

**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:** \*

**PAWS AND CLAWS ANIMAL HOSPITAL, LLC<sup>1</sup>** \*

Petitioner \*

Dr. Melissa Birken, DVM \*

Timothy Ober \*

Daniel Sur, Architect \*

For the Petitioner \*

Susan W. Carter, Esquire \*

Jody S. Kline, Esquire \*

Attorneys for Petitioner \*

Board of Appeals No. S-2871  
OZAH No. 13-20

\*\*\*\*\*

Before: Tammy J. CitaraManis, Hearing Examiner

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

**TABLE OF CONTENTS**

I. STATEMENT OF THE CASE .....	2
II. FACTUAL BACKGROUND .....	4
A. The Subject Property and its Current Use.....	4
B. The Surrounding Neighborhood .....	8
C. The Master Plan .....	9
D. The Proposed Use .....	10
E. Traffic Impacts .....	18
F. Environmental Impacts .....	19
G. Community Response .....	20
III. SUMMARY OF THE HEARING .....	20
IV. FINDINGS AND CONCLUSIONS .....	30
A. Standard for Evaluation .....	30
B. General Standards .....	32
C. Special Standards: Veterinary Hospital .....	38
D. General Development Standards .....	40
V. RECOMMENDATIONS .....	43

---

<sup>1</sup> The owner and veterinarian for the proposed facility is Melissa Birken (Dr. Birken). During her testimony, Dr. Birken clarified that Melissa Birken, LLC, is the principal owner and spokesperson for the corporate Petitioner, Paws and Claws Animal Hospital, LLC. Tr. 13-14.

## I. STATEMENT OF THE CASE

In Petition No. S-2871, Petitioner, Paws and Claws Animal Hospital, LLC (Paws and Claws), seeks approval of a Special Exception under Zoning Ordinance §59-G-2.32 to allow operation of a veterinary hospital in the existing Damascus Shopping Center located at 9815 Main Street (MD 108), Damascus, Maryland, in the Mixed Use Town Center (MXTC) Zone. The shopping center property owner is Damascus Centre, LLC. The legal description for the shopping center is Parcel N575 (Tax account number 12-01721150). Exhibit 1(a). Dr. Melissa Birken, D.V.M, as the principle owner of Melissa Birken, LLC d/b/a Paws and Claws Animal Hospital, LLC, entered into a lease agreement with the property owner to occupy suite 103 in building D in the shopping center.<sup>2</sup> Exhibit 33(b).

On May 1, 2013, the Board issued a notice of a public hearing before the Hearing Examiner for July 12, 2013. Exhibit 15(b). At the request of Petitioner's attorney, Susan Carter, the hearing was rescheduled to allow Technical Staff time to complete their report.<sup>3</sup> On May 16, 2013, a Notice of Rescheduled Hearing was issued and the hearing was rescheduled for July 26, 2013. Exhibit 19.

Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), in its report dated July 11, 2013 (Exhibit 22), recommended approval of the Petition, with six (6) conditions.<sup>4</sup> The Montgomery County Planning Board reviewed the matter on July 11, 2013, and voted to recommend approval with five (5) conditions.<sup>5</sup>

---

<sup>2</sup> The proposed facility will occupy two interior units (e.g., suites 102 and 103) in building D and will be 2,850 square feet in size (40' x 71'). Exhibits 5(a) and 27. According to the Site Plan for the shopping center the address for building D is 9811 Main Street. Exhibit 4.

<sup>3</sup> Mr. Jody Kline, Esquire, represented Petitioner at the hearing.

<sup>4</sup> The Technical Staff Report, Exhibit 22, is frequently quoted and paraphrased herein.

<sup>5</sup> The Planning Board's recommendation included Technical Staff's recommended conditions 1 through 5 with one modification to condition number 4. (Exhibit 23).

Exhibit 23. Prior to the hearing, Dr. Pamela Armstrong, a veterinarian from Damascus Veterinary Hospital, submitted a letter dated July 17, 2013. Exhibit 25.

The hearing went forward as scheduled on July 26, 2013. Petitioner's attorney, Mr. Jody Kline, presented the following witnesses in support of the Petition: 1) Dr. Melissa Birken, DVM – the owner and veterinarian responsible for the daily operations of the veterinary hospital at the proposed location (Tr. 13-36); 2) Timothy Ober – the general contractor responsible for the actual construction of the interior space in accordance with the amended floor plan (Tr. 36-50 and 107-117); and 3) Daniel Sur, a licensed architect qualified as an expert in acoustical design construction for noise reduction associated with the operation of a veterinary hospital (Tr. 51-104). Dr. Birken executed the Affidavit of Posting.<sup>6</sup> Exhibit 26. No opposition appeared at the hearing.

The record was held open until August 9, 2013, to permit the Petitioner time to submit a copy of the lease, photographs of the area behind the unit, a summary of past Board of Appeals decisions approving veterinary hospital use in a commercial zone, and proof necessary to find compliance with Zoning Ordinance § 59-G-2.32(a)(2), which states that “[a]ll interior areas for the keeping of animals must be soundproofed.” Tr. 122-17. Petitioner's supplemental submissions were timely filed on August 6, 2013. Exhibits 33, 33(a), 33(b) and 33(c) (i-iv).<sup>7</sup>

Based on a request from the Hearing Examiner, and prior to the close of the record, Technical Staff submitted a letter dated July 31, 2013, revising page 7 of the staff report to insert the current language for Section 59-G-1.21(9)(A) of the Zoning Ordinance and a copy of Transportation Planning staff's memorandum dated May 30,

---

<sup>6</sup> Dr. Birken handwrote “Melissa Birken, LLC d/b/a “Paws and Claws” above her signature. Exhibit 26.

<sup>7</sup> As required, Petitioner also submitted an electronic copy (e.g., CD) of all exhibits and submissions filed in this case. Exhibit 33(d).

2013. Exhibit 31(a)-(b). Further, Technical Staff also forwarded a copy of an internal e-mail dated May 30, 2013, to staff from Calvin Nelson, Planner Coordinator, regarding his review and design comments on the proposed design of the facility for compliance with the soundproofing requirements of Zoning Ordinance § 59-G-2.32(a)(1)-(2). Exhibit 32.<sup>8</sup> The record closed as scheduled on August 9, 2013.

The record was reopened on September 5, 2013, for the limited purpose of receiving a Neighborhood Map of the surrounding neighborhood which was missing from the Technical Staff Report. The requested map was timely filed and received into the record as Exhibit 34(a) on September 6, 2013. The record closed on September 6, 2013.

For the reasons set forth below, the Hearing Examiner recommends approval of the Special Exception petition, subject to the conditions set forth in Section V of this report.

## **II. FACTUAL BACKGROUND**

### **A. The Subject Property and its Current Use**

The proposed veterinary hospital will be located in a leased space in the redeveloped Damascus Shopping Center located at 9815 Main Street (MD 108), Damascus, Maryland. Technical Staff provided the following site description of the shopping center, including its location and redevelopment history (Exhibit 22, p. 2):

The proposed site is located in an existing rectangular unit consisting of 2,850 square feet in the Damascus Shopping Center located in the Damascus Town Center. The Damascus Shopping Center is situated in the northeast quadrant of the intersection of Maryland Route 27 and Main Street. Four years ago, Hekemian & Co. transformed a dated shopping

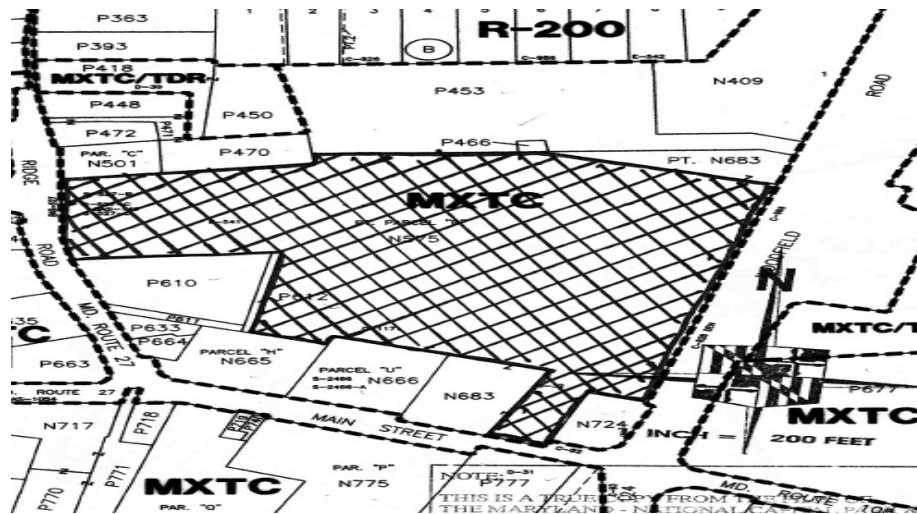
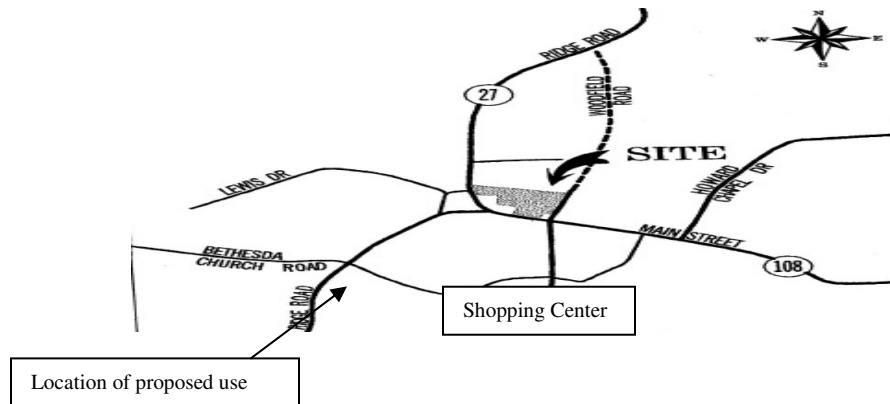
---

<sup>8</sup> The Hearing Examiner requested this information during a telephone conversation with Technical Staff (Kristin O'Connor) on July 28, 2013.

