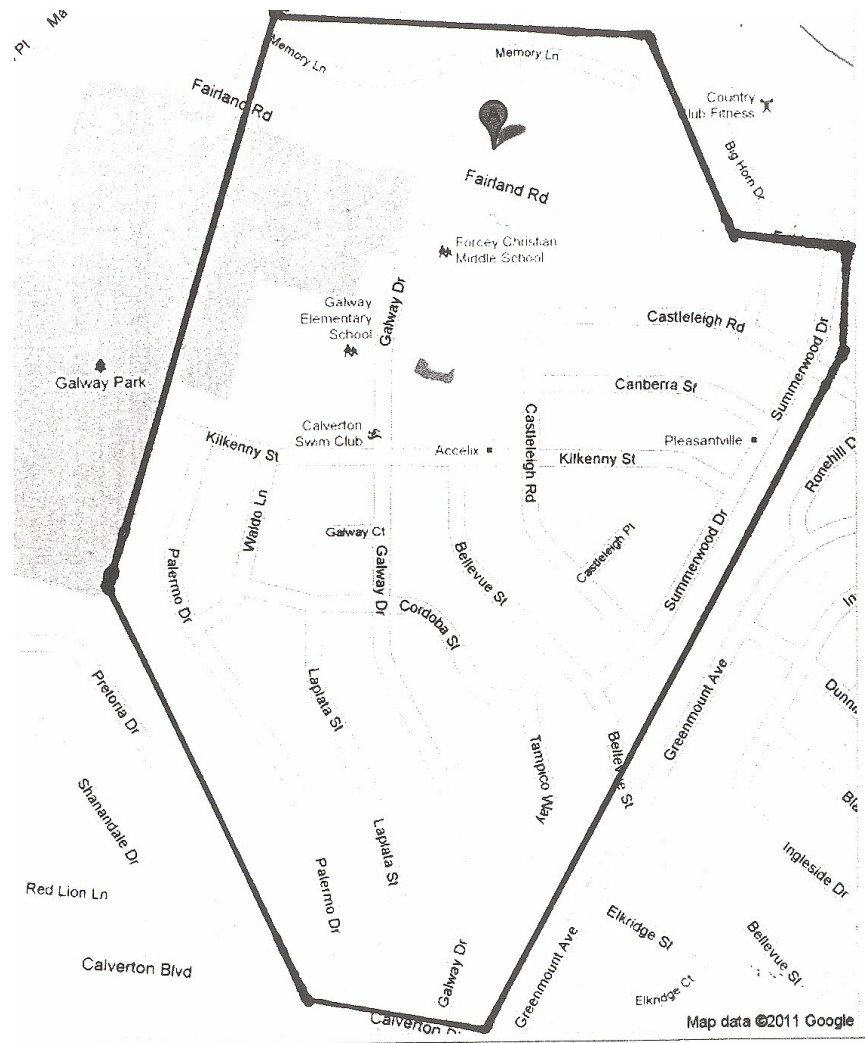
An aerial photograph (Exhibit 17, p. 6) depicting the neighborhood defined by Technical Staff is shown below. The Planning Board deferred this decision, leaving the determination of the neighborhood up to the Hearing Examiner. Exhibit 19.

Mr. Frank Kammel, representing the Calverton Citizens Association, testified at the public hearing. T. 13. He testified that the Association is working to preserve what they feel is a



Neighborhood Defined by Technical Staff
Exhibit 17, p. 6.

single family community, which has become “more and more inundated with large scale businesses that are intrusive” as well as single-family homes that are being converted to apartments. T. 14. After reviewing this special exception, the Association chose not to oppose the petition, but felt that the boundaries of the neighborhood should be expanded as shown below on Exhibit 21:



Neighborhood Defined by
Calverton Citizens Association (Ex. 21)

The Association felt that the larger area was more appropriate because their association borders the southern side of Fairland Road and Galway Drive. According to Mr. Kammel, Summer

Wood is a main conduit to get to Fairland Road. T. 17. The neighborhood they propose has a high volume of traffic, much of it generated from outside the neighborhood. The intersection of Fairland Road and Galway Drive is a traffic circle which is about 150 to 200 feet west of the subject property. That roundabout is the main access to one quadrant of Calverton. T. 17-19.

Mr. Frank Cockrell testified as an individual. T. 21. He is vice president of the Calverton Citizens Association. T. 21. He testified that the traffic volume in the area is very significant. He also stated that the subject property is closer to 100 feet from the roundabout. T. 22.

