

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR MONTGOMERY COUNTY, MARYLAND**

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**REQUEST OF MARGARET L. ZHANG *
for a modification of a child day care center *
special exception to increase permitted enrollment *
from 22 to up to 30 children on property located *
at 14315 Marian Drive, Rockville, Maryland ***

Margaret L. Zhang *
Shengyong Zhou¹ *
Michael Zhang *
Jane Lee, Lauren Adler, Keith Ripley, *
Liliana Simon, Joan Chen-Main, Andrew Lih, *
Janet Jing, Catherine Gedney and *
Patricia McHugh *

For the Modification Request *

Special Exception No. 11-2-A

James Green, Opposition Coordinator² *
Bryan Cook *

In Opposition to the Petition *

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S OPINION AND DECISION ON MODIFICATION REQUEST

¹ Mr. Zhou is Petitioner's husband and Michael Zhang is her brother.

² Mr. Green is an attorney admitted in the District of Columbia and New York, but not in Maryland. He coordinated for the opposition, but did not represent them and did not testify at the hearing. 9/6/13 Tr. 6, 122.

I. STATEMENT OF THE CASE AND FACTUAL BACKGROUND

Petition S.E. 11-2, filed on August 19, 2010, requested a special exception to operate a child day care center³ for up to 30 children in Petitioner's home at 14315 Marian Drive, Rockville, Maryland. The property is described as Lot 1, Block A, in the Hunting Hill Estates Subdivision, and it is zoned R-200. That petition was granted on May 4, 2011, by the Hearing Examiner, with 17 specific conditions. One of those conditions (Condition 3) limited the total enrollment to 22 children for the first year of operation, but permitted the Petitioner to request an increase in enrollment up to 30 under certain circumstances. It provided:

3. The number of children enrolled at the center shall not exceed 22 children, ages eighteen months to six years, until approved by the Hearing Examiner after a follow-up hearing which may be scheduled after one year of operation under this special exception. In no event shall the number of children exceed the number authorized by State licensing authorities, and the ages of the permitted children will be determined by State licensing authorities. The follow-up hearing will be scheduled if a request is received by the Office of Zoning and Administrative Hearings from the Petitioner on or after one year from the date of this Opinion and Decision. Concurrent with any such request, Petitioner must ask Technical Staff to review traffic volume, traffic safety and parking operations for the year of operations at the increased enrollment, and to submit a report to the Hearing Examiner with their findings. Any follow-up hearing will be formally noticed to all parties, and it will review traffic and parking concerns raised by members of the community prior to determining whether the number of children permitted on site should be increased to 30.

³ A "child day care center" is one of three types of "child day care facilities" defined in Zoning Ordinance §59-A-2.1. The other two are "family day care homes" for up to 8 children and "group day care homes" for up to 12 children. A "child day care center" is defined in §59-A-2.1 as:

- a. a dwelling in which child day care services are provided and the provider is not a resident and does not meet the requirements for a non-resident provider of a family day care home or a group day care home, or;
- b. a building in which child day care services are provided:
 - 1) for 13 or more children, or;
 - 2) which exceed the staffing limits of a family day care home, or a group day care home, or;
 - 3) for 24 hours a day provided that they are in conformance with state and local regulations.

On May 20, 2013, Petitioner Margaret L. Zhang filed a request for a modification of the May 4, 2011 Decision, seeking to increase the permitted enrollment of Petitioner's operational "Little Genius Montessori Center" from the 22 children permitted by the 2011 special exception to up to 30 children, pursuant to Condition 3 of the 2011 Decision.⁴

Notice scheduling a hearing on the modification request for September 6, 2013, was issued on June 27, 2013 (Exhibit 89). Petitioner was also required to post a notice sign on her property regarding the modification request, and she filed an affidavit of posting at the hearing certifying that she had done so. Exhibit 110. The notice specified that the hearing would be limited by the terms of Condition 3 of the May 4, 2011 decision to a "review [of] traffic volume, traffic safety and parking operations for the period that the special exception has been operational."