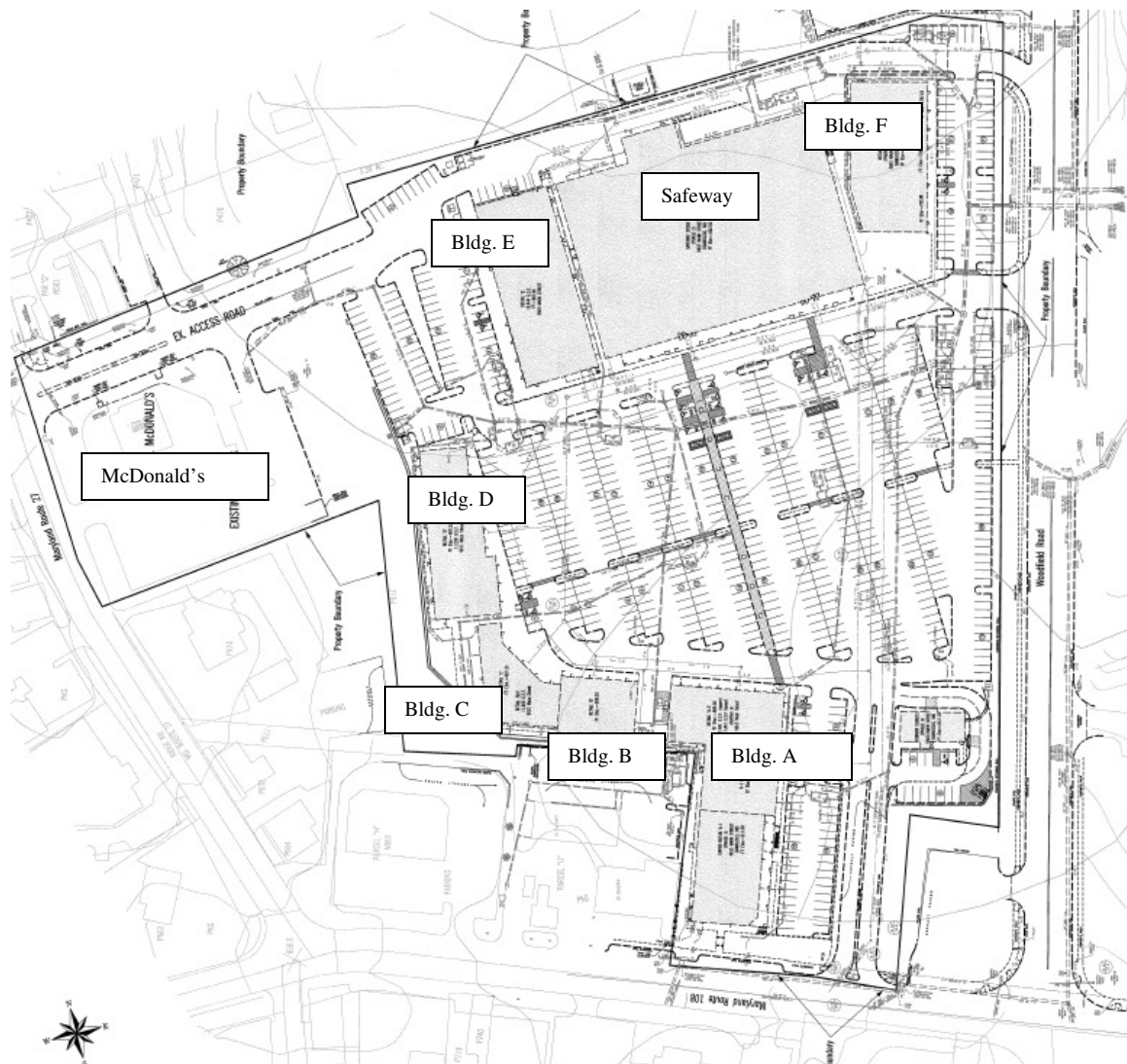
center into a 155, 000 square foot modern day shopping center. Anchored by a new 58,000 square foot Safeway, the shopping center also includes a Ledo Pizza, McDonald's, Hair Salons, Pet Value, cleaners, legal offices, and other professional services. The Petitioner has entered into a lease to occupy Suite 103 in Building D [in the] shopping center.

The shopping center's location is shown below on the vicinity map of the area (Exhibit 4):

The shopping center is located in the Mixed Use Town Center (MXTC) zone. The Zoning Map is shown below (Exhibit 4):



In addition to the Safeway, the shopping center is improved with six (6) separate buildings identified by letters from A to F. According to Technical Staff, “[t]here are approximately 600 parking spaces for the combined retail uses permitted in the shopping center.” Exhibit 22, p. 3. The Site Plan for the shopping center is shown below (Exhibit 4):



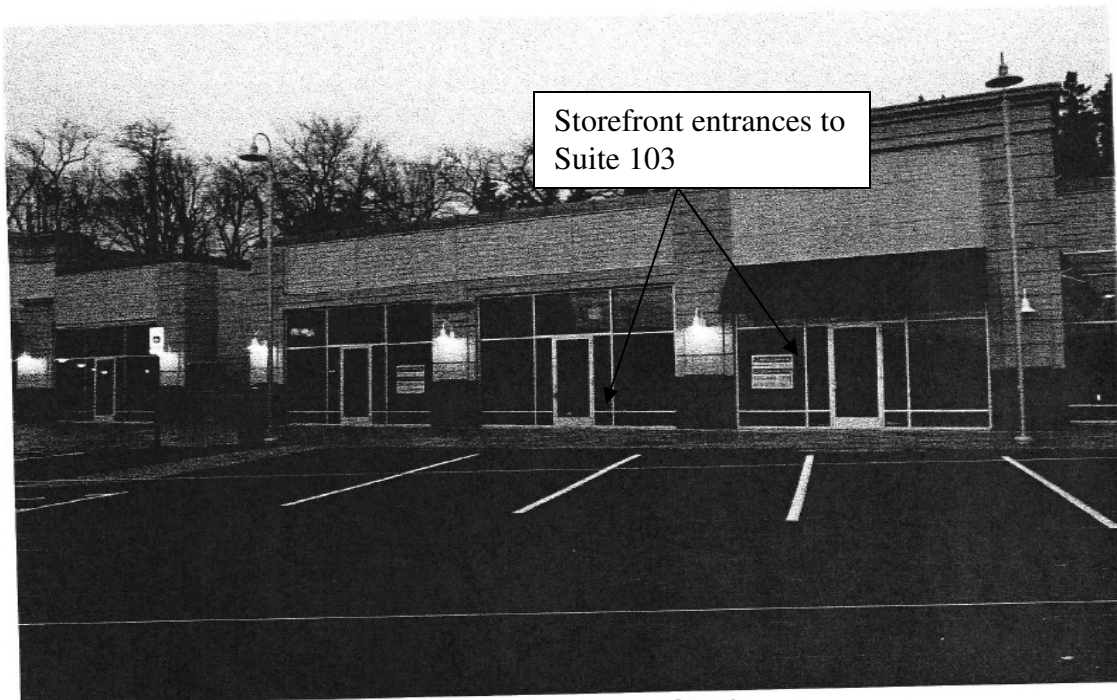
The proposed veterinary hospital will occupy suite 103 in building D. Technical Staff reports: “The existing space (2,850 square feet) has already been constructed as part

of an overall redevelopment of the shopping center.” Exhibit 22, p. 1. Petitioner provided the following building elevation drawing for building D (Exhibit 5(b)) and photographs of the existing storefront entrance to suite 103 (shown below) and view of the shopping center paved parking lot (shown on next page). (Exhibit 9).



6. Building D Elevation

Suite 103



Exterior frontage of Unit



View of Damascus Shopping Center from unit.

### **B. The Surrounding Neighborhood**

Technical Staff defined the surrounding neighborhood as bound by Main Street/MD 108 to the south, Ridge Road/MD Route 27 to the west and Woodfield Road to the east up and along the Town Center Boundary to the north over to Route 27. Consistent with the Zoning Map of this area (Exhibit 14), previously shown on page 5 of this report, the properties within and immediately adjacent to this area are in the MXTC zone. These properties include a McDonald's in the northwest corner of the shopping center, a post office to the north and "[a] bank, office/retail, and funeral home [] to the south." Exhibit 22, p. 3. According to Technical Staff, the McDonald's is the only special exception use (approved in 1978) in the area. *Id.* The Hearing Examiner accepts Technical Staff's description as defining the general neighborhood in this case as drawn on the Neighborhood Map (Exhibit 34) shown on the next page.