The Zoning Ordinance requires the Hearing Examiner to “consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location” when deciding whether to approve a special exception. The concept of “neighborhood” utilizes natural and manmade barriers to determine when the impacts of the use become too attenuated to have a significant effect on surrounding properties. *See, Burgess and Commissioners of Walkersville v. 103-29 Limited Partnership*, 123 Md. App. 293, 300 (1998)(in rezoning cases, the neighborhood must be the area which reasonably constitutes the immediate environs of the property); *Largo Civic Association v. Prince George’s County*, 21 Md. App. 76, 87 (1974)(the court defined a neighborhood as “an area having common geographical, physical and social characteristics which affect its physical development,” and delineated a neighborhood based on main roads as natural barriers “that give reference to borders of neighborhoods.”) *Id. at* 87.

Technical Staff characterized the neighborhood as consisting of single-family detached homes in the R-90 zoned and based its delineation on the minimal impact of the use and certain manmade and natural boundaries. Exhibit 17, p. 5. Staff extended the boundary to the east to a point where the R-90 zoned properties adjoin the rear property lines of an R-200 subdivision. To the west, Staff chose to end the neighborhood at the last nearby home with access directly onto

Fairland Road. Staff also included some of the single-family homes located on the south side of Fairland Road because those may be affected by the “potential increase in traffic, noise, or physical activity associated with the use.” Exhibit 17, p. 5. Technical Staff excluded several homes on Iona Court immediately across Fairland Road from the subject property.

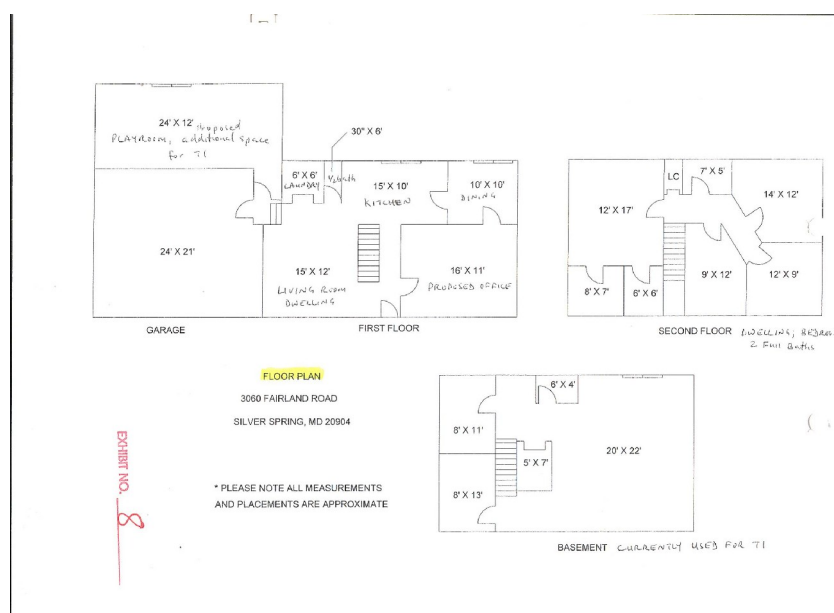
Based on Mr. Kammel’s testimony at the public hearing, the Hearing Examiner is persuaded that the neighborhood should be expanded slightly because of the traffic impact from Fairland Road. The evidence supports a finding that traffic generated by the facility will impact all of the homes whose access leads directly to Fairland Avenue. The Hearing Examiner therefore recommends expanding the neighborhood to include all the properties on Iona Court, which has direct access to Fairland Road across that road from the subject property. These are also single-family residential homes similar in character to the neighborhood defined by Technical Staff.

While the Hearing Examiner understands the concerns raised by the Calverton Citizens Association, she does not find that the minimal impact of this particular use justifies expanding the neighborhood to the extent proposed by the Association. As set forth below, Technical Staff found that the proposed use will generate only 3 peak hour morning and evening trips. As a result, Staff advised, and the Hearing Examiner agrees, that the minimal impact of the use may be absorbed by the existing roadways. Exhibit 17, p. 16. Similarly, Staff concluded that overall the proposed use will maintain the character of the single-family neighborhood, a conclusion with which the Hearing Examiner also agrees, therefore, there will be no significant impact on the larger area south of Fairland Road.