Per the Hearing Examiner's instructions (Exhibit 79), Ms. Zhang filed a Revised Statement of Operations (Exhibit 96) incorporating the conditions of the 2011 decision, and she requested Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) to review traffic volume, traffic safety and parking operations for the period that the special exception has been operational. Technical Staff did so in a memorandum to the Hearing Examiner dated July 25, 2013 (Exhibit 94(a)). By e-mail, the Hearing Examiner then asked Technical Staff to evaluate "whether it will continue to function safely and without unduly impacting the neighborhood (with regard to traffic and parking) if the enrollment is increased to 30 children." Mr. Ki Kim of Technical Staff responded on July 29, 2013, stating, "Based on my further evaluation of the projected traffic volumes and parking demand for 30 children, it is project[ed] that the site with existing vehicular access points and parking facility will continue to

⁴ The Exhibits for the modification request begin at Exhibit 76 (the Modification Request itself) and run through Exhibit 112.

function safely and efficiently and the nearby road system will not be adversely impacted.”

Exhibit 95.

The Hearing proceeded as scheduled on September 6, 2013. Margaret Zhang appeared *pro se*, but was assisted by her husband, Shengyong Zhou, and her brother, Michael Zhang, both of whom also testified.⁵ In addition, Ms. Zhang called nine witnesses who supported her request to increase the enrollment – Jane Lee, Lauren Adler, Keith Ripley, Liliana Simon, Joan Chen-Main, Andrew Lih, Janet Jing, Catherine Gedney⁶ and Patricia McHugh. All are parents of enrollees or are on the waiting list for the school. The sense of their testimony was that neither traffic nor parking is a problem at this facility, and that it operates very safely in both regards even on the two occasions a year when there are large gatherings at the home. 9/6/13 Tr. 37-86. Ms. Zhang also produced a copy of her standard Enrollment Agreement form (Exhibit 112). It specifies that parents must always park in the site’s parking lot, and “Under no circumstance will I park my vehicle on Marian Dr.” Exhibit 112, p. 2. It also provides spaces for the parents to specify arrival and pick-up times (Exhibit 112, p. 3).

Only one witness testified in opposition, Mr. Bryan Cook, who lives at 14301 Marian Drive, near the subject site. Mr. Cook feels strongly that the curve and elevation drop on Marian Drive adjacent to the subject site make it dangerous for pedestrians, in light of the increased traffic likely to be engendered by the increased enrollment. He also criticized Technical Staff’s analysis as being “inadequate,” although he admitted that he is not an expert in traffic engineering. 9/6/13 Tr. 122-148.⁷

⁵ Margaret Zhang’s testimony was recorded at 9/6/13 Tr. 12-35; Michael Zhang’s testimony was recorded at 9/6/13 Tr. 86-112; Mr. Zhou’s testimony was recorded at 9/6/13 Tr. 117-121.

⁶ The court reporter erroneously failed to list Ms. Gedney as a witness at the beginning of the transcript (9/6/13 Tr. 3-4), though she did testify, as indicated in 9/6/13 Tr. 75-77.

⁷ The Hearing Examiner notes that in the middle of Mr. Cook’s testimony, the court reporter switched from correctly identifying him as “Mr. Cook” to erroneously identifying him as “Mr. Green.” 9/6/13 Tr. 124-138. The court reporter also misspells his first name, which is correctly spelled “Bryan.”

The Hearing Examiner announced at the hearing that the previously admitted exhibits in the original special exception case may also be considered to the extent relevant to the modification request. 9/6/13 Tr. 10.

The record was held open until September 16, 2013 to give the opposition until September 11, 2013, to comment upon the Enrollment Agreement, if they choose to do so, and to give Petitioner until September 16, 2013 to respond to anything the opposition might file. 9/6/13 Tr. 153-156.

Nothing further was filed in the case, and the record closed, as scheduled, on September 16, 2013.

II. FINDINGS AND CONCLUSIONS

Requests for modification of a special exception are governed by the Zoning Ordinance, and in this case, by the terms of Condition 3 of the May 4, 2011 grant of the special exception, quoted above.

Zoning Ordinance §59-G-1.3(c) provides:⁸

(c) Modification. The Board may amend or modify the terms or conditions of a special exception on request of the special exception holder or recommendation of the Department, or after a show cause hearing held under subsection (e).