2871, Claws and Paws Animal Hospital Neighborhood Map



### C. The Master Plan

The subject property lies within the area designated as the Damascus Town Center in the 2006 Damascus Master Plan. Exhibit 7. Technical Staff reports that the 15-acre shopping center was “poorly visible and dated” when the Plan was adopted. The Plan envisioned and recommended redevelopment of the shopping center “into an attractive retail center with mixed-use potential.” Exhibit 7, p. 22. According to Technical

Staff, in order “[t]o achieve this goal, the property was rezoned MXTC in the SMA [Sectional Map Amendment] that followed the adopted Plan.” Exhibit 22, p. 3.

In the Implementation Plan section of the Plan, the rationale and goal for the commercial Town Center zoning (MXTC zone) is clearly stated (Exhibit 7, p. 93):

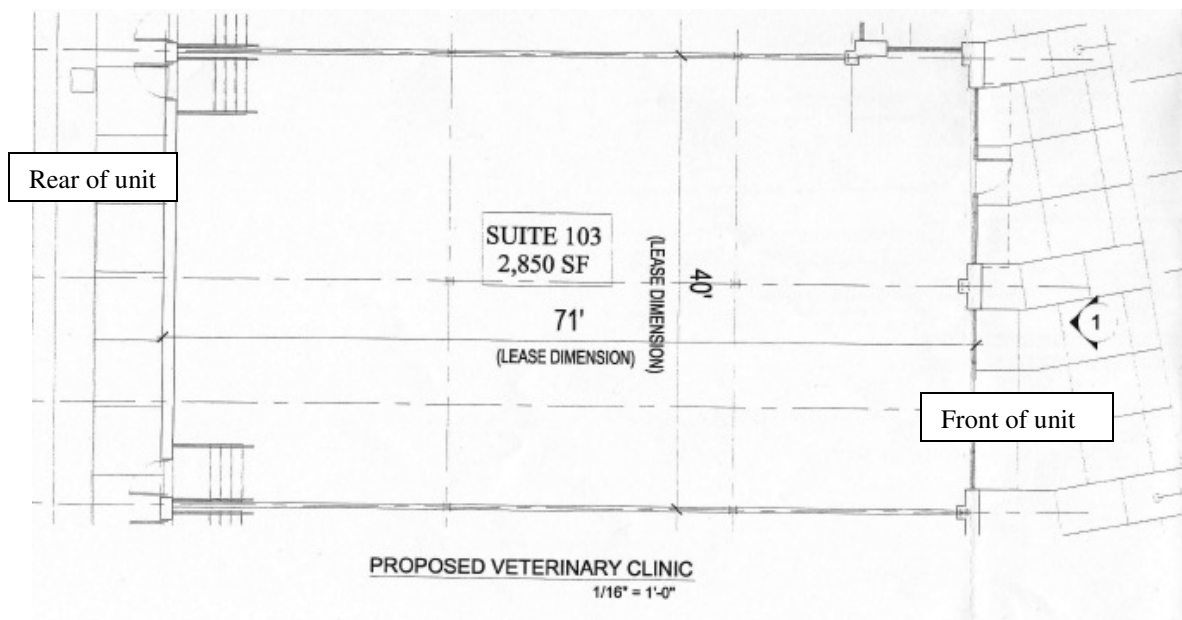
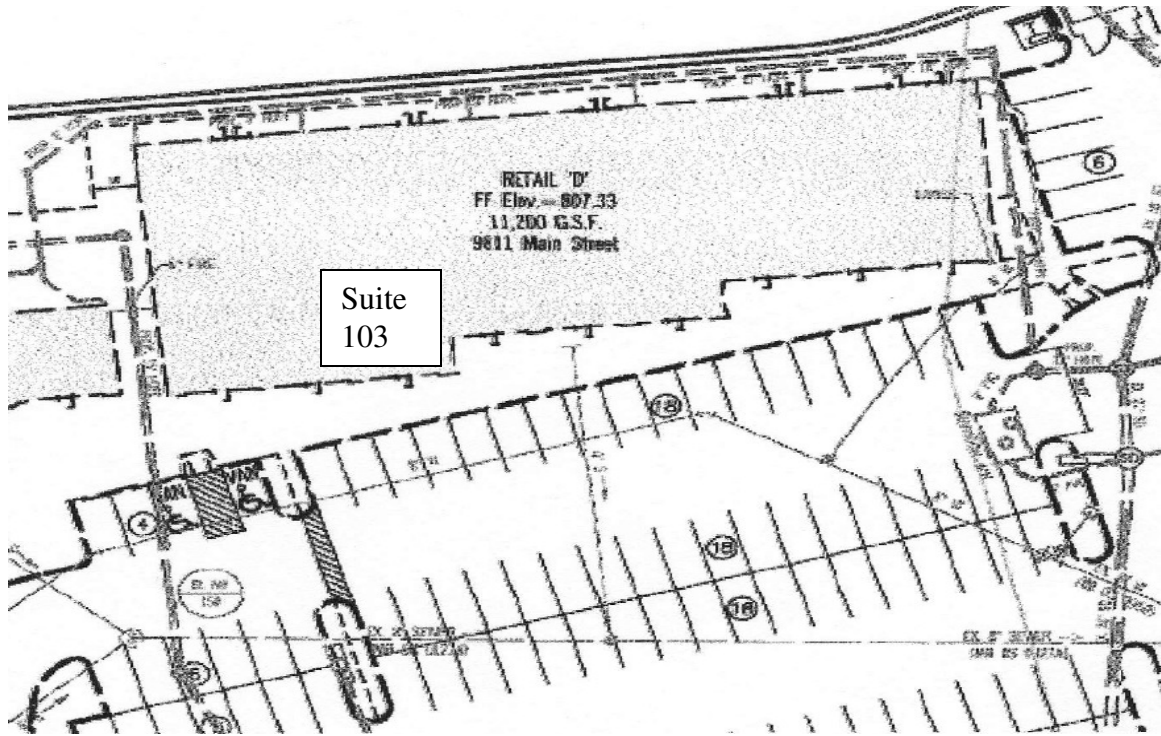
Damascus is envisioned to remain the local market center for northern Montgomery County. Commercial activity that includes a mix of retail, service and office uses within a Town Center allows residents and patrons to reach destinations and consolidate errands without driving long distances. The moderate density, multifamily residential development proposed in this Plan will reduce the burden on the roadway network, make access easier for residents of outlying neighborhoods, and bolster the market base to support a healthy retail center catering primarily to local residents.

Technical Staff concluded that “[b]ecause the proposed [veterinary] animal hospital is an allowable special exception use in the MXTC Zone, this proposal is consistent with the 2006 Damascus Master Plan and contributes to the existing mix of uses in the Town Center.” Exhibit 22, p. 3. The Hearing Examiner agrees with Technical Staff’s conclusion that the proposed use is consistent with the goals and recommendations of the Damascus Master Plan.

#### **D. The Proposed Use**

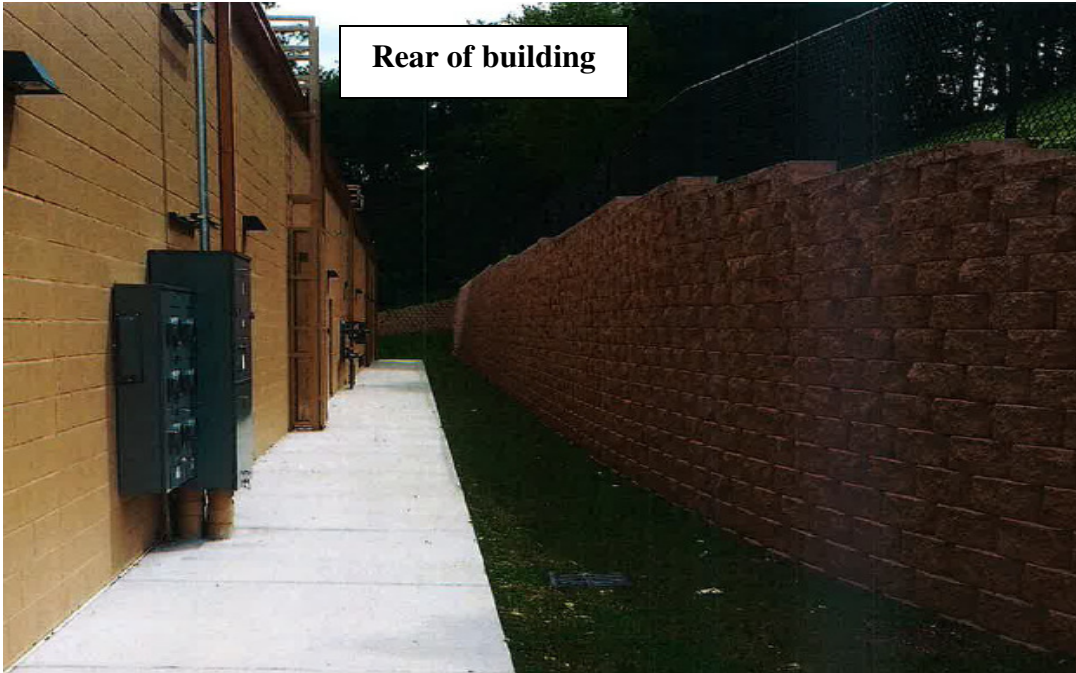
The Petitioner proposes to operate a small animal veterinary hospital in an existing commercial space identified as Suite 103 in Building D located in the redeveloped Damascus Shopping Center. Petitioner executed a lease with the property owner in January, 2013. Exhibit 33(b). The veterinary hospital will occupy two interior units located on the southern end of building D. The two units combined, rectangular in shape, measure 40’ x 71’ and will include 2,805 square feet of space.