B. The Proposed Use

The Petitioner is seeking a special exception to allow a daycare facility for persons with disabilities within a single family home. Currently, the Applicant uses 720 square feet of the

home for a home health care practitioner's office. Exhibit 17, p. . She seeks to add 1,200 square feet for a therapeutic daycare for autistic children. Exhibit 17, p. 6. The program will focus on music, dance and recreational activities to help teach autistic children social skills and behavior. Total enrollment will not exceed 10 children, although, according to Petitioner, it is unlikely that 10 children will be enrolled at any one time. T. 10. Floor plans for the proposed use (Exhibit 8) are set forth below. The first floor will house office space and the basement will be used for classroom, play and nap space for the children. Children will access the play area (the back yard) through a basement entrance. Exhibit 17, p. 7.



Floor Plans (Exhibit 8)

The Petitioner proposes to use a van service for pick-up and drop-off of children to minimize traffic. Exhibit 3. According to the Applicant, there will be no parent drop-off or pick-up at the site. The children will arrive between 2:00 p.m. and 3:00 p.m. on weekdays. The children will depart between 5:30 p.m. and 6:00 p.m. on weekdays. The daycare will also operate on weekends with arrivals between 10:00 a.m. and 11:00 a.m. and departure between 3:30 p.m. and 4:00 p.m. The office will operate from 9:00 a.m. to 5:00 p.m. on weekdays. The

Petitioner proposes to have two employees on-site to provide care for disabled individuals. Exhibit 3.

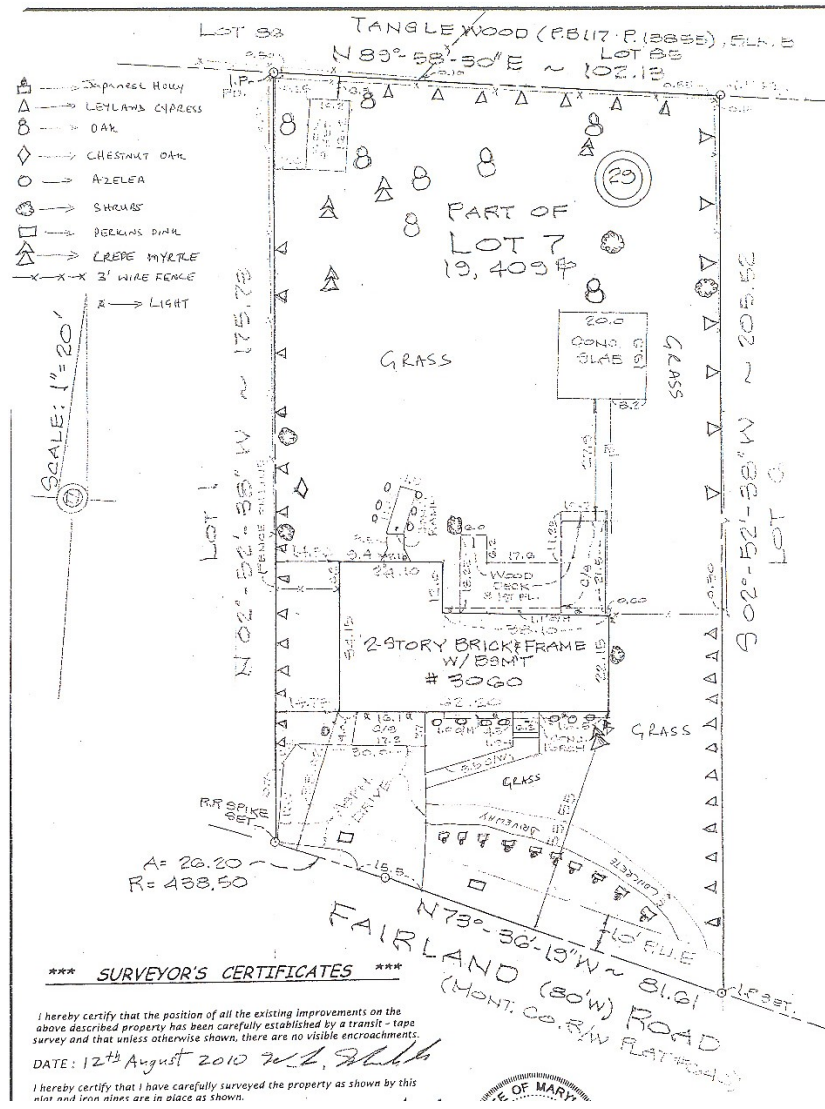
Petitioner recently installed a semi-circular driveway to avoid the necessity of having to back into Fairland Road. Exhibit 3. In order to utilize the existing parking pad, Petitioner is requesting a waiver of 12 feet from the required setbacks for special exception parking facilities.