(1) If the proposed modification is such that the terms or conditions could be modified without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood, the board, without convening a public hearing to consider the proposed change, may modify the term or condition. However, if the matter involves an accessory apartment, the Board must not act until 10 days after the posting of the property with a special exception for accessory apartment sign under Section 59-A-4.43. The sign must remain posted until at least 15 days after the mailing of the Board's resolution. The affirmative vote of at least 4 members of the Board is required to modify the terms or conditions.

A copy of the Board's resolution must be transmitted to the petitioner, the Planning Commission, the Department, the Department of Finance, all parties entitled to notice at the time of the original filing, and current adjoining and confronting property

⁸ The Hearing Examiner is granted the authority to conduct the modification proceedings specified in Zoning Ordinance §59-G-1.3(c), pursuant to Zoning Ordinance §59-G-1.3(f), for special exceptions such as the instant one which were initially granted by the Hearing Examiner under Zoning Ordinance §59-G-1.12.

owners. The resolution must state that any party may, within 15 days after the Board's resolution is mailed, request a public hearing on the Board's action. The request must be in writing, and must specify the reasons for the request and the nature of the objections or relief desired. If a request for a hearing is received, the Board must suspend its decision and conduct a public hearing to consider the action taken.

(2) If the proposed modification substantially alters the nature, character, intensity of use or the conditions of the original grant, the Board must convene a public hearing to consider the proposed modification. The Board must notify the special exception holder that, except as otherwise provided in this section, such request for modification is subject to the requirements set forth in Sections 59-A-4.2 and 59-A-4.4. The Board must receive and process petitions for modification of a special exception in accordance with the provisions of those sections.

(3) Petitions for modification of the terms or conditions of a special exception must be scheduled for hearing as promptly as possible, provided that hearings on petitions for modifications of a special exception must be held not less than 30 days following the date of public notice. Nothing herein prohibits the Board from convening a hearing within a shorter period of time if the Board determines by the vote of at least 3 members that an emergency exists which poses an immediate threat to the public health, safety, convenience, welfare or necessity, or that delay would impose unusual individual or community hardship.

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

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

* * *

If it were not for Condition 3 of the May 4, 2011 decision, which specified that any increase in enrollment beyond 22 would require a further hearing to review “traffic and parking concerns,” this modification request might well have been evaluated pursuant to §59-G-1.3(c)(1),

which permits the Hearing Examiner to grant the modification without a hearing, “*if the proposed modification is such that the terms or conditions could be modified without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood . . .*” However, due to the community concerns raised at the initial special exception hearings, the Hearing Examiner determined at that time that it would be best to evaluate any request to increase enrollment beyond 22 children after a public hearing.

As required by §59-G-1.3(c)(4), when a hearing is held on a modification request, “*the public hearing must be limited to consideration of the proposed modifications noted in the [Hearing Examiner]'s notice of public hearing and to (1) discussion of those aspects of the special exception use that are directly related to those proposals . . .*”⁹ That was the procedure followed in this case, and the hearing addressed only the issue of “traffic volume, traffic safety and parking operations” and directly related aspects of the special exception use. The evidence received at the hearing is contained in a verbatim transcript which is part of the record, and it is briefly described in Part I of this Opinion.

The evidentiary standard to be applied in special exception cases is preponderance of the evidence. Zoning Ordinance §59-G-1.21(a). Applying that standard to this request, this is not a close case. The only opposition evidence regarding the modification request is the testimony of Mr. Bryan Cook that he sees pedestrians in the area, that he has seen unsupervised children on the subject site and that, in his lay opinion, the increase in enrollment would create a traffic hazard. Arrayed against his testimony is the expert evidence of Technical Staff’s Transportation Division (Exhibits 94(a) and 95), indicating that the special exception has operated safely and will continue

⁹ The additional language in this subsection pertains only to cases where there has been a physical expansion of the floor area of the special exception, which is not the case here.