The Site Plan for building D and the leased premises are shown below (Exhibit 5(a)).





In addition to the photograph of the front entrance to the facility (Exhibit 9), previously shown on page 7 of this report, Petitioner provided additional photographs of the small area and retaining wall to the rear of the building (Exhibit 33(c)(i)-(iii)).



The stone retaining wall is approximately 16 to 18 feet tall with a fence on top. The area directly behind the proposed veterinary hospital is approximately 40 feet wide. As shown on the photographs above, the area between the building and the retaining wall includes a 6' wide concrete sidewalk and 4.5' small grassy area.

According to the terms of the lease, Petitioner will have exclusive use of the small grassy area measuring 4.5' x 40' directly behind her unit. Although this area is identified in the lease as a "dog run", Petitioner testified that this area will not be used as a "dog run" or as an exercise yard. Petitioner clarified that staff will accompany leashed dogs to this area to relieve themselves only when necessary and will "clean up and dispose of any animal waste." Tr. 23-25 and 29-35; Exhibit 3(a), p. 5.<sup>9</sup> Petitioner agreed to comply with this condition of approval as recommended by the Technical Staff and Planning Board. Exhibits 22 and 23.

Technical Staff described the proposed use (Exhibit 22, p. 2):

The applicant is requesting a special exception for a veterinary hospital use within an existing unit located in the Damascus Shopping Center. Paws and Claws Animal Hospital will offer veterinary services and care to companion animals. The hospital will function as a full service veterinary hospital for small animals with provision for in-patient overnight hospitalization only. This is not an animal boarding facility and only the most critical patients will be kept overnight. All activities of the veterinary hospital will occur entirely within the building. There will be no use of the external areas. There will be no exterior runs, [exercise] yards, or other outside facilities.

The business will operate Monday through Friday between 7:00 a.m. and 8:00 p.m. and on Saturday between 8:00 a.m. and 1:00 p.m. Exhibit 3(a). Petitioner will perform surgeries on Tuesday and Thursday mornings with drop-off between 7:00 a.m.

---

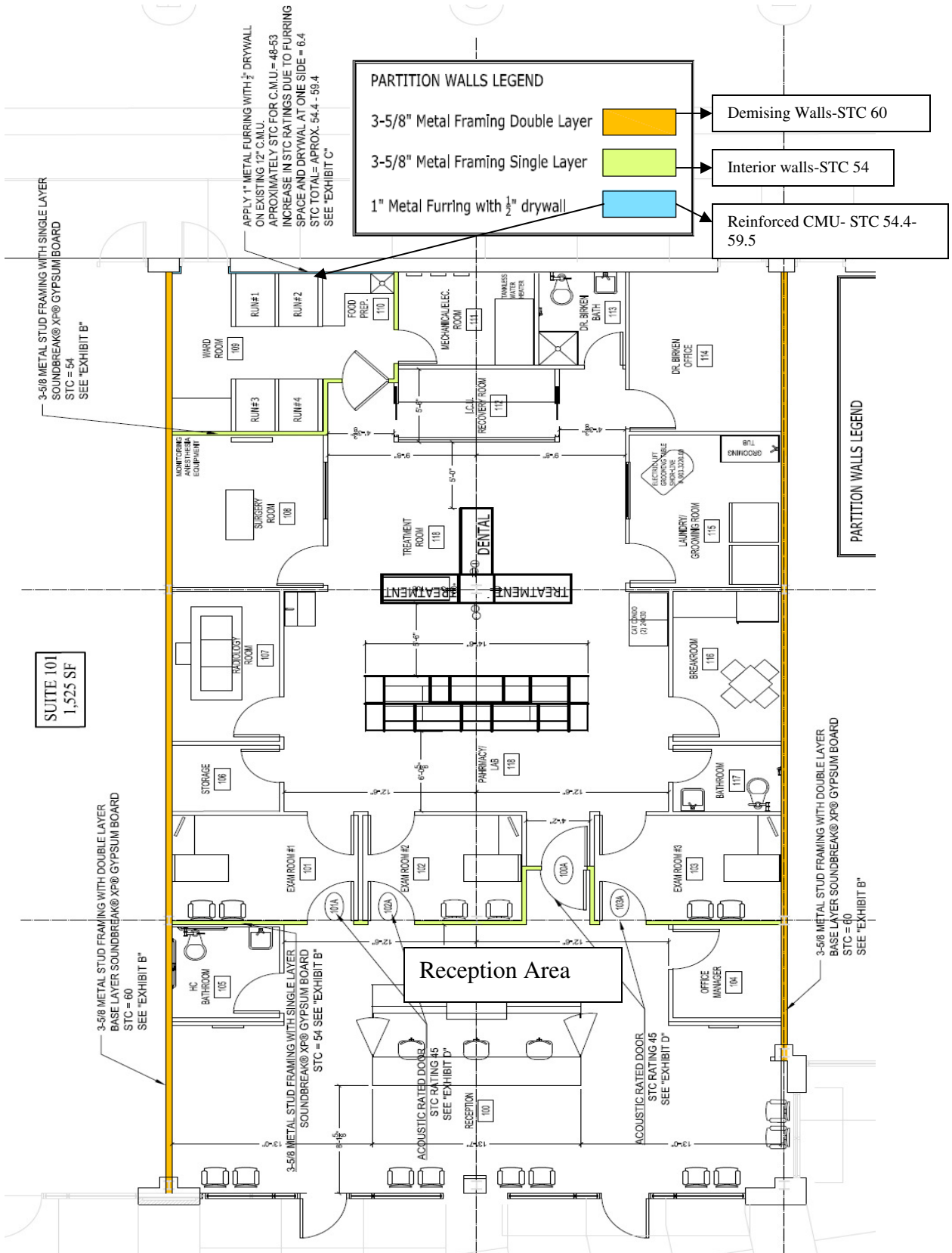
<sup>9</sup> According to the terms of the lease, "[i]n the event that the grass covered behind the Premises smells like urine at anytime during the Lease Term, Landlord shall replace the grass (at Tenant's expense) behind the Premises for an amount not to exceed [], and not more than once per year." Exhibit 33(b), p. 30.

and 9:00 a.m. and pick-up between 5:00 p.m. and 7:00 p.m. Petitioner confirmed that other than those animals which require additional post-operative IV fluid care, there will be no overnight boarding at this facility. Tr. 18-20.

Petitioner testified that regular appointments will be scheduled between 9:00 a.m. and 5:00 p.m. for 15 or 30 minute periods, depending on the reason for the visit. Ancillary services will include grooming and limited sales of related products like “medicated shampoo, limited prescription diet food, leashes and collars.” Tr. 16-18. Based on the growth of the practice, Petitioner proposes to have a maximum of no more than ten (10) employees (e.g., three veterinarians, five veterinary technicians and two receptionists) on site at one time. Tr. 21-23


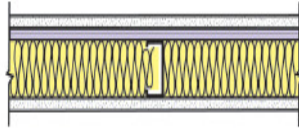
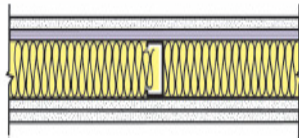
All services will be provided inside the building which will include a reception area in the front where animals will be checked in for regular visits or dropped off for scheduled surgery. Immediately adjacent to the reception area are three examination rooms and a pharmacy. The treatment and dental area is centrally located towards the rear of the facility and includes separate rooms for radiology, surgery, ICU recovery, grooming and a holding area (e.g., “Ward Room 109”) where the larger dogs will be housed while waiting for owner pick-up. The ICU recovery room is fully enclosed with glass walls.

As required, Petitioner’s architect, Daniel Sur, designed the facility to comply with the specific requirements of Zoning Ordinance § 59-G-2.32 (a)(2): “All areas for the keeping of animals must be soundproofed.” These areas are identified on the amended floor plan (Exhibit 27) as shown on the next page.



Mr. Sur provided the following diagrams showing the materials and sound transmission class rating for the partitions for the demising walls and interior walls (Exhibit 12, see “Exhibit B”).