Exhibit 3. Petitioner's justifies the waiver for the following reasons:

1. The Petitioner will use the semi-circular driveway and not the parking pad for drop off and pick-up to avoid additional noise and activity.
2. The parking pad has been screened with evergreens to prevent glare, reflection of automobile lights and fumes from adjoining neighbors.
3. The parking pad is removed from the pedestrian walkway and does not present any safety risks.
4. The semi-circular driveway avoids the problem of having to back onto Fairland Road; and
5. While the property has sufficient lighting, the parking pad will be used primarily during the day. Exhibit 3.

Both Technical Staff and the Planning Board supported the waiver request. Exhibits 17, 19. Technical Staff concluded that, "[T]he justification provided sensibly explains why the waiver should be permitted." Exhibit 17, p. 1.

Technical Staff advises that the Applicant's existing landscaping is well-maintained. Exhibit 17. The Applicant's proposed landscape plan (Exhibit 5) is shown on the next page. Technical Staff did recommend a condition requiring additional screening of the parking area "particularly along the front and western side of the parking pad." Exhibit 17, p. 2. The Planning Board modified the condition slightly to state "[t]he applicant should provide additional landscaped screening of the driveway and parking pad area with specific details of the proposed plantings to be submitted during the hearing examiner's proceedings with input from planning staff." Exhibit 19, p. 2.



Landscape Plan (Exhibit 5)

Technical Staff reports that the proposed use will generate only 3 peak-hour trips in the morning and the evening. Exhibit 17, p. 16. Because this is well under the 30 or more trips triggering Local Area Transportation Review (LATR), Staff advised that the Petition does not require a traffic study and “[T]his minimal amount of traffic increase can be accommodated by the existing road network in the neighborhood.” Exhibit 17, p. 16. Because the proposed use is expected to generate only 3 peak hour trips, it is exempt from Policy Area Transportation

Review.

Overall, with regard to proposed use, Technical Staff found:

[T]he home's entry points, landscaping, and overall appearance are typical compared to other single-family homes in the neighborhood. The use should not detract from the appearance of the neighborhood. Adequate lighting, residential in character, is located above the basement entrance to the daycare.

C. Neighborhood Response

There was one letter of support submitted to Technical Staff from the property owners adjacent to the parking pad. The property owners stated, "[W]e are writing to inform you that the parking lot at 3060 Fairland Road does not have any negative impact on us. Also that Ms. Emah has planted some trees to screen her parking area from us." Exhibit 17, Attachment 4. The Calverton Citizens Association did not oppose the petition, but appeared to request that the boundary of the neighborhood be expanded as shown in Section II.B above.

D. The Master Plan

The subject property lies within the *1997 Fairland Master Plan*. Exhibit 6. Technical Staff advises that there are no Master Plan recommendations specific to this site. Exhibit 17, p. 8. The Plan does note that the area is characterized by narrow interior roads and limited off-street parking. Technical Staff concluded that the additional parking on the site and its driveway access alleviated this issue, particularly if the parking was visually screened by additional landscaping. Exhibit 17, p. 8.

III. SUMMARY OF HEARING

At the hearing, testimony was heard from Ms. Mary Emah on behalf of the Petitioner, Mr. Frank Kammel representing the Calverton Citizens Association, and Mr. Frank Cockrell, who testified as an individual.

Ms. Mary Emah (on behalf of Petitioner):

Ms. Emah testified that she proposes to use the property for a school program for children with autism. She also will operate the daycare on weekends and days when there is no school. On weekends or days when school is out, the children will arrive from 10:00 a.m. to 4:00 p.m. She employs two staff members that come to the property to assist with the children. Other than the autism program, her agency provides home health care services. The employees of the home health care service do not have to come to the subject property except occasionally for training or meetings. T. 10. She stated that the program will not have more than 10 children on-site at any given time, and it is unlikely that it will have that number of children on-site at one time because the children come on different days. She is licensed by the State of Maryland to provide these services. T. 10

Ms. Emah testified that she is still awaiting a revised landscape plan from Technical Staff and agreed to comply with that plan as a condition of the special exception. T. 11. She testified that all her neighbors support the special exception because she assured them that it will not affect them in any way. T. 11. She stated that the business would not impact the community negatively and the van that brings the children will avoid any back-ups into Fairland Road. T. 12.