to do so at the increased enrollment; the testimony of twelve supporting witnesses (Mrs. Zhang; her brother, Michael Zhang; and her husband, Shengyong Zhou,¹⁰ in addition to nine other witnesses called by Petitioner) who have observed the operation at different times of day, all of whom testified as to its safe operation and the lack of any traffic congestion or parking issues; and the results of Petitioner's survey of child-care parents regarding "Traffic, Safety and Parking," which also indicates no problems in this regard (Exhibits 98(a)-(x)).¹¹

The Hearing Examiner must evaluate this case based on the evidence presented, and there is a paucity of lay evidence, as well as a complete absence of any expert evidence, to support Mr. Cook's contention of a safety hazard. Based on this record, the Hearing Examiner finds that the Little Genius Montessori Center has operated safely and without undue disturbance to the neighborhood in terms of traffic volume, traffic safety and parking operations for the period that the special exception has been operational and that the proposed increase in the enrollment ceiling from 22 to 30 will not adversely affect the neighborhood in terms of traffic volume, traffic safety and parking operations.

One final thing should be said about the issue of adverse affects on the community from the special exception in question. It is recognized in the Zoning Ordinance that special exceptions may create some adverse conditions for the immediate neighborhood. Nevertheless, Zoning Ordinance §59-G-1.2.1. expressly prohibits denial of a special exception petition if the only adverse effects on the community are those that are inherent in this type of use. "*Inherent adverse*

¹⁰ The court reporter erroneously failed to list Mr. Shengyong Zhou as a witness at the beginning of the transcript (9/6/13 Tr. 3-4), though he did testify, as indicated in 9/6/13 Tr. 117-121.

¹¹ The observations contained in the survey results are hearsay, in that they contain statements offered outside the hearing room offered to prove the truth of the matters asserted therein. Hearsay is permitted in this administrative proceeding, if it appears to the Hearing Examiner that the evidence "possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs." OZAH Rules 4.3 and 10.8. This Rule is consistent with the County's Administrative Procedures Act, Sec. 2A-8(e). Moreover, a number of the participants in the survey did offer sworn testimony at the hearing and were subjected to cross-examination. The Hearing Examiner's findings in this case would be the same whether or not the survey results of the those who did not testify were considered.

effects alone are not a sufficient basis for denial of a special exception.” The basis for this statutory policy is the determination of the Council that this type of special exception (a child care facility) has benefits to the community and the County as a whole that outweigh the potential adverse effects (*e.g.*, extra traffic, more parking and more activity) that are inherent in this type of facility.

As the Hearing Examiner found in his May 4, 2011 Opinion, the relevant site and operational characteristics of the proposed use are consistent with the inherent characteristics identified for a child day care center. Moreover, given the size of Petitioner’s parking area, and the staggered arrival of children, no additional on-street spaces should be needed to provide adequate parking for employees and discharge and pickup for the users; the amount of traffic generated would not be unusual; and operations at the day care center, from a land use perspective, are consistent with the typical operations of such a facility. There may be adverse effects, but they are of a kind that is typically created by this type of use (*i.e.*, inherent), and the Council elected to permit this use in this Zone. Moreover, the adverse effects have been addressed by conditions already imposed on the special exception.

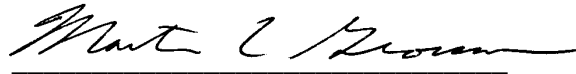
Based on the evidence admitted at the modification hearing, the Hearing Examiner finds that an increase in enrollment at the day care center allowing up to a total of 30 children will not substantially change the nature, character or intensity of the use and will not substantially change the effect on traffic or on the immediate neighborhood.

III. DECISION

Therefore, the Hearing Examiner hereby modifies Condition 3 of his May 4, 2011 Opinion and Decision to permit an enrollment of up to 30 children. This modification and the continued use of the special exception are subject to all terms and conditions imposed in connection with the

initial approval, except as specifically amended by the Hearing Examiner in this modification decision.

Dated: September 19, 2013



Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any person, board, association, corporation or official aggrieved by a decision of the Hearing Examiner under this section may, within ten days after this decision is rendered, appeal the decision to the County Board of Appeals in accordance with the provisions of Section 59-G-1.12(g) of the Zoning Ordinance.

cc: Petitioner
All parties of record
All hearing participants
The Planning Board
Department of Finance
All parties entitled to notice of filing