[click on the underlined Test No. "EXHIBIT B"](#)

Fire Rating	Ref.	Design No.	Description	Test No.	STC
<b>SINGLE LAYER – 3-5/8" STUDS</b>					
1 hr.	UL	U465	 <p>5/8" SoundBreak XP Gypsum Board vertically applied to one side of 3-5/8" steel studs 24" o.c. with 1" type S screws 8" o.c. at perimeter and 12" o.c. in the field. 5/8" Fire-Shield Gypsum Board vertically applied to opposite side with 1" type S screws 8" o.c. at perimeter and 12" o.c. in the field. Joints staggered on opposite side. 3-1/2" glass fiber in stud cavity.</p>	<a href="#">RAL TL07-389</a>	<b>54</b>
<b>UNBALANCED – 3-5/8" STUDS</b>					
1 hr.	UL	U465	 <p>Base layer 5/8" SoundBreak XP Gypsum Board vertically applied to 3-5/8" steel studs spaced 24" o.c. with 1" type S screws 24" o.c. Face layer 5/8" Fire-Shield Gypsum Board vertically applied with 1-5/8" type S screws 12" o.c. Opposite side 5/8" Fire-Shield Gypsum Board vertically applied with 1" type S screws 12" o.c. Vertical joints staggered 24" each layer and opposite sides. 3-1/2" glass fiber in stud cavity.</p>	<a href="#">RAL TL06-334</a>	<b>57</b>
<b>DOUBLE LAYER – 3-5/8" STUDS</b>					
2 hr.	UL	V484	 <p>Base layer 5/8" SoundBreak XP Gypsum Board vertically applied to 3-5/8" steel studs spaced 24" o.c. with 1" type S screws 24" o.c. Face layer 5/8" Fire-Shield Gypsum Board vertically applied with 1-5/8" type S screws 12" o.c. Opposite side two layers 5/8" Fire-Shield Gypsum Board vertically applied. Base layer attached with 1" type S screws 24" o.c. Face layer attached with 1-5/8" type S screws 12" o.c. Vertical joints staggered 24" each layer and opposite sides. 3-1/2" glass fiber in stud cavity.</p>	<a href="#">RAL TL07-168</a>	<b>60</b>

TO BE USED IN Exam Room #1, #2, #3, and interior wall at 109-Ward Room as shown on proposed floor plan

TO BE USED IN DEMISING WALLS

In his February 25, 2013 report, Mr. Sur concluded that “the proposed partitions will serve to mitigate the noise typically associated with the proposed use sufficiently to ensure that the use will operate in compliance with the provisions of [Section] 59-G-2.32(a)(2).” Exhibit 12.

At the hearing, Mr. Sur testified that the noise level for a veterinary hospital is between 65 decibels and 95 decibels. The frequency (measured in Hertz (Hz)) of a barking dog is generally between 300 and 500 Hz, or the equivalent of 70 to 80 decibels.



He explained the STC rating of a partition reflects the effectiveness of the partition to block or reduce airborne sound transmission through the wall. The higher the STC number the greater the transmission loss which is measured in decibels. In a commercial building, the International Building Code (IBC) requires that partition walls have a STC rating of 50. In this case, he is proposing demising walls with a STC rating of 60 which has a transmission loss of 61 decibels for sounds in the 500 Hz range and exceeds the minimum requirements of the IBC.

He explained that an individuals located on the other side of the exterior walls may have varied perceptions of sound that is not absorbed by the partition. The variance in perception depends on the distance of the source of the sound to the partition and the ambient noise levels on the other side of the wall. In this case, the ambient noise of a commercial space, including the front and rear of the building, is generally about 50 decibels or more. Thus, the proposed demising walls (with a STC of 60) will result in sounds that will be “perceptible” or barely audible to the adjacent units or individuals in the reception area or walking by the front or rear of the building. Further, in his professional opinion, “soundproof” is never interpreted to mean “zero” transmission of sound. He does not recommend that level of soundproofing due to safety concerns for the employees and specific OSHA regulations.

The interior walls will have a STC rating of 54 and the rear concrete wall, which provides a natural sound barrier to the rear, will be reinforced with additional sound absorbing material to provide additional sound protection in the large dog holding area, identified as “Ward Room 109” on the amended floor plan (Exhibit 27).

Based on Mr. Sur's report and all the materials attached to his report, and additional review of the same by another staff member (Calvin Nelson) with experience in acoustical designs to reduce noise associated with the proposed use (Exhibit 32), Technical Staff found sufficient proof that the "use will operate in compliance with [Section 59-G-2.32 (a)(2)]." Exhibit 22, p. 9. Technical Staff also found that "[t]he proposed use will not create any noise inconsistent with noise levels that now exist in the area [and based on] the acoustical study submitted by the applicant, the exterior walls will be constructed in a manner that would place the sound levels well within the requirements of the Zoning Ordinance." Exhibit 22, p. 6. Thus, Technical Staff concluded that "[t]here will be no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site." *Id.*

#### **E. Traffic Impacts**

Because the proposed use is expected to generate fewer than 30 trips, the Applicant submitted a "Traffic Statement" rather than a full traffic report (Exhibit 11). Technical Staff reviewed the Statement, and reports that no adverse transportation impacts would result from the proposed use. Exhibit 22, p. 3.

According to Petitioner's Traffic Statement, the hours of operation will be 7:00 a.m. to 8:00 p.m. Monday through Friday and 8:00 a.m. to 1:00 p.m. on Saturday. Appointments will be scheduled between 9:00 a.m. and 5:00 p.m. during the weekday. Regular visits will be scheduled at 15 minute intervals. New or sick patients will be scheduled for a 30 minute visit. Maximum staffing will include three (3) veterinarians, five (5) veterinarian technicians/assistants and two (2) receptionists/administrative aides. Petitioner clarified that only two (2) veterinarians will see patients during "regular

scheduled hours.” Exhibit 11. Thus, Petitioner estimated scheduling four (4) regular (15 minute) visits per hour per veterinarian for a total of eight (8) visits per hour. Based on these assumptions, Petitioner estimated that “during the morning and evening peak hours, there will be a maximum of sixteen (16) peak hour trips resulting from patient visits (8 visits x 2 trips in/out = 16 trips).” *Id.*

Transportation Staff recommended approval of the proposed use “without any transportation related condition[s].” Exhibit 31(b).

Transportation Staff reports (Exhibit 31(b):

Based on the information contained in the Traffic Statement submitted by the applicant, the site would generate 16 peak-hour trips during the AM and PM weekdays peak hours. Therefore, its [meets] the Local Area Transportation Review (LATR) requirements because the site is generating less than 30 peak-hour trips[.]

The site is located in the Damascus Policy Area where there is no Transportation Policy Area Review (TPAR) trip mitigation requirement according to the 2012-2015 Subdivision Staging Policy (SSP). Therefore, the application meets the TPAR requirement under the current SSP.

The subject site is located in the existing shopping center. Staff finds that the existing access point and on-site vehicular/pedestrian circulation are adequate and the existing road system in the vicinity of the site would not be affected by the proposal.

There is no evidence to the contrary in the record and the Hearing Examiner accepts these unrebutted findings.

#### **F. Environmental Impacts**

Technical Staff reports that there are no adverse environmental impacts associated with the proposed use. Because of its location within an existing shopping center, the use will not generate any new areas of land disturbance and does not encroach on any sensitive areas, forest or large trees. Staff reports that the property is exempt from the

requirements of the County's Forest Conservation Law. Staff also advises that the property's MXTC zoning relieves the shopping center from the requirements of Primary Management Guidelines (PMA). Exhibit 22, p. 4.

### **G. Community Response**

One individual opposed the application. Dr. Pamela Armstrong, a veterinarian from Damascus Veterinary Hospital, submitted a letter dated July 17, 2013, primarily to clarify the accuracy of the information contained in the Petition regarding the three "well-established" veterinary practices and services in the Damascus area. She also questioned whether there would be sufficient growth in the Damascus area "to warrant opening another 'companion animal veterinary practice' and to allow it to become financially successful." Exhibit 25.

### **III. SUMMARY OF THE HEARING**

Petitioner, Melissa Birken, Timothy Ober and architect, Daniel Sur, testified at the public hearing in support of the petition. There was no opposition at the hearing.

1. Dr. Melissa Birken, DVM: Dr. Birken testified that the actual applicant in this case is "Melissa Birken, LLC, and Paws and Claws." Dr. Birken stated that she accepted the findings and conclusions of the Technical Staff and its report (Exhibit 22) as part of her testimony and agreed to the conditions recommended by the Planning Board (Exhibit 23). She received her undergraduate degree from Montclair State in New Jersey and received her degree in veterinary medicine from Oklahoma State. She has several years of experience in general medicine care. For the past few years, Dr. Birken has been working full-time in an overnight emergency trauma facility in Hagerstown. She resides in Damascus with her husband and children. Tr. 13-15.

Dr. Birken is seeking to open an advanced veterinary practice in Damascus which will provide general services to dogs and cats of all ages, and “occasionally pocket pet animals, hamsters, rats and also reptiles.” The services she will provide include general and emergency care. The facility will be equipped to handle the most common “routine” surgeries (e.g., spays, neutering, cystostomy, tumor removal) to more complicated surgeries (e.g., spleen removal, bloat surgery or other respiratory problems that require a ventilator or other more advanced equipment not ordinarily found in a general medicine practice). Additional “ancillary services” will include grooming (e.g., bathing and nail clipping) and limited sales of related products like “medicated shampoo, limited prescription diet food, leashes and collars.” She clarified sales of these products will be limited because there is an existing Pet Value supply store in the shopping center. Tr. 16-18.