Mr. Frank Kammel (on behalf of Calverton Citizens Association):

Mr. Kammel testified that he represented the Calverton Citizens Association, which was formed in 1963. The Association does not object to the special exception petition. T. 13. They did request the additional landscaping to screen the parking, and Ms. Emah has agreed to do that. T. 13.

Mr. Kammel stated that the Association's concern is to maintain what they feel is a single family community. Over the years, the community has been "inundated" with large scale

business that they feel are intrusive. In addition, the community has experienced the conversion of single family homes into apartments. Because of this, they believe their community has taken on a “different look.” T. 14. The Association has been getting involved in zoning cases to make sure that new businesses have the proper licenses and permits because of the impact on the community. T. 14. Their two concerns are the landscaping, which the Association feels Ms. Emah has addressed, and the delineation of the neighborhood. T. 15.

According to Mr. Kammel, the Association believes that the neighborhood should be expanded because Fairland Drive is a major conduit for traffic in and out of Calverton. T. 15. Traffic flows down Calverton Boulevard or Summer Wood where people enter and leave Calverton via Fairland Road. T. 15. Because Galway School and the aquatic center are located there, it gets a lot of traffic. T. 15. He felt that the Association’s proximity to the roundabout at the intersection of Galway Drive and Fairland Road and its role of being the entrance to the community formed the basis for expansion of the neighborhood. T. 18, 19.

Mr. Kammel also testified that he was concerned that there were two open lots behind Ms. Emah’s house. He requested the Planning Board and the Hearing Examiner to look carefully were these two properties to file applications for business uses because it would create an intensification of those uses in the area. T. 16.

Mr. Frank Cockrell:

Mr. Cockrell testified that he lives on the Prince George’s side of the Calverton neighborhood and, while testifying as an individual, is vice president of the Association. T. T. 21. He testified that there is a propensity of zoning boards and the legislature to make it easier for further expansion of business uses. T. 22. He stated that the community is impacted by adjacent uses, such as the ICC and other uses which create problems in the morning and evening rush hours. T. 23.

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 Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if she complies with the recommended conditions (Exhibit 12).

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

For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a daycare facility for persons with disabilities. Characteristics of the proposed daycare facility for persons with disabilities that are consistent with the “necessarily associated” characteristics of daycare facility of this type will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with the use, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff have identified six characteristics to consider in analyzing inherent and non-inherent effects: (1) the physical building; (2) parking area for required spaces; (3) lighting; (4) activity generated by persons with disabilities utilizing grounds for outdoor activity or contemplative space; (5) employees of the facility; and (6) trips to and from the site. Exhibit 17, p. 12.

The Hearing Examiner concludes that the characteristics of this particular use have been adequately described by staff.

Technical Staff concluded that there were no non-inherent adverse impacts from this proposed use which would negatively impact the surrounding neighborhood (Exhibit 17, p. 12):

[T]here are no adverse effects that will negatively impact the community above and beyond those necessarily inherent to a daycare for persons with disabilities. The daycare activities will be located in the basement of the main dwelling and will be non-identifiable from the street. The space is set up to provide all the spaces and facilities necessary for a daycare use of this nature, including office space, classroom and play areas, and napping facilities.

The daycare entrance appears as a typical rear basement entry to a single-family house, making it difficult to distinguish from any other neighborhood home. The backyard and grounds of the property are relatively clear and safe while consistent with typical residential standards. The property is large enough – over twice the size of the minimum R-90 lot size – to help prevent noise from

adversely affecting surrounding properties.

Parking for the daycare will be sufficient. Here, in addition to the two available spaces in the attached garage for residential use, there is ample space for three vehicles to park along the property's semi-circle driveway and parking pad. Additionally, given the proposed operations of the use whereby children are taken by van to and from the site, substantial parking is not necessary.

Based on these findings, Staff concluded (Exhibit 17, p. 13):

The operational and physical characteristics of the proposed daycare are consistent with the inherent characteristics of a daycare for disabled persons use. There are no non-inherent adverse effects present in this case.

The Hearing Examiner agrees with Staff's assessment. Considering size, scale, scope, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there would be no non-inherent adverse effects from the proposed use.