Dr. Birken will perform surgeries on Tuesday and Thursday mornings with drop-off between 7:00 a.m. and 9:00 a.m. and pick-up between 5:00 p.m. and 7:00 p.m. The animals are checked in at the reception desk. Check-in is entered into a software system which is also backed up with the server. Once registered, the animal is taken to the ICU unit for pre-operative testing and insertion of an IV catheter. Surgery is performed in another room and the animals are returned to the ICU unit for recovery. The ICU unit is enclosed with clear walls which provide a quiet and tranquil environment for the animals to awake from surgery. It also limits any sound transmission within the room to the office operations. The facility can accommodate overnight care of an animal which requires additional post-operative IV fluid care. However, there will be no other overnight boarding at this facility. Tr. 18-20.

Animal waste will be double bagged and removed from the facility by a waste management company. The remains of all euthanized animals will be double-bagged and placed in another bag for pick-up by a company Dr. Birken will hire for this purpose. Tr. 20.

The hours of operation will be Monday through Friday from 7:00 a.m. to 8:00 p.m. and on Saturday from 8:00 a.m. to 1 p.m. The busiest periods are during drop-off (7:00 a.m. and 9:00 a.m.) and pick-up (5:00 p.m. and 7:00 p.m.). Appointments begin at 9:00 a.m. and range from 15 minutes to 30 minutes depending on the reason for the visit. Initially, Dr. Birken will be the only veterinarian seeing animals. She will hire two part-time receptionists, a full-time technician and a full-time manager/technician. However, as her business and clientele grows, she estimates having no more than two veterinarians, five technicians and two receptionists or no more than the maximum of 10 employees in the building at one time. Tr. 21-23

Dr. Birken believes that the proposed use, a small-animal veterinary practice and hospital, is appropriately located and will be in harmony with the surrounding shopping center use. Also, residents will not have to travel to Frederick or Gaithersburg for a specialty hospital. She also believes there will be no objectionable noise or other nuisances caused by the operation. Dr. Birken reviewed the amended Floor Plan (Exhibit 27) to illustrate this point. [See the summary of Mr. Ober and Mr. Sur's testimony for a more technical description of the acoustical materials to be used to minimize noise into adjacent units and within the facility.] She explained there is a small grassy area just outside the rear door where animals will be taken to relieve themselves. [This area will be fenced per the terms of the lease- Exhibit 33 (b) p. 3, ¶ (14).] Waste will be removed and

disposed of as previously mentioned above. Also, access to the rear of the building is for the exclusive use of the tenants and is not open to the public. Tr. 23-25, and 29-35.

In response to the Hearing Examiner's questions, Dr. Birken clarified the following: the ancillary services will be less than 20% of her business; the units on both sides of her suite are currently unoccupied (referring to building D as shown on Exhibit 5(a)); and she did not need to amend her Statement of Operations (Exhibit 3(a)). On redirect, Dr. Birken confirmed that she provided Technical Staff with the information contained in the Traffic Statement (Exhibit 11). [Mr. Kline noted that his office typed up the Traffic Statement.] Tr. 120-122.

**2. Timothy Ober:** Petitioner's husband, Timothy Ober, testified in support of the proposed special exception use. Mr. Ober is a general contractor specializing in commercial construction with experience in veterinary facilities. Mr. Ober testified that with the assistance of his architect, Daniel Sur, he will be responsible for constructing the interior of the facility as shown on the amended Floor Plan (Exhibit 27). The veterinary hospital will occupy two interior units located on the southern end of building D (Exhibit 5(a)). The general location is identified with a red star on the larger version of the Site Plan (Exhibit 27) of the shopping center and adjacent properties. Directly behind the building is a large hill with a 16 to 18 foot stone retaining wall with a metal fence along the top. The McDonald's fast food restaurant is set back approximately 500 to 1,000 feet north of the retaining wall on top of the hill. The area in the rear of the building and behind Petitioner's two units is approximately 40 feet wide and extends 11 feet from the building to the stone retaining wall. There is a six foot wide "common area" sidewalk and five feet of grassy area for the veterinary hospital's exclusive use and where staff will

take the animals to relieve themselves. [According to the lease (Exhibit 33 (b) p. 3, ¶ (14)) the grassy area is 4.5' x 40.] Tr. 36-41.

Because the veterinary hospital must provide an area for the animals to relieve themselves, the lease reflects that Petitioner is renting two non-contiguous areas: the interior space and grassy area behind the unit. The grassy area is not fenced or intended to be used as a dog-run. Dr. Birken must remove the animal waste, deodorize the area and replace the sod when needed. The sidewalk area must remain clear of obstructions and be clean. There is no vehicular access or public access to the rear of the building. The pedestrian access points on the front and side of the buildings are gated (as shown in photographs marked as Exhibit 9) and for the tenant's use only for delivery of goods to the rear of the building (See, Exhibit 5(a)). Tr. 42-48.

Mr. Ober estimates the shopping center has over 700 parking spaces. As a result, he believes there is adequate parking available in the shopping center to accommodate the parking needs for this use. He noted that there are two handicap parking spaces with ADA ramps and trash can receptacles located directly in front of the unit. Further, he also believes the proposed use complies with the development standards for the zone and is compatible with and will be in harmony with the surrounding shopping center. Tr. 48-49.

Mr. Kline recalled Mr. Ober (after Mr. Sur testified) to identify and authenticate the photographs submitted with the application (Exhibit 9), to provide further clarification of Mr. Sur's testimony regarding the amended floor plan (Exhibit 27) and his opinion that the design meets the soundproofing requirement of the ordinance.

Mr. Ober testified that he took the photographs submitted with the application



(Exhibit 9) approximately four months ago and that they accurately depict the property as it currently exists. He clarified that the photograph (page 2) identified as “View of exterior-back of unit” is a representation of the gate and grassy area behind the building and not directly behind the proposed facility. Mr. Ober agreed to provide additional photographs of the grassy area directly behind the proposed facility. Tr. 107-110.

Referring to the amended floor plan (Exhibit 27), Mr. Ober clarified that the area identified as “Ward Room 109” will be used to house the larger dogs waiting to be picked up. The kennels in this room will be constructed of steel and a fence-like material. The interior “ICU recovery room 111” was specifically designed to be fully enclosed for the protection of the employees and to minimize the noise of the animals recovering from surgery. Mr. Ober testified that he supported Mr. Sur’s opinion that the proposed design complies with the IBC recommendation that partitions in a commercial building have an STC of 50. In his lay opinion, he agrees with Mr. Sur that the proposed design complies with the soundproofing requirement in the Zoning Ordinance. Tr. 111-112.

He further explained that while he was only required to construct one demising wall as part of the lease, he agreed to construct both walls. He will extend both walls from the floor to the roof to provide further soundproof protection between the units. He agreed with Mr. Sur’s testimony (summary shown below) that the demising or perimeter walls will have a STC rating of 60 which provides much greater soundproof protection than a standard drywall demising wall, which has an STC rating of 32. Mr. Ober offered his lay opinion that the facility will be soundproofed as follows: “So with the furniture, with the fixtures, with the walls and with the soundproofing that we’re employing in the side of the walls and doubling up the thickness of the drywall of those walls, we’re

getting better soundproof, a better attempt to totally knock out sound all together.” Tr. 114-116.

**3. Daniel Sur, Architect:** Mr. Sur testified to his educational and professional background as an architect. He was educated and trained as an architecture in Argentina and has been practicing in the field since 1991. He is licensed in Maryland, the District of Columbia and Virginia. He is certified to obtain an architect license in any state. He has been working with a firm specializing in the acoustical design of horse facilities and animal hospitals since 2004. In that time, he has designed several animal hospitals in Virginia which are permitted by special exception. As a result, Mr. Sur has testified before administrative boards in Loudon County, Virginia and has been qualified as an expert in architectural design of an animal hospital specializing in acoustical issues related to this specific use. Based on his educational and professional experience, Mr. Sur was qualified as an expert architectural design of an animal hospital specializing in acoustical issues related to this specific use. Tr. 51- 58.

Mr. Sur identified and designed the amended Floor Plan (Exhibit 27). He testified that in his expert opinion the proposed facility will comply with the “soundproof” requirement in Section 59-G-2.32 (a) (2) of the Zoning Ordinance. He noted that the ordinance does not identify a standard, measured in decibels, by which the “soundproof” requirement is met for the proposed use in a commercial zone. However, he stated that the typical commercial building is designed to address noise levels of 50 decibels which is the condition he used to design the proposed facility. Tr. 59-60.

Referring to the amended Floor Plan (Exhibit 27), Mr. Sur identified the “critical walls” which will be constructed (e.g., “demising walls” separating the proposed facility

from suite 101 and suite 104) or reinforced (e.g., existing rear concrete masonry unit “CMU” wall) to mitigate the noise from the facility to the adjacent units and the rear of the building. As shown on the floor plan, the demising walls are sand color and the rear CMU wall is blue. The “green” colored interior walls are designed to isolate the noise going from the treatment and rear area to the reception area located at the front of the building. Tr. 61-69.