B. General Conditions

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the Housing Code Inspector's report, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§59-G-1.21(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 daycare facility for disabled persons is a permissible special exception in the R-90 Zone, pursuant to Code § 59-C-1.31.

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

sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.13 for a daycare facility for persons with disabilities, as outlined in Part 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 a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property is covered by the 1997 *Fairland Master Plan*. Exhibit 6. Technical Staff advises that there are no Master Plan recommendations specific to this site. Exhibit 17, p. 8. The Master Plan does mention citizen concerns that the narrow interior roads in the neighborhood make on-street parking difficult.

The Hearing Examiner finds that the use does maintain the single-family appearance of the surrounding neighborhood. There are no external modifications to the existing home. The visual evidence of the proposed use is primarily the semi-circular driveway and the parking pad. While these may not typically be found on properties within the area, they also serve to avoid the concerns about on-street parking raised in the master plan. With the additional screening to be provided, the Hearing Examiner finds that the visual impact of these physical characteristics may be minimized and overall, the property will preserve the residential character of the neighborhood. For these reasons, the Hearing Examiner finds that the proposed use is consistent with the 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.*²

Conclusion: The daycare facility for persons with disabilities will be located in an existing single family home and will not require any external changes. There will be sufficient parking, considering the driveway and parking pad, to avoid back-ups into Fairland Road. The parking pad will be landscaped to screen it from Fairland Road and the adjoining property to the west, whose property owner supports the application. Exhibit 12(b). Traffic conditions will not be affected adversely, according to Transportation Planning Staff. There are no other special exceptions in the neighborhood, and the addition of this use will not affect the area adversely. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will 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: For the reasons set forth in answer to the previous section of this report, the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties or the defined neighborhood, provided that the special exception is operated in compliance with the listed conditions of approval.

- (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: Technical Staff found that “noise and physical activity will be minimal, as the majority of operations will take place indoors.” Up to 10 children only will be enrolled in the

² This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

daycare, and the applicant has stated that it is unlikely that all 10 children will be on site at the same time. Activity from the use is minimized by the fact that there will be no parent drop-off and pick-up. Further, the subject property is more than twice the minimum required in the R-90 zone and the backyard is screened by both fence and plantings. Given all the above, outdoor play from the children will not likely cause substantial noise or physical activity to surrounding properties. The use will cause no objectionable illumination or glare because the provided lighting is residential in character.

For these reasons, the Hearing Examiner finds that the proposed use will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site.

- (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 in the record that there are any special exception uses in the neighborhood. The Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

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

Conclusion: Because of its minimal impact, described in previous sections, 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: Technical Staff indicates that the subject site will be adequately served by existing public services and facilities (Exhibit 17, p. 16) and the evidence supports this conclusion.

- (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:³*
 - (i) *does not require approval of a new preliminary plan of subdivision; and*
 - (ii) *the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact; then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision and there is no currently valid determination of the of adequacy of public facilities for the site, taking into account the impact of the proposed special exception. 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 the preceding paragraph of this report, Technical Staff did do such a review, and concluded that the proposed daycare facility for persons with disabilities would add three additional trips during each of the peak-hour weekday periods. Exhibit 17, Attachment 2. Since the proposed use would generate fewer than 30 total trips in the weekday

³ This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. Because it is estimated to generate only three additional peak-hour trips, PAMR is also satisfied. Therefore, Transportation Staff concluded, as does the Hearing Examiner, 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: The evidence demonstrates that the semi-circular driveway and parking pad provide sufficient on-site parking and will serve to prevent backups onto Fairland Road. The walkway from the driveway to the interior does not cross the parking area. Based on the evidence of record, especially the Technical Staff's conclusion that, "the proposed use is not likely to negatively impact the safety of vehicular or pedestrian traffic as the use will not generate a substantial increase in either form of traffic," the Hearing Examiner so finds. Exhibit 17, p. 17.

Sec. 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: Technical Staff concluded that the proposal conforms to all applicable development standards of the zone. Exhibit 17, p. 10. Having no evidence to the contrary, the Hearing Examiner agrees with Technical Staff and so finds.

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

Conclusion: The Applicant requests a waiver of the required setbacks for special exception parking facilities contained in Section 59-E-2.83 of the Zoning Ordinance, which requires parking areas to "be set back a distance not less than the applicable building front and rear yard

and twice the building side yard required in the zone.” Technical Staff advises that the required side setback is 16 feet and the front setback is 30 feet from the property line. Exhibit 17, p. 10. The parking pad is located 4 feet from the western property line and 2 feet from the front property line, thus necessitating a waiver of 12 feet from the western line and 28 feet from the front property line. Exhibit 17, p. 10.

In order to approve a waiver, the property owner must show that, even with the waiver, the following goals may be achieved:

- (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, and 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.

Staff supported the waiver, finding that the proposed use still appeared residential in character, and the use of the van to transport children would minimize activity on the parking pad. Exhibit 17, p. 11. The Hearing Examiner agrees with Technical Staff. The Applicant will use a van for drop-off and pick-up thereby minimizing the activity on the parking pad. Evidence also demonstrates that the walkway from the van drop-off and pick-up does not cross the parking pad. Finally, the parking pad along with the semi-circular driveway promotes safety by preventing traffic back-ups onto Fairland Road. According to the Applicant, the parking area will be used primarily in the daytime, although residential lighting is provided. Exhibit 3. Based on this evidence, and with a condition requiring additional screening, the Hearing Examiner concludes, as did Technical Staff, that the Applicant has demonstrated that the purposes set forth

above will be met with approval of the waiver.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 17), provide sufficient evidence that the specific standards required by Section 59-G-2.13 are satisfied in this case, as described on the next page.

Section 59-G-2.13. Day care facility for senior adults and persons with disabilities.

A day care facility or center for up to 40 senior adults and persons with disabilities may be allowed if the Board finds:

- (1) That such use will not constitute a nuisance because of traffic, insufficient parking, number of individuals being cared for, noise or type of physical activity.*

Conclusion: Technical Staff found that the use will not constitute a nuisance because of the limited number of individuals that will be on-site at any one time and because the lot size and screening helps shield neighboring properties from potential noise and activity. The Hearing Examiner agrees with this finding by Technical Staff. The Hearing Examiner additionally finds that the use will not constitute a nuisance because there is ample parking on the site, the driveway configuration prevents adverse impacts onto Fairland Road, and there will be no parent drop-off or pick-up at the site.

- (2) That the applicant possesses a valid certificate to operate an elderly and medically handicapped day care facility issued by the secretary of the Maryland Department of Health and Mental Hygiene; and*

Conclusion: The Applicant has submitted a license from the Maryland Department of Health and Mental Hygiene, Office of Health Care Quality, for a residential service agency. Exhibit 17, Attachment 5. Technical Staff advises that this is the necessary licensure to meet this requirement and the Hearing Examiner so finds.

(3) *That any property to be used as a day care facility is of sufficient size to accommodate the proposed number of residents and staff.*

Conclusion: As previously set forth, the subject property consists of 19,409 square feet and is more than twice the minimum lot size in the R-90 Zone. Exhibit 17. The rear yard is large and spacious, as shown in the previous pictures, and is fenced and landscaped. The parking pad may accommodate two on-site caregivers, leaving the driveway open for drop-off and pick-up of children. For these reasons, the Hearing Examiner agrees with Technical Staff that this criterion has been met.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2801, which seeks a special exception for a daycare facility for persons with disabilities to be located at 3060 Fairland Road, Silver Spring, Maryland, be GRANTED, with the following conditions:

1. The Applicant is bound by all submitted statements and materials pertaining to the proposed operations.
2. The hours of operation will be limited to Monday through Friday from 9:00 a.m. to 6:00 p.m. and Saturday and Sunday from 10:00 a.m. to 4:00 p.m.
3. Weekday van arrival time will be between the hours of 2:00 p.m. and 3:00 p.m. and weekday van departure time will be between 5:00 p.m. and 6:00 p.m.
4. Weekend van arrival time will be between the hours of 10:00 a.m. and 11:00 a.m. and weekend van departure time will be between 3:30 p.m. and 4:00 p.m.
5. The Applicant may have no more than 10 disabled persons cared for on-site at any time.
6. The Applicant may have no more than two non-resident employees providing care for disabled individuals on-site.

7. Prior to a decision by the Board of Appeals, the Applicant shall submit to the Board revised landscape plan that has been approved by Technical Staff showing additional screening of the driveway and parking pad area with specific details of proposed plantings.

Dated: May 16, 2011

Respectfully submitted,

Lynn A. Robeson
Hearing Examiner