Mr. Sur explained that because noise does not penetrate concrete very well, the existing rear CMU wall provides a natural sound barrier in the rear of the building, much like concrete wall along a highway. However, a portion of the CMU (left-hand rear corner) will be reinforced (blue wall) to further minimize the noise coming from “Ward Room 109” where the dogs will be held in steel or metal kennels. Tr. 59-67. The noise absorbing material or “furring” will be approximately 1 ½ thick and installed to the inside of the CMU. Tr. 70

The demising walls (sand color) will be constructed with 3-5/8 metal stud frame with double drywall. Once constructed, the walls will be approximately six inches thick. The base layer of the drywall will be “SoundBreak XP Gypsum Board,” similar to a concrete wall, which provides a sound transmission class (“STC”) of 60. Mr. Sur supplemented his February 25, 2013, Inspection Report and Soundproof Proposal (Exhibit 12) with two single-page documents titled as follows: 1) Sound Transmission Class (STC) (Exhibit 28); and 2) Key Acoustical Terms and Concepts (Exhibit 28(a)). These documents (Exhibits 28 and 28(a)) identify and explain the methodology, key terms and testing used to rate the effectiveness of the sound absorbing gypsum board he selected for this project, as noted on the SoundBreak XP Board Acoustical Selector

Guide attached to Mr. Sur's report (Exhibit 12) and identified as "Exhibit B". Tr. 69-71.

Mr. Sur stated that the "STC number is a figure that is given to the effectiveness of the partition wall that is [being] tested." More specifically, the STC number represents the rating of the effectiveness of the gypsum board in absorbing or interrupting airborne sound transmissions of varying frequencies from its source to the other side of the partition. The higher the STC number, the more effective the partition is in blocking the airborne sound from its source to the other side. The partitions are tested using 16 standard sound frequencies ranging from 100 to 4000 (Hz) to determine the transmission loss and STC rating as more specifically described in the attachments (Exhibits E and F) to Mr. Sur's report (Exhibit 12) and supplemental material submitted at the hearing (Exhibit 28 and 28(a)). Tr. 69-77.

The proposed demising wall partitions will have an STC of 60 which absorbs or blocks more sound from its source resulting in a greater transmission loss (measured in decibels) of sound to the other side of the partition. According to the test report (Exhibit E attached to Mr. Sur's report) sound with a frequency of 500 (Hz) has a transmission loss of 61 decibels. Assuming 25 to 30 decibels of sound on the other side of the partition with the transmission loss of the sound from its source the STC 60 partition results in sound which is barely audible to the occupants on the other side. In commercial spaces and parking lots the normal sound level is between 50 and 60 decibels. Tr. 77-79.

Mr. Sur testified that the noise level of a barking dog has a frequency range of 300 to 600 (Hz) which translates to between 70 and 80 decibels depending on the distance of the source to the demising (perimeter) wall and the receiver on the other side

of the wall. For example, noise from the treatment area is further attenuated or reduced by the other interior walls for the different rooms (e.g., surgery or radiology). He noted that the typical drywall partition has a STC of 32 which has a lower transmission loss and will reduce the sound transmission “in the range of five to six or ten decibels.” Tr. 79-81.

In Mr. Sur’s professional opinion, the proposed facility as designed and constructed in accordance with the materials identified in the amended Floor Plan (Exhibit 27) will be “soundproofed” as required by the Zoning Ordinance. Since the Zoning Ordinance lacks a maximum numerical noise level standard for the use in a commercial zone, it was Mr. Sur’s opinion that the International Building Code (IBC), which recommends partitions with a STC of 50 in a commercial building, is the “implied” standard. As proposed, the demising, CMU and interior walls all exceed the IBC standard and therefore provide the required soundproofing for this use. Further, the proposed use will not cause any objectionable noise to the occupants of the adjacent units or anyone walking by the front or rear of the building. In his opinion any sound from the proposed use to these areas would only be “perceptible.” Tr. 82-86. Mr. Sur also clarified that the definition of “soundproof” does not mean “zero” sound transmission. He noted that based on OSHA regulations, and safety concerns for the employees, he would not recommend that the proposed facility be totally soundproof. He reiterated that the noise level in a normal veterinary hospital can be between 65, and no more than 95 decibels. As an example, he noted it would be more like 90 decibels if all the dogs were barking and the phone were ringing at the same time. He clarified that the STC number is not in decibels but merely represents the effectiveness of the material in the partition to absorb sound as tested by approved laboratories (referring to Test Reports identified as

Exhibits E and F attached to his report identified as Exhibit 12). The transmission loss is in decibels. Thus, the proposed demising wall partition with a STC of 60 tested in the 500 frequency range to be a transmission loss of 61 decibels which effectively provides the required soundproofing for the proposed use. Tr. 92-97

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards and conditions are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if she complies with the recommended conditions. Exhibit 22.

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 recommended conditions set forth in Part V, below.

##### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code Section 59-G-1.2.1 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 Section 59-G-1.2.1. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified five inherent characteristics necessarily associated with a veterinary hospital: (1) vehicular trips to and from the site; (2) noise and odor of animals; (3) deliveries of mail and small parcels; (4) specialty medical equipment needing servicing, mostly by technicians in regular vehicles; and (5) drop-off and pick-up of pets in parking areas. Technical Staff found that there are no non-inherent adverse effects associated with the proposed use. Exhibit 22, p. 5.

The Hearing Examiner accepts that listing as a fair description of the inherent adverse impacts of veterinary hospital, but would add a more direct reference to the traffic, parking and lighting routinely created by such a use. Noise could also be an inherent effect, but acoustical conditions of the special exception circumscribe any such noise characteristics.

Technical Staff found (Exhibit 22, pp. 4-5):

The veterinary hospital use in this application will occupy an existing 2,850 square foot space in a redeveloped shopping center. There are no non-inherent adverse effects associated with this use. The project is an interior space and does not increase the floor area of the existing building. The exterior walls will be constructed in a manner that would place the sound levels well within the requirements of the Zoning Ordinance. The lighting is also interior. The proposed use will occur entirely within the building and will be in harmony with the neighborhood and its mix of

retail, restaurant and professional uses.

Staff finds that the size, scale, and scope of the proposed use will no result in unacceptable noise, traffic, illumination or environmental impacts.

The Hearing Examiner agrees with Staff that no non-inherent adverse effects likely to result from the activities associated with the petition. The use is relatively small in scale and will be located in a redeveloped shopping center located in the Damascus Town Center. The shopping center is a mix of retail and commercial uses and is surrounded by commercial uses that include a post office, bank, office/retail, funeral home and a McDonald's fast food restaurant (an approved special exception use granted in 1978). All activities, including drop-off and pick-up of the animals, will occur inside the facility. The noise levels will be sufficiently mitigated by the acoustical interior and exterior walls, as proposed in the amended floor plan, that the use will meet the soundproof requirement in Section 59-G-2.32(a)(2).

Under these circumstances, the Hearing Examiner concludes that there will be no adverse effects sufficient to warrant denial of the petition.

### **B. 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 or the Hearing Examiner finds from a preponderance of the evidence of record that the proposed use:*
  - (1) *Is a permissible special exception in the zone.*



Conclusion: A veterinary hospital is a permitted special exception in the MXTC Zone, pursuant to Zoning Ordinance Sections 59-G.2.32 and 59-C-11.4.

- (2) *Complies with the standard 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: As discussed in Part IV.C., below, the proposed use would comply with the standards and requirements set forth for the use in Code Section 59-G-2.32. In this case, the proposed special exception request must comply with the specific standards for a veterinary hospital in a commercial zone as stated in Section 59-G-2.32 (a)(1)-(2) of the Zoning Code. Section 59-G-2.32 (b) only applies to veterinary hospitals that will be in the residential or rural zone. The proposed special exception will be located in a commercial zone and therefore, the requirements stated in Section 59-G-2.32(b) do not apply to the proposed special exception. Technical Staff included this section in the staff report (Exhibit 22, pp. 9-11) and correctly responded “Not applicable. The subject property is located in a mixed use, commercial zone” to Section 59-G-2.32 (a)(1)-(7) and (9)-(10). *Id.* However, Technical Staff provided responses, some of which became conditions of approval, to Section 59-G-2.32(b)(8), (11)-(15) even though they technically do not apply. Given that Petitioner *voluntarily* provided this information in her special exception application and agreed to be bound by the findings and conclusions in the Technical Staff report and the conditions of approval recommended by the Planning Board, the Hearing Examiner will include Section 59-G-2.32(b)(1)-(15) in this

report for consistency with the staff report and recommended conditions of approval contained therein.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property is covered by the *Damascus Master Plan*, approved and adopted in 2006. For reasons set forth in Part II.C of this report, the Hearing Examiner finds that the planned special exception use, a veterinary hospital in the MXTC zone, is consistent with the goals and objectives of the *Damascus 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.*

Conclusion: The proposed use will be located in an existing 2,850 square foot space in a redeveloped shopping center which consists of a mix of retail, office, and commercial uses. No new structures are proposed and the use will occur entirely within the building. There is adequate parking available directly in front of the unit and in the shopping center's paved parking lot (approximately 600 spaces). Technical Staff, based on Transportation Staff's report, found that the proposed use will not adversely affect traffic conditions. The Hearing Examiner agrees with Technical Staff's conclusion and finds

that “the proposed use will be in harmony with general character of the neighborhood and its mix of retail, restaurant and professional uses.” Exhibit 22, p. 5

- (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: There is no evidence indicating that the requested special exception will be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site. Based on the evidence before it, the Hearing Examiner finds that the proposed use meets this standard.

- (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 based on the acoustical study submitted by the Petitioner (Exhibit 12), the “exterior walls will be constructed in a manner that would place the sound levels well within the requirements of the Zoning Ordinance.” Exhibit 22, p. 6. More specifically, Technical Staff agreed with Petitioner’s architect’s (Daniel Sur) opinion that “[t]he proposed partitions will serve to mitigate the noise typically associated with the proposed use sufficiently to ensure that the use will operate in compliance with [Section 59-G-2.32(a)(2)].” Exhibit 22, p. 9. Petitioner testified that animal waste and euthanized animals will be double bagged and removed from the facility by the appropriate waste management company, thereby eliminating the possibility of objectionable fumes or odors. There is will be no overnight boarding of animals (except for emergency care required for post-operative IV fluid care) or exterior dog runs or exercise yards. Based on this evidence, the Hearing Examiner agrees with

Technical Staff and finds that the use will not cause objectionable noise, vibrations, fumes, odors, dust illumination, glare, or physical activity at the 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: The proposed special exception use will be located in an existing redeveloped shopping center in the MXTC zone. The shopping center is surrounded by non-residential uses which include a post office and a McDonald's restaurant (special exception use approved in 1978) to the north, and a bank, office/retail and a funeral home to the south of the shopping center. Based on the Neighborhood Map (Exhibit 34(a)), the closest residential neighborhood (R-200 zone) is north of the Town Center boundary and includes a large open area directly behind the Safeway Store to the R-200 residential neighborhood. Based on the evidence in this case, the Hearing Examiner finds that the proposed use is not sufficiently proximate to any one-family residential area to have an effect on a one-family neighborhood. As the use is consistent with the Master Plan (as set forth in Section II.C. above), this general condition is met.

- (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 Technical Staff's 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. The Hearing Examiner accepts this recommendation and finds that the application has met the above standard.

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

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

(B) *If the special exception:*  
*(i) does not require approval of a 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:*  
*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 special exception application was submitted.*

Conclusion: Technical Staff advises that “[t]his site is not subject to a preliminary plan of subdivision [and] [t]he available public facilities are adequate to serve the proposed use, per the prior approval for the shopping center.” Exhibit 31(a). Technical Staff also reported that the proposed special exception use will not have an adverse impact on “utilities or other public facilities, particularly traffic.” Exhibit 22, p. 7. Thus, the proposed special exception use falls within and does not exceed the prior approved and currently valid adequate public facilities determination made when the shopping center

site plan was approved several years ago. Therefore, a determination of the adequacy of public facilities and services under the Growth standards policy in effect when the special exception application was submitted is not required. However, Technical Staff did such a review and found that the proposed use meet the “transportation related requirements including the Local Area Transportation Review (LATR).” Exhibit 22, p. 7.

- (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: Access points to the site will be those already approved as part of the shopping center redevelopment. There is no evidence that the proposed use will cause these to be unsafe. Based on this record, the Hearing Examiner finds that the proposed use will not reduce the safety of vehicular or pedestrian traffic.

### **C. Special Standards: Veterinary Hospital**

The relevant special standards governing a special exception for a veterinary hospital are found in Section 59-G-2.32. The Technical Staff report and the Petitioner’s written evidence and testimony provide sufficient evidence that these special standards would be satisfied in this case, as outlined below.

*Sec. 59-G-2.32. Veterinary Hospital.*

(a) *In any commercial, central business district or transit station zone where permitted by special exception, a veterinary hospital must comply with the following conditions and requirements:*

(1) *There must be no runs, exercise yards, or other facilities for the keeping of animals in any exterior space.*

Conclusion: All activities, including pet exercise, grooming and day care, are to take place within the building. There is a small exterior outdoor “grassy” area (4.5’ x 40’)

located in the rear of the building which is identified as a “dog run” in the Lease Agreement. Exhibit 33(b), p. 3, ¶ A.(14). However, Dr. Birken testified that this area will not be used as a “dog run” or to exercise the dogs and will only be used as an area where staff will take the dogs to relieve themselves when necessary. Tr. 23-25. Technical Staff advises that: “[T]he dog will be leashed and accompanied by a veterinary assistant who will clean up and dispose of any animal waste. This area will not be used as an exercise yard” *Id.* As recommended by the Planning Board, this condition of approval is included in Part V, of this recommendation. Therefore, the Petitioner complies with this standard.

(2) *All areas for the keeping of animals must be soundproofed.*

Conclusion: Technical Staff concluded that the petition will “not cause objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity.” Exhibit 22, p. 6. Based on this evidence, and the testimony and report of Mr. Sur summarized above, the Hearing Examiner finds that this standard has been met.

While Section 59-G-2.32(b)(1)-(15) is inapplicable to this case, the Petitioner voluntarily submitted information required by this provision of the Zoning Ordinance. In its Statement of Operations, the Petitioner indicated that there will be no outdoor kennel or dog run, and that the rear exterior grass area will be used only to permit dogs to relieve themselves. All waste will be removed promptly by hospital staff and hours of operation will be as set forth in the Statement of Operations. In addition, sales of accessories will be limited given that a large pet supply store is also located in the shopping center. As compliance with all evidence and testimony will be a condition of approval, these safeguards will be made part of the approved special exception.

#### **D. General Development Standards**

In addition to the general and special standards applicable to this special exception request, the Code contains additional development standards which may be relevant to this use, as outlined below:

*Section 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 found that the structure meets all of the development standards in the MXTC Zone. Exhibit 22, p. 8. Nothing in the record suggests to the contrary. Therefore, the Hearing Examiner finds that the general development standards have been met.

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

Conclusion: The shopping center provides “a total of approximately 600 parking spaces, including handicapped accessible parking spaces [which are] shared with the combined retail uses in the shopping center.” Exhibit 22, p. 8. Accordingly, Technical Staff found that the “proposed special exception satisfies all [relevant] requirements of Section 59-E.” *Id.* There are two (2) handicapped accessible parking spaces with ADA ramps located directly in front of suite 103. Tr. 48. There being no evidence to the contrary in the record, the Hearing Examiner finds that the parking requirements of Article 59-E have been met.

- (c) *Minimum frontage. In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section*



*59-G-1.21:*

- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
- (2) *Sand, gravel or clay pits, rock or stone quarries.*
- (3) *Sawmill.*
- (4) *Cemetery, animal.*
- (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
- (6) *Equestrian facility.*
- (7) *Heliport and helistop.*

Conclusion: This development standard is not applicable to this special exception.

- (d) *Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: This special exception is exempt from the forest conservation requirements set forth in Chapter 22A of the Code. Exhibit 8. Technical Staff advised that “the application is for an existing structure and the proposed use will not result in clearing of existing forest or trees. (Forest Conservation Exemption # 42013161E)” Exhibit 22, p. 8.

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

Conclusion: This proposed use does not require a water quality plan since it is not

in a special protection area; therefore, this requirement is inapplicable. However, Technical Staff clarifies that “[a]lthough the subject property is within the Patuxent River Watershed, the high intensity commercial zone on this site (MXTC) means that the Primary Management Guidelines (PMA) requiring impervious limitation, site design considerations and reforestation are not applicable to this project.” Exhibit 22, p. 9.

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

Conclusion: Petitioner will comply with the sign specifications and requirements for a “Façade” sign only as stated in the Lease agreement with the shopping center owner (Exhibit 33(b), attachment “Exhibit E.” Because these signs must be approved by the Department of Permitting Services, the Hearing Examiner finds that this standard has been met.

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

Conclusion: As the property is not located within a residential zone or adjacent to residential properties, this requirement is not applicable to the special exception request.

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

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

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

Conclusion: The property is not located within a residential zone, and this standard is not applicable. However, Technical Staff noted that Petitioner “provided a [Photometric-Site] Lighting Plan [(Exhibit 6)] that demonstrates the application achieves the required standards and does not exceed this standard.” Exhibit 22, p. 9.

## V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2871, which seeks a special exception for a Veterinary Hospital located in at 9815 Main Street (MD 108), Suite 103 Building “D”, Damascus, Maryland, be ***granted***, subject to the following conditions:

1. The Petitioner shall be bound by all of her testimony and exhibits of record, and by the testimony of her witnesses and her representations identified in this report.
2. Hours of operation are limited to 7:00 a.m. to 8:00 p.m., Monday through Friday and 8:00 a.m. to 1:00 p.m. on Saturday.
3. The special exception is limited to a maximum of ten (10) employees, consisting of three (3) veterinarians, five (5) veterinary technicians, and two (2) receptionists, on site at any one time.
4. Pursuant to 59-G-2.32(a)(1), there must be no dog runs, exercise yards, or other facilities for the keeping of animals in any exterior space.
5. Petitioner must comply with all requirements of her Statement of Operations (Exhibit 3).
6. Petitioner will adhere to the signage requirements as provided in the Lease Agreement (Exhibit 33(b)).
7. Petitioner additionally must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: September 9, 2013

Respectfully submitted

---

Tammy J. CitaraManis  
Hearing Examiner